

In the Supreme Court of the United States

Brenda Horsley, *et al.*,
Applicants,

v.

Kaiser Foundation Hospitals; *et al.*,
Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

**APPENDIX TO APPLICATION TO EXTEND THE TIME TO FILE
A PETITION FOR A WRIT OF *CERTIORARI***

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FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

NOV 17 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRENDA HORSLEY; CYNTHIA
ANDERSON; VINCENT
LANCHINEBRE; JUSTIN RAWSON;
DANIEL RUVALCABA; PATRICIA
UNDERHILL; COURTNEY
WOLFENSTEIN; KRISTI SHEPHERD;
JANET MANNING; MARIA
SAMANTHA DE LA CRUZ; JEFF
FOLKES; MICHAEL JANG; JOSHUA
PACHECO; MICHELLE MASSA,

Plaintiffs - Appellants,

v.

KAISER FOUNDATION HOSPITALS,
INC.; GAVIN NEWSOM, Governor of
California; TOMAS J. ARAGON; GREG
ADAMS; ANDREW BINDMAN,

Defendants - Appellees.

No. 24-5812

D.C. No.

3:23-cv-05628-AMO

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Araceli Martinez-Olguin, District Judge, Presiding

Submitted October 22, 2025**

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

San Francisco, California

Before: MURGUIA, Chief Judge, FORREST, Circuit Judge, and COLLINS,
District Judge.***

Plaintiffs-Appellants (“Plaintiffs”) are former healthcare employees of Kaiser Foundation Hospitals, Inc. (“KFH”) who were terminated for refusing to take the COVID-19 vaccine and failing to provide an exemption in violation of KFH’s vaccination policy and the State of California’s health order. Plaintiffs bring their claims against KFH and its executive officers Greg Adams and Andrew Bindman, M.D. (collectively, “Kaiser Defendants”), as well as the Governor of the State of California Gavin Newsom, and the Director of California’s Department of Public Health Tomas Aragón (collectively, “State Defendants”). Plaintiffs appeal the dismissal of their six federal claims under 42 U.S.C. § 1983, their implied right of action claim under 21 U.S.C. § 360bbb-3, and their two state-law claims. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review a district court’s dismissal for failure to state a claim de novo. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). We accept as true all factual allegations in the complaint and construe the pleadings in the light most favorable to the nonmoving party. *Id.*

*** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

1. The district court did not err in dismissing Plaintiffs’ six federal claims under Section 1983. Plaintiffs bring four claims stylized as “Subjected to Investigational Drug Use,” “Deprivation of Rights Under the Spending Clause,” “Unconstitutional Conditions Doctrine,” and “PREP Act.” Plaintiffs assert these claims based on 21 U.S.C. § 360bbb-3, 10 U.S.C. § 980, 42 U.S.C. § 247d-6, Article VII of the International Covenant on Civil and Political Rights Treaty (“ICCPR”), 45 C.F.R. § 46, the Belmont Report, the Federal Wide Assurance (“FWA”) Agreement, the COVID-19 Vaccination Program Provider Agreement, and Emergency Use Authorizations. *See also Curtis v. Inslee*, 154 F.4th 678, 686–90 (9th Cir. 2025) (relying on identical authorities).

Plaintiffs’ “kitchen sink” approach does not hold up, as none of Plaintiffs’ claims allege “a specific and definite right enforceable by Plaintiffs under Section 1983.” *Id.* at 685, 687 (addressing identical authorities). Moreover, to the extent Plaintiffs invoke the Supremacy Clause to support their claims, the Supremacy Clause “is not a source of any federal rights’ enforceable under Section 1983.” *Id.* at 690 (quoting *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 107 (1989)).

Plaintiffs’ two Section 1983 claims pursuant to the Fourteenth Amendment fare no better because they are foreclosed by our decision in *Curtis*. *See id.* at 691–92 (citing *Health Freedom Def. Fund, Inc. v. Carvalho*, 148 F.4th 1020 (9th

Cir. 2025) (en banc) and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). And the penalties imposed on Plaintiffs here “were amply justified by public health concerns.” *Id.* at 692. Plaintiffs’ procedural due process claim also fails because Plaintiffs’ at-will employment with KFH is not a constitutionally protected property interest under the Fourteenth Amendment, *id.* (citing *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)), and the process the state created for granting religious and medical exemptions “fulfilled the purpose of the requisite pretermination hearing,” *id.* at 693 (quoting *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 332 (9th Cir. 1995)). Plaintiffs also raise an equal protection claim. This claim likewise fails, as the state action, enforcing a vaccine mandate, “easily survives rational-basis review.” *Id.* at 694.

Thus, we affirm the dismissal of Plaintiffs’ claims brought under Section 1983. *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) (“We may affirm a district court’s judgment on any ground supported by the record.”).¹

2. The district court did not err in dismissing Plaintiffs’ implied right of action claim under 21 U.S.C. § 360bbb-3. Section 360bbb-3, a provision of the Food, Drug, and Cosmetic Act (“FDCA”), contains no “rights-creating language” that places ‘an unmistakable focus’ on the individuals protected instead of the

¹ We need not decide the questions of state action and qualified immunity addressed by the district court.

person regulated.” *Saloojas, Inc. v. Aetna Health of Cal., Inc.*, 80 F.4th 1011, 1015 (9th Cir. 2023) (emphasis omitted) (quoting *UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018)). Furthermore, Section 337 of the FDCA expressly states that all proceedings to enforce the FDCA “shall be by and in the name of the United States,” 21 U.S.C. § 337(a), confirming Congress’s intent not to create a private right of action in one of the FDCA’s provisions. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 109 (2014). Finally, “Section 360bbb-3 does not create a private right of action that is enforceable under Section 1983.” *Curtis*, 154 F.4th at 687.

3. The district court did not err in finding that Plaintiffs waived their state-law claims against the State Defendants. A plaintiff who makes a claim but fails to raise the issue in response to a motion to dismiss “has effectively abandoned his claim.” *Walsh v. Nev. Dep’t of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006). Plaintiffs do not dispute that they failed to oppose dismissal of their state-law claims against State Defendants before the district court.²

4. The district court did not abuse its discretion in dismissing without leave

² The district court further declined to exercise supplemental jurisdiction over Plaintiffs’ state-law claims against Kaiser Defendants. We review “a district court’s dismissal of supplemental state-law claims for an abuse of discretion.” *Bryant v. Adventist Health Sys./W.*, 289 F.3d 1162, 1165 (9th Cir. 2002) (citation omitted). Because the district court did not err in dismissing the federal claims, “it did not abuse its discretion in dismissing the state-law claims.” *See id.* at 1169 (citing 28 U.S.C. § 1367(c)(3)).

to amend. The “district court may dismiss without leave where a plaintiff’s proposed amendments would fail to cure the pleading deficiencies and amendment would be futile.” *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (citing *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (per curiam)). Plaintiffs requested leave to amend their complaint to include a new claim for deprivation of Plaintiffs’ “fundamental right to refuse unwanted medical treatment,” under a new theory that the COVID-19 injections were “medical treatment” rather than vaccinations. However, this new claim suffers from the same pleading deficiencies outlined by the district court in its order. Thus, the district court did not abuse its discretion in finding amendment would be futile.

AFFIRMED.

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRENDA HORSLEY, et al.,
Plaintiffs,
v.
KAISER FOUNDATION HOSPITALS,
INC., et al.,
Defendants.

Case No. [23-cv-05628-AMO](#)

**ORDER GRANTING STATE
DEFENDANTS’ MOTION TO
DISMISS, GRANTING KAISER
DEFENDANTS’ MOTION TO
DISMISS, AND DENYING
PLAINTIFFS’ MOTION FOR LEAVE
TO AMEND**

Re: Dkt. Nos. 36, 37, 45

This case arises from Defendants’ COVID-19 vaccine mandates for healthcare workers. Before this Court are two motions to dismiss and Plaintiffs’ motion for leave to file a third amended complaint. The Plaintiffs, former healthcare workers at Kaiser Foundation Hospitals (“Kaiser”), contend that Defendants violated their constitutional and international treaty rights, violated their federal statutory rights, committed various state torts, and breached a contract by requiring Plaintiffs to receive an investigational vaccine or lose their jobs. The matter is fully briefed and suitable for decision without oral argument. *See* Civil L.R. 7-1(b). Having read the parties’ papers and carefully considered their arguments and the relevant legal authority, the Court hereby **GRANTS** the motions to dismiss and **DENIES** the motion for leave to amend for the following reasons.

I. BACKGROUND¹

Plaintiffs are former employees of Kaiser who were terminated after refusing to receive a

¹ The court accepts factual allegations in the complaint as true, *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 722 (9th Cir. 2024), and “construe[s] the pleadings in the light most favorable to the nonmoving party,” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

1 COVID-19 vaccine. Second Amended Complaint (ECF 33) (“SAC”) ¶¶ 18, 329. On January 31,
2 2020, the Secretary of Health and Human Services declared a public health emergency related to
3 COVID-19. SAC ¶¶ 1-2. On December 11, 2020, the U.S. Food and Drug Administration (FDA)
4 issued an Emergency Use Authorization for the distribution of “investigational” COVID-19
5 vaccines. SAC ¶¶ 75-77.

6 On August 5, 2021, the California Department of Public Health issued a public health
7 order requiring that “all workers who provide services or work in [healthcare facilities] . . . have
8 their first dose of a one-dose regimen or their second dose of a two-dose regimen [of the COVID-
9 19 vaccine] by September 30, 2021.” SAC ¶ 218; *id.*, Ex D (ECF 33-4) (“Health Order”) at 2.
10 The Health Order specified that workers may be exempt from the vaccination requirements of the
11 Health Order “only upon providing the operator of the facility a declination form, signed by the
12 individual stating either of the following: (1) the worker is declining vaccination based on
13 Religious Beliefs, or (2) the worker is excused from receiving any COVID-19 vaccine due to
14 Qualifying Medical Reasons.” Health Order at 3. The Health Order “mandated the use of
15 investigational new drugs by healthcare workers.” SAC ¶ 6.

16 On August 27, 2021, the Kaiser Defendants implemented a policy requiring all employees
17 to be fully vaccinated against COVID-19 by September 30, 2021, or to submit proof of a
18 qualifying medical or religious exemption. SAC ¶¶ 308-09. The policy stated that employees
19 who were not fully vaccinated or who did not have an approved exemption would be terminated
20 by December 1, 2021. SAC ¶ 309. Plaintiffs refused to be vaccinated and Kaiser terminated them
21 as a result. SAC ¶¶ 171, 329. Plaintiffs do not assert that they sought an exemption, that Kaiser
22 administered a COVID-19 vaccine to any of the Plaintiffs, or that Kaiser required its employees to
23 get a COVID-19 vaccine from Kaiser.

24 Plaintiffs allege nine causes of action in the Second Amended Complaint: (1) Section
25 1983 – subjected to investigational drug use; (2) Section 1983 – deprivation of Equal Protection;
26 (3) Section 1983 – deprivation of Constitutional Due Process; (4) Section 1983 – deprivation of
27 rights under the Spending Clause; (5) Section 1983 – Unconstitutional Conditions Doctrine;
28 (6) Section 1983 – PREP Act; (7) breach of contract, third party beneficiary; (8) intentional

1 infliction of emotional distress; and (9) implied private right of action under 21 U.S.C. § 360bbb-
 2 3. Defendants Gavin Newsom, Governor of California, and Tomás Aragón, Director of the
 3 California Department of Public Health (collectively, “State Defendants”) move to dismiss each
 4 cause of action alleged against them. ECF 36. Defendants Greg Adams, Andrew Bindman, and
 5 Kaiser Foundation Hospitals (collectively, “Kaiser Defendants”) also move to dismiss each cause
 6 of action. ECF 37. The Court addresses each motion in turn.

7 **II. LEGAL STANDARD**

8 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be
 9 dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6).
 10 Rule 12(b)(6) requires dismissal when a complaint lacks either a “cognizable legal theory” or
 11 “sufficient facts alleged” under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201,
 12 1208 (9th Cir. 2019) (citation omitted). Whether a complaint contains sufficient factual
 13 allegations depends on whether it pleads enough facts to “state a claim to relief that is plausible on
 14 its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550
 15 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows
 16 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 17 *Id.* at 678. When evaluating a motion to dismiss, the court accepts plaintiffs’ factual allegations in
 18 the complaint as true, *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 722 (9th Cir.
 19 2024), and “construe[s] the pleadings in the light most favorable to the nonmoving party.”
 20 *Manzarek*, 519 F.3d at 1031. However, “allegations in a complaint . . . may not simply recite the
 21 elements of a cause of action [and] must contain sufficient allegations of underlying facts to give
 22 fair notice and to enable the opposing party to defend itself effectively.” *Levitt v. Yelp! Inc.*, 765
 23 F.3d 1123, 1135 (9th Cir. 2014) (citations omitted).

24 **III. STATE DEFENDANTS’ MOTION TO DISMISS**

25 The State Defendants move to dismiss the SAC, arguing that (1) Plaintiffs lack Article III
 26 standing; (2) Plaintiffs’ official capacity claims against State Defendants are barred by sovereign
 27 immunity; (3) Plaintiffs’ individual capacity claims against State Defendants fail to allege any
 28 personal involvement in the violation of their rights; (4) State Defendants are entitled to qualified

1 immunity from federal claims alleged against them in their individual capacities; and (5) Plaintiffs
2 fail to state a claim under Rule 12(b)(6). ECF 36 (“State Mot.”). The Court addresses standing
3 first as it is a threshold question. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879
4 (9th Cir. 2022) (citation omitted).

5 **A. Article III Standing²**

6 State Defendants move to dismiss the claims against them for lack of Article III standing.
7 State Mot. at 18-19. The Court evaluates challenges to Article III standing under Rule 12(b)(1),
8 which governs motions to dismiss for lack of subject matter jurisdiction. *Maya*, 658 F.3d at 1067.
9 Article III standing requires that a “plaintiff must have (1) suffered an injury in fact, (2) that is
10 fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by
11 a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). These three
12 elements are referred to, respectively, as: injury in fact, causation, and redressability. *See Planned*
13 *Parenthood of Greater Was. & N. Idaho v. U.S. Dep’t of Health & Human Servs.*, 946 F.3d 1100,
14 1108 (9th Cir. 2020).

15 State Defendants challenge causation, arguing that Plaintiffs’ termination from Kaiser for
16 their refusal to receive the COVID-19 vaccine is not “fairly traceable” to any action by the State
17 Defendants. State Mot. at 18. Causation requires that the injury is “fairly . . . trace[able] to the
18 challenged action of the defendant, and not . . . th[e] result [of] the independent action of some
19 third party not before the court.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)
20 (citations omitted). While plaintiffs need not show proximate cause, they “must establish a ‘line
21 of causation’ between defendants’ action and their alleged harm that is more than ‘attenuated.’”
22 *Maya*, 658 F.3d at 1070. A chain of causation does not fail “simply because it has several ‘links,’
23 provided those links are ‘not hypothetical or tenuous.’” *Id.* (quoting *Nat’l Audobon Soc., Inc. v.*
24 *Davis*, 307 F.3d 835, 849 (9th Cir.), *opinion amended on denial of reh’g*, 312 F.3d 416 (9th Cir.
25 2002)). “[W]hen a plaintiff alleges that government action caused injury by influencing the

26 _____
27 ² In ruling on a motion to dismiss for lack of standing, the court “must accept as true all material
28 allegations of the complaint and must construe the complaint in favor of the complaining party.”
Maya v. Centex Corp., 658 F.3d 1060, 1068 (9th Cir. 2011) (citation omitted).

1 conduct of third parties, [the Ninth Circuit has] held that ‘more particular facts are needed to show
2 standing’ because a third party ‘‘may well have engaged in their injury-inflicting actions even in
3 the absence of the government’s challenged conduct.’’ *Mendia v. Garcia*, 768 F.3d 1009, 1012
4 (9th Cir. 2014) (quoting *Nat’l Audubon Soc’y*, 307 F.3d at 849). To plausibly allege that the
5 injury was ‘‘not the result of the independent action of some third party,’’ the plaintiff must allege
6 that the government conduct is ‘‘at least a substantial factor motivating the third parties’ actions.’’
7 *Id.* (citations omitted).

8 Plaintiffs allege injury from (1) being forced to receive the COVID-19 vaccination without
9 their informed consent and (2) being terminated from their employment for failing to receive the
10 COVID-19 vaccine. *See generally* SAC. Because Plaintiffs do not allege that they received the
11 COVID-19 vaccine, and instead allege that they exercised their right to not be vaccinated,
12 SAC ¶¶ 171, 329, their first theory of injury does not allege an injury which is fairly traceable to
13 the State Defendants. *See Spokeo*, 578 U.S. at 338.

14 As regards Plaintiffs’ termination from their employment, State Defendants argue that
15 Plaintiffs’ terminations resulted from the Kaiser Defendants’ actions, and that State Defendants
16 did not mandate or cause such termination, whether pursuant to their own or Kaiser’s vaccination
17 requirement. State Mot. at 19. Plaintiffs respond that the harm is traceable to State Defendants
18 because State Defendants ‘‘issued a mandate [] requiring Kaiser to ensure all workers were
19 vaccinated according to the public health order under the force of law, which was official state
20 policy and required adherence by Kaiser.’’ Opp. (ECF 40) at 18 (citing SAC ¶ 218). On August 5,
21 2021, the State issued a Health Order requiring all healthcare workers be fully vaccinated against
22 COVID-19 (subject to medical and religious exemptions) by September 30, 2021. SAC ¶ 218, Ex
23 D. On August 27, 2021, Kaiser issued a policy requiring all employees (subject to exemptions) to
24 receive COVID-19 vaccinations by September 30, 2021 or face termination. SAC ¶ 308. The
25 Kaiser Policy notes that there is a ‘‘vaccination requirement[] under [the] state mandate.’’ SAC,
26 Ex. F at 1. Given the timing of the two policies and the Kaiser policy’s mention of the state
27 mandate, it is plausible that the State’s vaccine mandate led Kaiser to implement its own vaccine
28 policy. *See Nat’l Audubon Soc’y*, 307 F.3d at 849 (plausible chain of causation against state

1 officials and agencies where federal government removed wildlife traps in direct response to
 2 California Proposition 4). Plaintiffs sufficiently allege standing at this stage. Accordingly, the
 3 Court denies the motion to dismiss on this basis.

4 **B. Qualified Immunity**

5 State Defendants also move to dismiss the Section 1983 claims against them on the basis
 6 that they are entitled to qualified immunity. State Mot. at 21-24. Plaintiffs assert that State
 7 Defendants cannot invoke qualified immunity because (1) their conduct involved ministerial as
 8 opposed to discretionary functions, and (2) State Defendants failed to show that their conduct
 9 conformed with clearly established law. Opp. at 20-22. The Court considers each argument in
 10 turn.

11 **1. Ministerial Versus Discretionary Conduct**

12 Plaintiffs assert that State Defendants cannot invoke qualified immunity because they were
 13 under a duty to perform the ministerial function of “accepting the Plaintiff’s chosen option under
 14 the EUA [Emergency Use Authorization] statute and the CDC Program and to ensure the recruited
 15 healthcare facilities performed the same function.” Opp. at 21.

16 “Qualified immunity shields only actions taken pursuant to discretionary,” not ministerial
 17 functions. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989); *see Groten v.*
 18 *California*, 251 F.3d 844, 851 (9th Cir. 2001). A law is ministerial only if it specifies the “precise
 19 action that the official must take in each instance . . . [.]” *F.E. Trotter*, 869 F.3d at 1315 (quoting
 20 *Davis v. Scherer*, 468 U.S. 183, 196, n.14 (1984)). “[I]f an official is required to exercise his
 21 judgment, even if rarely or to a small degree, the Court would apparently not find the official’s
 22 duty to be ministerial in nature.” *Id.* at 1314 (quoting *Gagne v. City of Galveston*, 805 F.2d 558,
 23 560 (5th Cir. 1986)).

24 Plaintiffs offer only conclusory allegations that State Defendants had a “ministerial duty to
 25 obtain Plaintiffs’ legally effective informed consent.” ECF 68 at 4. In support, they reference a
 26 CDC Playbook that provides guidance on vaccination responses, a statute requiring informed
 27 consent before involving a human subject in research (45 CFR § 46.116), and a statute authorizing
 28 medical products for use in emergencies (21 U.S.C. §360bbb-3). *See* Opp. at 15-16; ECF 68 at 5-

1 7. Plaintiffs do not identify any language in these statutes or the handbook requiring State
 2 Defendants to accept Plaintiffs’ refusal to receive EUA vaccines or ensure that health facilities did
 3 the same in instituting the Health Order. *Cf. Rieman v. Vazquez*, 96 F.4th 1085, 1091-92 (9th Cir.
 4 2024) (no qualified immunity where social workers were mandated under the law to provide
 5 notice of a hearing and failed to provide such notice). Plaintiffs thus fail to establish that the State
 6 Defendants had a ministerial duty under Plaintiffs’ alleged facts.

7 2. Clearly Established Right

8 State Defendants assert that the rights at issue were not clearly established at the time of
 9 their conduct. State Mot. at 22-24. “[Q]ualified immunity protects government officials ‘from
 10 liability for civil damages insofar as their conduct does not violate clearly established statutory or
 11 constitutional rights of which a reasonable person would have known.’” *Pearson v. Callahan*, 555
 12 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine if
 13 government officials can avail themselves of qualified immunity, the Court must determine
 14 whether: (1) the facts alleged state a violation of a statutory or constitutional right; and (2) the
 15 right was clearly established when viewed in the specific context of the case. *Id.* at 232. “[C]ourts
 16 may determine which prong of qualified immunity they should analyze first.” *Jessop v. City of*
 17 *Fresno*, 936 F.3d 937, 940 (9th Cir. 2019) (citing *Pearson*, 555 U.S. at 236).

18 The Court first considers whether the right was clearly established, as doing so is
 19 particularly appropriate where a court can “quickly and easily decide that there was no violation of
 20 clearly established law.” *Jessop*, 936 F.3d at 940 (quoting *Pearson*, 555 U.S. at 239). “A right is
 21 clearly established when it is sufficiently clear that every reasonable official would have
 22 understood that what he is doing violates that right.” *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5
 23 (2021) (citations and quotation marks omitted). “[E]xisting precedent must have placed the
 24 statutory or constitutional question beyond debate.” *Id.* (citation omitted).

25 Plaintiffs argue that State Defendants “offer no case law establishing” the right to require a
 26 healthcare worker “to be injected with an EUA drug.” Opp. at 22. Plaintiffs miss the mark – it is
 27 “plaintiff[s] who bear[] the burden of showing that the rights allegedly violated were clearly
 28 established.” *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (citations

1 and internal quotation marks omitted). Plaintiffs offer the Court no authority showing that State
 2 Defendants violated a “clearly established” right by issuing the Health Order requiring COVID-19
 3 vaccinations for healthcare workers. *See Pearson*, 555 U.S. at 231.

4 Similarly, Plaintiffs do not provide any law existing at the time of State Defendants’
 5 Health Order that put “beyond debate” that requiring healthcare worker vaccination during a
 6 pandemic would violate a clearly established right. *See Rivas-Villegas*, 595 U.S. at 5 (citation
 7 omitted). Indeed, “[a]t best, the validity of these vaccine mandates under the principles discussed
 8 in *Jacobson* . . . and related cases is debatable . . . [.]” *Johnson v. Kotek*, No. 22-35624, 2024 WL
 9 747022, at *3 (9th Cir. Feb. 23, 2024); *see Biden v. Missouri*, 595 U.S. 87, 93 (2022) (holding that
 10 “[v]accination requirements are a common feature of the provision of healthcare in America:
 11 Healthcare workers around the country are ordinarily required to be vaccinated for diseases . . .”);
 12 *see also Miller v. City of Scottsdale*, 88 F.4th 800, 806 (9th Cir. 2023) (pointing to a long history
 13 of caselaw showing that “[d]uring pandemics like COVID-19, the legislative and executive
 14 branches have broad powers and discretion to carry out the recommendations of health officials
 15 designed to protect “[t]he safety and the health of the people.”) (citations omitted).

16 Because Plaintiffs have failed to meet their burden of showing a clearly established right,
 17 the Court finds that Director Aragón and Governor Newsom are entitled to qualified immunity on
 18 the federal claims. Accordingly, the Court **DISMISSES** the federal claims against the State
 19 Defendants.³

20 C. State Law Claims

21 State Defendants also move to dismiss Plaintiffs’ state law claims for breach of contract
 22 and intentional infliction of emotional distress, arguing that Plaintiffs (1) fail to allege that they
 23 first presented the claims to the State under the California Government Claims Act (CGA); (2) the
 24 CGA confers immunity for State Defendants’ actions; and (3) Plaintiffs fail to allege facts
 25 sufficient to state cognizable claims. State Mot. at 33. Plaintiffs fail to oppose these arguments,
 26

27 _____
 28 ³ Because the qualified immunity analysis is dispositive, the Court does not reach State
 Defendants’ alternative arguments for dismissing the SAC.

1 and thus concede them. *See Walsh v. Nevada Dep't of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir.
2 2006) (“A plaintiff who makes a claim . . . in his complaint, but fails to raise the issue in response
3 to a defendant’s motion to dismiss . . . has effectively abandoned his claim”); *Namisnak v. Uber*
4 *Techs., Inc.*, 444 F. Supp. 3d 1136, 1146 (N.D. Cal. 2020) (“Plaintiff fails to respond to this
5 argument and therefore concedes it through silence.”) (quoting *Ardente, Inc. v. Shanley*, No. 07-
6 cv-04479, 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010)). Further, in their reply, State
7 Defendants noted that they considered Plaintiffs’ failure to oppose these arguments to amount to a
8 waiver of their state law claims, and Plaintiffs have not moved for leave to clarify that they did not
9 intend to abandon these claims. *See Namisnak*, 444 F. Supp. 3d at 1145-46. Accordingly, the
10 Court **DISMISSES** the state law claims against the State Defendants with prejudice. *See*
11 *Ramachandran v. Best Best & Krieger*, No. 20-CV-03693-BLF, 2021 WL 428654, at *9 (N.D.
12 Cal. Feb. 8, 2021).

13 **IV. KAISER DEFENDANTS’ MOTION TO DISMISS**

14 The Kaiser Defendants move to dismiss the SAC, arguing that (1) the Section 1983 causes
15 of action (claims 1-6) fail because Plaintiffs do not allege that the Kaiser Defendants are state
16 actors; (2) Plaintiffs fail to state a Section 1983 claim; (3) the ninth cause of action fails because
17 there is no private right of action under 21 U.S.C. § 360bbb-3; and (4) Plaintiffs fail to state a
18 claim for their state law claims for breach of contract (claim 7) and intentional infliction of
19 emotional distress (claim 8). ECF 37 (“KFH Mot.”). The Court addresses each in turn.

20 **A. Section 1983 Claims**

21 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a
22 right secured by the Constitution or laws of the United States was violated, and (2) that the alleged
23 violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S.
24 42, 48 (1988). “The state-action element in § 1983 ‘excludes from its reach merely private
25 conduct, no matter how discriminatory or wrongful.’” *Caviness v. Horizon Cmty. Learning Ctr.,*
26 *Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40
27 (1999)).

28 The Kaiser Defendants contend that Plaintiffs’ federal claims, asserted pursuant to Section

1 1983, fail to allege that the Kaiser Defendants acted “under color of state law” as state actors.
 2 KFH Mot. at 14. As a threshold issue in determining whether the Kaiser Defendants were state
 3 actors, the Court “must identify the specific conduct” of which Plaintiffs complain. *Rawson v.*
 4 *Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020) (citations and quotation marks
 5 omitted). Plaintiffs contend that they were injured because of Kaiser’s actions as an employer –
 6 specifically, that the Kaiser Defendants implemented an unlawful policy that Plaintiffs receive a
 7 COVID-19 vaccination before September 30, 2021, subject to medical and religious exemptions,
 8 or face termination. SAC ¶¶ 308-10. Thus, the relevant inquiry here is whether enacting such a
 9 policy and terminating Plaintiffs from employment constituted state action.⁴

10 The Ninth Circuit recognizes four tests for determining whether a private party is a state
 11 actor and thus acting “under color of state law” under Section 1983: “(1) public function; (2) joint
 12 action; (3) governmental compulsion or coercion; and (4) governmental nexus.” *Rawson*, 975
 13 F.3d at 747 (citation omitted). “Satisfaction of any one test is sufficient to find state action, so
 14 long as no countervailing factor exists.” *Id.* (quoting *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th
 15 Cir. 2003)). However, “compliance with generally applicable laws” cannot convert private
 16 conduct into state action under any of these tests. *Heineke v. Santa Clara Univ.*, 965 F.3d 1009,
 17 1013 (9th Cir. 2020) (citing cases).

18 Plaintiffs only advance the public function and joint action tests in their Opposition. ECF
 19 41 at 16-21. Accordingly, they have conceded theories of government compulsion and nexus. *See*
 20 *Walsh*, 471 F.3d at 1037; *Namisnak*, 444 F. Supp. 3d at 1146. The Court therefore addresses only
 21 whether Plaintiffs have alleged that the Kaiser Defendants were performing a public action or
 22 acting jointly with the State.

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 26 ⁴ In the SAC and opposition to the motion to dismiss, Plaintiffs discuss Kaiser’s obligations as an
 27 entity that provides COVID-19 vaccines. SAC ¶¶ 86-90, 183-85, 371-78; ECF 41 at 17-19.
 28 However, Plaintiffs do not allege that they were forced to receive a COVID-19 vaccine from
 Kaiser. Thus, Kaiser’s actions as an entity that provides COVID-19 vaccines are irrelevant to
 whether it was a state actor for the Section 1983 claims alleged here. *See Curtis v. PeaceHealth*,
 No. 3:23-CV-05741-RJB, 2024 WL 248719, at *5 (W.D. Wash. Jan. 23, 2024).

1 insinuated into a position of interdependence with the [private party] that it was a joint participant
 2 in the enterprise.” *Rawson*, 975 F.3d at 748 (quoting *Jensen v. Lane Cnty.*, 222 F.3d 570, 575-78
 3 (9th Cir. 2000) (citations omitted)). The test is “intentionally demanding and requires a high
 4 degree of cooperation between private parties and state officials to rise to the level of state action.”
 5 *O’Handley v. Weber*, 62 F.4th 1145, 1159-60 (9th Cir. 2023), *cert. denied*, 2024 WL 3259696
 6 (July 2, 2024). Here, Plaintiffs merely allege that the Kaiser Defendants and the State of
 7 California were both obligated to follow federal law. That is insufficient to meet the “demanding
 8 standard” of joint action. *See O’Handley*, 62 F.4th at 1160; *see also Heineke*, 965 F.3d at 1013
 9 (complying with generally applicable laws is insufficient to convert private conduct into state
 10 action). Therefore, the Court cannot find that the Kaiser Defendants engaged in joint action with
 11 the State simply by following generally applicable law and issuing a vaccination policy.

12 Because the Court concludes that the Kaiser Defendants were not state actors, the Court
 13 **DISMISSES** the Section 1983 claims against them.⁵

14 **B. Implied Right of Action Under 21 U.S.C. § 360bbb-3**

15 Plaintiffs assert a claim for “Implied Private Right of Action 21 U.S.C. § 360bbb-3.”
 16 SAC ¶¶ 415-17. This provision of the Food, Drug, and Cosmetic Act (FDCA) authorizes medical
 17 products for use in emergencies. 21 U.S.C. § 360bbb-3. Section 310 of the FDCA expressly
 18 states that all proceedings to enforce the FDCA “shall be by and in the name of the United States.”
 19 21 U.S.C. § 337(a); *see Johnson*, 2024 WL 747022, at *2. The Supreme Court has clarified that
 20 “[p]rivate parties may not bring enforcement suits [under the FDCA]” and that the United States
 21 has “nearly exclusive enforcement authority” under the FDCA. *POM Wonderful LLC v. Coca-*
 22 *Cola Co.*, 573 U.S. 102, 109 (2014); *see also Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S.
 23 341, 349 n.4 (2001) (holding that “[t]he FDCA leaves no doubt that it is the Federal Government
 24 rather than private litigants who are authorized to file suit for noncompliance . . .”). Plaintiffs’
 25 only response to this significant authority precluding private enforcement of the FDCA is that the
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 28 ⁵ As the state action element is dispositive, the Court does not address Kaiser Defendants’
 additional arguments for dismissing the Section 1983 claims.

1 “EUA statute contains the same language, circumstances, and conditions courts used to imply a
2 private right of action under Title VI and IX. Therefore, courts should apply an implied private
3 right of action under this statute.” ECF 41 at 25. Plaintiffs offer no legal authority to support this
4 assertion, and it contradicts Supreme Court and statutory authority holding that there is no private
5 right of action under the FDCA. The Court therefore **DISMISSES** this claim as a matter of law.
6 *See POM Wonderful*, 573 U.S. at 109; *Buckman*, 531 U.S. at 349 n.4.

7 C. State Law Claims

8 Because the Court has dismissed all federal claims against the Kaiser Defendants, the
9 Court declines supplemental jurisdiction over the state law claims. Under 28 U.S.C. § 1367, a
10 district court “may decline to exercise supplemental jurisdiction” where “the district court has
11 dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Typically,
12 “[w]hen federal claims are dismissed before trial . . . pending state claims should also be
13 dismissed.” *Religious Tech. Ctr v. Wollersheim*, 971 F.2d 364, 367-68 (9th Cir. 1992) (citation
14 omitted). The Court thus declines to exercise supplemental jurisdiction over the remaining state
15 law claims. *See Vasquez v. City of San Jose*, 634 F. Supp. 3d 712, 733 (N.D. Cal. 2022), *aff’d*,
16 No. 22-16691, 2024 WL 445320 (9th Cir. Feb. 6, 2024); *see also City of Colton v. Am.*
17 *Promotional Events, Inc.-W.*, 614 F.3d 998, 1008 (9th Cir. 2010) (holding that the district court
18 acted within its discretion in declining to exercise supplemental jurisdiction after granting
19 summary judgment on all federal claims). Accordingly, the Court **DISMISSES** Plaintiffs’ state
20 law claims without prejudice.

21 V. LEAVE TO FILE A THIRD AMENDED COMPLAINT

22 While the instant motions to dismiss were pending, Plaintiffs filed a motion for leave to
23 file a Third Amended Complaint (“TAC”), seeking to add a tenth cause of action for deprivation
24 of the “fundamental right to refuse unwanted medical treatment.” ECF 45. The Court considers
25 the TAC in assessing whether to grant Plaintiffs leave to amend after concluding that the State
26 Defendants’ and Kaiser Defendants’ motions to dismiss should be granted.

27 Leave to amend “shall be freely given when justice so requires.” *Carvalho v. Equifax Info.*
28 *Services, LLC*, 629 F.3d 876, 892 (9th Cir. 2010). However, the “general rule” allowing

1 amendment of pleadings “does not extend to cases in which any amendment would be an exercise
2 in futility, [] or where the amended complaint would also be subject to dismissal.” *Steckman v.*
3 *Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (citations omitted). In determining
4 whether to grant leave to amend, courts consider five factors: “bad faith, undue delay, prejudice to
5 the opposing party, futility of amendment, and whether the plaintiff has previously amended the
6 complaint.” *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Here,
7 because there is no evidence of delay, prejudice, bad faith, or previous amendments to the
8 complaint,⁶ leave to amend turns on whether amendment is futile.

9 Plaintiffs’ proposed amendments allege that the COVID-19 injections were not a vaccine,
10 but instead were “medical treatment” because they do not effectively “prevent the spread” of the
11 virus. ECF 45 at 2.

12 Plaintiffs argue that amendment is not futile as to the Section 1983 claims against the State
13 Defendants because there is a clearly established right to refuse investigational drugs. ECF 68 at
14 7. However, in support of this contention, Plaintiffs cite dicta in a 2004 district court case from
15 the District of Columbia. *Id.* (citing *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004)).⁷ While
16 there need not be a case “directly on point,” a government official violates clearly established law
17 only when “existing precedent . . . placed the statutory or constitutional question beyond debate.”
18 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). “[A] district judge’s *ipse dixit* of a holding is not
19 ‘controlling authority’ in any jurisdiction,” *id.*, thus a district court case from the District of
20 Columbia cannot clearly establish law in California. Moreover, *Doe* is not the panacea that
21 Plaintiffs posit as it did not hold that requiring healthcare workers to receive investigational drugs
22 during a health emergency is against the law. *See Doe*, 341 F. Supp. 2d at 15-16 (finding an
23 Administrative Procedure Act violation for the FDA’s failure to follow correct procedures for
24

25 ⁶ The parties stipulated to previous amendments to the complaint.

26 ⁷ In arguing for leave to amend, Plaintiffs also contend that they were previously unaware of the
27 facts in the “groundbreaking decision in COVID-19 litigation that a plaintiff may plausibly allege
28 a cause of action based on the facts alleged in *Health Freedom*.” ECF 45 at 2-3. Thus, the 2024
decision in *Health Freedom* cannot support Plaintiffs’ theory that existing caselaw at the time of
the State Defendants’ conduct showed that they were violating clearly established law. *See Rivas-*
Villegas, 595 U.S. at 5.

1 certifying that an anthrax vaccine was safe and effective for its intended use). Although Plaintiffs
 2 offer a new theory that the COVID-19 injections were “medical treatment” rather than
 3 vaccinations, the right they assert was not clearly established at the time the State Defendants
 4 acted. They also fail to allege that the State Defendants knew that the COVID-19 vaccinations
 5 were “unwanted medical treatment” as opposed to vaccinations. Therefore, a reasonable official
 6 could have understood that requiring healthcare workers to receive what they believed to be a
 7 vaccine during a health emergency was compatible with existing law. *See Rivas-Villegas*, 595
 8 U.S. at 5.

9 As Plaintiffs’ proposed amendments do not allege that State Defendants violated a clearly
 10 established right, amendment would prove futile. Accordingly, the Court **DENIES** Plaintiffs’
 11 motion for leave to amend the claims against the State Defendants.

12 Nothing in the motion for leave to file a TAC or the allegations Plaintiffs seek to add
 13 shows that the Kaiser Defendants were state actors. Accordingly, amendment would be futile as
 14 to the Section 1983 claims alleged against the Kaiser Defendants, and the Court **DENIES**
 15 Plaintiffs’ motion for leave to amend the claims against the Kaiser Defendants.


16 **VI. CONCLUSION**

17 For the foregoing reasons, the Court **DISMISSES** the Section 1983 claims with prejudice.
 18 The Court **DISMISSES** the state law claims against the State Defendants with prejudice. The
 19 Court **DISMISSES** the state law claims against the Kaiser Defendants without prejudice towards
 20 Plaintiffs re-filing them in state court.

21 Defendants shall submit a proposed order of judgment consistent with this order. The
 22 Clerk shall close the file.

23
 24 **IT IS SO ORDERED.**

25 Dated: August 26, 2024

26
 27 

28 **ARACELI MARTÍNEZ-OLGUÍN**
United States District Judge