APPENDIX

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APPENDIX A

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-5812

D.C. No. 3:23-cv-05628-AMO

MEMORANDUM*

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.

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

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

Defendants—Appellees.

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

Submitted October 22, 2025**
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. §

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

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

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.*

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 person regulated." *Saloojas, Inc. v. Aetna Health of Cal., Inc.*, 80 F.4th 1011, 1015 (9th

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

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 the 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 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

[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)).

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.

APPENDIX B

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. No. 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.

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I. BACKGROUND[1]

Plaintiffs are former employees of Kaiser who were terminated after refusing to receive a COVID-19 vaccine. Second Amended Complaint (ECF 33) ("SAC") ¶¶ 18, 329. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency related to COVID-19. SAC ¶¶ 1–2. On December 11, 2020, the U.S. Food and Drug Administration (FDA) issued an Emergency Use Authorization for the distribution of "investigational" COVID-19 vaccines. SAC ¶¶ 75–77.

On August 5, 2021, the California Department of Public Health issued a public health order requiring that "all workers who provide services or work in [healthcare facilities … have their first dose of a one-dose regimen or their second dose of a two-dose regimen [of the COVID-19 vaccine] by September 30, 2021." SAC ¶ 218; *id.*, Ex D (ECF 33-4) ("Health Order") at 2. The Health Order specified that workers may be exempt from the vaccination requirements of the Health Order "only upon providing the operator of the facility a declination form, signed by the individual stating either of the

[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).

following: (1) the worker is declining vaccination based on Religious Beliefs, or (2) the worker is excused from receiving any COVID-19 vaccine due to Qualifying Medical Reasons." Health Order at 3. The Health Order "mandated the use of investigational new drugs by healthcare workers." SAC ¶ 6.

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

Plaintiffs allege nine causes of action in the Second Amended Complaint: (1) Section 1983 – subjected to investigational drug use; (2) Section 1983 – deprivation of Equal Protection; (3) Section 1983 – deprivation of Constitutional Due Process; (4) Section 1983 – deprivation of rights under the Spending Clause; (5) Section 1983 – Unconstitutional Conditions Doctrine; (6) Section 1983 – PREP Act; (7) breach of contract, third party beneficiary; (8) intentional infliction of emotional distress; and (9) implied private right of action under 21 U.S.C. § 360bbb-3. Defendants Gavin Newsom, Governor of California, and Tomás Aragón, Director of the California Department of Public Health (collectively, "State Defendants") move to dismiss each cause of

action alleged against them. ECF 36. Defendants Greg Adams, Andrew Bindman, and Kaiser Foundation Hospitals (collectively, "Kaiser Defendants") also move to dismiss each cause of action. ECF 37. The Court addresses each motion in turn.

II. LEGAL STANDARD

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim for which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) requires dismissal when a complaint lacks either a "cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (citation omitted). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. When evaluating a motion to dismiss, the court accepts plaintiffs' 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*, 519 F.3d at 1031. However, "allegations in a complaint … may not simply recite the elements of a cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing

party to defend itself effectively." *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014) (citations omitted).

III. STATE DEFENDANTS' MOTION TO DISMISS

The State Defendants move to dismiss the SAC, arguing that (1) Plaintiffs lack Article III standing; (2) Plaintiffs' official capacity claims against State Defendants are barred by sovereign immunity; (3) Plaintiffs' individual capacity claims against State Defendants fail to allege any personal involvement in the violation of their rights; (4) State Defendants are entitled to qualified immunity from federal claims alleged against them in their individual capacities; and (5) Plaintiffs fail to state a claim under Rule 12(b)(6). ECF 36 ("State Mot."). The Court addresses standing first as it is a threshold question. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 879 (9th Cir. 2022) (citation omitted).

A. Article III Standing[2]

State Defendants move to dismiss the claims against them for lack of Article III standing. State Mot. at 18–19. The Court evaluates challenges to Article III standing under Rule 12(b)(1), which governs motions to dismiss for lack of subject matter jurisdiction. *Maya*, 658 F.3d at 1067. Article III standing requires that a "plaintiff must have (1)

[2] In ruling on a motion to dismiss for lack of standing, the court "must accept as true all material 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).

suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). These three elements are referred to, respectively, as: injury in fact, causation, and redressability. *See Planned Parenthood of Greater Was. & N. Idaho v. U.S. Dep't of Health & Human Servs.,* 946 F.3d 1100, 1108 (9th Cir. 2020).

State Defendants challenge causation, arguing that Plaintiffs' termination from Kaiser for their refusal to receive the COVID-19 vaccine is not "fairly traceable" to any action by the State Defendants. State Mot. at 18. Causation requires that the injury is "fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). While plaintiffs need not show proximate cause, they "must establish a 'line of causation' between defendants' action and their alleged harm that is more than 'attenuated.'" *Maya*, 658 F.3d at 1070. A chain of causation does not fail "simply because it has several 'links,' provided those links are 'not hypothetical or tenuous.'" *Id*. (quoting *Nat'l Audobon Soc., Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir.), *opinion amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002)). "[W]hen a plaintiff alleges that government action caused injury by influencing the conduct of third parties, [the Ninth Circuit has] held that 'more particular facts are needed to show standing" because a third party "may well have engaged in their injury-inflicting actions even in the absence of the government's challenged conduct." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y*, 307 F.3d at 849).

To plausibly allege that the injury was "not the result of the independent action of some third party," the plaintiff must allege that the government conduct is "at least a substantial factor motivating the third parties' actions." *Id*. (citations omitted).

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

As regards Plaintiffs' termination from their employment, State Defendants argue that Plaintiffs' terminations resulted from the Kaiser Defendants' actions, and that State Defendants did not mandate or cause such termination, whether pursuant to their own or Kaiser's vaccination requirement. State Mot. at 19. Plaintiffs respond that the harm is traceable to State Defendants because State Defendants "issued a mandate [] requiring Kaiser to ensure all workers were vaccinated according to the public health order under the force of law, which was official state policy and required adherence by Kaiser." Opp. (ECF 40) at 18 (citing SAC ¶ 218). On August 5, 2021, the State issued a Health Order requiring all healthcare workers be fully vaccinated against COVID-19 (subject to medical and religious exemptions) by September 30, 2021. SAC ¶ 218, Ex D. On August 27, 2021, Kaiser issued a policy requiring all employees (subject to exemptions) to receive COVID-19 vaccinations by September 30, 2021 or face

termination. SAC ¶ 308. The Kaiser Policy notes that there is a "vaccination requirement[] under [the] state mandate." SAC, Ex. F at 1. Given the timing of the two policies and the Kaiser policy's mention of the state mandate, it is plausible that the State's vaccine mandate led Kaiser to implement its own vaccine policy. *See Nat'l Audubon Soc'y*, 307 F.3d at 849 (plausible chain of causation against state officials and agencies where federal government removed wildlife traps in direct response to California Proposition 4). Plaintiffs sufficiently allege standing at this stage. Accordingly, the Court denies the motion to dismiss on this basis.

B. Qualified Immunity

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

1. Ministerial Versus Discretionary Conduct

Plaintiffs assert that State Defendants cannot invoke qualified immunity because they were under a duty to perform the ministerial function of "accepting the Plaintiff's chosen option under the EUA [Emergency Use Authorization] statute and the

CDC Program and to ensure the recruited healthcare facilities performed the same function." Opp. at 21.

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

Plaintiffs offer only conclusory allegations that State Defendants had a "ministerial duty to obtain Plaintiffs' legally effective informed consent." ECF 68 at 4. In support, they reference a CDC Playbook that provides guidance on vaccination responses, a statute requiring informed consent before involving a human subject in research (45 CFR § 46.116), and a statute authorizing medical products for use in emergencies (21 U.S.C. §360bbb-3). *See* Opp. at 15–16; ECF 68 at 5–7. Plaintiffs do not identify any language in these statutes or the handbook requiring State Defendants to accept Plaintiffs' refusal to receive EUA vaccines or ensure that health facilities did the same in instituting the Health Order. *Cf. Rieman v. Vazquez*, 96 F.4th 1085, 1091–92 (9th Cir. 2024) (no qualified immunity where social workers were mandated under the law to provide notice of a hearing and failed to provide such notice). Plaintiffs thus fail to establish that the State Defendants had a ministerial duty under Plaintiffs' alleged facts.

2. Clearly Established Right

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

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

Plaintiffs argue that State Defendants "offer no case law establishing" the right to require a

healthcare worker "to be injected with an EUA drug." Opp. at 22. Plaintiffs miss the mark — it is "plaintiff[s] who bear[ ] the burden of showing that the rights allegedly violated were clearly established." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (citations and internal quotation marks omitted). Plaintiffs offer the Court no authority showing that State Defendants violated a "clearly established" right by issuing the Health Order requiring COVID-19 vaccinations for healthcare workers. *See Pearson*, 555 U.S. at 231.

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

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

C. State Law Claims

State Defendants also move to dismiss Plaintiffs' state law claims for breach of contract and intentional infliction of emotional distress, arguing that Plaintiffs (1) fail to allege that they first presented the claims to the State under the California Government Claims Act (CGA); (2) the CGA confers immunity for State Defendants' actions; and (3) Plaintiffs fail to allege facts sufficient to state cognizable claims. State Mot. at 33. Plaintiffs fail to oppose these arguments, and thus concede them. *See Walsh v. Nevada Dep't of Hum. Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) ("A plaintiff who makes a claim … in his complaint, but fails to raise the issue in response to a defendant's motion to dismiss … has effectively abandoned his claim"); *Namisnak v. Uber Techs., Inc.*, 444 F. Supp. 3d 1136, 1146 (N.D. Cal. 2020) ("Plaintiff fails to respond to this argument and therefore concedes it through silence.") (quoting *Ardente, Inc. v. Shanley*, No. 07-cv-04479, 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010)). Further, in their reply, State Defendants noted that they considered Plaintiffs' failure to oppose these arguments to amount to a waiver of their state law claims, and Plaintiffs have not moved for leave to

[3] Because the qualified immunity analysis is dispositive, the Court does not reach State Defendants' alternative arguments for dismissing the SAC.

clarify that they did not intend to abandon these claims. *See Namisnak*, 444 F. Supp. 3d at 1145–46. Accordingly, the Court **DISMISSES** the state law claims against the State Defendants with prejudice. *See Ramachandran v. Best Best & Krieger*, No. 20-CV-03693-BLF, 2021 WL 428654, at *9 (N.D. Cal. Feb. 8, 2021).

IV. KAISER DEFENDANTS' MOTION TO DISMISS

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

A. Section 1983 Claims

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). "The state-action element in § 1983 'excludes from its reach merely private conduct, no matter how discriminatory or wrongful.'" *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir.

2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999)).

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

The Ninth Circuit recognizes four tests for determining whether a private party is a state actor and thus acting "under color of state law" under Section 1983: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Rawson*, 975 F.3d at 747 (citation

[4] In the SAC and opposition to the motion to dismiss, Plaintiffs discuss Kaiser's obligations as an entity that provides COVID-19 vaccines. SAC ¶¶ 86–90, 183–85, 371–78; ECF 41 at 17–19. 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).

omitted). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Id.* (quoting *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003)). However, "compliance with generally applicable laws" cannot convert private conduct into state action under any of these tests. *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1013 (9th Cir. 2020) (citing cases). Plaintiffs only advance the public function and joint action tests in their Opposition. ECF 41 at 16–21. Accordingly, they have conceded theories of government compulsion and nexus. *See Walsh*, 471 F.3d at 1037; *Namisnak*, 444 F. Supp. 3d at 1146. The Court therefore addresses only whether Plaintiffs have alleged that the Kaiser Defendants were performing a public action or acting jointly with the State.

1. Public Function Test

The Kaiser Defendants argue that their enforcement of a vaccination policy is not a public function. KFH Mot. at 24. "The public function test is satisfied only on a showing that the function at issue is 'both traditionally and exclusively governmental.'" *Rawson*, 975 F.3d at 748 (citations omitted). The test is "difficult to meet," and there is a "lean list of [] 'very few' recognized public functions, including 'running elections,' 'operating a company town,' and not much else." *Prager Univ. v. Google LLC*, 951 F.3d 991, 997–98 (9th Cir. 2020) (citations omitted). Plaintiffs contend, without support, that "[t]he CDC Program was a Public Function because only the federal government can declare a federal emergency, authorize emergency use of unlicensed drugs, and create a federal program to administer those drugs through State governments as a public function."

ECF 41 at 20. Even assuming that these actions under the CDC Program constitute a "public function," Plaintiffs do not allege that the Kaiser Defendants declared a federal emergency, authorized emergency use of drugs, or created a federal program to administer the drugs. Plaintiffs further argue that the Kaiser Defendants assumed a public function by acting in accordance with "official state policy." ECF 41 at 16–17. Not so. A private party's compliance with state law does not make them a state actor. *See Heineke*, 965 F.3d at 1013; *see also Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 839 (9th Cir. 1999) (recognizing that Supreme Court precedent does not hold "that governmental compulsion in the form of a general statute, without more, is sufficient to transform every private entity that follows the statute into a governmental actor."). Accordingly, Plaintiffs have not shown that the Kaiser Defendants were engaged in a public function.

2. Joint Action

Plaintiffs also argue that the Kaiser Defendants were engaged in joint action or a "symbiotic relationship" with California because Kaiser and California were "required by the federal government to conduct medical research and obtain Plaintiffs' legally effective informed consent." SAC ¶ 307 n.111; ECF 41 at 17. The joint action test is satisfied where there is a "sufficiently close nexus between the state and the private actor" such that the actions of the private actor "may be fairly treated as that of the State itself" or where the State has "so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Rawson*, 975 F.3d at 748 (quoting *Jensen*

v. Lane Cnty., 222 F.3d 570, 575–78 (9th Cir. 2000) (citations omitted)). The test is "intentionally demanding and requires a high degree of cooperation between private parties and state officials to rise to the level of state action." *O'Handley v. Weber*, 62 F.4th 1145, 1159–60 (9th Cir. 2023), *cert. denied*, 2024 WL 3259696 (July 2, 2024). Here, Plaintiffs merely allege that the Kaiser Defendants and the State of California were both obligated to follow federal law. That is insufficient to meet the "demanding standard" of joint action. *See O'Handley*, 62 F.4th at 1160; *see also Heineke*, 965 F.3d at 1013 (complying with generally applicable laws is insufficient to convert private conduct into state action). Therefore, the Court cannot find that the Kaiser Defendants engaged in joint action with the State simply by following generally applicable law and issuing a vaccination policy.

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

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

Plaintiffs assert a claim for "Implied Private Right of Action 21 U.S.C. § 360bbb-3." SAC ¶¶ 415–17. This provision of the Food, Drug, and Cosmetic Act (FDCA) authorizes medical products for use in emergencies. 21 U.S.C. § 360bbb-3. Section 310 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); *see Johnson*, 2024 WL

[5] As the state action element is dispositive, the Court does not address Kaiser Defendants' additional arguments for dismissing the Section 1983 claims.

747022, at *2. The Supreme Court has clarified that "[p]rivate parties may not bring enforcement suits [under the FDCA]" and that the United States has "nearly exclusive enforcement authority" under the FDCA. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 109 (2014); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4 (2001) (holding that "[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance …"). Plaintiffs' only response to this significant authority precluding private enforcement of the FDCA is that the "EUA statute contains the same language, circumstances, and conditions courts used to imply a private right of action under Title VI and IX. Therefore, courts should apply an implied private right of action under this statute." ECF 41 at 25. Plaintiffs offer no legal authority to support this assertion, and it contradicts Supreme Court and statutory authority holding that there is no private right of action under the FDCA. The Court therefore DISMISSES this claim as a matter of law. *See POM Wonderful*, 573 U.S. at 109; *Buckman*, 531 U.S. at 349 n.4.

C. State Law Claims

Because the Court has dismissed all federal claims against the Kaiser Defendants, the Court declines supplemental jurisdiction over the state law claims. Under 28 U.S.C. § 1367, a district court "may decline to exercise supplemental jurisdiction" where "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Typically, "[w]hen federal claims are dismissed before trial … pendent state claims should

also be dismissed." *Religious Tech. Ctr v. Wollersheim*, 971 F.2d 364, 367–68 (9th Cir. 1992) (citation omitted). The Court thus declines to exercise supplemental jurisdiction over the remaining state law claims. *See Vasquez v. City of San Jose*, 634 F. Supp. 3d 712, 733 (N.D. Cal. 2022), *aff'd*, No. 22-16691, 2024 WL 445320 (9th Cir. Feb. 6, 2024); *see also City of Colton v. Am. Promotional Events, Inc.-W.*, 614 F.3d 998, 1008 (9th Cir. 2010) (holding that the district court acted within its discretion in declining to exercise supplemental jurisdiction after granting summary judgment on all federal claims). Accordingly, the Court **DISMISSES** Plaintiffs state law claims without prejudice.

V. LEAVE TO FILE A THIRD AMENDED COMPLAINT

While the instant motions to dismiss were pending, Plaintiffs filed a motion for leave to file a Third Amended Complaint ("TAC"), seeking to add a tenth cause of action for deprivation of the "fundamental right to refuse unwanted medical treatment." ECF 45. The Court considers the TAC in assessing whether to grant Plaintiffs leave to amend after concluding that the State Defendants' and Kaiser Defendants' motions to dismiss should be granted. Leave to amend "shall be freely given when justice so requires." *Carvalho v. Equifax Info. Services, LLC*, 629 F.3d 876, 892 (9th Cir. 2010). However, the "general rule" allowing amendment of pleadings "does not extend to cases in which any amendment would be an exercise in futility, [] or where the amended complaint would also be subject to dismissal." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (citations omitted). In

determining whether to grant leave to amend, courts consider five factors: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). Here, because there is no evidence of delay, prejudice, bad faith, or previous amendments to the complaint,[6] leave to amend turns on whether amendment is futile.

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

Plaintiffs argue that amendment is not futile as to the Section 1983 claims against the State Defendants because there is a clearly established right to refuse investigational drugs. ECF 68 at 7. However, in support of this contention, Plaintiffs cite dicta in a 2004 district court case from the District of Columbia. *Id.* (citing *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004)).[7] While there need not be a case "directly on point," a government official violates clearly established law only when "existing precedent … placed the statutory or constitutional question

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[6] The parties stipulated to previous amendments to the complaint.

[7] In arguing for leave to amend, Plaintiffs also contend that they were previously unaware of the facts in the "groundbreaking decision in COVID-19 litigation that a plaintiff may plausibly allege 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.

beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "[A] district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction," id., thus a district court case from the District of Columbia cannot clearly establish law in California. Moreover, *Doe* is not the panacea that Plaintiffs posit as it did not hold that requiring healthcare workers to receive investigational drugs during a health emergency is against the law. *See Doe*, 341 F. Supp. 2d at 15–16 (finding an Administrative Procedure Act violation for the FDA's failure to follow correct procedures for certifying that an anthrax vaccine was safe and effective for its intended use). Although Plaintiffs offer a new theory that the COVID-19 injections were "medical treatment" rather than vaccinations, the right they assert was not clearly established at the time the State Defendants acted. They also fail to allege that the State Defendants knew that the COVID-19 vaccinations were "unwanted medical treatment" as opposed to vaccinations. Therefore, a reasonable official could have understood that requiring healthcare workers to receive what they believed to be a vaccine during a health emergency was compatible with existing law. *See Rivas-Villegas*, 595 U.S. at 5.

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

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

the Court **DENIES** Plaintiffs' motion for leave to amend the claim against the Kaiser Defendants.

VI. CONCLUSION

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

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

IT IS SO ORDERED.

Dated: August 26, 2024.

s/*Araceli Martínez-Olguín*
ARACELI MARTÍNEZ-OLGUÍN
United States District Judge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution

Fourteenth Amendment, Section 1

… No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

21 U.S.C. § 355

(a) [n]o person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) is effective with respect to such drug. …

(i)(4) Regulations under paragraph (1) shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in

connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representtatives …

21 U.S.C. § 360bbb

(a) The Secretary may, under appropriate conditions determined by the Secretary, authorize the shipment of investigational drugs or investigational devices for the diagnosis, monitoring, or treatment of a serious disease or condition in emergency situations.

(b) Any person, acting through a physician licensed in accordance with State law, may request from a manufacturer or distributor, and any manufacturer or distributor may, after complying with the provisions of this subsection, provide to such physician an investigational drug or investigational device for the diagnosis, monitoring, or treatment of a serious disease or condition if—

> (1) the licensed physician determines that the person has no comparable or satisfactory alternative therapy available to diagnose, monitor, or treat the disease or condition involved, and that the probable risk to the person from the investigational drug or investigational device is not greater than the probable risk from the disease or condition;
>
> (2) the Secretary determines that there is sufficient evidence of safety and effectiveness to support the use of the investigational drug or

investigational device in the case described in paragraph (1); …

(4) the sponsor, or clinical investigator, of the investigational drug or investigational device submits to the Secretary a clinical protocol consistent with the provisions of section 355(i) or 360j(g) of this title, including any regulations promulgated under section 355(i) or 360j(g) of this title, describing the use of the investigational drug or investigational device in a single patient or a small group of patients.

21 U.S.C. § 360bbb-3

(e) Conditions of authorization

(1) Unapproved product

(A) Required conditions

With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1),shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i) Appropriate conditions designed to ensure that health care professionals administering the product are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and

(III) of the alternatives to the product that are available, and of their benefits and risks.

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

(iii) Appropriate conditions for the monitoring and reporting of adverse events associated with the emergency use of the product ….

(l) Nothing in this section provides the Secretary any authority to require any person to carry out any

activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity …

42 U.S.C. § 247d-6d(b)(8)

During the effective period of a declaration under subsection (b), or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—

(A) is different from, or is in conflict with, any requirement applicable under this section; and

(B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 *et seq*.].

42 U.S.C. § 247d-6e(c)

(c) The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d–6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

42 U.S.C. § 289

The Secretary shall by regulation require that each entity which applies for a grant, contract, or cooperative agreement under this chapter for any project or program which involves the conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to the Secretary that it has established (in accordance with regulations which the Secretary shall prescribe) a board (to be known as an "Institutional Review Board") to review biomedical and behavioral research involving human subjects conducted at or supported by such entity in order to protect the rights of the human subjects of such research.