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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

12/06/2021 at 11:29:00 PM

Clerk of the Superior Court
By Erika Engel, Deputy Clerk

7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

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

12 Plaintiff,

13 v.

14 SAN DIEGO UNIFIED SCHOOL
15 DISTRICT; and DOES 1–50,

16 Defendants.

Case No. 37-2021-00043172-CU-WM-CTL

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION FOR JUDGMENT ON
PETITION FOR WRIT OF MANDATE**

Department: C-64

Judge: Hon. John S. Meyer

Date: December 20, 2021

Time: 9:00 a.m.

Action filed: October 12, 2021

Trial date: Not set

1 TO THE COURT AND THE PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 20, 2021, at 9:00 a.m., or as soon thereafter
3 as the matter may be heard, in Department C-64 of the California Superior Court, County of San
4 Diego, located at 330 West Broadway, San Diego, California 92101, Plaintiff Let Them Choose
5 will move, and hereby does move, for judgment to be entered on its petition for writ of mandate
6 against Defendant San Diego Unified School District (“SDUSD”). Specifically, Plaintiff moves
7 the Court to enter judgment in favor of Plaintiff and against SDUSD as to Plaintiff’s First Cause
8 of Action for Violation of Health and Safety Code section 120335 and California Code of
9 Regulations, Title 17, sections 6026, 6060, and 6065; Second Cause of Action for Violation of
10 California Code of Regulations, title 5, section 11700; and Third Cause of Action for Violation
11 of Education Code sections 51746 and 51747, and find Plaintiff is entitled to an award of
12 attorneys’ fees under Code of Civil Procedure, section 1021.5. Further, Plaintiff respectfully
13 requests that this Court order a peremptory writ of mandate to issue, pursuant to Code of Civil
14 Procedure, section 1085, commanding SDUSD as follows:

- 15 1. SDUSD shall vacate its Vaccination Roadmap, which the SDUSD board approved
16 on September 28, 2021, and which requires all SDUSD students who are 16 years of
17 age and older as of November 1, 2021, to receive their first COVID-19 vaccine dose
18 by no later than November 29, 2021, and their second dose by no later than
19 December 20, 2021, and which further requires all students who are not vaccinated
20 for COVID-19 to be transferred to independent study and excluded from in-person
21 instruction, extracurricular activities, and sports effective Monday, January 24, 2021;
- 22 2. SDUSD shall not compel any student to receive vaccination for COVID-19, or
23 discriminate against any student based on COVID-19 vaccination status, except as
24 may be otherwise required by a valid statute or regulation of the State of California;
- 25 3. SDUSD shall provide notice of the writ and the Court’s order to all students enrolled
26 in SDUSD and their parents within three (3) days of the date of service of the order;
27 and
- 28 4. SDUSD shall file a return to the writ no later than fourteen (14) days after its
issuance

To facilitate a timely resolution of this matter, Plaintiff hereby withdraws its Fourth through
Eighth Causes of Action without prejudice.¹

¹ Plaintiff reserves the right to move for a preliminary injunction, reinstate any of the withdrawn
causes of action, and take any other action not inconsistent with this Court’s anticipated ruling

1 This motion is based on this notice and the accompanying memorandum of points and
2 authorities, declarations, exhibits, matters of which the Court may take judicial notice, and
3 proposed order and any other information or argument that the Court may consider at the
4 hearing. Plaintiff expressly incorporates herein by reference in support of its motion the
5 memorandum of points and authorities, declarations, and lodged exhibits submitted to this Court
6 December 1, 2021, in support of its ex parte application for a temporary restraining order and
7 order to show cause why an injunction should not issue pending trial. To avoid unnecessary
8 multiplication of documents, Plaintiff is not refileing or relodging these documents but would be
9 happy to provide an additional courtesy copy of any or all such documents to the court if
10 requested.

11 In addition to the documents filed in this matter, Plaintiff expressly incorporates herein
12 by reference the documents, including the memorandum of points and authorities, declaration of
13 S.V., and declaration of Caroline Tucker, filed this date in support of Plaintiff S.V.'s Motion for
14 Judgment on Petition for Writ of Mandate in Case No. 37-2021-00049949-CU-MC-CTL, which
15 the parties have stipulated to consolidate with the instant case.

16 Dated: December 6, 2021

AANNESTAD ANDELIN & CORN LLP

17
18 *s/ Lee M. Andelin*

Lee M. Andelin

Arie L. Spangler

Attorneys for Plaintiffs

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27 _____
28 in the event this Court determines that a final judgment cannot be entered or complete relief
otherwise cannot be granted.

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6 *Attorneys for Plaintiffs*

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12 Plaintiffs,

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14 SAN DIEGO UNIFIED SCHOOL
15 DISTRICT; and DOES 1–50,

16 Defendants.

Case No. 37-2021-00043172-CU-WM-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
JUDGMENT ON PETITION FOR WRIT
OF MANDATE**

Department: C-64

Judge: Hon. John S. Meyer

Date: December 20, 2021

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1 **I. INTRODUCTION.**

2 Plaintiff Let Them Choose respectfully requests that the court issue a peremptory writ of
3 mandate commanding Defendant San Diego Unified School District (“SDUSD”) to vacate its
4 Vaccination Roadmap requiring all SDUSD students who are 16 years of age and older as of
5 November 1, 2021, to receive their first COVID-19 vaccine dose by no later than November 29,
6 2021, and their second dose by no later than December 20, 2021, and involuntarily transferring
7 unvaccinated students to independent study on January 24, 2022.

8 SDUSD is not authorized to enact a COVID-19 vaccination mandate for its students.
9 Only the Legislature or the California Department of Public Health (“CDPH”) has the power to
10 mandate vaccinations for public schoolchildren. Health and Safety Code sections 120370 and
11 120335, along with the implementing regulations found at California Code of Regulations
12 sections 6000 *et seq.*, require schools to unconditionally admit, or allow continued attendance
13 to, any pupil who has had vaccinations for ten statutorily enumerated diseases plus any other
14 disease the CDPH deems appropriate under certain rules. COVID-19 remains absent from those
15 statutes, and CDPH has not yet deemed COVID-19 appropriate to add. No school board holds
16 the authority to add a new vaccine to the list of mandated vaccinations as enumerated by the
17 Legislature in sections 120370 and 120335.

18 Additionally, SDUSD’s COVID-19 vaccination mandate does not allow personal belief
19 exemptions as required by state law. While the mandate does provide for medical exemptions,
20 they are illusory because they generally cannot be obtained in the State of California and, per its
21 own exemption form, SDUSD will only accept an exemption request from students with
22 confirmed severe adverse reactions to the first dose of the two-dose COVID-19 vaccine.

23 Without the court’s intervention, SDUSD schoolchildren 16 years and above will suffer
24 irreparable harm because they will have to take the vaccine, exposing them to risk of harm, or
25 SDUSD will bar them from attending school and participating in extracurricular activities and
26 sports on its campuses beginning January 24, 2022.

27 **II. FACTUAL BACKGROUND.**

28 On September 28, 2021, the SDUSD board voted to approve a Vaccination Roadmap

1 requiring all SDUSD students who are 16 years of age and older as of November 1, 2021, to
2 receive their first COVID-19 vaccine dose by no later than November 29, 2021, and their
3 second dose by no later than December 20, 2021, and involuntarily transferring unvaccinated
4 students to independent study on January 24, 2022. SDUSD thus became one of the first public
5 school districts in the country to mandate COVID-19 vaccination for its students. The SDUSD
6 board did not pass any formal written resolution to enact this mandate. Nor did SDUSD update
7 its official district policy documents to reflect the mandate. The mandate that the SDUSD board
8 approved was embodied entirely in PowerPoint slides presented at the board meeting September
9 28, 2021. (Spangler Decl., Ex. B.)¹

10 The mandate offers an absurdly narrow medical exemption, which can be obtained only
11 if a student has an adverse reaction to the first dose of the vaccine. And, while SDUSD accepts
12 religious exemptions for employees, the mandate does not offer a personal belief exemption for
13 students as required by state law. (*Ibid.*; see also K.P. Decl.) SDUSD students ages 16 and
14 above who are not exempt and choose not to receive a COVID-19 vaccine will not be permitted
15 to attend classes or participate in extracurricular activities, including sports, on any SDUSD
16 campuses. Instead, they will be enrolled in the district's inferior independent study program.

17 In enacting the Vaccination Roadmap, SUDSD did not claim to be implementing any
18 requirement imposed by CDPH, the only agency authorized to add new vaccine requirements
19 for schools. And the Vaccination Roadmap does not cite any legal authority empowering the
20 district to impose new vaccine requirements on students beyond those that are already required
21 by California law. (See Spangler Decl., Ex. B.)

22 When asked by a SDUSD parent to state the evidentiary basis for the district's mandate,
23 district doctor Howard Taras, M.D. admitted: "I don't have the time or expertise (infectious,
24 epidemiological) to find and analyze the quality of each bit of data on Covid-19 vaccines
25

26 ¹ The exhibits cited herein are those submitted with the declarations filed on December 1, 2021,
27 in support of Plaintiff's application for a temporary restraining order and order to show cause
28 why an injunction should not issue. To avoid unnecessary multiplication of documents, Plaintiff
is not refiling these declarations and exhibits but would be happy to provide an additional
courtesy copy to the court if requested.

1 myself.” (Handler Decl., Ex. A.) The only evidence he could cite was the FDA approval data for
2 the Comirnaty vaccine at <https://www.fda.gov/media/151733/download>, which does not include
3 any recommendation that schools *mandate* the vaccine for children. (*Ibid.*) In his declaration
4 submitted to this Court December 1, 2021, Dr. Taras stated that he relied on the advice of a
5 committee of doctors and scientists at UCSD, but nothing in his declaration or in the
6 Vaccination Roadmap itself indicates that SDUSD “[took] into consideration the
7 recommendations of the Advisory Committee on Immunization Practices of the United States
8 Department of Health and Human Services, the American Academy of Pediatrics, and the
9 American Academy of Family Physicians” as required by state law to add a new vaccine to the
10 ten already required by statute. (Health & Safety Code § 120335, subd. (b).) Nor did Dr. Taras
11 claim to have consulted any of the well-qualified doctors and scientists at UCSF or any of the
12 other institutions that have a different view on the wisdom of COVID-19 vaccine mandates for
13 children. SDUSD’s narrow circle of UCSD advisors instead appear to have been selected
14 because they would support SDUSD’s predetermined outcome.

15 The SDUSD board did not set any expiration date for the district’s COVID-19
16 vaccination requirement. (Spangler Decl., Ex. B.) Thus, even if COVID-19 no longer poses a
17 threat, and even if the State of California ultimately does not add COVID-19 to the statutory list
18 of childhood illnesses for which a child must be immunized as a condition for admission to any
19 school in California, SDUSD students are indefinitely required to receive the vaccine.

20 SDUSD’s COVID-19 vaccine mandate is unprecedented. Childhood vaccination
21 requirements are historically promulgated by the Legislature or CDPH pursuant to Health and
22 Safety Code, section 120335, not by local school districts. And unlike existing vaccine
23 requirements — which apply when enrolling a new student in the district or advancing a student
24 to the next grade span — SDUSD’s vaccine mandate contemplates expulsion of students ages
25 16 and up who have *already been admitted* to the schools where they are currently attending,
26 for no reason other than their COVID-19 vaccination status, in the middle of the school year.

27 ///

28 ///

1 **III. ARGUMENT.²**

2 **A. The Court may issue a writ of mandate to compel SDUSD to comply with a**
3 **legal duty.**

4 “A writ of mandate may be issued by any court to any inferior tribunal, corporation,
5 board, or person, to compel the performance of an act which the law specially enjoins, as a duty
6 resulting from an office, trust, or station, or to compel the admission of a party to the use and
7 enjoyment of a right or office to which the party is entitled, and from which the party is
8 unlawfully precluded by that inferior tribunal, corporation, board, or person.” (Code Civ. Proc.,
9 § 1085.) Through a petition for writ of mandate, a petitioner may “broad[ly] challenge ...
10 agency conduct or procedures alleged to breach the agency’s statutory obligations.” (*Conlan v.*
11 *Bonta* (2002) 102 Cal.App.4th 745, 752.) Where, as here, the petition raises “a purely legal
12 question,” the Court “exercise[s] independent judgment” as to the legal question presented, “no
13 matter whether the issue arises by traditional or administrative mandate.” (*McIntosh v. Aubry*
14 (1993) 14 Cal.App.4th 1576, 1584.) The petition in this case presents at least two purely legal
15 questions, namely, (1) whether SDUSD’s addition of the new COVID-19 vaccine to the
16 required vaccine regimen is consistent with state law; and (2) whether SDUSD may forcibly
17 transfer currently enrolled students to an independent study program.

18 **B. SDUSD must unconditionally admit all students who are immunized for**
19 **statutorily enumerated diseases.**

20 Division 105, part 2, chapter 1, of the California Health and Safety Code regulates
21 immunization requirements for both public and private schools. Subject to exceptions that do
22 not apply here, section 120370, subdivision (a)(3), provides that, from July 1, 2021, onward,
23 “the governing authority [of a public or private school] shall not unconditionally admit or
24 readmit to any of those institutions specified in this subdivision” — thus capturing public or
25 private elementary or secondary schools — “or admit or advance any pupil to 7th grade level,
26 *unless* the pupil has been immunized *pursuant to Section 120335*” (Health & Safety Code, §

27 ² Plaintiff Let Them Choose incorporates here by reference the arguments presented in the
28 memorandum of points and authorities filed today by Plaintiff S.V. in the related case *S.V. v.*
San Diego Unified School District, Case No. 37-2021-00049949-CU-MC-CTL

1 120370, subd. (a)(3), emphasis added.)

2 Section 120335, subdivision (b), in turn, states that “[t]he governing authority shall not
3 unconditionally admit any person as a pupil of any private or public elementary or secondary
4 school..., unless, *prior to his or her first admission to that institution*, he or she has been *fully*
5 *immunized.*” (Health & Safety Code, § 120335, subd. (b), emphasis added.) Subdivision (b)
6 enumerates *ten specific diseases — which do not include COVID-19 —* for which
7 immunizations shall be documented, as follows: (1) Diphtheria; (2) Haemophilus influenzae
8 type b; (3) Measles; (4) Mumps; (5) Pertussis (whooping cough); (6) Poliomyelitis; (7) Rubella;
9 (8) Tetanus; (9) Hepatitis B; (10) Varicella (chickenpox); (11) *Any other disease deemed*
10 *appropriate by the department*, taking into consideration the recommendations of the Advisory
11 Committee on Immunization Practices of the United States Department of Health and Human
12 Services, the American Academy of Pediatrics, and the American Academy of Family
13 Physicians. (Health & Safety Code, § 120335, subd. (b), emphasis added.)

14 Thus, under sections 120370 and 120335, no local school board may require any student
15 to be vaccinated for COVID-19 or deny admission to any pupil lacking a COVID-19
16 vaccination. Only CDPH or California Legislature may deem appropriate the addition of
17 another disease to statutory vaccination requirements for school admission. And even CDPH
18 can do so only after going through a transparent rulemaking process and “taking into
19 consideration the recommendations of the Advisory Committee on Immunization Practices of
20 the United States Department of Health and Human Services, the American Academy of
21 Pediatrics, and the American Academy of Family Physicians.” (Health & Safety Code §
22 120335, subd. (b)(11).) SDUSD does not claim to have consulted or relied on any
23 recommendations of these bodies, and as far as Plaintiff has been able to determine, to date
24 none of those bodies has issued a recommendation that schools *require* all children of any age
25 group to receive the COVID-19 vaccine in order to attend school.

26 While those statutes command that result directly, the canon *expressio unius est exclusio*
27 *alterius* calls for the same outcome. (See *Brintle v. Board of Ed. of City of Long Beach* (1941)
28 43 Cal.App.2d 84, 87 [where no provisions of former School Code authorized or required

1 county education board to grant special secondary certificate or credential authorizing
2 bureaucrat to act as director, associate, or assistant director of educational research,
3 Legislature’s failure to authorize granting of that credential left no doubt that, in enumerating
4 several types of certificates, it intended to exclude board authority to grant certificates for other
5 types of employment].)

6 The unconditional admission of children who are fully vaccinated under section 120335
7 becomes even clearer under subdivision (g)(3), which, after grandfathering in pupils who before
8 January 1, 2016, submitted a letter or affidavit stating beliefs opposed to immunization, adds:
9 “Except as provided in this subdivision, on and after July 1, 2016, the governing authority shall
10 not unconditionally admit to any of those institutions specified in this subdivision for the first
11 time, or admit or advance any pupil to 7th grade level, unless the pupil has been immunized for
12 his or her age *as required by this section.*” [emphasis added].) In sum, the law mandates “full[]
13 immuniz[ation] against *10 specific diseases* and ‘[a]ny other disease deemed appropriate *by the*
14 *[State Department of Public Health]*,” or qualification for a statutory exemption. (*Love v. State*
15 *Dept. of Education* (2018) 29 Cal.App.5th 980, 986 [emphasis added].)

16 Thus, sections 120335 and 120370 constrain school boards from barring admission
17 based on vaccination status *other than* for the *enumerated* diseases.

18 Since COVID-19 does not appear as one of section’s 120335 enumerated diseases,
19 SDUSD must not deny unconditional admission to a pupil who has received the enumerated
20 immunizations but not a COVID-19 vaccination. Because they have already provided proof of
21 having received all of the statutorily enumerated vaccinations, SDUSD must allow current
22 students who have not received the COVID-19 vaccine to continue to attend school in person.

23 Complementing the above statutes, the California Code of Regulations also requires a
24 school to unconditionally admit and continue the attendance of each pupil who provides proof
25 of immunization for the enumerated diseases. CDPH, in consultation with the Department of
26 Education, must adopt and enforce all regulations necessary to carry out Health and Safety
27 Code, division 105, part 2, chapter 1, commencing with section 120325 but excluding section
28 120380. (Health & Safety Code, § 120330.) Those regulations appear in the California Code of

1 Regulations, title 17, division 1, chapter 4, beginning with section 6000.

2 Section 6000, subdivision (a), defines “[a]dmission” as “a pupil’s first attendance in a
3 school ... facility or re-entry after withdrawing from a previous enrollment,” while subdivision
4 (a)(1) defines “[u]nconditional admission” as “admission based upon documented receipt of all
5 required immunizations for the pupil’s age or grade, *in accordance with section 6025*, except
6 for those immunizations” permanently exempted for medical reasons in accordance with section
7 6051 or “exempted for personal beliefs in accordance with Health and Safety Code section
8 120335.” (Cal. Code Regs., tit. 17, § 6000, emphasis added.)

9 Unambiguously, section 6025, subdivision (a), *requires* a school to unconditionally
10 admit, or allow the continued attendance of, any child whose parent has documented the child’s
11 immunization for the enumerated diseases: “A school ... *shall unconditionally admit or allow*
12 *continued attendance* to any pupil age 18 months or older whose parent or guardian has
13 provided documentation of *any* of the following for *each immunization required* for the
14 student’s age or grade, as defined in Table A or B of this section: ...” (Emphasis added.) It then
15 lists three alternative forms of documentation: (1) “[r]eceipt of immunization in accordance
16 with sections 6065 and 6070 regardless of exemptions to other required vaccines”; (2) a
17 permanent exemption; and (3) “[a] personal beliefs exemption in accordance with Health and
18 Safety Code section 120335.” (Cal. Code Regs., tit. 17, § 6025.)

19 Table A applies only to pre-kindergarten. (Cal. Code Regs, tit. 17, § 6025, table A, Ex.
20 H.) Table B lists diseases for which proof of immunization is required for three groups: K-12
21 admission; 7th-12th grades; and 7th-grade advancement. (*Id.*, § 6025, table B.) COVID-19
22 remains absent from table B. (*Ibid.*; see Cal. Code Regs., tit. 17, § 6000, subd. (c) [defining
23 abbreviations], Ex. H.)

24 Further, section 6040 grants a school authority only to require vaccination for specified
25 diseases: “If a pupil attending a school or pre-kindergarten facility who was previously believed
26 to be in compliance is subsequently discovered to not be in compliance *with either the*
27 *unconditional admission requirements specified in section 6025* or the conditional admission
28 requirements specified in section 6035,” the governing authority must notify his parent or

1 guardian of the period within which the doses must be received, and the pupil “shall continue in
2 attendance only if the parent or guardian provides documentation that *the* immunization
3 requirements have been met within” that period. (Cal. Code Regs., tit. 17, § 6040, subds. (a)(1)–
4 (2), emphasis added.)

5 In addition, “[t]he parent or guardian shall submit documentation that *seventh grade*
6 *immunization requirements* have been met to the governing authority prior to first 7th grade
7 attendance.” (Cal. Code Regs., tit. 17, § 6040, subd. (b), emphasis added.)

8 The regulations limit SDUSD to excluding “any pupil who does not meet the
9 requirements for admission or continued attendance *as specified in* Article 2 of this subchapter
10 and Health and Safety Code section 120335.” (Cal. Code Regs., tit. 17, § 6055, emphasis
11 added.) Article 2 includes sections 6025 and 6040, while section 120335 enumerates the
12 diseases requiring vaccination.

13 Thus, section 6055 constrains a board’s authority to exclude a student from school,
14 allowing exclusion only when he has not received vaccinations for the statutorily enumerated
15 diseases, and section 6025 obligates a school to unconditionally admit, or permit the continued
16 attendance of, a pupil with documentation of *those immunizations*.

17 Once a student has provided documented proof of vaccination for all diseases
18 enumerated under section 120335 of the Health and Safety Code and section 6025 of the
19 California Code of Regulations, SDUSD must continue to unconditionally admit and allow that
20 student to continue to attend their current school in person.

21 SDUSD may not override the state’s authority by mandating additional vaccines without
22 allowing personal belief exemptions. Even if CDPH were to add the COVID-19 vaccine to the
23 statutory list of required immunizations, a student would have the right to an exemption based
24 on personal beliefs. SDUSD may not override CDPH’s authority by mandating an additional
25 vaccine without also providing for a personal beliefs exemption.

26 Section 120338 specifies, “[n]otwithstanding Sections 120325 and 120335, any
27 immunizations *deemed appropriate by the department* pursuant to paragraph (11) of subdivision
28 (a) of Section 120325 or paragraph (11) of subdivision (b) of Section 120335, may be mandated

1 before a pupil’s first admission to any private or public elementary or secondary school, child
2 care center, day nursery, nursery school, family day care home, or development center, only if
3 exemptions are allowed for both medical reasons *and personal beliefs*.”³ (Health & Safety
4 Code, § 120338, emphasis added.)

5 “Senate Bill No. 277 eliminated the personal beliefs exemption from the requirement
6 that children receive vaccines for *specified infectious diseases* before being admitted to any
7 public or private elementary or secondary school, daycare center or the like.”¹ (*Brown v. Smith*
8 (2018) 24 Cal.App.5th 1135, 1139.) *Brown* confirms that “[t]he childhood diseases specified are
9 diphtheria, hepatitis B, haemophilus influenzae type b, measles, mumps, pertussis (whooping
10 cough), poliomyelitis, rubella, tetanus, and varicella (chickenpox).” (*Id.* at p. 1139, fn. 1.)

11 While *Brown* notes that “[t]he list also includes ‘[a]ny other disease deemed appropriate
12 by the department, taking into consideration the recommendations of the Advisory Committee
13 on Immunization Practices of the United States Department of Health and Human Services, the
14 American Academy of Pediatrics, and the American Academy of Family Physicians[,]’” the
15 decision explained, “[a]s to the last item, immunization may be mandated before a pupil’s first
16 admission to any school or child care center *only if exemptions are allowed for both medical*
17 *reasons and personal beliefs.* (§ 120338.)” (*Brown, supra*, 24 Cal.App.5th at 1139, fn. 1,
18 emphasis added; accord *Love, supra*, 29 Cal.App.5th at 986, fn. 6.) SDUSD thus lacks authority
19 to circumvent the statutes by bypassing the State Department of Health Services and conjuring
20 its own list of mandatory vaccines with no exemption for personal beliefs.

21 **C. SDUSD may not apply a new vaccine requirement to currently enrolled**
22 **students.**

23 Under state law, new vaccine requirements only apply to a child’s “first admission” to
24 his or her school. (Health & Safety Code, § 120335, subd. (b).) This interpretation is confirmed
25 by the provision that “any immunizations deemed appropriate by the department [CDPH]
26 pursuant to paragraph (11) of subdivision (a) of Section 120325 or paragraph (11) of

27 ³ Section 120325 describes the Legislature’s intent to provide a means for total immunization
28 for the same ten diseases and “[a]ny other disease deemed appropriate by the department,” as
specified in section 120335. (§ 120325, subd. (a).)

1 subdivision (b) of Section 120335, *may be mandated before a pupil's first admission* to any
2 private or public elementary or secondary school ... only if exemptions are allowed for both
3 medical reasons and personal beliefs.” (Health & Safety Code, § 120338, emphasis added.)
4 Similarly, “on and after July 1, 2021, the governing authority *shall not unconditionally admit or*
5 *readmit* to any of those institutions specified in this subdivision, or *admit or advance any pupil*
6 *to 7th grade level*, unless the pupil has been immunized pursuant to Section 120335 or the
7 parent or guardian files a medical exemption form” (Health & Safety Code, § 120370, subd.
8 (a)(3).) SDUSD’s new COVID-19 vaccine requirement for students who are already enrolled in
9 school — in the middle of a school year — is contrary to state law, which contemplates that
10 vaccination status will be verified before the student’s first admission to the school or
11 advancement to 7th grade, as the case may be.

12 **D. SDUSD may not forcibly enroll students in independent study.**

13 SDUSD’s Vaccination Roadmap purports to require students who remain unvaccinated
14 for COVID-19 as of January 24, 2022, to enroll in SDUSD’s independent study program. (See
15 Spangler Decl., Ex. B, pp. 14, 16.) But California law could not be clearer that enrollment in
16 any such program must be voluntary: “independent study is an *optional educational alternative*
17 *in which no pupil may be required to participate.*” (Ed. Code, § 51747, subd. (f)(8), emphasis
18 added.) Thus, enrollment can occur only if there is a “pupil-parent-educator conference” to
19 determine whether enrollment in independent study is in the best interest of the child (Ed. Code,
20 § 51747, subd. (h)(2)) and “a signed written agreement for independent study from the pupil, or
21 the pupil’s parent or legal guardian if the pupil is less than 18 years of age” (Ed. Code, § 51747,
22 subd. (f)(9)(F)).

23 Additionally, a child who voluntarily enrolls in a distance learning or independent study
24 program cannot be excluded from school facilities. Rather, the school “*shall ensure the same*
25 *access* to all existing services and resources in the school in which the pupil is enrolled ... *as is*
26 *available to all other pupils in the school.*” (Ed. Code, § 51746, emphasis added.)

27 And a child enrolled in an independent study program always retains the option to return
28 to his or her regular classroom for in-person instruction. The school is required to “transition

1 pupils whose families wish to return to in-person instruction from independent study
2 expeditiously, and, in no case, later than five instructional days.” (Ed. Code, § 51747, subd. (f),
3 emphasis added.)

4 SDUSD thus cannot require students to enroll in independent study and cannot forcibly
5 transfer currently enrolled students to independent study.

6 **E. Education Code, section 35160, does not authorize SDUSD to require the**
7 **COVID-19 vaccine for students.**

8 Though SDUSD’s Vaccination Roadmap does not cite any legal authority, the board
9 presumably believed it was acting pursuant to Education Code, section 35160. Though the
10 powers granted by section 35160 are broad, they are not limitless. In particular, “the governing
11 board of any school district may initiate and carry on any program, activity, or may otherwise
12 act in any manner *which is not in conflict with or inconsistent with, or preempted by, any law*
13 *and which is not in conflict with the purposes for which school districts are established.*”

14 **1. SDUSD’s mandate is in conflict with and inconsistent with state law.**

15 As explained above, SDUSD’s Vaccination Roadmap is in conflict with and inconsistent
16 with state law in several ways. To summarize:

17 *First*, SDUSD does not allow unconditional admission or continued attendance to
18 students who have all state-required vaccinations, in violation of state law requiring SDUSD to
19 “unconditionally admit or allow continued attendance” to any student who has received all
20 state-required immunizations, which do not include COVID-19. (Cal. Code Regs., tit. 17, §
21 6025; see also Health & Safety Code, § 120335, subd. (b).)

22 *Second*, SDUSD does not recognize personal belief exemptions, in violation of state law
23 requiring personal belief exemptions to be recognized for any new vaccine requirement. (Health
24 & Safety Code, § 120338.)

25 *Third*, SDUSD does not allow medical exemptions when a child’s physician signs the
26 state-provided exemption form, subject to possible revocation by CDPH, “based on the medical
27 discretion of the clinically trained immunization staff member” of CDPH. (Health & Safety
28 Code, § 120372, subd. (d)(3)(B).) SDUSD instead allows no discretion by either the child’s

1 doctor or any reviewing medical professional, and allows medical exemptions only if the child
2 has an allergic reaction to the first of the two required shots. (Spangler Supp. Decl., Ex. O, p. 2.)

3 *Fourth*, SDUSD is imposing a new vaccine mandate on students who are already
4 enrolled in school. Under state law, vaccine requirements only apply to a child’s “first
5 admission” to his or her school. (See Health & Safety Code, §§ 120335, subd. (b); 120338;
6 120370, subd. (a)(3).)

7 *Fifth*, SDUSD is forcing students who are not vaccinated for COVID-19 to transfer or
8 enroll in independent study, in violation of Education Code, sections 51746 and 51747.

9 **2. SDUSD’s mandate is preempted by state law.**

10 As noted, a local school board also has no power to act in an area that is “preempted
11 by[] any law.” (Ed. Code, § 35160.) The California Supreme Court has explained the principle
12 of preemption as follows: “If otherwise valid local legislation conflicts with state law, it is
13 preempted by such law and is void. [¶] A conflict exists if the local legislation duplicates,
14 contradicts, or enters an area fully occupied by general law, either expressly or by legislative
15 implication. [¶] Local legislation is duplicative of general law when it is coextensive therewith.
16 [¶] Similarly, local legislation is ‘contradictory’ to general law when it is inimical thereto.”
17 (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897–898, internal citations
18 and quotation marks omitted.) SDUSD’s Vaccination Roadmap is “contradictory” and
19 “inimical” to state law for any or all of the reasons set forth above.

20 “[L]ocal legislation enters an area that is fully occupied by general law when the
21 Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly
22 done so in light of one of the following indicia of intent: (1) the subject matter has been so fully
23 and completely covered by general law as to clearly indicate that it has become exclusively a
24 matter of state concern; (2) the subject matter has been partially covered by general law couched
25 in such terms as to indicate clearly that a paramount state concern will not tolerate further or
26 additional local action; or (3) the subject matter has been partially covered by general law, and
27 the subject is of such a nature that the adverse effect of a local ordinance on the transient
28 citizens of the state outweighs the possible benefit to the locality. (*Id.* at 898, internal citations

1 and quotation marks omitted.) Here, state law fully occupies the field of vaccine requirements
2 for school admission.

3 First, the Legislature has expressly manifested its intent to fully occupy the area. The
4 authors of SB 277, the current version of the state’s school vaccine statute, stated in the Senate
5 Judiciary Committee report that the purpose of the legislation is “[t]o provide a statewide
6 standard [that] allows for a consistent policy that can be publicized in a uniform manner, so
7 districts and educational efforts may be enacted with best practices for each district.” (Spangler
8 Supp. Decl., Ex. N, p. 18.) Likewise, the Assembly’s health committee report on SB 277 states
9 that vaccine requirements are a matter of state law: “*States* enact laws or regulations that require
10 children to receive certain vaccines before they enter childcare facilities and school, but with
11 some exceptions, including medical, religious, and philosophical objections.” (Spangler Supp.
12 Decl., Ex. M, p. 3, emphasis added.) The health committee report continues:

13 *Current state law mandates immunization of school-aged children*
14 *against 10 specific diseases. Each of the 10 diseases was added to*
15 *California code through legislative action, after careful*
16 *consideration of the public health risks of these diseases, cost to*
17 *the state and health system, communicability, and rates of*
18 *transmission. The Legislature has a long history of thoughtful*
19 *consideration for which diseases pose the most serious health*
20 *risks to the public. Following is a brief summary of activity*
21 *related to mandated immunizations for children enrolling in*
22 *school:*

18 1889: School districts first allowed to exclude a student who is
19 not vaccinated against smallpox, and schools were
20 required to maintain a list of unvaccinated children (SB
21 92, Briceland, Chapter 24).

21 1961: Polio immunization added as a requirement, as well as the
22 first appearance of a philosophical exemption (AB 1940,
23 DeLotto and Rumford, Chapter 837).

23 1977: Diphtheria, pertussis, tetanus, and measles were added to
24 immunization requirements for children entering school
(SB 942, Rains, Chapter 1176).

25 1979: Mumps and rubella were added to the list (AB 805,
26 Mangers, Chapter 435).

26 1992: Haemophilus influenzae type b was added (AB 2798,
27 Floyd, Chapter 1300, and AB 2294, Alpert, Chapter
28 1320).

28 1995 and 1997: Hepatitis B was added (AB 1194, Takasugi,

1 Chapter 291, Statutes of 1995 and AB 381, Takasugi,
2 Chapter 882, Statutes of 1997).

3 1999: The Legislature voted to add Hepatitis A to the list, but it
4 was vetoed by Governor Davis (AB 1594, Florez).

5 1999: Varicella was added to the list (SB 741, Alpert, Chapter
6 747).

7 2007: The Legislature voted to add pneumococcus to the list, but
8 it was vetoed by Governor Schwarzenegger (SB 533,
9 Yee).

10 2010: Tetanus, diphtheria and pertussis (TDaP) booster was
11 required for 7th graders (AB 354, Arambula, Chapter
12 434).

13 All of the diseases for which *California requires* school
14 vaccinations are very serious conditions that pose very real health
15 risks to children.

16 (*Id.* at 4, emphasis added.)

17 Besides these explicit statements, there are also numerous indicia within the statutory
18 scheme itself that the Legislature intended to occupy the field. For example, as is clear from the
19 foregoing, “the subject matter has been so fully and completely covered by general law” —
20 right down to the forms that must be used and the establishment of a state vaccination database
21 — “as to clearly indicate that it has become exclusively a matter of state concern.” (*Sherwin-*
22 *Williams, supra*, 4 Cal.4th at 898.)

23 Alternatively, if the Court finds that the the subject matter has only been “partially
24 covered” by state law, the law is “couched in such terms as to indicate clearly that a paramount
25 state concern will not tolerate further or additional local action.” In particular, the regulations
26 promulgated by CDPH under state law unequivocally direct that schools “*shall* unconditionally
27 admit or allow continued attendance” to students who have the vaccinations required by state
28 law. (Cal. Code Regs., tit. 17, § 6025, emphasis added.)

29 Finally, assuming the subject matter has only been “partially covered” by state law, “the
30 subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of
31 the state outweighs the possible benefit to the locality.” (*Sherwin-Williams, supra*, 4 Cal.4th at
32 898.) As explained in the Assembly health committee report on AB 277, the Legislature has
33 statutorily prescribed a regime of ten childhood vaccinations “after careful consideration of the

1 public health risks of these diseases, cost to the state and health system, communicability, and
2 rates of transmission.” (Spangler Supp. Decl., Ex. M, p. 4.) The Legislature has also established
3 an orderly process for the state’s public health agency, CDPH, to add to the list through
4 administrative rulemaking only after “taking into consideration the recommendations of the
5 Advisory Committee on Immunization Practices of the United States Department of Health and
6 Human Services, the American Academy of Pediatrics, and the American Academy of Family
7 Physicians.” (Health & Safety Code § 120335, subd. (b)(11).) Schools also must also recognize
8 medical and personal belief exemptions. (Health & Safety Code, § 120338.)

9 Imagine the chaos if each local school district had its own vaccine requirements, its own
10 exemptions, and its own standards for granting exemptions. A student who is considered fully
11 vaccinated in one district might be considered unvaccinated in a neighboring school district. If
12 the student transfers to a different school across town, the student would suddenly be ineligible
13 to enroll. The likelihood of such inconsistencies is especially high for the COVID-19 vaccine,
14 which is still undergoing the approval process for various age groups. What if one school
15 district allows any of the available vaccines, while another school district recognizes only the
16 Pfizer vaccine? Will a transferring student have to be revaccinated? What if one school requires
17 boosters, whether for the original virus or the new Omicron variant or some future variant,
18 while another school does not require boosters? Will a transferring student who is fully
19 vaccinated have to obtain a booster before enrolling in the other school? And what if one school
20 district requires a vaccine only when the vaccine has been FDA-approved for the relevant grade
21 span, while other school districts require the vaccine before full approval by the FDA, as Los
22 Angeles Unified School District and some districts have done? Should a child be *required* to get
23 a vaccine that has not been fully approved? These kinds of issues beg for a consistent, statewide
24 standard, which would be thwarted if each district could impose its own vaccine requirements.

25 **IV. CONCLUSION.**

26 For the foregoing reasons, the Court should issue a writ of mandate commanding
27 SDUSD to vacate its Vaccination Roadmap approved September 28, 2021.

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Dated: December 6, 2021

AANNESTAD ANDELIN & CORN LLP

s/ Lee M. Andelin

Lee M. Andelin
Arie L. Spangler

Attorneys for Plaintiffs

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Clerk of the Superior Court
By Erika Engel, Deputy Clerk

6 *Attorneys for Plaintiffs*

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

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

12 Plaintiffs,

13 v.

14 SAN DIEGO UNIFIED SCHOOL
15 DISTRICT; and DOES 1–50,

16 Defendants.

Case No. 37-2021-00043172-CU-WM-CTL

**SUPPLEMENTAL DECLARATION OF
ARIE L. SPANGLER IN SUPPORT OF
PLAINTIFF’S MOTION FOR
JUDGMENT ON PETITION FOR WRIT
OF MANDATE**

Department: C-64

Judge: Hon. John S. Meyer

Date: December 20, 2021

Time: 9:00 a.m.

Action filed: October 12, 2021

Trial date: Not set

18
19 I, Arie L. Spangler, declare as follows:

20 1. I am an attorney duly licensed to practice before all of the courts in the State of
21 California and Of Counsel with Aannestad Andelin & Corn, LLP, attorneys of record for
22 Plaintiff Let Them Choose in this matter.

23 2. I have personal knowledge of the matters set forth below and could and would
24 testify competently to them if called to do so.

25 3. I submit this declaration, in support of Plaintiff’s motion for judgment on
26 petition for writ of mandate, as a supplement to my declaration submitted to this Court
27 December 1, 2021.

28 4. Lodged herein as **Exhibit M** is a true and correct copy of the Assembly

1 Committee on Health Report for Sen. Bill No. 277 (2015–2016 Reg. Sess.), dated June 9, 2015.

2 5. Lodged herein as **Exhibit N** is a true and correct copy of the Senate Judiciary
3 Committee Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.), dated April 22, 2015.

4 6. Lodged herein as **Exhibit O** is a true and correct copy of the Request for
5 Medical Exemption for COVID-19 Vaccine form published by San Diego Unified School
6 District at <https://drive.google.com/file/d/1KNwAzEs92CU5o4ZoEupFGYTxRBTq1wG2/view>
7 (undated; last accessed December 6, 2021).

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct.

10 DATED: December 6, 2021

s/ Arie L. Spangler
Arie L. Spangler

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Clerk of the Superior Court
By Erika Engel, Deputy Clerk

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

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

12 Plaintiffs,

13 v.

14 SAN DIEGO UNIFIED SCHOOL
15 DISTRICT; and DOES 1–50,

16 Defendants.

Case No. 37-2021-00043172-CU-WM-CTL

**SUPPLEMENTAL NOTICE OF
LODGMET OF EXHIBITS IN
SUPPORT OF PLAINTIFF’S MOTION
FOR JUDGMENT ON PETITION FOR
WRIT OF MANDATE**

Department: C-64
Judge: Hon. John S. Meyer
Date: December 20, 2021
Time: 9:00 a.m.

Action filed: October 12, 2021
Trial date: Not set

1 TO THE COURT AND THE PARTIES AND THEIR ATTORNEYS OF RECORD:
2 PLEASE TAKE NOTICE that Plaintiff has lodged with the Court the following exhibits in
3 support of Plaintiff's Motion for Judgment on Petition for Writ of Mandate:
4

EXHIBIT	DESCRIPTION
Exhibits Referenced in Declaration of Arie L. Spangler	
M	Assembly Committee on Health Report for Sen. Bill No. 277 (2015–2016 Reg. Sess.), dated June 9, 2015.
N	Senate Judiciary Committee Analysis of Sen. Bill No. 277 (2015–2016 Reg. Sess.), dated April 22, 2015.
O	Request for Medical Exemption for COVID-19 Vaccine form published by San Diego Unified School District.

10
11 Dated: December 6, 2021

AANNESTAD ANDELIN & CORN LLP

12
13 *s/ Lee M. Andelin*

Lee M. Andelin

Arie L. Spangler

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15 *Attorneys for Plaintiffs*
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County of San Diego
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By Erika Engel, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL DIVISION

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

Plaintiffs,

v.

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

Defendants.

S.V., individually, and on behalf of J.D.,
as guardian ad litem,

Plaintiff,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT; and DOES 1 through 50,
inclusive;

Defendants.

Case No. 37-2021-00043172-CU-WM-CTL,
consolidated with 37-2021-00049949-CU-
MC-CTL

**[PROPOSED] ORDER ON
PLAINTIFFS’ MOTIONS FOR
JUDGMENT ON PETITION FOR WRIT
OF MANDATE**

Department: C-64
Judge: Hon. John S. Meyer
Date: December 20, 2021
Time: 9:00 a.m.

Actions filed: October 12, 2021
November 24, 2021

Trial date: Not set

1 Having reviewed Plaintiff Let Them Breathe’s Motion for Judgment on Petition for Writ
2 of Mandate in Case No. 37-2021-00043172-CU-WM-CTL and Plaintiff S.V.’s Motion for
3 Judgment on Petition for Writ of Mandate in the consolidated Case No. 37-2021-00049949-CU-
4 MC-CTL, and having considered the papers filed in support and in opposition thereof and the
5 arguments presented at the joint hearing held December 20, 2021, the Court hereby GRANTS
6 Plaintiffs’ Motions for Judgment on Petition for Writ of Mandate and orders that a peremptory
7 writ of mandate be issued from this Court, pursuant to Code of Civil Procedure, section 1085,
8 commanding Defendant San Diego Unified School District (“SDUSD”) as follows:

- 9 1. SDUSD shall vacate its Vaccination Roadmap, which the SDUSD board approved on
10 September 28, 2021, and which requires all SDUSD students who are 16 years of age
11 and older as of November 1, 2021, to receive their first COVID-19 vaccine dose by
12 no later than November 29, 2021, and their second dose by no later than December
13 20, 2021, and which further requires all students who are not vaccinated for COVID-
14 19 to be transferred to independent study and excluded from in-person instruction,
15 extracurricular activities, and sports effective Monday, January 24, 2021;
- 16 2. SDUSD shall not compel any student to receive vaccination for COVID-19, or
17 discriminate against any student based on COVID-19 vaccination status, except as
18 may be otherwise required by a valid statute or regulation of the State of California;
- 19 3. SDUSD shall provide notice of the writ and this order to all students enrolled in
20 SDUSD and their parents; and
- 21 4. SDUSD shall file a return to the writ no later than fourteen (14) days after its issuance.

22 The Court finds Plaintiffs are entitled to recover their attorneys’ fees and costs under Code
23 of Civil Procedure, section 1021.5, with the amount of an award to be determined upon filing of
24 a fee application and memorandum of costs. Plaintiffs in the consolidated cases shall confer and
25 jointly submit a form of judgment consistent with this order.

26 IT IS SO ORDERED.

27 DATED: _____

28 Hon. John S. Meyer
Superior Court Judge