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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 REOPEN SAN DIEGO;
12 Plaintiff,
13 v.
14 CITY OF SAN DIEGO; and DOES 1–
50,
15 Defendants.
16

Case No.: 22-cv-208-GPC-AHG

FIRST AMENDED COMPLAINT

JURY TRIAL REQUESTED

Complaint Filed: February 15, 2022

Judge: Hon. Gonzalo P. Curiel

Courtroom: 2D

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1 **I. INTRODUCTION.**

2 1. Since March 2020, lives have been upended by the government’s extraordinary
3 response to stop the spread of the SARS-CoV-2 virus that causes COVID-19. At times the
4 government has myopically focused on an attempt to prevent the spread of the virus (which has
5 often proven to be an exercise in futility) at the expense of civil liberties. On November 29,
6 2021, Defendant City of San Diego (“City” or “Defendant”) took its response one step farther,
7 interfering with its citizens’ rights to participate in their own government unless they prove they
8 have been fully vaccinated for COVID-19, effective December 1, 2021.

9 2. Plaintiff ReOpen San Diego (“Plaintiff”) brings this lawsuit on behalf of its
10 many members who are citizens of the City that are now barred from serving their city and
11 fellow citizens as an elected official, a member of a commission or board, or even as a volunteer
12 or intern, if they have chosen not to be vaccinated for COVID-19, including but not limited to
13 the following:

14 3. **Mary H. Davis:** Mary H. Davis (“Davis”) is a retired City of San Diego
15 employee. As a retiree, Davis has a vested interest in the business operations and outcomes of
16 the decisions made by the City of San Diego. Davis has participated in City Council meetings
17 by phone, but finds telephonic attendance to be a stark, subpar contrast to in-person attendance.
18 Davis prefers to participate in public meetings in-person, where she can see the whole room and
19 take in everything that is occurring during a meeting, not just what one camera angle allows her
20 to see. She has also heard and witnessed a variety of technical glitches at various meetings that
21 impeded callers from being able to speak and have their voices fully heard. As she is not
22 vaccinated, under the City’s Plan and Ordinance, Davis will be denied an opportunity to engage
23 in full civic discourse when the City reopens its meetings to be public. Davis is opposed to
24 making her private medical information public to exercise her First Amendment rights; and she
25 has recovered from two bouts of COVID-19 infections and therefore has robust natural
26 immunity. Davis would like to volunteer for the City’s Literacy/Library program, but the
27 opportunity is foreclosed to her under the City’s Ordinance that requires all City volunteers to
28 present proof of full COVID-19 vaccination.

1 4. **Daniel Smiechowsky:** Daniel Smiechowsky (“Smiechowsky”) is running for
2 San Diego City Council, District 2. Smiechowsky has served as Clairemont Town Council’s
3 public safety chairperson as well as many years on the Clairemont Community Planning Group.
4 Smiechowsky is the only candidate besides the incumbent to speak at the City Council meetings
5 during public comment for three months straight. Because he is not fully vaccinated for
6 COVID-19, under the City’s Ordinance, Smiechowsky will be precluded from serving as City
7 Councilperson for District 2 if he wins the election.

8 5. **Teagen McClain:** Teagen McClain (“McClain”) has been a resident of the City
9 of San Diego since 1998. Civic engagement is very important to her. She has attended many
10 City council and committee meetings over the years at City Hall and off-site at various
11 community centers. She has attended and spoken as a member of various grass roots groups and
12 as an individual on a variety of topics affecting the quality of life in San Diego. McClain has
13 tried to call in to speak during a “remote” City meeting and believes the difference between
14 attending in person is like night and day. It is not the same as being in the same room with other
15 human beings and looking each other in the eyes. Because she is opposed to sharing her private
16 medical information in order to attend a public meeting, McClain will be foreclosed from
17 attending City meetings if the City’s Plan is implemented.

18 6. **Diane Ake:** Diane Ake (“Ake”) resides in the Del Cerro community. She is
19 semi-retired and has been interested in the arts for a long time. She would like to be to apply to
20 be a member of the City of San Diego’s Arts and Culture Commission, but she is precluded
21 from serving on a commission because she chose to not receive the COVID-19 vaccine. Ake
22 would also like to attend City Council meetings in person. In the past, she has attended many
23 City meetings related to her prior job in tobacco control and to express her opinion on issues
24 that are important to her. Ake will be precluded from attending meetings in person if the City
25 implements its Plan. Ake would like for the City to withdraw or revoke this policy to provide
26 her and others with equal access to the City, including the same rights and enjoyment that are
27 afforded to individuals who are vaccinated for COVID-19.

28 7. **Jane Doe:** Jane Doe is a 16 year old high school student who has been selected

1 for a coveted position in the San Diego Junior Lifeguards paid summer internship position. The
2 position is highly competitive and provides local teenagers with an opportunity that is highly
3 regarded in the community and by college admission officers. Jane Doe is not vaccinated for
4 COVID-19 and does not intend to get vaccinated for COVID-19 prior to the commencement of
5 the 2022 San Diego Junior Lifeguards program. Jane Doe has been advised by the City that she
6 cannot serve as an intern unless she provides proof of vaccination for COVID-19. But for its
7 COVID-19 vaccination requirement, Jane Doe would accept the City's offer. If the City's
8 Ordinance and Plan are not rescinded or withdrawn, Jane Doe will be forced to forgo this
9 valuable opportunity of working as an intern for the San Diego Junior Lifeguards this summer,
10 while another candidate who is vaccinated for COVID-19 will be chosen in her place.

11 8. Plaintiff seeks redress of the City's multiple violations of its citizens' protected
12 rights, including the right to privacy under the United States Constitution and California
13 Constitution, the right to freedom of association and speech under the First Amendment of the
14 United States Constitution, the right to substantive and procedural due process, and the right to
15 equal protection. Additionally, the City is in violation of the Brown Act and its own Municipal
16 Charter.

17 **II. VENUE AND JURISDICTION.**

18 9. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
19 §§ 1331 and 1343 and is brought pursuant to 42 U.S.C. §§ 1983 and 1988 because the
20 Defendants are violating Plaintiff's members' civil rights and privileges and immunities secured
21 by the United States Constitution and federal law.

22 10. Supplemental jurisdiction of this court is invoked pursuant to 28 U.S.C § 1367
23 over the state law claims which are so related and intertwined to the federal claims in this action
24 that the form part of the same case or controversy under Article III of the United States
25 Constitution.

26 11. Venue is proper in this Court under 28 U.S.C § 1391(b)(1) because all
27 Defendants reside in this judicial district and 28 U.S.C. § 1391(b)(2) because a substantial part
28 of the events or omissions giving rise to the claim occurred in this judicial district.

1 12. This Court is authorized to grant declaratory relief under the Declaratory Relief
2 Act, 28 U.S.C. §§ 2201 and 2202, and implemented through the Federal Rules of Civil
3 Procedure, Rule 57.

4 13. This Court is authorized to grant Plaintiff’s prayer for preliminary injunctive
5 relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

6 14. This Court has the authority to award attorneys’ fees and costs associated with
7 this action pursuant to 42 U.S.C. §§ 1988 and 2000e-5(k), California Code of Civil Procedure §
8 1021.5.

9 **III. JURY DEMAND.**

10 15. Plaintiff demands a trial by jury on all claims so triable.

11 **IV. PARTIES.**

12 16. Plaintiff is a nonprofit organization that is committed to peacefully
13 opening, without encumbrance, every school, business, and house of worship in San Diego
14 County. Plaintiff is supported by the approximately 20,000 San Diego County residents who are
15 its members, including Davis, Smiechowsky, McClain, and Doe, and Ake, who is both a
16 member and board member.

17 17. As an organization, Plaintiff “has standing to bring suit on behalf of its members
18 when its members would otherwise have standing to sue in their own right, the interests at stake
19 are germane to the organization’s purpose, and neither the claim asserted nor the relief requested
20 requires the participation of individual members in the lawsuit.” (*Friends of the Earth, Inc. v.*
21 *Laidlaw Envtl. Servs. (TOC), Inc.* (2000) 528 U.S. 167, 181.) Plaintiff’s members and/or board
22 members include individuals who vote in elections for City officials, intend to run for office to
23 serve as an elected official, intend to apply to serve as a member of a commission or board,
24 intend to volunteer or intern for the City, intend to speak at a City meeting, or intend to enter
25 into a City building and have not been “fully vaccinated” for COVID-19 and/or choose not to
26 share their private medical information including their COVID-19 vaccination status with the
27 City.

28 18. Defendant City is a public entity organized and existing under and by virtue of

1 the laws of the State of California. Defendant City is governed by eight councilmembers who
2 are elected by voters who reside in their individual district, along with the mayor, who is elected
3 by all voters in the City.

4 **V. FACTS.**

5 19. On February 19, 2020, the Board of Supervisors of the County of San Diego
6 ratified a declaration of local health emergency related to COVID-19.

7 20. On March 4, 2020, Governor Gavin Newsom declared a state of emergency in
8 response to COVID-19.

9 21. On March 12, 2020, the Mayor of the City of San Diego proclaimed a local
10 emergency related to COVID-19, which was ratified by the Council on March 17, 2020 by
11 Resolution No. R-312895.

12 22. To date, neither the Board of Supervisors, Governor nor Mayor have proclaimed
13 an end to the state of emergency. Thus, a state of emergency has been in effect throughout the
14 State of California and the County and City of San Diego for nearly two years. But “[s]ociety’s
15 interest in slowing the spread of COVID-19 cannot qualify as compelling forever, for if human
16 nature and history teach anything, it is that civil liberties face grave risks when governments
17 proclaim indefinite states of emergency.” *Doe v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J.,
18 dissenting).

19 23. Nearly two years after the initial declaration of the COVID-19 state of
20 emergency, and four months after Gov. Newsom proclaimed an end to statewide closures and
21 restrictions that marked the state’s “tiered” response to managing the COVID-19 pandemic, on
22 October 18, 2021, the City of San Diego City Council approved a 3-Stage Reopening Plan
23 (“Plan”). The Plan has not yet been fully implemented, but it has not been amended, rescinded,
24 or withdrawn, and therefore remains in place as a “roadmap” for the City Council to follow. The
25 Plan contemplates the complete and indefinite bar of members of the public who are not
26 vaccinated for COVID-19 from access to all city government buildings and in-person
27 attendance at all city meetings. Attached hereto as Exhibit “A” is a true and correct copy of the
28 Plan, which was approved on October 18, 2021, and has not been amended, rescinded, or

1 withdrawn.

2 24. On November 29, 2021, as part of its efforts to implement “Step 2” of the Plan,
3 the City of San Diego City Council approved emergency Ordinance No. 2022-53, which
4 requires all elected officials, board members, commission members, volunteers, interns and/or
5 individuals who attend public meetings to first prove they are “fully vaccinated” for COVID-19
6 (“Ordinance”). The Ordinance is currently being implemented throughout the City. As of April
7 8, 2022, the City’s website states that all volunteers and candidates for appointments to the
8 City’s boards or commissions are required to be fully vaccinated for COVID-19. (See
9 <https://www.sandiego.gov/boards-and-commissions>, also noting that board and commission
10 members meet via teleconference.) Attached hereto as Exhibit “B” is a true and correct copy of
11 the Ordinance, which was approved on November 29, 2021, and has not been amended,
12 rescinded, or withdrawn.

13 25. The Ordinance was approved during a special meeting under the purported
14 authority of Article XV, § 295 of the City Charter, which provides a mechanism for the Council
15 to approve emergency measure ordinances.

16 26. The Ordinance indefinitely “requires all current City employees (all
17 unclassified/unrepresented employees, classified/unrepresented employees, and employees
18 represented by a recognized employee organization), elected officials, members of boards and
19 commissions, and authorized volunteers to be fully vaccinated against COVID-19 and provide
20 proof of their full vaccination by December 1, 2021, as a condition of continued employment *or*
21 *service* with the City.” [Ital. added.]

22 27. The City Council received 262 written public comments and numerous speakers
23 called in during the meeting to express their opinion – the vast majority in opposition; only 8 of
24 the written comments expressed support.

25 28. Eight out of nine Councilmembers voted to approve the Ordinance. Consistent
26 with state and national policies related to COVID-19 mandates, the Ordinance received partisan
27 support, with only Councilmember Chris Cate – the sole Republican councilmember – voting
28 “no.”

1 29. The Ordinance and Plan together operate to indefinitely exclude an entire
2 category of individuals from meaningful participation in City government – whether by serving
3 as an elected official, board member, volunteer, intern, or even (eventually) attending a city
4 meeting or engaging in City business in a City building – due solely to a personal medical
5 decision whether to be vaccinated for COVID-19 (or based upon an individual’s refusal to
6 disclose their COVID-19 vaccine status).

7 30. The Ordinance and Plan are also blatantly illegal, as they violate the U.S.
8 Constitution and state and local law and offend the foundational principles of democracy.

9 31. On December 15, 2021, Plaintiff formally demanded that Defendant rescind its
10 illegal Ordinance and Plan via correspondence to Mayor Todd Gloria and the members of the
11 City Council, with a copy to City Attorney Mara Elliott. Defendant did not respond to Plaintiff’s
12 demand.

13 32. As of January 26, 2022, 79.5% of San Diego County residents are “fully
14 vaccinated.” Therefore, the Ordinance and Plan together exclude approximately 20.5% of San
15 Diego County residents from an opportunity to meaningfully participate in City government.

16 33. According to official County of San Diego records summarizing COVID-19
17 cases between December 7, 2021 to January 5, 2022, as of January 18, 2022, there were 65,492
18 cases of COVID-19 among individuals who were fully vaccinated and 62,872 cases of COVID-
19 19 among individuals who were not fully vaccinated—essentially an equal number of infections
20 among vaccinated versus unvaccinated individuals, with vaccinated individuals making up a
21 larger percentage of the total number. Among fully vaccinated individuals, 91.6% reported
22 symptoms, while 86.1% of individuals who were not fully vaccinated reported symptoms. Thus,
23 individuals who are vaccinated can and do continue to be infected with COVID-19, and
24 vaccinated individuals who test positive appear to be statistically more likely to experience
25 symptoms than individuals who are not vaccinated and test positive for COVID-19.

26 34. As of March 28, 2022, there were four recorded COVID-19 hospitalizations in
27 San Diego County, with an equal number of fully vaccinated and not fully vaccinated
28 individuals hospitalized. As of April 1, 2022, there was one recorded COVID-19 hospitalization

1 in the County of San Diego. That individual was fully vaccinated and boosted.

2 ([https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/status/COVID19_Cases_by_Vaccination_Status.html)
3 [2019-nCoV/status/COVID19_Cases_by_Vaccination_Status.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/status/COVID19_Cases_by_Vaccination_Status.html)).

4 35. According to a recent study by the CDC, survivors of a previous COVID-19
5 infection were better protected against a reinfection and related hospitalization than vaccinated
6 individuals who had not been previously infected. Leon, TM, et al., *COVID-19 Cases and*
7 *Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis –*
8 *California and New York, May – November 2021*, MMWR Morb. Mortal. Wkly. Rep. (ePub
9 Jan. 19, 2022).

10 36. Thus, not only is the City’s Ordinance and Plan unconstitutional and
11 discriminatory, but recent studies and real world data demonstrate that the City’s blanket
12 COVID-19 vaccination requirement is not rationally related to achieving the City’s alleged
13 compelling interest of reducing the spread of COVID-19. The Ordinance and Plan does not
14 achieve a goal of reducing the spread of COVID-19 because vaccinated individuals can be and
15 do still get infected with and transmit COVID-19. Moreover, individuals who have recovered
16 from COVID-19, regardless of vaccination status, are less likely to be re-infected with COVID-
17 19 than vaccinated individuals who have not been previously infected. Yet, the Ordinance and
18 Plan discriminate against all individuals who are not vaccinated for COVID-19 or who chose
19 not to share their private medical information, essentially treating all unvaccinated individuals
20 as vectors of disease.

21 **VI. CAUSES OF ACTION.**

22 **FIRST CAUSE OF ACTION**
23 **Violation of the Fourth and Fourteenth Amendments of the**
24 **United States Constitution – Substantive Due Process (42 U.S.C. § 1983)**

25 37. All the preceding paragraphs are hereby incorporated and realleged as if fully set
26 forth herein.

27 38. Defendant implemented and is enforcing the subject Ordinance and Plan by
28 excluding individuals, including Plaintiff’s members, who are not fully vaccinated for COVID-
19 from holding elected office, serving on boards, commissions, or as volunteers or interns.

1 Defendant intends to implement its Plan by excluding all individuals, including Plaintiff's
2 members, who wish to attend City meetings or engage in City business inside any City building,
3 unless they have provided proof that they are fully vaccinated for COVID-19.

4 39. Defendant's current and prospective conduct and such implementation and
5 enforcement violates Plaintiff's members' constitutional rights and was not done under color of
6 law. Multiple protected rights are at issue.

7 40. Defendant did not and does not have an adequate reason for infringing upon
8 Plaintiff's members' liberty. When fundamental rights are at issue, the government will satisfy
9 substantive due process only if it can demonstrate that the Ordinance and Plan is necessary to
10 achieve a compelling government interest. The Ordinance and Plan must be narrowly tailored
11 and by the least restrictive means available. As the Ordinance and Plan require all individuals to
12 provide proof of COVID-19 vaccination, regardless of whether they have recovered from prior
13 infection, or simply object to sharing their private medical information, neither the Ordinance
14 nor the Plan are sufficiently narrowly tailored to pass constitutional muster.

15 41. The Fourteenth Amendment has been made applicable to states and their
16 governments through the Fourth Amendment to the United States Constitution.

17 42. 42 U.S.C., § 1983 expressly authorizes lawsuits to enforce federal constitutional
18 rights.

19 **A. Right to refuse unwanted medical treatment.**

20 43. The Fourth Amendment of the U.S. Constitution also protects a person's right to
21 refuse unwanted medical treatment. This right is deeply rooted in our nation's history, tradition,
22 and practice, so as to acquire special protection under the Fourteenth Amendment.

23 44. All individuals have a protected liberty interest in their right to bodily integrity.
24 *Rochin v. California*, 342 U.S. 165 (1952). The government can only invade this interest if it
25 satisfies the strict scrutiny standard.

26 45. The Ordinance and Plan, which require COVID-19 vaccination in order to serve
27 as an elected official, board member, volunteer, intern, and even (eventually) to attend a City
28 meeting or engage in City business inside any City building, infringes upon the right to bodily

1 integrity.

2 46. The COVID-19 vaccine does not prevent infection or transmission, but it may
3 provide personal protection against severe illness and hospitalization. Thus, the COVID-19
4 vaccine does not confer a demonstrable community benefit sufficient to justify the
5 government’s interest in requiring that all elected officials, board members, volunteers, interns,
6 and citizens who wish to attend City meetings or engage in City business inside any City
7 building provide proof of vaccination for COVID-19.

8 47. The Ordinance and Plan do not permit elected officials, board members,
9 volunteers, interns, and citizens who wish to attend City meetings or engage in City business
10 inside any City building to refuse to share their private medical information, to attest to a lack of
11 COVID-19 like symptoms, or to submit proof of recovery from COVID-19 (which provides
12 more durable immunity than vaccination).

13 48. The Ordinance and Plan do not provide the least restrictive means nor are they
14 narrowly tailored to achieve the government’s alleged compelling interest of preventing the
15 spread of COVID-19 throughout the community.

16 49. Plaintiff’s members have a Constitutional right to refuse unwanted medical
17 treatment. *Cruzan v. Director Mo. Dept. of Health*, 497 U.S. 261, 278–79 (1990) (“The forcible
18 injection of medication into a nonconsenting person’s body represents a substantial interference
19 with that person’s liberty.”). Receiving a vaccine is a personal decision, especially when the
20 required vaccine is newly developed, and many individuals have already been infected with and
21 have recovered from COVID-19 and therefore have durable and robust immunity.

22 50. While the Supreme Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),
23 upheld the state’s right to require its citizens to submit to smallpox vaccination, it did so under
24 limited circumstances. In *Jacobson*, the Supreme Court held that the state could properly levy a
25 monetary fine against individuals who did not submit to the state’s smallpox vaccination
26 requirement. Importantly, however, individuals who did not submit to the smallpox vaccination
27 requirement did not lose any fundamental rights, including access to serve or petition their
28 government. Unvaccinated individuals were not barred from holding office, serving their

1 communities, attending government meetings, or conducting business in government offices, as
2 they are under the Ordinance and Plan.

3 51. The Ordinance and Plan require elected officials, board members, volunteers,
4 interns, and even (eventually) citizens who wish to attend a City meeting or engage in City
5 business inside any City building, to be “fully vaccinated” for COVID-19. This requirement
6 violates Plaintiff’s members’ fundamental rights to refuse unwanted medical treatment. The
7 government cannot demonstrate that it has used the least restrictive means to achieve its alleged
8 compelling interest in preventing the spread of COVID-19 throughout the community.

9 52. The Ordinance and Plan infringe upon an individual’s fundamental liberties,
10 which are protected by the Fourteenth Amendment’s Due Process Clause and “extend to certain
11 personal choices central to individual dignity and autonomy, including intimate choices defining
12 personal identity and beliefs,” such as the decision whether to receive a vaccination. (*Obergefell*
13 *v. Hodges* (2015) 576 U.S. 644, 645.) The right of an individual to make such choices are so
14 fundamental that the state must accord them its respect. (*Id.*)

15 53. The Ordinance and Plan violate Plaintiff’s members’ right to refuse medical
16 treatment. This is a guaranteed right and can only be paused or disregarded under limited
17 circumstances which the government cannot establish.

18 **B. Right to privacy.**

19 54. Bodily autonomy is a critical component of the constitutional right to privacy.
20 *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right to privacy is “no less important than
21 any other right carefully and particularly reserved to the people.” *Id.* at 485.

22 55. Plaintiff’s members have a constitutionally protected right to make decisions
23 concerning their bodies under the U.S. Constitution.

24 56. Plaintiff’s members have the right to make the decision whether to receive a
25 COVID-19 vaccine. Plaintiff’s members also have the right to decide not to disclose their
26 personal medical history (i.e., whether they have been “fully vaccinated” for COVID-19) if they
27 so choose.

28 57. Despite these rights, Defendant will force all individuals who wish to serve as

1 elected officials, board members, volunteers, interns, and those who wish to attend City
2 meetings or engage in City business inside any City building to provide proof that they have
3 been fully vaccinated for COVID-19 as a condition of their service or attendance at City
4 meetings or prior to engaging in City business inside any City building. In doing so, Defendant
5 is violating Plaintiff's members' rights to privacy.

6 58. Defendant cannot demonstrate that it has narrowly tailored its Ordinance or Plan
7 in an effort to preserve an individual's privacy, nor has it used the least restrictive means to
8 achieve its alleged compelling interest of preventing the spread of COVID-19 throughout the
9 community.

10 59. Plaintiff is entitled to a Declaration that the Ordinance and Plan violate
11 Plaintiff's members' substantive due process rights to bodily integrity.

12 60. Plaintiff is entitled to a Declaration that the Ordinance and Plan violate
13 Plaintiff's members' substantive due process rights to refuse unwanted medical treatment.

14 61. Plaintiff is entitled to a Declaration that the Ordinance and Plan violate
15 Plaintiff's members' substantive due process rights to privacy.

16 62. Plaintiff is entitled to preliminary and permanent injunctive relief requiring
17 Defendant to cease from taking any further action to implement the Ordinance and Plan and
18 consequently violate Plaintiff's members' rights.

19 63. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
20 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

21 64. Plaintiff is entitled to such other relief the Court deems just and proper.

22 **SECOND CAUSE OF ACTION**
23 **Violation of the Procedural Due Process Clause of the**
24 **Fourteenth Amendment of the United States Constitution**

25 65. All the preceding paragraphs are hereby incorporated and realleged as if fully set
26 forth herein.

27 66. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution
28 guarantees more than fair process, and the "liberty" it protects includes more than the absence
of physical restraint. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Defendant's actions

1 have denied Plaintiffs' life and liberty without adequate safeguards such as notice and hearing.

2 67. Defendant's implementation and enforcement of the Ordinance and Plan to
3 exclude unvaccinated individuals from elected office, commissions, boards, volunteer and intern
4 positions, and eventually, City meetings and buildings, violates Plaintiff's members'
5 constitutional rights and was not done under color of law. Multiple protected rights are at issue.

6 68. Defendant did not and does not have an adequate reason for infringing upon
7 Plaintiff's members' liberty. When fundamental rights are at issue, the government will satisfy
8 substantive due process only if it can demonstrate that the Ordinance is necessary to achieve a
9 compelling government interest. The Ordinance must be narrowly tailored and implemented by
10 the least restrictive means available.

11 69. Plaintiff's members' liberty interest in bodily integrity is protected by procedural
12 due process through the Fourteenth Amendment. *Rochin v. California* 342 U.S. 165 (1952).

13 70. Plaintiff's members' right to refuse unwanted medical treatment is also protected
14 by procedural due process through the Fourteenth Amendment. *Cruzan v. Director, Mo. Dept.*
15 *of Health*, 497 U.S. 261, 278–79 (1990).

16 71. Plaintiff's members' rights to freedom of speech, freedom of association, and
17 freedom of petition are protected by procedural due process through the Fourteenth
18 Amendment.

19 72. Defendant has deprived Plaintiff's members of the right to bodily integrity,
20 privacy rights, the right to refuse medical treatment, and the right to freedom of speech,
21 association, and petition. All these deprivations have occurred or will occur without any due
22 process of law.

23 73. Plaintiff seeks a Declaration from this Court that Defendant has violated the
24 procedural due process clause of the U.S. Constitution by approval and implementation of the
25 Ordinance and Plan.

26 74. Plaintiff is entitled to a preliminary and permanent injunctive relief staying
27 application and enforcement of the Ordinance and Plan.

28 75. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42

1 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

2 76. Plaintiff is entitled to such other relief the Court deems just and proper.

3 **THIRD CAUSE OF ACTION**
4 **Violation of the Fourteenth and First Amendments of the United States Constitution**

5 77. The First Amendment to the United States Constitution states: “Congress shall
6 make no law ... abridging the freedom of speech ...” This fundamental right to free speech
7 applies to the states through the Fourteenth Amendment’s Due Process Clause. *Aguilar v. Avis*
8 *Rent A Car System, Inc.*, 21 Cal.4th 121, 133–34 (1999).

9 78. “The freedom of speech and of the press, which are secured by the First
10 Amendment against abridgment by the United States, are among the fundamental personal
11 rights and liberties which are secured to all persons by the Fourteenth Amendment against
12 abridgment by a State.” *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

13 79. The Ordinance’s requirement that all elected officials, committee members,
14 members of commissions and, eventually, members of the public who attend City meetings or
15 conduct City business in City buildings, must be vaccinated for COVID-19, effectively
16 prohibits individuals who have chosen not to be vaccinated for COVID-19 from running for
17 elected office, serving as representatives of all of the citizens of the City of San Diego
18 (including citizens who are vaccinated or unvaccinated for COVID-19) and/or seeking redress
19 from their government and thus violates an individual’s right to free speech.

20 80. “No right is more precious in a free country than that of having a voice in the
21 election of those who make the laws under which, as good citizens, we must live. Other rights,
22 even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no
23 room for classification of people in a way that unnecessarily abridges this right.” *Wesberry v.*
24 *Sanders*, 376 U.S. 1, 17–18 (1964).

25 81. There is no right more basic in our democracy than the right to participate in
26 electing our political leaders. Citizens can exercise that right in a variety of ways: They can run
27 for office themselves, vote, urge others to vote for a particular candidate, volunteer to work on a
28 campaign, and contribute to a candidate’s campaign. *McCutcheon v. FEC*, 572 U.S. 185, 191
(2014).

1 82. “[S]peech concerning public affairs is more than self-expression; it is the essence
2 of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

3 83. The Ordinance and Plan infringe upon the First Amendment “right to vote freely
4 for the candidate of one's choice is of the essence of a democratic society, and any restrictions
5 on that right strike at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533,
6 555 (1964).

7 84. The Ordinance and Plan also infringe upon an individual’s First Amendment
8 freedom of association, which means “not only that an individual voter has the right to associate
9 with the political party of her choice, but also that a political party has a right to identify the
10 people who constitute the association.” *Eu v. San Francisco County Democratic Cent. Comm.*,
11 489 U.S. 214, 224 (1989).

12 85. “It is beyond debate that freedom to engage in association for the advancement
13 of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause
14 of the Fourteenth Amendment, which embraces freedom of speech.” *Tashjian v. Republican*
15 *Party*, 479 U.S. 208, 214 (1986).

16 86. By removing an entire category of individuals from eligibility for elected office,
17 boards and commissions, the Ordinance interferes with the fundamental freedom of association.

18 87. As evidenced by the Council’s strictly partisan vote to approve the Ordinance,
19 personal medical decisions whether to get vaccinated for COVID-19 and philosophical beliefs
20 whether one’s COVID-19 vaccination status should be shared with others or whether
21 individuals should be judged and/or ostracized based on that status, are particularly partisan.

22 88. Similarly, certain ethnic, racial, and socioeconomic groups are more resistant to
23 COVID-19 vaccination than others. For example, based upon current County of San Diego
24 Health and Human Services data, Black or African American and American Indian or Alaska
25 Native populations are significantly less vaccinated for COVID-19 as a group than Hispanic or
26 Latino, Asian, and White populations. Under the City’s Ordinance, the less vaccinated
27 populations will become more disenfranchised.

28 89. The Ordinance insidiously discriminates against individuals who are registered

1 as Republicans – and even more so against conservative Republicans, who are far less likely to
2 be vaccinated for COVID-19 than any Democrat and against racial and ethnic minorities – by
3 restricting access to elected office and narrowing the pool of candidates for voters and
4 restricting the right of citizens to serve as a member of a City board or commission, to
5 volunteer, to accept an internship, and/or to attend City meetings and conduct City business in
6 City buildings.

7 90. “[F]reedoms of speech and of press, of assembly, and of worship may not be
8 infringed on such slender grounds. They are susceptible of restriction only to prevent grave and
9 immediate danger to interests which the State may lawfully protect.” *West Virginia State Bd. of*
10 *Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

11 91. Even if Defendant could satisfy its burden to show that a COVID-19 vaccination
12 mandate is necessary to protect the community from a virus that is now endemic (which it
13 cannot), our Constitution and decades of Supreme Court precedent firmly establish that the state
14 and its municipalities cannot engage in such invidious discrimination that so blatantly restricts
15 the pool of candidates for public office and chills its citizens’ freedom of association and
16 expression by restricting the ability of unvaccinated individuals from participating in
17 government activity without violating both the First Amendment and the Fourteenth
18 Amendment of the Constitution, as Defendant has done here.

19 92. “No right is more precious in a free country than that of having a voice in the
20 election of those who make the laws under which, as good citizens, we must live. Other rights,
21 even the most basic, are illusory if the right to vote is undermined.” *Williams v. Rhodes*, 393
22 U.S. 23, 31 (1968).

23 93. “The State has the responsibility to observe the limits established by the First
24 Amendment rights of the State's citizens, including the freedom of political association.” (*Wash.*
25 *State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008).

26 94. “The loss of First Amendment freedoms, for even minimal periods of time,
27 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

28 95. A highly paternalistic approach is generally suspect. *Eu v. San Francisco County*

1 *Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

2 96. As Chief Justice Warren wrote: “Our form of government is built on the premise
3 that every citizen shall have the right to engage in political expression and association. This
4 right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic
5 freedoms in America has traditionally been through the media of political associations. Any
6 interference with the freedom of a party is simultaneously an interference with the freedom of
7 its adherents. All political ideas cannot and should not be channeled into the programs of our
8 two major parties. History has amply proved the virtue of political activity by minority,
9 dissident groups, who innumerable times have been in the vanguard of democratic thought and
10 whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing
11 mores is not to be condemned. The absence of such voices would be a symptom of grave illness
12 in our society.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250–51 (1957).

13 97. “By limiting the choices available to voters, the State impairs the voters’ ability
14 to express their political preferences. And for reasons too self-evident to warrant amplification
15 here, we have often reiterated that voting is of the most fundamental significance under our
16 constitutional structure.” *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S.
17 173, 184 (1979) (internal quotes and citations omitted) (holding Equal Protection Clause of
18 Fourteenth Amendment was violated where signature gathering standard required new parties
19 and independent candidates to gather substantially more signatures to gain access to the ballot
20 than a similarly situated party or candidate for statewide office). “[E]ven when pursuing a
21 legitimate interest, a State may not choose means that unnecessarily restrict constitutionally
22 protected liberty, and we have required that States adopt the least drastic means to achieve their
23 ends. This requirement is particularly important where restrictions on access to the ballot are
24 involved.” *Id.* at 185 (internal quotation marks and citations omitted). The Ordinance is not the
25 least drastic means to protect staff and the public from COVID-19.

26 98. The Ordinance and Plan, on its face and as applied, has caused, is causing and
27 will continue to cause irreparable harm and actual and undue hardship to Plaintiff’s members.
28 Plaintiff’s members have no adequate remedy at law to prevent the continuing violation of their

1 constitutional and statutory liberties.

2 99. Plaintiff is entitled to a Declaration that the Ordinance and Plan violates
3 Plaintiff's members' rights to freedom of association and expression, along with their right to
4 petition the government for redress of grievances.

5 100. Plaintiff is entitled to preliminary and permanent injunctive relief requiring
6 Defendant to allow Plaintiff to freely exercise its freedom of association and right to petition the
7 government for redress of grievances.

8 101. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
9 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

10 102. Plaintiff is entitled to such other relief the Court deems just and proper.

11 **FOURTH CAUSE OF ACTION**
12 **Violation of the Equal Protection Clause of the Fourteenth Amendment of the**
13 **United States Constitution and California Constitution**

14 103. Under the Fourteenth Amendment of the U.S. Constitution, "no person shall be
15 denied the equal protection of the laws." If a law neither burdens a fundamental right nor targets
16 a suspect class, we will uphold the legislative classification so long as it bears a rational relation
17 to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

18 104. "A bare ... desire to harm a politically unpopular group cannot constitute a
19 *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534
(1973).

20 105. "It is not within our constitutional tradition to enact laws of this sort. Central
21 both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is
22 the principle that government and each of its parts remain open on impartial terms to all who
23 seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

24 106. Defendant's Ordinance and Plan treats people who are vaccinated for COVID-19
25 favorably by permitting them to hold elected office, serve on a board or commission, volunteer,
26 intern for the City, attend a City meeting or visit City government buildings, while excluding
27 people who are not vaccinated for COVID-19, including people who have recovered from
28 COVID-19, from the ability to hold elected office, serve on a board or commission, volunteer,

1 intern, and, eventually, from attending City meetings and entering City buildings. The
2 Ordinance and Plan were enacted to achieve the alleged government interest in preventing the
3 spread of COVID-19 through the community. However, people who are vaccinated for COVID-
4 19 can and do become infected with and spread COVID-19. In fact, people who are vaccinated
5 for COVID-19 are more likely to become infected with and spread COVID-19 than people who
6 have recovered from COVID-19. Moreover, people who are vaccinated for COVID-19 become
7 infected with and spread COVID-19 at a rate that is equal to or at least similar to those who are
8 not vaccinated for COVID-19.

9 107. Thus, the Ordinance and Plan are not rationally related to serving an alleged
10 legitimate government interest of preventing the community spread of COVID-19.

11 108. The Ordinance and Plan, on its face and as applied, has caused, is causing and
12 will continue to cause irreparable harm and actual and undue hardship to Plaintiff's members.
13 Plaintiff's members have no adequate remedy at law to prevent the continuing violation of their
14 constitutional and statutory liberties.

15 109. Plaintiff is entitled to a Declaration that the Ordinance and Plan violates
16 Plaintiff's members' rights to freedom of association and expression, along with their right to
17 petition the government for redress of grievances.

18 110. Plaintiff is entitled to preliminary and permanent injunctive relief requiring
19 Defendant to allow Plaintiff to freely exercise its freedom of association and right to petition the
20 government for redress of grievances.

21 111. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
22 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

23 112. Plaintiff is entitled to such other relief the Court deems just and proper.

24 **FIFTH CAUSE OF ACTION**
25 **Violation of the California Constitution, art. I, § 1 (Right to Privacy)**

26 113. All the preceding paragraphs are hereby incorporated and realleged as if fully set
27 forth herein.

28 114. Under article I, section 1 of the California Constitution, "All people are by
nature free and independent and have inalienable rights. Among these are enjoying and

1 defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
2 obtaining safety, happiness, and privacy.”

3 115. The right to privacy is an inalienable right.

4 116. The California Constitution expressly grants Californians a right of privacy,
5 which extends to their medical records. *Grafilo v. Cohanshoet*, 32 Cal.App.5th 428, 428
6 (2019).

7 117. Plaintiff’s members have a constitutionally protected right to make decisions
8 concerning their bodies.

9 118. Plaintiff’s members have the right to make the decision whether to receive a
10 COVID-19 vaccine. Plaintiff’s members have a reasonable expectation that their personal
11 medical decisions, including the decision to be vaccinated for COVID-19, will be kept private.

12 119. Plaintiff’s members also have the right to decide not to disclose their personal
13 medical history (i.e., whether they have been “fully vaccinated” for COVID-19) if they so
14 choose.

15 120. Despite these rights, Defendant will force all individuals who wish to serve as
16 elected officials, board members, volunteers, interns, and those who wish to attend City
17 meetings or engage in City business inside any City building to provide proof that they have
18 been fully vaccinated for COVID-19 as a condition of their service or attendance at City
19 meetings or prior to engaging in City business inside any City building. In doing so, Defendant
20 is violating Plaintiff’s members’ rights to privacy.

21 121. Invasion of a privacy interest can only be justified by a legitimate competing
22 interest.

23 122. Defendant cannot demonstrate that it has narrowly tailored its Ordinance or Plan
24 in an effort to preserve an individual’s privacy, nor has it used the least restrictive means to
25 achieve its alleged compelling interest of preventing the spread of COVID-19 throughout the
26 community.

27 123. Plaintiff is entitled to a Declaration that the Ordinance and Plan violate
28 Plaintiff’s members’ rights to privacy under the Article 1, Section I of the California

1 Constitution.

2 124. Plaintiff is entitled to preliminary and permanent injunctive relief requiring
3 Defendant to cease from taking any further action to implement the Ordinance and Plan and
4 consequently violate Plaintiff's members rights.

5 125. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
6 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

7 126. Plaintiff is entitled to such other relief the Court deems just and proper.

8 **SIXTH CAUSE OF ACTION**
9 **Violation of the Brown Act (Cal. Gov. Code § 54950 et seq.)**

10 127. All the preceding paragraphs are hereby incorporated and realleged as if fully set
11 forth herein.

12 128. Pursuant to the Brown Act, "All meetings of the legislative body of a local
13 agency shall be open and public, and all persons shall be permitted to attend any meeting of the
14 legislative body of a local agency in person, except as otherwise provided in this chapter. Local
15 agencies shall conduct meetings subject to this chapter consistent with applicable state and
16 federal civil rights laws, including, but not limited to, any applicable language access and other
17 nondiscrimination obligations." Cal. Gov. Code § 54953(a).

18 129. The Ordinance and Plan violate the Brown Act by precluding members of the
19 public from attending any meeting of any legislative body of the City in person and unlawfully
20 discriminating against members of the public who are not vaccinated for COVID-19 or who do
21 not wish to share their private medical information in order to gain access to City meetings or
22 buildings.

23 130. The Ordinance and Plan, on its face and as applied, has caused, is causing and
24 will continue to cause irreparable harm and actual and undue hardship to Plaintiff's members.
25 Plaintiff's members have no adequate remedy at law to prevent the City's continuing violation
26 of the Brown Act.

27 131. Plaintiff is entitled to a Declaration that the Ordinance and Plan violates the
28 Brown Act.

132. Plaintiff is entitled to preliminary and permanent injunctive relief requiring

1 Defendant to allow Plaintiff to freely exercise its freedom of association and right to petition the
2 government for redress of grievances.

3 133. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
4 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.

5 134. Plaintiff is entitled to such other relief the Court deems just and proper.

6 **SEVENTH CAUSE OF ACTION**
7 **Violation of Municipal Charter**

8 135. The Ordinance and the Plan also violate the City’s Charter by adding
9 requirements for individuals who choose to run for elective office, choose to serve the city on a
10 board or commission, participate in City internship opportunities, and/or choose to petition the
11 City government for redress of grievances.

12 136. Article II, section 7 of the Charter provides: “An elective officer of the City shall
13 be a resident and elector of the City. In addition, every Council-member shall be an actual
14 resident and elector of the district from which the Council-member is nominated.... The
15 Council shall establish by ordinance minimum length of residency requirements for candidacy
16 to elective office, whether by appointment or election.” Because the Charter does not authorize
17 the Council to establish any additional requirements for candidates who run for elective office
18 — such as a requirement that any elected official be fully vaccinated for COVID-19 — the
19 Ordinance is ultra vires and violates the Charter through the addition of a requirement that must
20 be satisfied by those candidates who ultimately win an election to assume an elected position.

21 137. Article XIV, section 211 of the Charter establishes minimum requirements for
22 every officer or member of a Committee, Board or Commission to take and subscribe to an oath
23 or affirmation as provided by the Constitution or General Law of the State. Notably, however,
24 this section does not require every officer or member to provide proof of vaccination for
25 COVID-19. Since the Ordinance adds an additional requirement for members of committees,
26 boards and commissions, i.e., vaccination for COVID-19, it is ultra vires and violates the
27 Charter.

28 138. Additionally, the Ordinance and the Plan violate article XIV, section 216.1 of the
Charter, which provides for broad and open access to the government, giving the people the

1 right to instruct their representatives, to petition the government for redress of grievances, and
2 to assemble freely to consult for the common good, as well as the right of open access to
3 meetings of public bodies.

4 139. By imposing a requirement that all individuals share their private medical
5 information as a condition that must be satisfied to gain access to City offices and meetings, the
6 Ordinance and the Council's Plan further violates section 216.1, which also guarantees the right
7 of privacy provided by section 1 of the California Constitution.

8 140. Because the Ordinance and Plan restrict broad and open access to the
9 government, to only those who provide proof of vaccination for COVID-19, it necessarily
10 violates both the letter and intent of the Charter.

11 141. Because the Ordinance and Plan infringe upon the right of all people to petition
12 the government and assemble freely, to petition the government for redress, and to participate in
13 its processes, to only those who provide proof of vaccination for COVID-19, it necessarily
14 violates both the letter and intent of the Charter.

15 142. The Ordinance and Plan, on its face and as applied, has caused, is causing and
16 will continue to cause irreparable harm and actual and undue hardship to Plaintiff's members.
17 Plaintiff's members have no adequate remedy at law to prevent the continuing violation of the
18 City's Charter.

19 143. Plaintiff is entitled to a Declaration that the Ordinance and Plan violates the
20 City's Charter.

21 144. Plaintiff is entitled to preliminary and permanent injunctive relief requiring
22 Defendant to allow Plaintiff to freely exercise its freedom of association and right to petition the
23 government for redress of grievances.

24 145. Plaintiff is entitled to recover its reasonable costs of suit and attorney fees. 42
25 U.S.C. 1988; Cal. Code Civ. Proc. 1021.5.

26 146. Plaintiff is entitled to such other relief the Court deems just and proper.

27 **VII. PRAYER FOR RELIEF.**

28 Wherefore, Plaintiff prays for relief as follows:

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1. That the Court issue a preliminary injunction pending trial restraining and enjoining Defendant and all its officers, agents, employees, attorneys, representatives, and other individuals acting on its behalf from:
 - Enforcing the Ordinance as to elected officials, committee members, board members, commissioners, volunteers, interns, and individuals who attend City meetings or engage in City business in City buildings and implementing discriminatory portions of the Plan (as specified above); and
 - Barring any individuals who are otherwise qualified from serving as an elected official, committee member, board member, commissioner, volunteer or intern; attending City meetings; or engaging in City business in City buildings because they have not provided proof that they are “fully vaccinated” for COVID-19;
2. That the Court issue a permanent injunction upon judgment on the same terms as set forth in paragraph 1, above;
3. That the Court enter a declaratory judgment in accordance with the requested relief for each cause of action;
4. That the Court adjudge, decree, and declare the rights and other legal obligations and relations within the subject matters here in controversy so that such declaration shall have the same full force and effect of a final judgment;
5. That the Court award reasonable attorney fees and costs pursuant to 42 U.S.C 1988 and 2000e-5(k) and California Code of Civil Procedure § 1021.5; and
6. For such other and further relief as this Court deems equitable and appropriate.

Dated: April 11, 2022

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