

1 AANESTAD ANDELIN & CORN LLP
160 Chesterfield Drive, Suite 201
2 Cardiff-by-the-Sea, California 92007
Telephone (760) 944-9006
3 Facsimile (760) 454-1886
4 Lee M. Andelin (Cal. Bar No. 324234)
lee@aac.law
5 Arie L. Spangler (Cal. Bar No. 229603)
arie@aac.law

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7 *Attorneys for Plaintiff*

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

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

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

**PLAINTIFF’S OPPOSITION TO
DEFENDANT’S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Hearing: July 29, 2022
Time: 1:30 p.m.
Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Trial Date: Not Set

1 **I. INTRODUCTION AND FACTUAL BACKGROUND.**

2 The motion to dismiss by Defendant City of San Diego (“Defendant” or “City”) must
3 be overruled. While the motion focuses solely on the impact of the City’s action on City
4 employees, it misses the substance of Plaintiff Reopen San Diego’s claims, which
5 challenge the constitutionality of City action that precludes an entire category of
6 individuals who are not City employees from meaningful participation in City government
7 because they have chosen not to be “fully vaccinated” for COVID-19, or do not wish to
8 publicly disclose their vaccination status.

9 On or about October 18, 2021, more than a year and a half after closing its doors to
10 the public in response to the COVID-19 pandemic, the City approved a 3-Stage Reopening
11 Plan (“Plan”). While the Plan has not been fully implemented, it has not been amended,
12 rescinded or withdrawn by the City. (First Amended Complaint [“FAC”], ¶ 23.) Thus, the
13 Plan remains in effect, and is not moot. The Plan contemplates, among other steps, the
14 complete and indefinite bar of members of the public who are not vaccinated for COVID-
15 19 from in-person attendance at all City meetings. (FAC, ¶ 23.) The FAC challenges the
16 Plan based on claims that it violates the First, Fourth, and Fourteenth Amendments of the
17 United States Constitution by infringing upon an individual’s rights to freedom of speech
18 and association, as well as an individual’s right to refuse unwanted medical treatment, and
19 rights to privacy and bodily autonomy.

20 The City’s motion to dismiss fails to address Plaintiff’s constitutional challenges to
21 its Plan. And because additional steps in the Plan have been formally approved by the City
22 Council could still be implemented by the City at any time, Plaintiff’s claims related to the
23 Plan are not moot. “The voluntary cessation of challenged conduct does not ordinarily
24 render a case moot because a dismissal for mootness would permit a resumption of the
25 challenged conduct as soon as the case is dismissed.” *Rosebrock v. Mathis*, 745 F.3d 963,
26 971 (2014); see also *Givens v. Newsom*, 2021 U.S. Dist. LEXIS 192430, *7 (E.D., Cal.
27 2021) (“[E]ven if the government withdraws or modifies a COVID restriction in the course
28 of litigation, that does not necessarily moot the case where plaintiffs remain under constant

1 threat that government officials will use their power to reinstate the challenged
2 restrictions.”).

3 On November 29, 2021, the City took the extraordinary step of implementing “Step
4 2” of its Plan, by approving a COVID-19 vaccination mandate for all elected officials,
5 members of boards and commissions, and authorized volunteers as a condition of continued
6 service with the City. (FAC, ¶¶ 24, 26.) The mandate is codified as City Ordinance number
7 O-21398 (“Ordinance”).

8 As disclosed by the text of the Ordinance and referenced by the City in its moving
9 papers, the challenged Ordinance requires all current City employees, as well as non-
10 employees (which the City broadly and inaccurately categorizes as “employees” for
11 purposes of its motion) – elected officials, members of boards and commissions, and
12 authorized volunteers – from serving the City and its residents unless they first prove they
13 are fully vaccinated against COVID-19. (FAC, ¶ 26.)

14 Plaintiff’s first cause of action challenges the Ordinance as violating the right to
15 refuse unwanted medical treatment and the rights to privacy and bodily autonomy under
16 the substantive due process clause of the Fourth and Fourteenth Amendments. (FAC, ¶¶
17 37-64.) In its second cause of action, Plaintiff challenges the Ordinance as a violation of
18 the Procedural Due Process Clause of the Fourteenth Amendment. (FAC, ¶¶ 65-76.) The
19 third cause of action challenges the Ordinance as a violation of the Fourteenth and First
20 Amendments, and particularly the fundamental rights to freedom of speech and association.
21 (FAC, ¶¶ 77-102.) The fourth cause of action challenges the Ordinance as a violation of
22 the Equal Protection clause of the Fourteenth Amendment. (FAC, ¶¶ 103-112.) The fifth,
23 sixth and seventh causes of action raise state law challenges to the Ordinance. (FAC, ¶¶
24 113-145.)

25 II. ARGUMENT.

26 The City does not dispute that the forcible injection of medication into a
27 nonconsenting person’s body is a substantial interference with that person’s liberty.
28 (Plaintiff’s Motion, at 7:5-7.) While the Ordinance does not directly authorize the “forcible

1 injection” of a COVID-19 vaccine, it does deprive an individual of their right to choose
2 whether to be vaccinated for COVID-19 if they also wish to exercise their constitutional
3 right of participating in City government. The Ordinance compels all individuals who wish
4 to serve the City as an elected official, member of a board or commission, or volunteer, to
5 provide proof of vaccination in order to “qualify” for that service; individuals who do not
6 provide proof of vaccination for COVID-19 are deemed unqualified to serve.

7 Not only is the City’s Plan and Ordinance unconstitutional and discriminatory, but
8 recent studies and real-world data demonstrate that the City’s blanket COVID-19
9 vaccination requirement is not rationally related to achieving the City’s alleged compelling
10 interest of reducing the spread of COVID-19. (FAC, ¶ 36.) Vaccinated individuals can be
11 and still do get infected with and transmit COVID-19. (FAC, ¶ 36.)

12 **A. The City Cannot Evade this Court’s Review by Inaccurately Labeling the**
13 **Affected Individuals Employees, Contrary to the Allegations of the**
14 **Complaint.**

15 The City’s attempt to equate the Ordinance’s COVID-19 vaccination requirement to
16 other alleged employment related conditions that the City has historically imposed upon
17 its employees is a misguided effort to evade judicial review. Plaintiff’s members and other
18 citizens who choose not to be vaccinated for COVID-19, or who choose not to share their
19 vaccination status, who are not employed by the City, are currently precluded from
20 volunteering for City programs (FAC, ¶ 3), serving as elected officials (FAC, ¶ 4), and
21 serving on City commissions (FAC, ¶ 6). So long as the Ordinance stays in place, the public
22 is also precluded from electing individuals who are not vaccinated for COVID-19 to serve
23 as City officials.

24 Importantly, none of the categories of individuals for whom Plaintiff brings this
25 action fit the definition of “employee” under California law. Labor Code section 3352(a)(9)
26 specifically excludes from the definition of “employee,” “[a] person performing voluntary
27 service for a public agency or a private, nonprofit organization who does not receive
28 remuneration for the services, other than meals, transportation, lodging, or reimbursement

1 for incidental expenses.” (Labor Code, § 3352(a)(9).) An elected official is selected by the
2 will of the people through the democratic election process to voluntarily serve the people;
3 members of city boards and commissions voluntarily serve without remuneration; and
4 “authorized volunteers” donate their time and service without remuneration. Moreover,
5 members of the voting public who are deprived of an opportunity to elect individuals who
6 are not vaccinated for COVID-19 to City office are not all City employees. Thus, because
7 all of these categories of individuals are by definition volunteers, at best, the City’s efforts
8 to couch the Ordinance as a lawful condition of employment not subject to judicial review
9 must fail.

10 **B. The Ordinance Illegally Adds Qualifications for Elected Officials.**

11 While the City disingenuously argues that unvaccinated individuals are still able to
12 declare their intent to run in local elections, qualify for the ballot and campaign for office,
13 it concedes that the Ordinance does require all elected officials to provide proof of full
14 vaccination after they have been elected and “before their start date.” (City’s Motion, at
15 8:18-28.) Thus, while the City contends that an unvaccinated individual is permitted to run
16 for and can still be elected to a City office, their candidacy and election would be illusory
17 because, under the Ordinance, they will be precluded from serving unless they provide
18 proof of vaccination for COVID-19 prior to taking office.

19 The City’s imposition of this additional qualification for its elected officials also
20 violates California law, which does not authorize a local government to change – or add to
21 – the qualifications for an elected official to serve in local office. *Polis v. City of La Palma*,
22 10 Cal. App. 4th 25, 28 (1992) (city lacked power to apply term limits not required by state
23 law to exclude incumbent from city council candidacy). “The general rule is, that every
24 citizen who is a qualified elector has the right to hold any office for which he has been
25 elected or appointed.” *Fresno County Employees Assn. v. Fresno County*, 242 Cal. App.
26 2d 828, 831 (1966). Because the City cannot lawfully add to the qualifications for holding
27 an elected office, the Ordinance unlawfully discourages individuals who are not vaccinated
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1 for COVID-19 (or who do not wish to disclose whether they are vaccinated) from running
2 for an elected office in the City.

3 The City’s position that unvaccinated individuals can still run for office is also
4 contrary to California law, which precludes a candidate who is not qualified to hold an
5 office at the time of the election from eligibility to run for that office. *Samuels v. Hite*, 35
6 Cal. 2d 115, 116 (1950) (“[I]t has long been the law that a candidate, to be ‘eligible’ (when
7 the time of eligibility is not expressed), must be qualified at the time of election.”).

8 By impermissibly narrowing the field of individuals who are eligible to run for
9 office, the Ordinance intrudes not only upon potential candidates’ rights, but also upon the
10 public’s First Amendment “right to vote freely for the candidate of one’s choice,” which
11 “is the essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The
12 Ordinance unconstitutionally interferes with “[t]he right of the people to select from
13 citizens and qualified electors whomsoever they please to fill an elective office.” *Ward v.*
14 *Crowell*, 142 Cal. 587, 590-591 (1904). The right to vote for any candidate – regardless of
15 their medical history – is a foundational principal of our democracy. “Citizen participation
16 in the political process through voting and candidacy is the elemental, indispensable and
17 abiding need of a democratic republic.” *Smith v. Evans*, 42 Cal. App. 3d 154, 163 (1974).

18 **C. The City Cannot Evade Judicial Review by Enacting an Unconstitutional** 19 **Ordinance During a Government-Declared Emergency.**

20 Because the Ordinance has the effect of precluding Plaintiff’s members and other
21 individuals from participating in and petitioning City government – as either an elected
22 official, board or commission member, or volunteer – based solely on their COVID-19
23 vaccination status, the constitutionality of the Ordinance is ripe for review by this Court.

24 The City’s motion appears to be premised on an argument that Plaintiff’s claims
25 should be dismissed because the constitutionality of the Ordinance – which was enacted
26 during a government declared “emergency” – is subject to a “relaxed standard of review”
27 (i.e., akin to judicial deference) rather than the strict scrutiny standard that is traditionally
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1 applied to government action that interferes with an individual’s fundamental rights,
2 including the First Amendment rights that the Ordinance implicates here.

3 In support of its position, the City relies heavily upon the unreported case of *Gish v.*
4 *Newsom*, 2020 W.L. 1979970 (C.D. Cal. April 23, 2020), which it cites not once, but twice,
5 in support of its argument that this Court should apply a “relaxed scrutiny” standard to its
6 review of the Ordinance and other government intrusions into individual liberty interest to
7 address COVID-19. Besides being unreported, *Gish* has no precedential effect, because on
8 February 8, 2021, the Supreme Court granted an application for injunctive relief and
9 remanded *Gish* to the district court for further proceedings consistent with *South Bay*
10 *United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (“*South Bay*”). (*Gish v.*
11 *Newsom*, 2021 U.S. LEXIS 760 (2021), referencing *South Bay* as 592 U.S. ___, 2021 U.S.
12 LEXIS 758 (2021); see also, *Gish v. Newsom*, 987 F.3d 891 (2021).) Thus, the Central
13 District’s April 2020 opinion in *Gish* is not valid precedent and cannot be relied upon as
14 instructive to this Court’s review of the City’s Ordinance.

15 Even if this Court were to ultimately determine that it should defer to the City’s
16 judgment, the Ordinance should not evade the Court’s substantive review at the pleading
17 stage. “[J]udicial deference in an emergency or a crisis does not mean wholesale judicial
18 abdication, especially when important questions of religious discrimination, racial
19 discrimination, free speech, or the like are raised.” *Roman Catholic Diocese v. Cuomo*, 141
20 S. Ct. 63, 74 (2020). A court’s review of a government regulation that infringes upon an
21 individual’s constitutional rights does not fall by the wayside simply because the
22 challenged regulation was purportedly enacted to slow the spread of COVID-19, especially
23 since the so-called “emergency” has now been ongoing for well over two years.

24 As the Supreme Court opined when applying strict scrutiny to its review of
25 California’s COVID-19 tier system-based prohibition of indoor religious services: “It has
26 never been enough for the State to insist on deference or demand that individual rights give
27 way to collective interests.... The whole point of strict scrutiny is to test the government’s
28 assertions, and our precedents make plain that it has always been a demanding and rarely

1 satisfied standard. Even in times of crisis—perhaps especially in times of crisis—we have
2 a duty to hold governments to the Constitution.” *South Bay United Pentecostal Church v.*
3 *Newsom*, 141 S. Ct. 716, 718 (2021) (plurality op., Gorsuch).

4 **D. *Jacobson* Does Not Preclude this Court from Reviewing the Ordinance.**

5 The City also relies upon the frequently cited case of *Jacobson v. Commonwealth of*
6 *Massachusetts*, 197 U.S. 11 (1905), for the blanket and dubious proposition that the City
7 is authorized to enact laws and ordinances that “temporarily burden constitutional rights to
8 a greater degree than normally permissible” in order to protect residents and its workforce
9 against COVID-19. (City’s Motion, at 2:4-13.) Even if this Court finds that the City
10 continues to have a legitimate interest in preventing the spread of COVID-19 (more than
11 two years after the virus was initially discovered in San Diego County), *Jacobson* does not
12 authorize the City to enact regulations that completely bar certain individuals from all
13 meaningful participation in its governance.

14 *Jacobson* held that the state could levy a modest monetary fine against individuals
15 who refused to submit to the state’s smallpox vaccination requirement, not that the state
16 could exclude an unvaccinated individual from society. *Jacobson v. Commonwealth of*
17 *Massachusetts*, 197 U.S. 11 (1905). Importantly, individuals who did not submit to the
18 smallpox vaccination requirement did not lose any fundamental rights, including, as here,
19 access to serve or petition their government. (FAC, ¶ 50.) Unvaccinated individuals were
20 not barred from holding office, serving on boards or commissions, or volunteering, as they
21 are under the Ordinance at issue. (FAC, ¶ 50.) “*Jacobson* hardly supports cutting the
22 Constitution loose during a pandemic. That decision involved an entirely different mode
23 of analysis, an entirely different right, and an entirely different kind of restriction.” *Roman*
24 *Catholic Diocese v. Cuomo* 141 S. Ct. 63, 70 (2020). “Although *Jacobson* pre-dated the
25 modern tiers of scrutiny, [the Supreme] Court essentially applied rational basis review to
26 Henning Jacobson’s challenge to a state law that, in light of an ongoing smallpox
27 pandemic, required individuals to take a vaccine, pay a \$5 fine, or establish that they
28 qualified for an exemption.” (*Ibid.*) Indeed, as in *Jacobson*, this Court should not stray

1 from applying traditional levels of scrutiny to its review of the City’s Ordinance and its
2 implications on constitutional rights.

3 **III. CONCLUSION.**

4 This Court should determine that Plaintiff’s claims as pled establish an actionable
5 claim that the Ordinance violates the constitutional rights of Plaintiff’s members and other
6 members of the public, as it precludes individuals who are not vaccinated for COVID-19
7 or who do not wish to disclose their private medical information, from participating in City
8 government, and impermissibly narrows the field of candidates who are qualified to serve
9 as elected officials. Moreover, Plaintiff’s claims related to the Plan (as distinguished from
10 the Ordinance) have not been challenged by the City. The Plan, which has not been
11 rescinded by the City, contemplates the exclusion of individuals from all City meetings
12 unless they provide proof of vaccination from COVID-19, a clear violation of individual
13 fundamental rights. The Ordinance and Plan both remain subject to this Court’s review,
14 and the City’s motion to dismiss should be overruled.

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16 Dated: June 3, 2022

AANESTAD ANDELIN & CORN LLP

17 *s/ Arie L. Spangler*
18 _____
Arie L. Spangler
19 Lee M. Andelin

20 *Attorneys for Plaintiff*
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