

1 McGREGOR W. SCOTT  
 United States Attorney  
 2 PHILIP A. SCARBOROUGH (SBN 254934)  
 Assistant United States Attorney  
 3 501 I Street, Suite 10-100  
 Sacramento, CA 95814  
 4 Telephone: (916) 554-2700  
 Facsimile: (916) 554-2900  
 5 Philip.Scarborough@usdoj.gov  
 6 Attorneys for Joseph R. Biden, Jr.

7  
 8 IN THE UNITED STATES DISTRICT COURT  
 9 EASTERN DISTRICT OF CALIFORNIA

10 JOY GARNER, et al.,  
 11 Plaintiffs,  
 12  
 13 v.  
 14 JOSEPH R. BIDEN, JR., in his  
 official capacity as the  
 15 President of the United States  
 of America,  
 16  
 17 Defendant.

CASE NO. 2:20-CV-02470-WBS-JDP  
 MEMORANDUM IN SUPPORT OF MOTION TO  
 DISMISS  
 DATE: February 22, 2021  
 TIME: 1:30 p.m.  
 JUDGE: Hon. William B. Shubb  
 COURT: Courtroom 5

TABLE OF CONTENTS

1

2 INTRODUCTION.....1

3 BACKGROUND.....3

4 LEGAL STANDARDS.....6

5 ARGUMENT.....7

6     A.    The Operative Complaint Fails to Establish a Case or  
7            Controversy as to the President.....7

8            1.    The FAC Fails to Plead Injury Caused by the  
9                 President.....8

              2.    The Injury Will Not Be Redressed by a Favorable  
                Decision.....11

10     B.    The FAC Presents Non-Justiciable Political  
11            Questions.....14

12     C.    Plaintiffs Fail to State a Claim.....16

              1.    Claims One, Seven, Nine, and Ten Fail to State  
13                 a Claim.....16

14            2.    Claim Six Fails to State a Claim.....17

15            3.    Claims Three and Four Fail to State a Claim.....18

16            4.    Claim Eight Fails to State a Claim.....18

17            5.    Claim Five Fails to State a Claim.....19

18            6.    Claim Two Fails to State a Claim.....19

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

TABLE OF AUTHORITIES

CASES

1

2

3 *Ashcroft v. Iqbal*,

4 556 U.S. 662 (2009) ..... 6, 7

5 *Baker v. Carr*,

6 369 U.S. 186 (1962) ..... 14, 15, 16

7 *Bell Atlantic Corp. v. Twombly*,

8 550 U.S. 544 (2007) ..... 7

9 *Chandler v. State Farm Mut. Auto. Ins. Co.*,

10 598 F.3d 1115 (9th Cir. 2010) ..... 6

11 *Collins v. City of Harker Heights*,

12 503 U.S. 115 (1992) ..... 13

13 *Corrie v. Caterpillar*,

14 503 F.3d 974 (9th Cir. 2007) ..... 14

15 *El-Shifa Pharm. Indus. Co. v. United States*,

16 607 F.3d 836 (D.C. Cir. 2010) ..... 15

17 *Haig v. Agee*,

18 453 U.S. 280 (1981) ..... 15

19 *Hall v. Mueller*,

20 84 F. App'x 814 (9th Cir. 2003) ..... 18

21 *Hall v. U.S. Dep't of Agric.*,

22 984 F.3d 825 (9th Cir. 2020) ..... 8

23 *Henderson v. Carmon*,

24 2012 WL 6651552 (E.D. Cal. Dec. 20, 2012) ..... 18

25 *Ingraham v. Wright*,

26 430 U.S. 651 (1977) ..... 17

27 *Koohi v. United States*,

28 976 F.2d 1328 (9th Cir. 1992) ..... 14

*Lujan v. Defenders of Wildlife*,

504 U.S. 555 (1992) ..... 7, 8, 11

*Mayes v. Kaiser Found. Hosps.*,

917 F. Supp. 2d 1074 (E.D. Cal. 2013) ..... 7

*Peterson v. United States*,

774 F. Supp. 2d 418 (D.N.H. March 30, 2011) ..... 17

*Phillips v. City of New York*,

775 F.3d 538 (2d Cir. 2015) ..... 19

1 *Republic of the Marsh. Islands v. United States*,  
 865 F.3d 1187 (9th Cir. 2017) ..... 15

2

3 *Schneider v. Cal. Dep’t of Corr.*,  
 151 F.3d 1194 (9th Cir. 1998) ..... 7

4 *Schowengerdt v. United States*,  
 944 F.2d 483 (9th Cir. 1991) ..... 17

5

6 *Simon v. Eastern Ky. Welfare Rights Org.*,  
 426 U.S. 26 (1976) ..... 8

7 *Strandberg v. City of Helena*,  
 791 F.2d 744 (9th Cir. 1986) ..... 17

8

9 *Turner v. Hubbard*,  
 2012 WL 3133617 (E.D. Cal. July 31, 2012) ..... 17

10 *Whitlow v. California*,  
 203 F. Supp. 3d 1079 (S.D. Cal. 2016) ..... 19

11

12 *Wolfe v. Strankman*,  
 392 F.3d 358 (9th Cir. 2004) ..... 6

13 *Workman v. Mingo County Bd. of Educ.*,  
 419 F. App’x 348 (4th Cir. 2011) ..... 19

14

**STATUTES**

15 42 U.S.C. § 300aa-10..... 13

16 42 U.S.C. § 300aa-22..... 5

17 Pub. L. No. 116-260, Division M (2020)..... 13, 15

18 Cal. Health & Welfare Code § 120325..... 9, 10

19

**RULES**

20 Fed. R. Civ. P. 12(b)(1) ..... 6

21 Fed. R. Civ. P. 12(b)(6) ..... 6

22 Fed. R. Civ. P. 25(d) ..... 3

23

24

25

26

27

28



1 benefitted public health. See, e.g., ECF 21 ¶ 2. Other parts explain  
2 their ethical and religious objections to vaccines, *id.* ¶¶ 40(H),  
3 41(G), 42(G), 42(H), while some paragraphs delve into fantastical  
4 conspiracy theories. See *id.* ¶ 112 (alleging that “pharmaceutical  
5 companies [are] advancing new vaccines” that “manipulate human DNA”  
6 and “employ[] human tracking technology”). Still other parts suggest  
7 that plaintiffs’ true objection is that they want to be able to send  
8 their unvaccinated children to school, but state laws prohibit them  
9 from doing so, *id.* ¶¶ 40(H), 41(H), 42(I), or that state child  
10 protective services personnel in North Carolina conducted invasive  
11 visits, and a doctor made a threat to call state child protective  
12 services in Arizona, because their children were not vaccinated. *Id.*  
13 ¶¶ 42(J), 42(K).

14 Notably absent from the complaint are any facts showing what the  
15 President of the United States – the only named defendant in this  
16 action – has done to cause any legally cognizable injury to any of the  
17 plaintiffs. The complaint is virtually devoid of any references to  
18 federal statutes or regulations. Indeed, there are no federal laws  
19 establishing a general mandatory vaccination requirement, only a CDC  
20 recommended schedule, a fact that plaintiffs openly acknowledge. See  
21 ECF 21 ¶ 52(A). There are no allegations that the President or any  
22 federal entity blocks unvaccinated children from attending school,  
23 that the North Carolina child protective service officials who visited  
24 one of the plaintiffs, or the Arizona doctor who threatened to call  
25 child protective services in that state, acted at the President’s  
26 direction. Plaintiffs candidly disclaim any desire to sue any federal  
27 agencies involved in vaccine review and approval. *Id.* ¶ 52.

1 Plaintiffs fail to explain why they have sued the President at  
2 all, rather than state or local officials who do enforce vaccination  
3 requirements. And they do not explain how, exactly, the President can  
4 lawfully interfere in the enforcement of validly enacted state and  
5 local vaccine requirements.

6 For these and many other reasons, the First Amended Complaint  
7 ("FAC") (ECF 21) is hopelessly defective. If it does not cross into  
8 frivolous territory, it comes as close as it possibly can without  
9 stepping over the line. To the extent there are concrete injuries  
10 alleged, those injuries arise, if at all, from other actors not before  
11 the Court. Plaintiffs therefore do not have standing to sue the  
12 President. The relief plaintiffs seek - a broad injunction requiring  
13 "surveys" and studies, followed by distribution of vaccine-related  
14 data to every individual in the United States who receives a vaccine -  
15 presents a non-justiciable political question. And, on the merits,  
16 each of plaintiffs' ten claims fail to state a claim upon which relief  
17 can be granted.

18 This action should be dismissed without leave to amend.

19 **BACKGROUND**

20 Plaintiffs are composed of a group of individuals who oppose  
21 vaccines. See, e.g., ECF 21 ¶¶ 36-42. They filed their original  
22 complaint on December 14, 2020, naming then-President Donald Trump as  
23 the sole defendant, in his official capacity. See ECF 1. On January  
24 25, 2021, after President Biden had been inaugurated, plaintiffs filed  
25 the FAC. ECF 21.<sup>2</sup>

---

26  
27 <sup>2</sup> Pursuant to Federal Rule of Civil Procedure 25(d), President  
28 Biden was automatically substituted as the defendant. See ECF 27  
(court minutes ordering that docket be updated accordingly).

1 The FAC is a 74-page screed detailing plaintiffs' multitudinous,  
2 sometimes fantastical objections to vaccines. For example, plaintiffs  
3 object that widely accepted vaccination schedules are really the  
4 product of "a biotechnology revolution by pharmaceutical companies"  
5 which "manipulate human DNA," "incorporat[e] nanotechnology," and  
6 "employ[] human tracking technology." ECF 21 ¶ 112. They object to  
7 state laws that require children to be vaccinated before attending  
8 schools. See *id.* ¶¶ 40(H), 41(H), 42(I). They allege that at least  
9 some of them have been targeted by state child protection services  
10 because of their refusal to have their children vaccinated. See *id.*  
11 ¶¶ 42(J), 42(K). They more broadly allege that they have been  
12 unfairly discriminated against because of their unvaccinated status or  
13 their refusal to have their children vaccinated. See, e.g., *id.*  
14 ¶¶ 17, 39, 40(H), 40(I), 41(H), 49(D), 62, 64(A), 73-74, 80, 107, 113,  
15 115, 137, 140-141, 143, 172. "Communist China" makes several  
16 appearances. See, e.g., *id.* ¶¶ 35, 65, 111(B). Winding up to a fever  
17 pitch, the FAC concludes with an implicit threat that, if the Court  
18 does not act, a military overthrow of the government might be in the  
19 offing. See *id.* ¶ 166 (arguing that the President's "command over the  
20 military . . . is the mechanism by which our President may, and in  
21 fact is obliged to, uphold his own oath to the Constitution, when, if  
22 by wholly illegitimate interpretation, other branches have degraded or  
23 even attempted to eliminate the rights and protections the  
24 Constitution confers upon the people").

25 Plaintiffs claim that this parade of vaccine-related horrors  
26 violates multiple provisions of the Constitution, including: the  
27 President's oath of office and the Faithful Execution Clause (Claim  
28 One), the First Amendment's Free Exercise Clause (Claim Two), the

1 right to bodily integrity under the Fifth Amendment (Claim Three), the  
2 right to be free from "government created danger" under the Fifth  
3 Amendment (Claim Four), the right to privacy under the Fourth  
4 Amendment (Claim Five), the Cruel and Unusual Punishment Clause of the  
5 Eighth Amendment (Claim Six), the Thirteenth Amendment's prohibition  
6 on slavery (Claim Seven), the Equal Protection Clause of the  
7 Fourteenth Amendment (Claim Eight), the Ninth Amendment (Claim Nine),  
8 and the Tenth Amendment (Claim Ten).

9       Nowhere in their lengthy complaint, however, can one find a  
10 single reference to actions taken by the President. Quite the  
11 opposite, plaintiffs candidly and repeatedly admit that the President  
12 "is not the sole cause of" their purported injuries. *See, e.g.*, ECF  
13 21 ¶¶ 20, 117, 127, 144, 148, 157, 163. The only federal statute  
14 mentioned, other than jurisdictional statutes, is the National  
15 Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-22  
16 (establishing a no-fault alternative to traditional tort system for  
17 covered vaccine injuries). *See* ECF 21 ¶ 32. But even that statute is  
18 not the subject of their challenge, because they acknowledge that any  
19 attempt to overturn that act would present a political question. *See*  
20 *id.* ¶ 33.

21       Instead, plaintiffs ask the Court to order the President to  
22 exercise his "reasonable executive discretion" to protect unvaccinated  
23 individuals. *See, e.g.*, ECF 21 ¶¶ 49, 50, 93, 106, 117, 127, 144,  
24 148, 157, 163. Although the complaint does not ever specify what  
25 action it wishes the Court to order the President to take, part of it  
26 apparently would include allowing some kind of survey of unvaccinated  
27 individuals to take place, the results of which plaintiffs then want  
28 distributed to all individuals who receive vaccines. Only by doing

1 so, plaintiffs claim, can anyone possibly make an informed decision  
2 about whether to be vaccinated or not. *See, e.g., id.* ¶ 172 (request  
3 for relief, seeking preliminary and permanent injunctions against  
4 "discrimination based on vaccination status" and requiring "signed  
5 informed consent" from each person receiving a vaccination after  
6 reviewing "numerical" information about vaccines).

7 Plaintiffs have filed a motion for preliminary injunction (ECF  
8 16), which is set to be heard on the same date as the present motion  
9 to dismiss. *See* ECF 27 (court's minute order setting briefing  
10 schedule). Defendant will file a separate opposition to that motion  
11 in compliance with the schedule set by the Court.

#### 12 **LEGAL STANDARDS**

13 The lack of a case or controversy under Article III of the  
14 Constitution implicates the Court's subject matter jurisdiction;  
15 motions to dismiss on this basis therefore are analyzed under Federal  
16 Rule of Civil Procedure 12(b)(1). *See Chandler v. State Farm Mut.*  
17 *Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). A  
18 jurisdictional motion to dismiss can be either facial or factual. A  
19 facial motion to dismiss, such as this one, assumes the truth of the  
20 well-pled facts in the complaint. *See Wolfe v. Strankman*, 392 F.3d  
21 358, 362 (9th Cir. 2004).

22 To survive a motion to dismiss for failure to state a claim under  
23 Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain  
24 sufficient factual matter . . . to state a claim to relief that is  
25 plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
26 (internal quotations omitted). The complaint "must include something  
27 more than 'an unadorned, the-defendant-unlawfully-harmed-me  
28 accusation' or 'labels and conclusions' or 'a formulaic recitation of

1 the elements of a cause of action.'" *Mayes v. Kaiser Found. Hosps.*,  
2 917 F. Supp. 2d 1074, 1078 (E.D. Cal. 2013) (quoting *Iqbal*, 556 U.S.  
3 at 678 (internal quotations omitted)). Although the Court "must  
4 construe the complaint in the light most favorable to the plaintiff  
5 and accept as true the factual allegations of the complaint," *id.* at  
6 1078, the Court need not give such deference to "a legal conclusion  
7 couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550  
8 U.S. 544, 555 (2007). A motion to dismiss must be decided on the  
9 basis of the allegations in the complaint; other matters, such as  
10 affidavits that are submitted outside the four corners of the  
11 complaint, cannot form the basis for denying a motion under Rule  
12 12(b)(6). See *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197  
13 n.1 (9th Cir. 1998).

#### 14 ARGUMENT

##### 15 A. The Operative Complaint Fails to Establish a Case or 16 Controversy as to the President.

17 The Constitution limits federal courts' jurisdiction to cases and  
18 controversies, which includes the requirement that each plaintiff have  
19 standing with respect to each claim they assert. See *Lujan v.*  
20 *Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish  
21 standing, a party must demonstrate three elements. First, each party  
22 must show that she has suffered an injury in fact; that is, that there  
23 has been "an invasion of a legally protected interest which is (a)  
24 concrete and particularized, and (b) actual or imminent, not  
25 conjectural or hypothetical." *Id.* at 560 (internal quotations and  
26 citations omitted). Second, each party must demonstrate causation;  
27 that is, "the injury has to be fairly traceable to the challenged  
28 action of the defendant, and not the result of the independent action

1 of some third party not before the court." *Id.* (internal quotations  
2 and citations omitted). And third, "it must be likely, as opposed to  
3 merely speculative, that the injury will be redressed by a favorable  
4 decision." *Id.* at 561 (internal quotations and citations omitted).

5 The facts alleged in the FAC do not demonstrate standing.

6 **1. The FAC Fails to Plead Injury Caused by the President.**

7 "The requirement of standing means that a federal court may 'act  
8 only to redress injury that fairly can be traced to the challenged  
9 action of the defendant, and not injury that results from the  
10 independent action of some third party not before the court.'" *Hall*  
11 *v. U.S. Dep't of Agric.*, 984 F.3d 825, 834 (9th Cir. 2020) (quoting  
12 *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).  
13 A review of the allegations concerning each plaintiff shows that none  
14 of them can satisfy this constitutional requirement.

15 Joy Garner. The FAC alleges that plaintiff Joy Garner ("Joy") is  
16 "a scientifically-minded patriotic American from a United States of  
17 America military family," who "is a technology inventor and patent-  
18 holder." ECF 21 ¶ 36. She founded and operates The Control Group  
19 specifically for purposes of bringing this litigation. *See id.* ¶ 37.  
20 The Control Group conducted a purported "pilot survey" of unvaccinated  
21 individuals. *See id.* The FAC does not allege that Joy herself is  
22 unvaccinated, and it does not identify any harm that she has suffered.

23 Joy Elisse Garner, Evan Glasco, J.S. and F.G. The FAC alleges  
24 that plaintiffs Joy Elisse Garner ("Elisse") and Evan Glasco are the  
25 parent(s) of J.S. and F.G. ECF 21 ¶ 40. J.S. and F.G. are minor  
26 children who, according to the complaint, have never been vaccinated.  
27 *See id.* The FAC alleges that Elisse and Glasco "are religiously  
28 opposed to vaccines manufactured using aborted fetal cells." *Id.*

1 ¶ 40(G). They also allegedly wish to have J.S. and F.G. attend  
2 school, but are prohibited from doing so because of California Health  
3 and Safety Code § 120325 *et seq.* *Id.* ¶ 40(H). The FAC does not  
4 allege that Elisse and Glasco are themselves unvaccinated.

5 Michael Harris, Nicole Harris, and S.H. Plaintiffs Michael  
6 Harris and Nicole Harris allege that they are the parents of S.H., an  
7 unvaccinated minor child. See ECF 21 ¶ 41. They allege that they are  
8 "religiously opposed to vaccination," and thereby are prevented from  
9 having S.H. attend school by virtue of California's Health and Safety  
10 Code. See *id.* ¶¶ 41(G), (H). The FAC does not allege that Michael or  
11 Nicole are themselves unvaccinated.

12 Traci Music, K.M., and J.S. The FAC alleges that Traci Music is  
13 the parent of K.M. and J.S., minor children who are not vaccinated.  
14 ECF 21 ¶ 42. Music alleges that she has religious objections "to the  
15 use of aborted fetal cell lines in vaccine manufacturing." *Id.*  
16 ¶ 42(G). She also alleges that she would like to send K.M. and J.S.  
17 to school. See *id.* ¶¶ 42(H), (I). Music further alleges that her  
18 previous pediatrician "threatened to contact Arizona Child Protective  
19 Services" if she did not have her children vaccinated. *Id.* ¶ 42(J).  
20 She also alleges that, three years ago, the North Carolina Child  
21 Protective Services conducted a visit of her home and her children  
22 because she "was homeschooling and did not vaccinate her children."  
23 *Id.* ¶ 42(K).

24 Entirely absent from the allegations of the complaint are any  
25 plausible facts showing that any of the alleged conduct is traceable  
26 to the President. With respect to Joy, there are no facts supporting  
27 a conclusion that she has suffered any legally cognizable injury at  
28 all. She is not "unvaccinated." She does not have children who wish

1 to attend school but are prohibited by state vaccination laws. Her  
2 only connection to this case is that she has started an organization,  
3 solely for the purposes of bringing this litigation, to conduct a  
4 "survey" of unvaccinated individuals in the United States. That does  
5 not establish an injury for standing purposes; it certainly does not  
6 show that the President was the cause of any such injury.

7 With respect to the families who do not wish to vaccinate their  
8 children, plaintiffs fail to allege any facts that could plausibly be  
9 interpreted as showing that the President has caused any of their  
10 alleged injuries. Quite the opposite. It is not a federal law that  
11 prohibits their children from attending school; it is a law passed by  
12 the State of California. See ECF 21 ¶¶ 40(H), 41(H) (citing Cal.  
13 Health & Welfare Code § 120325). If plaintiffs believe that  
14 California's health and welfare code violates the Constitution, the  
15 proper suit to bring is an action against the state or local officials  
16 who enforce it. The President has no role in enforcing state and  
17 local vaccine laws.

18 Music's allegations that she was visited or threatened with a  
19 visit by child protective services in North Carolina and Arizona fare  
20 no better. There are no facts suggesting that any federal entity,  
21 much less the President, was involved in any way with those two  
22 incidents. Again, if Music believed that those incidents somehow  
23 violated her constitutional rights, the proper course of action was to  
24 seek relief against the individuals who were directly involved.

25 Plaintiffs openly acknowledge that the President has virtually  
26 nothing to do with their claimed injuries throughout the FAC. They  
27 state multiple times that the President "is not the sole cause of"  
28 their purported injuries. See, e.g., ECF 21 ¶¶ 20, 117, 127, 144,

1 148, 157, 163. They also admit that there are no mandatory federal  
2 vaccine requirements, and that state and local governments - not the  
3 federal government - pass and enforce their own vaccine requirements.  
4 *See, e.g., id.* ¶ 52(A) ("CDC recommended vaccine schedules are  
5 recommended rather than mandated, so [federal agencies] are not the  
6 only cause of" plaintiffs' perceived injuries); *id.* ("The State and  
7 local governments . . . participate in their own ever-changing  
8 patchwork of mandates and coercion techniques."); *id.* ¶ 74 ("the  
9 control group population of unvaccinated Americans is imminently  
10 threatened (*especially by myriad local health officials' . . . .*)"  
11 (emphasis added)); *id.* ¶ 143 ("[T]he ability to independently protect  
12 oneself from vaccination as a form of human medical experimentation is  
13 routinely dismissed *by local authorities . . . .*" (emphasis added));  
14 ¶ 147 ("Innumerable local governments, educational institutions, and  
15 businesses receive federal funding and federal contracts, and yet have  
16 implemented and enforce systematic segregation of unvaccinated  
17 individuals from vaccinated ones."); ¶ 155 (referring to "a patchwork  
18 of local authorities").

19 These admissions in the FAC should be the end of the standing  
20 inquiry. The conclusion is unavoidable given the lack of any factual  
21 allegations concerning the President's involvement in these matters.

22 **2. The Injury Will Not Be Redressed by a Favorable**  
23 **Decision.**

24 To establish standing, each plaintiff must also demonstrate that  
25 a favorable decision will redress their claimed injuries. *See Lujan*,  
26 504 U.S. at 561. "There is no redressability, and thus no standing,  
27 where . . . any prospective benefits depend on an independent actor  
28 who retains broad and legitimate discretion the courts cannot presume

1 either to control or to predict." *Glanton v. AdvancePCS Inc.*, 465  
2 F.3d 1123, 1125 (9th Cir. 2006) (internal quotations and citations  
3 omitted). "To establish redressability, the plaintiffs must show that  
4 the relief they seek is both (1) substantially likely to redress their  
5 injuries; and (2) within the district court's power to award."  
6 *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).  
7 Plaintiffs fail both elements of redressability.

8 First, for the same reasons that the President is not the cause  
9 of plaintiffs' alleged injuries, the relief they seek is not likely to  
10 redress their claimed injuries. For example, even if the Court grants  
11 the declaratory relief or the various injunctions plaintiffs seek, it  
12 would not invalidate the provisions of the California Health and  
13 Welfare Code - or any similar provisions of other states' laws - that  
14 require students to be vaccinated in order to attend school. See ECF  
15 21 ¶¶ 40(H), 41(H). No judgment in this case would have any effect on  
16 pharmaceutical companies, see *id.* ¶¶ 112, 142, on state or local child  
17 protection service agencies, see *id.* ¶¶ 42(J), 42(K), or on individual  
18 doctors, see *id.* ¶ 42(J).

19 Separately from this straightforward analysis, the relief  
20 plaintiffs seek - an order that the President use his discretion to do  
21 something about the purported discrimination vaccine objectors face -  
22 is not within the power of a district court to award. Plaintiffs  
23 apparently seek to have the Court order the President to take  
24 unspecified actions to prevent purported discrimination against  
25 vaccine objectors, perform a national survey of non-vaccinated  
26 persons, and then establish a national informed consent system. See  
27 ECF 21 ¶ 172 (request for relief).

1 This relief is not subject to any discernible legal standards.  
2 In a similar case involving a request to force the federal government  
3 to establish a climate control plan, the Ninth Circuit held that such  
4 a request failed the redressability requirement of standing because it  
5 was "beyond the power of an Article III court." *Juliana*, 947 F.3d at  
6 1171. "[A]ny effective plan would necessarily require a host of  
7 complex policy decisions entrusted, for better or worse, to the wisdom  
8 and discretion of the executive and legislative branches." *Id.*

9 So, too, here. Congress has actively legislated on policy  
10 matters relating to vaccines. For example, to encourage vaccinations  
11 as a means of advancing public health, Congress has established a no-  
12 fault alternative to the tort system for vaccine-related injuries.  
13 See 42 U.S.C. § 300aa-10 *et seq.* More recently, it has appropriated  
14 billions of dollars to assist in the development of a vaccine targeted  
15 to the COVID-19 virus. See Pub. L. No. 116-260, Division M (2020).  
16 Deciding whether to encourage or discourage vaccination, how to do so,  
17 how much money to invest in doing so, how to allocate liability for  
18 injuries related to vaccines, how to study the effects of vaccines,  
19 what level of safety for a vaccine should be demonstrated before  
20 approving it, and other matters implicated by plaintiffs' requested  
21 relief are "complex policy decisions" that are structurally left by  
22 the Constitution to the political branches of government. *Juliana*,  
23 671 F.3d at 1171. "These decisions . . . must be made by the People's  
24 'elected representatives, rather than by federal judges interpreting  
25 the basic charter of Government for the entire country.'" *Id.* at 1172  
26 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128-29  
27 (1992)).

1 For these reasons, plaintiffs lack standing to pursue their  
2 claims against the President.

3 **B. The FAC Presents Non-Justiciable Political Questions.**

4 Separately from the standing analysis, the Court also lacks  
5 jurisdiction because the relief plaintiffs request presents a non-  
6 justiciable political question. "The nonjusticiability of a political  
7 question is primarily a function of the separation of powers." *Baker*  
8 *v. Carr*, 369 U.S. 186, 210 (1962). "The political question doctrine  
9 serves to prevent the federal courts from intruding unduly on certain  
10 policy choices and value judgments that are constitutionally committed  
11 to Congress or the executive branch." *Koohi v. United States*, 976  
12 F.2d 1328, 1331 (9th Cir. 1992). The political question doctrine "is  
13 at bottom a jurisdictional limitation imposed on the courts by the  
14 Constitution, and not by the judiciary itself." *Corrie v.*  
15 *Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007). The courts lack  
16 subject matter jurisdiction over cases presenting political questions.  
17 *Id.* at 982.

18 The Supreme Court has established six formulations to consider  
19 when determining whether a case presents a non-justiciable political  
20 question, though in practice they frequently overlap. They include:

21 [1] a textually demonstrable constitutional  
22 commitment of the issue to a coordinate political  
23 department; or [2] a lack of judicially  
24 discoverable and manageable standards for  
25 resolving it; or [3] the impossibility of deciding  
26 without an initial policy determination of a kind  
27 clearly for nonjudicial discretion; or [4] the  
28 impossibility of a court's undertaking independent  
resolution without expressing lack of the respect  
due coordinate branches of government; or [5] an  
unusual need for unquestioning adherence to a  
political decision already made; or [6] the  
potentiality of embarrassment from multifarious  
pronouncements by various departments on one  
question.

1 *Baker*, 369 U.S. at 217. The presence of just one of these factors  
2 indicates the presence of a political question. *Republic of the*  
3 *Marsh. Islands v. United States*, 865 F.3d 1187, 1200 (9th Cir. 2017).

4 The relief plaintiffs seek here presents all six of the *Baker*  
5 factors. Plaintiffs cast their claims in the guise of an issue of  
6 utmost, pressing national security. See, e.g., ECF 21 ¶¶ 1, 18-20,  
7 33, 35, 43, 44, 51-52, 56, 64-66, 79, 95, 120, 172. Questions of  
8 national security have been found, time and again, to present  
9 political questions. See, e.g., *El-Shifa Pharm. Indus. Co. v. United*  
10 *States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("We have consistently held  
11 . . . that courts are not a forum for reconsidering the wisdom of  
12 discretionary decisions made by the political branches in the realm of  
13 . . . national security."); *Haig v. Agee*, 453 U.S. 280, 292 (1981)  
14 ("Matters intimately related to . . . national security are rarely  
15 proper subjects for judicial intervention."). Deciding whether  
16 encouraging or discouraging vaccines is in the interest of national  
17 security "involve[s] the exercise of a discretion demonstrably  
18 committed to the executive or legislature" and "turn[s] on standards  
19 that defy judicial application." *Baker*, 369 U.S. at 211. Similarly,  
20 whether to conduct the type of survey that plaintiffs ask the Court to  
21 order requires an initial policy determination concerning the  
22 desirability of vaccinations.

23 In addition, the injunction and declaration that plaintiffs seek  
24 from this Court would necessarily convey a message that vaccines are  
25 not safe. In the current national environment, that message would  
26 show a lack of respect to the political branches' decision to dedicate  
27 significant resources to the development and distribution of a COVID-  
28 19 vaccine. See, e.g., Pub. L. No. 116-260, Division M (2020)

1 (appropriating nearly \$23 billion for, among other things, "the  
2 development of necessary countermeasures and vaccines, [and] the  
3 purchase of vaccines, therapeutics, diagnostics, necessary medical  
4 supplies, as well as medical surge capacity, and other preparedness  
5 and response activities" and to "purchase vaccines developed using  
6 funds made available . . . to respond to an outbreak or pandemic  
7 related to coronavirus in quantities determined by the Secretary to be  
8 adequate to address the public health need"). At a time when COVID-19  
9 has caused extreme disruption to the U.S. economy and social life, and  
10 when Congress itself has made the policy decision that a vaccine is  
11 necessary to manage the COVID-19 pandemic, any suggestion from a court  
12 that vaccines are not safe would cause "embarrassment from  
13 multifarious pronouncements by various departments on one question."  
14 *Baker*, 369 U.S. at 217. Such action would undermine the need for a  
15 consistent approach for the policy response to COVID-19.

16 For this independent reason, the Court lacks subject matter  
17 jurisdiction over political questions inherent in plaintiffs' claims.

18 **C. Plaintiffs Fail to State a Claim.**

19 Although the above analysis disposes of plaintiffs' complaint,  
20 even if the Court had jurisdiction, the FAC fails to state any claims.

21 **1. Claims One, Seven, Nine, and Ten Fail to State a Claim.**

22 Claims One, Seven, Nine, and Ten each seek declaratory relief for  
23 alleged violations of various clauses of the Constitution, including  
24 the President's Oath of Office and the Faithful Execution Clause  
25 (Claim One), the Thirteenth Amendment's prohibition of slavery (Claim  
26 Seven), the Ninth Amendment (Claim Nine), and the Tenth Amendment  
27 (Claim Ten). The case law is clear that the Ninth, Tenth, and  
28 Thirteenth Amendments cannot be judicially enforced by private

1 citizens. See *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th  
2 Cir. 1991) (“[The] Ninth Amendment argument is meritless, because that  
3 amendment has not been interpreted as independently securing any  
4 constitutional rights for purposes of making out a constitutional  
5 violation.”); *Strandberg v. City of Helena*, 791 F.2d 744, 749 (9th  
6 Cir. 1986) (“The district court correctly determined the Tenth  
7 Amendment creates no constitutional rights cognizable in a civil  
8 rights cause of action.”); *Turner v. Hubbard*, 2012 WL 3133617, at \*2  
9 n.1 (E.D. Cal. July 31, 2012) (“Enforcement of the Thirteenth  
10 Amendment is accomplished by Congress. It does not provide for a  
11 private cause of action.”). The undersigned is aware of no authority  
12 holding that the President’s oath of office, or the Faithful Execution  
13 Clause, create a cause of action. To the contrary, the case law  
14 uniformly holds such claims present non-justiciable political  
15 questions. See, e.g., *Peterson v. United States*, 774 F. Supp. 2d 418,  
16 426 (D.N.H. March 30, 2011) (dismissing claim that “the President  
17 violated his oath of office” because “courts have consistently ruled  
18 that such a claim is not cognizable” and citing cases).

19 **2. Claim Six Fails to State a Claim.**

20 Claim Six seeks relief under the Cruel and Unusual Punishment  
21 Clause of the Eighth Amendment. But this clause applies only to  
22 individuals who have been convicted of crimes. See *Ingraham v.*  
23 *Wright*, 430 U.S. 651, 667-68 (1977) (“In the few cases where the Court  
24 has had occasion to confront claims that impositions outside the  
25 criminal process constituted cruel and unusual punishment, it has had  
26 no difficulty finding the Eighth Amendment inapplicable.”). Because  
27 plaintiffs do not allege that they have been convicted of any federal  
28 crime, or that any action has been taken against them as a result of

1 being convicted of a federal crime, they cannot state a claim under  
2 the Eighth Amendment.

3 **3. Claims Three and Four Fail to State a Claim.**

4 Claims Three and Four assert claims under the Due Process Clause  
5 of the Fifth Amendment for violation of the right to bodily integrity  
6 and the right to be free of government created dangers. These claims  
7 necessarily proceed on a theory of substantive due process, which  
8 requires demonstrating (1) a governmental deprivation of a liberty  
9 interest that (2) is shocking to the conscience, that is, conduct  
10 intended to injure in some way unjustifiable by any governmental  
11 interest. *Henderson v. Carmon*, 2012 WL 6651552, at \*2 (E.D. Cal. Dec.  
12 20, 2012) (internal quotations and citations omitted).

13 Assuming for purposes of this motion that plaintiffs have a  
14 liberty interest in bodily integrity and to be free from a state-  
15 created danger, they have not alleged any facts showing that the  
16 President has done anything shocking to the conscience. As noted  
17 above, plaintiffs' complaint is devoid of any factual allegations  
18 concerning the President's actions, much less actions that satisfy the  
19 stringent standard applicable to a substantive due process claim.

20 **4. Claim Eight Fails to State a Claim.**

21 Claim Eight seeks relief under the Fourteenth Amendment's Equal  
22 Protection Clause. This claim fails at the outset because the  
23 Fourteenth Amendment does not apply to federal officials. *See, e.g.,*  
24 *Hall v. Mueller*, 84 F. App'x 814, 815-16 (9th Cir. 2003) (observing  
25 that the Fourteenth Amendment "do[es] not apply to federal government  
26 actors").

27 Even if this claim is construed as being brought under the equal  
28 protection component of the Fifth Amendment's Due Process Clause, it

1 still fails. As with the other claims, there are no facts alleged in  
2 the complaint showing that the President has treated any of the  
3 plaintiffs differently than similarly situated individuals. Moreover,  
4 being unvaccinated is not a protected class. *E.g., Whitlow v.*  
5 *California*, 203 F. Supp. 3d 1079, 1087 (S.D. Cal. 2016). The limited  
6 federal action identified in the amended complaint - issuance of non-  
7 mandatory recommended vaccination schedules and a role in approving  
8 vaccines for use in the United States - easily meet the test for  
9 rational basis. Such actions further the federal government's  
10 interest in protecting public health and safety. *Accord id.* at 1088  
11 (rejecting equal protection claim to state school vaccination laws).

12 **5. Claim Five Fails to State a Claim.**

13 Claim Five asserts a Fourth Amendment right to a "zone of  
14 privacy." Again assuming for this motion that plaintiffs have a  
15 protectible privacy interest, this claim fails because there are no  
16 facts alleged showing that the President has taken any actions that  
17 violate the Fourth Amendment.

18 **6. Claim Two Fails to State a Claim.**

19 Claim Two alleges violations of the First Amendment's Free  
20 Exercise Clause. The complaint contains no facts suggesting that the  
21 President has taken any actions that intrude on plaintiffs' ability to  
22 practice their religion. Moreover, courts that have examined whether  
23 vaccination laws violate the Free Exercise Clause have rejected the  
24 argument. *See, e.g., Phillips v. City of New York*, 775 F.3d 538, 543  
25 (2d Cir. 2015) ("[W]e agree with the Fourth Circuit . . . that  
26 mandatory vaccination as a condition for admission to school does not  
27 violate the Free Exercise Clause." (citing *Workman v. Mingo County Bd.*  
28 *of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011))). Here, the only

1 federal action alleged is the promulgation of non-mandatory  
2 recommended vaccination schedules and approval of vaccines for use in  
3 the United States. If mandatory vaccination laws do not violate the  
4 Free Exercise Clause, then the limited federal actions alleged in the  
5 complaint cannot possibly violate it.

6 **CONCLUSION**

7 The governing complaint fails to allege any facts showing a case  
8 or controversy involving the President of the United States. It  
9 raises non-justiciable political questions. And none of the claims it  
10 asserts are viable. The complaint therefore must be dismissed without  
11 leave to amend.

12 Respectfully submitted,

13 Dated: February 10, 2021

McGREGOR W. SCOTT  
United States Attorney

15 By: /s/ Philip A. Scarborough  
16 PHILIP A. SCARBOROUGH  
Assistant United States Attorney

17 Attorneys for President Joseph  
18 R. Biden, Jr.