

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
 DEFENDANT'S OPPOSITION TO MOTION FOR
 PRELIMINARY INJUNCTION
 DATE: February 22, 2021
 TIME: 1:30 p.m.
 JUDGE: Hon. William B. Shubb
 COURT: Courtroom 5

1 Defendant Joseph R. Biden, Jr., sued in his official capacity as
2 the President of the United States, respectfully submits this
3 opposition to plaintiffs' motion for a preliminary injunction (ECF
4 16). The motion must be denied because plaintiffs have failed to
5 establish the existence of an actual case or controversy with respect
6 to President Biden. This Court therefore lacks jurisdiction, and the
7 plaintiffs cannot demonstrate that they are likely to prevail on the
8 merits. Nor have plaintiffs satisfied the remaining factors that must
9 be met before preliminary injunctive relief is issued.

10 BACKGROUND

11 Plaintiffs consist of a group of individuals who oppose vaccines.
12 See, e.g., ECF 21 ¶¶ 36-42. They filed their original complaint in
13 December 2020, naming then-President Donald Trump as the sole
14 defendant in his official capacity. By operation of law, see Fed. R.
15 Civ. P. 25(d), President Biden was substituted as the sole defendant
16 when he became President. See ECF 27.

17 Plaintiffs filed a motion for preliminary injunction on December
18 29, 2020, setting the motion to be heard on February 22, 2021. See
19 ECF 16. They filed a first amended complaint ("FAC") on January 25,
20 2021. ECF 21. That same date, they also filed an amended notice for
21 the preliminary injunction hearing, which does not appear to differ in
22 any significant way from their original notice of motion. Compare ECF
23 16, with ECF 22.

24 On February 1, 2021, the Court held a status conference and set a
25 briefing schedule for the preliminary injunction motion and the
26 defendant's motion to dismiss. In accordance with that schedule, on
27 February 10, 2021, the defendant filed a motion to dismiss the FAC,
28

1 which will be heard on the same date as plaintiffs' request for a
2 preliminary injunction. See ECF 28.¹

3 A detailed description of the FAC is contained in defendant's
4 motion to dismiss. See ECF 28-1 at 4-6. To avoid duplication,
5 defendant refers the Court to that background. See *id.*

6 LEGAL STANDARDS

7 "A preliminary injunction is an extraordinary remedy never
8 awarded as of right." *Winter v. Natural Resources Defense Council,*
9 *Inc.*, 555 U.S. 7, 24 (2008). "[T]he moving party has the burden of
10 proving the propriety of such a remedy by clear and convincing
11 evidence." *Jameson Beach Property Owners Ass'n v. United States*, No.
12 2:13-cv-01025-MCE-AC, 2014 WL 4377905, at *3 (E.D. Cal. Sep. 4, 2014).
13 A party seeking a preliminary injunction "must establish that he is
14 likely to succeed on the merits, that he is likely to suffer
15 irreparable harm in the absence of preliminary relief, that the
16 balance of equities tips in his favor, and that an injunction is in
17 the public interest." *Winter*, 555 U.S. at 21; see also *Flexible*
18 *Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 997 (9th
19 Cir. 2011) ("[P]laintiffs must satisfy the four-factor [*Winter*] test
20 in order to obtain equitable injunctive relief, even if that relief is
21 preliminary."). When the government is a party to an injunctive
22 action, analysis of the public interest and balance of equities
23

24 ¹ Plaintiffs have also filed a request for judicial notice,
25 attaching some 474 exhibits. See ECF 4 through ECF 15. Because
26 plaintiffs have failed to identify any conduct by the President that
27 has caused any injury to plaintiffs, the Court need not address
28 plaintiffs' request for judicial notice. Nonetheless,
contemporaneously with this opposition, defendant is filing objections
to plaintiffs' evidence submitted in support of the motion for
preliminary injunction, including the evidence that is the subject of
the request for judicial notice.

1 factors merges. See *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073,
2 1092 (9th Cir. 2014). The Court must “balance the competing claims of
3 injury” and “consider the effect on each party of the granting or
4 withholding of the requested relief.” *Winter*, 555 U.S. at 24 (quoting
5 *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). The
6 public interest may preclude an injunction even if the other
7 requirements are satisfied. *Id.*

8 As discussed below, this Court cannot issue a preliminary
9 injunction because it lacks jurisdiction over plaintiffs’ claims.
10 Moreover, plaintiffs cannot establish that they satisfy any of the
11 other elements necessary to obtain preliminary relief.

12 ARGUMENT

13 A. Plaintiffs Are Not Likely to Succeed on the Merits.

14 Plaintiffs must demonstrate a likelihood of success on the merits
15 before preliminary relief can be granted. *Winter*, 555 U.S. at 21.
16 They cannot do so here for several reasons.

17 1. Plaintiffs Lack Standing to Sue the President.

18 First, plaintiffs have failed to show that any of the conduct or
19 harms they allege is traceable in any way to the President. They
20 therefore lack standing to pursue any claims against him. The
21 Constitution limits federal court jurisdiction to cases and
22 controversies. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-
23 60 (1992). To establish standing, each party must demonstrate that it
24 has suffered an injury in fact, causation, and a likelihood that a
25 favorable decision will redress the injury. See *id.*

26 As explained in detail in the defendant’s memorandum in support
27 of its motion to dismiss, the FAC fails to allege any action taken by
28 the President causing any legally cognizable injury to the plaintiffs.

1 See ECF 28-1 at 7-11. Nor is it likely that a favorable decision
2 against the President would redress their claimed injuries. *See id.*
3 at 11-14. To avoid repetition, defendant incorporates those arguments
4 here by reference.

5 The closest plaintiffs come to pleading an injury in fact are the
6 allegations that some of them are prevented from sending their
7 children to schools in California because California state law
8 requires school children to be vaccinated, which plaintiffs cannot do
9 because of their religious objections to vaccines. *See* ECF 21
10 ¶¶ 40(G), 40(H), 41(G), 41(H), 42(G), 42(H), 42(I). In addition, one
11 of the plaintiffs alleges that an unnamed doctor threatened to call
12 Arizona Child Protective Services because of her refusal to vaccinate
13 one of her children, and that the North Carolina Child Protective
14 Services conducted a visit because she had not vaccinated her
15 children. *See id.* ¶¶ 42(H) - (K).

16 Even assuming these actions occurred, there are no facts
17 connecting these allegations in any way to the President of the United
18 States. The proper suit for plaintiffs to bring is one against the
19 entities or individuals that enforce state vaccination laws or the
20 child protective services officials who conducted the allegedly
21 unconstitutional visits.

22 Plaintiffs' preliminary injunction motion makes clear that their
23 real dispute is with state and local officials, not with the
24 President. For example, they object that their "wholesome children"
25 are "not allowed to congregate for Christian fellowship at Christian
26 school because *California politicians*" passed laws conditioning school
27 attendance on mandatory vaccination. ECF 16-1 at 21 (emphasis added).
28

1 They fail to explain how issuing a preliminary injunction against the
2 President would have any legal effect on a California state law.

3 The evidence plaintiffs submitted with their motion similarly
4 shows that whatever harms plaintiffs suffer come from the hands of
5 third parties other than the President. For example, Letrinh Hoang,
6 D.O., asserts that the irreparable harm non-vaccinated individuals
7 suffer is being "kicked out of other medical practices for not
8 choosing vaccination, and children kicked out of school for not
9 vaccinating." ECF 17 ¶ 18. Rachel West, D.O., makes similar
10 assertions. ECF 16-6 (declaration of Rachel West, D.O., discussing
11 "conventional [medical] practice" who "remove[]" patients "due to
12 their choice to forego vaccines"). So does Douglas Hulstedt, M.D.
13 ECF 16-4 ¶ 58 (declaration of Douglas Hulstedt, M.D., observing that
14 his patients have been denied education, medical care from other
15 doctors, and have experienced "bogus complaints to child protective
16 services"). Tina Kimmel, Ph.D., relates her experience working at a
17 California state government department in the 1990s with respect to
18 that state's "personal belief exemption" from vaccine laws, and
19 subsequent California state bills concerning state vaccination
20 requirements. See ECF 16-3 ¶¶ 30-32. And Rachel West goes on to
21 relate her conversation with a California state senator who co-
22 sponsored and voted for a bill relating to California's school
23 vaccination requirements. See ECF 16-6 ¶¶ 39-40. Notably absent from
24 any of these declarations is evidence that the President has done any
25 of the things plaintiffs and their witnesses find objectionable or
26 caused any of the alleged harm.

27 Plaintiffs' proposed injunctions likewise confirm their lack of
28 standing to sue the President. The President is the sole defendant in

1 this action, but the proposed injunctions would apply broadly to "any
2 laws, regulations, or policies" promulgated by "any branch of
3 government or any agency thereof, whether federal, state, county,
4 city, or otherwise." See, e.g., ECF 16-9 at 2-3. Plaintiffs cite no
5 authority, because there is none, for the proposition that a court can
6 declare the laws of every state, county, and city to be
7 unconstitutional by bringing a lawsuit against the federal executive.
8 Nor does the FAC identify any actual federal laws, regulations, or
9 policies that plaintiffs seek to overturn.

10 Plaintiffs lack standing for the additional reason that the
11 relief they ultimately seek - a broad national scientific study
12 concerning the effects of vaccines followed by mandatory "signed
13 informed consent" documents as a precondition to anyone in the country
14 receiving any vaccine, see ECF 21 ¶ 172(E) - is not the type of relief
15 that a court can order. On this point, the Ninth Circuit's decision
16 in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), is
17 dispositive.

18 In that case, the plaintiffs attempted to use the judicial system
19 to obtain a broad injunction requiring the executive branch to do
20 something about climate change. See *id.* at 1164. Addressing the
21 redressability prong of standing, the court noted that plaintiffs
22 sought "an injunction requiring the government not only to cease
23 permitting, authorizing, and subsidizing fossil fuel use, but also to
24 prepare a plan subject to judicial approval to draw down harmful
25 emissions." *Id.* at 1170. The court rejected plaintiffs' argument
26 that it was permissible for a court to issue an injunction so as "to
27 get the ball rolling by simply ordering the promulgation of a plan,"
28 and then leaving the political branches to determine the best manner

1 of implementing it. *See id.* at 1172-74. Instead, the court held that
2 the requested relief - a broad injunction directing the executive to
3 do *something* to address climate change - lacked discernible
4 constitutional and legal standards. *See id.* (citing *Rucho v. Common*
5 *Cause*, 139 S. Ct. 2484, 2508 (2019)). Granting the injunction "would
6 inject 'the unelected and politically unaccountable branch of the
7 Federal Government [into] assuming such an extraordinary and
8 unprecedented role.'" *Id.* at 1173 (quoting *Rucho*, 139 S. Ct. at
9 2507).

10 The analysis is identical here. Congress has legislated
11 extensively concerning vaccine policy, including by establishing a
12 national no-fault liability system for vaccine-related injuries. *See*
13 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. Pub. L. No. 116-260, Division M (2020). To
16 inject the judicial system into the policy question of how best to
17 encourage public health with (or without) vaccines "would necessarily
18 require a host of complex policy decisions entrusted, for better or
19 worse, to the wisdom and discretion of the executive and legislative
20 branches." *Juliana*, 947 F.3d at 1171. This is so even if the request
21 is simply to order the Executive to do something to stop the perceived
22 discrimination plaintiffs feel, because broad injunctions like that
23 "necessarily . . . entail a broad range of policymaking." *Id.* at
24 1172.

25 Although the pet policy issue plaintiffs pursue in this case
26 differs from the one pursued in *Juliana*, the relief sought both there
27 and here is not within the power of an Article III court to grant.
28 *See id.* at 1171.

1 **2. The Requested Relief Presents Political Questions.**

2 Relatedly, the plaintiffs' requested relief presents non-
3 justiciable political questions. Defendant refers the Court to, and
4 incorporates by reference, the argument on this point set forth in the
5 memorandum in support of the motion to dismiss. See ECF 28-1 at 14-
6 16.

7 The political nature of the relief plaintiffs seek is made clear
8 in plaintiffs three forms of proposed injunctions. All three purport
9 to enjoin discrimination on the basis of vaccination status. See ECF
10 16-8 at 4; ECF 16-9 at 3; ECF 16-10 at 2. But none of them elucidate
11 any legal justification or standards for how the President could
12 possibly interfere with the enforcement of state and local vaccine
13 laws. The first proposed injunction specifically relies on a
14 "national security" rationale. See ECF 16-8 at 4. Issues of national
15 security virtually always present political questions. See, e.g., *El-*
16 *Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir.
17 2010) ("We have consistently held . . . that courts are not a forum
18 for reconsidering the wisdom of discretionary decisions made by the
19 political branches in the realm of . . . national security."). That
20 first proposed injunction also would require the President to
21 "instruct the United States Attorney General Office . . . to prosecute
22 violations of this Order by persons and institutions engaging in the
23 unlawful discrimination and prejudicial segregation of an individual
24 based upon their vaccination status." ECF 16-8 at 4-5. It is not at
25 all clear what federal crimes any such actions implicate, but setting
26 that issue aside, federal prosecutorial priorities and prosecutorial
27 discretion are clearly political prerogatives of the Executive Branch.

1 Entirely separate from plaintiffs lack of standing, the Court
2 lacks jurisdiction over this action because it raises non-justiciable
3 political questions.

4 **3. Plaintiffs' Claims Are Meritless.**

5 Finally, plaintiffs are not likely to succeed on the merits of
6 their claims because each claim is defective. Defendant incorporates
7 by reference the arguments raised in the motion to dismiss. See ECF
8 28-1 at 16-20.

9 **B. Plaintiffs Have Not Shown Irreparable Harm.**

10 A court cannot grant preliminary relief unless it first finds
11 that there is irreparable harm to the plaintiffs. *Winter*, 555 U.S. at
12 20, 22-24. A "long delay before seeking a preliminary injunction
13 implies a lack of urgency and irreparable harm." *Oakland Tribune,*
14 *Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

15 For the reasons already explained, the plaintiffs are not
16 suffering any irreparable harm at the hands of the President.
17 Plaintiffs acknowledge there is no mandatory federal vaccination
18 requirement. See ECF 21 ¶ 52(A). The President has no role in
19 enforcing state and local vaccination requirements, in deciding what
20 homes the North Carolina Child Protective Services visits, in deciding
21 what patients individual doctors are willing to serve, or in deciding
22 whether individual students are allowed to attend school or not.
23 Plaintiffs have not alleged otherwise.

24 Plaintiffs may have generalized grievances against the use of
25 vaccines as a matter of public policy, but those types of grievances
26 do not confer standing to sue, much less demonstrate the irreparable
27 harm required for a preliminary injunction. See, e.g., *Hollingsworth*
28 *v. Perry*, 570 U.S. 693, 706 (2013) ("We have repeatedly held that such

1 a 'generalized grievance,' no matter how sincere, is insufficient to
2 confer standing."); *id.* at 707 ("Article III standing is not to be
3 placed in the hands of concerned bystanders, who will use it simply as
4 a vehicle for the vindication of value interests." (internal
5 quotations and citations omitted)); *Lujan*, 504 at 573-74 ("We have
6 consistently held that a plaintiff raising only a generally available
7 grievance about government - claiming only harm to his and every
8 citizen's interest in proper application of the Constitution and laws,
9 and seeking relief that no more directly and tangibly benefits him
10 than it does the public at large - does not state an Article III case
11 or controversy.").

12 Nor is there any evidence showing that plaintiffs cannot, if they
13 so wish, conduct the national study that they propose. Indeed, they
14 already purport to have conducted a preliminary survey, without any
15 need for involvement from the Court or the President. Nothing in the
16 status quo prevents them from simply proceeding with their study.

17 In addition, plaintiffs' delay in seeking preliminary relief
18 belies their claims that they are suffering irreparable harm.
19 Vaccines have been around for many decades, but this lawsuit was not
20 filed until December 2020. See ECF 1. Even then, plaintiffs waited
21 several weeks before filing the motion for preliminary relief and
22 noticed it for hearing nearly two months after they filed it. They
23 did not request a temporary restraining order, or even ask for the
24 motion to be briefed on a normal 28-day schedule. During that very
25 time, medical providers throughout the country were busily vaccinating
26 millions of people with the new COVID-19 vaccines. If the harm
27 plaintiffs sought to prevent was indeed irreparable, they would have
28

1 brought this suit many years ago, and would have acted with more
2 diligence after bringing it.

3 **C. The Balance of Equities and the Public Interest Require**
4 **Denying the Requested Injunction.**

5 When the government is a party to an injunctive action, analysis
6 of the public interest and balance of equities factors merges. See
7 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).
8 These factors require denying preliminary relief here.

9 Although plaintiffs' arguments concerning vaccines are broader
10 than just the COVID-19 vaccine, the legislated response to the current
11 national health pandemic demonstrates that the political branches have
12 already weighed in on the necessity for vaccines to protect public
13 health. Congress has appropriated tens of billions of dollars for the
14 development and distribution of a COVID-19 vaccine. See, e.g., Pub.
15 L. No. 116-260, Division M (2020). Other federal programs established
16 by the political branches likewise encourage vaccination to promote
17 public health. See, e.g., Vaccines for Children Program (VFC),
18 available at <https://www.cdc.gov/vaccines/programs/vfc/index.html>
19 (last accessed Feb. 13, 2021) ("The Vaccines For Children (VFC)
20 program is a federally funded program that provides vaccines at no
21 cost to children who might not otherwise be vaccinated because of
22 inability to pay."). Such programs indicate legislative judgments
23 that vaccines promote public health. And respected private national
24 medical organizations, such as the American Academy of Pediatrics
25 likewise encourage vaccination. See American Academy of Pediatrics,
26 Immunizations, Immunization Schedules, available at
27 [https://www.aap.org/en-us/advocacy-and-policy/aap-health-](https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/immunizations/Pages/Immunization-Schedule.aspx)
28 [initiatives/immunizations/Pages/Immunization-Schedule.aspx](https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/immunizations/Pages/Immunization-Schedule.aspx) (last

1 accessed Feb. 14, 2021). Any injunctive relief that this Court issues
2 would run counter to the clear legislative judgments concerning how
3 best to promote public health reflected in these laws. The public
4 interest, therefore, does not favor granting injunctive relief.

5 In contrast, plaintiffs have failed to provide any evidence that
6 they are being forced by federal officials to be vaccinated or that
7 they are being prevented from attending school or suffering any other
8 harm because of any federal laws. When weighing the Congressional
9 judgment that vaccination promotes public health against the
10 plaintiffs' interests in not being vaccinated, the balance of equities
11 weighs overwhelmingly against plaintiffs' requested injunction.
12 Plaintiffs can continue to refuse vaccinations and proceed with their
13 proposed scientific study without the need for any injunction.

14 **CONCLUSION**

15 Plaintiffs have failed to show a case or controversy against the
16 President. They may feel strongly about whether vaccines are a useful
17 tool for managing public health, but the proper forum for them to
18 pursue that agenda is in the legislative arena, not in this Court.
19 The motion for preliminary injunction should be denied.

20 Respectfully submitted,

21 Dated: February 15, 2021

McGREGOR W. SCOTT
United States Attorney

23 By: /s/ Philip A. Scarborough

24 PHILIP A. SCARBOROUGH
Assistant United States
25 Attorney

26 Attorneys for President Joseph
R. Biden, Jr.