

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

UNIFYSCC, et al.,  
Plaintiffs,  
v.  
SARA H. CODY, et al.,  
Defendants.

Case No. 22-cv-01019-BLF

**ORDER GRANTING IN PART AND  
DENYING IN PART CLASS  
CERTIFICATION**

[Re: ECF No. 81, 86]

Before the Court is Plaintiffs UnifySCC, Tom Davis, Maria Ramirez, and Elizabeth Baluyut’s Motion for Class Certification. ECF No. 81 (“Mot.”); ECF No. 86 (“Amended Notice”). Defendants Sara Cody, James Williams, Jeffrey Smith, and Santa Clara County<sup>1</sup> oppose the motion. ECF No. 105 (“Opp.”). Plaintiffs filed a reply in support of the motion. ECF No. 114. The Court heard a hearing on the motion on December 20, 2023. ECF No. 119.

For the reasons discussed below, the Court GRANTS IN PART and DENIES IN PART the motion and will certify a class only with respect to liability issues.

**I. BACKGROUND**

Beginning in March 2020, COVID-19 began to spread rapidly throughout the United States. ECF No. 95 (“Rudman Decl.”) ¶ 7. COVID-19 proved to be highly contagious and deadly, claiming the lives of over 1 million Americans in just over two years. *See id.*

On August 5, 2021, “based on the strong recommendation of the Health Officer

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<sup>1</sup> The Court will refer to the Defendants collectively as the “County” throughout this Order.

1 [Defendant County Health Officer Dr. Sara Cody], to stem the “significant rise of COVID-19  
2 cases and hospitalizations among the unvaccinated due to the Delta variant,” and “[t]o protect  
3 County personnel, the community members with whom County personnel interact, and all  
4 residents of the County,” Defendant County Executive Jeffrey Smith and Defendant County  
5 Counsel James Williams issued a policy regarding COVID-19 vaccinations. ECF No. 81-6 (“Aug.  
6 5 Mem.”) at 1. The Policy had two parts: (1) a COVID-19 vaccine mandate, with limited  
7 exemptions; and (2) an accommodations framework for County personnel who received  
8 exemptions to the mandate.

9 **A. Vaccine Mandate**

10 First, the Policy mandated that all County personnel (including employees, interns,  
11 volunteers, and certain types of contractors) be fully vaccinated and boosted against COVID-19  
12 (the “Mandate”). Aug. 5 Mem. at 1. County personnel had to become at least partially vaccinated  
13 or submit a request for exemption by August 20, 2021, and become fully vaccinated by September  
14 30, 2021. *Id.* at 2. The Mandate contained three “limited exemptions” that allowed County  
15 employees to request an exemption and “a reasonable accommodation to the vaccination  
16 requirement” if they had:

- 17 • “a contraindication recognized by the U.S. Centers for Disease Control and Prevention  
18 (CDC) or by the vaccine’s manufacturer to *every* approved COVID-19 vaccine”—i.e., “a  
19 condition that makes vaccination inadvisable” (the “medical exemption”);
- 20 • “a disability” that requires a “reasonable accommodation” (the “disability exemption”); or
- 21 • an “[o]bject[i]on to COVID-19 vaccination based on their sincerely-held religious belief,  
22 practice, or observance” (the “religious exemption”).

23 *Id.* at 3. Employees seeking exemptions were instructed to contact their department head to obtain  
24 a copy of one of two forms based on the type of exemption they were seeking: (1) a “Medical  
25 Exemption and/or Disability Accommodation Request Form,” or (2) a “Religious Accommodation  
26 Request Form.” *Id.* The exemption request forms were submitted to the County’s Equal  
27 Opportunity Division, which then informed employees and their departments if the exemptions  
28 were approved or denied. *Id.*

1 As to the requests for religious exemptions, the County exercised minimal discretion in  
2 determining whether to grant the requests. ECF No. 101 (“Doyle Decl.”) ¶ 6. The County  
3 considered only whether the request “articulated a claimed religious belief on the face of the  
4 exemption request form,” rather than some other belief, “such as a political objection or personal  
5 non-religious belief that vaccines are dangerous.” *Id.*

6 **B. Accommodations for Exempt Employees**

7 Second, the Policy provided employees granted exemptions from the Mandate different  
8 accommodations based on a tiered system (“Risk Tier System”). Based on guidance from the  
9 County Department of Public Health, each County department designated a position occupied by  
10 an employee seeking an exemption into one of three tiers based on the level of COVID-19  
11 transmission risk presented by that position. ECF No. 81-7 (“Gondiero Decl. Ex. F”) at 2.  
12 Positions were sorted into lower-, intermediate-, or high-risk tiers. *Id.* To determine the risk level  
13 of a position, departments considered factors such as the quantity and nature of contact the  
14 employee had with others; the risk posed to vulnerable populations that the County served; the risk  
15 posed to persons at serious risk of illness or death from COVID-19; the risk of a COVID-19  
16 outbreak in the job setting; and the essential job functions that position entailed with or without  
17 accommodations. *Id.* This analysis also considered where the employee worked. *Id.* For  
18 example, “employees who work in office settings and have minimal contact with the public are  
19 generally determined to be in lower-risk roles,” while “[e]mployees who work in health care  
20 settings where they have contact with patients, employees who work with young children, and  
21 employees who work in other particularly high-risk sites (shelters, custodial facilities, etc.) are in  
22 high-risk roles.” *Id.*

23 The risk tier determined what accommodations the County offered to employees. Exempt  
24 employees in lower-risk roles were permitted to wear a surgical mask and receive a COVID-19  
25 test each week in lieu of vaccination. Gondiero Decl. Ex. F at 2. Exempt employees in  
26 intermediate-risk roles were permitted to wear an N95 mask and obtain two COVID-19 tests per  
27 week in lieu of vaccination. *Id.* “[B]ased on the significant health and safety risks to and posed  
28 by unvaccinated employees in high-risk roles,” the County determined that it could not safely

1 allow exempt employees to remain in high-risk roles. *Id.* The County thus offered those  
2 employees leave (including option of using available leave banks) “during which the County  
3 would assist [the employee] in seeking reassignment or transfer to a lower- or intermediate-risk  
4 position.” *Id.*; Doyle Decl. ¶ 8; *see also* ECF No. 81-22 (“Gondiero Decl. Ex. U”) at 4.

5 Beginning on November 1, 2021, exempt employees in high-risk roles were placed on  
6 administrative leave while the County worked with them to determine if reassignments or transfers  
7 were possible. Gondiero Decl. Ex. U at 3–4. The County’s Equal Opportunity Division and  
8 Employee Services Agency were enlisted to help employees in this process. *Id.* at 4; ECF No. 81-  
9 14 (“Gondiero Decl. Ex. M”). Exempt employees with disability or medical exemptions were told  
10 that they may be entitled to “priority consideration” for vacant positions consistent with the  
11 Americans with Disabilities Act and the California Fair Employment and Housing Act. Gondiero  
12 Decl. Ex. U at 4; ECF No. 80-2 (“Gondiero Decl. Ex. K”) at 126:2–7.

13 As of April 15, 2022, 138 exempt employees in high-risk roles remained on leave, about  
14 30 of whom were on leave for reasons unrelated to their vaccination status (such as family,  
15 medical, or other personal leave). Doyle Decl. ¶ 7 & Ex. 2. In September 2022, the County  
16 amended the Policy to permit unvaccinated individuals in high-risk roles to work if they had an  
17 approved exemption and successfully completed certain safety measures. *See* Doyle Decl. ¶ 16 &  
18 Ex. 10.

### 19 C. Procedural History

20 On February 18, 2022, Plaintiffs UnifySCC, Tom Davis, and Maria Ramirez filed their  
21 initial complaint in this case. ECF No. 1 (“Compl.”) ¶¶ 8–10. The initial complaint asserted four  
22 claims: (1) a claim under 42 U.S.C. § 1983 for violation of the Free Exercise Clause of the First  
23 Amendment, Compl. ¶¶ 47–54; (2) violation of California’s Fair Employment and Housing Act  
24 (“FEHA”), Cal. Gov’t Code § 12940, Compl. ¶¶ 55–60; (3) a § 1983 claim for violation of the  
25 Equal Protection Clause of the Fourteenth Amendment, Compl. ¶¶ 61–67; and (4) a § 1983 claim  
26 pursuant to *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), Compl. ¶¶ 68–71.

27 On March 3, 2022, almost two weeks after filing the Complaint, Plaintiffs moved for a  
28 temporary restraining order. ECF No. 22. The Court denied Plaintiffs’ motion for a temporary

1 restraining order on the grounds that they waited “two days short of seven months after the  
2 issuance of the [P]olicy” to seek the TRO. ECF No. 25 at 3. On April 4, 2022, Plaintiffs filed a  
3 motion for a preliminary injunction. ECF No. 27. The Court granted in part the motion and  
4 enjoined the County’s accommodations framework to the extent that it gave priority consideration  
5 for vacant County positions based on the type of exemption from the County’s vaccine mandate  
6 that the employee received. ECF No. 44 at 23. The Court denied the motion with respect to the  
7 Mandate. *Id.* After the Court’s order, the Chief Operating Officer of the County directed staff  
8 facilitating accommodations for exempt employees that they should not prioritize any employee  
9 seeking alternative placement on the basis of the employee’s exemption. Doyle Decl. ¶ 15; ECF  
10 No. 81-15 (“Gondiero Decl. Ex. N”).

11 On August 23, 2022, Plaintiffs filed an amended complaint. ECF No. 55 (“FAC”). The  
12 amended complaint added Baluyut as a named plaintiff. *Id.* ¶ 11. It also added two additional  
13 claims: (1) a claim under 42 U.S.C. § 1983 for violation of the Establishment Clause of the First  
14 Amendment, FAC ¶¶ 79–85; and (2) a claim under Title VII of the Civil Rights Act of 1964, FAC  
15 ¶¶ 90–93. Finally, the amended complaint added class allegations. FAC ¶¶ 65–62. Plaintiffs now  
16 move to certify a class, defined as follows:

17 All individuals who: 1) work or worked for the County and/or [] were  
18 subject to its vaccine policies and orders, including the Risk Tier  
19 System; 2) were forced by the County to choose between taking the  
20 vaccine to maintain their jobs and/or their employment-related  
21 benefits or being placed on unpaid leave; 3) were [] classified as  
22 working in high risk jobs pursuant to the County’s Risk Tier System;  
23 and 4) received [] a religious exemption from the County (the  
24 “Class”) between August 5, 2021 and September 27, 2022 (the “Class  
25 Period”).

26 Mot. at 7 (alterations in original).<sup>2</sup>

27 <sup>2</sup> The Court observes that Plaintiffs have defined the Class differently between their First  
28 Amended Complaint, Notices of Motion, and Motion. *Compare* FAC ¶ 56, *with* Mot. at Notice,  
and ECF No. 86, and Mot. at 7. Because the Policy was amended in September 2022 to permit  
exempt employees in high-risk roles to return to work, after Plaintiffs filed the First Amended  
Complaint, it appears that Plaintiffs have chosen to modify the Class definition consistent with  
current policies.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 governs class certification. “The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of [Rule] 23.” *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1066 (9th Cir. 2021) (internal quotation marks and citation omitted). “As a threshold matter, a class must first meet the four requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.” *Id.*

“In addition to Rule 23(a)’s requirements, the class must meet the requirements of at least one of the three different types of classes set forth in Rule 23(b).” *Stromberg*, 14 F.4th at 1066 (internal quotation marks and citation omitted); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022). “To qualify for the third category, Rule 23(b)(3), the district court must find that ‘the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Olean*, 31 F.4th at 664 (quoting Rule 23(b)(3)).

“Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and 23(b)(3) have been satisfied.” *Olean*, 31 F.4th at 664 (internal quotation marks and citation omitted). “[P]laintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence.” *Id.* at 665. “In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence.” *Id.*

## III. DISCUSSION

### A. Rule 23(a) Requirements

Rule 23(a) requires a party seeking class certification to meet four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See Stromberg*, 14 F.4th at 1066. Plaintiffs argue that they meet each requirement of Rule 23(a). *See* Mot. 7–13. The County has not raised any arguments challenging Plaintiffs’ showing under the numerosity, typicality, and adequacy requirements. Instead, the County’s argument is focused on

1 the commonality requirement. The Court considers each of the requirements of Rule 23(a) in turn.

2 **i. Numerosity**

3 Rule 23(a)(1) requires that the size of the proposed class be “so numerous that joinder of  
4 all the class members is impracticable.” Fed. R. Civ. P. 23(a)(1). “No exact numerical cut-off is  
5 required; rather, the specific facts of each case must be considered.” *Litty v. Merrill Lynch & Co.*,  
6 No. CV 14-0425 PA (PJWx), 2015 WL 4698475, at \*3 (C.D. Cal. Apr. 27, 2015). “[N]umerosity  
7 is presumed where the plaintiff class contains forty or more members.” *Id.*

8 Plaintiffs argue that the Class consists of at least 463 individuals and point to evidence  
9 from a County spreadsheet that identifies individuals in high-risk settings to whom the County  
10 granted religious exemptions. Mot at 8–9; *see also* ECF No. 81-16 (“Gondiero Decl. Ex. O”).  
11 The County has not argued against numerosity. The Court finds that Plaintiffs’ evidence and the  
12 County’s non-opposition support that the Class easily meets the numerosity requirement.

13 **ii. Commonality**

14 Rule 23(a)(2) requires the plaintiff to show that “there are questions of law or fact common  
15 to the class.” Fed. R. Civ. P. 23(a)(2). The requirement cannot be satisfied by any common  
16 question, however. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). “Commonality  
17 requires the plaintiff to demonstrate that the class members have suffered the same injury.” *Id.* at  
18 349–50 (internal quotation marks and citation omitted). The claim of common injury must depend  
19 on a common contention “of such a nature that it is capable of classwide resolution – which means  
20 that determination of its truth or falsity will resolve an issue that is central to the validity of each  
21 one of the claims in one stroke.” *Id.* at 350.

22 Plaintiffs argue that the County’s policies and practices, including the Mandate, the Risk  
23 Tier System, and accommodations framework, applied to all Class members in the same way. *See*  
24 Mot. at 10. Similarly, Plaintiffs argue that common questions of law or fact include:

- 25 1. Whether Defendants violated Plaintiffs’ right to free exercise and  
26 equal protection of the law by prioritizing medical exemptions  
over religious exemptions in high-risk settings;
- 27 2. Whether Defendants’ Risk Tier System violated the Free Exercise  
28 Clause and Equal Protection Clause because it relegated Plaintiffs  
and the Class members to unpaid leave but allowed some  
unvaccinated or non-boosted employees to continue to work;



3. Whether the County's religious exemption and/or accommodation procedure was either non-neutral or not generally applicable such that it constitutes an individualized assessment under *Fulton*, 141 S. Ct. 1868, and is thereby subject to strict scrutiny;
4. Whether Defendants provided Individual Plaintiffs and the Class members with reasonable accommodation as required under FEHA and Title VII; and
5. Whether Defendants violated the Establishment Clause by demonstrating hostility towards religion.

*Id.* at 9–10.

The County argues that these questions cannot generate common answers. On the first question, the County argues that different class members will be in different positions based on whether they actually sought job transfers or actually received a job transfer or modification. *Opp.* at 10. On the second question, the County argues that the constitutional challenge to the Risk Tier System requires individualized inquiries into Class members' classification to see if they were misclassified and that Plaintiffs cannot rely on evidence of some misclassified individuals to prove class-wide injury. *Id.* at 11. The County also argues that two examples of exempt employees in high-risk roles who were allowed to work despite the Mandate are insufficient evidence that the Risk Tier System is irrational. *Id.* at 12. On the third question, the County argues that whether its policies are subject to strict scrutiny is a preliminary legal question that would not resolve any claims on a class-wide basis. *Id.* On the fourth question, the County argues that whether an accommodation is reasonable under the FEHA and Title VII is a fact-specific, individualized inquiry. *Id.* at 13. On the fifth question, the County argues that Plaintiffs' theory of how its policies violated the Establishment Clause is contrary to the evidence. *Id.* at 14.

The Court finds that Plaintiffs have sufficiently identified common questions of law or fact to meet their burden under Rule 23(a)(2). The first three of Plaintiffs' common questions concern their claims under the Free Exercise and Equal Protection Clauses. Plaintiffs' claims against the Risk Tier System and the prioritization of medical and disability exemptions are against the County's Policy—which applied to every member of the class in the same way—rather than against the County's conduct toward certain employees. *See* FAC ¶¶ 50–55, 63–71, 79–85. In arguing that Plaintiffs' common questions require individualized inquiries, the County either



1 makes merits arguments or construes Plaintiffs’ claims too narrowly. Even if the County is  
2 correct that it did not in practice treat medical and disability exemptions differently than religious  
3 exemptions and that the suggestion that some roles were misclassified as high-risk is insufficient  
4 to show that the Risk Tier System with respect to all 463 employees violated the Constitution,  
5 these arguments go to the merits of Plaintiffs’ claims rather than commonality. *See Ellis v. Costco*  
6 *Wholesale Corp.*, 657 F.3d 970, 983 n.8 (9th Cir. 2011) (noting that a court deciding whether  
7 common questions exist need not determine “whether class members could actually prevail on the  
8 merits of their claims”). Moreover, Plaintiffs’ Free Exercise and Equal Protection Claims do not  
9 require the level of individualized proof suggested by the County. For example, to determine  
10 whether the prioritization of medical and disability exemptions over religious exemptions violated  
11 the Free Exercise and Equal Protection Clauses, the finder of fact need not determine whether each  
12 Class member sought a job transfer and did not secure it because of preferential treatment. *See*  
13 *Opp.* at 10. It is sufficient that Plaintiffs are challenging a policy that adversely affected the Class.  
14 *See Stockwell*, 749 F.3d at 1116; *see also Doster v. Kendall*, 54 F.4th 398, 434–35 (6th Cir. 2022)  
15 (finding a common question where “[a] decisionmaker can answer ‘yes’ or ‘no’ to the question of  
16 whether the Air Force has followed a policy of denying religious exemptions based on its generic  
17 health and readiness justifications regardless of a service member’s circumstances.”), *cert.*  
18 *granted, judgment vacated on other grounds*, No. 23-154, 2023 WL 8531840 (U.S. Dec. 11,  
19 2023). Similarly, Plaintiffs need not show that every Class member’s role was misclassified as  
20 high-risk to show that the Risk Tier System was arbitrary or irrational and thus in violation of the  
21 Constitution. It is sufficient that the Risk Tier System affected Class members in the same way—  
22 by putting them on leave because their roles were classified as high-risk. Finally, the County is  
23 correct that whether any aspect of the Policy is subject to strict scrutiny is a preliminary legal  
24 question, but this question is answered for the same way with respect to every member of the  
25 Class and when considered with the other two common questions on Plaintiffs’ Free Exercise and  
26 Equal Protection claims, would “drive the resolution of the litigation” by resolving these claims on  
27 a class-wide basis. *Wal-Mart*, 564 U.S. at 350.

28 Plaintiffs’ fourth question concerns their FEHA and Title VII claims. In this case, every

1 member of the class received the same accommodation under the Policy—they were put on leave  
2 and offered assistance finding positions in low- or intermediate-risk roles. *See* Gondiero Decl. Ex.  
3 F at 2. The County argues that whether accommodations are reasonable is a fact-specific inquiry  
4 that requires analysis of each individual Class members’ circumstances, including roles, reaction  
5 to the Mandate, variety of accommodations provided, and the duration of leave taken. *Opp.* at 13.  
6 However, Plaintiffs’ argument is not that the County’s conduct toward individual employees is  
7 unreasonable but that the accommodation provided in the Policy is unreasonable, especially when  
8 considering alternatives such as bi-weekly testing and requiring employees to wear masks. *See*  
9 FAC ¶¶ 77, 92; 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*  
10 § 1763.1 (4th ed. 2021) (noting that a common question includes “whether there is a common  
11 unlawful policy that has injured the class as a whole”).

12 Plaintiffs’ fifth question concerns their Establishment Clause claim. Plaintiffs’ theory for  
13 their claim is that the County demonstrated hostility to religion because it had the ability to  
14 transfer or reassign employees with religious exemptions but chose not to do so. FAC ¶ 88. The  
15 County responds that this claim is unsupported by law or fact. *Opp.* at 14–15. Although the  
16 County has presented an argument that might be persuasive at summary judgment, that argument  
17 goes to the merits, rather than the commonality question. *See Ellis*, 657 F.3d at 983 n.8.

18 Given the showing discussed above and the permissive construction of Rule 23(a)(2), the  
19 Court finds that the commonality requirement has been satisfied. *See Kumandan v. Google LLC*,  
20 No. 19-CV-04286-BLF, 2023 WL 8587625, at \*8 (N.D. Cal. Dec. 11, 2023).

### 21 **iii. Typicality**

22 Rule 23(a)(3) requires that “the [legal] claims or defenses of the representative parties [be]  
23 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The purpose of this  
24 requirement is to “ensure[] that the interest of the class representative aligns with the interests of  
25 the class.” *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks  
26 and citation omitted). “The requirement is permissive, such that representative claims are typical  
27 if they are reasonably coextensive with those of absent class members; they need not be  
28 substantially identical.” *Id.* (internal quotation marks and citation omitted). However, “[a] court

1 should not certify a class if there is a danger that absent class members will suffer if their  
2 representative is preoccupied with defenses unique to it.” *Id.* (internal quotation marks and  
3 citation omitted).

4 Plaintiffs argue that their claims are typical of the Class for the same reasons that the  
5 commonality requirement is met. Mot. at 12. The County has not argued against typicality.

6 The Court finds that Plaintiffs UnifySCC, Davis, Ramirez, and Baluyut have claims for  
7 violations of the Free Exercise Clause, FEHA, Equal Protection Clause, Establishment Clause,  
8 Title VII, and *Monell* that are typical of Class members’ claims. UnifySCC is an unincorporated  
9 association of County employees in high-risk positions with religious exemptions, and thus  
10 overlaps significantly with the Class. See FAC ¶ 8. Davis, Ramirez, and Baluyut similarly are  
11 County employees that were in high-risk positions and were granted religious exemptions. See  
12 FAC ¶¶ 9–11. In light of the permissive nature of the typicality requirement and for the reasons  
13 discussed in the Court’s commonality analysis, the Court concludes that Plaintiffs have satisfied  
14 the typicality requirement. See *Wal-Mart*, 564 U.S. at 338 n.5 (“The commonality and typicality  
15 requirements of Rule 23(a) tend to merge.” (alteration omitted) (quoting *General Telephone Co. of*  
16 *Southwest v. Falcon*, 457 U.S. 147, 157 (1982))).

#### 17 **iv. Adequacy**

18 Courts generally resolve two questions in determining whether plaintiffs will adequately  
19 represent the class: “(1) do the named plaintiffs and their counsel have any conflicts of interest  
20 with other class members and (2) will the named plaintiffs and their counsel prosecute the action  
21 vigorously on behalf of the class?” *Ellis*, 657 F.3d at 985. “An absence of material conflicts of  
22 interest between the named plaintiffs and their counsel with other class members is central to  
23 adequacy and, in turn, to due process for absent members of the class.” *Rodriguez v. W. Publ’g*  
24 *Corp.*, 563 F.3d 948, 959 (9th Cir. 2009).

25 Plaintiffs argue that their interests are “entirely aligned” with that of the Class and they  
26 have retained legal counsel with considerable experience in major class actions and civil rights  
27 litigation. Mot. at 12. Baluyut, Davis, and Ramirez have also submitted declarations affirming  
28 that they are not aware of any conflicts of interest with the Class and that they will vigorously

1 represent the Class with the assistance of their counsel. *See* ECF No. 81-26 (“Baluyut Decl.”) ¶ 7;  
2 ECF No. 81-27 (“Ramirez Decl.”) ¶ 7; ECF No. 81-28 (“Davis Decl.”) ¶ 7. Counsel for Plaintiffs  
3 have also submitted their firm resumes. *See* ECF No. 81-24 (“Gondiero Decl. Ex. W”) (firm  
4 resume of Advocates for Faith & Freedom); ECF No. 81-25 (“Gondiero Decl. Ex. X”) (firm  
5 resume of Wolf Haldenstein Adler Freeman & Herz LLP). The County has not argued against  
6 adequacy.

7 The record does not reflect any conflicts of interest on the part of Plaintiffs or Plaintiffs’  
8 counsel. The Court is further satisfied that Plaintiffs and their counsel have demonstrated their  
9 ability and intention to prosecute this action vigorously on behalf of the Class. Accordingly, the  
10 Court finds the adequacy requirement is satisfied.

#### 11 **B. Rule 23(b)(3) Requirements**

12 “In addition to satisfying Rule 23(a)’s prerequisites, parties seeking class certification must  
13 show that the action is maintainable under Rule 23(b)(1), (2), or (3).” *Amchem Prod., Inc. v.*  
14 *Windsor*, 521 U.S. 591, 614 (1997). Plaintiffs’ opening brief argued for certification under Rule  
15 23(b)(1)(A) and 23(b)(3). Mot. at 13–24. However, in their reply, Plaintiffs withdrew their  
16 request for certification under Rule 23(b)(1)(A). A class may be certified under Rule 23(b)(3)  
17 only if “the court finds that the questions of law or fact common to class members predominate  
18 over any questions affecting only individual members, and that a class action is superior to other  
19 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
20 23(b)(3).

#### 21 **i. Predominance**

22 “When one or more of the central issues in the action are common to the class and can be  
23 said to predominate, the action may be considered proper under Rule 23(b)(3) even though other  
24 important matters will have to be tried separately, such as damages or some affirmative defenses  
25 peculiar to some individual class members.” *Olean*, 31 F.4th at 668 (internal quotation marks and  
26 citation omitted). The plaintiffs need not show that they are likely to succeed on the common  
27 issues in the case. *See id.* at 667. Courts typically analyze predominance on a claim-by-claim  
28 basis. *Moreno v. JCT Logistics, Inc.*, No. EDCV172489JGBKKX, 2019 WL 3858999 (C.D. Cal.

1 May 29, 2019); *see also Broomfield v. Craft Brew All., Inc.*, No. 17-CV-01027-BLF, 2018 WL  
2 4952519 (N.D. Cal. Sept. 25, 2018). “Considering whether ‘questions of law or fact common to  
3 class members predominate’ begins, of course, with the elements of the underlying cause of  
4 action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

5 As discussed in the following sections, the Court finds that common questions predominate  
6 with respect to the County’s liability for violations under the Free Exercise Clause, the FEHA, the  
7 Equal Protection Clause, Title VII, the Establishment Clause, and *Monell*. However, common  
8 questions do not predominate over the variety of individualized inquiries required to determine  
9 Class members’ damages. Accordingly, the Court will certify the Class for the resolution of the  
10 County’s liability but not for damages.

11 a. Free Exercise Claim

12 The Free Exercise Clause of the First Amendment states that “Congress shall make no law  
13 . . . prohibiting the free exercise [of religion].” U.S. Const. amend. I. “[L]aws incidentally  
14 burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so  
15 long as they are neutral and generally applicable.” *Fulton v. City of Phila., Penn.*, 141 S. Ct. 1868,  
16 1976 (2021) (citing *Employment Div. v. Smith*, 494 U.S. 872, 878–82 (1990)); *see also Church of*  
17 *the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–34 (1993)). If a rule is both neutral  
18 and generally applicable, it is subject to rational basis review in which the government action must  
19 be “rationally related to a legitimate governmental purpose.” *Stormans, Inc. v. Wiseman*, 794 F.3d  
20 1064, 1084 (9th Cir. 2015); *accord Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021). If a rule  
21 is either non-neutral or not generally applicable, then it is subject to strict scrutiny and must be  
22 “narrowly tailored” to serve a “compelling” state interest. *Kennedy v. Bremerton Sch. Dist.*, 597  
23 U.S. 507, 525 (2022) (citing *Lukumi*, 508 U.S. at 546); *Fulton*, 141 S. Ct. at 1881.

24 Plaintiffs argue that when the Court ruled on Plaintiffs’ motion for a preliminary  
25 injunction, it relied on evidence common to the class in analyzing whether Plaintiffs were likely to  
26 succeed on the merits of their Free Exercise claim. Mot. at 16–17. Similarly, Plaintiffs argue,  
27 their claims will rely on evidence common to the class, including evidence of the Policy itself,  
28 evidence of exempt employees in high-risk positions continuing to work, and evidence of County

1 employees describing their high-risk roles. *Id.* at 17–18. The County argues that Plaintiffs’ Free  
2 Exercise claim requires individualized inquiries into each Class members’ circumstances, that  
3 Plaintiffs reliance on the Court’s prior order is contrary to this District’s Local Rules, and that the  
4 Plaintiffs have failed to brief and thus cannot rely on legal theories about the efficacy of COVID-  
5 19 vaccines in their motion for class certification. *Opp.* at 17–18.

6 Whether the prioritization of certain exemptions or the Risk Tier System are non-neutral or  
7 generally applicable and whether they survive rational basis review or strict scrutiny are questions  
8 capable of resolution with generalized, class-wide proof. As the Court held above, Plaintiffs have  
9 identified three common questions regarding their Free Exercise claim: (1) Whether the County’s  
10 prioritization of medical exemptions over religious exemptions in high-risk settings violated the  
11 Free Exercise Clause; (2) Whether the Risk Tier System violated the Free Exercise Clause because  
12 it allowed some unvaccinated employees to continue to work; and (3) Whether the Policy’s  
13 religious exemption or accommodations were non-neutral or not generally applicable such that  
14 they would be subject to strict scrutiny. *Mot.* at 9–10. As discussed above, the answer to the first  
15 question can be determined with evidence of the Policy and the County’s practices with respect to  
16 prioritization of medical or disability exemptions. The answer to the second question can be  
17 determined with evidence that some roles were misclassified as high-risk and does not, as the  
18 County argues, require a showing that all 463 employees were classified as high-risk. To the  
19 extent that the County argues that Plaintiffs’ examples are insufficient evidence to prove their  
20 claim, this is a merits argument that is not dispositive of predominance. *See Olean*, 31 F.4th at  
21 667. Finally, the answer to the third question can be determined with evidence of the Policy, the  
22 accommodations framework, and the County’s practices with respect to the Policy and  
23 accommodations. The individualized inquiries to which the County points such as whether a  
24 Class member sought a job transfer, actually received a job transfer or modification, or received  
25 transfer assistance but lacked qualifications for relevant positions are all relevant to the question of  
26 whether Class members suffered damages as the result of any constitutional violation but not  
27 whether the County’s Risk Tier System or accommodations framework violated the Free Exercise  
28



1 Clause.<sup>3</sup> See *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 943 (9th Cir. 2019)  
 2 (“Damages may well vary, and may require individualized calculations. But ‘the rule is clear: the  
 3 need for individual damages calculations does not, alone, defeat class certification.”) (quoting  
 4 *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016)).

5 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
 6 question of the County’s liability under the Free Exercise Clause.

7 b. FEHA Claim

8 The FEHA makes it an unlawful employment practice “[f]or an employer, because of the  
 9 . . . religious creed . . . of any person, to refuse to hire or employ the person or . . . discharge the  
 10 person from employment . . . or to discriminate against the person in compensation or in terms,  
 11 conditions, or privileges of employment.” Cal. Gov’t Code § 12940(a). To establish a prima facie  
 12 claim of employment discrimination, a plaintiff must demonstrate that “(1) he is a member of a  
 13 protected class; (2) he was qualified for his position; (3) he experienced an adverse employment  
 14 action; and (4) similarly situated individuals outside his protected class were treated more  
 15 favorably, or other circumstances surrounding the adverse employment action give rise to an  
 16 inference of discrimination.” *Hittle v. City of Stockton, California*, 76 F.4th 877, 887 (9th Cir.  
 17 2023) (quoting *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir. 2004)).

18 The FEHA also makes it an unlawful employment practice for an employer “to  
 19 discriminate against a person . . . because of a conflict between the person’s religious belief and  
 20 observance and any employment requirement, unless the employer . . . demonstrates that it has  
 21 also explored any available reasonable alternative means of accommodating the religious belief or  
 22 observance . . . but is unable to reasonably accommodate the religious belief or observance  
 23 without undue hardship.” Cal. Gov’t Code § 12940(l).<sup>4</sup> “[A] successful section 12940(l) claim  
 24

25 <sup>3</sup> On Defendants’ other arguments, the Court finds Plaintiffs’ reference to the Court’s order on the  
 26 preliminary injunction illustrative rather than evidentiary. Moreover, although Plaintiffs did not  
 27 raise any argument about their legal theory based on the efficacy of COVID-19 vaccines in their  
 28 opening brief, the Court finds that it need not consider this legal theory, which would be common  
 to the Class, because the other common questions already predominate.

<sup>4</sup> Although Plaintiffs did not cite § 12940(l) in the First Amended Complaint, the Court reasonably  
 infers that Plaintiffs’ Second Cause of Action includes § 12940(l) based on paragraphs 74, 76, and  
 77.



1 requires that a plaintiff show (1) the employee sincerely held a religious belief; (2) the employer  
2 was aware of that belief; and (3) the belief conflicted with an employment requirement.” *Achal v.*  
3 *Gate Gourmet, Inc.*, 114 F.Supp.3d 781, 802 (N.D. Cal. 2015). “Once the employee establishes a  
4 prima facie case with sufficient evidence of the three elements, the burden shifts to the employer  
5 to establish that ‘it initiated good faith efforts to accommodate or no accommodation was possible  
6 without producing undue hardship.’” *California Fair Emp. & Hous. Com. v. Gemini Aluminum*  
7 *Corp.*, 122 Cal.App.4th 1004, 1011 (2004) (quoting *Johnson Controls, Inc. v. Fair Emp. & Hous.*  
8 *Com.*, 218 Cal.App.3d 517, 531 (1990)).

9 Plaintiffs argue that they will establish the elements of their FEHA claim using evidence  
10 common across the Class. Mot. at 18. Plaintiffs also argue that they will use common evidence to  
11 show that the County did not offer reasonable accommodations to the Class. *Id.* at 19. The  
12 County responds that Plaintiffs’ theory of an FEHA violation is demonstrably false, whether any  
13 employee was disadvantaged by preferential treatment depends on individualized inquiries, and  
14 that the FEHA requires Plaintiffs to show that each Class member exhausted their claims. Opp. at  
15 19–20.

16 The Court finds that whether the County discriminated against employees with religious  
17 exemptions in high-risk roles in violation of the FEHA is subject to general, class-wide proof.  
18 The primary dispute on Plaintiffs’ FEHA discrimination claim under § 12940(a) appears to be  
19 over whether the circumstances surrounding the Policy give rise to an inference of discrimination.  
20 This issue is subject to proof common to the class because it can be resolved with evidence of the  
21 Policy and the County’s practices regarding the Policy. Similarly, and as noted above, the  
22 question of whether the County offered reasonable accommodations under § 12940(l) can be  
23 decided on a class-wide basis because the accommodations at issue are specified in the Policy and  
24 applied to all Class members in the same way. To the extent that the County suggests that  
25 individualized inquiries predominate—including whether the employee sought a job transfer,  
26 whether the employee received a job transfer or modification, and the nature of the particular  
27 assistance that the County provided to the employee—these questions go to individual damages  
28 rather than liability under the FEHA. *See Senne*, 934 F.3d at 943.

1 The County’s other arguments are similarly unavailing. Although the County argues that  
 2 Plaintiffs’ theory of discrimination is demonstrably false because the County treated all exempt  
 3 employees the same in practice, this is a merits argument that is not appropriate at class  
 4 certification. *See Olean*, 31 F.4th at 667. To the extent that the County argues that individualized  
 5 proof that each Class member satisfied the exhaustion requirement is required, this assertion is  
 6 incorrect. *See* Cal. Gov’t Code § 12961 (noting that a complaint may be filed and investigated as  
 7 a group or class complaint); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1137 (9th Cir. 2012)  
 8 (holding that one class member’s filing of an administrative complaint is sufficient to establish  
 9 exhaustion for the class under the FEHA).

10 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
 11 question of the County’s liability under the FEHA.

12 c. Equal Protection Claim

13 The Equal Protection Clause provides that “[n]o state shall . . . deny to any person within  
 14 its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. “The Equal  
 15 Protection Clause . . . prohibits the Government from impermissibly discriminating among persons  
 16 based on religion.” *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017). Plaintiffs must  
 17 show first that an action “results in members of a certain group being treated differently from other  
 18 persons based on membership in that group.” *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir.  
 19 1999), *as amended on denial of reh’g and reh’g en banc* (Apr. 17, 1999) (quoting *United States v.*  
 20 *Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995)). “Second, if it is demonstrated that a  
 21 cognizable class is treated differently, the court must analyze under the appropriate level of  
 22 scrutiny whether the distinction made between the groups is justified.” *Id.* (quoting *Lopez-Flores*  
 23 63 F.3d at 1472).

24 Plaintiffs argue that, in a similar way as their Free Exercise claim, they will prove their  
 25 Equal Protection claim using evidence common to the class. Mot. at 20. The County responds  
 26 that Plaintiffs’ Equal Protection claim does not meet the predominance requirement for the same  
 27 reasons as Plaintiffs’ Free Exercise claim. Opp. at 20.

28 Whether the prioritization of certain exemptions or the Risk Tier System resulted in Class

1 members being treated differently than other exempt employees based on their religious beliefs  
 2 and whether the distinction survives the appropriate level of scrutiny are issues that are capable of  
 3 resolution on class-wide proof. As with Plaintiffs' Free Exercise claim, Plaintiffs have identified  
 4 common questions that can be answered using evidence of the Policy, the County's practices with  
 5 respect to prioritization of medical or disability exemptions, and evidence of roles that were  
 6 arguably misclassified as high-risk. *See Prince v. Mass.*, 321 U.S. 158, 170 (1944) (noting that an  
 7 Equal Protection claim rose and fell with a Free Exercise claim because "the one is but another  
 8 phrasing of the other").

9 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
 10 question of the County's liability under the Equal Protection Clause

11 d. Establishment Clause Claim

12 The Establishment Clause states that "Congress shall make no law respecting an  
 13 establishment of religion . . . ." U.S. Const. amend. I. The Establishment Clause requires that the  
 14 state "to be . . . neutral in its relations with groups of religious believers and non-believers."  
 15 *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). In light of the Supreme Court's  
 16 overruling of the *Lemon* test, and with it much of Establishment Clause case law, "lower courts  
 17 must now interpret the Establishment Clause by 'reference to historical practices and  
 18 understandings.'" *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 888 (9th Cir. 2022)  
 19 (quoting *Kennedy*, 597 U.S. at 535).

20 Plaintiffs argue that they will use evidence common to the Class to demonstrate that  
 21 Defendants acted with hostility toward religion. Mot. at 20. The County argues that in practice, it  
 22 treated all exempt employees in the same way and that Plaintiffs fail to cite evidence of hostility  
 23 toward religion. Opp. at 20–21.

24 The Court finds that whether the Policy or the County's practices violated the  
 25 Establishment Clause is an inquiry that can be resolved with facts common to the Class and does  
 26 not require individualized inquiries. For example, Plaintiffs point to the fact that the County  
 27 prioritized medical and disability exempt employees for job placements and the fact that after the  
 28 Court's injunction the County denied all employees automatic transfers and reassignments. The

1 County may be correct that it treated all exempt employees equally, but this is an argument that is  
2 more appropriate at summary judgment, rather than at class certification. *See Olean*, 31 F.4th at  
3 667.

4 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
5 question of the County 's liability under the Establishment Clause.

6 e. Title VII Claim

7 Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or  
8 refuse to hire or to discharge any individual, or otherwise to discriminate against any individual  
9 . . . because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). To establish a prima  
10 facie case for a failure to accommodate claim under Title VII, the plaintiff must establish that  
11 "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty;  
12 (2) he informed his employer of the belief and conflict; and (3) the employer discharged,  
13 threatened, or otherwise subjected him to an adverse employment action because of his inability to  
14 fulfill the job requirement." *Bordeaux v. Lions Gate Ent., Inc.*, No. 222CV04244SVWPLA, 2023  
15 WL 8108655, at \*8 (C.D. Cal. Nov. 21, 2023) (quoting *Berry v. Dep't of Soc. Servs.*, 447 F.3d  
16 642, 655 (9th Cir. 2006)). The burden then shifts to the defendant to show that "it initiated good  
17 faith efforts to accommodate reasonably the employee's religious practices or that it could not  
18 reasonably accommodate the employee without undue hardship." *Id.* (quoting *Berry*, 447 F.3d at  
19 655). "The analysis of a religious discrimination claim is the same under FEHA and Title VII."  
20 *U.S. Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 966 F.Supp.2d 949,  
21 961 (N.D. Cal. 2013).

22 Plaintiffs argue that, like their FEHA claim, they will use common evidence to show that  
23 the County discriminated against the Class for their religious beliefs and that the County failed to  
24 offer the Class reasonable accommodations. Mot. at 22. The County responds that individualized  
25 inquiries into the circumstances of each Class member are required to determine whether each  
26 Class member was injured by preferential treatment. Opp. at 21.

27 For the same reasons as Plaintiffs' FEHA claim, the Court finds that the common questions  
28 predominate. Whether the County discriminated against employees with religious exemptions can

1 be addressed by looking to the Policy and the County’s practices with respect to the Policy.  
2 Similarly, because the accommodations at issue are specified in the Policy and offered to all Class  
3 members, whether those accommodations were reasonable can be addressed on a class-wide basis.  
4 Again, the County points to individualized inquiries that are relevant to damages, rather than  
5 liability, and thus do not preclude a finding of predominance with respect to the County’s liability  
6 under Title VII. *See Senne*, 934 F.3d at 943.

7 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
8 question of the County’s liability under Title VII.

9 f. *Monell* Claim

10 To establish municipal liability under § 1983, plaintiffs “must show that the challenged  
11 conditions were part of a policy, custom or practice officially adopted by defendants.” *Upshaw v.*  
12 *Alameda Cnty.*, 377 F.Supp.3d 1027, 1032 (N.D. Cal. 2019). “They must also establish that the  
13 policy or custom evinces a deliberate indifference to the constitutional right and is the moving  
14 force behind the constitutional violation.” *Id.* (cleaned up) (quoting *Rivera v. County of L.A.*, 745  
15 F.3d 384, 389 (9th Cir. 2014)).

16 Plaintiffs argue that they will use common evidence to show that the alleged unlawful  
17 actions were carried out by County officials that qualify as final policymakers under *Monell* and  
18 that unlawful actions by County officials constituted municipal custom, policy, or practice. Mot.  
19 at 22. The County argues that risk tier determinations were made by the heads of different  
20 agencies and departments, that job transfers were assisted by County employees in the Employee  
21 Services Agency and the Equal Opportunity Division, and that none of these employees would  
22 qualify as a final policymaker under *Monell*. Opp at 22.

23 In this case, Plaintiffs challenge the County’s Risk Tier System and its prioritization of  
24 medical and disability exempt employees for job transfers and placements over employees with  
25 religious exemptions. Whether these conditions were part of a custom, policy, or practice  
26 officially adopted by the County is a question subject to class-wide proof. This question can be  
27 answered by looking to the Policy, evidence of communications and guidance from County  
28 executives, and evidence of County practices regarding the Policy. Although Defendants suggest

1 that individual risk tier determinations and employee placements were made by employees that  
 2 would not qualify as final policymakers under *Monell*, this argument is inapposite because  
 3 Plaintiffs do not challenge individual risk tier determinations or employee placements. Moreover,  
 4 even if Defendants were correct that the challenged conditions included individual risk tier  
 5 determinations and placements and that the relevant decisionmakers were not final policymakers  
 6 under *Monell*, this would answer the question of the County’s liability under *Monell* for the entire  
 7 Class and thus demonstrates that common questions predominate over individualized inquiries.

8 Accordingly, Plaintiffs have satisfied their burden of showing predominance as to the  
 9 question of the County’s liability under *Monell*.

10 g. Damages

11 “Rule 23(b)(3)’s predominance requirement takes into account questions of damages.”  
 12 *Just Film*, 847 F.3d at 1120. The Supreme Court has held that absent an appropriate methodology  
 13 for measuring damages on a classwide basis, “[q]uestions of individual damage calculations will  
 14 inevitably overwhelm questions common to the class.” *Comcast Corp. v. Behrend*, 569 U.S. 27,  
 15 34 (2013). “Calculations need not be exact.” *Id.* at 35. In fact, the Ninth Circuit has made clear  
 16 both before and after *Comcast* that “damage calculations alone cannot defeat certification.” *Leyva*  
 17 *v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (quoting *Yokoyama v. Midland Nat’l Life*  
 18 *Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)). However, “at the class-certification stage (as at  
 19 trial), any model supporting a plaintiff’s damages case must be consistent with its liability case.”  
 20 *Comcast*, 569 U.S. at 35 (internal quotation marks and citation omitted). “If the plaintiffs cannot  
 21 prove that damages resulted from the defendant’s conduct, then the plaintiffs cannot establish  
 22 predominance.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016).

23 The County argues that the damages model developed by Plaintiffs’ expert, Keith L  
 24 Mendes, does not establish that damages can be measured across the entire class in a way that is  
 25 consistent with Plaintiffs’ theory of liability. *Opp.* at 22–23. The County argues that Mendes’s  
 26 “Scenario 1” damages model (regarding the Risk Tier System) ignores individualized inquiries  
 27 such as whether a Class member mitigated damages and whether voluntary leave taken was caused  
 28 by the Mandate or for other reasons. *Opp.* at 23–24. The County also argues that Mendes’s

1 “Scenario 2” damages model (regarding prioritization of medical and disability exemptions) is  
2 unreliable and thus fails to satisfy Rule 23(b)(3) and should be excluded under Federal Rule of  
3 Evidence 702. The County notes that Mendes did not understand Plaintiffs’ theory of  
4 discrimination in his deposition. *Id.* at 24. Finally, the County argues that Mendes’s Scenario 2  
5 model ignores facts including whether a Class member refused to seek a job transfer, was actually  
6 provided a job transfer or modification, was provided assistance equal to medical or disability  
7 exempt employees, or applied for jobs for which the Class member was not qualified. *Id.* at 25.  
8 Plaintiffs respond that mitigation is an affirmative defense that does not defeat predominance, that  
9 Mendes can amend his report to incorporate any missing factors in his damages model, that  
10 Mendes’s Scenario 2 model is based on Plaintiffs’ theory of discrimination and compares data for  
11 religious exempt employees with data for medical and disability exempt employees, and that the  
12 County’s arguments against Mendes’s model go to the merits. Reply at 11–15. Plaintiffs also  
13 argue that the Court may either bifurcate the liability and damages issues or certify only a liability  
14 class. *Id.* at 13.

15 The Court finds that Mendes’s damages models are consistent with Plaintiffs’ theories of  
16 liability and thus satisfy *Comcast*. *Comcast* requires that an expert’s damages “model purporting  
17 to serve as evidence of damages in this class action must measure only those damages attributable  
18 to that theory.” *Comcast*, 569 U.S. at 35. Here, Mendes’s Scenario 1 damages model accounts for  
19 any damages from the Risk Tier System by calculating damages for each individual employee as a  
20 result of being put on administrative leave. *See* ECF No. 81-23 (“Gondiero Decl. Ex. V”)  
21 (“Mendes Report”) ¶¶ 15, 46. These damages include among other things lost wages, depletion of  
22 leave banks, depletion of CalPERS service credits, out of pocket health coverage costs, depletion  
23 of paid leave, and differences in income due to job changes. *See id.* ¶¶ 17–33. This damages  
24 model is consistent with Plaintiffs’ theory of liability—if the Risk Tier System is unconstitutional,  
25 then Class members were harmed when they were placed on administrative leave as a result of an  
26 unconstitutional system. Similarly, Mendes’s Scenario 2 damages model compares wage, leave,  
27 leave bank, and other financial data for religiously exempt employees to similar data for medically  
28 or disability exempt employees. *See id.* ¶¶ 34–44. This damages model is consistent with



1 Plaintiffs’ theory of liability—if the County treated religious exempt employees differently than  
2 medical or disability exempt employees in job transfers or placements, then the extent to which  
3 they were treated differently would be their damages.

4 Although the Court finds that Plaintiffs’ damages model satisfies *Comcast*, Defendants  
5 have identified significant individualized issues on the question of damages. Notably, Mendes’s  
6 damages calculations present formulas for calculating each individual Class members’ damages  
7 that require consideration of factors unique to each individual, including the Class member’s  
8 wages, the amount of paid leave taken, the amount of time on unpaid leave, out of pocket  
9 healthcare costs, and the like. *See Mendes Report* ¶¶ 17–44. Whether a particular Class member  
10 satisfied the duty to mitigate damages and whether the Class member obtained other employment  
11 that would entitle Defendants to an offset are also individualized issues. Plaintiffs have not  
12 identified any aspect of damages that might be subject to class-wide proof. Instead, they argue in  
13 their briefs that Mendes’s damages model can factor in additional information and suggested at  
14 oral argument that the Court could certify subclasses. *See Reply* at 13–14; ECF No. 124 at 21:24–  
15 25. But the Court will not speculate as to what Mendes’s revised damages model might look like  
16 or what appropriate subclasses might be. From the evidence and argument submitted, it appears  
17 that there would be multiple subclasses consisting of one Class member. Thus, before the Court  
18 are individualized determinations that predominate over any common questions with respect to  
19 Class damages. *See Little v. Washington Metro. Area Transit Auth.*, 249 F.Supp.3d 394, 425  
20 (D.D.C. 2017) (denying class certification under Rule 23(b)(3) where an expert’s damages  
21 formula would require evaluating individualized defenses and calculating individualized damages)

22 The Court acknowledges that individualized questions with respect to a particular Class  
23 member’s damages do not alone defeat class certification for liability issues. *See Ellis v. Costco*  
24 *Wholesale Corp.*, 285 F.R.D. 492, 539 (N.D. Cal. 2012) (collecting cases supporting the  
25 proposition that individualized damages questions need not defeat class certification on the issue  
26 of liability). As such, the Court will exercise its discretion to certify the Class only with respect to  
27 liability issues and not with respect to damages issues. *See Fed. R. Civ. P. 23(c)(4)* (“When  
28 appropriate, an action may be brought or maintained as a class action with respect to particular

1 issues.”); *see also Ellis*, 285 F.R.D. at 544 (collecting cases certifying classes on only liability  
2 issues); *Little*, 249 F.Supp.3d at 425 (describing ways in which liability can be efficiently litigated  
3 on a class-wide basis without certifying a class for monetary damages).

4 **ii. Superiority**

5 To satisfy Rule 23(b)(3), Plaintiffs must demonstrate that “a class action is superior to  
6 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
7 23(b)(3). Rule 23 lists the following factors that courts should consider in making this  
8 determination: “(A) the class members’ interests in individually controlling the prosecution or  
9 defense of separate actions; (B) the extent and nature of any litigation concerning the controversy  
10 already begun by or against class members; (C) the desirability or undesirability of concentrating  
11 the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a  
12 class action.” Fed. R. Civ. P. 23(b)(3).

13 Plaintiffs argue that, because the Class members’ claims will rise and fall with common  
14 evidence, class treatment would be more efficient than litigating individual actions based on  
15 identical proof. Mot. at 24. The County has not raised any arguments against Plaintiffs’  
16 superiority showing.

17 The Court finds that the Rule 23(b)(3) factors support that a class action is a superior  
18 method of adjudicating Plaintiffs’ claims with respect to the County’s liability, but not for  
19 damages. As the Court found above, common questions can be answered on a class-wide basis in  
20 the liability stages of this matter. Given these common questions and given that Class members  
21 can opt out of the class and/or pursue their damages individually, Class members have a  
22 diminished interest in individually controlling the common portions of this action. No party has  
23 identified any litigation concerning this controversy that has already begun by or against class  
24 members. The Court finds that concentrating litigation in this forum is appropriate because the  
25 relevant events occurred in this forum. Finally, the Court finds that class-wide disposition of  
26 liability issues before proceeding to individual hearings on damages is more manageable, would  
27 favor judicial economy, and would prevent inconsistent verdicts when compared to individual  
28 litigation on all issues. *Ellis*, 285 F.R.D. at 540.

1           Accordingly, the Court finds that the superiority requirement is met.

2       **IV. ORDER**

3           For the foregoing reasons, IT IS HEREBY ORDERED that:

4           1.       Plaintiffs UnifySCC, Tom Davis, Maria Ramirez, and Elizabeth Baluyut’s Motion  
5 for Class Certification (ECF No. 81) is GRANTED IN PART and DENIED IN PART. The Court  
6 CERTIFIES the following class:

7                   All individuals who: 1) work or worked for the County and/or [] were  
8 subject to its vaccine policies and orders, including the Risk Tier  
9 System; 2) were forced by the County to choose between taking the  
10 vaccine to maintain their jobs and/or their employment-related  
11 benefits or being placed on unpaid leave; 3) were [] classified as  
12 working in high risk jobs pursuant to the County’s Risk Tier System;  
13 and 4) received [] a religious exemption from the County (the  
14 “Class”) between August 5, 2021 and September 27, 2022 (the “Class  
15 Period”).

16           This Class is certified with respect to the following common questions regarding Defendants’  
17 liability:

- 18                   1. Whether Defendants violated Plaintiffs’ right to free exercise and  
19 equal protection of the law by prioritizing medical exemptions  
20 over religious exemptions in high-risk settings;
- 21                   2. Whether Defendants’ Risk Tier System violated the Free Exercise  
22 Clause and Equal Protection Clause because it relegated Plaintiffs  
23 and the Class members to unpaid leave but allowed some  
24 unvaccinated or non-boosted employees to continue to work;
- 25                   3. Whether the County’s religious exemption and/or  
26 accommodation procedure was either non-neutral or not generally  
27 applicable such that it constitutes an individualized assessment  
28 under *Fulton*, 141 S. Ct. 1868, and is thereby subject to strict  
scrutiny;
4. Whether Defendants provided Individual Plaintiffs and the Class  
members with reasonable accommodation as required under  
FEHA and Title VII; and
5. Whether Defendants violated the Establishment Clause by  
demonstrating hostility towards religion.

          The Class is NOT certified with respect to questions of damages.

          2.       The Court APPOINTS Plaintiffs UnifySCC, Tom Davis, Maria Ramirez, and  
Elizabeth Baluyut as class representatives.

          3.       The Court APPOINTS Advocates for Faith & Freedom and Wolf Haldenstein  
Adler Freeman & Herz LLP as class counsel.

4. Lead Plaintiffs SHALL file a proposed notice plan by February 14, 2024.

Dated: January 29, 2024

  
BETH LABSON FREEMAN  
United States District Judge

United States District Court  
Northern District of California

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