NO. 21-15587

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOY GARNER, ET AL.,
Plaintiffs-Appellants,

V.

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
2:20-CV-02470-WBS-JDP

ANSWERING BRIEF FOR THE PRESIDENT

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Joy Garner, Joy Elisse Garner, Evan Glasco, Traci Music, Michael Harris, and Nicole Harris initiated this suit on December 14, 2020. *See* 4-ER-660. The complaint asserted various constitutional claims relating to plaintiffs' objections to vaccine use and sought declaratory and injunctive relief against then-President Donald Trump, in his official capacity.[1] On February 23, 2021, the district court dismissed the complaint for lack of standing. 1-ER-3-11. Plaintiffs filed a notice of appeal on April 1, 2021, within the sixty days allowed by Federal Rule of Appellate Procedure 4(a)(1)(B). 4-ER-656. This Court has jurisdiction under 28 U.S.C. § 1291 to review the final judgment of the district court.

STATEMENT OF ISSUES

1. Whether plaintiffs lacked standing because their complaint showed that any cognizable injuries were caused by third parties not before the district court.

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[1] On January 20, 2021, Joseph R. Biden became the President, and he was substituted automatically as the defendant pursuant to Federal Rule of Civil Procedure 25(d). *See* 4-ER-662 (Dkt. Entry #27).

2. Whether plaintiffs' claims fail the redressability element of the standing inquiry because the relief they seek would not address any cognizable injuries and because their complaint seeks relief that a district court cannot provide.

3. Whether the district court lacked jurisdiction over the complaint because it raises non-justiciable political questions.

STATEMENT OF THE CASE

A. The Complaint Failed to Allege Any Injury Caused by the President.

Plaintiffs are approximately half a dozen parents who oppose vaccines, acting for themselves and their children, and a non-profit organization and its founder that surveyed unvaccinated people for the purposes of this litigation. 2-ER-195-205 (First Amended Complaint ("FAC") ¶¶ 36-42). They initiated suit in December 2020, naming the President as the sole defendant in his official capacity. *See* 4-ER-660.

The First Amended Complaint consists of a catalogue of plaintiffs' objections to vaccines. Although the COVID-19 vaccine is mentioned throughout the complaint and opening brief, plaintiffs' suit challenges the use of all vaccines in the United States. *See, e.g.*, 2-ER-183 (FAC ¶ 7). Some of the objections allege various acts of discrimination related

to state and local vaccination requirements, as described below. Others delve into the fantastical. *E.g.*, 2-ER-232 (FAC ¶ 112) (alleging that vaccines "manipulate human DNA" and "employ[] human tracking technology").

Plaintiff Joy Garner ("Garner") founded and operates "The Control Group" specifically for the purpose of bringing this litigation. 2-ER-196 (FAC ¶ 37). The FAC fails to identify any harm Garner has suffered. *See* 2-ER-195-96 (FAC ¶¶ 36-39). Garner's only connection to the case is that she alleges to have conducted a "pilot survey" of the health outcomes of unvaccinated individuals. 2-ER-196 (FAC ¶ 37). The FAC seeks to order the President to conduct a similar survey on a nationwide basis. *See, e.g.*, 2-ER-190 (FAC ¶ 22) (requesting court order "[a]uthorizing a national health survey of a control group of unvaccinated individuals").

Plaintiffs Joy Elisse Garner ("Elisse") and Evan Glasco ("Glasco") are residents of California and the parents of two minor children, J.S. and F.G., who have never been vaccinated. 2-ER-196-97 (FAC ¶ 40). Elisse and Glasco are religiously opposed to certain vaccines based on their manufacturing method. 2-ER-198 (FAC ¶ 40(G)). They allege

that they wish to have J.S. and F.G. attend school, but that California Health and Safety Code § 120325, *et seq.*, requires all children attending school in California to be vaccinated, thereby prohibiting J.S. and F.G. from enrolling in school. 2-ER-198 (FAC ¶ 40(H)).

Plaintiffs Michael Harris ("Michael") and Nichole Harris ("Nicole") are residents of California and the parents of a minor child, S.H., who is unvaccinated. 2-ER-200 (FAC ¶ 41). Michael and Nicole allege that they are religiously opposed to vaccination and thereby are prevented from sending S.H. to school under California's Health and Safety Code. 2-ER-201-03 (FAC ¶¶ 41(G), (H)).

Plaintiff Traci Music ("Music") is a resident of Alabama and the parent of minor children K.M. and J.S., who are not vaccinated, and S.S., who has received at least some vaccines. 2-ER-203 (FAC ¶ 42). Music alleges she is religiously opposed to the use of certain vaccines based on their manufacturing method. 2-ER-204 (FAC ¶ 42(G)). Music alleges that she had S.S. vaccinated as a small child due to pressure from an unnamed physician and that S.S. suffered complications from those vaccines, including blindness in her left eye and partial deafness. 2-ER-203-05 (FAC ¶¶ 42, 42(J)). The same physician allegedly

threatened to contact child protective services in Arizona if Music did not have S.S. vaccinated. *See* 2-ER-204-05 (FAC ¶ 42(J)). Music alleges that she would like to send her two unvaccinated children, K.M. and J.S., to school, although she does not identify any laws in Alabama that prevent her from doing so. 2-ER-204 (FAC ¶¶ 42(H), (I)). She also alleges that, about three years before the complaint was filed, the North Carolina Child Protective Services conducted a visit of her home because she "was homeschooling and did not vaccinate her children." 2-ER-205 (FAC ¶ 42(K)).

Entirely absent from the FAC are any factual allegations connecting plaintiffs' asserted injuries to actions by the President. On the contrary, the FAC acknowledges there is no mandatory federal vaccination requirement and that state and local governments – not the federal government – enforce their own vaccine requirements.[2] The

[2] *See, e.g.*, 2-ER-209 (FAC ¶ 52(A)) ("CDC recommended vaccine schedules are recommended rather than mandated, so [federal agencies] are not the only cause of and cannot offer relief to end" the alleged injuries); *id.* ("The State and local governments . . . participate in their own ever-changing patchwork of mandates and coercion techniques."); 2-ER-217 (FAC ¶ 74) ("[T]he control group population of unvaccinated Americans is imminently threatened (*especially by myriad local health officials'* . . .)" (emphasis added)); 2-ER-238 (FAC ¶ 143) ("[T]he ability to independently protect oneself from vaccination as a

FAC states multiple times that the President "is not the sole cause of" plaintiffs' purported injuries. *See, e.g.*, 2-ER-190, 2-ER-233, 2-ER-234, 2-ER-238-39, 2-ER-241-42 (FAC ¶¶ 20, 117, 127, 144, 148, 157, 163).

Despite the lack of federal involvement in plaintiffs' alleged injuries, the FAC asserted ten constitutional claims against the President, including claims under: the President's Oath of Office and the Faithful Execution Clause (Claim One); the First Amendment's Free Exercise Clause (Claim Two); the Due Process Clause of the Fifth Amendment (Claims Three and Four); the Fourth Amendment (Claim Five); the Cruel and Unusual Punishment Clause of the Eighth Amendment (Claim Six); the Thirteenth Amendment's prohibition of slavery (Claim Seven); the Equal Protection Clause of the Fourteenth Amendment (Claim Eight); the Ninth and Tenth Amendments (Claims Nine and Ten). *See* 2-ER-226-242 (FAC ¶¶ 91-163).

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form of human medical experimentation is routinely dismissed *by local authorities*" (emphasis added)); 2-ER-239 (FAC ¶ 147) ("Innumerable local governments, educational institutions, and businesses receive federal funding and federal contracts, and yet have implemented and enforce systematic segregation of unvaccinated individuals from vaccinated ones."); 2-ER-241 (FAC ¶ 155) (referring to "a patchwork of local authorities").

The general thrust of these claims is that the plaintiffs, as vaccine objectors, are discriminated against in various ways, including by not being permitted to send their children to school. *E.g.*, 2-ER-198-204 (FAC ¶¶ 40(H)-(I), 41(H), 42(H)). Moreover, plaintiffs assert that vaccines are the cause of a national health crisis of enormous proportions, which threatens the imminent demise of the country. *See, e.g.*, 2-ER-180-84 (FAC ¶¶ 2-7). To address the asserted discrimination and impending vaccine-driven collapse of the nation, the FAC sought declaratory relief and an injunction requiring the President to use his "reasonable executive discretion" to address the alleged discrimination against, and to conduct a national "health survey" of, unvaccinated individuals. 2-ER-190, 207-08, 226, 245 (FAC ¶¶ 22, 49, 93, 172). Plaintiffs also request an order requiring the President to implement a nationwide informed-consent requirement before any individual can receive any vaccine anywhere in the country. 2-ER-245 (FAC ¶ 172(E)).

B. The District Court Dismissed the Complaint for Lack of Standing.

On February 23, 2021, the district court dismissed the complaint for lack of jurisdiction, concluding that the FAC "contains no allegation that any department or agency of the federal government, much less the

President, is responsible for any of [the plaintiffs] alleged injuries." 1-ER-7. The district court also found that "plaintiffs allege throughout their first amended complaint that the actions complained of are the result of independent actions by third parties not before the court," such as the child protective services officials in North Carolina and Arizona, or California state laws. 1-ER-8.

The district court also concluded that the FAC failed the redressability element of standing because "the court cannot envision how anything it could constitutionally order the President to do in this action would remediate any of plaintiffs' alleged injuries." 1-ER-9. The district court found that none of the requested relief – such as ordering the President to "prevent purported discrimination against vaccine objectors, perform a national survey of unvaccinated Americans, and then establish a national informed consent system" – would remedy past injuries, prevent future ones, or invalidate the state laws that plaintiffs allege prevent unvaccinated students from attending school. 1-ER-9-10.

The district court declined to allow plaintiffs an opportunity to amend because, "to overcome the lack of standing, plaintiffs would have

to seek entirely different relief against an entirely different defendant or defendants," which "in essence, would have to be an entirely different action." 1-ER-10.

Because the district court concluded it lacked jurisdiction, it also denied the motions for a preliminary injunction and judicial notice and entered judgment the same day. *See* 1-ER-11; 1-ER-2.

SUMMARY OF ARGUMENT

The district court correctly held that plaintiffs lack standing to pursue their claims against the President. The only cognizable harms plaintiffs alleged, such as not being allowed to send their unvaccinated children to school under California state law or being subjected to state child welfare inspections based on their children not having been vaccinated, relate to the actions of third parties not before the court and have nothing to do with the President of the United States. Plaintiffs' true dispute with the President is a generalized policy disagreement. The Supreme Court has held that such disputes do not satisfy the injury-in-fact requirement of Article III. The relief plaintiffs seek – a declaratory judgment, an injunction requiring the President to use his "reasonable discretion" to prevent alleged discrimination against

unvaccinated individuals, and a nationwide study of the health effects of vaccines – would not redress plaintiffs' alleged harms. Those harms are caused, if at all, by state and local officials. And the relief plaintiffs seek is beyond the power of a court to order under this Court's precedent.

Separately, plaintiffs' requested relief presents non-justiciable political questions, including questions of national security and public policy, that are committed to the political branches of government.

None of plaintiffs' proposed amendments would cure the manifold defects in their complaint. The district court therefore did not abuse its discretion in denying leave to amend.

STANDARD OF REVIEW

This Court reviews a district court's decision that a plaintiff lacks standing *de novo*. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013). Application of the political question doctrine is also reviewed *de novo*. *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1212 (9th Cir. 2017).

ARGUMENT

I. The FAC Fails to Allege Facts Establishing Standing Against the President.

The Constitution limits federal courts' jurisdiction to cases and controversies, which includes the requirement that each plaintiff have standing with respect to each claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). To establish standing, a plaintiff must demonstrate three elements: an injury in fact, caused by the defendant, that likely can be redressed by a favorable judicial decision. *See id.* at 560-61. The FAC lacks the necessary factual allegations to satisfy this straightforward standard.

A. No Alleged Injury in the FAC Was Caused by the President.

The primary defect with plaintiffs' claims is an absence of factual allegations tying any cognizable injuries to the President. "The requirement of standing means that a federal court may 'act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 834 (9th Cir. 2020) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)); *cf Ashcroft v. Iqbal*, 556 U.S. 662, 683

(2009) ("[P]etitioners cannot be held liable *unless they themselves* acted on account of a constitutionally protected characteristic."). A review of each plaintiff's allegations shows they fail to allege injury caused by the President.

Elise, Glasco, Michael, and Nicole allege that, due to their religious objections to vaccines, they are unable to send their unvaccinated children to school in California under that state's Health and Safety Code § 120325 *et seq.* 2-ER-198, 201-03 (FAC ¶ 40(H), 41(G)-(H)). They argue that these allegations are sufficiently specific to establish standing. *See* Op. Br. at 31 (arguing that the FAC "even include[s] details of specific denial of education solely on the basis of vaccination status"). But that argument fails because there are no plausible allegations that the President enacted or enforces California's Health and Safety Code. Plainly he does not. As the district court held, 1-ER-7-8, the FAC contains no factual allegations tying injury suffered by these four plaintiffs to the President.

The allegations relating to Music are similarly deficient. Like the other plaintiffs, she alleges she has religious objections to certain vaccines and that she would like to send her children to school. 2-ER-

204 (FAC ¶ 42(G)). Unlike the other plaintiffs, however, she does not live in California, 2-ER-203 (FAC ¶ 42), and the FAC does not identify any state or federal laws that prevent her from sending her children to school in Alabama, where she lives. Instead, she points to past alleged interactions with Arizona and North Carolina state or local officials relating to her children's vaccination status. 2-ER-204-05 (FAC ¶¶ 42(J)-(K)); *see also* Op. Br. at 31 (arguing that standing exists because the FAC contained "a specific instance of a child protective services visit solely on the basis of vaccination status"). The district court correctly found that the FAC fails to allege any plausible facts tying these incidents to the President. *See* 1-ER-8.[3]

Both the FAC and the opening brief in this Court acknowledge that numerous actors other than the President are the primary cause of the plaintiffs' alleged injuries. The FAC alleges that "CDC recommended vaccine schedules are recommended rather than mandated, so [federal agencies] are not the only cause of and cannot offer relief to end" plaintiffs' perceived injuries. 2-ER-209 (FAC

[3] Joy Garner fails to allege any injury at all, as explained below in Part I.B.

¶ 52(A)). And the FAC repeatedly identifies state and local governments as a source of the vaccine requirements plaintiffs oppose. 2-ER-209, 217-18, 238-39, 241 (FAC ¶¶ 52(A), 74, 143, 147, 155). The opening brief in this appeal concedes the same point. *See* Op. Br. at 27 ("The district court was correct on this one point, that [the President] is not the 'sole' cause of the predicament."). These admissions standing alone demonstrate plaintiffs have not alleged facts satisfying the causation element of standing.

To get around this defect, plaintiffs primarily rely on a raft of factual allegations relating to federal involvement in vaccines, such as federal funding for research, vaccine distribution, or federal regulatory approval of vaccines. *See* Op. Br. at 24-26. But the causation element of standing requires "a causal connection between *the injury* and *the conduct complained of*." *Lujan*, 504 U.S. at 560 (emphases added). Although causation for standing purposes sometimes can be established when there are "multiple links in the chain," *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014), the alleged injury nonetheless still must "be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before

the court." *Lujan*, 504 U.S. at 560 (internal quotation and citation omitted).

Plaintiffs' alleged injuries are not "fairly traceable" to the President. *Id.* None of plaintiffs' allegations about federal vaccine funding, approval, or involvement shows a connection between any act of the President and the alleged prohibition on school attendance in California or alleged improper visits from state child welfare personnel. The FAC does not challenge any specific vaccine approval or seek to bar funding for any federal vaccine program. Only the state officials in California who allegedly prevent plaintiffs' children from attending school or the child welfare officials in North Carolina who allegedly conduct discriminatory child welfare visits could address plaintiffs' complaints.[4]

[4] The FAC does not seek compensation or relief relating to S.S.'s alleged personal injuries arising from vaccines, and plaintiffs disclaim an intent to obtain damages in their opening brief. Op. Br. at 20 (stating that plaintiffs "never made a request for compensatory damages"). Even if the complaint had sought damages, the FAC still is devoid of plausible factual allegations that the President caused any such damages.

The rest of the opening brief is filled with hyperbole and invective against the use of vaccines, including embracing recent popular conspiracy theories. According to plaintiffs, the United States is on the verge of collapse due to vaccine usage. *See, e.g.*, Op. Br. at 2, 3, 5, 7-8, 12-13, 22, 24, 29-30. They assert that COVID-19 vaccines turn recipients "magnetic" and alter their genetic makeup. *See id.* at 21-22. And they invoke end-of-times imagery to assert that vaccines are associated with the "mark of the beast." *Id.* at 33. These allegations are patently frivolous. Only plausible factual allegations must be credited on a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaints must be dismissed if they do not allege facts showing "a claim to relief that is plausible on its face").

B. Plaintiffs' General Policy Dispute Concerning Vaccine Usage Is Not a Cognizable Injury.

At most, the FAC shows that plaintiffs disagree with federal policies concerning the proper role of vaccines in public health and that they fear the United States is about to collapse because of vaccine usage. *See, e.g.*, 2-ER-180-84 (FAC ¶¶ 2-7). But, to identify an injury-in-fact under Article III, plaintiffs must assert an injury that is specific to them, beyond one that "is plainly undifferentiated and common to all

members of the public." *Lujan*, 504 U.S. at 575 (internal quotations and citations omitted). The Supreme Court has repeatedly held that such "generalized grievances" do not satisfy the case or controversy requirement of Article III. *See id.* at 575-76.

The relief plaintiffs request demonstrates their dispute is nothing more than a generalized policy grievance. The sparse factual allegations relating to the lead plaintiff, Joy Garner, make the policy nature of the dispute obvious. Garner fails to allege any injury at all. She does not allege that she is unvaccinated. She does not have children she is prevented from sending to school because they are not vaccinated. And she does not identify any action taken against her because of her beliefs concerning vaccination. *See* 2-ER-195-96 (FAC ¶¶ 36-39). Instead, she proffers that she founded and operates "The Control Group" specifically for the purpose of bringing this litigation and that it conducted a purported health survey of unvaccinated individuals. 2-ER-196 (FAC ¶ 37). The complaint then seeks to require the President to conduct the same type of survey on a nationwide basis. *See* 2-ER-190, 245 (FAC ¶¶ 22, 172(E)). Garner's involvement in this

suit appears to be nothing more than a bald attempt to use the court system to obtain a national platform for her anti-vaccine advocacy.

All the relief requested in the complaint is likewise policy-based. Plaintiffs do not seek an order requiring the President to allow their children to attend California's school or an order finding that any federal agency improperly approved any vaccine. Instead, they asked the district court to order the President to use his "reasonable executive discretion" to address the alleged discrimination they face, to conduct a national survey modeled on Garner's, and to impose a national "informed consent" requirement for anyone in the country who wishes to receive any vaccine at all. *See* 2-ER-207, 245 (FAC ¶¶ 49, 172). These requests are nothing more than an implementation of plaintiffs' preferred vaccine policy.

The Constitution does not permit plaintiffs to use the judicial system to legislate in this manner. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Generalized policy fights, like the one plaintiffs bring here, do "not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

C. No Order Against the President Will Redress Plaintiffs' Alleged Injuries.

Plaintiffs also fail the redressability element of standing. Each plaintiff must demonstrate that a favorable decision will provide redress. *See Lujan*, 504 U.S. at 561. "There is no redressability, and thus no standing, where . . . any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict." *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (internal quotations and citations omitted). "To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). Plaintiffs' claims fail both elements of redressability.

1. The Relief Plaintiffs Seek Will Not Redress Their Alleged Injuries.

First, for the same reasons that the President is not the cause of plaintiffs' alleged injuries, the relief they seek is not likely to provide redress. For example, even if the district court had granted declaratory relief or issued the requested injunction, nothing in that order would or could have invalidated any part of California's Health and Welfare Code or prevented California state officials from enforcing it. Similarly, an injunction against the President would have no effect on state or local child protective services in North Carolina, Arizona, or elsewhere. Nor would it affect individual doctors who advise plaintiffs to vaccinate their children or the pharmaceutical companies that make vaccines. But those are the actors who plaintiffs say have discriminated against them based on their vaccination status. *See* 2-ER-198, 202-05, 232 (FAC ¶¶ 40(H), 41(H), 42(J)-42(K), 112).

2. The Relief Plaintiffs Seek Is Not Within the Power of the Court to Award.

In addition, plaintiffs' requested relief fails the redressability element because it is not within the power of a court to award. This Court recently held that requests for broad injunctions that "necessarily

require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches" are "beyond the power of an Article III court to order." *Juliana*, 947 F.3d at 1171.

That is precisely the type of relief plaintiffs seek in this suit. The FAC asks for an order requiring the President to use "his reasonable executive discretion" to do something about the purported discrimination vaccine objectors face. *See* 2-ER-226-27 (FAC ¶ 93). This apparently would include an order requiring him to perform a national survey of non-vaccinated persons and to establish a national "informed consent" system for any person in the country who wishes to receive any vaccine at all. *See* 2-ER-190, 245 (FAC ¶¶ 22, 172(E)). But any such order requires legislative and executive judgment that the Constitution structurally commits to the political branches of government. *See Juliana*, 947 F.3d at 1171. This is particularly true

with respect to vaccines, where Congress has legislated actively through the decades.[5]

Plaintiffs argue that *Juliana* does not control because the relief sought there would have required "decades of unlimited and vague judicial supervision over 'climate change,'" whereas in this case plaintiffs only seek "limited, short-term, and specific relief" in the form of a court order. *See* Op. Br. at 20-21. Not so. The FAC requests an order requiring the President to use "reasonable executive discretion" to end vaccine discrimination, to conduct a broad survey of nationwide health outcomes, and to design and enforce a nationwide program of informed consent. *See, e.g.*, 2-ER-190, 226, 229, 245 (¶¶ 22, 93, 172). That request, which has the aim of injecting judicial supervision into every interaction between a health care provider and a patient seeking a routine vaccine, is breathtaking in scope. Any such survey and program would take years to set up and conduct, including extensive judicial oversight. This Court in *Juliana* held that such far-reaching

[5] For example, Congress has established a no-fault alternative to the tort system for vaccine-related injuries. *See* 42 U.S.C. § 300aa-10 *et seq*.

policy programs are the responsibility of the political branches of government, beyond the power of Article III courts to adjudicate and enforce. *See Juliana*, 947 F.3d at 1171.[6]

D. The FAC Presents Non-Justiciable Political Questions.

Independently of the standing analysis, the district court also lacked jurisdiction because the relief requested in the FAC presents non-justiciable political questions.[7] "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). "The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch." *Koohi v. United States*, 976 F.2d

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[6] Plaintiffs also cite to cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954), to argue that only the President can address the supposed problem of vaccine discrimination. *See* Op. Br. at 18-19. This argument is frivolous. The plaintiffs in *Brown* pursued relief against the specific school district that precluded them from attending, not against the President. *See Brown*, 347 U.S. at 486-88.

[7] The President moved to dismiss on this alternative ground, but the district court did not reach it. *See* 2-ER-172-74. "This court may affirm on any ground that appears from the record before the district court, whether or not the district court relied on it." *Schmit v. United States*, 896 F.2d 352, 353 (9th Cir. 1989).

1328, 1331 (9th Cir. 1992). The doctrine "is at bottom a jurisdictional limitation imposed on the courts by the Constitution, and not by the judiciary itself." *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007). Courts therefore lack subject matter jurisdiction over cases presenting political questions. *Id.* at 982.

The Supreme Court has established six formulations to consider when determining whether a case presents a non-justiciable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the 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.

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

Here, the relief sought in the FAC presents several of the *Baker* factors. Plaintiffs cast their claims as an issue of utmost, pressing

national security. *See, e.g.*, 2-ER-180, 189-90, 195, 205-06, 208-10, 214-15, 227, 234, 245 (FAC ¶¶ 1, 18-20, 33, 35, 43-44, 51-52, 56, 64-66, 95, 120, 172); *see also* Op. Br. at 1 (characterizing this as a "national security case"). But questions of national security have been found, time and again, to present political questions.[8] Deciding whether vaccine usage promotes national security, whether and how public policy should encourage the use of vaccines, and whether or how to conduct the survey plaintiffs request "involve[s] the exercise of a discretion demonstrably committed to the executive or legislature" and "turn[s] on standards that defy judicial application." *Baker*, 369 U.S. at 211.[9] It also involves an "initial policy determination" concerning the benefits of vaccines that courts are ill-suited to undertake. *Id.* at 217.

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[8] *See, e.g.*, *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to . . . national security are rarely proper subjects for judicial intervention."); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) ("We have consistently held, however, that courts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of . . . national security.").

[9] For example, plaintiffs nowhere explain how an injunction requiring the President to exercise his "reasonable executive discretion" could be judicially evaluated.

In addition, the injunction and declaration plaintiffs seek from this Court would necessarily convey a message regarding vaccines that conflicts with current public policies amid a worldwide pandemic. The political branches have dedicated significant resources to the development and distribution of a COVID-19 vaccine,[10] and achieving a sufficient rate of vaccination to stop the pandemic remains a high public policy priority at all levels of government. Issuing a court order requiring the President to conduct a vaguely defined public health study concerning vaccines at a time when Congress has made the policy decision that a vaccine should play a critical role in the response to the COVID-19 pandemic not only "express[es] lack of the respect due coordinate branches of government," but also would create the type of

[10] *See, e.g.*, Coronavirus Response and Relief Supplemental Appropriations Act, 2021, Title III, Pub. L. No. 116-260, 134 Stat. 1182, 1916-17 (2020) (appropriating approximately $23 billion for, among other things, "the development of necessary countermeasures and vaccines, [and] the purchase of vaccines, therapeutics, diagnostics, necessary medical supplies, as well as medical surge capacity, and other preparedness and response activities" and to "purchase vaccines developed using funds made available . . . to respond to an outbreak or pandemic related to coronavirus in quantities determined by the Secretary to be adequate to address the public health need").

"multifarious pronouncements by various departments on one question" that the political question doctrine prohibits. *Baker*, 369 U.S. at 217.

II. The District Court Correctly Denied Leave to Amend.

Plaintiffs argue that they should have been given leave to amend. *See* Op. Br. at 38-41. But a district court need not permit futile amendments. *See, e.g.*, *Perez v. Mortgage Elec. Registration Sys., Inc.*, 959 F.3d 334, 340-41 (9th Cir. 2020). None of the proffered amendments allege facts showing the President is responsible for California's health code or for the acts of state child protection services. Nor do the amendments change the relief sought, which is beyond the power of a court to order. *See Juliana*, 947 F.3d at 1171-72. And the proposed amendments do not remove the nonjusticiable political questions from plaintiffs' claims. The proposed amendments are futile.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellee is not aware of any additional related cases within the meaning of Ninth Circuit Rule 28-2.6 beyond that identified in the Opening Brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,183 words, excluding exempt material, according to the count of Microsoft Word.

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