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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN DOE et al.,

Plaintiffs,

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT et al.,

Defendants.

Case No.: 21-CV-1809-CAB-LL

**ORDER VACATING HEARING AND
DENYING APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

[Doc. No. 7]

This matter is before the Court on Plaintiffs’ application for a temporary restraining order. The application has been fully briefed, and a hearing is currently on calendar for November 19, 2021. Upon review of the briefs, however, the Court deems the application suitable for submission without oral argument. Accordingly, the hearing is **VACATED**, and for the reasons set forth below, the application is **DENIED**.

I. Background

A. SDUSD’s Vaccination Roadmap

On September 28, 2021, Defendant San Diego Unified School District (“SDUSD”) adopted, via a document called a Vaccination Roadmap, a requirement that all students eligible for a fully FDA approved COVID-19 vaccine receive all required doses of that vaccine by December 20, 2021, to attend school in-person and participate in extra-

1 curricular activities. [Doc. No. 1 at 31-34.] At the time the Vaccination Roadmap was
2 published, and currently, the only COVID-19 vaccine fully FDA approved for minors is
3 the BioNTech-Pfizer vaccine, now marketed as “Comirnaty,” which is full approved only
4 for individuals age 16 and older. [Doc. No. 15-2 at 5.] Thus, the Vaccination Roadmap
5 currently requires only students age 16 and over to be vaccinated by December 20, 2021.
6 [Id. at 33-34.] The BioNTech-Pfizer vaccine consists of two injections 21 days apart,
7 meaning that students age 16 and older must receive their first dose by November 29, 2021,
8 to complete the two dose regimen by December 20, 2021, in compliance with the
9 Vaccination Roadmap. [Id.]

10 The Vaccination Roadmap allows for medical exemptions to the vaccination
11 requirement, and also allows foster youth, homeless, migrant, military family, and students
12 with an Individualized Education Program (“IEP”) to conditionally enroll, consistent with
13 state law applicable to other immunizations required for students. *See, e.g.*, Cal. Educ.
14 Code §§ 48204.7, 48850, 48852.7, 49069.5, 49701; Cal. Health & Safety Code § 120341.
15 Contrary to Plaintiffs’ arguments, the Vaccination Roadmap does not exempt these
16 students from receiving a fully FDA approved COVID-19 vaccine. [Doc. No. 15-4 at 5, ¶
17 6.] The Vaccination Roadmap does not provide for religious or personal belief exemptions
18 to the COVID-19 vaccine requirement, just as the state does not provide for such
19 exemptions to state-wide immunization requirements for ten other diseases as a
20 precondition for admission to school. Cal. Health & Safety Code § 120325 *et seq.*

21 **B. Plaintiffs’ Free Exercise Claim**

22 Plaintiff Jill Doe is a 16-year-old student in her junior year at Scripps Ranch High
23 School in SDUSD. [Doc. No. 1 at ¶ 10.] She asserts that her religious beliefs preclude her
24 from taking any of the available COVID-19 vaccines. [Doc. No. 7-4.] On October 22,
25 2021, she and her parents filed this lawsuit against SDUSD and the individual members of
26 SDUSD’s board claiming that the Vaccination Roadmap violates her rights under the Free
27 Exercise Clause of the First Amendment to the Constitution. They also request leave to
28 proceed pseudonymously for fear of harassment by SDUSD officials, teachers, or students.

1 [Doc. No. 1 at ¶ 45.] In the prayer for relief, Plaintiffs ask that the Vaccination Roadmap,
2 facially and as applied to Jill Doe, be declared as violating the First Amendment, and seek
3 preliminary and permanent injunctions preventing SDUSD from granting any exemptions
4 to the Vaccination Roadmap “unless they give the exact same exemption to individuals
5 who cannot get vaccinated for religious reasons.” [*Id.* at 18.]

6 On November 1, 2021, Plaintiffs filed the ex parte application for a temporary
7 restraining order (“TRO”) and for leave to proceed pseudonymously that is currently before
8 the Court. Pursuant to a briefing scheduled agreed upon by the parties, Defendants filed
9 their opposition on November 8, 2021 [Doc. No. 15], and Plaintiffs filed a reply on
10 November 12, 2021 [Doc. No. 18].

11 The briefing includes various declarations with exhibits from the parties and their
12 experts. Each side also submitted objections to the other side’s evidence [Doc. Nos. 15-5,
13 15-6, 18-1, 19], most of which are based on relevance. Because the Court is competent to
14 determine whether evidence is relevant and to disregard any evidence that is not, all of the
15 evidentiary objections are overruled.

16 **II. Standing for Scope of Injunction Sought**

17 Although Defendants do not address the issue, “standing is a threshold issue” and
18 the Court must “consider whether [the plaintiff] has demonstrated standing for the form of
19 relief that is sought.” *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020) (internal quotation
20 marks, brackets and ellipses omitted) (citing *Davis v. Fed. Election Comm’n*, 554 U.S. 724,
21 734 (2008)). At the preliminary injunction stage, the plaintiff “‘must make a clear showing
22 of each element of standing,’ proving (1) an injury in fact that is ‘concrete and
23 particularized’ and ‘actual or imminent’; (2) ‘a causal connection between the injury and
24 the conduct complained of’; and that (3) ‘the injury will likely be redressed by a favorable
25 decision.’” *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013)).
26 “[S]tanding is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the
27 plaintiff’s particular injury.” *Gill v. Whitford*, 138 S.Ct. 1916, 1934 (2018) (quoting
28 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 354 (2006)).

1 Although Plaintiff Jill Doe satisfies the first two requirements, the injunction
2 Plaintiffs¹ seek here is not tailored to redress the injury Plaintiffs claim they will suffer as
3 a result of the Vaccination Roadmap. The Vaccination Roadmap requires Jill Doe to either
4 get vaccinated for COVID-19, which she is unwilling to do based on her religious beliefs,
5 or stop attending in-person classes and participating in extra-curricular activities. Thus,
6 the injury to Jill Doe is her inability to attend in person classes and participate in extra-
7 curricular activities. The injunction Plaintiffs seek, however, does not require Defendants
8 to allow Jill Doe to continue attending in-person classes and participating in extra-
9 curricular activities without being vaccinated for COVID-19. Instead, Plaintiffs ask for the
10 following injunction:

11 Defendants, their agents, employees, and successors in office, are restrained
12 and enjoined from granting any exemptions to the Vaccination Roadmap for
13 medical reasons, foster youth, homeless youth, migrant youth, students with
14 an IEP, and members of military families, unless they give the exact same or
15 a better exemption to Plaintiff Jill Doe, who cannot get vaccinated for
religious reasons.

16 [Doc. No. 7 at 2.] Although Defendants could comply with this injunction by granting an
17 exemption to Jill Doe, they could also comply while preventing Jill Doe from attending in-
18 person classes and participating in extra-curricular activities unless she gets vaccinated for
19 COVID-19. Specifically, if the Court enters this injunction, Defendants could comply by
20 eliminating all exemptions or exceptions to the vaccination requirements in the Vaccination
21 Roadmap, in which case Jill Doe will be in the same position she is now—unable to attend
22 in-person classes and unable to participate in extra-curricular activities. Thus, any claim
23 that this injunction will redress Jill Doe’s injury is merely speculative. *Lujan v. Defs. of*

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26 ¹ It also bears noting that although the complaint purports to assert claims on behalf of Jill Doe as well as
27 individual claims by each of her parents, the complaint only asserts one claim for violation of the Free
28 Exercise clause of the First Amendment to the Constitution. It is unclear how the Vaccination Roadmap,
which does not require the parents to receive a COVID-19 vaccine, implicates the parents’ free exercise
rights or how they have individual standing to contest its constitutionality.

1 *Wildlife*, 504 U.S. 555, 561 (1992) (“[I]t must be ‘likely,’ as opposed to merely
2 ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”). In sum,
3 Plaintiffs do not make a clear showing that a favorable decision on the broad injunction
4 they seek is likely to redress Jill Doe’s injury.² Accordingly, the instant motion can be
5 denied on this ground alone.

6 III. Discussion

7 Even if Plaintiffs have standing for the injunction they seek, or actually sought an
8 injunction tailored to their alleged injury, their motion fails on its merits. The standards
9 for a TRO and preliminary injunction are “substantially identical.” *Stuhlberg Int’l Sales*
10 *Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). “A preliminary
11 injunction is an extraordinary and drastic remedy, one that should not be granted unless the
12 movant, *by a clear showing*, carries the burden of persuasion.” *Fraihat v. U.S. Immigr. &*
13 *Customs Enf’t*, 16 F.4th 613, 635 (9th Cir. 2021) (internal quotation marks and citation
14 omitted) (*emphasis in original*). “[The] purpose of a preliminary injunction ... is to preserve
15 the status quo and the rights of the parties until a final judgment issues in the cause.” *Ramos*
16 *v. Wolf*, 975 F.3d 872, 887 (9th Cir. 2020) (quoting *U.S. Philips Corp. v. KBC Bank N.V.*,
17 590 F.3d 1091, 1094 (9th Cir. 2010)).

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20 ² Relatedly, the TRO Plaintiffs seek is overbroad. Overbreadth, though not typically addressed in the
21 caselaw as such, appears to be another way of saying that the plaintiffs lack standing for the breadth of
22 injunctive relief sought. *See generally Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)
23 (noting that an overbroad injunction is an abuse of discretion and that the “district court abused its
24 discretion in enjoining the rules themselves as opposed to enjoining their enforcement as to the plaintiffs
25 before him who asserted religious objections . . .”); *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987)
26 (“Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific
27 harm shown.”); *cf. Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1049 (9th Cir. 2013)
28 (“Injunctive relief should be no more burdensome to the defendant than necessary to provide complete
relief to the plaintiffs’ before the court.”) (internal quotation marks and citation omitted). The fact that
Plaintiffs seek a declaration that the Vaccination Roadmap is unconstitutional does not warrant a
preliminary injunction that would preclude enforcement as to anyone other than Jill Doe. *See McCormack*
v. Hiedeman, 694 F.3d 1004, 1020 (9th Cir. 2012) (holding that the fact that the plaintiff may ultimately
be entitled to declaration that the statute in question is unconstitutional and thus unenforceable against
anyone “does not mean that the *preliminary* injunction should apply so broadly, at least in the absence of
class certification.”) (*emphasis in original*).

1 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to
 2 succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of
 3 preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction
 4 is in the public interest.” *City & Cty. of San Francisco v. U.S. Citizenship & Immigr.*
 5 *Servs.*, 944 F.3d 773, 788–89 (9th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council,*
 6 *Inc.*, 555 U.S. 7, 20 (2008)). Defendants here focus their opposition on the first
 7 requirement (likelihood of success on the merits), which “is the most important” factor.
 8 *Disney Enter., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

9 **A. Likelihood of Success on the Merits**

10 The complaint asserts one claim under 42 U.S.C. § 1983—that the Vaccination
 11 Roadmap violates the Free Exercise clause of the First Amendment to the United States
 12 Constitution. Although the COVID-19 vaccines are new, the argument that vaccine
 13 requirements generally, and requirements that children obtain vaccinations to attend
 14 school, violate free exercise rights is not, and courts have consistently rejected it. *Prince*
 15 *v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (“The right to practice religion freely does
 16 not include liberty to expose the community or the child to communicable disease or the
 17 latter to ill health or death.”); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015)
 18 (“New York could constitutionally require that all children be vaccinated in order to attend
 19 public school.”); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348, 353–54 (4th Cir.
 20 2011) (“In sum, following the reasoning of *Jacobson [v. Massachusetts]*, 197 U.S. 11
 21 (1905)] and *Prince*, we conclude that the West Virginia statute requiring vaccinations as a
 22 condition of admission to school does not unconstitutionally infringe [the plaintiff’s] right
 23 to free exercise. This conclusion is buttressed by the opinions of numerous federal and
 24 state courts that have reached similar conclusions in comparable cases.”); *Klaassen v.*
 25 *Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *39 (N.D. Ind.
 26 July 18, 2021) (“[C]ourts have consistently held that schools that provided a religious
 27 exemption from mandatory vaccination requirements did so *above and beyond* that
 28 mandated by the Constitution.”) (*emphasis in original*) (citing cases); *Whitlow v.*

1 *California*, 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016) (“[I]t is clear that the Constitution
2 does not require the provision of a religious exemption to vaccination requirements.”);
3 *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“It is also well settled
4 that a state is not required to provide a religious exemption from its immunization program.
5 The constitutional right to freely practice one’s religion does not provide an exemption for
6 parents seeking to avoid compulsory immunization for their school-aged children.”). In
7 light of the overwhelming weight of authority upholding vaccination requirements in
8 response to free exercise challenges, the Court finds that Plaintiffs are not likely to succeed
9 on the merits of their claim.

10 Indeed, in the conclusion to their reply [Doc. No. 18 at 14], Plaintiffs acknowledge
11 that the weight of authority (both Supreme Court and otherwise) is against them, arguing
12 that this Court should ignore these cases and instead base its decision on a guess that the
13 Supreme Court may overrule this precedent. Although they do not say so outright,
14 Plaintiffs ask the Court to disregard *Employment Division, Department of Human*
15 *Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990), and any other cases that relied
16 on *Smith* when upholding laws in the face of free exercise challenges. The Supreme Court,
17 however, expressly declined to revisit *Smith* in *Fulton v. City of Philadelphia,*
18 *Pennsylvania*, 141 S.Ct. 1868, 1876-77 (2021), and this court declines Plaintiffs’ invitation
19 to disregard *Smith* here.

20 In *Smith*, the Court stated that “the right of free exercise does not relieve an
21 individual of the obligation to comply with a valid and neutral law of general applicability
22 on the ground that the law proscribes (or prescribes) conduct that his religion prescribes
23 (or proscribes).” *Smith*, 494 U.S. at 879 (internal quotation marks and citation omitted).
24 “*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict
25 scrutiny under the Free Exercise Clause so long as they are neutral and generally
26 applicable.” *Fulton*, 141 S.Ct. at 1876. Thus, “a law that is neutral and of general
27 applicability need not be justified by a compelling governmental interest even if the law
28 has the incidental effect of burdening a particular religious practice.” *Church of the Lukumi*

1 *Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Further, “nowhere in
2 [*Smith*] does the Supreme Court state that if the government provides a secular exemption
3 to a law or regulation that it must also provide a religious exemption. Indeed, a majority of
4 the Circuit Courts of Appeal have ‘refused to interpret *Smith* as standing for the proposition
5 that a secular exemption automatically creates a claim for a religious exemption.’”
6 *Whitlow*, 203 F.Supp. 3d at 1086 (quoting *Grace United Methodist Church v. City of*
7 *Cheyenne*, 451 F.3d 643, 651 (10th Cir. 2006)).

8 Plaintiffs point to recent Supreme Court cases finding a likelihood of success on free
9 exercise challenges to restrictions on gatherings intended to curtail the spread of COVID-
10 19,³ and to *Fulton*, as supporting their position that the Vaccination Roadmap is not neutral
11 and generally applicable and therefore is subject to strict scrutiny. Yet, circuit courts have
12 distinguished these cases, holding that COVID-19 vaccination requirements that include
13 medical exemptions⁴ but do not allow for religious exemptions are subject to rational basis
14 review and that plaintiffs seeking preliminary injunctions do not have a likelihood of
15 success on their free exercise challenges to those mandates. *See We The Patriots USA, Inc.*
16 *v. Hochul*, No. 21-2179, 2021 WL 5121983, at *14 (2d Cir. Nov. 4, 2021) (noting that “an
17 exemption is not individualized simply because it contains express exceptions for
18 objectively defined categories of persons” and that a medical exemption to a COVID-19
19 vaccination requirement did not “‘invite’ the government to decide which reasons for not
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22 ³ In particular, Plaintiffs rely on *Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *South Bay United Pentecostal*
23 *Church v. Newsom*, 141 S.Ct. 716 (2021); and, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63
(2020).

24 ⁴ Plaintiffs also point to the provisions for conditional enrollment of certain categories of students without
25 proof of vaccination as further evidence that the Vaccination Roadmap is not neutral and generally
26 applicable. However, that the Vaccination Roadmap accommodates the unique circumstances of some
27 students by giving them additional time to comply with the vaccine requirement does not mean that
28 Defendants must allow others to avoid the vaccination requirement entirely to preserve the general
applicability of the plan. *See generally Stormans, Inc.*, 586 F.3d at 1135 (“That the pharmacy regulations
recognize some exceptions cannot mean that the Board has to grant all other requests for exemption to
preserve the ‘general applicability’ of the regulations.”).

1 complying with the policy are worthy of solicitude.”) (quoting *Fulton*, 141 S. Ct. at 1879);
2 *Does 1-6 v. Mills*, 16 F.4th 20, 31 (1st Cir. 2021) (“The medical exemption is meaningfully
3 different from exemptions to other COVID-19-related restrictions that the Supreme Court
4 has considered. In those cases, the Supreme Court addressed whether a state could prohibit
5 religious gatherings while allowing secular activities involving everyday commerce and
6 entertainment and it concluded that those activities posed a similar risk to physical health
7 (by risking spread of the virus) as the prohibited religious activities.”) (citing *Tandon*, 141
8 S.Ct. at 1297, *Roman Cath. Diocese of Brooklyn*, 141 S.Ct. at 66-68, and *S. Bay Pentecostal*
9 *Church*, 141 S.Ct. at 717); *cf. Klaassen*, 2021 WL 3073926, at *24 (noting “the consistent
10 use of rational basis review to assess mandatory vaccination measures.”). Like these other
11 cases, the Court finds that the Vaccination Roadmap is subject only to rational basis review.
12 Further, the Roadmap easily passes that test as “a reasonable exercise of the State’s power
13 to enact rules to protect the public health.” *We the Patriots*, 2021 WL 5121983, at *15.

14 In sum, “State Legislatures have a long history of requiring children to be vaccinated
15 as a condition to school enrollment, and for as many years, both state and federal courts
16 have upheld those requirements against constitutional challenge. History, in itself, does not
17 compel the result in this case, but the case law makes clear that States may impose
18 mandatory vaccination requirements without providing for religious or conscientious
19 objections.” *Whitlow*, 203 F. Supp. 3d at 1092. The mere possibility that the Supreme
20 Court could hold that these cases were decided incorrectly is insufficient for this Court to
21 find that Plaintiffs have a likelihood of success on their free exercise claim here.

22 **B. Irreparable Harm**

23 Because Plaintiffs fail to demonstrate a likelihood of success on the merits, “the
24 court need not consider the other factors” required for a preliminary injunction. *Disney*
25 *Enter.*, 869 F.3d at 856. For completeness, however, the Court also finds that Plaintiffs do
26 not establish irreparable harm as required for the issuance of a TRO.

27 Plaintiffs point out that “[t]he loss of First Amendment freedoms, for even minimal
28 periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese of*

1 *Brooklyn*, 141 S.Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, (1976) (plurality
2 opinion)). Plaintiffs also quote another case involving COVID-19 capacity restrictions on
3 religious services for the proposition that “[r]eligious adherents are not required to establish
4 irreparable harm independent of showing a Free Exercise Clause violation.” *Agudath Israel*
5 *of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020). Plaintiffs make no other argument as
6 to how a failure to issue a TRO here will constitute irreparable harm to Jill Doe (or her
7 parents).

8 The flaw in Plaintiffs’ argument is that unlike either of these New York cases, where
9 the restrictions in question, if not enjoined, would preclude people from attending religious
10 services, failure to issue a TRO here will not cause Jill Doe to lose her right to free exercise
11 of her religion. She asserts that taking any of the available COVID-19 vaccines would
12 violate her religious beliefs. The Vaccination Roadmap, however, does not require her to
13 take a COVID-19 vaccine; it just precludes her from attending in-person classes or
14 participating in extra-curricular activities if she is not vaccinated. Thus, the harm Jill Doe
15 will suffer if a TRO does not issue is not, like the plaintiffs in *Roman Catholic Diocese of*
16 *Brooklyn* and *Agudath Israel of America*, the loss of a First Amendment freedom, but rather
17 the ability to attend in-person classes or participate in extra-curricular activities at her
18 current public high school. Because Plaintiffs make no effort to demonstrate how this harm
19 would be irreparable in the absence of the injunction they seek here, they have not satisfied
20 this requirement for the issuance of a TRO.

21 **IV. Request to Appear Pseudonymously**

22 Within the same application for a TRO, Plaintiffs ask for permission to proceed
23 using pseudonyms. The Court finds this issue more suitable for a separate motion than for
24 inclusion in a TRO application. Further, the Court is not persuaded that Plaintiffs have
25 overcome the presumption that parties must use their real names in litigation.⁵
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28 ⁵ See *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 596 F.3d 1036, 1042 (9th Cir. 2010) (“To determine whether to allow a party to proceed anonymously when the opposing party has objected, a

1 Nevertheless, in light of the instant ruling and Plaintiffs’ professed intention to file an
2 immediate appeal, the Court will temporarily permit Plaintiffs to proceed anonymously.
3 The Court will revisit this permission if and when this case returns after Plaintiffs’ appeal,
4 and it is without prejudice to Defendants filing a motion seeking to require Plaintiffs to
5 reveal their real names.

6 **V. Conclusion**

7 For the foregoing reasons, the Court finds that Plaintiffs lack standing for the
8 injunction they seek in the instant application, and that they have not established a
9 likelihood of success on the merits or that they will suffer irreparable harm if the Court
10 does not issue a TRO. Accordingly, Plaintiffs’ application for a TRO is **DENIED**. For
11 the same reasons, an injunction pending any appeal of this ruling is not warranted.

12 It is **SO ORDERED**.

13 Dated: November 18, 2021



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15 Hon. Cathy Ann Bencivengo
16 United States District Judge
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27 district court must balance five factors: ‘(1) the severity of the threatened harm, (2) the reasonableness of
28 the anonymous party's fears, ... (3) the anonymous party's vulnerability to such retaliation,’ (4) the
prejudice to the opposing party, and (5) the public interest.’) (quoting *Does I Thru XXIII v. Advanced
Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir.2000)).