

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UnifySCC, et al. v. Sara H. Cody, et al.

UnifySCC v. Cody, No. 5:22-cv-01019-BLF (N.D. Cal. May 21, 2025) · No. 5:22-cv-01019-BLF · Decided May 21, 2025

SUMMARY

The United States District Court for the Northern District of California grants the County of Santa Clara's motion to decertify a previously certified class challenging the County's COVID-19 vaccination, risk-tier, and accommodation policies. The court concludes that subsequent factual developments revealed substantial individualized differences in class members' vaccination decisions, leave status, accommodation efforts, and injuries, undermining commonality and class treatment under Federal Rule of Civil Procedure 23. Plaintiffs Tom Davis, Maria Ramirez, and Elizabeth Baluyut may continue on an individual basis.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Beth Labson Freeman
JURISDICTION	United States District Court for the Northern District of California
DECIDED	May 21, 2025
DOCKET	5:22-cv-01019-BLF
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiffs brought a putative class action challenging Santa Clara County's COVID-19 vaccination, religious-exemption, risk-tier, and accommodation policies. After certifying a class, the court considered the County's motion to decertify based on a more developed factual record and also addressed the organizational plaintiff's Article III standing.
STANDARD OF REVIEW	The court reevaluated the Rule 23 requirements in light of subsequent developments and applied the same standard governing class certification to decertification. It considered whether good cause existed to revisit certification, whether the class satisfied Rule 23(a)'s commonality requirement, and whether common issues predominated under Rule 23(b)(3). Article III standing was evaluated under the injury-in-fact, traceability, and redressability requirements.

PRECEDENTIAL VALUE	unpublished
PARTIES	UnifySCC, Tom Davis, Maria Ramirez, Elizabeth Baluyut v. Sara H. Cody, County of Santa Clara

TOPICS

class actions civil procedure subject matter jurisdiction employment discrimination free exercise clause

PRACTICE AREAS

civil procedure class actions employment law constitutional law civil rights

QUESTIONS PRESENTED

1. Whether good cause and subsequent developments permitted the court to revisit and decertify the previously certified class under Federal Rule of Civil Procedure 23.
2. Whether the class continued to satisfy Rule 23(a)'s commonality requirement for the free-exercise, equal-protection, Title VII, FEHA, and Establishment Clause theories.
3. Whether individualized issues concerning injury, adverse employment action, accommodation, undue hardship, and the County's interactions with employees defeated predominance and superiority under Rule 23(b)(3).
4. Whether UnifySCC continued to have Article III standing after its claims for prospective declaratory and injunctive relief became moot.

HOLDINGS

1. A district court may modify or decertify a class before final judgment when subsequent developments and newly developed facts provide good cause to reevaluate whether the class continues to satisfy Rule 23.
2. The class failed to satisfy commonality because the alleged injuries and the County's conduct could not be resolved through common answers for the class as a whole.
3. The class failed to satisfy Rule 23(b)(3) because individualized questions predominated over common questions and class treatment was not a superior method of adjudication.
4. UnifySCC lacked continuing Article III standing because its claims for prospective declaratory and injunctive relief had become moot, and it was dismissed from the case.
5. Decertification did not prevent Tom Davis, Maria Ramirez, and Elizabeth Baluyut from proceeding on their individual claims.

KEY QUOTATIONS

“Even after a certification order is entered, the [Court] remains free to modify it in the light of subsequent developments in the litigation.” (at 3)

“The common question “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”” (at 10)

“The determination of whether the County is liable on any of Plaintiffs’ remaining claims will rely on an analysis of the Parties’ conduct and interactions throughout the accommodations process on an employee-by-employee basis” (at 17)

FACTUAL BACKGROUND

Santa Clara County required County personnel to become vaccinated against COVID-19 or request a medical, disability, or religious exemption. The County used a Risk Tier System to categorize exempt employees' positions and communicated that employees in high-risk positions could seek reassignment, transfer, or other accommodations, with administrative leave potentially imposed if no alternative placement was available. The class members' experiences differed substantially: many never took leave, many never sought alternative positions, some accepted or declined transfers, and some became vaccinated without evidence showing that they did so because of coercion.

PROCEDURAL HISTORY

The action was filed on February 18, 2022, and an amended class complaint was filed on August 23, 2022. The court partially granted the motion for class certification on January 29, 2024, certifying a class of 463 County employees. During briefing on cross-motions for summary judgment, evidence showed that class members had materially different experiences, including that many never took leave or sought alternative placement. The court granted the County's motion for class decertification, dismissed UnifySCC for lack of standing after plaintiffs conceded its prospective-relief claims had become moot, and allowed Davis, Ramirez, and Baluyut to proceed individually.

DISPOSITION

other

CASES CITED

- Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157, 160 (1982)
- Krueger v. Wyeth, Inc., 310 F.R.D. 468, 473-74 (S.D. Cal. 2015)
- Lao v. H&M Hennes & Mauritz, L.P., No. 16-cv-00333, 2019 WL 7312623, at *2 (N.D. Cal. Dec. 30, 2019)
- Morales v. Kraft Foods Grp., Inc., No. 14-cv-04387, 2017 WL 2598556, at *20 (C.D. Cal. June 9, 2017)
- Ries v. Arizona Beverages USA LLC, No. 10-01139, 2013 WL 1287416, at *3 (N.D. Cal. Mar. 28, 2013)
- Cole v. CRST, Inc., 317 F.R.D. 141, 144 (C.D. Cal. 2016)
- Stromberg v. Qualcomm Inc., Stromberg v. Qualcomm Inc., 14 F.4th 1059, 1066 (9th Cir. 2021)
- Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 663-69 & n.14 (9th Cir. 2022)
- Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1124 n.4, 1126 (9th Cir. 2017)

- *Heredia v. Eddie Bauer LLC*, No. 16-cv-06236, 2020 WL 127489, at *5, *10 (N.D. Cal. Jan. 10, 2020)
- *Hovsepian v. Apple, Inc.*, No. 08-5788, 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009)
- *In re AutoZone, Inc., Wage & Hour Emp. Pracs. Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012)
- *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423, 430-31 (2021)
- *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)
- *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338-39 (2016)
- *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 n.5, 349-50 (2011)
- *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)
- *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1222, 1224 (9th Cir. 2023)
- *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004)
- *Groff v. DeJoy*, 600 U.S. 447, 470 (2023)
- *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999)
- *Steenmeyer v. Boeing Co.*, 92 F. Supp. 3d 1024, 1031 (W.D. Wash. 2015)
- *Dawson v. Akal Sec. Inc.*, 660 F. App'x 504, 506 (9th Cir. 2016)
- *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438-39 (9th Cir. 1993)
- *Gage v. Mayo Clinic*, 707 F. Supp. 3d 870, 879 (D. Ariz. 2023)
- *Zimmerman v. PeaceHealth*, 701 F. Supp. 3d 1099, 1109 (W.D. Wash. 2023)
- *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 614 & n.5 (9th Cir. 1988)
- *Opuku-Boateng v. State of California*, 95 F.3d 1461, 1467 & n.9 (9th Cir. 1996), as amended (Nov. 19, 1996)
- *Rodriguez v. City of Chicago*, No. 95-cv-5371, 1996 WL 22964, at *3 (N.D. Ill. Jan. 12, 1996)
- *Perata v. City & Cnty. of San Francisco*, No. 21-cv-02819, 2023 WL 4537695, at *16 (N.D. Cal. July 13, 2023)
- *Bezzina v. United Airlines, Inc.*, No. 22-55293, 2023 WL 6389397, at *2 (9th Cir. Oct. 2, 2023) (mem.)
- *Gallagher v. Hawaii Symphony Orchestra*, No. 23-cv-00395, 2024 WL 1331799, at *9 (D. Haw. Mar. 27, 2024)
- *Am. Postal Workers Union, San Francisco Loc. v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986)
- *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622, 624 (1997)
- *Van v. LLR, Inc.*, 61 F.4th 1053, 1067 (9th Cir. 2023)
- *Mazur v. eBay Inc.*, 257 F.R.D. 563, 568 (N.D. Cal. 2009)
- *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021)
- *Hunter v. U.S. Dep't of Educ.*, 115 F.4th 955, 964-65 (9th Cir. 2024)
- *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022)
- *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)
- *Iten v. Los Angeles*, 81 F.4th 979, 984 (9th Cir. 2023)
- *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393-94 (2024)
- *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982)
- *Arizona Alliance for Retired Americans v. Mayes*, 117 F.4th 1165 (9th Cir. 2024)

- *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986)
- *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)

OPINION

1 2 3 4 5 UNITED STATES DISTRICT COURT 6 NORTHERN DISTRICT OF CALIFORNIA 7
 SAN JOSE DIVISION 8 9 UNIFYSCC, et al., Case No. 5:22-cv-01019-BLF 10 Plaintiffs,
 ORDER GRANTING DEFENDANT’S 11 v. MOTION FOR CLASS DECERTIFICATION 12
 SARA H. CODY, et al., [Re: Dkt. No. 176] 13 Defendants. 14 15 This lawsuit concerns the
 County of Santa Clara’s (the “County”) response to the COVID- 16 19 pandemic, which included
 imposing a requirement on County employees to either become 17 vaccinated against the virus or
 obtain an exemption from vaccination.

Plaintiffs filed this lawsuit 18 to challenge the “Risk Tier System” that the County used to
 determine how an employee with an 19 exemption could be accommodated, as well as the ensuing
 accommodations procedure. 20 On January 29, 2024, the Court certified a class of “[a]ll
 individuals who: 1) work or 21 worked for the County and/or [] were subject to its vaccine
 policies and orders, including the Risk 22 Tier System; 2) were forced by the County to choose
 between taking the vaccine to maintain their 23 jobs and/or their employment-related benefits or
 being placed on unpaid leave; 3) were [] 24 classified as working in high risk jobs pursuant to the
 County’s Risk Tier System; and 4) received 25 [] a religious exemption from the County...
 between August 5, 2021 and September 27, 2022.” 26 Dkt.

No. 125 at 25. However, in subsequent briefing on the Parties’ cross-motions for summary 27
 judgment, it became apparent to the Court that there were serious questions regarding whether the
 1 Parties’ briefing on whether the case should continue to proceed as a class action. 2 Before the
 Court is the County’s Motion for Class Decertification. Dkt. No. 176 (“Mot.”).

3 Plaintiffs oppose the motion, Dkt. No. 182 (“Opp.”), and the County filed a reply in support of
 its 4 motion, Dkt. No. 183 (“Reply”). The Court heard oral argument on the motion on March 13,
 5 2025. Dkt. Nos. 185, 187. 6 For the following reasons, the Court GRANTS the County’s motion.

The Class is 7 DECERTIFIED. Plaintiffs Tom Davis, Maria Ramirez, and Elizabeth Baluyut may
 proceed on an 8 individual basis. 9 I. BACKGROUND 10 A. Factual Background 11 Starting in
 late 2019, a novel coronavirus called COVID-19 spread through the United 12 States, causing a
 pandemic that led to widespread illness and death. See Dkt. No. 176-1, 13 Declaration of Bryan K.
 Anderson in Support of Defendants’ Motion for Decertification 14 (“Anderson Decl.”), Ex. 1
 (“Márquez Decl.”) ¶¶ 5–7.

At first, no vaccination against the illness 15 was available, and the virus was poorly understood.
 Thus, many governments, including 16 Defendant County of Santa Clara, responded to the
 uncertainty by issuing health orders that 17 imposed restrictions on travel and in-person activities.

The first COVID-19 vaccines became available at the end of 2020, though the pandemic continued past that time. In fact, the summer of 2021 saw a surge in COVID-19 cases resulting from the highly contagious “Delta” variant of the virus. *Id.* ¶ 32.

Accordingly, on August 5, 2021, the California State Public Health Officer issued an Order requiring certain workers to be vaccinated against COVID-19. *Id.* ¶ 34. That same day, the County of Santa Clara issued a policy that required all County personnel to either become vaccinated against COVID-19 or request a medical, disability, or religious exemption by September 30, 2021.

Declaration of Rachele R. Byrd in Opposition to Defendant’s Motion for Class Decertification (“Byrd Decl.”), Ex. 1. That policy made use of a “Risk Tier System” that categorized exempt employees’ positions as either low-, medium-, or high-risk for communication of the COVID-19 virus. *Id.*, Ex. 2.

The policy made clear that those positions unless they received the COVID-19 vaccine. *Id.* at 2. Instead, they would be required to seek other accommodations, such as placement in an alternative position with the County. The County provisionally granted most if not all of the requested religious exemptions and informed those receiving exemptions of the procedures for seeking accommodations.

Márquez Decl. ¶¶ 38–41; see Byrd Decl., Ex. 11. For those working in high-risk positions, the County communicated that they might be placed on administrative leave if they did not receive the vaccine by the established compliance date. See Byrd Decl., Ex. 11; Anderson Decl., Ex. 4 9 (“Menzies Decl. No. 1”) ¶ 6. Those individuals were permitted to use leave banks—such as 10 vacation, sick time, etc.—in order to receive pay during the administrative leave, and the County 11 provided instructions on how they could seek other accommodations such as transfer to a lower- 12 risk position.

See Byrd Decl., Ex. 11. The County’s accommodations process information 13 included a statement that individuals who received a disability-related exemption might be entitled 14 to “priority consideration” for placement in alternative roles. Byrd. Decl., Ex. 8 at 2. 15 B. Procedural Background 16 This lawsuit was initially filed by Plaintiffs UnifySCC, Tom Davis, and Maria Ramirez on 17 February 18, 2022.

Dkt. No. 1. On August 23, 2022, Plaintiffs filed a Verified First Amended 18 Class Action Complaint for Declaratory and Injunctive Relief and Damages, which included 19 adding Plaintiff Elizabeth Baluyut. Dkt. No. 55. Approximately a year later, Plaintiffs moved for 20 class certification. Dkt. No. 86. Their motion was granted in part and denied in part on January 21 29, 2024, with the Court ultimately certifying a class of 463 County employees based on the 22 following definition: 23 All individuals who: 1) work or worked for the County and/or [] were

subject to its vaccine policies and orders, including the Risk Tier System; 2) were forced by the County to 24 choose between taking the vaccine to maintain their jobs and/or their employment-related benefits or being placed on unpaid leave; 3) were [] classified as working in high risk jobs 25 pursuant to the County's Risk Tier System; and 4) received [] a religious exemption from 26 the County... between August 5, 2021 and September 27, 2022.

27 Dkt. No 125 at 25. 1 141, 143. Through the briefing on those motions, various facts were presented that drew into 2 question the appropriateness of resolving this litigation on a class-wide basis. For example, the 3 County submitted evidence that more than half of the class members never went on leave.

In 4 addition, the County submitted evidence that out of 463 total class members, 309 never applied for 5 an alternative position as an accommodation, and some declined offers to move into lower-risk 6 positions that were offered to them by the County.

The Parties also submitted evidence of 7 individual class members' experiences during the accommodations process, which revealed that 8 those experiences varied significantly. 9 Accordingly, at the hearing on the Parties' summary judgment motions, the Court 10 requested briefing on whether the class should be decertified. Dkt. No. 173 at 3:20–4:21.

The 11 County responded by filing the Motion for Class Decertification on December 4, 2024. Dkt. No. 12 176. 13 II. LEGAL STANDARD 14 Federal Rule of Civil Procedure 23 governs class certification. Under that Rule, “[a]n 15 order that grants or denies class certification may be altered or amended before final judgment.” 16 Fed. R. Civ. P. 23(c)(1)(C); accord *Gen.*

Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982) 17 (“Even after a certification order is entered, the [Court] remains free to modify it in the light of 18 subsequent developments in the litigation.”); *Krueger v. Wyeth, Inc.*, 310 F.R.D. 468, 473–74 19 (S.D. Cal. 2015). Decertification will generally require a showing of good cause. *Lao v. H&M 20 Hennes & Mauritz, L.P.*, No. 16-cv-00333, 2019 WL 7312623, at *2 (N.D.

Cal. Dec. 30, 2019) 21 (“Decertification should not be granted except for good cause, such as discovery of new facts or 22 changes in the parties or in the substantive or procedural law.” (quoting *Morales, et al. v. Kraft 23 Foods Grp., Inc.*, No. 14-cv-04387, 2017 WL 2598556, at *20 (C.D. Cal. June 9, 2017)) (internal 24 alterations omitted)). 25 Class decertification motions are governed by the same standard as is applied to class 26 certification motions.

Ries v. Arizona Beverages USA LLC, No. 10-01139, 2013 WL 1287416, at 27 *3 (N.D. Cal. Mar. 28, 2013) (“The standard used by the courts in reviewing a motion to decertify 1 *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000)).

Accordingly, “[i]n 2 considering a motion to decertify, ‘a court must reevaluate whether the class continues to meet the 3 requirements of Rule 23.’” *Cole v. CRST, Inc.*, 317 F.R.D. 141, 144 (C.D. Cal. 2016) (quoting 4 *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 544 (C.D. Cal. 2012)). “As a threshold matter, a class 5 must first meet the four requirements of Rule 23(a): (1) numerosity, (2) commonality, 6 (3) typicality, and (4) adequacy of representation.” *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 7 1066 (9th Cir.

2021). “In addition to Rule 23(a)’s requirements, the class must meet the 8 requirements of at least one of the three different types of classes set forth in Rule 23(b).” *Id.* at 9 1066 (internal quotation marks and citation omitted); see also *Olean Wholesale Grocery Coop., 10 Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022). “To qualify for the third 11 category, Rule 23(b)(3), the district court must find that ‘the questions of law or fact common to 12 class members predominate over any questions affecting only individual members, and that a class 13 action is superior to other available methods for fairly and efficiently adjudicating the 14 controversy.’” *Olean*, 31 F.4th at 663–64 (quoting Rule 23(b)(3)).

15 III. DISCUSSION 16 As a preliminary matter, the Court finds that there is good cause to consider whether the 17 certification order should be revised. “Good cause” may include “discovery of new facts.” 18 *Morales*, 2017 WL 2598556, at *20; cf. *Heredia v. Eddie Bauer LLC*, No. 16-cv-06236, 2020 WL 19 127489, at *10 (N.D. Cal. Jan. 10, 2020) (“[A] district court may revisit a class certification order 20 ‘in the light of subsequent developments in the litigation.’” (quoting *Plascencia v. Lending 1st 21 Mortg.*, No. 07-cv-4485, 2012 WL 253319, at *3 (N.D.

Cal. Jan. 26, 2012))). The facts submitted 22 to the Court during the briefing on the cross-motions for summary judgment revealed that the 23 reality underlying this litigation differs from this Court’s understanding at the time of class 24 certification. This revelation is a subsequent development during the litigation that renders the 25 Class suspect, so the Court finds it appropriate to reexamine class certification now.

26 A. A Note About Ascertainability 27 Defendant first argues that the certified class is not ascertainable, arguing that a “class is 1 8. Specifically, Defendant argues that “over half the class lacks standing,” because 238 class 2 members did not ever go on leave and 309 class members “never sought job transfers.” *Id.* at 8. 3 Plaintiffs respond that the class members do have standing, “because the County forced them to 4 choose: receive the COVID-19 vaccination in violation of religious convictions; or be placed on 5 unpaid administrative leave.” *Opp.* at 9.

Plaintiffs characterize this as unlawful coercion and as a 6 “threat” under Title VII and FEHA on the part of the County. *Id.* at 10–12. Plaintiffs also argue 7 that the Class is ascertainable as an administrative matter because “the County has data from 8 which it can ascertain which individuals were granted religious exemptions, which individuals 9 were categorized as working in ‘high-risk’ jobs, which individuals were placed on administrative 10 leave, which Class

members eventually took the vaccine and when, and which Class members 11 used leave bank time and how much.” *Id.* at 13.

12 Courts in this circuit previously spoke of a requirement implied by Rule 23 that “the class 13 sought to be represented must be adequately defined and clearly ascertainable.” See *Vietnam 14 Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 211 (N.D. Cal. 2012) (“[A] class definition is sufficient 15 if the description of the class is ‘definite enough so that it is administratively feasible for the court 16 to ascertain whether an individual is a member.’” (quoting *O’Connor v. Boeing N. Am., Inc.*, 184 17 F.R.D.

311, 319 (C.D. Cal. 1998))). As a component of that implicit requirement, some courts— 18 including this one—discussed the lack of standing of absent class members as indicative of an 19 ascertainability-related overbreadth problem. See *Heredia*, 2020 WL 127489, at *5; *Hovsepian v. 20 Apple, Inc.*, No. 08-5788, 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009) (finding a class not 21 ascertainable because it included members who had “no injury and no standing to sue”); *In re 22 AutoZone, Inc., Wage & Hour Emp.*

Pracs. Litig., 289 F.R.D. 526, 545 (N.D. Cal. 2012) (finding a 23 class definition that included employees who were not injured and had “no standing to sue” 24 overbroad and thus not ascertainable). 25 However, the Ninth Circuit has declined to impose a separate “threshold ‘ascertainability’ 26 prerequisite to certification.” *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.4 (9th Cir.

27 2017). Considerations of administrative feasibility and overbreadth instead may come in under 1 23(b)(3) requires a court certifying a class under that section to consider ‘the likely difficulties in 2 managing a class action.’” *Id.* at 1126. Difficulty in determining who would be included as a part 3 of the class may thus inform a court’s findings regarding predominance and superiority, rendering 4 “a separate administrative feasibility requirement... largely superfluous.” See *id.* Likewise, 5 concerns about “overbreadth” may be considered as a part of those analyses.

Olean, 31 F.4th at 6 669 n.14 (“[A] court must consider whether the possible presence of uninjured class members 7 means that the class definition is fatally overbroad. When ‘a class is defined so broadly as to 8 include a great number of members who for some reason could not have been harmed by the 9 defendant’s allegedly unlawful conduct, the class is defined too broadly to permit certification.’” 10 (quoting *Messner v. Northshore Univ.*

HealthSystem, 669 F.3d 802, 824 (7th Cir. 2012))). 11 Therefore, the Court declines to separately address Defendant’s arguments regarding 12 “ascertainability,” and instead deals with the issues raised under that heading as they apply to the 13 relevant portions of the Rule 23 analysis below. 14 B. Article III Standing 15 Defendant’s arguments about ascertainability involve a second preliminary issue, as well.

16 Specifically, Defendant indirectly challenges whether class members who chose to become 17 vaccinated or who never sought accommodations suffered an injury-in-fact sufficient to confer 18 Article III standing. See Mot. at 8. Plaintiffs respond that they did, because they were allegedly 19 injured as soon as they were “forced... to choose” between adhering to their religious convictions 20 and keeping their jobs.

Opp. at 9. 21 Federal courts are courts of limited jurisdiction and may only resolve “Cases” and 22 “Controversies”—meaning disputes in which the plaintiff has a “personal stake” sufficient to 23 confer Article III standing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). A plaintiff 24 shows Article III standing by demonstrating “(i) that he suffered an injury in fact that is concrete, 25 particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and 26 (iii) that the injury would likely be redressed by judicial relief.” *Id.* (citing *Lujan v. Defenders of 27 Wildlife*, 504 U.S. 555, 560–561 (1992)). “To establish injury in fact, a plaintiff must show that he 1 ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 2 (2016), as revised (May 24, 2016) (citing *Lujan*, 504 U.S. at 560). “Every class member must 3 have Article III standing in order to recover individual damages,” and “[a] plaintiff must 4 demonstrate standing ‘with the manner and degree of evidence required at the successive stages of 5 the litigation.’” *TransUnion*, 594 U.S. at 431.

6 In this case, the brewing dispute is over whether a majority of class members experienced 7 an actual, concrete injury. The Court agrees with Defendant that Plaintiffs have presently failed to 8 establish that they did. Plaintiffs have asserted that the concrete injury suffered was being “forced 9... to choose[] [between] receiv[ing] the COVID-19 vaccination in violation of religious 10 convictions; or be[ing] placed on unpaid administrative leave.” Opp. at 9.

But Plaintiffs have not 11 submitted evidence that the class members were forced into that choice. To the contrary, 12 Plaintiffs’ evidence shows that the County contacted individuals who received religious 13 exemptions to inform them of next steps regarding how to seek an accommodation. See Byrd 14 Decl., Ex. 11. While unpaid administrative leave was discussed as an eventual possibility, the 15 communication by the County was not in nearly such stark terms as Plaintiffs suggest.

Instead, 16 the County made clear that each exempt employee was encouraged to commence discussions with 17 their Department regarding potential accommodations. See *id.* 18 Thereafter, nearly half of the class never took leave time. Anderson Decl., Ex. 31 (“Volk 19 Decl.”) ¶ 12 (noting that 205 class members have no leave time recorded during the class period).

20 Many of those people simply became vaccinated before the deadline—and for the vast majority of 21 those individuals, the Court has no evidence indicating why. Certainly there is some evidence in 22 the record that a few County employees felt forced to become vaccinated in violation of their 23 religious beliefs, e.g., Anderson Decl., Ex. 14 (“Valle Dep. Tr.”) at 20:10–12,

Anderson Decl., Ex. 24 24, but it is not reasonable to infer that every class member who received the vaccination did so 25 under “coercion” or “duress.” In light of the rapidly evolving circumstances, it is equally 26 plausible that many of those individuals simply decided that the benefits of vaccination 27 outweighed their objections, or that becoming vaccinated would not conflict with their convictions 1 were in fact forced into the choice Plaintiffs discuss, Plaintiffs have not yet carried their burden to 2 show an injury-in-fact for those class members.

TransUnion, 594 U.S. at 430–31 (“As the party 3 invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have 4 standing.”). 5 Similarly, the County has submitted evidence that 309 members of the class never applied 6 for alternative positions with the County. Anderson Decl., Ex. 32 (“Quon Decl.”) ¶ 5 & Ex. 1. 7 Again, Plaintiffs have not submitted evidence showing why those individuals declined to engage 8 in the accommodations process, meaning that Plaintiffs have likewise not yet carried their burden 9 to show that those individuals suffered a concrete injury, rather than a hypothetical one, based on 10 the County’s accommodations policy challenged in this litigation.

11 This motion does not directly present—and thus the Court does not decide—the question 12 of whether all absent class members can establish Article III standing. However, standing will 13 clearly be an issue for each Plaintiff who goes forward in the case.

Moreover, the above 14 discussion previews the following sections of this Order. That is, because the claims that 15 Plaintiffs assert largely depend on individualized and fact-intensive inquiries, the Court has 16 concluded that even for the class members who do ultimately have Article III standing, continuing 17 to pursue those claims on a class basis is not appropriate.

The Court will now address the class 18 certification requirements of Federal Rule of Civil Procedure 23 as applied to the class members 19 who are able to cross that jurisdictional threshold. 20 C. Showing Under Rule 23(a) 21 Rule 23(a) requires that (1) the members of the class must be so numerous that joinder is 22 impracticable, (2) there must be questions of law or fact common to the class, (3) the 23 representative’s claims and defenses must be typical of the class members’ claims and defenses, 24 and (4) the representative must fairly and adequately protect the interests of the class.

Fed. R. Civ. 25 P. 23(a)(1)–(4). Defendant specifically challenges Plaintiffs’ showing related to commonality.¹ 26 1 As the Supreme Court has previously stated, “[t]he commonality and typicality requirements of 27 Rule 23(a) tend to merge.” Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011) (citation 1 Defendant argues that the claims of the class members in this case “cannot be resolved ‘in 2 one stroke,’” and that therefore commonality—particularly regarding injury—is lacking.

Mot. at 3 8–9. Walking through the five certified questions, Defendant argues that individualized inquiries 4 will be required to resolve each one because so many class members did not seek or require 5 accommodations and were never “relegated... to unpaid leave.” Id. at 9–10.

The “mini trials” 6 necessary to resolve each class member’s claims, Defendant says, renders this action inappropriate 7 for class treatment. Id. at 11. 8 In response, Plaintiffs argue that “the County’s arguments speak to whether the Class is 9 overly broad, not to whether individualized issues control,” and point to the County’s policies and 10 orders as the relevant evidence, common to the entire class, that Plaintiffs think the Court must 11 assess in order to resolve the claims on a classwide basis.

Opp. at 18–20. Plaintiffs go on to argue 12 that “the County’s accommodations policy was uniform: Class members were placed on unpaid 13 administrative leave and allowed to use their leave banks.” Id. at 21. 14 In order for a case to proceed as a class action, there must be “questions of law or fact 15 common to the class.” Fed. R. Civ. P. 23(a)(2). Elaborating on this requirement, the Supreme 16 Court has explained that commonality requires the plaintiff to demonstrate that the class members 17 “have suffered the same injury,” such that “a class-wide proceeding [can] generate common 18 answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 19 338, 349–50 (2011) (emphasis added) (quoting *Falcon*, 457 U.S. at 157, and *Nagareda*, Class 20 Certification in the Age of Aggregate Proof, 84 N.Y.U.

L. Rev. 97, 132 (2009)). The common 21 question “must be of such a nature that it is capable of classwide resolution—which means that 22 determination of its truth or falsity will resolve an issue that is central to the validity of each one of 23 the claims in one stroke.” Id. at 350.

On the other hand, “an individual question is one where 24 members of a proposed class will need to present evidence that varies from member to member.” 25 *Olean*, 31 F.4th at 663 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016)). 26 This Court originally found that the commonality requirement was satisfied with regard to 27 1 Plaintiffs’ constitutional claims because “Plaintiffs’ claims against the Risk Tier System and the 2 prioritization of medical and disability exemptions are against the County’s Policy—which 3 applied to every member of the class in the same way.” Dkt.

No. 125 at 8. Likewise, the Court 4 found that the FEHA and Title VII claims also evinced the necessary commonality because “every 5 member of the class received the same accommodation under the Policy—they were put on leave 6 and offered assistance finding positions in low-or intermediate-risk roles.” Id. at 9–10. 7 In other words, the Court’s certification decision was based upon a misunderstanding about 8 the underlying facts that has been corrected through the Parties’ respective summary judgment 9 motions.

As the County aptly puts it: the “basic premise” upon which the Court relied at class 10 certification was that all County employees granted religious exemptions whose positions were 11 categorized as “high-risk” for COVID-19 transmission were placed on unpaid leave upon being 12 granted their exemptions. See Mot. at 7. Now, on a more developed record, it is clear that that is 13 not what happened.

Instead, the County communicated to its employees that individuals whose 14 roles were categorized as high-risk would not be able to continue working in that same role if they 15 did not become vaccinated. See Byrd Decl., Ex. 2.

Although the one-page document laying out 16 the Risk Tier System, id., stated that the County could “reasonably accommodate [individuals in 17 high-risk roles] through providing them a temporary leave of absence, during which the County 18 w[ould] assist them in seeking reassignment or transfer to a lower- or intermediate-risk position,” 19 id., the County’s communications to those individuals who were provisionally granted exemptions 20 make clear that unpaid administrative leave would only be imposed if the individual was unable to 21 move to a different position and/or to use leave banks.

As one such letter stated: [T]he County cannot safely accommodate you in your current role. The 22 Department will now meet with you to determine whether there is a reasonable 23 accommodation... such as a reassignment or transfer to a lower-risk position, or an unpaid leave of absence.... Unless you can be placed in a new position in the 24 Department before November 1, 2021, you will be placed on administrative leave effective November 1, 2021.

You may apply your applicable leave banks... to this leave of 25 absence, after which your leave will be unpaid. If you are able to be reassigned to an 26 alternate position while you are on administrative leave, you will return to paid status. If the Department is unable to reassign or accommodate you in a lower-risk 27 position, you will be referred to the Equal Opportunity Division (EOD) for potential placement elsewhere in the County to an open position for which you meet the minimum 1 Byrd Decl., Ex. 11 at 1.

Thus, class members were given advance warning that an unpaid leave of 2 absence might commence if (1) they remained unvaccinated, (2) they were unable to be 3 transferred to a new position within their department, (3) they were unable to find a position in 4 another department, and (4) they did not have or choose to use leave banks to continue receiving 5 pay while seeking an alternate placement.

At the same time, class members were invited to 6 immediately engage with their departments in order to begin the accommodation process. 7 Crucially, the Court agrees with Defendant that Plaintiffs’ “letter-receipt” theory—i.e., that 8 the County’s letters setting out next steps constituted “threats”—is unpersuasive.

First, as 9 discussed in the preceding paragraph, the Court finds that Plaintiff's theory does not fairly 10 characterize the communication sent by the County. Second, there is simply no evidence that 11 most class members actually experienced coercion or duress with regard to their decision to 12 become vaccinated, so Plaintiffs' theory fails for lack of proof as it pertains to class certification 13 only.

14 In the absence of this letter-receipt theory, and in light of the fact that nearly half of the 15 class members never actually went on leave, the Court must revisit each of the certified questions 16 in order to ascertain whether commonality still exists. Those five certified questions include: 17 1. Whether Defendants violated Plaintiffs' right to free exercise and equal protection of the law by prioritizing medical exemptions 18 over religious exemptions in high-risk settings; 2.

Whether Defendants' Risk Tier System violated the Free Exercise 19 Clause and Equal Protection Clause because it relegated Plaintiffs and the Class members to unpaid leave but allowed some 20 unvaccinated or non-boosted employees to continue to work; 3. Whether the County's religious exemption and/or 21 accommodation procedure was either non-neutral or not generally applicable such that it constitutes an individualized assessment 22 under [Fulton v. City of Philadelphia, 593 U.S. 522 (2021)], and is thereby subject to strict scrutiny; 23 4.

Whether Defendants provided Individual Plaintiffs and the Class members with reasonable accommodation as required under 24 FEHA and Title VII; and 5. Whether Defendants violated the Establishment Clause by 25 demonstrating hostility towards religion. 26 The Court will consider each question in turn. 27 1.

First Certified Question 1 exercise and equal protection of the law by prioritizing medical exemptions over religious 2 exemptions in high-risk settings." On this first question, the County argues that "individualized 3 inquiries are required... because... few (if any) Plaintiffs can even allege injury." Mot at 9. 4 Plaintiffs respond that this first question "generates a common answer" because "each of these 5 Class members claims a valid injury," referring to their arguments that the class members were 6 injured by the coercion they allegedly experienced upon receipt of the County's communications 7 letting them know that they could not continue in their positions unvaccinated.

Opp. at 18. 8 On this first question, the Court concludes that the commonality requirement is not met. 9 Over half of the County employees included in the class as presently certified (1) never took leave, 10 in some cases because they chose to get vaccinated rather than continue to pursue their requested 11 exemptions, (2) received an alternative placement, (3) went on leave for an unrelated reason, or 12 (4) declined to seek an accommodation through the proffered procedures, meaning that they could 13 not have been injured by any priority given in accommodations placements to those who received 14 medical- or disability-related exemptions.

See Volk Decl. ¶ 12; Quon Decl. ¶ 5; Anderson Decl., 15 Ex. 33 (“Doyle Decl.”) ¶ 7 (noting that, at a time when 138 County personnel in high-risk roles 16 were on leave, approximately 30 of those individuals “were on a leave (such as family, medical or 17 other personal leave) unrelated to their vaccination status”); id. ¶ 14 (noting that “80% of the 18 personnel placed in alternate roles had religious exemptions).

Again, Plaintiffs have not submitted 19 evidence showing that those individuals felt that the County’s policies burdened any sincerely held 20 beliefs, and Plaintiffs cannot meet their burdens to demonstrate standing and commonality by 21 simply urging the Court to assume that all (or most) class members were injured due to feeling 22 “coerced.” Instead, quite contrary to Plaintiffs’ argument that it is susceptible to a common 23 answer, the question of whether the County violated any individual Plaintiff’s free exercise or 24 equal protection rights must be resolved on a case-by-case basis.

25 2. Second Certified Question 26 The second certified question is “Whether Defendants’ Risk Tier System violated the Free 27 Exercise Clause and Equal Protection Clause because it relegated Plaintiffs and the Class members 1 As Plaintiffs concede, Opp. at 19, the second certified question is no longer relevant to this 2 decertification motion in light of the fact that the Court has already granted Defendant’s Motion 3 for Summary Judgment as to Plaintiffs’ Free Exercise and Equal Protection claims related to the 4 County’s Risk Tier System.

Dkt. No. 178 at 27. 5 3. Third Certified Question 6 The third certified question is “Whether the County’s religious exemption and/or 7 accommodation procedure was either non-neutral or not generally applicable such that it 8 constitutes an individualized assessment under [Fulton v. City of Philadelphia, 593 U.S. 522 9 (2021)], and is thereby subject to strict scrutiny.” On this third question, Defendant argues that it 10 involves a “preliminary legal determination that would not resolve a single claim of a single class 11 member” and that “the majority of class members have no standing to even seek this preliminary 12 determination.” Mot. at 10.

In response, Plaintiffs argue that this question is answered in the 13 same way “with respect to every member of the class” and, when considered in combination with 14 the other Free Exercise and Equal Protection claims, it is likely to “drive the resolution of the 15 litigation.” Opp. at 19. 16 The County correctly notes on Reply, Reply at 11, that the Court has already resolved the 17 question of which level of scrutiny applies to Plaintiffs’ Free Exercise and Equal Protection 18 claims.

Dkt. No. 178 at 23. As demonstrated by the Court’s determination at summary judgment, 19 it is a common legal question shared by all class members with standing. However, since the 20 relevant legal issue has already been decided, the fact that the third certified question meets the 21 commonality requirement does not weigh heavily in favor of maintaining the proceeding as a class 22 action.

23 4. Fourth Certified Question 24 The fourth certified question is “Whether Defendants provided Individual Plaintiffs and the 25 Class members with reasonable accommodation as required under FEHA and Title VII.” On the 26 fourth question, the County argues that “class members had diverse experiences with the County’s 27 accommodations,” including that many members of the class did not require accommodations at 1 were reasonable involves quintessentially fact-specific, individualized inquiries that cannot be 2 resolved in one stroke.” *Id.* (citing *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir.

3 1999)). In opposition, Plaintiffs argue that the commonality requirement is met because “the 4 accommodation provided in the Policy is unreasonable” and was “applicable to all personnel.” 5 *Opp.* at 19–20. 6 On this question, Plaintiffs are mistaken in suggesting that whether the provided 7 accommodations were reasonable is a “shared legal issue amongst” the class members.

See *id.* at 8 20. For Plaintiffs’ Title VII and FEHA claims, liability is determined based on a burden-shifting 9 analysis. *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1222 (9th Cir. 2023). 10 “To plead a prima facie case of failure to accommodate religion under Title VII and FEHA, a 11 plaintiff must allege... that she holds ‘a bona fide religious belief’ that conflicts with an 12 employment requirement.” *Id.* (citation omitted).

She must also show that she “informed [her] 13 employer of the belief and conflict,” and “the employer discharged, threatened, or otherwise 14 subjected [her] to an adverse employment action because of [her] inability to fulfill the job 15 requirement.” *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (citation 16 omitted). If the employee successfully sets out a prima facie case, “the burden shifts to the 17 employer to show ‘either that it initiated good faith efforts to accommodate reasonably the 18 employee’s religious practices or that it could not reasonably accommodate the employee without 19 undue hardship.’” *Bolden-Hardge*, 63 F.4th at 1224 (citation omitted); *Peterson*, 358 F.3d at 606 20 (citation omitted). “Undue hardship” means that “the burden of granting an accommodation 21 would result in substantial increased costs in relation to the conduct of its particular business.” 22 *Groff v. DeJoy*, 600 U.S. 447, 470 (2023) (citation omitted).

23 As the Court originally understood it, all class members were subjected to the same 24 allegedly adverse employment action: they were placed on indefinite unpaid leave when granted 25 their religious exemptions. If that had been true, Plaintiffs might have stated a classwide prima 26 facie case of failure to accommodate. See *Steenmeyer v. Boeing Co.*, 92 F. Supp. 3d 1024, 1031 27 (W.D.

Wash. 2015) (explaining that just because unpaid leave can sometimes be a reasonable 1 employee is placed on unpaid leave involuntarily”); *Dawson v. Akal Sec. Inc.*, 660 F. App’x 504, 2 506 (9th Cir. 2016). But it turned out not to be true. What actually happened was that the County 3 communicated the next steps to those individuals who were provisionally granted exemptions, 4

including how to seek transfers or alternate placements, and simultaneously invited them to 5 engage in discussions with their Departments regarding potential accommodations.

See Byrd 6 Decl., Ex. 11 at 1. After that, nearly half of the class never actually went on leave, and 309 class 7 members never sought alternative placements through the procedures laid out by the County. 8 Volk Decl. ¶ 12; Quon Decl. ¶ 5. 9 As previously discussed, *supra* section III.C, the Court does not agree that mere receipt of 10 the County's communication amounted to a "threat" of adverse action.

Thus, while Plaintiffs are 11 correct that a "threat" is enough to establish a *prima facie* case under their Title VII and FEHA 12 claims, see *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993), no such threat has been 13 shown here. Plaintiffs' cases do not persuade the Court otherwise.

First, in *Gage v. Mayo Clinic*, 14 707 F. Supp. 3d 870 (D. Ariz. 2023), the court expressly declined to address whether the Plaintiff 15 had sufficiently pleaded adverse action (or a threat of adverse action), because the Defendant did 16 not dispute that element of the claim. *Id.* at 879.

In *Zimmerman v. PeaceHealth*, 701 F. Supp. 3d 17 1099 (W.D. Wash. 2023), the Plaintiffs alleged that they were actually "placed on unpaid 18 administrative leave," not that they were "threatened" with unpaid administrative leave. *Id.* at 19 1109. Next, footnote number five in *Equal Employment Opportunity Commission v. Townley 20 Engineering & Manufacturing Company*, 859 F.2d 610 (9th Cir.

1988), merely recites the rule that 21 "[t]he threat of discharge (or of other adverse employment practices) is a sufficient penalty" to 22 state a *prima facie* case. *Id.* at 614 n.5 (citing *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 23 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979)).

The case does not further elaborate on 24 what constitutes a "threat," since the defendant in that case did not contest that the plaintiff had 25 established a *prima facie* case. *Id.* at 614. The same is true in *Opuku-Boateng v. State of 26 California*, 95 F.3d 1461 (9th Cir. 1996), as amended (Nov. 19, 1996). *Id.* at 1467 & n.9. 27 The closest analogy is Plaintiffs' final case.

There, the plaintiff clearly alleged that (1) he 1 telling the plaintiff that he would not consider the plaintiff's religious beliefs in setting 2 assignments, and (3) his supervisor stated that he "would refuse to change [the plaintiff's] 3 assignment" in response to the plaintiff's asserted religious concerns. See *Rodriguez v. City of 4 Chicago*, No. 95-cv-5371, 1996 WL 22964, at *3 (N.D.

Ill. Jan. 12, 1996). Based on those 5 allegations, the court concluded that the plaintiff "reasonably could have inferred that he would be 6 disciplined for his refusal to comply with [the supervisor's] assignment." *Id.* Yet in that case, the 7 employer's position was firm and served to end the

conversation. See *id.* Here, in contrast, the 8 County’s communications to exempted employees provided options and served to initiate 9 discussions regarding possible accommodations.

In other words, the Rodriguez case illustrates 10 that the point at which a County employee was actually placed on indefinite unpaid administrative 11 leave—or told that they would be placed on indefinite unpaid administrative leave because no 12 other option would be considered—could qualify as an adverse action or a threat of adverse action. 13 But the initial email from the County laying out next steps does not.

14 Since that message itself does not constitute “adverse action,” and since Plaintiffs have not 15 submitted evidence of the reason(s) why some people chose to vaccinate rather than pursue their 16 exemption request further, Plaintiffs cannot plausibly argue that any adverse action was taken 17 toward those class members who never took leave. Indeed, it appears likely that no *prima facie* 18 case can be stated for a large portion of the class.

More importantly for purposes of this motion, 19 an individualized inquiry is necessary to discern whether a given class member suffered a 20 qualifying adverse action. 21 For example, for any County employee who went on leave—paid or unpaid—for some 22 reason other than the requested religious accommodation, no *prima facie* case has been stated 23 because the allegedly adverse action (the leave) was not “because of” the requested religious 24 accommodation.

See Peterson, 358 F.3d at 606; Heller, 8 F.3d at 1439 (noting that the third step 25 of the *prima facie* analysis was met where employee was “discharged because of his refusal to 26 comply with the employment requirements” (emphasis added)). 27 For any County employee who went on paid or unpaid leave while seeking a transfer or a 1 the leave was an “adverse action” or whether the employee agreed that temporary leave was an 2 appropriate accommodation.

Courts have concluded that—under appropriate circumstances— 3 unpaid leave (or leave that consumes leave bank time) is not necessarily an “adverse action.” See, 4 e.g., *Perata v. City & Cnty. of San Francisco*, No. 21-cv-02819, 2023 WL 4537695, at *16 (N.D. 5 Cal. July 13, 2023) (“Plaintiff points to no caselaw indicating that an employee’s decision to go on 6 leave constitutes an adverse action by an employer and does not point the Court to evidence for a 7 reasonable jury to find Plaintiff was forced to take leave akin to a constructive discharge.”); 8 *Bezzina v. United Airlines, Inc.*, No. 22-55293, 2023 WL 6389397, at *2 (9th Cir.

Oct. 2, 2023) 9 (mem.) (“The question of whether placing Bezzina on unpaid leave was an accommodation, or 10 instead, an actionable adverse action, turns on that same, unresolved fact dispute.”); *Gallagher v. 11 Hawaii Symphony Orchestra*, No. 23-cv-00395, 2024 WL 1331799, at *9 (D. Haw. Mar. 27, 12 2024) (“There might be some situations where unpaid leave could itself constitute a reasonable 13 accommodation.” (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986))).

14 Employees who unwillingly went on an extended unpaid leave are, of course, differently 15
situated.² Those class members might be able to state a prima facie case of failure to 16
accommodate. But then the burden shifts, and the trier of fact must move to the next set of 17
individualized, fact-intensive questions: Did the County initiate good-faith efforts to accommodate
18 the individual in question?

See *Bolden-Hardge*, 63 F.4th at 1224. For the employee's specific 19 position, would permitting
the individual to continue working unvaccinated "result in substantial 20 increased costs in
relation to the conduct of [the County's] particular business"? *Groff*, 600 U.S. 21 at 470. (Since
class members were employed in widely varied positions across multiple 22 departments, the
hardship analysis will necessarily need to be tailored to the individual employee 23 and the
position that they held.)

Did that individual participate in the County's accommodation 24 efforts in good faith, or did they
stonewall the County's offers of anything other than their current 25 position? *Am. Postal Workers
Union, San Francisco Loc. v. Postmaster Gen.*, 781 F.2d 772, 777 26 27 2 It appears that the
representative Plaintiffs likely were unwillingly subjected to extended unpaid 1 (9th Cir.

1986) ("[A] reasonable accommodation need not be on the employee's terms only."). 2 And for
any County employee who received a transfer or reassignment, the trier of fact will then 3 need to
engage in a detailed, fact-specific analysis of how the new position compared to the 4 previous
one, in order to determine whether there was a material impact to the employee's pay or 5 benefits.

Id. at 776–77 ("Where an employer proposes an accommodation which effectively 6 eliminates
the religious conflict faced by a particular employee, however, the inquiry under Title 7 VII
reduces to whether the accommodation reasonably preserves the affected employee's 8
employment status."). 9 Each component of this burden-shifting analysis is relevant to a
determination of the 10 County's FEHA and Title VII liability to the plaintiff in question.

For that reason, this is not a 11 case in which the class members share a common injury that might
be hastened to a resolution 12 through class treatment of those claims. 13 5. Fifth Certified
Question 14 The fifth certified question is "Whether Defendants violated the Establishment Clause
by 15 demonstrating hostility towards religion." As to this question, Defendant argues that
"Plaintiffs 16 have not articulated a viable claim under the Establishment Clause, much less
explained how they 17 can maintain this case as a class action." *Mot.* at 11.

Plaintiffs respond that this is a "merits 18 argument" that is "not relevant to decertification." *Opp.*
at 20. 19 It remains to be seen whether Plaintiffs can prove their Establishment Clause claim. Only
20 Defendant moved for summary judgment on that claim, and neither side effectively addressed
the 21 governing Establishment Clause standard. See *Dkt. No. 178* at 25. "To determine whether

22 government action violates the Establishment Clause,” courts consider the Clause’s “original
23 meaning and history.” *Hunter v. U.S. Dep’t of Educ.*, 115 F.4th 955, 964–65 (9th Cir.

2024) 24 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022)). “Any practice that
was 25 ‘accepted by the Framers and has withstood the critical scrutiny of time and political
change’ does 26 not violate the Establishment Clause.” *Id.* (quoting *Town of Greece v. Galloway*,
572 U.S. 565, 27 577 (2014)).

In the Amended Complaint, Plaintiffs appear to allege that the County’s specific 1 hostility toward
religion.” See Dkt. No. 55 ¶ 88. However, as the evidence at summary 2 judgment—and submitted
as part of the briefing on the present motion—reveals, the County’s 3 interactions with class
members varied. See, e.g., *Anderson Decl.*, Ex. 2 (“*Ortega Decl.*”) ¶¶ 10– 4 17 (discussing
interactions with Plaintiff Davis); *Menzies Decl.*

No. 1 ¶¶ 9–21 (discussing 5 interactions with Plaintiff Ramirez); *Anderson Decl.*, Ex. 6 (“*Fisk*
Decl.”) ¶¶ 4–11 (discussing 6 interactions with class member Melanie Nguyen); *Anderson Decl.*,
Ex. 7 (“*Grumbos Decl.*”) ¶¶ 4– 7 15 & Sub-Exs. 1–8 (discussing interactions with class members
James Luna and Adam Valle). 8 Accordingly, determining whether the County’s conduct with
respect to a given class member 9 would have been accepted by the Framers and has since
withstood the test of time will require an 10 individualized analysis that negates a finding of
commonality on this question.

11 *** 12 Based on the foregoing analysis, the Court concludes that the first, fourth, and fifth 13
certified questions fail to meet the commonality requirement. The second and third certified 14
questions meet the commonality requirement.

However, neither justifies maintaining class 15 certification going forward, because the second
question has already been resolved in favor of the 16 County at summary judgment, and the third
question is a preliminary legal determination that will 17 not further “drive the resolution of the
litigation.” *Dukes*, 564 U.S. at 350. 18 D. Showing Under Rule 23(b) 19 Regarding Rule 23(b),
the Court’s discussion can be brief.

Although the Parties did not 20 expressly address Rule 23(b) in their briefing on this motion,
predominance concerns were 21 implicit in Defendant’s briefing regarding “ascertainability.” See
Mot. at 7–8, 11–12. Indeed, it 22 has become apparent that this is not a case in which “the
questions of law or fact common to class 23 members predominate over any questions affecting
only individual members,” and where “a class 24 action is superior to other available methods for
fairly and efficiently adjudicating the 25 controversy.” Fed.

R. Civ. P. 23(b)(3). 26 “The Rule 23(b)(3) predominance inquiry tests whether proposed classes
are sufficiently 27 cohesive to warrant adjudication by representation.” *Amchem Prods., Inc. v.*

Windsor, 521 U.S. 1 members [must] predominate over any questions affecting only individual members.” Fed. R. 2 Civ. P. 23(b)(3).

As the Ninth Circuit has recently explained, “[i]ndividual questions require each 3 class member ‘to present evidence that varies from member to member.’” Miles v. Kirkland’s 4 Stores Inc., 89 F.4th 1217, 1222 (9th Cir. 2024). Common questions, on the other hand, “can be 5 answered by ‘the same evidence... for each member... [or] the issue is susceptible to 6 generalized, class-wide proof.’” Id. (alterations in original) (quoting Tyson Foods, 577 U.S. at 7 453).

To establish that the predominance requirement is met, a plaintiff must be able to show, by 8 a preponderance of the evidence, that “class issues predominate” and that “the common 9 question[s] relate[] to the central issue[s]” in the class claims. Id. (citations omitted).

On the other 10 hand, the party challenging class certification is entitled to “provide sufficient evidence that the 11 individualized issues bar recovery on at least some claims, thus raising the spectre of class- 12 member-by-class-member adjudication of the issue.” Id. (quoting Van v. LLR, Inc., 61 F.4th 1053, 13 1067 (9th Cir. 2023)). “[T]he predominance criterion is far more demanding” than the 14 commonality requirement under Rule 23(a).

Anchem Prods., Inc., 521 U.S. at 624. 15 Here, the Court has already found that commonality is not met on all but one of the 16 certified questions that remain in play. Supra section III.C. And now that the Court better 17 understands the facts on the ground at the time of the events underlying this litigation, the Court 18 recognizes that it is “questions affecting only individual members” of the class that predominate in 19 this case.

Amchem Prods., Inc., 521 U.S. at 622. The determination of whether the County is 20 liable on any of Plaintiffs’ remaining claims will rely on an analysis of the Parties’ conduct and 21 interactions throughout the accommodations process on an employee-by-employee basis, as well 22 as on case-by-case consideration of the historical treatment of the County’s conduct for 23 Establishment Clause purposes.

These highly individualized issues of alleged discrimination will 24 without a doubt require “class-member-by-class-member adjudication.” Miles, 89 F.4th at 1222. 25 Accordingly, this is not a case in which the requirements of Rule 23(b)(3) are met. 26 *** 27 In sum, upon the more developed record now before the Court, it is clear that Plaintiffs are 1 action on a class basis.

Further, “[w]hile the court has the power to modify [] class definitions,” 2 Mazur v. eBay Inc., 257 F.R.D. 563, 568 (N.D. Cal. 2009), the Court declines to do so here. In 3 light of the highly varied experiences of the class members and the fact that all but one of the still- 4 live certified questions fails to meet the commonality requirement, the Court sees no reason to 5 rewrite the class definition at this juncture.

Accordingly, the Motion for Class Decertification is 6 GRANTED and the class is DECERTIFIED. 7 E. Article III Standing of Plaintiff UnifySCC 8 “[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction.” 9 *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Since “[t]he party invoking federal 10 jurisdiction[] bears the burden of establishing” the elements of Article III standing, a plaintiff must 11 be able to demonstrate regarding its claims (1) an “injury in fact” that is (2) “fairly traceable to the 12 challenged conduct of the defendant,” and (3) likely to be “redressed by a favorable judicial 13 decision.” *Spokeo*, 578 U.S. at 338 (citing *Lujan*, 504 U.S. at 560–61); *Iten v. Los Angeles*, 81 14 F.4th 979, 984 (9th Cir.

2023). “[O]rganizations may have standing ‘to sue on their own behalf 15 for injuries they have sustained,’” if they can satisfy the injury in fact, causation, and redressability 16 requirements. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393–94 (2024) 17 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982)). 18 At the summary judgment hearing, the Court advised the Parties to address UnifySCC’s 19 standing in light of *Arizona Alliance for Retired Americans v. Mayes*, 117 F.4th 1165 (9th Cir.

20 2024), and the Supreme Court’s decision in *Food and Drug Administration v. Alliance for 21 Hippocratic Medicine*, 602 U.S. 367 (2024), in the decertification motion. Responding to that 22 request, Defendant argues that UnifySCC has not suffered an injury sufficient to establish Article 23 III standing and that it lacks “representational” standing because it cannot meet the test set out in 24 *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

Mot. at 14–16. In 25 their Opposition brief, Plaintiffs state that, “while UnifySCC had standing at the inception of the 26 case because it sought declaratory and injunctive relief, Plaintiffs concede it no longer has 27 standing because those claims for prospective relief have been mooted.” Opp. at 23.

Accordingly, 1 dismissed from the case. 2 || IV. ORDER 3 For the foregoing reasons, IT IS HEREBY ORDERED that the Motion for Class 4 || Decertification (Dkt. No. 176) is GRANTED. The Class is DECERTIFIED. Plaintiff UnifySCC 5 is DISMISSED. Plaintiffs Tom Davis, Maria Ramirez, and Elizabeth Baluyut may each proceed 6 || on an individual basis. 7 8 IT IS SO ORDERED.

9 10 || Dated: May 21, 2025 TH LABSON FREEMAN United States District Judge © 15 16 = 17
Z 18 19 20 21 22 23 24 25 26 27 28