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9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 **ERICA JIMENEZ, individually and**
15 **on behalf of a class of similarly**
16 **situated individuals,**

17 Plaintiff,

18 v.

19 **DR. ERICA PAN, in her official**
capacity as Director of the California
Department of Public Health; DR.
20 **BARBARA FERRER, in her official**
capacity as Director of the Los
21 **Angeles County Department of Public**
Health; MANUEL CARMONA, in his
22 **official capacity as the Director of**
Public Health for the Pasadena Public
23 **Health Department; LOS ANGELES**
COUNTY DEPARTMENT OF
24 **PUBLIC HEALTH; and PASADENA**
PUBLIC HEALTH DEPARTMENT,

25 Defendants.
26
27
28

2:26-cv-03500-SPG-SP

DEFENDANT DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH ERICA PAN'S
REPLY IN SUPPORT OF MOTION
TO DISMISS UNDER RULE
12(B)(6)

Date: September 30, 2026
Time: 1:30 p.m.
Courtroom: 5C
Judge: The Honorable Sherilyn
Peace Garnett

Trial Date:
Action Filed: 4/02/2026

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INTRODUCTION

Plaintiff Erica Jimenez’s opposition to Defendants’ motions to dismiss fails to show that she has standing to bring her challenge to the State’s Black Infant Health (BIH) Program. Since Defendants filed their motions to dismiss, the Court has issued its well-reasoned and extensive August 28, 2026 Order Denying Motion for Preliminary Injunction (Order) based on Plaintiff’s lack of standing. Dkt. 44 [Order].) The Order found that the evidence and law did not support that Plaintiff has standing to bring this action, and that “Plaintiff has raised a generalized grievance against the Program and not a specified injury.” *Id.* at 2, 34. By her opposition to this motion, Plaintiff ignores the Court’s factual findings and conclusions and fails to cure the identified evidentiary deficiencies, focusing instead on an alleged “barrier” to her admission, which the Court has already addressed and found to be unsupported by evidence. *Id.* at 29-34.

Plaintiff has failed to establish that she suffered an injury in fact caused by Defendants’ actions, as required to establish standing. Plaintiff did not actually pursue enrollment in the BIH Program and was not denied participation. Moreover, there is no evidence in the record that any applicants who otherwise meet the general program criteria and wish to join the BIH Program have been excluded based on their race, and Defendants have testified that it is not their policy to exclude participants on the basis of race. In the face of such testimony, Plaintiff appears to have abandoned the foundational claim in her Complaint that she “has been and will continue to be harmed” by the Defendants’ alleged policy of “unlawfully excluding applicants on the basis of race” absent an injunction “prohibiting Defendants’ enforcement of the racial exclusion.” Dkt. 1 [Complaint], ¶¶ 48, 55-56. Improperly attempting to change the fundamental theory of her case through briefing, Plaintiff now argues it is irrelevant that the BIH Program does not actually exclude applicants based on race because, according to Plaintiff, the way in which non-Black applicants are admitted into the program in a flexible manner

1 allegedly imposes a racial “barrier.” Yet, unlike the cases on which Plaintiff relies
2 for this principle, there is no evidence whatsoever in this case that applicants to the
3 BIH Program are required to compete for a limited number of spots, or that the
4 program reserves a percentage or number of spots for certain applicants.

5 The evidence also shows that Plaintiff is not able and ready to complete the
6 steps to apply to the BIH Program, as she lacks the intent to do so. In fact,
7 Plaintiff’s opposition decidedly confirms that she is not actually interested in
8 participating in the BIH Program. She concedes that she rejected the City of
9 Pasadena’s offer for her to complete the BIH Program enrollment process, on the
10 newly proffered basis that she would only do so if the alleged program criteria
11 change, even if she would be admitted under the current criteria. Moreover, by her
12 declaration in support of her opposition to this motion, Plaintiff does not include a
13 single statement that she actually wants to participate in the BIH Program or
14 explain what benefits from the BIH program, in particular, she is interested in
15 receiving. These facts, among others, demonstrate that Plaintiff has “only a general
16 legal, moral, ideological, or policy objection” to the existence of the BIH program,
17 which does not provide a basis for standing. *See Food & Drug Admin. v. All. for*
18 *Hippocratic Med.*, 602 U.S. 367, 381 (2024).

19 The Court should, therefore, grant California Department of Public Health
20 (CDPH) Director Dr. Erica Pan’s motion to dismiss Plaintiff’s complaint for lack of
21 standing under Federal Rule of Civil Procedure 12(b)(1), without leave to amend.

22 **ARGUMENT**

23 **I. PLAINTIFF HAS FAILED TO ESTABLISH THAT SHE HAS STANDING TO** 24 **BRING HER CLAIMS**

25 **A. Plaintiff has Failed to Establish that She Suffered an Injury in** 26 **Fact**

27 Plaintiff has failed to submit evidence demonstrating that she actually applied
28 for and participated in the enrollment process for BIH, and therefore fails to meet
the threshold standing requirement for bringing this challenge to the BIH program.

1 As relevant here, she has failed to demonstrate a “concrete and particularized”
2 injury in fact to her, which is “actual or imminent,” and not hypothetical or
3 conjectural. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992).

4 As explained in Defendant’s moving papers, it is a “long-established rule ‘that
5 a plaintiff lacks standing to challenge a rule or policy to which he has not submitted
6 himself by actually applying for the desired benefit.’” *Friery v. L.A. Unified Sch.*
7 *Dist.*, 448 F.3d 1146, 1149 (9th Cir. 2006) (quoting *Madsen v. Boise State Univ.*,
8 976 F.2d 1219, 1220–21 (9th Cir. 1992) (per curiam)); see also *Moose Lodge No.*
9 *107 v. Irvis*, 407 U.S. 163, 166-71 (1972); *Alexandre v. Amazon.com, Inc.*, No. 22-
10 cv-1459-MMA (VET), 2024 WL 2445705, at *4-5 (S.D. Cal. May 23, 2024),
11 *appeal dismissed*, No. 24-3566, 2025 WL 1607660 (9th Cir. May 20, 2025). Here,
12 the evidence shows that Plaintiff did not actually suffer an injury in fact sufficient
13 to confer standing because she did not seek to enroll in the BIH Program, and has
14 never been rejected from the program. See Dkt. 40-1 [Defendant Pan’s
15 Memorandum of Points and Authorities in support of Motion to Dismiss (Mot.)] at
16 7-10; Dkt. 26-3 [Declaration of McKenzie Scott in Support of Opposition to
17 Motion for Preliminary Injunction (Scott Decl.)], ¶¶ 6-10.¹ The evidence also
18 shows that the BIH Program does not have a policy of excluding participants based
19 on race, and that some participants do not identify as Black or African American.
20 See Mot. at 9-11; Dkt. 40-2 [Declaration of Rita Nguyen, M.D. in Support of Pan’s
21 Motion to Dismiss (Nguyen Decl.)], ¶¶ 15-22; Scott Decl., ¶ 11; Dkt. 24-1
22 [Declaration of Dr. Melissa Franklin in Support of County Defendants’ Opposition
23 to Plaintiff’s Motion for Preliminary Injunction (Franklin Decl.)], ¶ 65.

24 ¹ Plaintiff’s new declaration attempts to contradict Ms. Scott’s sworn
25 testimony by presenting a new description of their conversation that she somehow
26 now remembers after “further review and reflection.” Dkt. 45-10 [Jimenez
27 Declaration in Opposition (New Jimenez Decl.)], ¶¶ 3-5. Her new allegation that
28 Ms. Scott told her she “would not be eligible,” *Id.*, ¶ 5, is not credible, especially
given Ms. Scott’s testimony that not only did she not tell Plaintiff that she was
ineligible for the BIH Program, “it is neither part of [her] training nor [her] practice
to inform those interested in the BIH Program (or any other program) over the
telephone that they are not eligible to participate.” Scott Decl., ¶¶ 9, 10.

1 The evidence also shows that Plaintiff intentionally declined to respond to
2 Pasadena's invitation for her to complete the enrollment process, supporting the
3 reasonable inference that she does not actually want to participate in the BIH
4 Program. New Jimenez Decl., ¶¶ 7-8; Dkt. 43 [Declaration of Amanda Cusick in
5 Support of Motions to Dismiss (Cusick Decl.)], Exh. A. Because Plaintiff has not
6 participated in the enrollment process, she cannot establish an actual injury in fact
7 resulting from any purported exclusion from the BIH Program. Instead, her claims
8 rest on an "abstract injury" stemming from "only a general legal, moral,
9 ideological, or policy objection" to the existence of a government health-based
10 program designed to improve the disproportionately high pregnancy and post-
11 partum-related mortality of Black mothers and infants, which is insufficient to
12 establish standing as a matter of law. *All. for Hippocratic Med.*, 602 U.S. at 381.

13 Despite her willful refusal to participate in the enrollment process, Plaintiff
14 argues that she has established an injury in fact on the basis that the BIH Program
15 allegedly erects "a barrier" by "forcing her to compete in a race-based process" for
16 enrollment. Dkt. 45 [Plaintiff's Combined Opposition to Defendants' Motion to
17 Dismiss (Opp.)], at 16:13-14.² Thus, she now argues that it does not matter if she
18 actually applied for or was rejected from the BIH Program, or declined to pursue
19 enrollment after the City's express invitation to do so, because the program has a
20 discretionary "exception" procedure for admission. *See id.* at 14:28-16:13-18.

21 Plaintiff relies upon *Northeastern Florida Chapter of Associated General*
22 *Contractors of America v. City of Jacksonville (General Contractors)*, 508 U.S.
23 656, (1993), and *Parents Involved in Community Schools. v. Seattle School District*.
24 *No. 1 (Parents Involved)*, 551 U.S. 701, 710 (2007) for this principle. Both cases

25
26 ² This represents an entirely different theory of injury from the one identified
27 in the Complaint, which described Plaintiff's injury as the BIH Program's alleged
28 "exclusion" of applicants based on race as the challenged harm. Complaint, ¶¶ 48,
55-56 (alleging that Plaintiff "has been and will continue to be harmed" by the
Defendants' alleged policy of "unlawfully excluding applicants on the basis of
race," absent an injunction prohibiting "enforcement of the racial exclusion.")

1 are distinguishable however. *General Contractors* concerned an ordinance that
2 required a percentage of the amount spent on city contracts to be set aside for the
3 exclusive competition of black- and female-owned businesses. 508 U.S. at 658-61.
4 An association of contractors who did business with the city, and mostly did not
5 qualify as black or female-owned, challenged the “set aside” bid process on the
6 grounds that it disadvantaged them in their efforts to obtain city contracts. *Id.* at
7 662. The association further alleged that its members regularly bid on construction
8 contracts in the city, and that “they would have bid on contracts set aside pursuant
9 to the city’s ordinance were they so able.” *Id.* at 668. Based on the evidence
10 presented, the Supreme Court found that the association met the requirement of
11 demonstrating that they were “able and ready” to bid on contracts, and held that the
12 set-aside unlawfully prevented association members that were able and ready to bid
13 on contracts from bidding on an equal basis solely based on race. *Id.* at 666-69.
14 Thus, it held that, in the specific context of “a challenge to a set-aside program, the
15 ‘injury in fact’ is the inability to compete on an equal footing in the bidding
16 process, not the loss of a contract.” *Id.* at 668.

17 In *Parents Involved*, parents of students in various school districts asserted
18 their children’s interest in not being “forced to compete for seats at certain high
19 schools in a system that uses race as a deciding factor in many of its admissions
20 decisions.” 551 U.S. at 719. The Court similarly explained that “one form of injury
21 under the Equal Protection Clause is being forced to compete in a race-based
22 system that may prejudice the plaintiff,” which was an injury the parents could
23 validly claim on behalf of their children. *Id.* The Supreme Court has applied this
24 principle in other decisions where the government erects a barrier that forces
25 applicants to compete for limited spots or access on uneven footing based on race.
26 See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (where
27 contractor claimed government’s practice of providing a financial incentive for
28 general contractors to hire subcontractors controlled by “socially and economically

disadvantaged individuals,” was discriminatory, the Court concluded that “[t]he injury in cases of this kind is that a “discriminatory classification prevent[s] the plaintiff from competing on an equal footing”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-279, 281 n.14 (1978) (recognizing a distinct injury grounded in a university’s “decision not to permit [the plaintiff] to compete for all 100 places in the class, simply because of his race,” pursuant to a special admissions program designed to assure the admission of a specified number of students from certain minority groups). Thus, this line of cases rests on the necessary premise that the benefit or program at issue has a limited number of spots for participants, or a limited number of government contracts that can be awarded, and thus inherently requires competition with other applicants on an unequal footing.

Here, by contrast, there simply is no evidence in the record of any *competition* with other applicants to participate in the BIH Program, or that non-Black participants must *compete* for a limited number of spots in the program. That is, Plaintiff has submitted no evidence that the BIH Program denies enrollment to *any* qualified applicant who would like to participate on the ground there are insufficient spots for enrollment.

Even if these cases were applicable, the evidence in the record makes clear that the BIH Program is flexible, does not have rigid participation criteria, and is available to applicants for whom the program would be useful. None of the criteria is strictly applied, but rather where a prospective participant is interested in the program and BIH staff believe she could benefit from participation despite not necessarily meeting all of the criteria, local BIH staff can and will facilitate the person’s admission. Nguyen Decl., ¶¶ 13, 19; Franklin Decl., ¶ 29. And Pasadena’s Community Outreach Liaison McKenzie. Scott has confirmed that “individuals who did not identify as Black or African American [have] participate[d] in the program because they were interested and otherwise eligible,” and that she is not aware of Pasadena ever rejecting on the basis of race an

1 application for admission of an otherwise qualified person interested in
2 participating in the BIH Program. Scott Decl., ¶ 11.

3 Moreover, there is no evidence that applicants who identify as Black or
4 African American and meet the other stated criteria are automatically *enrolled* in
5 the program. For example, through the program-enrollment assessment process,
6 including meeting with a BIH Program Mental Health Specialist to discuss
7 enrollment, it may be determined that the program's key structure and content, with
8 10 group sessions before giving birth and 10 group sessions after giving birth,
9 involves more time commitment than a prospective enrollee who identifies as Black
10 or African American is prepared to devote or provides more or different resources
11 than the applicant needs. In other words, the enrollment procedures permit a
12 collaborative process in the determination of whether potential enrollees of any race
13 are still interested in and would benefit from participation.

14 In its Order, the Court rejected Plaintiff's argument that the existence of a
15 discretionary "exception procedure" for non-Black applicants "confirms that race
16 operates as a barrier to equal access" in admission to the program, and found that it
17 lacked merit. Order at 29:15-30:10. First, the Court observed that, because
18 Plaintiff acknowledged that she "was not aware of the exception procedure, its
19 existence is irrelevant to the Court's injury analysis." *Id.* at 29:17-21. Second, the
20 Court explained that the evidence showed that Plaintiff "never applied to the BIH
21 Program and was never actually denied its services, and therefore never needed to
22 avail herself of any exception procedures," and that Plaintiff "has not stated 'that
23 she wants to participate in the program or explain[ed] how she might benefit from
24 it,'" further rendering the notion of an exception procedure entirely irrelevant. *Id.*
25 at 29:21-30:4. Based on these observations, the Court concluded that "Plaintiff
26 failed to show that the mere existence of an exception procedure is evidence of a
27 barrier that prevented Plaintiff from enrolling in and participating in the Program."
28

1 *Id.* at 30:4-8. Despite this, Plaintiff now seeks to ground her opposition argument
2 for an alleged barrier in the notion of an allegedly burdensome “exception.”

3 *General Contractors, supra*, and the cases applying it are also distinguishable
4 because Plaintiff cannot meet requirement of demonstrating that she is “able and
5 ready” to apply to the BIH Program. In *Carroll v. Nakatani*, 342 F.3d 934, 942
6 (9th Cir. 2003), the Ninth Circuit explained that the “intent” of the applicant may be
7 relevant to whether an application is “able and ready.” It concluded that a cursory
8 “declaration of interest”, submission of an incomplete application, and “failure to
9 respond” to a request for additional information did not demonstrate that the
10 plaintiff was “able and ready” to compete for a loan. *Id.* at 941-43.

11 Evaluating the evidence in the record, this Court found that Plaintiff had failed
12 to establish that she was “able and ready” to apply. Order at 30:11-33:21. The
13 further evidence Plaintiff submitted by her opposition to the present motion does
14 not overcome the deficiencies identified by the Court. Plaintiff still has not stated
15 that she wants to participate in the program or explain how she might benefit from
16 it. *See generally* New Jimenez Decl. Indeed, she doubles down on her obvious
17 disinterest by confirming that she deliberately chose not to respond to Pasadena’s
18 express invitation for her to enroll in the BIH Program by meeting with the mental
19 health specialist for an assessment. *See id.*, ¶ 7; Cusick Decl., Exh A. In addition,
20 Plaintiff makes the conclusory legal assertion, absent any supporting facts, that she
21 “is ready and able to apply” to the BIH Program “if [her] application were
22 considered on the same terms as any other applicant without regard to [her] or [her]
23 child’s race.” New Jimenez Decl., ¶ 8. Notably, in her prior declaration Plaintiff
24 had stated that “if [her] race and ethnicity and the race and ethnicity of [her] child
25 were eligible, [she] would be ready and able to apply” for the BIH Program. Dkt.
26 13-5 [Jimenez Declaration in Support of Preliminary Injunction Motion], ¶ 6. This
27 reveals her attempt to pivot in the face of evidence that she could be enrolled in the
28 BIH program if she actually intended to engage in the process (which she does not).

1 In any event, as the Court already determined, Plaintiff’s “barebones statement”
2 that she is “ready and able” is a “legal conclusion” that simply “parrots the
3 language” in cases, and is insufficient to show that she is currently interested in and
4 ready to apply to the BIH Program. Order at 31:26-33:10. Thus, Plaintiff has
5 failed to establish an injury in fact.

6 **B. Plaintiff Has Failed to Establish Causation**

7 Plaintiff also cannot establish “a causal connection between the injury and
8 defendant’s conduct,” which is a distinct required element of standing. *Lujan*, 504
9 U.S. at 560-61. Plaintiff argues that she has met this requirement because
10 Defendants’ conduct, not her own inaction, supposedly caused her claimed injury.
11 Opp. at 17:6-9. Specifically, she argues that there was no “public disclosure” of
12 any exception to racial eligibility requirements at the time of her informational call,
13 so she could not have known that she was eligible for consideration (while at the
14 same time, as detailed above, arguing that the exception procedure is actually the
15 “barrier” to her admission). *Id.* at 17:21-25.

16 Yet, Plaintiff does not dispute Defendants’ evidence in their moving papers
17 that she failed to contact Pasadena after receiving Defendants’ oppositions to her
18 motion for preliminary injunction, which confirmed that Defendants do not have a
19 policy to exclude based on race, and that people of other races have been and may
20 be admitted to the BIH Program. Plaintiff also concedes that Pasadena invited her
21 to complete an assessment with the mental health specialist from the Pasadena
22 Public Health Department, and to discuss the services available to her under the
23 BIH, and she chose not to respond. New Jimenez Decl., ¶ 7; Cusick Decl., Exh A.
24 Meeting with the mental health specialist is the process applicable to all prospective
25 enrollees, and is not reserved solely for those who do not meet all of the stated
26 program criteria. Scott Decl., ¶ 10. Plaintiff contends she did not respond because
27 she “did not believe [Pasadena’s] offer to be sincere,” or think she would be treated
28 “equally.” New Jimenez Decl., ¶ 7. Plaintiff’s subjective and unsupported belief

1 regarding the sincerity of Pasadena’s offer or that she would be discriminated
2 against does not make it so, especially in light of evidence in the record. Thus,
3 there can be no dispute that Plaintiff *chose* not to pursue enrollment to receive the
4 benefits of the BIH Program, even after she was aware that Defendants do not have
5 a policy to exclude prospective participants based on race, and after Pasadena
6 invited her to complete the next steps in the enrollment process. Plaintiff cannot
7 “manufacture” standing by “inflicting harm upon [herself]” through choosing to
8 avoid being enrolled in the BIH Program by refusing to participate in the
9 enrollment process. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 415 (2013).

10 **C. Plaintiff Has Not Established Redressability for All Her Claims**

11 To have standing, Plaintiff must also show that her injury will likely be
12 redressed if her requested relief is granted the Court. *Lujan*, 504 U.S. at 560-61.
13 Plaintiff argues that she has established redressability based on her request for \$1 in
14 nominal damages. Opp. at 12 n. 1. Plaintiff cites *Uzuegbunam v. Preczewski*, 592
15 U.S. 279, 293 (2021) for the proposition that in a section 1983 action against
16 defendants in both their official and individual capacities, a request for nominal
17 damages satisfies redressability for a completed constitutional violation, regardless
18 of any dispute about prospective relief. However, Plaintiff’s request for nominal
19 damages does not satisfy redressability for her Equal Protection claim against
20 Defendant Pan, in her official capacity alone, because a constitutional claim against
21 the state (or a state official in their official capacity) is barred by Eleventh
22 amendment immunity, which the State has not waived here. *See, e.g., Laird v.*
23 *United Teachers Los Angeles*, 615 F.Supp.3d 1171, 1181 (C.D. Cal. 2022) (absent
24 a waiver, sovereign immunity bars suits seeking nominal damages); *Platt v. Moore*,
25 15 F.4th 895, 910 (9th Cir. 2021) (state sovereign immunity protects state officer
26 defendants sued in federal court in their official capacities from liability in
27 damages, including nominal damages).

1 Also, Plaintiff’s nominal damages request does not satisfy redressability for
2 her injunctive relief requests pursuant to her Equal Protection and Title VI claims
3 because the receipt of nominal damages for alleged past harm would not result in
4 the issuance of prospective injunctive relief. *See, e.g., Friends of the Earth, Inc. v.*
5 *Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (a plaintiff “must
6 demonstrate standing separately for each form of relief sought”); *City of Los*
7 *Angeles v. Lyons*, 461 U.S. at 109 (notwithstanding the fact that the plaintiff had
8 standing to pursue damages, he lacked standing to pursue injunctive relief).

9 **II. THE FUTILITY EXCEPTION DOES NOT APPLY HERE**

10 Plaintiff has failed to adequately rebut Defendant Pan’s argument that the
11 futility exception is inapplicable here, because Plaintiff has not shown that she—or
12 indeed any other pregnant person who does not identify as Black or African
13 American—would be excluded from the BIH Program if they actually applied and
14 participated in the enrollment process. *See Mot.* at 15-17.

15 The futility exception, which allows a plaintiff to have standing to pursue her
16 lawsuit without first actually applying for the desired benefit or service, only
17 applies in cases where exclusionary policies are clear and express, such as an
18 ordinance “flatly prohibit[ing]” signs in particular locations, making it obviously
19 futile to even apply. *See, e.g., Desert Outdoor Advert., Inc. v. City of Moreno*
20 *Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *Alexandre*, 2024 WL 2445705, at *6
21 (“under certain circumstances a plaintiff can establish standing by alleging that
22 applying would be a futile gesture.”) Where, as here, whether the plaintiff would
23 receive the allegedly desired benefit depends on multiple independent variables, the
24 dispute between the parties becomes “too nebulous for judicial resolution, because
25 the precise nature of the asserted injury—and [the] appropriate relief—are unclear.”
26 *See Madsen*, 976 F.2d at 1221-22; *see also Friery*, 448 F.3d at 1149 (court lacked
27 information to apply futility exception to excuse the plaintiff’s failure to apply for a
28

1 transfer where it was “uncertain” whether the transfer policy would have affected
2 the plaintiff).

3 In support of her futility argument, Plaintiff claims that she subjected herself
4 to “personal rebuff” by participating in the preliminary inquiry call, and that the
5 BIH Program’s alleged “race-based barrier” to participation is not ambiguous.
6 Opp. at 19-21. She also attempts to distinguish *Madsen, supra*, on the ground that
7 the plaintiff’s challenge there concerned the university’s parking policy “in the
8 abstract” and the university had never been required “to grant or deny” his request.
9 *Id.* These arguments fail.

10 Plaintiff ignores that the Court has already evaluated Plaintiff’s futility
11 arguments in connection with her motion for preliminary injunction motion, and
12 found that “Plaintiff has not submitted evidence clearly showing it would have been
13 futile for her to apply for the BIH program.” *See* Order at 33:11-34:16. No
14 additional evidence submitted in support of the present motion changes that
15 conclusion. As this Court recognized in denying the preliminary injunction motion,
16 the evidence shows that it is not at all clear that Plaintiff would be denied
17 participation in the BIH Program on the basis of race had she actually chosen to
18 participate in the enrollment process. Order at 33:22-34:16; *see also* Nguyen Decl.,
19 ¶¶ 15-22; Scott Decl., ¶ 11; Franklin Decl., ¶ 65. Specifically, as established by
20 Defendants’ credible evidence, Plaintiff only participated in a preliminary inquiry
21 meeting, at which she was not “rebuffed,” but merely provided with information.
22 Scott Decl., ¶¶ 6-9. Ms. Scott did not know Plaintiff’s race, and did not determine
23 or advise whether Plaintiff was eligible for the program, per her usual practice. *Id.*,
24 ¶¶ 9-10. Indeed, despite previously declaring that she filled out Pasadena’s BIH
25 interest form that includes a question about race, Plaintiff now concedes “after
26 further review and reflection” that she actually filled out the State’s BIH interest
27 form that does not include a question about race. New Jimenez Decl., ¶ 3. Also,
28

1 Plaintiff did not tell the Pasadena liaison that she wanted to be part of the BIH
2 Program, or follow up after the call to pursue enrollment. Scott Decl., ¶ 12.

3 Furthermore, when Pasadena specifically invited Plaintiff to complete the next
4 steps to enroll, Plaintiff concedes she declined to participate, even though doing so
5 would result in an eligibility determination. Cusick Decl., Exh. A; New Jimenez
6 Decl., ¶ 7. Moreover, no evidence establishes that Plaintiff would necessarily have
7 been rejected from the BIH Program based on her self-identified race if she had to
8 enroll, as the BIH Program does not categorically exclude participants on the basis
9 of race. Scott Decl., ¶¶ 9-11; Nguyen Decl., ¶¶ 22-23; Franklin Decl., ¶¶ 64-65.

10 The evidence also does not show that the program's flexibility to admit otherwise
11 eligible women who do not identify as Black or African American but who desire to
12 participate and would benefit from the program creates a "race-based barrier" that
13 imposed a racially discriminatory burden on Plaintiff. As this Court already
14 concluded on virtually the same factual record, CDPH policy does not have or
15 require a categorical racial exclusion, and neither Defendant Pan, nor any of the
16 other defendants, are aware of any person being turned away, rejected, or
17 disenrolled from the BIH Program on the basis of race, including Plaintiff. Order at
18 10:8-22, 11:16-20, 26:6-20, 34:11-16; Nguyen Decl., ¶¶ 21-22; Scott Decl., ¶ 11;
19 Franklin Decl., ¶¶ 29, 65. Because it is far from certain that Plaintiff would have
20 been excluded from the BIH Program had she been willing to actually participate in
21 the enrollment process, the futility exception does not apply here.

22 **III. PLAINTIFF'S ARGUMENT THAT "DISPUTED FACTS PRECLUDE**
23 **DISMISSAL AND PERMIT LEAVE TO AMEND" FAILS**

24 **A. Because Defendants Brought Factual Motions to Dismiss, The**
25 **Court May Resolve Any Factual Disputes, If Needed**

26 Plaintiff argues that if the Court "concludes that a genuine dispute exists" this
27 does not defeat her standing. Opp. at 22:17-19. However, because this is a factual
28 motion to dismiss, the Court may weigh the evidence in the record and resolve
factual disputes to determine whether Plaintiff has met her burden to establish

1 standing, so long as the jurisdictional standing issue is not inextricable from the
2 merits of the case. Specifically, the court is not limited in its review to the
3 complaint's allegations, but may properly consider extrinsic evidence on a "factual"
4 12(b)(1) motion based on extrinsic evidence to determine whether the plaintiff has
5 met her burden to establish jurisdiction. *See, e.g., White v. Lee*, 227 F.3d 1214,
6 1242 (9th Cir. 2000). In doing so, the court may weigh the evidence presented and
7 resolve factual disputes where necessary to determine whether it has the power to
8 hear the case, unless the jurisdictional issue is inextricably intertwined with the
9 merits of the case. *Robinson v. U.S.*, 586 F.3d 683, 685 (9th Cir. 2009); *Thornhill*
10 *Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

11 Plaintiff conclusorily asserts that disputes regarding "whether Ms. Scott told
12 Ms. Jimenez she was 'not eligible' for BIH" or "whether Defendants consider race
13 in program enrollment" "intertwine her standing with the central merits question"
14 under her Equal Protection and Title VI claims, but does not provide any
15 explanation of how these disputes are inextricably intertwined with the merits.
16 Opp. at 22:17-21. In any event, the factual dispute over whether Pasadena told
17 Plaintiff that she was not eligible for the BIH Program is not intertwined with the
18 merits of whether the BIH Program violates the Equal Protection Clause and Title
19 VI. Thus, the Court is authorized to weigh the evidence and resolve the dispute
20 between statements in Plaintiff's declarations and Ms. Scott's declaration.

21 And the Court is not required to resolve disputed facts regarding the
22 consideration of race in program enrollment on this motion. The threshold issue of
23 whether Plaintiff's argument regarding the existence of an alleged "barrier"
24 requiring competition on unequal footing applies in this context constitutes a legal
25 dispute. That argument fails on the law. Moreover, the Court already found, based
26 on facts in the record for Plaintiff's preliminary injunction motion, that "Plaintiff
27 had failed to show that the mere existence of an exception procedure is evidence of
28 a barrier that prevented Plaintiff from enrolling in and participating in the

1 Program,” Order at 29:15-30:8, and none of the additional evidence Plaintiff
2 submitted in response to the present motion relevant to the Court’s determination of
3 that issue, would require the Court to resolve disputed facts.

4 **B. Leave to Amend is Not Warranted**

5 Finally, Plaintiff argues that if the Court grants Defendants’ motions, it should
6 not dismiss her Complaint without granting her leave to amend, because there are
7 allegedly “factual disputes.” Opp. at 23:14-18. But she makes no attempt to
8 explain how she would amend her Complaint to address the numerous deficiencies
9 that prevent her from having standing in this case. At this point, assuming the
10 Court again finds Plaintiff lacks standing, any attempt to amend would be futile in
11 light of her sworn statements in her declarations. By her opposition to this motion,
12 Plaintiff has already had a second opportunity to address her failure to establish
13 standing by submitting a further fact declaration. Not only that, Plaintiff has done
14 so with the benefit of the Court’s Order that explains the specific evidence the
15 Court found lacking. *See, e.g.*, Order at 25-34. Thus, this circumstance differs
16 markedly from a 12(b)(6) motion focused on interrogating only the allegations
17 appearing on the face of the complaint, and in which the Court undertakes no
18 evidentiary inquiry.

19 **CONCLUSION**

20 Because Plaintiff has failed to establish that she has standing to bring this
21 lawsuit, this motion should be granted and the Complaint dismissed for lack of
22 jurisdiction, without leave to amend.

23 Dated: September 16, 2026

Respectfully submitted,

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25 Attorney General of California
26 JENNIFER G. PERKELL
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27 */s/ Jennifer A. Bunshoft*
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Dr. Erica Pan, in her official capacity as Director of the California Department of Public Health, certifies that this brief is 15 pages, which:

___ complies with the word limit of L.R. 11-6.1.

X complies with the page limit set by the Court's Standing Order for Newly Assigned Civil Cases.

Dated: September 16, 2026

Respectfully submitted,

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the California Department of Public
Health

CERTIFICATE OF SERVICE

Case Name: Erica Jimenez v Dr. Erica Pan, et al. No. 2:26-cv-03500-SPG-SP

I hereby certify that on **September 16, 2026**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT DIRECTOR OF THE CALIFORNIA DEPARTMENT OF PUBLIC HEALTH ERICA PAN'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on **September 16, 2026**, at Los Angeles, California.

Valerie Thompson

Declarant

/s/ *Valerie Thompson*

Signature

LA2026301941