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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PRIME HEALTHCARE SERVICES, INC.,
12 and PRIME HEALTHCARE
13 FOUNDATION, INC.,

14 Plaintiffs,

15 v.

16 KAMALA D. HARRIS, in her personal
17 capacity, and XAVIER BECERRA, in his
18 official capacity as the Attorney General of
19 the State of California,

20 Defendants.

Case No.: 3:16-cv-00778-GPC-AGS

**ORDER DENYING DEFENDANTS’
MOTION TO STRIKE AND
GRANTING DEFENDANTS’
MOTION TO DISMISS**

[ECF No. 62.]

21 Before the Court is Defendants Kamala D. Harris (“Defendant” or “Harris”) and
22 Attorney General of California Xavier Becerra’s¹ (“Defendant’s” or “Becerra’s”)
23 (collectively, “Defendants”) motion to dismiss Plaintiffs Prime Healthcare Services, Inc.
24 and Prime Healthcare Foundation, Inc.’s (“Plaintiffs” or “Prime’s”) Second Amended
25 Complaint (“SAC”) pursuant to Federal Rule of Civil Procedure 12(b)(6) and to strike the
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28 ¹ Pursuant to Federal Rule of Civil Procedure 25(d), Attorney General Becerra is automatically substituted as a party for former Attorney General Harris.

1 *quid pro quo* allegations in Plaintiffs’ SAC pursuant to Federal Rule of Civil Procedure
2 12(f).² (Dkt. No. 62.) The motion has been fully briefed. (Dkt. Nos. 69, 74.)

3 The Court conducted a hearing on April 28, 2017. (Dkt. No. 76.) John Alfred
4 Mills, Esq. appeared on behalf of Plaintiffs. (*Id.*) S. Michele Inan, Esq. and Sharon
5 O’Grady, Esq. appeared on behalf of Defendants. (*Id.*)

6 Having reviewed the parties’ arguments and the applicable law, and for the reasons
7 set forth below, the Court **DENIES** Defendants’ motion to strike Prime’s *quid pro quo*
8 allegations, **GRANTS** Defendants’ motion to dismiss Prime’s 42 U.S.C. § 1983 claim
9 against Harris in her personal capacity for violation of the Equal Protection Clause, and
10 **GRANTS** Defendants’ motion to dismiss Prime’s 42 U.S.C. § 1983 claim against
11 Becerra in his official capacity for prospective injunctive relief. (Dkt. No. 62.)

12 **BACKGROUND**

13 **I. The Parties**

14 Plaintiff Prime Healthcare Services, Inc. is a California corporation that owns and
15 operates twenty-eight hospitals throughout the country. (Dkt. No. 57, SAC ¶ 21.)
16 Plaintiff Prime Healthcare Foundation, Inc. is a nonprofit public charity that owns seven
17 nonprofit hospitals, each of which was donated by Prime Healthcare Services, in various
18 states.³ (*Id.* ¶ 22.) Defendant Kamala D. Harris was the Attorney General of California
19 during the events giving rise to the instant litigation and at the time the instant action was
20 filed. (*Id.* ¶ 24.) Defendant Xavier Becerra is the current Attorney General of California.
21 This action stems from Harris’s allegedly improper, *de facto* denial of Prime’s proposed
22 acquisition of the Daughters of Charity Health System (“DCHS”), a group of five
23 financially distressed hospitals and a skilled nursing facility. (*Id.* ¶¶ 1, 2, 14, 90.)
24 Prime’s core contention is this—at the behest of Service Employees International Union-
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27 ² Citations are based upon CM/ECF pagination.

28 ³ Prime Healthcare Services, Inc. and Prime Healthcare Foundation, Inc. will hereinafter be referred to collectively as “Plaintiffs” or “Prime.”

1 United Healthcare Workers West, Harris effectively denied the Prime-DCHS transaction
2 by imposing untenable requirements on Prime to continue operating five of the six DCHS
3 facilities in their current state for ten years. (*Id.* ¶¶ 1, 14.)

4 **II. Statutory and Regulatory Background**

5 The Attorney General supervises all charitable organizations and enforces the
6 obligations of trustees, nonprofits, and fiduciaries that hold or control property in trust for
7 charitable purposes.⁴ Pursuant to California Corporations Code §§ 5914–5925 (“the
8 Nonprofit Hospital Transfer Statute” or “the Statute”), a nonprofit corporation that
9 operates a health facility must provide notice to and obtain the written consent of the
10 Attorney General prior to entering into an agreement to sell a material amount of its
11 assets to a for-profit corporation.⁵ Cal. Corp. Code § 5914(a)(1). The Attorney General
12 has “discretion to consent to, give conditional consent to, or not consent to any agreement
13 or transaction.” *Id.* § 5917.

14 In making this determination, the Attorney General “shall consider any factors that
15 the Attorney General deems relevant,” including, but not limited to, a non-exhaustive list
16 of nine factors specified by the Statute and the corresponding implementing regulations.
17 *Id.*; *see also* Cal. Code Regs. tit. 11, § 999.5(f). The factors span an expansive range of
18 considerations, from the terms of the agreement to antitrust concerns and the public
19 interest. *See* Cal. Corp. Code § 5917; Cal. Code Regs. tit. 11, § 999.5(f). They include,
20 *inter alia*, whether “[t]he terms and conditions of the agreement or transaction are fair
21 and reasonable to the nonprofit corporation,” whether the transaction “will result in
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25 ⁴ Supervisory and enforcement authority is granted to the Attorney General under the Supervision of
26 Trustees and Fundraisers for Charitable Purposes Act, Cal. Gov’t Code §§ 12580–12599.8; the
27 Nonprofit Corporation Law, Cal. Corp. Code §§ 5000–6216; the Solicitations for Charitable Purposes
28 Law, Cal. Bus. & Prof. Code §§ 17510–17510.95; and provisions of the California Business and
Professions Code that prohibit unlawful, unfair, or fraudulent business acts or practices within
California, *id.* §§ 17200–17210.

⁵ Cal. Corp. Code §§ 5914–5919 govern transactions from nonprofit entities to for-profit entities. Cal.
Corp. Code §§ 5920–5923 govern transactions between nonprofit entities.

1 inurement to any private person or entity,” whether the transaction “is at fair market
2 value,” with “fair market value” meaning “the most likely price that the assets being sold
3 would bring in a competitive and open market under all conditions requisite to a fair
4 sale,” whether “[t]he market value has been manipulated by the actions of the parties in a
5 manner that causes the value of the assets to decrease,” whether “[t]proposed use of the
6 proceeds from the agreement or transaction is consistent with the charitable trust on
7 which the assets are held by the health facility or by the affiliated nonprofit health
8 system,” whether the transaction “involves or constitutes any breach of trust,” whether
9 “[t]he Attorney General has been provided . . . with sufficient information and data by the
10 nonprofit corporation to evaluate adequately the agreement or transaction or the effects
11 thereof on the public,” whether the transaction “may create a significant effect on the
12 availability or accessibility of health care services to the affected community,” and
13 whether the transaction is “in the public interest.” Cal. Corp. Code § 5917; *see also* Cal.
14 Code Regs. tit. 11, § 999.5(f).

15 If consent is granted to a transaction, the Attorney General’s policy is to “require
16 for a period of at least five years the continuation at the hospital of existing levels of
17 essential healthcare services, including but not limited to emergency room services.”
18 Cal. Code Regs. tit. 11, § 999.5(f)(8)(C). It is also the policy of the Attorney General “to
19 require for a period of at least five years that a minimum level of annual charity costs be
20 incurred by the hospitals that are the subject of the agreement or transaction.” *Id.* §
21 999.5(f)(8)(B). Notwithstanding this policy, the Attorney General “retain[s] complete
22 discretion to determine whether this policy shall be applied in any specific transaction
23 under review.” *Id.* § 999.5(f)(8)(B)–(C). Further, “[p]otential adverse effects on
24 availability or accessibility of health care may be mitigated through provisions negotiated
25 between the parties to the transaction, through conditions adopted by the Attorney
26 General in consenting to the proposed transaction, or through any other appropriate
27 means.” *Id.* § 999.5(f)(8)(A).

1 The Attorney General considers information from a variety of sources in making
2 the determination on a proposed transaction. The selling entity must submit to the
3 Attorney General details about the transaction, reasons for the sale, the fair market value
4 of the transaction, and the impact of the sale on the availability and accessibility of
5 healthcare services in the community affected by the sale, among other information. Cal.
6 Corp. Code § 5914(b); Cal. Code Regs. tit. 11, § 999.5(d). The written notice must
7 include a section entitled “Impacts on Health Care Services.” Cal. Code Regs. tit. 11, §
8 999.5(d)(5). This section of the written notice must include, *inter alia*, a “description of
9 all charity care provided in the last five years by each health facility”; a “description of
10 all services provided by each health facility . . . in the past five years to Medi-Cal
11 patients, county indigent patients, and any other class of patients,” including details about
12 “the type and volume of services provided, the payors for the services provided, the
13 demographic characteristics of and zip code data for the patients served by the health
14 facility . . . and the costs and revenues for the services provided”; a “description of
15 current policies and procedures on staffing for patient care areas; employee input on
16 health quality and staffing issues; and employee wages, salaries, benefits, working
17 conditions and employment protections,” including “a list of all existing staffing plans,
18 policy and procedure manuals, employee handbooks, collective bargaining agreements or
19 similar employment-related documents”; “all existing documents setting forth any
20 guarantees made by any entity that would be taking over operation or control of the
21 health facility . . . relating to employee job security and retraining, or the continuation of
22 current staffing levels and policies, employee wages, salaries, benefits, working
23 conditions and employment protections”; and a “statement describing all effects that the
24 proposed agreement or transaction may have on health care services provided by each
25 facility proposed to be transferred.” *Id.* The Attorney General may also request that the
26 seller provide additional information that he or she deems reasonably necessary to make
27 the determination. *Id.* § 999.5(c)(2).
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1 Before issuing a written decision, the Attorney General must conduct one or more
2 public meetings in order to hear comments from interested parties. Cal. Corp. Code §
3 5916. The Attorney General’s policy is to receive and consider all relevant information
4 concerning the proposed transaction from “[a]ny interested person.” Cal. Code Regs. tit.
5 11, § 999.5(e)(7). The Attorney General may contract with consultants and experts to
6 review the proposed sale or receive expert opinion from any state agency. *Id.* §
7 999.5(e)(4).

8 If a proposed transaction affects an acute care hospital with more than fifty beds or
9 may result in a significant effect on the availability or accessibility of existing healthcare
10 services, the Attorney General prepares an independent healthcare impact statement that
11 evaluates the transaction’s potential impact on the availability and accessibility of
12 services to the affected community. *Id.* § 999.5(e). The independent statement may
13 assess factors such as the transaction’s potential impact on the “level and type of charity
14 care that the hospital has historically provided” and the “provision of health care services
15 to Medi-Cal patients, county indigent patients, and any other class of patients.” *Id.* §
16 999.5(e)(6). The information in the statement is then used to consider whether the
17 proposed transaction may “create a significant effect on the availability or accessibility of
18 health care services,” one of the nine factors listed in Cal. Corp. Code § 5917. *Id.* §
19 999.5(e). The statement is public. *Id.* § 999.5(e)(3)(D).

20 The Attorney General notifies the applicant of the decision in writing. Cal. Corp.
21 Code § 5915. The decision is reviewable in state court in an administrative mandamus
22 proceeding. Cal. Civ. Proc. Code § 1085.

23 **III. Factual Background**

24 **A. The Alleged Agreement Between Harris and SEIU-UHW**

25 Since 2009, Prime has been engaged in a protracted dispute with Service
26 Employees International Union-United Healthcare Workers West (“SEIU-UHW”), a
27 labor union that represents California hospital workers, in large part due to Prime’s
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1 unwillingness to allow SEIU-UHW to unionize Prime’s California hospitals.⁶ (SAC ¶
2 10.) Prime alleges that Harris entered into an unlawful scheme with SEIU-UHW: in
3 exchange for SEIU-UHW’s political and financial support of her United States Senate
4 campaign, Harris would prevent Prime from acquiring nonprofit hospitals in California
5 unless Prime agreed to allow SEIU-UHW to unionize its hospital workers. (*Id.* ¶¶ 112–
6 14.) Prime alleges that pursuant to this unlawful scheme, Harris “refus[ed] to reasonably
7 approve the sale of [DCHS] to [Prime] because Prime rejected [SEIU-UHW’s]
8 extortionate demands . . . to unionize workers at all Prime hospitals.” (*Id.* ¶ 1.)⁷

9 As evidence for this scheme, Prime cites SEIU-UHW’s donations to Harris’s 2010
10 and 2014 campaigns for Attorney General. (*Id.* ¶ 37.) Prime alleges on information and
11 belief that SEIU-UHW promised Harris up to \$25 million in political contributions to her
12 United States Senate campaign if she denied Prime’s acquisition or imposed conditions
13 that would effect a *de facto* denial of the DCHS sale. (*Id.* ¶ 38.) Prime also alleges on
14 information and belief that SEIU-UHW advised Harris that the union would support
15 Harris’s opposing candidates if she refused to comply with the union’s demands. (*Id.*)

16 **B. The Prime-VVCH Transaction**

17 On September 20, 2011, Harris denied consent to Prime Healthcare Foundation’s
18 proposed acquisition of Victor Valley Community Hospital (“VVCH”). (*Id.* ¶¶ 42–60.)
19 Prime asserts that Harris’s denial of the VVCH transaction was the first and only time
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21 ⁶ In 2011, Prime Healthcare Services, Inc. filed suit alleging that SEIU, UHW, Kaiser Permanente, and
22 several Kaiser-related entities engaged in an antitrust conspiracy to eliminate Prime from the healthcare
23 market and increase healthcare workers’ wages. *Prime Healthcare Servs., Inc. v. Serv. Employees Int’l*
24 *Union*, No. 11-CV-2652-GPC-RBB, 2013 WL 3873074, at *1 (S.D. Cal. July 25, 2013), *aff’d*, 642 F.
25 App’x 665 (9th Cir. 2016). In 2014, Prime filed suit alleging that the SEIU, UHW, and other related
26 entities and individuals engaged in a Racketeering Influenced and Corrupt Organization Act conspiracy
27 to unionize Prime or force Prime out of the healthcare market. *Prime Healthcare Servs., Inc. v. Servs.*
28 *Employees Int’l Union*, 147 F. Supp. 3d 1094, 1097 (S.D. Cal. 2015).

⁷ Prime maintains its stance that Harris formed a *quid pro quo* agreement with SEIU-UHW, despite the
Court’s previous finding that the *quid pro quo* allegations failed to pass muster under Federal Rule of
Civil Procedure 12(b)(6). (SAC at 2 n.1.) The Court reiterates its conclusion that its dismissal of
Prime’s FAC did not depend on the plausibility of Prime’s *quid pro quo* allegations. (*See* Dkt. No. 54 at
16 n.14.)

1 Harris denied the sale of a California nonprofit hospital. (*Id.* ¶¶ 51, 94.) Prime does not
2 appear to seek relief with respect to the VVCH transaction.

3 Prime alleges on information and belief that Harris denied the 2011 VVCH sale at
4 SEIU-UHW’s request. (*Id.* ¶¶ 44–45, 50.) In support of its assertion, Prime cites
5 examples of statements and conduct by SEIU-UHW. An SEIU-UHW attorney stated at a
6 bankruptcy hearing that Harris would deny the VVCH transaction; SEIU-UHW
7 campaigned against the sale; and SEIU-UHW opposed the sale at the Attorney General’s
8 public hearing on the transaction. (*Id.* ¶¶ 42, 44, 47.) Harris denied the sale, stating
9 generally that it was not in the public’s best interest. (*Id.* ¶ 49.) After Harris denied
10 Prime’s proposed acquisition of VVCH, SEIU-UHW publicly claimed credit for the
11 decision. (*Id.* ¶¶ 42, 59.)

12 During labor negotiations with Prime in July 2014, Dave Regan, president of
13 SEIU-UHW, stated that Harris denied the VVCH sale to Prime at the union’s request.
14 (*Id.* ¶ 50.) In 2015, a senior staff member in the Attorney General’s Office informed
15 Prime that Harris had “made a mistake and was inexperienced and new to the job” when
16 she denied consent to the VVCH transaction. (*Id.*)

17 **C. The Prime-DCHS Transaction**

18 Facing financial difficulty in 2014, the Daughters of Charity Health System
19 decided to sell five nonprofit hospitals and a skilled nursing facility that it owned and
20 operated in California.⁸ (*Id.* ¶¶ 3, 62, 91.) After a thirteen-month bidding process, DCCHS
21 selected Prime’s bid to purchase the hospitals on October 10, 2014. (*Id.* ¶¶ 4, 7, 75.)
22 Alongside acknowledging Prime’s strengths, DCCHS identified the potential shortcomings
23 of a Prime transaction, citing resistance from SEIU-UHW, potential transaction resistance
24 from the Attorney General and California politicians, and Prime’s litigious history. (*Id.* ¶

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27 ⁸ The hospitals are (1) Seton Medical Center in Daly City, California, (2) O’Connor Hospital in San
28 Jose, California, (3) Saint Louise Regional Hospital in Gilroy, California, (4) St. Francis Medical Center
in Lynwood, California, and (5) St. Vincent Medical Center in Los Angeles, California. (SAC ¶ 3.) The
skilled nursing facility is Seton Coastside in Moss Beach, California. (*Id.*)

1 6.) DCHS and Prime’s sale agreement required Prime to keep each of the hospitals open
2 and to “maintain all existing healthcare services, including emergency rooms and trauma
3 centers, for at least five years.” (*Id.* ¶ 75.) DCHS submitted written notice of the
4 proposed sale to the Attorney General on October 24, 2014. (*Id.* ¶¶ 8, 78.) Prime alleges
5 that its proposed acquisition was “the single largest hospital transaction ever reviewed by
6 the Attorney General’s office” and “the largest bail-out of non-profit hospitals in
7 California history.” (*Id.* ¶¶ 8–9.)

8 The Attorney General’s Office made public five healthcare impact statements
9 prepared by MDS Consulting. (*Id.* ¶ 79.) Harris allegedly requested that these
10 statements recommend requiring Prime to continue operating five of the six DCHS
11 facilities in their current state for a period of ten years. (*Id.* ¶¶ 15, 79, 88, 122.) On
12 information and belief, Prime alleges that Harris made this request “before the report or
13 any studies had been generated.” (*Id.* ¶¶ 79, 83.) In January 2015, the Attorney General
14 received written comments and held multiple public hearings over a period of five days to
15 receive input on the proposed sale. (*Id.* ¶ 82.)

16 In February 2015, prior to Harris’s issuance of her final decision, Prime met with
17 staff members of the Attorney General’s Office to express its concerns about the
18 proposed ten-year conditions. (*Id.* ¶ 85.) The Attorney General’s Office stated that the
19 ten-year conditions were non-negotiable, and that Harris would require a ten-year
20 commitment for future sales of nonprofit hospitals to for-profit operators in California.
21 (*Id.* ¶ 86.)

22 **D. The Attorney General’s Decision**

23 On February 20, 2015, the Attorney General conditionally consented to the Prime-
24 DCHS transaction. (*Id.* ¶¶ 14, 87, 93.) Harris imposed numerous conditions on the sale.
25 (*Id.* ¶ 87.) Harris’s conditions effectively required Prime to operate five hospitals as
26 acute care facilities for ten years and to maintain the majority of current hospital services
27 at each hospital, with the exception of St. Vincent Medical Center, for ten years. (*Id.*)
28 Staff members of the Attorney General’s Office informed Prime that Harris personally

1 requested the ten-year conditions. (*Id.* ¶¶ 15, 79, 83, 88.) Harris allegedly stated that the
2 conditions were “unique and tailored to Prime.” (*Id.* ¶ 120.)

3 Prime alleges that the Attorney General’s unprecedented ten-year conditions
4 rendered the proposed transaction financially unviable, requiring Prime to operate the
5 financially failing hospitals at a loss for ten years. (*Id.* ¶¶ 18, 89–91, 93.) Accordingly,
6 Prime characterizes the Attorney General’s conditional approval of the DCHS sale as a
7 *de facto* denial, as an outright denial of consent to the transaction was “politically
8 impossible” for Harris. (*Id.* ¶¶ 14, 83, 91–92.) On March 10, 2015, Prime withdrew its
9 bid to purchase the DCHS hospitals because of the ten-year conditions. (*Id.* ¶¶ 18, 90.)

10 **E. SEIU-UHW’s Alleged Involvement**

11 Prime asserts that Harris *de facto* denied Prime’s acquisition at the bidding of
12 SEIU-UHW. (*Id.* ¶¶ 1–2, 17, 38.) As evidence, Prime cites various statements and
13 conduct by SEIU-UHW. SEIU-UHW comprised the main source of public opposition to
14 the Prime-DCHS deal, (*id.* ¶¶ 76–77, 81–82), and publicly took credit for Harris’s
15 decision to impose “unprecedented conditions” on Prime’s acquisition of DCHS, (*id.* ¶
16 89). Prime alleges on information and belief that SEIU-UHW’s actions were “all
17 political theater, designed to mask the fact that . . . Harris would ultimately follow the
18 bidding of SEIU-UHW regardless of the true merits of Prime’s bid to acquire the DCHS
19 hospitals.” (*Id.* ¶ 76.) For example, SEIU-UHW created a website to oppose Prime’s
20 bid.⁹ (*Id.* ¶ 65.) SEIU-UHW aired television ads and initiated a calling campaign urging
21 Harris to deny consent to the sale. (*Id.* ¶ 76.) SEIU-UHW and a competing bidder, Blue
22 Wolf Capital Partners LLC (“Blue Wolf”), met with Harris to show Harris that an
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25 ⁹ Prime alleges that DCHS filed a lawsuit against SEIU-UHW and Blue Wolf in state court. (SAC ¶ 81.)
26 In the state lawsuit, DCHS alleged that SEIU-UHW represented to DCHS and Prime that it could “exert
27 influence over the California Attorney General,” that “[t]he SEIU Defendants . . . openly and explicitly
28 threatened administrative action by the Attorney General against DCHS and Prime unless Prime agreed
to provide unrelated benefits to these Defendants relating to non-DCHS hospitals,” and that
“[s]tatements and actions by the Attorney General confirm that the SEIU Defendants’ extortionate
scheme caused a delay in the [Attorney General’s] approval process.” (*Id.* (alterations in original).)

1 alternative buyer existed. (*Id.* ¶ 80.) SEIU-UHW passed a resolution calling on Harris to
2 halt the sale of any hospital to Prime during the pendency of investigations of Prime for
3 alleged Medicare fraud. (*Id.* ¶ 70.)

4 Prime alleges that SEIU-UHW threatened to withdraw its support for any
5 Democratic politician who accepted contributions from Prime. (*Id.* ¶ 71.) SEIU-UHW
6 issued a press release announcing that twenty-seven state legislators had submitted a
7 letter to Harris asking her to stop the sale to Prime. (*Id.*) SEIU-UHW issued a
8 subsequent announcement that thirty-eight state legislators, two United States
9 Representatives, and other elected officials had signed the letter to Harris. (*Id.*)

10 Dave Regan, the president of SEIU-UHW, repeatedly informed Prime and DCHS
11 that Harris would approve Prime’s acquisition only if Prime agreed to allow SEIU-UHW
12 to unionize workers at Prime’s hospitals. (*Id.* ¶¶ 9–11, 39–40, 61, 68–69, 83.) Regan
13 boasted to Prime that “he has the influence with Harris to either make or break Prime
14 with respect to the Prime-DCHS sale transaction,” that Harris “would do what she was
15 told and nothing more,” that “a SEIU-UHW deal was the price for doing business in
16 California and obtaining a sale approval from Harris,” and that Regan “control[s] Harris
17 and the political process in California.” (*Id.* ¶¶ 39, 68, 83.)

18 Similarly, during Prime’s 2014 labor negotiations with SEIU-UHW, Conway
19 Collis (DCHS’s senior advisor and primary lobbyist) and former Attorney General
20 William Lockyer (a mediator for Prime’s negotiations with SEIU-UHW) informed Prime
21 that Harris would deny Prime’s acquisition or require financially unviable conditions
22 unless Prime agreed to SEIU-UHW’s demands. (*Id.* ¶¶ 9, 12–13.) Collis and Lockyer
23 allegedly informed Prime that they had learned of this condition from Harris. (*Id.* ¶¶ 12–
24 13.)

25 **F. The BlueMountain-DCHS Transaction**

26 After Prime withdrew its bid to acquire DCHS, DCHS opened a new round of
27 bidding for potential buyers. (*Id.* ¶ 103.) On or about July 17, 2015, DCHS entered into
28 a System Restructuring and Support Agreement with BlueMountain Capital

1 Management, LLC (“BlueMountain”) and Integrity Healthcare, LLC (“Integrity”), a
2 company owned by BlueMountain. (*Id.*) Unlike Prime, BlueMountain received political
3 support from SEIU-UHW. (*Id.* ¶ 102.) Pursuant to the restructuring agreement, Integrity
4 would manage DCHS in exchange for a management fee of 4% of DCHS’s annual
5 operating revenue, and BlueMountain would have the option to purchase the hospitals,
6 beginning three years from the closing date. (*Id.* ¶ 103.) The agreement required
7 BlueMountain to maintain the DCHS hospitals for five years. (*Id.*)

8 Prime distinguishes the BlueMountain-DCHS agreement from its proposed
9 acquisition of DCHS. (*Id.*) Prime avers that the agreement posed “little, if any, financial
10 risk” for BlueMountain, as BlueMountain did not agree to actually purchase the hospitals.
11 (*Id.*) If the hospitals closed within a year, BlueMountain would not be held responsible
12 for the closure and would have no legal responsibility to keep the facilities open. (*Id.*)

13 On information and belief, Prime alleges that BlueMountain and DCHS, pursuant
14 to a mitigation and performance improvement plan, collaboratively closed certain
15 services—including ones that Harris had required Prime to maintain for ten years—and
16 reduced labor and physician costs prior to submitting the DCHS-BlueMountain
17 transaction to Harris for review. (*Id.* ¶¶ 104–05, 107.) Prime surmises that Harris
18 informed DCHS and BlueMountain that she would approve the transaction before they
19 even submitted it for review. (*Id.* ¶ 106.)

20 In August 2015, DCHS submitted notice to the Attorney General of a proposed
21 transaction with BlueMountain. (*Id.* ¶ 109.) Harris conditionally approved the
22 transaction in December 2015. (*Id.*) As she did with the Prime-DCHS transaction,
23 Harris required that existing service lines be maintained for ten years. (*Id.* ¶ 109.)
24 Notwithstanding Harris’s imposition of ten-year conditions on the BlueMountain-DCHS
25 transaction, Prime alleges BlueMountain received “less onerous” conditions than the ones
26 Harris imposed on Prime, largely due to the fact that DCHS and BlueMountain closed
27 several service lines and programs before submitting the transaction to Harris for review.
28

1 (*Id.* ¶¶ 110–11.) Prime alleges on information and belief that Harris imposed the ten-year
2 conditions on account of Prime filing the instant lawsuit in September 2015. (*Id.* ¶ 109.)

3 **IV. Procedural Background**

4 Prime filed a Complaint in the United States District Court for the Central District
5 of California on September 21, 2015, (Dkt. No. 1), and filed a FAC on November 12,
6 2015, (Dkt. No. 14). Prime asserted five claims for relief in the FAC: (1) a 42 U.S.C. §
7 1983 claim for violation of Prime’s rights under the Due Process Clause of the Fourteenth
8 Amendment; (2) a 42 U.S.C. § 1983 claim for violation of Prime’s rights under the Equal
9 Protection Clause of the Fourteenth Amendment; (3) a 42 U.S.C. § 1983 claim for
10 violation of Prime’s rights under the National Labor Relations Act, 29 U.S.C. §§ 151–
11 169; (4) a declaratory judgment that Cal. Corp. Code §§ 5914–5925 is unconstitutional
12 under the Fourteenth Amendment, both facially and as applied to Prime; and (5) a
13 permanent injunction enjoining Harris from enforcing Cal. Corp. Code §§ 5914–5925,
14 both generally and with respect to Prime. (Dkt. No. 14.)

15 Harris moved to transfer the case to the United States District Court for the
16 Southern District of California or, in the alternative, to dismiss Prime’s FAC on
17 November 30, 2015. (Dkt. Nos. 17, 18.) Harris’s motion to transfer was granted on
18 March 31, 2016 by Chief Judge George H. King of the United States District Court for
19 the Central District of California. (Dkt. No. 38.) Accordingly, Harris’s motion to
20 dismiss, (Dkt. No. 18), and Prime’s *Ex Parte* Application to Strike New Arguments and
21 Evidence in Defendant’s Reply Brief, (Dkt. No. 35), were denied without prejudice to
22 their reassertion in the transferee court, (Dkt. No. 38). On April 12, 2016, the parties
23 jointly moved the Court to accept as reasserted and filed Harris’s motion to dismiss
24 Prime’s FAC and *Ex Parte* Application, together with all related briefing. (Dkt. No. 42.)
25 Judge John A. Houston of the United States District Court for the Southern District of
26 California granted the parties’ joint motion on April 12, 2016. (Dkt. No. 43.) The case
27 was reassigned to the undersigned judge on July 11, 2016. (Dkt. No. 44.)
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1 The Court held a hearing on Harris’s motion to dismiss Prime’s FAC on September
2 30, 2016. (Dkt. No. 51.) On October 31, 2016, the Court granted in part and denied in
3 part Harris’s motion to dismiss Prime’s FAC. (Dkt. No. 54.) The Court dismissed all
4 claims with prejudice except for Prime’s § 1983 claim for violation of Prime’s rights
5 under the Equal Protection Clause of the Fourteenth Amendment. (Dkt. No. 54 at 44–
6 45.)

7 Prime filed a SAC on November 30, 2016. (Dkt. No. 57.) In the SAC, Prime
8 asserts a 42 U.S.C. § 1983 claim against Harris in her personal capacity for violation of
9 its equal protection rights under the Fourteenth Amendment. (SAC ¶¶ 117–24.) Prime
10 also seeks injunctive relief under 42 U.S.C. § 1983, requesting a permanent injunction
11 preventing the Attorney General of California from enforcing Cal. Corp. Code §§ 5914–
12 5925 in a manner that violates its equal protection rights. (SAC ¶ 126.)

13 Harris and Becerra filed the instant motion to dismiss on January 27, 2017. (Dkt.
14 No. 62.) Prime responded on March 17, 2017, (Dkt. No. 69), and Defendants replied on
15 April 7, 2017, (Dkt. No. 74). The Court conducted a hearing on April 28, 2017 and took
16 the matter under submission. (Dkt. No. 76.)

17 LEGAL STANDARDS

18 A. Rule 12(b)(6)

19 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
20 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
21 Dismissal is warranted under Rule 12 (b)(6) where the complaint lacks a cognizable legal
22 theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984); *see*
23 *also Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to
24 dismiss a claim on the basis of a dispositive issue of law.”). Alternatively, a complaint
25 may be dismissed where it presents a cognizable legal theory yet fails to plead essential
26 facts under that theory. *Robertson*, 749 F.2d at 534. While a plaintiff need not give
27 “detailed factual allegations,” a plaintiff must plead sufficient facts that, if true, “raise a
28 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

1 545 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ *Ashcroft*
3 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 547). A claim is
4 facially plausible when the factual allegations permit “the court to draw the reasonable
5 inference that the defendant is liable for the misconduct alleged.” *Id.* In other words,
6 “the non-conclusory ‘factual content,’ and reasonable inferences from that content, must
7 be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret*
8 *Service*, 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a
9 plausible claim for relief will . . . be a context-specific task that requires the reviewing
10 court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

11 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the
12 truth of all factual allegations and must construe all inferences from them in the light
13 most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.
14 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). Legal
15 conclusions, however, need not be taken as true merely because they are cast in the form
16 of factual allegations. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *W.*
17 *Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion to
18 dismiss, the court may consider the facts alleged in the complaint, documents attached to
19 the complaint, documents relied upon but not attached to the complaint when authenticity
20 is not contested, and matters of which the court takes judicial notice. *Lee v. Los Angeles*,
21 250 F.3d 668, 688–89 (9th Cir. 2001).

22 **B. Rule 12(f)**

23 Under Federal Rule of Civil Procedure 12(f), the Court may, by motion or on its
24 own initiative, strike “an insufficient defense or any redundant, immaterial, impertinent
25 or scandalous” matter from the pleadings. Fed. R. Civ. P. 12(f). The purpose of Rule
26 12(f) is “to avoid the expenditure of time and money that must arise from litigating
27 spurious issues by disposing of those issues prior to trial.” *Whittlestone, Inc. v. Handi-*
28 *Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d

1 1524, 1527 (9th Cir. 1993), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S.
2 517 (1994)).

3 The Court must view the pleading in the light more favorable to the pleader when
4 ruling on a motion to strike. *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F. Supp. 2d 955,
5 965 (C.D. Cal. 2000) (citing *California v. United States*, 512 F. Supp. 36, 39 (N.D. Cal.
6 1981)). Motions to strike are regarded with disfavor because striking is such a drastic
7 remedy. *Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 923 (N.D. Cal. 2012).
8 If a claim is stricken, leave to amend should be freely given when doing so would not
9 cause prejudice to the opposing party. *Vogel v. Huntington Oaks Delaware Partners,*
10 LLC, 291 F.R.D. 438, 440 (C.D. Cal. 2013) (citing *Wyshak v. City Nat'l Bank*, 607 F.2d
11 824, 826 (9th Cir. 1979)).

12 **C. Requests for Judicial Notice**

13 Defendants filed a request for judicial notice in support of their motion, (Dkt. No.
14 64), to which Plaintiffs objected, (Dkt. No. 70), and Defendants replied, (Dkt. No. 74-1).
15 Plaintiffs separately filed a request for judicial notice in support of the opposition to
16 Defendants' motion, (Dkt. No. 71), to which Defendants objected, (Dkt. No. 74-2).

17 Generally, a court may not consider materials outside of the pleadings in ruling on
18 a Rule 12(b)(6) motion without converting the motion into a Rule 56 motion for summary
19 judgment. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Two
20 exceptions to this general rule exist—"documents incorporated into the complaint by
21 reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor*
22 *Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

23 First, "a court may consider 'material which is properly submitted as part of the
24 complaint' on a motion to dismiss without converting the motion to dismiss into a motion
25 for summary judgment." *Id.* (citation omitted). "Even if a document is not attached to a
26 complaint, it may be incorporated by reference into a complaint if the plaintiff refers
27 extensively to the document or the document forms the basis of the plaintiff's claim."
28 *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Put simply, "a court may

1 consider evidence on which the complaint necessarily relies if: (1) the complaint refers to
2 the document; (2) the document is central to the plaintiff’s claim; and (3) no party
3 questions the authenticity of the copy attached to the 12(b)(6) motion.” *Daniels-Hall v.*
4 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (citation and internal quotation
5 marks omitted); *see also Lee*, 250 F.3d at 688. A “defendant may offer such a document,
6 and the district court may treat such a document as part of the complaint, and thus may
7 assume that its contents are true for purposes of a motion to dismiss under Rule
8 12(b)(6).” *Ritchie*, 342 F.3d at 908. To illustrate, “[t]he doctrine of incorporation by
9 reference may apply . . . when a plaintiff’s claim about insurance coverage is based on
10 the contents of a coverage plan, or when a plaintiff’s claim about stock fraud is based on
11 the contents of SEC filings.” *Id.* (citations omitted).

12 Second, a “court may judicially notice a fact that is not subject to reasonable
13 dispute because it: (1) is generally known within the trial court’s territorial jurisdiction;
14 or (2) can be accurately and readily determined from sources whose accuracy cannot
15 reasonably be questioned.” Fed. R. Evid. 201(b). “[U]nder Fed. R. Evid. 201, a court
16 may take judicial notice of ‘matters of public record,’” *Lee*, 250 F.3d at 688–89 (citation
17 omitted), such as “information . . . made publicly available by government entities,”
18 *Daniels-Hall*, 629 F.3d at 998–99 (citing cases), and “records and reports of
19 administrative bodies,” *Ritchie*, 342 F.3d at 909. It follows, accordingly, that “disputed
20 matters of fact”—or, phrased differently, facts “subject to reasonable dispute,” Fed. R.
21 Evid. 201(b)—are not properly subject to judicial notice, even if they are stated in public
22 records. *Lee*, 250 F.3d at 690. On the other hand, courts “are not . . . required to accept
23 as true allegations that contradict exhibits attached to the Complaint or matters properly
24 subject to judicial notice, or allegations that are merely conclusory, unwarranted
25 deductions of fact, or unreasonable inferences.” *Daniels-Hall*, 629 F.3d at 998.

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1 **1. Defendants’ RJN (Dkt. No. 64)**

2 **a. Exhibits 1–6, 9–30**

3 Exhibits 1–6 and 9–30 consist of Harris’s decisions regarding healthcare facility
4 transactions, healthcare impact reports prepared by her consultant, and a 2007 decision by
5 former Attorney General Edmund G. Brown, Jr. concerning Prime’s acquisition of
6 Anaheim Memorial Medical Center. (Dkt. No. 64 at 2.) The Court **GRANTS**
7 Defendants’ RJN with respect to these exhibits because Exhibits 1–30 consist of matters
8 of public record, and because Prime’s SAC refers to the transactions detailed in Exhibits
9 1–29. The Court **SUSTAINS** Plaintiffs’ objections insofar as Defendants seek judicial
10 notice of disputed matters of fact.

11 **b. Exhibits 7, 7.1, and 7.2**

12 Exhibits 7, 7.1, and 7.2 consist of the agreement between DCHS and
13 BlueMountain. (Dkt. No. 64 at 2–3.) The Court **GRANTS** Defendants’ RJN with
14 respect to these exhibits because Exhibits 7, 7.1, and 7.2 consist of matters of public
15 record. The Court **SUSTAINS** Plaintiffs’ objections insofar as Defendants seek judicial
16 notice of disputed matters of fact.

17 **c. Exhibit 8**

18 Exhibit 8 is an email dated September 3, 2015 from the Office of the Attorney
19 General distributing the DCHS mitigation plan to interested parties, including Prime.
20 (Dkt. No. 64 at 3.) The Court **DENIES** Defendants’ RJN with respect to this exhibit.
21 Although Plaintiffs reference in their SAC the mitigation plan distributed by the email,
22 the email itself is not incorporated by reference, is not “generally known within the trial
23 court’s territorial jurisdiction,” and does not appear to “be accurately and readily
24 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
25 Evid. 201(b).

26 **d. Exhibits 31, 32, 35**

27 Exhibits 31, 32, and 35 consist of (1) Harris’s memorandum of points and
28 authorities in opposition to a motion for peremptory writ of mandate filed in *Victor*

1 *Valley Community Hospital v. Kamala D. Harris, et al.* in the Superior Court of
2 California, County of San Bernardino County (case no. CIV VS 11055565); (2) the
3 petitioner Victor Valley Community Hospital's request for dismissal of the petition filed
4 in the same action; and (3) the complaint in intervention filed June 2016 in *United States*
5 *of America ex rel. Karin Berntsen v. Prime Healthcare Services Inc., et al.* in the United
6 States District Court for the Central District of California (case no. CV-11-08214). (Dkt.
7 No. 64 at 3–4.) The Court **GRANTS** Defendants' RJN with respect to these exhibits
8 because Exhibits 31, 32, and 35 are state and federal court documents not subject to
9 reasonable dispute. The Court **SUSTAINS** Plaintiffs' objections insofar as Defendants
10 seek judicial notice of disputed matters of fact.

11 **e. Exhibits 33 and 34**

12 Exhibits 33 and 34 are press articles reporting United States Senator Barbara
13 Boxer's announcement that she would not seek reelection and Harris's announcement
14 that she would run for election to Senator Boxer's seat. (Dkt. No. 64 at 4.) The Court
15 **GRANTS** Defendants' RJN with respect to the dates of the two announcements, as they
16 are facts not subject to reasonable dispute. The Court **SUSTAINS** Plaintiffs' objections
17 insofar as Defendants seek judicial notice of disputed matters of fact.

18 **2. Plaintiffs' RJN (Dkt. No. 71)**

19 **a. Exhibits A, C, D, and E**

20 Exhibit A is purportedly a copy of Centinela Hospital Medical Center's website as
21 it appeared on February 6, 2015. (Dkt. No. 71 at 2.) Exhibit C is purportedly a copy of
22 PIH Health Hospital Downey's website as it appeared on or about February 2015. (*Id.*)
23 Exhibit D is purportedly a copy of Whittier Hospital Medical Center's website as it
24 appeared on or about March 2016. (*Id.*) Exhibit E is purportedly a copy of Kaiser
25 Permanente Downey Medical Center's website as it appeared on March 13, 2017. (*Id.*)

26 Plaintiffs assert that each of the exhibits are copies of webpages taken from the
27 Internet Archive, and are thus not subject to reasonable dispute. *See Erickson v.*
28 *Nebraska Mach. Co.*, No. 15-CV-01147-JD, 2015 WL 4089849, at *1 (N.D. Cal. July 6,

1 2015) (“Courts have taken judicial notice of the contents of web pages available through
2 the [Internet Archive’s] Wayback Machine as facts that can be accurately and readily
3 determined from sources whose accuracy cannot reasonably be questioned.” (citing *Pond*
4 *Guy, Inc. v. Aquascape Designs, Inc.*, No. 13–13229, 2014 WL 2863871, at *4 (E.D.
5 Mich. Jun. 24, 2014); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*,
6 2013 WL 6869410 (S.D.N.Y. Dec. 30, 2013)).

7 This assertion is not clear, however, with respect to Exhibit E, which does not bear
8 the Internet Archive Wayback Machine watermark on the top of the exhibit. (*See* Dkt.
9 No. 71-1 at 33–34.) With respect to Exhibit A, the date listed in the Internet Archive
10 Wayback Machine watermark, although unclear, appears to indicate February 12, 2015,
11 rather than February 6, 2015, as Plaintiffs suggest. (*See* Dkt. No. 71-1 at 2.) With
12 respect to Exhibit C, the first page reflects February 15, 2015, but the second through
13 fourth pages reflect dates in March 2015, contrary to Plaintiffs’ representation that the
14 exhibit reflects the website as it appeared on or about February 2015. (*See* Dkt. No. 71-1
15 at 19–22.) Finally, with respect to Exhibit D, the first page does not bear the Internet
16 Archive Wayback Machine watermark, and the year of the date is obscured for the
17 remaining pages. (*See* Dkt. No. 71-1 at 24–31.) These exhibits are in fact subject to
18 reasonable dispute. The Court **DENIES** Plaintiffs’ RJN with respect to Exhibits A, C, D,
19 and E.

20 **b. Exhibit B**

21 Exhibit B is a copy of the Office of Statewide Health Planning and Development
22 2015 Financial and Utilization Data Report. (Dkt. No. 71 at 2.) The Court **GRANTS**
23 Plaintiffs’ RJN with respect to Exhibit B because it is a public government report from a
24 governmental website. However, the Court observes that the Court’s ability to make use
25 of this document is limited. The excerpt Plaintiffs provide to the Court is incomplete and
26 largely consists of data and figures which are difficult to comprehend without
27 explanation.

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1 the claim brought against her in her personal capacity; and (3) Prime’s claim for
2 injunctive relief is barred by the Eleventh Amendment, moot, non-justiciable, and
3 improperly seeks an advisory opinion. (*Id.* at 27–42.) In the alternative, Defendants
4 request that the Court abstain and dismiss this case under the *Younger* abstention
5 doctrine. (*Id.* at 42–44.)

6 I. Motion to Strike

7 Defendants move to strike Prime’s allegations of a *quid pro quo* conspiracy
8 between Harris and SEIU-UHW on two grounds. First, Defendants raise the Court’s
9 prior conclusion that the *quid pro quo* scheme was implausible. (Dkt. No. 62-1 at 25.)
10 Defendants argue that leave to amend the *quid pro quo* allegations was not granted, and
11 that Prime fails to justify its late disclosure of its new *quid pro quo* allegations.¹⁰ (*Id.* at
12 14, 25.) Prime responds that its equal protection claim does not depend on the existence
13 of a *quid pro quo* scheme.¹¹ (Dkt. No. 69 at 21–22.) Rather, its core theory is that
14 “Harris imposed the onerous and unprecedented conditions” on Prime “because of her
15 political alignment (irrespective of any *quid pro quo* exchange) with SEIU-UHW.” (Dkt.
16 No. 69 at 21–22.)

17 Second, Defendants argue that Prime’s two nonconclusory allegations—that (1)
18 Collis and Lockyer informed Prime that it would not be able to obtain Harris’s consent to
19 the DCHS transaction unless Prime agreed to SEIU-UHW’s unionization demands, and
20 that (2) Collis and Lockyer learned of this condition directly from Harris—are
21 implausible.¹² (Dkt. No. 62-1 at 25–26.) Specifically, Defendants contend that neither
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24 ¹⁰ Defendants’ citation to Federal Rule of Civil Procedure 60(b)(2) is misguided. (Dkt. No. 74 at 6.)
25 Prime does not presently move for reconsideration of the Court’s prior ruling on the plausibility of the
26 *quid pro quo* scheme, (Dkt. No. 69 at 21–22), and does not need to present “newly discovered evidence”
27 to justify amendment of its FAC.

28 ¹¹ The Court reiterates its prior conclusion that its dismissal of Prime’s FAC did not depend on the
plausibility of Prime’s *quid pro quo* allegations. (Dkt. No. 54 at 16 n.14.)

¹² Defendants argue that “at least some of the statements” by Collis and Lockyer were made in the
course of mediation negotiations, which are privileged and inadmissible under California law. (Dkt. No.
62-1 at 26 n.15.) However, federal common law generally governs claims of privilege. Fed. R. Evid.

1 Collis nor Lockyer are alleged to represent or speak for Harris. (*Id.*) Somewhat
2 unclearly, Defendants argue that “some events” detailed in Prime’s SAC “allegedly
3 occurred in November 2014 . . . two months before U.S. Senator Barbara Boxer
4 announced her retirement and Harris announced that she would run for her Senate seat.”
5 (*Id.*)

6 Defendants have not shown how the *quid pro quo* allegations are “(1) an
7 insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous.”
8 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973–74 (9th Cir. 2010). It is true
9 that the Court did not expressly permit Prime to amend its *quid pro quo* allegations.
10 Nonetheless, such allegations are not necessarily immaterial—they may bear on the
11 rational basis inquiry for Prime’s equal protection claim, to the extent the allegations pass
12 muster under *Iqbal* and *Twombly*.

13 Moreover, Defendants’ arguments about the plausibility of Prime’s two
14 nonconclusory allegations are more properly brought under Rule 12(b)(6) than under
15 Rule 12(f). *See Whittlestone*, 618 F.3d at 974 (observing that “allow[ing] litigants to use
16 [Rule 12(f)] as a means to dismiss some or all of a pleading . . . would . . . creat[e]
17 redundancies within the Federal Rules of Civil Procedure, because a Rule 12(b)(6)
18 motion . . . already serves such a purpose”). In any event, Defendants do not cite
19 authority requiring Prime to allege that Collis and Lockyer represented or spoke for
20 Harris. Nor does the timing of Harris’s Senate campaign announcement dislodge Prime’s
21 allegations regarding Harris’s political alignment with SEIU-UHW.

22 Accordingly, the Court **DENIES** Defendants’ motion to strike Prime’s *quid pro*
23 *quo* allegations.

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27 501. The instant action solely involves federal claims; there is no claim or defense for which state law
28 supplies the rule of decision. *See id.*; *see also Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir.
2005) (“Where there are federal question claims and pendent state law claims present, the federal law of
privilege applies.”).

1 **II. Motion to Dismiss**

2 **A. Class-of-One Equal Protection Claim**

3 Prime alleges a class-of-one equal protection claim against Harris in her personal
4 capacity. (SAC ¶ 118.) To state a valid “class-of-one” claim under the Equal Protection
5 Clause, Prime must allege that it has “been intentionally treated differently from others
6 similarly situated and that there is no rational basis for the difference in treatment.”
7 *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 601 (2008) (quoting *Vill. of*
8 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Here, the elements at issue are (1)
9 whether purchasers of nonprofit hospitals were similarly situated to Prime, and (2)
10 whether there was a rational basis for the difference in treatment.

11 **1. Similarly Situated**

12 The Equal Protection “does not forbid classifications. It simply keeps
13 governmental decisionmakers from treating differently persons who are *in all relevant*
14 *respects alike.*” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). Parties are
15 similarly situated when their “situations are arguably indistinguishable.” *Ross v. Moffitt*,
16 417 U.S. 600, 609 (U.S. 1974); *see also Erickson v. Cty. of Nevada ex rel. Bd. of*
17 *Supervisors*, 607 F. App’x 711, 712 (9th Cir. 2015) (“Parties allegedly treated differently
18 in violation of the Equal Protection Clause are similarly situated only when they are
19 ‘arguably indistinguishable.’” (citation omitted)).

20 The Court makes a number of threshold observations. To start, Prime conflates its
21 “similarly situated” arguments with its allegations of disparate treatment and pretext.
22 (See Dkt. No. 69 at 24–37.) Prime argues that it was (1) treated disparately under (2)
23 pretextual justifications. Prime misses the initial step of showing that the entities treated
24 more favorably than Prime were similarly situated. (See, e.g., Dkt. No. 69 at 32 (“The
25 purported distinction is just another example of Defendants contriving an after-the-fact
26 basis to justify disparate treatment.”).)

27 Prime’s arguments stem from a fundamental misunderstanding. Pretext affects the
28 rational basis element of a class-of-one claim; it does not diminish a plaintiff’s obligation

1 to show similarly situated comparators. (Dkt. No. 62-1 at 33–34 (citing Dkt. No. 54 at
2 29–30).) Prime revives its argument, based on the Seventh Circuit’s decision in *Swanson*
3 *v. City of Chetek*, 719 F.3d 780 (7th Cir. 2013), that where there is “readily obvious
4 animus” on a defendant’s part, a plaintiff need not show an exact, one-to-one comparison
5 with similarly situated comparators. (Dkt. No. 69 at 25.) In so arguing, Prime misstates
6 the Court’s prior Order. (*See id.*) Rather than adopting the Seventh Circuit’s reasoning,
7 the Court expressly indicated otherwise: “Contrary to Prime’s contention, a finding of
8 pretext on Defendants’ part affects the ‘rational basis’ element of a class-of-one claim,
9 not the ‘similarly situated’ element.”¹³ (Dkt. No. 54 at 29–30.)

10 The similarly situated inquiry’s focus on comparing individuals does not square
11 easily with this case. It is difficult, if not unrealistic, to effectively disentangle the
12 individuals—the nonprofit hospital purchasers—from the transactions. A comparison of
13 purchasers cannot be done without reference to the entities being purchased and the
14 communities being affected. The statutory and regulatory framework governing the
15 Attorney General’s review process underscores the same—the terms of the transaction
16 factor into the picture, as do broader considerations implicating the public interest. Even
17 a cursory review of the information that must be submitted for each nonprofit hospital
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21 ¹³ In reaching this conclusion, the Court examined the Ninth Circuit’s decision in *Squaw Valley Dev. Co.*
22 *v. Goldberg*, 375 F.3d 936 (9th Cir. 2004). (*See* No. 54 at 29–30.) Although the plaintiff in *Squaw*
23 *Valley* asserted a class-of-one claim without presenting evidence of other similarly situated entities, *see*
24 375 F.3d at 945, the Ninth Circuit, in declining to rehear the case, subsequently clarified that the
25 similarly situated prong was not raised or contested on summary judgment, *see Squaw Valley Dev. Co.*
26 *v. Goldberg*, 395 F.3d 1062, 1063–64 (9th Cir. 2005) (denying petition for rehearing or rehearing en
27 banc). In fact, the defendant had conceded on appeal that the plaintiff had been subjected to more
28 oversight and regulatory and enforcement action than other similarly situated parties. *See id.* The Ninth
Circuit emphasized that its statement about the lack of similarly situated comparators “was made in the
context of demonstrating that the record supports that [the defendant] had a *rational basis* for his
exceptionally close scrutiny and oversight of [the plaintiff].” *Id.* at 1063 (emphasis added).
Accordingly, the Court declines to adopt the principle that a defendant’s animus may diminish a
plaintiff’s obligation to show similarly situated comparators. If anything, the parties’ continuing debate
over the relationship between animus, the similarly situated element, and the rational basis element
underscores the lack of clearly established law in this matter. *See infra* Part II.B.

1 transfer illustrates the complex web of community-specific variables implicated by each
2 transaction. *See, e.g.*, Cal. Code Regs. tit. 11, § 999.5(d)(5). As is evident from their
3 arguments, both parties appear to tacitly recognize that the similarly situated inquiry
4 requires a holistic evaluation of entire transactions. The Court faces a dilemma in
5 attempting to apply equal protection law to this case—there may simply be no similarly
6 situated comparators to the Prime-DCHS transaction.

7 Having observed the above, the Court concludes that Prime has failed to plead
8 facts plausibly showing that similarly situated comparators exist.

9 **a. Transactions Before the Prime-DCHS Agreement**

10 SAC ¶ 95 provides a summary of nonprofit hospital transfers Harris approved
11 between denying the Prime-VVCH transaction and *de facto* denying the Prime-DCHS
12 deal. Four of the seven transactions Prime raises were transfers to nonprofit entities, not
13 to for-profit entities. (*See* SAC ¶ 95.) The three remaining transactions are also
14 dissimilar. The St. Rose Hospital transaction was a single-hospital transaction. (*See id.*)
15 Moreover, the transaction was not an outright purchase and sale agreement—it was a
16 management agreement with an option to purchase. (*See id.*) Both the Emanuel Medical
17 Center and VVCH transactions were single-hospital transfers. (*See id.*)

18 **b. Transactions After the Prime-DCHS Agreement**

19 SAC ¶¶ 96–97 provides a summary of nonprofit hospital transfers after Harris’s *de*
20 *facto* denial of the Prime-DCHS deal. Three of the five transactions were transfers to
21 nonprofit entities. (*See id.* ¶¶ 96–97.) The remaining two transactions are also
22 dissimilar. The Keiro transaction involved no hospitals—it entailed a transfer of a
23 retirement home, an intermediate care facility, and two skilled nursing facilities. (*See id.*)
24 The Gardens Regional transaction was a single-hospital transaction. (*See id.*)

25 **c. The BlueMountain-DCHS Agreement**

26 Perhaps most tellingly, Prime distinguishes itself from BlueMountain in both its
27 SAC and in its opposition brief. (*See id.* ¶ 103; Dkt. No. 69 at 34.) Prime alleges that
28 BlueMountain is “a New York hedge fund with no healthcare experience and known as a

1 company that profited on the poor and was instrumental in the credit swap debacle that
2 contributed to the 2008 Great Recession.” (SAC ¶ 102.) Prime alleges that the
3 BlueMountain-DCHS agreement posed “little, if any, financial risk” for BlueMountain,
4 because BlueMountain did not agree to purchase the hospitals—it had an option to
5 purchase the hospitals after a term of years.¹⁴ (*Id.* ¶ 103.) Prime alleges that as a result,
6 BlueMountain would not be held responsible for the closure and would have no legal
7 responsibility to keep the facilities open. (*Id.*) Prime’s takeaway is that “the
8 BlueMountain transaction was quite different from the Prime-DCHS transaction.” (Dkt.
9 No. 69 at 34.)

10 Prime cannot have it both ways. Prime avers generally that other transactions were
11 similar to the Prime-DCHS transaction on a macroscopic level, yet carefully distinguishes
12 the BlueMountain-DCHS transaction based upon the particular terms of the agreement.
13 Prime asserts that the unique circumstances of each transaction, such as the location of
14 the subject nonprofit hospital, do not render transactions dissimilar, yet argues that
15 “[e]ach of the DCHS hospitals was a separate facility serving a distinct community” and
16 should be evaluated independently. (Dkt. No. 69 at 33.) Indeed, each of the DCHS
17 hospitals—some large, some small—served entirely different geographic locations across
18 California, (SAC ¶ 3), yet Prime omits any mention of the locations of the majority of the
19 transactions it alleges are similarly situated comparators, (*see id.* ¶¶ 95–97). Prime
20 asserts that the size of a transaction does not matter to the similarly situated inquiry, yet
21 emphasizes in its SAC that the Prime-DCHS transaction was the single largest bailout of
22 nonprofit hospitals reviewed by the Attorney General’s Office. (*Id.* ¶¶ 8–9.) And while
23 Prime alleges that Harris treated BlueMountain more leniently, Prime’s allegations speak
24 to disparate treatment, not whether BlueMountain was similarly situated.

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28 ¹⁴ This distinction further belies how transactions such as the St. Rose Hospital transaction were not similar to the Prime-DCHS transaction.

1 Prime cannot allege that each transfer involved a transfer to a for-profit entity, or
2 that the terms of each transaction were arguably indistinguishable. Prime ignores the
3 circumstances of each transaction, such as the existing level of medical services
4 maintained by the hospitals, the geographic location of the hospitals, the size of the
5 facilities, the medical needs and demographics of the surrounding communities, and the
6 availability of alternative medical services, among others. As Prime admits, each
7 nonprofit hospital serves a “distinct community,” and even slight differences in
8 transaction terms can render transactions dissimilar at their core.

9 In light of the above, the Court concludes that Prime has not alleged facts plausibly
10 showing the existence of similarly situated comparators.

11 **2. Rational Basis**

12 “[T]he rational basis prong of a ‘class of one’ claim turns on whether there is a
13 rational basis for the *distinction*, rather than the underlying government *action*.” *Gerhart*,
14 637 F.3d at 1023 (emphasis in original). “Unless a classification trammels fundamental
15 personal rights or implicates a suspect classification, to meet constitutional challenge the
16 law in question needs only some rational relation to a legitimate state interest.” *Lockary*
17 *v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). Where there is “any reasonably
18 conceivable state of facts that could provide a rational basis for the classification,” the
19 inquiry ends. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313–14 (1993).

20 “This deferential standard of review is a paradigm of judicial restraint.” *Id.* at 314.
21 “‘The Constitution presumes that, absent some reason to infer antipathy, even
22 improvident decisions will eventually be rectified by the democratic process and that
23 judicial intervention is generally unwarranted no matter how unwisely we may think a
24 political branch has acted.’” *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The
25 Equal Protection Clause “applies equally to executive and legislative action.” *See Lazy Y*
26 *Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 n.4 (9th Cir. 2008) (citing *Nordlinger*, 505 U.S.
27 at 16 n.8); *Immigrant Assistance Project of Los Angeles Cty. Fed’n of Labor (AFL-CIO)*
28 *v. I.N.S.*, 306 F.3d 842, 872 (9th Cir. 2002)).

1 “Plausible reasons” support Harris’s imposition of ten-year conditions on Prime.
2 The Attorney General has discretion to consider whether each individual transaction
3 “may create a significant effect on the availability or accessibility of health care services
4 to the affected community” and whether the transaction is “in the public interest.” Cal.
5 Corp. Code § 5917. Further, “[p]otential adverse effects on availability or accessibility of
6 health care may be mitigated through provisions negotiated between the parties to the
7 transaction, through conditions adopted by the Attorney General in consenting to the
8 proposed transaction, or through any other appropriate means.” Cal. Code Regs. tit. 11, §
9 999.5(f)(8)(A). Requiring Prime to continue services for ten years, instead of merely five
10 years, plausibly appears to support the purposes enumerated in the Nonprofit Hospital
11 Transfer Statute and its implementing regulations. (*See* Dkt. No. 62-1 at 35–36; Dkt. No.
12 74 at 21.) Moreover, Harris had “complete discretion” to determine whether her policy
13 of requiring existing levels of essential healthcare services to be continued for at least
14 five years would “be applied in any specific transaction under review.” Cal. Code Regs.
15 tit. 11, § 999.5(f)(8)(B)–(C). Harris had the authority to vary upward from a minimum
16 floor of five years.

17 Prime complains that Defendants’ proffered reasons are merely a post hoc
18 justification. (Dkt. No. 69 at 38.) However, the Nonprofit Hospital Transfer Statute does
19 not require the Attorney General to provide reasons for the decision. Nor does the Equal
20 Protection Clause so require. *See Beach Commc’ns*, 508 U.S. at 315 (“[T]he absence of
21 legislative facts explaining the distinction on the record has no significance in rational-
22 basis analysis.” (citation, internal quotation marks, alteration omitted) (citing *Nordlinger*,
23 505 U.S. at 15 (equal protection “does not demand for purposes of rational-basis review
24 that a legislature or governing decisionmaker actually articulate at any time the purpose
25 or rationale supporting its classification”))).

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1 **3. Pretext**

2 “[A]cts that are malicious, irrational, or plainly arbitrary do not have a rational
3 basis.”¹⁵ *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), *aff’d sub*
4 *nom. Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591 (2008). “[I]n an equal protection
5 claim based on selective enforcement of the law, a plaintiff can show that a defendant’s
6 alleged rational basis for his acts is a pretext for an impermissible motive.” *Id.*

7 Prime argues that it has provided sufficient allegations of an impermissible motive
8 on Harris’s part, regardless of the plausibility of the alleged *quid pro quo* scheme. (Dkt.
9 No. 69 at 39–40.) Specifically, Prime contends that “a plausible inference can certainly
10 be raised . . . that Harris’ motivation to impose the disputed conditions was because the
11 SEIU-UHW opposed the Prime-DCHS transaction when Prime refused to unionize
12 unrelated hospitals.” (*Id.* at 39.)

13 At bottom, Prime alleges that Harris was motivated by politics:

14 Prime is informed and believes that Defendant Harris selectively enforced the Non-
15 Profit Hospital Transfer Statute against Plaintiffs using arbitrary, capricious,
16 onerous and unprecedented approval conditions because she is politically aligned

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18 ¹⁵ As Prime points out, (Dkt. No. 69 at 25 n.6), Defendants overstate the Seventh Circuit’s holding in
19 *Brunson v. Murray*, 843 F.3d 698 (7th Cir. 2016). *Brunson* does not hold that both animus and the lack
20 of any conceivable legitimate purpose must be demonstrated by a class-of-one plaintiff. *See* 843 F.3d at
21 705–08. Rather, the Seventh Circuit observed that “[t]he elements of class-of-one claims have remained
22 unsettled” since a 2012 en banc decision, in which three opinions articulated three different standards for
23 class-of-one claims. *Id.* at 706. One standard considers whether a rational basis can be conceived,
24 regardless of whether it is established in the record or whether the basis occurred to the defendant, and
25 gives intent no role in class-of-one suits outside of showing that discrimination exists. *Id.* A second
26 standard requires the plaintiff to show that he or she was singled out for intentional discrimination by
27 state actors who knew or should have known that they had no justification for singling the plaintiff out
28 for unfavorable treatment. *Id.* A third standard articulates a multi-part test: a plaintiff must show that he
or she was the victim of intentional discrimination at the hands of a state actor, that the state actor lacked
a rational basis for so doing, and that the plaintiff had been injured by the intentional discrimination. *Id.*
Instead of deciding which class-of-one standard to adopt, the Seventh Circuit expressly stated that the
claim in *Brunson* survived summary judgment under all three standards raised in the intra-circuit
doctrinal debate. *See id.* (“While we await a final resolution of the doctrinal debate, *Brunson*’s claim
survives summary judgment under all three standards.”). While *Brunson* does not bind this Court or
provide doctrinal clarity, *Brunson* underscores the unsettled nature of class-of-one law and the live
questions with which courts continue to wrestle in this area of law.

1 against Plaintiffs as the result of her relationship with SEIU-UHW and Regan, and
2 because Plaintiffs rejected SEIU-UHW's demands to unionize other Prime
3 hospitals unrelated to the Prime-DCHS transaction.

4 (SAC ¶ 120; *see also* ¶ 6 (alleging that DCHS's list of weaknesses for Prime's bid "was
5 short and primarily based on political opposition to the Prime proposal," and that Harris's
6 review of Prime's bid "would likely be biased by her political relationship with unions");
7 ¶¶ 17, 19 (noting that SEIU-UHW is Harris's "political ally"); ¶¶ 18, 76 (alleging that
8 Harris's conditional approval of the Prime-DCHS transaction was "political theater
9 designed to protect her from political fallout"); ¶ 35 (alleging that Harris "curr[ie]d favor
10 with political campaign contributors"); ¶ 40 (detailing meetings with several of Harris's
11 unnamed "political advisors"); ¶ 53 (positing that Harris "act[ed] as SEIU-UHW's
12 political agent"); ¶ 83 (noting that it would be "politically impossible" for Harris to
13 outright deny consent to the Prime-DCHS transaction); ¶ 83 (alleging that Harris and
14 Regan aimed "to further their own political agenda" and recounting Regan's "boast[s]
15 about his ability to control Harris and the political process in California"); ¶ 85 (noting
16 "the transparently political nature of the Attorney General's approval process"); ¶ 102
17 (noting that "BlueMountain received praise and political support from SEIU-UHW"); ¶¶
18 109, 111 (alleging that it was not "politically feasible" for Harris to impose five-year
19 conditions on the BlueMountain-DCHS deal, and that unlike Prime, BlueMountain had
20 the support of SEIU-UHW); ¶ 112 (alleging that SEIU-UHW agreed to provide political
21 and financial support of Harris's Senate campaign).)

22 Do political motivations or considerations constitute a legally impermissible
23 motive? Does acceding to union political pressure dislodge all of the rational reasons
24 underlying Harris's disparate treatment of Prime, rendering her acts malicious, irrational,
25 or plainly arbitrary? The answer remains unclear.¹⁶

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28 ¹⁶ The lack of clarity further amplifies the Court's qualified immunity analysis. *See infra* Part II.B.

1 In *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), an employer
2 challenged on equal protection grounds the “Living Wage Ordinance” imposed by the
3 City of Berkeley, “claim[ing] it was unfairly targeted when the City expanded coverage
4 of the Living Wage Ordinance to only a handful of employers—between one and five—
5 due to the geographical restrictions, as well as the limitations on the number of
6 employees . . . and annual revenue.” 371 F.3d at 1154–55. Like Prime, the employer
7 contended that the City’s true motive was to aid a unionization campaign directed at one
8 of the employers which would be negatively impacted by the ordinance. *See id.* The
9 Ninth Circuit deemed this argument “unpersuasive,” as “it is entirely irrelevant for
10 constitutional purposes whether the conceived reason for the challenged distinction
11 actually motivated the legislature.” *Id.* (quoting *Beach Commc’ns*, 508 U.S. at 315).¹⁷
12 The Ninth Circuit concluded that the plaintiff’s equal protection claim failed. *See id.* at
13 1155–56. To the extent the plaintiff raised a class-of-one claim, it, too, failed, because
14 there was a rational basis for the City to treat the allegedly “targeted” businesses
15 differently from their competitors. *See id.* at 1155–56.

16 While the Ninth Circuit wrote off as irrelevant the City’s alleged motive to aid a
17 unionization campaign in *RUI One*, *see id.*, the Ninth Circuit recently issued a decision
18 suggesting a different course, *see Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809 (9th
19 Cir. 2016). In *Fowler*, two employers challenged on equal protection grounds the
20 California legislature’s addition of carve-outs to safe harbor legislation that would
21 otherwise protect employers from minimum wage liability. *See* 844 F.3d at 811–16. The
22 plaintiffs—two of the only three corporate employers affected by the carve-outs—alleged
23 that state legislators added the carve-outs to obtain the support of a labor union. *See id.*
24 Tellingly, the three affected corporate employers were the defendants in the only three
25

26
27 ¹⁷ The Ninth Circuit also cited *Int’l Paper Co. v. Town of Jay*, 928 F.2d 480 (1st Cir. 1991), wherein the
28 First Circuit “specifically rejected a claim that an environmental ordinance violated the Equal Protection
Clause because its challengers alleged that its passage was motivated by a desire to restrict a business’s
power in dealing with unions.” 371 F.3d at 1154–55 (citing *Int’l Paper*, 928 F.2d at 485).

1 pending wage-and-hour class actions filed by the labor union in the seven preceding
2 years. *See id.* As a result of the carve-outs, the three employers would be precluded from
3 using the safe harbor in the pending litigation. *See id.* Plaintiffs argued that the
4 legislation failed to satisfy even rational basis review, because the only reason the carve-
5 outs were included in the legislation was to procure the support of the union. *See id.* The
6 Ninth Circuit agreed. *Id.* The Ninth Circuit observed, “[W]e can conceive of no other
7 reason why the California legislature would choose to carve out these three employers
8 other than to respond to the demands of a political constituent.” *Id.* “Because that
9 justification would not survive even rational basis scrutiny,” the Ninth Circuit held that
10 plaintiffs plausibly stated a claim that the carve-out provisions violated the Equal
11 Protection Clause. *Id.*

12 The instant case bears more resemblance to the facts of *RUI One* than *Fowler*. In
13 *Fowler*, the California legislature evinced an utter lack of any rational basis for adding
14 the carve-outs, beyond currying political favor. That is not the present case. Here, there
15 is a “reasonably conceivable state of facts that could provide a rational basis” for Harris’s
16 imposition of ten-year conditions on Prime. *Beach Commc’ns*, 508 U.S. at 313.

17 Notwithstanding the above, the Court need not resolve any apparent tension between *RUI*
18 *One*, *Fowler*, and the instant case today. If anything, the Ninth Circuit’s recent holding
19 in *Fowler* further militates in favor of concluding that the contours of class-of-one law
20 were not clearly established at the time of Harris’s conditional approval of the Prime-
21 DCHS deal.

22 The Court’s conclusion that Prime has insufficiently alleged the existence of
23 similarly situated individuals, *see supra* Part II.A.1, and the Court’s conclusion that
24 Prime lacked a clearly established right at the time Harris conditionally consented to the
25 Prime-DCHS deal, *see infra* Part II.B, supply independent grounds to dismiss Prime’s
26 SAC.

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B. Qualified Immunity

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). “Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Lower courts have discretion to decide which prong to address first. *Id.*

“A clearly established right is one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658 (2012)). While there need not be “a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* (quoting *al-Kidd*, 563 U.S. at 741)). “Put simply, qualified immunity protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The Supreme Court has “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” *al-Kidd*, 563 U.S. at 742; *see also City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (stating the same). “The dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’” *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). The clearly established inquiry “‘must be undertaken in light of the specific context of the case, not as a broad general proposition.’” *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). “[T]he clearly established law must be ‘particularized’ to the facts of the case.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). “Otherwise,

1 ‘[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of
2 virtually unqualified liability simply by alleging violation of extremely abstract rights.’”
3 *Id.* (quoting *Anderson*, 483 U.S. at 639).

4 “[I]n the last five years” the Supreme Court “has issued a number of opinions
5 reversing federal courts in qualified immunity cases.” *White*, 137 S. Ct. at 551 (citing
6 *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases)). The Supreme Court has found it
7 necessary to do so “both because qualified immunity is important to ‘society as a whole,’
8 and because as ‘an immunity from suit,’ qualified immunity ‘is effectively lost if a case is
9 erroneously permitted to go to trial.’” *Id.* (citations omitted).

10 Here, Harris asserts the qualified immunity defense in response to Prime’s equal
11 protection claim against her in her personal capacity. (Dkt. No. 62-1 at 37–39.) For the
12 reasons set forth in prior sections of this Order, *supra* Part II.A, Harris is entitled to
13 qualified immunity on the first prong alone. While the qualified immunity Court need
14 not continue on to discuss the second prong, the clearly established inquiry offers an
15 additional, independent ground entitling Harris to qualified immunity.

16 Harris asserts that “the contours of the law existing at the time of Harris’s decision
17 would not have alerted her that imposing a mix of five and 10-year requirements on the
18 maintenance of medical services was unconstitutional.” (*Id.* at 38–39.) Harris states that
19 she “know[s] of no case law imposing civil rights damage liability against a state
20 Attorney General for discretionary conduct overseeing and protecting a state’s charitable
21 trusts for the public in a manner within her statutory authority.” (*Id.* at 39.)

22 Prime cites the Ninth Circuit’s qualified immunity analysis in *Gerhart v. Lake Cty.*,
23 *Mont.*, 637 F.3d 1013 (9th Cir. 2011) to argue that it had a clearly established right. (Dkt.
24 No. 69 at 40–42.) In *Gerhart*, the plaintiff challenged the county commissioners’ denial
25 of his permit application for a lane approach on equal protection grounds. *See* 637 F.3d
26 at 1014–15. Evidence showed that the “outright denial of an approach permit application
27 [was] incredibly uncommon” in the county. *See id.* at 1018. The Ninth Circuit denied
28 the defendant commissioners’ qualified immunity defense, concluding that plaintiff’s

1 “constitutional right not to be intentionally treated differently than other similarly situated
2 property owners without a rational basis was clearly established at the time his permit
3 application was denied” in 2008, eight years after the Supreme Court decided *Vill. of*
4 *Willowbrook v. Olech*, 528 U.S. 562 (2000). *Id.* at 1025.

5 *Gerhart* is distinguishable. As the Ninth Circuit observed, *Olech* and *Gerhart*
6 presented “exceptionally similar” facts. *Gerhart*, 637 F.3d at 1025. The facts of *Olech*
7 are simple.

8 [A] property owner had asked the village of Willowbrook to connect her property
9 to the municipal water supply. Although the village had required only a 15-foot
10 easement from other property owners seeking access to the water supply, the
11 village conditioned *Olech*’s connection on a grant of a 33-foot easement. *Olech*
12 sued the village, claiming that the village’s requirement of an easement 18 feet
13 longer than the norm violated the Equal Protection Clause.

14 *Engquist*, 553 U.S. at 601. Like *Olech*, *Gerhart* involved state action which was not
15 “based on a vast array of subjective, individualized assessments.” *Id.* at 603. Rather,
16 *Gerhart*’s limited universe of facts involved a lane approach permit denial.

17 This case involves broad amounts of discretion and complex facts, and the specific
18 context of the case does not square easily with a class-of-one challenge. Did former
19 Attorney General Harris violate clearly established law by imposing more stringent
20 conditions on a nonprofit hospital transaction in response to political pressure from a
21 labor union, where the law expressly conferred upon her broad discretion to impose such
22 conditions, where the transaction—the largest of its kind—affected multiple
23 communities, and where the conditions were otherwise supported by plausible reasons?
24 Neither *Olech* nor *Gerhart* “placed the statutory or constitutional question beyond
25 debate,” such that it was “sufficiently clear that every reasonable official would have
26 understood that what [Harris was] doing violates that right.” *Mullenix*, 136 S. Ct. at 308
27 (citation and quotation marks omitted). Allowing Plaintiffs to constitutionalize their
28 disagreement with what is, at bottom, discretionary state decisionmaking by alleging a

1 violation of an abstract right would disregard qualified immunity’s “importan[ce] to
2 society as a whole.” *White*, 137 S. Ct. at 551 (citation and quotation marks omitted).

3 The Court is tasked with applying a legal test derived from the straightforward,
4 confined facts of *Olech* to the sprawling facts of this case—facts which implicate, *inter*
5 *alia*, former Attorney General Harris’s broad statutory and regulatory discretion to
6 impose conditions on nonprofit hospital transfers, her oversight over charitable
7 organizations, complex business transactions between sophisticated parties, public
8 comment and input from various groups, distinct communities’ access to continuing
9 health services, and the political process. It is unclear whether the similarly situated
10 inquiry should—or can—be conducted without reference to the totality of the
11 transactions; whether any two nonprofit hospital transfers can in fact be arguably
12 indistinguishable; whether pretext reduces a plaintiff’s obligation to show similarly
13 situated comparators; whether responding to political pressure from a labor union can
14 entirely dislodge the rational basis underlying the Attorney General’s conditional consent
15 to a nonprofit hospital transfer; and whether the Attorney General’s discretionary
16 decisionmaking is properly subject to a class-of-one claim.

17 “It seems unlikely that the Supreme Court intended such a dramatic result in its
18 *per curiam* opinion in *Olech*.” *Engquist*, 478 F.3d at 996 (quoting *Campagna v. Mass.*
19 *Dep’t of Env’tl. Prot.*, 206 F. Supp. 2d 120, 127 (D. Mass. 2002), *aff’d*, 334 F.3d 150 (1st
20 Cir. 2003)). In holding that class-of-one claims have no application in the public
21 employment context, the Supreme Court observed in *Engquist*,

22 What seems to have been significant in *Olech* and the cases on which it relied was
23 the existence of a clear standard against which departures, even for a single
24 plaintiff, could be readily assessed. There was no indication in *Olech* that the
25 zoning board was exercising discretionary authority based on subjective,
26 individualized determinations—at least not with regard to easement length,
27 however typical such determinations may be as a general zoning matter.

28 *Engquist*, 553 U.S. at 602–03.

1 The instant factual scenario is far less clear-cut than a straightforward zoning or
2 “arm’s-length regulation” matter. *Id.* at 602–04. This case foregrounds a “form[] of state
3 action . . . which by [its] nature involve[s] discretionary decisionmaking based on a vast
4 array of subjective, individualized assessments.” *Id.* at 603; *see also Tower v. Brewer*,
5 672 F.3d 650, 660 (9th Cir. 2012) (quoting the same). Here, “allowing a challenge based
6 on the arbitrary singling out of a particular person would undermine the very discretion
7 that such state officials are entrusted to exercise.” *Engquist*, 553 U.S. at 603. Not only
8 would the Attorney General’s statutory discretion be undermined—federal courts would
9 be assigned the daunting task of reviewing complex business transactions and state
10 officials’ decisions spanning broad domains, from public health to antitrust regulation.

11 In light of the above, the Court concludes that Harris is entitled to qualified
12 immunity. Prime has not stated that Harris violated a constitutional right, and the right
13 was not clearly established at the time of the challenged conduct.

14 **C. Injunctive Relief**

15 “The Eleventh Amendment bars a suit against state officials when ‘the state is the
16 real, substantial party in interest.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465
17 U.S. 89, 101 (1984) (citation omitted). As a suit against a state official in his or her
18 official capacity is effectively a suit against the state itself, “state officials sued in their
19 official capacities are not ‘persons’ within the meaning of § 1983.” *Doe v. Lawrence*
20 *Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (citing *Will v. Michigan Dep’t of*
21 *State Police*, 491 U.S. 58, 70 (1989)). There is, however, one exception to this rule under
22 the *Ex parte Young* doctrine: “When sued for *prospective injunctive relief*, a state official
23 in his official capacity is considered a ‘person’ for § 1983 purposes.” *Id.* (citing *Ex parte*
24 *Young*, 209 U.S. 123, 159–160 (1908)). Put simply, the *Ex parte Young* exception “is
25 available where ‘a plaintiff alleges an ongoing violation of federal law, and where the
26 relief sought is prospective rather than retrospective.’” *Id.* (quoting *Idaho v. Coeur*
27 *d’Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O’Connor, J., concurring)).
28

1 Prime seeks the following injunctive relief against the Attorney General in his
2 official capacity:

3 Entry of a permanent injunction . . . that enjoins the Attorney General of California
4 from enforcing, directly or indirectly through third parties, the Non-Profit Hospital
5 Transfer Statute, Corporations Code §§ 5914–5925, against Plaintiffs, including
6 with respect to the DCHS Sale Agreement, in a manner that violates their right to
7 equal protection of laws under the Fourteenth Amendment to the U.S.
8 Constitution[.]

9 (SAC at 79.) Prime asserts that it will suffer irreparable injury because the Attorney
10 General will prevent it from acquiring other nonprofit hospitals in California due to its
11 continued rejection of SEIU-UHW’s unionization demands. (SAC ¶ 126.) Although
12 unclear, Prime asserts that absent injunctive relief, it will “potentially” be liable to DCHS
13 for breach of the DCHS Sale Agreement, and will “be prevented from lawfully acquiring
14 and operating the DCHS hospitals pursuant to the terms of the DCHS Sale Agreement
15 should Prime and DCHS attempt to negotiate a sale/purchase of the DCHS hospitals in
16 the future.” (*Id.*)

17 First, to the extent Prime seeks relief against the Attorney General in his official
18 capacity “with respect to the DCHS Sale Agreement,” the Eleventh Amendment bars
19 Prime from seeking such retrospective relief. Second, while “[a]n allegation of an
20 ongoing violation of federal law where the requested relief is prospective is ordinarily
21 sufficient to invoke the *Young* fiction,” *Coeur d’Alene Tribe*, 521 U.S. at 281, Prime’s
22 recital of Harris’s past denials, both outright and allegedly *de facto*, of Prime’s proposed
23 nonprofit hospital transactions does not show that Becerra is committing an ongoing
24 violation of federal law.

25 Prime’s allegations are inextricably intertwined with Harris and her alleged
26 actions. Prime has not shown—or even attempted to show—that the allegations
27 underlying its prayer for injunctive relief apply to Becerra. Indeed, both Prime’s SAC,
28 filed at the end of Harris’s tenure as Attorney General, and Prime’s opposition brief are
devoid of any mention of Becerra. (*See* Dkt. Nos. 57, 69.)

1 [W]hen a public official is sued in his official capacity and the official is replaced
2 or succeeded in office during the pendency of the litigation, the burden is on the
3 complainant to establish the need for declaratory or injunctive relief by
4 demonstrating that the successor in office will continue the relevant policies of his
predecessor.

5 *Kincaid v. Rusk*, 670 F.2d 737, 741 (7th Cir. 1982); *see also Mayor of Philadelphia v.*
6 *Educ. Equal. League*, 415 U.S. 605, 622 (1974) (“Where there have been prior patterns of
7 discrimination by the occupant of a state executive office but an intervening change in
8 administration, the issuance of prospective coercive relief against the successor to the
9 office must rest, at a minimum, on supplemental findings of fact indicating that the new
10 officer will continue the practices of his predecessor.”); *Spomer v. Littleton*, 414 U.S.
11 514, 689–90 (1974) (holding that there may no longer be a controversy where the
12 wrongful conduct charged in plaintiffs’ § 1983 claim for injunctive relief was personal to
13 the former state attorney and inapplicable to the succeeding state attorney,
14 notwithstanding the fact that the former state attorney had also been sued in his official
15 capacity). Here, although Prime originally sued Harris in her official and individual
16 capacities, it is plain that Prime’s allegations are personal to Harris and shed no light on
17 Becerra’s prospective practices and policies. Prime, despite the opportunity to do so in
18 its opposition brief, did not attempt to provide supplemental facts to substantiate its claim
19 for prospective injunctive relief against Attorney General Becerra. (*See* Dkt. No. 69.)
20 Nor did it request leave to amend to do so. (*See id.*)

21 Accordingly, the Court **GRANTS** Defendants’ motion to dismiss Prime’s claim for
22 injunctive relief against Attorney General Becerra in his official capacity.

23 **D. *Younger* Abstention**

24 Defendants request, in the alternative, that the Court abstain and dismiss the instant
25 action under the *Younger* abstention doctrine. (Dkt. No. 62-1 at 42–44.) In *Younger v.*
26 *Harris*, the Supreme Court set forth the principles underlying what is now known as
27 *Younger* abstention. *See* 401 U.S. at 37, 43–54 (1971). At its core, *Younger* “reaffirmed
28 the long-standing principle that federal courts sitting in equity cannot, absent exceptional

1 circumstances, enjoin pending state criminal proceedings.” *ReadyLink Healthcare, Inc.*
2 *v. State Comp. Ins. Fund*, 754 F.3d 754, 758 (9th Cir. 2014) (citing *Younger*, 401 U.S. at
3 43–54). The Supreme Court “later extended the *Younger* principle to civil enforcement
4 actions ‘akin to’ criminal proceedings and to suits challenging ‘the core of the
5 administration of a State’s judicial system.’” *Id.* (citations omitted).

6 *Younger* abstention is available only in “three exceptional categories” of cases.
7 *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592 (2013). These categories are: “(1)
8 ‘parallel, pending state criminal proceeding[s],’ (2) ‘state civil proceedings that are akin
9 to criminal prosecutions,’ and (3) state civil proceedings that ‘implicate a State’s interest
10 in enforcing the orders and judgments of its courts.’” *ReadyLink*, 754 F.3d at 759
11 (quoting *Sprint*, 134 S. Ct. at 588).

12 In civil cases, *Younger* abstention is appropriate only when the following elements
13 are satisfied: the state proceedings: (1) are ongoing, (2) are quasi-criminal
14 enforcement actions or involve a state’s interest in enforcing the orders and
15 judgments of its courts, (3) implicate an important state interest, and (4) allow
litigants to raise federal challenges.

16 *Id.* If these four elements are met, federal courts then proceed to “consider whether the
17 federal action would have the practical effect of enjoining the state proceedings and
18 whether an exception to *Younger* applies.” *Id.*

19 This case does not satisfy the requirements for *Younger* abstention. Relying on
20 nonbinding case law,¹⁸ Defendants frame the instant action as a “quasi-judicial
21 proceeding” that falls within the second category of *Younger* cases. (Dkt. No. 62-1 at
22

23
24 ¹⁸ The Eighth Circuit held in a pair of decisions that a state insurance commissioner’s rejection of
25 plaintiff’s application to acquire control of in-state insurance companies was judicial in nature and
26 constituted an ongoing state proceeding for *Younger* purposes. *See Alleghany Corp. v. McCartney*, 896
27 F.2d 1138, 1143 (8th Cir. 1990); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1316 (8th Cir. 1990).
28 The Eighth Circuit observed that the director of insurance “investigated the facts surrounding
[plaintiff’s] proposed acquisition, and based on this fact-intensive inquiry, refused to permit the
acquisition.” *McCartney*, 896 F.2d at 1132. Even if the Court were bound by these Eighth Circuit
decisions, it is unsettled whether or not the quasi-criminal enforcement action was ongoing. *See infra*
n.19.

1 42–44; Dkt. No. 74 at 24.) Specifically, Defendants point out that the Attorney General’s
2 review of Prime’s proposed acquisition involved a fact-based investigation, public
3 hearing and comment, and a written decision that may be reviewed in state court for an
4 abuse of discretion. (*Id.*) Further, Defendants analogize the Attorney General’s exercise
5 of discretion to a license revocation proceeding, reasoning that “a decision not to consent
6 amounts to a rejection that deprives an acquiring entity of its ability to acquire the
7 facility.” (Dkt. No. 62-1 at 43.)

8 Defendants’ attempt to analogize the Attorney General’s review process to a
9 criminal prosecution is strained.

10 For civil enforcement actions that are akin to criminal proceedings, however, “a
11 state actor is routinely a party to the state proceeding and often initiates the action,”
12 the proceedings “are characteristically initiated to sanction the federal plaintiff . . .
13 for some wrongful act,” and “[i]nvestigations are commonly involved, often
culminating in the filing of a formal complaint or charges.”

14 *ReadyLink*, 754 F.3d at 759 (quoting *Sprint*, 134 S. Ct. at 592). Here, the Attorney
15 General’s review of Prime’s proposed acquisition does not bear any of the characteristics
16 enumerated above. The Supreme Court has warned against “divorc[ing]” the *Younger*
17 abstention factors “from their quasi-criminal context,” as doing so “would extend
18 *Younger* to virtually all parallel state and federal proceedings, at least where a party could
19 identify a plausibly important state interest.” *Sprint*, 134 S. Ct. at 593. Heeding the
20 Supreme Court’s guidance that “abstention from the exercise of federal jurisdiction is the
21 ‘exception, not the rule,’” *id.* (citation omitted), the Ninth Circuit has likewise cautioned
22 against indiscriminately construing the initiation of any quasi-judicial administrative
23 proceeding as a quasi-criminal civil enforcement action, *see ReadyLink*, 754 F.3d at 760.

24 Even if this case presented a quasi-criminal enforcement action, it remains
25 unsettled whether or not the state proceeding would be considered ongoing. The Ninth
26 Circuit has expressly declined to decide if a state proceeding is ongoing where “a state
27 administrative proceeding is final, and state-court judicial review is available but has not
28

1 been invoked.”¹⁹ *San Jose Silicon Valley Chamber of Commerce Political Action Comm.*
2 *v. City of San Jose*, 546 F.3d 1087, 1093 (9th Cir. 2008). Indeed, the Supreme Court has
3 stated that this is an open question. *Id.* (citing *New Orleans Pub. Serv., Inc. v. Council of*
4 *New Orleans*, 491 U.S. 350, 370 n.4 (1989)). Given the uncertainty surrounding this
5 open question of law, this Court declines to hold that a state proceeding is ongoing in the
6 instant case.

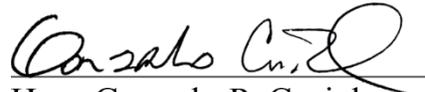
7 This case does not satisfy the requirements for *Younger* abstention. Defendants’
8 request for *Younger* abstention is **DENIED**.

9 **CONCLUSION**

10 For the foregoing reasons, the Court **DENIES** Defendants’ motion to strike
11 Plaintiffs’ *quid pro quo* allegations and **GRANTS** Defendants’ motion to dismiss
12 Plaintiffs’ SAC. (Dkt. No. 62.)

13 **IT IS SO ORDERED.**

14 Dated: August 16, 2017

15 
16 Hon. Gonzalo P. Curiel
United States District Judge

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27 ¹⁹ The Ninth Circuit withdrew the opinion on which Defendants rely. *See San Jose Silicon Valley*, 546
28 F.3d at 1094 (citing *Nev. Entm’t Indus., Inc. v. City of Henderson*, 8 F.3d 1348 (9th Cir. 1993) (per
curiam), *withdrawn by* 21 F.3d 895 (9th Cir.), *on reh’g* 26 F.3d 131 (9th Cir. 1994) (unpublished
disposition) (holding that the *Younger* abstention question was moot)).