No.

In The
Supreme Court of the United States

SCOTT TROOGSTAD,

Petitioner,

v.

CITY OF CHICAGO,

Respondents

On Petition for Certiorari to the Seventh Circuit Court of Appeal

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the City of Chicago violated substantive due process in requiring employees to be vaccinated against COVID-19 as a condition of their employment.

II. Whether the City of Chicago violated the First Amendment in conditioning religious exemptions to its vaccination policy on its appraisal of the correctness of the religious bases for requests for religious exceptions.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are employees of the City of Chicago. They include the following individuals:, SCOTT TROOGSTAD, MARCUS HARRIS, GARY DUSZAK, TIMOTHY SERBIN, RAUL DE LEON, JOHN CUNNINGHAM, KENNETH BREZINA, MARZENA SEMRAU, MICHELE GRABER, JOHN KNIGHT, MICHAEL ZACH, ELVIS PEREZ, NICHOLAS FORTUNA, MEGHAN MICHAELSEN, JAMES WALSH, JEFFREY SUTTER, JENNIFER KARABOYAS, JAMES DUIGNAN, NICK PANTALEO, STEPHEN HODO, DAVID MARTIN, DANIEL RIEGER, KELLY JOINER, JULIO SANCHEZ, JR., ANGELA BANDSTRA, PHILIP MARX, JOSEPH FORCHIONE, MARK ABRATANSKI, RICH CLEMENS, ROBERT TEBBENS, KRYSTAL KRANZ, GRANT VOSBURGH, IRENE RES, MATT PALLER, BRIAN BRANTLEY, DANIEL KAIRIS, ANTHONY ZUMARAS, RICHARD LOUZON, FELIX SERRANO, LUIS QUINONES, ROBERT SKALSKI, RYAN KELLY, ROBERTO CORONADO, EDWARD SANTIAGO, MICHELLE MAXWELL, BRENDAN BERRY, PAUL O'CONNOR, WENDY LUCIANO, JULIAN SANTOS, STEVE ANDOLINO, JOSEPH CUDAR, MICHAEL OUELLETTE, ROBERT STOPKA, CHRIS GRANDE, FLETCHER PRESTIDGE, COLLIN DUSZAK, THOMAS FLAVIN, SETH MARTINEZ, MICHELE MARTINEZ, PHILIP MOCKLER, DANIEL BAUMGARTNER, SCOTT CHIBE, EMILY PECORARO, ANTHONY PECORARO, CHRISTOPHER ESTHERHAMMER-FIC, SANDRA CHLEBOWICZ, CHRIS KING, JOHN DARDANES, DAWN HEDLUND, DAVID LEON, VICTOR MARTIN, FRANK PHEE, ROBERT

MORRIS, NICOLAS MINGHETTINO, MICHAEL CANNON, NICHOLAS SMITH, ROBERT THOMPSON, WILLIAM HURLEY, RYAN FRANZEN, DANIEL KRANZ, JAMES SPALLA, STEVEN DORICH, ROY ANDERSON, JR., DAVID MUELLER, MICHAEL RICHIED, WESLEY SIENKIEWICZ, CLINT RIVERA, KEVIN FERGUSON, JEFFREY KING, ARLETT PAYNE, KELLEE SIMZ, SCOTT ROONEY, HEATHER SCHERR, BERNARD CONSIDINE, LEAH LAFEMINA ESCALANTE, STEPHEN COYNE, REBIA BRADLEY, TRANG NGUYEN, GARY HORKAVY, JAIME QUEZADA, THOMAS SERBIN, RAUL MOSQUEDA, RAYMOND WILKE, MICHAEL MALLOY, STEVEN PALUCK, BRET LANDIS, JOHN HERZOG, JOHN BORNER, MICHAEL DAHL, PABLO DELGADO, SHELTON DAVIS, DANIEL KOENIG, JANET CONTURSI, MATT WIECLAWEK, ANTHONY BAGGETT, MICHAEL CRIEL, MATTHEW JOSEPH PUSATERI, JOSE A. PEREZ, THOMAS T. MORRIS, DANIEL McDERMOTT, MITCHELL FIGUEROA, ADAM SAWYER, JOANN IMPARATO, JOHN MULLANEY, MICHAEL REPEL, JAMES RAPPOLD, MONO KACHATORIAN, MATTHEW A. BALANDES, SAAR BRUCE SHAAR, DUHAMEL RENFORT, ANTHONY MARTIN MAGGIO, CHRISTOPHER J. KAHR, ERIK GOFF, TIMOTHY MALOY, and WILLIAM PARKER.

Respondent is the City of Chicago, Defendant in the lawsuit. Governor Jay Robert Pritzker was a defendant in the underlying lawsuit, but none of the claims against Governor Pritzker are relevant to this Petition.

Corporate Disclosure Statement Pursuant to Rule 26(6)

No Plaintiff in this matter is a corporation or other business entity. Therefore, no Plaintiff has a parent corporation, and no corporation owns 10% or more of the stock in any Plaintiff.

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This matter comes before this Court as a result of the denial of a petition for Preliminary Injunction filed in the matter of Troogstad v. City of Chicago, 21 CV 5600 (now published as Troogstad v. City of Chicago, 576 F.Supp.3d 578 (N.D., Ill, 2021), before the United States District Court for the Northern District of Illinois, and a decision of the Seventh Circuit Appellate Court, Lukaszczyk v. Cook County, ___ F.4th ___ (7th Cir., 2022), which consolidated this matter, 21-3371, with two other matters, affirming that decision. That decision is awaiting publication.

JURISDICTION

A complaint was filed on October 21, 2021. A Petition for a Temporary Restraining Order and Preliminary Injunction was filed at the same time. The Northern District of Illinois denied the Temporary Restraining Order on November 24, 2021 in Troogstad v. City of Chicago, 571 F.Supp.3d 901 (N.D. Ill., 2021). The Preliminary Injunction was denied on December 21, 2021 in Troogstand v. City of Chicago, 576 F.Supp.3d 578 (N.D., Ill, 2021).

A timely Notice of Appeal was filed on December 22, 2021. The Seventh Circuit Appellate Court affirmed the decision of the Northern District of Illinois on August 29, 2022. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

Fifth Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Fourteenth Amendment to the Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A complaint was filed on October 21, 2021. A Petition for a Temporary Restraining Order and Preliminary Injunction was filed at the same time. The Complaint and Petition sought an injunction barring the City of Chicago from penalizing its employees who have refused, for a variety of reasons, to take the COVID-19 vaccine.

The subjects of the Petition were two-fold: a State of Illinois mandate requiring health workers (including many Plaintiffs, who were employees of

the City of Chicago Fire Department) to vaccinate against COVID-19 or be subject to weekly (and then bi-weekly) COVID-19 tests, and a City of Chicago mandate requiring all of its employees (including all plaintiffs) to vaccinate against COVID-19. The State of Illinois mandate has since been withdrawn and is not a subject of this Petition. The Chicago mandate did have a process by which employees could seek an accommodation from the policy on both medical and religious grounds. However, the religious accommodation process required employees to obtain the signature of a clergy member, to identify their religion, the specific aspect of the religion that required an accommodation from the policy, an explanation of how the religion prevented vaccination, and a statement about whether the religion or religious principle required the employee to refrain generally from vaccinations or other medical products, or just the COVID-19 vaccines.

The Northern District of Illinois denied the Temporary Restraining Order on November 24, 2021 in Troogstad v. City of Chicago, 571 F.Supp.3d 901 (N.D. Ill., 2021). Though that Order was not an interlocutory order from which an appeal can be taken, the Court's reasoning in that Order was adopted later, by reference, in its Order denying the Petition for a Preliminary Injunction. The Preliminary Injunction was denied on December 21, 2021 in Troogstand v. City of Chicago, 576 F.Supp.3d 578 (N.D., Ill, 2021).

A timely Notice of Appeal was filed on December 22, 2021. The Seventh Circuit Appellate Court affirmed the decision of the Northern District of Illinois on August 29, 2022. The decision of the Seventh Circuit Appellate Court offered many of the same reasons for denial of the Preliminary Injunction that were offered by the District Court. However, it also offered a new reason: the Petition largely rested on principle of substantive due process articulated in, *inter alia*, Roe v. Wade, 40 US 113 (1973) and Planned Parenthood of Southeastern Pa. v. Casey, 505 US 844 (1992). This Court overturned both of those decisions in Dobbs v. Jackson Women's Health Organization, 597 US ___ (2022). Lukaszczyk v. Cook County, ___ F.4th ___ (7th Cir., 2022). As this Petition will argue, this Court's decision in Dobbs does not mean that the Petition was properly denied.

Though the Petition for a Preliminary Injunction and the Appeal proceeded on several theories, this Petition proceeds only on two: that the Petition for a Preliminary Injunction should have been granted because there is a substantive due process right to bodily autonomy, and because the religious accommodation process runs afoul of the First Amendment's Free Exercise clause.

ARGUMENT

I. Plaintiffs have a substantive due process right to refuse to vaccinate against COVID-19 that was violated when the City of Chicago threatened termination against employees who refused to vaccinate.

The last time this Court addressed the question of compulsory vaccination head-on was in 1905, in the decision of Jacobson v. Commonwealth of Massachusetts, 197 US 11 (1905). In construing Jacobson, this Court and others have found that it applied what would later be identified as "rational basis" scrutiny. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 70 (2020)(Gorsuch, J., concurring). The Petition below sought a heightened form of scrutiny for the reasons that follow. But one way or the other, the facts associated with the vaccine, its benefits, and its risks, are important for this or any Court to consider in rendering judgment on the constitutionality of any vaccine mandate. In short, the available vaccines do not prevent transmission of COVID-19, and involve risks that have been noted by health professionals. For the government to make employment contingent on accepting these risks, for little gain, violates the Constitution.

A. The efficacy of COVID-19 vaccines in preventing infection and transmission of the COVID-19 virus.

There presently are three vaccines for COVID-19 that are available in the United State. One is produced by Pfizer, another Moderna, and another by Johnson and Johnson. Of those, the Pfizer and Moderna vaccines are classified as mRNA vaccines, which means that they use messenger RNA to produce an immune response. The Johnson and Johnson vaccine uses viral vector technology to produce an immune response.

As will be argued, though the vaccines were marketed originally as preventing transmission to a vaccinated person, as well as preventing transmission from a vaccinated person, it is now clear that this is not entirely the case. The vaccines' efficacy against the original variant that was present in the United States decreased with time. Its efficacy against the Delta variant decreased with time as well to, perhaps, a greater extent. Natural immunity has proven to be either a superior form of immunity or no worse than the vaccines. Their success in preventing transmission of the Omicron variant is very low, compared even to their success against the Omicron variant. None of the vaccines prevent transmission of COVID-19 *from* somebody who is vaccinated at all. Finally, the vaccines have all been found to carry some risks, whether it is the risk of blood clots and other problems, in the case of the

Johnson and Johnson vaccine, or the risk of heart defects like myocarditis from the mRNA vaccines.

With each news cycle, Americans learn new things both about COVID-19 and the vaccines that are available here in the United States. This also means that our understanding of the vaccines has grown even since this matter was originally filed. One thing we now know is that there is no statistical correlation between levels of vaccination and increases in the number of cases in a given area. Subramanian, S.V., Kumar, A. *Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States*. Eur J Epidemiol (2021)[1]. This is not entirely surprising, with the aid of hindsight, given that the effectiveness of the vaccines has been called into serious question. But even standing alone, the study suggests that requiring vaccination does not lead to fewer COVID-19 cases, which is the basis for requiring vaccination in the first place.

In a paper that is awaiting peer review, scientists out of the State of Israel report that in studying thousands of patients, those whose only source of immunity was a vaccine (in the case of Israel, the Pfizer vaccine was used) had a 5.96 to 13.06-fold increased risk of a breakthrough infection with the Delta variant of COVID-19 over those whose immunity was natural (that is, their immunity came from having been infected with COVID-19 and

[1] https://doi.org/10.1007/s10654-021-00808-7

having recovered) Gazit, Sivan, *Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections*, medRxiv 2021.08.24.21262415 (August, 2021)[2]. That study was cited with approval in a Clinical Infectious Diseases journal article that found that the benefit of vaccination among those with natural immunity was statistically negligible. Pollock, Benjamin, *Real-World Incidence of Breakthrough Coronavirus Disease 2019 Hospitalization After Vaccination vs Natural Infection in a Large, Local, Empaneled Primary Care Population Using Time-to-Event Analysis*, October 2022, 75 Clinical Infectious Diseases 1 (March 5, 2022)[3].

Harvard epidemiologist Dr. Martin Kulldorff called the Gazit study "fair and unbiased." Kulldorff, Martin, *A Review and Autopsy of Two COVID Immunity Studies*, Brownstone Institute (Nov. 2, 2021)[4]. As Dr. Kulldorff explained, "to make a fair and unbiased comparison, researchers must match patients from the two groups on age and time since vaccination/disease. That is precisely what the study authors did, matching also on gender and

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[2] https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1

[3] https://academic.oup.com/cid/article/75/7/1239/6542971?searchresult=1

[4] https://brownstone.org/articles/a-review-and-autopsy-of-two-covid-immunity-studies/

geographical location." *Id.* He described the study's methodology: "For the primary analysis, the study authors identified a cohort with 16,215 individuals who had recovered from Covid and 16,215 matched individuals who were vaccinated. The authors followed these cohorts over time to determine how many had a subsequent symptomatic Covid disease diagnosis." *Id.* He called the study a "straightforward and well-conducted epidemiological cohort study that is easy to understand and interpret." *Id.*

An earlier study out of the Cleveland Clinic Health System provides another real-world study into the declining efficacy of COVID-19 vaccines. That study compared "breakthrough infections" (that is, re-infection after either contracting COVID-19 or taking a vaccine) among employees of the Cleveland Clinic Health System and found that of those who were previously infected and unvaccinated, 1,359 people, none suffered breakthrough infections. Shrestha, Patrick C. *Necessity of COVID-19 vaccination in previously infected individuals*, medRxiv. (June 2021)[5].

A newer study found that the vaccines' effectiveness rapidly declines. The study, which examined the decline of vaccine effectiveness from February 1, 2021, to October 1, 2021, found that the Johnson and Johnson (Janssen) vaccine had declined to 13.1% effectiveness during that time, that

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[5] https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v3

Moderna had declined to 58% effectiveness, and that the Pfizer vaccine had declined to 43.3% effectiveness. Cohn, B.A., *SARS-CoV-2 vaccine protection and deaths among veterans during 2021*, Science, 10.1126/science.abm0620 (2021)[6].

In late October, the Center for Disease Control updated its treatment of the subject of the vaccines and natural immunity. *Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced Immunity, Center for Disease Control and Prevention* (updated Oct. 29, 2021)[7]. While the purpose of this was to support the CDC's narrative about the importance and effectiveness of vaccines, even this brief had to admit that the efficacy of vaccines wanes over time, and is less effective against new variants like the Delta variant (and, it goes without saying, the Omicron variant, that the brief did not discuss). It further cited a United Kingdom study that found that during the "Delta-dominant period" of May 17 through August 14, 2021, the two-dose vaccine treatment reduced the risk of testing positive by 67%, but that natural immunity reduced the risk of testing positive by 71%. *Coronavirus (COVID-19) Infection Survey Technical Article: Impact of vaccination on testing positive in the UK: October 2021*, Office for National Statistics (Oct. 18, 2021)[8].

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[6] https://www.science.org/doi/epdf/10.1126/science.abm0620

[7] https://www.ncbi.nlm.nih.gov/books/NBK575088/

[8] https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid1

The purpose of the City of Chicago mandate is ostensibly to prevent transmission employees to others. Presumably, this suggests that the vaccinated are less likely to transmit the virus, whether to the vaccinated or to the unvaccinated. The problem is that there is no support for the claim that vaccines prevent such transmission. The Lancet published the results of a study of the communicability of COVID-19 in households between the vaccinated and the unvaccinated. Wilder-Smith, *What is the vaccine effect on reducing the transmission in the context of the SARS- CoV-2 delta variant?*, The Lancet, (Oct. 29, 2021)[9]. It found that there was transmission of the virus in 25% of the cases among fully vaccinated individuals and 23% of unvaccinated individuals. *Id.* Those with vaccination may have a more robust and durable response to COVID-19 once infected, but, as the study concluded, "this study unfortunately […] highlights that the vaccine effect on reducing transmission is minimal in the context of Delta variant circulation." *Id.* A Pfizer executive recently acknowledged that there is no data suggesting that vaccination prevents transmission of the virus to others[10].

The Omicron variant was not the dominant variant when the Petition was initially filed, and

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9infectionsurveytechnicalarticleimpactofvaccinationontestingpositiveintheuk/october2021

[9] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8554481/

[10] See https://www.reuters.com/article/factcheck-pfizer-vaccine-transmission-idUSL1N31F20E

when the Court ultimately rejected it. But the data regarding the now dominant Omicron variant of COVID-19 is, in many ways, much more promising (in terms of the risk COVID-19 poses to the public), but mitigates strongly against vaccine mandates[11].

The SARS-CoV-2 variant Omicron was first identified in South Africa on November 9, 2021. Due to numerous mutations in the spike protein, which is the antigenic target of vaccine-elicited antibodies, Omicron raises serious concerns of a significant reduction in vaccine efficacy and an increased risk of reinfection. Wilhelm, Alexander, *Reduced Neutralization of SARS-CoV-2 Omicron Variant by Vaccine Sera and monoclonal antibodies*, medRxiv 2021.12.07.21267432 (Dec., 7, 2021)[12].

Others have similarly found that the Omicron variant has "extensive but incomplete escape" of mRNA vaccines. Cele, Sandile, *SARS-CoV-2 Omicron has extensive but incomplete escape of Pfizer BNT162b2 elicited neutralization and requires ACE2 for infection* (December, 2021)(preprint)[13] [14].

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[11] Despite the rapidly changing nature of the science on both COVID-19 and COVID vaccines, attempts have been made to avoid preprint studies in favor of peer reviewed and published studies. The Omicron variant is likely to be the dominant variant in America by the time this matter is argued and by the time any decision is rendered. It was first discovered in November, 2021. Its novelty makes any treatment confined to peer reviewed and published studies impossible.

[12] Accessed at https://www.medrxiv.org/content/10.1101/2021.12.07.21267432v1.full-text

[13] Accessed at https://sigallab.net/.

The news is not all bad, however. The Omicron variant has also been found to be much weaker than the previously dominant Delta variant. A preprint University of Edinburgh study found that hospitalization with Omicron was two-thirds less likely than with previous variants. Sheikh, A, *Severity of Omicron variant of concern and vaccine effectiveness against symptomatic disease: national cohort with nested test negative design study in Scotland*, U. Edinburgh (Dec. 22, 2021)[15]. A South African study was even more optimistic, finding that the Omicron variant was 80% less likely to result in hospitalization and 70% less likely to result in serious disease than the Delta variant. Wolter, Nicole, *Early assessment of the clinical severity of the SARS-CoV-2 Omicron variant in South Africa*, medRxiv 2021.12.21.21268116 (Dec. 21, 2021)[16].

The impact on this matter is stark. If Omicron can evade vaccines, the push to force them onto unwilling employees is a severely flawed method of

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[14] Though there is a preference for peer-reviewed studies, the Omicron variant is new enough that there are few peer reviewed articles about it. However, see this treatment of it, which explains that Omicron evades vaccines almost totally. https://www.forbes.com/sites/williamhaseltine/2021/12/17/how-omicron-evades-natural-immunity-vaccination-and-monoclonal-antibody-treatments/?sh=3800c2c860e0

[15] Accessed at https://www.research.ed.ac.uk/en/publications/severity-of-omicron-variant-of-concern-and-vaccine-effectiveness-

[16] Accessed at https://www.medrxiv.org/content/10.1101/2021.12.21.21268116v1.full-text

meeting the new challenges that Omicron brings; and if the Omicron variant is much more mild than the formerly dominant Delta variant, the weighing of interests between Plaintiffs liberty interests and the state's interest in confronting the virus favors Plaintiffs even more.

The CDC released a new study confirming much of what was already argued here. León TM, *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California and New York, May–November 2021*. Center for Disease Control, MMWR Morb Mortal Wkly Rep. (Jan. 19, 2022)[17]. That report found that in New York and California, during the Delta-dominant period, unvaccinated individuals with natural immunity from previous infections with COVID-19 were far less likely to contract or be hospitalized with COVID-19 than those with vaccine immunity only. Indeed, the percentage of people who were hospitalized with COVID-19 was similar between those who were vaccinated and had a previous diagnosis and those who were unvaccinated with a previous diagnosis. In other words, among those with natural immunity, the vaccine offered little protection. Any policy that does not take this into account is not rationally related to increasing public health.

[17] https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm

B. The Risks Associated with COVID-19 vaccines.

There also have been several scientists who have expressed concern about the vaccines' safety. Dr. Joseph Lapado, of the UCLA Geffen School of Medicine, and Dr. Harvey Risch, of the Yale School of Public Health, noted that "[t]he large clustering of certain adverse events immediately after vaccination is concerning, and the silence around these potential signals of harm reflects the politics surrounding Covid-19 vaccines. Stigmatizing such concerns is bad for scientific integrity and could harm patients." They continue:

> Four serious adverse events follow this arc, according to data taken directly from Vaers: low platelets (thrombocytopenia); noninfectious myocarditis, or heart inflammation, especially for those under 30; deep-vein thrombosis; and death. Vaers records 321 cases of myocarditis within five days of receiving a vaccination, falling to almost zero by 10 days. Prior research has shown that only a fraction of adverse events are reported, so the true number of cases is almost certainly higher. This tendency of underreporting is consistent with our clinical experience. […] Analyses to confirm or

> dismiss these findings should be performed using large data sets of health-insurance companies and healthcare organizations. The CDC and FDA are surely aware of these data patterns, yet neither agency has acknowledged the trend...the implication is that the risks of a Covid-19 vaccine may outweigh the benefits for certain low-risk populations, such as children, young adults and people who have recovered from Covid-19. This is especially true in regions with low levels of community spread, since the likelihood of illness depends on exposure risk.[18]

The State of Florida's Surgeon General has issued a statement warning about the use of COVID-19 vaccines for males, in particular, between 18-39 years of age due to concerns of cardiac arrest, myocarditis and other heart-related matters[19]. That decision came partially on the heels of a newly

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[18] https://townhall.com/tipsheet/katiepavlich/2021/06/24/doctors-from-yale-and-ucla-there-are-concerns-about-the-vaccine-officials-may-not-be-telling-you-about-n2591466, and https://www.wsj.com/articles/are-covid-vaccines-riskier-than-advertised-11624381749?st=xanwe361hampa5l&reflink=article_imessage_share

[19] https://www.floridahealth.gov/newsroom/2022/10/20220512-guidance-mrna-covid19-vaccine.pr.html

published study suggesting both that the mRNA vaccines (Pfizer and Moderna) have been associated with an above-normal number of adverse reactions, including myocarditis. The study bemoaned the lack of public data with which the public could become more educated so that their decision-making regarding the vaccines could be fully educated. Fraiman, Joseph, *Serious adverse events of special interest following mRNA COVID-19 vaccination in randomized trials in adults*, Vaccine, Volume 40, Issue 40, 5798-5805 (Septeber 22, 2022)[20]. The CDC itself published cautions regarding the Janssen (Johnson & Johnson) COVID-19 vaccine, stating that due to safety concerns, the mRNA vaccines are preferred, as the Janssen COVID-19 vaccines has been associated with a "rare and serious adverse event – blood clots with low platelets" or "thrombosis with thrombocytopenia syndrome." Center for Disease Control and Prevention, *Johnson & Johnson's Janssen COVID-19 Vaccine: Overview and Safety* (Aug. 3 2022)[21]. There are risks associated with each of the vaccines that are presently available. There is, admittedly, a very good argument that some have made in favor the choice to vaccinate: the risks *may* be outweighed by the benefits. But while that is a fine argument in favor of the *choice* to vaccinate, it's a poor argument in favor of *requiring*

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[20] Accessed at https://www.sciencedirect.com/science/article/pii/S0264410X22010283.

[21] Accessed at https://stacks.cdc.gov/view/cdc/119908.

vaccination. Nobody should be ***forced*** to take on the risk of death or bodily harm.

The question of the constitutionality of the mandate therefore does not merely involve the question of whether an individual can be compelled to violate his privacy or conscience in the interest of public health; it also involves the serious question of whether an individual can be compelled to subject himself to risk of illness or death – whatever that risk may be[22] – in the interest of public health.

C. This Court should grant Certiorari on the question of Plaintiffs' substantive due process rights.

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. Winter v. Natural Resources Defense Council, Inc., 555 US 7 (2008). The appellate court largely confined its discussion to the question of likelihood of success on the merits. In other words, it confined its discussion to the question of whether government "violated a fundamental right or liberty." See Washington v. Glucksberg, 521 US 702, 720 (1997). Though this Petition will discuss each of the elements, it will focus on the question of likelihood of

[22] The data is still coming in, and changes weekly.

succeed on the merits. That question turns on the nature of the substantive due process right to autonomy.

In the Jacobson decision, this Court considered the validity of a Massachusetts statute that required all persons older than 21 to receive the smallpox vaccine. Jacobson, 197 US at 12. The penalty was a $5 fine (the equivalent of $140 today). *Id.*, see Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 70 (Gorsuch, J., concurring). The law contained an exception for children deemed unfit for vaccination who presented a certificate signed by a registered physician. Jacobson, 197 US at 12-13. This Court determined that such a requirement is "not an unusual… requirement." *Id.* at 27. It further found that any such requirement designed to "protect the public health" was constitutional unless it lacks "real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31. By contrast, if a policy has "no real or substantial relation" to its ends, courts have a duty to intervene. *Id.* at 31.

The appellate court pointed out (citing Halgren v. City of Naperville, 21 CV 5039 (N.D. Ill., Dec. 19, 2021)) that the vaccine at issue here is substantially different than the vaccine at issue in Jacobson. COVID-19 has a "low attack rate" in contrast to the smallpox pandemic. Lukaszczyk v. Cook County, ___ F.4th ___ (7th Cir., 2022); See Patterson, Grace E., *Societal Impacts of Pandemics: Comparing COVID-19 With History to Focus Our*

Response, Frontiers in Public Health (Apr. 21, 2021). Further, the smallpox vaccine is a sterilizing vaccine. That means that one who is vaccinated, largely, is immune to smallpox. This is not the case with the COVID-19 vaccines. Myhre, J, *Sterilizing Immunity and COVID-19 Vaccines,* Verywell Health (Dec. 24, 2020).

Justice Gorsuch recently noted that Jacobson is not a "towering authority that overshadows the Constitution during a pandemic." Roman Cath. Diocese of Brooklyn, 141 S.Ct. at 71 (Gorsuch, J., concurring). The time has come for this Court to examine Jacobson again. It has been invoked to justify forced sterilization in Buck v. Bell, 274 US 200 (1927). It has, more recently, been invoked to justify draconian lockdowns. Finally, its been invoked here to justify terminating public employees for non-compliance with mandates that require them to take questionable vaccines that present potential risks to life and health.

This Court recognized that individuals possess a "significant liberty interest" in avoiding unwanted administration of drugs. Washington v. Harper, 494 US 210, 221 (1990). In a partial dissent, Justice Stevens (along with Justices Brennan and Marshall) noted that "[e]very violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death. Moreover, any such action is degrading if it overrides a competent person's choice to reject a

specific form of medical treatment." *Id.* at 237 (Stevens, J., dissenting). The partial dissent cites Justice Brandeis, noting that the Founders "conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." *Id.* at 238, citing Olmstead v. United States, 277 US 438, 478 (1928)(Brandeis, J., dissenting).

The interest in bodily autonomy is strong, but not unassailable. For example, "it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement." Winston v. Lee, 470 US 753, 759 (1985). Nonetheless, "[a] compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Id.* Similarly, a prisoner awaiting trial may only be forced to take antipsychotic drugs if an "essential" and "overriding" state interest is implicated. Sell v. United States, 539 US 166, 179 (2003). Stated otherwise, "important government interests" must be at stake before the imposition can be constitutionally sound. *Id.* at 180.

While the Harper, Winston and Lee decisions pertain to the rights of incarcerated persons, they establish that there is a robust protection for people's personal and bodily autonomy. Certainly, the rights

of public employees are no less than the rights of prisoners.

The appellate court noted that Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) overruled both Roe v. Wade, 410 US 113 (1973) and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 US 833 (1992), upon which Plaintiffs relied in part below. Dobbs, however, finds that "[w]hat sharply distinguishes the abortion right from the rights recognized in the cases on which Roe and Casey rely is something that both those decisions acknowledged: Abortion destroys what those decisions call 'potential life' and what the law at issue in this case regards as the life of an 'unborn human being.'" *Id.* at 2258. This Court found, in effect, that the right to bodily autonomy (i.e., the right to an abortion) cannot categorically be found to overcome the right to life of the unborn. Here, there is no right of the unborn at issue. Rather, the right at issue is *only* the right to bodily autonomy.

The basis for the vaccine mandates is the hope that vaccinated persons will not transmit the virus to other people. There is nothing specific about municipal employees that makes them a greater threat to people in the City of Chicago than anyone else, such that they should specifically be targeted. See Garvey v. The City of New York, Index # 85163/2022 (NY Supreme Ct., Oct. 25, 2022)(noting that the municipal employee mandate was arbitrary in that it only targeted municipal employees). Moreover, there is nothing about requiring public

employees to vaccinate that immunizes others in the City, or elsewhere, from COVID-19. The vaccines do not prevent transmission from a vaccinated person. As to the dominant Omicron variant, they barely prevent transmission *to* a vaccinated person. As to those who have already had COVID-19, the studies show that the available vaccines do almost nothing.

On the flip-side, concerns have been raised as to their safety. The State of Florida has issued an opinion that, particularly in the case of younger men, the vaccines drastically increase the possibility of death and other serious heart conditions. Various experts have opined about the risks associated with the vaccine, including the risk of heart problems like myocarditis, which could lead to death. The City's policy wrestles control out of the hands of its employees (and their doctors) to weigh those risks.

Accepting *Certiorari* in this matter will also give this Court an opportunity to clarify Dobbs. By overruling Doe and Casey, this Court left open the question of the limits of substantive due process. In this case, that central right – the right to be left alone – is squarely implicated.

Finally, when analyzing substantive due process questions, this Court has, until now, recognized only two forms of scrutiny: rational basis scrutiny, and strict scrutiny. Both forms of scrutiny require some analysis of the facts. Simply stating "this implicates public health" does not justify *any* violation of rights, even under rational basis review. "[R]ational basis review is not a rubber stamp of all

legislative action." Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir., 2000). It requires the government's deprivation to be "reasonable, not arbitrary." Johnson v. Robison, 415 US 361, 374 (1974)[23]. The legitimate purpose of the mandate must be public health, not merely public vaccination as an end unto itself. But the truth is that some form of scrutiny that is less deferential than rational basis scrutiny should be employed here[24]. Forcing healthy people to preemptively take medication that may do little to ameliorate against the virus which the vaccines ostensibly address, at the potential risk of their cardiological health (and, potentially, other side effects) is a violation of a right that should be viewed as fundamental. That the vaccines could be associated with serious adverse effects – even if, as some have argued, the chance of adverse effects is small – also mitigates in Plaintiffs favor. However slight the possibility is of death or harm, Plaintiffs' employment with the government should not be contingent upon accepting that risk. That was true

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[23] This decision deals with equal protection, but the inquiry is "essentially the same, with the minor exception that instead of determining the rationality of the state's impingement upon a protected right… the court must determine the rationality of making a distinction or classification between two groups of people for differential treatment." Goodpaster v. City of Indianapolis, 763 F.3d 1060, 1071 (7th Cir., 2013).

[24] In the equal protection context, an intermediate form of scrutiny exists that has, to date, not been recognized in the substantive due process context. See Dobbs, 142 S.Ct at 2353. Perhaps now is the time to similarly tweak the treatment of substantive due process.

before the Omicron-dominant period; it is all the truer today.

There is a role for a Court in weighing the other elements of a preliminary injunction, but easily the most important element is the question of the likelihood of success on the merits. If any Court were to find that there was a likelihood of success on the merits, it would likely be compelled to find for Plaintiff on the other elements. The appellate court in this matter simply did not weigh them once it ruled against Plaintiff on the question of likelihood of success. This Petition shall briefly address them now.

In terms of irreparable harm, Courts have found that there is irreparable harm, even in the context of employment, if one's right to be employed by a public employer is dependent on them relinquishing a liberty interest. Perry v. Sindermann, 408 US 593 (1972); Joelner v. Village of Washington Park, Illinois, 378 F.3d 613, 620 (7th Cir., 2004). In terms of the vaccinations themselves, there is a risk of irreparable harm inasmuch as Plaintiffs are concerned with potential adverse effects of the vaccines.

Nearly by definition, there is no adequate remedy at law when the main relief sought – reinstatement – is equitable in nature. See Foodcomm Intern. v. Barry, 328 F.2d 300, 304 (7th Cir., 2003). If Plaintiffs succeed after trial or summary judgment, what they will be primarily seeking is reinstatement, and for the policy to be rescinded.

Finally, whether an injunction is in the public interest – that is, whether one weighing the harms were compelled to find that the greater harm would be to deny the preliminary injunction – is intimately tied to the question of whether there is a liberty interest in bodily autonomy and to what extent. Here, time has demonstrated that while the imposition on Plaintiffs is great, the ostensible benefit of these mandates to the greater public is negligible; there may not even be a benefit.

II. The City of Chicago's COVID-19 Vaccine Mandate violate Plaintiffs' rights under the Free Exercise Clause of the First Amendment.

Different appellate circuits, not to mention different district courts, have dealt with the issue of religious accommodations to public mandates differently. At least one appellate circuit, the 6th Circuit, has found that when a governmental entity has given itself the power to grant religious accommodations, that it can be subject to strict scrutiny in picking and choosing, as will be addressed. This Court has long held that facially neutral and neutrally applied rules that have the incidental effect of infringing upon people's religious beliefs and practices will largely be upheld under the most deferential form of scrutiny. Employment Div. v. Smith, 494 US 872, 877 (1990). If policies are either non-neutral or not generally applicable, however, they are subject to strict scrutiny, meaning

they must be narrowly tailored to serve a compelling state interest. See Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63 (2020). Similarly, "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions," triggers strict scrutiny under the Free Exercise Clause. Trinity Lutheran Church of Colombia Inc. v. Comer, 137 S.Ct. 2012, 2022 (2017).

In Dahl v. Board of Trustees of Western Michigan Univ., 15 F.4th 728 (6 Cir., 2021), the Sixth Circuit Appellate Court ruled that a mandate employed by Western Michigan University violated the Free Exercise clause when requests for religious accommodations were rejected. "A policy that forces a person to choose between observing her religious beliefs and receiving a generally available government benefit for which she is otherwise qualified burdens her free exercise rights." *Id.* at 731 citing Fulton v. City of Phila., 141 S.Ct. 1868, 1867 (2021), and Trinity Lutheran, 137 S.Ct. at 2023. "The reason is simple: denying a person an equal share of the rights, benefits, and privileges enjoyed by other citizens because of her faith discourages religious activity." *Id.*, citing Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S., 439, 449 (1988). "A party may mount a free exercise challenge, it bears noting, even where it does not have a constitutional right to the benefit it alleges is being improperly denied or impaired." *Id.* at 731-32, citing Trinity Lutheran, 137 S.Ct. at 2017.

A policy is not generally applicable "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." Fulton v. City of Philadelphia, ___ U.S. ___ (2021). "Where a state has in place a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* A policy is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* This Court, therefore, "must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* Since the university "retain[ed] discretion to extend exemptions in whole or in part," the policy at issue there was not generally applicable. *Id.* Therefore, the university there was compelled to prove that its decision not to grant religious exemptions survives strict scrutiny, and the preliminary injunction was granted in the interim. *Id.*

The City of Chicago's mandate is not absolute. It allows employees to seek a religious accommodation. But it requires them to use a specific form. That form requires a signature of a religious or spiritual leader, identify their religion, and identify the religious beliefs that conflict with taking the COVID-19 vaccine, and the specific way that their religious belief prevent them from being vaccinated. It also asks when the employee began practicing

their religion or following their beliefs, and whether the religious beliefs involve objections to other vaccines or medications (See Plaintiffs' Complaint at ¶¶ 179-180).

This country has long recognized that "the law knows no heresy, and is committed to the support of no dogma." Watson v, Jones, 80 U.S. 679, 728 (1872). "Men may believe what they cannot prove. They may not be put to proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law." United States v. Ballard, 322 US 78, 86-7 (1944). A government, therefore, may not make someone's employment contingent upon any test of the sufficiency, consistency, or acceptance by a given member of any clergy, of their religious beliefs. See Epperson v. Arkansas, 393 US 97, 106 (1968)(Government may not "aid one religion… or prefer one religion over another").

Whether a person's deeply held religious beliefs are endorsed by a pastor or a rabbi is no business of the City of Chicago's. Whether a person's religious objection to taking the COVID-19 vaccines (for whatever reason) similarly compels him not to take a Tylenol or an ibuprofen pill, or even a flu shot, cannot possibly be a legitimate basis for denying or accepting a request for religious accommodation. Whether a person adopted his deeply held faith yesterday, or was born into the same religious

practice he now follows could not possibly be a constitutional inquiry when examining any request for a religious accommodation from the government.

The City of Chicago has set itself up as the arbiter of which religious beliefs are worthy of respect and which are not. It did so in violation of the free exercise clause. It should be enjoined from continuing to do so.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant this Petition so that this violation of Substantive Due Process and Free Exercise can be enjoined.

Dated: November 2, 2022

Respectfully Submitted,

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APPENDIX

No. 21 C 5600

2021-11-24

Scott TROOGSTAD et al., Plaintiffs, v. The CITY OF CHICAGO and Governor Jay Robert Pritzker, Defendants.

Jonathan D. Lubin, Attorney at Law, Skokie, IL, for Plaintiffs. Michael A. Warner, Jr., William R. Pokorny, Franczek Radelet PC, Celia Meza, City of Chicago Law Department, Erin Kathryn Walsh, Richard Jason Patterson, Franczek P.C., Chicago, IL, for Defendant City of Chicago. Hal Dworkin, Mary Alice Johnston, Office of Illinois Attorney General, Chicago, IL, for Defendant Jay Robert Pritzker.

John Z. Lee, United States District Judge

Jonathan D. Lubin, Attorney at Law, Skokie, IL, for Plaintiffs.

Michael A. Warner, Jr., William R. Pokorny, Franczek Radelet PC, Celia Meza, City of Chicago Law Department, Erin Kathryn Walsh, Richard Jason Patterson, Franczek P.C., Chicago, IL, for Defendant City of Chicago.

Hal Dworkin, Mary Alice Johnston, Office of Illinois Attorney General, Chicago, IL, for Defendant Jay Robert Pritzker.

MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District Judge

Various employees of the City of Chicago have filed this case to challenge Governor J.B. Pritzker's Executive Order 2021-22 as well as the City's mandatory vaccination policy. Along with the complaint, Plaintiffs filed a motion for a temporary restraining order. The Court denied that motion on October 29, 2021. This Memorandum Opinion and Order memorializes that ruling.

I. Factual Background

In response to the ongoing COVID-19 pandemic and the rise of the significantly more transmissible Delta variant of the virus, Illinois Governor J.B. Pritzker signed Executive Order 2021-22 ("EO 2021-22") on September 3, 2021. EO 2021-22 mandates that all health care workers be fully vaccinated against COVID-19 or submit to weekly COVID-19 testing by September 19, 2021. Def. Gov. J.B. Pritzker's Resp. Opp'n Pls.' Pet. TRO ("Def. J.B. Pritzker's Resp.") Ex. A (EO 2021-22) § 2(a)(i), ECF No. 14. The order provides exemptions to the vaccination requirement for persons for whom vaccination is "medically contraindicated" and for whom vaccination would require violating "a sincerely held religious belief, practice, or observance." *Id.* § 2(e). Persons who qualify for either exemption must submit to weekly testing. *Id.*

EO 2021-22 defines "Health Care Worker" as

> any person who (1) is employed by, volunteers for, or is contracted to provide services for a Health Care Facility, or is employed by an entity that is contracted to provide services to a Health Care

Facility, and (2) is in close contact (fewer than 6 feet) with other persons in the facility for more than 15 minutes at least once a week on a regular basis as determined by the Health Care Facility.

EO 2021-22 § 2(a)(i). (Sept. 3, 2021). It defines "Health Care Facility" as

any institution, building, or agency, or portion of an institution, building or agency, whether public or private (for-profit or nonprofit), that is used, operated or designed to provide health services, medical treatment or nursing, or rehabilitative or preventive care to any person or persons.

Id. § 2(a)(ii). EO 2021-22 also implements vaccination mandates for primary and secondary school teachers and personnel; higher education teachers, personnel, and students; and employees at "State-owned or operated congregate facilities." *Id.* §§ 3–5.

Specifically, EO 2021-22 mandates that all covered persons "have, at a minimum, the first dose of a two-dose COVID-19 vaccine series or a single-dose COVID-19 vaccine by September 19, 2021, and the second dose of a two-dose COVID-19 vaccine series within 30 days following administration of their first dose in a two-dose vaccination series." *Id.* § 2(a)(i).

Following Governor Pritzker's order, the City of Chicago announced its own mandatory vaccination policy ("City Vaccination Policy"). Unlike EO 2021-22, the City's vaccine mandate covers all City employees, *see* Def. City of Chicago's Resp. Pls.' Emergency Pet. TRO ("Def. City's Resp."), Ex. B1 (City Vaccination Policy) § II, ECF No. 18, requiring them either to be fully vaccinated by October 15, 2021, or submit to biweekly COVID-19 testing. *Id.* § IV.A–B. And unlike EO 2021-22, the City Vaccination Policy contains a sunset provision that ends the option to submit to biweekly testing as an alternative to vaccination on December 31, 2021. *Id.* After that date, full vaccination (or an approved medical or religious exemption) will become a "condition of employment." *Id.* § IV.B.

Plaintiffs are employees of the City of Chicago who work for the City's Fire, Water, and Transportation Departments. *See* Compl. ¶¶ 5–139, ECF No. 1. Some Plaintiffs allege that they have already contracted COVID-19, while others do not believe they have had the virus. *See id.* Forty-five Plaintiffs have applied for a religious exemption from the City Vaccination Policy. *See* Def. City's Resp., Ex. B, Owen Decl. ¶ 13. Five of these exemptions have been denied, and the rest are still pending as of the date of the October 29, 2021 hearing. *Id.*

Plaintiffs oppose EO 2021-22 and the City Vaccination Policy because they believe requiring vaccination and testing as a condition of continued employment violates their constitutional rights and Illinois law. They bring claims against both Governor Pritzker and the City, alleging that EO 2021-22 and

the City Vaccination Policy violate their substantive due process, procedural due process, and free exercise rights. Plaintiffs also bring claims against both Defendants under the Illinois Healthcare Right of Conscience Act, 745 Ill. Comp. Stat. 70/1 *et seq.*

To prevent the orders from taking effect, Plaintiffs seek a temporary restraining order that:

1. Enjoins the Governor from enforcing EO 2021-22's requirement that all health care workers, firefighters, EMTs, and paramedics be fully vaccinated against COVID-19, until the Court rules on their motion for a preliminary injunction or for the duration of the lawsuit;

2. Enjoins the City of Chicago from enforcing the City Vaccination Policy, which requires all City employees to be vaccinated against COVID-19 or submit to biweekly testing, and will require vaccination as a condition of employment, until the Court rules on their motion for a preliminary injunction or for the duration of the lawsuit; and

3. Enjoins the Governor and the City from terminating or taking disciplinary action against employees who refuse to be vaccinated or submit to COVID-19 testing, until the Court rules on their motion for a preliminary injunction or for the duration of the lawsuit.

II. Legal Standard

As the Seventh Circuit has stated repeatedly, a temporary restraining order or a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Orr v. Shicker* , 953 F.3d 490, 501 (7th Cir. 2020) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.* , 549 F.3d 1079, 1085 (7th Cir. 2008)). And to obtain such drastic relief, the party seeking the relief—here, the Plaintiffs—carries the burden of persuasion by a clear showing. *See Mazurek v. Armstrong* , 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997).

When considering a motion for temporary restraining order, the Court must employ the same test as a request for a preliminary injunction: the plaintiff has the burden to show (1) a likelihood of success on the merits; (2) irreparable harm; and (3) that the balance of the equities and the public interest favors emergency relief. Fed. R. Civ. P. 65(b)(1)(A) ; *see Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

The Court then weighs these factors in what the Seventh Circuit has called a "sliding scale" approach. That is, "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Valencia v. City of Springfield* , 883 F.3d 959, 966 (7th Cir. 2018) (internal quotation marks omitted). And "[w]here appropriate, this balancing process should also encompass any effects that granting or denying the preliminary injunction would have on nonparties

(something courts have termed the 'public interest')." *Id.*

Additionally, the Court notes that its ruling is based upon the factual record currently before it on October 29, 2021. The complaint and motion were filed on October 21, 2021. The responses were filed on October 25, 2021, and Plaintiffs' reply brief was filed on October 28, 2021. Neither side has had an opportunity for discovery regarding the various factual and scientific contentions raised in the parties' briefs, and a more fulsome factual record may shed additional light on some of the arguments raised in the case.

Furthermore, the Court notes that Plaintiffs' motion papers do not precisely define the scope of the right to bodily integrity upon which they rely. Most often, Plaintiffs rely on a right to be free from having to take vaccines. At others, Plaintiffs appear to object to being forced to perform self-administered COVID tests as part of one's employment. The Court focuses here on the first, because that is where the parties aim most of their arguments, but the Court believes its rationale disposes of the second as well.

During the last hearing, Plaintiffs' counsel also talked about the right to be free from having to disclose one's medical information to one's employer. But this is nowhere to be found in Plaintiffs' pleadings or motion papers, and so the Court does not consider it to be raised in this motion.

III. Analysis

I. Likelihood of Success on the Merits

The first factor—"likelihood of success on the merits"—requires the plaintiff to make a "strong showing that she is likely to succeed on the merits" of her claim; a mere "possibility of success is not enough" to warrant emergency relief. *Ill. Republican Party v. Pritzker* , 973 F.3d 760, 762 (7th Cir. 2020). This showing "does not mean proof by a preponderance," but requires the plaintiff to provide facts and legal theories supporting "the key elements of its case." *Id.* at 763. The Court will address each of Plaintiffs' claims in turn.

A. Substantive Due Process Claim

Plaintiffs first allege that EO 2021-22 and the City Vaccination Policy violate substantive due process. A substantive due process claim requires the plaintiff to "allege that the government violated a fundamental right or liberty." *Campos v. Cook Cnty.* , 932 F.3d 972, 975 (7th Cir. 2019). The violation must also be "arbitrary or irrational," because "substantive due process protects against only the most egregious and outrageous government action." *Id.*

According to Plaintiffs, requiring them to be vaccinated and submit to regular testing as a condition of employment infringes their fundamental right to bodily autonomy. More specifically, Plaintiffs argue that the vaccination and testing requirements violate the fundamental right to refuse unwanted medical treatment as articulated in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990)

and *Washington v. Harper* , 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). From this, they assert that, because they have identified a fundamental right at stake, the Supreme Court's decisions in *Roe v. Wade* , 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* , 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), require the Court to apply strict scrutiny to the vaccination orders. Plaintiffs' substantive due process argument is not likely to succeed on the merits for several reasons.

1. The Seventh Circuit's *Klaassen* decision

As an initial matter, Plaintiffs' argument that the Defendants' vaccine orders infringe their fundamental right to bodily autonomy runs squarely in the face of the Seventh Circuit's recent decision in *Klaassen v. Trustees of Indiana University* , 7 F.4th 592 (7th Cir. 2021). There, the Seventh Circuit upheld Indiana University's recent vaccination, masking, and testing requirements against a challenge from a group of students, who asserted nearly identical substantive due process claims. *See id.* at 593 ; *Klaassen v. Trs. of Ind. Univ.* , —— F. Supp. 3d ——, ——, 2021 WL 3073926, at *22 (N.D. Ind. July 18, 2021) ("The students assert a right to refuse the vaccine, saying the mandate infringes on their bodily autonomy and medical privacy."). The students, like Plaintiffs here, argued that the vaccine requirement comprised an invasion of bodily privacy that merited strict scrutiny. *Klaassen,* —— F. Supp. 3d at ——, 2021 WL 3073926, at *17.

The Seventh Circuit in *Klaassen* soundly rejected that argument. It instructed that the Supreme Court's decision in *Jacobson v. Massachusetts* , 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), "shows that plaintiffs lack" a substantive due process right not to be vaccinated against COVID-19. *Klaassen,* 7 F.4th at 593. The court further noted that the University's testing requirements "cannot be constitutionally problematic" considering the sweeping vaccine mandates
that *Jacobson* authorized. *Id.*

Plaintiffs' attempts to distinguish *Klaassen* are unconvincing. Plaintiffs first assert that *Klaassen* is outdated because the pandemic is less severe now than it was when the case was decided and because " *Klaassen* ... does not address the newest information ... about vaccine efficacy, or the superiority of natural immunity to vaccine immunity." *See* Pls.' Reply Supp. Prelim. Inj. ("Pls.' Reply") at 10, ECF No. 25. But the severity of the pandemic at Indiana University did not materially factor into the Seventh Circuit's analysis, and the Court is not convinced that *Klaassen* would have come out differently had COVID-19 cases been at current levels. Indeed, other courts to consider the same question in more recent weeks have come to the same conclusion. *See, e.g.* , *We The Patriots USA, Inc. v. Hochul* , 17 F.4th 266, ——, 2021 WL 5121983, at *18 (2d Cir. 2021).

Furthermore, the questions Plaintiffs raise about the efficacy of vaccines as compared to natural immunity do not persuade the Court that Defendants' policies lack a rational basis. Nor does the Court believe the

comparative efficiencies of vaccine immunity versus natural immunity (at least, as depicted on this record) would have altered the Seventh Circuit's holding.

Plaintiffs next argue that *Klaassen* , which addressed a vaccination requirement for university students, ought not apply to vaccination requirements for public employees because "the determination to terminate or not to renew a public employment contract cannot be premised upon the employee's protected activities." Pls.' Reply at 12 (quoting *Perry v. Sindermann* , 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)). But this argument misinterprets *Klaassen . Klaassen* did not hold that *Jacobson* permitted the university to violate the fundamental right of students not to be vaccinated. Instead, *Klaassen* held that no such substantive due process right exists in the first instance. *See Klaassen* , 7 F.4th at 593 (noting that the students' "argument depends on the existence of a fundamental right ingrained in the American legal tradition. Yet *Jacobson* ... shows that plaintiffs lack such a right.").

Plaintiffs alternatively argue that *Jacobson* , which figured heavily in *Klaassen* 's analysis, should not guide the Court's due process analysis because "it is part of a bygone era in American jurisprudence" akin to the Supreme Court's discredited decisions in *Buck v. Bell* , 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927), and *Korematsu v. United States* , 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). Pls.' Mot. TRO ("TRO Mot.") at 5, ECF No. 4. But the Supreme Court has given no indication that *Jacobson* is void,

and this Court cannot ignore binding precedent simply because Plaintiffs find it to be antiquated. Indeed, just this past year, Chief Justice Roberts cited favorably to *Jacobson* . *See S. Bay United Pentecostal Church v. Newsom* , —— U.S. ——, 140 S. Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (mem.) (Roberts, C.J., concurring in denial of application for injunctive relief). What is more, the Seventh Circuit has cited *Jacobson* numerous times throughout the course of the pandemic as a yardstick for evaluating constitutional challenges to governmental responses to COVID-19. *See Democratic Nat'l Comm. v. Bostelmann,* 977 F.3d 639, 643 (7th Cir. 2020) (citing *Jacobson* for the proposition that "[d]eciding how best to cope with difficulties caused by disease is principally a task for the elected branches of government"); *Ill. Republican Party* , 973 F.3d at 763 ("The district court appropriately looked to *Jacobson* for guidance, and so do we."); *Elim Romanian Pentecostal Church v. Pritzker,* 962 F.3d 341, 347 (7th Cir. 2020) (citing *Jacobson* , 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643).

2. Whether a Fundamental Right Exists

Numerous other circuit courts and district courts across the country have done the same. *See, e.g.* , *We The Patriots,* 17 F.4th at ——, —— & —— n.35, 2021 WL 5121983, at *15, *18 & *18 n.35 ("*Jacobson* is still binding precedent." *Id.* at —— n.35, 2021 WL 5121983, *18 n.35); *Big Tyme Invs., L.L.C. v. Edwards* , 985 F.3d 456, 466–68 (5th Cir. 2021) ; *Robinson v. Att'y Gen.,* 957 F.3d 1171, 1179, 1182 (11th Cir. 2020) ; *7020 Ent., LLC v. Miami-Dade Cnty.* , 519 F. Supp. 3d 1094, 1105 (S.D. Fla.

2021) ; *Tandon v. Newsom* , 517 F. Supp. 3d 922, 949 (N.D. Cal. 2021) ; *Mass. Corr. Officers Federated Union v. Baker,* —— F. Supp. 3d ——, ——, 2021 WL 4822154, at *6 (D. Mass. Oct. 15, 2021) (applying *Jacobson* to reject plaintiffs' substantive due process challenges to a similar vaccine mandate for Massachusetts state employees).

But, even if the Seventh Circuit's decision in *Klaassen* did not command this result, the Court concludes that Plaintiffs have not shown that the vaccine and testing orders in question implicate their fundamental right to bodily autonomy.

Plaintiffs' reliance upon the Supreme Court's right-to-privacy cases does not support their claim that Defendants' policies infringe a fundamental right. As Defendants point out, the issues at stake in *Roe, Casey, Cruzan,* and *Harper* were "rights to individual bodily autonomy [that] do not impact the public health." Def. J.B. Pritzker's Resp. at 19. When an individual's behavior directly affects the health and welfare of others in the community, she cannot rely on the Supreme Court's longstanding protection of "intimate and personal choices," *Casey* , 505 U.S. at 851, 112 S.Ct. 2791, to the utter exclusion of all other interests. *See Cassell v. Snyders* , 990 F.3d 539, 550 (7th Cir. 2021) (noting that while "[a] person's ability to make private choices affecting his or her own body and health is fundamental to the concept of individual liberty that our Constitution protects," plaintiffs who challenged capacity limits on religious services during the peak of the pandemic "[were] not asking to be allowed to make a self-contained choice to risk only their own health"); *see*

also We The Patriots, 17 F.4th at —— n.35, 2021 WL 5121983, at *18 n.35 (rejecting plaintiffs' comparisons between refusing vaccination and the decisions in *Roe* and *Casey* because "[t]hese cases do not establish a broad fundamental privacy right for all medical decisions made by an individual—and particularly not for a decision with such broad community consequences as declining vaccination against a highly contagious disease").

The core flaw with Plaintiffs' claim that refusing vaccination is a fundamental right, then, is not that there is no privacy interest implicated when someone is required or coerced to take a vaccine that they do not want. There certainly is. Rather, the problem is that, when a person's decision to refuse a vaccine creates negative consequences (even life-threatening at times) for other people, that interest is not absolute. *See We the Patriots,* 17 F.4th at ——, 2021 WL 5121983, at *18. As *Jacobson* demonstrated, and numerous cases over the course of the pandemic have reiterated, the right Plaintiffs assert here is limited by "reasonable conditions ... essential to the safety, health, [and] peace" of the public. *Jacobson* , 197 U.S. at 26, 25 S.Ct. 358 ; *see* , *e.g.* , *We the Patriots,* 17 F.4th at —— n.35, 2021 WL 5121983, at *18 n.35 ("[T]he the urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination."). Because the exigencies of the current pandemic justify the degree of intrusion at issue here, Plaintiffs have not demonstrated that Defendants' vaccine and testing policies infringe a fundamental constitutional right.

3. Rational Basis Review

Even though Plaintiffs have not shown that Defendants' vaccine policies infringe a fundamental constitutional right, the Court finds that Plaintiffs have shown (or are likely to show) that these policies do abridge an individual's right to liberty and bodily autonomy to a greater than *de minimis* degree, and the Court will apply rational basis review to their substantive due process claims as the district court did in *Klaassen,* —— F. Supp. 3d at ——, 2021 WL 3073926, at *22 ; *see Brown v. City of Mich. City* , 462 F.3d 720, 733 (7th Cir. 2006) ; *Lee v. City of Chi.* , 330 F.3d 456, 466 (7th Cir. 2003). In doing so, the Court keeps in mind that rational basis review is "highly deferential," and to find that a government action lacks a rational basis in this context, a court must find the action "utterly lacking in rational justification." *Brown,* 462 F.3d at 733 (quoting *Turner v. Glickman* , 207 F.3d 419, 426 (7th Cir. 2000)).

On the present record, Defendants have demonstrated that their vaccination policies have a rational justification. Defendants have submitted a substantial amount of evidence supporting the public health necessity of vaccination and testing in abating the ongoing COVID-19 pandemic. For example, Defendants cite to the findings of the Centers for Disease Control and Prevention ("CDC") that "recommend[ ] that everyone aged 12 years and older gets vaccinated as soon as possible" and maintain that "vaccines are playing a crucial role in limiting spread of the virus and minimizing severe disease." And Defendants cite numerous peer-reviewed studies bolstering their claims that

widespread vaccination is effective at reducing the spread of COVID-19.

Delta Variant: What We Know About the Science , CDC (August 26, 2021) https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html?s_cid=11504:is%20there%20a%20vaccine%20for%20delta%20variant:sem.ga:p; *see generally, e.g.* , *Rates of COVID-19 Cases and Deaths by Vaccination Status* , CDC, https://covid.cdc.gov/covid-data-tracker/#rates-by-vaccine-status (last visited November 13, 2021).

See, e.g. , Jamie L. Bernal et al., *Effectiveness of Covid-19 Vaccines Against the B.1.617.2 (Delta) Variant* , 385 N. Eng. J. Med. 585 (2021) https://www-nejm-org.ezproxy.lib.ntust.edu.tw/doi/full/10.1056/nejmoa2108891; Ashley Fowlkes et al., *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance — Eight U.S. Locations, December 2020–August 2021* , 70 Morbidity and Mortality Wkly. Rep. 1167 (2021) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8389394 .

Defendants also submitted declarations from government health professionals, attesting that widespread vaccination and testing are instrumental in reducing the severity of the COVID-19 pandemic. *See, e.g.* , Def. J.B. Pritzker's Resp., Ex. A, Bleasdale Decl. ¶ 59; Def. City's Resp., Ex. A, Arwady Decl. ¶¶ 18–22, ECF No. 18-1. These officials, who helped to create and administer the

challenged policies, include Dr. Allison Arwady, Chief Medical Officer of the Chicago Department of Public Health; Christopher Owen, Commissioner of Human Resources for the City of Chicago; and Dr. Arti Barnes, Medical Director and Chief Medical Officer of the Illinois Department of Public Health. *See generally* Arwady Decl.; Owen Decl.; Def. J.B. Pritzker's Resp., Ex. B, Barnes Decl. The declarations have presented the scientific rationale behind the vaccine and testing orders at issue, and the Court finds that their statements are credible and provide ample rational justification for the policies.

For example, Dr. Arwady notes that City employees are "approximately twice as likely" to be infected with COVID-19 than residents of Chicago as a whole. Arwady Decl. ¶ 10. She explains that the job duties of City employees often require them to be in close contact with the public in unpredictable situations where the COVID-19 exposure status or vaccination status of the resident is not known. *Id.* ¶ 13. Thus, "developing immunity in all employees who have contact with each other and members of the public" is a key component of the City's strategy to reduce the spread of COVID-19. *Id.* ¶ 11. Furthermore, Dr. Bleasdale explains that vaccines provide a high degree of protection against both contracting COVID-19, *see* Bleasdale Decl. ¶¶ 34–37, and—as suggested by preliminary research—transmitting the virus to others. *Id.* ¶ 42. She therefore concludes that mandating vaccination or weekly testing for healthcare workers, who frequently meet populations especially vulnerable to COVID-19, will help prevent "an increase in sickness and quite possibly death" in

the state resulting from the significantly more transmissible Delta variant. *Id.* ¶ 44; *see id.* ¶¶ 25–32.

In response, Plaintiffs argue that Defendants' vaccination policies have no rational basis, because there is evidence that "natural immunity" against COVID-19 is more effective than vaccine-created immunity in preventing transmission. And to support this contention, Plaintiffs rely upon two academic sources. The first is a study that, while showing that prior infection from COVID-19 results in some degree of immunity, does not compare natural immunity with vaccine-created immunity. The second is an unpublished, non-peer reviewed study conducted in Israel in January and February 2021, to which Defendants have raised serious questions regarding its methodological rigor and reliability. *See* Bleasdale Decl. ¶¶ 46–52; Barnes Decl. ¶ 32. This is the sum total of Plaintiff's evidence.

See Jennifer M. Dan et al., *Immunological Memory to SARS-CoV-2 Assessed for up to 8 Months After Infection* , Science (Jan. 6, 2021) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7919858/pdf/abf4063.pdf.

See Sivan Gazit et al., *Comparing* SARS-CoV-2 *Natural Immunity to Vaccine-Induced Immunity: Reinfections Versus Breakthrough Infections* (August 25, 2021) (unpublished manuscript) https://www.medrxiv.org/content/10.1101/2021.08.24.21262415v1.full.pdf.

When the Court weighs the slim evidence presented by Plaintiffs against the substantial evidence presented by Defendants (particularly the declarations by the medical professionals), the Court finds on this record that Plaintiffs have not met their burden to show that EO 2021-22 and the City Vaccination Policy are "arbitrary or irrational," *Campos* , 932 F.3d at 975, or "utterly lacking in rational justification," *Brown,* 462 F.3d at 733.

That said, even if there were robust scientific debate about whether natural immunity is more effective than vaccine-created immunity in preventing the contraction and transmission of COVID-19 (as Plaintiffs contend), this still would not be enough for Plaintiffs to prevail. For a government regulation to have a rational basis, the state need not prove the premises upon which it based the action to a degree of scientific certainty. Rather, the government need only show that its rationale is supported by a "reasonably conceivable state of facts." *Minerva Dairy, Inc. v. Harsdorf* , 905 F.3d 1047, 1053 (7th Cir. 2018) (quoting *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook* , 808 F.3d 318 (7th Cir. 2015)). This is a low bar. *See id.* ; *Monarch Beverage Co., Inc. v. Cook* , 861 F.3d 678, 683 (7th Cir. 2017) (noting that under rational basis review, the government's "proffered rationale for the law ... can be 'based on rational speculation unsupported by evidence or empirical data' " (quoting *F.C.C. v. Beach Commc'ns, Inc.* , 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993))). And, in relying on federal and state public health recommendations, credible academic sources, and the expertise of its

own health officials, Defendants have met this burden, even if there might be some scientific disagreement on the issue. *See Vasquez v. Foxx* , 895 F.3d 515, 525 (7th Cir. 2018) (rejecting argument that sex-offender registration policy lacked a rational basis because "scant evidence" supported it, since "[the Court's] role is not to second-guess the legislative policy judgment by parsing the latest academic studies on sex-offender recidivism").

Numerous courts have come to the same conclusion for substantially similar reasons. *See Does 1-6 v. Mills* , 16 F.4th 20, 32 (1st Cir. 2021) (a state vaccine mandate "easily" passed rational basis review), *application for injunctive relief denied sub nom. Does 1-3 v. Mills,* —— U.S. ——, —— S. Ct. —— –, —— L.Ed.2d ——, 2021 WL 502177 (mem.) (1st Cir. Oct. 29, 2021) ; *We The Patriots,* 17 F.4th at —— –, 2021 WL 5121983, at *15 (same); *Norris v. Stanley* , —— F. Supp. 3d ——, —— – ——, 2021 WL 4738827, at *3–4 (W.D. Mich. Oct. 8, 2021) (holding that, in response to a similar argument that Michigan State University failed to consider natural immunity in imposing a vaccine mandate, "even if there is vigorous ongoing discussion about the effectiveness of natural immunity, it is rational for MSU to rely on present federal and state guidance in creating its vaccine mandate," *id.* at ——, 2021 WL 4738827, *3); *Kheriaty v. Regents of Univ. of Cal.* , No. SACV 21-01367 JVS (KESx), 2021 WL 4714664, at *8 (C.D. Cal. Sept. 29, 2021) (rejecting claim that university's choice not to exempt previously infected students from vaccine mandate lacked a rational basis because "merely drawing different conclusions

based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational").

Because Plaintiffs cannot show that Defendants' vaccination policies infringe a fundamental constitutional right and cannot show that Defendants' policies lack a rational basis, the Court finds that Plaintiffs are unlikely to succeed on the merits of their substantive due process claim.

B. Procedural Due Process Claim

Plaintiffs next claim that EO 2021-22 and the City Vaccination Policy violate procedural due process. A procedural due process claim requires the plaintiff to show that the government deprived them of a protected interest with "constitutionally deficient procedural protections" surrounding the deprivation. *Tucker v. City of Chi.* , 907 F.3d 487, 491 (7th Cir. 2018). Plaintiffs are unlikely to succeed here as well.

1. Procedural Due Process Claim Against the City

Plaintiffs raise two procedural due process arguments against the City. First, they argue that the City Vaccination Policy violates procedural due process because Chicago Mayor Lori Lightfoot exceeded her authority by imposing the policy "unilaterally" without the approval of the city council. TRO Mot. at 11. The problem with Plaintiffs' first argument is that the Chicago Municipal Code does authorize the Mayor to enact policies through an "administrative officer, subject to the direction and control of the mayor, ... [to] supervise the administrative management of all city departments,

boards, commissioners and other city agencies," and to "supervise the conduct of all of the officers of the city." Chi. Mun. Code 2-4-020. By their plain language, these provisions grant the Mayor broad policymaking discretion over City employees.

Additionally, even if Mayor Lightfoot's implementation of the City Vaccination Policy did comprise a traditionally legislative function, this would not raise any constitutional concerns. At its core, Plaintiffs' argument relies on a strict separation-of-powers theory that is not applicable to local governments. *See Auriemma v. Rice* , 957 F.2d 397, 399 (7th Cir. 1992) (noting that in the context of local government, "[e]xecutive officials sometimes exercise legislative powers ... [and] executive officials may have the power to set policy ... when the legislature is silent."); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function* , 114 Harv. L. Rev. 1833, 1884 (2001) ("[L]ocal governments are ... not required to conform to federal-style separation of powers and, for the most part, do not.").

Accordingly, the Court cannot say on this record that Mayor Lightfoot's actions in announcing the City Vaccination Policy were *ultra vires.* Furthermore, the Court takes judicial notice of the fact that, on the same day as the TRO hearing, the City Council voted to keep the City Vaccination Policy in place, removing one of the core bases of Plaintiffs' argument.

See Chicago City Council Turns Down Attempt to Repeal Vaccine Mandate , NBC Chi. (Oct. 29, 2021

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PM) https://www.nbcchicago.com/news/local/chicago-city-council-turns-down-attempt-to-repeal-vaccine-mandate/2662116/.

Plaintiffs' second argument asserts that the policy violates Plaintiffs' due process rights, because it "fundamentally changes the nature of Plaintiffs' contracts with ... the City." TRO Mot. at 11. This argument too is unpersuasive, for two primary reasons.

First, the mere alteration of an employment contract, standing alone, does not violate procedural due process. Plaintiffs must identify some liberty or property interest of which they are being deprived in order to make out a procedural due process claim. *See Hannemann v. S. Door Cnty. Sch. Dist.* , 673 F.3d 746, 752 (7th Cir. 2012) ; *Brown* , 462 F.3d at 728. To the extent that Plaintiffs argue that the vaccination policy deprives them of their ability to work for the City without being vaccinated, this deprivation is not a violation of procedural due process, because (as the Seventh Circuit has held) Plaintiffs do not have a liberty or property interest in not being vaccinated. *See Klaassen,* 7 F.4th at 593 ; *see also* , *e.g.* , *We The Patriots,* 17 F.4th at ——–, 2021 WL 5121983, at *18.

Second, many of Plaintiffs' employment contracts are governed by collective bargaining agreements between the City and public employee unions. Thus, any alleged procedural deficiency in the alteration of Plaintiffs' employment contracts is properly aggrieved under Illinois labor law. Moreover,

grievance procedures in collective bargaining agreements "can (and typically do) satisfy" the requirements of procedural due process for terminated public employees. *Calderone v. City of Chi.* , 979 F.3d 1156, 1166 (7th Cir. 2020) (quoting *Chaney v. Suburban Bus Div. of Reg'l Transp. Auth.* , 52 F.3d 623, 630 (7th Cir. 1995)). Plaintiffs have not garnered any evidence to the contrary.

2. Procedural Due Process Claim Against the Governor

As for EO 2021-22, Plaintiffs first assert that Governor Pritzker violated their procedural due process rights by exceeding the limitations on his emergency powers under the Illinois Emergency Management Agency Act ("EMAA"), 20 Ill. Comp. Stat. 3305/1 *et seq.* They claim that because "the Governor's power is not unlimited [and] ... [t]he legislature has remained silent on the subject of vaccine mandates," EO 2021-22 "violates Plaintiffs' rights under the US Constitution and under Illinois law." TRO Mot. at 11. For several reasons, this procedural due process claim against the Governor is not viable.

First, Plaintiffs' procedural due process claim is likely barred by the Eleventh Amendment, under which "absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State." *Va. Office for Prot. and Advocacy v. Stewart* , 563 U.S. 247, 254, 131 S.Ct. 1632, 179 L.Ed.2d 675 (2011) ; *see Cassell v. Snyders* , 458 F. Supp. 3d 981, 999 (N.D. Ill. 2020), *aff'd* , 990 F.3d 539 (7th Cir. 2021). In *Cassell* , a church and its

pastor sued the Governor and other Illinois state officials to enjoin the state's stay-at-home orders that placed capacity limitations on religious services. *See* 458 F. Supp. 3d at 987.
The *Cassell* plaintiffs alleged the state officials violated, *inter alia* , the state statutory limitations of the EMAA on the Governor's emergency powers. *See id.* This Court denied the injunction as to the EMAA claim because the Governor and state officials had properly raised sovereign immunity. *Id.* at 999.

Like the plaintiffs in *Cassell* , Plaintiffs here are suing the Governor for alleged violations of the EMAA, and the Governor has invoked sovereign immunity. Because "a claim that [a] state official[ ] violated state law in carrying out [his] official responsibilities" is "a claim against the State that is protected by the Eleventh Amendment," the Eleventh Amendment precludes Plaintiff's procedural due process claim against the Governor. *Pennhurst State Sch. and Hosp. v. Halderman* , 465 U.S. 89, 101, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) ; *see Cassell* , 458 F. Supp. 3d at 999.

Furthermore, setting aside Eleventh Amendment concerns, Plaintiffs cannot bring a federal procedural due process claim to compel state officials to follow state law because "there is no federal constitutional right to state-mandated procedures." *GEFT Outdoors, LLC v. City of Westfield* , 922 F.3d 357, 366 (7th Cir. 2019), *cert denied* , —— U.S. ——, 140 S. Ct. 268, 205 L.Ed.2d 137 (2019) ; *see also Charleston v. Bd. of Trs. of Univ. of Ill. at Chi.,* 741 F.3d 769, 773 (7th Cir. 2013). A state's

decision not to follow its own procedural rules may create a cause of action under state law, but it does not violate federal due process protections. *See Charleston* , 741 F.3d at 773. Put simply, any grievances Plaintiffs may have with the way Governor Pritzker did or did not follow state law should be raised in the state courts. *See River Park, Inc. v. City of Highland Park* , 23 F.3d 164, 166–67 (7th Cir. 1994) ("Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court.").

That said, in their reply brief, Plaintiffs shift the framing of their procedural due process claim. They now contend that they are suing the Governor to enjoin him from violating the Constitution, not Illinois state law, and that their suit thus is permitted under the doctrine of *Ex parte Young* , 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Specifically, Plaintiffs appear to mount an "unconstitutional conditions" challenge to the policies on the principle that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.* , 570 U.S. 595, 604, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) (citations omitted); *see also Klaassen,* —— F. Supp. 3d at ——, 2021 WL 3073926, at *23. But Plaintiffs' attempt to recharacterize their original claim is unprevailing, both procedurally and on its merits.

First, Plaintiffs' remodeled procedural due process claim, which centers on the Governor's alleged interference with their "liberty to follow a trade, profession, or other calling," Pls.' Reply at 16

(citing *Vill. of Orland Park v. Pritzker* , 475 F. Supp. 3d 866, 884 (N.D. Ill. 2020)), is nowhere to be found in their earlier pleadings. Plaintiffs' Complaint and Motion for Temporary Restraining Order both rest on the Governor's alleged failure to comply with the EMAA. For example, the Motion's discussion of Plaintiffs' "procedural due process" claim is entitled "The Governor exceeded his authority under Illinois law in enacting Executive Order 2021-22," TRO Mot. at 10, and the section goes on to cite the EMAA and invoke this Court's previous invitation to challenge the propriety of the Governor's exercises of emergency powers pursuant to that statute. *See id.* (first citing the EMAA, 20 Ill. Comp. Stat. 3305/1 *et seq.* , and then citing *Cassell,* 458 F. Supp. 3d at 981 (noting that future parties will be able to bring an EMAA challenge "[s]hould this or any future Governor abuse his or her authority by issuing emergency declarations after a disaster subsides")); *see also* Compl. ¶ 199 (stating, in pleading the procedural due process claim, that because "the Governor did not have the authority to enter the Executive Order[,] ... [t]he imposition on Plaintiff health care workers – including the members of the Fire Department who perform health care services – was therefore taken without due process of law"). Plaintiffs cannot amend their claims in a reply brief.

But, even if the Court were to consider Plaintiffs' new approach, their "unconstitutional conditions" procedural due process claim against the Governor still would fall short, because, as the Seventh Circuit has held, Defendants do not have a fundamental constitutional right to refuse COVID-19

vaccinations. *See Klaassen* , 7 F.4th at 593. Put another way, Plaintiffs are correct that they have "the right to hold specific private employment and to follow a chosen profession free from *unreasonable* governmental interference," *Greene v. McElroy* , 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), but the vaccine policies in question are not unreasonable, because they satisfy the rational basis test. *See Turner* , 207 F.3d at 426.

What is more, a procedural due process claim requires a plaintiff to allege a deprivation of constitutional rights. *See Tucker* , 907 F.3d at 491. But, here, none of the Plaintiffs subject to the Governor's order has been fired or disciplined as of the hearing date.

This is not to say that, were any Plaintiffs to be disciplined or terminated for failure to comply with the vaccination requirement, a procedural due process claim would be viable. On the contrary, under the three-factor balancing test articulated in *Mathews v. Eldridge* , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), used to evaluate procedural due process claims, Plaintiffs' interest in not being terminated for refusing vaccination would likely be outweighed by the public's interest in preventing the spread of COVID-19 and the cost to the public's safety of requiring additional procedures. *See Vill. of Orland Park* , 475 F. Supp. 3d at 883 (noting that "the second and third factors in the *Mathews* test weigh heavily against the need for pre-deprivation process" in the context of a

procedural due process challenge to COVID-19 mitigation measures).

For the reasons set forth in this section, the Court finds that it unlikely that Plaintiffs will prevail on their procedural due process claims against the City or the Governor.

C. Free Exercise Claim

Next, Plaintiffs assert that EO 2021-22 and the City Vaccination Policy violate the Free Exercise Clause of the First Amendment. They contend that the policies unconstitutionally burden their free exercise rights by forcing them either to be vaccinated in violation of their sincerely held religious beliefs or lose their jobs. They also claim that the City violated the Free Exercise Clause by denying, or refusing to grant, religious exemptions to them.

A free exercise claim requires a plaintiff to show that a government action has burdened her exercise of a sincerely held religious belief. *See Fulton v. City of Phila.* , —— U.S. ——, 141 S. Ct. 1868, 1876, 210 L.Ed.2d 137 (2021). Under *Employment Division v. Smith* , 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), neutral laws of general applicability that only incidentally burden religion are not subject to strict scrutiny. *Fulton* , 141 S. Ct. at 1876 (citing *Smith* , 494 U.S. at 878–82, 110 S.Ct. 1595). Government action that satisfies *Smith* receives rational basis review, *see Ill. Bible Colls. Ass'n v. Anderson* , 870 F.3d 631, 639 (7th Cir. 2013), while government action that is not neutral or generally applicable must pass strict scrutiny. *Fulton* , 141 S. Ct. at 1881.

Plaintiffs argue that the Court should apply strict scrutiny to the City Vaccination Policy, mainly relying on the Sixth Circuit's decision in *Dahl v. Bd. of Trustees of Western Michigan University* , 15 F.4th 728 (6th Cir. Oct. 7, 2021), where the court applied strict scrutiny to Western Michigan University's denial of religious exemptions to its vaccination requirement for student athletes. *Id.* at 734. This too does not win the day for Plaintiffs.

First, whatever the rule may be in the Sixth Circuit, this Court must follow the dictates of the Seventh Circuit's ruling in *Klaassen* , which applied rational basis review to *all* of the plaintiffs' claims against Indiana University's vaccine requirement, including the free exercise claim. *See Klaassen* , 7 F.4th at 593 ; *see also Klaassen,* —— F. Supp. 3d at ——— – ——, 2021 WL 3073926, at *25–26. And, as the Court has repeatedly noted, the vaccine orders pass the rational basis test.

Second, Plaintiffs' free exercise challenge is distinguishable from the free exercise claim in *Dahl* , because Plaintiffs here do not state a claim for an as-applied challenge to any specific employee's denial of a religious exemption. In *Dahl* , the plaintiffs alleged specific facts suggesting that the university failed to accommodate their sincerely held religious beliefs, *See Dahl* , 15 F.4th at 733–34. By contrast, Plaintiffs here baldly assert that the City Vaccination Policy's religious exemption has not been administered properly. *See* Pls.' Reply at 19–20. They do not plead the particularized facts present in *Dahl* .

To be clear, if a particular employee is denied a religious exemption, she may challenge that denial, based on the particular facts of her case, as a violation of her free exercise rights. But no Plaintiffs have been denied a religious exemption on grounds other than failing to adequately articulate their individual circumstances, as the City Vaccination Policy requires. *See* Def. City's Resp., Ex. B4, City of Chicago COVID-19 Vaccine Religious Exemption Request Form ("City Religious Exemption Form") (requiring a reason for the request and an explanation of the principle of the applicant's religion that conflicts with taking the vaccine). The City notes that "the only Plaintiffs who have been denied an exemption sought under either statute submitted [a] form letter that did nothing other than quote the HCRCA definition of 'conscience.' " Def. City's Resp. at 23, *see generally* Def. City's Resp., Ex. B5 (scans of the denied applications). Because every denial before the Court at the present time fails to comply with the basic requirements of the City Vaccination Policy's religious exemption process, these denials do not raise free exercise concerns. *Cf. Baer-Stefanov v. White* , 773 F. Supp. 2d 755, 759–60 (N.D. Ill. 2011) (plaintiffs who had not complied with the requirements for applying for a religious exemption could not bring a free exercise claim challenging the constitutionality of the exemption process). And, tellingly, Plaintiffs have not challenged any of these determinations in their motion, nor have they provided the individualized facts necessary to conduct such a review. Thus, on this record, Plaintiffs are not likely to succeed on their free exercise challenge to the City Vaccination Policy. Because Plaintiffs' free exercise claims are

either not fully developed or receive rational basis review, the Court finds that Plaintiffs are unlikely to succeed on the merits of their free exercise claims.

Plaintiffs also seem to argue that the religious exemption in the City Vaccination Policy is unconstitutionally narrow because it requires the signature of a religious leader to verify the sincerity of the applicant's religious objections. The only authority Plaintiffs cite for this proposition is a dissenting opinion in a Title VII case from another circuit. *See* TRO Mot. at 12–13 (quoting *Davis v. Fort Bend Cnty* , 765 F.3d 480, 497 (5th Cir. 2014) (Smith, J., dissenting)). But the Court is not persuaded that it should read this requirement into the First Amendment, especially under the present record.

D. Illinois Healthcare Right of Conscience Act (HCRCA)

Plaintiffs' final claims arise under the Illinois Healthcare Right of Conscience Act (HCRCA), 745 Ill. Comp. Stat. 70/1 *et seq.* Generally, this statute protects the rights of Illinoisans to refuse to provide, receive, or participate in the administration of health care services "contrary to [their] conscience." *Id.* § 70/2. And the particular provisions at issue prohibit "discrimination against any person in any manner ... because of such person's conscientious refusal to receive ... any particular form of health care services contrary to his or her conscience." *Id.* § 70/5; *see also id.* § 70/7 (prohibiting employment discrimination based on refusal to receive or provide health care services contrary to one's conscience).

The HCRCA defines "conscience" to include both religious and secular or philosophical objections. *See* 745 Ill. Comp. Stat. 70/3 ("conscience" is "a sincerely held set of moral convictions arising from belief in and relation to God, or ... from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths").

Plaintiffs argue that EO 2021-22 and the City Vaccination Policy discriminate against them based on their "vaccination status." TRO Mot. at 13. In support of this contention, they cite several cases purporting to show that "employees [cannot] be terminated for their deeply held beliefs concerning health matters." *Id.* (first citing *Vandersand v. Wal-Mart Stores, Inc.* , 525 F. Supp. 2d 1052 (C.D. Ill. 2017), and then citing *Rojas v. Martell* , 443 Ill.Dec. 212, 161 N.E.3d 336 (Il. App. Ct. 2020)). For the reasons discussed below, the Court concludes that Plaintiffs' HCRCA claims are unlikely to succeed on the merits.

1. HCRCA Claims Against the Governor

Plaintiffs' HCRCA claims against the Governor must be dismissed at the outset, because Governor Pritzker has properly invoked sovereign immunity. *See* Def. J.B. Pritzker's Resp. at 30. As noted above, the Eleventh Amendment bars suits for injunctive relief against state officials for violations of state law when the state is the "real, substantial party in interest." *Pennhurst* , 465 U.S. at 106, 104 S.Ct. 900. Here, Plaintiffs again are suing the Governor under a state statute based on his official action taken in his official capacity. Thus, their claim is barred. *Id.*

2. HCRCA Claims Against the City

The Eleventh Amendment does not prohibit Plaintiffs' claims against the City, but they still fall short of the showing required for a temporary restraining order. In their papers, Plaintiffs appear to be marshalling a facial challenge to the City Vaccination Policy under the HCRCA; they quote the statute and argue simply that the vaccine policy is "squarely a violation of the Act." *See* TRO Mot. at 13. And Plaintiffs might well be correct, if the City Vaccination Policy did not contain any avenue for religious exemptions.

But the City Vaccination Policy does provide a detailed religious exemption process that protects anyone who holds sincere religious objections to being vaccinated. *See generally* City Religious Exemption Form. In fact, the religious exemption included in the City Vaccination Policy safeguards the same religious objections to medical treatment that the HCRCA protects. *Compare id.* (granting exemptions for those with "a sincerely held set of moral convictions arising from belief in and relation to religious beliefs"), *with* 745 Ill. Comp. Stat. 70/3 (defining "conscience" as "a sincerely held set of moral convictions arising from belief in and relation to God, or ... from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths"). Accordingly, the Court concludes that the City Vaccination Policy on its face does not violate the HCRCA and that Plaintiffs have not demonstrated more than "a mere possibility of success" on the merits of their HCRCA claim. *Ill. Republican Party* , 973 F.3d at 762.

In summary, the Court finds that Plaintiffs have not shown a likelihood of success as to any of their claims. This alone is enough to deny their motion for a temporary restraining order. *See GEFT Outdoors* , 922 F.3d at 364 ("If the plaintiff fails to meet any of the[ ] threshold requirements, the court must deny the injunction." (quoting *Girl Scouts of Manitou Council* , 549 F.3d at 1086)). However, the Court will briefly touch on the remaining factors for the sake of completeness.

II. Irreparable Harm

To show that they would suffer irreparable harm absent injunctive relief, Plaintiffs must demonstrate more than a possibility of harm; they must prove that such harm is likely. *Winter* , 555 U.S. at 21, 129 S.Ct. 365 (plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction"). To this end, Plaintiffs argue that "violations of individuals' constitutional rights constitute irreparable harm as a matter of law," TRO Mot. at 13 (citing *Joelner v. Vill. of Washington Park* , 378 F.3d 613, 620 (7th Cir. 2004)). However, because Plaintiffs lack a fundamental constitutional right to decline vaccinations during times of pandemic, *see Klaassen* , 7 F.4th at 593, they cannot rely upon the abridgment of that right to establish irreparable harm.

Not to be deterred, Plaintiffs argue that a finding that they have no fundamental right not to be vaccinated does not preclude a finding of irreparable harm, because Defendants' alleged violations of procedural due process also comprise constitutional injury. But Plaintiffs' procedural due process

argument likewise hinges upon a finding that they have a fundamental constitutional right to refuse COVID vaccinations. *See Greene* , 360 U.S. at 492, 79 S.Ct. 1400 (requiring "*unreasonable* government interference" to state a claim for a procedural due process violation stemming from termination of employment (emphasis added)).

Alternatively, Plaintiffs could establish that EO 2021-22 and the City Vaccination Policy are "unreasonable" for purposes of their procedural due process claim if they could show that the policies lack a rational basis. *See Turner* , 207 F.3d at 426. But as the Court has already stated, *see supra* section I.A.3, Defendants' policies survive rational basis scrutiny on the current record.

Moreover, even assuming that EO 2021-22 and the City Vaccination Policy inflict a greater than *de minimis* constitutional injury, there is no evidence in this record that any of the Plaintiffs has been fired or disciplined because he or she has refused to take a vaccine. And if Plaintiffs were to be suspended without pay or lose their jobs pursuant to the Governor or the City's vaccination policies, Plaintiffs would have an adequate relief at law—they could seek money damages. *See D.U. v. Rhoades* , 825 F.3d 331, 339 (7th Cir. 2016) (money damages can generally provide complete redress for termination of employment). **III. Balance of the Equities**

The Seventh Circuit has indicated that there are circumstances where termination of employment may lead to irreparable harm, but only when the

particular injuries alleged "really depart from the harms common to most discharged employees." *Bedrossian v. Northwestern Memorial Hosp.* , 409 F.3d 840, 845 (7th Cir. 2005). Plaintiffs here have not alleged any such extraordinary injuries.

Lastly, Plaintiffs have not shown that the balance of the equities and the public interest, which "merge when the [g]overnment is the opposing party," *Nken v. Holder* , 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), favors the issuance of a temporary restraining order. In assessing this factor, the Court must weigh the interests favoring an injunction against "the consequences of granting or denying the injunction to non-parties." *Abbott Labs. v. Mead & Johnson Co.* , 971 F.2d 6, 11 (7th Cir. 1992). Here, the Court finds that the public's interest in reducing the transmission of COVID-19 weighs heavily against granting the temporary restraining order, and numerous other courts agree. *See, e.g.* , *Does 1–6* , 16 F.4th at 37 (finding that public interest weighed in state government's favor in affirming denial of injunctive relief to healthcare workers challenging state vaccine mandate); *We the Patriots,* 17 F.4th at ——, 2021 WL 5121983, at *20 ; *Klaassen,* —— F. Supp. 3d at —— – ——, 2021 WL 3073926, at *43–44 ; *Cassell* , 458 F. Supp. 3d at 1003.

Although Plaintiffs have disputed the efficacy of vaccination in preventing transmission of COVID-19, under the rational basis standard, the Court may not second-guess the informed and rational scientific judgments upon which Defendants base their

policies, especially without the benefit of discovery. *See generally* , *e.g.* , Bleasdale Decl.; Owen Decl.; *see also Minerva Dairy* , 905 F.3d at 1055 (noting that courtroom fact-finding is inappropriate on rational basis review); *Vasquez* , 895 F.3d at 525 (same); *Klaassen,* —— F. Supp. 3d at ——, 2021 WL 3073926, at *46 ("Given a preliminary record such as today's, the court must exercise judicial restraint in superimposing any personal view in the guise of constitutional interpretation."). Thus, the Court finds that the public interest factor weighs against granting Plaintiffs the emergency relief they seek.

Conclusion

For the reasons stated above, Plaintiffs' motion for a temporary restraining order is denied.

IT IS SO ORDERED.

No. 21 C 5600

2021-12-21

Scott TROOGSTAD et al., Plaintiffs, v. The CITY OF CHICAGO and Governor Jay Robert Pritzker, Defendants.

Jonathan D. Lubin, Attorney at Law, Skokie, IL, for Plaintiffs. Michael A. Warner, Jr., William R. Pokorny, Franczek Radelet PC, Celia Meza, City of Chicago Law Department, Erin Kathryn Walsh, Richard Jason Patterson, Franczek P.C., Chicago, IL, for Defendant City of Chicago. Hal Dworkin, Mary Alice Johnston, Office of Illinois Attorney General, Chicago, IL, for Defendant Jay Robert Pritzker.

John Z. Lee, United States District Judge

Jonathan D. Lubin, Attorney at Law, Skokie, IL, for Plaintiffs.

Michael A. Warner, Jr., William R. Pokorny, Franczek Radelet PC, Celia Meza, City of Chicago Law Department, Erin Kathryn Walsh, Richard Jason Patterson, Franczek P.C., Chicago, IL, for Defendant City of Chicago.

Hal Dworkin, Mary Alice Johnston, Office of Illinois Attorney General, Chicago, IL, for Defendant Jay Robert Pritzker.

MEMORANDUM OPINION AND ORDER

John Z. Lee, United States District Judge

Illinois Governor J.B. Pritzker and the City of Chicago ("City") (collectively "Defendants") enacted policies requiring certain healthcare workers and public employees to be vaccinated against COVID-19 by the end of 2021 or be subject to disciplinary action and termination. Plaintiffs, comprising over 100 employees in the City's Fire, Water, and Transportation Departments, claim that these policies violate their substantive due process, procedural due process, and free exercise rights under the United States Constitution, as well as Illinois law. As such, they seek a preliminary injunction against the policies. For the following reasons, Plaintiffs' motion is denied.

Background

The Court assumes familiarity with the factual record of this case from its previous written opinion denying Plaintiffs' petition for a temporary restraining order. *See* Mem. Op. Order, *Troogstad v. City of Chi.* , 571 F.Supp.3d 901, 905–07 (N.D. Ill. Nov. 24, 2021) (" TRO Order"), ECF No. 35. A brief summary of the more salient facts follows.

With the Delta variant of COVID-19 spiking across the country, Illinois Governor J.B. Pritzker signed Executive Order 2021-22 ("EO 2021-22") on September 3, 2021. EO 2021-22 requires all healthcare workers—defined as persons who work in "health services, medical treatment or nursing, or rehabilitative or preventive care"—in the state to be vaccinated against COVID-19 or submit to weekly COVID-19 testing. Def. Gov. J.B. Pritzker's Resp.

Opp'n Pls.' Pet. TRO ("Def. J.B. Pritzker's Resp. TRO"), Ex. A (EO 2021-22) § 2(a)(i), ECF No. 14. EO 2021-22 contains a religious exemption to the vaccination requirement for covered persons whose "sincerely held religious belief[s], practice[s], or observance[s]" conflict with being vaccinated. *Id.*

After Governor Pritzker's order, the City followed with its own mandatory vaccination policy ("City Vaccination Policy"), which requires all City employees to be fully vaccinated (or have an approved exemption) by December 31, 2021 as a "condition of employment." Def. City of Chicago's Resp. Pls.' Emergency Pet. TRO ("Def. City's Resp. TRO"), Ex. B1 (City Vaccination Policy) §§ II–IV, ECF No. 18. Like EO 2021-22, the City Vaccination Policy contains a religious exemption protecting those with "a sincerely held set of moral convictions arising from belief in and relation to religious beliefs" that conflict with COVID-19 vaccination. *See* Def. City's Resp. TRO, Ex. B4, City of Chicago COVID-19 Vaccine Religious Exemption Request Form ("City Religious Exemption Form"). Exemption requests are considered on an individual basis and require the applicant to fill out a form stating the reason for the exemption and the principle of their religion that conflicts with being vaccinated, and including the signature of a religious leader. *See id.*

Before the December 31 deadline, the City Vaccination Policy requires City employees either to be vaccinated or to submit to biweekly COVID-19 testing. City Vaccination Policy § IV.A–B.

Plaintiffs are City employees, who contend that EO 2021-22 and the City Vaccination Policy violate their rights to bodily autonomy as protected by the constitutional doctrines of substantive due process, procedural due process, and free exercise of religion. They also assert that these policies infringe upon their right of conscience as protected by the Illinois Health Care Right of Conscience Act ("HCRCA"), 745 Ill. Comp. Stat. 70/1 *et seq.* Upon filing this suit, Plaintiffs petitioned the Court for a temporary restraining order against enforcement of the policies. *See* Pls.' Mot. TRO ("TRO Mot."), ECF No. 4. The Court denied that petition in an oral ruling, *see* Hr'g Tr., *Troogstad* , No. 21 C 5600 (Oct. 29, 2021), ECF No. 31, which subsequently was memorialized in a written order. *See* TRO Order.

Plaintiffs then informed the Court that they wished to proceed with their motion for preliminary injunction, seeking to enjoin Governor Pritzker and the City from enforcing EO 2021-22 or the City Vaccination Policy. Accordingly, the Court provided Plaintiffs with an opportunity to supplement the factual record with witnesses and additional evidence. The Court also granted Plaintiffs leave to engage in limited discovery of Defendants' factual contentions.

In the end, Plaintiffs stated that they did not need discovery and would not be presenting any witnesses, but requested an opportunity to file a supplemental brief to support their preliminary injunction motion. The Court agreed and set a schedule for the submission of supplemental briefs. Now, relying on

the factual record before it, the Court considers Plaintiffs' motion for a preliminary injunction.

Legal Standard

As the Seventh Circuit has stated, a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Orr v. Shicker* , 953 F.3d 490, 501 (7th Cir. 2020) (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.* , 549 F.3d 1079, 1085 (7th Cir. 2008)). And to obtain such drastic relief, the party seeking the relief—here, the Plaintiffs—carries the burden of persuasion by a clear showing. *See Mazurek v. Armstrong* , 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997).

To succeed on a motion for preliminary injunction, the plaintiff has the burden to show (1) a likelihood of success on the merits; (2) irreparable harm; and (3) that the balance of the equities and the public interest favors emergency relief. Fed. R. Civ. P. 65(b)(1)(A) ; *see Winter v. Nat. Res. Def. Council* , 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

The Court then weighs these factors in what the Seventh Circuit has called a "sliding scale" approach. That is, "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Valencia v. City of Springfield* , 883 F.3d 959, 966 (7th Cir. 2018) (internal quotation marks omitted). And "[w]here appropriate, this balancing process should also

encompass any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the 'public interest')." *Id.*

Analysis

I. Likelihood of Success on the Merits

The first factor—"likelihood of success on the merits"—requires the plaintiff to make a "strong showing that she is likely to succeed on the merits" of her claim; a mere "possibility of success is not enough" to warrant emergency relief. *Ill. Republican Party v. Pritzker* , 973 F.3d 760, 762 (7th Cir. 2020). This showing "does not mean proof by a preponderance," but requires the plaintiff to provide facts and legal theories supporting "the key elements of its case." *Id.* at 763. The Court will address each of Plaintiffs' claims in turn.

A. Substantive Due Process

Plaintiffs first allege that EO 2021-22 and the City Vaccination Policy violate substantive due process. A substantive due process claim requires the plaintiff to "allege that the government violated a fundamental right or liberty." *Campos v. Cook Cnty.* , 932 F.3d 972, 975 (7th Cir. 2019). The violation must also be "arbitrary or irrational," because "substantive due process protects against only the most egregious and outrageous government action." *Id.*

According to Plaintiffs, the vaccine policies offend their fundamental right to bodily autonomy. In

support, they cite numerous Supreme Court cases holding that individuals have a fundamental right to refuse unwanted medical treatment, *see, e.g., Cruzan v. Dir., Mo. Dep't of Health* , 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) ; *Washington v. Harper* , 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), and argue that, because a right to decline vaccinations is a fundamental constitutional right, the Court should apply strict scrutiny when evaluating the policies.

1. Whether a Fundamental Right Exists

In its ruling on Plaintiffs' TRO motion, the Court discussed its views on this issue at length, *see* TRO Order at 907–11, and sees no reason to alter its reasoning now. As previously noted, the Seventh Circuit's decision in *Klaassen v. Trustees of Indiana University* , 7 F.4th 592 (7th Cir. 2021), forecloses Plaintiffs' claim that requiring vaccination against COVID-19 encroaches upon a fundamental right. In *Klaassen* , a group of Indiana University students challenged the university's vaccination, masking, and testing requirements on similar grounds. *Id.* at 593. The students, like Plaintiffs here, argued that the university's mandate violated their right to bodily autonomy; the Seventh Circuit disagreed. Citing *Jacobson v. Massachusetts* , 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905), the unanimous panel held that "plaintiffs lack such a right" when it comes to COVID-19 vaccination requirements. *Klaassen* , 7 F.4th at 593. As a result, the court endorsed *Jacobson* 's rational basis standard of review for challenges to COVID-19 vaccine mandates under substantive due process. *See id.* ; *see*

also Klaassen v. Trs. of Ind. Univ. , 549 F.Supp.3d 836, 867-68 (N.D. Ind. 2021).

Klaassen controls here. And because there is no fundamental constitutional right at stake when people are required to be vaccinated during a pandemic, Plaintiffs' substantive due process challenge to COVID-19 vaccination policies receives rational basis review. Other courts in this district and across the country agree. Furthermore, Plaintiffs' supplemental brief does not raise any new arguments on this point. Thus, the Court will apply rational basis review.

See, e.g. , Mem. Op. Order at 5–6, *Ciseneroz v. City of Chi.* , Case No. 21-cv-5818, 2021 WL 5630778 (N.D. Ill. Dec. 1, 2021), ECF No. 21 ; Hr'g Tr. at 5:18-20, *Lukaszycyk v. Cook Cnty.* , No. 21 C 5407 (N.D. Ill. Nov. 17, 2021), *appeal docketed* , No. 21-3200 (7th Cir. Nov. 24, 2021).

See, e.g. , *Gold v. Sandoval* , No. 3:21-cv-00480-JVS-CBL, 2021 WL 5762190, at *2 (D. Nev. Dec. 3, 2021) ; *Rydie v. Biden* , No. DKC 21-2696, 572 F.Supp.3d 153, 161–62 (D. Md. Nov. 19, 2021) ; *McCutcheon v. Enlivant ES, LLC* , No. 5:21-cv-00393, 2021 WL 5234787, at *3 (S.D.W. Va. Nov. 9, 2021) ; *Smith v. Biden* , No. 1:21-cv-19457, 2021 WL 5195688, at *7 (D.N.J. Nov. 8, 2021) ; *see also* TRO Order at 912–13 (collecting other cases).

2. Rational Basis Review

Rational basis review of a substantive due process claim requires the challenged action to be "rationally related to legitimate government

interests." *Washington v. Glucksberg* , 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). This standard is "highly deferential" to the government. *Brown v. City of Mich. City* , 462 F.3d 720, 733 (7th Cir. 2006) (quoting *Turner v. Glickman* , 207 F.3d 419, 426 (7th Cir. 2000)).

Rational basis review places the burden on the plaintiff to show that there is no "conceivable basis which might support" the government's action. *Minerva Dairy, Inc., v. Harsdorf* , 905 F.3d 1047, 1055 (7th Cir. 2018) (quoting *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook* , 808 F.3d 318, 322 (7th Cir. 2015)). Put differently, the plaintiff must prove irrationality; "it is not the [government's] obligation to prove rationality with evidence." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.* , 743 F.3d 569, 576 (7th Cir. 2014) ; *see also F.C.C. v. Beach Commc'ns* , 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). Thus, the question is not whether Plaintiffs have the better argument—it is whether there is any rational justification for the policies at issue. *See Minerva Dairy* , 905 F.3d at 1054–55 ; *Hayden* , 743 F.3d at 576 ; *see also, e.g.* , *Gold* , 2021 WL 5762190, at *3 ("While [Plaintiff] cites to numerous studies that he alleges show that the Policy is misguided, that does not mean that his challenge is likely to succeed ... [u]nder rational basis review ...."); *Kheriaty v. Regents of Univ. of Cal.* , No. SACV 21-01367 JVS (KESx), 2021 WL 4714664, at *8 (C.D. Cal. Sept. 29, 2021) (rejecting substantive due process challenge to

university's vaccine policy because "merely drawing different conclusions based on consideration of scientific evidence does not render the Vaccine Policy arbitrary and irrational").

To this end, Defendants argue that requiring healthcare workers and public employees to be vaccinated is rationally related to reducing the spread of COVID-19 in Illinois and Chicago. Combating the COVID-19 pandemic is "unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn v. Cuomo* , —— U.S. ——, 141 S. Ct. 63, 67, 208 L.Ed.2d 206 (2020) (holding that abating the COVID-19 pandemic satisfied the much stricter "compelling interest" test under the Free Exercise Clause). The sole question, then, is whether EO 2021-22 and the City Vaccination Policy are "rationally related" to preventing increased sickness and death from COVID-19 Illinois and Chicago. *Glucksberg* , 521 U.S. at 728, 117 S.Ct. 2258. For reasons more fully explained in the Court's previous order, the answer is yes. *See* TRO Order at 911–12.

Defendants have submitted credible evidence to justify these policies—in particular, declarations from the public health officials who designed and implemented them. These medical professionals explain in great detail how healthcare workers and City employees face increased risks of contracting and transmitting COVID-19, and how requiring vaccination will reduce those risks—both to the employees themselves and to the public with whom they come into contact. *See id.* (first citing Arwady Decl. ¶¶ 10–13, and then citing Bleasdale Decl. ¶¶

25–44). This alone would suffice to clear the low bar of rational basis review, *see Minerva Dairy* , 905 F.3d at 1053, but Defendants go beyond what the Constitution requires and cite research from the Centers for Disease Control ("CDC") and peer-reviewed studies from major scientific journals supporting the efficacy of vaccines in abating the pandemic's spread. *See* TRO Order at 911–12 & 911–12 nn. 5–6.

These officials include Dr. Allison Arwady, Chief Medical Officer of the Chicago Department of Public Health, *see* Def. City's Resp. TRO, Ex. A, Arwady Decl., ECF No. 18-1 ; Christopher Owen, Commissioner of Human Resources for the City of Chicago, *see* Def. City's Resp. TRO, Ex. B, Owen Decl., ECF No. 18-1 ; Dr. Susan Bleasdale, Associate Professor of Clinical Medicine at the University of Illinois at Chicago, *see* Def. J.B. Pritzker's Resp., Ex. A, Bleasdale Decl.; and Dr. Arti Barnes, Medical Director and Chief Medical Officer of the Illinois Department of Public Health, *see* Def. J.B. Pritzker's Resp. TRO, Ex. B, Barnes Decl., ECF No. 14-1.

Plaintiffs failed to rebut Defendants' justifications at the TRO stage, and their arguments fare no better now. Plaintiffs' supplemental brief supporting their preliminary injunction petition contains little if any legal argument. Instead, Plaintiffs "update the court with some recent scientific findings," Pls.' Suppl. Br. Supp. Pet. Prelim. Inj. ("Pls.' Suppl. Br.") at 1, ECF No. 32, that purportedly bolster their critique of COVID-19 vaccines and their efficacy. But the rational basis test does not allow courts to "second-guess ... policy judgment[s] by parsing the latest

academic studies." *Vasquez v. Foxx* , 895 F.3d 515, 525 (7th Cir. 2018). And even if it did, Plaintiffs have not presented any expert witnesses or conducted any discovery (despite the opportunity to do so) that would allow the Court to evaluate the scientific merits of the articles on which they rely. *Cf. Daubert v. Merrell Dow Pharms., Inc.* , 509 U.S. 579, 592–93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (noting that the introduction of scientific evidence "is premised on the assumption" that the evidence, through introduction by a qualified expert, will have "a reliable basis in the knowledge and experience of [the] discipline" from which it arises).

What is more, even on the most generous reading of their evidence, Plaintiffs have shown only the existence of some scientific debate surrounding the degree of immunity provided by vaccines and whether "natural immunity" from prior COVID-19 infection provides comparable (or, as Plaintiffs assert, superior) protection from the virus. *See* TRO Order at 912–13. But the existence of debate would mean, by definition, that Defendants' policies are not "arbitrary or irrational." *Campos* , 932 F.3d at 975 ; *see* TRO Order at 912–13 (explaining that "even if there were robust scientific debate about whether natural immunity is more effective than vaccine-created immunity ... this still would not be enough for Plaintiffs to prevail"). Therefore, Plaintiffs' additional studies and scientific arguments do not alter the Court's conclusion that EO 2021-22 and the City Vaccination Policy survive rational basis review.

Because Plaintiffs have not identified a fundamental right at stake and because the challenged policies satisfy the rational basis test, the Court finds that Plaintiffs are unlikely to succeed on the merits of their substantive due process claims.

B. Procedural Due Process

The parties have not addressed Plaintiffs' procedural due process, free exercise, or HCRCA claims in their supplemental briefs on the preliminary injunction petition. Thus, the conclusions reached in the TRO Opinion, which contains a more comprehensive treatment of those claims, remain unchanged.

Plaintiffs next contend that Defendants' policies violate procedural due process. A procedural due process claim requires a plaintiff to show that the government deprived them of a constitutionally protected interest with "constitutionally deficient procedural protections" surrounding the deprivation. *Tucker v. City of Chi.* , 907 F.3d 487, 491 (7th Cir. 2018). Plaintiffs, however, have not established that Defendants' enactment or implementation of their vaccine policies violate Plaintiffs' procedural due process rights.

1. Procedural Due Process Claims Against the Governor

As to the Governor, Plaintiffs argue that EO 2021-22 is procedurally invalid because it was issued in violation of Governor Pritzker's statutory authority under the Illinois Emergency Management Agency Act ("EMAA"), 20 Ill. Comp. Stat. 3305/1 *et seq.* However, Plaintiffs do not identify what

procedures they believe the Governor owed them. The closest they come is a suggestion that only the state legislature can enact such restrictions under Illinois law. *See* TRO Mot. at 4 (stating that "[t]he legislature has remained silent on the subject of vaccine mandates"). But, even if Plaintiffs were correct as a matter of state law, "there is no federal constitutional right to state-mandated procedures." *GEFT Outdoors, LLC v. City of Westfield* , 922 F.3d 357, 366 (7th Cir. 2019), *cert denied* , —— U.S. ——, 140 S. Ct. 268, 205 L.Ed.2d 137 (2019). And, in any case, this argument is foreclosed by the Eleventh Amendment, which bars any "claim that [a] state official[ ] violated state law in carrying out [his] official responsibilities." *Pennhurst State Sch. and Hosp. v. Halderman* , 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

In the alternative, Plaintiffs argue that EO 2021-22 unconstitutionally conditions their employment on being vaccinated. In support, they recite the maxim that the government cannot condition their public employment on exercising a constitutional right and assert that EO 2021-22 violates their procedural due process rights on this basis alone. But identifying an alleged constitutional violation is only one half of the test—Plaintiffs must also point to specific procedural shortcomings surrounding the violation, which they have not done here. *See Tucker* , 907 F.3d at 491. Moreover, despite nearly two months having passed since EO 2021-22 took effect, Plaintiffs have not alleged on this record that any of them have been terminated, or even disciplined, pursuant to the Governor's order. For these reasons, the Court finds

that Plaintiffs' procedural due process claims against the Governor are unlikely to succeed on the merits.

Plaintiffs have not alleged sufficient constitutional shortcomings to warrant a *Mathews* analysis, but as the Court noted in its prior ruling, were one needed, "Plaintiffs' interest in not being terminated for refusing vaccination would likely be outweighed by the public's interest in preventing the spread of COVID-19 and the cost to the public's safety of requiring additional procedures." TRO Order at 916 n.10 (citing *Vill. of Orland Park v. Pritzker* , 475 F. Supp. 3d 866, 883 (N.D. Ill. 2020) (conducting a *Mathews* analysis and concluding that "the second and third factors in the *Mathews* [*v. Eldridge* , 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)] test weigh heavily against" the plaintiff in a challenge to COVID-19 mitigation measures)).

2. Procedural Due Process Claims Against the City

Plaintiffs' procedural due process claims also fail as to the City. Plaintiffs first contend that Mayor Lightfoot exceeded her authority in promulgating the City Vaccination Policy, which, Plaintiffs claim, is legislative in nature and requires the approval of the Chicago City Council. Once more, Plaintiffs have not articulated what, if any, procedural protections they should be afforded or exactly how the promulgation of the City's policy violated their procedural due process rights. Moreover, as the Court's previous order explained, strict separation-of-powers is not applicable to local governments, and it is certainly not enforceable as a federal right. *See Auriemma v. Rice* , 957 F.2d 397, 399 (7th Cir. 1992). Alternatively, Plaintiffs argue that the City

Vaccination Policy impermissibly alters their employment contracts. But again, they do not identify how these changes contravened procedural due process. In the same vein, Plaintiffs also fail to address how the City Vaccination Policy could unconstitutionally "alter" their employment contracts when those contracts are governed by collective bargaining agreements, which "can (and typically do) satisfy" the requirements of procedural due process for terminated public employees. *Calderone v. City of Chi.* , 979 F.3d 1156, 1166 (7th Cir. 2020) (quoting *Chaney v. Suburban Bus Div. of Reg'l Transp. Auth.* , 52 F.3d 623, 630 (7th Cir. 1995)). Thus, the Court finds that Plaintiffs' procedural due process claims against the City are unlikely to succeed on the merits.

C. Free Exercise

Next, Plaintiffs bring a challenge under the Free Exercise Clause of the First Amendment. They argue that Defendants' policies unconstitutionally burden their exercise of sincerely held religious beliefs by forcing them either to be vaccinated in violation of those beliefs or lose their jobs. Additionally, they claim that the City violated the Free Exercise Clause by denying, or refusing to grant, religious exemptions. Based on the current record, the Court finds that neither of these claims are likely to succeed on the merits.

Under the Free Exercise Clause, a government action that burdens a plaintiff's exercise of a sincerely held religious belief generally receives strict scrutiny. *Fulton v. City of Phila.* , —— U.S. —— –, 141 S. Ct. 1868, 1876, 210 L.Ed.2d 137 (2021). The

Supreme Court created an exception to this rule in *Employment Division v. Smith* , which held that a neutral law of general applicability that only incidentally burdens religion receives rational basis review. *Fulton* , 141 S. Ct. at 1876 (citing 494 U.S. 872, 878–82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1993)); *Ill. Bible Colls. Ass'n v. Anderson* , 870 F.3d 631, 639 (7th Cir. 2017).

The Court need not apply the *Smith* test to Defendants' policies at this stage because Plaintiffs have not stated a claim under the Free Exercise Clause on the current record. On the facts before the Court, no Plaintiffs have alleged that they have applied for an exemption from EO 2021-22, let alone have been denied one. And none of the Plaintiffs who have applied for and been denied an exemption from the City Vaccination Policy have made a good faith attempt to comply with the Policy's exemption process, which requires the applicant to fill out a form providing a reason for the request and an explanation of the principle of the applicant's religion that conflicts with vaccination. *See* City Religious Exemption Form. Instead, rather than providing individualized facts, they have submitted formulaic recitations of the HCRCA's definition of a "sincerely held religious belief." *See* Def. City's Resp. TRO, Ex. B5 (collecting the denied applications); *see also* City Religious Exemption Request Form. This is in stark contrast to *Dahl v. Board of Trustees of Western Michigan University* , 15 F.4th 728 (6th Cir. 2021), where the plaintiffs pleaded individualized facts showing that the university disregarded their sincerely held religious beliefs. *See id.* at 733–34 ; *Dahl v. Bd. of Trs. of W. Mich. Univ.* , 558

F.Supp.3d 561, 563–64 (W.D. Mich. Aug. 31, 2021), *aff'd* , 15 F.4th 728. Here too, Plaintiffs were given an opportunity to develop the factual record on this point, but they have not done so. Based upon the current record, the Court finds that they are unlikely to succeed on the merits of their free exercise claims.

D. Illinois Health Care Right of Conscience Act (HCRCA)

Plaintiffs' final claims arise under the Illinois Health Care Right of Conscience Act (HCRCA), 745 Ill. Comp. Stat. 70/1 *et seq.* Generally, this statute protects the rights of Illinoisans to refuse to provide, receive, or participate in the administration of health care services "contrary to [their] conscience." *Id.* § 70/2. The section of HCRCA relevant here prohibits "discrimination against any person in any manner ... because of such person's conscientious refusal to receive ... any particular form of health care services contrary to his or her conscience." *Id.* § 70/5. Plaintiffs' HCRCA claims against the Governor and the City are addressed in turn.

1. HCRCA Claims Against the Governor

Plaintiffs' HCRCA claims against the Governor cannot succeed because, as explained more fully above and in the Court's previous order, the Eleventh Amendment prevents Plaintiffs from suing the Governor in his official capacity for violations of state law. *See Pennhurst* , 465 U.S. at 106, 104 S.Ct. 900.

2. HCRCA Claim Against the City

Although the Eleventh Amendment does not bar the HCRCA claims against the City, the Court concludes that Plaintiffs are unlikely to succeed on the merits of these claims, because the City Vaccination Policy's religious exemption neatly tracks the definition of a protected religious belief under HCRCA. *Compare* City Religious Exemption Form (granting exemptions for individuals with "a sincerely held set of moral convictions arising from belief in and relation to religious beliefs"), *with* 745 Ill. Comp. Stat. 70/3 (protecting persons with "a sincerely held set of moral convictions arising from belief in and relation to God, or ... from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths"). Plaintiffs' facial challenge cannot succeed in light of this substantial overlap. *See Ezell v. City of Chi.* , 651 F.3d 684, 698–99 (7th Cir. 2011) (a successful facial challenge requires a law to be unconstitutional "in all its applications" (emphasis omitted)). And although it is unclear at this preliminary stage whether the City complies with HCRCA in administering the religious exemption, Plaintiffs have not adduced any facts indicating that it does not. Accordingly, the Court finds that Plaintiffs' HCRCA claim against the City is unlikely to succeed on the merits.

Again, Plaintiffs do not specify whether they believe the City Vaccination Policy violates HCRCA on its face or as applied to their individual applications, but language in their TRO Motion suggests the former. *See* TRO Mot. at 13 ("The threatened suspension and subsequent termination here is squarely a violation of the [HCRCA].").

In summary, the Court reaches the same conclusion as it did in its prior ruling—Plaintiffs have not established a likelihood of success as to any of their claims. This alone is enough to deny injunctive relief, *see GEFT Outdoors* , 922 F.3d at 366 ("If the plaintiff fails to meet any of the[ ] threshold requirements, the court must deny the injunction." (quoting *Girl Scouts of Manitou Council* , 549 F.3d at 1086)), but the Court will briefly discuss the other preliminary injunction factors for the sake of completeness.

II. Irreparable Harm

In order to show that they would suffer irreparable harm without injunctive relief, Plaintiffs must "demonstrate that irreparable injury is likely." *Winter* , 555 U.S. at 21, 129 S.Ct. 365 (emphasis omitted). Plaintiffs contend that the Court must find irreparable harm as a matter of law because Defendants' policies violate their constitutional rights. For the reasons stated above, the Court finds no constitutional violation arising out of Defendants' policies, so this argument is unavailing. But, even assuming *arguendo* that requiring Plaintiffs to be vaccinated as a condition of employment does inflict some degree of constitutional injury, the record in this case contains no evidence that any Plaintiffs were fired or disciplined because they refused to get the vaccine. And as the Court noted in its prior ruling, termination of employment is typically redressable through money damages. *See Bedrossian v. Northwestern Mem'l Hosp.* , 409 F.3d 840, 845 (7th Cir. 2005) ; *Garland v. N.Y. City Fire Dep't* , 21-cv-6586, 574 F.Supp.3d 120, 131–32 (E.D.N.Y. Dec. 6,

2021) (rejecting argument that termination for refusing to comply with vaccine policy comprised irreparable harm because, even if plaintiffs alleged constitutional injuries, they could be made whole through damages and reinstatement). Therefore, on these facts, the Court finds that Plaintiffs have not demonstrated that they would suffer irreparable harm in the absence of injunctive relief.

III. Balance of the Equities

Finally, the Court finds that the balance of the equities and the public interest, which are considered together when the government is the party opposing injunctive relief, *see Nken v. Holder* , 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), do not favor a preliminary injunction. The Court must evaluate this factor by weighing the degree of harm the nonmoving party would suffer if the injunction is granted against the degree of harm to the moving party if the injunction is denied. *See Cassell v. Snyders* , 990 F.3d 539, 545 (7th Cir. 2021). The analysis also should consider the public interest, or "the consequences of granting or denying the injunction to non-parties." *Id.* (quoting *Abbott Labs. v. Mead Johnson & Co.* , 971 F.2d 6, 11 (7th Cir. 1992)).

Here, the Court finds, as have numerous other courts, that the public's interest in reducing the transmission of COVID-19 weighs heavily against granting an injunction. *See, e.g.* , *Does 1–6 v. Mills* , 16 F.4th 20, 37 (1st Cir. 2021), *cert denied sub nom. Does 1–3 v. Mills* , —— U.S. ——, 142 S. Ct. 17, 211 L.Ed.2d 243 (mem.) (2021) ; *We The Patriots USA, Inc. v. Hochul* , 17 F.4th 266, 295–96 (2d Cir.

2021) ; *Doe v. San Diego Unified Sch. Dist.* , 19 F.4th 1173, 1181-83 (9th Cir. 2021) ; *Garland* , 574 F.Supp.3d at 132-34 ; *Rydie* , 572 F.Supp.3d at 161–62. Conversely, Plaintiffs' interest in not being vaccinated is relatively weak, given the absence of a fundamental constitutional right to refuse vaccination during a pandemic such as the one facing us today. *See Klaassen* , 7 F.4th at 593. Indeed, when confronted with a widely contagious pandemic, "plaintiffs are not asking to be allowed to make a self-contained choice to risk only their own health," given that their refusal to be vaccinated "could sicken and even kill many others who did not consent" to their decisions. *Cassell* , 990 F.3d at 545. As a result, the Court finds that Plaintiffs have not shown that the balance of the equities favors the relief they seek.

To the extent that developments since the Court's ruling on the TRO have impacted the balance of the countervailing interests, they only push the needle farther in Defendants' favor. Since that ruling was issued, the seven-day average of daily new COVID-19 cases reported in Illinois has increased more than fourfold. *See COVID-19 Home: Daily Cases Change Over Time* , Ill. Dep't Pub. Health , (Dec. 20, 2021, 12:00 PM) https://dph.illinois.gov/covid19.html (showing a seven-day average of 10,179 new cases per day as of December 20, 2021, compared to 2,088 new cases per day on October 29, 2021). Additionally, the Omicron variant has emerged, *see Science Brief: Omicron (B.1.1.529) Variant* , CDC, (Dec. 2, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/scientific-brief-omicron-variant.html, and is currently "rapidly spreading"

across the country. Nate Rattner, *Omicron Now the Dominant US Covid Strain at 73% of Cases, CDC Data Shows* , CNBC (Dec. 20, 2021, 6:46 PM), https://www.cnbc.com/2021/12/20/omicron-now-the-dominant-us-covid-strain-at-73percent-of-cases.html. And, although little is known about whether Omicron presents a greater risk of transmission or reinfection than previous variants, its emergence prompted the CDC to "strengthen[ ] its recommendation" on booster doses of the vaccine. Maggie Fox, *All Adults Should Get a COVID-19 Booster Shot Because of the Omicron Variant, CDC Says* , CNN (Nov. 29, 2021, 5:35 PM) https://www.cnn.com/2021/11/29/health/cdc-booster-guidance-omicron/index.html. This uncertainty, combined with the upswing in cases, makes Defendants' position regarding the balance of the equities and public interest factor even stronger than it was at the TRO stage.

Conclusion

Because Plaintiffs have not satisfied any of the elements necessary to obtain preliminary injunctive relief, their motion for a preliminary injunction is denied.

IT IS SO ORDERED.

BARBARA LUKASZCZYK, et al., Plaintiffs-Appellants,
v.
COOK COUNTY, et al., Defendants-Appellees.
JOHN HALGREN, et al., Plaintiffs-Appellants,
v.
CITY OF NAPERVILLE, et al., Defendants-Appellees.
SCOTT TROOGSTAD, et al., Plaintiffs-Appellants,
v.
CITY OF CHICAGO and JAY ROBERT PRITZKER, Governor, Defendants-Appellees.

Nos. 21-3200, 21-3231, 21-3371.

United States Court of Appeals, Seventh Circuit.

Argued May 26, 2022.

Decided August 29, 2022.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:21-cv-05407, Robert W. Gettleman, *Judge.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:21-cv-05039, John Robert Blakey, *Judge.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:21-cv-05600, John Z. Lee, *Judge.*

Before BRENNAN, SCUDDER, and ST EVE, *Circuit Judges.*

BRENNAN, *Circuit Judge*.

In these appeals, which we consolidate for decision, three district judges denied motions for preliminary injunctions against state and local COVID-19 vaccine mandates. The plaintiffs argue the mandates violate their constitutional rights to substantive due process, procedural due process, and the free exercise of religion. They also contend the mandates violate Illinois state law. Although the plaintiffs could have presented some forceful legal arguments, they have failed to develop factual records to support their claims. Because the plaintiffs have not shown a likelihood of success on the merits, we affirm the decisions of the district judges.

I. Factual Background.

In response to the COVID-19 pandemic, state and local authorities in Illinois enacted a series of mandates and restrictions. The State of Illinois, Cook County Health and Hospitals System, the City of Chicago, and the City of Naperville each issued an order, policy, or directive requiring certain employees to vaccinate or regularly test for the virus. Employees who failed to comply with the mandates would be subject to disciplinary action, including possible termination. We begin by briefly summarizing each of the relevant state and local policies.

The 2021 Illinois Mandate. On September 3, 2021, Governor Pritzker used his emergency powers under the Illinois Emergency Management Agency Act, 20 ILL. COMP. STAT. 3305/1 *et seq.,* to issue Executive

Order 2021-22 ("2021 Order"). The 2021 Order requires certain healthcare workers to vaccinate, or test at least weekly, for COVID-19. Workers who fail to comply with the mandate will not be permitted on the premises of a healthcare facility. Under the 2021 Order, a "Health Care Worker" is defined as "any person who (1) is employed by, volunteers for, or is contracted to provide services for a Health Care Facility, or is employed by an entity that is contracted to provide services to a Health Care Facility, and (2) is in close contact" with other persons in the facility for a specified amount of time. Initially, a "Health Care Facility" included "any institution, building, or agency ... whether public or private (for-profit or nonprofit), that is used, operated or designed to provide health services, medical treatment or nursing, or rehabilitative or preventive care to any person or persons." According to the Order, "hospitals" and "emergency medical services" met this definition.

A worker is exempt from the vaccination requirement if "(1) vaccination is medically contraindicated," or "(2) vaccination would require the individual to violate or forgo a sincerely held religious belief, practice, or observance." But exempt workers still need to "undergo, at a minimum, weekly testing." The 2021 Order also provides that "[s]tate agencies... may promulgate emergency rules as necessary to effectuate" it.

The 2021 Order states it is intended to reduce COVID-19 exposure and transmission: "health care workers, and particularly those involved in direct patient care, face an increased risk of exposure to

COVID-19." Requiring these workers to receive a "vaccine or undergo regular testing can help prevent outbreaks and reduce transmission to vulnerable individuals who may be at higher risk of severe disease." The Order states that "stopping the spread of COVID-19 in health care settings is critically important because of the presence of people with underlying conditions or compromised immune systems."

The 2022 Illinois Mandate. Ten months later, on July 12, 2022, Governor Pritzker issued Executive Order 2022-16 ("2022 Order"), which re-issued and modified the 2021 Order. The 2022 Order removes "emergency medical services" and "IDPH licensed emergency medical service vehicles" from the definition of a "Health Care Facility." It also requires that certain healthcare workers undergo weekly or biweekly testing only when the level of COVID-19 Community Transmission is moderate or high, depending on the type of facility.

The Cook County Mandate. Cook County Health and Hospitals System ("Cook County Health") is an agency of Cook County, Illinois. On August 16, 2021, it issued a vaccination policy ("County Health Vaccination Policy") that required all personnel be fully vaccinated by September 30, 2021 as a condition of their employment.[1] The policy applies to all Cook County Health personnel, including contractors like the Hektoen Institute for Medical Research, LLC, a nonprofit organization that administers medical research grants. Failure to comply with the County Health Vaccination Policy

"constitute[s] gross insubordination and will result in disciplinary action, up to and including termination."

The policy permits exemptions "based upon a disability, medical condition, or sincerely held religious belief, practice, or observance." Exemption requests are considered individually. When reviewing an exemption request, Cook County Health considers: (1) "the duration of the request (either permanent in the case of exemptions or temporary in the case of deferrals)," (2) "the nature and severity of the potential harm posed by the request," (3) "the likelihood of harm," and (4) "the imminence of the potential harm." Exempt personnel are still "required to comply with preventive infection control measures established by the Health System," which could include conditions "such as job location, job duties, and shift, but will minimally include weekly COVID-19 testing and enhanced [personal protective equipment] protocols." At first, Cook County Health decided to reject any religious accommodation request made by a person who had previously taken the flu vaccine. It remains unclear whether this approach was formally reversed, but there is no dispute that Cook County Health later decided to grant religious exemptions.

The City of Chicago Mandate. On October 8, 2021, the City of Chicago issued a COVID-19 Vaccination Policy ("Chicago Vaccination Policy"), which required all City employees to be fully vaccinated by the end of the calendar year. Effective October 15, 2021, all employees, "as a condition of employment," had to "either be fully vaccinated against COVID-19" or undergo testing on a "twice weekly basis with tests

separated by 3-4 days." Employees are "responsible for obtaining tests on their own time and at no cost to the City." The testing option expired at the end of the year, at which point employees would need to be fully vaccinated. The Chicago Vaccination Policy permits accommodations for a disability, medical condition, or sincerely held religious belief. To receive a religious accommodation, an employee must fill out a request form, including the reason for the exemption, the religious principle that conflicted with being vaccinated, and the signature of a religious leader.

The City of Naperville Mandate. On September 9, 2021, the City of Naperville issued "Naperville Fire Department Special Directive #21-01" ("Naperville Special Directive"). Under that directive, emergency medical technicians and firefighters employed by Naperville are required to either produce weekly negative COVID-19 tests or show proof of vaccination. This mandate is effectively coterminous with the State of Illinois's 2021 Order.

II. Procedural Background.

Three lawsuits were filed in the Northern District of Illinois, each challenging the Governor's 2021 Order and one of the local mandates.

In *Troogstad v. City of Chicago,* a group of City employees ("*Troogstad* plaintiffs") challenged the Chicago Vaccination Policy and the 2021 Order. They claimed the regulations violated their rights to bodily autonomy under the constitutional doctrines of substantive due process, procedural due process, and

the free exercise of religion. They also claimed the policies violated the Illinois Health Care Right of Conscience Act. The *Troogstad* plaintiffs petitioned for a temporary restraining order against the enforcement of the policies, which Judge John Lee denied. They then moved for a preliminary injunction. The *Troogstad* plaintiffs declined to supplement the record with witnesses and limited discovery, instead filing a supplemental brief in support of their motion. Judge Lee denied that motion, and the *Troogstad* plaintiffs appeal that decision.

In *Lukaszczyk v. Cook County,* a group of Cook County Health and Hektoen employees ("*Lukaszczyk* plaintiffs") challenged the County Health Vaccination Policy and the 2021 Order. They brought claims implicating substantive due process, procedural due process, free exercise of religion, and the Illinois Health Care Right of Conscience Act. Based on these claims, the plaintiffs moved for a preliminary injunction to bar enforcement of the mandates. Judge Robert Gettleman denied that motion from the bench. The *Lukaszczyk* plaintiffs appeal that decision.

In *Halgren v. City of Naperville,* employees of the City of Naperville Fire Department ("*Halgren* plaintiffs") challenged the Naperville Special Directive and the 2021 Order.
The *Halgren* plaintiffs named as defendants Governor Pritzker, the City of Naperville, and Edward-Elmhurst Healthcare ("EEH")—a health system which operates a Naperville hospital and coordinates emergency medical services with the Fire

Department. The Naperville Special Directive also stated that the Edward Hospital EMS System required the Fire Department to "provide a roster of who is vaccinated and a roster of who will be submitting to weekly testing." According to the *Halgren* plaintiffs, the regulations violated their rights to privacy and bodily autonomy under the constitutional doctrines of substantive due process, procedural due process, and equal protection. They moved for a temporary restraining order and preliminary injunction against the policies, as well as a declaratory judgment that the Governor had exceeded his statutory authority. The parties later agreed to convert the *Halgren* plaintiffs' combined motion for emergency relief into a motion only for a preliminary injunction. When given the opportunity, both parties chose to forgo discovery. Judge John Robert Blakey denied the *Halgren* plaintiffs' motion, which they now appeal.

III. Mootness and Standing.

Two threshold issues for our consideration are whether certain claims are moot because of the 2022 Order and if certain parties have standing.

The Constitution limits federal jurisdiction to cases and controversies. U.S. CONST. art. III, § 2. This limitation applies "at `all stages of review, not merely at the time the complaint is filed.'" *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 860 (7th Cir. 2018) (quoting *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016)). A plaintiff has standing if he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,

and (3) that is likely to be redressed by a favorable judicial decision." *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1151 (7th Cir. 2020) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). The case becomes moot, "[i]f at any point the plaintiff would not have standing to bring suit at that time." *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs of City of the Milwaukee*, 708 F.3d 921, 929 (7th Cir. 2013). As a general rule, cases or individual claims for relief are moot when the "issues presented are no longer `live' or the parties lack a legally cognizable interest in the outcome." *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 721 (7th Cir. 2021) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

A. The 2022 Order

Governor Pritzker's 2022 Order, which amended the 2021 Order, removed (among other things) the phrase "emergency medical services" from the definition of a "Health Care Facility." This amendment meant the 2021 Order no longer applied to emergency medical services because employees at these facilities did not fall within the definition of a healthcare worker. So, employees of the Chicago and Naperville Fire Departments were not subject to the Governor's vaccination mandate. As a result, the claims of those plaintiffs against Governor Pritzker are moot because they seek to enjoin a policy that no

longer applies to them. All other plaintiffs may still proceed with their claims against the Governor.

Practically, this means all the *Halgren* plaintiffs' claims against Governor Pritzker are moot,[2] and all the claims made by Chicago Fire Department employees in *Troogstad* against Governor Pritzker are moot. Each of these plaintiffs were considered healthcare workers because they were part of "emergency medical services," so they now seek to enjoin an inapplicable policy.

B. The Hektoen Employees

Governor Pritzker argues that the *Lukaszczyk* plaintiffs lack standing to challenge the 2021 Order because their alleged injury is not fairly traceable to the mandate. According to the Governor, the plaintiffs failed to present evidence that they objected to the weekly testing option, which was permitted in lieu of vaccination. Each of the *Lukaszczyk* plaintiffs— the Cook County and Hektoen employees—testified in their depositions that they were willing to comply with a testing option. So, the Governor submits, the plaintiffs' "alleged injuries of unwanted vaccination and/or employment discipline are the product of the County's mandate and are not fairly traceable to the Governor's conduct."

We disagree and conclude that the *Lukaszczyk* plaintiffs have standing to challenge the 2021 Order. There is standing if a plaintiff has a fairly traceable injury that the court could redress with a favorable decision. *Fox*, 980 F.3d at 1151. An

injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized," and "(b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up). An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. It is concrete if it is "real," not abstract. *Spokeo, Inc.*, 578 U.S. at 340 (citation omitted).
The *Lukaszczyk* plaintiffs' successfully alleged an injury in fact by claiming they were burdened by scheduling and paying for weekly COVID-19 tests. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an `injury.'" (citations omitted)). The burden of scheduling and paying for weekly tests suffices for an Article III injury.

The injuries here are also fairly traceable to the defendants because they are a direct result of the County Health Vaccination Policy. Both the district court and our court could redress the plaintiffs' injuries by enjoining the vaccination mandate, eliminating the extra costs imposed on the defendants. *See id.* The *Lukaszczyk* plaintiffs therefore have standing to challenge the County Health Vaccination Policy.

C. Edward-Elmhurst Healthcare

EEH argues it is not responsible for the vaccine and testing mandates so it should not be a party. Standing requires "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560-61 (citing *Simon v. E. Ky. Welfare Rights*

Org., 426 U.S. 26, 41-42 (1976)). Because EEH did not issue or require compliance with either the 2021 or 2022 Orders or the Naperville Special Directive, EEH argues it did not cause the harm the *Halgren* plaintiffs allege.

On this record, the *Halgren* plaintiffs do not have standing against EEH. Like those plaintiffs, EEH was subject to the Naperville Special Directive. But there is no evidence that EEH helped promulgate it. By its own terms, the Naperville Special Directive mentions EEH only once, stating that certain employers must provide EEH with "lists of vaccinated and tested employees." Affidavits from an EEH official confirm this account. The plaintiffs do not respond to this argument, except to state that EEH's agent is empowered to supervise, and potentially to suspend, EMS personnel. But the only evidence the plaintiffs provided are their own affidavits, claiming that Naperville told them that EEH required compliance with the Special Directive. That EEH complied with Naperville's Special Directive is not, by itself, enough to prove a causal connection. *See* *Doe v. Holcomb*, 883 F.3d 971, 975-76 (7th Cir. 2018) (noting that when a plaintiff sues a state official to enjoin the enforcement of a state statute, he must "establish that his injury is causally connected to that enforcement and that enjoining the enforcement is likely to redress his injury"). So, the *Halgren* plaintiffs do not have standing against EEH, and we need not resolve EEH's alternative argument that it is not a state actor.
The *Halgren* plaintiffs may proceed on their claims against Naperville, but not against EEH.

IV. Preliminary Injunction.

Having resolved those justiciability questions, we now review the denial in each case of a motion for a preliminary injunction. Such a denial is examined for abuse of discretion. *DM Trans, LLC v. Scott*, 38 F.4th 608, 617 (7th Cir. 2022). A district court abuses its discretion "when it commits a clear error of fact or an error of law." *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021) (quoting *Abbott Lab'ys v. Mead Johnson & Co.*, 971 F.2d 6, 13 (7th Cir. 1992)). We consider the district court's legal conclusions de novo and its findings of fact for clear error. *Common Cause Ind. v. Lawson*, 978 F.3d 1036, 1039 (7th Cir. 2020) (citations omitted).

A preliminary injunction is "an exercise of a very farreaching power, never to be indulged in except in a case clearly demanding it." *Cassell*, 990 F.3d at 544 (quoting *Orr v. Shicker*, 953 F.3d 490, 501 (7th Cir. 2020)). A party seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted). The first step requires that the plaintiff "demonstrate that [his] claim has some likelihood of success on the merits, not merely a better than negligible chance." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (internal citation and quotation marks omitted). It "is often decisive." *Braam v. Carr*, 37 F.4th 1269, 1272 (7th Cir. 2022). If plaintiffs fail to establish their likelihood of success on the

merits, we need not address the remaining preliminary injunction elements. *Doe v. Univ. of S. Ind.*, No. 22-1864, 2022 WL 3152596, at *3 (7th Cir. Aug. 8, 2022).

We address the remaining claims in the order presented on appeal, which is the same order in which the district judges addressed them. Those claims are:

	Halgren v. City of Naperville, No. 21-3231 Judge Blakey	*Lukaszczyk v. Cook County,* No. 21-3200 Judge Gettleman	*Troogstad v. City of Chicago,* No. 21-3371 Judge Lee
Substantive Due Process	X	X	X
Procedural Due Process	X	X	X
Free Exercise		X	X

Illinois Health Care Right of Conscience Act	X	X

A. Substantive Due Process

The plaintiffs in each case claim state and local COVID-19 regulations violated their constitutional right to substantive due process by interfering with their rights to bodily autonomy and privacy.

The Fourteenth Amendment provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Due Process Clause has a substantive and procedural component. But "[t]he scope of substantive due process is very limited." *Campos v. Cook Cnty.*, 932 F.3d 972, 975 (7th Cir. 2019) (quoting *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005)). "Substantive due process protects against only the most egregious and outrageous government action." *Id.* (citations omitted). When stating a claim, a "plaintiff must allege that the government violated a fundamental right or liberty." *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Such a violation must have been arbitrary and irrational. *Id.* (citations omitted). Courts should also be "reluctant to expand the concept of substantive

due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted).

Under this framework, we consider whether the plaintiffs assert a fundamental right or liberty. If so, we must apply heightened scrutiny. If not, we review the claim for a rational basis. Several cases speak to this decision. In *Jacobson v. Commonwealth of Massachusetts,* the Supreme Court considered the validity of a Massachusetts statute that required all persons older than 21 receive the smallpox vaccine. 197 U.S. 11, 12 (1905). Failure to comply with the law would result in a $5 fine (about $140 today). *Id.*; *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). The law's only exception was for children deemed unfit for vaccination who presented a certificate signed by a registered physician. *Jacobson,* 197 U.S. at 12. In response to the state law, the city of Cambridge board of health adopted a regulation requiring that all city inhabitants be vaccinated or revaccinated. *Id.* at 12-13. Henning Jacobson did not comply with the mandate and was sentenced to jail until he agreed to pay the fine. *Id.* at 13. He appealed, claiming the Massachusetts law authorizing the local mandate violated his constitutional rights under the Fourteenth Amendment. *Id.* at 14.

The Supreme Court held in *Jacobson* that a state may require, without exception, that the public be vaccinated for smallpox. *Id.* at 39. The Court reasoned that "[a]ccording to settled principles, the

police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25 (citations omitted). The Massachusetts legislature "required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety." *Id.* at 27. Investing "such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement," the Court concluded. *Id.* But "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety" lacks any "real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 31 (citations omitted).

Jacobson, although informative precedent, is factually distinguishable. The Massachusetts law and Cambridge mandate were challenged in the wake of the smallpox pandemic, which was of a different nature than the COVID-19 pandemic of the last few years. For example, as Judge Blakey found in *Halgren,* the smallpox fatality rate among the unvaccinated was about 26 percent; by contrast, the COVID-19 infection fatality rate was estimated in January 2021 to be somewhere between 0.0-1.63 percent. Frank Fenner et al., *Smallpox and its Eradication,* WORLD HEALTH ORGANIZATION (1988); John P.A. Ioannidis, *Infection fatality rate of COVID-19 inferred from seroprevalence*

data, WORLD HEALTH ORGANIZATION BULLETIN (Oct. 14, 2020) (stating that COVID-19 "[i]nfection fatality rates ranged from 0.00% to 1.63%" with "corrected values from 0.00% to 1.54%" and in "people younger than 70 years, infection fatality rates ranged from 0.00% to 0.31% with crude and corrected medians of 0.05%").

In *Halgren* the district court also found that COVID-19 has "a low attack rate"[3] in contrast to the smallpox pandemic. Grace E. Patterson et al., *Societal Impacts of Pandemics: Comparing COVID-19 With History to Focus Our Response,* FRONTIERS IN PUBLIC HEALTH (Apr. 21, 2021). Judge Blakey further concluded that the vaccines for smallpox and COVID-19 are distinguishable—the smallpox vaccine was a sterilizing vaccine, intended to kill the virus and prevent transmission, but many of the COVID-19 vaccines are, by design, non-sterilizing. James Myhre and Dennis Sifris, MD, *Sterilizing Immunity and COVID-19 Vaccines,* VERYWELL HEALTH (Dec. 24, 2020).

Jacobson is also legally and historically distinguishable. The decision predates *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which the Court reserved the possibility of stricter standards of review for certain constitutional cases implicating "prejudice against discrete and insular minorities." *Id.* at 152-53 & n.4. The principles underlying *Jacobson* are also important to consider. As Judge Blakey noted in a thorough opinion, in *Jacobson* the Court voiced concerns for federalism, the limits of liberty, and the separation of

powers. *Jacobson* instructed that in emergency circumstances courts defer to the executive and legislative branches, but they do not abdicate their constitutional role. If a policy had "no real or substantial relation" to its ends, the Court in *Jacobson* reasoned, courts had a duty to intervene. *Jacobson,* 197 U.S. at 31.

Recent circuit precedent supplements *Jacobson.* In *Klaassen v. Trustees of Indiana University,* eight students brought a lawsuit against Indiana University challenging the school's COVID-19 vaccine policy. 7 F.4th 592, 592 (7th Cir. 2021). That policy required all students be vaccinated against COVID-19 unless they were exempt for religious or medical reasons. *Id.* The students sought a preliminary injunction, claiming the policy violated their due process rights under the Fourteenth Amendment. *Id.* Citing *Jacobson,* this court applied the rational basis standard. *Id.* at 593. We noted that the university's vaccine policy made for an easier case than *Jacobson* because the university's policy had religious and medical exceptions, and it required only university attendees to vaccinate, rather than all the citizens of a state. *Id.* This court then denied the request for an injunction pending appeal. *Id.* at 594.

The plaintiffs here cite several other decisions to argue they have a fundamental liberty and bodily autonomy interest, which require our court to review the mandates under strict scrutiny review. *See* *Cruzan v. Dir., Missouri Dep't of Health,* 497 U.S. 261, 278 (1990) (stating that a "competent person has a constitutionally protected

liberty interest in refusing unwanted medical treatment"); *Washington v. Harper*, 494 U.S. 210, 221-22, 229 (1990) (recognizing that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment" and stating that the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty" (citations omitted)); *Glucksberg*, 521 U.S. at 735 (holding that a state ban on assisted suicide did "not violate the Fourteenth Amendment, either on its face or as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors" (citation and internal quotation marks omitted)). The plaintiffs also rely on *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), both since overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

"Unless a governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003) (citing *Glucksberg*, 521 U.S. at 728). Following the guidance of the Supreme Court, our court has been hesitant to expand the scope of fundamental rights under substantive due process. *See, e.g.*, *Campos*, 932 F.3d at 975 (noting that employment-related rights are not fundamental); *Palka v. Shelton*, 623 F.3d 447, 453

(7th Cir. 2010) (stating that "an alleged wrongful termination of public employment is not actionable as a violation of substantive due process unless the employee also alleges the defendants violated some other constitutional right or that state remedies were inadequate" (citation omitted)). Using similar reasoning, our court applied rational basis review to the vaccine mandate claim in *Klaassen.* 7 F.4th at 593. *E.g.* *Cuomo,* 141 S. Ct. at 70 (Gorsuch, J., concurring) ("Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge."). We follow that path here.

Plaintiffs in each case have failed to provide facts sufficient to show that the challenged mandates abridge a fundamental right. Nor do they provide a textual or historical argument for their constitutional interpretation. Plaintiffs do not cite any controlling case law or other legal authority in support of their position, instead relying on decisions that are either factually distinguishable or that have been overruled. Neither this court nor the district judges deny that requiring the administration of an unwanted vaccine involves important privacy interests. But the record developed and presented here does not demonstrate that these interests qualify as a fundamental right under substantive due process.

The district judge in each of these cases followed Supreme Court and circuit court precedent by applying the rational basis standard. Following that same authority, we decline to apply strict scrutiny and instead review for rational basis. "Under

rational-basis review, a statutory classification comes to court bearing a strong presumption of validity, and the challenger must negative every conceivable basis which might support it." *Minerva Dairy, Inc. v. Harsdorf,* 905 F.3d 1047, 1053 (7th Cir. 2018) (quoting *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook,* 808 F.3d 318, 322 (7th Cir. 2015)). So, "to uphold the statute, `we need only find a reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *Ind. Petroleum Marketers,* 808 F.3d at 322). Rational basis review is "a heavy legal lift for the challengers." *Ind. Petroleum Marketers,* 808 F.3d at 322. As Judge Blakey stated in *Halgren,* the plaintiffs' substantive due process claim "is two-fold: (1) the mandate is based on a misconception that vaccinated individuals are less likely to spread the SARS-CoV-2 virus than the unvaccinated and naturally immune; and (2) natural immunity provides incredibly strong protection against infection from COVID-19, and it does so on par with any vaccine protection."

In *Halgren,* the parties agreed that the vaccines can mitigate some dangerous COVID-19 symptoms. They also agreed that both unvaccinated and vaccinated people can spread the virus, and they did not dispute the existence of serious vaccine-induced side-effects. The parties did dispute the relative protection provided by natural immunity and COVID-19 vaccines. The defendants provided evidence from the Centers for Disease Control, declarations from public health officials, and numerous studies, all reporting that the vaccine is effective against COVID-19. The evidence that vaccines reduce the rate of

transmission provides a reasonably conceivable set of facts to support the mandates.

The same is true for the protections afforded by natural immunity. The challenged mandates are susceptible to scientific critique, but the plaintiffs did not provide any evidence— studies, expert reports, or otherwise—showing that the benefits of vaccination on top of natural immunity eliminate a "conceivable basis" for the mandates under rational basis review. The plaintiffs do not dispute that these governments have an interest in preventing the spread of COVID-19, and they relied on reasonably conceivable scientific evidence when promulgating the contested policies. Even if the vaccination policies do not fully account for natural immunity or studies with contrary results, under rational basis review a government need only show that its rationale is supported by a "reasonably conceivable state of facts." *Minerva Dairy*, 905 F.3d at 1053. The governments here have met that low bar. As Judge Blakey noted, the plaintiffs do not account for the fact that vaccination combined with natural immunity could reasonably be judged as more effective than natural immunity alone.

On this record, the *Lukaszczyk, Troogstad,* and *Halgren* plaintiffs have not met their burden under the rational basis standard to show that the challenged policies violate their substantive due process rights. They have shown the efficacy of natural immunity as well as pointed out some uncertainties associated with the COVID-19 vaccines. But they have not shown the governments lack a "reasonably conceivable state of facts" to

support their policies. *Id.* Thus, the district judges correctly concluded that the substantive due process claims were not likely to succeed on the merits.

B. Procedural Due Process

Plaintiffs in each case claim the state and local COVID-19 regulations violated their procedural due process rights. *See* U.S. CONST. amend. XIV, § 1. Before reviewing this claim, we consider the doctrine of sovereign immunity.

1. The Eleventh Amendment

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. A "claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *Id.* at 106. Rather, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* This type of "result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Id.*

Even "when properly raised, sovereign immunity is not absolute immunity." *Council 31 of the Am. Fed'n of State, Cnty., and Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012). A state may be subjected to an action in federal court in three instances: "(1) where Congress, acting under its constitutional authority conveyed by amendments passed after the Eleventh Amendment ... abrogates a state's immunity from suit; (2) where the state itself consents to being sued in federal court; and (3) under the [*Ex parte Young*] doctrine." *Id.* (citation omitted). Under the *Ex parte Young* doctrine, private parties may "sue individual state officials for prospective relief to enjoin ongoing violations of federal law." *Id.* (quoting *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000)). The longstanding rationale for this doctrine is that "[b]ecause an unconstitutional legislative enactment is `void,' a state official who enforces that law `comes into conflict with the superior authority of the Constitution,' and therefore is `stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" *Id.* (quoting *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011)). A court therefore "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (quoting *Ind. Prot. & Advocacy Servs. v. Ind. Fam. and Soc. Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010)).

For reasons previously discussed, the procedural due process claims against Governor Pritzker of

all *Halgren* plaintiffs and those *Troogstad* plaintiffs who were Chicago Fire Department employees are moot. The remaining claims, made by the *Lukaszczyk* plaintiffs and the rest of the *Troogstad* plaintiffs are against Governor Pritzker in his official capacity and seek prospective relief. To the extent these plaintiffs allege violations of Illinois law—such as whether Governor Pritzker exceeded his authority under the Emergency Management Agency Act—sovereign immunity bars their claims in this court. Individual state officials may be sued personally for federal constitutional violations committed in their official capacities, but that principle does not extend to "claim[s] that state officials violated state law in carrying out their official responsibilities." *Pennhurst*, 465 U.S. at 121.

2. The Fourteenth Amendment

Review of the claim that Governor Pritzker's 2021 Order violated the Fourteenth Amendment by depriving the *Lukaszczyk* and *Troogstad* plaintiffs of their protected property interests is not barred by the Eleventh Amendment. A plaintiff who asserts "a procedural due process claim must have a protected property interest in that which he claims to have been denied without due process." *Khan v. Bland*, 630 F.3d 519, 527 (7th Cir. 2010) (citation omitted). To demonstrate a procedural due process violation of a property right, the plaintiff must establish that there is "(1) a cognizable property interest; (2) a deprivation of that property interest; and (3) a denial of due process." *Id.* (quoting *Hudson v. City of Chicago*, 374 F.3d 554, 559 (7th Cir. 2004)).

In *Board of Regents of State Colleges v. Roth,* the Supreme Court explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it," and "more than a unilateral expectation of it." 408 U.S. 564, 577 (1972). Instead, the person must "have a legitimate claim of entitlement to it." *Id.* For "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* The right to a hearing provides an opportunity to vindicate those claims. *Id.*

The *Lukaszczyk* and *Troogstad* plaintiffs argue that the right to earn a living is protected under the Fourteenth Amendment. They contend that even if an employee does not have a property interest in public employment, a termination or decision not to renew a contract "cannot be premised upon the employee's protected activities." But beyond these general statements, the plaintiffs have not provided any evidence or a legal argument as to why they have a property interest in public employment. Conclusory statements are not enough to establish "a legitimate claim of entitlement," so the plaintiffs' claim against Governor Pritzker fails.

The *Lukaszczyk* and *Troogstad* plaintiffs also assert procedural due process claims against local authorities. They argue that local executives exceeded their authority by promulgating vaccination policies without legislative directives. The *Troogstad* plaintiffs claim the City of Chicago violated their procedural due process rights when Mayor Lori Lightfoot promulgated the City

Vaccination Policy. According to the *Troogstad* plaintiffs, the City Vaccination Policy is legislative in nature and requires approval from the Chicago City Council. As to the County Health Vaccination Policy, the *Lukaszczyk* plaintiffs point out that Cook County Health "answer[s] to the [Cook] County Board." Other than this uncontested assertion, though, they fail to explain what procedural violation occurred.

The procedural due process claims here fail because the *Lukaszczyk* and *Troogstad* plaintiffs have not articulated what procedural protections they should have been afforded. As this court has stated before, "[s]tate and local governments need not follow the pattern of separated powers in the national Constitution." *Auriemma v. Rice,* 957 F.2d 397, 399 (7th Cir. 1992) (citations omitted). For example, "[e]xecutive officials sometimes exercise legislative powers (think of the city manager model, related to parliamentary government)." *Id.* A "[p]urely executive official[] may have the power to set policy by delegation (express or implied by custom) when the legislature is silent." *Id.* (citations omitted). In fact, "[e]ven executive action in the teeth of municipal law could be called policy." *Id.* Without specifying the process that was due, how it was withheld, and evidence for the alleged protected interest, the plaintiffs' procedural due process claims fail. *See Roth,* 408 U.S. at 577; *Khan,* 630 F.3d at 527.

*** * ***

The district judges correctly ruled that the procedural due process claims of the plaintiffs were unlikely to succeed on the merits due to the bar of sovereign immunity or because they have failed to show how the local policies denied them procedural due process.

C. Free Exercise of Religion

The *Lukaszczyk* and *Troogstad* plaintiffs also claim that the state and local COVID-19 regulations unconstitutionally burdened their right to the free exercise of religion under the First Amendment. Many of these plaintiffs object on religious grounds to the use of alleged aborted fetal cells in the development of the vaccine.

The First Amendment provides that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. CONST. amend I. To merit protection under the Constitution, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). According to the plaintiffs, the COVID-19 regulations violated the exercise of their sincerely held religious beliefs by forcing them to either vaccinate in violation of their faith or lose their jobs. We consider these claims, with the exception of the Chicago Fire Department employees' claims against Governor Pritzker in *Troogstad,* which are moot for the reasons discussed above.

The *Lukaszczyk* and *Troogstad* plaintiffs cite certain decisions to guide our evaluation of these claims.

In *Fulton v. City of Philadelphia,* the Supreme Court reiterated that "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." 141 S. Ct. 1868, 1876 (2021) (citing *Emp. Div., Dep't of Human Res. of Oregon v. Smith,* 494 U.S. 872, 878-82 (1990)). The government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* (citations omitted). Further, a law is not generally applicable if it provides "`a mechanism for individualized exemptions'" or "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877 (citations omitted) (quoting *Smith,* 494 U.S. at 884). So, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* (quoting *Smith,* 494 U.S. at 884).

The Sixth Circuit reviewed a similar claim in *Dahl v. Board of Trustees of Western Michigan University,* 15 F.4th 728 (6th Cir. 2021). There, a public university promulgated a policy requiring "student-athletes to be vaccinated against COVID-19." *Id.* at 730. The policy permitted the school to consider "individual requests for medical and religious exemptions on a discretionary basis." *Id.* But, when 16 student-athletes requested religious exemptions, the university ignored or denied their requests and barred them from participating in team activities. *Id.* The student-athletes sued the university, and a district court

preliminarily enjoined the officials from enforcing the mandate. *Id.* The Sixth Circuit denied the motion for a stay of the preliminary injunction because the Free Exercise challenge would likely succeed on appeal. *Id.* at 736. The court stated that "having announced a system under which student-athletes can seek individualized exemptions, the University must explain why it chose not to grant any to plaintiffs." *Id.* Because "the University's policy is not neutral and generally applicable," the court "analyze[d] the policy through the lens of what has come to be known as `strict scrutiny.'" *Id.* at 734 (citing *Fulton,* 141 S. Ct. at 1881).

In *Troogstad,* Judge Lee concluded that there was no need to apply the test reiterated in *Fulton* because the plaintiffs had "not stated a claim under the Free Exercise Clause on the current record." On the facts before him, no plaintiff that "applied for and [was] denied an exemption from the City Vaccination Policy ... made a good faith attempt to comply with the Policy's exemption process." That process requires applicants to "fill out a form providing a reason for the request and an explanation of the principle of the applicant's religion that conflicts with vaccination."

Before us, the *Troogstad* plaintiffs concede that Judge Lee "correctly pointed out that there was no as-applied challenge" in the case. The plaintiffs note, though, that when the petition was filed, the City of Chicago had "not yet ruled on requests for religious accommodations." Rather than wait for the accommodation decisions, the *Troogstad* plaintiffs brought a facial challenge, arguing the

accommodation forms "demonstrate that the City reserved great discretion for itself to rule on whether the religious beliefs were legitimate, consistent, and approved by religious leaders." But this facial challenge is insufficient. On paper, the City of Chicago provides religious exemptions for its vaccination policy. Judge Lee gave the *Troogstad* plaintiffs an opportunity to develop the factual record on this point, but they declined to do so. It is unlikely that they will succeed on the merits without evidence of how the religious exemption is applied in practice.

The *Lukaszczyk* plaintiffs argue that Cook County Health's initial decision to reject any religious accommodation request made by someone who had previously received the flu vaccine violated the Free Exercise Clause. They claim this policy was never rescinded, although they admit that the government did an "about-face," later deciding to grant religious exemptions. According to the *Lukaszczyk* plaintiffs, this accommodation permitted individuals to seek "non-existent telecommuting positions" and favored individuals who received one Pfizer or Moderna shot over those who had natural immunity. Once again, if these assertions have merit, there is no record evidence to support them. The plaintiffs should have gathered facts and created a record detailing any wrongful denials of requests for religious exemptions. Instead, they made a facial challenge, which ignored the text of the policy's religious exemption and the status of the plaintiffs' exemption requests. This does not show a violation of their right to freely exercise their religions.

For these reasons, the district judges correctly concluded that the free exercise claims of the *Lukaszczyk* and *Troogstad* plaintiffs were unlikely to succeed on the merits.

D. The Illinois Health Care Right of Conscience Act

Finally, the *Lukaszczyk* and *Troogstad* plaintiffs claim that the state and local COVID-19 regulations violate their rights under the Illinois Health Care Right of Conscience Act, 745 ILL. COMP. STAT. § 70/1 *et seq.* ("HCRCA"). Between these two cases, the plaintiffs make claims against Governor Pritzker, Cook County, the City of Chicago, and Hektoen. As discussed above, the HCRCA claims against Governor Pritzker are either mooted by the 2022 Order or barred by the Eleventh Amendment. *See Pennhurst,* 45 U.S. at 106.

The HCRCA states in part:

> It shall be unlawful for any person, public or private institution, or public official to discriminate against any person in any manner ... because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.

745 ILL. COMP. STAT. § 70/5. The statute defines "[c]onscience" as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." *Id.* § 70/3.

The plaintiffs claim that the local vaccine mandates on their face violate this provision. But both of the challenged mandates provide individualized religious exemptions. For example, as Judge Lee explained in *Troogstad,* the City of Chicago's religious exemption form separates out individuals with "a sincerely held set of moral convictions arising from belief in and relation to religious beliefs." So, both the HCRCA and the City's Vaccination Policy endeavor to protect those who object to the vaccine for moral reasons.

The same is true in *Lukaszczyk.* Those plaintiffs argue that the County Health Vaccination Policy violates the HCRCA because it "threaten[s] suspension and subsequent termination" of noncompliant employees. But on its face, the policy permits exemptions "based upon a disability, medical condition, or sincerely held religious belief, practice, or observance." The text of this exemption fits within the HCRCA's conscience protections. The County Health Vaccination Policy also states it does not permit "exemption[s] or deferral[s] based solely upon a general philosophical or moral reluctance." Although more troubling on its face, this language does not disqualify the County Health Vaccination Policy under the HCRCA because that Policy still permits exemptions based upon a sincerely held religious belief.

The *Lukaszczyk* plaintiffs also have not made an as-applied claim or provided any evidence that the County Health Vaccination Policy's religious exemption does not cover people who are protected under the HCRCA. *See* *Wash. State Grange v. Wash.*

State Republican Party, 552 U.S. 442, 450-51 (2008) ("[W]e must be careful not to go beyond the statute's facial requirements and speculate about `hypothetical' or `imaginary' cases." (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)). In short, the *Lukaszczyk* plaintiffs do not present any textual argument or evidence that the County Health Vaccination Policy violates Illinois state law.

We cannot conclude that the local vaccine mandates violate the HCRCA as a facial matter. To pursue this claim, the plaintiffs should have produced evidence of their allegations. Without this evidence, it is unlikely that their claims against the local governments and Hektoen will succeed on their merits.

V. Conclusion.

Based on the records before us, the district judges did not abuse their discretion when they denied the plaintiffs' motions for a preliminary injunction. Even if the plaintiffs had established the other elements required for a preliminary injunction, they have not shown that their claims are likely to succeed on the merits. We therefore AFFIRM the decisions of the district court.

[1] Several days later, the Cook County President issued an executive order, which mandated the COVID-19 vaccine for certain Cook County employees and encouraged County offices to develop their own vaccination policies.

[2] The *Halgren* plaintiffs were the only parties to raise an equal protection claim, and that claim was made solely against the Governor, so we have no occasion to reach that constitutional argument.

[3] An "attack rate" is typically "calculated as the number of people who became ill divided by the number of people at risk for the illness." *Attack Rate,* ENCYCLOPEDIA BRITANNICA (2016).

Certificate of Service

I, Jonathan Lubin, an attorney, hereby certify under penalty of perjury, that I caused a copy of this instrument to be served upon the following parties, in accordance with Supreme Court Rule 26, by placing them in a US mail slot at 8800 Bronx Ave., Skokie, IL 60077, on or before Nov. 7, 2022.

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Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 6330 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

s/Jonathan Lubin