APPENDIX

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APPENDIX A

FILED
JAN 30, 2024
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH M. WILKINS, Plaintiff-Appellant, v. STEVE HERRON; et al., Defendants-Appellees.	No. 24-80 D.C. No. 6:23-cv-00169-AA District of Oregon, Eugene **ORDER**

Before: CALLAHAN, NGUYEN, and SUNG,
Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40. The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

FILED
DEC 23, 2024
Molly C. Dwyer, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH M. WILKINS, Plaintiff-Appellant, v. STEVE HERRON; CHAD LOWE; STEVEN COOK; PAUL DEAN; BEND-LAPINE SCHOOL DISTRICT 1, an Oregon Public School District, authorized and chartered by the laws of the State of Oregon Defendants-Appellees.	No. 24-80 D.C. No. 6:23-cv-00169-AA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted December 4, 2024
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: CALLAHAN, NGUYEN, and SUNG, Circuit Judges.

Appellant Keith Wilkins, a former public-school teacher, was placed on unpaid leave and subsequently fired for refusing to comply with COVID-19 vaccine and mask mandates. In response, he filed the present action against his former employer, the Bend La-Pine Administrative School District 1 ("School District"), as well as four administrators ("Administrators"), asserting various claims under 42 U.S.C. § 1983 ("Section 1983"). The district court dismissed Wilkins's amended complaint without leave to amend, and Wilkins timely appealed. We have jurisdiction under 28 U.S.C. § 1291. We review the dismissal of Wilkins's claims de novo and may affirm on any basis supported by the record. *Kappouta v. Valiant Integrated Servs., LLC*, 60 F.4th 1213, 1216 (9th Cir. 2023). We affirm.

1. Wilkins has failed to state a claim that Defendants violated Section 564 of the Food, Drug, and Cosmetic Act ("FDCA"). The relevant provision defines the responsibilities of the Secretary of Health and Human Services ("HHS") with respect to "ensur[ing] that health care professionals administering" emergency use products are properly informed and, in turn, "ensur[ing] that individuals to whom the product is administered" are properly informed. 21 U.S.C. § 360bbb-3(e)(1)(A)(i), (ii). Accordingly, the statute does not regulate the conduct of Defendants, who are neither HHS officials nor health care professionals.

Moreover, Wilkins cannot use Section 1983 to enforce Section 564 of the FDCA. Even when a Section 1983 plaintiff makes a showing that a "federal statute creates an individually enforceable

right in the class of beneficiaries to which he belongs," a defendant may rebut the "presumption that the right is enforceable under § 1983" by "demonstrating that Congress did not intend that remedy for a newly created right." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (citations and quotation marks omitted). "[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Id.* at 120 (cleaned up). "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 121 (citation and quotation marks omitted).

Even assuming that Wilkins has made the requisite showing of an individually enforceable right, Defendants have successfully rebutted the presumption that any such right is enforceable under Section 1983. Section 310 of the FDCA provides that, with specified exceptions for proceedings brought by the states, "all such proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States." 21 U.S.C. § 337(a). Thus, "[t]he FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions." *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 349 n.4 (2001).

2. Wilkins's remaining claims against the School District fail to state a claim under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

Monell requires a plaintiff suing a municipal entity under Section 1983 to "show that [his] injury was caused by a municipal policy or custom." *Los Angeles County v. Humphries*, 562 U.S. 29, 31 (2010). A municipality may be held liable "only for its own violations of federal law," *id.* at 36, and a municipal policy or custom must constitute a "deliberate choice to follow a course of action ... made from among various alternatives," *Benavidez v. County of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021) (citations and quotation marks omitted).

Wilkins claims that the School District violated his constitutional rights by enforcing Oregon's regulatory vaccine and mask mandates for public school employees. *See* Or. Admin. R. 333-019-1015, 333-019-1030. Wilkins does not dispute that the School District was bound by state law to enforce these mandates, but he argues that the School District may nevertheless be held liable based on *Evers v. Custer County*, 745 F.2d 1196 (9th Cir. 1984).

Evers is distinguishable. There, the plaintiff's claimed injury—the deprivation of her property interests without due process—was caused by municipal conduct that was not required by state law. Although a state law had made it the "duty of the commissioners to record as public highways roads which have become such by use," *id.* at 1198 n.1, it left the determination of whether the road in question was a public highway to the commissioners and did not prohibit them from providing the plaintiff with notice and an opportunity to be heard. By contrast, Wilkins has failed to allege that his injuries were caused by any conduct of Defendants not required by state law. Instead, he concedes that state laws required school employees to be vaccinated

and to wear masks and that those laws were binding on the School District.

Accordingly, Wilkins has failed to allege that his injuries are traceable to any policy or custom of the School District, as opposed to state law. *Cf. Sandoval v. County of Sonoma*, 912 F.3d 509, 517–18 (9th Cir. 2018) (policy or custom requirement met where municipalities erroneously interpreted state law); *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1202 (9th Cir. 2008), as amended (Jan. 30, 2009) (remanding for determination of whether plaintiffs could meet policy or custom requirement based on theory that municipality failed to take action that was not prohibited by state law), *rev'd on other grounds*, 562 U.S. 29 (2010).

3. Wilkins's remaining claims against the individual Administrators fail on qualified immunity grounds.

"The doctrine of qualified immunity protects government officials from liability for civil damages 'unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" *Wood v. Moss*, 572 U.S. 744, 757 (2014) (citation omitted). "The plaintiff bears the burden of pointing to prior case law that articulates a constitutional rule specific enough to alert these officers in this case that their particular conduct was unlawful." *Hughes v. Rodriguez*, 31 F.4th 1211, 1223 (9th Cir. 2022) (cleaned up). The plaintiff is not required to cite "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (citation omitted).

At the time the Administrators enforced the vaccine and mask mandates, there was no clearly established due process right to refuse a vaccine or to wear a mask during a pandemic. To the contrary, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), had upheld a government vaccine mandate over objections about the vaccine's efficacy and safety. As a result, the Administrators could have reasonably believed that they could require their employees to receive a COVID-19 vaccination and to comply with the much less invasive measure of wearing a mask. Indeed, since the onset of the COVID-19 pandemic, numerous courts have rejected claims that COVID-19 vaccine mandates[1] or mask mandates[2] violate individuals' substantive due process rights, which illustrates that any purported due process right to refuse a vaccine or to wear a mask during a pandemic was not clearly established.

There also was no clearly established First Amendment right to refuse to wear a mask on compelled speech grounds. Under *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47 (2006), conduct cannot "be labeled 'speech'

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[1] *E.g., Child.'s Health Def., Inc. v. Rutgers, the State Univ. of N.J.*, 93 F.4th 66, 78 & n.25 (3d. Cir. 2024), *cert. denied* 144 S. Ct. 2688 (2024); *Brox v. Hole*, 83 F.4th 87, 100–01(1st Cir. 2023); *Norris v. Stanley*, 73 F.4th 431, 435–37 (6th Cir. 2023), *cert. denied* 144 S. Ct. 1353 (2024); *Lukaszczyk v. Cook County*, 47 F.4th 587, 599–603 (7th Cir. 2022), *cert. denied sub nom. Troogstad v. City of Chicago*, 143 S. Ct. 734 (2023); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 592–94 (7th Cir. 2021); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293–94 (2d Cir. 2021) (per curiam), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021).

[2] *E.g., Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86, 96–97 (2d. Cir. 2024) (collecting cases), *cert. denied* No. 24-340, 2024 WL 4805912 (U.S. Nov. 18, 2024).

whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 65–66 (citation omitted). Instead, "First Amendment protection" extends "only to conduct that is inherently expressive." *Id.* at 66. When an observer has "no way of knowing" that conduct is intended to express a message unless it is "accompanied" by "speech explaining it," that is "strong evidence that the conduct at issue" is "not so inherently expressive that it warrants protection." *Id.* Accordingly, in *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), we rejected a claim that a school uniform policy compels inherently expressive conduct—namely, that students express a message of uniformity—because it was "unlikely anyone viewing a uniform-clad student would understand the student to be communicating a particular message via his or her mandatory dress." *Id.* at 428; *see id.* at 437–38.

Thus, the Administrators could have reasonably believed that wearing a mask was not inherently expressive conduct and, therefore, that the mask mandate did not compel speech in violation of the First Amendment. As with Wilkins's substantive due process claims, courts have rejected Wilkins's compelled speech claim,[3] which further demonstrates that Wilkins's asserted First Amendment right was not clearly established.

4. Because Wilkins has failed to show that he could amend his complaint to cure these defects, we affirm the district court's dismissal of his claims

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[3] *E.g., Falcone v. Dickstein*, 92 F.4th 193, 205–10 & n.10 (3d Cir. 2024) (collecting cases), *cert. denied sub nom. Murray-Nolan v. Rubin*, 144 S. Ct. 2560 (2024).

without leave to amend. See *Huffman v. Lindgren,* 81 F.4th 1016, 1021–22 (9th Cir. 2023).[4]

AFFIRMED.

[4] We need not address Wilkins's remaining arguments, including his arguments based on *Health Freedom Defense Fund, Inc. v. Carvalho*, 104 F.4th 715 (9th Cir. 2024), *petition for reh'g en banc filed* (9th Cir. June 21, 2024).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

KEITH M. WILKINS,

Plaintiff,

v.

STEVE HERRON, CHAD LOWE, STEVEN COOK, PAUL DEAN, BEND-LA PINE ADMINISTRATIVE SD-1, AN OREGON PUBLIC SCHOOL DISTRICT, AUTHORIZED AND CHARTERED BY THE LAWS OF THE STATE OF OREGON,

Defendants.

Case No. 6:23-cv-00169-AA
OPINION AND ORDER

AIKEN, District Judge:

Plaintiff Keith Wilkins, a schoolteacher, challenges state Covid-19 vaccine mandates implemented by his employer, the Bend-La Pine School District ("the District"). Plaintiff brings suit against the District and its human resources director; principal; superintendent; and appointed czar (collectively, "defendants"). Before the Court is defendant's Second Motion to Dismiss, ECF No. 7. Defendant's First Motion to Dismiss, ECF No. 5, is DENIED as MOOT, by the filing of plaintiff's First Amended Complaint ("FAC"), ECF No. 6. For the reasons explained, defendants' Second Motion to

Dismiss, ECF No. 7, is GRANTED. Plaintiff's FAC, ECF No. 6, is DISMISSED.

BACKGROUND

The District has employed plaintiff since August 2007. FAC ¶ 1. In response to the COVID-19 pandemic, the Oregon Health Authority ("OHA") mandated school employees to receive the COVID-19 vaccine or obtain a religious or medical exception. *See id.* ¶ 63 (citing n. 19, OAR 333-019-1030); *id.* ¶ 188 (discussing OAR 333-019-1015). The State of Oregon also required individuals in schools to wear masks. FAC ¶ 35. Plaintiff refused to comply with the vaccine and mask requirements. *Id.* ¶ 64. In February 2021, the District placed plaintiff on unpaid leave. *Id.* ¶ 27, 30. Plaintiff makes claims premised on allegations that the Covid-19 vaccine and mask requirements are unconstitutional.

STANDARD OF REVIEW

To survive a motion to dismiss under the federal pleading standards, the complaint must include a short and plain statement of the claim and "contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard ... asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* The court is not required to accept legal conclusions, unsupported by

alleged facts, as true. *Id*. The complaint must contain more than "naked assertion[s,]" "labels and conclusions," or "a formulaic recitation of the elements of a cause of action" to state a claim for relief. *Twombly*, 550 U.S. at 555–57.

DISCUSSION

Plaintiff claims that defendants are liable under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendment, and Section 564 of the Food, Drug, and Cosmetic Act. In response to defendants' motion, plaintiff concedes dismissal of his sixth, seventh, and eighth claims for relief, and the Court accordingly dismisses those claims.[1] Plaintiff seeks damages; a permanent injunction; and attorney fees and costs. Defendants move to dismiss all claims under Federal Rule of Civil Procedure 12(b)(6).

I. Proper Party

Defendants contend that plaintiff's challenge to the vaccine mandate should be brought against the state—not defendants. Mot. at 4. Defendants assert that they are the District's employees, bound to follow the state vaccine laws, and therefore, the proper party to sue would be the State of Oregon. *Id*.

Plaintiff responds that individual defendants are liable under 42 U.S.C. § 1983 because they were acting under color of state law when implementing OAR 333-019-1015 and OAR 333-019-1030—the mask and vaccine mandates ("the mandates"). Plaintiff alleges that the mandates, as "enforced" by individual defendants, violate his rights under the

[1] Plaintiff concedes dismissal of claims for disability discrimination, conspiracy, and wrongful discharge.

First and Fourteenth Amendment. Plaintiff maintains that, because defendants complied with the mandates, they are liable to him for the violation of his constitutional rights, and "not immune" from suit. Resp. at 3–4. At this stage of litigation, the Court finds that plaintiff's allegations are sufficient to infer that defendants are the proper party and defendants' motion is denied on that issue,

II. Vaccine Mandate — Fourteenth Amendment

Plaintiff alleges that defendants violated his "liberty interest to refuse medical treatment" under the Fourteenth Amendment when defendants attempted to coerce him to comply with the mandates. FAC ¶¶ 174–75. Defendants assert that this claim must be dismissed because there is no fundamental right to refuse vaccination. Mot. at 4. Plaintiff responds that the international law principle of *jus cogens*,[2] which plaintiff connects with the Nuremburg Code to prohibit forced medical experimentation, requires the Court to analyze defendants' application of the mandates under strict scrutiny. Resp. at 14, 18.

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[2] Explained in *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1247 n. 24 (D. Or. 2021), "*Jus cogens*, the literal meaning of which is 'compelling law,' is the technical term given to those norms of general international law that are argued as hierarchically superior." Kamrul Hossain, The Concept of Jus Cogens and the Obligation Under the U.N. Charter, 3 SANTA CLARA J. INT'L L. 72, 73 (2005); *see also United States v. Struckman*, 611 F.3d 560, 576 (9th Cir. 2010) ("*Jus cogens* norms are a subset of 'customary international law'; 'customary international law' is defined as the general and consistent practice of states followed by them from a sense of legal obligation. These norms, which are derived from values taken to be fundamental by the international community are binding on all nations and cannot be preempted by treaty.")

The United States Supreme Court rejected the notion that vaccine mandates violate the liberty interest secured by the Due Process Clause of the Fourteenth Amendment. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In *Jacobson*, the Supreme Court wrote that "a community has the right to protect itself against an epidemic of disease [that] threatens the safety of its members." *Id.* at 27–28. Courts across the country have concluded that *Jacobson* established that there is no fundamental right to refuse vaccination, and that rational basis review is appropriate. *See Klaassen v. Trs. of Ind. Univ.*, 549 F. Supp. 3d 836, 871–71 (N.D. Ind. July 18, 2021), *aff'd*, 7 F.4th 592 (7th Cir. 2021) ("Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."); *Norris v. Stanley*, 567 F. Supp. 3d 818, 821, No. 1:21-cv-756 (W.D. Mich. Oct. 8, 2021) ("Plaintiff is absolutely correct that she possesses those rights [to privacy and bodily integrity], but there is no fundamental right to decline a vaccination.").

This district has also found that *Jacobson* is applicable when reviewing the COVID-19 vaccine mandate. *See e.g., Johnson*, 567 F. Supp. 3d at 1251; *Williams v. Brown*, 567 F. Supp. 3d 1213, 1224-26 (D. Or. 2021). Under rational basis review, government conduct is presumed valid and will be upheld so long as it is rationally related to a legitimate interest. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.432, 440 (1985).

Further, under rational basis review, courts regularly uphold vaccination requirements in the context of public education. *E.g., Gunter v. North*

Wasco Cnty. Sch. Dist. Bd. Of Edu., 577 F. Supp. 3d 1141, 1160 (D. Or. 2021) (rejecting an argument that a COVID-19 vaccine mandate violated provisions of the U.S. Constitution, including substantive due process); *Zucht v. King*, 260 U.S. 174, 176 (1922) (rejecting a challenge to Texas ordinance requiring vaccination to attend school); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (rejecting an argument that a mandatory vaccine requirement violated provisions of the U.S. Constitution, including substantive due process); *Williams*, 567 F. Supp. 3d at 1227 (rejecting a claim that the COVID-19 vaccine mandate violated U.S. Constitution provisions, including substantive due process).

The Court also finds that plaintiff's argument, raised under the principle of *jus cogens*, fails to state a claim because plaintiff chose not to take the vaccine, thus no forced experimentation—allegedly justifying "strict scrutiny" review—occurred. The Court does not reach further legal analysis of the international law doctrines plaintiff posits.

III. Mask Mandate — Fourteenth Amendment

Plaintiff alleges that defendants' implementation of Oregon's mask mandate for school employees violates his liberty interest to refuse a medical device and that it is not rational to compel healthy people to wear a mask. FAC ¶¶ 39, 180–82. Plaintiff asserts that a mask is an experimental medical device. FAC ¶¶ 179-80. Defendants contend that this claim should be dismissed, because mask mandates do not require medical treatment, and therefore do not violate his right to refuse a medical device. Mot. at 5–6.

This District has found the mask mandate is no more medical treatment than laws requiring shoes in

public places or helmets while riding a motorcycle. *Gunter*, F. Supp. 3d at 1156.

The Court agrees and finds that plaintiff has failed to state a claim. The mask mandate is not medical treatment, and defendant's implementation of the mask mandate does not violate a fundamental right under the Fourteenth Amendment.

Further, plaintiff alleges that he never wore a mask. FAC ¶ 164. Defendants' motion is granted on this issue, and plaintiff's second claim for relief is dismissed.

III. Food, Drug, and Cosmetic Act

Plaintiff asserts that, under Section 564 of the Food, Drug, and Cosmetic Act, entities are prohibited from mandating the use of products under the Emergency Use Authorization ("EUA"). FAC ¶ 190. Plaintiff alleges that, under the EUA, persons must be granted a choice to receive or not receive the [Pfizer-BioNTech, Moderna, or Janssen COVID-19 vaccine], *id*. ¶ 71, and that defendants failed to grant plaintiff such a choice under the mandates.

Defendants move to dismiss on the grounds that there is no private right of action under the Food, Drug, and Cosmetic Act, and that, at any rate, the mandates permit persons to choose whether to take the vaccine, and plaintiff chose not to take the vaccine. Mot. at 6–7.

This District has found that there is no private right of action to enforce Section 564. 21 U.S.C. § 337(a), (b)(1). *Kiss v. Best Buy*, 2022 WL 17480936, at *7-8 (D. Or. Dec. 6, 2022). The availability of a § 1983 remedy depends on whether the statute creates a sufficiently specific obligation for the courts to enforce, and requires that the remedy is not foreclosed by express provision of the statute itself.

Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423, 432. The Food, Drug, and Cosmetic Act expressly forbids private rights of action under that statute. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010) (citing 21 U.S.C. § 337). S*ee also Lloyd v. Sch. Bd. Of Palm Beach Cnty.*, 570 F. Supp. 3d 1165, 1175 (S.D. Fla. 2021).

Accordingly, plaintiff cannot state a claim for violation of a right under the Food, Drug, and Cosmetic Act, given the statute's express prohibition on private rights of action.

And the EUA Section 564 only applies to the Secretary of Health and Human Services and medical providers. *Johnson*, 567 F. Supp. 3d. at 1255–56. *See also Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1173 (D.N.M. Sep. 13, 2021) (stating that 21 U.S.C. § 360bbb-3(e)(1)(A) only applies to medical providers who directly administer the vaccine). Plaintiff has not alleged that defendants provided the vaccines or masks. Rather, plaintiff alleges that defendants enforced an unconstitutional OHA mandate. Accordingly, defendants are not included within the statute. At any rate, the text of the vaccine mandate, and defendants' implementation, provided plaintiff and others with the choice whether to receive the vaccine. *See* Mot. at 7; *Johnson*, 567 F. Supp. 3d at 1256–67. Accordingly, defendants' motion is granted on this issue and plaintiff's third claim for relief is dismissed.

IV. Mask Mandate — First Amendment

Plaintiff alleges that the mask mandate violated his First Amendment right to free expression. FAC ¶ 199. Plaintiff alleges that forcing individuals to wear masks is a form of government indoctrination and

oppression. *Id*. ¶ 194–95. Defendants contend that plaintiff fails to state a claim for a violation of the First Amendment because mask mandates regulate conduct, not speech, and do not implicate the First Amendment at all. Mot. at 7–8.

To determine whether the First Amendment applies, a court must ask "whether conduct within a 'significant expressive element' drew the legal remedy or the ordinance has the inevitable effect of 'singling out those engaged in expressive activity.'" *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 706–07). A court may consider the inevitable effects of a statute, as well as a statute's stated purpose. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). The First Amendment "does not prevent restrictions directed at ... conduct from imposing incidental burdens on speech." *Id*. at 567. Vaccine mandates are "viewed as a means of preventing the spread of COVID-19, not expressing any message." *Antietam Battlefield KOA v. Hogan*, 641 F. Supp. 3d 214, 237 (D. Md 2020), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020), and *aff'd in part, appeal dismissed in part,* No. 20-2311, 2022 WL 1449180 (4th Cir. May 9, 2022).

Here, plaintiff's allegations show that mandates apply equally to all workers in schools and do not have the effect of singling out those engaged in a particular speech related activity. Further, the pleadings demonstrate that the mask mandate is content neutral. Plaintiff's allegations do not demonstrate that the mandate's purpose—protecting public health and preventing the spread of COVID-19—is related to speech in any way. Accordingly, defendants' motion is granted on this issue and

plaintiff's fourth claim for relief under the First Amendment is dismissed.

V. Qualified Immunity Under § 1983

In his response to defendants' motion, plaintiff asserts that, based on defendants' violation of his constitutional rights under the First and Fourteenth Amendment, and the Food, Drug, and Cosmetic Act, defendants are liable under § 1983, and that qualified immunity does not apply. Resp. at 34.

Because plaintiff has failed to state a claim that defendants violated any legal right, the Court need not reach plaintiff's argument concerning qualified immunity. *Kisela v. Hughes*,138 S.Ct. 1148, 1152 (2018).

CONCLUSION

For the reasons set forth above, defendants' Second Motion to Dismiss, ECF No. 7, is GRANTED. Plaintiff's First Amended Complaint, ECF No. 6, is DISMISSED. The Court finds under the circumstances here, there is no set of facts that could be proved under amendment to pleadings that would constitute valid and sufficient claim or defense. Fed. R. Civ. P. 15(a). Accordingly, dismissal is WITHOUT leave to amend and judgment shall be entered accordingly.

It is so ORDERED and DATED this 30th day of November 2023.

/s/Ann Aiken
ANN AIKEN
United States District Judge