App. No. 21A_____

In the Supreme Court of the United States

TALISHA VALDEZ AND JENNIFER BLACKFORD,

APPLICANTS,

v.

MICHELLE LUJAN GRISHAM AND DAVID SCRASE,

RESPONDENTS.

APPENDIX TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
VOLUME I (Pages App. 1 to App. 238)

To the Honorable Neil M. Gorsuch
Associate Justice of the Supreme Court of the United States and Acting Circuit Justice for the Tenth Circuit

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December 15, 2021

Christopher M. Wolpert
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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TALISHA VALDEZ, on behalf of herself and others similarly situated, et al.,
Plaintiffs - Appellants,

v.

MICHELLE LUJAN GRISHAM, officially and individually, acting under the color of law, et al.,
Defendants - Appellees.

No. 21-2105
(D.C. No. 1:21-CV-00783-MV-JHR)
(D. N.M.)

ORDER

Before **HARTZ** and **MATHESON**, Circuit Judges.

This matter comes before the court on Appellants' motion for an injunction seeking to prohibit New Mexico officials from enforcing a COVID-19 vaccine mandate that applies to certain healthcare workers and State Fair attendees pending this interlocutory appeal of the district court's denial of such relief. Appellants also seek a stay of the district-court proceedings.

In considering "a request for a stay or an injunction pending appeal," we "make[] the same inquiry as [we] would when reviewing a district court's grant or denial of a preliminary injunction." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001).

> To succeed on a typical preliminary-injunction motion, the moving party needs to prove four things: (1) that she's substantially likely to succeed on

> the merits, (2) that she'll suffer irreparable injury if the court denies the injunction; (3) that her threatened injury (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't adverse to the public interest.

Mrs. Fields Franchising, LLC v. MFGPC, 941 F.3d 1221, 1232 (10th Cir. 2019) (internal quotation marks omitted); *see also* 10th Cir. R. 8.1. If a movant fails to establish a likelihood of success on the merits, the court can deny the motion. *See, e.g.*, *Warner v. Gross*, 776 F.3d 721, 736 (10th Cir. 2015) (finding "it unnecessary to address the remaining requirements for a preliminary injunction" where the "plaintiffs failed to establish a significant possibility of success on the merits" and denying an emergency motion for stay of execution pending appeal for the same reason).

To show a likelihood of success in their interlocutory appeal, Appellants must show a likelihood this court will hold that the district court abused its discretion by denying their motion for a preliminary injunction. *See First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1140 (10th Cir. 2017). The district court based its denial in part on its conclusion that Appellants were unlikely to succeed in their suit challenging the vaccine mandate. Among other things, we do not find persuasive the arguments Appellants advance to challenge this conclusion.

At the outset, we note that Plaintiff-Appellant Valdez concedes that her claims for injunctive relief are moot because the State Fair is over.

Plaintiff-Appellant healthcare worker Blackford argues the district court erred by finding she is unlikely to succeed on the merits of her substantive-due-process, equal-protection, Contracts Clause, and New Mexico Constitution claims.

Blackford's substantive-due-process claim rests on her argument that the vaccine mandate infringes her rights to occupational choice and bodily integrity. Blackford argues that these are fundamental rights, triggering heightened scrutiny of the vaccine mandate. But the district court relied on Tenth Circuit precedent holding that the "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny," *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012), and Blackford does not address this precedent or otherwise explain how the district court abused its discretion by relying on it and concluding rational-basis review applies here. As for Blackford's bodily-integrity argument, it was inadequately presented to the district court. Her pleadings submitted to the district court before it denied her request for preliminary injunction present her bodily-integrity claim only as a Fourth Amendment claim and without any explanation (or even citing authority that presented an explanation) of how the Fourth Amendment would apply in this context. Thus the bodily-integrity claim was forfeited below. *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012).

"Under rational basis review, we will uphold a law if there is any reasonably conceivable state of facts that could provide a rational basis for the infringement." *Maehr v. U.S. Dep't of State*, 5 F.4th 1100, 1122 (10th Cir. 2021) (brackets and internal quotation marks omitted). "This requires no more than a 'reasonable fit' between governmental purpose and the means chosen to advance that purpose." *Id.* (ellipsis and internal quotation marks omitted).

Blackford does not point to evidence undermining the district court's conclusion that there is a rational connection between the vaccine mandate and the "compelling" state interest in "[s]temming the spread of COVID–19," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Yet she would have to in order to prevail on her substantive-due-process claim under rational-basis review. *See, e.g.*, *Maehr*, 5 F.4th at 1122 ("Our rational basis review is highly deferential toward the government's actions, and the burden is on the plaintiff to show the governmental act complained of does not further a legitimate state purpose by rational means." (brackets and internal quotation marks omitted)).

On equal protection, Blackford does not contest the district court's finding that the vaccine mandate does not target a suspect class. Blackford's equal-protection claim will therefore proceed under rational-basis review, *see Rector v. City & Cnty. of Denver*, 348 F.3d 935, 949 (10th Cir. 2003), dooming her argument that the district court abused its discretion for the reasons discussed above.

On Blackford's Contracts Clause claim, the district court concluded she failed to establish a substantial impairment of any contractual relationship in part because she did not provide the district court with copies of the purported contract at issue or cite to any provisions therein to show that the mandate undermines her contractual bargain. Blackford does not argue the district court erred in reaching this conclusion. Blackford similarly fails to challenge the district court's conclusion that the Eleventh Amendment bars her from bringing her New Mexico Constitution claims in federal court, nor has she shown that the New Mexico Constitution provides her with more protection than the

United States Constitution in this context. She is therefore unlikely to show that the district court abused its discretion in finding she is unlikely to succeed on those claims in her federal suit. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019).

We conclude that Appellants have failed to show that an injunction pending appeal or a stay of the district-court proceedings is warranted in this case. Our conclusion comports with holdings from the Supreme Court and other circuits in similar circumstances. *See, e.g.*, *We The Patriots USA v. Hochul*, No. 21A125, --- S. Ct. ---, 2021 WL 5873122 (Dec. 13, 2021); *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021); *We The Patriots*, 17 F.4th 266; *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021). Therefore, Appellants' motion is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD, on behalf of herself
and others similarly situated,

Plaintiffs,

Case No. 21-cv-783 MV/JHR

vs.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages (the "Complaint") [Doc. 1]. The Court, having considered the Complaint and the relevant law, finds that Plaintiffs' requests for a temporary restraining order and a preliminary injunction are not well-taken and will be denied.

BACKGROUND

Since its emergence last year, the novel coronavirus 2019, or Sars-CoV-2, the virus that causes COVID-19, has spread exponentially through the world, and New Mexico has been no exception. Doc. 13 at 3. The ease and rapidity with which COVID-19 spreads and its potentially

severe symptoms create a frightening potential for mass deaths and an overloaded healthcare system. *Id.* at 4. During the winter of 2020-21, the United States averaged nearly 200,000 new cases and 4,000 COVID-19-related deaths every day. *Id.* at 4-5. One in five New Mexicans who were hospitalized for COVID-19 passed away. *Id.* at 5.

In February 2020, the United States Department of Health and Human Services ("HHS") declared a public emergency and instructed the United States Food and Drug Administration ("FDA") to grant emergency use authorizations ("EUA") for "medical devices and interventions" to combat the pandemic, including vaccines. *Id.* at 6. The FDA issued detailed guidance to vaccine manufacturers, requiring a determination that the vaccine's benefits outweigh its risks based on data from at least one well-designed Phase 3 clinical trial that demonstrates the vaccine's safety and efficacy in a clear and compelling manner. *Id.*

Three vaccine candidates emerged as frontrunners: Pfizer/BioNTech and Moderna's two-dose mRNA vaccines, and Johnson & Johnson's ("J&J") single-dose viral vector vaccine. *Id.* By the time Pfizer, Moderna, and J&J applied for EUA status (which, for Pfizer and Moderna, was in November 2020, and for J&J, was in February 2021), each vaccine had undergone significant testing. *Id.* at 6-7. After a team of representatives from across the FDA reviewed the data submitted by each manufacturer and independently assessed the risks and benefits of the vaccines, the FDA granted EUA, for individuals 16 and older, to Pfizer and Moderna's vaccines in December 2020 and to J&J's vaccine in February 2021, noting that each had met the expectations set out in the FDA's comprehensive guidance. *Id.* at 7. Pfizer's vaccine later received EUA for individuals 12 and older, and on August 23, 2021, received full FDA approval for individuals 16 and older. *Id.* at 8.

Since the three vaccines received EUA status, over 368 million doses have been administered and over 173 million Americans have been fully vaccinated. *Id.* Comprehensive data collected since the three vaccines received EUA status demonstrates that they are safe and highly effective in preventing infection and severe illness, and that serious adverse side effects from the vaccines are exceedingly rare. *Id.* at 8-9. Further, the immunity provided by the vaccines is significantly more robust than natural immunity gained following infection. *Id.* at 9.

In late 2020, the "Delta" variant, a highly infectious and possibly more deadly strain of the coronavirus, appeared in India; by mid-June of 2021, the Centers for Disease Control and Prevention ("CDC") had labeled it a "variant of concern." *Id.* The Delta variant now accounts for virtually all new infections in the United States – including in New Mexico – and is believed to be twice as contagious as previous variants. *Id.* Studies indicate that individuals infected with the Delta variant are more likely to be hospitalized than those infected with other strains. *Id.* While the Delta variant is more likely to cause "breakthrough" infections than other variants, the vaccines still provide strong protection against serious illness and death in individuals who contract the Delta variant. *Id.* at 10.

Although case rates in New Mexico had begun to drop dramatically, the numbers rose rapidly with the rise of the Delta variant. *Id.* at 11. Back in June, there were approximately 60 new cases a day but by mid-August, there were nearly 900 new cases a day – a fifteenfold increase. *Id.* As a result, hospitals are again operating over their capacity to accommodate the surge of infected New Mexicans, the majority of whom are not vaccinated. *Id.*

To stem the tide of new cases and ease the pressure on our hospitals, on August 17, 2021, New Mexico Department of Health Acting Secretary David R. Scrase, M.D., issued "Public Health Emergency Order Requiring All School Workers Comply with Certain Health

Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated" (the "PHO"). Doc. 1-2. In relevant part, the PHO requires all "hospital workers . . . to be fully vaccinated against COVID-19 unless they qualify for an exemption." *Id.* at 3-4. The PHO also requires that "[a]ll persons who are eligible to receive a COVID-19 vaccine and enter the grounds of the New Mexico State Fair . . . provide adequate proof of being fully vaccinated against COVID-19 . . . unless the individual qualifies for an exemption." *Id.* at 5. Both hospital workers and individuals who seek entry into the State Fair "may be exempt from the COVID-19 vaccination requirement . . . if they have a qualifying medical condition which immunization would endanger their health, or they are entitled . . . to a disability-related reasonable accommodation or a sincerely held religious belief accommodation." *Id.* at 4, 5-6. A religious belief exemption may be supported by "a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual." *Id.* at 4-5, 6. The PHO specifically indicates that the vaccine requirements set forth therein are based on the following scientific and medical evidence: "the currently available COVID-19 vaccines are safe and the most effective way of preventing infection, serious illness, and death"; "widespread vaccination protects New Mexico's health care system as vaccines decrease the need for emergency services and hospitalization"; and "the refusal to receive the COVID-19 vaccine not only endangers the individual but the entire community, and further jeopardizes the progress the State has made against the pandemic by allowing the virus to transmit more freely and mutate into more transmissible or deadly variants." Doc. 1-2.

On August 19, 2021, Plaintiffs commenced the instant action. Named Plaintiff Jennifer Blackford is a registered nurse employed by Presbyterian. Doc. 1-3 ¶ 2. She asserts that the

PHO "requires that [she] be terminated if [she] refuse[s] to be vaccinated for COVID-19," and that, based on her "medical training and her own independent research," she is "opposed to receiving the EUA covid vaccines." *Id.* ¶¶ 4-5. Named Plaintiff Talisha Valdez, on behalf of herself and her 11- and 12-year-old daughters, has contracted to exhibit their animals at the New Mexico State Fair. Doc. 1-4 ¶¶ 2, 6. She asserts that the PHO "prohibits [her] and [her] children from attending the New Mexico State Fair and showing their animals," and that she has chosen "not to be vaccinated" and "to refuse to have [her] child injected with an experimental EUA vaccine." *Id.* at ¶¶ 9, 12. Together, Plaintiffs allege that, unless this Court enters a temporary restraining order and preliminary injunction, under the PHO, "New Mexicans will be forced to take an experimental vaccine in order to retain their employment and will forever lose the ability to exhibit their unique animals at the New Mexico State Fair." Doc. 1 at 22. In their Complaint, Plaintiffs request "a temporary restraining order to prohibit Defendants from enforcing public health orders against the Plaintiffs and other putative class members that are similarly situated," and a preliminary injunction "to prohibit Defendants from enforcing public health orders in the arbitrary and capricious manner and fashion engaged by Defendants." *Id.* at 15.

In an Order entered on August 23, 2021, the Court denied Plaintiffs' request for entry of an emergency order on an *ex parte* basis, explaining that Plaintiffs did not meet the requirements of Rule 65(b)(1) of the Federal Rules of Civil Procedure that would entitle them to a temporary restraining order "without written or oral notice to the adverse party or its attorney." Doc. 3. The Court, however, set an expedited briefing schedule on Plaintiffs' request for preliminary relief. *Id.* Later that day, Plaintiffs filed a motion asking the Court to reconsider its decision. Doc. 4. In an Order entered on August 25, 20121, the Court denied Plaintiffs' motion, explaining that Plaintiffs provided no basis for the Court to use its inherent authority to

reconsider its decision to refrain from issuing an order enjoining enforcement of the PHO without providing Defendants with an opportunity to respond. Doc. 10. In accordance with the expedited briefing schedule set by the Court, Defendants filed a response in opposition on August 30, 2021, Doc. 13, and Plaintiffs' reply followed on September 1, 2021. Doc. 14.

STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019). To obtain a "typical" preliminary injunction, the moving party must prove four things: (1) "that she's substantially likely to succeed on the merits"; (2) "that she'll suffer irreparable injury if the court denies the injunction"; (3) "that her threatened injury (without the injunction) outweighs the opposing party's under the injunction"; and (4) "that the injunction isn't adverse to the public interest." *Id.* (citation omitted).[1] "The third and fourth factors 'merge' when, like here, the government is the opposing party." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). "[B]ecause a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Id.* (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation marks omitted)). Notably, the movant "must" satisfy her burden as to each element; the elements "do not establish a balancing test – each must be satisfied independently,

[1] As noted above, Plaintiffs request both a temporary restraining order and a preliminary injunction. Where, as here, there has been notice to the adverse party, a motion for a temporary restraining order "may be treated by the court as a motion for preliminary injunction." 13 Moore's Federal Practice § 65.31 (2920). Further, the standard applicable to a motion for a preliminary injunction is the same as that applicable to a motion for a temporary restraining order. *Firebird Structures, LLC v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1505*, 252 F. Supp. 3d 1132, 1156 (D.N.M. 2017). Accordingly, the Court analyzes Plaintiffs' requests for temporary and preliminary relief together as a request for a preliminary injunction.

and the strength of one cannot compensate for the weakness of another." *Peterson v. Kunkel*, 492 F. Supp. 3d 1183, 1192 (D.N.M. 2020) (citing *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F. 3d 1276, 1282 (10th Cir. 2016)).

Courts, however, "'disfavor' some preliminary injunctions and so require more of the parties who request them." *Free the Nipple*, 916 F.3d at 797 (citing *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005)). Specifically, a "disfavored preliminary injunction[]" is one that does not "merely preserve the parties' relative positions pending trial," but instead "may exhibit any of three characteristics": (1) "it mandates action (rather than prohibiting it)"; (2) "it changes the status quo"; or (3) "it grants all the relief that the moving party could expect from a trial win." *Free the Nipple*, 916 F.3d at 797. To obtain a "disfavored" preliminary injunction, the moving party "faces a heavier burden on the likelihood-of-success-on-the merits and the balance-of-harms factors," namely, she must make a "strong showing that these tilt in her favor." *Id.* (citation omitted).

DISCUSSION

Defendants argue that the injunction Plaintiffs seek, namely, "to prohibit Defendants from enforcing public health orders," is disfavored for two reasons: (1) Plaintiffs seek the same injunctive relief sought in their Complaint, and thus "seek virtually all the relief they could be awarded at the end of trial on the merits"; and (2) an injunction would "force Defendants to affirmatively alter the PHO and the State's enforcement of it," thus changing the status quo. Doc. 13 at 15-16. The Court is inclined to agree that the requested preliminary injunction is disfavored. *See Peterson*, 492 F. Supp. 3d at 1193 (finding that the requested preliminary injunction, namely, requiring defendants to allow private schools to conduct in-person learning at 50% capacity, was disfavored because it would change the status quo set by the challenged

public health order, which imposed a 25% capacity limitation on private schools, and because the requested preliminary relief was "an exact overlay of relief sought" in plaintiffs' complaint). The Court, however, need not decide whether the heightened disfavored-injunction standard applies, thus requiring "strong" showings from Plaintiffs on the first and third factors, because, as set forth herein, Plaintiffs fail to make even the baseline showing on any of the four factors as required to obtain a "typical" injunction.

I. Likelihood of Success on the Merits

In their Complaint, Plaintiffs assert that the PHO's vaccine requirements violate the Federal Food, Drug, and Cosmetic Act ("FDCA"), their Fourteenth Amendment rights to equal protection, substantive due process, and procedural due process, their rights under Article 1, Section 10 of the United States Constitution, and their rights under the New Mexico Constitution. Doc. 1 at 9-14. Plaintiffs, however, have failed to establish that any of these claims are likely to succeed on the merits.

A. FDCA Claims

According to Plaintiffs, by mandating that certain individuals be vaccinated against COVID-19, the PHO violates the FDCA, because the provisions of the FDCA relevant to medical products under an EUA "state[] that where a medical product is 'unapproved' then no one may be mandated to take it." Doc. 1 ¶ 54 (quoting 21 U.S.C. § 360bbb-3(e)). As an initial matter, and despite Plaintiffs' protestation to the contrary, the FDA has now given its full approval – not just emergency use authorization – to the Pfizer vaccine as administered to individuals 16 years of age and older. *See FDA News Release,* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/comirnaty-and-pfizer-biontech-covid-19-vaccine ("On August 23, 2021, the FDA approved the first COVID-19 vaccine. The

vaccine has been known as the Pfizer-BioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty, for the prevention of COVID-19 disease in individuals 16 years of age and older."). Accordingly, the provisions of the FDCA quoted by Plaintiff, which are applicable only to medical products under an EUA, are not applicable to the administration of the Pfizer vaccine to individuals 16 years of age and older.

Further, while the statutory provisions quoted by Plaintiffs apply to the Moderna vaccine, the J&J vaccine, and the Pfizer vaccine as administered to individuals under the age of 16, those provisions nowhere prevent the state, or any other entity, from requiring certain individuals to be vaccinated against COVID-19. Rather, in relevant part, the FDCA requires that, for medical products under an EUA, "HHS must establish conditions to facilitate informed consent." *Klaassen v. Trustees of Indiana Univ. ("Klaassen I")*, __ F. Supp. 3d __, No. 21-cv-238, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021), *aff'd*, 7 F.4th 592 (7th Cir. 2021) (citing 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)). Specifically, "HHS must ensure that individuals taking the vaccine are informed that the Secretary has authorized the emergency use of the product," "of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown," and "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." *Klaassen I*, 2021 WL 3073926, at *25 (quoting 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)). This informed consent requirement "only applies to medical providers." *Klaassen I*, 2021 WL 3073926, at *25. Here, Defendants are not "directly administering the vaccine" to hospital workers and individuals who seek entry into the State Fair; instead, they are requiring such individuals "to obtain the vaccine from a medical provider and to attest that they have been vaccinated, save for certain

exemptions." *Id.* The individuals "will be informed of the risks and benefits of the vaccine and of the option to accept or refuse the vaccine by their medical providers." *Id.*

Accordingly, to the extent that the vaccines at issue here remain subject to the EUA provisions of the FDCA, the PHO does not run afoul of those provisions. *Id.; see also Bridges v. Hous. Methodist Hosp.*, No. 21-H-1774, 2021 WL 2399994, at * (S.D. Tex. June 12, 2021) (rejecting hospital employee's claim, virtually identical to Plaintiffs' claim here, that under FDCA "no one can be mandated to receive 'unapproved' medicines in emergencies," noting that the FDCA "confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency," "neither expands nor restricts the responsibilities of private employers," and "does not confer a private opportunity to sue the government"); Dep't of Justice, *Whether Section 564 of the Food, Drug and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* at 2 (July 6, 2021), https://www.justice.gov/olc/file/1415446/download (finding that informed consent provision in FDCA "specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements"). It follows that Plaintiffs are unlikely to succeed on the merits of their FDCA claims.

B. Substantive Due Process Claims

Plaintiffs generally allege that they "have [constitutionally] protected liberty interests" "in their right to live without governmental interference," their right "to bodily integrity," their right "to raise their children as they see fit," and their right "to engage in their chosen professions," and that because the PHO is "not narrowly tailored," it violates these substantive due process rights. Doc. 1 ¶¶ 63, 65. Here, "plaintiffs advance a substantive due process challenge to a *legislative* enactment," namely, the PHO. *Dias v. City & Cty. of Denver*, 567 F.3d

1169, 1182 (10th Cir. 2009) (emphasis in original); *see also ETP Rio Rancho Park, LLC, v. Grisham*, __ F. Supp. 3d __, No. 21-cv-92, 2021 WL 765364, at *41 (D.N.M. Feb. 26, 2021) (noting that, "[although the NMDOH – a state executive agency" – issued the challenged PHO, that PHO was "akin to a legislative action"). Accordingly, a "two-part substantive due process framework is applicable." *Dias*, 567 F.3d at 1182; *see also ETP Rio Rancho Park*, 2021 WL 765364, at *41 (applying the two-part approach to trampoline park owners' substantive due process challenge to PHO that limited operations for recreational facilities). First, the Court must "carefully describe the asserted fundamental liberty interest." *Dias*, 567 F.3d at 1182 (citation omitted). Second, the Court must decide "whether that interest is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997)). If the Court determines that the rights asserted are fundamental, the Fourteenth Amendment "forbids the government to infringe [those] rights at all, . . . unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721. If the legislative (or executive) action at issue "does not implicate a fundamental right, it must nonetheless bear a rational relationship to a legitimate government interest." *Dias*, 567 F.3d at 1182 (citation omitted).

Here, Plaintiffs' assertion of broadly defined rights falls short of providing the "careful description of the asserted fundamental liberty interest" required under *Glucksberg* to establish a fundamental right. *ETP Rio Rancho Park*, 2021 WL 765364, at * 42. Plaintiffs do not explain how the rights allegedly violated by the PHO are *fundamental*; indeed nowhere, do they address how the right to work in a hospital or attend the State Fair, unvaccinated and during a pandemic, is "deeply rooted in this Nation's history and tradition." *Id.*

In support of their request for preliminary relief, Plaintiffs focus solely on the right to "engage in their chosen profession," which they contend "is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment." Doc. 14 at 6. But the Tenth Circuit has unequivocally held that the "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny." *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012). "[A]lthough 'the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment,' this right is 'subject to reasonable government regulation.'" *Id.* (quoting *Conn v. Gabbert,* 526 U.S. 286, 291-92, (1999)); *see also Collins v. Texas,* 223 U.S. 288, (1912) (the right to practice medicine is not a fundamental right). Thus, while Plaintiffs may "have a right to engage in their chosen professions," governmental infringement on this right will be "presumed to be valid" so long as it is "rationally related to a legitimate state interest." *Klaassen I*, 2021 WL 3073926, at *17 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). Indeed, federal courts have consistently held that vaccine mandates do not implicate a fundamental right and that rational basis review therefore applies in determining the constitutionality of such mandates. *Klaassen v. Trustees of Indiana Univ. ("Klaassen II")*, 7 F.4th 592 (7th Cir. 2021) (rejecting assertion by plaintiffs, who challenged Indiana University's mandatory COVID-19 vaccine requirement, that the rational basis standard does not offer enough protection for their interests, indicating that the court "must apply the law established by the Supreme Court" in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), which, in holding that "a state may require all members of the public to be vaccinated against smallpox," "shows that plaintiffs lack" a fundamental right to be free from mandatory vaccine measures); *Klaassen I*, 2021 WL 3073926, at *24 (collecting cases demonstrating "the

consistent use of rational basis review to assess mandatory vaccination measures," and, in light of "a century's worth of rulings, declining to "extend substantive due process to recognize" a fundamental right to be free from COVID-19 vaccination requirements); *Harris v. Univ. of Mass.*, No. 21-cv-11244, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) ("[T]he case [challenging a policy requiring students who seek to be on campus to be vaccinated prior to fall semester] "commends a deferential standard for analyzing Fourteenth Amendment challenges to generally applicable public health measures like the one here"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (Gorsuch, J., concurring) (explaining that *Jacobson* is "essentially . . . rational basis review").

"To satisfy the rational basis test, the [challenged governmental action] need only be rationally related to a legitimate government purpose." *Powers v. Harris,* 379 F.3d 1208, 1215 (10th Cir. 2004). Rational basis review "is highly deferential toward the government's actions. The burden is on the plaintiff to show the governmental act complained of does not further a legitimate state purpose by rational means." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 772 (10th Cir. 2008). The government's decision "must be upheld if any state of facts either known or which could reasonably be assumed affords support for it. Second-guessing by a court is not allowed." *Powers*, 379 F.3d at 1216-17. Moreover, "rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question." *Id.* at 1217. The Court "will not strike down [governmental action] as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, or because the statute's classifications lack razor-sharp precision." *Id.* Nor will the Court "overturn [an order] on the basis that no empirical evidence supports the assumptions underlying the [governmental] choice." *Id.* Indeed, the Court is "not bound by the parties' arguments as to

what legitimate state interests the [order] seeks to further," but instead "is obligated to seek out other conceivable reasons for validating a state [order]." *Id.*

The Court finds that the PHO meets the rational basis test. "Vaccination requirements, like other public-health measures, have been common in this nation." *Klaassen*, 7 F.4th at 593. In *Jacobson,* the Supreme Court held that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." 197 U.S. at 27. Based on that premise, the Supreme Court declined to find unconstitutional, on either substantive due process or equal protection grounds, a Cambridge, Massachusetts regulation that required all adult inhabitants of that city, *without exception*, to be vaccinated against smallpox. The Supreme Court explained that "when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing." *Id.* The Court further explained that, "in view of the methods employed to stamp out the disease of smallpox," no one could "confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. The Court noted that while it did "not decide, and [could not] decide, that vaccination is a preventive of smallpox," it took "judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation," held that Cambridge's compulsory vaccine statute was "a health law, enacted in a reasonable and proper exercise of the police power." *Id.* at 35. The Court then found that, since "vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court . . . is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was – perhaps, or possibly – not the best either for children or adults." *Id.*

In reaching its decision, the Supreme Court considered and rejected the defendant's "offers of proof" of "those in the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body." *Id.* at 30. The Court explained that it assumed that the legislature "was not unaware of these opposing theories," and that it was for the legislature, *and not the court*, to "determine which one of the two modes was likely to be the most effective for the protection of the public against disease." *Id.* Indeed, the Court explained that the legislature "could not properly abdicate its function to guard the public health and safety," and thus was compelled, of necessity, to choose between opposing theories on how best to "meet and suppress the evils of a smallpox epidemic that imperiled an entire population." *Id.* at 30-31. The Court emphasized that the "possibility that the belief [in the efficacy of vaccines] may be wrong, and that science may yet show it to be wrong," was "not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id.* at 35.

Ultimately, the Court refused to allow the defendant to "claim [] an exemption" from the vaccination statute based on his offers of proof regarding the "evil" of vaccines, as doing so would "strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37. And in so refusing, the Court noted that it was "not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state." *Id.* The Court concluded: "We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person,

or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state." *Id.*

With its decision in *Jacobson*, the Supreme Court "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176, (1922). In the context of the current pandemic, courts have applied *Jacobson* to find that mandatory vaccine policies at state universities – all of which, like the vaccine policy at issue here, provide for medical, disability, and religious belief exemptions – meet the rational basis test. *See Klaassen I*, 2021WL3073926, at *27 (noting that, in light of the fact that the "vaccination campaign has markedly curbed the pandemic," "Indiana University insisting on vaccinations for its campus communities," thereby "stemming illness, hospitalizations, or deaths at the university level[,] hardly proves irrational"); *Harris,* 2021 WL 384012, at *6 (holding that university's decision to mandate vaccines was based "upon both medical and scientific evidence and research and guidance, and thus is at least rationally related to" the "legitimate interests" of curbing the spread of COVID-19 and "returning students safely to campus"); *America's Frontline Doctors v. Wilcox*, No. 21-EDCV-1243, 2021 U.S. Dist. LEXIS 144477 (C.D. Cal. July 30, 2021) (holding that "there is clearly a rational basis for Defendants to institute the Policy requiring vaccination" to further the goal of facilitating the "protection of the health and safety of the University community," where the policy was "the product of consultation with UC infections disease experts and ongoing review of evidence from medical studies concerning the dangerousness of COVID-19 and emerging variants of concern, as well as the safety and effectiveness of the vaccines"). Applying *Jacobson* to the PHO's vaccine mandate, the Court reaches the same conclusion.

The governmental purpose of stemming the spread of COVID-19, especially in the wake of the Delta variant, is not only legitimate, but is "unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67. Other legitimate goals follow from that, including: (1) protecting "persons who may be extremely vulnerable to the virus and at high risk for poor outcomes," "children younger than 12 years" who are not eligible for vaccination, and "individuals who are not able to get vaccinated due to a contraindication . . . or persons who may be severely immunocompromised and not able to mount an effective immune response to the vaccine"; and (2) "significantly reduc[ing] the transmission of this virus from person to person" in order to "decrease the likelihood" of "new mutations in the viral genome that could possibly lead to more severe disease or even the ability to evade the current vaccines and anti-viral therapeutics." Doc. 13-1 ¶¶ 14, 20-21, 26. Following the research, recommendations, and guidance of several medical and scientific sources, including the CDC, the American Academy of Pediatrics, the American Academy of Family Practice, the Infectious Diseases Society of America, the New Mexico state public health lab, University of New Mexico, Los Alamos National Lab, and the Advisory Committee on Immunization Practices, Defendants have determined that the three vaccines – which are "extremely safe" and, even against the Delta variant, "highly effective" – "are the best tool we have to protect individuals and protect communities from [COVID-19]." Doc. 13-1 ¶¶ 15, 28. Notably, based on the scientific and medical research, Defendants have determined that vaccinating health care personnel is the "best tool" to protect patients who come into close contact with them – patients who "may be extremely vulnerable to the virus and at high risk for poor outcomes." *Id.* ¶ 14. Similarly, Defendants have determined that "the most effective way to stop transmission both to children younger than 12 years" and to "individuals who are not able to get vaccinated" "is to vaccinate

eligible family members and those in the community where they live." *Id.* ¶¶ 20-21. Further, Defendants have determined that "[t]he best tool we have" to decrease the likelihood that new, more lethal mutations of the virus develop "is through protecting as many people as possible by vaccination." *Id.* ¶ 26. Finally, Defendants have determined that "the immunity provided by vaccines may be more long-lasting compared to immunity gained following infection." *Id.* ¶ 39.

The vaccination requirements set forth in the PHO, thus grounded in medicine and science, are rationally related to Defendants' legitimate purpose of protecting our community "against an epidemic of disease [that] threatens the safety of its members." *Jacobson*, 197 U.S. at 27. As was smallpox in 1905, COVID-19 is "prevalent to some extent" in New Mexico and, because of the Delta variant, "the disease [is] increasing." *Id.* Since *Jacobson* was decided, the "methods employed to stamp out" diseases have continued to include vaccination, which, "as a means of protecting a community against smallpox [other diseases, and now, COVID-19], finds strong support in the experience of this and other countries." *Id.* Accordingly, no one could "confidently assert that the means prescribed by the state to prevent the spread of COVID-19," namely, requiring certain individuals to be vaccinated, have "no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. It follows that the PHO was "enacted in a reasonable and proper exercise of [Defendants'] police power." *Id.* at 35. Indeed, "this case is easier than *Jacobson*," as *"Jacobson* sustained a vaccination requirement that lacked exceptions for adults," while the PHO has medical, disability, and religious belief exemptions, and "does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*," but rather is targeted to those individuals most likely to impact vulnerable populations. *Klaassen II*, 7 F.4th at 593.

Plaintiffs decry the basis for the PHO as "technocratic selective science," and argue that it fails to take into account that "Covid-recovered individuals have equal to or better immunity response than vaccinated individuals." Doc. 14 at 2; Doc. 1 ¶ 13. But Plaintiffs' "disputes over the most reliable science" are of no moment to the instant analysis, as "the court doesn't intervene so long as [Defendants'] process is rational in trying to achieve public health." *Klaassen I*, 2021 WL 3073926, at * 38 (citing *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) ("[P]laintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* makes clear, that is a determination for the [policymaker], not the individual objectors.")). As did the Court in *Jacobson*, this Court assumes that Defendants are aware of "opposing theories" on the safety and efficacy of vaccines; and as did the Court in *Jacobson*, this Court finds, as it must, that it is for Defendants, and not the Court, to determine what "[is] likely to be the most effective [mode] for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. Indeed, this is so regardless of whether "science may yet show" Defendants' belief in the efficacy of the COVID-19 vaccines "to be wrong," as Defendants have the right to enact orders "adapted to prevent the spread of contagious diseases." *Id.*

Plaintiffs also contend that the PHO represents an "offensive disregard for the civil rights of the unvaccinated to make their own decision about what to put in their bodies trusting the science they think is best and their own doctors to decide for themselves what is best for them." Doc. 14 at 3. But the *Jacobson* Court made clear that the Fourteenth Amendment does not grant individuals any such rights in the face of a state-imposed vaccine mandate. To the contrary, the Court explicitly refused to "hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and

enjoying the benefits of its local government" should have the power [] to dominate the majority by "defy[ing] the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state." *Jacobson*, 197 U.S. at 38. In short, by failing to accommodate Plaintiffs' (or their doctors') views on the COVID-19 vaccines, the PHO does not lack a rational relationship to a legitimate government purpose. Indeed, to hold otherwise would "practically strip [Defendants] of [their] function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37.

For these reasons, the PHO meets the rational basis test. Accordingly, Plaintiffs are unlikely to succeed on the merits of their substantive due process claims.

C. Equal Protection Claims

Plaintiffs allege that Defendants are violating their equal protection rights because their "actions create a class of individuals who . . . are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them any alternative," and "[t]he PHO is not rationally related to achieving a compelling government purpose." Doc. 1 ¶¶ 59, 60 (emphasis in original). "Equal protection is essentially a direction that all persons similarly situated should be treated alike." *Dalton v. Reynolds*, 2 F.4th 1300, 1308 (10th Cir. 2021) (citation omitted). "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998)). "Upon this showing, [plaintiffs] must then demonstrate that the state actor's differential treatment of [them] cannot pass the appropriate standard of scrutiny." *Dalton,* 2 F.4th at 1308.

"Different types of equal protection claims call for different forms of review." *Id.* "[U]nless a legislative classification either burdens a fundamental right or targets a suspect class,

it need only bear a rational relation to some legitimate end to comport with equal protection." *Curley v. Perry*, 246 F.3d 1278, 1285 (10th Cir. 2001) (citation omitted). As discussed above, the PHO does not burden a fundamental right. Nor does it target a suspect class, as it does not "categorize persons based on suspect classifications, such as race and national origin," or "on 'quasi-suspect' classifications, such as gender and illegitimacy." *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) (citations omitted). Accordingly, the Court applies rational basis review, asking "whether the government's classification bears a rational relation to some legitimate end." *Dalton*, 2 F.4th at 1308.

As explained above in the context of Plaintiffs' substantive due process claims, the PHO meets the rational basis test. The PHO, including its classification of individuals as to whom vaccination requirements apply, is grounded in medicine and science, and thus is rationally related to Defendants' legitimate purpose of protecting our community "against an epidemic of disease [that] threatens the safety of its members." *Jacobson*, 197 U.S. at 27. Accordingly, Plaintiffs are unlikely to succeed on the merits of their equal protection claims.

D. Procedural Due Process Claims

Plaintiffs allege that the PHO deprives them of "fundamental liberties without due process of law." Doc. 1 ¶ 73. Because the PHO, however, "is generally applicable" to all congregate care facility workers, hospital workers, school workers, State Fair attendees, and Governor's office staff, Plaintiffs "are not entitled to [process] above and beyond the notice provided by the enactment and publication of the [PHO] itself." *Harris,* 2021 WL 3848012, at *5 (citation omitted); *see also United States v. Locke*, 471 U.S. 84, 108 (1985) ("In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to

the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements."); *Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 936 (10th Cir. 1989) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process."); *Curlott v. Campbell*, 598 F.2d 1175, 1181 (9th Cir. 1979) ("[W]e doubt very much that procedural due process prior to reduction of benefits is required when an agency makes a broadly applicable, legislative-type decision."). Based on this principle, courts in this district have held that the public health orders issued by Defendants in response to the current pandemic do not implicate procedural due process. *See Hernandez v. Lujan Grisham*, 508 F. Supp. 3d 893, 977-981 (D.N.M. 2020); *Peterson*, 492 F. Supp. 3d at 1197-98. This Court agrees. Accordingly, Plaintiffs are unlikely to succeed on the merits of their procedural due process claims.

E. Claims under Article I, Section 10 of the United States Constitution

Plaintiffs allege that Defendants' vaccine requirements "constitute[] a bill of attainder" and "impair" the contract entered into between Valdez and her children "to participate in the New Mexico State Fair junior livestock competitions" and Blackford's "employment contract," in violation of Article I, Section 10 of the United States Constitution. Doc. 1 ¶¶ 75-76. In their reply brief, Plaintiffs appear to abandon their theory that the PHO constitutes a bill of attainder, referring to Defendants' arguments refuting that theory as "a complete red herring." Doc. 14 at 7. Accordingly, the Court will consider only Plaintiffs' remaining argument under the Contracts Clause of Article I, Section 10 of the United States Constitution, namely that Defendants have impaired Plaintiffs' existing contracts by enacting the PHO. *Id.* at 8-9.

"The Contracts Clause restricts the power of States to disrupt contractual arrangements." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.* (quoting U.S. Const., Art. I, § 10, cl. 1). Not all laws affecting pre-existing contracts, however, violate the Clause. *Sveen*, 138 S. Ct. at 1821. The Supreme Court has articulated a "two-step test" to determine "when such a law crosses the constitutional line." *Id.* First, the Court asks whether the state law has "operated as a substantial impairment of a contractual relationship." *Id.* at 1822. In answering that question, the Court considers "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id.* "If such factors show a substantial impairment," the Court next asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411–412 (1983)).

Here, Plaintiffs have failed to establish a "substantial impairment" of any contractual relationship. Plaintiffs have not provided the Court with copies of any of the purported contracts at issue or cited to any provisions therein to demonstrate that the PHO undermines their contractual bargain, interferes with their reasonable expectations, or prevents them from safeguarding or reinstating their rights. And indeed, the evidence available to the Court demonstrates to the contrary.

First, as Plaintiffs concede, Blackford's employer, Presbyterian, has instituted its own private vaccine mandate – a mandate that reaches more broadly than does the PHO – requiring its entire workforce to be vaccinated against COVID-19 in the absence of a qualifying exemption. Colleen Heild, *Presbyterian requires vaccines for entire workforce of 13,000*, Santa

Fe New Mexican (Aug. 18, 2021), https://www.abqjournal.com/2420650/ presbyterian-requires-vaccines-for-entire-workforce-of-13000-ex-pnm-is-asking-all-staff-to-get-vaccinated-or-be-tested-weekly.html. Plaintiffs contend that Presbyterian's mandate was implemented simply so that Blackford's "employer can remain compliant with the [] PHO," Doc. 14 at 8, but there is no support for this contention, as the PHO applies directly to individual workers rather than to the hospitals that employ them. Nor is there any indication that, but for the PHO, Presbyterian would not have instituted its own vaccine requirements. Notably, commenting on its mandate, Presbyterian's president and CEO, Dale Maxwell, stated, "We take care of some of the most vulnerable people in the state of New Mexico, . . . and I believe . . . we should take every measure possible to deliver the safest environment." *Id.* Maxwell further stated that Presbyterian made its own independent decision "to also include all other Presbyterian employees, including clinical, clerical and health plan employees," because "we believe at Presbyterian that vaccines are the best way to combat this pandemic . . . We know that vaccines reduce the spread of the infection and we know that vaccines reduce the illness of those that contract COVID-19. Any action to increase vaccines in our community, we support." *Id.* Thus, Blackford has no "reasonable expectation" that she would be entitled to continue her employment without being vaccinated, and thus cannot claim that the PHO substantially impairs her contractual rights.

Similarly, while Plaintiffs allege that Valdez has been deprived of the benefit of her contract with Expo New Mexico because her children cannot participate in the New Mexico State Fair junior livestock competitions, Expo New Mexico cancelled the 2021 New Mexico State Fair Junior Livestock Shows and Sale. *See* New Mexico State Fair website, https://statefair.exponm.com/p/participate/competitions/livestock-shows. The website indicates that

Expo New Mexico is "issuing full refunds of all fees to our exhibitors," and provides a form on its website for individuals who had contracted to attend to make their request for a refund. *Id.* Because Valdez thus is entitled to a refund of the consideration that she paid for her children to participate in the State Fair, the PHO does not undermine her contractual bargain. Further, she and her children will still be able to show their animals, as the New Mexico Youth Livestock Expo is going forward in Roswell, welcoming all entries free of charge and in an unlimited number. *See* New Mexico Youth Livestock Expo Facebook page, https://www.facebook.com/NMJLF1989/photos/pb.181295355267698.2207520000../4601143193282870/?type=3&theater. The fact that they may exhibit their animals in the New Mexico Youth Livestock Expo negates Plaintiffs' claim that the PHO has "fully removed the ability of these children to participate." Doc. 14 at 8.

Even if Plaintiffs were able to show a substantial impairment of a contractual relationship, their claim under the Contracts Clause would fail because, just as it meets the rational basis test, the PHO is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. For these reasons, Plaintiffs are unlikely to succeed on the merits of their claims that the PHO violates the Contracts Clause of Article I, Section 10 of the United States Constitution.

F. State Constitutional Claims

Plaintiffs allege that, by requiring individuals to be vaccinated "to maintain employment or enjoy the benefits of an existing contract," Defendants are violating Plaintiffs' rights "secured by the New Mexico Constitution," and that such violation "is actionable under the New Mexico Civil Rights Act [("NMCRA")]." Doc. 1 ¶¶ 81, 86. "The eleventh amendment generally bars lawsuits in federal court seeking damages against states as well as against state agencies,

departments, and employees acting in their official capacity." *Bishop v. John Doe 1*, 902 F.2d 809, 810 (10th Cir. 1990). Nonetheless, a state "may waive its eleventh amendment immunity and consent to suit against itself, related entities and employees." *Id.* Under the NMCRA, the state of New Mexico has waived sovereign immunity "for itself or any public body within the state for claims brought pursuant to the New Mexico Civil Rights Act." N.M. Stat. Ann. § 41-4A-9. This waiver, however, is limited to actions commenced in "any New Mexico district court." N.M. Stat. Ann. § 41-4A-3. The Tenth Circuit has interpreted analogous language in the New Mexico Tort Claims Act ("NMTCA") to mean that a plaintiff cannot "pursue [a] claim against [a state public body] and its employees acting within the scope of their employment in the federal district court, but rather is relegated to the state district court to seek relief consistent with the limited waiver of immunity under [the NMTCA]." *Bishop*, 902 F.2d at 810.

Here, Defendants invoke eleventh amendment immunity and argue that, because the NMCRA waives immunity only as to actions commenced in New Mexico state court, Plaintiffs may not pursue their New Mexico constitutional claims, brought pursuant to the NMCRA, in this Court. Doc. 13 at 32. In response, Plaintiffs argue that this Court nonetheless has pendent jurisdiction over their NMCRA claims. Doc. 14 at 9-10. This Court has considered and rejected that argument in the analogous context of the NMTCA as "incorrect as a matter of law." *Quarrie v. New Mexico Inst. of Mining & Tech.*, No. 13-cv-349, 2014 WL 11456598, at *2 (D.N.M. Feb. 25, 2014). As the *Quarrie* Court explained, "immunity under the Eleventh Amendment is not abrogated by 28 U.S.C. § 1367, and therefore, § 1367 does not authorize federal district courts to exercise jurisdiction over claims against nonconsenting states." *Id.* (citing *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 542 (2002) (holding that "§ 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state

defendants")). Plaintiffs have pointed to no contrary authority to suggest that Defendants have lost the right to invoke eleventh amendment immunity solely because this Court otherwise would have supplemental jurisdiction over their NMCRA claims.

Because Plaintiffs are unable to seek a decision on the merits of their NMCRA claims in this Court, they necessarily are unlikely to succeed on the merits of those claims.

* * *

Accordingly, Plaintiffs have failed to prove that they are "substantially likely to succeed on the merits" of any of their claims. *Free the Nipple,* 916 F.3d at 797. Because Plaintiffs "must" satisfy their burden as to each factor of the preliminary injunction test, Plaintiffs' failure to satisfy their burden as to the likelihood of success factor is alone fatal to their request for preliminary injunctive relief. *Peterson*, 492 F. Supp. 3d at 1192. Nonetheless, the Court will consider the remaining factors of the preliminary injunction test.

II. Irreparable Harm

Plaintiffs argue that, because the PHO "burden[s] if not outright den[ies]" their due process and equal protection rights, the irreparable harm standard is met. Doc. 1 at 23. But "[a]s explained in the preceding sections, [Plaintiffs have] failed to demonstrate the requisite likelihood of success" on their constitutional claims and, "[a]s a result, [they are] not entitled to a presumption of irreparable injury." *Schrier*, 427 F.3d at 1266.

Accordingly, to satisfy the irreparable harm prong of the preliminary injunction test, Plaintiffs must show that they stand to suffer "an injury" that is "certain, great, actual, and not theoretical." *Id.* at 1267 (citation omitted). "Merely serious or substantial harm is not irreparable harm." *Id.* (citation omitted). Further, "the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable

relief to prevent irreparable harm." *Id.* (citation omitted). Importantly, "[i]t is [] well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages." *Id.* (citation omitted). Similarly, "[a] permanent loss of employment, standing alone, does not equate to irreparable harm." *E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005).

Plaintiffs claim that "[t]here is no adequate legal remedy for [their] intangible harms," namely, "being terminated from their employment and from engaging in their chosen profession." Doc. 1 at 23. But, as discussed above, any harm to Blackford caused by her potential termination and/or inability to continue to work as a nurse is a function not of the PHO but rather of her employer's own vaccine mandate. And indeed, even if that harm were attributable to the PHO, being so terminated/prevented from working as a nurse does not equate to irreparable harm. Similarly, Valdez cannot establish any harm from the PHO, because, as discussed above, Expo New Mexico has offered to refund all fees paid to participate in the New Mexico State Fair Junior Livestock Shows and Sale, and Valdez and her children may enter, at no cost, the New Mexico Youth Livestock Expo. Further, Plaintiffs have failed to establish that any loss to Valdez resulting from the PHO is not compensable by monetary damages.

Plaintiffs thus have failed to establish that they will suffer irreparable harm if the PHO is not enjoined.

III. Balance of Harms

Plaintiffs contend that "the balance of harms tips decidedly in favor of Plaintiff[s]," because, if an injunction is granted, "Defendants will suffer [only] speculative harm," but if an injunction is not granted, Plaintiffs will suffer "an injury to [their] [constitutional] rights." Doc. 1 at 24. As the Court has already explained, Plaintiffs are unlikely to succeed on the merits of

their constitutional claims. Accordingly, the threatened harm that Plaintiffs seek to prevent does not reach a constitutional magnitude. Nor can the Court agree that any harm to Defendants can be so easily minimized as "speculative." To the contrary, the Court finds that "the balance of equities tips in Defendants' favor given the strong public interest here they are promoting – preventing further spread of COVID-19 [], a virus [that] has infected and taken the lives of thousands of [New Mexico] residents." *Harris,* 2021 WL 3848012, at *8. "Plaintiffs' requested relief here would weaken the efforts of [Defendants] to carry out those goals." *Id.* "Similarly, given the public health efforts promoted by the [PHO], enjoining the continuation of same is not in the public interest." *Id.*

The Court thus finds that Plaintiffs have failed to establish that the balance of harms weighs in their favor or that granting the requested injunction would not be adverse to the public interest. *See ETP Rio Rancho Park*, 2021 WL 765364, at *57 (holding that "the threatened injuries – financial injuries and possible permanent business closure – do not outweigh possible damage – increased COVID-19 spread leading to sickness, hospitalizations, and death – to the Defendants," and "for similar reasons," the requested injunction "would be adverse to the public interest").

CONCLUSION

To obtain preliminary injunctive relief, Plaintiffs are required to prove that they are substantially likely to succeed on the merits of their claims, that they will suffer irreparable injury if the Court denies the requested injunction, that the balance of harms weighs in their favor, and that the injunction would not be adverse to the public interest. As set forth above, Plaintiffs fail to satisfy their burden as to any, let alone all, of these factors. Accordingly, Plaintiffs are not entitled to an order enjoining the PHO.

IT IS THEREFORE ORDERED that Plaintiffs' requests for a temporary restraining order and a preliminary injunction, as set forth in Plaintiffs' Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages [Doc. 1], are **DENIED**.

DATED this 13th day of September 2021.

MARTHA VÁZQUEZ
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD, on behalf of herself
and others similarly situated,

Plaintiffs,

Case No. 21-cv-783 MV/JHR

vs.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

ORDER

THIS MATTER comes before the Court on Plaintiffs' Opposed Motion for Stay and Injunction Pending Appeal ("Motion") [Doc. 23]. Specifically, Plaintiffs request that this Court "issue an injunction pending appeal that bars the Defendants from enforcing order or guidance requiring individuals to be fully vaccinated to continue in their employment and stay the matter before the Court." Doc. 23 at 2. As set forth herein, Plaintiffs do not meet the standards applicable under Rule 8 of the Federal Rules of Appellate Procedure for either a stay or an injunction pending appeal, and thus are not entitled to any of the relief sought in their Motion.

Rule 8(a)(1) provides that "[a] party must ordinarily move first in the district court for," *inter alia*, "a stay of . . . the order of a district court pending appeal" or "an order . . . granting an injunction while an appeal is pending." Fed. R. App. P. 8(a)(1)(A), (C). A Rule 8(a) motion for a stay pending appeal "is subject to the exact same standards" as that applicable to a motion for a preliminary injunction. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). Accordingly, to

obtain a stay pending appeal, the moving party must prove four things: (1) "that she's substantially likely to succeed on the merits"; (2) "that she'll suffer irreparable injury if the court denies the injunction"; (3) "that her threatened injury (without the injunction) outweighs the opposing party's under the injunction"; and (4) "that the injunction isn't adverse to the public interest." *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019) (citation omitted). A Rule 8(a) motion for an order granting an injunction while an appeal is pending "demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by [the] court[]." *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020). "This power is used where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." *Id.*

In its Memorandum Opinion and Order entered on September 13, 2021, the Court determined that Plaintiffs failed to make the requisite showing on any of the four factors required to obtain a preliminary injunction. Doc. 18 at 8-29. Because Plaintiffs failed to demonstrate their entitlement to a preliminary injunction, they equally fail to demonstrate their entitlement to a stay pending appeal. Nor have Plaintiffs made any effort on the instant Motion to provide the "significantly higher justification" required for their request for an injunction pending appeal. "Where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to the changing facts on the ground," the "notion that it is 'indisputably clear' that [Defendants' vaccine mandates] are unconstitutional seems quite improbable." *South Bay United Pentecostal Church*, 140 S. Ct. at 1614.

In support of their motion, Plaintiffs argue that "this case plainly satisfies Rule 8(a)'s 'impracticable' exception, as it will likely be futile to ask this Court for the same relief the Court

has just denied them in rejecting their injunction motion." Doc. 23 ¶ 2. This argument is nonsensical here, where Plaintiffs are asking *the district court* – the same court that denied their request for a preliminary injunction – for relief.

As noted above, Rule 8(a)(1) applies when a party moves in the district court for a stay or an injunction pending appeal. In contrast, Rule 8(a)(2) applies when a party makes a motion for such relief directly "to the court of appeals or to one of its judges." Fed. R. App. P. 8(a)(2). Specifically, Rule 8(a)(2) allows for a party to skip the routine first step of seeking relief from the district court and instead go directly to the court of appeals, if its motion "show[s] that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(i). Impracticability thus comes into play only where a movant seeks relief in the appellate court, and not where, as here, the movant seeks relief from the district court. Accordingly, while the impracticability of moving for a stay or injunction in this Court well might have provided a basis for Plaintiffs to move for such relief (in the first instance) in the Tenth Circuit, it provides no basis for this Court to grant Plaintiffs a stay or an injunction pending appeal.

Next, Plaintiffs argue that a stay or injunction pending appeal is warranted because this Court "rendered its decision without oral argument and without an evidentiary hearing" and in particular, "made its determinations that no irreparable harm was sufficiently alleged without allowing Plaintiffs an opportunity at hearing to present evidence" that Blackford "has been constructively terminated from her employment as a nurse and is prohibited from obtaining employment as a nurse anywhere else in the state." Doc. 23 at ¶¶3-4. But neither the federal rules nor Tenth Circuit precedent "require the district court to hold an evidentiary hearing or oral argument before deciding a motion for a preliminary injunction." *Gess v. USMS and 10th Cir. Dist. Court*, No. 20-cv-1790, 2020 WL 8838280, at *16 (D. Colo. Dec. 10, 2020) (quoting *Northglenn Gunter Toody's LLC v. HQ8-1-41—1450 Melody Lane LLC*, 702 F. App'x 702, 705

(10th Cir. 2017)). Further, where a motion for a preliminary injunction "fail[s] based upon the resolution of questions of law as to which there are no disputed issues of fact," it is "unnecessary to conduct an evidentiary hearing or oral argument." *Gess*, 2020 WL 8838280, at *17 (citing *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 538, 545 (10th Cir. 2000) ("An evidentiary hearing, however, was unnecessary to resolve these legal issues.")). Here, the Court decided as a matter of law that, based on the facts as presented by Plaintiffs, they did not demonstrate a substantial likelihood of success on the merits, irreparable harm, or that the balance of harms weighed in favor of an injunction. *See, generally,* Doc. 18. In making that decision, the Court accepted as true, *inter alia,* that Blackford has been "constructively terminated from her employment" and that, unless she applies for an exemption, will not be able to work as a nurse without being vaccinated. *See id.* at 23-24, 28. Accordingly, there was no need for an evidentiary hearing or oral argument. Indeed, Plaintiffs did submit evidence along with their request for a preliminary injunction, including their declarations. *See* Docs. 1-3, 1-4, 14-2, 14-3. This Court was entitled to base its decision on those declarations and "other documentary evidence." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990).

Finally, Plaintiffs argue that their request for a stay or injunction pending appeal is supported by "a similar proceeding in United States District Court for the Northern District of New York in which the Honorable David N. Hurd granted temporary relief to the plaintiffs," Doc. 23 ¶ 6, namely *A v. Hochul*, 21-cv-1009, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021). That case, however, is distinguishable, as it involves a challenge to a New York State Department of Health regulation that mandates COVID-19 vaccination of health care workers and "excludes any religious exemption." *A*, 2021 WL 4189533, at *1. The plaintiffs in *A* specifically sought, and the court granted, a temporary restraining order enjoining the "defendants from enforcing the vaccine mandate to the extent it categorically requires health care

employers to deny or revoke religious exemptions from COVID-19 vaccination mandates." *Id.* In contrast, the Public Health Order at issue here contains three exemptions, including a broad religious exemption that encompasses personal beliefs. *See* Doc. 18 at 4. Accordingly, the *A* court's decision to grant a temporary restraining order enjoining enforcement of a vaccine mandate *to the extent that it did not allow for religious exemptions* is of no persuasive value here.

For these reasons, the Court finds that Plaintiffs are entitled to neither a stay nor an injunction pending appeal.

IT IS THEREFORE ORDERED that Plaintiffs' Opposed Motion for Stay and Injunction Pending Appeal [Doc. 23] is DENIED.

DATED this 7th day of October 2021.

MARTHA VÁZQUEZ
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 21-2105

TALISHA VALDEZ AND JENNIFER BLACKFORD
Plaintiffs-Appellants,

v.

MICHELLE LUJAN GRISHAM AND DAVID SCRASE
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
No. 1:21-cv-00783-MV-JHR

OPENING BRIEF

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November 8, 2021

Oral Argument Requested

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STATEMENT OF PRIOR RELATED APPEALS

There are no prior related appeals.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico had subject matter jurisdiction to hear the underlying case pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201 and 2202.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292. The District Court for the District of New Mexico Entered a Memorandum Opinion and Order denying Plaintiffs' request for a Temporary Restraining Order and Preliminary Injunction on September 13, 2021. Plaintiffs filed a timely Notice of Interlocutory Appeal on September 13, 2021.

STATEMENTS OF THE ISSUES

1. The Lower Court erred in denying Plaintiffs' request for Preliminary Injunction.

STATEMENT OF THE CASE

Father of the Bill of Rights and fourth U.S. President, James Madison, famously stated that "crisis is the rallying cry of tyrants." Even today in modern day New Mexico, the last public health orders pronounced by the Governor through her Acting Secretary of Health prove that statement is as true today as it was for the revolutionary period of our Republic's history. Not since the

Japanese internment camps that so darkly cloud our modern history, set out by President Franklin Roosevelt and upheld by the U.S. Supreme Court in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944 does anything resembling the punitive tyrannical efforts contained in the public health orders at issue in this case even remotely arrive on the horizon of our American Liberty. Yet here, a tyrannical governor is willing to punish children and destroy livelihoods to punish adults that would dare to refuse her orders that advance her agenda of violating the right to bodily integrity. We stand at the precipice of losing the liberty that is foundational to our Country and these brave Appellants, in the complaint, respectfully begged the lower Court to stop that destruction of liberty. Thomas Paine in American Crisis stated that: "tyranny, like hell, is not easily conquered, yet, we have this consolation with us, that the harder the conflict, the more glorious the triumph."

The Complaint in this matter was filed in the United States District Court for the District of New Mexico on August 19, 2021, with an emergency request for a temporary restraining order, and a request for preliminary injunction and permanent injunctive relief. (Aplt App 006-042) The lower court, after ordering expedited briefing (Aplt App 044-047), denied Plaintiffs/Appellants' request for temporary restraining order and preliminary injunction on September 13, 2021. (Aplt App 199-228) Plaintiffs/Appellants' timely filed an interlocutory appeal on September 13,

2021. (Aplt App 229)

STATEMENT OF THE FACTS

On August 17, 2021 Acting Cabinet Secretary David R. Scrase, M.D. issued the Public Health Emergency Order Requiring Congregate Care Facility Workers and Hospital Workers be fully vaccinated. (Aplt App 008, 276). As a result of the Order, Plaintiff Blackford and other Congregate Care Facility Workers and Hospital Workers similarly situated who are not currently vaccinated had to receive their first experimental EUA shot within ten days of the effective date or were required to be terminated from their employment in order for the employers to be lawfully compliant (at the time of filing the FDA had not approved any of the vaccines.) (Aplt App 008, 128-129). Plaintiff Blackford, based upon her medical training as well as experience as a nurse for 10 years, along with her own independent research, is opposed to receiving the EUA covid vaccines. (Aplt App 008, 054-055). The Public Health Order does not give an exemption for those in the affected professions to abstain from being vaccinated without falling under one of the prescribed exemptions. (Aplt App 008-009, 031-036, 051).

The statute granting the Food and Drug Administration the power to authorize a medical product for emergency use requires that the person being administered the unapproved product be advised of his and her right to refuse administration of the product. 21 U.S.C. § 360bbb-3(e)(1)(A). (Aplt App 009). Covid-recovered

individuals have equal to or better immunity response that vaccinated individuals, and covid-recovered individuals with natural immunity do not benefit from receiving the vaccines. (Aplt App 009, 146-147, 247-248). The Public Health Order does not account for or recognize the health implications associated to individuals that have natural immunity. (Aplt App 009, 141-143, 147). All three of the currently available Covid vaccines for the United States are available under an "Emergency Use Authorization" or "EUA" on an emergency declaration from the Secretary of Health under 21 U.S.C.A. § 360bbb-3. (Aplt App 009, 049-051, 120, 128-139). Though Plaintiff disputes that the vaccines can be legally mandated under the EUA (Aplt App 014-015, 019, 026, 028), the focus of this appeal and more specifically the contemporaneously filed motion for injunction is directed to the constitutionality of the PHO and the impact to the fundamental liberties of Plaintiff Blackford and putative class members (Aplt App 016-017, 024, 120-121, 231-232, 236) without according them owing due process. (Aplt App 013, 016-019, 122-123, 233).

Plaintiff Valdez and her children originally also sought an injunction so that they could participate in the New Mexico State Fair, but the Fair has now passed mooting the need for injunctive relief and Plaintiff Valdez along with putative class members remaining claims are limited to damages. (Aplt App 010).

Plaintiffs brought the suit in the lower court as a class action pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2), proposing two (2) classes

seeking declaratory and injunctive relief as well as damages. (Aplt App 011-014). Plaintiffs claim that the actions of the Governor and her Secretary of Health are depriving them of equal protection, (Aplt App 015) due process of law (Aplt App 013, 016-019, 122-123, 233) and of constitutional protections for their preexisting contracts. (Aplt App 010, 012-014, 017-019, 121, 123-124, 237-238). The lower court denied Plaintiffs' request for Temporary Restraining Order and Preliminary Injunction. (Aplt App 199-228). In denying the requested relief the District Court relied heavily, in consistent fashion with times, on *Jacobson* to find that the collective good trumps individual liberty concerns of bodily integrity and engaging in one's chosen profession. (Aplt App 210-212, 214, 216-219). In so doing, the District Court ignored the abrogation of *Jacobson* by the Supreme Court when it stated that:

> *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990); cf., *e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135, 112 S.Ct. 1810, 1815, 118 L.Ed.2d 479 (1992); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); see also, *e.g.*, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30, 25 S.Ct. 358, 360–363, 49 L.Ed. 643 (1905).

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 857, 112 S. Ct.

2791, 2810, 120 L. Ed. 2d 674 (1992). And only by ignoring that limitation against the plenary override individual liberty claims of the Plaintiffs here, was the District Court able to determine that Plaintiffs lacked the ability to satisfy a likelihood of success on the merits test for a preliminary injunction.

Following the denial of the preliminary injunction and the filing of this appeal Plaintiff sought to have the District Court stay the underlying matter as well as injunction pending appeal and was denied by the district court. (Aplt App 276-277, 296-300). It is also worth noting that the Fifth Circuit has issued a nationwide stay of the Biden OSHA Mandate, that is by any account a similar attack on individual liberty in favor of plenary override to the Public Health Order at issue in this case citing that "because the petitions give cause to believe there are grave statutory and constitutional issues with the Mandate, the Mandate is hereby STAYED pending further action by this court. *BST Holdings, L.L.C., et al., v. OSHA, et al.*, No. 21-60845 (November 6, 2021).

SUMMARY OF THE ARGUMENT

A plaintiff seeking an injunction while an appeal is pending before this Court under Fed. R. App. P. 8(a)(1)(C); *see also* Fed. R. App. P. 8(a)(2), "requires the applicant to address the following: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm

to the public interest. In ruling on such a request, this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001).[1] Here, had the District Court correctly applied the law concerning infringements on fundamental liberties to perform its constitutional review to evaluate the likelihood of success, Appellants would satisfy the factors necessary for a preliminary injunction to issue.

ARGUMENT

Standard of Review

This Court reviews the denial of a request for preliminary injunction for abuse of discretion. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir.2001). Moreover:

> In doing so, we examine the district court's factual findings for clear error and review its legal determinations de novo. *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir.2002); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir.2001); *Tri–State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir.1986). The abuse of discretion standard commands that we give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence. We will not challenge that evaluation unless it finds no support in the record, deviates from the appropriate legal standard, or follows from a plainly implausible, irrational,

[1] Plaintiffs/Appellants satisfied Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this very preliminary injunction from that court and then by subsequently filing a motion for relief pending appeal.

> or erroneous reading of the record. *United States v. Robinson,* 39 F.3d 1115, 1116 (10th Cir.1994) (citation omitted).

Heideman v. S. Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003)

The Mandatory COVID-19 Vaccination Directive issued by Appellees is in direct violation of the constitutional rights to bodily integrity and to engage in one's chosen profession. Because these rights are fundamental to Appellants and putative class members, the proper constitutional measuring stick is whether when examined under strict scrutiny the PHO is narrowly tailored. Appellant respectfully, offers that had the District Court applied this standard of constitutional review based upon the jurisprudence of the Supreme Court that Appellants are likely to prevail on the merits and have suffered an irreparable injury of being required to choose between a vaccine that irreversibly violates their bodily integrity or their employer being mandated by the government to terminate them from their chose profession for an indefinite period that has now stretched into months, despite the fact that the Equal Protection Clause requires governments to act in a rational and nonarbitrary fashion.

Appellees' actions create a class of individuals who, though they exempted by federal law from being required to receive the vaccine, cannot be deprived of their fundamental liberty interest to engage in their chosen profession and enjoy a fundamental right to bodily integrity that the state cannot deprive them of without due process of law. Moreover, they are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them

any alternative. The PHO is not even rationally related to achieving a compelling government purpose much less narrowly tailored. Appellees' actions are and have been therefore a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Substantive Due Process prevents the government from engaging in conduct that "shocks the conscious" or that interferes with fundamental liberty without narrowly tailoring such interference to achieve a compelling government interest which must withstand strict scrutiny. Appellees' actions constitute official policy, custom and practice of the State of New Mexico. Appellees' actions are not narrowly tailored as many individuals similarly situated to Appellants are covid-recovered and the actions ignore that measures such as masking, testing and social distance have been adopted as sufficient to achieve the compelling government interest for vaccinated individuals that remain just as likely to continue the spread of Covid-19. Appellees' actions do not comport with the traditional ideas of fair play and decency. Appellants have the right to pursue lawful employment as they shall determine and be free of unreasonable governmental interference. The PHO imposed by the Appellees will cause Appellants and other similarly situation citizens of New Mexico to lose their livelihoods and to suffer the loss of their bodily integrity.

No due process protections have been afforded to Appellants, or any citizen of New Mexico, as required by the United States Constitution of a pre-deprivation

or post deprivation process that allows for any opportunity, much less a meaningful opportunity, to be heard and address the propriety of the government's actions. All fundamental rights comprised within the term liberty, including but not limited to, the rights to be free from bodily restraint, the right to contract and engage in the common occupations of life, the right to acquire useful knowledge, to worship God according to the dictates of one's own conscience, and to generally enjoy the privileges long associated with the rights of free people are guaranteed substantive due process rights under the Fourteenth Amendment. The August 17, 2021 Order deprives Appellants, and many residents of New Mexico, of fundamental liberties without due process of law, based solely upon discretion of the Appellees in favor of exercising plenary power for the collective with no respect for the individual liberties fundamental to Appellant Blackford and other putative class members. Finally, the actions of Appellees to require the termination of unvaccinated individuals that do not meet or request an exemption impair Appellant Blackford's employment contract and others similarly situated.

Appellants enjoyed a right to bodily integrity under the Fourteenth Amendment and Article II Section 10 of the New Mexico Constitution. Appellees' actions to unreasonably require that the EUA vaccine injection be mandatory in order to maintain employment or enjoy the benefits of an existing contract violates Art. II Sec. 10. Appellants enjoy a right to due process and equal protection under

Article II Section 18 of the New Mexico Constitution. Appellees' actions to unreasonably and contrary to federal law require that EUA vaccine injection is mandatory in order to maintain employment or enjoy the benefits of an existing contract deprived Appellants of their owing due process and discriminated against them on the basis of the individual choice to vaccinate themselves. Appellants enjoy a right to contract free from government impairment pursuant to Article II Section 19 of the New Mexico Constitution. Appellants' actions to unreasonably impair the existing employment contracts of Appellant Blackford and others similarly situated have violated those rights. The violation of rights secured by the New Mexico Constitution is actionable under the New Mexico Civil Rights Act NMSA § 41-4A-1 *et seq.* which provides for damages and attorney's fees for violations of those rights in an amount to be proven at trial and the District Court's declination of supplemental jurisdiction based upon the denial of preliminary injunction based upon an incorrect reading of the law is likewise not proper.

To determine whether a government act violates the substantive component of the Due Process Clause or the Equal Protection Clause, courts begin by determining the proper level of scrutiny to apply for review. "Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental right guaranteed by the U.S. Constitution. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th

Cir. 2002). An act passes strict scrutiny only if it is "narrowly tailored to further a compelling government interest." *Id.* "If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose." *Id*. "In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is 'based on characteristics beyond an individual's control,'[] and whether the class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (citations omitted).

Appellees have not, because they cannot, explain how the Public Health Order (PHO) outlawing nurses from working as nurses in New Mexico does not implicate the long recognized fundamental liberty to engage in one's chosen profession as protected by the Fourteenth Amendment, nor how conditioning that fundamental liberty upon surrendering another fundamental right to bodily integrity does not implicate a violation of the right in favor of the plenary exercise of the collective power.

Here, Appellant Blackford has plausibly alleged and verified that she has protected property interest to engage in her chosen profession and that if the government's PHO mandate is enforced, she is prohibited from working as a nurse in New Mexico as long as the order is in effect, and she is unvaccinated.

It is important to note that her employer has implemented a policy in order to comply with the PHO mandate that has now resulted in her being placed on leave without pay for at least 4 months but had not done so prior to the issuance of the PHO.

Appellant Blackford has identified a liberty interest warranting due process of law, Appellees disagree because otherwise their actions most certainly would run afoul of the Due Process Clause's protections by depriving Appellants of their ability to earn a livelihood in the occupation of their choosing.[2] For example, the United States Supreme Court in *Barry v. Barchi* has opined as to the constitutionally protected property interest in engaging in one's chosen profession of horse racing, stating "Plaintiffs have a liberty interest in pursuing their profession of horse racing and are entitled to due process of law if they are to be lawfully denied an opportunity to do so." *Barry v. Barchi*, 443 U.S. 55, 64, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

Thus, the right of citizens to support themselves by engaging in a chosen

[2] "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson · in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man." *Barsky v. Board of Regents of University of State of New York*, 347 U.S. 442, 472 (1954) (Douglas, J, dissenting).

occupation is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment. Over a century ago, the Supreme Court recognized that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Later, in striking down a law banning the teaching of foreign languages in school, the Supreme Court observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life ...." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Despite later jurisprudence following the *Lochner* era, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), de-emphasizing economic substantive due process, our Supreme Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation.

The Third Circuit has recognized "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Comm. of Pa.*, 36

F.3d 1250, 1259 (3d. Cir. 1994) (citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Truax*, 239 U.S. at 41, 36 S.Ct. 7). However,

> [t]he Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits ... brought directly under the due process clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.

Id. (internal citations and quotation marks omitted). Thus, the District Court was flat wrong, Appellant Blackford, and the many others similarly situated, most certainly have a right to engage in their chosen professions of nursing, other healthcare employees, congregate caregivers or detention officers do as well. There is no question, then, that the Fourteenth Amendment recognizes a liberty interest in citizens—the Appellants here—to pursue their chosen occupation. The dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated.

It is supremely troubling that these Appellees do not recognize the fundamental liberty interest of the individual to decide what should be injected into their person, otherwise recognized as the common law right to bodily integrity. The Supreme Court has recognized that "no right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S.

250, 251, 11 S. Ct. 1000, 1001, 35 L. Ed. 734 (1891). Moreover, the Supreme Court has clearly held that "[T]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 1041, 108 L. Ed. 2d 178 (1990).

In *Harper*, the Court was not dealing with a free person, but rather an incarcerated person, and as of yet citizens of New Mexico should not be treated as prisoners. Justice Stevens dissented in *Harper*, arguing that the majority had "virtually ignore[d] the several dimensions" of the liberty interest it recognized. *Id.* at 237. He noted that a forced administration of medication is especially troubling if it "creates a substantial risk of permanent injury and premature death." *Id.* He also recognized that such intrusions are "degrading" when performed against the will of a competent person. *Id.*

In *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court applied the test from *Harper*, finding that the state did not meet its burden to establish both the need for the drug and its medical appropriateness for the Defendant specifically finding that the state was obligated to show that the medication was the least intrusive means of achieving an "essential" state purpose. *Id.* at 138. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), the Court unequivocally acknowledged that "[t]he principle that a competent person has a constitutionally protected liberty

interest in refusing unwanted medical treatment may be inferred from our prior decisions." *Id.* at 278.

I. The Failure to Recognize Clearly Articulated Fundamental Liberty Interests Was Clear Error by the District Court.

The District Court's failure to apply the correct constitutional analysis to Appellees as to why they can satisfy strict scrutiny that the PHO is narrowly tailored to meet their compelling or essential purpose led to clear error in determining the likelihood of success on the merits. As demonstrated above, this Court does not even need to perform a *Washington v. Glucksberg*, 521 U.S. 702, analysis to the alleged liberty interests because they have already been recognized as fundamental by the United States Supreme Court. There is no real debate that the right to engage in ones chose profession (*Barchi*) or the right to bodily integrity **(***Casey*, *Cruzan*, *Riggins*, *Harper*, *Rochin*) are not fundamental rights recognized previously by the Supreme Court. Moreover, to argue that the most sacred right as recognized as such by the Supreme Court to bodily integrity is not fundamental is tragically disappointing in our Republic; but more importantly it means that it is at least quasi-fundamental and not subject to a rational basis test. Importantly, even if bodily integrity is not a "fundamental" right, it is at least a "quasi" fundamental right subject to intermediate scrutiny. It is well settled that, under *Plyler v. Doe*, "infringements on certain 'quasi-fundamental' rights, [*like bodily integrity*], also mandate a heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412 n.1 (9th Cir. 1992) (emphasis

added).

Thus, because the District Court fails to address whether the PHO can withstand either strict or intermediate scrutiny and relies solely on a rational basis test argument, it incorrectly fails to properly assess likelihood of success on the merits, requiring reversal by this Court as upon the record Appellant has demonstrated a likelihood of success.

II. The Appellees' Power from the State to Impair Contracts for Public Welfare is Limited and Appellant Blackford is Also Likely to Succeed on the Merits of that Claim.

As is typical for Appellees, they have found a blank check with unlimited power everywhere in the law and in every jurisprudence under the umbrella of public health during the COVID pandemic. This quite simply is not the case, as with *Jacobson* (even before it was limited by *Casey*), when it comes to impairment of contracts, the Supreme Court has set limits stating that "the states' inherent power to protect the public welfare may be validly exercised under the Contract Clause even if it impairs a contractual obligation so long as it does not destroy it." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 26, 97 S. Ct. 1505, 1520, 52 L. Ed. 2d 92 (1977); *citing* 134 N.J.Super., at 190, 338 A.2d, at 870-871. Here the Appellees' PHO unequivocally destroys Appellant Blackford and putative class members' employment contracts. It destroys the employment contract of Ms. Blackford by requiring her employer terminate her employment or prevent her from working to

remain compliant with the PHO. It is worth noting that when Congress does this, they are still required to pay damages to any harmed party under the Fifth Amendment.

Here, because the destruction of the contracts is fully realized, this Court must examine the limit of state's actions to impair a contract as to the reasonableness of the conditions and of a character appropriate to the public purpose as the Supreme Court has warned "private contracts are not subject to unlimited modification under the police power." *U.S. Tr. Co. of New York*, 431 U.S. at 22. Thus, Court must evaluate that limit, "[a]ssuming that this stated interest is a 'broad and general social or economic problem,' and therefore, a legitimate public purpose, the Court must then address the reasonableness and necessity of the regulation. *Universal Ins. Co. v. Dep't of Justice*, 866 F. Supp. 2d 49, 69 (D.P.R. 2012), *on reconsideration in part* (June 22, 2012). Essentially, a review as to reasonableness of this a particular measure, the District Court should have, and this Court must therefore conduct some review of the tailoring of the PHO's actions.

As to the destruction of the employment contracts of healthcare workers like Ms. Blackford (despite the disingenuous and unsubstantiated argument that the employers would have imposed that condition on those contracts regardless of the requirement of the PHO that they do so), Appellants provided examples to District Court of the well understood fact that the vaccinated are as susceptible to contracting

the disease and spreading the disease as the unvaccinated. There is no documentation that unvaccinated workers in the affected industries were being infected at any greater rate or severity than the vaccinated workers, that they were responsible for a greater rate of spread, that masking and other physical measures were not working, or that other treatments were not available short injection of gene modification therapies that work to treat Covid and slow its spread. (Aplt App 128-164, 242-275). It is simply not a reasonable condition to place the workers in such a position, who by all accounts serve as no greater threat for spread of the disease, to require employers to terminate them from their chosen professions and given the character of the government actions should still be evaluated under strict scrutiny for reasonableness and necessity.

III. The Appellants Will Suffer Irreparable Injury if Injunctive Relief Is Denied

"The loss of [constitutional] freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added); As Appellants explained to the District Court, the PHO requires that Appellant Blackford and the putative class members must suffer one irreparable harm or another. They must permanently lose their bodily integrity by receiving a vaccine they do not wish to have inside their bodies, or they must be indefinitely terminated from their chosen profession in New Mexico by their employer.

The fact that Due Process and Equal Protection rights are burdened if not outright denied, as they are in this case, establishes the preliminary injunctions' "irreparable harm" standard. Thus, under the Tenth Circuit Court of Appeals' jurisprudence, irreparable injury has occurred and will continue to occur until an injunction issues.

IV. The Balance of Harms Favors Issuance of Injunctive Relief

Appellants have established both likelihood of success on the merits as well as a clear irreparable injury. In addition, the balance of harms tips decidedly in favor of Appellants. In this Circuit, "the [government's] potential harm must be weighed against [Appellants'] actual [constitutional] injury." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007) *rvs'd other grounds by* 555 U.S. 460 (2009). Where the government's perception of harm is speculative and when the state permits the same speculative harm in other places, as it is here, such speculative harm cannot outweigh an injury to the Due Process, Equal Protection and contractual rights of Appellants, who have established a substantial likelihood of success on the merits.

If preliminary injunctive relief is not granted, and the Court later finds that the challenged laws impermissibly infringe constitutional rights, the Appellants will have suffered irreparable harm. After the fact, this Court will be unable to make things right again. By contrast, if this Court grants preliminary injunctive relief and

the District Court later finds against the Appellants, the Appellees will not have suffered any hardship that the Appellees do not currently countenance by allowing the vaccinated to work under conditions of masking, and social distancing. Because the Appellees will not suffer more than speculative harm if an injunction is granted, and the Appellants will suffer certain harm in the absence of injunctive relief, the balance of hardships favors the Appellants. When Appellants establish that a case raises constitutional issues, as the Appellants have in this case, the Court should presume that the balance of harms tips in their favor. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002).

V. An Injunction is in the Public Interest

Finally, Appellants establish that issuance of a preliminary injunction is in the public interest. The Tenth Circuit Court of Appeals recognizes "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016); *citing Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Utah Licensed Bev.*, 256 F.3d at 1076; *Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997). As discussed in *Casey* the right to bodily integrity is sacrosanct, just as the right to engage in one's chose profession is fundamental requiring that the actions of the government to interfere with those rights should be limited, not simply allowed as plenary override in favor of the collective good of public health. Thus,

an injunction is in the public interest and this Court should grant it.

SPECIFICS OF PRELIMINARY RELIEF REQUESTED

Appellants request that the Appellees be prevent from enforcing the PHO order at issue in this matter during the pendency of the matter before the district court.

CONCLUSION

For all the foregoing reasons, the District Court's denial should be reversed and a preliminary injunction should issue.

ORAL ARGUMENT STATEMENT

Pursuant to 10th Cir. L.R. 28.2(C)(4), Appellants request oral argument in this matter. Such argument is necessary because the issues involve important questions of procedural law. Appellant respectfully suggests that the Court may benefit from the interactive conversation that oral argument would provide on these issues.

Respectfully submitted this November 8, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,702 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B) (iii). This opening brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the 10th Circuit ECF User's Manual, Section II.J, I hereby certify with respect to the foregoing document, that:

1) All required privacy redactions have been made per 10th Cir. R. 25.5;

2) Required hard copies will be filed with the court upon acceptance; and

3) The digital submission has been scanned for viruses with the most recent version of Microsoft Windows Defendant Antivirus Version: 1.263.1943.0 Updated March 15, 2008 and according to this program is free of viruses.

CERTIFICATE OF SERVICE

I, A. Blair Dunn, hereby certify that on November 8, 2021, I served a copy of the foregoing upon parties of record as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD, on behalf of herself
and others similarly situated,

Plaintiffs,

Case No. 21-cv-783 MV/JHR

vs.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages (the "Complaint") [Doc. 1]. The Court, having considered the Complaint and the relevant law, finds that Plaintiffs' requests for a temporary restraining order and a preliminary injunction are not well-taken and will be denied.

BACKGROUND

Since its emergence last year, the novel coronavirus 2019, or Sars-CoV-2, the virus that causes COVID-19, has spread exponentially through the world, and New Mexico has been no exception. Doc. 13 at 3. The ease and rapidity with which COVID-19 spreads and its potentially

severe symptoms create a frightening potential for mass deaths and an overloaded healthcare system. *Id.* at 4. During the winter of 2020-21, the United States averaged nearly 200,000 new cases and 4,000 COVID-19-related deaths every day. *Id.* at 4-5. One in five New Mexicans who were hospitalized for COVID-19 passed away. *Id.* at 5.

In February 2020, the United States Department of Health and Human Services ("HHS") declared a public emergency and instructed the United States Food and Drug Administration ("FDA") to grant emergency use authorizations ("EUA") for "medical devices and interventions" to combat the pandemic, including vaccines. *Id.* at 6. The FDA issued detailed guidance to vaccine manufacturers, requiring a determination that the vaccine's benefits outweigh its risks based on data from at least one well-designed Phase 3 clinical trial that demonstrates the vaccine's safety and efficacy in a clear and compelling manner. *Id.*

Three vaccine candidates emerged as frontrunners: Pfizer/BioNTech and Moderna's two-dose mRNA vaccines, and Johnson & Johnson's ("J&J") single-dose viral vector vaccine. *Id.* By the time Pfizer, Moderna, and J&J applied for EUA status (which, for Pfizer and Moderna, was in November 2020, and for J&J, was in February 2021), each vaccine had undergone significant testing. *Id.* at 6-7. After a team of representatives from across the FDA reviewed the data submitted by each manufacturer and independently assessed the risks and benefits of the vaccines, the FDA granted EUA, for individuals 16 and older, to Pfizer and Moderna's vaccines in December 2020 and to J&J's vaccine in February 2021, noting that each had met the expectations set out in the FDA's comprehensive guidance. *Id.* at 7. Pfizer's vaccine later received EUA for individuals 12 and older, and on August 23, 2021, received full FDA approval for individuals 16 and older. *Id.* at 8.

Since the three vaccines received EUA status, over 368 million doses have been administered and over 173 million Americans have been fully vaccinated. *Id.* Comprehensive data collected since the three vaccines received EUA status demonstrates that they are safe and highly effective in preventing infection and severe illness, and that serious adverse side effects from the vaccines are exceedingly rare. *Id.* at 8-9. Further, the immunity provided by the vaccines is significantly more robust than natural immunity gained following infection. *Id.* at 9.

In late 2020, the "Delta" variant, a highly infectious and possibly more deadly strain of the coronavirus, appeared in India; by mid-June of 2021, the Centers for Disease Control and Prevention ("CDC") had labeled it a "variant of concern." *Id.* The Delta variant now accounts for virtually all new infections in the United States – including in New Mexico – and is believed to be twice as contagious as previous variants. *Id.* Studies indicate that individuals infected with the Delta variant are more likely to be hospitalized than those infected with other strains. *Id.* While the Delta variant is more likely to cause "breakthrough" infections than other variants, the vaccines still provide strong protection against serious illness and death in individuals who contract the Delta variant. *Id.* at 10.

Although case rates in New Mexico had begun to drop dramatically, the numbers rose rapidly with the rise of the Delta variant. *Id.* at 11. Back in June, there were approximately 60 new cases a day but by mid-August, there were nearly 900 new cases a day – a fifteenfold increase. *Id.* As a result, hospitals are again operating over their capacity to accommodate the surge of infected New Mexicans, the majority of whom are not vaccinated. *Id.*

To stem the tide of new cases and ease the pressure on our hospitals, on August 17, 2021, New Mexico Department of Health Acting Secretary David R. Scrase, M.D., issued "Public Health Emergency Order Requiring All School Workers Comply with Certain Health

Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated" (the "PHO"). Doc. 1-2. In relevant part, the PHO requires all "hospital workers . . . to be fully vaccinated against COVID-19 unless they qualify for an exemption." *Id.* at 3-4. The PHO also requires that "[a]ll persons who are eligible to receive a COVID-19 vaccine and enter the grounds of the New Mexico State Fair . . . provide adequate proof of being fully vaccinated against COVID-19 . . . unless the individual qualifies for an exemption." *Id.* at 5. Both hospital workers and individuals who seek entry into the State Fair "may be exempt from the COVID-19 vaccination requirement . . . if they have a qualifying medical condition which immunization would endanger their health, or they are entitled . . . to a disability-related reasonable accommodation or a sincerely held religious belief accommodation." *Id.* at 4, 5-6. A religious belief exemption may be supported by "a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual." *Id.* at 4-5, 6. The PHO specifically indicates that the vaccine requirements set forth therein are based on the following scientific and medical evidence: "the currently available COVID-19 vaccines are safe and the most effective way of preventing infection, serious illness, and death"; "widespread vaccination protects New Mexico's health care system as vaccines decrease the need for emergency services and hospitalization"; and "the refusal to receive the COVID-19 vaccine not only endangers the individual but the entire community, and further jeopardizes the progress the State has made against the pandemic by allowing the virus to transmit more freely and mutate into more transmissible or deadly variants." Doc. 1-2.

On August 19, 2021, Plaintiffs commenced the instant action. Named Plaintiff Jennifer Blackford is a registered nurse employed by Presbyterian. Doc. 1-3 ¶ 2. She asserts that the

PHO "requires that [she] be terminated if [she] refuse[s] to be vaccinated for COVID-19," and that, based on her "medical training and her own independent research," she is "opposed to receiving the EUA covid vaccines." *Id.* ¶¶ 4-5. Named Plaintiff Talisha Valdez, on behalf of herself and her 11- and 12-year-old daughters, has contracted to exhibit their animals at the New Mexico State Fair. Doc. 1-4 ¶¶ 2, 6. She asserts that the PHO "prohibits [her] and [her] children from attending the New Mexico State Fair and showing their animals," and that she has chosen "not to be vaccinated" and "to refuse to have [her] child injected with an experimental EUA vaccine." *Id.* at ¶¶ 9, 12. Together, Plaintiffs allege that, unless this Court enters a temporary restraining order and preliminary injunction, under the PHO, "New Mexicans will be forced to take an experimental vaccine in order to retain their employment and will forever lose the ability to exhibit their unique animals at the New Mexico State Fair." Doc. 1 at 22. In their Complaint, Plaintiffs request "a temporary restraining order to prohibit Defendants from enforcing public health orders against the Plaintiffs and other putative class members that are similarly situated," and a preliminary injunction "to prohibit Defendants from enforcing public health orders in the arbitrary and capricious manner and fashion engaged by Defendants." *Id.* at 15.

In an Order entered on August 23, 2021, the Court denied Plaintiffs' request for entry of an emergency order on an *ex parte* basis, explaining that Plaintiffs did not meet the requirements of Rule 65(b)(1) of the Federal Rules of Civil Procedure that would entitle them to a temporary restraining order "without written or oral notice to the adverse party or its attorney." Doc. 3. The Court, however, set an expedited briefing schedule on Plaintiffs' request for preliminary relief. *Id.* Later that day, Plaintiffs filed a motion asking the Court to reconsider its decision. Doc. 4. In an Order entered on August 25, 20121, the Court denied Plaintiffs' motion, explaining that Plaintiffs provided no basis for the Court to use its inherent authority to

reconsider its decision to refrain from issuing an order enjoining enforcement of the PHO without providing Defendants with an opportunity to respond. Doc. 10. In accordance with the expedited briefing schedule set by the Court, Defendants filed a response in opposition on August 30, 2021, Doc. 13, and Plaintiffs' reply followed on September 1, 2021. Doc. 14.

STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019). To obtain a "typical" preliminary injunction, the moving party must prove four things: (1) "that she's substantially likely to succeed on the merits"; (2) "that she'll suffer irreparable injury if the court denies the injunction"; (3) "that her threatened injury (without the injunction) outweighs the opposing party's under the injunction"; and (4) "that the injunction isn't adverse to the public interest." *Id.* (citation omitted).[1] "The third and fourth factors 'merge' when, like here, the government is the opposing party." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). "[B]ecause a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Id.* (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation marks omitted)). Notably, the movant "must" satisfy her burden as to each element; the elements "do not establish a balancing test – each must be satisfied independently,

[1] As noted above, Plaintiffs request both a temporary restraining order and a preliminary injunction. Where, as here, there has been notice to the adverse party, a motion for a temporary restraining order "may be treated by the court as a motion for preliminary injunction." 13 Moore's Federal Practice § 65.31 (2920). Further, the standard applicable to a motion for a preliminary injunction is the same as that applicable to a motion for a temporary restraining order. *Firebird Structures, LLC v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1505*, 252 F. Supp. 3d 1132, 1156 (D.N.M. 2017). Accordingly, the Court analyzes Plaintiffs' requests for temporary and preliminary relief together as a request for a preliminary injunction.

and the strength of one cannot compensate for the weakness of another." *Peterson v. Kunkel*, 492 F. Supp. 3d 1183, 1192 (D.N.M. 2020) (citing *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F. 3d 1276, 1282 (10th Cir. 2016)).

Courts, however, "'disfavor' some preliminary injunctions and so require more of the parties who request them." *Free the Nipple*, 916 F.3d at 797 (citing *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258-59 (10th Cir. 2005)). Specifically, a "disfavored preliminary injunction[]" is one that does not "merely preserve the parties' relative positions pending trial," but instead "may exhibit any of three characteristics": (1) "it mandates action (rather than prohibiting it)"; (2) "it changes the status quo"; or (3) "it grants all the relief that the moving party could expect from a trial win." *Free the Nipple*, 916 F.3d at 797. To obtain a "disfavored" preliminary injunction, the moving party "faces a heavier burden on the likelihood-of-success-on-the merits and the balance-of-harms factors," namely, she must make a "strong showing that these tilt in her favor." *Id.* (citation omitted).

DISCUSSION

Defendants argue that the injunction Plaintiffs seek, namely, "to prohibit Defendants from enforcing public health orders," is disfavored for two reasons: (1) Plaintiffs seek the same injunctive relief sought in their Complaint, and thus "seek virtually all the relief they could be awarded at the end of trial on the merits"; and (2) an injunction would "force Defendants to affirmatively alter the PHO and the State's enforcement of it," thus changing the status quo. Doc. 13 at 15-16. The Court is inclined to agree that the requested preliminary injunction is disfavored. *See Peterson*, 492 F. Supp. 3d at 1193 (finding that the requested preliminary injunction, namely, requiring defendants to allow private schools to conduct in-person learning at 50% capacity, was disfavored because it would change the status quo set by the challenged

public health order, which imposed a 25% capacity limitation on private schools, and because the requested preliminary relief was "an exact overlay of relief sought" in plaintiffs' complaint). The Court, however, need not decide whether the heightened disfavored-injunction standard applies, thus requiring "strong" showings from Plaintiffs on the first and third factors, because, as set forth herein, Plaintiffs fail to make even the baseline showing on any of the four factors as required to obtain a "typical" injunction.

I. Likelihood of Success on the Merits

In their Complaint, Plaintiffs assert that the PHO's vaccine requirements violate the Federal Food, Drug, and Cosmetic Act ("FDCA"), their Fourteenth Amendment rights to equal protection, substantive due process, and procedural due process, their rights under Article 1, Section 10 of the United States Constitution, and their rights under the New Mexico Constitution. Doc. 1 at 9-14. Plaintiffs, however, have failed to establish that any of these claims are likely to succeed on the merits.

A. FDCA Claims

According to Plaintiffs, by mandating that certain individuals be vaccinated against COVID-19, the PHO violates the FDCA, because the provisions of the FDCA relevant to medical products under an EUA "state[] that where a medical product is 'unapproved' then no one may be mandated to take it." Doc. 1 ¶ 54 (quoting 21 U.S.C. § 360bbb-3(e)). As an initial matter, and despite Plaintiffs' protestation to the contrary, the FDA has now given its full approval – not just emergency use authorization – to the Pfizer vaccine as administered to individuals 16 years of age and older. *See FDA News Release,* https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/comirnaty-and-pfizer-biontech-covid-19-vaccine ("On August 23, 2021, the FDA approved the first COVID-19 vaccine. The

vaccine has been known as the Pfizer-BioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty, for the prevention of COVID-19 disease in individuals 16 years of age and older."). Accordingly, the provisions of the FDCA quoted by Plaintiff, which are applicable only to medical products under an EUA, are not applicable to the administration of the Pfizer vaccine to individuals 16 years of age and older.

Further, while the statutory provisions quoted by Plaintiffs apply to the Moderna vaccine, the J&J vaccine, and the Pfizer vaccine as administered to individuals under the age of 16, those provisions nowhere prevent the state, or any other entity, from requiring certain individuals to be vaccinated against COVID-19. Rather, in relevant part, the FDCA requires that, for medical products under an EUA, "HHS must establish conditions to facilitate informed consent." *Klaassen v. Trustees of Indiana Univ. ("Klaassen I")*, __ F. Supp. 3d __, No. 21-cv-238, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021), *aff'd*, 7 F.4th 592 (7th Cir. 2021) (citing 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)). Specifically, "HHS must ensure that individuals taking the vaccine are informed that the Secretary has authorized the emergency use of the product," "of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown," and "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." *Klaassen I*, 2021 WL 3073926, at *25 (quoting 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)). This informed consent requirement "only applies to medical providers." *Klaassen I*, 2021 WL 3073926, at *25. Here, Defendants are not "directly administering the vaccine" to hospital workers and individuals who seek entry into the State Fair; instead, they are requiring such individuals "to obtain the vaccine from a medical provider and to attest that they have been vaccinated, save for certain

exemptions." *Id.* The individuals "will be informed of the risks and benefits of the vaccine and of the option to accept or refuse the vaccine by their medical providers." *Id.*

Accordingly, to the extent that the vaccines at issue here remain subject to the EUA provisions of the FDCA, the PHO does not run afoul of those provisions. *Id.; see also Bridges v. Hous. Methodist Hosp.*, No. 21-H-1774, 2021 WL 2399994, at * (S.D. Tex. June 12, 2021) (rejecting hospital employee's claim, virtually identical to Plaintiffs' claim here, that under FDCA "no one can be mandated to receive 'unapproved' medicines in emergencies," noting that the FDCA "confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency," "neither expands nor restricts the responsibilities of private employers," and "does not confer a private opportunity to sue the government"); Dep't of Justice, *Whether Section 564 of the Food, Drug and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* at 2 (July 6, 2021), https://www.justice.gov/olc/file/1415446/download (finding that informed consent provision in FDCA "specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements"). It follows that Plaintiffs are unlikely to succeed on the merits of their FDCA claims.

B. Substantive Due Process Claims

Plaintiffs generally allege that they "have [constitutionally] protected liberty interests" "in their right to live without governmental interference," their right "to bodily integrity," their right "to raise their children as they see fit," and their right "to engage in their chosen professions," and that because the PHO is "not narrowly tailored," it violates these substantive due process rights. Doc. 1 ¶¶ 63, 65. Here, "plaintiffs advance a substantive due process challenge to a *legislative* enactment," namely, the PHO. *Dias v. City & Cty. of Denver*, 567 F.3d

1169, 1182 (10th Cir. 2009) (emphasis in original); *see also ETP Rio Rancho Park, LLC, v. Grisham*, __ F. Supp. 3d __, No. 21-cv-92, 2021 WL 765364, at *41 (D.N.M. Feb. 26, 2021) (noting that, "[although the NMDOH – a state executive agency" – issued the challenged PHO, that PHO was "akin to a legislative action"). Accordingly, a "two-part substantive due process framework is applicable." *Dias*, 567 F.3d at 1182; *see also ETP Rio Rancho Park*, 2021 WL 765364, at *41 (applying the two-part approach to trampoline park owners' substantive due process challenge to PHO that limited operations for recreational facilities). First, the Court must "carefully describe the asserted fundamental liberty interest." *Dias*, 567 F.3d at 1182 (citation omitted). Second, the Court must decide "whether that interest is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997)). If the Court determines that the rights asserted are fundamental, the Fourteenth Amendment "forbids the government to infringe [those] rights at all, . . . unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721. If the legislative (or executive) action at issue "does not implicate a fundamental right, it must nonetheless bear a rational relationship to a legitimate government interest." *Dias*, 567 F.3d at 1182 (citation omitted).

Here, Plaintiffs' assertion of broadly defined rights falls short of providing the "careful description of the asserted fundamental liberty interest" required under *Glucksberg* to establish a fundamental right. *ETP Rio Rancho Park*, 2021 WL 765364, at * 42. Plaintiffs do not explain how the rights allegedly violated by the PHO are *fundamental*; indeed nowhere, do they address how the right to work in a hospital or attend the State Fair, unvaccinated and during a pandemic, is "deeply rooted in this Nation's history and tradition." *Id.*

In support of their request for preliminary relief, Plaintiffs focus solely on the right to "engage in their chosen profession," which they contend "is deeply rooted in our nation's legal and cultural history and has long been recognized as a component of the liberties protected by the Fourteenth Amendment." Doc. 14 at 6. But the Tenth Circuit has unequivocally held that the "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny." *Guttman v. Khalsa*, 669 F.3d 1101, 1118 (10th Cir. 2012). "[A]lthough 'the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment,' this right is 'subject to reasonable government regulation.'" *Id.* (quoting *Conn v. Gabbert,* 526 U.S. 286, 291-92, (1999)); *see also Collins v. Texas,* 223 U.S. 288, (1912) (the right to practice medicine is not a fundamental right). Thus, while Plaintiffs may "have a right to engage in their chosen professions," governmental infringement on this right will be "presumed to be valid" so long as it is "rationally related to a legitimate state interest." *Klaassen I*, 2021 WL 3073926, at *17 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). Indeed, federal courts have consistently held that vaccine mandates do not implicate a fundamental right and that rational basis review therefore applies in determining the constitutionality of such mandates. *Klaassen v. Trustees of Indiana Univ. ("Klaassen II")*, 7 F.4th 592 (7th Cir. 2021) (rejecting assertion by plaintiffs, who challenged Indiana University's mandatory COVID-19 vaccine requirement, that the rational basis standard does not offer enough protection for their interests, indicating that the court "must apply the law established by the Supreme Court" in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), which, in holding that "a state may require all members of the public to be vaccinated against smallpox," "shows that plaintiffs lack" a fundamental right to be free from mandatory vaccine measures); *Klaassen I*, 2021 WL 3073926, at *24 (collecting cases demonstrating "the

consistent use of rational basis review to assess mandatory vaccination measures," and, in light of "a century's worth of rulings, declining to "extend substantive due process to recognize" a fundamental right to be free from COVID-19 vaccination requirements); *Harris v. Univ. of Mass.*, No. 21-cv-11244, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) ("[T]he case [challenging a policy requiring students who seek to be on campus to be vaccinated prior to fall semester] "commends a deferential standard for analyzing Fourteenth Amendment challenges to generally applicable public health measures like the one here"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (Gorsuch, J., concurring) (explaining that *Jacobson* is "essentially . . . rational basis review").

"To satisfy the rational basis test, the [challenged governmental action] need only be rationally related to a legitimate government purpose." *Powers v. Harris,* 379 F.3d 1208, 1215 (10th Cir. 2004). Rational basis review "is highly deferential toward the government's actions. The burden is on the plaintiff to show the governmental act complained of does not further a legitimate state purpose by rational means." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 772 (10th Cir. 2008). The government's decision "must be upheld if any state of facts either known or which could reasonably be assumed affords support for it. Second-guessing by a court is not allowed." *Powers*, 379 F.3d at 1216-17. Moreover, "rational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question." *Id.* at 1217. The Court "will not strike down [governmental action] as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, or because the statute's classifications lack razor-sharp precision." *Id.* Nor will the Court "overturn [an order] on the basis that no empirical evidence supports the assumptions underlying the [governmental] choice." *Id.* Indeed, the Court is "not bound by the parties' arguments as to

what legitimate state interests the [order] seeks to further," but instead "is obligated to seek out other conceivable reasons for validating a state [order]." *Id.*

The Court finds that the PHO meets the rational basis test. "Vaccination requirements, like other public-health measures, have been common in this nation." *Klaassen*, 7 F.4th at 593. In *Jacobson,* the Supreme Court held that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." 197 U.S. at 27. Based on that premise, the Supreme Court declined to find unconstitutional, on either substantive due process or equal protection grounds, a Cambridge, Massachusetts regulation that required all adult inhabitants of that city, *without exception*, to be vaccinated against smallpox. The Supreme Court explained that "when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing." *Id.* The Court further explained that, "in view of the methods employed to stamp out the disease of smallpox," no one could "confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. The Court noted that while it did "not decide, and [could not] decide, that vaccination is a preventive of smallpox," it took "judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation," held that Cambridge's compulsory vaccine statute was "a health law, enacted in a reasonable and proper exercise of the police power." *Id.* at 35. The Court then found that, since "vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court . . . is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was – perhaps, or possibly – not the best either for children or adults." *Id.*

In reaching its decision, the Supreme Court considered and rejected the defendant's "offers of proof" of "those in the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body." *Id.* at 30. The Court explained that it assumed that the legislature "was not unaware of these opposing theories," and that it was for the legislature, *and not the court*, to "determine which one of the two modes was likely to be the most effective for the protection of the public against disease." *Id.* Indeed, the Court explained that the legislature "could not properly abdicate its function to guard the public health and safety," and thus was compelled, of necessity, to choose between opposing theories on how best to "meet and suppress the evils of a smallpox epidemic that imperiled an entire population." *Id.* at 30-31. The Court emphasized that the "possibility that the belief [in the efficacy of vaccines] may be wrong, and that science may yet show it to be wrong," was "not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id.* at 35.

Ultimately, the Court refused to allow the defendant to "claim [] an exemption" from the vaccination statute based on his offers of proof regarding the "evil" of vaccines, as doing so would "strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37. And in so refusing, the Court noted that it was "not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state." *Id.* The Court concluded: "We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person,

or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state." *Id.*

With its decision in *Jacobson*, the Supreme Court "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176, (1922). In the context of the current pandemic, courts have applied *Jacobson* to find that mandatory vaccine policies at state universities – all of which, like the vaccine policy at issue here, provide for medical, disability, and religious belief exemptions – meet the rational basis test. *See Klaassen I*, 2021WL3073926, at *27 (noting that, in light of the fact that the "vaccination campaign has markedly curbed the pandemic," "Indiana University insisting on vaccinations for its campus communities," thereby "stemming illness, hospitalizations, or deaths at the university level[,] hardly proves irrational"); *Harris,* 2021 WL 384012, at *6 (holding that university's decision to mandate vaccines was based "upon both medical and scientific evidence and research and guidance, and thus is at least rationally related to" the "legitimate interests" of curbing the spread of COVID-19 and "returning students safely to campus"); *America's Frontline Doctors v. Wilcox*, No. 21-EDCV-1243, 2021 U.S. Dist. LEXIS 144477 (C.D. Cal. July 30, 2021) (holding that "there is clearly a rational basis for Defendants to institute the Policy requiring vaccination" to further the goal of facilitating the "protection of the health and safety of the University community," where the policy was "the product of consultation with UC infections disease experts and ongoing review of evidence from medical studies concerning the dangerousness of COVID-19 and emerging variants of concern, as well as the safety and effectiveness of the vaccines"). Applying *Jacobson* to the PHO's vaccine mandate, the Court reaches the same conclusion.

The governmental purpose of stemming the spread of COVID-19, especially in the wake of the Delta variant, is not only legitimate, but is "unquestionably a compelling interest." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67. Other legitimate goals follow from that, including: (1) protecting "persons who may be extremely vulnerable to the virus and at high risk for poor outcomes," "children younger than 12 years" who are not eligible for vaccination, and "individuals who are not able to get vaccinated due to a contraindication . . . or persons who may be severely immunocompromised and not able to mount an effective immune response to the vaccine"; and (2) "significantly reduc[ing] the transmission of this virus from person to person" in order to "decrease the likelihood" of "new mutations in the viral genome that could possibly lead to more severe disease or even the ability to evade the current vaccines and anti-viral therapeutics." Doc. 13-1 ¶¶ 14, 20-21, 26. Following the research, recommendations, and guidance of several medical and scientific sources, including the CDC, the American Academy of Pediatrics, the American Academy of Family Practice, the Infectious Diseases Society of America, the New Mexico state public health lab, University of New Mexico, Los Alamos National Lab, and the Advisory Committee on Immunization Practices, Defendants have determined that the three vaccines – which are "extremely safe" and, even against the Delta variant, "highly effective" – "are the best tool we have to protect individuals and protect communities from [COVID-19]." Doc. 13-1 ¶¶ 15, 28. Notably, based on the scientific and medical research, Defendants have determined that vaccinating health care personnel is the "best tool" to protect patients who come into close contact with them – patients who "may be extremely vulnerable to the virus and at high risk for poor outcomes." *Id.* ¶ 14. Similarly, Defendants have determined that "the most effective way to stop transmission both to children younger than 12 years" and to "individuals who are not able to get vaccinated" "is to vaccinate

eligible family members and those in the community where they live." *Id.* ¶¶ 20-21. Further, Defendants have determined that "[t]he best tool we have" to decrease the likelihood that new, more lethal mutations of the virus develop "is through protecting as many people as possible by vaccination." *Id.* ¶ 26. Finally, Defendants have determined that "the immunity provided by vaccines may be more long-lasting compared to immunity gained following infection." *Id.* ¶ 39.

The vaccination requirements set forth in the PHO, thus grounded in medicine and science, are rationally related to Defendants' legitimate purpose of protecting our community "against an epidemic of disease [that] threatens the safety of its members." *Jacobson*, 197 U.S. at 27. As was smallpox in 1905, COVID-19 is "prevalent to some extent" in New Mexico and, because of the Delta variant, "the disease [is] increasing." *Id.* Since *Jacobson* was decided, the "methods employed to stamp out" diseases have continued to include vaccination, which, "as a means of protecting a community against smallpox [other diseases, and now, COVID-19], finds strong support in the experience of this and other countries." *Id.* Accordingly, no one could "confidently assert that the means prescribed by the state to prevent the spread of COVID-19," namely, requiring certain individuals to be vaccinated, have "no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. It follows that the PHO was "enacted in a reasonable and proper exercise of [Defendants'] police power." *Id.* at 35. Indeed, "this case is easier than *Jacobson*," as *"Jacobson* sustained a vaccination requirement that lacked exceptions for adults," while the PHO has medical, disability, and religious belief exemptions, and "does not require every adult member of the public to be vaccinated, as Massachusetts did in *Jacobson*," but rather is targeted to those individuals most likely to impact vulnerable populations. *Klaassen II*, 7 F.4th at 593.

Plaintiffs decry the basis for the PHO as "technocratic selective science," and argue that it fails to take into account that "Covid-recovered individuals have equal to or better immunity response than vaccinated individuals." Doc. 14 at 2; Doc. 1 ¶ 13. But Plaintiffs' "disputes over the most reliable science" are of no moment to the instant analysis, as "the court doesn't intervene so long as [Defendants'] process is rational in trying to achieve public health." *Klaassen I*, 2021 WL 3073926, at * 38 (citing *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) ("[P]laintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* makes clear, that is a determination for the [policymaker], not the individual objectors.")). As did the Court in *Jacobson*, this Court assumes that Defendants are aware of "opposing theories" on the safety and efficacy of vaccines; and as did the Court in *Jacobson*, this Court finds, as it must, that it is for Defendants, and not the Court, to determine what "[is] likely to be the most effective [mode] for the protection of the public against disease." *Jacobson*, 197 U.S. at 30. Indeed, this is so regardless of whether "science may yet show" Defendants' belief in the efficacy of the COVID-19 vaccines "to be wrong," as Defendants have the right to enact orders "adapted to prevent the spread of contagious diseases." *Id.*

Plaintiffs also contend that the PHO represents an "offensive disregard for the civil rights of the unvaccinated to make their own decision about what to put in their bodies trusting the science they think is best and their own doctors to decide for themselves what is best for them." Doc. 14 at 3. But the *Jacobson* Court made clear that the Fourteenth Amendment does not grant individuals any such rights in the face of a state-imposed vaccine mandate. To the contrary, the Court explicitly refused to "hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and

enjoying the benefits of its local government" should have the power [] to dominate the majority by "defy[ing] the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state." *Jacobson*, 197 U.S. at 38. In short, by failing to accommodate Plaintiffs' (or their doctors') views on the COVID-19 vaccines, the PHO does not lack a rational relationship to a legitimate government purpose. Indeed, to hold otherwise would "practically strip [Defendants] of [their] function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37.

For these reasons, the PHO meets the rational basis test. Accordingly, Plaintiffs are unlikely to succeed on the merits of their substantive due process claims.

C. Equal Protection Claims

Plaintiffs allege that Defendants are violating their equal protection rights because their "actions create a class of individuals who . . . are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them any alternative," and "[t]he PHO is not rationally related to achieving a compelling government purpose." Doc. 1 ¶¶ 59, 60 (emphasis in original). "Equal protection is essentially a direction that all persons similarly situated should be treated alike." *Dalton v. Reynolds*, 2 F.4th 1300, 1308 (10th Cir. 2021) (citation omitted). "In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998)). "Upon this showing, [plaintiffs] must then demonstrate that the state actor's differential treatment of [them] cannot pass the appropriate standard of scrutiny." *Dalton,* 2 F.4th at 1308.

"Different types of equal protection claims call for different forms of review." *Id.* "[U]nless a legislative classification either burdens a fundamental right or targets a suspect class,

it need only bear a rational relation to some legitimate end to comport with equal protection." *Curley v. Perry*, 246 F.3d 1278, 1285 (10th Cir. 2001) (citation omitted). As discussed above, the PHO does not burden a fundamental right. Nor does it target a suspect class, as it does not "categorize persons based on suspect classifications, such as race and national origin," or "on 'quasi-suspect' classifications, such as gender and illegitimacy." *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) (citations omitted). Accordingly, the Court applies rational basis review, asking "whether the government's classification bears a rational relation to some legitimate end." *Dalton*, 2 F.4th at 1308.

As explained above in the context of Plaintiffs' substantive due process claims, the PHO meets the rational basis test. The PHO, including its classification of individuals as to whom vaccination requirements apply, is grounded in medicine and science, and thus is rationally related to Defendants' legitimate purpose of protecting our community "against an epidemic of disease [that] threatens the safety of its members." *Jacobson*, 197 U.S. at 27. Accordingly, Plaintiffs are unlikely to succeed on the merits of their equal protection claims.

D. Procedural Due Process Claims

Plaintiffs allege that the PHO deprives them of "fundamental liberties without due process of law." Doc. 1 ¶ 73. Because the PHO, however, "is generally applicable" to all congregate care facility workers, hospital workers, school workers, State Fair attendees, and Governor's office staff, Plaintiffs "are not entitled to [process] above and beyond the notice provided by the enactment and publication of the [PHO] itself." *Harris,* 2021 WL 3848012, at *5 (citation omitted); *see also United States v. Locke*, 471 U.S. 84, 108 (1985) ("In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to

the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements."); *Oklahoma Educ. Ass'n v. Alcoholic Beverage Laws Enforcement Comm'n*, 889 F.2d 929, 936 (10th Cir. 1989) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process – the legislative process."); *Curlott v. Campbell*, 598 F.2d 1175, 1181 (9th Cir. 1979) ("[W]e doubt very much that procedural due process prior to reduction of benefits is required when an agency makes a broadly applicable, legislative-type decision."). Based on this principle, courts in this district have held that the public health orders issued by Defendants in response to the current pandemic do not implicate procedural due process. *See Hernandez v. Lujan Grisham*, 508 F. Supp. 3d 893, 977-981 (D.N.M. 2020); *Peterson*, 492 F. Supp. 3d at 1197-98. This Court agrees. Accordingly, Plaintiffs are unlikely to succeed on the merits of their procedural due process claims.

E. Claims under Article I, Section 10 of the United States Constitution

Plaintiffs allege that Defendants' vaccine requirements "constitute[] a bill of attainder" and "impair" the contract entered into between Valdez and her children "to participate in the New Mexico State Fair junior livestock competitions" and Blackford's "employment contract," in violation of Article I, Section 10 of the United States Constitution. Doc. 1 ¶¶ 75-76. In their reply brief, Plaintiffs appear to abandon their theory that the PHO constitutes a bill of attainder, referring to Defendants' arguments refuting that theory as "a complete red herring." Doc. 14 at 7. Accordingly, the Court will consider only Plaintiffs' remaining argument under the Contracts Clause of Article I, Section 10 of the United States Constitution, namely that Defendants have impaired Plaintiffs' existing contracts by enacting the PHO. *Id.* at 8-9.

"The Contracts Clause restricts the power of States to disrupt contractual arrangements." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.* (quoting U.S. Const., Art. I, § 10, cl. 1). Not all laws affecting pre-existing contracts, however, violate the Clause. *Sveen*, 138 S. Ct. at 1821. The Supreme Court has articulated a "two-step test" to determine "when such a law crosses the constitutional line." *Id.* First, the Court asks whether the state law has "operated as a substantial impairment of a contractual relationship." *Id.* at 1822. In answering that question, the Court considers "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id.* "If such factors show a substantial impairment," the Court next asks "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id.* (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411–412 (1983)).

Here, Plaintiffs have failed to establish a "substantial impairment" of any contractual relationship. Plaintiffs have not provided the Court with copies of any of the purported contracts at issue or cited to any provisions therein to demonstrate that the PHO undermines their contractual bargain, interferes with their reasonable expectations, or prevents them from safeguarding or reinstating their rights. And indeed, the evidence available to the Court demonstrates to the contrary.

First, as Plaintiffs concede, Blackford's employer, Presbyterian, has instituted its own private vaccine mandate – a mandate that reaches more broadly than does the PHO – requiring its entire workforce to be vaccinated against COVID-19 in the absence of a qualifying exemption. Colleen Heild, *Presbyterian requires vaccines for entire workforce of 13,000*, Santa

Fe New Mexican (Aug. 18, 2021), https://www.abqjournal.com/2420650/ presbyterian-requires-vaccines-for-entire-workforce-of-13000-ex-pnm-is-asking-all-staff-to-get-vaccinated-or-be-tested-weekly.html. Plaintiffs contend that Presbyterian's mandate was implemented simply so that Blackford's "employer can remain compliant with the [] PHO," Doc. 14 at 8, but there is no support for this contention, as the PHO applies directly to individual workers rather than to the hospitals that employ them. Nor is there any indication that, but for the PHO, Presbyterian would not have instituted its own vaccine requirements. Notably, commenting on its mandate, Presbyterian's president and CEO, Dale Maxwell, stated, "We take care of some of the most vulnerable people in the state of New Mexico, . . . and I believe . . . we should take every measure possible to deliver the safest environment." *Id.* Maxwell further stated that Presbyterian made its own independent decision "to also include all other Presbyterian employees, including clinical, clerical and health plan employees," because "we believe at Presbyterian that vaccines are the best way to combat this pandemic . . . We know that vaccines reduce the spread of the infection and we know that vaccines reduce the illness of those that contract COVID-19. Any action to increase vaccines in our community, we support." *Id.* Thus, Blackford has no "reasonable expectation" that she would be entitled to continue her employment without being vaccinated, and thus cannot claim that the PHO substantially impairs her contractual rights.

Similarly, while Plaintiffs allege that Valdez has been deprived of the benefit of her contract with Expo New Mexico because her children cannot participate in the New Mexico State Fair junior livestock competitions, Expo New Mexico cancelled the 2021 New Mexico State Fair Junior Livestock Shows and Sale. *See* New Mexico State Fair website, https://statefair.exponm.com/p/participate/competitions/livestock-shows. The website indicates that

Expo New Mexico is "issuing full refunds of all fees to our exhibitors," and provides a form on its website for individuals who had contracted to attend to make their request for a refund. *Id.* Because Valdez thus is entitled to a refund of the consideration that she paid for her children to participate in the State Fair, the PHO does not undermine her contractual bargain. Further, she and her children will still be able to show their animals, as the New Mexico Youth Livestock Expo is going forward in Roswell, welcoming all entries free of charge and in an unlimited number. *See* New Mexico Youth Livestock Expo Facebook page, https://www.facebook.com/NMJLF1989/photos/pb.181295355267698.2207520000../4601143193282870/?type=3&theater. The fact that they may exhibit their animals in the New Mexico Youth Livestock Expo negates Plaintiffs' claim that the PHO has "fully removed the ability of these children to participate." Doc. 14 at 8.

Even if Plaintiffs were able to show a substantial impairment of a contractual relationship, their claim under the Contracts Clause would fail because, just as it meets the rational basis test, the PHO is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose. For these reasons, Plaintiffs are unlikely to succeed on the merits of their claims that the PHO violates the Contracts Clause of Article I, Section 10 of the United States Constitution.

F. State Constitutional Claims

Plaintiffs allege that, by requiring individuals to be vaccinated "to maintain employment or enjoy the benefits of an existing contract," Defendants are violating Plaintiffs' rights "secured by the New Mexico Constitution," and that such violation "is actionable under the New Mexico Civil Rights Act [("NMCRA")]." Doc. 1 ¶¶ 81, 86. "The eleventh amendment generally bars lawsuits in federal court seeking damages against states as well as against state agencies,

departments, and employees acting in their official capacity." *Bishop v. John Doe 1*, 902 F.2d 809, 810 (10th Cir. 1990). Nonetheless, a state "may waive its eleventh amendment immunity and consent to suit against itself, related entities and employees." *Id.* Under the NMCRA, the state of New Mexico has waived sovereign immunity "for itself or any public body within the state for claims brought pursuant to the New Mexico Civil Rights Act." N.M. Stat. Ann. § 41-4A-9. This waiver, however, is limited to actions commenced in "any New Mexico district court." N.M. Stat. Ann. § 41-4A-3. The Tenth Circuit has interpreted analogous language in the New Mexico Tort Claims Act ("NMTCA") to mean that a plaintiff cannot "pursue [a] claim against [a state public body] and its employees acting within the scope of their employment in the federal district court, but rather is relegated to the state district court to seek relief consistent with the limited waiver of immunity under [the NMTCA]." *Bishop*, 902 F.2d at 810.

Here, Defendants invoke eleventh amendment immunity and argue that, because the NMCRA waives immunity only as to actions commenced in New Mexico state court, Plaintiffs may not pursue their New Mexico constitutional claims, brought pursuant to the NMCRA, in this Court. Doc. 13 at 32. In response, Plaintiffs argue that this Court nonetheless has pendent jurisdiction over their NMCRA claims. Doc. 14 at 9-10. This Court has considered and rejected that argument in the analogous context of the NMTCA as "incorrect as a matter of law." *Quarrie v. New Mexico Inst. of Mining & Tech.*, No. 13-cv-349, 2014 WL 11456598, at *2 (D.N.M. Feb. 25, 2014). As the *Quarrie* Court explained, "immunity under the Eleventh Amendment is not abrogated by 28 U.S.C. § 1367, and therefore, § 1367 does not authorize federal district courts to exercise jurisdiction over claims against nonconsenting states." *Id.* (citing *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 542 (2002) (holding that "§ 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state

defendants")). Plaintiffs have pointed to no contrary authority to suggest that Defendants have lost the right to invoke eleventh amendment immunity solely because this Court otherwise would have supplemental jurisdiction over their NMCRA claims.

Because Plaintiffs are unable to seek a decision on the merits of their NMCRA claims in this Court, they necessarily are unlikely to succeed on the merits of those claims.

* * *

Accordingly, Plaintiffs have failed to prove that they are "substantially likely to succeed on the merits" of any of their claims. *Free the Nipple,* 916 F.3d at 797. Because Plaintiffs "must" satisfy their burden as to each factor of the preliminary injunction test, Plaintiffs' failure to satisfy their burden as to the likelihood of success factor is alone fatal to their request for preliminary injunctive relief. *Peterson*, 492 F. Supp. 3d at 1192. Nonetheless, the Court will consider the remaining factors of the preliminary injunction test.

II. Irreparable Harm

Plaintiffs argue that, because the PHO "burden[s] if not outright den[ies]" their due process and equal protection rights, the irreparable harm standard is met. Doc. 1 at 23. But "[a]s explained in the preceding sections, [Plaintiffs have] failed to demonstrate the requisite likelihood of success" on their constitutional claims and, "[a]s a result, [they are] not entitled to a presumption of irreparable injury." *Schrier*, 427 F.3d at 1266.

Accordingly, to satisfy the irreparable harm prong of the preliminary injunction test, Plaintiffs must show that they stand to suffer "an injury" that is "certain, great, actual, and not theoretical." *Id.* at 1267 (citation omitted). "Merely serious or substantial harm is not irreparable harm." *Id.* (citation omitted). Further, "the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable

relief to prevent irreparable harm." *Id.* (citation omitted). Importantly, "[i]t is [] well settled that simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages." *Id.* (citation omitted). Similarly, "[a] permanent loss of employment, standing alone, does not equate to irreparable harm." *E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005).

Plaintiffs claim that "[t]here is no adequate legal remedy for [their] intangible harms," namely, "being terminated from their employment and from engaging in their chosen profession." Doc. 1 at 23. But, as discussed above, any harm to Blackford caused by her potential termination and/or inability to continue to work as a nurse is a function not of the PHO but rather of her employer's own vaccine mandate. And indeed, even if that harm were attributable to the PHO, being so terminated/prevented from working as a nurse does not equate to irreparable harm. Similarly, Valdez cannot establish any harm from the PHO, because, as discussed above, Expo New Mexico has offered to refund all fees paid to participate in the New Mexico State Fair Junior Livestock Shows and Sale, and Valdez and her children may enter, at no cost, the New Mexico Youth Livestock Expo. Further, Plaintiffs have failed to establish that any loss to Valdez resulting from the PHO is not compensable by monetary damages.

Plaintiffs thus have failed to establish that they will suffer irreparable harm if the PHO is not enjoined.

III. Balance of Harms

Plaintiffs contend that "the balance of harms tips decidedly in favor of Plaintiff[s]," because, if an injunction is granted, "Defendants will suffer [only] speculative harm," but if an injunction is not granted, Plaintiffs will suffer "an injury to [their] [constitutional] rights." Doc. 1 at 24. As the Court has already explained, Plaintiffs are unlikely to succeed on the merits of

their constitutional claims. Accordingly, the threatened harm that Plaintiffs seek to prevent does not reach a constitutional magnitude. Nor can the Court agree that any harm to Defendants can be so easily minimized as "speculative." To the contrary, the Court finds that "the balance of equities tips in Defendants' favor given the strong public interest here they are promoting – preventing further spread of COVID-19 [], a virus [that] has infected and taken the lives of thousands of [New Mexico] residents." *Harris,* 2021 WL 3848012, at *8. "Plaintiffs' requested relief here would weaken the efforts of [Defendants] to carry out those goals." *Id.* "Similarly, given the public health efforts promoted by the [PHO], enjoining the continuation of same is not in the public interest." *Id.*

The Court thus finds that Plaintiffs have failed to establish that the balance of harms weighs in their favor or that granting the requested injunction would not be adverse to the public interest. *See ETP Rio Rancho Park*, 2021 WL 765364, at *57 (holding that "the threatened injuries – financial injuries and possible permanent business closure – do not outweigh possible damage – increased COVID-19 spread leading to sickness, hospitalizations, and death – to the Defendants," and "for similar reasons," the requested injunction "would be adverse to the public interest").

CONCLUSION

To obtain preliminary injunctive relief, Plaintiffs are required to prove that they are substantially likely to succeed on the merits of their claims, that they will suffer irreparable injury if the Court denies the requested injunction, that the balance of harms weighs in their favor, and that the injunction would not be adverse to the public interest. As set forth above, Plaintiffs fail to satisfy their burden as to any, let alone all, of these factors. Accordingly, Plaintiffs are not entitled to an order enjoining the PHO.

IT IS THEREFORE ORDERED that Plaintiffs' requests for a temporary restraining order and a preliminary injunction, as set forth in Plaintiffs' Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages [Doc. 1], are **DENIED**.

DATED this 13th day of September 2021.

MARTHA VÁZQUEZ
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TALISHA VALDEZ AND JENNIFER BLACKFORD
Plaintiffs-Appellants,

v.

MICHELLE LUJAN GRISHAM AND DAVID SCRASE
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
No. 1:21-cv-00783-MV-JHR

OPPOSED MOTION OF PLAINTIFFS-APPELLANTS FOR INJUNCTION PENDING APPEAL AND STAY OF THE DISTRICT COURT PROCEEDINGS

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November 8, 2021

INTRODUCTION

This Motion is made pursuant to this Court's jurisdiction to hear immediate appeals of denials of preliminary injunctions. In this case, the District Court has jurisdiction under 42 U.S.C. Section 1983 to hear the claims that Appellants brought concerning violations of constitutional rights and an application was first made to the District Court following the denial of the requested preliminary injunction for a stay and injunction pending this appeal which was denied for the reasons stated in the decision found in the concurrently filed appendix (Aplt App 199-228), but summarized here as being denied as matter of law that, based on the facts as presented by Appellants, that they did not demonstrate a substantial likelihood of success on the merits, irreparable harm, or that the balance of harms weighed in favor of an injunction. Because it appeared imminent that the District Court would likely rule on a pending F.R.C.P Rule 12(b)(6) to dismiss this case, Appellants have delayed filing the instant motion and have instead elected to file the instant motion contemporaneously with the Opening Brief and Appendix in this matter. Like the District Court's Order, the Declaration of Appellant Jennifer Blackford that was presented to the District Court and upon which Appellant relies for the instant request are found in the Appendix (Aplt App 054-055), and has been attached hereto.

THE FACTORS ARE SATISFIED FOR THE GRANTING OF INJUNCTIVE RELIEF PENDING APPEAL

As set forth in 10th Cir. R. 8.1, a plaintiff seeking an injunction while an appeal is pending before this Court under Fed. R. App. P. 8(a)(1)(C); *see also* Fed. R. App. P. 8(a)(2), "requires the applicant to address the following: (a) the likelihood of success on appeal; (b) the threat of irreparable harm if the stay or injunction is not granted; (c) the absence of harm to opposing parties if the stay or injunction is granted; and (d) any risk of harm to the public interest. In ruling on such a request, this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction. *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001).[1]

As set forth in detail, in the contemporaneously filed Opening Brief, Appellants satisfy each of the four factors for this Court to issue a preliminary injunction pending this Court's resolution of appeal of the District Court's denial of preliminary injunction and incorporates fully the arguments, citations and recitations of the Opening Brief herein as stated regarding these factors.

[1] Plaintiffs satisfied Rule 8(a)(1)'s requirement to "move first in the district court for . . . an order . . . granting an injunction," by first requesting this very preliminary injunction from that court and then by subsequently filing a motion for relief pending appeal.

SPECIFICS OF PRELIMINARY RELIEF REQUESTED

Appellants request that the Appellees be prevent from enforcing the PHO order at issue in this matter during the pendency of this appeal and a stay of the matter before the district court while this appeal is pending.

Conclusion

For all the foregoing reasons, Appellants' motion for a preliminary injunction pending appeal should be granted.

Dated: November 8, 2021

Respectfully submitted,

WESTERN AGRICULTURE,
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ADVOCATES, LLP

By: */s/ A. Blair Dunn*

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CERTIFICATE OF SERVICE

I, A. Blair Dunn, hereby certify that on November 8, 2021, I served a copy of the foregoing upon parties of record as follows:

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD on behalf of herself
And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

DECLARATION OF JENNIFER BLACKFORD

I, Jennifer Blackford declare:

1. I am a resident of Rio Rancho, New Mexico.
2. I am a registered nurse employed by Presbyterian.
3. I have not been vaccinated for COVID-19.
4. The August 17, 2021, Public Health Order required that I be terminated if I refused to be vaccinated for COVID-19 or was not exempted without exemption.
5. I do not meet the criteria for either a medical exemption or a religious exemption, and I have been told I will not be allowed to continue in my employment without the vaccine.
6. I will be denied the right to engage in employment in my chosen profession by the PHO.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and is executed this 23rd day of August 2021, in Rio Rancho, New Mexico.

Jennifer Blackford
Jennifer Blackford

FILED
United States Court of Appeals
Tenth Circuit

November 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TALISHA VALDEZ, on behalf of herself and others similarly situated, et al.,

Plaintiffs - Appellants,

v.

MICHELLE LUJAN GRISHAM, officially and individually, acting under the color of law, et al.,

Defendants - Appellees.

No. 21-2105
(D.C. No. 1:21-CV-00783-MV-JHR)
(D. N.M.)

ORDER

The appellants have filed a motion for an injunction pending appeal and a stay of the district court proceedings. We have determined that a response from the appellees would be beneficial in our resolution of this motion. The appellees are directed to respond to the appellants' motion on or before November 23, 2021.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TALISHA VALDEZ and JENNIFER BLACKFORD, **Plaintiffs/Appellants,** **v.** **MICHELLE LUJAN GRISHAM, and DAVID SCRASE,** **Defendants/Appellees.**	**Case No. 21-2105**

Appeal from the Honorable Martha A. Vázquez of the
United States District Court for the District of New Mexico
No. 1:21-cv-00783-MV-JHR

DEFENDANTS/APPELLEES GOVERNOR LUJAN GRISHAM AND SECRETARY SCRASE'S ANSWER BRIEF

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-November 22, 2021-

-ORAL ARGUMENT IS NOT REQUESTED-

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

INTRODUCTION/NATURE OF THE CASE

This interlocutory appeal represents yet another attempt to have the courts overturn elected officials' constitutional measures enacted to protect lives and safety during an unprecedented pandemic. In an effort to stem the rapid resurgence of a highly contagious and potentially more lethal variant of the virus that causes COVID-19, Defendants issued a public health order requiring individuals working with New Mexico's most vulnerable populations in hospitals and congregate care settings to receive a safe and effective vaccine—one of which is now ***fully*** approved by the U.S. Food and Drug Administration—or meet a health, disability, or religious exemption. Defendants also required all vaccine-eligible individuals to show proof of vaccination or entitlement to an exemption to attend the (now over) New Mexico State Fair.

Unfortunately, not everyone agrees with the science. Those disagreements, however, do not give rise to a justiciable dispute. As Justice Cardozo eloquently observed, "The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law." *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 268 (1934). Plaintiffs—two individuals subject to the vaccine requirements and apparently not entitled to an exemption—seek to halt

Defendants' carefully calculated life-saving measures based on their (faulty and speculative) belief that the vaccines are neither safe nor necessary. But such minority views are insufficient to defeat the wisdom of elected officials guided by the State and nation's preeminent public health experts. As the U.S. Supreme Court proclaimed over a century ago,

> We are not prepared to hold that a minority, residing or remaining in any city or town where [a deadly, contagious virus] is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population.

Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905). Plaintiffs (who no longer have standing to pursue injunctive relief) give this Court no reason to conclude otherwise or find an abuse of discretion in the denial of preliminary injunctive relief.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in denying Plaintiffs' request for a preliminary injunction?

STATEMENT OF THE CASE

I. The rapid and dangerous spread of COVID-19

Since its emergence last year, the novel coronavirus 2019 (Sars-CoV-2), the virus that causes COVID-19, has spread exponentially across the globe, throughout

the United States, and here in New Mexico.[1] COVID-19's rapid spread is attributable to certain characteristics of the virus that causes it and the ease with which that virus is transmitted. COVID-19 is a respiratory illness that causes severe complications in some patients, including respiratory failure, organ failure, and death.[2] Like most respiratory illnesses, COVID-19 spreads easily through close person-to-person contact, and the risk of transmission increases if individuals interact with more people, come within six feet of one another, and spend longer periods of time together.[3] Although it has not been measured precisely, a significant portion of COVID-19 cases result in mild symptoms or no symptoms.[4] Additionally, even in cases that are symptomatic, the average time from exposure to symptom onset is five to six days, with symptoms sometimes not appearing until as long as

[1] *See* Appellants' Appendix (Aplt. App.) at 99 ¶¶ 4-5.

[2] *See* Aplt. App. at 100 ¶ 7; *What Is Coronavirus?*, Johns Hopkins Medicine, https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus (last visited Aug. 25, 2021).

[3] *How COVID-19 Spreads*, Ctr. for Disease Control and Prevention (Oct. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html; *Deciding to Go Out*, Ctr. for Disease Control and Prevention (Sept. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html#:~:text=COVID%2D19%20spreads%20easier%20between, People%20are%20wearing%20masks.

[4] Katie Kerwin McCrimmon, *The truth about COVID-19 and asymptomatic spread: It's common, so wear a mask and avoid large gatherings*, UC Health (Nov. 5, 2020), https://www.uchealth.org/today/the-truth-about-asymptomatic-spread-of-covid-19/.

thirteen days after infection.[5] This means that individuals who have been infected and have the potential to infect others usually do not know they are infected for at least several days (and may never know, if they remain asymptomatic).

The ease and rapidity with which COVID-19 spreads and its severe and sometimes fatal symptoms in a certain percentage of the population create a potential for mass deaths and a severely overloaded health care system. At the height of the pandemic (so far) last winter, the United States was recording on average nearly 200,000 new cases and over 4,000 COVID-related deaths *every day*.[6] New Mexico was averaging over 2,500 new cases and over 40 deaths daily.[7] The Department of

[5] *COVID-19 Basics: Symptoms, Spread and Other Essential Information About the New Coronavirus and COVID-19*, Harvard Medical School (March 2020), https://www.health.harvard.edu/diseases-and-conditions/covid-19-basics.

[6] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctr. for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (last visited Nov. 20, 2021); *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctr. for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths (last visited Nov. 20, 2021).

[7] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctr. for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailycases (follow "New Mexico" on drop down menu) (last visited Nov. 20, 2021); *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctr. for Disease Control and Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailydeaths (follow "New Mexico" on drop down menu) (last visited Nov. 20, 2021).

Health had to activate crisis standards of care because hospitals were literally overflowing with patients.[8] Tragically, hospitals were not the only things at capacity. One in five New Mexicans hospitalized for COVID-19 eventually succumbed to the virus—leaving morgues inundated as well.[9]

II. The development of the COVID-19 vaccines

Thankfully, science came to the rescue. In February 2020, the U.S. Department of Health and Human Services (HHS) declared a public health emergency and instructed the U.S. Food and Drug Administration (FDA) to grant emergency use authorizations (EUAs) for medical devices and interventions to combat the pandemic. *See* 85 Fed. Reg. 7316, 7317 (Feb. 7, 2020); 85 Fed. Reg. 18250, 18251 (Mar. 27, 2020). While an EUA generally allows a manufacturer to receive approval for a medical product using only interim clinical trial data, products that receive EUA approval still must adhere to specified safety, efficacy, and

[8] Governor Michelle Lujan Grisham, *Executive Order 2020-083*, at 4 (Dec. 4, 2020), https://www.governor.state.nm.us/wp-content/uploads/2020/12/Executive-Order-2020-083.pdf (executive order preparing for implementation of crisis care standards); N.M. Dep't of Health, Public Health Order (Dec. 9, 2021), https://cv.nmhealth.org/wp-content/uploads/2020/12/120920-PHO_Activation-of-CSC-and-TCA.pdf (public health order activating crisis care standards).

[9] N.M. Dep't of Health, *New Mexico COVID-19 Hospitalization Update* (Dec. 14, 2020), https://cv.nmhealth.org/wp-content/uploads/2020/12/hospitalizations_covid19_public-report_12.14.20_final.pdf; Gabrielle Burkhart, *New Mexico receives 'mortuary trailers' as COVID-19 death toll rises*, KRQE (Nov. 19, 2020), https://www.krqe.com/health/coronavirus-new-mexico/new-mexico-receives-mortuary-trailers-as-covid-19-death-toll-rises/.

manufacturing criteria. *See* 21 U.S.C. § 360bbb-3(e)(1)(B), (A)(ii)(I)-(III). Additionally, HHS must ensure medical providers and individuals are informed of the product's EUA status, the "significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown"; and for individuals, of the option to refuse and the consequences of such a decision. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I)-(III). Specifically with regard to the development of a COVID-19 vaccine, the FDA issued detailed guidance to manufacturers and specifically informed them that it would require a determination that the vaccine's benefits outweigh its risks based on data from at least one well-designed Phase 3 clinical trial that demonstrates the vaccine's safety and efficacy in a clear and compelling manner.[10]

Numerous manufacturers rose to the occasion, and three vaccines candidates quickly emerged as frontrunners: Johnson & Johnson's single-dose viral vector vaccine, and Pfizer/BioNTech and Moderna's two-dose mRNA vaccines.[11] By the time Pfizer and Moderna applied for EUA status in November 2020, each vaccine had undergone significant testing. Pfizer's application included safety,

[10] Aplt. App. at 106-107 ¶¶ 30-32 & n.22-27; U.S. Food & Drug Admin., *Emergency Use Authorization for Vaccines to Prevent COVID-19: Guidance for Industry* at 4 (May 2021), https://www.fda.gov/media/142749/download.

[11] *Different COVID-19 Vaccines*, Ctr. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines.html (last visited Aug. 25, 2021).

immunogenicity, and efficacy data from over 40,000 study participants in ongoing phase I, II, and III, randomized, placebo-controlled, observer-blind, clinical trials conducted in the U.S., Argentina, Brazil, Germany, South Africa, and Turkey.[12] Moderna's application included safety, immunogenicity, and efficacy data from over 30,000 study participants in ongoing phase I, II, and III, randomized, stratified, observer-blind, placebo-controlled clinical trials conducted at 99 locations in the United States.[13] J&J applied for EUA status in February 2021, submitting an application that included safety, immunogenicity, and efficacy data from five studies with over 70,000 participants, including two randomized, double-blind, placebo-controlled phase III trials.[14]

A team of representatives from across the FDA—including experts in clinical review, toxicology, biostatistics, products, production facilities, pharmacovigilance, data integrity, bioresearch monitoring, and labeling—reviewed the data submitted by Pfizer, Moderna and J&J, and independently assessed the risks and benefits of

[12] *See generally* U.S. Food & Drug Admin., *Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum* (Dec. 11, 2020), https://www.fda.gov/media/144416/download.

[13] *See generally* U.S. Food & Drug Admin., *Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum* (Dec. 18, 2020), https://www.fda.gov/media/144673/download.

[14] *See generally* U.S. Food & Drug Admin., *Emergency Use Authorization (EUA) for an Unapproved Product Review Memorandum* (Feb. 4, 2021), https://www.fda.gov/media/146338/download.

the vaccines. *See* U.S. Food & Drug Admin., *supra* note 14 at 1, 49-54; U.S. Food & Drug Admin., *supra* note 15 at 1, 55-60; U.S. Food & Drug Admin., *supra* note 16 at 1, 55-60. The FDA granted EUA to Pfizer and Moderna's vaccines in December 2020 and J&J's vaccine in February 2021 for individuals ages 16 and older, noting that each had met their expectations set out in the FDA's comprehensive guidance.[15] Pfizer's vaccine has since received EUA for individuals ages 12 and older and **received *full* FDA approval for individuals ages 16 and over on August 23, 2021**.[16]

Despite the unprecedented timeline for development, the vaccines have been a resounding success. Since the three vaccines received EUA status, hundreds of millions of doses have been administered. *See* Aplt. App. at 109 ¶ 39 n.35.

[15] U.S. Food & Drug Admin., *FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19; U.S. Food & Drug Admin., F*DA Takes Additional Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for Second COVID-19 Vaccine* (Dec. 18, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid; U.S. Food & Drug Admin., *FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine* (Feb. 27, 2021), https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine.

[16] U.S. Food & Drug Admin., *FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

Comprehensive data collected to date demonstrates that the vaccines are safe, with serious adverse reactions remaining exceedingly rare.[17] In terms of effectiveness, initial data and evidence demonstrated that the Pfizer vaccine was 91.3% effective in preventing infections and 100% effective in preventing severe disease, Moderna's vaccine was 90% effective in preventing infections and more than 95% effective in preventing severe disease, and J&J's vaccine was 85% effective in preventing severe disease.[18] The protection provided by the vaccines has proven relatively durable over time, with one study finding that the Pfizer and Moderna vaccines were 86% effective in preventing illness serious enough to require hospitalization 2-12 weeks after vaccination and 84% effective at 13-24 weeks. *See* Aplt. App. at 108 ¶ 37 &

[17] Aplt. App. at 101 ¶ 15, 100 ¶ 39; *Selected Adverse Events Reported after COVID-19 Vaccination*, Ctr. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html (last visited Aug. 25, 2021).

[18] Press Release, *Pfizer and BioNtech Confirm High Efficacy And No Serious Safety Concerns Through Up To Six Months Following Second Dose In Updated Topline Analysis Of Landmark Covid-19 Vaccine Study*, Pfizer (Apr. 1, 2021), https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-confirm-high-efficacy-and-no-serious; Press Release, *Moderna Provides Clinical and Supply Updates on COVID-19 Vaccine Program Ahead of 2nd Annual Vaccines Day* (Apr. 13, 2021), https://investors.modernatx.com/news-releases/news-release-details/moderna-provides-clinical-and-supply-updates-covid-19-vaccine; Press Release, *Johnson & Johnson COVID-19 Vaccine Authorized by U.S. FDA For Emergency Use - First Single-Shot Vaccine in Fight Against Global Pandemic*, Johnson & Johnson (Feb. 27, 2021), https://www.jnj.com/johnson-johnson-covid-19-vaccine-authorized-by-u-s-fda-for-emergency-usefirst-single-shot-vaccine-in-fight-against-global-pandemic.

n.32. Additionally, laboratory data and real-world epidemiologic studies demonstrate that the immunity provided by vaccines is significantly more robust than natural immunity gained following infection. For instance, one recent study found that unvaccinated individuals who were previously infected had 2.34 times the odds of being reinfected than those who had been fully vaccinated. *See* Aplt. App. at 105 ¶ 27 n.19.

III. The emergence of the Delta variant

Unfortunately, a highly infectious and possibly more deadly variant has emerged and taken the world by storm. B.1.617.2, commonly known as the "Delta" variant was first discovered in India in late 2020 and soon became the predominant strain in that country.[19] By mid-June, the CDC labeled Delta a "variant of concern."[20] Now, it is widely estimated that the Delta variant accounts for nearly all of new infections in the United States and New Mexico, and is believed to be at least twice as contagious as previous variants. *See* Aplt. App. at 103-04 ¶¶ 22 & n.13, 24-25 & n.16-18. Additionally, studies indicate that individuals infected with the Delta

[19] Kathy Katella, *5 Things To Know About the Delta Variant*, Yale Med. (Aug. 18, 2021), https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid.

[20] *See SARS-CoV-2 Variant Classifications and Definitions*, Ctr. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/variants/variant-info.html (last visited Aug. 24, 2021).

variant are more likely to be hospitalized than those infected with the original strain or other variants. *See id.* at 104 ¶ 24 n.17.

In terms of the variant's impact on vaccines, there is bad news and good news: while the variant is more likely to cause "breakthrough" infections, the vaccines still provide strong protection against serious illness and death. *See id.* at 105 ¶ 28 & n.20. For example, one recent analysis of over 40,000 infections in Los Angeles from May to the end of July found that vaccinated individuals were nearly ***5 times less likely to become infected*** and nearly ***30 times less likely to require hospitalization***. *Id.* at 105 ¶ 27 n.19.

IV. New Mexico's public health emergency orders and the current state of the pandemic

Recognizing the seriousness of this virus and its ability to spread exponentially through close contacts and public spaces, the Governor declared a public health emergency under the Public Health Emergency Response Act, NMSA 1978, §§ 12-10A-1 to -19 (2003, as amended through 2015), and invoked the All Hazards Emergency Management Act, NMSA 1978, §§ 12-10-1 to -10 (1959, as amended through 2007), by directing all cabinets, departments, and agencies to comply with the directives of the declaration and the further instructions of the Department of Health.[21] Consistent with the powers provided during an emergency

[21] Governor Michelle Lujan Grisham, *Executive Order 2020-004* (March 11, 2020), https://www.governor.state.nm.us/wp-content/uploads/2020/03/Executive-Order-

under the Public Health Emergency Response Act and the All Hazards Emergency Management Act, as well as the Public Health Act, NMSA 1978, §§ 24-1-1 to -40 (1973, as amended through 2019), the Secretary subsequently entered a series of public health orders ("PHOs").[22]

The PHOs initially included various measures such as limiting most public and private gatherings of any significant size and curtailing the operations of many businesses. *Id.* However, the PHOs' restrictions were largely phased out as case rates dropped dramatically with New Mexico's efficient rollout of the COVID-19 vaccines that began earlier this year.[23] Unfortunately, cases again climbed rapidly in the early fall with the spread of the Delta variant. The number of new cases rose from an average of approximately 60 cases per day in late June to nearly 900 cases per day in late August when Plaintiffs filed this action—*almost a fifteenfold*

2020-004.pdf. This declaration was most recently renewed until December 10, 2021. *See* Governor Michelle Lujan Grisham, *Executive Order 2021-061* (Nov. 12, 2021), https://www.governor.state.nm.us/wp-content/uploads/2021/11/Executive-Order-2021-061.pdf.

[22] *See generally Public Health Orders and Executive Orders*, N.M. Dep't of Health, https://cv.nmhealth.org/public-health-orders-and-executive-orders/ (last visited Nov. 19, 2021) (collecting PHOs and executive orders relating to COVID-19).

[23] *Id.*; N.M. Dep't of Health, *New Mexico COVID-19 Cases Update Statewide and County-Level Trends* at 1 (Aug. 16, 2021), https://cv.nmhealth.org/wp-content/uploads/2021/08/State-Report_geotrends_08.16.21.pdf (showing cases drop significantly beginning in December and January).

increase.[24] Unfortunately, the surge has not yet subsided, with the average daily case rate again above 900. *See id.*

Many hospitals have now been operating over capacity for several months to accommodate the surge of infected New Mexicans—the majority of which are unvaccinated.[25] Indeed, hospitals have become so overrun that crisis standards of care are again necessary.[26] As of November 17, 2021, there were only ten intensive

[24] *COVID-19 in New Mexico*, N.M. Dep't of Health, https://cvprovider.nmhealth.org/public-dashboard.html (follow "Show Historical Statewide Date" on bottom left-hand corner; then scroll down to "Epidemic Curve") (last visited Nov. 19, 2021).

[25] *See* Aplt. App. at 100 ¶¶ 9-10, 105 ¶ 28; *see also* Morgan Lee, *NM hospitals struggle amid push to vaccinate youths*, Albuquerque J. (Nov. 12, 2021), https://www.abqjournal.com/2445194/new-mexico-hospitals-struggle-amid-push-to-vaccinate-youths.html (discussing current crisis of lack of intensive care beds due to unvaccinated patients that has led to a rationing of care).

[26] Dan McKay, *New Mexico enacts crisis standards for hospitals*, Albuquerque J. (Oct. 18, 2021), https://www.abqjournal.com/2438725/nm-enacts-crisis-standards-for-hospitals.html; *San Juan Regional Medical Center implements crisis standards of care*, KRQE (Nov. 4, 2021), https://www.krqe.com/health/coronavirus-new-mexico/san-juan-regional-medical-center-implements-crisis-standards-of-care/; *see generally* Governor Michelle Lujan Grisham, *Executive Order 2021-059* (Oct. 18, 2021), https://www.governor.state.nm.us/wp-content/uploads/2021/10/Executive-Order-2021-059.pdf (executive order authorizing Department of Health to implement measures to address medical care shortage); Meredith Deliso *Albuquerque hospitals enact crisis standards of care during 'unprecedented' time*, ABC News, (Nov. 11, 2021) https://abcnews.go.com/Health/albuquerque-hospitals-enact-crisis-standards-care-unprecedented-time/story?id=81116226 (noting the two largest hospital systems in Albuquerque, New Mexico, University of New Mexico Health System and Presbyterian Healthcare Services, activated crisis standards of care).

care unit beds *in the entire state*, making it difficult to attend to any kind of health emergency.[27] Blackford's own employer, Presbyterian Healthcare Services, has enacted crisis standards of care.[28] In fact, Presbyterian's chief medical officer reported last week that its network of hospitals across the state are at about 120 percent capacity, including intensive care units. He also reported that 87 percent of Presbyterian's COVID-19 patients are unvaccinated. *Id.* It is unclear just how long New Mexico's hospital system can sustain such operations, with healthcare workers in short supply and reports of workers "burning out" or falling ill becoming increasingly common.[29]

[27] Meredith Deliso, *New Mexico facing 'serious problems' amid latest COVID-19 surge, health officials warn*, ABC News (Nov. 18, 2021), https://abcnews.go.com/US/mexico-facing-problems-amid-latest-covid-19-surge/story?id=81210830.

[28] Scott Wyland, *New Mexico hospitals bracing for spike in hospitalizations amid holidays*, Santa Fe New Mexican, (Nov. 18, 2021) https://www.santafenewmexican.com/news/local_news/new-mexico-hospitals-bracing-for-spike-in-hospitalizations-amid-holidays/article_d338a528-488b-11ec-b8a0-97db35ce7751.html.

[29] *See* Colleen Heild, *Stressed and exhausted, nurses are calling it quits*, Albuquerque J. (Aug. 21, 2021), https://www.abqjournal.com/2421756/stressed-and-exhausted-nurses-are-calling-it-quits.html; Dan McKay, *Exhaustion in the ICU: Doctors reflect on state's nearly 5,000 COVID-19 deaths*, Albuquerque J. (Oct. 25, 2021), https://www.abqjournal.com/2440183/doctors-reflect-on-states-nearly-5000-covid19-deaths.html; *see also* Aplt. App. at 101 ¶¶ 12-13.

V. The challenged vaccine mandate

To stem the recent surge of cases and ease the pressures on New Mexico hospitals, the Secretary issued a PHO on August 17, 2021, generally requiring individuals working in hospitals and certain congregate care facilities to receive their first dose of a COVID-19 vaccine within 10 days and their second dose (for Pfizer and Moderna) within 40 days of their first dose.[30] However, such workers are not required to get a vaccine if they have a: (1) qualifying medical condition for which immunization would endanger the individual's health, (2) disability requiring reasonable accommodations, or (3) sincerely held religious belief against vaccination. *Id.* at 4.

To qualify for the first and second exemptions, the individual must provide their employer with a statement from a licensed medical professional stating that the individual has a qualifying medical condition or disability that necessitates accommodation and stating the probable duration of the individual's inability to receive the vaccine or need for an accommodation. *Id.* To qualify for the religious

[30] N.M. Dep't of Health, *Public Health Order* 3-4 (Aug. 17, 2021), https://cv.nmhealth.org/wp-content/uploads/2021/08/081721-PHO-Vaccines.pdf. This requirement also applies to employees from the Office of the Governor. *Id.* However, everyone within the Office of the Governor is vaccinated. Additionally, the PHO requires school workers to either provide proof of their vaccination status or undergo weekly COVID-19 testing, *id.* at 3, but Plaintiffs do not assert any claims on behalf of teachers because they are not required to receive the vaccine. *See* Aplt. App. at 12 ¶¶ 33-34.

exemption, the individual must document their request for an accommodation and provide a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with their religious observance, practice, or belief. *Id.* at 4-5. Individuals who meet an exemption must undergo weekly COVID-19 testing. *Id.* In addition to the above requirements, the PHO requires all individuals attending the New Mexico State Fair that are eligible to receive a COVID-19 vaccine (i.e., those ages 12 years and older) be fully vaccinated or meet one of the above exemptions and provide proof of a recent negative COVID-19 test result. *See id.* at 5-6.

VI. Procedural history

Against this factual backdrop, Plaintiffs filed the instant purported "class action" on August 19, 2021. *See* Aplt. App. at 6-42. Plaintiff Talisha Valdez is a mother of two children who entered to show their animals at the New Mexico State Fair. *See* Aplt. App. at 40-41. Plaintiff Jennifer Blackford is a registered nurse employed at Presbyterian Hospital in Albuquerque. *Id.* at 38-39. Neither Plaintiffs nor their children were vaccinated against COVID-19 at the time of filing. *Id.* at 38-41. Plaintiffs did not claim to qualify for a medical, disability, or religious exception but remain opposed to receiving a COVID-19 vaccine. *See id.* at 38-41, 51, 54-55. Plaintiffs generally allege that the PHOs' vaccine requirements violate: (1) the Federal Food, Drug, and Cosmetic Act (FDCA), (2) the Equal Protection clause, (3) substantive due process, (4) procedural due process, (5) the contracts clause of

Article I, § 10 of the U.S. Constitution,[31] and (6) various rights under the New Mexico constitution. *See* Aplt. App. at 14-19. Plaintiffs requested a declaratory judgment that the PHOs' vaccine requirements were unconstitutional and further requested a temporary restraining order and a preliminary and permanent injunction prohibiting Defendants from enforcing the vaccine requirements. *Id.* at 19-20. The district court denied Plaintiffs' requested TRO and ordered expedited briefing regarding Plaintiffs' request for a preliminary injunction. *Id.* at 44-47, 56-61. Defendants filed a response in opposition supported by the declaration of the State Epidemiologist, Dr. Christine Ross. *Id.* at 62-116.

The court issued a memorandum opinion and order on September 13, 2021. *Id.* at 199-228. The court concluded Plaintiffs were unlikely to succeed on the merits of any of their claims. Specifically, the Court held: (1) Plaintiffs' FDCA claim was likely to fail because the Pfizer vaccine received full FDA approval with regard to those ages 16 and older, and none of the statutory provisions cited by Plaintiffs applied to Defendants or otherwise prevented them from imposing the vaccine mandates; Aplt. App. at 206-08; (2) Plaintiffs' equal protection and substantive due process claims were likely to fail because the vaccine requirement did not discriminate against a suspect class or infringe on a fundamental right and was

[31] Although Plaintiffs initially called the public health order a bill of attainder, they abandoned this argument and clarified they only challenged the order under the contracts clause. *Compare* Aplt. App. at 18 ¶ 75, *with id.* at 220.

rationally related to a *compelling* interest in stemming the spread of COVID-19; *id.* at 208-219; (3) Plaintiffs' procedural due process claim was likely to fail because the public health order was legislative in nature, which did not implicate procedural due process beyond general notice; *id.* at 219-20; (4) Plaintiffs' contracts clause claim was likely to fail because Plaintiffs failed to show that the vaccine requirement constituted a "substantial impairment" of their contracts and the requirement "was drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose"; *id.* at 220-23; and (5) Plaintiffs' state constitutional claims were likely to fail because New Mexico had not waived sovereign immunity to be sued in federal court. *Id.* at 223-24.

The district court further held that Plaintiffs failed to demonstrate any irreparable harm because they did not demonstrate a likelihood of success on the merits for their constitutional claims and loss of employment or the opportunity to attend could be adequately compensated with monetary damages. *Id.* at 225-36. The court also found that any harm befalling Plaintiff Blackford was the result of her employer's independent decision to require vaccines rather than the PHO. *Id.* Finally, the court held that the balance of the harms weighed in Defendants' favor given the strong public interest in protecting the public. *Id.* at 226-27. Accordingly, the court denied Plaintiffs' requested preliminary injunction. *Id.* at 227. Plaintiffs filed a notice of interlocutory appeal and request for a stay and injunction pending

appeal on September 13 and 14, respectively. *Id.* at 229, 276-82.[32] This appeal followed.

SUMMARY OF THE ARGUMENT

As a preliminary matter, the Court must dismiss the appeal for lack of an active controversy vis-à-vis injunctive relief. But regardless of standing, the district court properly denied Plaintiffs' request for a preliminary injunction because they failed to satisfy any of the prerequisites for such extraordinary relief. Plaintiffs do not, as they cannot, demonstrate otherwise.

ARGUMENT

I. No plaintiff has standing to seek injunctive relief

The Court should summarily dismiss this appeal for lack of jurisdiction. "Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007) (en banc). "[A] suit does not present a Case or Controversy unless the plaintiff satisfies the requirements of Article III standing." *Id.* To establish such standing, a plaintiff must show three things: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt*, 549 F.3d

[32] The district court denied Plaintiffs' motion on October 7, 2021. *Id.* at 296-300.

1294, 1298 (10th Cir. 2008) (internal quotation marks and citation omitted). A plaintiff must maintain standing for each form of relief sought at all times throughout the litigation for a court to retain jurisdiction. *See Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006).

Valdez admits that the state fair she originally sought to attend with her children is over, and therefore her claim for injunctive relief is now moot. *See* Opening Brief at 4. Nor does she claim any exception to the mootness doctrine applies. *See generally id.* Thus, the only plaintiff currently seeking injunctive relief is Blackford. *See* Aplt. App. at 6. Blackford seeks to bring claims on behalf of "all others similarly situated that work in healthcare, congregate care or the Office of the Governor for the purpose of asserting the claims alleged in this complaint on a common basis." *Id.* at 11 ¶ 26. However, as the district court found, Blackford's employer is separately requiring *all* its employees (not just those covered by the PHO) to be vaccinated. *See* Aplt. App. at 221-22. This development deprives Blackford of standing to challenge the PHO or represent any class of plaintiffs. *See Bronson v. Swensen*, 500 F.3d 1099, 1109 (10th Cir. 2007) ("The principle of causation for constitutional standing requires a plaintiff's injury to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (internal quotation marks and citations omitted)); *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1287 (11th

Cir. 2001) ("[T]here cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class."). Blackford's assertion that her employer required vaccinations due to the PHO is unsubstantiated. She offered no evidence to support this argument to the district court, nor can she on appeal. *See* Aplt. App. at 221. Instead the statements of Presbyterian's CEO relied upon by the district court and the recent reports from Presbyterian's chief medical officer demonstrate Presbyterian instituted its own vaccine requirements because vaccines are the best way to combat the pandemic. *Id.* at 221-22; Wyland, *supra* note 28. Therefore, the Court should dismiss the instant appeal, which only seeks interlocutory review of an order denying injunctive relief.

II. The district court did not abuse its discretion in denying the requested preliminary injunction

Assuming, *arguendo*, the Court concludes Blackford has standing to seek injunctive relief, the district court properly denied her request for a preliminary injunction because she failed to satisfy *any* of the prerequisites for such relief. "It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is clear and unequivocal." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (internal quotation marks and citation omitted). To obtain a preliminary injunction, the moving party must demonstrate: "(1) a likelihood of success on the merits; (2) a

likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *AG of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (internal quotation marks and citation omitted). "The third and fourth factors 'merge' when, like here, the government is the opposing party." *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020). The movant *must* satisfy his or her burden for *each* one of these prerequisites. *Diné Citizens Against Ruining Our Env't*, 839 F.3d 1276, 1281-82 (10th Cir. 2016).

This Court reviews a district court's decision to deny a preliminary injunction for an abuse of discretion. *See Heideman*, 348 F.3d at 1188. "An abuse of discretion occurs where a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016) (internal quotation marks omitted). When determining whether the district court abused its discretion, the Court "review[s] the district court's factual findings for clear error and its conclusions of law de novo." *Id.*

A. Blackford fails to demonstrate any likelihood of success on merits

1. The FDCA does not apply to Defendants and any claim is now moot insofar as injunctive relief is requested

Blackford first claims Defendants are violating the 21 U.S.C. § 360bbb-3 of the FDCA because they did not "advise Plaintiffs of the known and potential benefits and risks of such emergency use of the product, and of the extent to which such

benefits and risks are unknown" or "inform Plaintiffs of their right to refuse administration of [an] experimental vaccine." Aplt. App. at 15 ¶ 55, 23. The FDCA authorizes the FDA to issue an "emergency use authorization" for a medical product, such as a vaccine, to be introduced into interstate commerce and administered to individuals in an emergency situation when the product has not yet undergone the standard review and approval process. § 360bbb-3(a)(1), (2). Here, the FDA has granted emergency use authorizations for three COVID-19 vaccines, with each vaccine manufacturer meeting more stringent standards compared to emergency use authorization vaccines in the past. *See* Background Section II, *supra*; *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 U.S. Dist. LEXIS 133300, at **21-22 (N.D. Ind. July 18, 2021).

Blackford's claims based on the emergency use authorization section of the FDCA fail as the FDCA does not prevent a public or private entity from requiring vaccines. The plain language of § 360bbb-3(e) demonstrates that the section only applies to healthcare providers administering COVID-19 vaccines and to the potential vaccine recipients. The FDCA states for the emergency use of an unapproved product the Secretary of the HHS shall "*for person who carries out any activity for which the authorization is issued*, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to

protect the public health[.]" § 360bbb-3(e)(1)(a) (emphasis added). Specifically, the FDCA requires the Secretary issue:

> (i) Appropriate conditions designed to ensure that *health care professionals administering the product are informed—*
>
> > (I) that the Secretary has authorized the emergency use of the product;
> > (II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
> > (III) of the alternatives to the product that are available, and of their benefits and risks.
>
> (ii) Appropriate conditions designed *to ensure that individuals to whom the product is administered are informed—*
> > (I) that the Secretary has authorized the emergency use of the product;
> > (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
> > (III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

§ 360bbb-3(e)(1)(a)(i), (ii) (emphases added). Several courts, as well as the U.S. Department of Justice, have analyzed this provision and concluded that it does not apply to those requiring vaccines but only to the individuals in the process of *receiving* a vaccine.[33] Thus, Blackford is unlikely to succeed on this claim.

[33] *See id.*; *Bridges v. Hous. Methodist Hosp.*, No. H-21-1774, 2021 U.S. Dist. LEXIS 110382, at *5-6 (S.D. Tex. June 12, 2021) ("[§ 360bbb-3] neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers [requiring employees be vaccinated]."); *Klaassen,* 2021 U.S. Dist.

Finally, even if the FDCA *did* apply to Defendants, Plaintiffs' injunctive claims are now moot. The FDA granted the Pfizer vaccine ***full*** approval for individuals 16 years of age and older. *See* U.S. Food & Drug Admin., *supra* note 16. Given that Blackford is over the age of 16, her claim for injunctive relief based on the FDCA is moot. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) ("A case becomes moot . . . when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." (internal quotation and citation omitted)).

2. The vaccine mandate does not violate equal protection or substantive due process

Blackford next claims the vaccine mandate violates both equal protection and substantive due process. *See* Aplt. App. at 15-17. Although the Equal Protection and Due Process clauses protect distinctly different interests, "their substantive analyses converge." *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004). For substantive due process claims challenging legislative-type actions, such as the vaccine mandate, the Court typically applies a two-part test in which it first asks whether the action

LEXIS 133300, *64-65 (interpreting § 360bbb-3(e)(1)(A)(ii) as establishing conditions to facilitate informed consent for medical providers and the persons receiving vaccines); Dep't of Justice, *Whether Section 564 of the Food, Drug and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization* at 2 (July 6, 2021), https://www.justice.gov/olc/file/1415446/download ("This language in section 564 specifies only that certain information be provided to potential vaccine recipients and does not prohibit entities from imposing vaccination requirements.").

implicates a fundamental right. *See Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009). If so, the Court applies strict scrutiny; if not, the Court applies rational basis review. *Id.* Similarly, in considering equal protection claims, the Court will apply rational basis review unless the classification at issue discriminates against a suspect class. *See Curley v. Perry*, 246 F.3d 1278, 1285 (10th Cir. 2001).

i. The vaccine mandate is subject to rational basis review

a. Equal Protection

Blackford does not allege (as she cannot) that she is a member of a suspect class which would give rise to any sort of heightened scrutiny. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002) (stating governmental classifications are only subject to strict scrutiny if they target a suspect class such as race or national origin and intermediate scrutiny is applied to quasi-suspect classes like gender). Thus, the Court must use rational basis review when reviewing Blackford's equal protection claims.

b. Substantive Due Process

Blackford's substantive due process claim is similarly subject to rational basis review. There are two types of substantive due process claims: (1) claims that the government has infringed a fundamental right and (2) claims that government action deprived a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience. *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019).

"[Courts] apply the fundamental-rights approach when the plaintiff challenges legislative action, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious executive action." *Id.* (alterations, internal quotation marks, and citation omitted). The fundamental-rights approach is applicable in this case, as the PHO is a quasi-legislative action generally applicable to thousands of New Mexicans, and it is the Department of Health's attempt to "through policy, to achieve a stated government purpose."[34] *Abdi v. Wray*, 942 F.3d 1019, 1027-28 & n.1 (10th Cir. 2019).

Legislative action is tested under a two-part substantive due process framework in which the Court asks first asks whether a fundamental right is implicated. *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009).

[34] Even if the "shocks conscience" standard applied in this case, Blackford's claim would still fail. "Conduct that shocks the judicial conscience is deliberate government action that is arbitrary and unrestrained by the established principles of private right and distributive justice." *Woodard*, 912 F.3d at 1300 (internal quotation marks omitted). Issuing public health orders requiring certain people working with highly vulnerable populations or attending a state fair to be vaccinated or meet an exception can hardly be considered conscious-shocking. *See World Gym, Inc. v. Baker*, Civil Action No. 20-cv-11162-DJC, 2020 U.S. Dist. LEXIS 131236, at *12 (D. Mass. July 24, 2020) ("In light of the toll of the pandemic, [the plaintiffs' argument that the governor's COVID-19-related orders shock the conscious] is unconvincing. The state has a strong interest in stopping the spread of COVID-19, and accordingly, it cannot be said that the Governor's conduct amounts conscience-shocking action."); *Herrin v. Reeves*, No. 3:20cv263-MPM-RP, 2020 U.S. Dist. LEXIS 176604, at *23 (N.D. Miss. Sep. 25, 2020) ("[T]he notion that restrictions designed to save human lives are 'conscious shocking' [is] absurd and not worthy of serious discussion.").

The plaintiff bears the burden of providing a "careful description of the asserted fundamental liberty interest" and demonstrating how such a right is "objectively deeply rooted in [the] Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). Vague, conclusory, or generalized assertions will not suffice. *See Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (noting plaintiff must put forth "a 'careful description' of the asserted fundamental liberty interest for the purposes of substantive due process analysis; vague generalities . . . will not suffice").

Blackford's general allegations to a fundamental right "to live without arbitrary governmental interference," "to bodily integrity," and to "engage in [her] chose profession" can hardly be considered to satisfy *Glucksberg*'s requirements. Aplt App. at 16. Blackford focused her arguments in the district court on her purposedly fundamental right to work. *See id.* at 24-27, 121-23. Yet she fails to explain how her right to work in a hospital unvaccinated during a pandemic is "deeply rooted in [the n]ation's history and tradition." *Glucksberg*, 521 U.S. at 720-21. Nor could she, as it is well established that "[t]he right to 'make a living' is not a 'fundamental right,' for either equal protection or substantive due process purposes." *Medeiros v. Vincent*, 431 F.3d 25, 32 (1st Cir. 2005); *see also Guttman*

v. Khalsa, 669 F.3d 1101, 1118 (10th Cir. 2012) (holding that a right to practice in one's chosen profession is not fundamental).

Blackford switches gears on appeal to focus on the general right to bodily integrity but fails to explain how she has a fundamental right to refuse a vaccine during a pandemic. True, the Supreme Court has "assumed" and strongly suggested that individuals have some right to refuse unwanted medical treatment. *See, e.g.*, *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990); *Glucksberg*, 521 U.S. at 720; *Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Riggins v. Nevada*, 504 U.S. 127, 138 (1992). "But in these [cases]. . . this liberty interest has remained confined either by duly enacted and constitutional state laws or the state's legitimate interests that it had rationally pursued in regulation." *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at *60. Moreover, "[t]he rights recognized (or assumed) in these cases weren't 'simply deduced from abstract concepts of personal autonomy[,]' . . . [t]hey were rooted in longstanding common law rules or legal traditions consistent with this Nation's history." *Id.* at *61 (quoting *Glucksberg*, 521 U.S. at 725). In contrast, there is no longstanding history of allowing individuals to refuse vaccination against communicable diseases. *See id.* at *62 (collecting cases applying rational basis review to assess mandatory vaccination measures and concluding that Indiana University's COVID-19 requirement was subject to rational basis "[g]iven over a century's worth of rulings saying there is no greater right to

refuse a vaccination than what the Constitution recognizes as a significant liberty"); *see generally Jacobson*, 197 U.S. 11. And this makes sense, as the refusal to receive a safe and effective vaccine affects more than just the individual but jeopardizes the health of others. *See Klaassen*, 2021 U.S. Dist. LEXIS 133300, at *61 ("Vaccines address a collective enemy, not just an individual one."). Accordingly, rational basis review is appropriate.

ii. The vaccine mandate is rationally related to a *compelling* government interest in stemming the spread of COVID-19

To survive rational basis review, "the [law] need only be rationally related to a legitimate government purpose." *See Save Palisade FruitLands*, 279 F.3d at 1210. In challenging a governmental action for want of a rational basis, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the [law]." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 367 (2001) (internal quotation marks and citation omitted). "Th[e] standard is objective—if there is a reasonable justification for the challenged action, [the court] do[es] not inquire into the government actor's actual motivations." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011). "[R]ational-basis review does not give courts the option to speculate as to whether some other scheme could have better regulated the evils in question." *Powers*, 379 F.3d at 1217. Courts "will not strike down a law as irrational simply because it may not succeed in

bringing about the result it seeks to accomplish or because the statute's classifications lack razor-sharp precision. *Id.* (citations omitted). "Nor can [a court] overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice." *Id.* Indeed, rational basis scrutiny is so deferential that courts "must independently consider whether there is any conceivable rational basis for the classification, regardless of whether the reason ultimately relied on is provided by the parties." *Teigen v. Renfrow*, 511 F.3d 1072, 1084 (10th Cir. 2007) (alterations, internal quotation marks, and citation omitted).

It cannot be disputed that Defendants have a legitimate, indeed *compelling*, interest in stemming the spread of COVID-19 and preventing more hospitalizations and deaths. *See Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest[.]"). The question is whether requiring individuals working at hospitals and certain congregate care facilities to be vaccinated or meet an exception is rationally related to the State's interest? Unquestionably, it is.

Over one hundred years ago, the Supreme Court rejected a challenge to a universal smallpox vaccine mandate. In *Jacobson*, the state passed a law permitting a city to enforce vaccination of its citizens or face a $5.00 criminal penalty (about $140.00 today). 197 U.S. at 12; *Cuomo*, 141 S. Ct. at 70 (Gorsuch, J., concurring). After refusing a smallpox vaccine, as required by the city of Cambridge, Jacobson

was sentenced to jail until he paid the fine. *Jacobson*, 197 U.S. at 11. Jacobson sued, claiming the mandate violated his right to "bodily integrity." *Id.* at 13-14. The Supreme Court rejected Jacobson's challenge, recognizing that a state's police power "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. Thus, according to the Supreme Court, "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no 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. Cambridge's vaccine mandate withstood this test. The mandate had a real and substantial relation to stemming the spread of smallpox—despite a minority view that the vaccines were ineffective. *See id.* at 31-39. In so holding, the Court quoted the New York Court of Appeals, which stated,

> It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. . . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action[.]

Id. at 34-35 (quoting *Viemeister v. White*, 179 N.Y. 235, 239-41, 72 N.E. 97 (1904). The Court also rejected Jacobson's offer of proof that the vaccine "quite often caused serious and permanent injury," stating that to allow him to avoid vaccination on this general concern "would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease." *Id.* at 37.

Jacobson has been upheld and relied on throughout the years by courts across the country—including in challenges to COVID-19 vaccine mandates. *See, e.g.*, *Zucht v. King*, 260 U.S. 174, 176 (1922) (relying on *Jacobson* to uphold a city ordinance excluding from its public school children not having a certificate of vaccination); *cf. Roman Catholic*, 141 S. Ct. at 71 (Gorsuch, J. concurring) ("In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors."); *America's Frontline Doctors v. Wilcox*, No. EDCV 21-1243 JGB (KKx), 2021 U.S. Dist. LEXIS 144477, at **14-17 (C.D. Cal. July 30, 2021) (citing *Jacobson* and concluding that the plaintiffs were unlikely to succeed in their due process claim against the University of California's COVID-19 vaccination mandate).

Recently, a U.S. district court relied on *Jacobson* to reject a group of students' request for a preliminary injunction against the Indiana University's requirement that all students be vaccinated against COVID-19 or meet various religious or medical exemptions. *See Klaassen*, 2021 U.S. Dist. LEXIS 133300, at **15-17, 42-104. After carefully reviewing the current state of scientific consensus regarding the safety and effectiveness of the COVID-19 vaccines, the court noted that "the students' arguments amount to disputes over the most reliable science. But when reasonable minds can differ as to the best course of action . . . the court doesn't intervene so long as the university's process is rational in trying to achieve public health." *Id.* at *103. Ultimately, the court concluded that that Indiana University "has a rational basis to conclude that the COVID-19 vaccine is safe and efficacious for its students." *Id.* at *99.

The U.S. Court of Appeals for the Seventh Circuit denied the students' motion for an injunction pending appeal, noting that "*Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack [a fundamental right to attend school without being vaccinated]." *Klaassen v. Trs. of Ind. Univ.*, No. 21-2326, 2021 U.S. App. LEXIS 22785, at *2 (7th Cir. Aug. 2, 2021). The Court further observed that the case was "easier" than *Jacobson* because the university had exceptions for persons "who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated," and Indiana

was not requiring every member of the public be vaccinated but instead to simply condition attendance on vaccination. *Klaassen*, 2021 U.S. App. LEXIS 22785, at **3-4. Notably, Justice Amy Coney Barrett denied the students' application for injunctive relief following the Seventh Circuit's decision, signaling the Supreme Court did not find the students' case meritorious.[35]

The instant case is identical to *Klaasen* and doomed to the same fate. Like Indiana University, Defendants side with the vast majority of the scientific community—including the CDC and the State's public health experts—in concluding that the COVID-19 vaccines are a safe and effective way to protect individuals from becoming infected or at least becoming seriously ill. *See generally* Aplt. App. at 98-109. Relying on this general consensus, Defendants instituted a targeted vaccine mandate aimed at individuals working with the State's most vulnerable populations in hospitals and certain congregate care facilities, as well as individuals attending one of the largest events in the state. *See* N.M. Dep't of Health, *supra* note 30. Moreover, Defendants (like Indiana University) tailored the mandate to provide exemptions for individuals who have a qualifying medical condition which immunization would endanger their health or a disability or sincerely held

[35] *See Docket Search*, U.S. Supreme Court, https://www.supremecourt.gov/docket/docket.aspx (search "No. 21A15"; select "Docket for 21A15") (last visited Nov. 20, 2021).

religious belief requiring accommodation. *Compare* N.M. Dep't of Health, *supra* note 30, *with Klaassen*, 2021 U.S. Dist. LEXIS 133300, at **15-17.

Blackford's disagreement with the scientific community or speculation about theoretical long-term side effects of the vaccines does not negate Defendants' rational basis for their actions. *See Jacobson*, 197 U.S. at 34-37; *Klaassen*, 2021 U.S. Dist. LEXIS 133300, at **103. Nor do the PHO's vaccine requirements need to "take into account for or recognize the health implications associated to [sic] individuals that have natural immunity[,]" which Blackford alleges is "equal to or better" than the immunity provided from vaccines. Aplt. App. at 9 ¶¶ 13-14. As explained above, there is ample evidence that the immunity provided by vaccines is more robust and durable than natural immunity. *See generally* Background Section II, *supra*; *see also America's Frontline Doctors*, 2021 U.S. Dist. LEXIS 144477, at *17 ("The Court finds that there is clearly a rational basis for Defendants to institute the Policy requiring vaccination, *including for individuals who previously had COVID-19*." (emphasis added)). And even if Blackford's allegations happened to be true, the PHO's vaccine requirements need not be narrowly tailored to exclude individuals who have been previously infected. *See Powers*, 379 F.3d at 1217 ("[W]e will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, or because the statute's classifications lack razor-sharp precision."). Left only with speculative arguments previously rejected

by the Supreme Court, the Court must conclude Blackford cannot succeed on her equal protection and substantive due process claims.

3. The vaccine mandate does not implicate procedural due process because it is quasi legislative

Blackford next claim Defendants violated her right to procedural due process under the Fourteenth Amendment. *See* Aplt. App. at 12. However, a procedural due process violation will not lie when the underlying governmental action affects a general class of persons. *See Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enf't Comm'n*, 889 F.2d 929, 936 (10th Cir. 1989) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process."). Although this exception typically applies to laws passed by Congress or state legislatures, courts have recognized this exception so long as the challenged action applies generally to a larger segment of the population rather than a limited number of individuals. *See, e.g.*, *Curlott v. Campbell*, 598 F.2d 1175, 1181 (9th Cir. 1979) ("At the outset we doubt very much that procedural due process prior to reduction of benefits is required when an agency makes a broadly applicable, legislative-type decision." (citing *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915)). This is because "[w]here a rule of conduct applies to more than a few people[,] it is impracticable that every one should have a direct voice in its adoption." *Bi-Metallic*, 239 U.S. at

445. Nor would there be any "risk of an erroneous deprivation" of a right or property interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Following this principle, courts across the country have held that executive orders issued in response to the current pandemic were legislative in nature, and therefore, did not implicate procedural due process. *See, e.g.*, *Frantz v. Beshear*, No. 21-5163, 2021 U.S. App. LEXIS 31295, at *7 (6th Cir. Oct. 18, 2021); *ETP Rio Rancho Park, LLC v. Grisham*, No. CIV 21-0092 JB/KK, 2021 U.S. Dist. LEXIS 188120, at *119 (D.N.M. Sep. 30, 2021) (Browning, J.); *Carmichael v. Ige*, No. 20-00273 JAO-WRP, 2020 U.S. Dist. LEXIS 116860, at *29 (D. Haw. July 2, 2020). Respectfully, this Court should likewise hold that Blackford is not entitled to any more procedural due process regarding the issuance of the PHO other than the general notice she indisputably had.

4. The vaccine mandate does not violate the contracts clause because it does not substantially impair Plaintiffs' contracts, and it is drawn in a reasonable way to advance a significant public purpose

Blackford is also unlikely to succeed on her contracts clause claim. "[T]he Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 (1977). However, the Contracts Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398, 428 (1934). Nor does the clause "operate to

obliterate the police power of the States." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). Courts apply a two-step test to determine whether a state law violates the Contracts Clause. "The threshold issue is whether the state law has 'operated as a substantial impairment of a contractual relationship.'" *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22, (2018) (quoting *Allied*, 438 U.S. at 244). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Id.* at 1822. When a law substantially impairs or destroys[36] a contract, "the State, in justification, must have a significant and legitimate public purpose behind the [law], such as the remedying of a broad and general social or economic problem." *Stillman v. Teachers Ins. & Annuity Ass'n College Ret. Equities Fund*, 343 F.3d 1311, 1321 (10th Cir. 2003) (internal quotation marks and citations omitted). Specifically, the court will ask "whether the state law is drawn in an appropriate and reasonable way to advance a

[36] Blackford cites *U.S. Trust Co of N.Y.* for the proposition that the Contracts Clause prevents the State from using its police power to destroy an individual contract. *See* Opening Brief at 18. However, the quotation relied upon by Blackford is not the Court's holding, but rather a restatement of the district court's conclusion *rejected* by the Court. *See U.S. Trust Co.*, 431 U.S. at 26 ("The trial court's 'total destruction' test is based on what we think is a misreading of *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935)."); *id.* at 22 ("States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements.").

significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822 (internal quotation marks and citations omitted).

Blackford's claim fails for three reasons. First, Blackford failed to demonstrate that the vaccine requirement substantially interferes with her employment contract because she did not provide the district court with any copies of the contract. *See* Aplt. App. at 221. Second, the PHO does not substantially impair her contract because her employer is independently requiring COVID-19 vaccinations for its entire workforce. *See id.* Lastly, the vaccine requirement is an appropriate and reasonable means of advancing the State's significant and legitimate purpose. It is undeniable that Defendants have not only a legitimate but a *compelling* interest in preventing the spread of COVID-19, *see Roman Catholic Diocese*, 141 S. Ct. at 67, especially now when its hospitals are being overwhelmed by a highly contagious variant. *See* Lee, *supra* note 25; Deliso, *supra* note 27; Wyland, *supra* note 28. There is also substantial evidence that vaccines are the best way to prevent the strain on New Mexico's healthcare system and protect the State's population. *See generally* Aplt. App. at 98-109. Requiring the workers who interact with ill patients or serve persons living in close proximity is a reasonable measure to protect not only the populations within hospitals and congregate care facilities but also all employees from the risk of severe illness or death. *See id.* Therefore, Blackford is unlikely to succeed on her contracts clause claims.

5. Blackford's state constitutional claims are barred by sovereign immunity

Finally, Blackford brings a claim under the newly enacted New Mexico Civil Rights Act, NMSA 1978, §§ 41-4A-1 to -13 (2021), asserting that the PHOs violate various provisions of the New Mexico constitution. *See* Aplt. App. at 18-19. However, sovereign immunity prohibits Blackford from maintaining such claims in *federal* court. *See Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995) ("[T]he Eleventh Amendment bars suits brought in federal court seeking to enjoin a state official from violating state law."). Though the State waived sovereign immunity in passing the New Mexico Civil Rights Act, *see* § 41-4A-9, it did so only for suits brought in New Mexico *state* courts. *See* § 41-4A-3(B) (providing that a individuals "may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any *New Mexico* district court" (emphasis added)); *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) ("[A] waiver of sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign. So, for example, a State's consent to suit in its own courts is not a waiver of its immunity from suit in federal court." (internal quotation marks and citations omitted)). Accordingly, the Court cannot consider these state law claims in determining Blackford's likelihood of success on the merits.[37]

[37] Leaving sovereign immunity aside, the Court should not consider Blackford's state law claims in determining the likelihood of success on the merits in light of her

B. Blackford fails to demonstrate any irreparable harm

Plaintiffs' failure to demonstrate a likelihood of success on the merits of their claims is determinative to their requested preliminary injunctive relief. *See Amoco Oil Co. v. Rainbow Snow*, Inc., 809 F.2d 656, 664 (10th Cir. 1987) ("As a prerequisite to the granting of a preliminary injunction, the moving party must show, *in addition to the likelihood of success on the merits*, that it will suffer irreparable injury unless the injunction issues." (emphasis added)). Equally fatal to Plaintiffs' request is their inability to demonstrate any form of irreparable harm required for their requested injunctive relief. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Id.* (internal quotation marks and citations omitted). "Irreparable harm is not harm that is merely serious or substantial." *Heideman v. S.*

failure to bring any viable federal claims. *See Merrifield v. Bd. of Cty. Comm'rs*, 654 F.3d 1073, 1085 (10th Cir. 2011) (stating that a district court may decline supplemental jurisdiction when it has "dismissed all claims over which it has original jurisdiction" (quoting 28 U.S.C. § 1367(c)(3)); *cf. Bray v. City of N.Y.*, 356 F. Supp. 2d 277, 282 (S.D.N.Y. 2004) ("This Court may not entertain the City's motion for a preliminary injunction if supplemental jurisdiction is lacking or imprudent."). Additionally, the Court should decline supplemental jurisdiction because Plaintiffs' claims raise novel and complex issues of state constitutional law that should be addressed by New Mexico courts. *See* 28 U.S.C. § 1367(c)(1); *see generally* Linda M. Vanzi, et al., *State Constitutional Litigation in New Mexico: All Shield and No Sword*, 48 N.M. L. Rev. 302, 305 (2018) (stating that the New Mexico supreme court has considered only three civil cases involving a claim under the state constitution in the past twenty years).

Salt Lake City, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks and citation omitted).

Blackford has not established a likelihood of success on the merits of any of her claims, and therefore cannot use a purported constitutional violation as the basis for any irreparable harm. *See Schrier*, 427 F.3d at 1266 ("Dr. Schrier has failed to demonstrate the requisite likelihood of success on his free speech and academic freedom claims. As a result, he is not entitled to a presumption of irreparable injury."). Further, as the district court found, Blackford cannot demonstrate *any* harm vis-à-vis the PHO because her employer has independently announced it will be requiring its entire workforce to be vaccinated. *See* Aplt. App. at 221-22. Moreover, "[a] permanent loss of employment, standing alone, does not equate to irreparable harm." *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2005). Hence, Blackford's requested preliminary injunctive relief was also properly rejected for want of irreparable injury.

C. Blackford fails to demonstrate that the balance of the equities weighs in her favor

Even if Blackford could demonstrate a likelihood of success or an irreparable injury, she fails to clearly demonstrate that the threatened injury outweighs the harm that preliminary injunctive relief would cause the public. It cannot be gainsaid that the State (and the public) has a compelling interest in limiting the spread of a deadly, contagious virus. *See Roman Catholic Diocese*, 141 S. Ct. at 67. While Blackford

may incur hardship in seeking alternative employment, granting her requested preliminary relief would undoubtedly lead to more New Mexicans falling ill and dying. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 Fed. Appx. 125, 129 (6th Cir. 2020) ("Enjoining the actions of elected state officials, especially in a situation where an infectious disease can and has spread rapidly, causes irreparable harm."). New Mexico's hospitals are at or near capacity, and New Mexicans continue to succumb to the virus every day. *See generally* Aplt. App. at 98-109. Each newly announced death is not simply a statistic, but a mother, a son, a grandfather, a sister. Each one leaves a gaping hole in the lives of their loved ones, and each one deserves protection. These losses are truly irreparable, and the community's interest in preventing more is paramount. *Cf. League of Indep. Fitness Facilities & Trainers, Inc.*, 814 Fed. Appx. at 129 (concluding that "the Governor's interest in combatting COVID-19 is at least equally significant" to the plaintiffs' "real risk of losing their businesses").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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/s/ Holly Agajanian
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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TALISHA VALDEZ and JENNIFER BLACKFORD, **Plaintiffs/Appellants,** **v.** **MICHELLE LUJAN GRISHAM, and DAVID SCRASE,** **Defendants/Appellees.**	**Case No. 21-2105**

Appeal from the Honorable Martha A. Vázquez of the
United States District Court for the District of New Mexico
No. 1:21-cv-00783-MV-JHR

RESPONSE TO MOTION OF PLAINTIFFS-APPELLANTS FOR INJUNCTION PENDING APPEAL AND STAY OF THE DISTRICT COURT PROCEEDINGS

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-November 22, 2021-

INTRODUCTION/DISCUSSION

This interlocutory appeal represents yet another attempt to have the courts overturn elected officials' constitutional measures enacted to protect lives and safety during an unprecedented pandemic. In an effort to stem the rapid resurgence of a highly contagious and potentially more lethal variant of the virus that causes COVID-19, Defendants issued a public health order requiring individuals working with New Mexico's most vulnerable populations in hospitals and congregate care settings to receive a safe and effective vaccine—one of which is now ***fully*** approved by the U.S. Food and Drug Administration—or meet a health, disability, or religious exemption. *See* Appellants' Appendix (Aplt. App.) at 31-37. Defendants also required all vaccine-eligible individuals to show proof of vaccination or entitlement to an exemption to attend the (now over) New Mexico State Fair. *See id.*

Plaintiffs—two individuals subject to the vaccine requirements and apparently not entitled to an exemption—seek to halt Defendants' carefully calculated life-saving measures based on their (faulty and speculative) belief that the vaccines are neither safe nor necessary. But such minority views are insufficient to defeat the wisdom of elected officials guided by the State and nation's preeminent public health experts. As the U.S. Supreme Court proclaimed over a century ago,

> We are not prepared to hold that a minority, residing or remaining in any city or town where [a deadly, contagious virus] is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting

> in good faith for all, under the legislative sanction of the State. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population.

Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905).

Not only do Plaintiffs challenge the district court's denial of a preliminary injunction, they now ask this Court to grant them the same extraordinary relief that was denied by the district court *and* a stay of the underlying proceedings. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, J., concurring) (quoting *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). "This power is used where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances." *Id.* (internal quotation marks and citations omitted).

In requesting injunction or stay pending appeal, the applicant must demonstrate: (1) "the likelihood of success on appeal"; (2) "the threat of irreparable harm if the stay or injunction is not granted"; (3) "the absence of harm to opposing parties if the stay or injunction is granted"; and (4) "any risk of harm to the public interest." 10th Cir. R. 8.1. "In ruling on such a request, [the C]ourt makes the same

inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction. Thus, [the Court] must consider, based on a preliminary record, whether the district court abused its discretion and whether the movant has demonstrated a *clear and unequivocal right to relief*." *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) (citation omitted) (emphasis added).

Plaintiffs filed the instant motion for an injunction and stay pending appeal (the "Motion") along with their opening brief challenging the district court's denial of a preliminary injunction. *See* Motion at 2. Rather than separately explain why an injunction and stay pending appeal now necessary, the Motion simply incorporates by reference the arguments contained in Plaintiffs' opening brief. *See id.* at 3. Defendants understand such practice to generally be disfavored by this Court. *Cf. Jones v. Price*, 695 Fed. Appx. 374, 377 n.2 (10th Cir. 2017) (rejecting attempt to circumvent briefing requirements by incorporating by reference arguments made outside the brief). However, to the extent the Court entertains the Motion based on arguments made in Plaintiffs' opening brief, Defendants respectfully request the Court consider the same made in Defendants' answer brief. As explained fully in Defendants' brief (filed concurrently with this response), there is no longer any plaintiff with standing to seek injunctive relief, and regardless, Plaintiffs fail to demonstrate any of the prerequisites for a preliminary injunction, let alone an injunction pending appeal. *See generally* Defendants/Appellees Governor Lujan

Grisham and Secretary Scrase's Answer Brief. Nor do Plaintiffs explain anywhere how they would be irreparably harmed absent a stay of the litigation that they themselves initiated. *See Renegotiation Board v. Bannercraft Clothing Co.*, Inc., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury").

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' request for an injunction and stay pending appeal.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
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Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
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Oral Argument Requested

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Cases

INTRODUCTION

Appellee Governor Michelle Lujan Grisham's hypocrisy regarding a fundamental right to choose medical procedures for one's own body cannot be overstated. Tellingly of this hypocrisy, earlier this year, before she began telling nurses like Appellant Blackford what medical procedures they must receive into their bodies in order to remain employed anywhere in the state of New Mexico in their chosen profession, Governor Lujan Grisham equivocally stated regarding the recently passed pro-choice abortion bill that she signed in to law that provides that an abortion may be performed up to the delivery of that child thereby ending a life stating **"[a]nyone who seeks to violate bodily integrity, or to criminalize womanhood, is in the business of dehumanization. New Mexico is not in that business — not anymore. Our state statutes now reflect this inviolable recognition of humanity and dignity."** And yet, despite a clear acknowledgment that the state's right to protect life is abrogated by a woman's choice for her body in relation to pregnancy; the Appellees' responses on appeal do not even mention the abrogation of *Jacobson v. Massachusetts,* 197 U.S. 11(1905), in *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992). In fact, not only does the Governor's brief not mention *Casey*, no explanation is offered to square that requiring a vaccine with known risks for adverse reactions to the point of death is acceptable as a plenary override of individual liberty claims; but banning abortions

up to delivery are out of bounds for a state that wishes to protect the lives of the unborn when weighed against a woman's right to choose.

And just as the Appellees do not address the limits on plenary power over mandatory medical procedures found in numerous Supreme Court decisions since *Jacobson*; likewise does the Response ignore and fails to mention, much less differentiate, the significant jurisprudence supporting the fundamental liberty interest of engaging in ones chosen profession. Tellingly, *Barry v. Barchi,* 443 U.S. 55 (1979), *Barsky v. Board of Regents of University of State of New York*, 347 U.S. 442 (1954) *Truax v. Raich*, 239 U.S. 33 (1915), *Meyer v. Nebraska*, 262 U.S. 390 (1923) are not discussed in the Appellees' Responses even though they were discussed before the District Court and in the Opening Brief. It is as though the Appellees, here, believe that they can ignore the Supreme Court's interpretations of the Constitution's protections of individual liberty claims; just as they ignore the Constitutional rights of New Mexico's citizens, in a campaign to seize ever more control over everyday life in the name of combatting a pandemic that is less deadly than the obesity driven heart disease pandemic the state faces. Certainly, that grab for plenary governmental control to protect against a disease is less important than protecting the lives of unborn children where the risk of fatality from that medical procedure is virtually 100%.

ARGUMENT

I. THE APPELLEE'S ARGUMENT REGARDING STANDING IS NONSENSICAL.

Here, Appellees' responses require this Court to suspend reality and common sense. Appellees ask this Court to ignore the reality that Appellant Blackford's employer was not requiring vaccination until compelled to do so in order to remain compliant with the Appellees' mandatory regulation. But, perhaps more importantly, the Appellees arguments regarding standing fail to recognize that the Appellees' mandate covered the entire state making it unlawful for Appellant Blackford to work as a nurse (her chosen profession) anywhere in the state for any employer. The idea that Appellees' PHO was not a cause of Appellant Blackford's injury conveying standing requires this Court to ignore the Supreme Court's precedent regarding the state depriving someone of their ability to engage in their chosen profession and the fact that the PHO applied to all healthcare workers regardless of the decisions their employer might have made in the absence of the PHO vaccine mandate.

II. Appellees Continue to Ignore, Just as the District Court Did, Clear Precedent Regarding the Fundamental Liberties Implicated by Their Actions Contrary to the Protections of the Fourteenth Amendment.

Despite, clear inclusion in the briefing before the District Court and in the Opening Brief, Appellees make no effort at addressing the clear and unrepudiated precedent from the Supreme Court over a century ago that "[i]t requires no argument

to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Nor does the Appellees' Answer brief address the Supreme Court's observation that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life ...." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). But, of course they do not address those cases in their Answer brief, because if they did, any argument that the District Court correctly applied rational basis review instead of strict scrutiny or at least intermediate scrutiny goes out the window.

Likewise, the Appellees ignore the clear holding from *Casey* that the states plenary power to protect health and safety does not automatically override the fundamental liberty interest of bodily integrity that the Governor elsewhere holds so sacrosanct or at least so when it comes to a right to an abortion. In fact, the quotation ignored and unaddressed by Appellees in the Answer Brief from the Opening Brief bears repeating here because of that omission:

> *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.

> If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990); cf., *e.g.*, *Riggins v. Nevada*, 504 U.S. 127, 135, 112 S.Ct. 1810, 1815, 118 L.Ed.2d 479 (1992); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); see also, *e.g.*, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30, 25 S.Ct. 358, 360–363, 49 L.Ed. 643 (1905).

Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 857, 112 S. Ct. 2791, 2810, 120 L. Ed. 2d 674 (1992). A fundamental right to bodily integrity protected by the Fourteenth Amendment requiring the District Court to apply strict scrutiny really isn't a subject the Supreme Court has left unclear or open for debate despite the efforts of the District Court and the Appellees to avoid that precedent.

III. Appellees' Argument Regarding the Violation of the Contract Clause Falls Flat When the Test is Correctly Applied

Appellant supplied via Declaration to the District Court that because of the Public Health Order that she was prohibited by her employer (or by any employer for that matter) from continuing any employment contract as nurse in the state of New Mexico. Thus, because the Public Health Order made her continued employment unlawful, her employment contract was not just substantially interfered with, it was completely destroyed. The fact that, later after it was already unlawful to employ Appellant Blackford, her employer also made it a policy does not absolve the state of New Mexico for its actions to interfere with that contract. Nor is it a reasonable condition to require a person to inject a potentially dangerous substance

that has not been thoroughly vetted and tested by normal medical standards into their body in order to continue their employment. Not when testing, masking and social distancing were held to be otherwise sufficient prior to the PHO vaccine mandate and after it.

CONCLUSION

Death is an unfortunate reality of life. Appellees have no problem with the death of unborn children when it meets their standards for protecting a women's fundamental right to get an abortion, but when it comes to those same women working as nurses not wishing to inject their bodies with an experimental gene-altering "vaccine" that does not actually immunize them and puts them at serious risk for heart problems or other unproven, as of yet, serious side effects, that respect for a women's liberty to choose for her own body is rudely discarded in favor of the plenary power to protect the common good. This is definitionally the fascism that our Constitution was established to protect against. Appellees should not be allowed to trample liberty whenever it suits their whim, and this Court should correct the District Court's error in denying preliminary injunctive relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,482 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B) (iii). This opening brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman.

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to the 10th Circuit ECF User's Manual, Section II.J, I hereby certify with respect to the foregoing document, that:

1) All required privacy redactions have been made per 10th Cir. R. 25.5;

2) Required hard copies will be filed with the court upon acceptance; and

3) The digital submission has been scanned for viruses with the most recent version of Microsoft Windows Defendant Antivirus Version: 1.263.1943.0 Updated March 15, 2008 and according to this program is free of viruses.

CERTIFICATE OF SERVICE

I, A. Blair Dunn, hereby certify that on December 13, 2021, I served a copy of the foregoing upon parties of record as follows:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TALISHA VALDEZ AND JENNIFER BLACKFORD
Plaintiffs-Appellants,

v.

MICHELLE LUJAN GRISHAM AND DAVID SCRASE
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
No. 1:21-cv-00783-MV-JHR

REPLY IN SUPPORT OF THE *OPPOSED* MOTION OF PLAINTIFFS-APPELLANTS FOR INJUNCTION PENDING APPEAL AND STAY OF THE DISTRICT COURT PROCEEDINGS

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December 13, 2021

THE RESPONSE OF APPELLEES DOES NOT CALL INTO QUESTION ANY OF THE FACTORS REQUIRED FOR THE GRANTING OF INJUNCTIVE RELIEF PENDING APPEAL

As set forth in detail, in the contemporaneously filed Reply Brief, Appellants still satisfy each of the four factors for this Court to issue a preliminary injunction pending this Court's resolution of appeal of the District Court's denial of preliminary injunction and incorporates fully the arguments, citations and recitations of the Reply Brief herein as stated regarding these factors.

SPECIFICS OF PRELIMINARY RELIEF REQUESTED

Appellants request that the Appellees be prevented from enforcing the PHO order at issue in this matter during the pendency of this appeal and a stay of the matter before the district court while this appeal is pending.

Conclusion

For all the foregoing reasons, Appellants' motion for a preliminary injunction and a stay of the district court proceedings pending appeal should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD on behalf of herself
And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

VERIFIED CLASS ACTION COMPLAINT FOR CIVIL RIGHTS VIOLATIONS UNDER 42 U.S.C.A. §1983; VIOLATIONS OF RIGHTS PROTECTED BY THE NEW MEXICO CIVIL RIGHTS ACT; EMERGENCY REQUEST FOR A TEMPORARY RESTRAINING ORDER; REQUST FOR PRELIMINARY INJUNCTION, PERMANANT INJUNCTIVE RELIEF AND DAMAGES

COMES NOW Plaintiffs hereby respectfully move this Honorable Court for a temporary restraining order, preliminary injunction, and permanent injunctive relief pursuant to Federal Rule of Civil Procedure 65, and damages and states as follows in support thereof.

INTRODUCTION

Father of the Bill of Rights and 4th U.S. President, James Madison, famously stated that "crisis is the rallying cry of tyrants." Even today in modern day New Mexico, the last public health orders pronounced by the Governor through her Acting Secretary of Health prove that statement is as true today as it was for the revolutionary period of our Republic's history. Not since the Japanese internment camps that so darkly cloud our modern history, set

out by President Franklin Roosevelt and upheld by the U.S. Supreme Court in *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944), does anything resembling the punitive tyrannical efforts contained in the public health orders at issue in this case even remotely arrive on the horizon of our American Liberty. Yet here, a tyrannical governor is willing to punish children and destroy livelihoods to punish adults that would dare to refuse her orders that advance her agenda of violating the right to bodily integrity. We stand at the precipice of losing the liberty that is foundational to our Country and these brave Plaintiffs in this complaint respectfully beg this Court to stop that destruction of liberty. Thomas Paine in American Crisis stated that: "tyranny, like hell, is not easily conquered, yet, we have this consolation with us, that the harder the conflict, the more glorious the triumph."

PARTIES AND JURISDICTION

1. Plaintiff Talisha Valdez is a resident of Union County, New Mexico. She is the County Extension Agent and the mother of two daughters who entered to show their 4-H animals at the New Mexico State Fair.

2. Plaintiff Jennifer Blackford is resident of Bernalillo County, New Mexico. She is a registered nurse employed by Presbyterian Hospital in Albuquerque.

1. Defendant Michelle Lujan Grisham is the Governor of New Mexico, and she is sued in her individual and official capacities.

2. Defendant Dr. David Scrase, M.D. is the Human Services Secretary and is the acting New Mexico Department of Health Secretary. He is sued in his individual and official capacities.

3. The Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 because, Plaintiffs allege a current and imminent continuing violation of their rights under

the laws and Constitution of the United States.

4. The Court may declare the legal rights and obligations of the parties in this action pursuant to 28 U.S.C. § 2201 because this action presents an actual controversy within the Court's jurisdiction.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b). All Defendants are residents of and/or perform their official duties in this district. In addition, all of the events giving rise to the claims in this Complaint arose in this district.

GENERAL ALLIGATIONS

8. On August 17, 2021, Acting Cabinet Secretary David R. Scrase, M.D. issued the Public Health Emergency Order Requiring All School Workers Comply with Certain Health Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated. (Exhibit 1).

9. As a result of the above-mentioned Public Health Order, Plaintiff Blackford and other Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor similarly situated (likely numbering in the 1000) who are not currently vaccinated must be received their first experimental EUA shot within ten days of the effective date or are required to be terminated from their employment in order for the employers to be lawfully compliant.

10. Plaintiff Blackford is currently working as registered nurse for Presbyterian Hospitals, based upon her medical training as well as experience as a nurse for 10 years and her own independent research she is opposed to receiving the EUA covid vaccines. *See* Exhibit 2, Declaration of Jennifer Blackford.

11. The Public Health Order ("PHO") does not give an exemption for those in the affected professions to abstain from being vaccinated without falling under one of the prescribed

exemptions.

12. The statute granting the Food and Drug Administration (FDA) the power to authorize a medical product for emergency use requires that the person being administered the unapproved product be advised of his and her right to refuse administration of the product. *See* 21 U.S.C. § 360bbb-3(e)(1)(A) ("Section 360bbb-3").

13. Covid-recovered individuals have equal to or better immunity response than vaccinated individuals.[1][2][3][4] Moreover, covid-recovered individuals with natural immunity do not benefit from receiving the vaccines.[5]

14. The PHO does not account for or recognize the health implications associated to individuals that have natural immunity.

15. All three of the currently available Covid vaccines for the United States are available under an "Emergency Use Authorization" or "EUA" on an emergency declaration from the Secretary of Health under 21 U.S.C.A. § 360bbb-3.

16. Only the Pfizer Covid vaccine is currently authorized for children aged 12 to 18 years old.[6]

17. Under the PHO, individuals that qualify to receive the Covid vaccine must either be fully vaccinated or be exempt under one of the three exceptions and possess a covid negative test from within 48 hours to enter upon the grounds of the New Mexico State Fair Grounds.

18. In order to receive the second shot of the Pfizer vaccine 21 days must have passed from the date that the individual received the first shot of the 2 doses of the vaccine.[7] In order to

[1] https://www.cell.com/cell/pdf/S0092-8674(21)00007-6.pdf
[2] https://www.nature.com/articles/d41586-021-01442-9
[3] https://pubmed.ncbi.nlm.nih.gov/34046033/
[4] https://www.israelnationalnews.com/News/News.aspx/309762
[5] https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v2
[6] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/adolescents.html
[7] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/second-shot.html

be considered fully vaccinated it must have been 2 weeks since your second Pfizer shot.[8] Thus, if a child receives their first shot on August 18, 2021 (the day following issuance of the PHO) that child is not fully vaccinated and able to enter the New Mexico State Fair Grounds until September 22, 2021, which is 3 days after the New Mexico State Fair ends.

19. The PHO is purely punitive towards parents and the children of parents that have previously exercised their fundamental liberty to raise their children in a manner they chose that does not include injecting their child or children with an experimental EUA vaccine.

20. Plaintiff Valdez and her children have entered into a contract to exhibit their 4-H animals at the New Mexico State Fair. *See* Exhibit 3, Declaration of Talisha Valdez.

21. Plaintiff Valdez has two daughters, Raley (age 11) and Riata (age 12), who have entered as exhibitors 4 pigs and 3 lambs to compete at the New Mexico State Fair. The daughters have expended approximately at least 150 hours per month on their animals and over $9000.00 to prepare their animals for the State Fair.

22. There is no way that Plaintiff Valdez, who is not vaccinated, or her 12-year-old daughter may enter the fairgrounds to exhibit the animals that they paid entry fees to enter.

23. Upon information and belief, there are numerous (more than 35 families) that are punished by the PHO in an identical fashion.

24. In addition, Plaintiff Valdez is prohibited from performing an integral part of her job responsibilities as a Union County Agricultural Extension Agent by her exclusion from the New Mexico State Fair Grounds.

[8] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/second-shot.html

CLASS ACTION ALLEGATIONS

A. GENERAL CLASS ACTION ALLEGATIONS

25. Plaintiff Talisha Valdez brings this action, on behalf of herself and all others similarly situated with children registered to exhibit animals at the 2021 New Mexico State Fair, for the purpose of asserting the claims alleged in this complaint on a common basis.

26. Plaintiff Jennifer Blackford brings this action, on behalf of herself and all others similarly situated that work in healthcare, congregate care or the Office of the Governor for the purpose of asserting the claims alleged in this complaint on a common basis.

27. A class action is a superior means, and the only practicable means, by which Plaintiffs and unknown class members can challenge the State of New Mexico's actions, acting through her Governor and the Governor's cabinet members, restricting the rights (constitutional and statutory) of Plaintiffs and similarly situated class members without providing them due process of law.

28. This action is brought and may properly be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(a), and 23(b)(2).

29. This action satisfies the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a), as well as the predominance and superiority requirements of Rule 23(b)(2), where applicable.

30. Plaintiffs propose two (2) classes seeking declaratory and injunctive relief as well as damages.

31. The Declaratory and Injunctive Relief Classes are defined as: 1) the parents of the New Mexico children who are or will be subject to the loss of the ability to exhibit their animal(s) at the junior livestock competition of the New Mexico State Fair, and 2) healthcare

workers, congregate care workers and workers in the Office of the Governor who are or will lose their livelihoods if they decline to receive the EUA vaccines or decline to share their vaccination status.

B. RULE 23(A)(1): NUMEROSITY

32. The class is so numerous that joinder is impracticable.

33. The individuals in the class represented by Plaintiff Valdez are parents of children that will be punished for their parents exercising their fundamental liberty interest to raise their children in the way they see fit and whose children's contracts to exhibit their animal in competition at the State Fair will be impaired by the actions of the State of New Mexico acting through Defendants.

34. The individuals in the class represented by Plaintiff Blackford are employees that will lose their employment in their chosen professions because they have elected not to receive the EUA vaccinations mandated by the State of New Mexico acting through Defendants.

35. The total number of individuals in each of the classes will separately number in the 100's if not the 1000's in the case of the Blackford class.

C. RULE 23(A)(2): COMMONALITY

36. Common questions of law or fact exist as to all members of the classes.

37. All class members seek relief on the common legal question of whether New Mexico's actions violate their constitutional or statutory rights.

38. All class members also present common factual questions.

39. All members of the declaratory and injunctive relief class seek relief on the common legal question of whether a declaratory judgment and injunctive relief are appropriate relief for the asserted constitutional (both federal and state) violations.

D. RULE 23(A)(3): TYPICALITY

40. Plaintiffs' claims are typical of the claims of other respective members of the classes.

41. Like all members of the classes, Plaintiffs claim that the actions of the Governor, and her Secretary of Health are depriving them of equal protection, due process of law and of constitutional protections for their preexisting contracts.

42. Like all members of the declaratory and injunctive relief class, Plaintiffs seek a declaratory judgment that the actions of the Defendants are unlawful and unconstitutional and an injunction preventing the Defendants from continuing any such action.

43. There is nothing distinctive about Plaintiffs claim for declaratory relief or injunctive relief that would lead to a different result in their case than in any case involving other class members.

E. RULE 23(A)(4): ADEQUACY

44. Plaintiffs are adequate representatives of the classes because their interest in the vindication of their constitutional and statutory rights is entirely aligned with the interests of the other class members, each of whom has the same constitutional or statutory claims.

45. Plaintiffs are a member of the respective classes, and their interests do not conflict with those of the other class members with respect to any claims.

46. Plaintiffs are represented by attorneys from Western Agriculture, Resource and Business Advocates, LLP who have extensive experience litigating complex civil rights matters in federal court and detailed knowledge of New Mexico's law and other relevant issues.

47. Class counsel has undertaken a detailed investigation of New Mexico's policies, practices, and procedures as they relate to federal constitutional requirements.

48. Class counsel has developed and continues to develop relationships with Plaintiffs

and others similarly situated. The interests of the members of the class will be fairly and adequately represented by Plaintiffs and their attorneys.

F. RULE 23(B)(2): DECLARATORY AND INJUNCTIVE RELIEF CLASS

49. A class action is appropriate for the declaratory and injunctive relief class under Rule 23(b)(2) because Defendants have acted on grounds that apply generally to the classes—namely the Governor's PHO interferes with the statutory and constitutional rights of the members of the class.

50. The classes seek declaratory and injunctive relief to enjoin the State of New Mexico acting through her Governor and the Secretary of Health from denying class members their fundamental liberty interest in engaging in the profession of their choosing, to raise their children as they see fit and to have their existing contracts performed without interference from the state.

51. Class status is particularly appropriate because there is an acute risk that any individual class member's claim for declaratory and injunctive relief will become moot before the litigation is finally resolved.

G. RULE 23(B)(3): DAMAGES CLASS

52. Both classes of Plaintiffs will have suffered either or both the loss of employment and the loss of the benefits of their contracts.

COUNT I: VIOLATION OF FEDERAL FOOD, DRUG AND COSMETIC ACT

53. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

54. The Mandatory COVID-19 Vaccination Directive issued by Defendants is in direct violation of Federal law, specifically 21 U.S. Code § 360bbb-3 – Authorization for medical products for use in emergencies. That law states that where a medical product is "unapproved" then no one may be mandated to take it. At Section (e)(1)(A) of the a forementioned statute it

states:

> With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:
>
> a. Appropriate conditions designed to ensure that the health care professionals administering the product are informed –
> b. of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and
> c. of the alternatives to the product that are available, and of their benefits and risks.
> d. Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—
> e. that the Secretary has authorized the emergency use of the product;
> f. of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and
> g. **of the option to accept or refuse administration of the product,** of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks. (emphasis added).

Id. (emphasis added)

55. The Defendants violated at least two quoted sections (a and c). The Defendants did not advise Plaintiffs of the "known and potential benefits and risks of such emergency use of the product, and of the extent to which such benefits and risks are unknown" of the COVID-19 experimental vaccine.

56. It is unlawful and highly questionable for the Defendants to require the Plaintiffs or their children to take the emergency experimental vaccine after more than 1.5 years have elapsed since the event giving rise to the emergency occurred.

COUNT II: VIOLATION OF EQUAL PROTECTION – 42 U.S.C. § 1983

57. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

58. The Equal Protection Clause requires governments to act in a rational and

nonarbitrary fashion.

59. Defendants' actions create a class of individuals who, though they are exempted by federal law from being required to receive the vaccine, or enjoy a fundamental liberty interest in raising their children in the manner they deem fit, are punished for being unvaccinated and discriminated against without any real justifiable basis and without providing them any alternative.

60. The PHO is not rationally related to achieving a compelling government purpose.

61. Defendants' actions are and have been therefore a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT III – SUBSTANTIVE DUE PROCESS - 42 U.S.C. § 1983

62. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

63. The Plaintiffs have protected liberty interests in their right to live without arbitrary governmental interference under the Fourteenth Amendment, to bodily integrity under the Fourth Amendment, to raise their children as they see fit and to engage in their chosen professions under the Fourteenth Amendment.

64. Substantive Due Process prevents the government from engaging in conduct that "shocks the conscious" or that interferes with fundamental liberty without narrowly tailoring such interference to achieve a compelling government interest which must withstand strict scrutiny.

65. Defendants' actions constitute official policy, custom and practice of the State of New Mexico. Defendants' actions are not narrowly tailored as many individuals similarly situated to Plaintiffs are covid-recovered and the actions violate federal law which requires that it must be an option not to be required to receive the vaccination.

66. Defendants' actions do not comport with the traditional ideas of fair play and decency.

67. Plaintiffs have the right to pursue lawful employment as they shall determine and be free of unreasonable governmental interference.

68. The PHO imposed by the Defendant will cause Plaintiffs and other similarly situation citizens of New Mexico to lose their livelihoods and to suffer the loss of their bodily integrity.

COUNT IV - PROCEDURAL DUE PROCESS - 42 U.S.C. § 1983

69. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

70. The Fourteenth Amendment to the United States Constitution forbids a state from depriving anyone of life, liberty, or property without due process of law.

71. No due process protections have been afforded to Plaintiffs, or any citizen of New Mexico, as required by the United States Constitution of a pre-deprivation or post deprivation process that allows for any opportunity, much less a meaningful opportunity, to be heard and address the propriety of the government's actions.

72. All fundamental rights comprised within the term liberty, including but not limited to, the rights to be free from bodily restraint, the right to contract and engage in the common occupations of life, the right to acquire useful knowledge, to worship God according to the dictates of one's own conscience, and to generally enjoy the privileges long associated with the rights of free people are guaranteed substantive due process rights under the Fourteenth Amendment.

73. The August 17, 2021 Order deprives Plaintiffs, and many residents of New Mexico, of fundamental liberties without due process of law, based solely upon discretion of the Defendants.

COUNT V – VIOLATIONS OF U.S.C.A. CONST. ART. I § 10

74. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

75. The actions of Defendants to penalize parents and children including Plaintiff Valdez and others similarly situated that have previously elected not to vaccinate themselves or their children by excluding them from the benefits open to all to participate in the New Mexico State Fair constitutes a bill of attainder.

76. The actions of Defendants to exclude Plaintiff Valdez, her children and others similarly situated impairs the contract established with consideration exchanged between them and Expo New Mexico to participate in the New Mexico State Fair junior livestock competitions.

77. The actions of Defendants to require the termination of unvaccinated individuals that do not meet or request an exemption impair Plaintiff Blackford's employment contract and others similarly situated.

78. Plaintiff and others similarly situated have been damaged by these actions of Defendants and are entitled compensatory and punitive damages in an amount to be proven at trial.

COUNT VI – VIOLATION OF RIGHTS SECURED BY THE NEW MEXICO CONSTITUTION UNDER THE NEW MEXICO CIVIL RIGHTS ACT NMSA 1978 § 41-4A-3 (PENDENT JURISDICTION)

79. Plaintiffs incorporate the preceding paragraphs as though fully set forth herein.

80. Plaintiffs enjoyed a right to bodily integrity under Article II Section 10 of the New Mexico Constitution.

81. Defendants' actions to unreasonably and contrary to federal law require that EUA vaccine injection be mandatory in order to maintain employment or enjoy the benefits of an existing contract violates Art. II Sec. 10.

82. Plaintiffs enjoy a right to due process and equal protection under Article II Section 18 of the New Mexico Constitution.

83. Defendants' actions to unreasonably and contrary to federal law require that EUA

vaccine injection is mandatory in order to maintain employment or enjoy the benefits of an existing contract deprived Plaintiffs of their owing due process and discriminated against them on the basis of the individual choice to vaccinate themselves or their children.

84. Plaintiffs enjoy a right to contract free from government impairment Article II Section 19 of the New Mexico Constitution.

85. Defendants' actions to unreasonably and contrary to federal law require that EUA vaccine injection is mandated impair the existing employment contracts of Plaintiff Blackford and others similarly situated and impairs the contracts of Plaintiff Valdez and her children as well as others similarly situated to exhibit their animals at the State Fair in violation of the New Mexico Constitution's Bill of Rights.

86. The violation of rights secured by the New Mexico Constitution is actionable under the New Mexico Civil Rights Act NMSA § 41-4A-1 *et seq.* which provides for damages and attorney's fees for violations of those rights in an amount to be proven at trial.

JURY DEMAND

Plaintiffs request a trial by a jury of twelve (12) persons.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs demand judgment in their favor, against Defendants jointly and severally, and seek relief as follows:

(1) a Declaratory Judgment that issuance and enforcement of the August 17, 2021 Public Health Order requiring certain professions be vaccinated is unconstitutional for the reasons stated herein, and that the actions of the Defendants were unlawful and unconstitutional;

(2) a Declaratory Judgment that issuance and enforcement of the August 17, 2021

Public Health Order excluding families from the New Mexico State Fair Ground contracted to exhibit animals in the junior livestock competitions is unconstitutional for the reasons stated herein, and that the actions of the Defendants were unlawful and unconstitutional;

(3) a temporary restraining order to prohibit Defendants from enforcing public health orders against the Plaintiffs and other putative class members that are similarly situated

(4) a preliminary and permanent injunction to prohibit Defendants from enforcing public health orders in the arbitrary and capricious manner and fashion engaged by Defendants

(5) a declaration that the rights of the Plaintiffs and the citizens of New Mexico have been violated by the various actions of the Defendants and the said Defendants are enjoined from engaging in such violations and declaring them to be null and void ab initio;

(6) award of costs and expenses, including reasonable attorneys' fees under 42 U.S.C. § 1983 and 1988; and,

(7) actual and punitive damages; and

(8) such other relief as this Court deems appropriate.

REQUEST FOR TEMPORARY RESTRAING ORDER

COVID-19 Investigational Vaccine Not Approved by the FDA

On December 11, 2020, the United States Food and Drug Administration ("FDA") issued the first emergency use authorization ("EAU") for an experimental vaccine for the prevention of coronavirus disease 2019 ("COVID-19"). Emergency use authorization is not an FDA approval.

The experimental vaccine has been in existence for less than a year. The first reported use of the experimental vaccine was December 14, 2020.

It is undisputed that the vaccine being forced upon Plaintiffs is "unapproved". Even though the FDA granted emergency use authorization for the Pfizer/BioNTech and Moderna vaccines in December 2020, the clinical trials the FDA will rely upon to ultimately decide whether to license these and other COVID-19 experimental vaccines are still underway and are designed to last for approximately two (2) years to collect adequate data to establish if these vaccines are safe and effective enough for the FDA to approve. The abbreviated timelines for the emergency use applications and authorizations means there is much the FDA does not know about these products even as it authorizes them for emergency use, including their effectiveness against infection, death, and transmission of SARS-CoV-2, the virus that is allegedly the cause of the COVID disease. Given the uncertainty about the COVID-19 experimental vaccines, the FDA requires that each dose of the experimental vaccine shall have a label that states that the product is an emergency use authorization, that the EUA is explicit that each is "an investigational vaccine not licensed for any indication" and that all "promotional material relating to the Covid-19 Vaccine clearly and conspicuously...state that this product has not been approved or licensed by the FDA, but has been authorized for emergency use by FDA". (Exhibit "A-1", EAU letter for Pfizer).

> The FDA on their website has stated the following:
> "FDA believes that terms and conditions of an EAU issued under section 564 preempt state or local law, both legislative requirement and common-law duties, that impose different or additional requirements on the medical product for which the EAU was issued in the context of the emergency declared under section 564... In an emergency, it is critical that the conditions that are part of the EAU or an order or waiver issued pursuant to section 564A – those that FDA has determined to be necessary or appropriate to protect the public health-be strictly followed, and no additional conditions be imposed."

In August 2020, the Centers for Disease Control and Prevention ("CDC") published a meeting of the Advisory Committee on Immunizations and Respiratory Diseases, Dr. Amanda

Cohn stated (@1:14:40):

> "I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EAU, vaccines are not allowed to be mandatory. So, early in the vaccination phase, individuals will have to be consented and they won't be able to be mandated."

Here, Plaintiffs are in imminent and immediate danger of being terminated from their jobs for refusing to take an experimental vaccine that is being provided under an EAU.

COVID-19 Vaccine was Rushed

On January 30, 2020, the World Health Organization ("WHO") declared a "public health emergency of international concern over the global outbreak" of COVID-19. Among other recommendations, WHO called for the accelerated development of "vaccines", therapeutics and diagnostics." The following day, U.S. Health and Human Services ('HHS") Secretary, Alex Azar, declared a national Public Health Emergency ("PHE") retroactive to January 27, 2020, "to aid the nation's healthcare community in responding" to COVID-19. By then, HHS was already collaborating with the pharmaceutical industry regarding the development of vaccines.

In April 2020, the National Administration announced Operation Warp Speed ("OWS") – a public/private partnership to develop and distribute a vaccine for COVID-19 by the end of 2020 or early 2021. The process for developing a vaccine normally takes place in several phases, over a period of years.

The general stages of the development cycle for a vaccine are:

1. Exploratory stage;
2. Pre-clinical stage (animal testing);
3. Clinical development (human trials - see below);
4. Regulatory review and approval;
5. Manufacturing; and
6. Quality control[9]

[9] https://www.cdc.gov/vaccines/basics/test-approve.html.

The timeline set by OWS telescoped what would normally take years of research into a matter of months. Commercial vaccine manufacturers and other entities proceeded with the development of COVID-19 vaccine candidates using different technologies including RNA, DNA, protein, and viral vectored vaccines. Two potential vaccines emerged early on as likely candidates: one developed by Moderna ("Moderna Vaccine") and the other by Pfizer ("Pfizer Vaccine") with both announcing Phase III trial results in November 2020. In early 2021, Janssen Biotech, Inc., submitted Phase III trial results for its adenovirus vector vaccine ("Janssen Vaccine").

Experimental COVID-19 Vaccines Have Not Received Final Approval from the FDA- Plaintiffs are not given a choice on whether or not they want to participate in this experimental trial.

None of the currently available experimental vaccines for COVID-19 has received final approval from the FDA. Rather, each one of the COVID-19 experimental vaccines is an unapproved product that has been granted EAU. The FDA refers to the COVID-19 experimental vaccine as "investigational products", meaning they remain classified as experimental.

The statute granting the FDA the power to authorize a medical product for emergency use requires that the person being administered the unapproved product be advised of his and her right to refuse administration of the product. *See* 21 U.S.C. § 360bbb-3(e)(1)(A) ("Section 360bbb-3"). Additionally, terms and conditions of EAUs preempt state and local laws that would impose obligations that are inconsistent with those terms and conditions. Here, Defendants do not inform Plaintiffs of their right to refuse administration of the experimental vaccine. In fact, Plaintiffs are not given a choice as to whether or not they want to participate in the experimental vaccine trials. The only choice the Plaintiffs have is to join the experimental trial and be injected with the experimental vaccine or be fired.

Long Standing Public Policy Against Forcing Plaintiffs to Participate in Vaccine Trial

Section 360bbb-3 reflects a fundamental, public policy goal of striking a balance between giving people the option of having access to experimental medical products during public emergencies, while also assuring that no one is forced to accept administration of such and the experimental medical product. Section 360bbb—further recognizes the well-settled doctrine that medical experiments, better known in modern parlance as "clinical research", may not be performed on human subjects without the express, informed consent of the individual receiving treatment.

Plaintiffs Have a Liberty Interest in Engaging in Their Chosen Profession That Requires Due Process of Law Before They are Deprived of Liberty.

Plaintiffs have a liberty interest in engaging in their chosen profession. Defendants disagree because otherwise their actions most certainly run afoul of the Due Process Clause's protections by depriving Plaintiffs in the manner they did of their ability to earn a livelihood in the occupation of their choosing.[10] For example, the United States Supreme Court in *Barry v. Barchi* has opined as to the constitutionally protected property interest in engaging in one's chosen profession of horse racing, stating "Plaintiffs have a liberty interest in pursuing their profession of horse racing and are entitled to due process of law if they are to be lawfully denied an opportunity to do so." *Barry v. Barchi*, 443 U.S. 55, 64, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

Thus, the right of citizens to support themselves by engaging in a chosen occupation is deeply rooted in our nation's legal and cultural history and has long been recognized as a

[10] "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson · in his essay on Politics, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man." *Barsky v. Board of Regents of University of State of New York,* 347 U.S. 442, 472 (1954) (Douglas, J, dissenting).

component of the liberties protected by the Fourteenth Amendment. Over a century ago, the Supreme Court recognized that "[i]t requires no argument to show that the right to work for a person living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (holding that a state anti-alien labor statute violated both equal protection and due process). Later, in striking down a law banning the teaching of foreign languages in school, the Supreme Court observed that the Fourteenth Amendment guaranteed the right, *inter alia*, "to engage in any of the common occupations of life ...." *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Despite later jurisprudence following the *Lochner* era, *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), de-emphasizing economic substantive due process, our Supreme Court has never repudiated the recognition that a citizen has the right to work for a living and pursue his or her chosen occupation.

The Third Circuit has recognized "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and the 'property' concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Comm. of Pa.*, 36 F.3d 1250, 1259 (3d. Cir. 1994) (citing *Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Truax*, 239 U.S. at 41, 36 S.Ct. 7). However,

> [t]he Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits ... brought directly under the due process clause. It is the liberty to pursue a calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.

Id. (internal citations and quotation marks omitted). There is no question, then, that the Fourteenth Amendment recognizes a liberty interest in citizens—the Plaintiffs here—to pursue their chosen

occupation. The dispositive question is not whether such a right exists, but rather, the level of infringement upon the right that may be tolerated.

Although federal courts have recognized the existence of a substantive due process right of a citizen to pursue a chosen occupation for over a century, there is little specific analysis on how that right should be weighed and what sort of test should be applied to allegedly infringing conduct. Plaintiffs do not dispute that as a matter of general consensus, courts generally treat government action purportedly violating the right to pursue an occupation in the same light as economic legislation and use the general standard of review applied to substantive due process claims. In reviewing a substantive due process claim, the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "Specific acts" are also known as "executive acts" in substantive due process jurisprudence. The Third Circuit has explained that "executive acts, such as employment decisions, typically apply to one person or to a limited number of persons, while legislative acts, generally laws and broad executive regulations, apply to large segments of society." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 139 n.1 (3d. Cir. 2000). Substantive due process challenges to a legislative act that do not implicate a fundamental right are reviewed under the rational basis test. *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009).

Moreover, the United States Constitution is unequivocal in Art. I Section 10 that the State (here New Mexico) may not enact Bills of Attainer or impair existing contracts, yet that is exactly the harm that Defendants visit on the these Plaintiffs by punishing Plaintiff Valdez and her children for not being vaccinated as well as others similarly situated including impairing their contracts with Expo New Mexico or impairing the employment contract of Plaintiff Blackford and other

similarly situated by requiring that employers terminate them from their chosen professions if they are not vaccinated.

A Temporary Restraining Order is Necessary to Prevent Irreversible Harm

Unless the Court enters this Temporary Restraining Order and Preliminary Injunction, New Mexicans will be forced to take an experiential vaccine in order to retain their employment and will forever lose the ability to exhibit their unique animals at the New Mexico State Fair. This government edict is punitive toward New Mexican's who have not yet been vaccinated or refuse to be vaccinated and to have their children vaccinated with an experimental EUA vaccine.

I. Standards for Issuance of a Preliminary Injunction

A movant may obtain a preliminary injunction if: (1) the movant will be irreparably injured by denial of the relief; (2) the movant's injury outweighs any damage the injunction may cause the opposing party; (3) granting the preliminary relief would not be adverse to the public interest; and (4) there is asubstantial likelihood of success on the merits. *Keirnan v. Utah Transit Auth.*, 339 F.3d 1217, 1220 (10th Cir. 2003) (citation omitted). For the reasons that follow, the standards for granting a temporary and preliminary injunction have been met in this case.

II. Plaintiffs are Likely to Succeed on the Merits.

A. Defendants' Public Health Order Violates the Fourteenth Amendment's Due Process and Equal Protection Clauses, the Fourth Amendment's protection of Bodily Integrity as well as Article I Section 10 and the corresponding New Mexico Constitution provision in the Bill of Rights.

To determine whether a government act violates the substantive component of the Due Process Clause or the Equal Protection Clause, courts begin by determining the proper level of scrutiny to apply for review. "Even though citizens of statutory counties are not a suspect class, we will still apply strict scrutiny if the state's classification burdens the exercise of a fundamental

right guaranteed by the U.S. Constitution. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). An act passes strict scrutiny only if it "narrowly tailored to further a compelling government interest." *Id.* "If no heightened scrutiny applies, the statute need only be rationally related to a legitimate government purpose." *Id*. "In deciding whether to recognize additional classifications as suspect, courts traditionally look to see if the classification is 'based on characteristics beyond an individual's control,'[] and whether the class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (citations omitted).

III. The Plaintiffs Will Suffer Irreparable Injury if Injunctive Relief Is Denied

The loss of [constitutional] freedoms, *for even minimal periods of time*, unquestionably constitutes irreparable injury." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (emphasis added); Plaintiffs if they are forced to be vaccinated face the harsh reality of being terminated from their employment and from engaging in their chosen profession. There is no adequate legal remedy for these "intangible harms." *Cmty. Television of Utah, LLC v. Aereo, Inc.*, 997 F. Supp. 2d 1191, 1210 (D. Utah 2014) ("Rather, the court looks to intangible harms that are difficult to quantify when it determines whether irreparable harm warrants a preliminary injunction). Moreover, deprivation of constitutionally protected rights—including the rights to due process and equal protection—inexorably creates irreparable harm. *See Elrod v. Burns* 427 U.S. 347, 373 (1976).; *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citations omitted).

The fact that Due Process and Equal Protection rights are burdened if not outright denied, as they are in this case, establishes the preliminary injunction's "irreparable harm" standard. Thus, under the Tenth Circuit Court of Appeals' jurisprudence, irreparable injury has occurred and will continue to occur until an injunction issues.

IV. The Balance of Harms Favors Issuance of Injunctive Relief

Plaintiff has established both likelihood of success on the merits as well as a clear irreparable injury. In addition, the balance of harms tips decidedly in favor of Plaintiff. In the Tenth Circuit, "the [government's] potential harm must be weighed against [plaintiffs'] actual [constitutional] injury." *Summum v. Pleasant Grove City*, 483 F.3d 1044, 1056 (10th Cir. 2007) *rvs'd other grounds by* 555 U.S. 460 (2009). Where the government's perception of harm is speculative and when the state permits the same speculative harm in other places, as it is here, such speculative harm cannot outweigh an injury to the Due Process, Equal Protection and State Constitutional Education rights of plaintiffs who have established a substantial likelihood of success on the merits.

If preliminary injunctive relief is not granted, and the Court later finds that the challenged laws impermissibly infringe constitutional rights, the Plaintiffs will have suffered irreparable harm. After the fact, this Court will be unable to make things right again. By contrast, if this Court grants preliminary injunctive relief and later finds against the Plaintiff, the Defendants will not have suffered any hardship that the Defendants do not currently countenance in the operation of hospitals, schools and other entities. Because the Defendants will not suffer more than speculative harm if an injunction is granted, and the Plaintiffs will suffer certain harm in the absence of injunctive relief, the balance of hardships favors the Plaintiff. When plaintiffs establish that a case raises constitutional issues, as the Plaintiffs have in this case, the Court should presume that the

balance of harms tips in their favor. *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002).

V. An Injunction Is in the Public Interest

Finally, Plaintiff establishes that issuance of a preliminary injunction is in the public interest. The Tenth Circuit Court of Appeals recognizes "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016); *citing Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Utah Licensed Bev*., 256 F.3d at 1076; *Elam Constr., Inc. v. Regional Transp. Dist*., 129 F.3d 1343, 1347 (10th Cir.1997). The vaccine is experiential, and an individual is not required by law to receive a vaccine in the experiential stage. It is in the public interest to not allow government to mandate what we put into our bodies, especially when dealing with an experiential vaccine for which we do not know the long-term effects.

CONCLUSION

French mathematician and philosopher, Blaise Pascal, stated that *"[j]ustice without force is powerless; force without justice is tyrannical*." This Court should give force to justice and for all the foregoing reasons, Plaintiffs respectfully request this Court grant a Temporary Restraining Order.

Respectfully submitted this 19th day of August 2021.

WESTERN AGRICULTURE, RESOURCE
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EXHIBIT 1

NEW MEXICO
Department of Health
Office of the Secretary

MICHELLE LUJAN GRISHAM
Governor

DAVID R. SCRASE, M.D.
Acting Cabinet Secretary

PUBLIC HEALTH ORDER
NEW MEXICO DEPARTMENT OF HEALTH
ACTING SECRETARY DAVID R. SCRASE, M.D.

August 17, 2021

Public Health Emergency Order Requiring All School Workers Comply with Certain Health Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated

WHEREAS, on January 30, 2020, the World Health Organization announced the emergence of a novel Coronavirus Disease 2019 ("COVID-19") that had not previously circulated in humans, but has been found to have adopted to humans such that it is contagious and easily spread from one person to another and one country to another;

WHEREAS, COVID-19 has been confirmed in New Mexico since March 11, 2020, when the New Mexico Department of Health confirmed the first cases of individuals infected with COVID-19 in New Mexico and additional cases have been confirmed each day since then;

WHEREAS, on March 11, 2020, because of the spread of COVID-19, Governor Michelle Lujan Grisham issued Executive Order 2020-004 declaring that a Public Health Emergency exists in New Mexico under the Public Health Emergency Response Act, and invoked her authority under the All Hazards Emergency Management Act;

WHEREAS, Governor Michelle Lujan Grisham has renewed the declaration of a Public Health Emergency through September 15, 2021;

WHEREAS, over 36 million people have been infected with COVID-19 in the United States, with over 615,000 related deaths, and the New Mexico Department of Health has reported 220,000 positive COVID-19 cases and 4,450 related deaths in New Mexico;

WHEREAS, the currently available COVID-19 vaccines are safe and the most effective way of preventing infection, serious illness, and death;

WHEREAS, widespread vaccination protects New Mexico's health care system as vaccines decrease the need for emergency services and hospitalization;

WHEREAS, the refusal to receive the COVID-19 vaccine not only endangers the individual but the entire community, and further jeopardizes the progress the State has made against the pandemic by allowing the virus to transmit more freely and mutate into more transmissible or deadly variants;

WHEREAS, one such highly transmissible variant, B.1.617.2, commonly known as the Delta variant, now accounts for the majority of new infections in the United States;

WHEREAS, New Mexico has recorded a significant increase in new COVID-19 cases in recent weeks, with cases expected to rise even further in the Fall and Winter months;

WHEREAS, the further spread of COVID-19 in the State of New Mexico poses a threat to the health, safety, and wellbeing of children who are not yet eligible to receive a vaccine; persons who cannot be vaccinated due to medical reasons; immunocompromised individuals; and vulnerable persons including persons in hospitals, long-term care facilities, and other congregate care facilities; and

WHEREAS, the New Mexico Department of Health possesses legal authority pursuant to the Public Health Act, NMSA 1978, Sections 24-1-1 to -40, the Public Health Emergency Response Act, NMSA 1978, Sections 12-10A-1 to -19, the Department of Health Act, NMSA 1978, Sections 9-7-1 to -18, and inherent constitutional police powers of the New Mexico state government, to preserve and promote public health and safety, to maintain and enforce rules for the control of a condition of public health importance, and issue rules for immunization against conditions of public health importance.

NOW, THEREFORE, I, David R. Scrase, M.D., Acting Secretary of the New Mexico Department of Health, in accordance with authority vested in me by the Constitution and the Laws of the State of New Mexico, and as directed by the Governor pursuant to the full scope of emergency powers under the All Hazard Emergency Management Act, do hereby declare the current outbreak of COVID-19 a condition of public health importance, as defined in NMSA 1978, Section 24-1-2(A), and hereby **ORDER** and **DIRECT** as follows:

DEFINITIONS

For the purposes of this Order, the following terms shall have the meaning given to them, except where the context clearly requires otherwise:

(1) "Congregate care facility" means nursing homes, assisted living facilities, adult day cares, hospice facilities, rehabilitation facilities, State correctional facilities, juvenile justice facilities, residential treatment centers, the New Mexico State Veterans' Home, and community homes.

(2) "Congregate care facility worker" means any paid or unpaid individuals working in a congregate care facility. This includes workers providing services who have the potential for direct or indirect exposure to patients or residents in a congregate care facility. A congregate care facility worker includes contractors who perform services on-site at the congregate care facility.

(3) "Fully vaccinated" means two weeks after an individual completed the entire recommended series of vaccination with a vaccine approved by the Food and Drug Administration (FDA), including on an emergency use basis, to prevent COVID-19. An individual will be fully vaccinated two weeks after the second dose of the Pfizer-BioNTech or Moderna COVID-19

vaccines. An individual will be fully vaccinated two weeks after a single-dose Johnson and Johnson's Jassen COVID-19 vaccine.

(4) "Hospital" means any public hospital, profit or nonprofit private hospital, general hospital, or special hospital.

(5) "Hospital Worker" means all paid and unpaid individuals who work on-site in a hospital in a setting where care is provided to patients or patients have access for any purpose. This includes workers who have the potential for direct or indirect exposure to patients or COVID-19 airborne aerosols. Hospital workers include, but are not limited to, nurses, physicians nursing assistants, technicians, therapists, phlebotomists, pharmacists, students and trainees, contractual staff not employed by the hospital, and persons not directly involved in patient care, but who could be exposed to infection agents that can be transmitted in the hospital (e.g. clerical, dietary, environmental services, laundry, security, and volunteer personnel).

(6) "School worker" means all paid and unpaid adults serving in a private school, public school, or charter school.

(7) "Qualifying medical condition" means a permanent or temporary medical condition recognized by the FDA or Centers for Disease Control and Prevention (CDC) as a contra-indication to COVID-19 vaccination.

DIRECTIVES

I HEREBY DIRECT AS FOLLOWS:

(1) Beginning Monday August 23, 2021, all school workers in any private school, public school, or charter school who are not fully vaccinated against COVID-19 or are unwilling to provide proof of vaccination to their respective supervisors shall:

a. Provide adequate proof that the school worker has tested negative for COVID-19 on a weekly basis; and

b. Wear a mask or multilayer cloth face covering at all times indoors during the course and scope of their employment except when eating or drinking. An unvaccinated school worker will only be exempt from wearing a mask indoors if adequate proof is provided that the school worker has been instructed otherwise by a licensed healthcare provider.

(2) All private schools, public schools, and charter schools shall maintain records of school worker vaccination status in accordance with applicable privacy laws and regulations. The records regarding a worker's vaccination status shall be provided to the Department of Health promptly upon request.

(3) All hospital workers, congregate care facility workers, and employees of the Office of the Governor Michelle Lujan Grisham are required to be fully vaccinated against COVID-19

unless they qualify for an exemption. If an individual does not qualify for an exemption, the individual shall:

a. Receive the first dose of a COVID-19 vaccine within 10 days of the effective date of this Order and their second dose within 40 days of their first dose of a COVID-19 vaccine; and

b. Provide proof of vaccination to the appropriate person or supervisor:

i. Hospital workers and congregate care facility workers shall provide proof of vaccination or exemption to their respective supervisors.

ii. Contractors who are hospital workers shall provide proof of vaccination to the operator of the hospital in which the contractor provides on-site services.

iii. Employees of the Office of Governor Michelle Lujan Grisham shall provide proof of vaccination to the Chief Operations Officer.

(4) The workers subject to Section (3) of this Order may be exempt from the COVID-19 vaccination requirement set forth above if they have a qualifying medical condition which immunization would endanger their health, or they are entitled under the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), or any other applicable law to a disability-related reasonable accommodation or a sincerely held religious belief accommodation. Nothing in this Order precludes the entities which employ or contract with these workers from providing disability-related reasonable accommodations and religious accommodations to the requirements of this Order as required by law.

a. To be eligible for an exemption due a qualifying medical condition, the individual must provide their employer or operator of the facility they contract with a statement from a physician, nurse practitioner, or other medical professional licensed to practice in New Mexico stating that the individual qualifies for the exemption and indicating the probable duration of the individual's inability to receive the vaccine;

b. To be eligible for an exemption due to a disability, the individual must provide their employer or the operator of the hospital or congregate care facility they contract with accommodation documentation from a physician, nurse practitioner, or other medical professional licensed to practice in New Mexico stating that the individual has a disability that necessitates an accommodation and the probable duration of the need for the accommodation; or

c. To be eligible for an exemption due to a sincerely held religious belief, the individual must document that the request for an accommodation has been made and provide their employer or the operator of the facility they contract with a statement regarding the manner in which the administration of a

COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual.

(5) If an operator of a hospital, operator of a congregate care facility, or the Office of Governor Michell Lujan Grisham determines a worker to have met the requirements of an exemption pursuant to Section (4), the unvaccinated exempt worker shall:

a. Provide adequate proof that the individual has tested negative for COVID-19 on a weekly basis; and

b. Wear a mask or multilayer cloth face covering at all times indoors at the hospital or congregate care facility except when eating or drinking. An unvaccinated worker will only be exempt from wearing a mask indoors if adequate proof is provided that the individual has been instructed otherwise by a licensed healthcare provider.

(6) The operator of a hospital, operator of a congregate care facility, and the Office of Governor Michelle Lujan Grisham shall maintain records of all workers' vaccination or exemption status in accordance with applicable privacy laws and regulations. If a worker is exempt pursuant to Section (4), then the operator or employer also must maintain records of the worker's testing results pursuant to Section (5). The records regarding a worker's vaccination or exemption status shall be provided to the Department of Health promptly upon request.

(7) Hospital workers, congregate care facility workers, and employees of the Office of the Governor Michelle Lujan Grisham shall provide proof of vaccination or records of their exemption status to the Department of Health if requested.

(8) All persons who are eligible to receive a COVID-19 vaccine and enter the grounds of the New Mexico State Fair from September 9-19, 2021 must provide adequate proof of being fully vaccinated against COVID-19 to a State Fair official unless the individual qualifies for an exemption. A person may be exempt from the COVID-19 vaccination requirement set forth in this section if they have a qualifying medical condition which immunization would endanger their health, or they are entitled under the ADA, Title VII, or any other applicable law to a disability-related reasonable accommodation or a sincerely held religious belief accommodation. Nothing in this Order precludes the New Mexico State Fair from providing disability-related reasonable accommodations and religious accommodations to the requirements of this Order as required by law. The requirements for an exemption are as follows:

a. To be eligible for an exemption due a qualifying medical condition, the individual must provide a State Fair official with a statement from a physician, nurse practitioner, or other medical professional licensed to practice in New Mexico stating that the individual qualifies for the exemption and indicating the probable duration of the individual's inability to receive the vaccine;

b. To be eligible for an exemption due to a disability, the individual must provide a State Fair Official with accommodation documentation from a

physician, nurse practitioner, or other medical professional licensed to practice in New Mexico stating that the individual has a disability that necessitates an accommodation and the probable duration of the need for the accommodation; or

c. To be eligible for an exemption due to a sincerely held religious belief, the individual must document that the request for an accommodation has been made and provide a State Fair official a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual.

(9) If a State Fair official determines an individual entering the grounds of the New Mexico State Fair has met the requirements of an exemption pursuant to Section (8), the unvaccinated individual shall provide adequate proof that they have tested negative for COVID-19 within 48 hours prior to entering the fair grounds.

(10) New Mexico State Fair officials shall maintain records of the vaccination or exemption status of all persons entering the grounds New Mexico State Fair in accordance with applicable privacy laws and regulations. The records regarding an individual's vaccination or exemption status shall be provided to the Department of Health promptly upon request. All individuals entering the grounds of the New Mexico State Fair shall provide proof of vaccination or records of their exemption status and negative test to the Department of Health, if requested.

I FURTHER DIRECT as follows:

(1) This Order shall be broadly disseminated in English, Spanish, and other appropriate languages to the citizens of the State of New Mexico.

(2) Nothing in this Order is intended to restrain or preempt local authorities or state agencies from enacting more stringent restrictions than those required by the Order.

(3) The New Mexico Department of Health, the New Mexico Department of Public Safety, the New Mexico Public Education Department, and all other State departments and agencies are authorized to take all appropriate steps to ensure compliance with this Order.

(4) Any person, hospital, or congregate care facility who willfully violates this Order may be subject to civil administrative penalties available at law.

(5) This Order shall take effect on August 17, 2021 and remain in effect for the duration of the public health emergency first declared in Executive Order 2020-004 and any subsequent renewals of that public health emergency declaration, unless otherwise rescinded.

ATTEST:

MAGGIE TOULOUSE OLIVER
SECRETARY OF STATE

DONE AT THE EXECUTIVE OFFICE
THIS 17TH DAY OF AUGUST 2021

WITNESS MY HAND AND THE GREAT
SEAL OF THE STATE OF NEW MEXICO

DAVID R. SCRASE, M.D.
ACTING SECRETARY OF THE
NEW MEXICO DEPARTMENT OF HEALTH

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD on behalf of herself
And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

DECLARATION OF JENNIFER BLACKFORD

I, Jennifer Blackford declare:

1. I am a resident of Rio Rancho, New Mexico.
2. I am a registered nurse employed by Presbyterian.
3. I have not been vaccinated for COVID-19.
4. The August 17, 2021, Public Health Order required that I be terminated if I refuse to be vaccinated for COVID-19.
5. COVID-19 vaccines are not approved by the Food and Drug Administration and are still experiential. Based upon my medical training and my own independent research I am opposed to receiving the EUA covid vaccines.
6. I should not be required to be vaccinated in order to retain my employment in my chosen profession.

7. The August 17, 2021, Public Health Order deprives me of my livelihood and prohibits me from engaging in my chosen profession anywhere in the state of New Mexico.
8. It is my right to choose not to be vaccinated for COVID-19 and it violates my right to bodily integrity under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution to require that in order to keep my job I must inject an experimental EUA vaccine into my body.
9. I am familiar with the contents of the complaint in this matter and I verify that they are true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and is executed this 18th day of August 2021, in Rio Rancho, New Mexico.

Jennifer Blackford

Jennifer Blackford

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself and others similarly situated, and JENNIFER BLACKFORD on behalf of herself And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM, Officially and Individually, Acting Under the Color of Law, and DAVID SCRASE, Officially and Individually, Acting Under the Color of Law,

Defendants.

DECLARATION OF TALISHA VALDEZ

I, Talisha Valdez declare:

1. I am a resident of Union County, New Mexico.
2. I am a parent to Raley Valdez who is 11 years old, and Riata Valdez who is 12 years old.
3. Each of my children are involved in 4H and have put considerable time and labor into the organization.
4. Raley and Riata have four pigs and 3 show lambs.
5. My family has dedicated $9,000 in financial resources working toward showing these animals at the New Mexico State Fair.
6. Raley and Riata were anticipating showing their animals in the upcoming 2021 New Mexico State Fair.

7. I have not been vaccinated for COIVD-19 and neither has my daughter Riata.
8. I am Covid recovered having had covid in the proceeding 15 months.
9. The August 17, 2021, Public Health Order prohibits me and my children from attending the New Mexico State Fair and showing their animals.
10. We have paid entry fees associated with my children's animals being able to be shown at the New Mexico State Fair and have a contract.
11. I should not be required to be vaccinated in order to attend the New Mexico State Fair nor should I be required to vaccinate my child.
12. It is my right to choose not to be vaccinated for COVID-19 and it is my right as a parent to refuse to have my child injected with an experimental EUA vaccine.
13. I am familiar with the contents of the complaint in this matter and I verify that they are true and correct to the best of my knowledge.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and is executed this 18th day of August 2021, in Union County, New Mexico.

Tayisha Valdez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ; DANIELLE MCLEOD-CORNUM

Plaintiff(s),

vs. No. CIV

MICHELLE LUJAN GRISHAM; DAVID SCRASE

Defendant(s).

INFORMATION SHEET FOR T.R.O.

Attorney(s) for Plaintiff(s): *(include phone #)*

A. Blair Dunn, Esq. abdunn@ablairdunn-esq.com and Jared R. Vander Dussen, Esq.; warba.llp.jared@gmail.com (505) 750-3060;

Attorney(s) for Defendant(s): *(include phone #)*

Holly Agajanian, holly.agajanian@state.nm.us , Kyle P. Duffy, kyle.duffy@state.nm.us (505) 476-2210; Maria S. Dudley, maria.dudley@state.nm.us (505) 476-2210

Nature of Underlying Claim: *(contract, tort, environment, etc.)*

Civil Rights Violation

Jurisdiction: *(Cite Statutes)*

23 U.S.C. 1331; 42 U.S.C. 1983; 28 U.S.C. 2201; 28 U.S.C. 1391(b)

Precise statement of activity sought to be restrained or compelled:

Temporary Restraining Order and Preliminary Injunction on Public Health Order issued 8-17-2021

HEARING

Estimated length of hearing: 1 hour

Request hearing to be set for: *(Select one)*

◯ Today ◯ Tomorrow ◉ Within One Week ◯ Within Ten Days

NOTICE

Are all parties represented by counsel at this time? ◯ Yes ◯ No

Have the opposing party(ies) and their attorney(s) been notified ? ◉ Yes ◯ No

If answer is yes, when? August 17, 2021 via email

If answer is no, why not?

Notice given by: ☐ Phone ☐ Fax ☐ Letter ☐ In Person ☒ Other

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself and others similarly situated, and JENNIFER BLACKFORD on behalf of herself And others similarly situated,

Plaintiffs,

Civil Action No. 1:21-cv-783

v.

MICHELLE LUJAN GRISHAM, Officially and Individually, Acting Under the Color of Law, and DAVID SCRASE, Officially and Individually, Acting Under the Color of Law,

Defendants.

NOTICE OF ERRATA

COME NOW, Plaintiffs, by and through undersigned counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq. and Jared R. Vander Dussen, Esq.) and provides this notice of errata.

The Complaint, in paragraph 2, indicates that Plaintiff Jennifer Blackford is a resident of Bernalillo County, New Mexico. Plaintiff Jennifer Blackford is actually a resident of Sandoval County, New Mexico.

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
Jared R. Vander Dussen, Esq.
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com
warba.llp.jared@gmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD, on behalf of herself
and others similarly situated,

Plaintiffs,

Case No. 21-cv-783 MV/JHR

vs.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

ORDER

THIS MATTER comes before the Court on Plaintiffs' Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages (the "Complaint"). Doc. 1. Although Plaintiffs did not file a separate motion requesting emergency relief, the Complaint requests "a temporary restraining order to prohibit Defendants from enforcing public health orders against the Plaintiffs and other putative class members that are similarly situated," and a preliminary injunction "to prohibit Defendants from enforcing public health orders in the arbitrary and capricious manner and fashion engaged by Defendants." *Id.* at 15. The Court finds it appropriate to set an expedited briefing schedule on Plaintiffs' request for preliminary relief, rather than issue an emergency order on an *ex parte* basis.

On August 17, 2021, New Mexico Department of Health Acting Secretary David R. Scrase, M.D. issued "Public Health Emergency Order Requiring All School Workers Comply with Certain Health Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated" ("PHO"). Doc. 1-2. In relevant part, the PHO requires all "hospital workers . . . to be fully vaccinated against COVID-19 unless they qualify for an exemption." *Id.* at 3-4. The PHO also requires that "[a]ll persons who are eligible to receive a COVID-19 vaccine and enter the grounds of the New Mexico State Fair . . . provide adequate proof of being fully vaccinated against COVID-19 . . . unless the individual qualifies for an exemption." *Id.* at 5. Both Hospital workers and individuals who seek entry into the State Fair "may be exempt from the COVID-19 vaccination requirement . . . if they have a qualifying medical condition which immunization would endanger their health, or they are entitled . . . to a disability-related reasonable accommodation or a sincerely held religious belief accommodation." *Id.* at 4, 5-6. A religious belief exemption may be supported by "a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual." *Id.* at 4-5, 6.

Named Plaintiff Jennifer Blackford is a registered nurse employed by Presbyterian. Doc. 1-3 ¶ 2. She asserts that the PHO "requires that [she] be terminated if [she] refuse[s] to be vaccinated for COVID-19," and that based on her "medical training and her own independent research," she is "opposed to receiving the EUA covid vaccines." *Id.* ¶¶ 4-5. Named Plaintiff Talisha Valdez, along with her 11- and 12-year old daughters, has contracted to exhibit their animals at the New Mexico State Fair. Doc. 1-4 ¶¶ 2, 6. She asserts that the PHO "prohibits [her] and [her] children from attending the New Mexico State Fair and showing their animals," and that she has chosen "not to be vaccinated" and "to refuse to have [her] child injected with an

experimental EUA vaccine." *Id.* at ¶¶ 9, 12. Together, Plaintiffs allege that, unless this Court enters a temporary restraining order and preliminary injunction, under the PHO, "New Mexicans will be forced to take an experimental vaccine in order to retain their employment and will forever lose the ability to exhibit their unique animals at the New Mexico State Fair." Doc. 1 at 22.

This Court is authorized to issue a temporary restraining order "without written or oral notice to the adverse party or its attorney" only if two conditions are met: (1) "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition" and (2) "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). Here, Plaintiffs' attorney did not certify in writing any efforts to give notice or the reasons why notice should not be required. There is no record on the docket that Defendants have so far been served. Nor would Plaintiffs' service alone satisfy the requirements of Rule 65(b)(1). Further, the Court finds that the facts alleged by Plaintiffs do not clearly show that immediate and irreparable injury, loss, or damage will result to Plaintiffs before Defendants can be heard in opposition. While alleging that the PHO would prevent Blackford from retaining her employment and Valdez from entering the State Fair, the Complaint ignores the existence of the exemptions to the PHO's vaccination requirements. As noted above, the PHO allows for three exemptions to the vaccination requirements for hospital workers and State Fair attendees, including an exemption that can be supported by a mere statement as to the manner in which the administration of a vaccination conflicts with the beliefs of the individual. The Complaint provides no factual allegations as to why none of the exemptions would apply to the named Plaintiffs, both of whom have clearly asserted that administration of the COVID-19 vaccine does, indeed, conflict with their beliefs. Because

Plaintiffs have made no effort to seek an exemption to the vaccination requirement and thus have no reasonable basis to conclude that they will lose their employment and/or be denied entry to the State Fair, the Court finds no grounds to issue an order without providing Defendants with an opportunity to respond. It will, however, order an expedited briefing schedule on Plaintiffs' request for a preliminary injunction.

IT IS THEREFORE ORDERED that:

1. Plaintiffs must effect service of a copy of this Order, together with the Complaint [Doc. 1], and any attachments thereto, to be received by Defendants **no later than 5:00 p.m. Mountain Time ("MT") today, Monday, August 23, 2021**, notwithstanding any previous attempts made by Plaintiffs to serve Defendants. Proof of any service done pursuant to this Order shall be filed with the Clerk of Court as soon as practicable.

2. If Defendants oppose Plaintiff's Motion, a written response shall be filed with the Court and served on Plaintiffs no later than **Monday, August 30, 2021 at 5:00 p.m. MT.**

3. Plaintiffs' reply, if any, shall be filed with the Court and served on Defendants no later than **Wednesday, September 1, 2021 at 5:00 p.m. MT.**

4. The Court will set a hearing on this matter if it finds that such a hearing is necessary.

DATED this 23rd day of August 2021.

MARTHA VÁZQUEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself and others similarly situated, and JENNIFER BLACKFORD on behalf of herself And others similarly situated,

Plaintiffs,

Civil Action No. 1:21-cv-00783-MC-JHR

v.

MICHELLE LUJAN GRISHAM, Officially and Individually, Acting Under the Color of Law, and DAVID SCRASE, Officially and Individually, Acting Under the Color of Law,

Defendants.

OPPOSED[1] MOTION TO RECONSIDER THE COURT'S ORDER OF AUGUST 23, 2021

COMES NOW Plaintiffs hereby respectfully move this Court to reconsider its August 23, 2021 Order. This matter comes before the Court on Verified Class Action Complaint for Civil Rights Violations Under 42 U.S.C.A. § 1983; Violations of Rights Protected by the New Mexico Civil Rights Act; Emergency Request for a Temporary Restraining Order; Request for Preliminary Injunction, Permanent Injunctive Relief and Damages (the "Complaint"). Doc. 1.

LAW REGARDING MOTIONS TO RECONSIDER

Federal Rule of Civil Procedure 54(b) provides that a district court can freely reconsider its prior rulings and puts no limit or governing standard on the district court's ability to do so, other than that it must do so "before the entry of judgment." *Kruskal v. Martinez,* 429 F. Supp. 3d 1012, 1026 (D.N.M. 2019), *citing* Fed. R. Civ. P. 54(b). "[D]istrict courts generally remain free to

[1] Counsel for Defendants has been consulted and is opposed to this motion.

reconsider their earlier interlocutory orders." *Been v. O.K. Indus.*, 495 F.3d 1217, 1225 (10th Cir. 2007).

COVID-19 Investigational Vaccine Not Approved by the FDA

As of the filing of this Motion the FDA has only approved the Pfizer/BioNTech vaccine. However, the Plaintiff in this matter specifically Plaintiff Valdez and her children will still suffer harm. In order to be considered fully vaccinated it must have been 2 weeks since your second Pfizer shot.[2] Thus, if a child receives their first shot on August 18, 2021 (the day following issuance of the PHO) that child is not fully vaccinated and able to enter the New Mexico State Fair Grounds until September 22, 2021, which is 3 days after the New Mexico State Fair ends. Furthermore, the one-time dose produced by Johnson and Johnson has not yet been approved for individuals under the age of 18.[3] Furthermore, the Moderna COVID-19 Vaccine requires 2 shots 28 days apart and has not been approved for individuals under the age of 18.[4] On December 11, 2020, the United States Food and Drug Administration ("FDA") issued the first emergency use authorization ("EAU") for an experimental vaccine for the prevention of coronavirus disease 2019 ("COVID-19"). Emergency use authorization is not an FDA approval. The experimental vaccine has been in existence for less than a year. The first reported use of the experimental vaccine was December 14, 2020.

It is undisputed that the vaccine being forced upon Plaintiffs is "unapproved". Even though the FDA granted emergency use authorization for the Pfizer/BioNTech and Moderna vaccines in December 2020, the clinical trials the FDA will rely upon to ultimately decide whether to license

[2] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/second-shot.html

[3] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html

[4] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html

these and other COVID-19 experimental vaccines are still underway and are designed to last for approximately two (2) years to collect adequate data to establish if these vaccines are safe and effective enough for the FDA to approve. The abbreviated timelines for the emergency use applications and authorizations means there is much the FDA does not know about these products even as it authorizes them for emergency use, including their effectiveness against infection, death, and transmission of SARS-CoV-2, the virus that is allegedly the cause of the COVID disease. Given the uncertainty about the COVID-19 experimental vaccines, the FDA requires that each dose of the experimental vaccine shall have a label that states that the product is an emergency use authorization, that the EUA is explicit that each is an investigational vaccine not licensed for any indication and that all promotional material relating to the Covid-19 Vaccine clearly and conspicuously...state that this product has not been approved or licensed by the FDA, but has been authorized for emergency use by FDA

> The FDA on their website has stated the following:
> "FDA believes that terms and conditions of an EAU issued under section 564 preempt state or local law, both legislative requirement and common-law duties, that impose different or additional requirements on the medical product for which the EAU was issued in the context of the emergency declared under section 564... In an emergency, it is critical that the conditions that are part of the EAU or an order or waiver issued pursuant to section 564A – those that FDA has determined to be necessary or appropriate to protect the public health-be strictly followed, and no additional conditions be imposed."

In August 2020, the Centers for Disease Control and Prevention ("CDC") published a meeting of the Advisory Committee on Immunizations and Respiratory Diseases, Dr. Amanda Cohn stated (@1:14:40):

> "I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EAU, vaccines are not allowed to be mandatory. So, early in the vaccination phase, individuals will have to be consented and they won't be able to be mandated."

Here, Plaintiffs are in imminent and immediate danger of being terminated from their jobs for refusing to take an experimental vaccine that is being provided under an EAU.

Immediate and irreparable injury, loss, or damage will result to Plaintiffs if the Court does not grant a temporary restraining order. Plaintiff Blackford and many like her face immediate threat of being terminated from their employment when they will not seek or are not eligible for an exemption. Plaintiff Blackford is not seeking an exemption therefore leaving her only two options: 1) Termination or 2) getting the vaccine.[5] The Court has misapprehended that the Plaintiffs are seeking or are eligible for an exemption and thus are in actuality facing termination because they do not fall under one of the exemptions in its Order of August 23, 2021. Furthermore, Plaintiff Valdez and her children will suffer as the only vaccine the children are eligible for is the Pfizer/BioNTech vaccine which cannot be fully administered until after the New Mexico State fair has ended. Plaintiff respectfully request that Court recognize that the threat of harm is imminent and that no exemption available to these Plaintiffs will save them from the irreparable harm of the loss of Constitutional freedoms that goes into effect on August 27, 2021.

CONCLUSION

The Plaintiff respectfully moves the Court to reconsider its August 23, 2021 order and grant the Plaintiff the relief they so desperately need as a temporary order until a preliminary hearing may be held.

Respectfully submitted this 23th day of August 2021.

WESTERN AGRICULTURE, RESOURCE AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
Jared R. Vander Dussen, Esq.
400 Gold Ave SW, Suite 1000
Albuquerque, NM 87102
(505) 750-3060
abdunn@ablairdunn-esq.com
warba.llp.jared@gmail.com

[5] *See* Second Declaration of Plaintiff Blackford

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD on behalf of herself
And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

DECLARATION OF JENNIFER BLACKFORD

I, Jennifer Blackford declare:

1. I am a resident of Rio Rancho, New Mexico.
2. I am a registered nurse employed by Presbyterian.
3. I have not been vaccinated for COVID-19.
4. The August 17, 2021, Public Health Order required that I be terminated if I refused to be vaccinated for COVID-19 or was not exempted without exemption.
5. I do not meet the criteria for either a medical exemption or a religious exemption, and I have been told I will not be allowed to continue in my employment without the vaccine.
6. I will be denied the right to engage in employment in my chosen profession by the PHO.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself and others similarly situated, and JENNIFER BLACKFORD on behalf of herself And others similarly situated,

Plaintiffs,

Civil Action No. 21-cv-783-MC-JHR

v.

MICHELLE LUJAN GRISHAM, Officially and Individually, Acting Under the Color of Law, and DAVID SCRASE, Officially and Individually, Acting Under the Color of Law,

Defendants.

NOTICE OF ERRATA

COME NOW, Plaintiffs, by and through undersigned counsel of record Western Agriculture, Resource and Business Advocates, LLP (A. Blair Dunn, Esq. and Jared R. Vander Dussen, Esq.) and provides this notice of errata.

Plaintiffs' Opposed Motion to Reconsider the Court's Order of August 23, 2021, [ECF Doc 4] was inadvertently filed with the unsigned version of Plaintiff Jennifer Blackford's second declaration. The signed copy of the declaration, the correct version of the exhibit, is attached hereto.

WESTERN AGRICULTURE, RESOURCE
AND BUSINESS ADVOCATES, LLP

/s/ A. Blair Dunn
A. Blair Dunn, Esq.
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD on behalf of herself
And others similarly situated,

Plaintiffs,

Civil Action No.

v.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

DECLARATION OF JENNIFER BLACKFORD

I, Jennifer Blackford declare:

1. I am a resident of Rio Rancho, New Mexico.
2. I am a registered nurse employed by Presbyterian.
3. I have not been vaccinated for COVID-19.
4. The August 17, 2021, Public Health Order required that I be terminated if I refused to be vaccinated for COVID-19 or was not exempted without exemption.
5. I do not meet the criteria for either a medical exemption or a religious exemption, and I have been told I will not be allowed to continue in my employment without the vaccine.
6. I will be denied the right to engage in employment in my chosen profession by the PHO.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and is executed this 23rd day of August 2021, in Rio Rancho, New Mexico.

Jennifer Blackford
Jennifer Blackford

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TALISHA VALDEZ, on behalf of herself
and others similarly situated, and
JENNIFER BLACKFORD, on behalf of herself
and others similarly situated,

Plaintiffs,

Case No. 21-cv-783 MV/JHR

vs.

MICHELLE LUJAN GRISHAM,
Officially and Individually, Acting Under the Color of Law,
and
DAVID SCRASE,
Officially and Individually, Acting Under the Color of Law,

Defendants.

ORDER

THIS MATTER comes before the Court on Plaintiffs' Opposed Motion to Reconsider the Court's Order of August 23, 2021 [Doc. 4]. Specifically, Plaintiffs ask the Court to reverse its decision to set an expedited briefing schedule on Plaintiffs' request for preliminary relief rather than issue an emergency order on an *ex parte* basis. As set forth herein, because Plaintiffs have not met the requirements of Rule 65(b)(1) of the Federal Rules of Civil Procedure that would entitled them to a temporary restraining order "without written or oral notice to the adverse party or its attorney," the Court declines to reconsider its decision.

As noted in the August 23, 2021 Order (the "Order"), in their Complaint, Plaintiffs request "a temporary restraining order to prohibit Defendants from enforcing public health orders against the Plaintiffs and other putative class members that are similarly situated," and a preliminary injunction "to prohibit Defendants from enforcing public health orders in the arbitrary and capricious manner and fashion engaged by Defendants." Doc. 1 at 15. In

particular, Plaintiffs take issue with the "Public Health Emergency Order Requiring All School Workers Comply with Certain Health Requirements and Requiring Congregate Care Facility Workers, Hospital Workers, and Employees of the Office of the Governor Be Fully Vaccinated" ("PHO"), issued on August 17, 2021 by New Mexico Department of Health Acting Secretary David R. Scrase, M.D. Doc. 1-2.

In relevant part, the PHO requires all "hospital workers . . . to be fully vaccinated against COVID-19 unless they qualify for an exemption." *Id.* at 3-4. The PHO also requires that "[a]ll persons who are eligible to receive a COVID-19 vaccine and enter the grounds of the New Mexico State Fair . . . provide adequate proof of being fully vaccinated against COVID-19 . . . unless the individual qualifies for an exemption." *Id.* at 5. Both Hospital workers and individuals who seek entry into the State Fair "may be exempt from the COVID-19 vaccination requirement . . . if they have a qualifying medical condition which immunization would endanger their health, or they are entitled . . . to a disability-related reasonable accommodation or a sincerely held religious belief accommodation." *Id.* at 4, 5-6. A religious belief exemption may be supported by "a statement regarding the manner in which the administration of a COVID-19 vaccine conflicts with the religious observance, practice, or belief of the individual." *Id.* at 4-5, 6.

Named Plaintiff Jennifer Blackford is a registered nurse employed by Presbyterian. Doc. 1-3 ¶ 2. She asserts that the PHO "requires that [she] be terminated if [she] refuse[s] to be vaccinated for COVID-19," and that based on her "medical training and her own independent research," she is "opposed to receiving the EUA covid vaccines." *Id.* ¶¶ 4-5. Named Plaintiff Talisha Valdez, along with her 11- and 12-year old daughters, has contracted to exhibit their animals at the New Mexico State Fair. Doc. 1-4 ¶¶ 2, 6. She asserts that the PHO "prohibits [her] and [her] children from attending the New Mexico State Fair and showing their animals,"

and that she has chosen "not to be vaccinated" and "to refuse to have [her] child injected with an experimental EUA vaccine." *Id.* at ¶¶ 9, 12. Together, Plaintiffs allege in their Complaint that, unless this Court enters a temporary restraining order and preliminary injunction, under the PHO, "New Mexicans will be forced to take an experimental vaccine in order to retain their employment and will forever lose the ability to exhibit their unique animals at the New Mexico State Fair." Doc. 1 at 22.

In the Order, this Court explained that it is authorized to issue a temporary restraining order "without written or oral notice to the adverse party or its attorney" only if two conditions are met: (1) "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition" and (2) "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Doc. 3 at 3 (quoting Fed. R. Civ. P. 65(b)(1)). The Court further explained that Plaintiffs had not met either of these requirements. Specifically, Plaintiffs' attorney did not certify in writing any efforts to give notice or the reasons why notice should not be required, and there was no record on the docket that Defendants had been served. Doc. 3 at 3. Further, the Court found that the facts as alleged by Plaintiffs did not clearly show that immediate and irreparable injury, loss, or damage would result to Plaintiffs before Defendants can be heard in opposition. *Id.* The Court stated that, while alleging that the PHO would prevent Blackford from retaining her employment and Valdez from entering the State Fair, the Complaint ignored the existence of the exemptions to the PHO's vaccination requirements. *Id.* As noted above, the PHO allows for three exemptions to the vaccination requirements for hospital workers and State Fair attendees, including an exemption that can be supported by a mere statement as to the manner in which the administration of a vaccination conflicts with the beliefs of the individual. The Complaint provided no factual allegations as to

why none of the exemptions would apply to the named Plaintiffs, both of whom, in connection with this case, have asserted that administration of the COVID-19 vaccine does, indeed, conflict with their beliefs. *Id.* The Court concluded that, because Plaintiffs made no effort to seek an exemption to the vaccination requirement and thus had no reasonable basis to conclude that they would lose their employment and/or be denied entry to the State Fair, the Court found no grounds to issue an order without providing Defendants with an opportunity to respond. *Id.* at 4. Because of the time-sensitive nature of this case, however, the Court ordered an expedited briefing schedule on Plaintiffs' request for a preliminary injunction. *Id*.

On the instant motion, Plaintiffs ask the Court to reconsider its decision, arguing that "[i]mmediate and irreparable injury, loss, or damage will result to Plaintiffs if the Court does not grant a temporary restraining order." Doc. 4 at 4. In support of this argument, Plaintiffs claim that, in discussing the exemptions to the vaccine requirement, the Court has "misapprehended that the Plaintiffs are seeking or are eligible for an exemption and thus in actuality facing termination because they do not fall under one of the exemptions in its Order of August 23, 2021." *Id*. The Court did not misunderstand Plaintiffs' position, but rather found, and continues to find, that Plaintiffs have not sufficiently shown that they will suffer immediate and irreparable injury, loss, or damage before Defendants can be heard in opposition.

In connection with the motion to reconsider, Blackford asserts (for the first time) that she does "not meet the criteria for either a medical exemption or a religious exemption." Doc. 4-1 ¶ 5. But Plaintiffs have provided no factual basis for this conclusory assertion. Indeed, as noted in the Order, Blackford and Valdez both state in their original affidavits that administration of the COVID-19 vaccine conflicts with their individual beliefs. Plaintiffs concede that they have made no effort to seek an exemption to the vaccination requirements based on those stated beliefs. Having made no such effort, Plaintiffs have no reasonable basis to conclude that none of

the exemptions would be available to them. And in the absence of any showing that none of the exemptions would be available to them, Plaintiffs cannot establish that enforcement of the PHO puts them at risk of immediate harm. In short, Plaintiffs cannot make their own emergency by refusing to even so much as pursue the exemptions afforded under the PHO.

In further support of the instant motion, Blackford asserts that she has "been told that [she] will not be allowed to continue in [her] employment without a vaccine." Doc. 4-1 ¶ 5. However, Blackford's employer, Presbyterian – separate and apart from the PHO – has instituted its own private vaccine mandate, requiring that its entire workforce be vaccinated against COVID-19 in the absence of a qualifying exemption. Given Presbyterian's mandate, Plaintiffs' evidence falls short of showing that, by granting Plaintiffs' request for an emergency order enjoining enforcement of the PHO, this Court would be able to save Blackford from the threat of termination from her employment.

Nor does the Court find availing Plaintiffs' claim that "Plaintiff Valdez and her children will suffer [if a temporary order is not issued] as the only vaccine the children are eligible for is the Pfizer/BioNTech vaccine which cannot be fully administrated until after the New Mexico State fair has ended." Doc. 4 at 4. In setting an expedited briefing schedule, the Court was mindful that the New Mexico State Fair begins on September 9, 2021. Briefing on Plaintiffs' request for preliminary injunctive relief will be completed no later than September 1, 2021, eight days before the State Fair begins. Accordingly, the Court's decision to allow Defendants to be heard in opposition before deciding whether to enjoin enforcement of the PHO will not result in irreparable harm to Valdez and her children.

Finally, nowhere in their motion to reconsider do Plaintiffs address their failure to meet the second condition for obtaining emergency *ex parte* relief, namely, a written certification by their attorney stating "any efforts made to give notice and the reasons by it should not be

required." Fed. R. Civ. P. 65(b)(1). Because Plaintiffs failed to meet this condition and have provided no basis for that failure, their motion to reconsider must also fail.

This Court is cognizant of its inherent authority to reconsider its non-final orders. Plaintiffs have provided no basis for the Court to use that authority to reconsider its decision to refrain from issuing an order enjoining enforcement of the PHO without providing Defendants with an opportunity to respond. The briefing schedule set in the Order remains in effect.

IT IS THEREFORE ORDERED that Plaintiffs' Opposed Motion to Reconsider the Court's Order of August 23, 2021 [Doc. 4] is DENIED.

DATED this 25th day of August 2021.

MARTHA VÁZQUEZ
United States District Judge