APPENDIX

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APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
October 21, 2025
Christopher M. Wolpert, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 24-1378

KAYCEE TIMKEN; CHRISTINE HARMS,

Plaintiffs—Appellants,

v.

SOUTH DENVER CARDIOLOGY ASSOCIATES, P.C.; TROY STOCKMAN; JILL HUNSAKER RYAN,

Defendants—Appellees.

No. 25-1005

JESSICA SWEENEY; ROXIE BLUE; ERICA BODE; AMBER CANO; JULIE DETERS-FRANK; KAREN DONELSON; JENNIFER EDDINS; POLLY GOODWIN; GABRIEL HERGENRETER; MARY LOU HOWARD; GWENN HREN; JOHN LANSFORD; JAIME MONTGOMERY; ERIN PHIPPS; KINGA SHELTON; STEPHANIE SILVERS; PATRICIA SPOERL; LONI THALHEIMER; ALISHA TORBECK,

Plaintiffs—Appellants,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY; ELIZABETH CONCORDIA, in her individual and official capacities; MARGARET REIDY, in her individual and official capacities; MICHAEL RANDLE, in his individual and official capacities; JILL HUNSAKER RYAN, in her individual and official capacities; D. RANDY KUYKENDALL, in his individual and official capacities; PATRICIA HAMMON, in her individual and official capacities; RAYMOND ESTACIO, in his individual and official capacities; DANIEL PASTULA, in his individual and official capacities; SHAWN TURK, in his individual and official capacities; TOM BUTTS, in his individual and official capacities; EVELINN BORRAYO, in her individual and official capacities; KENDALL ALEXANDER, in her individual and official capacities,

Defendants—Appellees.

AMERICA'S FRONTLINE DOCTORS; DR. SIMONE GOLD, M.D., J.D.,

Amici Curiae.

Appeals from the United States District Court
for the District of Colorado
(D.C. Nos. 1:23-CV-02859-GPG-SBP &
1:23-CV-02451-NYW-MDB)

David Joseph Schexnaydre, Schexnaydre Law Firm, LLC, Mandeville, Louisiana, for Plaintiff-Appellants in 24-1378 and 25-1005.

Lauren Davison, Assistant Attorney General (Philip J. Weiser, Attorney General; Christopher Diedrich, Senior Assistant Attorney General; and Ryan Lorch, Senior Assistant Attorney General, with her on the brief), Office of Colorado Attorney General, Denver, Colorado, for Defendants-Appellees Jill Hunsaker Ryan in 24-1378 and 25-1005, and D. Randy Kuykendall, Patricia Hammon, Raymond Estacio, Daniel Pastula, Shawn Turk, Tom Butts, Evelinn Borrayo, and Kendall Alexander in 24-1378.

Abraham James Spung (Tessa Frances Carberry, with him on the brief), Husch Blackwell LLP, Denver, Colorado, for Defendant-Appellees South Denver Cardiology Associates, P.C., and Troy Stockman in 24-1378.

Christopher M. Jackson (Andrew C. Lillie and Nicholas W. Katz, with him on the brief), Holland & Hart LLP, Denver, Colorado, for Defendants-Appellees University of Colorado Hospital Authority, Elizabeth Concordia, Margaret Reidy, and Michael Randle in 25-1005.

Simone Gold, M.D., J.D. and David A. Dalia, New Orleans, Louisiana, filed an Amici Curiae Brief of America's Frontline Doctors and Dr. Simone Gold, M.D., J.D in 25-1005.

Before **TYMKOVICH**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

TYMKOVICH, Circuit Judge.

South Denver Cardiology and the University of Colorado Hospital Authority fired Jessica Sweeney,

Kaycee Timken, and their co-appellants for not complying with COVID-19 vaccination policies. Those policies, enacted almost a year after the FDA gave temporary authorization for the first COVID-19 vaccines, required all employees either to get vaccinated or to receive a medical or religious exemption. Timken and Sweeney declined vaccination: they did not want to receive drugs that were unlicensed and still undergoing the FDA's full review process.[1] And since they did not seek exemptions, their employers held them in violation of the policies and fired them.

Timken and Sweeney led separate lawsuits against their former employers. They allege nearly identical breaches of their statutory, constitutional, and contractual rights. Their core argument is that the U.S. Constitution and a set of federal statutes, regulations, contracts, and even a treaty, give them the right—enforceable under 42 U.S.C. § 1983—to refuse unlicensed drugs without risking their jobs. The district court in each case dismissed the complaints, finding Timken and Sweeney had not adequately pled a ground for relief on any of their claims.

Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM. A plaintiff asserting that a statute confers a § 1983-enforceable right must show that the statute does so unambiguously. Despite offering an assortment of statutes and other authorities, Timken and Sweeney fail to identify any language satisfying that test. And their constitutional and

[1] We use the last names of the lead appellants throughout this opinion to refer to them and their co-appellants.

state-contract pleadings likewise fail to assert any other viable legal ground for relief.[2]

Accordingly, the district courts were correct to grant the defendants' motions to dismiss.

I. Background

A. Factual History

Responding to COVID-19's spread, in December 2020 the FDA began issuing emergency-use authorizations (EUAs) for several newly developed vaccines. The EUAs allowed healthcare providers to distribute the vaccines, which had yet to go through the full FDA approval process. To facilitate administration, the Centers for Disease Control and Prevention (CDC) created a "Vaccination Program." Under the Vaccination Program, the CDC purchased vaccines directly from the manufacturers and distributed them to healthcare providers free of charge. Any provider wishing to participate had to sign a CDC COVID-19 Program Provider Agreement, which commands compliance with all federal, state, and territorial laws relevant to the vaccines, including applicable EUA requirements.

Jessica Sweeney and her co-appellants worked at the University of Colorado Hospital Authority (UCHA), a Colorado state government agency and

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[2] Courts in other jurisdictions have decided that similar claims lack sufficient legal grounds for relief. *E.g., Boyd v. Shriners Hosp. for Child.*, No. 1:23-342, 2024 WL 5263009 (W.D. Pa. Dec. 31, 2024). And the Courts of Appeals for the Fifth and Ninth Circuits have affirmed dismissals of claims that are nearly identical to Timken's and Sweeney's. *Pearson v. Shriners Hosps. for Child., Inc.*, 133 F.4th 433 (5th Cir. 2025); *Curtis v. Inslee*, No. 24-1869, 2025 WL 2827880 (9th Cir. Oct. 6, 2025).

component of the larger UCHealth system. In July 2021, UCHA mandated all its employees either get vaccinated against COVID-19 or receive a medical or religious exemption by October 1, 2021. The Colorado Department of Public Health and Environment (CDPHE) similarly believed vaccinating medical workers would help stem the virus's spread. So on August 30th, it issued new healthcare-facility licensing requirements directing vaccination for all facility employees, contractors, and support staff. Those requirements set an October 31st deadline and obligated facility operators to permit religious and medical exemptions. UCHA acknowledged the new CDPHE requirements but left its earlier October 1st deadline in place. Sweeney and other co-workers sought neither vaccination nor exemption and were fired after the UCHA deadline passed.

Kaycee Timken and Christine Harms worked for South Denver Cardiology Associates (SDCA), a private medical practice in Colorado. On September 8th, a few days after the CDPHE issued its updated licensure requirements, SDCA began requiring its employees either to get vaccinated or receive an exemption. SDCA personnel could get a vaccine from any available source, so long as they complied by September 30, 2021. Like Sweeney, Timken and Harms let the deadline pass without complying and were fired.

B. Procedural History

The firings led to two separate lawsuits in the District of Colorado; one led by Timken and one by Sweeney. While the parties differed, the claims were nearly identical. Both Timken and Sweeney sued

their respective employers and members of the CDPHE alleging ten claims, including federal claims under 42 U.S.C. § 1983, state-law breach-of-contract and tort claims, and an implied private right of action under the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 360bbb-3.

The defendants in both cases moved to dismiss on various grounds, including state sovereign immunity, qualified immunity, and failure to state a claim upon which relief can be granted. The district court decided Sweeney's case first and dismissed every claim. First, it held Sweeney's claims against government employees in their official capacities were barred by the Eleventh Amendment. Next, it determined the state-law tort claims were blocked by the Colorado Governmental Immunity Act, which prevents tort actions against state employees in most circumstances. Finally, the court dismissed the official-capacity § 1983 claims, the breach-of-contract claim, and the implied right of action claim under Fed. R. Civ. P. 12(b)(6). Upon issuing its order, the court immediately entered judgment and closed the case without giving Sweeney an opportunity to amend her complaint. Sweeney then attempted to reopen under Fed. R. Civ. P. 59(e), but the court denied the motion.

A different judge ruled on Timken's case. The district court similarly dismissed Timken's individual-capacity claims against the CDPHE Director due to state sovereign immunity. It then rejected all of Timken's § 1983 claims against SDCA and its chief executive because Timken had not adequately alleged that they acted "under color of

state law."[3] 42 U.S.C. § 1983. The court then explicitly adopted the reasoning from Sweeney to dismiss the remaining federal claims against the CDPHE Executive Director under Rule 12(b)(6). Finally, with the federal claims dispatched, the court declined to exercise supplemental jurisdiction over the remaining state law issues. As in Sweeney, the court delivered its decision and immediately entered judgment.

II. Discussion

Timken and Sweeney both appealed the district courts' judgments dismissing their § 1983 claims. Sweeney alone appeals the court's dismissal of her breach-of-contract claim. And both parties appeal the courts' closures of their cases without first providing an opportunity to amend their complaints.

We review a dismissal under Rule 12(b)(6) de novo. *SEC v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014). In doing so, "[w]e accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the [plaintiff]." *Id*. It is not our role "to weigh potential evidence … but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Smith v. United States*, 561 F.3d

[3] Timken challenges this ruling on appeal and spends much of her opening brief arguing that SDCA and its CEO were state actors subject to § 1983 claims. But we do not reach that issue because the claim fails for independent reasons. We must review Timken's identical § 1983 allegations against SDCA's co-defendant, CDPHE executive director Jill Hunsaker Ryan. And since we affirm the district court's dismissal of those claims on the merits, Timken's claims against the SDCA defendants fail for the same reasons, independent of the state-action question.

1090, 1098 (10th Cir. 2009). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A. Section 1983 Claims

1. Legal Framework

Section 1983 provides a cause of action for violations of federal rights by a person or entity acting under color of state law. 42 U.S.C. § 1983. The violated right can have its source in either the "Constitution" or "laws" of the United States. *Id.* Timken and Sweeney alleged six § 1983 claims, some statutory and others constitutional.

When a § 1983 cause of action rests upon a federal statute, we first ask whether the statute "secures an enforceable right, privilege, or immunity, and does not just provide a benefit or protect an interest." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025). "[T]he statute must display an unmistakable focus on individuals like the plaintiff," and the plaintiff must prove the statute "clearly and unambiguously uses rights-creating terms." *Id.* (citation modified) (emphasis added). The Supreme Court cautions that the test is "stringent and demanding" and it is "rare" for a statute to meet it. *Id.* We "employ traditional tools of statutory construction to assess" whether a statute unambiguously confers an enforceable right. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023).

Even when a statute passes this high bar, a "defendant may defeat the presumption by demonstrating that Congress did not intend that §

1983 be available to enforce those rights." *Id.* at 186 (citation modified). We look to the statute creating the right for evidence of that intent. *Id.* The statute may expressly forbid § 1983's use, or it may do so implicitly "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (citation modified). Thus, a statute can "displace[] § 1983's general cause of action with a more specific remedy." *Medina*, 145 S. Ct. at 2229.

2. Statutory § 1983 Claims

With these principles in mind, we turn to Timken's and Sweeney's statutory § 1983 claims.

Sweeney identifies three statutes she thinks confer an enforceable federal right: (1) the Emergency Use Authorization (EUA), (2) the Public Readiness and. Emergency Preparedness (PREP) Act, and (3) a provision of Title 10 governing human subjects research. Sweeney contends they each confer a right to "legally effective informed consent." Sweeney's Opening Br. 49–58.

Timken claims the same legal sources provide a right against "subject[ion] to investigational drug use." Timken's Opening Br. 32. Both arguments fail because none of the identified sources confer any federally enforceable right.[4] We analyze each in turn.

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[4] Timken and Sweeney, in background sections of their briefs, also discuss the CDC Provider Agreement, the Federalwide Assurance program, a 1978 Department of Health and Human Services publication called the Belmont Report, regulations contained in 45 C.F.R. pt. 46, and the International Covenant on Civil and Political Rights Treaty. They argue that these sources, sometimes independently and sometimes through their

a. Emergency Use Authorization

In most circumstances, a drug, medical device, or biological product must be approved and licensed by the Food and Drug Administration before it may be introduced into interstate commerce. See 21 U.S.C. §§ 355, 360(k), 360b, 360e. But during a public health emergency, the EUA statute empowers the Secretary of Health and Human Services to temporarily authorize unapproved and unlicensed products. *Id.* § 360bbb-3. The statute is directed at the Secretary of HHS; it confers powers and conditions their exercise. For this reason alone, Sweeney's and Timken's claims fail. But in any event, neither Sweeney nor Timken point to language that "unambiguously confer[s] individual federal rights." *Medina*, 145 S. Ct. at 2233 (quoting *Talevski*, 599 U.S. at 180).

First, Timken and Sweeney claim the statute gives potential recipients of EUA-drugs the right to refuse them, as well as the right to be informed that refusal may result in being fired. That subsection requires the Secretary of HHS to establish conditions

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interdependencies, confer federal rights enforceable by § 1983. To the extent those musings can be understood as attempts to revive arguments from the district court proceedings, we do not consider them. In their motions to dismiss, the defendants challenged those sources as incapable of conferring § 1983-enforceable rights because they are not federal statutes. The appellants did not contest those arguments in their replies to the motions, and the district courts deemed them either conceded or abandoned. Timken and Sweeney do not argue that the district courts were wrong to do so, and arguments abandoned below are waived on appeal. *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1203 (10th Cir. 2014) (holding that when a "theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it").

"designed to ensure individuals to whom the product is administered are informed … of the option to accept or refuse administration of the product [and] the consequences, if any, of refusing." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Timken and Sweeney argue that an employer cannot obstruct these rights by imposing a vaccine requirement.

We disagree. The statute does not display "an unmistakable focus on individuals like the [appellants]." *Medina*, 145 S. Ct. at 2229. As the district court recognized, the statute governs the relationship between the medical provider and the person receiving an EUA drug. See *Sweeney v. Univ. of Colo. Hosp. Auth.*, No. 23-CV-02451-NYW-MDB, 2024 WL 3713835, at *6 (D. Colo. July 12, 2024). It is silent on the interaction between an employer and an employee who receives or refuses a vaccine. So while the Secretary must set conditions for a vaccine administrator to inform a recipient that he may decline the vaccine, the statute says nothing about limits on an employer's vaccination policy.

Further, the statute lacks the "unambiguous … rights-creating terms" required for a § 1983-enforceable right. *Medina*, 145 S. Ct. at 2229. In fact, the EUA provision never mentions rights, privileges, or immunities; it speaks of "benefits" only of an EUA drug's positive therapeutic effects. *E.g.,* 21 U.S.C. § 360bbb-3(c)(2)(B) (discussing "the known and potential benefits of the product . . . [for] diagnos[is], prevent[ion], or treat[ment]" in relation to "the known and potential risks of the product").

Sweeney and Timken focus on a subsection of the statute labeled "Conditions of Authorization" that directs the Secretary to establish "[a]ppropriate conditions" to inform potential recipients of their

"option" to accept or refuse an EUA drug. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Contrast this with the Federal Nursing Home Reform Act (FNHRA), the statute the *Talevski* Court held unambiguously conferred rights on nursing home residents. 599 U.S. at 172. The relevant FNHRA provisions reside in 42 U.S.C. § 1396r(c), which concerns "[r]equirements relating to *residents' rights*." *Id.* at 184. That subsection's subordinate clauses are riddled with language focused on residents' rights, such as "*[t]he right* to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the *resident's* medical symptoms." *Id.* (quoting 42 U.S.C. § 1396r(c)(1)(A)(ii)). Another provision discusses "transfer and discharge *rights*." *Id.* at 184–85 (quoting 42 U.S.C. § 1396r(c)(2)).

The *Talevski* Court also pointed out the statute's focus on "the *resident's* welfare … the *resident's* health … and the *resident's* urgent medical needs." *Id.* at 185 (quoting 42 U.S.C. §§ 1396r(c)(2)(A), 1396r(c)(2)(B)(ii)(I)–(III)). Unlike the FNHRA's clear emphasis on patients' individual rights, the EUA statute contains only a single, oblique reference to a potential recipient's "option" to decline. And that "option" only comes up within a statutory subsection focused on the Secretary's power to grant emergency authorizations. Whatever one might infer from the EUA language, it does not explicitly create any discernable individual right, let alone the rights to informed consent and investigational drug refusal that Timken and Sweeney assert.

Since the EUA statute does not use "clear and unambiguous rights-creating language," it cannot support a private suit under § 1983.

b. PREP Act

Timken and Sweeney turn next to the PREP Act. 42 U.S.C. § 247d-6d. The PREP Act provides a liability shield for anyone involved in the development or distribution of countermeasures during a public health emergency. *Id.* § 247d-6d(a). And it contains a preemption clause that prohibits state and local governments from interfering with federal law governing covered medical countermeasures. *Id.* § 247d-6d(b)(8). Timken and Sweeney argue that prohibition forbids interference with "the statutory right to refuse such countermeasures under [the] EUA." Sweeney's Opening Br. 54. This argument fails for two reasons.

First, the preemption clause does not confer any individual rights enforceable via § 1983. The statute's primary function is to immunize the manufacturers and administrators of covered medical countermeasures during a public health emergency as declared by the Secretary of HHS. See 42 U.S.C. § 247d-6d(a)(1). Absent willful misconduct, parties involved in the development, production, distribution, and administration of a drug covered by the PREP Act are shielded from liability for any injuries to recipients. *Id.* §§ 247d-6d(a)–(c). The preemption clause prohibits state and local governments from creating or enforcing any law that conflicts with the PREP Act's liability provisions and relates to the covered countermeasure. *Id.* § 247d-6d(b)(8). It lacks rights-enforcing language and does not refer, in any way, to covered countermeasure recipients.

Timken and Sweeney counter by arguing that the preemption clause incorporates the right to

refuse a covered countermeasure articulated in the EUA statute. But as we discussed above, the EUA statute creates no such right and, therefore, cannot support a § 1983 claim—either on its own or through the PREP Act.

Timken and Sweeney also argue that the preemption clause incorporates a voluntariness requirement in the next PREP Act section. That provision requires the Secretary to ensure, in part, that potential countermeasure recipients are "educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part." *Id*. § 247d-6e(c). Timken and Sweeney believe the preemption clause precludes a state or local government from imposing a vaccine mandate on its employees because doing so would obviate the federal voluntariness requirement in § 247d-6e(c). But again, taking the Supreme Court's instructions in *Talevski* and *Medina*, § 247d-6e(c) fails to reach the high bar for unambiguous rights-enforcing language. And even if it did confer an individually enforceable right, a state or local law that contradicts § 247d-6e(c) falls outside the preemption clause, which, by its terms, only applies to legal requirements contradicting § 247d-6d. Id. § 247d-6d(b)(8)(A) (preempting state and local law that "is different from, or is in conflict with, any requirement applicable under *this section*" (emphasis added)). Thus, the PREP Act's preemption clause does not create any right that may be vindicated under § 1983.

Second, even where the PREP Act confers enforceable rights, it prescribes a specific enforcement mechanism that precludes a § 1983 claim. *See City of Rancho Palos Verdes v. Abrams*,

544 U.S. 113, 120 (2005) (explaining that the presumption of a § 1983-enforceable right can be rebutted by "the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" (quoting *Blessing v. Firestone*, 520 U.S. 329, 341 (1997)). The statute asserts that the "sole exception" to its immunity grant is an "exclusive Federal cause of action … for death or serious physical injury proximately caused by willful misconduct." *Id.* § 247d-6d(d)(1). The next subsection details the necessary procedures and the available remedies. *See id.* § 247d-6d(e). A general § 1983 cause of action like the one Timken and Sweeney are advocating would frustrate this scheme. If any party that suffered a hardship other than death or serious physical injury could bring a claim under § 1983, the PREP Act's remedial mechanism would be just one of many exceptions to the statute's liability shield, not the sole exception.

Since neither Timken nor Sweeney claims they suffered serious physical injury, they do not have a cause of action under the statute. If they did, the PREP Act would channel that claim through its own enforcement mechanism, thereby precluding a § 1983 cause of action. And since the PREP Act confers no other individually enforceable rights, Timken and Sweeney lack a viable § 1983 claim.

c. 10 U.S.C. § 980

The next statutory claim runs through 10 U.S.C. 980, which governs how the Department of Defense may spend money on research involving human

subjects. The relevant portions of that enactment provide that:

> **(a)** Funds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject unless—
>
> **(1)** the informed consent of the subject is obtained in advance; or
>
> **(2)** in the case of research intended to be beneficial to the subject, the informed consent of the subject or a legal representative of the subject is obtained in advance.

10 U.S.C. § 980(a). The district courts correctly dismissed this claim because neither Timken nor Sweeney alleged that any DoD funds were used to experiment on them or explained how the defendants would be responsible if they had been.

Further, this statute, like the EUA statute and PREP Act, lacks rights-conferring language. A plain reading of the statute reveals it for what it is: a condition on how the DoD can spend its appropriations. As discussed below, the normal remedy for a violation of this kind of condition is revocation of the funding. *Medina*, 145 S. Ct. at 2228 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)). The reference to securing "the informed consent of the subject" falls far short of the unambiguous language required to support a § 1983-enforceable right. 10 U.S.C. § 980(a)(1). Timken and Sweeney do not offer an alternative interpretation—just a conclusion, unsupported by any legal source, that the statute recognizes an enforceable right.

They have not carried their burden of showing "that [the] statute secures an enforceable right, privilege, or immunity," and the district court was correct to dismiss the claim. *See Medina*, 145 S. Ct. at 2229.

3. Constitutional § 1983 Claims

a. Fourteenth Amendment – Equal Protection

Sweeney's next claim is an equal-protection claim based on allegations that the "[d]efendants selectively punished only those individuals who exercised their legal option to refuse [vaccination]." Sweeney's Opening Br. 59. She argues all UCHA employees were similarly situated because the EUA statute and CDC Program conferred a choice to receive or to refuse vaccination. But only employees who did not get vaccinated lost their jobs. Sweeney argues that by firing her and other unvaccinated employees, the appellees violated their equal protection rights under the Fourteenth Amendment.[5]

The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. "Different types of equal protection claims call for different forms of review. A claim that a state actor discriminated on the basis of a suspect (e.g., race), quasi-suspect (e.g., gender), or a non-suspect

[5] Timken made a similar argument in the district court but did not raise this issue in her opening brief. An appellant bears the responsibility of raising her "contentions and the reasons for them." Fed. R. App. P. 28(a)(8)(A). Thus, Timken's equal protection argument is waived. See *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011).

classification calls for strict, intermediate, or rational basis scrutiny, respectively." *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011).

Sweeney provides us no guidance on what type of classification she believes UCHA and CDPHE made with their vaccination policies. The district court determined the claim was predicated on vaccination status and that such classification is non-suspect. Applying rational basis review, the district court decided that slowing the spread of COVID-19 is a legitimate interest and that "[r]equiring those who work in a hospital or healthcare facility to take preventative measures against the spread of COVID-19 is easily rationally related to that interest." Sweeney, 2024 WL 3713835, at *12. Again, Sweeney does not contest that finding and merely asserts that "[d]efendants engaged in unconstitutional conduct by creating and implementing this discriminatory enforcement scheme against those exercising a legally protected choice." Sweeney's Opening Br. 59.

Conclusory statements of this sort are insufficient. Parties have an obligation to support their arguments with authority. *United States v. Banks*, 451 F.3d 721, 728 (10th Cir. 2006). We have already found that the CDC Provider Agreement and EUA statute do not create individual rights. And Sweeney points to no case or legal source to undercut the district court's reasoning. We therefore decline to consider her equal-protection claim further.

b. Fourteenth Amendment – Due Process

Timken and Sweeney next allege their employers' vaccine mandates deprive employees of their constitutional due process rights secured by the

Fourteenth Amendment. That amendment provides that "[n]o state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Due process comes in two forms, procedural and substantive. "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000).

Timken does not address procedural due process in her opening brief, but Sweeney does. Sweeney's argument is that she held a protected property interest in her job and that UCHA, as a public employer, may not deprive her of that interest without giving her an opportunity to be heard. But, she says, UCHA did just that by firing her without providing "a place or time to air [her] complaints." Sweeney's Opening Br. 60. The district court found that Sweeney abandoned her procedural due process claim by failing to respond to the defendants' arguments challenging the claim in their motions to dismiss. Sweeney does not tell us if or how the district court was wrong to do so. Thus, Sweeney's procedural due process claim is waived, and we will not consider it. *See Paycom Payroll, LLC*, 758 F.3d at 1203.

Both Timken and Sweeney appear to argue that they were deprived of rights secured by substantive due process. Sweeney asserts that "legally effective informed consent" and the option "to refuse unwanted investigational drug treatments" are fundamental rights and any interference with them

must leap the high hurdle of strict scrutiny. Sweeney's Opening Br. 36, 46–47. Timken seems to make similar allegations, and also asserts that the vaccination policies deprived her of her "fundamental liberty interests of privacy [and] bodily autonomy." Timken's Opening Br. 47–48.

The district courts acknowledged similar arguments that Timken and Sweeney raised in their responses to the motions to dismiss. But looking beyond those briefs to the complaints, the courts determined that Timken and Sweeney had not alleged breaches of recognized liberty interests. Rather, their claims asserted a "right to continued employment … without receiving the COVID-19 vaccine." Sweeney, 2024 WL 3713835, at *14. Since "neither the expectation of employment, nor continued employment, is a fundamental right," the district courts applied rational basis review. *Id.* (citation modified). The courts used the same rationale from their equal-protection analysis to find the vaccination policies satisfied rational basis review for the substantive due process claims.

We agree with the district courts' readings of Timken's and Sweeney's complaints. The relevant paragraphs, which are identical, state:

> Defendants' requirement that Plaintiffs inject unlicensed drugs into their bodies as a condition to sell their labor "is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with and void under, the Federal

> Constitution." *Lochner v. New York*, 198 U.S. 45 (1905).

25-1005 App. vol. 1, at 107; 24-1378 App. vol. 1, at 86. The citation to *Lochner* alone suggests the assertion of a liberty interest to contract freely, rather than an interest in bodily autonomy or informed consent. And nothing in the complaints' text encourages a contrary reading. The district court was right to apply rational basis review. And since Timken and Sweeney cite no authority and make no argument that the vaccination policies are not rationally related to any legitimate government interest, we have no reason to overturn that result.

Alternatively, Sweeney argues that the district court misinterpreted her claim, which, she says, was based on other fundamental rights. But once again, Sweeney's brief is fatally flawed. As evidence that the district court misconstrued her argument, Sweeney points to her post-judgment Rule 59(e) motion. But a motion to dismiss is decided on the pleadings and a post-judgment motion is an inappropriate place to advance a new basis for a claim. *See Smith*, 561 F.3d at 1098 ("The court's function on a rule 12(b)(6) motion is … to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." (emphasis added)). As a result, we treat the substantive due process arguments based on rights other than the alleged right to continued employment as raised for the first time on appeal. And "we generally do not consider new theories on appeal—even those that fall under the same general category as the one that was presented in the district court." *Utah Animal Rts. Coal. v. Salt Lake County*,

566 F.3d 1236, 1244 (10th Cir. 2009). To act otherwise would encourage disappointed litigants to abuse the appellate courts by treating them as forums "where secondary, back-up theories may be mounted for the first time." *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997). Accordingly, we decline to take up Sweeney's new substantive due process theory.

To conclude, Timken and Sweeney have not adequately contested the district courts' dismissals of the original substantive due process allegations and we do not consider the theories they raise for the first time on appeal.

c. Spending Clause

Timken and Sweeney also allege a deprivation of their rights under the Constitution's Spending Clause. Specifically, they claim the CDC Program, EUA statute, 10 U.S.C. § 980, and 45 C.F.R. § 46.122 were each passed pursuant to Congress's Article I spending power and confer § 1983-enforceable rights that the appellees violated.

The argument belies some confusion about the nature of § 1983 claims. Rather than a "Spending Clause claim," the claim is rightly understood as a § 1983 claim based on a statute passed through the spending power. As discussed already, a statute confers a § 1983-enforceable right only through unambiguous rights-creating language that displays an unmistakable focus on individuals like the plaintiff. *Medina*, 145 S. Ct. at 2229. The Supreme Court developed this standard in a line of cases dealing with spending-power legislation. *Id*. at 2232–34 (tracing the issue's development from *Pennhurst*

State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), to *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), to *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023)). Indeed, the Court has repeatedly cautioned that legislation passed through the spending power is *more unlikely* to create § 1983-enforceable rights than laws passed under other enumerated powers. *Id.* at 2230. This is "because spending-power legislation is in the nature of a contract, [and] a grantee must voluntarily and knowingly consent to answer private § 1983 enforcement suits before they may proceed." *Id.* at 2234. But that consent cannot be "fairly inferred" absent "clear and unambiguous notice" that the statute creates § 1983-enforceable right. *Id.* Rather, the "typical remedy for state noncompliance with federally imposed conditions [on receipt of federal funds] is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Gonzaga,* 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 28).

The upshot for Timken and Sweeney is that their Spending Clause claims are essentially restatements of their earlier statutory claims. Since we already examined the relevant legal sources to review those claims, we need not repeat the analysis. Instead, we briefly note that the argument is flawed for the additional reason that neither the EUA statute, the Provider Agreement, nor 45 C.F.R. § 46.122 were passed pursuant to the spending power. The EUA statute was enacted via Congress's power to regulate interstate commerce. 21 U.S.C. § 360bbb-3(a)(1). And the Provider Agreement and 45 C.F.R. § 46.122 are not even statutes. This leaves only 10 U.S.C. § 980,

which we interpreted above as not creating a § 1983-enforceable right.

Thus, Timken's and Sweeney's Spending Clause arguments fail, and we affirm the district courts' dismissals of those claims.

d. Unconstitutional Conditions

Timken's and Sweeney's final § 1983 claims are based on the unconstitutional-conditions doctrine. That doctrine prohibits the government from "deny[ing] a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 545 (1983)). A "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Id.* at 612. The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* at 604.

Timken and Sweeney argue that the CDPHE, UCHA, and SDCA vaccination policies unconstitutionally conditioned their continued employment in healthcare on surrendering their due-process and equal-protection rights to refuse investigational drugs. We dealt with the due-process and equal-protection arguments above and found them lacking. Since Timken and Sweeney have not adequately pled a burden on the exercise of their constitutional rights, they have no basis for an unconstitutional-conditions claim.

B. Sweeney's Breach of Contract Claim

Only Sweeney appeals the district court's ruling on the breach-of-contract claim. Sweeney's argument relies on her assertion that UCHA employees were third-party beneficiaries to the CDC Provider Agreements signed by UCHA and the CDPHE. The district court dismissed the claim because Sweeney's complaint merely lists a conclusory set of purported third-party rights that is insufficient to establish that she was an intended third-party beneficiary under Colorado state law.

Sweeney did not adequately raise this issue in her brief, so she waived this claim. The appellant bears the responsibility to craft her arguments; we will not do that for her. *Dodds v. Richardson*, 614 F.3d 1185, 1205 (10th Cir. 2010). Allegations that "fail[] to frame and develop an issue" are insufficient "to invoke appellate review." *Kelley v. City of Albuquerque*, 542 F.3d 802, 819 (10th Cir. 2008). And a party must support its arguments with authority. *Banks*, 451 F.3d at 728.

In just a single paragraph, Sweeney advances her claim that she is a third-party beneficiary under the CDC Provider Agreement. She says the Provider Agreement "provides specific rights" but does not name any. Sweeney's Opening Br. 62. Her brief makes no legal argument to support her third-party beneficiary status, cites no law, and points out no error in the district court's reasoning. On that record, we consider the issue waived and do not review the merits. *See United States v. Kunzman*, 54 F.3d 1522, 1534 (10th Cir. 1995).

In the same section, Sweeney asserts that the Federalwide Assurance (FWA) agreements between

the CDC, UCHA, and CDPHE confer third-party beneficiary rights because the FWA program "exists exclusively to ensure that the signatories obtain an individual's legally effective informed consent."[6] Sweeney's Opening Br. 62. But Sweeney's complaint lists the Provider Agreements, not the FWAs, as the basis for her breach of contract claim. Since the FWA argument is new and was not made before the district court, we deem it waived as well. *See Utah Animal Rts. Coal.*, 566 F.3d at 1244.

C. Appellants' Request to Amend

Finally, Timken and Sweeney argue that the district courts erred by ordering their cases closed without first giving them a post-dismissal opportunity to amend their complaints. We find that the district courts did not abuse their discretion and affirm.

Federal Rule of Civil Procedure 15 governs amendment of complaints. Under Rule 15(a), a party "may amend its pleading once as a matter of course" within prescribed time limits. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "Absent a request to amend, a district court may dismiss the action rather than sua sponte granting leave to amend." *Young v. Colo.*

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[6] An FWA is a legally-binding agreement in which "an institution commits to the HHS that it will comply with the requirements in the HHS Protection of Human Subjects regulations at 45 C.F.R. part 46. *FWAs*, U.S. Dep't of Health & Hum. Servs. (Dec. 15, 2021), https://www.hhs.gov/ohrp/register-irbs-and-obtain-fwas/fwas/index.html.

Dep't of Corr., 94 F.4th 1242, 1256 (10th Cir. 2024). We review a denial of leave to amend for abuse of discretion. *Id.*

In both suits, the district courts granted the defendants' motions to dismiss and immediately entered judgment. Shortly thereafter, Sweeney filed a motion to alter the judgment under Fed. R. Civ. P. 59(e) which alternatively sought leave to amend her complaint. The district court denied the motion, finding no adequate grounds to set aside the judgment under Rule 59(e). Sweeney does not challenge any other aspect of the Rule 59(e) order, and failure to reopen the case is sufficient grounds to deny the alternative request to amend, since setting aside the judgment is a prerequisite to bringing a post-judgment Rule 15 motion. *See Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1185 (10th Cir. 1999). But the court proceeded to explain that Sweeney's attempt to amend would fail for the additional reason that she did not request to do so at any point during the proceedings.

The court did not abuse its discretion in so ruling. On appeal, Sweeney argues that the district court erred because she was given no opportunity to formally request leave to amend after judgment was entered. She provides no authority for that argument and, regardless, ignores that she could have moved for leave to amend at any point prior to judgment.[7] In

[7] Sweeney's single citation comes in the "Conclusion" section of her brief rather than the body of her argument. But even that case, *Cohen v. Longshore*, 621 F.3d 1311 (10th Cir. 2010), is unhelpful. There, we reversed a district court's denial of a plaintiff's pre-judgment request to amend. *Cohen*, 621 F.3d at 1318. But the key issue here is the complete lack of a formal request before judgment.

Young v. Colorado Department of Corrections, we explained that plaintiffs have many opportunities to request leave to amend: they can request leave in a response to a motion to dismiss, in a separate prophylactic filing, or in a post-judgment motion to reconsider a dismissal order. 94 F.4th at 1256. And "[a]bsent a request to amend, a district court may dismiss the action rather than sua sponte granting leave to amend." *Id.* Sweeney does not say she ever requested leave to amend or that the court should have understood any part of her reply to the motion to dismiss as doing so. Without a formal request to amend in front of it, the district court did not abuse its discretion by entering judgment and ordering the case closed.

Like Sweeney, Timken did not request leave to amend her complaint prior to judgment. But unlike Sweeney, Timken did not file any post-judgment motions. So her argument on appeal is effectively her first attempt to request leave to amend. Typically, this would mean the argument is waived and we would not address it. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Since, however, we have already decided Sweeney's case, we acknowledge Timken's argument would fail for the same reason. Absent a pre-judgment request to amend, the district court had no obligation to withhold judgment and sua sponte grant leave to amend. *Young*, 94 F.4th at 1256. Its choice to issue the judgment and close the case was within its discretion.

III. Conclusion

For the foregoing reasons, we affirm the district courts' judgments.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-02451-NYW-MDB

JESSICA SWEENEY, ROXIE BLUE, ERIKA BODE, AMBER CANO, JULIE DETERS-FRANK, KAREN DONELSON, JENNIFER EDDINS, POLLY GOODWIN, GABRIEL HERGENRETER, MARY LOU HOWARD, GWENN HREN, JOHN LANSFORD, JAMIE MONTGOMERY, ERIN PHIPPS, KINGA SHELTON, STEPHANIE SILVERS, PATRICIA SPOERL, LONI THALHEIMER, and ALISHA TORBECK,

Plaintiffs,

v.

UNIVERSITY OF COLORADO HOSPITAL AUTHORITY, ELIZABETH CONCORDIA, in her individual and official capacities, MARGARET REIDY, in her individual and official capacities, MICHAEL RANDLE, in his individual and official capacities, JILL HUNSAKER RYAN, in her individual and official capacities, D. RANDY KUYKENDALL, in his individual and official capacities, PATRICIA HAMMON,[1] in her individual and official capacities, RAYMOND ESTACIO, in his individual and official capacities, DANIEL PASTULA, in his individual and official capacities, SHAWN TURK, in his individual

[1] The CDPHE Defendants indicate that Plaintiffs have misspelled Patricia Hammon's and Shawn Turk's names. [Doc. 46 at 1 n.1]. This Court **ORDERS** the Clerk of the Court to **AMEND** the caption to reflect the correct spellings of these Defendants' names.

and official capacities, TOM BUTTS, in his individual and official capacities, EVELINN BORRAYO, in her individual and official capacities, and KENDALL ALEXANDER, in her individual and official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the CDPHE Defendants' Motion to Dismiss, [Doc. 46], and the UCHA Defendants' Motion to Dismiss, [Doc. 47]. The Court has reviewed the Motions, the related briefing, and the applicable case law, and concludes that oral argument would not materially assist in the resolution of these matters. For the reasons set forth in this Order, the Motions to Dismiss are respectfully **GRANTED**.

BACKGROUND

"The essential contours of the COVID-19 pandemic are well-known," *Children's Health Def., Inc. v. Rutgers, the State Univ. of N.J.*, 93 F.4th 66, 71 (3d Cir. 2024), and need not be repeated here. Accordingly, while the Court has reviewed the entirety of the Complaint, the Court limits its recitation of this case's background to the most salient facts.[2]

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[2] Plaintiffs' 101-page Complaint contains over 400 paragraphs, many of which contain recitations of legal authority or legal argument, which are not properly included in a pleading. See Fed. R. Civ. P. 8(a); s*ee also Womack v. Ocwen Loan Servicing*, LLC, No. 13-cv-02749-CMA-BNB, 2013 WL 5661128, at *1 (D.

On July 28, 2021, the University of Colorado Hospital Authority ("UCHA") implemented a new policy requiring its employees to be vaccinated against COVID-19, or to have received a valid exemption from the requirement, by October 1, 2021. [Doc. 1 at ¶ 194]. Those who received an exemption would be required to wear a mask while present in UCHealth[3] facilities and be tested weekly for COVID-19. [*Id.*].

On or about August 30, 2021, the Colorado Department of Public Health and Environment ("CDPHE") voted to approve new state licensing requirements for healthcare facilities ("Part 12 Rules") that included, among other things, a directive that all healthcare facility employees, direct contractors, and support staff be vaccinated against COVID-19 by October 31, 2021. [*Id.* at ¶¶ 264–66]. The Part 12 Rules also required healthcare facilities to permit employees to request exemptions from this requirement for religious or medical reasons. [Doc. 1-

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Colo. Oct. 17, 2013) (explaining that "superfluous facts, legal arguments, and immaterial statements" are "not appropriately included in a complaint"). Thus, this Court focuses on the sufficiency of the factual averments.

[3] Plaintiffs allege that UCHA

> is a political subdivision of the State of Colorado that formed a joint venture with the non-profit company Poudre Valley Medical Group, LLC, called UCHealth Medical Group. UCHA is a body corporate and political subdivision of the State of Colorado pursuant to C.R.S. § 23-21-503. UCHealth Medical Group is wholly owned by Poudre Valley Health Care Inc., d/b/a Poudre Valley Health System ("PVHS"). Together, UCHA and PVHS formed University of Colorado Health (UCHealth), a Colorado non-profit corporation. All of these entities operate under the umbrella of "UCHealth."

[Doc. 1 at ¶ 19.1].

7 at §§ 12.2.4, 12.3].[4] Thereafter, UCHA informed its employees that, "[p]er the Colorado Board of Health Rules requirements," all of its healthcare workers, support staff, and direct contractors must be vaccinated against COVID-19, but that "[t]he UCHealth requirement dates [would] not change." [Doc. 1 at ¶ 278].

In addition, the Centers for Disease Control and Prevention ("CDC") created a "Vaccination Program" to facilitate administration of the COVID-19 vaccine across the United States; before a healthcare provider can participate in the Vaccination Program, the person or entity must sign the CDC COVID-19 Vaccination Program Provider Agreement (the "Provider Agreement"). [*Id*. at ¶¶ 172, 174]. The Provider Agreement requires, among other things, that participants administer the COVID-19 vaccine in compliance with all applicable state and territorial laws and in compliance with FDA requirements, including any Emergency Use Authorization ("EUA") requirements applicable to the COVID-19 vaccine. [*Id*. at ¶ 184]; see also [Doc. 1-2 (the Provider Agreement)]. Dr. Margaret Reidy, the Chief Medical Officer of UCHealth ("Dr. Reidy"), and Dr. Michael Randle, the CEO of UCHealth Medical Group ("Dr. Randle"), are signatories to the Provider Agreement

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[4] The Court's review in the Rule 12(b)(6) context is typically limited to the contents of the challenged pleading. *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010). However, the Court may also consider (1) documents that the complaint incorporates by reference; (2) documents referenced in the complaint that are referenced in the complaint if the documents are central to the plaintiff's claim and are indisputably authentic; and (3) matters of which a court may take judicial notice. Id. The Court may consider the contents of the Part 12 Rules given that it is central to Plaintiffs' claim, referenced in the Complaint, and no Party disputes its authenticity.

on behalf of UCHealth. [Doc. 1 at ¶¶ 19.3–19.4]. Plaintiffs also allege that the CDPHE "voluntarily agreed to comply with the terms and conditions of the CDC COVID-19 Vaccination Program Provider Agreement." [*Id*. at ¶ 272].

Plaintiffs Jessica Sweeney, Roxie Blue, Erika Bode, Amber Cano, Julie Deters-Frank, Karen Donelson, Jennifer Eddins, Polly Goodwin, Gabriel Hergenreter, Mary Lou Howard, Gwenn Hren, John Lansford, Jaime Montgomery, Erin Phipps, Kinga Shelton, Stephanie Silvers, Patricia Spoerl, Loni Thalheimer, and Alisha Torbeck (collectively, "Plaintiffs") are former "employee[s] of UCHealth or one of its DBA entities in Colorado." [*Id*. at ¶¶ 18.1–18.19]. Plaintiffs allege that they were terminated from their employment with UCHealth when they "refus[ed] to participate in the use of COVID-19 investigational drugs." [*Id*. at ¶¶ 406, 410].

Plaintiffs initiated this action on September 20, 2023, naming two groups of Defendants. The "UCHA Defendants" consist of UCHA; Dr. Reidy, in her official and individual capacities; Dr. Randle, in his official and individual capacities; and Elizabeth Concordia, UCHealth's President and CEO, in her official and individual capacities. [*Id*. at ¶¶ 19.1–19.4]. Plaintiffs also name Jill Hunsaker Ryan, the Executive Director of the CDPHE, in her official and individual capacities; D. Randy Kuykendall, the Director of Health Facilities and Emergency Medical Services Division of the CDPHE, in his official and individual capacities; and a number of the CDPHE's Board of Health members in their official and individual capacities: Patricia Hammon, Raymond Estacio, Daniel Pastula, Shawn Turk, Tom Butts, Evelinn Borrayo, and Kendall Alexander (collectively, the "CDPHE Defendants"). [*Id*. at ¶¶

19.5–19.13]. The Complaint contains ten claims: (1) a claim for "Deprivation of Legally Effective Informed Consent" under 42 U.S.C. § 1983 ("Claim One"); (2) a § 1983 equal protection claim ("Claim Two"); (3) a § 1983 due process claim ("Claim Three"); (4) a § 1983 claim for "Deprivation of Rights Under the Spending Clause" ("Claim Four"); (5) an "Unconstitutional Conditions Doctrine" claim under § 1983 ("Claim Five"); (6) a § 1983 claim titled "PREP Act" ("Claim Six"); (7) a breach of contract claim ("Claim Seven"); (8) a claim for "Colorado State Common Law Employment Torts" ("Claim Eight"); (9) a claim for extreme and outrageous conduct ("Claim Nine"); and (10) an "Implied Private Right of Action" claim under 21 U.S.C. § 360bbb-3, a provision of the Food, Drug, and Cosmetic Act ("FDCA") ("Claim Ten"). [Doc. 1 at ¶¶ 320–415]. Plaintiffs seek compensatory damages, punitive damages, attorney's fees, and costs. [*Id*. at ¶¶ 416–422].

The CDPHE Defendants and the UCHA Defendants have separately moved to dismiss all of Plaintiffs' claims. [Doc. 46 (the "CDPHE Motion to Dismiss"); Doc. 47 (the "UCHA Motion to Dismiss")]. Plaintiffs oppose dismissal, see [Doc. 48; Doc. 49], and Defendants have separately replied, [Doc. 50; Doc. 51].

LEGAL STANDARDS

I. Rule 12(b)(1)

Under Rule 12(b)(1), a court may dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Dismissal under Rule 12(b)(1) is not a judgment on the merits of the plaintiff's claim. Instead, it is a determination that the court lacks

authority to adjudicate the matter." *Creek Red Nation, LLC v. Jeffco Midget Football Ass'n, Inc.*, 175 F. Supp. 3d 1290, 1293 (D. Colo. 2016). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013) (quotation omitted). The burden of establishing jurisdiction rests with the party asserting jurisdiction—here, Plaintiffs. *Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017).

II. Rule 12(b)(6)

A court may also dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded factual allegations … and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010). The plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

ANALYSIS

Defendants' respective Motions to Dismiss raise several arguments, many of which overlap. The CDPHE Defendants argue that (1) Plaintiffs' claims

against them in their official capacities are barred by the Eleventh Amendment, [Doc. 46 at 7–9]; (2) Plaintiffs' state tort claims are barred by the Colorado Governmental Immunity Act ("CGIA"), [*id.* at 10–11]; (3) all of Plaintiffs' claims fail to state a claim upon which relief can be granted, [*id.* at 11–27]; and (4) insofar as the CDPHE Defendants are sued in their individual capacities, they are entitled to qualified immunity against Plaintiffs' federal claims, [*id.* at 27–28]. The UCHA Defendants argue that (1) they are entitled to qualified immunity against Plaintiffs' individual-capacity federal claims, [Doc. 47 at 15–17]; (2) Plaintiffs' federal claims fail to state a claim under Rule 12(b)(6), [*id.* at 17–32]; (3) Plaintiffs' state tort claims are barred by the CGIA, [*id.* at 32–34]; (4) Plaintiffs state claims fail to state a plausible claim for all counts, [*id.* at 34–38]; and (5) Plaintiffs' request for punitive damages is improper, [*id.* at 38–39].[5]

[5] Both sets of Defendants also argue that most of Plaintiffs' claims are time-barred because Plaintiffs filed suit more than two years after they were given notice that they could lose their jobs absent vaccination. See [Doc. 46 at 4 n.6; Doc. 47 at 18; Doc. 1-4 at 2 (noting that as of September 3, 2021, "[a]ny employees who are not in compliance with the UCHealth vaccine policy will receive notification of disciplinary action" and as of October 1, "[a]ny employees who remain out of compliance will face disciplinary action up to and including termination")]. A court may only grant a motion to dismiss on statute of limitations grounds if it is clear from the complaint that the right sued upon has been extinguished. *See Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022). Plaintiffs do not dispute that a two-year statute of limitations applies to their causes of action arising under 42 U.S.C. § 1983 (Claims One through Six), but they argue that their claims did not accrue until they were terminated. See [Doc. 48 at 6; Doc. 49 at 11]. The *Herrera* court explained that a "civil rights action accrues when the plaintiff knows or has reason to know of the

The Court first addresses the CDPHE Defendants' Eleventh Amendment immunity argument before jointly addressing Defendants' identical arguments under the CGIA. Then, the Court reviews each remaining claim one-by-one, collectively considering the various arguments raised in the two Motions to Dismiss.

I. Eleventh Amendment Immunity

The CDPHE Defendants first argue that Plaintiffs' claims against them in their official capacities are barred by the Eleventh Amendment. [Doc. 46 at 7]. The Eleventh Amendment guarantees that "[s]tates may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity." *Muscogee (Creek) Nation v. Okla. Tax Comm'n,* 611 F.3d 1222, 1227 (10th Cir. 2010). "This prohibition encompasses suits against state agencies" and "[s]uits against state officials acting in their official capacities." *Id.* Neither § 1983 nor the CGIA waive Colorado's sovereign immunity. *Id.*; *Quern v.*

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injury which is the basis of the action, or when the plaintiff's right to resort to federal court was perfected." *Herrera*, 32 F.4th at 990 (cleaned up). It also noted that the accrual analysis begins with identifying the specific constitutional right alleged to have been infringed. *Id.* at 990 n.5. But this Court need not, and does not, reach this issue because it finds that dismissal pursuant to Rule 12(b)(6) is appropriate on other grounds. *See St. Francis Hosp., Inc. v. Becerra*, 28 F.4th 119, 133 (10th Cir. 2022) (observing that a court's duty "is to provide clarity while adhering to [the] usual, prudent practice of not reaching out to decide unnecessary issues" (quotation omitted)) (Baldock, J., concurring).

Jordan, 440 U.S. 332, 338–40 (1979); *Griess v. Colorado*, 841 F.2d 1042, 1044 (10th Cir. 1988).

Plaintiffs do not respond to the CDPHE Defendants' Eleventh Amendment argument. See generally [Doc. 48]. They have thus conceded dismissal of the official-capacity claims against the CDPHE Defendants. *See Baum v. Dunmire Prop. Mgmt., Inc.*, No. 21-cv-00964-CMA-NYW, 2022 WL 889097, at *7 (D. Colo. Mar. 25, 2022) ("[B]ecause Plaintiff failed to respond to Defendant, the Court deems this claim as having been abandoned based on her failure to raise any arguments to save the claim from dismissal."); *Poole v. Sw. Bell Tel. L.P.*, 86 F. App'x 372, 374 (10th Cir. 2003) (deeming claims abandoned in the district court because, in responding to the defendant's motion to dismiss, the plaintiff did not oppose the defendant's argument for dismissal). Indeed, the Eleventh Amendment constitutes a "jurisdictional limitation on a court's ability to hear a case against a state once raised by the state," *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 527 (10th Cir. 2022), and it is Plaintiffs' burden to establish the Court's jurisdiction over this matter, *Kline*, 861 F.3d at 1180. By neglecting to address this argument, Plaintiffs have not met this burden..

Accordingly, the CDPHE Defendants' Motion to Dismiss is **GRANTED** to the extent it seeks dismissal of Plaintiffs' official-capacity claims against them. The official-capacity claims against the CDPHE Defendants are **DISMISSED without prejudice**. *Shue v. Lampert*, 580 F. App'x 642, 644 (10th Cir. 2014) (dismissal on Eleventh Amendment grounds should be without prejudice). The Court's

remaining analysis as to the CDPHE Defendants is thus limited to Plaintiffs' individual-capacity claims.[6]

II. The Colorado Governmental Immunity Act

Next, all Defendants argue that the CGIA bars Claims Eight and Nine—Plaintiffs' "Colorado State Common Law Employment Torts" and extreme and outrageous conduct claims. [Doc. 46 at 10; Doc. 47 at 33].

The CGIA bars actions in tort against public employees and entities, subject to certain provisions waiving immunity. *Medina v. Colorado*, 35 P.3d 443, 453 (Colo. 2001). However, regardless of whether public employees are afforded immunity under the CGIA, the law requires the plaintiff to provide notice of tort claims to the public entity or public employee within 182 days of discovering the tort injury and before filing an action in court. Colo. Rev. Stat. § 24-10-109(1); *Garcia v. Chamjock*, No. 11-cv-00263-PAB-MEH, 2012 WL 638145, at *3 (D. Colo. Feb. 27, 2012); *Handy v. Pascal*, No. 11-cv-00708-WYD-KMT, 2011 WL 5176153, at *7 (D. Colo. Aug. 29, 2011) (explaining that the notice requirement applies to claims against public entities and claims against public employees in their individual capacities), report and recommendation adopted, 2011 WL 5240435 (D. Colo. Oct. 31, 2011). Proper notice under the CGIA is generally considered a jurisdictional prerequisite to suit. *Maestas v. Lujan*, 351 F.3d 1001,

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[6] The Court notes that although Plaintiffs sue all of the Defendants in their individual capacities, the Complaint contains no allegations of any individual actions carried out by Defendants Hammon, Estacio, Pastula, Turk, Butts, Borrayo, or Alexander, naming them only in introductory paragraphs. *See* [Doc. 1 at ¶¶ 19.7–19.13].

1013–14 (10th Cir. 2003); see also Colo. Rev. Stat. § 24-10-109(1) ("Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this article, and failure of compliance shall forever bar any such action.").

The CDPHE Defendants and the UCHA Defendants argue that the CGIA bars Claims Eight and Nine because Plaintiffs did not provide notice prior to suit as required by the CGIA. [Doc. 46 at 11; Doc. 47 at 33–34]. Again, Plaintiffs do not respond to this argument, see generally [Doc. 48; Doc. 49], and have thus abandoned or conceded dismissal of these claims, Baum, 2022 WL 889097, at *7; Poole, 86 F. App'x at 374. The CDPHE Motion to Dismiss and the UCHA Motion to Dismiss are **GRANTED** as to these claims, and Claims Eight and Nine are **DISMISSED** as to all Defendants **with prejudice**.[7]

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[7] Dismissal with prejudice due to a failure to comply with the CGIA's notice requirement is appropriate if the plaintiff cannot cure the defect. *See Aspen Orthopaedics & Sports Med., LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 842 (10th Cir. 2003); *Trujillo v. Amity Plaza, LLC,* No. 23-cv-01019-CMA-SKC, 2024 WL 358129, at *4 n.2 (D. Colo. Jan. 31, 2024). While the Complaint does not identify any particular date that Plaintiffs discovered their alleged injury, the Complaint was filed on September 20, 2023, meaning that they knew of their alleged injury, at the very latest, on that date. Because more than 182 days have passed since that date, Plaintiffs cannot cure the defect and dismissal with prejudice is appropriate. *See Hoffschneider v. Marshall*, No. 20-cv-03018-CNS-MEH, 2022 WL 4104270, at *4 (D. Colo. Sept. 8, 2022) (dismissing tort claims with prejudice because "the necessary notice period ha[d] clearly expired").

III. Failure to State a Claim

A. Deprivation of Consent (Claim One) and PREP Act (Claim Six)

Claim One is titled "Deprivation of Legally Effective Informed Consent," [Doc. 1 at 82], and is purportedly asserted under "[t]he CDC COVID-19 Vaccination Program Provider Agreement, and the implementing statutes and regulations found at 45 CFR Part 46, the Belmont Report, 21 U.S.C. § 360bbb-3, Article VII of the ICCPR Treaty, Federal Wide Assurance [("FWA")], 10 U.S.C. § 980, EUA Scope of Authorization letters, and the Fourteenth Amendment," [*id.* at ¶ 321]. Claim One alleges that "Defendants breached their duties to establish 'adequate standards' of informed consent when applying 'sanctions,' 'coercion,' 'undue influence,' and 'unjustifiable pressures' on Plaintiffs to participate in COVID-19 investigational new drugs and devices (e.g., masks, testing articles)." [*Id.* at ¶ 328]. Claim Six is a "PREP Act" claim that is purportedly asserted under "[t]he PREP Act, the CDC COVID-19 Vaccination Program Provider Agreement, and the implementing statutes and regulations found at 45 CFR Part 46, the Belmont Report, 21 U.S.C. § 360bbb-3, Article VII of the ICCPR Treaty, Federal Wide Assurance, the EUA Scope of Authorization letter, and the Fourteenth Amendment." [*Id.* at ¶ 375].

This claim alleges that the "State of Colorado and the UCHA political subdivision established laws and policies that conflicted with the PREP Act and 21 U.S.C. § 360bbb-3 when they required Plaintiffs to participate in the use of a covered countermeasure under threat of penalty" and that "Defendants

engaged in policy-making and conduct that conflicted with the PREP Act and the Fifth and Fourteenth Amendments of the United States Constitution." [*Id.* at ¶ 381].

The CDPHE Defendants argue that Claims One and Six should be dismissed under Rule 12(b)(6) because all of the legal authorities cited in the claims are inapplicable to this case. [Doc. 46 at 13–15]. In the alternative, they argue that none of the cited authorities establish enforceable rights under § 1983. [*Id.* at 15–19]; *see also Curtis v. PeaceHealth*, No. 3:23-cv-05741-RJB, 2024 WL 248719, at *7 (W.D. Wash. Jan. 23, 2024) ("*Curtis II*") (explaining that § 1983 "provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.,* rights independently 'secured by the Constitution and laws' of the United States" (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002))), *appeal docketed*, No. 24-1869 (9th Cir. Apr. 1, 2024). The UCHA Defendants raise similar arguments. They argue first that, with respect to Claim One, this claim must fail because none of the cited authorities provide an individual right enforceable through § 1983. [Doc. 47 at 19–25]. As for Claim Six, they argue that the PREP Act does not apply in this case. [Id. at 31–32]. The Court addresses Claims One and Six together and respectfully agrees with Defendants that Plaintiffs fail to show that any of the federal statutes, regulations, reports, or treaties apply in this case and/or that these sources create a private right enforceable through § 1983.

The EUA Statute. Plaintiffs often refer to 21 U.S.C. § 360bbb-3 as the "EUA statute," *see, e.g.,* [Doc. 1 at 44; Doc. 48 at 14–17], and the Court does

the same here.[8] The two groups of Defendants raise similar arguments with respect to the EUA statute. The CHDPE Defendants argue that "the EUA Statute does not apply to state agencies or its employees or agents such as the CDPHE Defendants" and is therefore not applicable to this case. [Doc. 46 at 13]. They also contend that the EUA statute confers no private right enforceable through § 1983. [*Id*. at 16]. The UCHA Defendants make these same arguments. *See* [Doc. 47 at 21 (the EUA statute "imposes obligations only on the HHS secretary, not employers" and "confers no individual rights that might otherwise support § 1983 liability" (quotation omitted))].

As for the contention concerning the statute's applicability to this case, Plaintiffs respond only to the CDPHE Defendants' argument on this point, thus conceding the issue with respect to the UCHA Defendants. *See* [Doc. 49 at 13–14 (Plaintiffs arguing, in response to the UCHA Motion to Dismiss, only that "Congress created a right for them" in the EUA statute)]. Plaintiffs contend that "through the Secretary [of Health and Human Services]," the EUA statute "imposes conditions on persons who carry out EUA activities to protect public health." [Doc. 48 at 15]. Plaintiffs maintain that the CDPHE agreed to comply with those conditions, and in Plaintiffs' view, this means that "the CDC Vaccination Program, the Provider Agreement, and the EUA letters work together to impose obligations on not just the Secretary, but every person who carries out an EUA activity." [*Id*. at 15–16]. This argument is not supported by any legal authority. [*Id*.].

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[8] The UCHA Defendants refer to the FDCA provision as "Section 564." See, e.g., [Doc. 47 at 20].

The EUA statute "governs emergency use authorization of medicine," *Curtis v. Inslee*, No. 3:23-cv-05741-RJB, 2023 WL 8828753, at *5 (W.D. Wash. Dec. 21, 2023) ("*Curtis I*"), appeal docketed, No. 24-1869 (9th Cir. Apr. 1, 2024), and requires the Secretary of Health and Human Services to establish conditions designed to ensure "that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product," 21 U.S.C. § 360bbb-3(3)(1)(A)(ii)(III). By its plain language, the statute "obligates only the Secretary of Health and Human Services to act, by establishing 'conditions designed to ensure' informed consent." *Children's Health Def., Inc.*, 93 F.4th at 76. Nothing in the statute's plain language imposes obligations on state agencies, state employees, or state employers. *See id*. (holding that statute does not apply to state university); *cf. Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021) (explaining that the statute "confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency" but does not restrict the actions of private employers or "confer a private opportunity to sue the government, employer, or worker"), *aff'd*, No. 21-20311, 2022 WL 2116213 (5th Cir. June 13, 2022); *Norris v. Stanley*, 73 F.4th 431, 438 (6th Cir. 2023) ("The EUA statute's relevant language … addresses the interaction between the medical provider and the person receiving the vaccine, not the interaction between an employer and an employee receiving a vaccine."), *cert. denied*, 144 S. Ct. 1353 (2024).

Plaintiffs do not cite any legal authority negating these cases or otherwise demonstrating the EUA statute's imposition of duties on any of the Defendants in this case. Moreover, as for Plaintiffs'

reliance on the Provider Agreement, as explained below, the Complaint does not allege that any of the individual CDPHE Defendants are signatories to the Provider Agreement. *See* [Doc. 1]. Accordingly, the Court agrees with both sets of Defendants that the EUA statute does not apply in this case, and Plaintiffs cannot assert a § 1983 claim based on Defendants' purported violations of the statute. *See Curtis I*, 2023 WL 8828753, at *5.

The EUA Letters. Plaintiffs allege that the Secretary of Health and Human Services establishes the conditions contemplated in the EUA statute in "EUA letters," "known as the Scope of Authorization." [Doc. 1 at ¶¶ 78–79, 117–18]. The UCHA Defendants argue that the EUA letters cannot form the basis of a claim because the letters are not "laws" enforceable through § 1983. [Doc. 47 at 24]. Similarly, the CDPHE Defendants argue that the EUA letters are not "enforceable legal authority." [Doc. 46 at 18]. Plaintiffs do not respond to these arguments and have thus conceded them. *See generally* [Doc. 48; Doc. 49].[9]

Section 1983 provides a cause of action to vindicate "the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws." 42 U.S.C. § 1983 (emphasis added). The

[9] Plaintiffs' argument that the CDPHE is an "emergency response stakeholder" under the EUA letter(s) and that it thus "had ministerial duties to ensure its Rule did not cause the 'Organization' (vaccination providers) to violate federal law," see [Doc. 48 at 16], responds to the CDPHE Defendants' argument "on p. 13 that 'the EUA Letters … impose obligations upon only the vaccine manufacturers and those who actually provide the vaccine to recipients,'" [id. at 16 (quoting Doc. 46 at 13)], but does not respond to the CDPHE Defendants' statutory argument about whether the letters are "laws" that may be enforced by § 1983, *see generally* [*id.*].

Supreme Court has "consistently refused to read § 1983's 'plain language' to mean anything other than what it says." *Health & Hosp. Corp. of Marion Cnty. v. Talevski,* 599 U.S. 166, 177 (2023). While Plaintiffs allege in their Complaint that the "Scope of Authorization contained in each EUA letter has the force of law as it establishes the conditions under which the emergency activities can occur, prescribing duties for the manufacturer and rights of all persons involved in the administrative process of the product," [Doc. 1 at ¶ 118], this is a legal conclusion that need not be taken as true, *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012), and "it is Congress, and not an agency of the Executive Branch, that creates federal rights," *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 957 (5th Cir. 2020). Plaintiffs have not shown that the EUA letters are "laws" that may be enforced through § 1983.

The PREP Act. "In 2005, Congress passed the PREP Act to encourage the development and deployment of medical countermeasures (such as diagnostics, treatments, and vaccines) by limiting legal liability relating to their administration during times of crisis." *Curtis v. Inslee*, No. 3:23-cv-05741-RJB, 2024 WL 810503, at *6 (W.D. Wash. Feb. 27, 2024) ("*Curtis III*") (citing *Maney v. Brown*, 91 F.4th 1296, 1298 (9th Cir. 2024)), appeal docketed, No. 24-1869 (9th Cir. Apr. 1, 2024). "The statute gives 'covered persons immunity from suit and liability for claims caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.'" *Id.* (quoting Maney, 91 F.4th at 1298) (further quotations omitted).

Each set of Defendants argues that the PREP Act cannot support a § 1983 claim because the PREP

Act provides immunity to vaccine providers for injuries caused by the administration of a vaccine, but it does not create any rights, duties, or obligations, such that there is no individual right under the PREP Act that is enforceable through § 1983. [Doc. 46 at 14, 18; Doc. 47 at 31–32]. Plaintiffs respond to the UCHA Defendants' argument by asserting that the PREP Act confers the right "to be informed about the voluntary nature of any PREP Act program," and because "[t]hat right was conferred on Plaintiffs by a federal statute, … the deprivation of that right can be redressed through § 1983." [Doc. 49 at 25]. As for the CDPHE Defendants, Plaintiffs contend that "the PREP Act expressly preempts CDPHE from establishing, enforcing, or continuing in effect any law or legal requirement that is different from, or in conflict with, any requirement under the FDCA, including the option to accept or refuse under 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III)," and that this "rights-creating language serves as the basis of an enforceable § 1983 action." [Doc. 48 at 17]. Plaintiffs' arguments are again not supported by any legal authority. *See* [*id.*].

If "a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284. To determine if a statute confers an individual right, the Court "must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Talevski,* 599 U.S. at 183 (quoting *Gonzaga*, 536 U.S. at 283, 285–86). A statute unambiguously confers individual rights if it is "phrased in terms of the persons benefited" and "contains 'rights-creating,' individual-centric language with an 'unmistakable

focus on the benefited class.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 284, 287). But even if "a statutory provision unambiguously secures rights, a defendant may defeat the presumption by demonstrating that Congress did not intend that § 1983 be available to enforce those rights." *Id*. at 186 (cleaned up).

Plaintiffs do not direct the Court to any specific text from the PREP Act that amounts to "rights-creating" or "individual-centric" language sufficient to confer an individual right enforceable under § 1983, and it is not this Court's duty to perform legal research for or make legal arguments on Plaintiffs' behalf. *Cf. United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) (the Court need not consider "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation" (quotation omitted)). Insofar as Plaintiffs rely on the PREP Act's preemption provisions—which are not included in their briefs—and argue that these provisions contain "rights-creating" language, the Court is unconvinced. The PREP Act provides, in pertinent part, that no state can establish or enforce any law that conflicts with the provisions of the PREP Act or that relates to "the covered countermeasure" under the PREP Act. 42 U.S.C. § 247d-6d(a)(8)(A)–(B). This statutory section does not include any of the clear "rights-creating" or "individual-centric" language contemplated by the Supreme Court in *Talevski*. *See, e.g., Talevski*, 599 U.S. at 184–86 (language that concerns "[r]equirements relating to residents' rights" and that requires nursing homes to "protect and promote … [t]he right to be free from … any physical or chemical restraints … not required to treat the resident's medical symptoms" is clear rights-creating language, and many provisions focusing on

individual residents demonstrated an unmistakable focus on the benefitted class (alterations in original and emphasis omitted)).

Moreover, at least one other district court has concluded that "Congress evinced clear intent that § 1983 was not available to enforce rights under the PREP Act, even federal constitutional claims." *Curtis III*, 2024 WL 810503, at *7 (emphasis added). Indeed, courts uniformly recognize that, with one exception, the PREP Act does not create an enforceable right, but creates immunity against a potential action arising from an injury during the administration of a vaccine. *Roberts v. Inslee*, No. 2:23-cv-00295-TOR, 2024 WL 1160895, at *7 (E.D. Wash. Mar. 18, 2024), *appeal docketed*, No. 24-1949 (9th Cir. Apr. 1, 2024);[10] *see also Elliot v. Care Inn of Edna LLC*, No. 3:20-cv-3185-S, 2021 WL 2688600, at *3 (N.D. Tex. June 30, 2021) (The PREP Act "does not create a federal cause of action or any rights, duties, or obligations."). For all of these reasons, the Court agrees with Defendants that the PREP Act does not create an individual right enforceable under § 1983. *See Curtis III*, 2024 WL 810503, at *7.

The Provider Agreement. The CDPHE Defendants argue that the Provider Agreement does not apply to Plaintiffs' claims against them because it is binding only as to its signatories, and the

[10] As an Eastern District of Washington court explained, "[t]he 'sole exception' to such immunity stems from 'an exclusive Federal cause of action against a covered person for death or serious physical injury proximately cause by willful misconduct,'" and a complaint asserting a cause of action under this exception must be filed in the District of Columbia and must be submitted with "a physician's affidavit and certified medical records documenting the injury." *Roberts*, 2024 WL 1160895, at *7 (quoting 42 U.S.C. § 247d- 6d(d)(1) and citing 42 U.S.C. § 247d-6d(e)(1), (e)(4)).

CDPHE Defendants are not signatories. [Doc. 46 at 13–14]. Plaintiffs disclaim any reliance on the Provider Agreement as "the basis of a § 1983 claim," but they argue that the Provider Agreement "establishes CDPHE's duty to comply with the EUA statute and the PREP Act, both of which contain rights conferred upon Plaintiffs that do serve as the basis for a § 1983 claim." [Doc. 48 at 17–18]. This argument is not supported by legal authority.

Plaintiffs do not respond to the CDPHE's argument about their non-signatory status and thus concede this argument. *See Curtis I*, 2023 WL 8828753, at *6 (dismissing § 1983 claim premised on Provider Agreement asserted against non-signatory). And Plaintiffs' other argument is unmeritorious, as it rests on an assertion that the Provider Agreement establishes CDPHE's duty (as an entity) to comply with the EUA statute and the PREP Act, and the Court has already concluded that these two statutes do not confer rights enforceable under § 1983. Moreover, Plaintiffs do not explain how the CDPHE Defendants can be individually liable using this theory.

Further, the UCHA Defendants argue that the Provider Agreement is not a "law" enforceable under § 1983. [Doc. 47 at 24]. Plaintiffs do not respond to this argument and thus concede the issue. See generally [Doc. 49]. Accordingly, Plaintiffs have not shown that the Provider Agreement confers rights enforceable under § 1983.

10 U.S.C. § 980. Next, Defendants challenge Plaintiffs' reliance on 10 U.S.C. § 980, which provides that

> [f]unds appropriated to the Department of Defense may not be used for research

> involving a human being as an experimental subject unless … (1) the informed consent of the subject is obtained in advance; or (2) in the case of research intended to be beneficial to the subject, the informed consent of the subject or a legal representative of the subject is obtained in advance.

10 U.S.C. § 980. The CDPHE Defendants and the UCHA Defendants alike argue that this statute itself lacks an enforcement mechanism and does not confer an independent right that is enforceable under § 1983. [Doc. 46 at 17; Doc. 47 at 24]. The UCHA Defendants also argue that "Plaintiffs don't allege that any Department of Defense funds were used to experiment on them without their informed consent, much less explain how UCHA would be responsible." [Doc. 47 at 24]\

Plaintiffs do not respond to the CDPHE Defendants' argument about § 980 and have thus waived opposition to this basis for dismissal. See generally [Doc. 48]. In their Response to the UCHA Defendants' Motion, Plaintiffs argue that this statute "confers a right upon individuals to give, or withhold, informed consent before being involved in medical research." [Doc. 49 at 20]. Missing from Plaintiffs' argument, however, is any supporting legal authority or meaningful discussion about how the statutory text contains the sort of clear, rights-creating language contemplated by the Supreme Court in *Talevski*. *See* [*id*.]. The Court cannot make legal arguments on behalf of Plaintiffs. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). And even on the Court's own review of the statute, the Court agrees with Defendants that 10 U.S.C. § 980 does not contain clear and unambiguous "rights-creating" or

"individual-centric" language demonstrating Congressional intent to create an enforceable right under § 1983.

The FWA, the Belmont Report, 45 C.F.R. Part 46, and the ICCPR Treaty. Both sets of Defendants argue that none of these sources—the FWA,[11] the Belmont Report, 45 C.F.R. Part 46, and the ICCPR Treaty—confer rights enforceable under § 1983. The CDPHE Defendants argue that none of these authorities apply because "they apply only to research or experimentation with human subjects, or when federal funds have been appropriated for such research," and "Plaintiffs do not plausibly allege the CDPHE Defendants engaged in such research or that Plaintiffs were subjects of it." [Doc. 46 at 14–15]. Plaintiffs do not respond directly to this argument, but they assert that "the CDC Vaccination Program, as designed, involves medical research involving human subjects," noting that they "were very detailed in Doc 1, Section VII, on the definition of 'research'" and declining to "repeat those allegations" in their Response. [Doc. 48 at 6].

Section VII of Plaintiffs' Complaint is titled "45 CFR Part 46" and contains recitations of legal authority, not factual allegations. [Doc. 1 at ¶¶ 36–50]. Plaintiffs do not refute the CDPHE Defendants' contention that Plaintiffs do not allege that they were human subjects of research (or direct the Court to any allegations supporting such a theory), see generally [Doc. 48], and it is not this Court's duty to search through the 400-paragraph Complaint for allegations supporting Plaintiffs' argument, *Mitchell v. City of Moore*, 218 F.3d 1190, 1199 (10th Cir.

[11] Plaintiffs allege that the FWA "is an agreement by entities conducting business with HHS to comply with 45 CFR 46 [sic] and the Belmont Report's ethical guidelines." [Doc. 1 at ¶ 138].

2000). The Court agrees with the CDPHE Defendants' argument. *See Bridges*, 543 F. Supp. 3d at 527–28 ("The hospital's employees are not participants in a human trial. They are licensed doctors, nurses, medical technicians, and staff members. The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials. [The] claim that the injection requirement violates 45 C.F.R. § 46.116 … fails.").

Furthermore, as the CDPHE Defendants and the UCHA Defendants each argue, "Plaintiffs cannot rely on regulations, agency guidance, international treaties, or statements of principles as 'laws' enforceable through § 1983." [Doc. 47 at 24]; see also [Doc. 46 at 15–18 (arguing that these authorities are not enforceable through § 1983 actions)]. Plaintiffs do not respond to these arguments or provide any authority that an individual § 1983 cause of action exists to enforce rights under any of these authorities, see generally [Doc. 48;12[12] Doc. 49], and have waived opposition on these points.

The Court agrees that the Belmont Report and the ICCPR Treaty are not "laws" that can be enforced through § 1983. *See Kriley v. Nw. Mem'l Healthcare*, No. 22-1606, 2023 WL 371643, at *2 (7th Cir. Jan. 24, 2023) (the Belmont Report is a "statement[] of principles"); *Dutton v. Warden, FCI Estill*, 37 F.

[12] While Plaintiffs challenge the CDPHE Defendants' contention that 45 C.F.R. Part 46 does not create a private right of action by attempting to distinguish the cases cited by the CDPHE Defendants, see [Doc. 48 at 19], they do not challenge the contention that this section is inapplicable here or cite any authority in which a court found that 45 C.F.R. Part 46 could be enforced through § 1983.

App'x 51, 53 (4th Cir. 2002) ("To be privately enforceable, a treaty must either be self-executing or Congress must have passed implementing legislation. … The ICCPR is not self-executing, nor has it been implemented by Congress."); *cf. Curtis I*, 2023 WL 8828753, at *6 (concluding that "there is no private right of action under the Belmont Report . . . or the ICCPR which is enforceable in federal courts"). And "agency regulations cannot independently confer federal rights enforceable under § 1983 for one simple reason: Those cases make clear that it is Congress, and not an agency of the Executive Branch, that creates federal rights." *Thurman*, 982 F.3d at 957. Moreover, Plaintiffs fail to explain how the FWA confers a right enforceable through § 1983. See [Doc. 47; Doc. 48]; see also *Curtis I*, 2023 WL 8828753, at *6 (dismissing claim relying on the FWA).

The Fourteenth Amendment. Claims One and Six also mention the Fourteenth Amendment, [Doc. 1 at ¶¶ 321, 375], but neither claim is expressly a Fourteenth Amendment claim, [id. at 82, 92]. Moreover, Claim One does not identify any Fourteenth Amendment right at stake, [id. at ¶¶ 320–30], and to the extent Plaintiffs allege that Claim Six vindicates a violation of their due process rights, *see* [*id.* at ¶¶ 382, 387], they have elsewhere asserted a Fourteenth Amendment due process claim, [*id.* at ¶¶ 336–43].[13] The Court can thus discern no viable due process claim in Claims One or Six.

For all of these reasons, the Court agrees with Defendants that all of the legal sources cited in

[13] As explained below, *see infra* Section III.C., Plaintiffs fail to state a due process claim under Rule 12(b)(6),

Claims One and Six are inapplicable to this case and/or do not create an enforceable cause of action under § 1983. The Motions to Dismiss are **GRANTED** as to Claims One and Six, which are **DISMISSED without prejudice**.[14]

B. Equal Protection Claim (Claim Two)

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and "keeps governmental decision makers from treating differently persons who are in all relevant respects alike," *Soskin v. Reinertson*, 353 F.3d 1242, 1247 (10th Cir. 2004). "Different types of equal protection claims call for different forms of review. A claim that a state actor discriminated on the basis of a suspect (e.g., race), quasi-suspect (e.g., gender), or a non-suspect classification calls for strict, intermediate, or rational basis scrutiny, respectively." *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011).

Claim Two is an equal protection claim based on allegations that "Defendants intentionally only penalized individuals who exercised their federally secured right to refuse administration of a product

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[14] The UCHA Defendants seek dismissal of all of Plaintiffs' claims with prejudice, but they do not address the standard for dismissal with prejudice on Rule 12(b)(6) grounds. [Doc. 47 at 39]. "A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). The Court declines to address futility sua sponte and will instead dismiss Plaintiffs' inadequately pleaded claims without prejudice.

under the PREP Act or an EUA drug (e.g., Pfizer-BioNTech COVID-19 Vaccine), biologic, or device (e.g., masks, COVID-19 testing articles)," which Plaintiffs claim deprived them "of their Constitutional Equal Protection Rights." [Doc. 1 at ¶ 334]; *see also* [*id*. at ¶ 195 (Plaintiffs alleging that UCHA's requirement that non-vaccinated employees wear masks and submit to weekly testing violated their equal protection rights "because the policy did not require the same activities of employees who agreed" to be vaccinated)]. In other words, Plaintiffs base their claim on purported unequal treatment between vaccinated and unvaccinated UCHA employees; because this classification is neither suspect nor quasi-suspect, rational basis review applies. *See Roberts*, 2024 WL 1160895, at *5; *see also* [Doc. 48 at 20 (Plaintiffs appearing to make a rational basis equal protection argument)].[15]

[15] In their Responses, Plaintiffs appear to assert a new equal protection theory, suggesting that UCHA treated them differently than *non*-employees who, like Plaintiffs, refused to take the COVID-19 vaccine. See [Doc. 48 at 4 ("UCHA had no right to penalize non-employees who refused a COVID shot, so UCHA had no right to deny its employees that same 'equal protection' of the laws when exercising that same right."); Doc. 49 at 21 ("UCHA willfully and unlawfully chose to strip the option to refuse only from individuals they employed, volunteered, or contracted with, but not others.")]. However, this theory of the claim is not clearly asserted in Plaintiffs' equal protection claim, see [Doc. 1 at ¶¶ 331–35], and Plaintiffs do not direct the Court to allegations detailing how UCHA allegedly treated non-employees who refused the vaccine. Furthermore, Plaintiffs cannot amend their Complaint by asserting a new legal theory in a response to a motion to dismiss. *See Fuqua v. Lindsey* Mgmt. Co., 321 F. App'x 732, 734 (10th Cir. 2009) ("Normally a claim or theory that is not adequately raised in the complaint will not be considered."). Accordingly, the Court does not address this new theory.

Accordingly, Defendants' alleged actions "need only rationally further a legitimate state purpose to be valid." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984).

The CDPHE Defendants and the UCHA Defendants each contend that Plaintiffs cannot state an equal protection claim because protecting public health is a legitimate government purpose and requiring that healthcare workers be vaccinated (or requiring non-vaccinated workers to wear masks and be tested) are rational means to further that goal, thereby satisfying rational basis review. [Doc. 46 at 21; Doc. 47 at 15–17]. Plaintiffs respond that Defendants violated the Equal Protection Clause because "Defendants … treat[ed] persons accepting the administration of the federally funded COVID-19 drugs differently than those who refuse[d]." [Doc. 48 at 20]; see also [Doc. 49 at 21]. Plaintiffs then cursorily assert that "[t]here is no rational basis for [Defendants] violating executive agreements, federal law, and the federal constitution." [Doc. 48 at 20]; see also [Doc. 49 at 21–22 ("UCHA can state no 'rational basis' to violate the EUA statute and the PREP Act or its own contractual agreements when it fails to apply the law equally to all potential vaccine recipients.")].[16]

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[16] Plaintiffs disagree with the UCHA Defendants' "focus[] on cases involving 'vaccine mandates,'" implying instead that the focus should be on the fact that "UCHA agreed to treat the options to accept or refuse [the COVID-19 vaccine] equally and owed as much to Plaintiffs." [Doc. 49 at 21]. But any challenge to UCHA's alleged unequal treatment of the "options to accept or refuse" the vaccine is the same as a challenge to UCHA's vaccination requirement for employees, as Plaintiffs allege that their failure to comply with the requirement (i.e., their election to "refuse" the vaccine) led to their termination.

Plaintiffs' argument turns the Equal Protection Clause on its head. It is fundamental to equal protection analysis that "States must treat like cases alike but may treat unlike cases accordingly.'" *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (quoting *Vacco v. Quill*, 521 U.S. 793, 799 (1997)). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who *are in all relevant respects alike*." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). Plaintiffs do not allege that they are alike in all relevant respects to UCHA employees who did not "refuse" the COVID-19 vaccine (and presumably kept their jobs with UCHA). Nor could they, as the Complaint's allegations describe a material difference between the two groups: one group is comprised of individuals who complied with a condition of their employment, and the other group is comprised of individuals who, like Plaintiffs, did not.

Furthermore, Plaintiffs' cursory argument that there is no rational basis for Defendants' conduct is insufficient to survive dismissal. Courts "accord a strong presumption of validity to [government actions] that neither involve fundamental rights nor proceed along suspect lines." *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010). A court will strike down the government's action under rational basis review only "if the state's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)). "Because a classification subject to rational basis review 'is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might

support it.'" *Petrella v. Brownback*, 787 F.3d 1242, 1266 (10th Cir. 2015) (quoting *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012)).

"[S]temming the spread of COVID-19 … is not only legitimate, but is 'unquestionably a compelling interest.'" *Legaretta v. Macias*, 603 F. Supp. 3d 1050, 1067 (D.N.M. 2022) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020)). Requiring those who work in a hospital or healthcare facility to take preventative measures against the spread of COVID-19 is easily rationally related to that interest. *Id.*; *see also Andre-Rodney v. Hochul*, 569 F. Supp. 3d 128, 140 (N.D.N.Y. 2021). Indeed, several courts have concluded that governments and employers alike have a rational basis for imposing and enforcing vaccine mandates, *see, e.g., Roberts*, 2024 WL 1160895, at *5; *Legaretta*, 603 F. Supp. 3d at 1065–67; *Williams v. Brown*, 567 F. Supp. 3d 1213, 1227 (D. Or. 2021), and for requiring unvaccinated employees to take additional safety precautions, such as wearing masks or submitting to weekly COVID-19 tests, *see, e.g., Schmidt v. City of Pasadena*, No. 2:21-cv-08769-JAK-JC, 2023 WL 4291440, at *11 (C.D. Cal. Mar. 8, 2023). Plaintiffs have not negated "every conceivable basis which might support" the policies at issue in this case, *Petrella*, 787 F.3d at 1266, and have thus failed to state an equal protection claim. Accordingly, the Motions to Dismiss are **GRANTED** as to Claim Two, which is **DISMISSED without prejudice**.

C. Due Process Claim (Claim Three)

The Fourteenth Amendment Due Process Clause states that "[n]o state shall … deprive any person of life, liberty, or property, without due process of law,"

U.S. Const. amend. XIV, § 1, and provides a basis for two different claims: procedural due process claims and substantive due process claims. "Procedural due process ensures the state will not deprive a party of property without engaging fair procedures to reach a decision, while substantive due process ensures the state will not deprive a party of property for an arbitrary reason regardless of the procedures used to reach that decision." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000).

Plaintiffs' Claim Three is a Fourteenth Amendment due process claim and appears to allege violations of Plaintiffs' substantive and procedural due process rights. *See* [Doc. 1 at ¶ 339]. Both the CDPHE Defendants and the UCHA Defendants argue that Plaintiffs fail to state either type of claim under Rule 12(b)(6). [Doc. 46 at 21–23; Doc. 47 at 29–30]. However, Plaintiffs do not respond to Defendants' arguments challenging their procedural due process claim or even use the term "procedural due process" anywhere in their Responses. *See generally* [Doc. 48; Doc. 49]. Accordingly, Plaintiffs have abandoned any procedural due process claim asserted in their Complaint, *Baum*, 2022 WL 889097, at *7, and the Court focuses only on substantive due process.

"[T]he Supreme Court recognizes 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) (citing *Washington v. Glucksb*erg, 521 U.S. 702, 721–22 (1997), and *City of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). In the Tenth Circuit, courts

generally "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." *Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018) (emphasis omitted). Here, Defendants raise arguments as to both approaches, and the Court will address both standards. *See Legaretta*, 603 F. Supp. 3d at 1061 (concluding that a case similar to this one "d[id] not fit comfortably into either category," as the plaintiffs "d[id] not challenge the tortious conduct of an individual agency officer, nor … a purely legislative action" (quotations omitted)).

1. The UCHA Defendants

The UCHA Defendants argue that Plaintiffs' substantive due process claim fails under either a fundamental-rights or a shocks-the-conscience approach. [Doc. 47 at 27]. First, they contend that because no fundamental right is at stake, UCHA's vaccine policy is subject to only rational basis review, which it satisfies. [Id. at 27–29]. Then, they contend that the implementation of a workplace vaccine policy does not shock the conscience. [Id. at 29].

Fundamental-Rights Approach. The fundamental-rights approach involves a two-part test. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009). First, the Court determines whether a fundamental right is implicated. Id. "A 'fundamental right' must be either enumerated in the Bill of Rights or 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.'" *Children's Health Def., Inc.*, 93 F.4th at 78 (quoting *Glucksberg*, 521 U.S. at 720–21). If no

fundamental right is involved, rational basis review applies. *Dias*, 567 F.3d at 1182.

Plaintiffs contend that this case implicates the fundamental rights of bodily autonomy and bodily integrity, and that "[r]equiring Plaintiffs to have their bodies injected with an EUA/PREP Act drug violates" these fundamental rights. [Doc. 49 at 22]. They attempt to distinguish a requirement to take "an FDA-licensed vaccine," which they concede "may require a rational basis standard," from a requirement to be "injected with an unlicensed EUA/PREP Act drug," which they insist requires a higher level of scrutiny. [*Id.*]. Plaintiffs cite no cases in support of their argument. *See* [*id.*].

The Court is not persuaded that a fundamental right is implicated in this case. Despite Plaintiffs' framing of the issue in their Response, the Complaint does not allege that Plaintiffs were "[r]equir[ed] … to have their bodies injected with an EUA/PREP Act drug." Rather, the Complaint alleges that UCHA implemented a workplace policy that required its employees to receive the COVID-19 vaccine to continue their employment, absent a medical or religious exemption. [Doc. 1 at ¶ 194]. In other words, the right implicated here is not the right to bodily autonomy or bodily integrity, but the right to continued employment at UCHA without receiving the COVID-19 vaccine. *See Andre-Rodney*, 569 F. Supp. 3d at 139 (reviewing similar vaccine mandate and concluding that it "d[id] not force Plaintiffs to consent to vaccination," but rather "condition[ed] Plaintiffs' right to be employed at a covered entity on their vaccination against COVID-19"); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293–94 (2d Cir.) ("Plaintiffs provide no basis for concluding that the vaccination requirement here … violates a

fundamental constitutional right. Vaccination is a condition of employment in the healthcare field; the State is not forcibly vaccinating healthcare workers." (footnote omitted)), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021); *Bauer v. Summey*, 568 F. Supp. 3d 573, 592 (D.S.C. 2021) ("Plaintiffs' overly general characterization of the rights at issue as 'bodily integrity' or 'privacy' falls short of the required 'careful description' of the liberty interest. Rather, a more appropriate description is plaintiffs' interest in continued employment with defendants while unvaccinated for COVID-19." (citation and footnote omitted)).

But neither the "expectation of employment," *Legaretta*, 603 F. Supp. 3d at 1063, nor "continued employment," *Mass. Corr. Officers Federated Union v. Baker*, 567 F. Supp. 3d 315, 326 (D. Mass. 2021), is a fundamental right. Therefore, rational basis review applies. Dias, 567 F.3d at 1182; see also *Legaretta*, 603 F. Supp. 3d at 1064 ("[W]hen the government acts in its role as an employer … as opposed to its 'role in governing the citizenry at large,' the Supreme Court 'has applied what was essentially a rational basis test' to constitutional claims." (quoting *Baker*, 567 F. Supp. 3d at 326)).

Plaintiffs make no argument using the rational basis standard with respect to the UCHA Defendants, see [Doc. 49 at 22], and have thus not negated "every conceivable basis which might support" UCHA's vaccination requirement, *Petrella*, 787 F.3d at 1266. They have given this Court no reason to depart from the numerous courts concluding that similar employer-mandated vaccination requirements satisfy the rational basis test. *See e.g., Legaretta*, 603 F. Supp. 3d at 1065; Bauer, 568 F. Supp. 3d at 595. As explained above,

stemming the spread of COVID-19 is a compelling government interest, and requiring hospital employees to take measures against the spread is rationally related to that interest. Plaintiffs have not stated a plausible substantive due process claim using a fundamental-rights approach.[17]

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[17] On July 6, 2024, Plaintiffs filed a Corrected Notice of Supplemental Authority directing the Court to the Ninth Circuit's recent decision in *Health Freedom Defense Fund, Inc. v. Carvalho*, 104 F.4th 715 (9th Cir. 2024). See [Doc. 57]. Plaintiffs assert that Carvalho "reiterated the importance of accepting as true the Plaintiffs' allegations on a Motion to Dismiss," "held that *Jacobson v. Massachusetts*," 197 U.S. 11 (1905), "does not apply to the facts of the current case," and "relates to the COVID-19 drugs at issue herein." [*Id.* at 1]. As Plaintiffs acknowledge, see [*id.*], the Court is not bound by this case. Moreover, the Court has reviewed the *Carvalho* decision and concludes that it does not change the analysis here. In *Carvalho*, the district court had relied on *Jacobson*, which upheld the constitutionality of a smallpox vaccine mandate, see *Jacobson*, 197 U.S. at 25–31, to rule that a school district's vaccine mandate passed rational basis scrutiny, *see Carvalho*, 104 F.4th at 718, 724–25. The Ninth Circuit disagreed with this approach, concluding that "*Jacobson* d[id] not directly control based on [the] [p]laintiffs' allegations" in their complaint, which included allegations that the COVID-19 vaccine "does not effectively prevent spread, but only mitigates symptoms for the recipient." *Id.* at 724–25. And because, in the Ninth Circuit's view, *Jacobson* involved the "government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others," *id.* at 725 (quotation omitted), and because the plaintiffs had alleged the COVID-19 vaccine did not prevent the spread of the disease, the Ninth Circuit concluded that *Jacobson* was meaningfully distinguishable and the district court erred in relying on it, *id.* (vacating and remanding because "the district court wrongly applied *Jacobson* to the substantive due process claim"). The Ninth Circuit itself did not conduct a rational basis analysis or identify any fundamental right at stake. See *id. Carvalho* does not change this Court's analysis, which does not rely on *Jacobson*, because even taking

Shocks-the-Conscience Approach. Alternatively, Plaintiffs contend that the UCHA Defendants' conduct shocks the conscience because "there are millions of Americans who are shocked when they learn that respected medical institutions, whose first duty is to do no harm, penalized their own employees who refused to be injected with an EUA/PREP Act investigational drug." [Doc. 49 at 22]. Plaintiffs argue that "despite … having given their lives for decades to UCHA to help them [sic] to be successful, UCHA stripped from them their state-licensed careers, health insurance, educational opportunities, dreams, goals, and financial peace and with a callous and reckless disregard for Plaintiffs' rights," which Plaintiffs assert "shocks the conscience for sure."[18] [*Id*. at 22–23].

"Conduct that shocks the judicial conscience must be egregious and outrageous." *Est. of Carrigan v. Park Cnty. Sheriff's Off.*, 381 F. Supp. 3d 1316, 1326 (D. Colo. 2019). To meet this high threshold, a plaintiff must show that "a government actor arbitrarily abused his authority or employed it as an instrument of oppression," *Hernandez v. Ridley*, 734 F.3d 1254, 1261 (10th Cir. 2013), and the challenged

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Plaintiffs' allegations as true, they have not alleged that they were forcibly vaccinated or forcibly given medical treatment, have not identified an articulable fundamental right at issue in this case, and have not directed the Court to any legal authority that supports their position. Nor does *Carvalho* save Plaintiffs' claims using a rational basis approach, as Plaintiffs have made no argument that the UCHA Defendants' conduct is unconstitutional under this standard.

[18] The Court notes that the Complaint contains no factual allegations detailing how Plaintiffs "[gave] their lives for decades to UCHA" or clearly detailing how UCHA "stripped" Plaintiffs' "educational opportunities, dreams, goals, and financial peace." *See generally* [Doc. 1].

conduct must meet a "degree of outrageousness and magnitude of potential or actual harm [that is] truly conscience shocking," *Schwartz v. Booker*, 702 F.3d 573, 586 (10th Cir. 2012). Courts have routinely found that vaccine mandates do not shock the conscience and do not run afoul of the Constitution. *See, e.g., Roberts*, 2024 WL 1160895, at *5; *Legaretta*, 603 F. Supp. 3d at 1062; *Kane v. de Blasio*, 623 F. Supp. 3d 339, 360 (S.D.N.Y. 2022); *Bauer*, 568 F. Supp. 3d at 591. The Court agrees with these judicial decisions. Plaintiffs allege that their employer instituted a requirement that its employees be vaccinated against COVID-19 or receive a valid exemption, and that employees who were exempted would be required to wear a mask and be tested for COVID-19 weekly. *See, e.g.,* [Doc. 1 at ¶ 194]. Even in light of Plaintiffs' allegations that the COVID-19 vaccine was "investigational," [*id.* at ¶ 197], this conduct is not "egregious and outrageous."

The UCHA Motion to Dismiss is, therefore, **GRANTED** with respect to Claim Three against the UCHA Defendants, and the claim is **DISMISSED without prejudice**.

2. The CDPHE Defendants

Next, the CDPHE Defendants argue that Plaintiffs fail to state a substantive due process claim because (1) there is no fundamental right implicated in this case; and (2) requiring healthcare workers to receive vaccines does not shock the conscience. [Doc. 46 at 22]. In their Response, Plaintiffs do not identify any fundamental right at issue or argue that that right has been infringed. See generally [Doc. 48]. Nor do they argue that the CDPHE Defendants' conduct shocks the conscience. See [id.]. Instead, they argue

that CDPHE's Part 12 Rules "deprived all persons working in the healthcare industry of their right to use their property (state-issued medical license), which is a violation of their substantive due process rights" and that the Part 12 Rules "deprived persons of their due process rights to seek judicial relief should they sustain injury from using the listed countermeasure as a condition to continue employment under the state's licensing requirements and for a political subdivision of the State." [*Id*. at 21].

For a number of reasons, Plaintiffs' arguments are unconvincing. First, they fail to directly address the CDPHE Defendants' assertions or make any arguments under the applicable legal standards (under either a fundamental-rights or shocks-the-conscience standard), which is alone a sufficient basis to grant the CDPHE Motion on this point. Even setting this aside, Plaintiffs cite no authority suggesting that the "right to use their property" is a fundamental right, *see* [Doc. 48 at 21], and "[c]ourts have routinely held that property interests and rights do not rise to the level of fundamental rights requiring a strict scrutiny analysis," *Swepi, LP v. Mora Cnty.*, 81 F. Supp. 3d 1075, 1174 (D.N.M. 2015).[19] Moreover, to the extent Plaintiffs argue that the Part 12 Rules "deprived persons of their due process rights to seek judicial relief should they sustain injury" from receiving the COVID-19

[19] Neither Plaintiffs nor the CDPHE Defendants make an argument about whether the CDPHE Defendants' conduct satisfies rational basis review, see [Doc. 46; Doc. 48], an so the Court need not address this issue as to the CDPHE Defendants. However, the Court's above rational-basis analysis with respect to the UCHA Defendants would apply equally to Plaintiffs' claim against the CDPHE Defendants.

vaccine[20] "as a condition to continue employment," [Doc. 48 at 21], from the Court's review, the Complaint does not actually allege that any Plaintiffs were injured by the COVID-19 vaccine (or even received the vaccine) or that they were deprived of their right to "judicial relief" to address a vaccine-related injury, *see generally* [Doc. 1], and Plaintiffs direct the Court to no such allegations, *cf. Milton v. Daniels*, 521 F. App'x 664, 668 (10th Cir. 2013) ("The district court [is] not required to comb through [a party's] filings to find legal nuggets to support [their] position.").

And finally, Plaintiffs do not argue that Defendants' conduct shocks the judicial conscience, see [Doc. 48], and for the reasons set forth above, the Court finds that Plaintiffs have failed to allege conscience-shocking conduct. For these reasons, the CDPHE Defendants' Motion to Dismiss is **GRANTED** with respect to Plaintiffs' due process claim. Claim Three is **DISMISSED without prejudice** as against the CDPHE Defendants.

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[20] Plaintiffs verbatim state that "the Rule deprived persons of their due process rights to seek judicial relief should they sustain injury from using the listed countermeasure as a condition to continue employment under the state's licensing requirements and for a political subdivision of the State." [Doc. 48 at 21]. Plaintiffs do not clearly explain what "countermeasure" they refer to here, but elsewhere in their brief they assert that "the only drugs available to Plaintiffs for compliance with the Rule were federally owned, FDA-classified as investigational, under EUA authorization, and countermeasures under the PREP Act," [id. at 3], so the Court assumes the "countermeasure" referenced here means the COVID-19 vaccine.

D. Spending Clause Claim (Claim Four)

Claim Four alleges a "Deprivation of Rights Under the Spending Clause." [Doc. 1 at 87]. Plaintiffs assert, in conjunction with their Spending Clause claim, that "[t]he laws cited in the CDC COVID-19 Vaccination Program Provider Agreement, 45 CFR § 46.122, 10 U.S.C. § 980, and the Fourteenth Amendment clearly and unambiguously create rights enforceable pursuant to 42 U.S.C. § 1983." [*Id.* at ¶ 345].

The Spending Clause authorizes Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quotation omitted). However, "the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Gonzaga*, 536 U.S. at 280 (quotation omitted). Unless Congress speaks "with a clear voice" and "manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Id.* at 280 (quotation omitted). Thus, a case in which a private cause of action exists is an "atypical case." *Talevski*, 599 U.S. at 183.

The UCHA Defendants argue that Plaintiffs cannot bring a viable § 1983 claim based on the Spending Clause because four of the five sources Plaintiffs cite (the EUA statute, the Fourteenth Amendment, the Provider Agreement, and 45 C.F.R. § 46.122) are not laws passed pursuant to Congress's Spending power, and the fifth source—10 U.S.C. § 980—cannot be enforced through § 1983. [Doc. 47 at 31–32]. The CDPHE Defendants raise the same argument. [Doc. 46 at 19–20].

Plaintiffs do not appear to respond to Defendants' arguments about Congress's Spending Clause power. See [Doc. 48 at 20; Doc. 49 at 25].[21] In their Response to the CDPHE Motion to Dismiss, Plaintiffs state that "[w]hile the Spending Clause itself does not create a cause of action, the conferred rights in any spending legislation do." [Doc. 48 at 20]. They argue that "[t]he option to accept or refuse under the EUA statute applies to any person (CDPHE and UCHA) engaged in the CDC Vaccination Program because the federal government fully funds that program," such that the EUA statute

[21] Plaintiffs do argue that "UCHA's claim that the Spending Clause involving 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III) is not enforceable fails [sic]" for "reasons discussed" elsewhere in their brief "regarding *Talevski*," see [Doc. 49 at 25], but this cursory argument fails to address the UCHA Defendants' specific arguments about the Spending Clause power. They also make arguments about whether 10 U.S.C. § 980 "applies" in this case, see [Doc. 49 at 20–21], but this argument appears to be directed to the UCHA Defendants' argument that "Plaintiffs identify no other source of enforceable rights" in connection with their "implied consent" claim, not the UCHA Defendants' arguments about Claim Four, see [Doc. 47 at 24–25]. Plaintiffs' failure to clearly set out which affirmative arguments their responsive arguments address has hindered the Court's ability to efficiently rule on the Motions to Dismiss.

"is spending legislation, so deprivation of the conferred rights therein provides the basis for a § 1983 action." [*Id.*]. This limited argument is not supported by any legal authority. *See* [*id.*].

The Court has already concluded above that the EUA statute does not confer individual rights enforceable through § 1983, and Plaintiffs' present argument, which fails to direct the Court to any provision in the statute that clearly and unambiguously creates individually enforceable rights under § 1983, see [*id.*], does not change the Court's analysis. Furthermore, Plaintiffs do not respond to Defendants' arguments that the EUA statute was enacted pursuant to Congress's Commerce Clause power, not its Spending Clause power. *See* [Doc. 46 at 8; Doc. 47 at 30 n.15]; *see also* 21 U.S.C. § 360bbb-3(a)(1). Accordingly, Plaintiffs fail to state a viable § 1983 claim based on a violation of rights under the Spending Clause, and Claim Four is **DISMISSED without prejudice**. *See Roberts*, 2024 WL 1160895, at *6 (dismissing Spending Clause claim where "Plaintiffs ha[d] not identified applicable spending legislation giving rise to enforceable rights").

E. Unconstitutional Conditions Doctrine Claim (Claim Five)

Claim Five is based on the "Unconstitutional Conditions Doctrine." [Doc. 1 at 90]. "The unconstitutional conditions doctrine forbids the government from denying or terminating a benefit because the beneficiary has engaged in constitutionally protected activity" and applies only "if the government places a condition on the exercise of a constitutionally protected right." *Petrella*, 787

F.3d at 1265. A "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013).

The Complaint alleges that the CDPHE's Part 12 Rules "established a condition requiring Plaintiffs to surrender their equal protection and due process rights before they could engage in the Constitutionally protected activity of selling their labor to Colorado healthcare facilities," [Doc. 1 at ¶ 371], and that the UCHA Defendants "enacted policies requiring Plaintiffs to surrender their Fourteenth Amendment rights (*e.g.,* required to utilize EUA masks and tests) [sic] as a condition to submit an exemption request" and precluded Plaintiffs from "continu[ing] employment unless they voluntarily surrendered their Constitutional protections," [*id*. at ¶ 372].

The CDPHE Defendants argue that this claim should be dismissed because Plaintiffs have "failed to allege a required 'predicate' of an unconstitutional conditions claim," given that states may constitutionally impose a vaccination requirement. [Doc. 46 at 23–24 (quoting *Andre-Rodney v. Hochul*, 618 F. Supp. 3d 72, 85 (N.D.N.Y. 2022))]. Similarly, the UCHA Defendants contend that Plaintiffs' claim fails for failure to identify a constitutional right that the UCHA Defendants burdened. [Doc. 47 at 31]. Plaintiffs respond to these two arguments in identical fashion, arguing that when Defendants "demanded that Plaintiffs inject an EUA/PREP Act drug into their bodies as a condition of employment in a profession licensed by the State, i.e., healthcare, they conditioned the enjoyment of that State

privilege upon the forfeiture of the Constitutional rights of due process, equal protection, and bodily autonomy." [Doc. 48 at 21; Doc. 49 at 25].

The Court agrees with Defendants that Plaintiffs fail to state an unconstitutional conditions claim. The Court has already concluded that Plaintiffs cannot state an equal protection or due process claim, so they have not alleged a "predicate" for their unconstitutional conditions claim, i.e., "that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 570 U.S. at 612. Accordingly, their unconstitutional conditions claim must be dismissed, too. *See Andre-Rodney*, 618 F. Supp. 3d at 84–85 (dismissing unconstitutional conditions claim where the plaintiffs "ha[d] not alleged that their employment [was] conditioned on their 'giving up' a right protected by substantive due process" and "ha[d] not plausibly alleged that the state could not directly impose a vaccination requirement as part of the state's police power"). The Motions to Dismiss are therefore **GRANTED** with respect to Claim Five, and Claim Five is **DISMISSED without prejudice**.

F. Breach of Contract Claim (Claim Seven)

Next, Defendants seek dismissal of Plaintiffs' breach of contract claim under Rule 12(b)(6). The CDPHE Defendants argue that (1) the Complaint's allegations fail to establish that the CDPHE Defendants were parties to the Provider Agreement and (2) Plaintiffs fail to allege adequate facts showing that they were intended third-party beneficiaries to the Provider Agreement. [Doc. 46 at 24–25]. The UCHA Defendants also argue that

Plaintiffs were not intended third-party beneficiaries to the Provider Agreement. [Doc. 47 at 34–35].

"Colorado law recognizes that a person not a party to an express contract may bring an action on the contract if the parties to the agreement intended to benefit the non-party, provided that the benefit claimed is a direct and not merely incidental benefit of the contract." *Baker v. Wood, Ris & Hames, Pro. Corp.*, 364 P.3d 872, 881 (Colo. 2016). "While the intent to benefit the non-party need not be expressly recited in the contract, the intent must be apparent from the terms of the agreement, the surrounding circumstances, or both." *Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co.*, 874 P.2d 1049, 1056 (Colo. 1994).

Plaintiffs do not respond to the third-party beneficiary argument at all in their Response to the UCHA Motion to Dismiss, see generally [Doc. 49], thereby conceding dismissal of the claim against the UCHA Defendants or abandoning the claim, Baum, 2022 WL 889097, at *7. In responding to the CDPHE Motion to Dismiss, Plaintiffs do not direct the Court to any allegations in the Complaint, or any provisions from the properly considered Provider Agreement, establishing that they are intended third-party beneficiaries to the Provider Agreement. *See generally* [Doc. 48]. Instead, they state only that the

> Provider Agreement … violated Plaintiffs' third-party beneficiary rights, such as the right to be informed of the option to accept or refuse (which CDPHE failed to do), the right to consider that participation without fearing or being subjected to "sanctions," "coercion," or "undue influence,["] and to consider

> participation by obtaining medical counseling from participating providers without incurring a fee.

[*Id*. at 22]. However, this conclusory list of Plaintiffs' purported third-party rights is insufficient to establish that Plaintiffs were actually intended third-party beneficiaries of the Provider Agreement. *See Roberts v. Shriners Hosps. for Colo.*, No. 2:23-cv-00295-TOR, ECF No. 42 at 24 (E.D. Wash Feb. 8, 2024) (dismissing similar claim for failure to allege that the plaintiffs were third-party beneficiaries).

While this alone is sufficient to dismiss Plaintiffs' breach of contract claim against the CDPHE Defendants, the Court also briefly touches on the CDPHE Defendants' argument that they are not parties to the Provider Agreement. Plaintiffs contend that the CDPHE Defendants are parties to the Provider Agreement because "CDPHE is the Department in Colorado that administers the State's [immunization information system] and is the Department responsible for fulfilling the State's requirements under the Provider Agreement." [Doc. 48 at 22]. However, Plaintiffs fail to direct the Court to any citations in the Complaint supporting these assertions, and Plaintiffs cannot amend their pleading by raising new factual allegations in their Response to the Motion to Dismiss. *Sudduth v. Citimortgage, Inc.*, 79 F. Supp. 3d 1193, 1198 n.2 (D. Colo. 2015). And even assuming that CDPHE is the department responsible for fulfilling Colorado's obligations under the Provider Agreement, Plaintiffs fail to explain how the CDPHE Defendants individually can be deemed parties to the Provider Agreement based on this fact. *See* [Doc. 48 at 22].

These deficiencies provide an additional basis for dismissal of this claim.

For the reasons explained above, the UCHA Motion to Dismiss and the CDPHE Motion to Dismiss are **GRANTED** with respect to Plaintiffs' breach of contract claim. Claim Seven is **DISMISSED without prejudice**.

G. Implied Cause of Action (Claim Ten)

Claim Ten asserts an "Implied Right of Action" under the FDCA, 21 U.S.C. §360bbb-3. [Doc. 1 at 98]. The CDPHE Defendants contend that Claim Ten should be dismissed because "numerous courts have held in the context of challenging COVID-19 vaccine mandates" that "there is no such implied right of action" under the FDCA (or EUA statute). [Doc. 46 at 27 (citing *Johnson v. Tyson Foods, Inc.,* 607 F. Supp. 3d 790, 806–07 (W.D. Tenn. 2022), and *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1131 (M.D. Fla. 2021))]. The UCHA Defendants similarly argue that there is no private cause of action available under this statute. [Doc. 47 at 32]; *see also* [*id*. at 20–22].

Plaintiffs' response to these arguments is difficult to decipher. They do argue that "Congress created a *right* for them under 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)," [Doc. 48 at 19 (emphasis added)]; see also [Doc. 49 at 12 (arguing that "the EUA statute" creates "a *right* enforceable under § 1983" (emphasis added))], but it is unclear to which of Defendants' arguments this contention responds, as Plaintiffs elsewhere distinguish between a statute creating an enforceable *right* and a statute creating a *cause of action*, *see* [Doc. 48 at 18–19; Doc. 49 at 13]. And at no point do Plaintiffs directly reference the "implied cause of action" identified in the Complaint

or argue that this section of the FDCA creates a standalone cause of action. *See generally* [Doc. 48; Doc. 49].

In any event, the Court agrees that Plaintiffs have not met their burden to show that there is an implied private right of action available under this statute. In a similar case, the Tenth Circuit rejected the argument that private parties may bring enforcement suits under the FDCA. *Bird v. Martinez-Ellis*, No. 22-8012, 2022 WL 17973581, at *5 (10th Cir. Dec. 28, 2022); *see also* 21 U.S.C. § 337(a) ("Except [certain enforcement actions that may be brought by a State in its own name], all … proceedings for the enforcement, or to restrain violations, of [the FDCA] shall be by and in the name of the United States."). A number of other district courts have similarly held that this statute provides no private right of action. *Curtis II*, 2024 WL 248719, at *7; *Navy Seal 1*, 574 F. Supp. 3d at 1130; D*oe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270, 292 (E.D.N.Y. 2021); *Curtis I*, 2023 WL 8828753, at *7. Because Plaintiffs have failed to demonstrate that a private right of action exists under the statute, the Motions to Dismiss are **GRANTED** as to Claim Ten, which is **DISMISSED with prejudice**. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) The CDPHE Defendants' Motion to Dismiss [Doc. 46] is **GRANTED**;
(2) The UCHA Defendants' Motion to Dismiss [Doc. 47] is **GRANTED**;
(3) Claims One, Two, Three, Four, Five, Six, and Seven are **DISMISSED without prejudice**;
(4) Claims Eight, Nine, and Ten, to the extent they are asserted against the CDPHE Defendants in their official capacities, are **DISMISSED without prejudice**;
(5) Claims Eight, Nine, and Ten, to the extent they are asserted against the UCHA Defendants and the CDPHE Defendants in their individual capacities, are **DISMISSED with prejudice**;
(6) Defendants are entitled to their costs under Rule 54 and Local Rule 54.1; and
(7) The Clerk of Court is directed to close this case.[22]

DATED: July 12, 2024

BY THE COURT:
s/Nina Y. Wang
Nina Y. Wang
United States District Judge

[22] "Absent a request to amend, a district court may dismiss the action rather than sua sponte granting leave to amend." Young *v. Colo. Dep't of Corr.*, 94 F.4th 1242, 1256 (10th Cir. 2024). Because Plaintiffs have not formally requested leave to amend their Complaint, the Court declines to sua sponte grant leave to amend.