

APPENDIX `

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APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 24-1869

D.C. No. 3:23-cv-05741-RJB

OPINION

AILA CURTIS; CIERA AGEE; ALISON ARCHER; SHANNON
LEE ADAMS; BECKY BARCENAS; HANNAH BERNHARDT;
KATHY BORDEAUX; CHRISTINE AMBER BRUCE; SUSAN
BUCHANAN; KIRSTEN CLARKE; DIANE CLEMANS; JEFF
COFFEY; DEREK COINER; SHEILA CRAIG; RAE LY
CROCKER; LISA DALUZ; CHRISTINA DAWSON;
MARGARITA DEMCHENKO; MONICA DICKINSON;
HAYLEY DIXON; JASON DONG; SHANTA GERVICKAS;
EDUARD GONCHARUK; AMY HASEROT; BETHEN
HAYDEN; RHONDA HOLMES; MIKAYLA HOLSINGER
SUMIKO KUBA; NADEZHDA LITVINENKO; LILIYA
LOPATIN; MISTY LYONS; SHEILA LYONS; IRINA
MAKSIMENKO; LYUBOV MELNYCHUK; ASHLEY
MENDOZA; MONICA MILLER; CHERYL MITCHELL;
DAMARIS MOCAN; KATHRYN MORGAN; NICK MORZHOV;
DWAIN NASH; LYSANDER NERIDA; KATHRYN ORTEGA;
YVONNE QUASHIE; LESLIE QUINTANA; EMMA RANSON;
SHANNON RINGNALDA; MALLORY SCHLANG; MELISSA
SMITHDEAL; LORI SOUDERS; BROOKE TANNER; TRACIE
THOMAS; DENA THORP; JENNIFER TORRES; LYUBOV

TSHUPRIN; OLGA TSYTSYNA; ROXANA VOLYNETS;
HANNAH WAGER; VERA YADLOVSKIY; ALLA KUTSA
ZABOLOTSKA; DINA ZABOLOTSKA; NELYA ZABOLOTSKA;
KRISTINE ZAMUDIO; DANIEL BRICKERT; AMY JAMES;
BRITNEY BROWN; NELLI ANTONOV; DAVID BENNETT;
AMBER TAYLOR; TAMARA KOPP; WHITNEY KONRADY;
JOSEY KOLBO; LINDSEY LAMB; KATERINA EROKHINA;
IGOR SHAPOVAL; WHITNEY ONOFREY; AMY TALLBUT;
VIOLETTA ROBERTS; LINDA VEATCH; ANGELA RIPP;
KRISTIN ELLISON; STACI GRAY,

Plaintiffs—Appellants,

v.

JAY ROBERT INSLEE; PEACEHEALTH, INC.; LIZ DUNNE;
DOUG KOEKKOEK,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted July 9, 2025
Seattle, Washington

Filed October 6, 2025

Before: M. Margaret McKeown, Richard A. Paez, and
Gabriel P. Sanchez, Circuit Judges.

Opinion by Judge McKeown

SUMMARY*

Employment/COVID-19

The panel affirmed the district court’s dismissal for failure to state a claim of an action brought by former at-will employees of a nonprofit health care system (Employees) alleging various statutory, constitutional, and state law claims arising from then-Governor Jay Inslee’s August 2021 proclamation requiring healthcare workers in Washington to be vaccinated against COVID-19.

The panel first held that none of the Employees’ statutory and non-constitutional claims alleged specific and definite rights enforceable under 42 U.S.C. § 1983. The panel therefore rejected Employees’ claims based on 21 U.S.C. § 360bbb-3, 10 U.S.C. § 980, 42 U.S.C. § 247d-6, Article VII of the International Covenant on Civil and Political Rights, 45 C.F.R. Part 46, the Belmont Report, the Federal Wide Assurance Agreement, the COVID-19 Vaccination Program Provider Agreement, and Emergency Use Authorizations.

Addressing the Employees’ constitutional claims, the panel held that neither the Spending Clause nor the Supremacy Clause provided Employees with a federal right enforceable under § 1983. Employees’ claims under the Fourteenth Amendment Due Process Clause failed. The substantive due process claim alleging the right to refuse unwanted investigational drugs was foreclosed by *Jacobson v.*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Massachusetts, 197 U.S. 11 (1905), and *Health Freedom Def. Fund, Inc. v. Carvalho*, 148 F.4th 1020 (9th Cir. 2025) (en banc). The procedural due process claim failed because, among other things, the Employees’ at-will employment was not a constitutionally protected property interest. Employees’ Equal Protection Clause claim, asserting a claim of discrimination against a non-suspect class, failed because the mandate here survived rational-basis review.

Because amendment of the federal claims would be futile, the panel held that the district court did not abuse its discretion in denying leave to amend the complaint. The panel affirmed the dismissal of the state law claims alleging breach of contract, employment tort, outrage, and invasion of privacy against the Governor. As for the state-law claims against PeaceHealth, the panel upheld the district court’s discretion to decline to exercise supplemental jurisdiction.

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

We have considered a spate of appeals related to vaccination orders spawned by COVID-19. This case arises from then-Governor Jay Inslee’s August 2021 proclamation requiring healthcare workers in Washington to be vaccinated against COVID-19. Aila Curtis and more than 80 other former at-will employees of the nonprofit health care system PeaceHealth (“Employees”) were terminated after they refused to comply with PeaceHealth’s COVID-19 vaccination policy. Employees’ claims against PeaceHealth and Governor Inslee range from statutory and constitutional claims under 42 U.S.C. § 1983 to state-law contract and tort claims. The district court dismissed all claims with prejudice. Although Employees throw the kitchen sink at the Proclamation, none of their wide-ranging sources of purported rights supports their federal claims. As for the state-law claims, the district court correctly dismissed with prejudice the claims against the Governor and left the merits of the claims against PeaceHealth for state courts to adjudicate. The district court acted within its discretion in denying leave to amend.

Because we affirm on the basis of Employees’ failure to state a claim, we do not decide the questions of state action and qualified immunity addressed by the district court. We also note that our analysis holds even if the drug in question was deemed “investigational,” as Employees assert; any claimed error by the district court in its view of the facts pertaining to this issue is harmless. We affirm.

Background

On August 20, 2021, then-Governor of Washington State Jay Inslee (“the Governor”) issued Proclamation 21-14 (“the Proclamation”), which, absent an exemption, required healthcare workers to be vaccinated against COVID-19 before October 18, 2021. In accord with this directive, on August 30, PeaceHealth adopted a vaccination mandate for its employees, with a deadline of October 15. Because Employees refused to be vaccinated, PeaceHealth terminated their employment.

Employees sued PeaceHealth and its executives (collectively, “PeaceHealth”), as well as the Governor, seeking damages. Employees allege that, leading up to the vaccination deadline, the sole available vaccine to satisfy the vaccination mandate was an “investigational drug,” authorized only for emergency use.¹ Despite the fact that the Pfizer vaccine authorized for emergency use and the Pfizer vaccine fully approved by the Food and Drug Administration undisputedly had the same “medical formulation,”

¹ The Food and Drug Administration (“FDA”) issued an Emergency Use Authorization (“EUA”) for Pfizer’s COVID-19 vaccine in January 2021. *Authorizations of Emergency Use of Two Biological Products During the COVID–19 Pandemic; Availability*, 86 Fed. Reg. 5200 (January 19, 2021). By August 2021, Pfizer’s EUA-authorized COVID-19 vaccines had been manufactured and made available for many months.

As the district court noted, on August 23, 2021, the FDA approved Pfizer’s COVID-19 vaccine, marketed as COMIRNATY. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 283 (2d Cir. 2021) (“[T]he FDA gave full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older.”). We take as true Employees’ factual assertion that Pfizer’s COVID-19 vaccines manufactured under FDA approval were not available before the relevant vaccination deadlines.

Employees claim that their rights were violated when they were penalized for refusing a vaccine that was only EUA-authorized and not yet FDA-approved. Employees also claim they were not adequately informed of their option to refuse administration of the vaccine. Employees contend that these rights are enforceable through a variety of sources—ranging from multiple federal statutes to the Fourteenth Amendment to the terms of the agreements under which COVID-19 vaccines (or “investigational drugs”) were administered.

The district court first dismissed all of the claims against the Governor, then dismissed the federal claims against PeaceHealth, and finally denied Employees’ motions for leave to amend and reconsideration and declined to exercise supplemental jurisdiction over their state-law claims against PeaceHealth.

Analysis

I. Statutory and Other Non-Constitutional Claims

Section 1983 authorizes private parties to sue for violations of their constitutional rights and certain federal statutory rights. 42 U.S.C. § 1983. Because a statutory right enforceable under Section 1983 is not created “as a matter of course,” *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023), Employees must “prove that a 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).² Provisions that place a “merely precatory obligation” on the government do not create enforceable rights. *Ball v. Rodgers*, 492 F.3d 1094, 1103 (9th Cir. 2007).

Although the existence of an “unambiguously conferred,” “sufficiently specific and definite” statutory right establishes a presumption of enforceability under Section 1983, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283 (2002) (citation omitted), that presumption can be overcome. A Section 1983 claim will not be available where there is “incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted.” *Talevski*, 599 U.S. at 187.

Employees’ non-constitutional claims under Section 1983—styled as “subjected to investigational drug use,” “unconstitutional conditions doctrine,” equal protection, due process, and “spending clause doctrine”—are based on an eclectic collection of statutes, an international treaty, a regulation, two agreements, a report, and constitutional doctrines and provisions. After considering each in turn, our conclusion is unequivocal: None of these claims alleges a specific and definite right enforceable by Employees under Section 1983.

² “Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. ... Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 284 (2002).

A. 21 U.S.C. § 360bbb-3 – “EUA Statute”

The statutory provision referred to by Employees as “the EUA Statute” or 21 U.S.C. § 360bbb-3, a section of the Food, Drug, and Cosmetic Act (“FDCA”), empowers the FDA to authorize the use of a drug in certain circumstances. Under this statute, the Secretary of Health and Human Services is obliged to design “[a]ppropriate conditions ... 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(e)(1)(A)(ii). Employees argue that Defendants did not adequately inform them of their option to refuse the COVID-19 vaccine, thereby violating the statute.

Even assuming this language applies to Defendants and their conduct, Congress has limited the enforcement of the FDCA to public actions. *Id.* § 337(a) (requiring that enforcement be brought “by and in the name of the United States”). Contrary to Employees’ wishes, we cannot “judicially creat[e] an implied private right of action.” Instead, our role is to interpret Congress’s intent in creating a private right. “In the absence of clear evidence of congressional intent, we may not usurp the legislative power by unilaterally creating a cause of action.” *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230–31 (9th Cir. 2008). By providing only for public enforcement, Congress has made its intent to “shut the door to private enforcement” evident. *Gonzaga Univ.*, 536 U.S. at 284 n.4. Employees have not provided evidence of any contrary Congressional intent or even a colorable interpretation of the statute that would enable their

suit. We conclude that Section 360bbb-3 does not create a private right that is enforceable under Section 1983.

B. 10 U.S.C. § 980 – “Funds Appropriated for Human Subjects”

This statute, 10 U.S.C. § 980, provides that “[f]unds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject.” Spending-power statutes, like this one, are “especially unlikely” to confer an enforceable right. *Medina*, 145 S. Ct. at 2230. This statute contains no language “phrased in ... explicit rights-creating terms.” *Gonzaga*, 536 U.S. at 284. Nor does it “manifest[] an ‘unambiguous’ intent to confer individual rights” and so is not enforceable under Section 1983. *Id.* at 280 (citation omitted).

C. 42 U.S.C. § 247d-6 – “Public Readiness and Emergency Preparedness Act”

The Public Readiness and Emergency Preparedness Act (“PREP Act”), 42 U.S.C. § 247d-6, requires the Secretary of Health and Human Services to “ensure that ... potential participants [in the administration or use of a covered countermeasure] are educated with respect to ... the voluntary nature of the program.” *Id.* § 247d-6e(c). Employees extrapolate from this statute a “right” to be so educated and thus hang their hat on this statute as a basis for their Section 1983 claims. The PREP Act, however, lacks the requisite “rights-creating language” and “individual[] focus” to create

rights enforceable under Section 1983. *Gonzaga*, 536 U.S. at 290. Further, the statute, at most, imposes an educational obligation on a federal agency, not Defendants. Plaintiffs’ PREP Act claim therefore fails.

D. Article VII of the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“ICCPR”) is a treaty that protects certain human rights. Some treaties—those that are either self-executing or legislatively implemented—can confer enforceable rights under Section 1983. *See, e.g., Olympic Airways v. Husain*, 540 U.S. 644, 646 (2004) (upholding the imposition of liability under Article 17 of the Warsaw Convention); *Missouri v. Holland*, 252 U.S. 416, 431 (1920) (discussing the Migratory Bird Treaty Act of 1918 as legislative implementation that “g[a]ve effect” to a 1916 treaty between the United States and Great Britain); *see also Medellín v. Texas*, 552 U.S. 491, 568–69 (2008) (appendix listing “Supreme Court decisions considering a treaty provision to be self-executing”).

However, the ICCPR was ratified by the United States “on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). Because the ICCPR is not self-executing, and Congress has not acted to enable private lawsuits for violations of rights enshrined in that treaty, it is not “susceptible to judicial enforcement.” *Serra v. Lappin*, 600 F.3d 1191, 1196 (9th Cir. 2010) (citation omitted). Article

VII of the ICCPR thus cannot serve as the basis for a Section 1983 action. *See Medellín*, 552 U.S. at 505 (concluding that absent self-executing status or implementing statutes, such treaties’ commitments are “not domestic law”); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (holding that a treaty “do[es] not provide the basis for a private lawsuit” if it is neither self-executing nor implemented by legislation).

E. 45 C.F.R. Part 46 – “Human Subjects in Research”

Employees contend that Defendants, in administering “investigational drugs,” were “bound to comply” with 45 C.F.R. Part 46, which concerns the protection of human subjects in research. 45 C.F.R. §§ 46.101, *et seq.* But even if these regulations applied to the conduct at issue here, a regulation “may not create a right that Congress has not.” *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *see also Save Our Valley v. Sound Transit*, 335 F.3d 932, 936 (9th Cir. 2003). Employees do not argue that any authorizing statutes create any right enforceable under Section 1983.³ The regulation, standing alone, cannot support Employees’ claims.

³ If a “statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute—in conjunction with the regulation—may create a federal right as further defined by the regulation.” *Save our Valley*, 335 F.3d at 941 (quoting *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997)).

F. The Belmont Report

The Belmont Report outlines “basic ethical principles” and their application in the conduct of research on human subjects. National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, The Belmont Report (April 18, 1979), <https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/read-the-belmont-report/index.html>, accessed May 9, 2025. The Belmont Report is neither a statute nor a regulation. It does not carry the force of law. It contains no hint of a legal right or remedy enforceable in U.S. courts. Employees’ claims based on the Belmont Report also fail.

G. The Federal Wide Assurance Agreement

Like the Belmont Report, the Federal Wide Assurance agreement (“FWA”) is far afield from any potential rights-creating source. The FWA is an agreement between the U.S. Department of Health and Human Services and any institution involved in federally funded research, under which the institution commits to complying with requirements in 45 C.F.R. Part 46 and the Belmont Report. Employees argue that the FWA created a duty to obtain “legally effective informed consent” from them and “to ensure that at no time is an individual under ‘coercion,’ ‘undue influence,’ ‘unjustifiable pressures’ or a sanction to participate” in the administration of an investigational drug. Notably, the language regarding “coercion” and similar phrases comes from the Belmont Report, not the FWA. Even if the FWA created such a duty, and such a duty applied to Defendants, the FWA does not create rights

enforceable under Section 1983. *See Save Our Valley*, 335 F.3d at 941–42. Employees, who bear the burden of proving the existence of a right enforceable under Section 1983, have failed to point to any “explicit rights-creating terms” in the FWA itself. *Gonzaga*, 536 U.S. at 284. Their sole citation is to a federal government website that explains the general nature of the FWA. This basis for Employees’ Section 1983 claim too fails.

H. The COVID-19 Vaccination Program Provider Agreement

The COVID-19 Vaccination Program Provider Agreement (“Provider Agreement”) is “a form contract between the [Center for Disease Control] and medical providers that plan to administer COVID-19 vaccines.” As relevant, medical providers are to “provide a[] ... fact sheet ... to each vaccine recipient, the adult caregiver accompanying the recipient, or other legal representative.” The contract also incorporates “all applicable requirements as set forth by the U.S. Food and Drug Administration.” Employees contend that the Provider Agreement, by incorporating all federal requirements, required the medical providers to “accept[] the Appellants’ freely chosen option” to refuse the administration of the drug at issue. Once more, such an agreement cannot create enforceable rights under Section 1983. *Id.*

Nor do Employees meet the requirements for bringing suit as direct third-party beneficiaries to a government contract. Employees bear the burden of demonstrating that they individually can enforce any right created by the contract and seek damages. *See Indep. Living Ctr. of S. Cal., Inc. v. Kent*, 909 F.3d

272, 280 (9th Cir. 2018). Where, as here, third-party beneficiaries seek consequential damages for failure to perform under a government contract, that burden has two requirements: 1) that “the terms of the promise provide for such liability,” Restatement (Second) of Contracts § 313(2)(a); and 2) that the plaintiffs “fall within a class clearly intended by the parties to benefit from the contract.” *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004) (citation omitted).

Employees meet neither requirement. The Provider Agreement contemplates fines and imprisonment as penalties but does not address private enforcement. *Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (“We have been quite reluctant to infer a private right of action from a criminal prohibition alone.”). Nothing in the Provider Agreement even hints at the option for a damages claim. As for the second requirement, if there are any direct beneficiaries to the Provider Agreement, those would be “vaccine recipient[s].” As the district court pointed out, Employees are not vaccine recipients but rather vaccine refusers. Once again, Employees have not demonstrated that they have a right to sue under this type of agreement.

I. Emergency Use Authorizations

Emergency use authorizations (“EUAs”) are letters from the Chief Scientist of the FDA to drug manufacturers. These letters contain conditions of authorization, including the requirement of distribution of “authorized labeling” to “vaccination providers, recipients, and caregivers.” Yet again,

these letters do not confer rights enforceable under Section 1983. Nor are the Employees direct beneficiaries of these letters such that they could possibly sue in contract—they are neither the senders nor the recipients of these letters, and they have not alleged that they are “vaccination providers, recipients, [or] caregivers.”

II. Constitutional Provisions

A. Spending Clause

Employees style one of their Section 1983 claims under the “Spending Clause Doctrine,” presumably referring 10 U.S.C. § 980, governing the use of Department of Defense funds. While statutes enacted pursuant to the Spending Clause “can create § 1983-enforceable rights,” the operative question is whether they “actually do so.” *Talevski*, 599 U.S. at 180. That question is answered by our discussion of the statutes above. The invocation of the Spending Clause does not change the analysis.

B. Supremacy Clause

When discussing the PREP Act and the “EUA Statute,” Employees invoke “preemption” in their complaint and briefs. To the extent Employees rely on the Supremacy Clause as a basis for their Section 1983 claims, this argument fails. The Supremacy Clause itself “is not a source of any federal rights” enforceable under Section 1983. *Golden State Transit*, 493 U.S. at 107 (citation omitted). The “availability of the § 1983 remedy turns on whether the statute[s]” that Employees argue preempt state

action create enforceable rights. We already concluded they do not.

C. Fourteenth Amendment Due Process

a. Substantive Due Process

Employees’ efforts to situate their claims under the Fourteenth Amendment Due Process Clause also fail. Employees claim Defendants violated their substantive due process right “to refuse unwanted investigational drugs.” The “substantive protection of the Due Process Clause” extends to “[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental.” *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995). Because fundamental rights are highly circumscribed, courts are “reluctant to expand the concept of substantive due process.” *Regino v. Staley*, 133 F.4th 951, 962 (9th Cir. 2025) (citation omitted). Employees must therefore articulate a “careful description” of a fundamental right. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997)). If a fundamental right is implicated, we apply strict scrutiny. *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817 (9th Cir. 2006)). If a fundamental liberty interest is not implicated, we apply rational basis review, which is “highly deferential to the government, allowing any conceivable rational basis to suffice.” *Health Freedom Def. Fund, Inc. v. Carvalho*, 148 F.4th 1020, 1029 (9th Cir. 2025) (en banc) (quotation omitted).⁴

⁴ We recently rejected a similar challenge to a COVID-19 vaccine mandate. In *Carvalho*, we held that the “constitutionality of a vaccine mandate ... turns on what reasonable

Employees’ clearest articulation of the right they assert is the “right to refuse an investigational drug without penalty or pressure.” It is undisputed that the “investigational drug” is a COVID-19 vaccine and that the Governor and PeaceHealth believed compulsory vaccination for healthcare workers would protect public health. In fact, the vaccine even has the same “medical formulation” as a vaccine that was FDA-approved before the issuance of PeaceHealth’s vaccination policy and thus prior to Employees’ refusals. On this record, for the purposes of this analysis, there is no material distinction between the refusal of a vaccine and Employees’ refusal of administration of an investigational drug that is clinically identical to a vaccine.

Under longstanding Supreme Court precedent, the right to refuse a vaccine is not inviolate. Penalties for refusing vaccination are plainly permissible. The Supreme Court in *Jacobson v. Massachusetts* upheld a vaccination-refusal penalty of “commit[ment] until [a] fine was paid” and indicated the permissibility of “manifold restraints,” including quarantine. 197 U.S. 11, 21, 26 (1905); see also *Zucht v. King*, 260 U.S. 174, 175 (1922) (upholding the exclusion of a student from school for refusing vaccination). When we consider “substantive due process challenges to COVID-19 vaccine mandates,” our analysis is controlled by *Jacobson. Carvalho*, 148 F.4th at 1029.

Specifically, under *Jacobson*, penalties justified by public health concerns are legitimate. The court in *Jacobson* was crystal clear that, because “a

legislative and executive decisionmakers could have rationally concluded about whether a vaccine protects the public’s health and safety.” *Id.* at 1031.

community has the right to protect itself against an epidemic of disease which threatens the safety of its members,” a vaccine mandate that has a “real or substantial relation to the protection of public health” is not “in palpable conflict with the Constitution.” 197 U.S. at 27, 31. Thus, the Court in *Jacobson* “essentially applied rational basis review” to the smallpox vaccine mandate and found it survived such deferential review. *Carvalho*, 148 F.4th at 1030. In *Carvalho*, applying *Jacobson*, we reached the same conclusion with respect to a vaccination policy imposed for closely analogous reasons, at nearly the same time, as the vaccine mandates at issue here. In that case, applying rational basis review, we upheld the vaccine policy because it was “more than reasonable for the [state actors] to conclude that COVID-19 vaccines would protect the health and safety of [the relevant populations].” *Id.*

Jacobson and *Carvalho* foreclose Employees’ substantive due process claim regarding the purported “right to refuse an investigational drug without penalty or pressure.” The penalties imposed on Employees were amply justified by public health concerns, as explained elsewhere in this opinion. Employees have failed to plausibly allege that the state action in this case was an exercise of “arbitrary power” rather than merely “that broad discretion required for the protection of the public health.” *Zucht*, 260 U.S. at 177. We therefore conclude that Employees have not stated a substantive due process claim based on the right to refuse the COVID-19 vaccine at issue.

Employees’ substantive due process claim regarding the PREP Act’s grant of immunity also

fails. Even if there exists some constitutional limit on the Congressional power to grant immunity, Employees have pointed to no authority suggesting that the PREP Act exceeds that limit. Employees cannot allege a deprivation of their ability to bring suit, as they have had an opportunity to be heard in this action. And, of course, Employees are not entitled to damages in the absence of a meritorious claim. As for any right to “educat[ion] with respect to the voluntary nature of the program,” Employees have not shown a deprivation of that right. Materials provided to recipients and caregivers made clear that “it is [their] choice to receive or not receive any of these vaccines,” and consent forms acknowledged their right to refuse.

b. Procedural Due Process

Employees’ procedural due process claim fares no better. Employees’ at-will employment with PeaceHealth is not a constitutionally protected property interest under the Fourteenth Amendment. *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993) (holding that at-will employees “ha[ve] no property interest in the[ir] job[s]”). In the absence of a deprivation of a protected interest, Employees cannot make out a procedural due process claim. *See Reed v. Goertz*, 598 U.S. 230, 236 (2023).

Employees also allege a deprivation of a protected liberty interest in the refusal of unwanted administration of a drug and a protected property interest in the use of their medical licenses (asserted in the Second Amended Complaint). Assuming without deciding that Employees have adequately alleged a deprivation, they have not plausibly alleged

that they have not received all the process that was due.

Unlike their prior pleadings, Employees’ Second Amended Complaint claims that the Governor gave Employees no “date, time, place, or procedure to defend their right to refuse injection ... before depriving them of their liberty and property.”⁵ However, the Proclamation provided notice of the vaccination requirements and of the consequence of termination for failure to comply. The Proclamation also required that healthcare workers be given opportunities to be heard for the purpose of religious and medical exemptions and that assessments for qualification for such exemptions be “individualized.” Employees do not contend that they sought and were deprived of an exemption without due process.

Indeed, it is difficult to characterize Employees’ complaint in the usual framework of a procedural due process challenge. A typical challenge concerns a plaintiff who, subjected to a permissible standard by the state, seeks to show that “there is no [non-discriminatory] basis for their finding that he fails to meet these standards.” *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239 (1957). The ordinary purpose of the due process inquiry is to fulfill “the public interest in correct eligibility determinations,” and thus the ordinary question is one of factual “eligibility.” *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

Here, by contrast, Employees seek to challenge the standards themselves: either the breadth of the mandate or the narrowness of the exemptions. But

⁵ The Second Amended Complaint does not make any assertions on this point as to PeaceHealth.

the legitimacy of a standard—as opposed to the process by which the state determines whether the Employee meets that standard—is not a question to be answered by procedural due process. The Supreme Court long ago held that “legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates.” *Dent v. West Virginia*, 129 U.S. 114, 124 (1889). The Governor was under no obligation to hold a town hall for Employees to make known their various complaints regarding the Proclamation. The process the state created for granting exemptions “fulfilled the purpose of the requisite pretermination hearing”: to “provide a meaningful hedge against erroneous action.” *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 332 & n.13 (9th Cir. 1995) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 n.8 (1985)).

Employees’ procedural due process challenge better construed as a bid to alter the state’s policies, rather than its procedures—fails.

D. Equal Protection

Employees assert a claim of discrimination against a non-suspect class, *cf. New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592–93 (1979), namely, a class of “healthcare workers ... choosing the option to refuse.” However, the Proclamation “appl[ie]d evenhandedly” to all healthcare workers in Washington State, except for its religious and medical exemptions. *Beazer*, 440 U.S. at 587. The presence of the exemptions splits Employees’ articulated class in two: those workers who refused

and had exemptions (and so were not penalized), and those workers who refused and did not have exemptions (and so were penalized). The “exclusionary line” of vaccination status challenged by Employees simply does not reflect the reality of the policy, which allows exemptions for medical and religious reasons. *Id.* at 592. We are hard-pressed to conclude that they have “confronted [us] with the question whether the rule reflects an impermissible bias against a special class.” *Id.* at 588.

Even if the vaccine mandates classify such that the Equal Protection Clause applies, our “only inquiry” is whether Employees’ treatment is “rationally related to the State’s objective.” *Harrah Indep. Sch. Dist. v. Martin*, 440 U.S. 194, 199 (1979) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 315 (1976)); see also *Carvalho*, 148 F.4th at 1033. We conclude that the state action here easily survives rational-basis review.

Rational-basis review affords government actions a “strong presumption of validity.” *Aleman v. Glickman*, 217 F.3d 1191, 1200 (9th Cir. 2000) (citation omitted). It is satisfied where the state decisionmaker “could rationally have decided” that its action would further a legitimate state interest. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis omitted). “Under rational basis review, the state actor has no obligation to produce evidence to sustain the rationality of a ... classification; rather, the burden is on the one attacking the ... arrangement to negative every conceivable basis which might support it.” *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1031 (9th Cir. 2010) (internal quotations and citation omitted).

Early in the pandemic, we reiterated that “[s]temming the spread of COVID-19” is not merely a legitimate state interest; it is “unquestionably a compelling” one. *Slidewaters LLC v. Wash. State Dep’t of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020)). In *Biden v. Missouri*, the Supreme Court recently articulated the public-health rationale underlying vaccine mandates for healthcare workers:

COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID-19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. ... He accordingly concluded that a vaccine mandate is “necessary to promote and protect patient health and safety” in the face of the ongoing pandemic.

595 U.S. 87, 93 (2022).

That decision plainly demonstrates that a state decisionmaker “could rationally have decided” that a vaccine mandate for healthcare workers would further the legitimate state interest of stemming the spread of COVID-19. Thus, the mandate here survives rational-basis review. *Clover Leaf Creamery*, 449 U.S. at 466.

Employees provide no factually supported argument to undermine this conclusion. Employees only note that “[a]n investigational drug does not

have a legal indication to treat, cure, or prevent any known disease or virus.” But the absence of a legal indication does not negate the obvious inference that the available COVID-19 vaccine would be rationally related to the protection of public health. *See Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d at 1031. For example, the Proclamation recognized that based on “clinical trials involving tens of thousands of participants” and “the [FDA’s] rigorous scientific standards” for emergency use authorization, the available COVID-19 vaccines are “safe and effective.” *See also Carvalho*, 148 F.4th at 1033 (concluding that an August 2021 COVID-19 vaccination mandate for public school teachers easily survived rational basis review). And, in this case, Employees even concede that the vaccine available to them had the same medical formulation and effectiveness as an FDA-approved COVID-19 vaccine. If there were any state action constituting differential treatment of Employees as a class, that action had a rational basis. Employees’ equal protection challenge fails.

III. Denial of Leave to Amend

We review for abuse of discretion the district court’s denial of leave to amend. *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1155 (9th Cir. 2021). Employees appeal that denial only with respect to their federal claims. Denial of leave to amend was proper because amendment of those claims would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011). No amendment to Employees’ existing claims could change the absence of a source of law conferring on them a right enforceable under Section 1983. Employees’ one

novel claim in the Second Amended Complaint, an invocation of 21 U.S.C. § 355(a), another provision of the FDCA, fails for the same reasons as did their claim under 21 U.S.C. § 360bbb-3. Nor do Employees’ proposed amendments alter our analysis with respect to the constitutional claims. The Second Amended Complaint reiterates that the EUA-authorized and FDA-approved vaccines “can be used interchangeably to provide the vaccination series.” In light of that continued allegation, an inference in favor of Employees’ inconsistent new assertion that the EUA-authorized vaccine does not “stop infection or transmission” of COVID-19 would be unreasonable. On review of a motion to dismiss, we need draw only those reasonable inferences in the Employees’ favor, not all potential inferences. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

Employees’ attempt to distinguish *Jacobson* by comparing fatality rates from smallpox to fatality rates from COVID-19 does not change the equal protection analysis under rational-basis review, particularly given that stemming the spread of COVID-19 is a “compelling” interest. *Roman Cath. Diocese of Brooklyn*, 592 U.S. at 18. Nor does this new assertion disturb our conclusion that *Jacobson* forecloses Employees’ substantive due process claim. *See Carvalho*, 148 F.4th at 1029–31. Further, Employees’ attempt to distinguish *Jacobson* on this ground fails under *Carvalho*, which rejected attempts to distinguish *Jacobson* on similar grounds. *Id.* at 1033. Employees’ proposed amendment regarding procedural due process “fail[s] to cure the pleading deficiencies.” *Cervantes*, 656 F.3d at 1041.

Because amendment would be futile, the district court did not abuse its discretion in denying leave to amend the complaint.

IV. Dismissal of State Law Claims

Employees brought four claims under Washington state law: “breach of contract,” “employment tort,” “outrage,” and “invasion of privacy.” We review de novo the district court’s dismissal of the state-law claims as to the Governor. *Laws. for Fair Reciprocal Admission v. United States*, 141 F.4th 1056, 1063 (9th Cir. 2025). We review for abuse of discretion the district court’s decision not to exercise supplemental jurisdiction over the state-law claims as to PeaceHealth and thus to dismiss them without prejudice. *Bryant v. Adventist Health Sys./W.*, 289 F.3d 1162, 1165 (9th Cir. 2002).

The breach-of-contract claim was properly dismissed because the Governor was not a signatory to the Provider Agreement, the contract at issue, and therefore had no duty that could have been breached. The employment-tort claim was dismissed because Employees did not allege that the Governor was acting as their employer. The invasion-of-privacy claim was dismissed because Employees’ allegations did not relate to any actions taken by the Governor. Employees do not specifically dispute any of these determinations on appeal.

As to the outrage claim against the Governor, the district court concluded that “[t]he properly credited allegations in the Amended Complaint are insufficient from which to conclude that the Proclamation was ‘beyond all possible bounds of

decency’ considering the circumstances at the time,” and therefore could not meet an element of outrage under Washington state law. On de novo review, even assuming that the drugs were “investigational,” we are unpersuaded that Employees have alleged facts sufficient to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678. As the Supreme Court noted with respect to a similar federal vaccine mandate, “[v]accination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella.” *Biden*, 595 U.S. at 95. At the time of the Proclamation, the drug in question was already authorized for emergency use to prevent COVID-19. The record shows that the CDC had concluded months earlier that the drug had a 92% efficacy and that taking the EUA-authorized drug was associated with “reduced risk for ... severe outcomes” of infection with COVID-19. Within three days of the Proclamation’s issuance, a vaccine with an identical medical formulation was fully approved by the FDA. Given the backdrop of common vaccination requirements for healthcare workers, the Proclamation does not remotely constitute conduct “utterly intolerable in a civilized community.” *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003) (emphasis omitted). We affirm the district court’s dismissal of the outrage claim as to the Governor.

As for the state-law claims against PeaceHealth, we uphold the district court’s discretion to decline to exercise supplemental jurisdiction. The district court concluded that it had “dismissed all claims over which it ha[d] original jurisdiction,” and that the

remaining state-law claims “raise[] novel or complex issues of state law,” two of the important factors that trigger a court’s discretion to decline supplemental jurisdiction. *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 n.2 (9th Cir. 1997) (en banc) (citing 28 U.S.C. § 1367(c)). In exercising that discretion, the court appropriately noted that the decision served the value of comity and possibly also the values of economy, convenience, and fairness. The district court did not pass judgment on whether the Employees had failed to state a claim under state law or failed to assert rights protected under state law. The court left those issues to the state courts and was within its discretion in doing so.

AFFIRMED.

APPENDIX B

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

AILA CURTIS, et al.,
Plaintiffs,

v.

JAY ROBERT INSLEE,
PEACEHEALTH,
LIZ DUNNE, DOUG
KOEKKOEK,
Defendants.

CASE NO. 3:23-CV-05741-
RJB

ORDER DENYING
PLAINTIFFS' VARIOUS
MOTIONS AND DIS-
MISSING REMAINING
STATE LAW CLAIMS
WITHOUT PREJUDICE

This matter comes before the Court on the Plaintiffs' Rule 59(E) Motion to Alter or Amend the Ruling, or in the Alternative, Motion for Leave to File Second Amended Complaint (Dkt. 38), the Plaintiffs' Motion for Reconsideration (Dkt. 47), and the Plaintiffs' and Defendants PeaceHealth, Liz Dunne, and Doug Koekkoek's (collectively "PeaceHealth") responses to the Court's January 23, 2024 order to show cause (Dkts. 44 and 45). The Court has considered the pleadings filed regarding the motions, the responses to the order to show cause, and the remaining file. It is fully advised.

This case arises from Defendants' COVID-19 vaccine mandates for healthcare workers. Dkt. 8. The healthcare worker Plaintiffs contend that the Defendants violated Plaintiffs' constitutional and international treaty rights, federal statutory rights,

and that Defendants breached a contract and committed various state torts in connection with their “unlawful, malicious, unequal and contractually violative COVID-19 investigational drug mandate[s].” *Id.* at 2.

For the reasons provided below, the Plaintiffs’ motions (Dkts. 38 and 47) should be denied. The Court should decline to exercise supplemental jurisdiction over the state law claim asserted against the PeaceHealth Defendants, dismiss those state law claims without prejudice, and close the case.

I. PROCEDURAL HISTORY AND BACKGROUND FACTS

All claims against Defendant Washington State Governor Jay Robert Inslee were dismissed on December 21, 2023. Dkt. 32. The federal claims asserted against the PeaceHealth Defendants were dismissed on January 23, 2024. Dkt. 41. The January 23, 2024 order also ordered the Plaintiffs and the PeaceHealth Defendants to show cause, if any they have, why the Court should not decline to exercise supplemental jurisdiction over the Plaintiffs’ state law claims and dismiss those claims without prejudice. *Id.* The Plaintiffs and PeaceHealth Defendants have responded. Dkts. 44 and 45.

On January 18, 2024, the Plaintiffs filed their motion to alter or amend the December 21, 2023 order dismissing the claims against Gov. Inslee, or in the alternative, to amend their complaint. Dkt. 38. They also filed a motion for reconsideration of the portion of the January 23, 2024 order dismissing the federal claims against PeaceHealth. Dkt. 47.

The background facts and earlier procedural history of this case are in the December 21, 2023

Order Granting Defendant Inslee’s Motion to Dismiss (Dkt. 32 at 1-6) and the January 23, 2024 Order on PeaceHealth Defendants’ Motion to Dismiss (Dkt. 41 at 1-8) and are adopted here by reference.

This opinion will first consider the Plaintiffs’ motion to alter or amend the December 21, 2023 order dismissing all claims against Gov. Inslee (Dkt. 38) and the Plaintiffs’ motion for reconsideration of the portion of the January 23, 2024 order that dismissed the federal claims against the PeaceHealth Defendants (Dkt. 47). It will then turn to the Plaintiffs’ motion for leave to file a second amended complaint (Dkt. 38). This opinion will lastly consider whether the Court should exercise supplemental jurisdiction over the state law claims asserted against the PeaceHealth Defendants.

II. DISCUSSION

A. MOTION TO ALTER OR AMEND THE DECEMBER 21, 2023 ORDER DISMISSING ALL CLAIMS AGAINST GOV. INSLEE AND MOTION FOR RECONSIDERATION OF THE JANUARY 23, 2024 ORDER DISMISSING THE FEDERAL CLAIMS AGAINST THE PEACEHEALTH DEFENDANTS

1. Motions

Pursuant to Fed. R. Civ. P. 59(E), the Plaintiffs move to alter or amend the December 21, 2023 Order dismissing the claims asserted against Gov. Inslee regarding the applicability of *Johnson v. Brown*, 567 F.Supp.3d 1230 (D. Or. 2021) and the “non-availability of COMIRNATY®.” Dkt. 38. The

Plaintiffs argue that *Johnson* does not hold that the “Pfizer-BioNTech vaccine is not an [emergency use authorization (“EUA”)/Public Readiness and Emergency Preparedness Act (“PREP”)] drug.” *Id.* at 2. They maintain that *Johnson* “actually confirmed that COMIRNATY® and that Pfizer-BioNTech vaccine are two different products governed by two different laws.” *Id.* The Plaintiffs further assert that *Johnson* did not “address what the lack of availability of COMIRNATY® would have on a vaccine mandate.” *Id.*

The Plaintiffs move for reconsideration of the January 23, 2024 order dismissing the federal claims against the PeaceHealth Defendants “for the reasons set forth” in their Rule 59(E) Motion to Alter or Amend (Dkt. 38). Dkt. 47.

2. Standard

Fed. R. Civ. P. 59(E) provides, “[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.”

No judgment has been entered here. In essence, the Plaintiffs seek reconsideration of the Court’s decision to dismiss all claims against Gov. Inslee.

Local Rule W.D. Wash 7(h)(1) provides, “[m]otions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.” Such motions should be filed within 14 days after the order to which it relates is filed.

3. Analysis

The Plaintiffs’ motion to alter or amend the judgment, functionally a motion for reconsideration of the order dismissing all claims against Gov. Inslee, (Dkt. 38) should be denied. It is untimely as it was filed over 14 days from the order to which it relates.

Further, the motion to reconsider the order dismissing all claims against Gov. Inslee (Dkt. 38) and the motion to reconsider the order dismissing the federal claims against the PeaceHealth Defendants (Dkt. 47) should be denied on the merits. The Plaintiffs have failed to point to a “manifest error in the prior ruling[s]” or made “a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.”

The Plaintiffs’ arguments regarding the applicability of *Johnson* are immaterial to whether the claims against Gov. Inslee or PeaceHealth should be dismissed. While they again argue that COMIRNATY® was not widely available at the time of Defendants’ vaccine mandates, the Plaintiffs fail to explain how that is relevant to the claims they asserted against Gov. Inslee or the federal claims asserted against PeaceHealth, or why it merits reversal of the Court’s prior decisions dismissing those claims.

Furthermore, the day that the pending motions in this case were noted for consideration (February 23, 2024), the Ninth Circuit Court of Appeals affirmed the *Johnson* district court’s separate decision to dismiss the plaintiffs’ federal claims as a matter of law. *Johnson, et. al. v. Kotek, et. al.*, 2024 WL 747022, at *2 (9th Cir. Feb. 23, 2024). (This Court cited the *Johnson* district court’s 56-page decision denying plaintiffs’ motion for temporary

restraining order in the Order Granting Defendant Inslee’s Motion to Dismiss. Dkt. 32 at 4).

The plaintiffs in *Johnson* challenged then Oregon Governor Kate Brown and the Director of the Oregon Health Authority’s August of 2021 COVID-19 vaccine mandates for state employees, healthcare workers, and school employees. *Id.* The *Johnson* plaintiffs asserted several claims, including that the defendants’ vaccine mandates were preempted by 21 U.S.C. § 360bbb-3(E)(1)(A) under the Supremacy Clause. The *Johnson* court rejected that challenge noting that the “the Supremacy Clause, of its own force, does not create rights enforceable under § 1983.” *Johnson* at 2. It held that the availability of the § 1983 remedy under the Supremacy Clause “turns on whether the assertedly pre-empting statute [there and here 360bbb-3(E)(1)(A)], by its terms or as interpreted, (1) creates obligations sufficiently specific and definite to be within the competence of the judiciary to enforce, (2) is intended to benefit the putative plaintiff, and (3) is not foreclosed by express provision or other specific evidence from the statute itself.” *Id.* at 2 (*cleaned up, citations and internal quotation marks omitted*). The *Johnson* court noted that the plaintiffs’ Supremacy Clause claim, based on § 360bbb-3, “falters at the third prong of this test,” because the Food, Drug, and Cosmetic Act (“FDCA”) (of which § 360bbb-3 is a part) expressly states that all proceedings to enforce it “shall be by and in the name of the United States.” *Id.* (*citing* 21 U.S.C. § 337(a)). Concluding that the plaintiffs’ Supremacy Clause claim was an attempt to use § 1983 to create a federal damages remedy to enforce the requirements of the FDCA, the Ninth Circuit held that the plaintiffs’ supremacy clause claim is

“foreclosed by an express provision of the FDCA” and was properly dismissed. *Id.*

The Plaintiffs, in their motion for reconsideration, argue that this Court “did not address” the argument in their amended complaint that § 360bbb-3 and the PREP ACT preempt the Defendants’ vaccine mandates under the supremacy clause. Dkt. 38. To the extent that the Plaintiffs seek relief on a preemption/supremacy clause basis, these claims were not clearly identified as one of the Plaintiffs’ “counts” and are not listed as “counts” in the proposed second amended complaint.

In any event, pursuant to the Ninth Circuit’s decision in *Johnson*, the Plaintiffs’ preemption/supremacy clause claims based on § 360bbb-3 should be dismissed with prejudice. That claim is expressly foreclosed by the FCDA and should be dismissed as a matter of law. *Johnson* at 2. Further, the Plaintiffs make no showing that § 1983 is available to provide a remedy for alleged PREP Act preemption violations. The Plaintiffs’ preemption/supremacy clause claims based on § 360bbb-3 or the PREP Act should be dismissed.

Moreover, dismissal of the Plaintiffs’ preemption claims is consistent with the Third Circuit Court of Appeal’s decision in *Children’s Health Defense, Inc. v. Rutgers, the State Univ. of New Jersey*, 2024 WL 637353 (3rd Cir. Feb. 15, 2024). The *Rutgers* court held that Section 360bbb-3 does not preempt the university’s COVID-19 vaccine mandate because (1) 21 U.S.C. § 360bbb-3 applies to the Secretary of Health and Human Services only and not the defendants and (2) the plaintiffs did not allege sufficient facts to show that the university’s mandate conflicted with § 360bbb-3. *Id.* at 5. Although they argue in supplemental briefing that the *Rutgers*

court erred in so concluding (Dkt. 53), the Plaintiffs here fail to point to any Ninth Circuit authority which requires a different result.

The Plaintiffs move for reconsideration of the Court’s ruling that Gov. Inslee was entitled to qualified immunity on their federal claims. Dkt. 38. Their motion should be denied. The Plaintiffs have failed to point to any grounds from which to conclude that Gov. Inslee’s Proclamation violated constitutional or statutory rights that were “clearly established when viewed in the specific context of the case” as is their burden. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001). The Plaintiffs argue that the Court’s reliance on *Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724 (9th Cir. 2023) in the qualified immunity analysis was in error. Dkt. 38 at 7. As it relates to qualified immunity, the December 21, 2023 order cited *Seaplane* for the proposition that “even if the only vaccines available at the time were experimental, the Ninth Circuit has cautioned that when governmental actions are ‘undertaken during a time of great uncertainty with a novel disease, medical uncertainties afford little basis for judicial responses in absolute terms and that legislative authority must be especially broad in areas fraught with medical and scientific uncertainties.’” Dkt. 32 (*quoting Seaplane* at 730). The Plaintiffs argue that the parties’ actions in *Seaplane* occurred before the COVID-19 vaccines ineffectiveness was known. Dkt. 38 at 7. This argument is unrelated to whether there was existing precedent which clearly established that Gov. Inslee’s August 2021 COVID-19 vaccine mandate violated the Plaintiffs’ statutory or constitutional rights. Furthermore, the decision to grant Gov. Inslee qualified immunity here is consistent with the Ninth Circuit Court of Appeals

ruling in *Johnson* that the Oregon governor and state officials were entitled to qualified immunity against § 1983 claims (including for violations of plaintiffs’ due process rights) related to their August 2021 COVID-19 vaccine mandates. *Johnson* at 3.

The Plaintiffs’ motions for reconsideration (Dkts. 38 and 47) should be denied.

B. MOTION TO AMEND THE AMENDED COMPLAINT

1. Standard

Under Fed. R. Civ. P. 15 (a)(2), “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.” A motion to amend under Rule 15 (a)(2), “generally shall be denied only upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing party.” *Chudacoff v. University Medical Center of Southern Nevada*, 649 F.3d 1143 (9th Cir. 2011).

“A motion for leave to amend may be denied if it appears to be futile or legally insufficient.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209 (9th Cir. 1988), overruled on other grounds. The test to determine the sufficiency of a proposed amendment is the same as the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(1) or 12(b)(6). *See Id.*

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the

complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.

2. Proposed Second Amended Complaint – Federal Claims

The Plaintiffs filed a proposed second amended complaint with their motion to alter or amend the judgment, or in the alternative, for leave to file a second amended complaint. Dkt. 38-2. It makes the following federal claims: (1) “42 U.S.C. § 1983 – violation of 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III),” referring to 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 VI of the [International Covenant on Civil and Political Rights (“ICCPR”)] Treaty, Federal Wide Assurance, 10 U.S.C. § 980, EUA Scope of Authorization letters, and the Fourteenth Amendment,” (2) “42 U.S.C. § 1983 - Deprivation of Equal Protection Rights,” (3) “42 U.S.C. § 1983 – Deprivation of Constitutional

Procedural Due Process Rights,” (4) “42 U.S.C. § 1983 - Substantive Due Process Rights under 21 U.S.C. §360bbb-3,” (5) “42 U.S.C. § 1983 – Substantive Due Process Rights under PREP Act,” (6) “Unconstitutional Conditions Doctrine – 42 U.S.C. § 1983,” (7) “Deprivation of Rights Under Color of Law – 42 U.S.C. § 1983 Spending Clause Doctrine,” (claims 8-11 are state law claims) and (12) an “Implied Private Right of Action 21 U.S.C. § 360bbb-3.” Dkt. 38-2. The proposed second amended complaint also contains two sections referencing preemption and the Supremacy Clause, one regarding 21 U.S.C. § 360bbb-3 and the second regarding the PREP Act (Dkt. 38-2) that can be considered as unnumbered claims.

3. Analysis

The Plaintiffs’ motion for leave to file a second amended complaint (Dkt. 38) should be denied as futile as to their federal claims. The Plaintiffs have twice failed to plead legally sufficient federal claims. Dkts. 32 and 41. For many of the same reasons stated in the prior orders (Dkts. 32 and 41), the proposed second amended complaint (Dkt. 38-2) also fails to articulate a cognizable federal legal theory upon which relief could be granted.

For the reasons stated in the December 21, 2023 order, Gov. Inslee has demonstrated that he is entitled to qualified immunity on all the Plaintiffs’ § 1983 claims; there is no showing that he is not entitled to qualified immunity on the Plaintiffs’ repackaged § 1983 claims contained in the proposed second amended complaint. Further, the Plaintiffs’ proposed second amended complaint does not plead sufficient plausible facts from which to conclude that

the PeaceHealth Defendants were state actors for purposes of § 1983 liability. Moreover, there are additional grounds from which to conclude that the Plaintiffs’ proposed amendment of their federal claims is futile, with more in-depth discussions found in the prior orders (Dkts. 32 and 41):

Federal Claim 1. As it relates to the first claim, Plaintiffs fail to show that any of the federal statutes, regulations, reports or international treaties they cite in their proposed second amended complaint apply and/or that they create a right enforceable under § 1983 that is available against Gov. Inslee or PeaceHealth.

The Plaintiffs point to *Health and Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166 (2023) to argue that they are bringing § 1983 claims for “deprivation of rights created by those statutes;” and seek to amend their complaint to more clearly set forth that they are bringing § 1983 claims not private right of action claims. Dkt. 38 at 6.

In *Talevski*, the Supreme Court held that a nursing-home resident had unambiguously conferred rights (relating to unnecessary restraint and pre-discharge notice) under the Federal Nursing Home Reform Act and that those rights were presumptively enforceable under § 1983. 536 U.S. at 184. It further concluded that there was no showing that Congress intended to preclude the use of § 1983 to enforce those particular rights. *Id.* at 188.

The Court in *Talevski* relied on *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) for the proposition that “statutory provisions must unambiguously confer individual federal rights” for a presumption of enforceability under § 1983 to arise. 599 U.S. at 180. Further, the *Talevski* court noted that the presumption may be defeated where Congress

evinced an intention that § 1983 was not available to enforce those rights. *Id.* at 186.

The Plaintiffs’ proposed second amended complaint again fails to point to federal law — whether statutory, regulatory, international treaty provisions or some other source — that “unambiguously confer” individual federal rights enforceable under § 1983 which would entitle them to relief here. (To the extent Plaintiffs base their claims on the Fourteenth Amendment, those arguments are addressed below). Further, as stated above in Section A.3., the statute mentioned in the title of claim one, “21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III),” contains an express provision limiting enforcement actions to “a State in its own name” or by the United States. *Johnson* at 2 (*citing* 21 U.S.C. § 337(a)). Accordingly, even if 21 U.S.C. § 360bbb-3(e) unambiguously conferred individual federal rights which were presumptively enforceable under § 1983, Congress evinced an express intention that § 1983 was not available to enforce those rights — only a State or the United States may sue under the statute. *Talevski* at 186. The Plaintiffs’ proposed claim 1 fails to state a claim. Amendment to add it would be futile.

Federal Claims 2–5. To the extent the Plaintiffs again assert federal constitutional claims under the Fourteenth Amendment’s equal protection, substantive due process or procedural due process clauses (claims 2–5), they fail to show that their proposed amendment is not futile. They again do not state a claim on which relief could be granted. A rational basis of review applies to these constitutional claims because there is no fundamental right to refuse vaccination based on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Federal Claim 2. The Plaintiffs’ proposed equal protection claim (claim 2) fails because, their conclusory assertions aside, they have failed to adequately plead facts from which to conclude that the Defendants did not have a rational basis from treating them differently than others in the community. *See Seaplane* at 729-730.

Federal Claim 3. The Plaintiffs’ proposed procedural due process claim (claim 3) fails because the Plaintiffs all had notice of the mandates and contrary to their allegations, both Gov. Inslee’s and the PeaceHealth Defendants’ vaccine mandates contained opportunities to be heard – processes to request exemptions and accommodations. Accordingly, the Plaintiffs point to no authority that supports the notion that they were entitled to more process than they were given. *See Pilz v. Inslee*, 2022 WL 1719172 (W.D. Wash. 2022) (holding that Gov. Inslee’s vaccine mandate did not violate procedural due process).

Federal Claim 4. The Plaintiffs’ motion to add the proposed “42 U.S.C. § 1983 – Substantive Due Process Rights under 21 U.S.C. § 360bbb-3” claim, should be denied as futile because as stated above in Section II.B.3. Federal Claim 1, Congress has expressly foreclosed a §1983 claim based on “rights” arising from 21 U.S.C. § 360bbb-3. *Johnson* at 2. The Plaintiffs’ attempt at recasting the claim as brought with reference to the substantive due process clause does not change the result.

Further, as was true in their prior attempts to assert substantive due process claims, the Plaintiffs have failed to allege sufficient facts from which to conclude that the vaccine mandates implicate fundamental rights and so rational basis review applies. The Plaintiffs have not pointed to properly

credited assertions from which to conclude that the Defendants did not have a rational basis for the mandates.

Federal Claim 5. The Plaintiffs’ proposed “42 U.S.C. § 1983 - Substantive Due Process Rights under the PREP Act” claim, is equally unavailing. The exact nature of Plaintiffs’ claim 5 is unclear.

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. *Maney v. Brown*, 91 F.4th 1296, 1298 (9th Cir. 2024).¹ 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 42 U.S.C. § 247d-6d(a)(1)). Immunity under the PREP Act “applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure.” *Id.*

In *Maney*, the Ninth Circuit held that Oregon Governor Kate Brown was immune from suit and liability under the PREP Act. 91 F.4th at 1303. In that case, the plaintiff-prisoners asserted federal constitutional claims, pursuant to § 1983, related to the governor’s COVID-19 vaccine policy placing prisoners in a lower tier than prison guards to receive the vaccine. *Id.* After finding that the

¹ After most of the briefing on the present motions was complete, the Ninth Circuit Court of Appeals issued its decision in *Maney*. The parties were given an opportunity to file supplemental briefs on what, if any, impact the case has on the present motions; they did so. Dkts. 46, 49–51. Their supplemental briefing was considered.

statutory requirements for PREP Act immunity were met, the *Maney* Court concluded that “Congress intended to expressly immunize covered persons from § 1983 actions for claims covered by the Act, even if those claims are federal constitutional claims.” *Id.* at 1303.

To the extent that they are attempting to assert a § 1983 claim using the PREP Act as the source of their federal rights, the Plaintiffs fail to state a claim. First, they fail to point to a provision of the statute that “unambiguously confer[s] individual federal rights,” that is applicable here — which is required for the presumption of enforceability under § 1983 to arise. *Talevski* at 180. Second, excluding an exception that does not apply here, Congress evinced clear intent that § 1983 was not available to enforce rights under the PREP Act, even federal constitutional claims. *Maney* at 1303 n.3 (noting that “the PREP Act expressly forecloses § 1983 actions for covered claims”). Accordingly, even if the PREP Act “unambiguously” conferred relevant rights on the Plaintiffs, Congress’s intention to preclude the types of § 1983 claims asserted here bars the Plaintiffs’ claim 5. *See Id.* at 186. Amendment to add this claim is futile.

Federal Claim 6. In their proposed sixth claim for relief, the Plaintiffs again make an Unconstitutional Conditions Doctrine claim pursuant to § 1983. Dkt. 38-2. The conclusion that *Jacobson* controls (that there is no fundamental constitutional right to refuse a vaccination) and that the Plaintiffs failed to state a constitutional claim, is fatal to their proposed unconstitutional conditions doctrine claim. *Rutgers* at 9. Leave to add this claim is futile.

Federal Claim 7. In their proposed seventh claim for relief, the Plaintiffs again make a spending

clause doctrine claim pursuant to § 1983. Dkt. 38-2. The Plaintiffs’ motion to add a spending clause doctrine claim should be denied. As was the case with their prior spending clause doctrine claims, they fail to point to any authority that the spending clause applies to governors or private employers. Further, to the extent they point to the spending clause doctrine as a source of federal rights, they fail to point to a provision that “unambiguously confer[s] individual federal rights,” that are relevant to the facts alleged here - which is required for the presumption of enforceability under § 1983 to arise, *Talevski* at 180. Amendment should be denied.

Federal Claim 12. In their proposed claim 12 (claims 8-11 are state law claims) the Plaintiffs again make an “implied private right of action 21 U.S.C. § 360bbb-3” claim. Amendment to add this claim is futile. Congress provided that 21 U.S.C. § 360bbb-3 enforcement cases are to be brought by United States only (and under limited circumstances States). 21 U.S.C. § 337. The plain language of § 337 expressly forbids private parties from bringing enforcement suits. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010). Accordingly, there is no reason to conclude that Congress intended to create a private cause of action to prosecute a § 360bbb-3 claim. *Johnson* at 2. The Plaintiffs’ motion to amend their amended complaint to add this claim should be denied.

Federal Claim – Preemption/Supremacy Clause – Unnumbered. To the extent the Plaintiffs move to amend their amended complaint to seek relief on a preemption/supremacy clause theory based on § 360bbb-3 or the PREP Act, their motion should be denied as futile. The claim based on § 360bbb-3 fails as a matter of law. *Johnson* at 2.

Further, the Plaintiffs make no showing that § 1983 is available to provide a remedy for alleged PREP Act preemption violations. *Maney* at 1303 n.3 (noting that “the PREP Act expressly forecloses § 1983 actions for covered claims”). Amendment to include these claims is futile.

4. Motion to Amend Amended Complaint to Add State Claims Asserted Against Gov. Inslee

The Plaintiffs’ proposed second amended complaint seeks to reallege state law claims against Gov. Inslee for: outrage (claim 8), breach of contract (claim 9), “Washington State Common Law Employment Torts” (claim 10), and invasion of privacy and defamation of character (claim 11).

State Law Claim 8. The Plaintiffs’ proposed amendment to re-add a claim for outrage against Gov. Inslee should be denied as futile. The properly credited allegations in the proposed second amended complaint are insufficient from which to conclude that the governor’s Proclamation was “beyond all possible bounds of decency” considering the circumstances at the time. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96 (2003).

State Law Claim 9. The Plaintiffs’ motion to re-add their proposed claim for breach of contract asserted against Gov. Inslee should be denied. As stated in the December 21, 2023 Order dismissing this claim, it is undisputed that Gov. Inslee did not sign the Provider Agreement; accordingly he did not agree to be bound by a duty imposed by it. Dkt. 32 at 15-16. While the Plaintiffs state that they want to show that he should be bound, they fail to offer any rational argument or legal authority to support this

assertion. Reassertion of a breach of contract claim against Gov. Inslee is futile.

State Law Claim 10. The Plaintiffs’ motion to re-add their “Washington State Common Law Employment Torts” claim against Gov. Inslee should be denied. There is no creditable allegation that Gov. Inslee was their employer. Addition of this claim is futile.

State Law Claim 11. The Plaintiffs propose reasserting a claim for invasion of privacy and defamation of character against Gov. Inslee. They fail to allege sufficient facts to support such claims against him. Their motion to add this claim should be denied.

5. Motion to Amend Amended Complaint to Add State Claims to be Asserted Against the PeaceHealth Defendants

To the extent the Plaintiffs move to amend their amended complaint to clarify their state law claims against the PeaceHealth Defendants, the motion should be denied without prejudice. As stated below in Section II.C., this Court should decline to exercise supplemental jurisdiction over the state law claims asserted against PeaceHealth.

6. Conclusion on Motion for Leave to File a Second Amended Complaint

The Plaintiffs’ motion for leave to file a second amended complaint (Dkt. 38) should be denied as to all federal claims and the state law claims asserted against Gov. Inslee. Amendment is futile. The Plaintiffs have had several opportunities to plead these claims and have failed to do so. The motion

(Dkt. 38) should be denied without prejudice regarding the state law claims the Plaintiffs are attempting to assert against the PeaceHealth Defendants.

C. EXERCISE OF SUPPLEMENTAL JURISDICTION

Pursuant to 28 U.S.C. § 1367 (c), district courts may decline to exercise supplemental jurisdiction over state law claims if: (1) the claims raise novel or complex issues of state law, (2) the state claims substantially predominate over the claim which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. “While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367 (c), it is informed by the values of economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (*internal citations omitted*).

Here, two of the four conditions in § 1367(c) are present. All Plaintiffs’ claims against Gov. Inslee have been dismissed (Dkt. 32) and all Plaintiffs’ federal claims against the PeaceHealth Defendants have been dismissed (Dkt. 41). Accordingly, this Court has “dismissed all claims over which it has original jurisdiction,” and so has discretion to decline to exercise supplemental jurisdiction over the state law claims under § 1367(c)(3). Moreover, the remaining state claims “raise novel or complex issues of state law” under § 1367(c)(1). These are issues for which the state court is uniquely suited. Because

state courts have a strong interest in enforcing their own laws, *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 (1988), the value of comity is served by this Court declining jurisdiction. Further, the values of economy, convenience, and fairness may well be served by this Court’s declining to exercise supplemental jurisdiction. *See Acri* at 1001.

Accordingly, the Court should decline to exercise supplemental jurisdiction over the Plaintiffs’ state law claims asserted against the PeaceHealth Defendants. Those claims should be dismissed without prejudice. The PeaceHealth Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint (Dkt. 30) should be denied without prejudice as it relates to the Plaintiffs’ state law claims. This case should be closed.

III. ORDER

It is **ORDERED** that:

- The Plaintiffs’ Rule 59(E) Motion to Alter or Amend the Ruling (Dkt. 38) and Motion for Reconsideration (Dkt. 47) **ARE DENIED**;
- The Plaintiffs’ Motion for Leave to File a Second Amended Complaint (Dkt. 38) **IS**:
 - **DENIED** as to all federal claims and the state law claims against Gov. Inslee, and
 - **DENIED WITHOUT PREJUDICE** as to the Plaintiffs’ state law claims against the PeaceHealth Defendants,
- The Court **DECLINES TO EXERCISE** supplemental jurisdiction over the Plaintiffs’ state law claims that are asserted against the PeaceHealth Defendants;

- The Plaintiffs’ state law claims that are asserted against the PeaceHealth Defendants **ARE DISMISSED WITHOUT PREJUDICE**;
- The PeaceHealth Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint (Dkt. 30) **IS DENIED WITHOUT PREJUDICE** as it relates to the Plaintiffs’ state law claims; and
- This case **IS CLOSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party’s last known address.

Dated this 27th day of February, 2024.

s/Robert J. Bryan

ROBERT J. BRYAN

United States District Judge

APPENDIX C

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

AILA CURTIS, et al., Plaintiffs, v.	CASE NO. 3:23-CV-05741- RJB
PEACEHEALTH, LIZ DUNNE, DOUG KOEKKOEK, Defendants.	ORDER ON PEACEHEALTH DEFENDANTS’ MOTION TO DISMISS

This matter comes before the Court on PeaceHealth, Liz Dunne, and Doug Koekkoek’s (collectively “PeaceHealth” or “PeaceHealth Defendants”) Motion to Dismiss Plaintiffs’ Amended Complaint (Dkt. 30) and Plaintiffs’ motion for judicial notice (Dkt. 36). Oral argument has been requested but is unnecessary to decide the motions. The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

This case arises from Defendants’ COVID-19 vaccine mandates for healthcare workers. Dkt. 8. The healthcare worker Plaintiffs contend that the Defendants violated Plaintiffs’ constitutional and international treaty rights, federal statutory rights, and that Defendants breached a contract and committed various state torts in connection with their “unlawful, malicious, unequal and contractually violative COVID-19 investigational drug mandate[s].” *Id.* at 2.

All claims against Washington State Governor Jay Robert Inslee were dismissed on December 21, 2023. Dkt. 32. The PeaceHealth Defendants now move to dismiss the claims against them pursuant to Fed. R. Civ. P. (“Rule”) 12(b)(6). Dkt. 30. The Plaintiffs also move the Court to take judicial notice of a letter and a declaration filed in an out-of-district case. Dkt. 36. For the reasons provided below, the motion for judicial notice (Dkt. 36) should be granted and the motion to dismiss (Dkt. 30) should be granted, as to the federal claims, and renoted as to the state law claims.

I. MOTION FOR JUDICIAL NOTICE, PROCEDURAL HISTORY AND FACTS

A. MOTION FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201(b): “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”

The Plaintiffs move the Court to take judicial notice of facts in a letter, dated August 23, 2021, from the United States Food and Drug Administration (“FDA”) to Pfizer Inc. (Dkt. 36-1) and facts in the Declaration of Peter Marks, M.D. Ph.D. dated January 14, 2022 (36-2). Dkt. 36.

Letter. In the December 21, 2023 order that dismissed all claims against Gov. Inslee, the Court took judicial notice of facts in the August 23, 2021 letter. Dkt. 32. Accordingly, Plaintiffs’ motion regarding that letter (Dkt. 36) should be granted.

Declaration of Dr. Marks. The Plaintiffs’ motion for the Court to take judicial notice of facts in Dr. Mark’s Declaration (Dkt. 36) should be granted.

Dr. Marks, who at that time was the FDA’s Director of the Center for Biologics Evaluation and Research (“CBER”), prepared his declaration for *Coker v. Austin*, U.S. Dist. Court for the Northern Dist. of Florida case number 21-1211 AW-HTC. Dkt. 36-2. His declaration states that it was based, in part, on information available to him in his official capacity, and that in his official capacity as CBER Director, he was “fully familiar with [*Coker*] and the facts stated [therein].” Dkt. 36-2 at 1-2. While no such showing that he is familiar with the facts of this case is made, facts relevant to this case in his declaration “can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.” In any event, the relevant facts in Dr. Marks’ Declaration are unhelpful to the Plaintiffs as will be discussed more thoroughly below in Section I.C.

B. PROCEDURAL HISTORY

Parties. The Plaintiffs are current and former PeaceHealth employees who filed a lengthy complaint on August 18, 2023. Dkt. 1. Although there are over 80 Plaintiffs, this is not a class action. The defendants were/are Gov. Inslee, PeaceHealth, a not-for-profit healthcare system headquartered in Clark County, Washington, and officers of PeaceHealth, Liz Dunne and Doug Koekkoek. *Id.*

Amended Complaint. The Amended Complaint asserts federal claims against the Defendants for: (1) violation of the Fourteenth Amendment’s equal protection rights, (2) violation of the Fourteenth

Amendment’s due process rights, (3) violation of the “Spending Clause Doctrine,” (4) “Subjected to Investigational Drug Use,” pursuant to 42 U.S.C. § 1983, (5) “Unconstitutional Conditions Doctrine,” (6) “Implied Right of Action 21 U.S.C. § 360bbb-3;” a provision of the Federal Food, Drug, and Cosmetic Act (“FDCA”), and state law claims for (7) breach of contract, (third party beneficiary), (8) “employment torts,” (9) outrage, and (10) invasion of privacy and defamation of character. Dkt. 8 at 57–70.

Order Granting Gov. Inslee’s Motion to Dismiss. On December 21, 2023, Gov. Inslee’s motion to dismiss was granted and all claims asserted against him were dismissed. Dkt. 32. That order further granted Gov. Inslee’s motion for judicial notice that: on August 23, 2021, the Pfizer-BioNTech vaccine received full FDA approval for individuals 16 and older. *Id.* This order adopts the reasoning (*Id.*) regarding that finding. As was the case in the December 21, 2023 order, this order does not credit allegations in the Amended Complaint that the only available vaccines at the relevant time were “investigational” or “experimental.” *Id.*; *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014) (holding that although for purposes of a motion to amend or for a motion to dismiss the court ordinarily credits the allegations in the complaint as true, it need not “accept as true allegations that contradict matters properly subject to judicial notice,” or in a complaint’s attachment, or incorporated by reference into the complaint).

The December 21, 2023 order dismissed the Plaintiffs federal constitutional claims asserted against Gov. Inslee because they failed to allege sufficient properly credited facts in the Amended

Complaint to assert a claim for violation of their equal protection, substantive due process or procedural due process rights. Dkt. 32 at 8–10. It further found that there was no private cause of action under the spending clause doctrine. *Id.* As to the Plaintiffs’ “subjected to investigational drug use,” claim, which referred to 21 U.S.C. § 360bbb-3, 45 C.F.R. Part 46, the Belmont Report, Article VI of the International Covenant on Civil and Political Rights (“ICCPR”) Treaty, 10 U.S.C. § 980, Federal Wide Assurance, and the CDC COVID-19 Vaccination Program Provider Agreement, the December 21, 2023 order held that these laws/report/treaty were inapplicable and there was no private cause of action under any of these against Gov. Inslee. *Id.* at 11–13. The December 21, 2023 order held that the Plaintiffs failed to allege sufficient facts for which relief could be granted on their “unconstitutional conditions doctrine claim.” *Id.* It further held that Gov. Inslee was entitled to qualified immunity. *Id.* at 13–15. This order adopts the reasoning from the December 21, 2023 order on all federal claims. The state law claims against Gov. Inslee were also dismissed. *Id.*

C. BACKGROUND FACTS RELEVANT TO PEACEHEALTH’S MOTION

The background facts are taken from the Amended Complaint, its attachments, and facts subject to judicial notice. *Gonzalez* at 1115. Where judicial notice has been, or is now taken, it will be designated. Additionally, some general background information will be taken from court decisions.

1. COVID-19, Emergency Use Authorizations for Vaccines, and Vaccine Program

COVID–19 is a “highly contagious, dangerous, and ... deadly disease.” *Biden v. Missouri*, 595 U.S. 87, 93 (2022). The COVID-19 pandemic posed significant challenges for federal and state governments. Dkt. 8. Beginning in February of 2020, Gov. Inslee declared a state of emergency and issued several public health and safety proclamations. *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1227 (9th Cir. 2022).

In December of 2020, the FDA granted emergency use authorization (“EUA”) for the Pfizer-BioNTech (“Pfizer-BioNTech”) two-dose mRNA vaccine for individuals 16 and older and for the Moderna two-dose mRNA vaccine for individuals 18 years and older. Dkt. 8. On December 21, 2020, Pfizer-BioNTech received conditional marketing authorization in the European Union for its COVID-19 vaccine, marketed as COMIRNATY®. *Id.* On February 27, 2021, the FDA granted EUA for the Johnson & Johnson vaccine for individuals 18 and older. *Id.*

The Amended Complaint alleges that PeaceHealth voluntarily agreed to participate in the Center for Disease Control and Prevention’s (“CDC”) COVID-19 Vaccination Program. Dkt. 8 at 20. Attached to the Amended Complaint is a blank “CDC COVID-19 Vaccination Program Provider Agreement” (sometimes referred to herein as “Provider Agreement”) (Dkt. 8-1) that the Plaintiffs allege PeaceHealth signed (Dkt. 8 at 20). *Id.* This Provider Agreement states that it was an agreement between the CDC and the organization, like PeaceHealth, who agreed to administer COVID-19

vaccines. Dkt. 8-1 at 2. The agreement requires certain conduct like: a vaccine provider would administer the vaccines in accordance with all CDC requirements and recommendations, make a record, report vaccine administration data, not sell the vaccines, provide fact sheets to those they vaccinate, handle the vaccines “under proper conditions, including maintaining cold chain conditions,” report adverse reactions and provide vaccine record cards. *Id.*

The Amended Complaint does not assert that the PeaceHealth Defendants administered a COVID-19 vaccine (whether experimental or not) on any of the Plaintiffs. Dkt. 8. It does not allege that PeaceHealth required its employees to get a COVID-19 vaccine from PeaceHealth. *Id.*

Even after vaccines became available, the pandemic continued, with the virus mutating into various strains. *Does 1-6 v. Mills*, 16 F.4th 20, 26 (1st Cir. 2021) (*cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022)). In the United States, the summer of 2021 saw the emergence of a highly contagious COVID variant referred to as the “Delta” variant. *Id.* COVID cases, hospitalizations and deaths rose sharply. CDC, COVID Data Tracker, https://covid.cdc.gov/covid-datatracker/#trends_weeklyhospitaladmissions_select_00 (last visited December 13, 2023); https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00 (last visited December 13, 2023).

2. Gov. Inslee’s Proclamation, Approval of the Pfizer-BioNTech Vaccine, PeaceHealth’s Policy, and Federal Government’s Rule

On August 20, 2021, Gov. Inslee issued Proclamation 21-14.1, “Covid-19 Vaccination Requirement,” (“Proclamation”) which required state workers, workers in an education setting, and healthcare providers to be fully vaccinated by October 18, 2021, unless they qualified for medical or religious exemptions. Dkt. 8-7.

On August 23, 2021, the Pfizer-BioNTech vaccine received full FDA approval for individuals 16 and older. Dkt. 32. (*citing FDA Approval Letter* (August 23, 2021), <http://www.fda.gov/media/151710/download> (last visited December 13, 2023); *FDA News Release* (August 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (last visited December 13, 2023); *Pfizer-BioNTech COVID-19 Vaccine Overview and Safety (also known as COMIRNATY®), Ctrs For Disease Control & Prevention* (Oct. 28, 2021), <https://stacks.cdc.gov/view/cdc/111109> (*emphasis in original*) (last visited December 13, 2023); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 283 (2d Cir. 2021); *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1241 (D. Or. 2021)).

The Plaintiffs argue that the Court should take judicial notice of facts in Dr. Marks’ Declaration. Dkt. 36. In his declaration, Dr. Marks states that there are some “legal” differences between the Pfizer-BioNTech vaccine and COMIRNATY® while fully acknowledging that the “medical formulation” is the same and that both products are “made by the same manufacturer under current good manufacturing practice requirements.” Dkt. 36-2 at 5. He points out

that COMIRNATY® is labeled in one manner and the Pfizer-BioNTech vaccine is labeled differently. Dkt. 36-2 at 5. That the labels are different is a fact that “can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned” and so is judicially noticed here. However, a difference in labeling does not change the outcome of this case.

In any event, on August 30, 2021, PeaceHealth issued its “COVID-19 Vaccine Requirement Policy” (sometimes referred to herein as “Policy”). Dkt. 8-2. Like Gov. Inslee’s Proclamation, this Policy required that PeaceHealth employee healthcare workers be “fully vaccinated against COVID-19” subject to medical or religious exemptions. *Id.* October 15, 2021 was set as the compliance date for full vaccination or approval of an exemption under PeaceHealth’s Policy. *Id.*

After the deadlines set in both the Proclamation and Policy, on November 5, 2021, the U.S. Secretary of Health and Human Services “issued an interim final rule amending the existing conditions of participation in Medicare and Medicaid to add a new requirement—that facilities ensure that their covered staff are vaccinated against COVID–19.” *Biden v. Missouri*, 595 U.S. 87, 91 (2022) (*citing* 86 Fed. Reg. 61561, 61616–61627). Under this rule, Medicare and Medicaid program participants like PeaceHealth must require medical staff be vaccinated against COVID-19 unless medical and/or religious exemptions are appropriate. *Id.* Further, “[a] facility’s failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs.” *Id.* On January 13, 2022, the United States Supreme Court upheld the rule. *Id.*

II. DISCUSSION

A. MOTION TO DISMISS STANDARD

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.

B. FEDERAL CLAIMS MADE PURSUANT TO SECTION 1983

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United

States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

1. Whether the PeaceHealth Defendants Acted Under the Color of Law – State Actor?

The PeaceHealth Defendants contend that the Plaintiffs’ federal claims, asserted pursuant to § 1983 should be dismissed because they did not act “under the color of law,” that is, as state actors. Before the Court can answer the question of whether the PeaceHealth Defendants acted as a state actor, the Court “must identify the specific conduct” of which the Plaintiffs complain. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020).

In the Amended Complaint and their response, the Plaintiffs engage in lengthy discussions about PeaceHealth’s obligations as an entity that gives COVID-19 vaccines. Dkts. 8 and 36. The Plaintiffs frequently conflate PeaceHealth’s obligations as an entity that administers vaccines with PeaceHealth’s actions as an employer. The Plaintiffs’ arguments related to the PeaceHealth Defendants’ role as an entity that gives COVID-19 vaccines are not relevant to whether it was a state actor for its § 1983 based claims. The Amended Complaint does not allege that PeaceHealth gave them a COVID-19 vaccine or forced the Plaintiffs to receive a COVID-19 vaccine from PeaceHealth. *Id.* The Plaintiffs fail to allege that they were injured in any manner by

PeaceHealth in its role as an entity that administered COVID-19 vaccines.

The Plaintiffs contend that they were injured (fired) as a result of PeaceHealth’s actions in its role as an employer. Dkt. 8. More specifically, in their Amended Complaint, the Plaintiffs seek to hold the PeaceHealth Defendants liable for their Policy that the Plaintiffs receive a COVID-19 vaccination before October 15, 2021, subject to medical and religious exemptions, or face being fired. *Id.* The relevant inquiry here, then, is whether the PeaceHealth Defendants’ role as an employer requiring their employees to receive a COVID-19 vaccine, subject to exemptions, constituted state action.

Four general tests may be used in identifying state action: (1) public function; (2) joint action; (3) governmental nexus; and (4) governmental compulsion or coercion. *Rawson* at 747. Compliance with generally applicable laws is not sufficient to convert private conduct into state action under any of the four tests. *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1013 (9th Cir. 2020).

The conduct of which Plaintiffs complain was merely PeaceHealth’s compliance with a generally applicable law — Gov. Inslee’s Proclamation. Accordingly, it did not constitute state action. *Zimmerman v. PeaceHealth*, 2023 WL 7413650, at *13 (W.D. Wash. Nov. 9, 2023). In *Zimmerman*, 50 current and former PeaceHealth employees filed a lawsuit in this district, in part arguing that PeaceHealth failed to properly grant them religious accommodations after having been granted an exemption from PeaceHealth’s COVID-19 vaccine policy (the same policy that is at issue here). *Id.* The *Zimmerman* Plaintiffs also argued that PeaceHealth acted as a state actor and that PeaceHealth’s

COVID-19 vaccine policy constituted “arbitrary and capricious government action.” *Id.* On November 9, 2023, the court dismissed the *Zimmerman* Plaintiffs’ “arbitrary and capricious” claim, finding that PeaceHealth’s enforcement of its COVID-19 vaccine policy did not constitute state action. *Id.* at 12–23. *Zimmerman*’s finding is persuasive and applies here.

As stated in *Zimmerman*, the Plaintiffs have failed to demonstrate that PeaceHealth’s enforcement of its Policy was a public function (state action test (1)) because they did not demonstrate that the function at issue was “both traditionally and exclusively governmental.” *Rawson* at 755 (*cleaned up*) (public function test satisfied only where function is “both traditionally and exclusively governmental”). The Plaintiffs did not establish that PeaceHealth’s enforcement of its COVID-19 vaccine policy constituted joint action (state action test (2)) or that it had a sufficient governmental nexus (state action test (3)). *Zimmerman* at 13. Lastly, they did not show that PeaceHealth’s enforcement of its Policy was a result of governmental compulsion or coercion (state action test (4)). *Id.* Governmental compulsion in the form of a generally applicable law, without more, is not sufficient to deem a private entity a governmental actor. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 841 (9th Cir. 1999). “Instead, the plaintiff must establish some other nexus sufficient to make it fair to attribute liability to the private entity.” *Id.* This the Plaintiffs have not done. The Plaintiffs have failed to demonstrate that the PeaceHealth Defendants were state actors.

2. Whether PeaceHealth Deprived Plaintiffs of a Federal Constitutional or Statutory Right?

Even if the PeaceHealth Defendants were state actors, the Plaintiffs have failed to allege sufficient creditable facts to state a claim for relief for all claims asserted under § 1983.

a. Equal Protection Claim

The Equal Protection Clause provides that, “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1. “The Equal Protection Clause ensures that ‘all persons similarly situated should be treated alike.’” *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 992 (9th Cir. 2007).

Plaintiffs raise a “class of one” equal protection claim, alleging that they were treated differently than other, similarly situated groups. While they argue that they are members of a suspect class, the Plaintiffs fail to support that contention with any authority or rationale. Accordingly, to assert a “class of one” equal protection claim, the Plaintiffs must demonstrate that the PeaceHealth Defendants: (1) intentionally (2) treated them differently than other similarly situated groups, (3) without a rational basis. *Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724, 729 (9th Cir. 2023). Because the Plaintiffs fail to allege sufficient facts regarding the third requirement, the Court need not reach the remaining two requirements.

In the December 21, 2023 order granting Gov. Inslee’s motion to dismiss, this Court held that Gov. Inslee had a rational basis for issuance of the Proclamation. Dkt. 32 at 9. The PeaceHealth

Defendants’ Policy mirrored Gov. Inslee’s Proclamation. Accordingly, even if the PeaceHealth Defendants were state actors, they did not violate the Plaintiffs’ equal protection rights because there was a rational basis for the Policy. This claim should be dismissed.

b. Substantive and Procedural Due Process

“The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Substantive Due Process. The December 21, 2023 order held that COVID-19 vaccine mandates do not implicate a fundamental right protected by the substantive due process clause and so rational basis review applies to the Plaintiffs’ substantive due process claims. Dkt. 32 at 10. As stated in Section II.B.2.a. above, the Plaintiffs have not alleged sufficient facts from which to conclude that PeaceHealth did not have a rational basis for its Policy. Their substantive due process claim should be dismissed.

Procedural Due Process. “A procedural due process claim has two elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.” *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th Cir. 2021). The Plaintiffs fail to point to facts, which if believed, would demonstrate that they were denied “adequate procedural protections” from the PeaceHealth Defendants. They fail to point to procedural protections that they were due but did not receive. This claim should be dismissed.

c. Spending Clause Doctrine Claim

The Spending Clause of the U.S. Constitution places some limits on the federal government’s ability to condition use of federal funds. *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987). The Plaintiffs fail to point to any authority that the spending clause doctrine places limits on PeaceHealth’s enforcement of a COVID-19 vaccine mandate. This claim should be dismissed.

d. “Subjected to Investigational Drug Use Claim”

As it relates to this claim, the Plaintiffs refer to 21 U.S.C. § 360bbb-3, 45 C.F.R. Part 46, the Belmont Report, Article VI of the ICCPR Treaty, 10 U.S.C. § 980, Federal Wide Assurance, and the CDC COVID-19 Vaccination Program Provider Agreement. Dkt. 8.

As was the case against Gov. Inslee, the Plaintiffs fail to show that any of the federal statutes, regulations, reports or international treaties they cite in their Amended Complaint apply and/or that they contain a private cause of action that is available against the PeaceHealth Defendants here.

21 U.S.C. § 360bbb-3. As is relevant here, 21 U.S.C. § 360bbb-3(e)(1)(A)(ii), which governs emergency use authorization of medication, requires that the Secretary of the U.S. Dept. of Health and Human Services establish:

Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of

the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

This statute does not apply to PeaceHealth’s enforcement of the Policy. The statute directs the Secretary of the U.S. Dept. of Health and Human Services’ actions and those of entities administering a vaccine vis-à-vis someone to whom they are administering the vaccine. It does not apply to a private employer’s enforcement of a vaccine mandate.

Further, there is no private right of action under 21 U.S.C. § 360bbb-3(e)(1)(A). *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021) (holding that 21 U.S.C. § 360bbb-3(e)(1)(A)’s “option to accept or refuse” an emergency vaccine confers no private right of action, creates no opportunity to sue the government, and permits enforcement by the United States and by the states in specific circumstances only); *Doe v. Franklin Square Union Free Sch. Dist.*, 568 F.Supp.3d 270, 292 (E.D.N.Y. 2021); *Bird v. Martinez-Ellis*, 22-8012, 2022 WL 17973581, at *5 (10th Cir. Dec. 28, 2022). As stated below in Section II.B.2.f., no private right of action should be implied for § 360bbb-3(e)(1)(A). While Plaintiffs argue that § 1983 provides them a private right of action, § 1983 “merely provides a mechanism for enforcing individual rights ‘secured’ elsewhere, i.e., rights

independently ‘secured by the Constitution and laws’ of the United States.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). Plaintiffs still must demonstrate that they have a private right of action under a statute. *Id.* The Plaintiffs have failed to do so here.

Moreover, the Plaintiffs could have received an FDA-authorized vaccine, so § 360bbb-3(e)(1)(A) does not apply to PeaceHealth’s enforcement of its vaccine policy. To the extent the Plaintiffs assert a claim under the statute, it should be dismissed.

45 C.F.R. Part 46, The Belmont Report, Article VI of the ICCPR. As was noted in the December 21, 2023 order, there is no private right of action under 45 C.F.R. Part 46, the Belmont Report, or the ICCPR. Dkt. 32 at 12. The Plaintiffs claims based on 45 C.F.R. Part 46, The Belmont Report, Article VI of the ICCPR should be dismissed for lack of a cognizable legal theory.

10 U.S.C. § 980. Under 10 U.S.C. § 980(a)(1), “funds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject unless ... the informed consent of the subject is obtained in advance ...”

The Plaintiffs have failed to allege sufficient creditable facts from which they could obtain relief from PeaceHealth based on § 980(a)(1). There is no allegation that PeaceHealth expended Department of Defense funds. This claim should be dismissed.

Federal Wide Assurance. According to the Amended Complaint, through Federal Wide Assurance, “an institution commits to the [U.S. Dept. of Health and Human Services] that it will comply with the requirements in the [U.S. Dept. of Health and Human Services] Protection of Human Subjects regulations at 45 C.F.R. Part 46.” Dkt. 8 at 30, n. 23.

Federal wide assurance does not apply here – it applies to institutions “engaged in research ...” 45 C.F.R. § 46.103(a). There are no properly credited allegations that PeaceHealth was engaged in research in its enforcement of the Policy. Further, the Plaintiffs fail to point to any authority that there is a private cause of action for Federal Wide Assurance. The claim should be dismissed.

The CDC COVID-19 Vaccination Program Provider Agreement. The Amended Complaint alleges that in signing the Provider Agreement, PeaceHealth agreed to comply with “the conditions specified in this agreement.” Dkt. 8 at 38. The Amended Complaint contends that “compliance with the conditions specified in this agreement’ extends under 21 U.S.C. §360bbb-3 to Plaintiffs’ ‘option to accept or refuse.’” *Id.*

The Plaintiffs’ claim pursuant to the Provider Agreement, brought under § 1983, should be dismissed for failure to state a claim. The Provider Agreement arguably creates obligations for PeaceHealth to people to whom it administers COVID-19 vaccines. According to the allegations in the Amended Complaint, the Plaintiffs did not receive a COVID-19 vaccine from PeaceHealth. The Plaintiffs have not shown that they are entitled to relief under the Provider Agreement because the Provider Agreement does not apply to them. The Plaintiffs arguments and contentions related to the Provider Agreement conflate PeaceHealth’s obligations to people to whom it administers COVID-19 vaccines, with PeaceHealth’s actions as an employer. It is PeaceHealth’s actions as an employer that are relevant here and there is no logical connection between PeaceHealth’s employment

decisions and its agreement to be bound by requirements in the Provider Agreement.

Moreover, even if it did somehow apply, the Plaintiffs cite no authority that they are entitled to enforce a contract — the Provider Agreement — between the federal government and PeaceHealth on a matter (failure to comply with § 360bbb-3) which is unrelated to their claimed harm (being fired for failing to comply with the vaccine Policy). Even assuming the Plaintiffs could claim some benefit from the Provider Agreement, “[p]arties that benefit from a [federal] government[al] contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary.” *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (opinion amended on denial of reh’g on unrelated issue, 203 F.3d 1175 (9th Cir. 2000)). The Plaintiffs fail to point to any clear intent in either the Provider Agreement that they are any more than incidental beneficiaries. Accordingly, they are not entitled to enforce the Provider Agreement. *Klamath Water* at 1211.

The Amended Complaint alleges that the Provider Agreement “clearly and unambiguously create rights enforceable pursuant to 42 U.S.C. 1983.” Dkt. 8 at 57. The Plaintiffs fail to explain this assertion or point to an authority that supports it. Section 1983 merely provides an enforcement mechanism of rights that exist pursuant to federal law. *Gonzaga* at 285. As stated above in Section II.B.2.d, there is no privately enforceable right available under 21 U.S.C. § 360bbb-3 and the Plaintiffs have not shown that they have a privately enforceable right pursuant to the Provider Agreement. This claim should be dismissed.

e. Unconstitutional Conditions Doctrine Claim

The unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). It prohibits the government from denying a person a benefit because they exercise a constitutional right. *Id.*

The Amended Complaint acknowledges that the Plaintiffs are “at will” employees of a private employer — PeaceHealth. Dkt. 8. Accordingly, they fail to plead sufficient facts to allege that a government benefit has been denied. The Plaintiffs’ unconstitutional conditions doctrine claim should be dismissed. *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553, 566 (W.D. Va. 2022) (University’s COVID-19 vaccine mandate challenger failed to allege violation of unconstitutional conditions doctrine because no government benefit was at issue).

f. Implied Right of Action for the FDCA Provision Found at 21 U.S.C. §360bbb-3

As stated above, there is no private right of action under 21 U.S.C. § 360bbb-3(e)(1)(A). *Navy Seal 1* at 1030; *Doe* at 292. The Plaintiffs assert that a private cause of action should be implied under this provision of the FDCA.

Although courts used to use a four factor test to determine whether a private cause of action should be implied, the Supreme Court collapsed the prior test “into a single focus: the central inquiry remains whether Congress intended to create, either

expressly or by implication, a private cause of action.” *Saloojas, Inc. v. Aetna Health of California, Inc.*, 80 F.4th 1011, 1014 (9th Cir. 2023). The enforcement provisions of the FDCA are in 21 U.S.C. § 337. *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010). The plain language of § 337 expressly forbids private parties from bringing enforcement suits for violations of the FDCA. *Id.*; *Bird v. Martinez-Ellis*, 2022 WL 17973581, at *5 (10th Cir. Dec. 28, 2022) (*citing* 21 U.S.C. § 337(a) “[e]xcept [certain enforcement actions that may be brought by a State in its own name], all ... proceedings for the enforcement, or to restrain violations, of this Chapter shall be by and in the name of the United States” in holding that there was no actionable claim for violation of § 360bbb-3 of the FDCA to challenge prison’s COVID-19 vaccine practices). That Congress chose to include an enforcement mechanism in the FDCA that is limited to actions by a State in its own name or the United States “cuts strongly against” a finding of intent to create a private cause of action. *Saloojas* at 1016. The Plaintiffs offer no rational argument to the contrary. Their implied right of action 21 U.S.C. § 360bbb-3(e)(1)(A) claim should be dismissed.

C. EXERCISE OF SUPPLEMENTAL JURISDICTION OVER STATE LAW CLAIMS, ORDER TO SHOW CAUSE, AND RENOTING PORTION OF MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1367 (c), district courts may decline to exercise supplemental jurisdiction over state law claims if: (1) the claims raise novel or complex issues of state law, (2) the state claims

substantially predominate over the claim which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. “While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367 (c), it is informed by the values of economy, convenience, fairness, and comity.” *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (*internal citations omitted*).

Here, two of the four conditions in § 1367(c) are present. All Plaintiffs’ claims against Gov. Inslee have been dismissed (Dkt. 32) and, by this order, all Plaintiffs’ remaining federal claims are dismissed. Accordingly, this Court has “dismissed all claims over which it has original jurisdiction,” and so has discretion to decline to exercise supplemental jurisdiction over the state law claims under § 1367(c)(3). Moreover, the remaining state claims “raise novel or complex issues of state law” under § 1367(c)(1). These are issues for which the state court is uniquely suited. Because state courts have a strong interest in enforcing their own laws, See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 (1988), the value of comity is served by this Court declining jurisdiction. Further, the values of economy, convenience, and fairness may well be served by this Court’s declining to exercise supplemental jurisdiction. See *Acri* at 1001.

Accordingly, by February 2, 2024, the parties should be ordered to show cause, in writing, if any they have, why the Court should not decline to exercise supplemental jurisdiction and should not dismiss the remaining state law claims without

prejudice. To the extent the PeaceHealth’s motion to dismiss relates to state law claims, that motion (Dkt. 30) should be renoted for February 2, 2024. If the Court retains supplemental jurisdiction over the state law claims, PeaceHealth’s motion to dismiss the state law claims (Dkt. 30) will be addressed.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- The Plaintiffs’ motion for judicial notice (Dkt. 36) **IS GRANTED**; and
- The PeaceHealth Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint (Dkt. 30) **IS**:
 - **GRANTED** as to the Plaintiffs’ federal claims; the Plaintiffs’ federal claims asserted against the PeaceHealth Defendants **ARE DISMISSED WITH PREJUDICE** and
 - **RENOTED to February 2, 2024** as to Plaintiffs’ state law claims.
- By **February 2, 2024**, the parties **ARE ORDERED TO SHOW CAUSE**, in writing, if any they have, why the Court should not decline to exercise supplemental jurisdiction and should not dismiss the remaining state law claims without prejudice.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party’s last known address.

Dated this 23rd day of January, 2024.

s/Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX D

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

AILA CURTIS, et al.,
Plaintiffs,
v.

JAY ROBERT INSLEE,
PEACEHEALTH,
LIZ DUNNE, DOUG
KOEKKOEK,
Defendants.

CASE NO. 3:23-CV-05741-
RJB

ORDER GRANTING
DEFENDANT INSLEE'S
MOTION TO DISMISS

This matter comes before the Court on Washington State Governor Jay Robert Inslee's Motion to Dismiss. Dkt. 18. The Court has considered the pleadings filed regarding the motion and the file herein.

This case arises from Defendants' COVID-19 vaccine mandates for healthcare workers. Dkt. 8. Gov. Inslee moves the Court to take judicial notice of certain facts and moves to dismiss the claims against him pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6). Dkt. 18. For the reasons provided below, the motions (Dkt. 18) should be granted.

**I. MOTION FOR JUDICIAL NOTICE, FACTS
AND PROCEDURAL HISTORY**

**A. SOURCES OF THE FACTS TO BE
CONSIDERED ON THE MOTION TO**

DISMISS AND GOV. INSLEE’S MOTION FOR JUDICIAL NOTICE

When evaluating the sufficiency of a pleading under Rule 12(b)(6), a court reviews the allegations in the complaint and any attachments or documents incorporated by reference. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019). “Certain written instruments attached to pleadings may be considered part of the pleading. Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

Although for purposes of a motion to amend or for a motion to dismiss the court ordinarily credits the allegations in the complaint as true, it need not “accept as true allegations that contradict matters properly subject to judicial notice,” or in a complaint’s attachment, or incorporated by reference into the complaint. *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)(the court is “not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint”).

Pursuant to Federal Rule of Evidence 201(b): “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned.”

The facts are taken from the Amended Complaint, its attachments, and facts subject to

judicial notice. Where judicial notice is taken, it will be designated. Additionally, some general background information will be taken from court decisions.

B. BACKGROUND FACTS

1. COVID-19, Emergency Use Authorizations for Vaccines, and Vaccine Program

COVID–19 is a “highly contagious, dangerous, and ... deadly disease.” *Biden v. Missouri*, 595 U.S. 87, 93 (2022). The COVID-19 pandemic posed significant challenges for federal and state governments. Dkt. 8. Beginning in February of 2020, Gov. Inslee declared a state of emergency and issued several public health and safety proclamations. *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1227 (9th Cir. 2022).

In December of 2020, the Federal Drug Administration (“FDA”) granted emergency use authorization (“EAU”) for the Pfizer-BioNTech (“Pfizer-BioNTech”) two-dose mRNA vaccine for individuals 16 and older and for the Moderna two-dose mRNA vaccine for individuals 18 years and older. Dkt. 8. On December 21, 2020, Pfizer-BioNTech received conditional marketing authorization in the European Union (“EU”) for its COVID-19 vaccine, marketed as COMIRNATY®. *Id.* On February 27, 2021, the FDA granted EUA for the Johnson & Johnson vaccine for individuals 18 and older. *Id.*

The Amended Complaint alleges that Gov. Inslee voluntarily agreed to participate in the Center for Disease Control and Prevention’s (“CDC”) COVID-19 Vaccination Program. Dkt. 8 at 20. It further

contends that “[a]lthough the CDC states that Defendants are engaged in a ‘Vaccination Program,’ the CDC has relied exclusively on investigational drugs to administer its COVID-19 Vaccination Program Provider Agreement (‘Provider Agreement), which means no one has received a true vaccine against any COVID-19 virus.” *Id.*

Even after vaccines became available, the pandemic continued, with the virus mutating into various strains. *Does 1-6 v. Mills*, 16 F.4th 20, 26 (1st Cir. 2021), cert. denied sub nom. *Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022). In the United States, the summer of 2021 saw the emergence of a highly contagious COVID variant referred to as the “Delta” variant. *Id.* COVID cases, hospitalizations and deaths rose sharply. CDC, *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#trends_weeklyhospitaladmissions_select_00 (last visited December 13, 2023); https://covid.cdc.gov/covid-data-Tracker/#trends_weeklydeaths_select_00 (last visited December 13, 2023).

2. Gov. Inslee’s Proclamation, Approval of Pfizer-BioNTech Vaccine, PeaceHealth’s Policy, and Federal Government’s Rule

On August 20, 2021, Gov. Inslee issued Proclamation 21-14.1, “Covid-19 Vaccination Requirement,” (“Proclamation”) which required state workers, workers in an education setting, and healthcare providers to be fully vaccinated by October 18, 2021, unless they qualified for medical or religious exemptions. Dkt. 8-7.

On August 23, 2021, the Pfizer-BioNTech vaccine, COMIRNATY®, received full approval for individuals 16 and older. *FDA Approval Letter*

(August 23, 2021), <http://www.fda.gov/media/151710/download> (last visited December 13, 2023); *FDA News Release* (August 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (last visited December 13, 2023).

The Plaintiffs’ Amended Complaint maintains that the Pfizer-BioNTech vaccine was not fully approved in August of 2021 and so was, and still is, “experimental.” Dkt. 8. This contention was considered and rejected by the court in *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1241 (D. Or. 2021), is belied by the FDA’s approval of COMIRNATY®, and the CDC’s later explanation, which provided:

Pfizer-BioNTech (COMIRNATY®) received U.S. Food and Drug Administration (FDA) approval on August 23, 2021, for individuals 16 years of age and older. Once vaccines are approved by the FDA, companies can market the vaccines under brand names. COMIRNATY® is the brand name for the Pfizer-BioNTech COVID-19 Vaccine. Now that the FDA-authorized Pfizer-BioNTech COVID-19 vaccine has been approved by the FDA for individuals 16 years of age and older, it will be marketed as COMIRNATY®. The use of the name Pfizer-BioNTech will still be used for individuals 12-15 years old since this age group has not been approved. There has been **no change** in the formulation of the vaccine since the name change.

Pfizer-BioNTech COVID-19 Vaccine Overview and Safety (also known as COMIRNATY®), Ctrs For

Disease Control & Prevention (Oct. 28, 2021), <https://stacks.cdc.gov/view/cdc/111109> (emphasis in original) (last visited December 13, 2023).

In light of the FDA’s actions and the CDC’s explanation, Governor Inslee’s motion for the Court to take judicial notice that the Pfizer-BioNTech vaccine was approved on August 23, 2021 (Dkt. 18) should be granted. The Pfizer-BioNTech vaccine received approval on August 23, 2021. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 283 (2d Cir. 2021) (noting the FDA gave full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older on August 23, 2021), cert. denied sub nom. *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022). This fact is “accurately and readily determined” from the FDA’s approval and CDC’s explanation. Federal Rule of Evidence 201(b). The FDA and CDC are “sources whose accuracy cannot be reasonably questioned.” *Id.*

On August 30, 2021, Defendant PeaceHealth issued its “COVID-19 Vaccine Requirement Policy” (“Policy”). Dkt. 8-2. Like Gov. Inslee’s Proclamation, this Policy also required that PeaceHealth employee healthcare workers be “fully vaccinated against COVID-19.” *Id.* October 15, 2021 was set as the compliance date for full vaccination or approval of medical or religious exemptions under PeaceHealth’s Policy. *Id.*

After the deadlines set in both the Proclamation and Policy, on November 5, 2021, the U.S. Secretary of Health and Human Services “issued an interim final rule amending the existing conditions of participation in Medicare and Medicaid to add a new requirement—that facilities ensure that their covered staff are vaccinated against COVID–19.” *Biden v. Missouri*, 595 U.S. 87, 91 (2022) (citing 86 Fed. Reg. 61561, 61616–61627). Under this rule,

Medicare and Medicaid program participants like PeaceHealth must require medical staff be vaccinated against COVID-19 unless medical and/or religious exemptions are appropriate. *Id.* Further, “[a] facility’s failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs.” *Id.* On January 13, 2022, the United States Supreme Court upheld the rule. *Id.*

C. PROCEDURAL HISTORY OF THIS CASE

The plaintiffs are current and former PeaceHealth employees who filed a lengthy complaint on August 18, 2023. Dkt. 1. Although there are over 80 plaintiffs, this is not a class action. The defendants are Gov. Inslee, PeaceHealth, a not-for-profit healthcare system headquartered in Clark County, Washington, and officers of PeaceHealth, Liz Dunne and Doug Koekkoek. *Id.*

After notice of the complaint’s deficiencies, the Plaintiffs were given an opportunity to file an amended complaint. Dkt. 7. The Amended Complaint (Dkt. 8) is the operative complaint rendering the Plaintiffs’ original complaint “without legal effect.” *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). The Amended Complaint asserts federal claims for: (1) violation of the Fourteenth Amendment’s equal protection rights, (2) violation of the Fourteenth Amendment’s due process rights, (3) violation of the “Spending Clause Doctrine,” (4) “Subjected to Investigational Drug Use,” pursuant to 42 U.S.C. § 1983, (5) “Unconstitutional Conditions Doctrine,” (6) “Implied Right of Action 21 U.S.C. § 360bbb-3;” and state law claims for (7) breach of contract, third party beneficiary, (8) “employment

torts,” (9) outrage, and (10) invasion of privacy and defamation of character. Dkt. 8 at 57–70.

II. DISCUSSION

A. STANDARD FOR MOTION TO DISMISS

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547.

B. FEDERAL CLAIMS AGAINST GOV. INSLEE IN HIS OFFICIAL CAPACITY

Claims against state officials, in their official capacities, are considered claims against the state. *Will v. Michigan Dept. of State Police*, 491 U.S. 48

(1989). “[A] state and its officials sued in their official capacity are not considered ‘persons’ within the meaning of § 1983.” *Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004). The Plaintiffs do not seek prospective relief for constitutional violations, and so the exception announced in *Ex Parte Young*, 209 U.S. 123 (1908), does not apply. They seek only damages. Accordingly, all federal claims asserted against Gov. Inslee, in his official capacity, should be dismissed because he is not a “person” as is required to bring a claim against him, in his official capacity, under § 1983. *Wolf* at 364.

**C. FEDERAL CLAIMS AGAINST GOV. INSLEE
IN HIS INDIVIDUAL CAPACITY AND QUALIFIED IMMUNITY.**

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981) (*overruled on other grounds*); *Daniels v. Williams*, 474 U.S. 327 (1986). Defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 129 S. Ct. 808, 81 (2009) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In analyzing a qualified immunity defense the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the

party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001). Each of the Plaintiffs’ federal claims will be examined.

SAUCIER STEP 1 – VIOLATION?

1. Equal Protection Claim

The Equal Protection Clause provides that, “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1. “The Equal Protection Clause ensures that ‘all persons similarly situated should be treated alike.’” *Engquist v. Oregon Dep’t of Agric.*, 478 F.3d 985, 992 (9th Cir. 2007).

Plaintiffs raise a “class of one” equal protection claim, alleging that Gov. Inslee treated them differently than other, similarly situated groups. They do not contend that they are members of a suspect class. Accordingly, to assert a “class of one” equal protection claim, the Plaintiffs must demonstrate Gov. Inslee: (1) intentionally (2) treated them differently than other similarly situated groups, (3) without a rational basis. *Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724, 729 (9th Cir. 2023). Because the Plaintiffs fail to allege sufficient facts regarding the third requirement, the Court need not reach the remaining two.

A “classification comports with the Equal Protection Clause if it is rationally related to a legitimate state interest.” *Seaplane* at 730. “The rational basis prong of a ‘class of one’ claim turns on whether there is a rational basis for the distinction,

rather than the underlying government action.” *Id.*
“This prong is deferential to the government.” *Id.*

Even construing the properly credited portions of the Plaintiffs’ Amended Complaint liberally, the Plaintiffs fail to allege sufficient facts from which to conclude that Gov. Inslee did not have a rational basis for treating them differently than others in the community. The Plaintiffs Amended Complaint indicates that they were (and are) healthcare workers during the COVID-19 pandemic. Dkt. 8. “Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella.” *Biden v. Missouri*, 595 U.S. 87, 93 (2022). COVID-19 vaccine mandates for healthcare workers “substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients.” *Id.* At the time of the Proclamation, there was a rise in COVID-19 cases, hospitalizations and deaths. *Mills* at 6. Gov. Inslee had a rational basis for the Proclamation.

2. Substantive and Procedural Due Process Claim

“The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of life, liberty, or property.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Substantive Due Process. The COVID-19 vaccine mandates do not implicate a fundamental right protected by the substantive due process clause. *Kheriaty v. Regents of the Univ. of California*, 2022 WL 17175070, at *1 (9th Cir. Nov. 23, 2022)

(California educator’s challenge of the University of California’s COVID-19 vaccination policy as a violation of his due process rights did not implicate a fundamental constitutional right); *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (a substantive due process claim “depends on the existence of a fundamental right ingrained in the American legal tradition. Yet *Jacobson* [*v. Massachusetts*, 197 U.S. 11 (1905)], which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack such a right.”). Accordingly, the rational basis standard of review applies. *Id.* As stated in Section II.C.1. above, the Plaintiffs have not alleged sufficient facts from which to conclude that Gov. Inslee did not have a rational basis for the Proclamation.

Procedural Due Process. “A procedural due process claim has two elements: (1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.” *Miranda v. City of Casa Grande*, 15 F.4th 1219, 1224 (9th Cir. 2021). The Plaintiffs fail to point to facts, which if believed, would demonstrate that they were denied “adequate procedural protections” from Gov. Inslee. They fail to point to procedural protections that they were due but did not receive.

3. Spending Clause Doctrine Claim

The Plaintiffs fail to allege facts from which to conclude that Gov. Inslee violated the spending clause doctrine. While the Spending Clause of the U.S. Constitution places some limits on the federal government’s ability to condition use of federal funds, *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987), Plaintiffs

fail to point to any authority that it places limits on state governors.

4. “Subjected to Investigational Drug Use” Claim

As it relates to this claim, the Plaintiffs refer to 21 U.S.C. § 360bbb-3, 45 C.F.R. Part 46, the Belmont Report, Article VI of the International Covenant on Civil and Political Rights (“ICCPR”) Treaty, 10 U.S.C. § 980, Federal Wide Assurance, and the CDC COVID-19 Vaccination Program Provider Agreement. Dkt. 8.

The Plaintiffs fail to show that any of the federal statutes, regulations, reports or international treaties they cite in their Amended Complaint apply and/or that they contain a private cause of action that is available against Gov. Inslee in federal court.

21 U.S.C. § 360bbb-3. As is relevant here, 21 U.S.C. § 360bbb-3(e)(1)(A)(ii), which governs emergency use authorization of medication, requires that the Secretary of the U.S. Dept. of Health and Human Services establish:

Appropriate conditions designed to ensure that individuals to whom the product is administered are informed--

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the con-

sequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

This statute does not apply to Gov. Inslee. It directs the Secretary of the U.S. Dept. of Health and Human Services' actions. Further, the Plaintiffs do not allege that Gov. Inslee was required to provide them with any information that was mandated by the statute and that he did not so provide it. To the extent the Plaintiffs assert a claim under the statute, it should be dismissed.

45 C.F.R. Part 46, The Belmont Report, Article VI of the ICCPR. There is no private right of action under 45 C.F.R. Part 46, the Belmont Report, or the ICCPR. Agency regulations, like 45 C.F.R. Part 46, cannot provide a private right of action where the authorizing statute has not so provided. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (holding that “language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not”). The Plaintiffs have failed to point to, and this Court cannot find, a Congressionally given private right of action in any of the authorizing statutes for 45 C.F.R. Part 46. Accordingly, there is no private right of action in 45 C.F.R. Part 46. *Wright v. Fred Hutchinson Cancer Research Ctr.*, 269 F. Supp. 2d 1286, 1289 (W.D. Wash. 2002). Further, there is no private right of action under the Belmont Report, *Kriley v. Nw. Mem'l Healthcare*, 2023 WL 371643, at *2 (7th Cir. Jan. 24, 2023), or the ICCPR which is enforceable in federal courts, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

10 U.S.C. § 980. Under 10 U.S.C. § 980(a)(1), “funds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject unless ... the informed consent of the subject is obtained in advance ...”

The Plaintiffs have failed to allege sufficient facts from which they could obtain relief from Gov. Inslee based on this statute. There is no allegation that he expended Department of Defense funds or was obligated to inform the Plaintiffs of information, and he did not provide such information.

Federal Wide Assurance. According to the Amended Complaint, through Federal Wide Assurance, “an institution commits to the [U.S. Dept. of Health and Human Services] that it will comply with the requirements in the [U.S. Dept. of Health and Human Services’] Protection of Human Subjects regulations at 45 C.F.R. Part 46.” Dkt. 8 at 30, n. 23. The Plaintiffs do not meaningfully respond to Gov. Inslee’s argument that there is no private right of action for them against the governor pursuant to Federal Wide Assurance. The argument has merit and the claim should be dismissed.

The CDC COVID-19 Vaccination Program Provider Agreement. As stated in Section II. D. below, there is no allegation that Gov. Inslee signed this agreement. The claim should be dismissed.

5. Unconstitutional Conditions Doctrine Claim

The unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). It prohibits

the government from denying a person a benefit because they exercise a constitutional right. *Id.*

The Amended Complaint acknowledges that the Plaintiffs are “at will” employees of a private employer. Dkt. 8. Accordingly, they fail to plead sufficient facts to allege that a government benefit has been denied. The Plaintiffs’ unconstitutional conditions doctrine claim should be dismissed. *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553, 566 (W.D. Va. 2022) (University’s COVID-19 vaccine mandate challenger failed to allege violation of unconstitutional conditions doctrine because no government benefit was at issue).

6. Implied Right of Action 21 U.S.C. § 360bbb-3 Claim

As stated above in Section II.C.4., the Plaintiffs have failed to allege sufficient facts that 21 U.S.C. § 360bbb-3 applies to Gov. Inslee. This claim should be dismissed.

SAUCIER STEP 2 – QUALIFIED IMMUNITY?

This opinion will next consider whether Gov. Inslee is entitled to qualified immunity, the second *Saucier* step. (The first *Saucier* step is in Sections II.C.1-6. immediately above.) As to the second *Saucier* step, the Court must determine whether the constitutional rights asserted were “clearly established when viewed in the specific context of the case.” *Saucier* at 2156. For purposes of qualified immunity, “[a] right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that

right.” *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (*cleaned up*). While case law directly on point is not required for a right to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* at 7–8.

Gov. Inslee is entitled to qualified immunity on all federal claims. The Plaintiffs have failed to point to any grounds from which to conclude that Gov. Inslee’s Proclamation violated constitutional or statutory rights that were “clearly established when viewed in the specific context of the case.” *Saucier* at 2156. They point to no existing precedent that “placed the statutory or constitutional question[s] beyond debate.” *Rivas-Villegas* at 7–8.

The Plaintiffs reference *Doe v. Rumsfeld*, 297 F. Supp. 2d 119, 123 (D.D.C. 2003). Dkt. 29. In *Doe*, the court held that the government violated the Administrative Procedures Act when it required active duty military personnel to take an anthrax drug that was not designated for that use, was not licensed for that use, and where studies were at least a decade old. This case is distinguishable: *Doe* did not take place during a pandemic of a highly transmissible virus that killed millions of people. Further, it did not address any of the claims the Plaintiffs make here. The inquiry into whether a constitutional or statutory right is clearly established “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). *Doe* did not clearly establish that the Plaintiffs’ constitutional or statutory rights would be violated by Gov. Inslee’s Proclamation 21-14.1.

The Plaintiffs point to *United States v. Lanier*, 520 U.S. 259 (1997), and maintain that qualified immunity does not require “established law, even in

novel factual situations” where there is “obvious clarity to the specific conduct in question.” Dkt. 29. The Plaintiffs premise their argument and much of their case on the notion that the only vaccines available at the time of the Proclamation were “experimental contending that the Pfizer-BioNTech, Moderna, and Johnson & Johnson vaccines were only authorized pursuant to 21 U.S.C. § 360bbb-3, the EUA statute. As stated above in Section I.B.2., this contention was considered and rejected by another court in this circuit, *Johnson* at 1238–1243, and its reasoning applies here. The Pfizer-BioNTech vaccine received FDA approval on August 23, 2021. *We The Patriots USA* at 283. Further, even if the only vaccines available at the time were “experimental,” the Ninth Circuit has cautioned that when governmental actions are “undertaken during a time of great uncertainty with a novel disease, medical uncertainties afford little basis for judicial responses in absolute terms and that legislative authority must be especially broad in areas fraught with medical and scientific uncertainties.” *Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724, 730 (9th Cir. 2023) (*cleaned up*). Gov. Inslee is entitled to qualified immunity on all the federal claims.

D. STATE LAW CLAIMS

The Plaintiffs’ state law claims for breach of contract, third party beneficiary, “employment torts,” outrage, invasion of privacy and defamation of character against Gov. Inslee should be dismissed.

Breach of Contract. In Washington, “[a] breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.” *C 1031*

Properties, Inc. v. First Am. Title Ins. Co., 175 Wn. App. 27, 33–34 (2013) (*cleaned up*).

As to the Plaintiff's breach of contract, third party beneficiary claim, the Amended Complaint alleges that the Proclamation "deprived [them of] of the intended benefits conferred" by the Provider Agreement. Dkt. 8 at 64. While the Amended Complaint alleges that Gov. Inslee voluntarily agreed to participate in the COVID-19 Vaccination Program, *Id.* at 20, it does not allege that he signed the Provider Agreement. (Healthcare facilities administering the vaccines signed it.) Accordingly, Gov. Inslee did not agree to a duty imposed by the Provider Agreement. The breach of contract claim asserted against him should be dismissed.

"Employment Torts." The Plaintiffs' fail to explain the "employment torts" claim. There is no allegation that Gov. Inslee was the Plaintiffs' employer. This claim should be dismissed.

Outrage. In Washington, "[t]he tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor*, 149 Wn.2d 192, 195 (2003). Any claim for outrage "must be predicated on behavior so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 196 (*cleaned up*).

The Plaintiffs' outrage claim should be dismissed. The properly credited allegations in the Amended Complaint are insufficient from which to conclude that the Proclamation was "beyond all possible bounds of decency" considering the circumstances at the time.

Invasion of Privacy and Defamation of Character. The allegations in the Amended Complaint regarding this claim relate to Defendant PeaceHealth’s actions and not Gov. Inslee’s actions. This claim against Gov. Inslee should be dismissed.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- Jay Robert Inslee’s Motion to Dismiss (Dkt. 18) **IS GRANTED.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party’s last known address.

Dated this 21st day of December, 2023.

s/Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX E

**CONSTITUTIONAL AND STATUTORY
PROVISIONS**

U.S. Constitution

Fourteenth Amendment, Section 1

... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Statutes

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

21 U.S.C. § 355

(a) [n]o person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) is effective with respect to such drug. ...

(i)(4) Regulations under paragraph (1) shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in

connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives ...

21 U.S.C. § 360bbb

(a) The Secretary may, under appropriate conditions determined by the Secretary, authorize the shipment of investigational drugs or investigational devices for the diagnosis, monitoring, or treatment of a serious disease or condition in emergency situations.

(b) Any person, acting through a physician licensed in accordance with State law, may request from a manufacturer or distributor, and any manufacturer or distributor may, after complying with the provisions of this subsection, provide to such physician an investigational drug or investigational device for the diagnosis, monitoring, or treatment of a serious disease or condition if—

(1) the licensed physician determines that the person has no comparable or satisfactory alternative therapy available to diagnose, monitor, or treat the disease or condition involved, and that the probable risk to the person from the investigational drug or investigational device is not greater than the probable risk from the disease or condition;

(2) the Secretary determines that there is sufficient evidence of safety and effectiveness to support the use of the investigational drug or

investigational device in the case described in paragraph (1); ...

(4) the sponsor, or clinical investigator, of the investigational drug or investigational device submits to the Secretary a clinical protocol consistent with the provisions of section 355(i) or 360j(g) of this title, including any regulations promulgated under section 355(i) or 360j(g) of this title, describing the use of the investigational drug or investigational device in a single patient or a small group of patients.

21 U.S.C. § 360bbb-3

(e) Conditions of authorization

(1) Unapproved product

(A) Required conditions

With respect to the emergency use of an unapproved product, the Secretary, to the extent practicable given the applicable circumstances described in subsection (b)(1), shall, for a person who carries out any activity for which the authorization is issued, establish such conditions on an authorization under this section as the Secretary finds necessary or appropriate to protect the public health, including the following:

(i) Appropriate conditions designed to ensure that health care professionals administering the product are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of the emergency use of the product, and of the extent to which such benefits and risks are unknown; and

(III) of the alternatives to the product that are available, and of their benefits and risks.

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

(iii) Appropriate conditions for the monitoring and reporting of adverse events associated with the emergency use of the product

(l) Nothing in this section provides the Secretary any authority to require any person to carry out any

activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity ...

42 U.S.C. § 247d-6d(b)(8)

During the effective period of a declaration under subsection (b), or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—

(A) is different from, or is in conflict with, any requirement applicable under this section; and

(B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 *et seq.*].

42 U.S.C. § 247d-6e(c)

(c) The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

42 U.S.C. § 289

The Secretary shall by regulation require that each entity which applies for a grant, contract, or cooperative agreement under this chapter for any project or program which involves the conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to the Secretary that it has established (in accordance with regulations which the Secretary shall prescribe) a board (to be known as an “Institutional Review Board”) to review biomedical and behavioral research involving human subjects conducted at or supported by such entity in order to protect the rights of the human subjects of such research.