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APPENDIX A

FILED

DEC 3, 2025

MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS

NOT FOR PUBLICATION

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

No. 24-5204

D.C. No. 6:23-cv-01229-AA

MEMORANDUM*

SARA BOYSEN, *et al.*,

Plaintiffs—Appellants,

v.

PEACEHEALTH, INC.; PATRICK ALLEN; Gov. KATE
BROWN; LIZ DUNNE; DOUG KOEKKOEK; TODD SALNAS,

Defendants—Appellees.

Appeal from the United States District Court
for the District of Oregon

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

Ann L. Aiken, District Judge, Presiding

Submitted July 9, 2025**
Seattle, Washington

Before: McKEOWN, PAEZ, and SANCHEZ, Circuit Judges.

Sara Boysen and other former PeaceHealth employees (collectively, “Plaintiffs”) appeal the district court’s dismissal of their claims with prejudice. Plaintiffs were terminated after refusing to vaccinate against COVID-19 in violation of Defendant PeaceHealth’s COVID-19 vaccination policy. Plaintiffs allege that PeaceHealth and various PeaceHealth executives (collectively, “PeaceHealth”), former Oregon Governor Kate Brown, and former Oregon Health Authority Director Patrick Allen (“State Defendants”) violated Plaintiffs’ rights under federal and state law by penalizing their decision to refuse vaccination. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo the grant of a motion to dismiss under Rule 12(b)(6) and may affirm on any ground supported by the record. *Saloojas, Inc. v. Aetna Health of Cal., Inc.*, 80 F.4th 1011, 1014 (9th Cir. 2023). “[W]e accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Heineke v. Santa Clara Univ.*, 965 F.3d 1009, 1012 (9th Cir. 2020) (quotation omitted). We review de novo the district court’s determination that a party is

**The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

not a state actor. *Id.* We review for abuse of discretion the dismissal of a complaint with prejudice. *Benevidez v. Cnty. of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021). We affirm.

1. Plaintiffs’ § 1983 Claims (Counts 1 through 5). Plaintiffs allege that their rights have been violated under various federal statutes, a regulation, two contractual agreements, a scientific report, an international treaty, and the Fourteenth Amendment. Plaintiffs’ claims are foreclosed by our recent decision in *Curtis v. Inslee*, 154 F.4th 678 (9th Cir. 2025), which affirmed the district court judgment dismissing claims by similarly situated “vaccine refusers” for relief under the Emergency Use Authorization statute, 21 U.S.C. § 360bbb-3(e)(1)(A)(ii),¹ the Spending Clause Doctrine, the Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6(a)(1), the “Federal Wide Assurance Agreement,” the COVID-19 Vaccination Program Provider Agreement, the Belmont Report, Article VII of the International Convention on Civil and Political Rights, and the Fourteenth Amendment. *Id.* at *3-9. For the reasons explained in *Curtis*, none of Plaintiffs’ statutory or constitutional sources of law create any specific and definite rights enforceable under Section 1983.² *Id.*

¹ *Curtis* also resolves Plaintiffs’ claim under Count Eight (“Implied Private Right of Action 21 U.S.C. § 360bbb-3”). See *Curtis*, 154 F.4th at 687.

² Although Count Two purports to assert a claim under the Unconstitutional Conditions Doctrine, Plaintiffs’ allegations are derivative of their Fourteenth Amendment claims and fail for the reasons explained in *Curtis*. See *Curtis*, 154 F.4th at 690-95.

2. Plaintiffs’ State Law Claims (Counts 6 & 7). The district court dismissed Plaintiffs’ state law claims for breach of contract and intentional infliction of emotional distress for lack of standing and failure to state a claim, respectively. Because Plaintiffs do not challenge dismissal of these claims on appeal, these issues are forfeited. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).³

3. The district court correctly dismissed Plaintiffs’ complaint with prejudice because it determined that no amendment could cure the legal flaws in Plaintiffs’ allegations. As discussed in *Curtis*, 154 F.4th at 695, any amendment to Plaintiffs’ § 1983 claims would be futile because Plaintiffs have not identified an actionable source of federal law for their non-constitutional claims, and their constitutional claims do not survive under rational basis review. *See Webb v. Trader Joe’s Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021) (quotation omitted) (“Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment.”).

AFFIRMED.

³ In light of our determination, we do not reach the parties’ arguments concerning qualified immunity or whether PeaceHealth is a state actor.

APPENDIX B

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

SARA BOYSEN, *et al.*,
Plaintiffs,

v.

PEACEHEALTH, *et al.*,
Defendants.

Case No.
6:23-cv-01229-AA

**OPINION &
ORDER**

This matter comes before the Court on PeaceHealth, Liz Dunne, Doug Koekkoek, and Todd Salnas’s (collectively “PeaceHealth” or “PeaceHealth Defendants”) Motion to Dismiss, ECF No. 25, and on (former) Oregon State Governor Kate Brown and (former) Director of Oregon Health Authority Patrick Allen’s (collectively “State Defendants”) Motion to Dismiss. ECF No. 12. State Defendants also move to join the PeaceHealth motion to dismiss. ECF No. 26. For the reasons explained, the Motion to Join, ECF No. 26 is GRANTED. PeaceHealth and State Defendants’ Motions to Dismiss, ECF Nos. 12, 25, are GRANTED. This case is DISMISSED with prejudice.

BACKGROUND

I. Factual Background

All background is drawn from the allegations in the Complaint, along with judicially noticed facts 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 global tribulation caused by the Covid-19 pandemic, which broke out in 2020, is now well-known. This case, filed in August 2023, arises from Defendants’ mandates that healthcare workers be vaccinated against Covid-19 or obtain a medical or religious exemption. Compl. ¶¶ 19, 230. Plaintiffs are former healthcare workers suing their employer, PeaceHealth, a licensed general hospital provider, and three PeaceHealth executives: Liz Dunne, Todd Salnas, and Doug Koekkoek. Compl. ¶¶ 32-35, 231. Plaintiffs also name as Defendants then-acting Oregon governor Kate Brown and Patrick Allen, former director of the Oregon Health Authority, for issuing orders mandating vaccination. *Id.* ¶¶ 35.1-35.2.

The crux of Plaintiffs’ claim is that the “Pfizer-BioNTech COVID-19 Vaccine” (“Pfizer Vaccine”) is not a vaccine. Rather, it is an investigational medical product legally distinct from a vaccine. *Id.* ¶¶ 37, 287. Essentially, Plaintiffs maintain that the Pfizer Vaccine was first made available by the federal government through the emergency authorization process, rather than through a commercial license to pharmaceutical companies to market it for its intended use, and therefore, has no indication to treat, cure, or prevent any disease. *Id.* ¶¶ 81, 88, 94, 259, 489, 533. According to Plaintiffs, because the

Pfizer Vaccine is not really a vaccine, but instead medical treatment, Plaintiffs have a federally secured right to refuse it without losing their employment benefits. *Id.* ¶ 37.

Plaintiffs allege that, on August 5, 2021, “[d]uring the height of the pandemic, when hospitalization rates soared, and SARS-CoV-2 variants abounded,” PeaceHealth implemented a policy requiring its caregivers to be fully vaccinated against COVID-19 or have an approved medical or religious exception from the vaccine. *Id.* ¶¶ 21, 262. Later, on August 25, 2021, the Oregon Health Authority (“OHA”) issued a rule implementing similar statewide orders requiring that all health state licensed healthcare workers either receive a Covid-19 vaccine or obtain an approved medical or religious exemption. *Id.* ¶ 261; Ex. D.

When Plaintiffs refused to receive a vaccination, obtain a medical exception, or provide a religious exception, PeaceHealth presumably terminated Plaintiffs. *Id.* ¶¶ 31.1-31.12. Plaintiffs contend that all Defendants violated their 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 4. Both State Defendants and PeaceHealth move to dismiss Plaintiffs’ Complaint in its entirety.

II. Emergency Use Authorization and the Pfizer Vaccine

The Emergency Use Authorization (“EUA”) authority allows the Food and Drug Administration

(“FDA”) to help strengthen the nation’s public health protections against threats including infectious diseases, by facilitating the availability and use of medical countermeasures needed during public health emergencies. Compl. Ex. C at 11.¹ Accordingly, the Health and Human Services (“HHS”) Secretary declared that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to section 564 of the [Food, Drug, and Cosmetic] Act, effective March 27, 2020. *Id.*²

As described in text in official government websites, hyperlinked in attachments to Plaintiffs’ Complaint, for an EUA to be issued for a vaccine, the manufacturer of the vaccine must undergo a rigorous development process that includes tens of thousands of study participants to generate non-clinical, clinical, and manufacturing information needed by FDA for the agency to determine whether the known and potential benefits outweigh the known and potential risks of a vaccine for the prevention of

¹ The Court incorporates by reference, set forth in Exhibit C attached to Plaintiffs’ Complaint, hyperlinks to the FDA’s official government website: “Food and Drug Administration: Emergency Use Authorization — About Emergency Use Authorizations (EUAs),” available at <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization>.

² See “Coronavirus Disease 2019 (COVID-19) EUA Information, “Detailed Information for all COVID-19 EUAs, including authorizations and fact sheets, COVID-19 EUAs for Vaccines,” available at <https://www.fda.gov/emergency-preparedness-and-response/mcm-legal-regulatory-and-policy-framework/emergency-use-authorization#vaccines>.

COVID-19. *Id.*³

Ultimately, after Pfizer-BioNTech received Emergency Use Authorization for its Covid-19 vaccine in December 2020. See Compl. ¶ 108 n. 25 (citing ACIP, Morbidity and Mortality Weekly Report, “Use of Pfizer-BioNTech COVID-19 Vaccine in Persons Aged \geq 16 Years: Recommendations of the Advisory Committee on Immunization Practices – United States, September 2021”, Vol.70, No.38, at 1, available at <https://stacks.cdc.gov/view/cdc/109943>).

The CDC Advisory Committee on Immunization Practices (“ACIP”) reported high rates of efficacy of the Pfizer Vaccine “in preventing symptomatic, laboratory-confirmed Covid-19.” *Id.* at 2. In fact, the ACIP report refers to the Pfizer Vaccine as a “vaccine” and discusses its success and efficacy for immunization during the eight months it was offered under the EUA. *Id.* at 1-5. The report states that evidence supports the use of Pfizer Vaccine, “and that the desirable effects of disease prevention via vaccination with the [Pfizer] vaccine” are large and outweigh the potential harms. *Id.* at 4. As of September 22, 2021, the report then announced that the Pfizer Vaccine had been fully approved:

In summary, after 8 months of use under an FDA EUA and ACIP interim recommendation, the Pfizer-BioNTech COVID-19 vaccine, Comirnaty, now has full FDA approval and is recommended by ACIP for use in persons aged \geq 16 years in the United States. Comirnaty has the same formulation

³ See *id.*, “Emergency Use Authorizations for Vaccines Explained” available at <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained>.

and can be used interchangeably with the Pfizer-BioNTech COVID-19 vaccine used under EUA without presenting any safety or effectiveness concerns.

Id. See also *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1241 (D. Or. 2021) (setting forth detailed history of the Pfizer Vaccine’s remarkable journey from early development to full FDA approval); Fed. R. Evidence 201(b)(1) (permitting the judicial notice of fact that not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction).

LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), a motion to dismiss shall be granted where the plaintiff fails to state a claim upon which relief can be granted. “A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (internal quotation marks and citation omitted). Review of a motion to dismiss is limited to “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice” along with any “writing referenced in a complaint but not explicitly incorporated therein if the complaint relies on the document and its authenticity is unquestioned.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

A plaintiff’s complaint must allege facts to state a claim for relief that is plausible on its face. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “[A]

plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted; second brackets in original). This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Dismissal with prejudice is appropriate when no amendment can cure a deficient complaint. *Hernandez v. Fed. Home Loan Mortg. Corp.*, 663 F. App'x 518, 520 (9th Cir. 2016).

DISCUSSION

Plaintiffs assert eight claims against the PeaceHealth Defendants: five variations of claims under 42 U.S.C. § 1983, a breach of contract claim, an intentional infliction of emotional distress claim, and an "Implied Private Right of Action" claim under 21 U.S.C. §360bbb-3. Plaintiffs maintain the same claims, except the breach of contract claim, against State Defendants. As supplemental authority, Plaintiffs point to *Health Freedom Def. Fund, Inc ("Health Freedom"). v. Carvalho*, 104 F.4th 715 (9th Cir. 2024), for the proposition that the Court must accept as true Plaintiffs' allegation that the Pfizer Vaccine is not a vaccine to prevent COVID-19, but rather an investigational medical product distinguishable from a vaccine, Compl. ¶¶ 287, 463, implicating an alleged fundamental right to refuse medical treatment.

I. Claims Against Brown and Allen

A. Official Capacity Suit for Damages

Plaintiffs bring claims against the former Governor and former OHA director in the personal and official capacities. Claims against state officials, in their official capacities, are considered claims against the state. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). The Supreme Court has held that, absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. *See, e.g., Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

Plaintiffs do not seek prospective relief for constitutional violations, thus, the exception announced in *Ex Parte Young*, 209 U.S. 123 (1908), does not apply. They seek only damages. Compl. at 137. To the extent that Plaintiffs seek damages against state Defendants in their official capacities, those claims are barred by the Eleventh Amendment. *Johnson v. Kotek*, No. 22-35624, 2024 WL 747022, at *2 (9th Cir. Feb. 23, 2024) (citing *Mitchell v. Washington*, 818 F.3d 436, 442 (9th Cir. 2016)).

B. Individual Capacity - Federal Claims Against Brown and Allen (Step One – Qualified Immunity Analysis)

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). 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*, 555 U.S. 223, 231 (2009). 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. *Id.* at 232. Each of the Plaintiffs’ federal claims will be examined.

1. Standard of Review

Before the Court analyzes whether Plaintiffs have stated a claim on their allegations of constitutional violations, it is necessary to determine the standard of review. Plaintiffs are not alleging that they are a suspect class, thus the Court must establish whether a fundamental right is at issue. Plaintiffs assert that rational basis standard does not apply, because, under an EUA, a vaccine is not a licensed vaccine, and implicates a higher standard of review.

Plaintiffs contend that the Court must accept as true that all drugs issued under EUA have “no legal indication to treat, cure, or prevent any known disease,” and therefore, by legal definition, a vaccine issued under an EUA is not legally a vaccine, but rather, investigational medical treatment, the use of which cannot be mandated by a state actor. ECF No. 33 at 2; Compl. ¶¶ 81, 88, 259, 463, 489, 533.

Accordingly, Plaintiffs assert that they have a federally secured right to refuse a non-vaccine without loss of continued employment. *See e.g.*, Compl. ¶¶ 81-96.

Plaintiffs provide as authority *Health Freedom*, 104 F.4th 715. In *Health Freedom*, the plaintiffs challenged the defendant school district’s vaccine mandate. The *Health Freedom* plaintiffs also alleged that the Covid-19 vaccine was not a vaccine, because it was “designed to reduce symptoms ... rather than to prevent transmission and infection.” *Id.* at 725. In the plaintiffs’ view, the Covid-19 vaccine was not a “traditional vaccine,” the mandate of which has historically been subject to rational basis review, and that it was medical treatment, refusal of which implicates a fundamental right. *Id.* at 720.

The Ninth Circuit agreed with the Health Freedom plaintiffs that, when uncontradicted by judicially noticeable facts, their allegations must be taken as true. *Id.* at 725. The appellate court determined that the district court below had erred when it held that, even if the court accepted as true the plaintiffs’ allegations that the Covid-19 vaccine was medical treatment not preventing the spread of the virus, the vaccine had other features aimed at protecting against the virus, thus the defendant school district’s mandate was rooted in a legitimate government interest and survived rational basis review under *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In so holding, the district court explained that *Jacobson* does not require that a vaccine have the specific purpose of preventing disease. *Health Freedom*, 104 F.4th at 725.

Looking at *Jacobson*, the Supreme Court upheld a challenge to a state law mandating vaccination

during a smallpox pandemic. The court applied a standard akin to rational basis review, balancing an individual's liberty interest in declining an unwanted vaccine against the State's interest in preventing the disease.⁴ 197 U.S. at 38.

In deciding *Health Freedom*, The Ninth Circuit determined that *Jacobson* “does not directly control based on [plaintiffs'] allegations.” 104 F.4th at 724. The Ninth Circuit distilled from *Jacobson* that the “principle of vaccination” is “to prevent the spread” of smallpox. *Health Freedom*, 104 F.4th at 724 (citing *Jacobson*, 197 U.S. at 31-32). The *Health Freedom* plaintiffs alleged that a “traditional vaccine” must provide immunity and “prevent the spread” of Covid-19, and that the Covid-19 vaccine was “medical treatment” that “mitigates symptoms,” but does not “prevent the spread.” *Id.* at 720, 725.

Thus, the Ninth Circuit determined that the *Health Freedom* plaintiffs had presented a different government interest—mitigating symptoms—distinct from the interest in “preventing” infection which the Ninth Circuit identified as the principle of vaccination in *Jacobson*. *Id.* at 725. Accordingly, the Ninth Circuit held that the district court wrongly applied *Jacobson* to the plaintiffs’ substantive due process claim.

However, the Ninth Circuit explained that the nature of its holding was “preliminary,” and that “on a more developed factual record” it would not prejudge whether the plaintiffs’ allegations would

⁴ In addition to “preventing” smallpox, *Jacobson* also described a vaccine as a means to “eradicate” smallpox, 197 U.S. at 27; “meet and suppress the evils of smallpox,” *id.* at 30-31; “stamp out the disease of smallpox,” *id.* at 31; “prevent[] the transmission and spread [of smallpox],” *id.*; and “render [smallpox] less dangerous to those who contract it.” *Id.* at 34.

prove true. *Id.* at 725. The court noted that the defendant school district had only provided “a CDC publication that says ‘COVID-19 vaccines are safe and effective.’ But ‘safe and effective’ for what?” the court asked. *Id.* While it was implied that the Covid-19 vaccine was aimed at preventing COVID-19, the Ninth Circuit found that the record did not contain “judicially noticeable facts that prove this.” *Id.*

Here, the record is replete with judicially noticeable facts that Pfizer-BioNTech COVID-19 vaccine is a vaccine—as that term is used in *Jacobson*—“as a preventative” of Covid-19. 197 U.S. at 24. First, the principal chapter of regulations governing EUAs to which Plaintiffs cite states that: (1) EUA drugs are only authorized if they “may be effective in diagnosing, treating, or preventing . . . [a] disease or condition,” 21 U.S.C. § 360bbb-3(c)(2)(A)(i); and that (2) EUA drugs “shall not be considered to constitute a clinical investigation,” 21 U.S.C. § 360bbb-3(k). This squarely contradicts Plaintiffs’ allegation that vaccines that receive approval under an EUA are not, as a matter of law, true vaccines aimed at treating or preventing disease.

Likewise, Plaintiffs’ Complaint attaches as Exhibit C a “Fact Sheet for Healthcare Providers Administering Vaccine (“EUA Fact Sheet”)” subtitled “Emergency Use Authorization (EUA) of the Pfizer-Biontech Covid-19 Vaccine *to Prevent Coronavirus Disease 2019 (Covid-19)*.” Compl., Ex. C at 1. The Fact Sheet states that “The U.S. Food and Drug Administration (FDA) has issued an Emergency Use Authorization (EUA) to permit the emergency use of the unapproved product, Pfizer-BioNTech COVID-19 Vaccine, *for active immunization to prevent COVID-19* in individuals 16 years of age and older. *Id.* Plaintiffs’ Complaint references the EUA Fact

Sheet sixteen times. Compl. ¶¶ 108, 224-A, 225, 281, 282, 317-G, 327, 392, 394, 493, 528.

Moreover, attached to Plaintiffs’ Complaint is Exhibit D, the Oregon Health Authority’s Public Health Division Temporary Administrative Order, PH 38-2021, which includes a statement of need and justification for the mandate that healthcare providers must be vaccinated or have obtained an exception to vaccination. Compl., Ex. D. The Order covers the time period complained of by Plaintiffs, where they allege that only the EAU doses were available. The Order states that the vaccination **“helps to prevent and slow the spread of COVID-19.”** *Id.* at 3. The text of the rule, set forth in the order, states that **“Being vaccinated, is therefore critical to prevent spread of [the] Delta [variant of COVID-19].”**

Plaintiffs’ Exhibit D also cites to a host of top governmental and peer-reviewed scientific sources relied upon by OHA, which, on the whole, are in accord that that the Pfizer Vaccine of which Plaintiffs complain was indeed a vaccine effective in immunizing against infection of Covid-19. *Id.* at 2-3.

The Court notes that Plaintiffs have plucked out text from regulations to support their claim that the Pzizer Vaccine is not a vaccine. But the Court in *Jacobson* did not look to the text of a mandate, or any licensing label put on the smallpox vaccine to determine whether it was a vaccine that prevents smallpox. To find that the vaccination mandate was aimed at controlling the disease, the court took “judicial notice of the fact [such was] the common belief of the people of the state ... as well as [] most members of the medical profession ... our state, and in most civilized nations for generations.” 197 U.S. at 34. And that, therefore, the “legislature has the right

to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.” 197 U.S. at 34-35.

The record flatly contradicts and renders implausible Plaintiffs theory that the Pfizer Vaccine was investigational only, and not really a vaccine. “What everybody knows the court must know ... that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature ... was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. *Jacobson*, 197 U.S. at 30. Accordingly, the Court finds that Plaintiffs have not plausibly alleged that the Pfizer Vaccine is anything other than a vaccine. Rational basis review under *Jacobson* applies.

2. U.S.C. § 1983 – Unlawful Investigational Drug Use

In Count One, 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. Compl. at 130.

The Plaintiffs fail to show that any of the federal statutes, regulations, reports or international treaties they cite in their Complaint apply. Plaintiffs also fail to demonstrate that any of those rules or reports contain a private cause of action that available against state Defendants in federal court.

a. Private Right of Action Under 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 state Defendants. Rather, it directs the Secretary of the U.S. Department of Health and Human Services' actions. Further, Plaintiffs do not allege that the State Defendants were (1) required to provide them with any information that was mandated by the statute and (2) that state Defendants did not so provide it. To the extent Plaintiffs assert a claim under this

statute against any Defendant it should be dismissed.⁵

b. 45 C.F.R. Part 46; The Belmont Report; 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”). 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.

Further, courts have not found a 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). Accordingly, Plaintiffs fail to state a claim under this theory.

c. 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

⁵ Plaintiffs bring this claim about PeaceHealth in the alternative. Compl. (Count Eight) at 136. The statute does not apply to PeaceHealth.

experimental subject unless ... the informed consent of the subject is obtained in advance ...”

Plaintiffs have failed to allege sufficient facts from which they could obtain relief from state Defendants based on this statute. There is no allegation that state Defendants expended Department of Defense funds or were obligated to inform Plaintiffs of information, but failed provide such information. Accordingly, Plaintiffs have failed to state a claim for relief under this theory.

d. Federal Wide Assurance

According to the 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.” Compl. ¶ 172 n.41.

The Plaintiffs do not meaningfully respond to state Defendants’ argument that there is no private right of action for them against state Defendants pursuant to Federal Wide Assurance. See MTD at 8-9, ECF No. 12. State Defendants’ argument has merit. Accordingly, Plaintiffs have failed to state a claim for relief under this theory.

e. Vaccination Program Provider Agreement

The Court liberally construes Plaintiffs’ allegations as asserting that state Defendants were required to abide by the Covid-19 Vaccination Program Provider Agreement to distribute proper vaccines—not experimental drugs under an EUA. Compl. ¶¶ 207-213. The contention that the Pfizer

Vaccine was not a vaccine has been addressed above. This claim fails.

3. 42 U.S.C. § 1983 – Unconstitutional Conditions Doctrine

Count Two asserts that Defendants’ vaccination requirements violated the unconstitutional conditions doctrine because the Defendants pressured Plaintiffs to “barter away [their] li[ves] or [their] freedom, or [their] substantial rights.” Compl. ¶ 578. This allegation does not, however, implicate the unconstitutional conditions doctrine, which “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgm’t Dist.*, 570 U.S. 595, 604 (2013).

Plaintiffs’ Complaint alleges that they are former employees of PeaceHealth, a private employer. Compl. ¶¶ 31.1-31.13. Accordingly, they fail to plead sufficient facts to allege that a government benefit has been denied. Plaintiffs do not allege that their wages were government benefits. Plaintiffs’ unconstitutional conditions doctrine claim must be dismissed. *See 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).

4. 42 U.S.C. § 1983 – Fourteenth Amendment, Equal Protection

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).

In Count Three, Plaintiffs assert that state Defendants’ vaccination policy violates the Fourteenth Amendment’s Equal Protection Clause. Compl. ¶ 584. To state a claim, a plaintiff must allege that “the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). As noted, Plaintiffs do not plead that they belong to a “protected class.” *Shavelson v. Haw. Civil Rights Comm’n*, 740 F. App’x 532, 534 (9th Cir. 2018). The only conceivable class would be persons who declined a Covid-19 vaccination, but this would necessarily fail for two reasons. First, state Defendants vaccination orders applied equally to all healthcare workers—subject to religious or medical exemptions.

Second, and more critically, “unvaccinated individuals do not constitute a suspect class.” See *George v. Grossmont Cuyamaca Cmty. College Dist. Bd. of Governors*, No. 22-cv-0424-BAS-DDL, 2022 WL 16722357, at *10 (S.D. Cal. Nov. 4, 2022); *Williams*, 567 F. Supp. 3d at 1228 (“The Court is fully in agreement with this growing consensus that no fundamental right or suspect classification is implicated by the Oregon vaccine mandates”); see also *McArthur v. Brabrand*, 610 F. Supp. 3d 822, 839-42 (E.D. Va. 2022) (dismissing the plaintiff’s equal protection claim because plaintiff failed to combat “several cases holding that unvaccinated people do not constitute a suspect class”); *Halgren v. City of Naperville*, 577 F. Supp. 3d 700, 753 (N.D. Ill.

2021) (“[the plaintiffs] have not identified any legal support for the notion that vaccination status alone is a traditional suspect (or quasi-suspect) class within the meaning of the Equal Protection Clause.”).

Because Plaintiffs do not plead that they are members of a suspect class, their challenge to state Defendants’ vaccine orders are subject to rational basis review. Moreover, courts have “no trouble discerning a legitimate state interest in slowing the spread of Covid-19” and have consistently concluded that “vaccine mandates are rationally related to furthering that interest.” *Williams*, 567 F. Supp. 3d at 1228; *Kheriaty*, 2021 WL 4714664, at *7-9. Plaintiffs fail to state a claim under this theory.

5. 42 U.S.C. § 1983 – Fourteenth Amendment, Due Process

In Count Four, Plaintiffs allege that state Defendants violated both Plaintiffs’ “substantive” and “procedural” rights under the “Due Process Clause of the Fourteenth Amendment.” Compl. ¶ 588.

As to substantive due process, noted above, the Covid-19 vaccine mandates do not implicate a fundamental right, or a 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).

Explained above, *Jacobson* applies, and the rational basis standard of review controls. *Id.* Plaintiffs have not alleged sufficient facts from which to conclude that state Defendants do not have a rational basis for the vaccination orders.

Regarding 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). Plaintiffs fail to point to facts, which if believed, would demonstrate that they were denied “adequate procedural protections” from state Defendants. They fail to point to procedural protections that they were due but did not receive. Accordingly, Plaintiffs have failed to state a claim for relief under this theory.

5. 42 U.S.C. § 1983 – Spending Clause

In Count Five, Plaintiffs claim that the CDC Covid Vaccination Provider Program, 45 CFR §46.122, 10 U.S.C. § 980, the Fourteenth Amendment, and 21 U.S.C. § 360bbb-3 “clearly and unambiguously create rights enforceable pursuant to 42 U.S.C. § 1983” because Spending Clause legislation gave rise to a § 1983 claim where the law “explicitly conferred specific monetary entitlements upon the plaintiffs, and there was no sufficient administrative means of enforcing the requirements.” Compl. ¶¶ 383, 399, 589-94.

Plaintiffs fail to allege facts from which to conclude that state Defendants violated the spending clause doctrine. While the Spending Clause 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 such limits on state Defendants here. Plaintiffs fail to state a claim under this theory.

B. (Step Two – Qualified Immunity Analysis)

This opinion will next consider whether state Defendants are entitled to qualified immunity, the second step. See *Pearson*, 555 U.S. at 232 (in analyzing a qualified immunity defense, the Court must determine whether (1) a constitutional right would have been violated on the facts alleged, and (2) the right was clearly established when viewed in the specific context of the case).

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*, 595 U.S. 1, 5 (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.

State Defendants are entitled to qualified immunity on all federal claims. Plaintiffs have failed to point to any grounds from which to conclude that state Defendants’ orders violated constitutional or statutory rights that were “clearly established when viewed in the specific context of the case.” *Id.* They point to no existing precedent that “placed the statutory or constitutional question[s] beyond

debate.” *Id.* Accordingly, claims against state Defendants are dismissed with prejudice.

I. Claims Against PeaceHealth

A. Claims Under 42 U.S.C. § 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. State Action

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. *Curtis v. PeaceHealth*, No. 3:23-CV-05741-RJB, 2024 WL 248719, at *5 (W.D. Wash. Jan. 23, 2024) (citing *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020)).

Plaintiffs allege that PeaceHealth is a participating immunization provider for the Oregon

Health Authority’s immunization program, and that “[i]mmunization program administration constitutes a public function of the State of Oregon.” Compl. ¶¶ 234-35. Plaintiffs maintain that PeaceHealth “willfully volunteered to participate in the CDC Covid-19 Vaccination Provider Program, which constitutes an exclusive public function of the state.” *Id.* ¶¶ 239-40, 252.

However, the Complaint does not allege that PeaceHealth gave Plaintiffs a Covid-19 vaccine or forced Plaintiffs to receive a Covid-19 vaccine from PeaceHealth. Plaintiffs fail to allege that they were injured in any manner by PeaceHealth in its role as an entity that administered COVID-19 vaccines.

Rather, the conduct that Plaintiffs allege to have caused their injury is PeaceHealth’s vaccination policy for its employees. *Id.* ¶ 21, 126, 263, 426, 442, 511 (alleging that PeaceHealth vaccination policy led to termination, violation of rights); see also *id.* ¶ 371, 442, 538. 557-H, I (alleging that PeaceHealth unlawfully altered Plaintiffs’ employment). Accordingly, Plaintiffs seek to hold the PeaceHealth liable for their policy that its healthcare workers receive a Covid-19 vaccination before October 15, 2021, subject to medical and religious exemptions, or face being terminated. *Id.*

The relevant inquiry here, then, is whether in PeaceHealth’s role as an employer, it became a state actor when it required its employees to receive a Covid-19 vaccine, subject to exemptions, and when it terminated employment for those who did not comply with the vaccine requirements.

Courts may treat the action of a private entity as an act of the state government “if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private

behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295, (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

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). Any conduct by which PeaceHealth aligned their vaccination policy with that of the State constitutes compliance with a generally applicable law and accordingly, is not state action. See *Zimmerman v. PeaceHealth*, 2023 WL 7413650, at *13 (W.D. Wash. Nov. 9, 2023) (so explaining). *Zimmerman*’s finding is persuasive, and the Court applies here.

a. Public Function

To satisfy the Public Function test, a plaintiff must demonstrate that the function at issue (here, employment termination) was “both traditionally and exclusively governmental.” *Rawson* at 755. Plaintiffs’ allegations are difficult to parse, but as explained in their briefing, Plaintiffs point to the State of Oregon’s emergency healthcare orders and assert that PeaceHealth’s employment policy was in service or “on behalf” of the State’s emergency orders. Resp. at 27-29.

Here, the State of Oregon’s emergency healthcare orders were issued by the State. And the private enforcement of PeaceHealth’s vaccination

policy is not akin to limited activities that are traditionally and exclusively performed by the government. *See Johnson v. Tyson Foods, Inc.*, 607 F. Supp. 3d 790, 800 (W.D. Tenn. 2022) (private business’s implementation of an employee vaccination policy is not akin to any of those limited activities—for example running a city—that have “traditionally and exclusively” been performed by the government.” Accordingly, Plaintiffs have failed to demonstrate that PeaceHealth’s enforcement of its vaccination policy for employees was a public function, because they did not demonstrate that the function at issue (employment termination) was “both traditionally and exclusively governmental.” *See Rawson* at 755.

b. Joint Action Test / Government Nexus Test

Joint action exists “where the State has so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise.” *Rawson*, 975 F.3d at 748 (internal quotations omitted). (internal quotations omitted). A close nexus exists where there is “a sufficiently close nexus between the state and the private actor so that the action of the latter may be fairly treated as that of the State itself.” *Rawson*, 975 F.3d at 748.

The “joint action” alleged by Plaintiffs concerns PeaceHealth as an administrator of vaccines and does not implicate PeaceHealth as an employer. *See* Resp. at 29 (arguing that the PeaceHealth is a state actor because it “administered the Covid-19 Program on behalf of the State to share in the Program’s cash flow benefiting the State and Defendants which required informing individuals of their rights as a condition of the Program’s process”).

Defendants assert that Plaintiffs have not established joint action, where PeaceHealth's administration of the Covid-19 Vaccination Program was not administered on any Plaintiff—Plaintiffs have not alleged that they have received or even attempted to receive a Covid-19 vaccine, or that PeaceHealth required its employees to be vaccinated by PeaceHealth.

In response, Plaintiffs expound upon their allegations in their briefing, explaining that PeaceHealth “affirm[ed] that they acted on behalf of Governor Brown’s (State Policy) when terminating Plaintiffs’ access to living wages when refusing the administration of the federally funded property.” Resp. at 29.

To the extent Plaintiffs allege that the PeaceHealth Defendants terminated Plaintiffs’ employment due to Governor Brown’s policy, this is belied by the timing of the announcement of PeaceHealth’s policy. *See* Compl. ¶ 295), and by Plaintiffs’ own allegation that they were terminated because they refused to be injected with an “investigational drug.” (*see* Compl. ¶¶ 19, 21). Moreover, Plaintiffs’ allegations suggesting that PeaceHealth acted in alignment with the emergency orders fails to state a claim that PeaceHealth is a state actor, where “compliance with generally applicable laws” is not “sufficient to convert private conduct into state action.” *Heineke*, 965 F.3d at 1013. Plaintiffs have not plausibly alleged joint action between PeaceHealth and the State.

c. Government Compulsion Test

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 Plaintiffs have not done.

Governmental compulsion or coercion may exist where the State “has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Rawson*, 975 F.3d at 748. (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Even taking Plaintiffs’ allegations as true, PeaceHealth's alleged conduct does not satisfy any of these tests, where PeaceHealth issued their vaccination policy for its employees before Governor Brown’s order, and where Plaintiff have not alleged that PeaceHealth was coerced to terminate Plaintiffs’ employment. *See Zimmerman*, 701 F. Supp. 3d at 1119 (finding same).

In all, because Plaintiff has not plausibly alleged that PeaceHealth was a state actor when it terminated Plaintiff, it cannot be liable to Plaintiffs under § 1983.

III. Breach of Contract, Third Party Beneficiary

Plaintiffs assert that the CDC Covid-19 Vaccination Program Provider Agreement is a contract that “clearly and unambiguously create[s] third-party rights.” Compl. ¶¶ 596.13. Plaintiffs maintain that Defendants breached that contract.

To establish oneself as a third-party beneficiary, “the third party must show that the contract reflects

the express or implied intention of the parties to the contract to benefit the third party.” *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999). When it is a government contract at issue, the standard is even more demanding: “[p]arties that benefit from a government contract are generally assumed to be incidental beneficiaries and may not enforce the contract absent a clear intent to the contrary.” *Id.*; *see also Restatement (Second) of Contracts* § 313(2), cmt. a (1979) (“Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested.”).

Here, the Provider Agreement lacks any “clear intent” to grant Plaintiffs enforceable rights as third-party beneficiaries. *See* Compl. Ex. A. It contains no mention of third-party beneficiaries, and Plaintiffs do not identify any provisions that they allege demonstrate an intent to grant them enforceable rights. *Id.* ¶ 596. Accordingly, the Court finds that Plaintiffs lack standing to assert breach of the Provider Agreement. This claim is dismissed for lack of jurisdiction.

IV. Intentional Infliction of Emotional Distress

On thorough review of the Complaint, the Court finds that Plaintiffs offer only conclusory, vague statements as to what any Defendant did to inflict emotional distress. *See e.g.*, Compl. ¶¶ 598-601. There is not a single, specific allegation that former Governor Brown, former Director Allen, PeaceHealth, or its executives committed a qualifying act, or that they did anything that plausibly states an intent to cause emotional

distress. The Court is not required to accept conclusory allegations as true and dismisses this claim.

CONCLUSION

A plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. This requires a plaintiff to plead "more than an unadorned, the-defendant-unlawfully-harmed-me-allegation." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). For the reasons explained, the Motion to Join, ECF No. 26 is GRANTED. PeaceHealth and State Defendants' Motions to Dismiss, ECF Nos. 12 and 25, are GRANTED. Dismissal with prejudice is appropriate when no amendment can cure a deficient complaint. *Hernandez*, 63 F. App'x 518, 520 (9th Cir. 2016). The Court finds no amendment can cure the allegations here. This case is DISMISSED with prejudice.

It is so ORDERED and DATED this 19th day of August 2024.

s/Ann Aiken
ANN AIKEN
United States District Judge

APPENDIX C

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

David J. Schexnaydre (argued), Schexnaydre Law Firm LLC, Mandeville, Louisiana; Charice L. Holtsclaw, Bellingham, Washington; for Plaintiffs-Appellants.

Ian D. Rogers (argued), Kai A. Smith, Zachary J. Pekelis, and Meha Goyal, Pacifica Law Group LLP, Seattle, Washington; Whitney A. Brown (argued), Stoel Rives LLP, Anchorage, Alaska; Vanessa S. Power and Jenna M. Poligo, Stoel Rives LLP, Seattle, Washington; for Defendants-Appellees.

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 D

**CONSTITUTIONAL AND STATUTORY
PROVISIONS**

U.S. Constitution

Fourteenth Amendment, § 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(a)(1)

Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

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.