APPENDIX

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APPENDIX A

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24-1949

D.C. No. 2:23-cv-00295-TOR

MEMORANDUM*

JANE ELIZABETH ROBERTS; JON ALLEMAN; MICHELLE ANDREWS; GINGER BENNETT; LANI LAGANOWSKI; INGA MILLER; FRANCISCO OQUENDO; ERIN PALMER; MICHELLE RICHARDSON; PETER SPRINGS; KATHY WOLD; JULIA ZELEPUKHIN, *et al.,*

Plaintiffs—Appellants,

v.

JAY INSLEE, Governor; SHRINERS HOSPITALS FOR CHILDREN SPOKANE; SHRINERS HOSPITALS FOR CHILDREN, INC.; BEVERLY BOKOVITZ; FRANCES FARLEY, M.D.; JERRY GANTT; JOHN MCCABE;

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

PHILLIP GRADY; PETER BREWER,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Washington
Thomas O. Rice, District Judge, Presiding

Submitted July 9, 2025**
Seattle, Washington

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

Jane Elizabeth Roberts and eleven others ("Plaintiffs") were fired from Shriners Hospital for Children in Spokane, Washington ("Shriners") after they refused to vaccinate themselves against COVID-19, as required by Shriners policy and a Washington state proclamation. Plaintiffs allege that former Governor Inslee, Shriners, and several of Shriners' executives violated federal and state law by penalizing them for refusing the COVID-19 vaccine, which had only been authorized for emergency use. The district court dismissed all of Plaintiffs' claims with prejudice. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Plaintiffs' Federal Claims (Counts 1 through 6 & Count 10). Plaintiffs bring claims under 42 U.S.C. § 1983 for violations of (1) their right not to be "[s]ubjected to [i]nvestigational [d]rug[s]"

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

based on various statutes, regulations, agreements, treaties, and a letter (Count One), *see Curtis v. Inslee*, 154 F.4th 678, 687–90 (9th Cir. 2025); (2) equal protection under the law (Count Two), *see id.* at 693–95; (3) substantive and procedural due process (Count Three), *see id.* at 691–93; (4) the "Spending Clause" (Count Four), *see id.* at 690; and (5) the "unconstitutional conditions doctrine" (Count Five), *see id.* at 687, 690–95.[1] Plaintiffs also bring two federal claims under 42 U.S.C. § 247d-6d, *id.* § 247d-6e, the Public Readiness and Emergency Preparedness Act (Count Six) and 21 U.S.C. § 360bbb-3 (Count Ten), *see id.* at 687–88. Our recent decision in *Curtis*, 154 F.4th at 687–95, forecloses each of Plaintiffs' federal claims. We therefore affirm the district court's dismissal of these claims.

2. Plaintiffs' State Law Claims (Counts 7 through 9). Curtis also forecloses Plaintiffs' Washington state law claims against former Governor Inslee for "employment torts" (Count Eight), *see Curtis*, 154 F.4th at 695, and against both Inslee and Shriners for "breach of contract" (Count Seven) and "outrage" (Count Nine), *id.* at 689–90, 696.

Plaintiffs' "employment torts" claim against Shriners fails because Plaintiffs have not plausibly alleged any "legal right or privilege" to refuse COVID-19 vaccination such that they were "unlawful[ly] discharge[d]," in violation of public policy. *See Rickman v. Premera Blue Cross*, 358 P.3d 1153, 1158 (Wash. 2015) (en banc) (citation omitted)

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[1] Although Count Five purports to assert a claim under the unconstitutional conditions doctrine, Plaintiffs' allegations are derivative of their Fourteent Amendment claims and fail for the reasons explained in *Curtis*, 154 F.4th at 690–95.

(requiring the plaintiff to prove that her dismissal violates "a clear mandate of public policy … 'previously manifested in the constitution, a statute, or a prior court decision'").[2]

3. "Misbranding." To the extent that Plaintiffs allege or seek to allege a "misbranding" claim for violations of 21 U.S.C. § 331, this claim fails as a matter of law.[3] Even if federal drug labeling laws were implicated here, they are part of the Federal Food, Drug, and Cosmetic Act ("FDCA") and are not privately enforceable under 42 U.S.C. § 1983 or on their own. *See* 21 U.S.C. § 337(a); *see also Curtis*, 154 F.4th at 687 (explaining that the FDCA forecloses private enforcement of its requirements).

4. Leave to Amend. The district court did not abuse its discretion in denying leave to amend because amendment would be futile. *See Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009). Plaintiffs present no argument that their proposed amendments could cure the deficiencies in their claims.

AFFIRMED.

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[2] In light of our determination, we do not reach the parties' arguments concerning qualified immunity or whether Shriners is a state actor.

[3] While Plaintiffs discuss "misbranding" in their opening brief, this claim was not alleged in Plaintiffs' complaint and so appears to be solely a defensive argument.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANE ELIZABETH ROBERTS, JON ALLEMAN, MICHELLE ANDREWS, GINGER BENNETT, LANI LAGANOWSKI, INGA MILLER, FRANCISCO OQUENDO, ERIN PALMER, MICHELLE RICHARDSON, PETER SPRINGS, KATHY WOLD, and JULIA ZELEPUKHIN,

Plaintiffs,

v.

SHRINERS HOSPITALS FOR CHILDREN, SHRINERS HOSPITALS FOR CHILDREN – SPOKANE, BEVERLY BOKOVITZ, FRANCES FARLEY, JERRY GANTT, JOHN MCCABE, PHILLIP GRADY, PETER BREWER, and GOVERNOR JAY INSLEE,

Defendants.

NO. 2:23-CV-0295-TOR

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS & DENYING PLAINTIFFS' MOTION TO FILE AMENDED COMPLAINT

BEFORE THE COURT is Defendant Governor Jay Inslee's Motion to Dismiss (ECF No. 36 and Plaintiffs' Motion for Leave to File an Amended Complaint (ECF No. 45). The Court finds oral argument unnecessary to the disposition of these motions. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Defendant's Motion to Dismiss (ECF No. 36) is **GRANTED** and Plaintiffs' Motion to

File an Amended Complaint (ECF No. 45) is **DENIED**.

BACKGROUND

These matters arise out of Defendant Governor Jay Inslee's response to the outbreak of the novel coronavirus SARS-CoV-2 (COVID-19) in Washington State. See ECF No. 1. Plaintiffs are former at-will healthcare employees of Shriners Hospitals for Children – Spokane (Shriners Spokane) whose employment was terminated after they failed to vaccinate against COVID-19 as required by their employer. *Id*. at 6-7, ¶¶ 18.1-18.12.

Plaintiffs blame their termination on Defendant's promulgation of Proclamation 21-14, which was issued August 9, 2021 in response to increased transmission of COVID-19 due to a mutation known as the "Delta variant." *Id*. at 5, ¶ 6; see also *Procl*. 21-14 at 2, https://perma.cc/C5AU-MT2U. As recounted in this Court's previous Order, Proclamation 21-14 required all healthcare workers to fully vaccinate against COVID-19 by October 18, 2021, and barred any health care employer from continuing to employ any unvaccinated worker past that date. ECF No. 42 at 3-4 (citing Procl. 21-14 at 4, § 1(d)). An employee was considered "fully vaccinated" either (1) two weeks after receiving "the second dose in a two-dose series of a COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the FDA" or (2) two weeks after receiving "a single-dose COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the FDA." *Id*. at 4 (quoting Procl. 21-14 at 7, § 5(e)). The Proclamation carved out specific exemptions for individuals with disabilities and sincerely held religious beliefs. Procl. 21-14 at 4-5, § 2(a), (b). In accordance with this mandate, Shriners Spokane circulated a staff-wide email notice instructing employees to fully vaccinate against COVID-19 by the October 18 deadline. ECF No. 42 at 4 (citing ECF No. 1-5 at 6).

Prior to the promulgation of Proclamation 21-14, the United States Food and Drug Administration (FDA) approved three COVID-19 vaccines for Emergency Use Authorization (EUA), including Pfizer-BioNTech, a two-part vaccination series.[1] *Id.* at 4-5 (citing FDA, *FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN. (Dec 11, 2020), https://perma.cc/2V4A-TNRK). Under the EUA statute, the FDA may authorize emergency use of a vaccine pending full agency approval. *See* 21 U.S.C. § 360bbb-3(a)(2).

On August 23, 2021—approximately two weeks after Proclamation 21-14 was issued and two months before the October 18 vaccination deadline—the FDA approved the first COVID-19 vaccine for individuals 16 years of age and older. *Id.* at 5 (citing FDA, *FDA Approves First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMIN. (Aug. 23, 2021), https://perma.cc/4KJS-MBM2). The agency explained that the approved vaccine had previously been known as Pfizer-

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[1] In considering a motion to dismiss, the Court may take judicial notice of facts "not subject to reasonable dispute," Fed. R. Evid. 201(b), and matters of public record, including the records and reports of administrative bodies, *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (citation omitted). A matter is not subject to reasonable dispute where it "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1), (2).

BioNTech and would be marketed as "Comirnaty" going forward. *Id*. The FDA further explained that the Pfizer-BioNTech and Comirnaty immunizations were composed of "the same formulation" and therefore could "be used interchangeably … to provide the COVID-19 vaccination series." *Id*. at 5-6 (quoting ECF No. 34-1 at 2). Clinical trials showed the vaccine was 91% effective in preventing COVID-19. *Id.* at 5.

Plaintiffs' employment was terminated for refusing to vaccinate by Proclamation 21-14's October 18, 2021 deadline. *Id*. at 6 (citing ECF No. 1 at 5, ¶ 8). Plaintiffs believe they were unlawfully terminated and otherwise sanctioned for refusing an "unlicensed investigational new drug." *Id.* (citing ECF No. 1 at 75, ¶ 280). Specifically, Plaintiffs maintain that the vaccine formula available to them—Pfizer-BioNTech—by the October 18 deadline was still only provisionally authorized under the EUA statute and that they could not be required to vaccinate with a formula only authorized for emergency use. *Id*. In other words, Plaintiffs assert that Comirnaty was the only FDA-approved drug that they could be compelled to vaccinate with, and that the Comirnaty was legally distinct from the Pfizer-BioNTech vaccine. *Id.*

On October 13, 2023, Plaintiffs filed a 104-page complaint against their former employer and Defendant Inslee in this Court. See ECF No. 1. The complaint raises six claims under 42 U.S.C. § 1983, including that: (1) Defendants unlawfully "subjected [them] to investigational drug use"; (2) Defendants violated the Equal Protection Clause of the Fourteenth Amendment; (3) Defendants violated the Due Process Clause of the Fourteenth Amendment; (4) Defendants violated the Spending Clause; (5)

Defendants violated the unconstitutional conditions doctrine; and (6) Defendants violated the Public Readiness and Emergency Preparedness Act (PREP Act). *Id*. at 86–98. Plaintiffs separately allege that (7) Defendants breached a contract to which Plaintiffs were a third-party beneficiary; (8) Defendants violated "Washington State common law employment torts"; (9) Defendants committed the tort of outrage; and (10) if the Court does not find that Defendants were engaged in state action under issue (1), then the Court should find that the EUA statute contains an implied right of action. *Id*. at 98–102.

This Court previously considered and dismissed with prejudice all claims against the Shriners Defendants. ECF No. 42. The Court now turns to Defendant Inslee's motion to dismiss (ECF No. 36) and Plaintiffs' motion for leave to file an amended complaint (ECF No. 45).

DISCUSSION

I. Defendant's Motion to Dismiss

Defendant moves to dismiss all ten counts pending against him. The Court grants the motion. Plaintiffs cannot prevail on their Section 1983 claims because Defendant is immune from suit in his official capacity and entitled to qualified immunity in his individual capacity. The remaining four claims each fail as a matter of law.

A. Rule 12(b)(6) Standard

A motion to dismiss for failure to state a claim under Rule 12(b)(6) "tests the legal sufficiency" of a plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732

(9th Cir. 2001); *see also* Fed. R. Civ. P. 12(b)(6) (allowing defendants to bring a motion to dismiss for "failure to state a claim upon which relief can be granted"). To withstand a motion to dismiss, a complaint must "contain enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This requires the plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly,* 550 U.S. at 550.

While a plaintiff need not establish a probability of success on the merits, he must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

When determining whether a claim has been stated, the Court may consider the "complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff's "allegations of material fact are taken as true and construed in the light most favorable to the plaintiff[,]" but "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Stac Elecs. Secs. Litig.,* 89

F.3d 1399, 1403 (9th Cir. 1996) (citation and brackets omitted).

In assessing whether Rule 8(a)(2) is satisfied, the court must first identify the elements of the plaintiff's claims and then determine whether those elements could be proven by the facts pled. The court may disregard allegations contradicted by matters properly subject to judicial notice or by exhibit. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court may also disregard conclusory allegations and arguments which are unsupported by reasonable deductions and inferences. *Id.* A claim may only be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Navarro*, 250 F.3d at 732.

B. Section 1983 Claims: Official Capacity

Plaintiffs bring multiple constitutional and statutory claims under 42 U.S.C. § 1983. To stake a claim under Section 1983, Plaintiffs must allege Defendant is a "person" who subjected them "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Such claims are "limited by the scope of the Eleventh Amendment," which immunizes the States from suits brought in federal court absent a waiver by the State. *Doe v. Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 839 (9th Cir. 1997). The United States Supreme Court has determined that "a suit against a state official … is no different from a suit against the State itself," and that an official acting within his official capacity is therefore not a "person" within the meaning of Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). As an exception to this general rule, a State official sued in his official capacity under Section 1983 for "prospective injunctive relief" does qualify as a "person" subject to suit. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

In this case, Plaintiffs do not dispute that they seek monetary damages rather than prospective injunctive relief. ECF Nos. 41 at 10 (admitting Defendant cannot be sued in his official capacity); 1 at 102-103, ¶¶ 410-16. Accordingly, the Section 1983 claims against Defendant Inslee in his official capacity are dismissed.

C. Section 1983 Claims: Individual Capacity

Plaintiffs also sue Defendant in his individual capacity for actions taken under color of law. ECF No. 1 at 9, ¶ 19.9. Defendant answers that he is entitled to qualified immunity on these issues because Plaintiffs have not established that the Proclamation violated any clearly established constitutional or statutory rights. ECF No. 36 at 55.

Qualified immunity shields government actors from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* In evaluating a state actor's qualified immunity assertion, a court must determine (1) whether the facts, viewed in the light most favorable to the plaintiff, show that the defendant's conduct violated a statutory or constitutional right; and (2) whether the right was clearly established at the time of the alleged violation such that a reasonable person in the defendant's position would have understood that his actions violated that right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part by Pearson*, 555 U.S. at 227.

A court may, within its discretion, decide which of the two prongs should be addressed first in light of the particular circumstances of the case. *Pearson*, 555 U.S. at 236. If the answer to either inquiry is "no," then the defendant is entitled to qualified immunity and may not be held personally liable for his conduct. *Glenn v. Wash. Cnty.*, 673 F.3d 864, 870 (9th Cir. 2011). The Court analyzes each Section 1983 claim made by Plaintiffs in turn.

1. Investigational Drug Use Claims

Plaintiffs assert that they were unlawfully "[s]ubjected to investigational drug use" under "[t]he CDC COVID-19 Vaccination Program Provider Agreement, and the implementing statutes and regulations found at 45 CFR Part 46, the Belmont Report, 21 U.S.C. § 360bbb-3, Article VII of the ICCPR Treaty, Federal Wide Assurance, 10 U.S.C. § 980, EUA Scope of Authorization letters, and the Fourteenth Amendment." ECF No. 1 at 86, ¶ 316.

These claims fail from the outset because, as this Court and several others have now concluded, Plaintiffs cannot establish that the Proclamation subjected them to any kind of "investigational" drug use. As explained in this Court's prior Order on the Shriners Defendants' motion to dismiss, the Pfizer-

BioNTech vaccine available to Plaintiffs before the October 18 deadline was not "investigational" but instead fully approved by the FDA: the Pfizer-BioNTech and Comirnaty vaccines were identical in all but name. ECF No. 42 at 15 (citing *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1247 (D. Or. 2021); *Curtis v. Inslee*, ___ F. Supp. 3d ___, 2023 WL 8828753, at *2 (W.D. Wash. Dec. 21, 2023)). Moreover, because it is undisputed that Plaintiffs rejected the FDA-approved Pfizer vaccine, Plaintiffs cannot claim that they were unlawfully "subjected" to any investigational medical product or procedure. ECF No. 1 at 87-88, ¶ 325. As such, the facts do not indicate that Defendant's conduct violated any constitutional or statutory right under the EUA or related laws or treaties, and Defendant is entitled to qualified immunity on this issue.

2. Equal Protection Claim

Plaintiffs also claim that Defendant violated the Equal Protection Clause of the Fourteenth Amendment by penalizing healthcare workers who failed to receive the full vaccination series by October 18. ECF No. 1 at 88, ¶ 329; see U.S. Const. Amend. XIV, § 1 ("No State shall … deny to any person within its jurisdiction the equal protection of the laws.").

The Equal Protection Clause applies "when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 605 (2008) (citations omitted). If there is no suspect class at issue, a government policy "need only rationally further a legitimate state purpose to be valid."

Minnesota State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 291 (1984). The requirements of the Equal Protection Clause will be satisfied if "there is a plausible policy reason for the classification, the government relied on facts that may have been considered to be true, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Williams v. Brown*, 567 F. Supp. 3d 1213, 1228 (D. Or. 2021) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)) (internal quotations omitted). "Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 585 U.S. 667, 705 (2018).

Plaintiffs have not alleged that they are members of suspect class, nor would the Court entertain such argument. *See Valdez v. Grisham*, 559 F. Supp. 3d 1161, 1178 (D. N.M. 2021) (noting suspect and quasi-suspect classes include classifications based on features such as race, national origin, sex, and illegitimacy). Accordingly, rational basis review applies.

Defendant offered legitimate policy reasons for issuing Proclamation 21-14. As this Court held in a similar Order challenging the lawfulness of Proclamation 21-14 in the context of a challenge brought by firefighters and other operational employees employed by the City of Spokane, "While the Proclamation differentiates between vaccinated and unvaccinated employees, the classifications serve a legitimate government purpose, which is to slow the spread of COVID-19, and the classifications are not arbitrary or irrational." *Bacon v. Woodward*, 2:21-CV-0296-TOR, 2022 WL 2381021, at *3 (E.D. Wash. June 30, 2022). "The Ninth Circuit has recognized that reducing the spread of COVID-19 is a legitimate state interest." *Pilz v. Inslee*, 3:21-cv-05735-BJR, 2022 WL 1719172, at *5 (W.D. Wash. May 27, 2022) (citing *Slidewaters LLC v. Washington State Dep't of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 (9th Cir. 2021), *application for injunctive relief denied*, 142 S. Ct. 1099 (2022)). In the context of challenges brought by former healthcare workers employed by a children's hospital, the rationale behind Proclamation 21-14 is even more acute. *See* Procl. 21-14 at 2 (explaining vaccination protects "youth who are not eligible to receive a vaccine, immunocompromised individuals, and vulnerable persons including persons in health care facilities"). Thus, because Plaintiffs have not stated any facts which show that Proclamation 21-14 was issued beyond Defendant's lawful authority, Defendant is entitled to qualified immunity on this issue.

3. Due Process Claims

Plaintiffs present both substantive and procedural due process challenges. The Court begins with the substantive due process claim. Plaintiffs assert that Defendant ignored Plaintiffs' right to refuse administration of "EUA drugs and medical products … in an attempt to increase the number of participants in the CDC COVID-19 Vaccination Program for purposes of greed." ECF No. 1 at 89, ¶ 334. Plaintiffs further aver that Proclamation 21-14's "requirement that Plaintiffs inject unlicensed drugs into their bodies as a condition to sell their labor is not a legitimate exercise of the police power of the State." *Id.* at 89-90, ¶ 336.

"The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that … interferes with rights implicit in the concept of ordered liberty." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007) (internal quotations and citation omitted). As explained above, Defendant had a rational basis for issuing the Proclamation.

Second, and contrary to Plaintiffs' assertions, there is no fundamental right to continued employment in a particular job. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); see also *Culinary Studios, Inc. v. Newsom*, 517 F. Supp. 3d 1042, 1069 (9th Cir. 2021) (recognizing substantive due process violations only where there has been "a complete prohibition of the right to engage in a calling"). This Court has now ruled on several occasions that employees may be lawfully terminated for refusing to vaccinate in accordance with the terms of Proclamation 21-14. *See e.g., Jensen v. Biden*, 4:21-CV-5119-TOR, 2021 WL 10280396, at *8 (E.D. Wash. Nov. 19, 2021) (holding that Plaintiff who refused vaccination did not have a constitutionally protected interest in continued employment as an athletics coach); *see also, e.g., Wise v. Inslee*, 2:21-CV-0288-TOR, 2022 WL 1243662, at *5 (E.D. Wash. Apr. 27, 2022) (holding that state employees who refused to vaccinate were not entitled to continued employment in their jobs). The result is the same here. Despite the widespread availability of an FDA-approved vaccination series, Plaintiffs refused vaccination and thereby failed to meet the requirements to maintain their employment. Accordingly, the facts do not show that Defendant's conduct violated Plaintiff's rights under the substantive due process clause, and Defendant is entitled to qualified immunity on this claim.

Turning to the procedural due process challenge, Plaintiffs assert that Defendant did not provide them "with a date, time, place, or procedure to defend their right to refuse injection of an unlicensed drug before depriving them of their liberty or their property." ECF No. 1 at 89-90, ¶ 336.

"A section 1983 claim based upon procedural due process … has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Portman v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). However, as this Court has explained:

> [W]hen a policy is generally applicable, employees are not entitled to process above and beyond the notice provided by the enactment and publication of the policy itself. District courts around the country have applied this principle to employer-issued vaccine mandates during the COVID-19 pandemic, finding employees are not entitled to greater service than what is provided by the enactment of the mandates themselves.

Wise, 2022 WL 1243662 at *5 (internal quotations and citations omitted).

As in *Wise*, Defendant was not required to provide Plaintiffs "with more process beyond what was provided by enacting the Proclamation." *Id.* Further, as this Court discussed in examining Plaintiffs' substantive due process claim, Plaintiffs have not identified a constitutionally protected liberty or property interest in maintaining their employment at Shriners. Therefore, the Court finds that Defendant is entitled to qualified immunity on this claim.

4. Spending Clause Claim

Next, Plaintiffs assert that Defendant violated the Spending Clause. ECF No. 1 at 90-92. In their response briefing, Plaintiffs admit that "the Spending Clause itself does not create a cause of action," but argue that "conferred rights in any spending legislation do." ECF No. 41 at 23. Plaintiffs press that the CDC Program "is spending legislation" because the EUA statute confers certain rights and all vaccinations were purchased by the federal government using funding from the Department of Defense. *Id*.

The Spending Clause authorizes Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." *See* U.S. Const., Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

The Spending Clause may attach limits on the federal government's ability to condition use of federal funds, but Plaintiffs identify no authority for the proposition that it likewise limits state governors or private employers. *See Curtis v. Inslee*, 3:23-cv-

5741-RJB, 2024 WL 810503, at *7 (W.D. Wash. Feb. 27, 2024) (denying leave to file an amended complaint).

Additionally, as Defendant observes, Plaintiffs have not identified applicable spending legislation giving rise to enforceable rights. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). The only arguable spending legislation Plaintiffs discussed—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." (emphasis added). The statute by its plain terms does not apply to the Governor, and neither does the Proclamation involve research on human beings. Thus, because Plaintiffs cannot show Defendant's conduct violated any of their rights under the Spending Clause or applicable spending legislation, Defendant is entitled to qualified immunity on this issue.

5. Unconstitutional Conditions Doctrine Claim

Plaintiffs contend that the Proclamation violated the unconstitutional conditions doctrine. ECF No. 1 at 94-95. Under the unconstitutional conditions doctrine, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons … [i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Bingham v. Holder*, 637 F.3d 1040, 1045–46 (9th Cir. 2011) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). The doctrine does not apply where a government benefit is not at issue or where at-will employees have been terminated. *See Curtis*, 2023 WL 8828753 at *7 (citing *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553, 566 (W.D. Va. 2022).

Plaintiffs assert that the unconstitutional conditions doctrine applies because Defendant "established conditions requiring Plaintiffs to surrender their Constitutional rights under the Fourteenth Amendment to enjoy privileges of the State, such as the ability to sell their labors in the marketplace freely." ECF No. 1 at 95, ¶ 365. Because Plaintiffs have not alleged a government benefit is at issue and do not deny their status as at-will employees, Defendant's conduct did not amount to a violation of the unconstitutional conditions doctrine.

6. PREP Act Claims

Plaintiff's final Section 1983 claim concerns the PREP Act. Plaintiffs argue that Defendant established laws and policies which conflicted with the PREP Act by requiring "Plaintiffs to participate in the use of a covered countermeasure under threat of penalty." ECF No. 1 at 96, ¶ 376.

Under the PREP Act, the Secretary of Health and Human Services may authorize certain "covered countermeasures," including drugs for emergency use authorization, upon "a determination that disease or other health condition or other threat to health constitutes a public health emergency." 42 U.S.C. § 247d-6d(b)(1). The PREP Act creates immunity for covered persons for "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure" upon the Secretary's declaration that a disease constitutes public health emergency. *Maney v. Brown*, 91 F.4th 1296, 1298 (9th Cir. 2024) (citing 42 U.S.C. § 247d-6d(a)(2)(B)). Thus, as Defendant explains, "rather than creating a cause of action, the PREP Act creates immunity." ECF No. 36 at 46 (quotations and citations omitted); *see also Maney*, 91 F.4th at 1301 ("Several of the PREP Act's provisions expressly show Congress's intent to extend immunity to persons who make policy-level decisions regarding administration or use of covered countermeasures and do not directly administer countermeasures to particular individuals."). The "sole exception" to such immunity stems from "an exclusive Federal cause of action against a covered person for death or serious physical injury proximately cause by willful misconduct." 42 U.S.C. § 247d-6d(d)(1). A complaint under this exception must be filed and maintained in the United States District Court for the District of Columbia and accompanied by a physician's affidavit and certified medical records documenting the injury. § 247d-6d(e)(1), (e)(4).

Plaintiffs have not alleged that they were subject to death or any kind of serious physical injury. Nor could any such physical injury have occurred because it is conceded that Plaintiffs refused administration of the vaccine. As such, Court finds that Defendant is entitled to qualified immunity on all claims raised under Section 1983 on the basis that Plaintiffs have not pled any facts which establish Defendant violated a constitutional or statutory right. The Court does not proceed to consider the second step, and the claims are dismissed with prejudice. *Glenn,* 673 F.3d at 870.

C. Implied Right of Action

Separate from their Section 1983 claims, Plaintiffs urge that the EUA statute contains a private right of action which permits them to sue.

The Court addressed this issue in its previous Order on the Shriners Defendants' motion to dismiss and explained that the statute contains no such implied right. ECF No. 42 at 21-22. That conclusion remains in force. The claim is dismissed with prejudice.

D. Breach of Contract

Plaintiffs claim that the CDC COVID Vaccination Program Provider Agreement accorded them the benefit of choice—whether to vaccinate or not—without "fear [of] the loss of benefits to which they are otherwise entitled when considering participation." ECF No. 1 at 98, ¶ 387. As this Court explained on the Shriners Defendants' motion to dismiss, Plaintiffs' claim for breach of contract is legally deficient because:

> The Provider Agreement is concerned with vaccine administration and, by all counts, Plaintiffs declined to receive a COVID-19 vaccination. Thus, even if the Court were to accept that recipients of COVID-19 vaccinations were the intended third-party beneficiaries who the parties contracted to protect, that would have no bearing on Plaintiffs' claims of unlawful termination because Plaintiffs refused vaccination. At best, any benefit to Plaintiffs resulting from this agreement was purely indirect or incidental. Moreover, the alleged breach of contract that Plaintiffs complain of did not in fact occur because an FDA-authorized vaccine—Pfizer-BioNTech—was available to Plaintiffs at the time the employment policy was in place.

ECF No. 42 at 22.

The same rationale applies here, and the claim is dismissed with prejudice.

E. Employment Torts & Outrage

Plaintiffs do not address their claim for Washington State common law employment torts or outrage in their response briefing; the Court presumes the argument is therefore waived. *See Atchley v. Pepperidge Farm, Inc.*, CV-04-0452-FVS, 2008 WL 2074035, at *8 (E.D. Wash. May 14, 2008) ("[H]aving failed to respond to this argument in their briefing, the Court has no choice but to consider the issue conceded."). Additionally, these claims are legally deficient for the reasons outlined in the Court's underlying Order on Defendants' motion to dismiss. ECF No. 42 at 24-25. The claims are dismissed with prejudice.

II. Plaintiffs' Motion to File an Amended Complaint

Plaintiffs move to file an amended complaint. ECF No. 45. The motion proposes to add information about, *inter alia*, the "CDC Playbook;" the State's duties per the EUA letter issued by the FDA; "[h]ow Gov. Inslee's proclamation unlawfully amended the FDCA;" the doctrine of fair warning as it relates to qualified immunity; and "[f]acts supporting Plaintiffs' claim to a property interest in their right to refuse an EUA/PREP Act drug." ECF No. 45 at 2-3.

Federal Rule of Civil Procedure 15(a) governs the amendment of pleadings prior to trial. Rule 15(a)(2) provides that leave to amend a complaint should be freely given when justice so requires. Although this standard is generous and construed liberally to promote resolution of disputes on their merits, it is "subject to the qualification that amendment of the complaint does not cause the opposing party undue prejudice." *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir. 1987). In addition to prejudice to the opposing party, the court may also consider the timing of the motion, the presence or absence of bad faith by the moving party, and the futility of the proposed amendment when ruling on a motion to amend a complaint prior to trial. *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011).

The Court has ruled that Defendant Governor Inslee has immunity for all claims pressed against him under Section 1983, and that the Shriners Defendants were not state actors for purposes of Section 1983. The Court has further found that Plaintiffs have failed to state a cause of action under their state law claims. For the reasons articulated in this Order, the Court's prior Order, and similar Orders by the United States District Court for the Western District of Washington in examining substantially similar claims brought by Plaintiff's counsel, the Court finds that further amendment would be futile. Plaintiffs have not offered any set of facts in the proposed amended complaint which undermine the conclusions set forth herein or which would establish some new theory of liability.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant Governor Jay Inslee's Motion to Dismiss (ECF No. 36) is **GRANTED**. All pending

claims against Defendant are dismissed with prejudice.

2. Plaintiffs' Motion for Leave to File an Amended Complaint (ECF No. 45) is **DENIED**.

The District Court Executive is directed to enter this Order and Judgment, furnish copies to counsel, and **CLOSE** the file.

DATED March 18, 2024.

/s/ *Thomas O. Rice*
THOMAS O. RICE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANE ELIZABETH ROBERTS, JON ALLEMAN, MICHELLE ANDREWS, GINGER BENNETT, LANI LAGANOWSKI, INGA MILLER, FRANCISCO OQUENDO, ERIN PALMER, MICHELLE RICHARDSON, PETER SPRINGS, KATHY WOLD, and JULIA ZELEPUKHIN,

Plaintiffs,

v.

SHRINERS HOSPITALS FOR CHILDREN, SHRINERS HOSPITALS FOR CHILDREN – SPOKANE, BEVERLY BOKOVITZ, FRANCES FARLEY, JERRY GANTT, JOHN MCCABE, PHILLIP GRADY, PETER BREWER, and JAY INSLEE,

Defendants.

NO. 2:23-CV-0295-TOR

ORDER GRANTING DEFENDANT SHRINERS' MOTION TO DISMISS

BEFORE THE COURT is Defendant Shriners Hospitals for Children's Motion to Dismiss (ECF No. 32). This matter was heard without oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Defendant Shriners' Motion to Dismiss (ECF No. 32) is **GRANTED**.

BACKGROUND

The outbreak of the novel coronavirus SARS-CoV-2 (COVID-19) in early 2020 spawned innumerable challenges to the legality of preventative and remedial measures undertaken by the government, judiciary, and other public and private organizations.[1] This matter, which arises out of a private hospital's implementation of an employee vaccination policy, presents one such case.

Defendant Shriners Hospitals for Children (Shriners) is a private nonprofit corporation that operates in eastern Washington through its subsidiary, Defendant Shriners Hospitals for Children — Spokane (Shriners Spokane). ECF No. 1 at 7, ¶¶ 19.1-19.2. With the exception of Governor Jay Inslee, the individually named Defendants in this action are all Shriners Spokane employees who exercised policymaking authority over the hospital at the time of the events at issue. *Id.* at 8, ¶¶ 19.3-19.8. Plaintiffs are former employees of Shriners Spokane. *Id.* at 6-7, ¶¶ 18.1-18.12.

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[1] *See, e.g., Biden v. Missouri*, 595 U.S. 87, 97, 142 S. Ct. 647, 211 L. Ed. 2d 433 (2022) (per curiam) (staying injunctions which would have halted the implementation of an interim final rule mandating employee vaccinations for facilities participating in Medicare and Medicaid); *see also Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 141 S.Ct. 2485, 2486, 210 L. Ed. 2d 856 (2021) (per curiam) (concluding that the CDC exceeded its authority by imposing a temporary moratorium on tenant evictions to slow the spread of COVID-19); *see Democratic Nat'l Comm. v. Wisconsin State Leg.,* 141 S.Ct. 28, 34, 208 L. Ed. 2d 247 (2020) (mem.) (Kavanaugh, J., concurring) (stating that the district court had misapprehended the limited role of the federal judiciary by altering the deadline for absentee voting to accommodate pandemic-related delays).

On August 9, 2021, Washington State Governor Jay Inslee issued Proclamation 21-14. *See* Proclamation No. 21-14 (Aug. 9, 2021). In general terms, the order barred any entity operating a "Health Care Setting"[2] from continuing to employ a "Health Care Provider"[3] after October 18, 2021, unless the employee-provider was "fully vaccinated" against COVID-19 by that date. *Id.* at 4, § 1(d). An employee was considered "fully vaccinated" either (1) two weeks after receiving "the second dose in a two-dose series of a COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the FDA" or (2) two weeks after receiving "a single-dose COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved by the FDA." *Id.* at 7, § 5(e).

Pursuant to this authority, administrators at Shriners Spokane circulated a staff-wide email notice on August 11, 2021 stating that employees were required to fully vaccinate against COVID-19 by October 18, 2021. ECF No. 1-6 at 1. The email provided that employees who refused to vaccinate would be subject to dismissal. *Id.* at 3. On September 14, 2021, Shriners adopted a formal organization-wide policy requiring all personnel to vaccinate by December 6, 2021. ECF No. 1-5 at 6. The policy provided that certain exemptions might be granted for medical or religious reasons. *Id.* at 1.

At the time Proclamation 21-14 was issued, the United State Food and Drug Administration (FDA)

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[2] The Proclamation defines a "Health Care Setting" as "any public or private setting that is primarily used for the delivery of in-person health care services to people." Proclamation No. 21-14 at 6, § (c).

[3] "Health Care Provider[s]" include "[w]orkers in any Health Care Setting." Proclamation No. 21-14 at 6, § 5(b).

had approved three COVID-19 vaccines for Emergency Use Authorization (EUA), including Pfizer-BioNTech, a two-part vaccination series.[4] See FDA, *FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMINISTRATION (Dec. 11, 2020), https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19 [https://perma.cc/2V4A-TNRK]. Under the EUA statute, the FDA may authorize emergency use of a vaccine pending full approval. *See* 21 U.S.C. § 360bbb-3(a)(2).

On August 23, 2021—two weeks after Proclamation 21-14 was issued and one month before Shriners adopted its organization-wide immunization policy—the FDA approved the first COVID-19 vaccine for individuals 16 years of age and older. *See* FDA, *FDA Approves First COVID-19 Vaccine*, U.S. FOOD & DRUG ADMINISTRATION, https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine [https://perma.cc/4KJS-MBM2]. The agency explained that the approved vaccine "has been known as the Pfizer-BioNTech COVID-19 Vaccine, and will now be marketed as Comirnaty." *Id*. Clinical results showed the vaccine was 91% effective in preventing COVID-19. *Id*. The FDA further announced that the Pfizer-BioNTech and Comirnaty immunizations were composed of "the same formulation" and therefore could "be used

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[4] In considering a motion to dismiss, the Court may take judicial notice of facts "not subject to reasonable dispute," Fed. R. Evid. 201(b), and matters of public record, including the records and reports of administrative bodies, *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (citation omitted).

interchangeably … to provide the COVID-19 vaccination series." ECF No. 34-1 at 2.

Plaintiffs' employment was terminated for refusing to vaccinate against COVID-19 by the Shriners policy deadline.[5] ECF No. 1 at 5, ¶ 8. Plaintiffs assert that they were unlawfully terminated and otherwise sanctioned for refusing an "unlicensed investigational new drug." *Id.* at 75, ¶ 280. Specifically, Plaintiffs maintain that the only FDA licensed drug, Comirnaty, was not available to them by the deadline of Defendants' vaccination policy (December 6, 2021) and that their only alternative option was to immunize using one of the other vaccines, such as Pfizer-BioNTech, which was only provisionally authorized under the EUA. *Id.* Plaintiffs believe that they could not be compelled to vaccinate with formulas only authorized for emergency use. *Id.*

On October 13, 2023, Plaintiffs filed a 104-page complaint against Defendants in this Court. *Id.* The complaint raises six claims under 42 U.S.C. § 1983, including that: (1) Defendants violated the EUA statute; (2) Defendants violated the Equal Protection Clause of the Fourteenth Amendment; (3) Defendants violated the Due Process Clause of the Fourteenth Amendment; (4) Defendants violated the Spending Clause; (5) Defendants violated the unconstitutional conditions doctrine; and (6) Defendants violated the Public Readiness and Emergency Preparedness Act ("PREP") Act. Id. at 86-98. Plaintiffs separately allege (7) Defendants breached a contract to which Plaintiffs were a third-party beneficiary; (8) Defendants violated "Washington

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[5] Of the twelve Plaintiffs, only one claimed a medical exemption. ECF No. 1 at 82, ¶ 302. Defendants denied the request. *Id.* at 83, ¶ 303.

State common law employment torts"; (9) Defendants committed the tort of outrage; and (10) if the Court does not find that Defendants were engaged in state action under issue (1), then the Court should find that the EUA statute contains an implied right of action. *Id*. at 98-102.

DISCUSSION

Defendant Shriners brings this motion to dismiss on behalf of itself, its subsidiary, and its individual employees. *See* ECF No. 32.[6] The Court grants the motion. The first six claims are dismissed because Defendants are not state actors subject to suit under 42 U.S.C. § 1983. The remaining four claims are dismissed because Plaintiffs have failed to establish any sort of cognizable legal violation.

I. Rule 12(b)(6) Standard

A motion to dismiss for failure to state a claim under Rule 12(b)(6) "tests the legal sufficiency" of a plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *see also* Fed. R. Civ. P. 12(b)(6) (allowing defendants to bring a motion to dismiss for "failure to state a claim upon which relief can be granted"). To withstand a motion to dismiss, a complaint must "contain enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for

[6] A separate motion to dismiss by Governor Inslee is pending before the Court. *See* ECF No. 36.

the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This requires the plaintiff to provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 550. While a plaintiff need not establish a probability of success on the merits, he must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

When determining whether a claim has been stated, the Court may consider the "complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff's "allegations of material fact are taken as true and construed in the light most favorable to the plaintiff[,]" but "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re Stac Elecs. Secs. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996) (citation and brackets omitted).

In assessing whether Rule 8(a)(2) is satisfied, the court must first identify the elements of the plaintiff's claims and then determine whether those elements could be proven by the facts pled. The court may disregard allegations contradicted by matters properly subject to judicial notice or by exhibit. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court may also disregard conclusory allegations and arguments which are unsupported by reasonable deductions and inferences. *Id*. A claim may only be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Navarro*, 250 F.3d at 732.

II. 42 U.S.C. § 1983 Claims

Plaintiffs bring multiple constitutional and statutory claims under 42 U.S.C. § 1983. To stake a claim under § 1983, Plaintiffs must allege the Defendants "act[ed] under color of state law" to deprive Plaintiffs of a federal right. *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) ("'The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.'") (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000). In determining whether there has been state action, the fundamental inquiry is whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) ("The state-action element in § 1983 'excludes from its reach merely private conduct, no matter how discriminatory or wrongful.'") (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)). A two-part test applies to determine whether the conduct may be fairly attributed to the State, and a plaintiff must satisfy both elements. *Lugar*, 457 U.S. at 922. "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." Id. "The state actor requirement ensures that not all private parties 'face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.'" *Collins v. Womancare*, 878 F.2d 1145, 1151 (9th Cir. 1989).

The parties here dispute the second prong of the *Lugar* test: whether the Shriners Defendants, as private parties, may be fairly characterized as state actors. *See* ECF Nos. 32 at 25-30; 34 at 7-29. Courts generally begin with the presumption that private parties are not state actors. *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). The Supreme Court has approved four different tests to be used in determining whether a private party is a state actor: "the public function test, the joint action test, the state compulsion test, and the governmental nexus test." *Wright v. Serv. Emps. Int'l Union Local 503*, 48 F.4th 1112, 1122 (9th Cir. 2022). "Satisfaction of a single test is sufficient to establish state action, so long as there is no countervailing factor." *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1109 (9th Cir. 2022); *see also Lugar*, 457 U.S. at 939 ("Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court . . . need not be resolved here."). The Court finds that Defendants are not state actors under any articulation of that standard.

A. Specific Conduct

As a prerequisite to completing a state action analysis under any of the four tests, the court must first identify the specific conduct which the plaintiff complains of as constituting state action. *Caviness*, 590 F.3d at 812 ("It is important to identify the function at issue because an entity may be a State actor for some purposes but not for others.") (quoting *Lee v. Katz*, 276 F.3d 550, 555 n.5 (9th Cir. 2002)). The question presented by the complaint is whether Defendants, as private employers and policymakers, were engaged in state action when they adopted a policy requiring employees to receive a COVID-19 vaccine while allegedly knowing that the only available formulation to employees was only provisionally authorized under the EUA. *See* ECF No. 1 at 1-2.

B. Public Function

Plaintiffs assert that Defendants are state actors under the public function test. ECF No. 1 at 73. Private individuals or entities meet the public function test when they "are endowed by the State with powers or functions governmental in nature," thereby rendering them "agencies or instrumentalities of the State and subject to its constitutional limitations." *Lee*, 276 F.3d at 554-55 (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)). "[T]he function at issue must be both traditionally and exclusively governmental." *Id.* at 555 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982)). "The test is difficult to meet." *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020); *see also Manhattan Comm. Access Corp. v. Halleck*, 587 U.S. 802 (2019) ("The Court has stressed that 'very few' functions fall into that category."). "The lean list of the very few recognized public functions includes running elections, operating a company town, and not much else." *Prager Univ.*, 951 F.3d at 998 (internal quotations and citations omitted).

Plaintiffs assert that the State traditionally and exclusively (1) licenses healthcare facilities and employees; (2) sets licensing requirements; (3) manages emergency declarations; and (4) determines "how the public function of distributing the federal government's COVID-19 EUA drug property" will be exercised. ECF No. 34 at 18. Plaintiffs also argue that (5) Defendants assumed a public function by administering COVID-19 vaccinations to the public and enacting an employee vaccination policy in accordance with Proclamation 21-14 and (6) Defendants assumed a public function by entering into the CDC COVID-19 Vaccination Program. ECF No. 1 at 72-73, ¶ 276 n.94.[7]

Even crediting Plaintiffs' arguments that issuing medical facility and healthcare worker licenses, pronouncing emergency declarations, and making decisions on how to distribute vaccinations and which facilities could participate in that program constitutes state action, Plaintiffs have not pled any set of facts which demonstrates that Defendants undertook those public functions by adopting an employee vaccination policy. *See generally* ECF No. 1. There is simply no reliable evidence that

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[7] The "CDC COVID-19 Vaccination Program Provider Agreement" that Plaintiffs refer to is an agreement that Defendants allegedly entered into with the Center for Disease Control (CDC). *See* ECF No. 1-1 (attaching a blank copy). Among other things, parties to the Provider Agreement contract to record vaccine administration data, provide EUA fact sheets to vaccine recipients, comply with vaccine storage and handling conditions, report abnormal vaccination, and follow all other applicable legal requirements. *Id.* at 2-3.

Defendants' issuance of the employee vaccination policy or administration of vaccines to the public gave them any power over medical licensing, emergency declaration management, or the rules and conditions for the distribution of the federal government's COVID-19 property.

As to the first part of Plaintiffs' fifth contention, the issue of whether Defendants lawfully administered vaccinations to the public is attenuated from the specific conduct in issue, *i.e.*, whether Plaintiffs were illegally terminated for refusing a vaccination. The second part of Plaintiffs' argument—that the hospital assumed a public function by complying with emergency orders—is equally untenable. Relevant authority instructs that a private employer's compliance with a government mandate does not constitute state action. *See, e.g., Sutton*, 192 F.3d at 839 ("[W]e do not believe that … government compulsion in the form of a general statute, without more, is sufficient to transform every private entity that follows the statute into a governmental actor."); *see also Zimmerman v. PeaceHealth*, 701 F. Supp. 3d 1099, 2023 WL 7413650, at *12 (W.D. Wash. 2023) ("A private entity's compliance with … federal and state COVID-19 mandates does not constitute state action.").

Plaintiffs respond by disputing the lawfulness of Proclamation 21-14, arguing that it could not be legally implemented while only EUA versions of the vaccine were available to employees. To the contrary, multiple courts in the Ninth Circuit have determined that because the emergency-authorized Pfizer-BioNTech vaccine and the FDA-approved Comirnaty vaccine were "physically, chemically, and biologically identical," the Pfizer-BioNTech vaccine was effectively FDA approved and was not an "experimental" drug under the EUA statute or PREP Act. *Johnson v. Brown*, 567 F Supp. 3d 1230, 1247 (D. Or. 2021); *Curtis v. Inslee*, 709 F. Supp. 3d 1257, 2023 WL 8828752 at *2 (W.D. Wash. 2023). Therefore, Plaintiffs' claims that Defendants' vaccination policy was unlawful because an FDA-approved vaccine was unavailable falls short. Regardless, however, there is no authority that supports the proposition that a private party transforms into a state actor when the private party follows a government mandate later found to be unconstitutional. *See Sutton*, 192 F.3d at 839 (rejecting the contention that private entities should be responsible for defending laws resulting in the deprivation of rights); *Collins*, 878 F.2d at 1151 (declaring that private parties should not face constitutional litigation when they rely on a state rule).

Finally, Plaintiffs' sixth contention fails for similar reasons as its fifth argument. A private party's participation in a government program, such as the CDC Provider Agreement, does not convert that party into a state actor. *See Rendell-Baker*, 457 U.S. at 842 (a "legislative policy choice in no way makes [government] services the exclusive province of the State"); *Kitchens v. Bowen*, 825 F.2d 1337, 1339-40 (9th Cir. 1987) (no state action found where receipt of federal funds was conditioned on compliance with regulatory program). Accordingly, the Court finds that Defendants were not engaged in a "public function" sufficient to convert their enforcement of an employment policy into state action.

C. Joint Action

Plaintiffs alternatively allege Defendants were engaged in "joint action" with the State. ECF Nos. 1 at 73; 34 at 21. Under the "joint action" or "symbiotic relationship" test, the court will inquire "'whether the government has so far insinuated itself into a position of interdependence with a private entity that the private entity must be recognized as a joint participant in the challenged activity.'" *Pasadena Republican Club v. W. Just. Ctr.*, 985 F.3d 1161, 1167 (quoting *Brunette v. Humane Soc'y of Ventura Cnty.*, 294 F.3d 1205, 1210 (9th Cir. 2002)). Joint participation "occurs when the state knowingly accepts the benefits derived from unconstitutional behavior." *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003) (internal quotations and citations omitted). A key factor is whether the State stood to financially gain from the alleged intertwinement. *Brunette*, 294 F.3d at 1213 ("Often significant financial integration indicates a symbiotic relationship."); *see also, e.g., Burton v. Wilmington Parking Auth.,* 365 U.S. 715 (1961) (seminal "joint action" case, finding state action on behalf of a private restaurant that leased space in a public parking lot building and refused to allow African-American patrons to enter the establishment, where discrimination was profitable to both the agency and the restaurant). Alternatively, a plaintiff may establish joint action "'by proving the existence of a conspiracy'" between the State and the private party. *O'Handley v. Weber*, 62 F.4th 1145, 1159 (9th Cir. 2023) (quoting *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)); see also *Brunette*, 294 F.3d at 1211 ("A conspiracy between the State and a private party to violate another's constitutional rights may also satisfy the joint action test.").

Again, Plaintiffs' claims fail here because the specific conduct complained of—whether Plaintiffs were unlawfully terminated for refusing to vaccinate using Pfizer-BioNTech or some other EUA-approved formula—was merely Defendants' fulfillment of a generally applicable law (Proclamation 21-14). *See Zimmerman*, 2023 WL 7413650, at *13. Moreover, the specific conduct in issue is untethered to Plaintiffs' claims of financial integration. Plaintiffs urge that the financial element of the joint action test is satisfied because Defendants "administered the COVID-19 Program on behalf of the State to share in the Program's cash flow benefiting the State and Defendants." ECF No. 34 at 21. Even assuming this to be true, it does not follow that Defendants or the State stood to gain any financial benefit by Defendants enacting an employee vaccination policy—the alleged financial benefit of the CDC Program Provider Agreement was that it authorized and supplemented Defendants' public administration of vaccinations, not that it had anything to do with Defendants' private employment policy. *Compare, e.g., Burton*, 365 U.S. at 724 ("Neither can it be ignored … that profits earned by discrimination [against black patrons] not only contribute to, but also are indispensable elements in, the financial success of [the] governmental agency."). There is no evidence that Defendants or the State profited by terminating Plaintiffs' employment in accordance with a lawful employment policy. As such, the Court finds that Plaintiffs have not satisfied the joint action test.

D. State Compulsion & Government Nexus

The Court considers the state compulsion and government nexus tests together. *See Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 n.13 (9th Cir. 2013) (noting the public function and joint action tests "largely subsume the state compulsion and governmental nexus tests, because they address the degree to which the state is intertwined with the private actor or action"); *see also Kirtley*, 326 F.3d at 1094 (characterizing the governmental nexus test as "[a]rguably the most vague of the four approaches").

Under the state compulsion test, state action exists "were the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the private actor's choice must in law be deemed to be that of the State.'" *Johnson v. Knowles*, 113 F.3d 1114, 1119 (9th Cir. 1997) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Once again, however, courts will not "convert every employer . . . into a government actor every time it complies with a presumptively valid, generally applicable law." *Sutton*, 192 F.3d at 838. Moreover, even where government compulsion is identifiable, there must be "some additional nexus that [makes] it fair to deem the private entity a governmental actor in the circumstances." *Id.* at 839. "Typically, the nexus has consisted of participation by the state in an action ostensibly taken by the private entity, through conspiratorial agreement, official cooperation with the private entity to achieve the private entity's goal, or enforcement and ratification of the private entity's chosen action." *Id.* at 841 (citations omitted). Similarly, under the governmental nexus tests, courts ask whether "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.'" *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)).

Plaintiffs complain that compulsion exists because "[t]he State issued a mandate impacting Plaintiffs' employment." ECF No. 1 at 73, n.95. In their responsive briefing, Plaintiffs further argue that Defendants and Governor Inslee "established and enforced a state custom whereby a person's EUA and PREP Act statutory rights to refuse the federal property could be ignored 'as if' they did not exist and that they could be treated differently under the Fourteenth Amendment than persons choosing the option to accept the administration of the federal property." ECF No. 34 at 27.

As stated, a plaintiff cannot successfully establish state action where the defendant was merely complying with a generally applicable state law. *Sutton*, 192 F.3d at 838-39. Even if Plaintiffs could satisfy the element of compulsion, however, Plaintiffs have not alleged a sufficient governmental nexus. As Defendants point out, "a private actor cannot take part in the development of a custom while simultaneously being compelled by that custom as though it has 'the force of law.'" ECF No. 37 at 13 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 163 (1970)).

Recent authority from the U.S. District Court for the Western District of Washington bolsters the finding that Plaintiffs were not engaged in state action. In *Curtis v. PeaceHealth*, Plaintiffs' counsel here brought a nearly identical complaint on behalf of a similarly situated group of claimants whose employment had been terminated for failing to comply with their employer's COVID-19 vaccination policy. No. 3:23-cv-05741-RJB, 2024 WL 248719, at *2–5 (W.D. Wash. Jan. 23, 2024). The court there rejected the plaintiffs' claims that they were state actors under any of the four tests, explaining that "[t]he conduct of which Plaintiffs complain was merely PeaceHealth's compliance with a generally applicable law — Gov. Inslee's Proclamation." *Id.* at *5. The Court finds the reasoning in *Curtis* compelling and adopts the same conclusion here. Plaintiffs have failed to demonstrate that Defendants were state actors under any of the four tests. The Court therefore declines to reach the substantive merits of Plaintiffs' § 1983 claims. *See Sullivan*, 526 U.S. 40 (state action required to prevail on a § 1983 claim).

III. Implied Right of Action Under the EUA

As an alternative to suing under § 1983 for alleged violations of the EUA, Plaintiffs assert that the EUA statute, 21 U.S.C. § 360bbb-3, contains an implied right of action. ECF No. 1 at 102, ¶¶ 407-409.

Federal courts around the country, including in Washington State, have uniformly rejected the contention that the EUA statute contains any implied right of action. *See, e.g., Curtis*, 2024 WL 248719 at *7 (holding that "no private right of action should be implied for 21 U.S.C. § 360bbb-3(e)(1)(A)" and that because plaintiffs could have received an FDA-authorized vaccine via Pfizer-BioNTech, the EUA statute was not applicable in the first instance to the employer's enforcement of the vaccine policy); *accord Bird v. Martinez-Ellis*, No. 22-8012, 2022 WL 17973581 at *5, (10th Cir. Dec. 28, 2022) (unreported). *See also, e.g., Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021) (holding that the EUA "confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency" but "does not confer a private opportunity to sue the government, employer, or worker"); *see also, e.g., Kiss v. Best Buy Stores*, 3:22-cv-00281-SB, 2022 WL 17480936 (D. Or. Dec. 6, 2022) ("Even if [plaintiff] could adequately plead state action, courts have consistently held that the [EUA statute] provides no private right of action.").

The Court agrees with the weight of authority holding that the EUA statute does not contain an implied right of action. Plaintiffs have not offered any contradicting sources or compelling analysis that convinces the Court otherwise.

IV. Breach of Contract

Plaintiffs separately assert that Defendants breached the CDC COVID-19 Provider Agreement, claiming that they were third-party beneficiaries to the contract. *See* ECF Nos. 1 at 98-99, ¶¶ 385-88; 34 at 52-53. Plaintiffs believe the agreement was designed to protect potential recipients of COVID-19 vaccinations and that "the applicable laws provide third-party rights," including the right to refuse emergency authorized inoculation "without penalty." ECF No. 34 at 52.

Plaintiffs' claim for breach of contract is legally deficient because Plaintiffs have not pled a set of facts which establish that Plaintiffs were the intended third-party beneficiaries of the agreement. "The creation of a third-party beneficiary contract requires that the parties intend that the promisor assume a *direct obligation* to the intended beneficiary at the time they enter into the contract." *Postlewait Constr., Inc. v. Great American Ins. Cos.*, 41 Wn. App. 763, 765 (1985), *aff'd*, 106 Wash. 2d 96, (1986) (citation omitted) (emphasis in original). The court is to evaluate the parties' intent objectively, asking whether performance "necessarily and directly benefits the third party." *Warner v. Design & Build Homes, Inc.*, 128 Wash. App. 34, 43 (2005). "An incidental, indirect, or inconsequential benefit to a third party is insufficient to demonstrate an intent to create a [third-party beneficiary]." *Id.* (citing *Del Guzzi Const. Co., Inc. v. Glob. Nw., Ltd., Inc.*, 105 Wash.2d 878, 886 (1986)); *see also Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) ("Parties 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.").

Plaintiffs did not offer a signed copy of the alleged contract between Defendants and the CDC, *see* ECF No. 1-1 (attaching a blank copy), but since Defendants do not refute that Shriners entered into the Provider Agreement, the Court accepts the form copy as representative of the agreement that Defendants executed. The agreement supplies that it is "between [the] Organization and CDC," as "a part of collaboration under the relevant state['s] cooperative agreement with CDC." *Id.* at 2. In general terms, the contract sets out various requirements for the administration of COVID-19 vaccines by the contracting facility, including, among other requirements, that the organization must comply with all requirements set forth by the FDA and EUA. *Id.* at 3.

Plaintiffs have not shown their claim has any facial plausibility under the facts alleged. The Provider Agreement is concerned with vaccine administration and, by all counts, Plaintiffs declined to receive a COVID-19 vaccination. Thus, even if the Court were to accept that recipients of COVID-19 vaccinations were the intended third-party beneficiaries who the parties contracted to protect, that would have no bearing on Plaintiffs' claims of unlawful termination because Plaintiffs refused vaccination. At best, any benefit to Plaintiffs resulting from this agreement was purely indirect or incidental. Moreover, the alleged breach of contract that Plaintiffs complain of did not in fact occur because an FDA-authorized vaccine—Pfizer-BioNTech—was available to Plaintiffs at the time the employment policy was in place. The Court therefore finds that Plaintiffs have not stated a claim for breach of contract.

V. Employment Law Torts

Plaintiffs seek damages for "Washington State Common Law Employment Torts." ECF No. 1 at 99-101. The complaint makes several broad allegations under this heading, including that "Defendants lacked authority to condition [Plaintiffs'] employment" upon their participation in EUA or PREP Act measures; that Defendants created a "hostile work environment"; that Defendants placed Plaintiffs under moral duress; that Defendants coerced Plaintiffs; that Defendants discriminated against Plaintiffs; and that Plaintiffs "did not knowingly submit to the deprivation of labor, wages, or employment" in declining the vaccine. *Id.* at 99-100, ¶¶ 391, 393-98, 401. When pressed by

Defendants in their motion to dismiss, ECF No. 32, on which precise "employment torts" were in issue, Plaintiffs merely countered, "Plaintiffs stated the claim and provided case law to support the claim … Shriners Policy Makers enacted the vaccination policy, authorized persons to enforce the policy, and the policy was the basis for Plaintiffs being deprived of their rights." ECF No. 34 at 53.

The Court declines to decode these conclusory allegations and translate them into a cognizable tort claim on Plaintiffs' behalf. Under Rule 8, it is Plaintiffs' burden to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiffs have not established which employment torts claims are in issue, and the Court will not engage in guesswork on their behalf. *See Bell Atl. Corp.*, 550 U.S. at 555 (a complaint must offer "more than labels and conclusions").

VI. Outrage

Plaintiffs assert that Defendants committed the tort of outrage by "apply[ing] consequences to Plaintiffs refusing to participate in the use of COVID-19 investigational drugs" and "engag[ing] in a scorched earth policy and inflict[ing] with malicious intent severe emotional distress." ECF No. 1 at 101, ¶ 404.

To establish a claim for outrage, a plaintiff must allege facts demonstrating (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Stansfield v. Douglas Cnty.*, 107 Wash. App. 1, 15 (2001). The first element requires conduct "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Reyes v. Yakima Health Dist.*, 191 Wash.2d 79, 91 (2018) (quoting Restatement (Second) of Torts § 46 cmt. d (Am. Law Inst. 1965)). A "high burden" applies to claims of outrage. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wash.2d 775, 792 (2014).

Defendants' enactment and enforcement of their employment policy was in accordance with a lawful vaccination requirement (Proclamation 21-14). Plaintiffs therefore cannot establish that Defendants' lawful behavior was extreme, outrageous, or otherwise intolerable. *See, e.g., Marse v. Quality Food Ctrs., Inc.*, 133 Wash. App. 1048, 2006 WL 1914644 at *3 (2006) (Plaintiff could not prevail on outrage claim where employer criticized her hygiene because the comments related to plaintiff's compliance with her employment obligations). Even if matters were otherwise, Plaintiffs have not stated facts which show that the policy was enacted to intentionally or recklessly inflict emotional distress on employees, or that it in fact caused Plaintiffs severe emotional distress. Accordingly, Plaintiffs' claim for outrage is dismissed.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendant Shriners' Motion to Dismiss (ECF No. 32) is **GRANTED**.

2. Plaintiffs' claims against Defendants Shriners Hospitals for Children, Shriners Hospitals for Children — Spokane, Beverly Bokovitz, Frances Farley, Jerry Gantt, John McCabe, Phillip Grady, and Peter Brewer are **DISMISSED**

WITH PREJUDICE. The claims against Governor Jay Inslee remain.

The District Court Executive is directed to enter this Order and furnish copies to counsel. The file remains **OPEN**.

DATED February 8, 2024.

/s/ Thomas O. Rice
THOMAS O. RICE
United States District Judge

APPENDIX D

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.*

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

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

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

COUNSEL

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OPINION

McKEOWN, Circuit Judge:

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

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

Background

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

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

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[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.

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[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 counter-measure] 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.

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[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]

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[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

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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." *Schware 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[ied] 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 E

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 represent-tatives …

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.