No. __A___

In the Supreme Court of the United States

Aila Curtis, *et al.*,
Applicants,

v.

Governor Jay Inslee; *et al.*,
Respondents.

To the Honorable Elena Kagan,

Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

APPENDIX TO APPLICATION TO EXTEND THE TIME TO FILE A PETITION FOR A WRIT OF *CERTIORARI*

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

OPINION

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 KUTSAR 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)

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

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. 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.

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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," Employees claim that their rights were violated when they were penalized for refusing a vaccine that was only EUA-

[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.

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

[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).

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.

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

The statutory provision referred to by Employees as "the EUA Statute" or 21 U.S.C. § 360bbb-3, a section of the Food, Drug, and Cosmetic Act ("FDCA"), empowers the FDA to authorize the use of a drug in certain circumstances. Under this statute, the Secretary of Health and Human Services is obliged to design "[a]ppropriate conditions . . . to ensure that individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii). Employees argue that Defendants did not

adequately inform them of their option to refuse the COVID-19 vaccine, thereby violating the statute.

Even assuming this language applies to Defendants and their conduct, Congress has limited the enforcement of the FDCA to public actions. *Id.* § 337(a) (requiring that enforcement be brought "by and in the name of the United States"). Contrary to Employees' wishes, we cannot "judicially creat[e] an implied private right of action." Instead, our role is to interpret Congress's intent in creating a private right. "In the absence of clear evidence of congressional intent, we may not usurp the legislative power by unilaterally creating a cause of action." *In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1230–31 (9th Cir. 2008). By providing only for public enforcement, Congress has made its intent to "shut the door to private enforcement" evident. *Gonzaga Univ.*, 536 U.S. at 284 n.4. Employees have not provided evidence of any contrary Congressional intent or even a colorable interpretation of the statute that would enable their suit. We conclude that Section 360bbb-3 does not create a private right that is enforceable under Section 1983.

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

This statute, 10 U.S.C. § 980, provides that "[f]unds appropriated to the Department of Defense may not be used for research involving a human being as an experimental subject." Spending-power statutes, like this one, are "especially unlikely" to confer an enforceable right. *Medina*, 145 S. Ct. at 2230. This statute contains no language "phrased in . . . explicit rights-creating terms." *Gonzaga*, 536 U.S. at 284. Nor does it "manifest[] an 'unambiguous' intent

to confer individual rights" and so is not enforceable under Section 1983. *Id.* at 280 (citation omitted).

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

The Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247d-6, requires the Secretary of Health and Human Services to "ensure that . . . potential participants [in the administration or use of a covered countermeasure] are educated with respect to . . . the voluntary nature of the program." *Id.* § 247d-6e(c). Employees extrapolate from this statute a "right" to be so educated and thus hang their hat on this statute as a basis for their Section 1983 claims. The PREP Act, however, lacks the requisite "rights-creating language" and "individual[] focus" to create rights enforceable under Section 1983. *Gonzaga*, 536 U.S. at 290. Further, the statute, at most, imposes an educational obligation on a federal agency, not Defendants. Plaintiffs' PREP Act claim therefore fails.

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

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

"Supreme Court decisions considering a treaty provision to be self-executing").

However, the ICCPR was ratified by the United States "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). Because the ICCPR is not self-executing, and Congress has not acted to enable private lawsuits for violations of rights enshrined in that treaty, it is not "susceptible to judicial enforcement." *Serra v. Lappin*, 600 F.3d 1191, 1196 (9th Cir. 2010) (citation omitted). Article VII of the ICCPR thus cannot serve as the basis for a Section 1983 action. *See Medellín*, 552 U.S. at 505 (concluding that absent self-executing status or implementing statutes, such treaties' commitments are "not domestic law"); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (holding that a treaty "do[es] not provide the basis for a private lawsuit" if it is neither self-executing nor implemented by legislation).

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

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

statutes create any right enforceable under Section 1983.[3] The regulation, standing alone, cannot support Employees' claims.

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,'

[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)).

'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]

Employees' clearest articulation of the right they assert is the "right to refuse an investigational drug without penalty

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

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 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

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

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 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.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

AILA CURTIS, et al.,

Plaintiffs,

v.

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

Defendants.

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

ORDER DENYING PLAINTIFFS' VARIOUS MOTIONS AND DISMISSING REMAINING STATE LAW CLAIMS WITHOUT PREJUDICE

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

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

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

I. PROCEDURAL HISTORY AND BACKGROUND FACTS

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

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

The background facts and earlier procedural history of this case are in the December 21, 2023 Order Granting Defendant Inslee's Motion to Dismiss (Dkt. 32 at 1-6) and the January 23, 2024 Order on PeaceHealth Defendants' Motion to Dismiss (Dkt. 41 at 1-8) and are adopted here by reference.

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

II. DISCUSSION

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

1. Motions

Pursuant to Fed. R. Civ. P. 59(E), the Plaintiffs move to alter or amend the December 21, 2023 Order dismissing the claims asserted against Gov. Inslee regarding the applicability of *Johnson v. Brown,* 567 F.Supp.3d 1230 (D. Or. 2021) and the "non-availability of COMIRNATY®." Dkt. 38. The Plaintiffs argue that *Johnson* does not hold that the "Pfizer-BioNTech vaccine is not an [emergency use authorization ("EAU")/Public Readiness and Emergency Preparedness Act ("PREP")] drug." *Id.* at 2. They maintain that *Johnson* "actually confirmed that COMIRNATY® and that Pfizer-BioNTech vaccine are two different products

governed by two different laws." *Id.* The Plaintiffs further assert that *Johnson* did not "address what the lack of availability of COMIRNATY® would have on a vaccine mandate." *Id.*

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

2. Standard

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

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

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

3. Analysis

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

Further, the motion to reconsider the order dismissing all claims against Gov. Inslee (Dkt. 38) and the motion to reconsider the order dismissing the federal claims against the PeaceHealth Defendants (Dkt. 47) should be denied on the merits. The Plaintiffs have failed to point to a

"manifest error in the prior ruling[s]" or made "a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence."

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

Furthermore, the day that the pending motions in this case were noted for consideration (February 23, 2024), the Ninth Circuit Court of Appeals affirmed the *Johnson* district court's separate decision to dismiss the plaintiffs' federal claims as a matter of law. *Johnson, et. al. v. Kotek, et. al.*, 2024 WL 747022, at *2 (9th Cir. Feb. 23, 2024). (This Court cited the *Johnson* district court's 56-page decision denying plaintiffs' motion for temporary restraining order in the Order Granting Defendant Inslee's Motion to Dismiss. Dkt. 32 at 4).

The plaintiffs in *Johnson* challenged then Oregon Governor Kate Brown and the Director of the Oregon Health Authority's August of 2021 COVID-19 vaccine mandates for state employees, healthcare workers, and school employees. *Id.* The *Johnson* plaintiffs asserted several claims, including that the defendants' vaccine mandates were preempted by 21 U.S.C. § 360bbb-3(E)(1)(A) under the Supremacy Clause. The *Johnson* court rejected that challenge noting that the "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983." *Johnson* at 2. It held that the availability of the § 1983 remedy under the Supremacy Clause "turns on whether the assertedly pre-empting statute [there and here 360bbb-3(E)(1)(A)], by its terms or as interpreted, (1) creates obligations sufficiently specific and definite to be within

the competence of the judiciary to enforce, (2) is intended to benefit the putative plaintiff, and (3) is not foreclosed by express provision or other specific evidence from the statute itself." *Id.* at 2 (*cleaned up, citations and internal quotation marks omitted*). The *Johnson* court noted that the plaintiffs' Supremacy Clause claim, based on § 360bbb-3, "falters at the third prong of this test," because the Food, Drug, and Cosmetic Act ("FDCA") (of which § 360bbb-3 is a part) expressly states that all proceedings to enforce it "shall be by and in the name of the United States." *Id.* (*citing* 21 U.S.C. § 337(a)). Concluding that the plaintiffs' Supremacy Clause claim was an attempt to use § 1983 to create a federal damages remedy to enforce the requirements of the FDCA, the Ninth Circuit held that the plaintiffs' supremacy clause claim is "foreclosed by an express provision of the FDCA" and was properly dismissed. *Id.*

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

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

Moreover, dismissal of the Plaintiffs' preemption claims is consistent with the Third Circuit Court of Appeal's decision in *Children's Health Defense, Inc. v. Rutgers, the State Univ. of New Jersey*, 2024 WL 637353 (3rd Cir. Feb. 15, 2024). The *Rutgers* court held that Section 360bbb-3 does not preempt the university's COVID-19 vaccine mandate because (1) 21 U.S.C. § 360bbb-3 applies to the Secretary of Health and Human Services only and not the defendants and (2) the plaintiffs did not allege sufficient facts to show that the university's mandate conflicted with § 360bbb-3. *Id.* at 5. Although they argue in supplemental briefing that the *Rutgers* court erred in so concluding (Dkt. 53), the Plaintiffs here fail to point to any Ninth Circuit authority which requires a different result.

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

that the parties' actions in *Seaplane* occurred before the COVID-19 vaccines ineffectiveness was known. Dkt. 38 at 7. This argument is unrelated to whether there was existing precedent which clearly established that Gov. Inslee's August 2021 COVID-19 vaccine mandate violated the Plaintiffs' statutory or constitutional rights. Furthermore, the decision to grant Gov. Inslee qualified immunity here is consistent with the Ninth Circuit Court of Appeals ruling in *Johnson* that the Oregon governor and state officials were entitled to qualified immunity against § 1983 claims (including for violations of plaintiffs' due process rights) related to their August 2021 COVID-19 vaccine mandates. *Johnson* at 3.

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

B. MOTION TO AMEND THE AMENDED COMPLAINT

1. Standard

Under Fed. R. Civ. P. 15 (a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." A motion to amend under Rule 15 (a)(2), "generally shall be denied only upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing party." *Chudacoff v. University Medical Center of Southern Nevada,* 649 F.3d 1143 (9th Cir. 2011).

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

Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.

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

2. Proposed Second Amended Complaint – Federal Claims

The Plaintiffs filed a proposed second amended complaint with their motion to alter or amend the judgment, or in the alternative, for leave to file a second amended complaint. Dkt. 38-2. It makes the following federal claims: (1) "42 U.S.C. § 1983 – violation of 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III)," referring to the "CDC COVID-19 Vaccination Program Provider Agreement, and the implementing statutes and regulations found at 45 CFR Part 46, the Belmont Report, 21 U.S.C. § 360bbb-3, Article VI of the [International Covenant on Civil and Political Rights ("ICCPR")] Treaty, Federal Wide Assurance, 10 U.S.C. § 980, EUA Scope of Authorization letters, and the Fourteenth Amendment," (2) "42 U.S.C. § 1983 - Deprivation of Equal Protection Rights," (3) "42 U.S.C. § 1983 - Deprivation of Constitutional Procedural Due Process Rights," (4) "42 U.S.C. § 1983 - Substantive Due Process Rights under 21 U.S.C. § 360bbb-3," (5) "42 U.S.C. § 1983 – Substantive Due Process Rights under PREP Act," (6) "Unconstitutional Conditions Doctrine – 42 U.S.C. § 1983," (7) "Deprivation of Rights Under

Color of Law - 42 U.S.C. § 1983 Spending Clause Doctrine," (claims 8-11 are state law claims) and (12) an "Implied Private Right of Action 21 U.S.C. § 360bbb-3." Dkt. 38-2. The proposed second amended complaint also contains two sections referencing preemption and the Supremacy Clause, one regarding 21 U.S.C. § 360bbb-3 and the second regarding the PREP Act (Dkt. 38-2) that can be considered as unnumbered claims.

3. Analysis

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

For the reasons stated in the December 21, 2023 order, Gov. Inslee has demonstrated that he is entitled to qualified immunity on all the Plaintiffs' § 1983 claims; there is no showing that he is not entitled to qualified immunity on the Plaintiffs' repackaged § 1983 claims contained in the proposed second amended complaint. Further, the Plaintiffs' proposed second amended complaint does not plead sufficient plausible facts from which to conclude that the PeaceHealth Defendants were state actors for purposes of § 1983 liability. Moreover, there are additional grounds from which to conclude that the Plaintiffs' proposed amendment of their federal claims is futile, with more in-depth discussions found in the prior orders (Dkts. 32 and 41):

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

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

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

The Court in *Talevski* relied on *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) for the proposition that "statutory provisions must unambiguously confer individual federal rights" for a presumption of enforceability under § 1983 to arise. 599 U.S. at 180. Further, the *Talevski* court noted that the presumption may be defeated where Congress evinced an intention that § 1983 was not available to enforce those rights. *Id.* at 186.

The Plaintiffs' proposed second amended complaint again fails to point to federal law – whether statutory, regulatory, international treaty provisions or some other source - that "unambiguously confer" individual federal rights enforceable under § 1983 which would entitle them to relief here. (To the extent Plaintiffs base their claims on the Fourteenth Amendment, those arguments are addressed below). Further, as stated above in Section A.3., the statute mentioned in the title of claim one, "21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III)," contains an express provision limiting enforcement actions to "a State in its own name" or by the United States. *Johnson* at 2 (*citing* 21 U.S.C. § 337(a)). Accordingly, even if 21 U.S.C. § 360bbb-3(e) unambiguously conferred individual federal rights which were presumptively enforceable under

§ 1983, Congress evinced an express intention that § 1983 was not available to enforce those rights – only a State or the United States may sue under the statute. *Talevski* at 186. The Plaintiffs' proposed claim 1 fails to state a claim. Amendment to add it would be futile.

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

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

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

Federal Claim 4. The Plaintiffs' motion to add the proposed "42 U.S.C. § 1983 - Substantive Due Process Rights under 21 U.S.C. § 360bbb-3" claim, should be denied as futile because as stated above in Section II.B.3. Federal Claim 1, Congress has expressly foreclosed a §

1983 claim based on "rights" arising from 21 U.S.C. § 360bbb-3. *Johnson* at 2. The Plaintiffs' attempt at recasting the claim as brought with reference to the substantive due process clause does not change the result.

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

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

In 2005, Congress passed the PREP Act to encourage the development and deployment of medical countermeasures (such as diagnostics, treatments, and vaccines) by limiting legal liability relating to their administration during times of crisis. *Maney v. Brown*, 91 F.4th 1296, 1298 (9th Cir. 2024).[1] The statute gives "'covered persons' immunity 'from suit and liability' for claims 'caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.'" *Id.* (*quoting* 42 U.S.C. § 247d-6d(a)(1)). Immunity under the PREP Act "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure." *Id.*

In *Maney,* the Ninth Circuit held that Oregon Governor Kate Brown was immune from suit and liability under the PREP Act. 91 F.4th at 1303. In that case, the plaintiff-prisoners

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

asserted federal constitutional claims, pursuant to § 1983, related to the governor's COVID-19 vaccine policy placing prisoners in a lower tier than prison guards to receive the vaccine. *Id.* After finding that the statutory requirements for PREP Act immunity were met, the *Maney* Court concluded that "Congress intended to expressly immunize covered persons from § 1983 actions for claims covered by the Act, even if those claims are federal constitutional claims." *Id.* at 1303.

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

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

Federal Claim 7. In their proposed seventh claim for relief, the Plaintiffs again make a spending clause doctrine claim pursuant to § 1983. Dkt. 38-2. The Plaintiffs' motion to add a

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

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

Federal Claim - Preemption/Supremacy Clause - Unnumbered. To the extent the Plaintiffs move to amend their amended complaint to seek relief on a preemption/supremacy clause theory based on § 360bbb-3 or the PREP Act, their motion should be denied as futile. The claim based on § 360bbb-3 fails as a matter of law. *Johnson* at 2. Further, the Plaintiffs make no showing that § 1983 is available to provide a remedy for alleged PREP Act preemption violations. *Maney* at 1303 n.3 (noting that "the PREP Act expressly forecloses § 1983 actions for covered claims"). Amendment to include these claims is futile.

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

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

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

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

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

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

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

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

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

The Plaintiffs' motion for leave to file a second amended complaint (Dkt. 38) should be denied as to all federal claims and the state law claims asserted against Gov. Inslee. Amendment is futile. The Plaintiffs have had several opportunities to plead these claims and have failed to do so. The motion (Dkt. 38) should be denied without prejudice regarding the state law claims the Plaintiffs are attempting to assert against the PeaceHealth Defendants.

C. EXERCISE OF SUPPLEMENTAL JURISDICTION

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

Here, two of the four conditions in § 1367(c) are present. All Plaintiffs' claims against Gov. Inslee have been dismissed (Dkt. 32) and all Plaintiffs' federal claims against the

PeaceHealth Defendants have been dismissed (Dkt. 41). Accordingly, this Court has "dismissed all claims over which it has original jurisdiction," and so has discretion to decline to exercise supplemental jurisdiction over the state law claims under § 1367(c)(3). Moreover, the remaining state claims "raise novel or complex issues of state law" under § 1367(c)(1). These are issues for which the state court is uniquely suited. Because state courts have a strong interest in enforcing their own laws, *See Carnegie-Mellon University v. Cohill,*484 U.S. 343, 352 (1988), the value of comity is served by this Court declining jurisdiction. Further, the values of economy, convenience, and fairness may well be served by this Court's declining to exercise supplemental jurisdiction. *See Acri* at 1001.

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

III. ORDER

It is **ORDERED** that:

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

- The Court **DECLINES TO EXERCISE** supplemental jurisdiction over the Plaintiffs' state law claims that are asserted against the PeaceHealth Defendants;
    - The Plaintiffs' state law claims that are asserted against the PeaceHealth Defendants **ARE DISMISSED WITHOUT PREJUDICE;**
    - The PeaceHealth Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Dkt. 30) **IS DENID WITHOUT PREJUDICE** as it relates to the Plaintiffs' state law claims; and
- This case **IS CLOSED**.

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

Dated this 27th day of February, 2024.

ROBERT J. BRYAN
United States District Judge