Judge Linfield Ruling for Firefighters 4 Freedom Case
LA Fire City Case Linfield Ruling

Case Number: 21STCV34490 **Hearing Date:** February 15, 2022 **Dept:** 34

SUBJECT: **Amended Demurrer to Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief**

Moving Party: Defendant City of Los Angeles

Resp. Party: Plaintiff Firefighters4Freedom Foundation

TENTATIVE DECISION

The Court SUSTAINS WITHOUT LEAVE TO AMEND Defendant City of Los Angeles' Amended Demurrer to Plaintiff Firefighters4Freedom's Second Amended Complaint.

I. SUMMARY OF ARGUMENT

The Court takes judicial notice that COVID-19 vaccinations are safe and effective in protecting the health and safety of the public. Vaccinations save lives; vaccinations slow the spread of the disease; vaccinated people have fewer and less serious infections. These facts are not reasonably subject to dispute within the medical community.

For more than a century, plaintiffs have filed lawsuits to halt vaccination mandates. For more than a century, our Courts have consistently held that government has the power to require vaccinations to protect the public's health and safety.

This is another in a long line of cases that challenges vaccination mandates. No Court has upheld such a challenge. This case is equally without merit.

The case is dismissed.

II. BACKGROUND

On August 18, 2021, the Los Angeles City Council adopted Ordinance No. 187134, effective August 25, 2021. (Plaintiff's RJN in Support of Plaintiff's Motion for Preliminary Injunction, dated November 16, 2021, Ex. H.) The Ordinance requires all current and future City employees to be fully vaccinated for COVID-19 or request an exemption no later than October 19, 2021. (*Id.*) As of October 20, 2021, these COVID-19 vaccination and reporting requirements became conditions of City employment and a minimum requirement for all City employees. (*Id.*) In compliance with state law, exemptions to the City's Vaccine Mandate are available only to accommodate sincerely held religious beliefs or individual medical conditions. (Plaintiff's RJN in Support of Plaintiff's Motion for Preliminary Injunction, dated November 16, 2021, Ex. H; Girard Decl. in Support of Defendant City of Los Angeles' Opposition to Plaintiff's Motion for Preliminary Injunction, dated December 10, 2021, ¶¶ 45-58, Ex. 11.)

On September 24, 2021, the Los Angeles Fire Department (LAFD) emailed all its employees to provide notices concerning the Ordinance's vaccination status reporting requirement. On October 4, 2021 and October 12, 2021, the Fire Chief issued an order on the reporting requirement to all LAFD employees who had yet to report their vaccination status or failed to report their status effectively given the available options. (Muus Decl. in Support of Motion for Preliminary Injunction, dated November 16, 2021, Exs. A, B.) On October 14, 2021, ongoing consultations with the City's various employee unions, including United Firefighters Los Angeles City by the City Administrative Officer culminated in the CAO's release of the City's Last, Best, and Final Offer ("LBFO") regarding Vaccine Mandate non-compliance by City workers. (Girard Decl. in Support of Defendant City of Los Angeles' Opposition to Plaintiff's Motion for Preliminary Injunction, dated December 10, 2021, ¶ 53, Ex. 10.)

> "[U]nder the LBFO, employees who fail to comply with the vaccine requirement by the October 20, 2021 compliance deadline and are not seeking a medical or religious exemption, will be issued a Notice granting them additional time (until December 18, 2021) to comply with the vaccine mandate if they agree to certain conditions, including bi-weekly testing, at their own expense, and employees who fail to show proof of full vaccination by close of business on December 18, 2021 will be subject to corrective action, i.e., involuntary separation from City employment for failure to meet a condition of employment, but employees with pending exemption requests will be exempt from the vaccination requirement until their request is approved or denied." (Girard Decl. in Support of Defendant City of Los Angeles' Opposition to Plaintiff's Motion for Preliminary Injunction, dated December 10, 2021, ¶ 45.)

On October 26, 2021, the Los Angeles City Council adopted a resolution to instruct the mayor to implement the LBFO, and to further support the mayor's declaration of a public health emergency imposed by the ongoing COVID-19 global pandemic. On October 28, 2021, Mayor Eric Garcetti issued a memorandum to all City department heads to instruct them to implement the terms of the City's October 14, 2021 LBFO. On October 29, 2021, the City's Personnel Department emailed all City employees with a Notice of Mandatory COVID-19 Vaccination Policy Requirements ("VPR"), which included a request to agree to its terms within 24 hours. (Muus Decl. in Support of Motion for Preliminary Injunction, dated November 16, 2021, Ex. C.) The VPR's final paragraph before the signature page reads as follows: "I understand that my failure to sign, or if I disagree to any part of this Notice, will cause me to be placed off duty without pay, pending pre-separation due process procedures and I will be provided written notice of the proposed action of separation, or similar action shall be taken as applicable for sworn employees as provided above." (*Id.*)

From November 9, 2021 to December 9, 2021, 239 LAFD employees (238 sworn and 1 civilian) who received the 48-Hour Notice were place on administrative leave. (Everett Decl. in Support of Defendant City of Los Angeles' Opposition to Plaintiff's Motion for Preliminary Injunction, dated December 10, 2021, ¶ 22.) All 239 employees received at least 48-hours to respond to the notice. (*Id.*) As of December 9, 2021, no LAFD employee had been denied a requested medical or religious exemption. (Everett Decl. in Support of Defendant City of Los Angeles' Opposition to Plaintiff's Motion for Preliminary Injunction, dated December 10, 2021, ¶ 28.)

On September 17, 2021, Plaintiff Firefighters4Freedom, who represents 125 of the 239 employees placed on administrative leave, filed a Complaint against Defendant City of Los Angeles alleging a violation of constitutionally protected autonomous privacy rights and ultra-vires legislation. Plaintiff filed a First Amended Complaint on November 3, 2021, adding additional causes of action alleging a violation of Fourteenth Amendment substantive due process, violation of Fourteenth Amendment equal protection, intentional infliction of emotional distress, invasion of privacy, declaratory and injunctive relief under the Americans with Disabilities Act (disparate treatment and failure to accommodate), and violation of due process.

On November 16, 2021, Plaintiff Firefighters4Freedom filed a motion for a preliminary injunction.

On December 21, 2021, the Court denied Plaintiff's motion for preliminary injunction.

On January 13, 2022, Plaintiff Firefighters4Freedom filed a Second Amended Complaint for Declaratory and Injunctive Relief.

On January 18, 2022, Plaintiff Firefighters4Freedom and Defendant City of Los Angeles filed a Joint Stipulation Regarding the Filing of the Second Amended Complaint, where the parties "stipulated and agreed that Plaintiff shall file its Second Amended Complaint by January 14, 2022, with the amended demurrer kept on calendar. . . ." (Joint Stipulation, p. 2:17-19.) Plaintiff drafted a Second Amended Complaint "that addresses recent events surrounding the spread of COVID-19 and the City's COVID-19 vaccine mandate." (Joint Stipulation, p. 2:7-8.)

On January 18, 2022, Defendant City of Los Angeles filed an amended demurrer to Plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief. On January 25, 2022, Plaintiff opposed Defendants' demurrer. On January 31, 2022, Defendant filed a reply to Plaintiffs Opposition.

III. LEGAL STANDARD ON DEMURRER

A demurrer is a pleading used to test the legal sufficiency of other pleadings. (*City of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1008–09; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. It is not the function of the demurrer to challenge the truthfulness of the complaint. (*Unruh-Haxton v. Regents of Univ. of California* (2008) 162 Cal.App.4th 343, 365.) For purpose of the ruling on the demurrer, all facts pleaded in the complaint are assumed to be true, however improbable they may be. (CCP §§ 422.10, 589.)

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack, or from matters outside the pleading that are judicially noticeable. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 311.) No other extrinsic evidence can be considered (i.e., no "speaking demurrers").

"We also consider matters that may be judicially noticed. Courts may — and, indeed, must — disregard allegations that are contrary to judicially noticed facts and documents. Where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1141 [cleaned up].)

A demurrer may be brought under Code of Civil Procedure section 430.10, subdivision (e) if insufficient facts are stated to support the cause of action asserted. A demurrer for uncertainty may be brought pursuant to Code of Civil Procedure section 430.10, subdivision (f). "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616.) "In general, 'demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond.'" (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.)

The demurring party must file with the court, and serve on the other party, the: (1) demurrer; (2) notice of hearing; (3) memorandum of points and authorities; and (4) proof of service. (See Cal. Rules of Court, rule 3.1112(a), rule 3.1300(c), rule 3.1320; Code Civ. Proc., § 1005(b).) "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint . . . are taken. Unless it does so, it may be disregarded." (CCP § 430.60.)

IV. ANALYSIS

A. Request for Judicial Notice

Defendant City of Los Angeles requests that the Court take judicial notice of the following 11 exhibits filed in connection with Defendant's Amended Demurrer to Plaintiff's Second Amended Complaint:

1. Exhibit 1: "Safety of COVID-19 Vaccines," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html (last updated Dec. 6, 2021).

2. Exhibit 2: "COVID-19: Vaccines to prevent SARS-CoV-2 Infection," UpToDate, by Kathryn M. Edwards, MD, et al., available at https://www.uptodate.com/contents/covid-19-vaccinesto-prevent-sars-cov-2-infection (last updated Dec. 1, 2021).

3. Exhibit 3: "CDC Expands Eligibility for COVID-19 Booster Shots to All Adults," Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s1119-booster-shots.html (last updated November 19, 2021).

4. Exhibit 4: "Interim Public Health Recommendations for Fully Vaccinated People," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (updated November 19, 2021).

5. Exhibit 5: "Variant Proportions," Centers for Disease Control and Prevention, available at https://covid.cdc.gov/covid-data-tracker/#variant-proportions (last updated Dec. 4, 2021).

6. Exhibit 6: "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html (Aug. 6, 2021).

7. Exhibit 7: "Antibody Testing Is Not Currently Recommended to Assess Immunity After COVID-19 Vaccination: FDA Safety Communication," U.S. Food and Drug Administration, available at https://www.fda.gov/medical-devices/safety-communications/antibody-testing-not-currently-recommended-assess-immunity-after-covid-19-vaccination-fda-safety (May 19, 2021).

8. Exhibit 8: "Morbidity and Mortality Weekly Report (MMWR): Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January-September 2021," Centers for Disease Control and Prevention, available at https://www.cdc.gov/mmwr/volumes/70/wr/mm7044e1.htm (Nov. 5, 2021).

9. Exhibit 9: State Public Health Officer Order of July 26, 2021: "Health Care Worker Protections in High-Risk Settings," available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx (Jul. 26, 2021).

10. Exhibit 10: Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134, adopted October 26, 2021 by the Los Angeles City Council.

11. Exhibit 11: "Omicron Variant: What You Need to Know," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html (updated Dec. 20, 2021).

Plaintiff opposes the Request for Judicial Notice. Plaintiff argues that "the effectiveness of the COVID-19 vaccines is a disputed factual issue in this case." (Plaintiff's Opposition to Request for Judicial Notice, p. 3:10-11.) In essence, Plaintiff argues that "COVID-19 is a novel virus. At some point, there may be a scientific consensus about its origin, treatment, and other issues. No consensus exists now." (*Id.* at p. 3:25-26.)

Plaintiff's position is contrary to case law, science, and common sense.

1. The Evidence Code

a. Evidence Code Section 451

Under Evidence Code section 451, "[j]udicial notice shall be taken of the following:

> "(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (Ev. Code § 451.)

The "Comments" to this section indicate that "universally known" in subdivision (f) "does not mean that every man [or woman] on the street has knowledge of such facts. A fact known among person of reasonable and average intelligence and knowledge will satisfy the 'universally known' requirement. Cf. People v. Tossetti (1930) 107 Cal.App. 7, 12.)"

b. Evidence Code Section 452

Under Evidence Code section 452, "[j]udicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

> "(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

"(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Ev. Code § 452.)

The "Comments" to this section state that subdivision (h) includes, "for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings."

2. Case Law Supports Taking Judicial Notice of the Facts Requested by Defendant City

Courts have often taken judicial notice of scientific facts. As our Supreme Court stated more than 50 years ago, "[m]atters of scientific certainty are subject to judicial notice." (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 414.)

More importantly, in the case most similar to this one, the Court itself took judicial notice of the efficacy of vaccines. In October 2016, a Los Angeles trial court sustained a demurrer without leave to amend in a case challenging the State's vaccination requirement for schoolchildren. The trial court's ruling was upheld on appeal. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135.)

Of particular interest is that the *Brown* court took judicial notice of documents published by the CDC. (*Id.* at p. 1142.)

Plaintiff's objections to this Court taking judicial notice of the CDC reports on vaccination were raised and dismissed four years ago in *Brown*:

"Plaintiffs . . . object to the materials on vaccination as hearsay, inadmissible opinion evidence, and 'government propaganda.' Plaintiffs further argue that we cannot take judicial notice of the safety and effectiveness of vaccines. They contend the proposition that 'protection of school children against crippling and deadly diseases by vaccinations is done effectively and safely' is not common knowledge, and is the subject of reasonable dispute. But they cite no authority that supports their contention. The authorities are to the contrary.

"More than 90 years ago, a California court observed that: 'Where the issue pertains to medical or surgical treatment, the nature, effect, and result of which are the subjects of common knowledge, such matters are within the rule of judicial knowledge. As for instance, the court will take judicial notice of the nature, purpose, and effects of vaccination.' [Citation.]

"Our courts have also pointed out we may take judicial

notice of scientific facts. . . .

"Accordingly, we conclude judicial notice of the safety

and effectiveness of vaccinations is proper." (*Id.* at pp. 1142-1143.)

Citing *Brown*, Witkin now states that judicial notice can be taken of the "safety and effectiveness of vaccinations" because it is a well-known "medical and scientific" fact. (Witkin, *Evidence*, "Judicial Notice," §35, 2021 Supplement.)

3. Universal Agreement is Not Required Before a Court Can Take Judicial Notice of a Fact

In 1980, an Auschwitz survivor, Mel Mermelstein, sued the Institute for Historical Review, an organization that denied that the Holocaust occurred. (*Mermelstein v. Institute for Historical Review, etc.* Los Angeles Superior Court Case C36542.) There were – and there still are – numerous people in the United States and throughout the World who deny that the Holocaust occurred.

According to *The Atlantic*, "Seventy years after the liberation of Auschwitz, two-thirds of the world's population don't know the Holocaust happened—or they deny it." ("The World Is Full of Holocaust Deniers," *The Atlantic*, May 14, 2014, available at https://www.theatlantic.com/international/archive/2014/05/the-world-is-full-of-holocaust-deniers/370870/.)

A 2020 survey of young Americans showed that "Sixty-three percent of those surveyed did not know that 6 million Jews were murdered in the Holocaust. . . ." ("Survey finds 'shocking' lack of Holocaust knowledge among millennials and Gen Z," available at https://www.nbcnews.com/news/world/survey-finds-shocking-lack-holocaust-knowledge-among-millennials-gen-z-n1240031.)

Holocaust denial and out-and-out anti-Semitism was certainly present in a substantial section of the population 40 years ago. Nonetheless, in 1981, Judge Thomas T. Johnson, the trial judge in *Mermelstein,* took judicial notice of the Holocaust:

> "The Court . . . takes judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during 1944. This is a fact not reasonably subject to dispute, determinable by resort to sources of reasonably indisputable accuracy." (*Mermelstein v. Institute for Historical Review, etc. et al.,* Los Angeles Superior Court Case C36542 (Notice of Ruling, Oct. 19, 1981

(This Court, on its own motion, takes judicial notice of this ruling pursuant to Ev. Code §452(d) and takes judicial notice of the unattributed facts in the following paragraph pursuant to Ev. Code §452(g) and (h). Judge Johnson's Order of October 19, 1981, is attached as an exhibit to this opinion.)

Judge Johnson was appointed to the Los Angeles Municipal Court by then-Governor Ronald Reagan in 1971, and he served as Presiding Judge of the Los Angeles Superior Court from 1985-1986. Of course, Judge Johnson's decision is not binding on this Court. (See, e.g., *Budrow v. Dave & Buster's of California* (2009) 171 Cal.App.4th 875, 885 ["A written trial court ruling in another case has no precedential value."]) In his 18 years on the bench, Judge Johnson had numerous high-profile cases, including disputes involving Billie Jean King, Rudy Vallee and Norton Simon, yet he is most famous for this ruling on the Holocaust. The opening sentence of Judge Johnson's obituary was that he took taking judicial notice of the Holocaust – a fact that was "not reasonably subject to dispute." ("Thomas T. Johnson dies at 88; judge ruled that Holocaust was a fact," *Los Angeles Times*, Dec. 31, 2011, available at https://www.latimes.com/local/obituaries/la-xpm-2011-dec-31-la-me-thomas-johnson-20111231-story.html.)

The issue, as Judge Johnson was aware, is not whether some people dispute the facts that are subject to judicial notice. It is whether there is consensus in the relevant professional or scientific community about the facts asserted.

After all, former President Trump filed and lost at least 63 lawsuits contesting the 2020 election. Yet more than 40% of Americans do not believe that President Biden won the 2020 election. ("More than 40% in US do not believe Biden legitimately won election – poll," *The Guardian*, Jan. 5, 2022, available at https://www.theguardian.com/us-news/2022/jan/05/america-biden-election-2020-poll-victory.) Another poll shows that one-third of Americans believe that "Biden's victory . . . was illegitimate." ("Poll: A Third of Americans Question Legitimacy of Biden Victory Nearly a Year Since Jan. 6," *U.S. News*, Dec. 28, 2021, available at https://www.usnews.com/news/politics/articles/2021-12-28/poll-a-third-of-americans-question-legitimacy-of-biden-victory-nearly-a-year-since-jan-6.) Yet despite more than 100 million Americans believing this misinformation, a Court could, in the appropriate case, take judicial notice of the fact that Biden legitimately won the last presidential election.

In 2019, on the 50th anniversary of the Moon landing, polls showed that between 6% and 20% of Americans believed the moon landing was a hoax. (See, e.g., "Moon landing conspiracy theories," Wikipedia, available at https://en.wikipedia.org/wiki/Moon_landing_conspiracy_theories.)

That translates to some 30 million Americans. Yet the Court can certainly, in the appropriate case, take judicial notice that Neil Armstrong landed on the moon on July 20, 1969.

According to a 2021 poll conducted by the Public Religion Research Institute, 23% of Republicans believe the QAnon conspiracy theory's central belief that "the government, media, and financial worlds are controlled by a group of Satan-worshipping pedophiles who run a sex-trafficking operation." ("Understanding QAnon's Connection to American Politics, Religion, and Media Consumption," PRRI, May 27, 2021, available at https://www.prri.org/research/qanon-conspiracy-american-politics-report/; see also "QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests," *New York Times*, May 27, 2021, available at https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html.) Certainly, a Court, in the appropriate case, could take judicial notice of the fact that this belief is false.

In short, we do not consult the man on the Clapham bus to determine whether a fact is "universally known." Rather, we look to the consensus of scientific, historical or professional opinion.

Plaintiff argues that the "'facts' the City discusses in the demurrer—primarily statements from other cases and studies regarding the COVID-19 vaccines—cannot be judicially noticed for their truth because they are not indisputably true." (Opposition, p. 2:17-20.) But as indicated above, the fact that some people may believe a falsehood – i.e., that a fact is not "indisputably true" – does not mean that the fact cannot be judicially noticed.

Plaintiff also cites to *Fremont Indemnity Co. v. Fremont General Corp.*, (2007) 148 Cal.App.4th 97, 115 for the proposition that a "court ruling on a demurrer cannot decide a question that may depend on disputed facts by

means of judicial notice." (Opposition, p. 5:26-27.) But the case cited by Plaintiff is not apposite. In *Fremont Indemnity*, the Court held that it was improper for the trial court to take judicial notice of the proper interpretation and enforceability of a contract. (*Fremont, supra*, 148 Cal.App.4th at p. 115.) *Fremont Indemnity* does not stand for the proposition that it is improper to take judicial notice of U.S. government agency documents which cite facts around which the world scientific community has reached consensus.

4. Conclusion

The Court finds the fact that COVID-19 vaccinations are safe and effective in protecting the health and safety of the public. This fact is not reasonably subject to dispute. The Court takes judicial notice of items Nos. 1-11 requested by Defendant.

B. The Courts Have Repeatedly Upheld Vaccination Mandates

Well over a century ago, the United States Supreme Court held that compulsory vaccinations are not unconstitutional. (*Jacobson v. Massachusetts* (1905) 197 U.S. 11, 39.) Fifteen years later, the United States Supreme Court reaffirmed its decision:

> "Long before this suit was instituted, *Jacobson v. Massachusetts* . . . had settled that it is within the police power of a state to provide for compulsory vaccination. That case and others had also settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative. [Citation.] And still others had settled that the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law." (*Zucht v. King* (1922) 260 U.S. 174, 176.)

Even before *Jacobson* and *Zucht*, the California Supreme Court upheld a vaccination mandate for schoolchildren. "The legislature has power to enact such laws as it may deem necessary, not repugnant to the constitution, to secure and maintain the health and prosperity of the state, by subjecting both persons and property to such reasonable restraints and burdens as will effectuate such objects. (See art. 19, sec. 1.)" (*Abeel v. Clark* (1890) 84 Cal. 226, 230.)

One year before the U.S. Supreme Court decided this issue in *Jacobson*, our Supreme Court again reaffirmed the constitutionality of vaccine mandates in *French v. Davidson* (1904) 143 Cal. 658.) The *French* Court held that the issue "has already been settled"; that the "soundness" of *Abeel* "has never been questioned"; and that *Abeel* "has been frequently cited and the principle of it approved both in this and other states." (*Id.* at p. 661.)

More recently, plaintiffs in both *Brown v. Smith* and *Love v. Board of Education* sued to halt the vaccination requirements for schoolchildren. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135; *Love v. State Department of Education* (2018) 29 Cal.App.5th 980.) Both challenges were tossed out on demurrers. Both are instructive.

In *Brown,* parents of Los Angeles area schoolchildren brought an action to invalidate legislation that required mandatory immunizations for school children. Judge Gregory Alarcon of the Los Angeles Superior Court sustained a demurrer without leave to amend and dismissed the complaint.

> "In 1890, the California Supreme Court rejected a constitutional challenge to a 'vaccination act' that required schools to exclude any child who had not been vaccinated against smallpox. In dismissing the suggestion that the act was 'not within the scope of a police Regulation," the court observed that, '[w]hile vaccination may not be the best and safest preventive possible, experience and observation ... dating from the year 1796 ... have proved it to be the best method known to medical science to lessen the liability to infection with the disease.'" [quoting *Abeel v. Clark, supra*, at pp. 227-228, 230.]

> "More than 125 years have passed since *Abeel*, during which many federal and state cases, beginning with the high court's decision in *Jacobson v. Massachusetts* . . . have upheld, against various constitutional challenges, laws requiring immunization against various diseases. This is another such case, with a variation on the theme but with the same result.
>
> "We affirm the trial court's order dismissing plaintiffs' challenge . . . ." (*Brown, supra,* 24 Cal.App.5th at p. 1138.)

Plaintiff states that *Brown* was the only case involving a "challenge to state immunization requirements for schoolchildren" that was decided on a demurrer. (Opposition, p. 8:13-15.) Plaintiff is incorrect.

The same year that *Brown* was decided, an almost identical challenge to the school vaccination mandate was dismissed on a demurrer in *Love v. State Department of Education* (2018) 29 Cal.App.5th 980. Plaintiffs in both *Brown* and *Love* challenged the same State law that required all schoolchildren to be vaccinated against at least 10 different childhood diseases – diphtheria, hepatitis B, Haemophilus influenzae type b, measles, mumps, pertussis, poliomyelitis, rubella, tetanus and varicella – and "any other disease deemed appropriate by the department." (*Brown, supra,* 24 Cal.App.5th at p. 1138p. 1139, fn. 1.)

"It is well established that laws mandating vaccination of school-aged children promote a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases." (*Love*, *supra*, at p. 990.)

This is because "routine vaccination is one of the most spectacularly effective public health initiatives this country has ever undertaken. But these gains are fragile and even a brief period when vaccination

programs are disrupted can lead to children's deaths." (*Bruesewitz v. Wyeth LLC* (2011) 562 U.S. 223, 246 (conc. opn. of Breyer, J. [cleaned up].)

Ordinances mandating a certificate of vaccination prior to allowing school attendance do not violate substantive due process rights because it is "settled that it is within the police power of a state to provide for compulsory vaccination." (*Zucht v. King, supra*, 260 U.S. at p. 176.) "That interest exists regardless of the circumstances of the day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases." (*Love, supra,* 29 Cal.App.5th at p. 990.)

The *Love* Court found Plaintiffs' arguments to be either unconvincing or without merit. (*Love, supra,* 29 Cal.App.5th at pp. 993, 994.) Not surprisingly, the *Love* Court also upheld the dismissal of the action challenging the vaccination mandate.

C. *Ultra Vires* Legislation

Ultra vires legislation refers to legislation adopted by a governmental body beyond the body's legal authority. *Ultra vires* is an adjective defined by Black's Law Dictionary as "unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." ("Ultra Vires," Black's Law Dictionary (10th ed. 2014.) Plaintiff in its Second Amended Complaint alleges that Defendant "acted in its capacity as an employer, not the sovereign" when it altered the employment conditions for municipal workers and adopted the Vaccine Mandate. (SAC, ¶ 28.) Plaintiff claims that the City of Los Angeles lacks the authority, as the firefighter's employer, "to unilaterally change the conditions of employment for city firefighters, who are represented by a labor union and whose employment is governed by a Memorandum of Understanding between the City and the union. (*Id.*) In the alternative, the Second Amended Complaint argues that "if the City does possess the authority under the police power to adopt the Vaccine Mandate, the mandate is not

reasonably related to promoting public health and that the means used is not reasonably appropriate under the circumstances." (SAC, ¶ 29.)

Defendant City of Los Angeles argues that the Vaccine Mandate's statutory language contradicts the firefighters' employer capacity argument because the City's stated objective constitutes an act of sovereignty: "To protect the City's workforce and the public that it serves, all employees must be fully vaccinated for COVID-19, or request an exemption, and report their vaccination status in accordance with the City's Workplace Safety Standards, not later than October 19, 2021." (SAC, Ex. B, § 4.701(a); Motion, MPA, p. 3:8-11.) Defendant also argues that Plaintiff lacks standing to claim that the Vaccine Mandate constitutes a change in employment conditions for City firefighters because Plaintiff Firefighters4Freedom is not a party to the Memorandum of Understanding and does not represent City firefighters in employee relations with the City. (Motion, MPA, p. 3:12-17.) Defendant's main argument is that the Vaccine Mandate presents "a valid exercise of the City's police powers and is reasonably related to promoting the public health and safety" of both the City's workforce and the general public. (Motion, MPA, p. 3:21-23.)

The California Constitution vests the City with the authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations" so long as they do not "conflict with general laws." (Cal. Const., art. XI, § 7.) "An ordinance so enacted will ordinarily be upheld if 'it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to the purpose.'" (*Sunset Amusement Co. v. Board of Police Commissioners* (1972) 7 Cal.3d 64, 72.)

"Municipal police power extends to objectives in furtherance of the public peace, safety, morals, health and welfare. It is not a circumscribed prerogative but rather is elastic." (*Loska v. Superior Court* (1986) 188 Cal.App.3d 569, 575, citing *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 676.) "Nor does the fourteenth amendment, or any other part of the federal constitution, interfere with the power of the state to prescribe regulations to promote the health and general welfare of the people. 'Special burdens are often necessary for general benefits.'" (*French v. Davidson, supra*, 143 Cal. at p. 662.)

Courts have consistently held that compulsory vaccination mandates are a permissible use of state power to combat public health emergencies. (See, e.g., *Abeel, supra*, 84 Cal. at p. 230; *French, supra*, 143 Cal. at p. 662; *Jacobson*, *supra*, 197 U.S. at p. 39; *Zucht*, *supra*, 260 U.S. at p. 176.) "It has been settled since 1905 in *Jacobson* . . . that it is within the police power of a State to provide for compulsory vaccination." (*Brown*, *supra*, 24 Cal.App.5th at pp. 1143–1144.)

Like the school vaccines at issue in *Brown*, there is no reasonable dispute over the effectiveness of vaccines in combating COVID-19. (RJN Exs. 2, 6.) The overwhelming consensus of scientific opinion supports the conclusion that COVID-19 vaccines are safe and effective at both combating the spread of, and the severity of illness from, COVID-19. (RJN Exs. 1-8.) "COVID-19 vaccines were evaluated in tens of thousands of participants in clinical trials. The vaccines met the Food and Drug Administration's (FDA's) rigorous scientific standards for safety, effectiveness, and manufacturing quality needed to support emergency use authorization." (RJN Ex. 1: "Safety of COVID-19 Vaccines," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html (last updated Dec. 6, 2021).) Data from the Centers for Disease Control "further indicate that COVID-19 vaccines offer better protection than natural immunity alone and that vaccines, even after prior infection, help prevent reinfections." (RJN Ex. 6: "New CDC Study: Vaccination Offers Higher Protection than Previous COVID-19 Infection," Centers for Disease Control and Prevention, available at https://www.cdc.gov/media/releases/2021/s0806-vaccination-protection.html (Aug. 6, 2021).)

Plaintiff does not have a cognizable cause of action for Ultra Vires Legislation. Compulsory vaccination is a valid exercise of state police power. There is consensus in the medical and scientific community that COVID-19 vaccines are a reasonable method to lessen the spread of COVID-19 during the present global pandemic.

Defendant City of Los Angeles' demurrer to Plaintiff Firefighters4Freedom's First Cause of Action for Declaratory and Injunctive Relief re: Ultra Vires Legislation is SUSTAINED WITHOUT LEAVE TO AMEND (CCP ¶ 430.10(e).)

D. Right of Privacy

To allege an invasion of privacy in violation of the state constitutional right, a plaintiff "must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39–40.) Defendants may prevail by negating any element or "by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. Plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests." (*Id.* at p. 40.) "Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Id.* at p. 37.)

Plaintiff's Second Cause of Action for Declaratory and Injunctive Relief under Article I, section 1 of the California Constitution in the Second Amended Complaint alleges that the *Hill* standard has been met because (1) City firefighters possess a legally protected privacy interest in their bodily integrity, (2) the firefighters' privacy expectation is reasonable given the unparalleled nature compulsory vaccinations for City firefighters, and (3) the City Vaccine Mandate amounts to a serious invasion of the firefighters' rights. (SAC, ¶¶ 38-40.) Plaintiff further alleges that "feasible and effective alternatives" to the City's Vaccine Mandate with reduced impact on privacy interests exist, calling into question City's Vaccine Mandate compelling interest rationale.

Defendant City argues that when a statute "primarily concerns health and safety, no fundamental right to privacy is at stake," citing *Wilson v. California Health Facilities Com.* (1980) 110 Cal.App.3d 317, 322. (Motion, MPA, p. 6:5-7.) The City notes that the California Constitution allows compulsory vaccination. (*Abeel*, *supra*, 84 Cal. at 230; Motion, MPA, p. 6:11.) Numerous courts have upheld the compelling governmental interest in compulsory vaccination as a disease-prevention measure. (See, e.g., *Love v. State Dept. of Education*, *supra*, 29 Cal.App.5th at p. 990; *Brown*, *supra*, 24 Cal.App.5th at p. 1146; *Abeel*, *supra*, 84 Cal. at pp. 230-231.) The State has an important interest in safeguarding its residents' health; such legislation is presumed

to be constitutionally valid and will be upheld if there is a rational basis for its enactment. (*Love*, *supra*, 29 Cal.App.5th at p. 993.)

The City suggests that its Vaccine Mandate survives rational basis review because (1) the Mandate addresses the "legitimate and compelling objective" of reducing COVID-19 workplace and public transmission risk, (2) evidence of COVID-19 vaccine efficacy and safety "establishes that the Vaccine Mandate is rationally related to the City's legitimate interests," and (3) insofar as the firefighters dispute the scientific rationale for City's measure, "the Court doesn't intervene" so long as City engages a rational process in pursuit of public health. (Motion, MPA, p. 7:10-17, p. 7:28—8:4 [and cases cited therein].)

Plaintiff argues that its Second Amended Complaint adequately pleads all elements of the *Hill* standard and argues that City's arguments lack merit. (Opposition, p. 10:18-23.) Plaintiff raises *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 530-532 to argue that competent adults have the right to refuse medical treatment, a right rooted in the constitutional right of privacy under the California Constitution. Further, Plaintiff argues that the issue of whether affected firefighters have a reasonable expectation of privacy is a mixed question of law and fact, inappropriate for decision through a demurrer. (*Hill*, *supra*, 7 Cal.4th at p. 40; *Mathews v. Becerra* (2019) 8 Cal.5th 756; see Opposition, p. 11:15-24.)

In *Mathews*, plaintiffs were licensed marriage and family therapists and a certified alcohol and drug counselor who treated patients with sexual disorders, addictions, and compulsions. (*Mathews*, *supra*, 8 Cal.5th at 760.) Many patients admitted to downloading or electronically viewing child pornography but did not present in plaintiffs' professional judgment a serious risk of child sexual contact. (*Id.* at p. 761.) Plaintiffs contended that the confidentiality granted by the psychotherapist-patient privilege applied to such admissions and legislation that required mandatory reporting of such patients to law enforcement and child welfare institution violated their patients' rights to privacy under both the California Constitution, article I, section 1, and the Fourteenth Amendment to the United States Constitution. (*Id.*) *Mathews* holds that "for purposes of demurrer, plaintiffs have established that their patients have a reasonable expectation of privacy in admissions during voluntary psychotherapy that they have viewed or possessed child pornography." (*Id.* at pp. 776–777.)

However, *Mathews* does not address municipal actions during a global pandemic that produces public safety threats. (RJN Ex. 11: "Omicron Variant: What You Need to Know," Centers for Disease Control and Prevention, available at https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html(updated Dec. 20, 2021) "Persons infected with the Omicron variant can present with symptoms similar to previous variants. The presence and severity of symptoms can be affected by COVID-19 vaccination status, the presence of other health conditions, age, and history of prior infection." (*Id.*) The Court finds that the challenged action clearly implicates public health and safety and does not affect a fundamental right to privacy. (*Wilson*, *supra*, 110 Cal.App.3d at p. 324.) The firefighters represented by Plaintiff do not enjoy a reasonable expectation of privacy sufficient to overrule a demurrer because the firefighters' privacy interests are not implicated; even if they were, the ongoing global COVID-19 public health emergency poses a countervailing state interest sufficient to render the firefighters' privacy expectations unreasonable.

It is important to note at this point that no firefighter is being forced to be vaccinated. Even under the vaccination mandate, any firefighter can choose whether or not to be vaccinated against COVID-19. The government is not compelling a person to be vaccinated. It is simply saying that a person may not continue to work as a firefighter unless they are vaccinated (or they have been granted a medical or religious exemption from vaccination).

Plaintiff's Second Amended Complaint asserts misinformation on COVID-19 vaccine efficacy to argue that the City's Vaccine Mandate "does not serve its stated purpose." (SAC, ¶ 41.) As stated above, the scientific consensus on data accumulated on available COVID-19 vaccines clearly supports their use to combat the spread of SARS-CoV-2 among the general population. (RJN Ex. 3: "COVID-19: Vaccines to prevent SARS-CoV-2 Infection," UpToDate, by Kathryn M. Edwards, MD, et al., available at https://www.uptodate.com/contents/covid-19-vaccinesto-prevent-sars-cov-2-infection (last updated Dec. 1, 2021).) Plaintiff fails to plead a legally protected privacy interest or a reasonable expectation of privacy because the health and welfare of the City's workforce and the general public present countervailing state interests that support the City's Vaccine Mandate over bodily integrity protests. Given the overwhelming scientific evidence in favor of COVID-19 vaccine use coupled with the choices available to employees under the City's Vaccine Mandate, the Court concludes that the firefighters' privacy concerns are not reasonable.

The vaccine mandate at issue in *Love* and *Brown* was stricter than the City Ordinance challenged here, forbidding a child to attend school unless immunized against at least "10 specific diseases and any other disease deemed appropriate," with no exemption for personal religious beliefs. (*Love, supra*, 29 Cal.App.5th at p. 865.) Both *Brown* and *Love* found that the vaccination requirement for schoolchildren did not violate California's Right to Privacy. (*Brown, supra*, 24 Cal.App.5th at p. 1146; *Love, supra*, 29 Cal.App.5th at pp. 993-994.) In 2018, the Court stated that "[w]e are aware of no case holding mandatory vaccination statutes violate a person's right to bodily autonomy." (*Love, supra,* 29 Cal.App.5th at p. 991.)

Now, four years after *Brown* and *Love*, we have yet another constitutional challenge to vaccination mandates. This case is equally without merit.

Plaintiff's privacy argument fails. Plaintiff argues that firefighters have a right not to be vaccinated and that "the right to refuse medical treatment [is] 'basic and fundamental' and . . . cannot be 'overridden by medical opinion.'" (Opposition, p. 11:2-3, citing *Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 532.) That may well be true, but that is not the issue before the Court. Defendant City has not passed a law that requires everyone to be vaccinated. The City simply passed a law saying that if a firefighter is not vaccinated – and the firefighter has not been given a religious or medical deferral from the vaccination – they cannot continue to work and be paid as a City employee. Any firefighter may choose not to get the vaccine. That is their choice. They may remain unvaccinated and seek other employment with an employer that does not require its employees to be vaccinated.

As this Court stated when it denied Plaintiff's request for a Preliminary Injunction on December 20, 2021, "The Court does not find a privacy violation under the California Constitution." (12/20/21 Minute Order.)

This Court finds that the City's Vaccination Mandate does not violate the firefighters' right to privacy. Plaintiff's complaint does not state a cause of action for violation of privacy.

Defendant City of Los Angeles' demurrer to the Second Cause of Action for Declaratory and Injunctive Relief under Article I, section 1 of the California Constitution of Plaintiff Firefighters4Freedom's Second Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. (CCP ¶ 430.10(e).

E. *Skelly* Hearings

Under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 207 when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. While some form of notice and a hearing must precede a final deprivation of property in accordance with due process, "the timing and content of the notice and the nature of the hearing will depend on an appropriate accommodation of the competing interests involved." (*Id.* at p. 209.) Competing interests include "whether pre-deprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the post-deprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful." (*Id.*) Pre-removal due process safeguards under *Skelly* must include "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Id.* at p. 215.)

Post-*Skelly*, the "California Supreme Court and the United States Supreme Court have repeatedly recognized that due process is a flexible concept," and "calls for such procedural protections as the particular situation demands." (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1276, citing *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561; *Gilbert v. Homar*(1997) 520 U.S. 924, 930; *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 112–113.) To identify specific due process requirements, the Court considers (1) the private interest affected by the official action, (2) the risk the procedures used will erroneously deprive

that interest, and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335.

Plaintiff alleges that under the Due Process Clause and *Skelly*, the City "must provide the firefighters with notice and an opportunity to challenge the action before it stops paying them." (SAC, ¶ 49.) Further, Plaintiff alleges that the City "cannot take any adverse employment action against city firefighters without providing them with the rights they have under the state law Firefighter Bill of Rights." (SAC, ¶ 50.) In its demurrer, the City argues that the firefighters' Second Amended Complaint fails to allege sufficient facts to show a *Skelly* violation. (Motion, MPA, p. 9:19-21.) Defendant City argues that Plaintiff did not allege facts to show that its members failed to receive a notice of the Vaccine Mandate and an opportunity to respond prior to being placed off duty without pay. (Motion, MPA, p. 9:27—10:1.) Further, the City asserts that the Second Amended Complaint does not allege facts to establish *Skelly*'s applicability, as *Skelly* "evolved from a nonemergency situation and cannot be considered direct authority for the issue raised here." (*Mitchell v. State Personnel Bd.* (1979) 90 Cal.App.3d 808, 812.) The City cites their October 26, 2021 Emergency Resolution for recitals that discuss the City's rationale for its emergency declaration, and the City contends that the Second Amended Complaint lacks facts that suggest that its emergency resolution abused its discretion. (Motion, MPA, p. 11:2-3; RJN Ex. 10.) Lastly, the City states that no specific violation of the Firefighter Bill of Rights has been alleged in the Second Amended Complaint. (Motion, MPA, p. 11:6-15.)

In opposition, Plaintiff argues that the City's post-deprivation hearing arguments "are factual ones that go to the merits of this claim," rather than pleading defects in the Second Amended Complaint. (Opposition, p. 16:8-9.) Plaintiff argues that it is entitled to show following discovery that City violated the Due Process Clause. (Opposition, p. 16:10-16.)

The Court finds that *Skelly* does not entitle municipal firefighters to a hearing before an adverse employment action during an emergency situation. Rather, *Skelly* and subsequent cases afford the firefighters a framework to determine whether a post-deprivation adverse employment action complied with the employee's due process rights. Plaintiff fails to plead facts that show how the events that led to adverse employment actions illustrate a due process violation under *Skelly*. Factors that involve pre-deprivation safeguards or post-deprivation hearing promptness are not discussed. It is a misstatement of law to assert that

"notice and an opportunity to challenge the action" must occur before the City suspends a firefighter's pay. (SAC, ¶ 49.) Even in normal times, due process requires flexibility; an emergency situation arguably requires more. The Second Amended Complaint does not challenge the City's determination that it navigated an emergency; rather Plaintiff essentially pleads that even during an emergency, due process equates to notice and a hearing before any adverse employment actions take effect. This is not the law.

Plaintiff's due process arguments plead insufficient facts to state a claim under *Skelly* and does not contend with the emergency situation within which the City operates today. The Court finds that the Plaintiff fails to state a claim under *Skelly*.

Defendant City of Los Angeles' demurrer to the Third Cause of Action for Declaratory and Injunctive Relief under Due Process Clause/Skelly/Firefighter Bill of Rights of Plaintiff Firefighters4Freedom's Second Amended Complaint is SUSTAINED WITHOUT LEAVE TO AMEND. (CCP ¶ 430.10(e).)

V. CONCLUSION

The Court SUSTAINS WITHOUT LEAVE TO AMEND Defendant City of Los Angeles's Amended Demurrer to Plaintiff Firefighters4Freedom's Second Amended Complaint.