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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Central Division – Stanley Mosk Courthouse)

FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY FIREFIGHTERS,

Plaintiff,

vs.

CITY OF LOS ANGELES,

Defendant.

Case No.: 21STCV34490

Judge: Michael P. Linfield, Dept. 34

VERIFIED STATEMENT OF JOHN W. HOWARD, ESQ., OBJECTING TO AND REQUESTING DISQUALIFICATION OF JUDGE MICHAEL P. LINFIELD FOR CAUSE (CAL. CIV. PROC. CODE § 170.3)

Complaint filed: Sept. 19, 2021

VERIFIED STATEMENT OF JOHN W. HOWARD, ESQ.

I, John Howard, declare as follows:

1. I am an attorney duly licensed to practice before all courts in the state of California and am the founding partner of JW Howard/Attorneys, Ltd., counsel of record to Plaintiff Firefighters4Freedom in this action. I have personal knowledge of the facts set forth in this Verified Statement and could testify competently to them if called to do so. I am submitting this Verified Statement pursuant to section 170.3 of the Code of Civil Procedure to request that Judge Michael P. Linfield be disqualified from hearing this matter due to his impartiality and political bias in favor of COVID-19 restrictions, including the City of Los Angeles' COVID vaccine mandate for public employees.

2. This request arises out of comments that Judge Linfield made in connection with two motions that were filed during the early stages of this case: Plaintiff's motion for a preliminary injunction (heard on December 20, 2021) and the City's demurrer to Plaintiff's Second Amended Complaint (heard on February 15, 2022).

3. The motion for a preliminary injunction was filed in November 2021. It focused on the narrow legal issue of whether the City can stop paying unvaccinated firefighters without a pre-deprivation hearing as required by the Due Process Clause and the California Supreme Court's decision in *Skelly v. State Personnel Board*.

4. At the time, this case was assigned to Judge Stephanie Bowick. She recused herself to avoid an appearance of partiality given that she knows several city firefighters. The case was re-assigned to Judge Linfield on November 23, 2021. He advanced the hearing on the motion for a preliminary injunction from April 2022 to Monday December 20, 2021.

5. Judge Linfield issued a tentative ruling denying the motion for a preliminary injunction on Sunday December 19, 2021. A true and correct copy of the tentative ruling is attached hereto as **Exhibit "A."**

6. Judge Linfield's ruling on the preliminary injunction motion contained numerous legal errors. It also went far beyond the issues necessary to decide the motion. It discussed

arguments that were not raised and cited evidence, such as articles from *The New York Times*, that was not before the Court and which no competent jurist would rely on.

7. Judge Linfield's opinion also compared the number of COVID-19 deaths—a number that is constantly being revised, in part because authorities often do not distinguish between people who die *with* COVID versus those who die *because* of it—to the number of Americans killed during the Civil War and other armed conflicts. It disparaged a public health expert hired by Plaintiff to provide basic background information about the COVID-19 pandemic while citing to an unidentified "scientific consensus" about issues that had no bearing on the legal analysis required to decide the motion.

8. The opinion also questioned the credibility of Plaintiff's counsel for describing the COVID-19 restrictions as the "greatest" restrictions on liberty in American history, a rhetorical comment about the scope of the restrictions, which the World Health Organization and others have said are unprecedented. Judge Linfield said this comment is "just plain wrong" and that the COVID-19 restrictions are "trivial" compared to slavery and the internment of 125,000 Japanese Americans during World War II, among other things.

9. This emotional reaction to a rhetorical comment that the court admitted was "not evidence" obviously factored into Judge Linfield's decision, as he made a point of mentioning that "an attorney's credibility is his most important asset," and he suggested that Plaintiff's counsel lack it.

10. Judge Linfield heard oral argument on the motion for a preliminary injunction on December 20. A true and correct copy of the transcript of that hearing is attached as **Exhibit "B."** He took the matter under submission but denied the motion the next day with a final decision that was almost identical to the tentative decision. A true and correct copy of the final decision is attached as **Exhibit "C."**

11. Judge Linfield's opinion on the preliminary injunction motion was strong evidence of bias. It was emotional and hyperbolic. It read more like an opinion piece in *The Nation* than a reasoned judicial decision on the narrow legal issues presented. It had an adversarial tone. It

reflected a bias toward one position (pro-vaccine and pro-mandate) with cases cited to support that position. It ignored cases that supported Plaintiff's position, especially *Mathews v. Becerra*, 8 Cal.5th 756 (2019), which said that courts cannot decide a state law privacy claim at the pleading stage. It suggested that Judge Linfield had prejudged the case and its participants and would not give them a fair process, including discovery and a chance to present their case at trial, as California law requires.

12. My colleague Scott Street mentioned that concern during the preliminary injunction hearing. Trying to appear impartial, Judge Linfield said he had not prejudged the case. He said he was "not throwing out your case. Your case will proceed and you will have the discovery and eventually, if you pursue it, you will go to trial." He added: "And I think in your reply brief you said you need more discovery. And you will get more discovery."

13. Those statements were false. Judge Linfield knew they were false. He had made up his mind. He had only had the case for a month but was committed to rejecting Plaintiff's claims as quickly as possible.

14. That is exactly what happened. The City had demurred to Plaintiff's First Amended Complaint but, following the preliminary injunction hearing, the parties agreed that Plaintiff would file the Second Amended Complaint to focus on the three state law claims for declaratory and injunctive relief that are the focus of this case. A true and correct copy of the Second Amended Complaint is attached as **Exhibit "D."**

15. Like most demurrers, the City's demurrer should have been overruled because, accepting its allegations as true, the Second Amended Complaint states claims for declaratory and injunctive relief under state law. Nonetheless, before the hearing, Judge Linfield issued a 24-page tentative decision sustaining the demurrer without leave to amend. A true and correct copy of it is attached as **Exhibit "E."**

16. Like the previous ruling, this opinion ignored the rules regarding pleading motions and focused on disproving the allegations in the Second Amended Complaint. Its tone was adversarial and condescending. It compared people who have questioned the effectiveness of the

COVID-19 vaccines—a group that now includes the Centers for Disease Control, the Centers for Medicare and Medicaid Services and numerous governments, among many others—to people who question whether the Holocaust and moon landing really happened, as well as people who believe Donald Trump won the last presidential election.

17. The opinion was based entirely on Judge Linfield taking judicial notice of the truth of matters asserted about COVID-19 on a hodgepodge of websites, which are constantly being modified, in clear violation of the law regarding judicial notice.

18. The opinion refused to follow *Manhews*, binding authority from the California Supreme Court, by saying it "does not address municipal actions during a global pandemic ...."

19. The opinion also ignored a published Court of Appeal decision, *Coshow v. City of Escondido*, that said competent adults have a fundamental right to bodily integrity that includes objecting to compulsory vaccination, a right Judge Linfield falsely said does not exist.

20. These legal errors, combined with Judge Linfield's failure to follow the rules regarding demurrers, will almost certainly lead to reversal on appeal. But those are just the legal errors. Put simply, the opinion is a political document, not a judicial opinion.

21. More importantly, Judge Linfield's ruling on the demurrer confirmed what we said about him in a writ petition that challenged his ruling on Plaintiff's motion for a preliminary injunction. A true and correct copy of that petition, minus the exhibits (which are voluminous and somewhat duplicative) is attached as **Exhibit "F."**

22. The writ petition also questioned Judge Linfield's partiality, and his comments about me and my colleague lacking credibility, and it asked the Court of Appeal to disqualify him for cause if it considered the petition on the merits. Plaintiff personally served the writ petition on the clerk in Judge Linfield's courtroom. Judge Linfield did not respond to it. The Court of Appeal declined to hear the petition.

23. I appeared at the demurrer hearing on February 15, 2022. I told Judge Linfield that we would ask for him to be disqualified for cause pursuant to section 170.3 of the Code of Civil Procedure. Since his bias affected his analysis of the City's demurrer, I also asked Judge Linfield to

defer entering a final ruling on the demurrer until the process described in section 170.3 had been completed. He declined and entered a final order from the bench.

24. The writ petition Plaintiff filed last month contains a lengthy discussion of the law regarding disqualification of a judge for cause. I do not need to rehash it all here. Put simply, a judge must be impartial. More importantly, a judge must appear to be impartial. Thus, a judge may be disqualified from hearing a matter because of "a particular combination of circumstances creating an unacceptable risk of bias." *Geraway Farming, Inc. v. Agric. Lab. Rels. Bd.*, 52 Cal. App. 5th 141, 208 (2020) (quotations omitted).

25. Of course, a judge will not be "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute ...." *Hortonville Joint School Dist. v. Hortonville Education Assn.*, 426 U.S. 482, 493 (1976) (quotations omitted). But "bias or prejudice against a party may be shown when a judge gratuitously offers an opinion on a matter not yet pending before him or her." *Geraway*, 52 Cal. App. 4th at 209.

26. Bias may also be shown by "'a commitment to a result (albeit, perhaps, even a tentative commitment)'" that shows the judge has prejudged a matter. *Geraway*, 52 Cal. App. 4th at 208 (quoting *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1236 (2000)). Judges have also been disqualified because their "comments strongly suggest[ed], if they [did] not directly state, that the court believed [one party's lawyer] was an attorney who lacked credibility ...." *Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1447-49 (2009).

27. Whatever the case, this analysis always focuses on whether the judge's comments "impair the judge's impartiality so that it appears probable that a fair trial cannot be held." *Andrews v. Agricultural Labor Relations Bd.*, 28 Cal.3d 781, 792 (1981).

28. Judge Linfield's comments about COVID-19 qualify. They caused him to disregard the law that governs demurrers, to apply an incorrect standard and to reach a clearly erroneous result—and to do so despite his prior statement that he would not dismiss the case.

29. This does not appear to be an isolated incident. Last year, the Court of Appeal reversed a $13-million jury verdict in a case tried in Judge Linfield's court due to multiple legal

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errors and violations of the judicial code of conduct which, according to the Court of Appeal, "gave the appearance that the court was partial to [the plaintiff's] causes of action" and which caused the "trial [to be] fundamentally unfair to [the defendant] UCLA." *Pinter-Brown v. Regents of Univ. of California*, 48 Cal. App. 5th 55, 87 (2020).

30. We do not raise these issues lightly. All Plaintiff asked for was a fair process, a chance to gather evidence and to have its day in court. Judge Linfield's overwrought and emotional comments show an unacceptable risk of bias (and actual bias) which will inevitably lead to reversal on appeal.

31. Therefore, pursuant to section 170.3 of the Code of Civil Procedure, I object to Judge Linfield's handling of this matter and request that he be disqualified *for cause*. Since Judge Linfield's bias affected his ruling on the City's demurrer—and since he declined to defer entry of judgment until this process has been completed—I also request that Judge Linfield's ruling on the demurrer be vacated so a new judge can decide it.

Under penalty of perjury, under the laws of the State of California, I declare that the foregoing is true and correct. Executed this 16th day of February 2022, at San Diego, California.

John W. Howard
Attorneys for Plaintiff,
Firefighters4Freedom

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above-entitled Court. The business address is:

JW Howard Attorneys LTD
701 B Street, Ste. 1725
San Diego, California 92101

☐ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

■ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic system and said documents were successfully transmitted via One Legal that same day.

■ PERSONAL. The below described documents were personally served on date below via By The Books Attorney Service to Dept. 34.

On the date indicated below, I served the within as indicated:

VERIFIED STATEMENT OF JOHN W. HOWARD, ESQ., OBJECTING TO AND REQUESTING DISQUALIFICATION OF JUDGE MICHAEL P. LINFIELD FOR CAUSE (CAL. CIV. PROC. CODE § 170.3)

TO:

Mike Feuer, Esq. Los Angeles City Attorney Cit Hall East, Ste. 800 200 N. Spring Street Los Angeles, CA 90012 Vivienne A. Swanigan Vivienne.swanigan@lacity.org Jennifer Gregg Jennifer.gregg@lacity.org Erika Johnson-Brooks erika.johnsonbrooks@lacity.org Travis T. Hall travis.t.hall@lacity.org	Attorneys for Defendant

Hon. Michael P. Linfield Los Angeles Superior Court Central District, Dept. 34 Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	**Via Personal Delivery**

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on February 16, 2022, at San Diego, CA.

Dayna Dang, Paralegal
dayna@jwhowardattorneys.com

JW HOWARD ATTORNEYS, LTD.
501 B Street, Suite 1715
San Diego, California 92101

EXHIBIT “A”

DEPARTMENT 34 LAW AND MOTION RULINGS

The Court often posts its tentative several days in advance of the hearing. Please re-check the tentative rulings the day before the hearing to be sure that the Court has not revised the ruling since the time it was posted.

Please call the clerk at (213) 633-0154 by 4:00 pm. the court day before the hearing if you wish to submit on the tentative.

Case Number: 21STCV34490 **Hearing Date:** December 20, 2021 **Dept:** 34

SUBJECT: **Application of Robert F. Kennedy, Jr. to Appear Pro Hac Vice**

Moving Party: Plaintiff Firefighters4Freedom

Resp. Party: None

Plaintiff Firefighters4Freedom's Application of Robert F. Kennedy, Jr. to Appear Pro Hac Vice is GRANTED.

BACKGROUND

On August 18, 2021, the Los Angeles City Council adopted Ordinance No. 187134, effective August 25, 2021. (Plaintiff's RJN, 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 are conditions of City employment and a minimum requirement for all City employees. (Id.) In compliance with state law, exemptions to City's Vaccine Mandate are available only to accommodate sincerely held religious beliefs or individual medical conditions. (Plaintiff's RJN, Ex. H; Girard Decl., ¶¶ 45-58, Ex. 11.)

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 to allege violation of constitutionally protected autonomous privacy rights and ultra-vires legislation. Plaintiff filed a First Amended Complaint on November 3, 2021, and added 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 ot accommodate), and violation of due process to the causes of action levied against Defendant.

On November 10, 2021, Plaintiff filed the instant application of Robert F. Kennedy, Jr. to Appear pro hac vice. The application is unopposed.

ANALYSIS

Robert F. Kennedy, Jr applies for admission to practice before the Court pro hac vice to represent Plaintiff Firefighters4Freedom pursuant to Cal. Rules of Court, Rule 9.40.

A. Legal Standard

Under California Rules of Court, rule 9.40(a),

> [a] person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. (Cal. Rules of Court, rule 9.40(a).)

No person is eligible to appear as counsel pro hac vice under rule 9.40(a) if the person is "(1) A resident of the State of California; (2) Regularly employed in the State of California; or (3) Regularly engaged in substantial business, professional, or other activities in the State of California." (Cal. Rules of Court, rule 9.40(a).)

"Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application." (Cal. Rules of Court, rule 9.40(b).) Any individual "desiring to appear as counsel pro hac vice in a superior court must file with the court a verified application together with proof of service by mail in accordance with Code of Civil Procedure section 1013a of a copy of the application and of the notice of hearing of the application on all parties who have appeared in the cause and on the State Bar of California at its San Francisco office." (Cal. Rules of Court, rule 9.40(c).) Additionally, "[t]he notice of hearing must be given at the time prescribed in Code of Civil Procedure section 1005 unless the court has prescribed a shorter period." (*Ibid*.)

The application must include:

> (1) The applicant's residence and office address; (2) The courts to which the applicant has been admitted to practice and the dates of admission; (3) That the applicant is a member in good standing in those courts; (4) That the applicant is not currently suspended or disbarred in any court; (5) The title of court and cause in which the applicant has filed an application to appear as counsel pro hac vice in this state in the preceding two years, the date of each application, and whether or not it was granted; and (6) The name, address, and telephone number of the active member of the State Bar of California who is attorney of record.
>
> (Cal. Rules of Court, rule 9.40(d).)

An applicant "must pay a reasonable fee not exceeding $50 to the State Bar of California with the copy of the application and the notice of hearing that is served on the State Bar." (Cal. Rules of Court, rule 9.40(e).) If the applicant is permitted to appear as counsel pro hac vice, he is "subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California." (Cal. Rules of Court, rule 9.40(f).) Additionally, "[t]he counsel pro hac vice must familiarize himself or herself and comply with the standards of professional conduct required of members of the State Bar of California and will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of such appearance." (*Ibid*.)

B. Discussion

The application includes all of the required information pursuant to rule 9.40(a) and (d). (See Kennedy Appl. ¶¶ 1-10; Howard Decl., ¶¶ 1-7.) Applicant declares that the required $50.00 fee to the State Bar has been paid. (See Kennedy App., ¶ 10.) The application includes proof of service on the other parties to this action. (Proof of Service, filed November 10, 2021.)

The application is not opposed.

CONCLUSION

Plaintiff Firefighters4Freedom's Application of Robert F. Kennedy, Jr. to Appear Pro Hac Vice is GRANTED.

SUBJECT: **Motion for Preliminary Injunction**

Moving Party: Plaintiff Firefighters4Freedom Foundation ("Firefighters4Freedom")

Resp. Party: Defendant City of Los Angeles ("City")

Plaintiff Firefighters4Freedom's Motion for Preliminary Injunction is DENIED.

SUMMARY OF ARGUMENT

Plaintiff Firefighters4Freedom is unlikely to prevail at trial. The unvaccinated firefighters have not shown a due process violation, they have not shown that the City abused its discretion in passing the vaccination mandate, and they have not shown a sufficient violation of their privacy rights.

Further, the balance of harm weighs overwhelmingly against granting this injunction. This Court does not want to minimize the harm to the individual firefighter who is placed on unpaid leave. It is certainly a severe harm. But it is dwarfed by the death of a person due to COVID. We can reimburse a person for monetary losses caused by being put on unpaid leave. We cannot resurrect the dead.

As Plaintiff itself states in this Motion:

> "'The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause.' Thus, 'as a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.'" (Plaintiff's Motion for a Preliminary Injunction, p. 5:26 – p. 6:3 [citations omitted].)

Plaintiff's request for a preliminary injunction fails on both of these factors.

PRELIMINARY CONSIDERATIONS

A. Covid Cases are Rising at an Increasing Fast Rate

As of December 17, 2021, there have been 1,477,842 COVID-19 cases and 26,001 COVID-19 deaths in Los Angeles County, excluding the cities of Long Beach and Pasadena. (http://dashboard.publichealth.lacounty.gov/covid19_surveillance_dashboard/.) Covid cases are now 17% higher than they were just two weeks ago. ("Coronavirus in the U.S.: Latest Map and Case Count," *New York Times*, December 18, 2021, available at https://www.nytimes.com/interactive/2021/us/covid-cases.html.)

According to the Department of Veterans Affairs, the deadliest war in American history was the Civil War; some 500,000 Americans died during the course of the four-year war. (See, e.g., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf). Yet more than 800,000 people in the United States have died in less than two years due to COVID – more than in any war in the nation's history. More than 50,000,000 Americans have contracted COVID. As of December 16, 2021, our country was reporting more than 120,000 new coronavirus cases each day. ("Amid worries about Omicron, virus cases are jumping across the United States," *New York Times*, https://www.nytimes.com/live/2021/12/16/world/covid-omicron-vaccines.)

Plaintiff asserts that "Covid-19 no longer poses the immediate threat to [sic] that it may have posed last spring. Covid data for Los Angeles County posted Sept. 11, 2021, showed a 25.37% *decrease* in new cases and a 26.14% decrease in new hospital admissions." (Complaint, ¶ 5 [emphasis in original].) Even if this were true when the complaint was filed on September 17, 2021, it is clearly no longer true today. In just the last five days that that the Court has been writing this tentative decision, 14,727 people have been sickened by COVID-19 in Los Angeles County and 96 additional people have

died of COVID-19 in Los Angeles County. (See, " Public Health Reports 9 New Deaths and 3,512 New Positive Cases of Confirmed COVID-19 in Los Angeles County," December 19, 2021, available at http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&cur=cur&prid=3581&row=25&start=1)

B. No Firefighter Being Put on Unpaid Leave has Requested a Medical or Religious Exemption

Plaintiff states that there are 105 unvaccinated firefighters who would be put on unpaid leave if this Court does not enjoin the enforcement of the vaccination mandate. (Reply, p. 2:23-24, p. 3:18-19.) According to the Los Angeles Fire Department, there are 3,435 uniformed fire personnel. (See, LAFD, "Our Mission," https://www.lafd.org/about/about-lafd/our-mission.) Thus, it appears that approximately 3% of the uniformed fire personnel are facing unpaid leave.

The Court has no evidence that any of the 105 suspended firefighters whom Plaintiff Firefighters4Freedom represents have requested a medical or religious exemption. They are simply refusing to get vaccinated for unspecified reasons. More importantly, no firefighter is being placed on unpaid leave because they have asked for a medical or religious exemption to the vaccine mandate. (See, e.g., (Girard Decl., ¶ 45; Everett Declaration, ¶¶ 9-12.)

C. Plaintiff's Hyperbole Does Not Help its Case

Plaintiff's "FACTS" section of its Motion begins with the statement, "The facts below are not disputed and can largely be established through judicial notice." (Motion, p. 2:15.) Plaintiff then asserts, without any citation to authority:

> "Though nobody knew it at the time, the Covid-19 pandemic would lead to the greatest restrictions on liberty in American history." (Motion, MPA, p. 2:19-20.)

The Court notes that this is a mere assertion of counsel, and "an assertion is not evidence." (*Paleski v. State Dept. of Health Services* (2006) 144 Cal.App.4th 713, 732.)

More importantly, this assertion by counsel is just plain wrong. While COVID restrictions might impinge on the liberty of Americans, they pale in comparison to the enslavement of tens of millions of African Americans, the murder and forced relocation of millions of Native Americans, and the imprisonment of more than 115,000 Japanese Americans during World War II.

"An attorney's chief asset . . . is his or her credibility." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1326.) Such hyperbole undermines Plaintiff's counsel's credibility.

In addition, Plaintiff's Motion for a Preliminary Injunction sets up – and then proceeds to knock down – several straw men. The Motion spends several pages arguing that the City cannot terminate a Los Angeles Firefighter without affording him or her a *Skelly* hearing. (See Motion, p. 8:27 – 10:16.) However, this is irrelevant; under the City's vaccine mandate, no firefighter will be terminated without a *Skelly* hearing.

Similarly, Plaintiff states that "[t]he City does not explain how summarily firing hundreds of firefighters will solve the Covid-19 emergency." (Motion, p. 9:22-23.) Again, the City's vaccination mandate does not result in the "summar[y] firing of hundreds of firefighters." Rather, under the mandate, those firefighters who are not vaccinated, or do not have a valid medical or religious exemption, will be placed on unpaid leave. (The Court also notes that Plaintiff's Reply states that there are 105 firefighters who may be placed on unpaid leave, not "hundreds" as stated in their Motion. (Cf. Reply, p. 2:23-24, p. 3:18-19; Motion, p. 9:22-23.)

D. FireFighters' Procedural Bill of Rights

Firefighters4Freedom argues that it is entitled to injunctive relief pursuant to the Firefighters' Procedural Bill of Rights. (Motion 3:17-25; Motion, pp. 2:10-13, 5:21, 6:23, 8:15, 9:1, 10:14-15, 11:14-28, 14:19 – p. 15:7.) This Court will not address Firefighters' Procedural Bill of Rights claims because these claims were not alleged in Firefighters4Freedom's First Amended Complaint.

BACKGROUND

On August 18, 2021, the Los Angeles City Council adopted Ordinance No. 187134, effective August 25, 2021. (Plaintiff's RJN, 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, Ex. H; Girard Decl., ¶¶ 45-58, Ex. 11.)

On September 24, 2021, the Los Angeles Fire Department 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 failed to report their status. (Muus Decl., Exs. A, B.) On October 14, 2021, ongoing consultations with the City's various employee unions, including the United Firefighters Los Angeles City ("UFLAC") by the City Administrative Officer ("CAO") 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., ¶ 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., ¶ 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., 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., ¶ 22.) All 239 employees received at least 48-hours to respond to the notice. (*Id*.) As of December 9, 2021, no LAFD employee has been denied a requested medical or religious exemption. (Everett Decl., ¶ 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 the instant motion for a preliminary injunction. Defendant City of Los Angeles opposed the motion on December 10, 2021.

ANALYSIS

A. Requests for Judicial Notice

1. Firefighters4Freedom's Requests for Judicial Notice

Plaintiff Firefighters4Freedom requests that the Court take Judicial Notice of the following documents:

1. A report from the Congressional Research Service dated March 1, 2021, titled "Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials," a true and correct copy of which is attached hereto as Exhibit "A."

2. An Associated Press article dated September 16, 2020, titled "Biden says he trusts vaccines and scientists, not Trump," a true and correct copy of which is attached as Exhibit "B."

3. A Business Insider article dated October 7, 2020, titled "Kamala Harris says she will be 'first in line' for a coronavirus vaccine if health experts approve it, but 'if Donald Trump tells us we should take it, then I'm not

taking it,'" a true and correct copy of which is attached as Exhibit "C."

4. A Reuters article dated October 19, 2020, titled "California says it will independently review coronavirus vaccine," a true and correct copy of which is attached as Exhibit "D."

5. A Good Day Sacramento report from June 1, 2019, titled "Gov. Newsom Has Doubts About Having Government Officials Sign Off On Vaccine Exemptions," a true and correct copy of which is attached as Exhibit "E."

6. A BBC report from December 5, 2020, titled "Joe Biden: Covid vaccination in US will not be mandatory," a true and correct copy of which is attached as Exhibit "F."

7. A Nature article dated February 16, 2021, titled "The coronavirus is here to stay — here's what that means," a true and correct copy of which is attached as Exhibit "G."

8. Ordinance No. 187134 adopted by the Los Angeles City Council on August 16, 2021, a true and correct copy of which is attached as Exhibit "H."

9. A memorandum from Los Angeles Mayor Eric Garcetti to all City Department Heads dated October 28, 2021, regarding "Mandatory Implementation of Non-Compliance with the Requirements of Ordinance No. 187134 ("COVID-19 VACCINATION REQUIREMENT FOR ALL CURRENT AND FUTURE CITY EMPLOYEES")," a true and correct copy of which is attached as Exhibit "I."

10. The order and opinion from the Fifth Circuit U.S. Court of Appeals dated November 12, 2021 affirming a stay on Biden's COVID-19 vaccine mandate, a true and correct copy of which is attached as Exhibit "J."

11. A Los Angeles Times article dated November 3, 2021, titled "'This could be my room for a few days': Garcetti tests positive, isolates in Scotland," a true and correct copy of which is attached as Exhibit "K."

12. A press release from California Governor Gavin Newsom's office, dated June 11, 2021, titled "As California Fully Reopens, Governor Newsom Announces Plans to Lift Pandemic Executive Orders," a true and correct copy of which is attached as Exhibit "L."

The Court GRANTS Plaintiff's requests as to Requests Nos. 1 and 8-10, and DENIES Plaintiff's requests as to Requests Nos. 2-7, 11 and 12. (Evid. Code, § 452, subd. (c).)

2. The City of Los Angeles' Requests for Judicial Notice

Defendant City of Los Angeles requests that the Court take Judicial Notice of the following documents:

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-ofvaccines. 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-testingnot-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).

The Court GRANTS Defendant's requests for judicial notice. (Evid. Code, § 452, subd. (c).)

B. Legal Standards

1. Preliminary Injunctions

"A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefore." (CCP, § 527(a).) The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. *(Jamison v. Department of Transportation* (2016) 4 Cal.App.5th 356, 361; *Major v. Miraverde Homeowners Ass'n.* (1992) 7 Cal. App. 4th 618, 623.)

In deciding whether to issue a preliminary injunction, courts "should evaluate two interrelated factors . . . The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70; *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 633; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.)

As Plaintiff Firefighters4Freedom states, "[t]he ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." *IT Corp. v. County of Imperial*, 35 Cal.3d 63, 73 (1983)." (Motion, p. 5:26–28.)

"The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) "Before issuing a preliminary injunction, the trial court must 'carefully weigh

the evidence and decide whether the facts require[] such relief.' [Citation.] The court evaluates the credibility of witnesses and makes factual findings on disputed evidence." (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 356.)

"In seeking a preliminary injunction, [the party seeking the injunction] b[ears] the burden of demonstrating both likely success on the merits and the occurrence of irreparable harm." (*Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562, 1571; *Citizens for Better Streets v. Board of Sup'rs of City and County* (2004) 117 Cal.App.4th 1, 6.) A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. (CCP §526(a)(4).) Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. (*Pacific Designs Sciences Corp. v. Sup.Ct. (Maudlin)* (2004) 121 Cal.App.4th 1100, 1110.) A preliminary injunction must not issue unless "it is reasonably probable that the moving party will prevail on the merits." (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 Cal.App.3d 438, 442.)

Irreparable harm occurs where someone will be significantly injured in a manner that cannot later be repaired. (*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870–871.) Threats of irreparable harm must be imminent. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) "Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471; *see also O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1464 ["In reviewing the injunction issued in this case, we must also bear in mind the extent to which separation of powers principles may affect the propriety of injunctive relief against state officials. In that context, our Supreme Court has emphasized that 'principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials.'"])

Code of Civil Procedure sections 525-533 "provide the primary statutory authority for injunctions pending trial." (*Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545, 551.) Code of Civil Procedure section 527, together with Cal. Rules of Court Rules 3.1150 - 3.1151 outline basic injunction-seeking procedure. (Weil & Brown*, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2021) ¶ 9:501.) A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (*See* Code Civ. Proc. § 529, subd. (a); *City of South San Francisco v. Cypress Lawn Cemetery Assn*. (1992) 11 Cal. App. 4th 916, 920.)

2. *Skelly v. State Personnel Bd.* and Related Cases

The California Supreme Court in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 determined that "the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process." (*Id*. at p. 206.) Thus, a person who enjoys "a legally enforceable right to receive a government benefit provided certain facts exist" holds "a property right protected by due process." (*Id*. at p. 207.) However, "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action." (*Id*. at p. 214.) Rather, minimum pre-removal due process procedure 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*.)

Our cases recognize that "due process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) "Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." (*Id*.) To determine what process is constitutionally due, courts balance three factors. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, 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, 334-335; *see also Gilbert v. Homar* (1997) 520 U.S. 924, 931–932.) *Skelly* "does not reject the concept that under extraordinary circumstances the governmental interest in prompt removal of its employees may outweigh the employee's right to a predismissal hearing." (*Mitchell v. State Personnel Bd.* (1979) 90 Cal.App.3d 808, 812.)

C. Discussion

Plaintiff Firefighters4Freedom moves the Court for a preliminary injunction to bar Defendant City of Los Angeles from "firing any firefighters employed by the City – or taking any other adverse action tantamount to termination, including placing the firefighters on unpaid leave – for non-compliance with the City's new Covid-19 vaccination mandate unless and until the City has provided the firefighters with due process required by the California Supreme Court's decision in *Skelly v. State Personnel Board*, (1975) 15 Cal. 3d 194." (Motion, p. 2:5-10.)

To grant a preliminary injunction in this case, the Court must find that Firefighters4Freedom is both likely to succeed on the merits at trial and that the balance of harms weighs in Plaintiff's favor.

1. Plaintiff Firefighters4Freedom is Unlikely to Succeed on the Merits

a. Due Process

Firefighters4Freedom argues that its motion "should be granted because Firefighters4Freedom is likely to prevail on its claim that the City cannot fire the firefighters *en masse* without providing them due process, a right to adequately defend, and a pre-deprivation hearing before an impartial hearing officer, as required by *Skelly* and the Firefighters Bill of Rights." (Motion, p. 6:20-23.) The firefighters argue that although "the type of hearing that must be provided varies on the exigency and the severity of the proposed discipline, '[t]he potential deprivation of a person's means of livelihood demands a high level of due process.'" (Motion, p. 7:7-9, quoting *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 110.)

The firefighters argue that the City's current procedures fall short of this standard, because "the Mayor's October 28 memo" informs municipal workers who do not comply with the City's Covid Vaccine Mandate by December 18, 2021 that they "shall be placed off duty without pay pending service of a *Skelly* package that includes a Notice of Proposed Separation." (Motion, p. 7:17-21; Plaintiff's Request for Judicial Notice, Ex. I.) Plaintiff argues that firefighters face a choice between unpaid leave or complying with a policy with which they disagree – a policy that they contend violates their constitutional rights and their collective bargaining agreement. (Motion, p. 7:21-24.) The firefighters argue they face indefinite unpaid leave because "no one knows how long it will take the City to process the *Skelly* hearings for employees who do not obey the Covid Vaccine Mandate." (Motion, p. 8:7-9.) The firefighters argue (albeit without evidence) that the

City "will take far longer than seven months to conduct *Skelly* hearings for most city employees, resulting in a far greater deprivation of liberty here than the one that violated due process in *Bostean*." (Motion, p. 8:11-13; cf. *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th 551, 556 ["the arguments of counsel in a motion are not a substitute for *evidence*, such as a statutorily required affidavit." [emphasis in original]; *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1173 [absolutely no evidence was submitted to support this factual claim . . . . Argument of counsel is not evidence."])

Plaintiffs' citation to *Bostean v. Los Angeles Unified School District* does not help their argument. (See Motion, p. 7:25 – p. 8:5.) According to Plaintiffs' own summary of the case, Bostean, a "Los Angeles school district . . . employee[, was put] on unpaid medical leave for seven months due to a medical condition." (Motion, p. 7:28 – p. 8:1.) He then sued and was awarded his back pay. It is uncontested that the unvaccinated firefighters in this case will all be afforded a *Skelly* hearing; if the employees believe it is warranted, they will be able to sue for back pay.

> "Although due process generally requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, the United States Supreme Court has 'rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property.' . . .
>
> "[D]ue process is flexible and calls for such procedural protections as the particular situation demands. This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. 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, supra,* 63 Cal.App.4th at pp. 112-113 [cleaned up].)

Firefighters4Freedom cites *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191 to support its argument that "even if an emergency exists, the government must explain why it must terminate its employees without a *Skelly* hearing. (Motion, p. 9:12-13.) This citation is inapposite, because the *IBEW* court did not find that the labor dispute that gave rise to a strike among firefighters was an emergency. (*Id*., *supra*, 34 Cal.3d at p. 209 ["We need not consider whether some emergencies justify dispensing with predismissal safeguards for, even assuming the strike constituted an emergency, the city fails to explain how dismissing all of its striking employees without a hearing would alleviate the emergency."]) The City notes that *Skelly* "evolved from a nonemergency situation" and does not offer direct authority for an ongoing pandemic fueled by a highly communicable novel coronavirus that caused "over 49,000,000 cases of COVID-19 in the U.S., and nearly 800,000 deaths in the U.S., with the majority of those deaths having been in older adults." (Opposition, p. 7:11-13; *Mitchell*, 90 Cal.App.3d at 812; Manoukian Decl., ¶ 8.)

This Court must weigh the unvaccinated municipal employees' "significant private interest in the uninterrupted receipt of his paycheck" against the City's "significant interest in removing unvaccinated employees swiftly from the workplace to stem the spread of COVID-19 and protect other employees and the public." (See *Bostean*, 63 Cal.App.4th at p. 113; Opposition, p. 8:10-11.)

According to LAFD Battalion Chief Scott Quinn who is the Commander of the Risk Management Section of the Fire Department:

> "LAFD firefighters work 24 hours on, then 24 hours off, then 24 hours on, then 24 hours off, then 24 hours on, followed by four days off, but may work additional days by working overtime or by trading days with other firefighters in the same or another firehouse;

"[A]s part of the LAFD efforts to protect firefighters in the workplace from COVID-19, firefighters are instructed to keep socially distant as much as possible and wear masks in the firehouse, except when eating and sleeping." (Quinn Declaration, ¶¶ 6, 7.)

Despite these precautions, 1,134 LAFD members tested positive for coronavirus between March 15, 2020 and December 8, 2021 and had to be sent home or told to remain at home. (*Id*., ¶¶ 8, 9.) Two firefighters have died from COVID. (*Id*., ¶ 18.) "[D]ata collected from the inception of the COVID-19 pandemic in March of 2020 through to the present supports a conclusion of firefighter to firefighter spread in the workplace." (*Id*., ¶ 14.)

To combat the spread of COVID-19, multiple effective vaccines have been developed and tested in the United States, European nations, China, and elsewhere. (Manoukian Decl., ¶¶ 9, 14.) "The Pfizer and Moderna mRNA vaccines also have provided exceptional protection against symptomatic COVID-19 cases, asymptomatic cases, and transmission. The vaccines are also highly efficacious against variants, particularly variants of concern such as the Delta variant. This success is due to the broad immune response elicited by the mRNA vaccines." (Manoukian Decl., ¶ 14.)

The Court finds that the first and third *Mathews* factors weigh in the City's favor. Evidence has been presented that COVID-19's exceptional communicability reduces the LAFD's available workforce and hence reduces the City's readiness to respond to emergency situations. The second *Mathews* factor, the risk of an erroneous deprivation of a private interest through the procedures used, appears low. Ample notice of the City's vaccine mandate was provided to municipal employees. The Ordinance that "requires all City employees to report their vaccination status no later than October 19, 2021 and be fully vaccinated for COVID-19 – subject to a medical or religious exemption – by October 20, 2021" was passed by the City Council on August 18, 2021, and took effect on August 25, 2021. (Girard Decl., ¶ 5.) The City's unions were consulted about the Ordinance two days prior to its passage, and the City received input from several City unions regarding Ordinance language. (Girard Decl., ¶¶ 8-9.) Changes to the Ordinance were made as a direct result of that consultation. (*Id*.) Union consultation continued following passage of the Ordinance, including the United Firefighters of Los Angeles. (Girard Decl., ¶¶ 10-14.) After significant negotiation, the City presented to City unions its Last, Best, and Final Offer ("LBFO") regarding Ordinance noncompliance on October 14, 2021. (Girard Decl., ¶ 44.)

City employees "who refused to sign the Notice and/or failed to comply with its requirements" were "first given at least 48 hours to respond" before unpaid leave pending a formal *Skelly* hearing on their proposed separation from City service. (Opposition, p. 9:18-20; Everett Decl., ¶¶ 17-19.) This pre-removal opportunity to be heard satisfies both the minimum pre-removal due process procedure under *Skelly* and the due process flexibility, especially in emergency situations, envisioned by *Morrissey* and *Mitchell*.

For purposes of this Motion, the Court finds that the unvaccinated firefighters' due process rights are not violated by the City's Ordinance.

b. Abuse of Discretion

A plaintiff challenging a government's emergency ordinance "must assume the burden of showing its invalidity," which "includes surmounting all possible intendments, presumptions, and reasonable doubts indulged in favor of the Ordinance's validity." (*Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 275.)

Firefighters4Freedom must show that the City Council abused its discretion on October 26, 2021, when it declared an emergency in the Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134. (Girard Decl., Ex. 11.) This Resolution references the City Council's ratification of the Mayor's Declaration

of Local Emergency, dated March 4, 2020, where "he declared that conditions of disaster or extreme peril to the safety of persons have arisen in the City of Los Angeles (City) as a result of the introduction of COVID-19, a communicable coronavirus disease." (Girard Decl., ¶ 3, Ex. 11.) In *Sonoma County*, the recitals contained within the ordinance that declared the existence of an emergency "constituted prima facie evidence of the fact of the emergency." (*Sonoma County*, *supra*, 1 Cal.App.4th at p. 276.)

Nonetheless, Firefighters4Freedom does not consider the ongoing COVID-19 pandemic an emergency sufficient to relieve the City of its *Skelly* obligations. (Motion, p. 8:27 – p. 10:16.) The firefighters argue that the City "does not explain how summarily firing hundreds of firefighters will solve the Covid-19 emergency." (Motion, p. 9:22-23.) Plaintiff further suggests that the City will not suffer harm from complying with its interpretation of *Skelly*, stating that the "only harm it could possibly assert is the alleged 'imminent threat' to public health posed by unvaccinated people that Mayor Garcetti mentioned, a political statement that has no evidentiary support and which is belied by the City's reliance on firefighters throughout the pandemic." (Motion, p. 11:20-23.)

The firefighters' evidentiary showing is insufficient to persuade the Court that the City's Declaration of Local Emergency was declared and ratified in error. The Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134 reference multiple recitals, including the following:

> "WHEREAS, the City Council has repeatedly renewed the Mayor's March 4, 2020 Declaration of Local Emergency, most recently on September 21, 2021;
>
> WHEREAS, extensively during the period of this local emergency, the Mayor of Los Angeles has exercised his emergency authority under the Los Angeles Administrative Code Section 8.29 by issuing Public Orders and Directives to City Departments in furtherance of the ongoing need to preserve life and property of individuals living and working in the City;
>
> WHEREAS, the COVID-19 pandemic continues to change and evolve, and such emergency orders and directives will continue to be necessary;
>
> WHEREAS, as of October 18, 2021, out of a total of 53,168 City employees, 37,524 employees have reported their status as "fully vaccinated", 1,250 employees have reported their status as "partially vaccinated", 4,872 employees have reported their status as "not vaccinated", 1,839 employees have reported their status as "decline to state", and 7,683 employees have failed to report their status." (Girard Decl., Ex. 11.)

It cannot be seriously argued that the City did not have sufficient evidence to declare a state of emergency. Over 97% of all COVID-19 hospitalizations in the United States occur among our unvaccinated population. (Manoukian Decl., ¶ 17.) Breakthrough infections are "typically associated with mild illness and no symptoms, and vaccinated individuals are less likely to transmit COVID-19 compared to those who are not vaccinated. (*Id.*, ¶ 16.) Evidence of fire station COVID-19 outbreaks merely underscores the fact that the COVID-19 global pandemic continues to upend daily life and threaten public safety.

As indicated above, judicial review of a City's declaration of an emergency "is one of pronounced deference to the legislative decision." (*Sonoma County, supra*, 1 Cal.App.4th at p. 276.)

For purposes of this Motion, the Court finds that that the City did not abuse its discretion in declaring an emergency.

c. 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.) Defendant 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.)

Firefighters4Freedom considers the City's Covid-19 vaccination requirement a violation of its members' right to privacy, arguing that the City's Covid Vaccine Mandate "qualifies as a serious invasion of the firefighters right to bodily autonomy" under the California Constitution that calls into question any application of rational basis review. (Motion, p. 12:23 – p. 13:3.) In its opposition, the City cites to an extensive line of cases where courts have held that the United States Constitution and the California Constitution permit compulsory vaccinations. (Opposition, p. 1:21-25; *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 39; *Zucht v. King* (1922) 260 U.S. 174, 176 ["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."]; *French v. Davidson* (1904) 143 Cal.658, 662 ["When we have determined that the act is within the police power of the state, nothing further need be said."]; *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1143-1144; *Abeel v. Clark* (1890) 84 Cal. 226, 230 ["Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether [it should be required], and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class."]) The City further cites recent cases where courts "rejected attempts to enjoin COVID-19 vaccine mandates." (Opposition, p. 2:1; *Klaassen v. Trs. Of Ind. Univ.*, 7 F.4th 592, 2021, U.S. App. LEXIS 22785 (7th Cir. Aug. 2, 2021) [denial of preliminary injunction seeking to enjoin student vaccine mandate]; *Kheriaty v. Regents of the Univ. of California*, 2021 U.S. Dist. LEXIS 196639, 2021 WL 5238586 (C.D. Cal. Sept. 29, 2021) [University of California's vaccine mandate upheld]; *America's Frontline Doctors v. Wilcox*, 2021 U.S. Dist. LEXIS 144477, 2021 WL 4546923 (C.D. Cal. July 30, 2021) [University of California's vaccine mandate upheld]; *Bridges v. Houston Methodist Hosp.*, 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021) [denying TRO sought against hospital policy requiring COVID-19 vaccination for employees].)

One month ago, a unanimous opinion of the U.S. Court of Appeals for the Second Circuit upheld New York's vaccine mandate:

> "Faced with an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of over 750,000 in the United States and some 55,000 in New York, the state decided as an emergency measure to require vaccination for all employees at health care facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated. This was a reasonable exercise of the State's power to enact rules to protect the public health." (*We The Patriots USA v. Hochul* (2d Cir. 2021) 17 F.4th 266, 290.)

Just two days ago, the U.S. Court of Appeals for the Sixth District reversed the U.S. Court of Appeals for the Fifth Circuit [Exh. 10 to Plaintiff's Request for Judicial Notice] and reinstated Pres. Biden's vaccine mandates for employers with over 100 employees. The Court found that "[v]accinated employees are significantly less likely to bring (or if infected, spread) the virus into the workplace." Further, "mutations of the virus become increasingly likely with every transmission, contributing to uncertainty and greater potential for serious health effects. Based on this record, the symptoms of exposure are therefore neither "easily curable and fleeting" nor is the risk of developing serious disease speculative." (*In re MCP No. 165* (2021 U.S.App. LEXIS 37349, 2021 FED App. 0287P, 6th Cir., December 17, 2021), available at https://int.nyt.com/data/documenttools/sixth-circuit-osha-ruling/86fd0c47a33a99ba/full.pdf)

Of course, none of these federal decisions are binding on this Court. "[F]ederal decisional authority is neither binding nor controlling in matters involving state law." (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 55.) Nor is this court bound by the decisions of lower federal courts interpreting federal law. (*People v. Williams* (1997) 16 Cal.4th 153, 190.) Nonetheless, these decisions can be persuasive.

The United States Supreme Court in *Jacobson* "essentially applied rational basis review" to a law that criminalized the refusal to submit to a state ordinance requiring all adults to be inoculated against smallpox in Massachusetts. (*Kheriaty*, 2021 WL 5238586, at *6; *see also Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 141 S.Ct. 63, 70 (Gorsuch, J., concurring) ["Although Jacobson pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption."]) Citing *Jacobson* in the COVID-19 era, courts across the country have concluded that *Jacobson* established that there is no fundamental right to refuse vaccination. (*Williams v. Brown* (D. Or., Oct. 19, 2021, No. 6:21-CV-01332-AA) 2021 WL 4894264, at *8; see also *Klaassen*, 7 F.4th at 593 ["Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."]; *Johnson v. Brown* (D. Or., Oct. 18, 2021, No. 3:21-CV-1494-SI) 2021 WL 4846060, at *13]"As *Jacobson* reveals, the right to refuse vaccination is not deeply rooted in this nation's history. . . In fact, the opposite is true."].) Like the plaintiff in *Williams*, Firefighters4Freedom "contend[s] that the vaccine mandates implicate a fundamental right to bodily integrity and privacy." (Motion, p. 13:2-3.) Unlike *Williams*, the firefighters ask the Court to recognize the that "under California privacy law, the standard of review depends on the "specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests. (Motion, p. 12:24-26; *Hill*, *supra,* 7Cal.4th at p. 34.)

Over 130 years ago, our Supreme Court found that "[v]accination [is] the most effective method known of preventing the spread of the disease." (*Abeel v. Clark* (1890) 84 Cal. 226, 230.) The scientific consensus has not changed since then.

COVID-19 vaccines offer the public their best chance to avoid COVID infection and/or minimize its harms. The Managing Physician for the City of Los Angeles, Medical Services Division, notes a recent Oxford University study that examined nearly 150,000 contacts traced from roughly 100,000 initial cases found that "when infected with the Delta variant, a given contact was 65 percent less likely to test positive if the person from whom the exposure occurred was fully vaccinated with two doses of the Pfizer vaccine." (Manoukian Decl., ¶¶ 2, 16.) The firefighters' assertion that "natural immunity does actually provide immunity whereas the COVID vaccines do not" is, simply put, contrary to the current scientific consensus. "Antibodies generated by mRNA COVID-19 vaccines outperform natural immunity for potency against variants," as Dr. Manoukian attests. (*Id.*, ¶ 18.)

To be clear, *Jacobson* does not endorse blind deference to the state during public health emergencies. The *Jacobson* court allowed individuals with legitimate medical concerns to oppose vaccine mandates that may threaten their health. (*Jacobson*, 197 U.S. at pp. 38-39.) But as indicated above, the Court has no evidence that any of the 105 suspended firefighters whom Plaintiff Firefighters4Freedom represents have requested a medical (or religious) exemption. No firefighter is being placed on unpaid leave because they have asked for a medical or religious exemption to the vaccine mandate. (See, e.g., (Girard Decl., ¶ 45; Everett Declaration, ¶¶ 9-12.)

The appropriate standard of review for the firefighters' right of privacy concerns is rational basis review. "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 440.)

The City's goal "to have a vaccinated workforce" to aid in "stemming the spread of COVID–19 is unquestionably a compelling interest." (Ordinance No. 187134, Plaintiff's RJH, Ex. H, Sec. 4.702; *Roman Catholic Diocese of Brooklyn v.*

Cuomo, *supra,* 141 S.Ct. at p. 67.)

The City's Vaccine Mandate requires that "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, no later than October 19, 2021." It further states that "employees will not have the option to 'opt out' of getting vaccinated and become subject to weekly testing." The Court finds that these requirements are rationally related to a legitimate municipal interest.

Firefighters4Freedom states that the right to privacy is expressly protected in the California Constitution, which they correctly note is more protective of privacy than federal constitutional law. However, the firefighters do not cite authority for their position that a reasonable expectation of privacy amid a global novel coronavirus pandemic excuses municipal employees from the vaccine mandates. Before the *Hill* burden may shift to the City, the firefighters must show they have a reasonable expectation of privacy *in these circumstances*. These circumstances include 50,636,126 total COVID-19 cases in the United States of America and 802,969 total COVID-19 deaths nationally as of December 18, 2021. (See *Hill*, *supra,* 7 Cal.4th at pp. 39-40; Centers for Disease Control and Prevention COVID Data Tracker; https://covid.cdc.gov/covid-data-tracker/#trends_dailycases.)

Three years ago, the Court of Appeal rejected an argument that a vaccination requirement for students enrolling in public schools infringed on the students' substantive due process rights and right to bodily autonomy and to refuse medical treatment. (*Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980.) The court held that "[i]t is well established that laws mandating vaccination of school-aged children promote a compelling government interest of ensuring health and safety by preventing the spread of contagious diseases." (*Id*. at p. 990.)

This Court finds that Plaintiff Firefighters4Freedom has not met its burden.

> "A person's medical history and information and the right to retain personal control over the integrity of one's body is protected under the right to privacy. Although the right is important, it is not absolute; it must be balanced against other important interests and may be outweighed by supervening public concerns." (*Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 993 [cleaned up].)

In the present case, "supervening public concerns" – namely the City's goal to "protect the City's workforce and the public that it serves" from COVID-19 transmission and infection – clearly outweigh Firefighters4Freedom's privacy rights. (Ordinance No. 187134, Plaintiff's RJH, Ex. H, Sec. 4.701(a).)

The Court does not find a privacy violation under the California Constitution.

Plaintiff has failed to demonstrate a likelihood of prevailing on its due process, abuse of discretion or privacy claims. Therefore, the Court denies Plaintiff's request for a preliminary injunction.

2. Balancing of Hardships

Even if Plaintiff could show a likelihood of success on the merits, the balance of hardships weighs heavily in favor of denying Plaintiff's request for a preliminary injunction.

For this second factor, the court must consider "the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be likely to suffer if the preliminary injunction were issued." (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) "Irreparable harm" generally means that the defendant's act constitutes an actual or threatened injury to the personal or property rights of the plaintiff that cannot be compensated by a damages award. (See *Brownfield v. Daniel Freeman Marina Hospital* (1989) 208 Cal.App.3d 405, 410.)

"Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. . . . This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.)

Plaintiff argues that the balance of hardship tips in its favor because the firefighters it represents will lose their paychecks and benefits if a preliminary injunction is not granted. In support of this argument, Plaintiff cites *Nelson v. National Aeronautics and Space Admin.* (9th Cir. 2008) 530 F.3d 865. In that case, contract employees sued NASA alleging that NASA's requirement that such employees submit to in-depth background investigations seeking highly personal information was unlawful. (*Id.* at pp. 870-871.) The employees moved for a preliminary injunction to prevent NASA from terminating them for failing to answer highly invasive questionnaires. (*Id*.) The district court denied the request for preliminary injunction, but on appeal, the Ninth Circuit reversed, finding that some of the information sought by NASA "raised serious privacy issues." (*Id.* at p. 872.) On the issue of balancing harms, the Ninth Circuit explained that "monetary injury is not normally considered irreparable," but "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (*Id.* at pp. 881-882.) However, *Nelson* is not applicable to this case because, as discussed above, Plaintiff has failed to show that the City's vaccine mandate amounts to a due process, privacy, or other constitutional violation. The only potential harm that Plaintiff demonstrates is the temporary loss of paychecks and benefits, which is not irreparable; it can be remedied through damages such as backpay. Plaintiff also cites language in *Nelson* that "the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages." (*Id*. at p. 882.) Here, however, firefighters will not immediately lose their jobs, but rather will be placed on unpaid leave pending a formal *Skelly* hearing on their proposed separation.

More importantly, any harm to the firefighters who refuse to be vaccinated is vastly outweighed by the life-threatening harm of permitting over a hundred unvaccinated firefighters to continue living, eating, and sleeping with fellow firefighters at over 106 City firehouses. (Quin Dec., ¶¶ 4-6.) The COVID-19 vaccines "have the ability to prevent transmission of the virus in two ways: (1) by preventing infection altogether, or (2) by reducing the amount of infectious virus should somebody get sick." (Manoukian Dec., ¶ 14.) As a result, "vaccinated individuals are less likely to transmit COVID-19 compared to those who are not vaccinated." (*Id.*, ¶ 16.) While breakthrough infections can occur, infected individuals are less likely to spread COVID-19 if they have been fully vaccinated. (*Ibid*.) Given the data showing the effectiveness of the COVID-19 vaccines, the potential harm to firefighters simply cannot compare to the potential loss of life that could result from issuance of the requested preliminary injunction.

The Court recognizes that Plaintiff has provided evidence from its own expert, Mr. Kaufman, that COVID-19 is not particularly dangerous and that vaccinations are not effective. However, Mr. Kaufman is not an epidemiologist. He is not a virologist. He is not even a doctor. He has a master's degree in Public Health; according to his own declaration, he is basically a public relations person who "translates scientific information for the public to understand." (Kaufman Declaration, ¶ 1.) While Mr. Kaufman may well have done excellent work communicating with the public on AIDS/HIV, Ebola and other infectious diseases, his qualifications regarding the COVID pandemic are meager. Mr. Kaufman concludes that "vaccination is not necessary to control the spread of COVID-19 and may be less effective than natural immunity and common-sense workplace practices that have been used for years to promote public health." (See Kaufmann Declaration, ¶ 25.) The Court must take his conclusions with a grain of salt; his conclusions are contrary to those of the vast majority of epidemiologists and coronavirus experts. (See, e.g., California Jury Instructions, CACI 221, "Conflicting

Expert Testimony" ["If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications."])

The Court finds that the balance of harms weighs against granting the preliminary injunction. Plaintiff has not made the "significant showing" of irreparable harm necessary to enjoin a public entity in the performance of its duties.

CONCLUSION

Plaintiff Firefighters4Freedom's Motion for Preliminary Injunction is DENIED.

EXHIBIT “B”

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 34 HON. MICHAEL P. LINFIELD, JUDGE

FIREFIGHTERS4FREEDOM FOUNDATION, PLAINTIFF, VS. CITY OF LOS ANGELES, DEFENDANT.	SUPERIOR COURT NO. 21STCV34490

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 20, 2021

APPEARANCES:

FOR THE PLAINTIFF: JW HOWARD/ATTORNEYS LTD.
BY: SCOTT J. STREET
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LOS ANGELES, CA 90017

JW HOWARD/ATTORNEY LTD.
BY: JOHN W. HOWARD
701 B STREET, #1725
SAN DIEGO, CA 92101

FOR THE DEFENDANT: LOS ANGELES CITY ATTORNEY'S OFFICE
(LA COURTCONNECT) BY: JENNIFER GREGG
BY: ERIKA JOHNSON-BROOKS
200 NORTH MAIN STREET
LOS ANGELES, CA 90012

GAIL PEEPLES, CSR NO. 11458
PRO TEMPORE OFFICIAL REPORTER

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VOLUME N/A

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INDEX FOR DECEMBER 20, 2021

VOLUME N/A

M A S T E R I N D E X

EXHIBITS

CASE NUMBER:	21STCV34490
CASE NAME:	FIREFIGHTERS4FREEDOM
LOS ANGELES, CALIFORNIA	DECEMBER 20, 2021
DEPARTMENT 34	HON. MICHAEL P. LINFIELD, JUDGE
REPORTER:	GAIL PEEPLES, CSR NO. 11458
TIME:	1:38 P.M.
APPEARANCES:	(AS PREVIOUSLY NOTED.)

THE COURT: GOOD AFTERNOON, EVERYBODY.

WE'RE ON THE CASE OF THE FIREFIGHTERS4FREEDOM FOUNDATION VERSUS THE CITY OF LOS ANGELES, CASE 21STCV34490.

I UNDERSTAND WE HAVE SOME PEOPLE HERE -- SOME ATTORNEYS HERE IN COURT AND SOME VIRTUALLY.

CAN WE HAVE APPEARANCES FOR THE RECORD FROM PLAINTIFFS.

MR. STREET: YES. GOOD MORNING, YOUR HONOR. SCOTT STREET BEHALF OF THE PLAINTIFF FIREFIGHTERS4FREEDOM.

THE COURT: GOOD AFTERNOON.

MR. HOWARD: GOOD AFTERNOON, YOUR HONOR. JOHN HOWARD APPEARING FOR THE PLAINTIFFS.

THE COURT: GOOD AFTERNOON.

AND FOR THE DEFENDANTS?

MS. GREGG: GOOD AFTERNOON, YOUR HONOR. JENNIFER GREGG, DEPUTY CITY ATTORNEY.

MS. JOHNSON-BROOKS: GOOD AFTERNOON, YOUR HONOR.

ERIKA JOHNSON-BROOKS, DEPUTY CITY ATTORNEY, ON BEHALF OF THE CITY OF LOS ANGELES.

THE COURT: OKAY. GOOD AFTERNOON TO EVERYONE. WANT TO WELCOME EVERYONE HERE.

I KNOW WE HAVE SOME MEDIA PRESENT. THERE MAY BE SOME MEDIA IN THE AUDIENCE. BASIC GROUND RULES. SINCE THE COURT BELIEVES THAT ALL THE HEARINGS WE HAVE ARE OPEN TO THE PUBLIC, AND I WELCOME THAT, WE ALSO -- PEOPLE MAY USE -- IF YOU HAVE HANDHELD DEVICES, YOU ARE WELCOME TO TAKE NOTES ON THEM. YOU ARE ALLOWED TO TWEET OR SEND TEXT MESSAGES. THERE IS NO VIDEO OR AUDIO RECORDING OTHER THAN FOR THE MEDIA POOL TO MY RIGHT, TO YOUR LEFT. SO, YOU MAY NOT USE YOUR CELL PHONE FOR ANY AUDIO OR VIDEO RECORDING OF THIS HEARING.

I ALSO NOTE JUST IN PASSING THERE ARE THREE OTHER CASES THAT MAY HAVE SOME RELATION TO THIS CASE.

THERE'S A CASE CALLED UNITED FIREFIGHTERS OF LOS ANGELES AND NOTICE OF RELATED CASE, AND AN OPPOSITION WAS FILED THERE.

THERE ARE TWO OTHER CASES, LOS ANGELES PROTECTIVE LEAGUE VERSUS THE CITY OF LOS ANGELES AND THE CHILDREN'S HEALTH DEFENSE VERSUS LOS ANGELES UNIFIED SCHOOL DISTRICT. I DON'T KNOW IF THOSE CASES ARE RELATED. NO NOTICE OF RELATED CASE WAS FILED. IF COUNSEL BELIEVES THAT A NOTICE OF RELATED CASE SHOULD BE FILED UNDER THE RULES OF COURT, PLEASE, DO SO.

WE HAVE TODAY TWO MOTIONS BEFORE THIS COURT. ONE IS THE MOTION PRO HAC VICE TO HAVE ROBERT F.

KENNEDY, JR., APPEAR AS ONE OF THE ATTORNEYS FOR THE PLAINTIFF. THAT WAS UNOPPOSED, AND THE COURT IS GRANTING THAT MOTION.

THE SECOND ISSUE -- AND I'LL PROBABLY GO -- OBVIOUSLY THE LARGER ONE IS THE REQUEST FOR PRELIMINARY INJUNCTION BY THE PLAINTIFFS. THE COURT HAS POSTED ITS TENTATIVE DECISION. IT WAS POSTED YESTERDAY. IT WAS A TENTATIVE DECISION SUBJECT TO CHANGE.

TO JUST SUMMARIZE VERY BRIEFLY THE COURT'S TENTATIVE, THE COURT FINDS THAT THE PLAINTIFF FIREFIGHTERS4FREEDOM IS UNLIKELY TO PREVAIL AT TRIAL. THE UNVACCINATED FIREFIGHTERS HAVE NOT SHOWN A DUE PROCESS VIOLATION, THEY HAVE NOT SHOWN THAT THE CITY ABUSED THIS DISCRETION IN PASSING THE VACCINATION MANDATE, AND THEY HAVE NOT SHOWN A SUFFICIENT VIOLATION OF THEIR PRIVACY RIGHTS.

FURTHER, THE BALANCE OF HARM OVERWHELMINGLY HITS AGAINST GRANTING THIS INJUNCTION.

THIS COURT -- I SHOULD SAY I DON'T WANT TO MINIMIZE THE HARM TO ANY INDIVIDUAL FIREFIGHTER WHO IS PUT ON UNPAID LEAVE. IT'S CERTAINLY A SEVERE HARM. BUT IT'S DWARFED BY THE DEATH OF PERSONS DUE TO COVID.

IN THE LAST FIVE DAYS THAT I HAVE BEEN PREPARING FOR THIS HEARING, 96 ANGELINOS HAVE DIED OF COVID.

WE CAN REIMBURSE A PERSON FOR MONETARY LOSSES CAUSED BY BEING PUT ON UNPAID LEAVE; WE CANNOT RESURRECT THE DEAD.

THE COURT'S TENTATIVE IS TO DENY THE PRELIMINARY INJUNCTION.

LET ME TURN TO PLAINTIFFS -- I'M SORRY, TO PLAINTIFFS FIRST. I'LL HEAR ARGUMENTS. THEN I'LL TURN TO DEFENDANTS AFTER PLAINTIFF.

MR. STREET: AND I THANK YOU, YOUR HONOR --

THE COURT: LET ME ASK WHEN YOU'RE SPEAKING PLEASE STAND.

I KNOW WE CAN'T DO THAT FOR PEOPLE ON -- WHO ARE APPEARING VIRTUALLY.

BUT WE DO HAVE A PODIUM RIGHT BEHIND YOU.

(COURT REPORTER REQUESTS COUNSEL IDENTIFY THEMSELVES WHEN SPEAKING.)

THE COURT: COUNSEL, THE COURT REPORTER ASKS THAT COUNSEL WHO SPEAK IDENTIFY YOURSELF.

MR. STREET: SURE.

GOOD AFTERNOON. FOR THE COURT REPORTER, THIS IS SCOTT STREET, COUNSEL FOR THE PLAINTIFFS.

AND, YOUR HONOR, I DO WANT TO THANK YOU. I READ THE TENTATIVE DECISION THIS MORNING. AND I DO WANT TO THANK YOU FOR THE THOROUGHNESS OF IT AND THE RESEARCH THAT YOU DID, PARTICULARLY GIVEN HOW RECENTLY YOU GOT THIS CASE. SO, I DO APPRECIATE IT.

AND THERE ARE SOME THINGS THAT I WOULD QUIBBLE WITH, ESPECIALLY AS THE FACTUAL FINDINGS GO.

BUT I WANT TO TAKE THIS AS THE FIRST ORDER

AND REALLY FOCUS ON THREE THINGS HERE TODAY THAT I THINK ARE CRITICAL AND I THINK IF THE COURT IS WILLING TO CONSIDER THEM MAY CHANGE YOUR ASSESSMENT OF THE -- OF THIS MOTION.

THE FIRST IS SPECIFICALLY WHAT WE'RE ASKING FOR HERE.

TO BE CLEAR, WE ARE NOT ASKING TO STOP THE CITY FROM ENFORCING THIS MANDATE. WE ARE NOT ASKING FOR ANY FIREFIGHTER OR ANYBODY ELSE TO BE PUT BACK INTO DUTY, POTENTIALLY GOING OUT AND INFECTING MEMBERS OF THE PUBLIC. ALL WE ARE ASKING FOR IS THAT THE COURT REQUIRE THE CITY TO GIVE THE FIREFIGHTERS A HEARING IN COMPLIANCE WITH SKELLY BEFORE THEY STOP PAYING THEM, WHICH THEY HAVE NOT DONE AND HAVE SAID THEY WILL NOT DO --

THE COURT: I --

MR. STREET: -- WE CANNOT RESURRECT THE DEAD, I DO NOT THINK THAT THAT'S NECESSARILY THE APPROPRIATE BALANCING HERE BECAUSE THESE FIREFIGHTERS, SOME OF WHOM ARE WITH ME IN THE COURTROOM HERE TODAY, ARE NOT ON DUTY. THEY HAVE BEEN PUT OFF. THE ISSUE IS THEY HAVE BEEN PUT OFF WITHOUT PAY. AND WE CONTEND THAT THAT IS A VIOLATION OF THEIR DUE PROCESS RIGHTS UNDER SKELLY.

THE COURT: AM I CORRECT, COUNSEL, THAT THE CITY HAS -- YOUR COMMENTS INDICATED THERE WILL BE A SKELLY HEARING, A DUE PROCESS HEARING, PRIOR TO ANY TERMINATION?

MR. STREET: CORRECT. CORRECT.

AND THAT WAS -- TO BE CLEAR, WHEN WE FILED THIS MOTION BACK IN NOVEMBER, THAT HAD NOT BEEN DONE YET.

SO, WE WERE REALLY DISCUSSING ABOUT THE THREATENED HARM TO THOSE FIREFIGHTERS, WHICH, OF COURSE, IS SOMETHING THAT A MOTION FOR PRELIMINARY INJUNCTION CAN BE BASED ON, PARTICULARLY IN THE EMPLOYMENT CONTEXT.

SO, THE CITY HAS DONE THE RIGHT THING IN SAYING THAT THEY WILL NOT BE TERMINATED UNTIL THEY RECEIVE A SKELLY HEARING.

BUT THEY ARE NOT BEING PAID. SOME HAVE NOT BEEN PAID SINCE NOVEMBER. MANY HAVE NOT BEEN PAID -- I BELIEVE AT LEAST 105 HAVE NOT BEEN PAID SINCE DECEMBER 9.

SO, OUR BELIEF, YOUR HONOR, IS THAT, OKAY, THE CITY WILL PUT THEM THROUGH A PRE-TERMINATION HEARING; BUT IN ORDER FOR THAT PROCESS TO BE FAIR, IN ORDER FOR THAT PROCESS TO COMPLY WITH SKELLY, THE FIREFIGHTERS HAVE TO BE PAID DURING THAT PROCESS. THAT'S ALL WE'RE ASKING FOR --

THE COURT: LET'S PURSUE THAT FOR A MOMENT, COUNSEL.

IF YOU'RE CORRECT, THEN THE CITY WOULD KEEP UNVACCINATED FIREFIGHTERS -- WHEN I SAY "UNVACCINATED," THESE ARE ALSO FIREFIGHTERS THAT DO NOT HAVE -- HAVE NOT REQUESTED A RELIGIOUS EXEMPTION OR A MEDICAL EXEMPTION -- THESE PEOPLE WILL BE KEPT, BASICALLY, ON ADMINISTRATIVE LEAVE WITH FULL PAY DOING NOTHING.

MR. STREET: CORRECT.

THE COURT: WOULDN'T -- DOESN'T THAT ENCOURAGE LOTS OF OTHER PEOPLE TO SIMPLY REQUEST -- WHO DO NOT HAVE A MEDICAL REASON OR RELIGIOUS REASON TO SIMPLY REQUEST

LEAVE?

MR. STREET: WELL, MANY OF THEM MAY DO THAT. AND THERE ARE SEVERAL -- YOUR HONOR MAKES A VERY GOOD POINT.

THERE ARE SEVERAL HUNDRED -- I DON'T KNOW THE EXACT NUMBER BECAUSE I HAVEN'T GOTTEN THAT NUMBER FROM THE CITY. BUT THERE ARE SEVERAL OTHER UNVACCINATED FIREFIGHTERS CURRENTLY ON DUTY, CURRENTLY, AS THE CITY SAYS, INFECTING THE PUBLIC THAT THEY SERVE, BUT THEY ARE ON DUTY AND GETTING PAID BECAUSE THEY REQUESTED A RELIGIOUS OR MEDICAL EXEMPTION.

NOW, MY CLIENTS -- 105 -- ARE OFF DUTY, HAVE MADE DIFFERENT DECISIONS FOR WHATEVER REASON, WHETHER THEY BELIEVE IN MEDICAL FREEDOM OR WHATNOT. BUT THEY ARE BEING DEPRIVED NOT JUST OF BEING ON DUTY SERVING THE PUBLIC -- AND BY THE WAY, THESE ARE FIREFIGHTERS. AND I CAN'T EMPHASIZE THIS ENOUGH, YOUR HONOR. FIREFIGHTERS ARE THE PEOPLE WHO WE ASK TO RUN INTO BURNING BUILDINGS AND TO -- THEY ARE THE FIRST RESPONDERS. THEY HAVE SERVED ADMIRABLY THROUGHOUT THE PANDEMIC. MANY OF THEM, MANY OF THE PEOPLE WHO ARE AFFECTED HERE TODAY HAVE EXEMPLARY RECORDS, HAVE SERVED THE CITY FOR MANY, MANY YEARS. THEY WOULD LIKE TO BE ON DUTY.

BUT WHAT WE REALLY NEED, WHAT THEIR FAMILIES NEED, ESPECIALLY DURING THE HOLIDAYS, IS THEIR LIVELIHOOD, THEIR PAYCHECKS, THE THING THAT THEY HAVE WORKED FOR, THAT THEY WERE GRANTED UNDER CALIFORNIA LAW, UNDER SKELLY, BY VIRTUE OF THEIR SERVICE TO THE PUBLIC,

BY VIRTUE OF BECOMING PERMANENT CITY EMPLOYEES. THAT'S THE MINIMUM THAT THEY NEED. AND THEY'LL DEAL WITH THE TERMINATION PROCESS.

AND I KNOW THERE ARE OTHER ISSUES GOING ON. YOUR HONOR REFERRED TO THEM. THE UNION. THE UNION IS IN NEGOTIATIONS ABOUT THE CONSEQUENCES OF NON-COMPLIANCE HERE.

BUT ALL OUR CLIENTS ARE ASKING FOR TODAY FOR THEM AND THEIR FAMILIES IS "PAY US WHILE YOU TRY TO FIRE US, PAY US SO WE HAVE A MEANINGFUL AND FAIR OPPORTUNITY TO CHALLENGE THAT ACTION." THAT'S IT.

AND, SO, I THINK WHEN WE LOOK AT THE RELATIVE BALANCE OF HARMS -- BY THE WAY, YOUR HONOR, I READ IN YOUR TENTATIVE THAT -- AND I AGREE WITH YOU THAT BACK PAY IS SOMETHING THAT CAN BE RECOVERED IN THESE CASES. EVEN IF THE TERMINATION -- THE CASE LAW IS VERY CLEAR ABOUT THIS. EVEN IF THE TERMINATION IS PROPER, THESE FIREFIGHTERS COULD SUE FOR BACK PAY AND POTENTIALLY RECOVER BACK PAY --

THE COURT: SO, IT'S NOT -- LEGALLY IT'S NOT IRREMEDIAL DAMAGE. IT IS CERTAINLY A DAMAGE -- I MEAN, I AGREE THIS IS A HARM. IF SOMEONE HAS TO WAIT A YEAR TO GET BACK PAY, THEY ARE -- THAT'S A HARM.

MR. STREET: CORRECT.

THE COURT: BUT THERE IS NO DISAGREEMENT THAT THEY CAN GET THAT BACK.

MR. STREET: THEY COULD GET THAT. I MEAN, THEY WOULD HAVE TO FILE A LAWSUIT. AND IT COULD BE YEARS

BEFORE THEY GET THAT. THEY WILL PROBABLY HAVE TO SEEK ANOTHER JOB IN THE MEANTIME.

BUT I WANT TO DIRECT -- THERE IS ONE THING I WANT TO DIRECT THE COURT'S ATTENTION TO. AND THIS IS -- THIS QUESTION COMES FROM AN UNPUBLISHED CASE. BUT IT IS A SECOND DISTRICT COURT OF APPEAL. THAT'S WHY WE DIDN'T INCLUDE IT IN OUR BRIEF.

THE COURT SAID: TO HOLD, AS APPELLANTS ASSERT WE SHOULD, THAT AN EMPLOYEE DENIED A PROPER SKELLY HEARING HAS AN ADEQUATE REMEDY IN THAT HE CAN AVAIL HIMSELF OF A FULLEST EVIDENTIARY HEARING AND/OR CAN CHALLENGE THE FINAL DECISION BY A WRIT OF ADMINISTRATIVE MANDAMUS WOULD EFFECTIVELY NULLIFY SKELLY RIGHTS.

AND I THINK THAT'S -- I THINK THAT'S EXACTLY THE CASE HERE, YOUR HONOR --

THE COURT: YOU ARE QUOTING FROM A CASE THAT CANNOT BE QUOTED.

IS THAT CORRECT?

MR. STREET: I'M QUOTING FROM A CASE I DID NOT CITE FOR THAT REASON.

BUT IT IS SECOND DISTRICT COURT OF APPEAL. AND I THINK IT'S -- IT SHOWS THAT OUR ARGUMENT HERE IS NOT FRIVOLOUS AND THAT WE, UNDER THE CIRCUMSTANCES, AS YOUR HONOR SAID, ALTHOUGH THERE IS A MONETARY POTENTIAL-- POTENTIAL MONETARY VALUE HERE, POTENTIAL LEGAL REMEDY, UNDER THESE CIRCUMSTANCES IT'S NOT ADEQUATE.

AND WHEN YOU COMPARE THAT HARM VERSUS THE HARM THAT THE CITY HAS CITED, WHICH IS THE THREAT TO

PUBLIC HEALTH, EVEN IF WE ACCEPT THAT AS TRUE, WE TAKE THE CITY'S POSITION THAT UNVACCINATED FIREFIGHTERS ARE A THREAT TO THE PUBLIC THEY SERVE, WE HAVE REMOVED THAT PROBLEM, WE REMOVED THAT EMERGENCY BY PUTTING THEM OFF DUTY ON ADMINISTRATIVE LEAVE; JUST HAVE TO BE PAID UNDER SKELLY.

AND AS FOR A PUBLISHED CASE THAT DID SAY THAT, YOUR HONOR, I DIRECT THE COURT'S ATTENTION TO MITCHELL -- THE MITCHELL CASE, WHICH YOU CITED IN YOUR TENTATIVE, 90 CAL.APP.3D 808 WHERE THE GOVERNMENT ASSERTED A SIMILAR EMERGENCY IN REMOVING A HOSPITAL TECHNICIAN WHO HAD AN ENCOUNTER WITH A PATIENT AND THE HOSPITAL PUT HIM ON FORCED LEAVE AND DID NOT GIVE HIM SKELLY HEARING. EVER ACTUALLY.

AND WHAT THE COURT OF APPEAL SAID IS THEY SAID: LOOK, YOU CANNOT USE THE SKELLY EMERGENCY PROCESS -- I WILL READ YOU THE EXACT LANGUAGE, YOUR HONOR.

"UTILIZATION OF AN EMERGENCY EXCEPTION FOR THE PROCEDURAL REQUIREMENT ANNOUNCED IN SKELLY IS UNWARRANTED BECAUSE A FORCED LEAVE REMOVES ANY EMERGENCY WHICH MIGHT HAVE BEEN PREVENTED BY PLAINTIFF'S CONTINUED PRESENCE AT THE HOSPITAL."

SO, I WILL SUBMIT, YOUR HONOR, MITCHELL IS SQUARELY ON POINT --

THE COURT: YOU SAID MATTHEW?

MR. STREET: MITCHELL VERSUS STATE PERSONNEL BOARD, 90 CAL.APP.3D 808 CITED BY US -- CITED IN THE

TENTATIVE.

SO -- AND THAT'S ALL WE'RE ASKING FOR HERE, YOUR HONOR.

SO, WHEN YOU COMPARE THE RESPECTIVE HARMS IN LIGHT OF THAT INFORMATION, I BELIEVE THE BALANCE OF EQUITIES TIPS MUCH MORE HEAVILY IN THE PLAINTIFFS' FAVOR THAN IN THE CITY'S.

THAT'S JUST ONE POINT I WANTED YOUR HONOR TO CONSIDER.

THE OTHER TWO POINTS ARE ABOUT -- ARE RELATED.

FIRST IS ABOUT EXACTLY WHAT WE'RE SEEKING HERE IS A STANDARD THAT GOVERNS THIS REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF. BECAUSE, AGAIN, WE ARE NOT TRYING TO STOP THE CITY FROM ENFORCING THE MANDATE. THE VACCINE MANDATE. WE ARE NOT TRYING TO FORCE THE CITY TO STOP THE SKELLY PROCESS ITSELF. ALL WE'RE DOING IS ASKING FOR THESE FIREFIGHTERS' PAYCHECKS TO BE PROTECTED.

AND THAT MATTERS BECAUSE WHEN YOU LOOK AT CASES LIKE COSTA MESA -- THE COSTA MESA CASE, WHICH IS CITED IN OUR REPLY BRIEF, 209 CAL.APP.4TH 298 -- THAT CASE WAS A CASE WHERE THE CITY OF COSTA MESA TRIED TO LAY OFF A HUNDRED CIVIL SERVICE EMPLOYEES WHILE CONTRACTING OUT THEIR JOBS, AND THE EMPLOYEES MOVED FOR A PRELIMINARY INJUNCTION TO BLOCK THAT AND THEY PREVAILED.

ONE OF THE REASONS THEY PREVAILED IS THAT THE COURT SAID -- BOTH THE TRIAL COURT AND THE COURT OF APPEAL SAID WHEN YOU'RE TALKING ABOUT EMPLOYMENT, ABOUT

INDIVIDUALS' PAYCHECK, PARTICULARLY SOMEONE WHO IS A CIVIL SERVANT, PUBLIC SERVANT WHO HAS EARNED A DUE PROCESS PROPERTY RIGHT IN HIS OR HER EMPLOYMENT, A DIFFERENT STANDARD APPLIES.

AND ALL YOU NEED TO ASK IS IS THERE SOME POSSIBILITY THAT THESE INDIVIDUALS MIGHT PREVAIL IN THE CASE?

THE REASON I MENTION THAT, YOUR HONOR, IS BECAUSE YOU ADDRESS SEVERAL OF OUR CLAIMS IN THE TENTATIVE -- IN THE TENTATIVE DECISION. I THINK THE MOST IMPORTANT OF THE CLAIMS IS THE STATE RIGHT OF PRIVACY UNDER THE CALIFORNIA CONSTITUTION.

AND THE CASE THAT I WOULD LIKE YOUR HONOR TO PLEASE CONSIDER IN THIS CONTEXT IS THE CASE OF MATTHEWS VERSUS BECERRA, 8 CAL.5TH 756, CITED EXTENSIVELY IN OUR MOTION AND ALSO IN OUR REPLY BRIEF.

BECAUSE WHAT MATTHEWS VERSUS BECERRA TALKED ABOUT WHAT -- THE NATURE OF THE PRIVACY RIGHT UNDER THE CONSTITUTION AND THE NATURE OF THE ANALYSIS THAT A COURT MUST DO WHEN IT ASSESSES ALLEGED INVASIONS OF THE PRIVACY RIGHTS. AND THERE ARE TWO KEY TAKEAWAYS FROM MATTHEWS VERSUS BECERRA THAT I'D LIKE THE COURT TO CONSIDER AND HOPEFULLY HAVE YOU TAKE THIS UNDER SUBMISSION.

THE FIRST IS JUSTICE LU'S COMMENT THAT RECOGNIZING THE VALUE OF FACTUAL DEVELOPMENT IN CASES INVOLVING THE STATE CONSTITUTIONAL RIGHT TO PRIVACY.

SECONDLY, WHAT JUSTICE LIU DID IN THIS CASE WAS REVERSE TWO LOWER COURT DECISIONS THAT SAID ON

DEMURRER YOU HAVE NO RIGHT TO PRIVACY FOR ALL THESE REASONS. AND JUSTICE LIU SAID YOU CANNOT DO THAT ON A DEMURRER.

IN CALIFORNIA, WITH OUR ROBUST RIGHT TO PRIVACY, CONSTITUTIONAL RIGHT TO PRIVACY, WHICH HAS NO EQUIVALENT IN THE FEDERAL CONSTITUTION, YOU NEED TO HAVE A FULL RECORD. WHEN YOU HAVE AN INVASION OF THE RIGHT TO BODILY INTEGRITY THAT YOU DO HERE, THERE IS A WHOLE ANALYSIS THAT HAS TO BE DONE UNDER HILL VERSUS THE NCAA THAT HAS NOT BEEN DONE YET --

THE COURT: BUT ISN'T THAT REALLY COMPARING TWO DIFFERENT -- CASES AT TWO DIFFERENT PROCEDURAL STEPS?

WE'RE TALKING OF JUSTICE LIU IN A DEMURRER SAYING THAT WE SHOULD NOT THROW OUT THE CASE BUT WE SHOULD CONTINUE AND ALLOW THE CASE TO PROCEED.

MR. STREET: CORRECT.

THE COURT: IF THIS COURT ADOPTS ITS TENTATIVE, I AM NOT THROWING OUT YOUR CASE. YOUR CASE WILL PROCEED AND YOU WILL HAVE THE DISCOVERY AND EVENTUALLY, IF YOU PURSUE IT, YOU WILL GO TO TRIAL.

SO, I'M NOT SURE THE RELEVANCE OTHER THAN, YOU KNOW, CITING CERTAIN QUOTATIONS THE RELEVANCE OF THAT CASE TO THIS ONE.

I AM NOT TOSSING OUT THE CASE; MY TENTATIVE IS SIMPLY TO DENY THE INJUNCTION.

AND YOU HAVE ALREADY STARTED DISCOVERY. AND I THINK IN YOUR REPLY BRIEF YOU SAID YOU NEED MORE DISCOVERY. AND YOU WILL GET MORE DISCOVERY.

MR. STREET: I APPRECIATE THE COURT SAYING THAT BECAUSE WE DO INTEND TO DO MORE DISCOVERY AND TO KEEP LITIGATING THIS CASE.

THE REASON I MENTIONED IT, YOUR HONOR, IS THAT WHEN YOU CONSIDER THIS MOTION AND YOU CONSIDER THE STANDARD THAT APPLIES -- AND, AGAIN, I TURN BACK TO THE COSTA MESA EMPLOYEE CASE WHICH TALKED ABOUT WHEN YOU HAVE THREAT OF DEPRIVING HUNDREDS OF PEOPLE, ANYBODY, MUCH LESS HUNDREDS OF PEOPLE OF THEIR PAYCHECKS --

THE COURT: IT'S NOT HUNDREDS, IT'S 105.

MR. STREET: 105.

AND THE COSTA MESA CASE, IT WAS ROUGHLY A HUNDRED. SO, HENCE WHY I MAKE THE ANALOGY.

THE COURT THERE SAID, REALLY, WE'RE LOOKING AT, IN A CASE LIKE THAT INVOLVING INDIVIDUALS' LIKELIHOOD, YOU LOOK AT -- AS FAR AS PROBABILITY OF SUCCESS ON THE MERITS, YOU LOOK AT WHETHER THERE IS SOME POSSIBILITY THAT THEY WILL PREVAIL.

SO, THE REASON I MENTION MATTHEWS IS BECAUSE, YOUR HONOR, I DO NOT THINK -- AND I'M NOT EXPECTING YOU TO MAKE A DECISION ON THIS TODAY. BUT I THINK WHEN YOU LOOK AT WHAT JUSTICE LIU SAID IN MATTHEWS, I THINK IT IS HIGHLY LIKELY THIS CASE WILL GET PAST DEMURRER, THAT THERE WILL BE MORE DISCOVERY DONE, THAT THERE MAY BE, YOU KNOW, A BENCH TRIAL OR SUMMARY JUDGMENT OR WHAT HAVE YOU.

SO, I DO NOT THINK YOU CAN SAY THERE IS NO POSSIBILITY OF SUCCESS HERE. AND THAT'S WHY IT MATTERS.

WHEN YOU CONSIDER THE POSSIBILITY OF SUCCESS -- NOW, HOW GREAT IT IS I DON'T KNOW, WE NEED TO SEE WHAT DISCOVERY INFORMATION WE GET IN DISCOVERY. BUT I DO THINK THERE IS SOME POSSIBILITY.

THE COURT: BUT YOUR ARGUMENT -- LET ME ASK IS YOUR ARGUMENT THAT IF THERE IS EVEN A SLIGHT POSSIBILITY OF SUCCESS I SHOULD GRANT THE INJUNCTION?

MR. STREET: I THINK THAT -- I WOULDN'T SAY A SLIGHT POSSIBILITY OF SUCCESS, I WOULD USE WHAT THE -- WHAT THE COURT SAID IN THE COSTA MESA CASE, WHICH IS "SOME POSSIBILITY."

AND THAT LANGUAGE HAS BEEN QUOTED MANY, MANY TIMES BY MANY, MANY OTHER COURTS.

SO, I THINK THAT.

AND I THINK THAT ON THIS RECORD BASED ON THE PLEADING STANDARD ALONE WITH THE STATE PRIVACY RIGHT CLAIM, NOT TO MENTION THE DUE PROCESS -- POTENTIAL DUE PROCESS VIOLATION, WHEN YOU CONSIDER THAT POSSIBILITY OF SOME POSSIBILITY OF SUCCESS AND NOW YOU TAKE THAT STANDARD AND YOU THINK ABOUT THAT BALANCING THE HARMS NOW WHERE WE'RE NOT ASKING FOR THESE FIREFIGHTERS TO BE PUT BACK ON DUTY SERVING THE PUBLIC, WE'RE JUST ASKING FOR THEM TO BE PAID WHILE THEY GO THROUGH THE SKELLY TERMINATION PROCESS, NOW I THINK THE BALANCE OF HARMS TILTS IN OUR FAVOR.

AND I THINK THAT IT CERTAINLY WARRANTS ORDERING THE CITY TO AT LEAST PAY THESE FIREFIGHTERS WHILE IT PUTS THEM THROUGH THE SKELLY PROCESS INSTEAD OF

TELLING THEM "GOOD LUCK, GO THROUGH WITHOUT PAY AND FILE A LAWSUIT AGAINST THE CITY, BUT YOU MAY GET SOMETHING BACK ONE DAY."

THE COURT: LET ME ASK YOU ONE QUESTION AND THEN I WILL TURN TO DEFENDANTS. AND, OF COURSE, WE WILL COME BACK TO PLAINTIFFS.

I KNOW IN THE COMPLAINT WHICH WAS FILED, I BELIEVE IN SEPTEMBER, THERE WAS SOME CITATION TO THE FACT THAT QUOTE -- I'M QUOTING FROM THE CLAIM: "COVID 19 NO LONGER POSES THE IMMEDIATE THREAT THAT IT MAY HAVE POSED LAST SPRING."

AND IT CITES THAT COVID CASES ARE DECREASING.

OBVIOUSLY, IN THE LAST SEVERAL WEEKS WITH THE OMICRON VARIANT AND THE DELTA VARIANT THE CASES ARE INCREASING. SHOULD THE COURT CONSIDER THE FACT THAT CASES ARE INCREASING EXPONENTIALLY AT THIS POINT IN LOS ANGELES?

MR. STREET: WELL, I THINK THAT IF THE COURT CONSIDERED THAT WE SHOULD -- IT SHOULD BE DONE BASED ON PROPER EVIDENCE, NOT NECESSARILY THESE REPORTS. AND I THINK THAT IT SHOULD BE CONSIDERED IN THE CONTEXT OF THE THREAT POSED OR NOT POSED BY PLAINTIFF -- BY THE INDIVIDUALS WHO ARE SEEKING THIS RELIEF.

SO, AS FAR AS CASES INCREASING, THAT IN AND OF ITSELF I DON'T THINK IS RELEVANT IN THIS MOTION, YOUR HONOR, BECAUSE WE'RE NOT ASKING FOR FIREFIGHTERS TO BE PUT BACK ON DUTY AND TO BE PUT BACK INTO THE PUBLIC. SO,

IT'S NOT -- I DON'T SEE THAT AS BEING DIRECTLY RELEVANT TO THE ISSUES UNDER CONSIDERATION IN THIS MOTION.

CERTAINLY THE -- THE HISTORY, OF COURSE, OF THE COVID 19 VIRUS HAS BEEN WE HAVE SEEN AN INCREASE AND DECREASE IN CASES. AND I EXPECT THAT THAT WILL CONTINUE.

SO, I THINK IT'S HARD TO JUDGE AN EVIDENTIARY MOTION LIKE THIS WHERE WE'RE REALLY FOCUSED ON, YOU KNOW, THE DUE PROCESS RIGHTS ON THE SKELLY PROCESS. THE DATA OF THAT ON INCREASES OR --

THE COURT: YOU MENTION THIS -- YOU SAY IT'S HARD TO BASE AN EVIDENTIARY HEARING SUCH AS THIS ONE ON THAT.

THIS IS AN EVIDENTIARY HEARING. I KNOW IN YOUR COMPLAINT YOU BRING UP THE FACT THAT CASES ARE DECREASING. WE KNOW THAT CASES ARE INCREASING NOW. SUBSTANTIALLY INCREASING. AND IT'S NOT CLEAR IF IT WAS RELEVANT IN YOUR COMPLAINT WHEN YOU WROTE IT WHETHER IT'S RELEVANT NOW THAT THE OPPOSITE IS HAPPENING AND IF THE COURT SHOULD CONSIDER THAT AS PART OF THE EVIDENTIARY HEARING.

IF THESE ARE IN THE DECLARATIONS THAT THE COURT CONSIDERS THAT THE CDC OR OTHER ITEMS THAT THE COURT CAN TAKE JUDICIAL NOTICE OF, SHOULD THE COURT CONSIDER THIS?

YOU KNOW, ARE WE IN A DIFFERENT SITUATION TODAY THAN WE WERE PERHAPS WHEN YOU FILED THIS LAWSUIT FOUR MONTHS AGO? THREE MONTHS AGO?

MR. STREET: WELL, I MEAN IT -- CERTAINLY IT'S A DIFFERENT SITUATION, YOUR HONOR, THE FACT THAT THERE IS A

NEW VARIANT NOW, THE CONTAINMENTNESS OF THE VARIANT. WHETHER THE VARIANT IS ESPECIALLY DEADLY OR NOT TO MY KNOWLEDGE ARE NOT KNOWN.

I HAVE HEARD, OF COURSE, THAT THERE IS OMICRON-RELATED DEATH IN THE UNITED KINGDOM. THERE MAY BE MORE. I JUST DON'T KNOW.

I MEAN, IT'S CERTAINLY BACK OF THE BACKGROUND.

BUT I THINK THERE WILL ALWAYS BE AN INCREASE AND DECREASE IN CASES. AND I THINK THAT IT IS HARD TO CONDITION THE PAYCHECK OF PUBLIC EMPLOYEES WHO HAVE PROPERTY INTEREST IN THEIR EMPLOYMENT ON THE INCREASE OR DISEASE OF CASES BECAUSE IT CHANGES SO OFTEN.

AND -- AND, IN FACT, I THINK THE FACT YOU SEE FLUCTUATING NUMBERS IS ONE OF THE REASONS WHY IT'S SO IMPERATIVE TO PROTECT INDIVIDUALS' PAYCHECKS BECAUSE WE DON'T KNOW WHAT THE FUTURE HOLDS.

THE COURT: LET ME TURN TO THE DEFENDANTS, THEN I WILL COME BACK TO. COUNSEL, YOU MAY HAVE A SEAT.

DEFENDANTS, YOU DON'T NEED TO STAND UP BECAUSE YOU ARE APPEARING VIRTUALLY.

WHO WOULD LIKE TO RESPOND?

YOU ARE MUTED. MISS GREGG, YOU ARE MUTED.

MS. GREGG: THANK YOU. I APOLOGIZE, YOUR HONOR.

GOOD AFTERNOON, YOUR HONOR. I WILL GO AHEAD AND RESPOND.

BUT I WOULD LIKE TO SAY FIRST OF ALL THE

CITY DID FILE A NOTICE OF RELATED CASES WITH REGARD TO THE UFLAC CASE THAT YOU MENTIONED IN YOUR OPENING REMARKS. THE PLAINTIFF -- OPPOSED THAT NOTICE OF RELATED CASE AND ACTUALLY ATTACHED A COPY OF THE COURT'S DECISION IN THAT CASE DENYING THE PRELIMINARY INJUNCTION WHICH WE FEEL ONLY FURTHER SUPPORTS THE CONCLUSION THAT THE TWO CASES ARE INDEED RELATED.

SO, I'M NOT SURE IF THAT HASN'T MADE IT TO YOU YET. BUT, YOUR HONOR, AFTER THE HEARING WE MAKE SURE THAT WE GET A COPY TO YOU IN CASE YOU DON'T ALREADY HAVE IT --

THE COURT: THAT -- SORRY TO INTERRUPT, COUNSEL.

THAT NOTICE OF RELATED CASE THE COURT HAS RECEIVED THAT. AND I'VE RECEIVED THE OPPOSITION.

MY COMMENT WAS THAT THERE ARE TWO OTHER CASES WHICH MAY OR MAY NOT BE RELATED. AND I JUST WAS SUGGESTING TO COUNSEL -- AND I DON'T KNOW IF IT'S EVEN CURRENT COUNSEL -- THAT IF THOSE OTHER CASES ARE ALSO RELATED NOTICES OF RELATED CASES SHOULD ALSO BE FILED FOR THE OTHER TWO CASES --

MS. GREGG: ABSOLUTELY, YOUR HONOR.

THE COURT: AS TO THE UFLAC UNITED FIREFIGHTERS CASE, THE COURT WILL MAKE ITS RULING ON WHETHER TO RELATE THE CASES SHORTLY.

MS. GREGG: THANK YOU. THANK YOU, YOUR HONOR, FOR CLARIFYING THAT.

I HAVE A COUPLE OF REMARKS IN RESPONSE TO MR. STREET'S OPENING COMMENTS.

BUT FIRST OF ALL, I'D LIKE TO SAY WE APPRECIATE THE VERY THOROUGH AND DETAILED TENTATIVE RULING YOU PROVIDED AND THAT THE STATE IS PREPARED TO SUBMIT ON THE TENTATIVE SUBJECT, OF COURSE, TO ANY QUESTIONS FROM THE COURT.

I'D LIKE TO HIT A COUPLE OF POINTS THAT MR. STREET MADE BEFORE THE COURT IF IT HAS QUESTIONS.

IF I MAY?

THE COURT: PLEASE, PROCEED.

MS. GREGG: OKAY. FIRST OF ALL, THE QUESTION ABOUT MR. STREET'S COMMENTS LEFT -- IGNORED ENTIRELY THE FACT THAT THE CITY HAS DECLARED A STATE OF A PUBLIC HEALTH EMERGENCY AND UNDER THAT DECLARATION STATE -- A PUBLIC HEALTH EMERGENCY HAS MADE A SPECIFIC FINDING, THE CITY COUNCIL HAS, THAT THE CITY LACKS THE FUNDS TO PAY UNVACCINATED EMPLOYEES ON PAID LEAVE WHILE SIMULTANEOUSLY CONTINUING TO PAY OVERTIME FOR EMPLOYEES TO REPLACE THOSE ABSENT EMPLOYEES AND THAT TO DO SO WOULD COMPROMISE THE CITY'S ABILITY TO PROVIDE VITAL AND ESSENTIAL PUBLIC SERVICES.

SO, I WANTED TO CALL YOUR ATTENTION TO THAT. THAT'S ON PAGE 3 OF EXHIBIT 11 OF THE GIRARD DECLARATION.

SECONDLY, THE REPRESENTATION -- THE REPRESENTATION WAS MADE THAT THESE EMPLOYEES HAVE BEEN ON UNPAID LEAVE.

AS YOU MAY HAVE NOTED IN THE PAPERWORK, EMPLOYEES WHO ARE REMOVED FROM DUTY DUE TO THE FAILURE TO

MEET THE CONDITION OF EMPLOYMENT FOR BEING VACCINATED ARE ALLOWED TO USE THEIR ACCRUED COMPENSATED TIME, TO THE EXTENT THEY HAVE IT, TO COVER THE PERIOD BETWEEN THE TIME WHEN THEY'RE PLACED ON UNPAID LEAVE AND THE TIME THEY HAVE THE SKELLY --

THE COURT: MISS GREGG, I WILL JUST ASK YOU TO SPEAK A LITTLE SLOWER FOR THE COURT REPORTER BECAUSE BOTH YOU AND SHE ARE VIRTUAL --

MS. GREGG: OF COURSE, YOUR HONOR --

THE COURT: -- SO, SLOW DOWN SLIGHTLY.

MS. GREGG: THANK YOU, YOUR HONOR.

SO, I JUST WANTED TO MAKE THAT POINT THAT UNDER THE TERMS OF THE LAST, BEST, AND FINAL EMPLOYEES WHO ARE REMOVED FOR CLEAR AND IMMEDIATE CONDITION OF EMPLOYMENT ARE ABLE TO USE COMPENSATED TIME TO COVER -- TO COVER THEIR TIME DURING THE PERIOD THAT THEY ARE AWAITING A SKELLY.

PLAINTIFFS' COUNSEL BROUGHT UP THE MITCHELL CASE.

WE DISTINGUISHED MITCHELL IN OUR PAPERS. IN THAT CASE THE EMPLOYEE WAS PLACED OFF LEAVE WITHOUT ANY NOTICE OR OPPORTUNITY TO RESPOND TO THE CHARGES WHICH HAD TO DO WITH MIS -- ACTUAL MISCONDUCT.

THIS CASE IS NOT ABOUT MISCONDUCT, IT IS ABOUT A FAILURE TO MEET A CONDITION OF EMPLOYMENT.

AND AS WE EXPLAINED IN OUR PAPERS, EVERY SINGLE FIREFIGHTER THAT'S BEEN PLACED ON UNPAID LEAVE HAS BEEN GIVEN A 48-HOUR OPPORTUNITY TO RESPOND TO THE

FAILURE TO MEET THE CONDITION OF EMPLOYMENT OF WHICH THEY HAVE HAD NOTICE SINCE AUGUST.

SO, THIS IS CLEARLY DISTINGUISHABLE FROM THE MITCHELL SITUATION.

AND, LASTLY, I'D LIKE TO JUST COMMENT ON THE FACT THAT CITY OF COSTA MESA HAS NO APPLICATION HERE AT ALL.

THERE WAS NO EMERGENCY DECLARED BY THE PUBLIC ENTITY IN THAT SITUATION, AND THE BALANCING OF HARMS IN THIS CASE IS CLEARLY DIFFERENT THAN THE SITUATION IN CITY OF COSTA MESA.

THE COURT: MISS JOHNSON-BROOKS, DO YOU WISH TO ENTER THE DISCUSSION?

MS. JOHNSON-BROOKS: NO, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

PLAINTIFF. MR. STREET. MR. HOWARD.

MR. STREET: YOUR HONOR, MY LAST POINT.

FIRST, GIVEN THAT THERE IS -- WELL, TO YOUR QUESTION ABOUT THE OMICRON VARIANT AND THE INCREASE IN CASES, I WOULD JUST NOTE FOR THE RECORD THAT THAT EVIDENCE -- THERE IS NO EVIDENCE ABOUT THAT BEFORE THE COURT. AND IF YOUR HONOR BELIEVES THAT IS RELEVANT OR WOULD LIKE TO HAVE EVIDENCE, WE ARE HAPPY TO PROVIDE THAT.

THE COURT: THE QUESTION WAS MORE THAT YOUR COMPLAINT POSITED THAT THERE WAS A DECREASE AND THAT THAT WOULD BE A REASON FOR GRANTING THE MOTION.

IF THAT'S A REASON FOR GRANTING THE MOTION

WHEN THERE IS A DECREASE, CONCOMITANTLY WHEN THERE IS AN INCREASE IN COVID PRESUMABLY BE A REASON NOT TO GRANT THE MOTION. AND I WAS JUST PURSUING THAT CHAIN OF THOUGHT.

MR. STREET: I UNDERSTAND.

I DON'T THINK -- I WOULD NOT INTERPRET US SAYING IN THE COMPLAINT THAT THEY -- A -- THERE BEING A DECREASE IN CASES WAS NECESSARY FOR US TO RAISE THESE CLAIMS. CERTAINLY THAT WAS SOMETHING THAT WAS RELEVANT AT THE TIME GIVEN THAT THE MANDATE WAS ADOPTED DURING A TIME WHEN CASES WERE DECREASING. SO, THAT WAS RELATIVE TO THE COMPLAINT.

BUT I THINK THE MORE IMPORTANT ASPECT OF THAT STATEMENT IN THE COMPLAINT IS THAT THE COVID -- THE RESPONSE TO COVID 19 NOW IS NOT THE SAME AS IT WAS DURING THE SPRING OF 2020. DURING THE SPRING OF 2020 THIS WAS A NOVEL VIRUS THAT NOBODY REALLY KNEW MUCH ABOUT. AND NOW WE HAVE THE BENEFIT OF A YEAR-AND-A-HALF, NEARLY TWO YEARS OF DEALING WITH IT. SO, TO SAY THIS IS A EMERGENCY THAT ALWAYS REQUIRES THE SAME RESPONSE NO MATTER HOW MUCH TIMES GOES ON AND HOW MUCH WE LEARN ABOUT THE VIRUS I DO NOT THINK IS WARRANTED UNDER THE LAW. I DO NOT THINK THAT THAT JUSTIFIES OVERRIDING THESE INDIVIDUALS' SKELLY RIGHTS.

I DO ALSO WANT TO MENTION ONE THING THAT THE CITY -- THAT IS, THIS PROCESS -- THIS TERMINATION PROCESS NOT BEING ABOUT DISCIPLINE OR NOT INVOLVING PUNITIVE ACTION.

AND I'D LIKE TO DIRECT THE COURT'S

ATTENTION TO A CASE THAT WE CITED IN OUR REPLY BRIEF, STEARNS VERSUS ESTES, A FEDERAL COURT CASE FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES, 504 F.SUP 998 WHERE A SIMILAR ARGUMENT WAS MADE BY THE GOVERNMENT THERE.

AND THE CITY'S DISCUSSION THAT THE DISCIPLINE IN THAT CASE WAS NOT PUNITIVE OR FOR A DISCIPLINARY REASON, THE COURT FOUND THAT THEREFORE THE COMPELLING REASON FOR SHORTCUTTING CAREER REMOVAL SAFEGUARDS IN DISCIPLINARY CASES ARE NOT PRESENT. THE PLAINTIFF, THUS, HAS AT LEAST RAISED A SERIOUS QUESTION WITH RESPECT TO WHETHER HIS PRE-DISCHARGE HEARING WAS ADEQUATE UNDER DUE PROCESS STANDARDS.

AND I THINK THAT'S THE KEY HERE, YOUR HONOR.

AND I THINK WHEN YOU LOOK AT THE CASES, THE TWO CASES BOTH NAMED GILBERT INTERESTINGLY THAT THE CITY CITED, WHERE THE UNITED STATES SUPREME COURT IN GILBERT VERSUS HOMAR SAID, YOU KNOW, UNDER FEDERAL CONSTITUTIONAL LAW THE GOVERNMENT DOES NOT HAVE TO GIVE A PRE-DEPRIVATION HEARING TO A STATE POLICE OFFICER -- STATE UNIVERSITY POLICE OFFICER WHO WAS ARRESTED AND CHARGED WITH FELONY DRUG POSSESSION AND IT EMPHASIZED THE FACT THAT PROSECUTORS WENT THROUGH AND OBTAINED EVIDENCE TO SHOW THIS, WELL, THAT'S A SERIOUS CRIME, AND, THEREFORE YOU DON'T NECESSARILY HAVE TO PROVIDE PRE-DEPRIVATION HEARING IN THAT CASE.

GILBERT VERSUS THE CITY OF DYNO (PHONETIC),

THE OTHER GILBERT CASE, IS VERY SIMILAR. POLICE OFFICER AGAIN WHO WAS DISCIPLINED, FIRED, FOR LEAKING CONFIDENTIAL INFORMATION ABOUT AN INVESTIGATION TO A THIRD PARTY. THE COURT SAID, YOU KNOW, THIS IS SERIOUS MISCONDUCT. IN THIS CASE YOU DON'T NECESSARILY HAVE TO GIVE A PRE-DEPRIVATION HEARING.

BUT THE SUPREME COURT IN GILBERT VERSUS HOMAR, YOUR HONOR, EMPHASIZED THAT THE CASES WHERE A PRE-DEPRIVATION HEARING MAY NOT BE NECESSARY ARE LIMITED AND YOU HAVE TO SHOW SUBSTANTIAL ASSURANCES THAT DISCIPLINE IS PROPER.

WE EXPLAIN IN OUR BRIEF WHY WE DON'T THINK THAT'S THE CASE, PARTICULARLY UNDER MATTEWS VERSUS BECERRA, AND WE'D URGE YOUR HONOR TO CONSIDER THAT AND CONSIDER REVISING YOUR TENTATIVE.

THE COURT: THANK YOU.

ANYTHING -- ANY RESPONSE OR ANYTHING FURTHER FROM DEFENDANT?

HEAD SHAKING NO --

MS. GREGG: NO, YOUR HONOR. THANK YOU.

THE COURT: THE COURT WILL -- WANTS TO THANK ALL COUNSEL, BOTH THE PLAINTIFFS' AND THE DEFENDANT'S, FOR PROFESSIONAL ARGUMENT.

THE COURT WILL TAKE THIS UNDER SUBMISSION AND ISSUE ITS RULING WITHIN THE NEXT 48 HOURS.

THE PRO HAC VICE ORDER IS ADOPTED GRANTING PRO HAC VICE FOR ROBERT F. KENNEDY.

THANK YOU, EVERYONE.

(ENDING TIME: 2:14 P.M.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 34

FIREFIGHTERS4FREEDOM FOUNDATION, PLAINTIFF, VS. CITY OF LOS ANGELES, DEFENDANT.	CASE NO. 21STCV34490 REPORTER'S CERTIFICATE

I, GAIL PEEPLES, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1 THROUGH 26, INCLIUSIVE, COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN DEPARTMENT 34 ON DECEMBER 20, 2021, IN THE MATTER OF THE ABOVE-ENTITLED CAUSE.

DATED THIS 23RD DAY OF DECEMBER, 2021.

GAIL PEEPLES, CSR NO. 11458
PRO TEMPORE REPORTER

EXHIBIT “C”

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 34

21STCV34490 December 21, 2021
FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY vs CITY OF LOS ANGELES 10:09 AM

Judge: Honorable Michael P. Linfield
Judicial Assistant: R. Navarro
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 12/20/2021 for Hearing on Motion for Preliminary Injunction CRS#:780368497618, now rules as follows:

SUBJECT: Motion for Preliminary Injunction

Moving Party: Plaintiff Firefighters4Freedom Foundation (“Firefighters4Freedom”)

Resp. Party: Defendant City of Los Angeles (“City”)

Plaintiff Firefighters4Freedom's Motion for Preliminary Injunction is DENIED.

I. SUMMARY OF ARGUMENT

Plaintiff Firefighters4Freedom is unlikely to prevail at trial. The unvaccinated firefighters have

not shown a due process violation, they have not shown that the City abused its discretion in passing the vaccination mandate, and they have not shown a sufficient violation of their privacy rights.

Further, the balance of harm weighs overwhelmingly against granting this injunction. This Court does not want to minimize the harm to the individual firefighter who is placed on unpaid leave. It is certainly a severe harm. But it is dwarfed by the death of a person due to COVID. We can reimburse a person for monetary losses caused by being put on unpaid leave. We cannot resurrect the dead.

As Plaintiff itself states in this Motion:

"'The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause.' Thus, 'as a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of harms that is likely to result from the granting or denial of interim injunctive relief.'" (Plaintiff's Motion for a Preliminary Injunction, p. 5:26 – p. 6:3 [citations omitted].)

Plaintiff's request for a preliminary injunction fails on both of these factors.

II. PRELIMINARY CONSIDERATIONS

A. Covid Cases are Rising at an Increasing Fast Rate

As of December 17, 2021, there have been 1,477,842 COVID-19 cases and 26,001 COVID-19 deaths in Los Angeles County, excluding the cities of Long Beach and Pasadena. (http://dashboard.publichealth.lacounty.gov/covid19_surveillance_dashboard/.) Covid cases are now 20% higher than they were just two weeks ago. ("Coronavirus in the U.S.: Latest Map and Case Count," New York Times, December 21, 2021, available at https://www.nytimes.com/interactive/2021/us/covid-cases.html.)

According to the Department of Veterans Affairs, the deadliest war in American history was the Civil War; some 500,000 Americans died during the course of the four-year war. (See, e.g., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf). Yet more than 800,000 people in the United States have died in less than two years due to COVID – more than in any war in the nation's history. More than 50,000,000 Americans have contracted COVID. As of December 16, 2021, our country was reporting more than 120,000 new coronavirus cases each day. ("Amid worries about Omicron, virus cases are jumping across the United States," New York Times, https://www.nytimes.com/live/2021/12/16/world/covid-omicron-vaccines.)

Plaintiff asserts that "Covid-19 no longer poses the immediate threat to [sic] that it may have posed last spring. Covid data for Los Angeles County posted Sept. 11, 2021, showed a 25.37% decrease in new cases and a 26.14% decrease in new hospital admissions." (Complaint, ¶ 5 [emphasis in original].) Even if this were true when the complaint was filed on September 17, 2021, it is clearly no longer true today. In just the last five days that that the Court has been writing this tentative decision, 14,727 people have been sickened by COVID-19 in Los Angeles County and 96 additional Angelenos have died of COVID-19. (See, "Public Health Reports 9 New Deaths and 3,512 New Positive Cases of Confirmed COVID-19 in Los Angeles County," December 19, 2021, available at http://publichealth.lacounty.gov/phcommon/public/media/mediapubdetail.cfm?unit=media&ou=ph&prog=media&cur=cur&prid=3581&row=25&start=1)

B. No Firefighter Being Put on Unpaid Leave has Requested a Medical or Religious Exemption

Plaintiff states that there are 105 unvaccinated firefighters who would be put on unpaid leave if this Court does not enjoin the enforcement of the vaccination mandate. (Reply, p. 2:23-24, p. 3:18-19.) According to the Los Angeles Fire Department, there are 3,435 uniformed fire personnel. (See, LAFD, "Our Mission," https://www.lafd.org/about/about-lafd/our-mission.) Thus, it appears that approximately 3% of the uniformed fire personnel are facing unpaid leave.

The Court has no evidence that any of the 105 suspended firefighters whom Plaintiff Firefighters4Freedom represents have requested a medical or religious exemption. They are simply refusing to get vaccinated for unspecified reasons. More importantly, no firefighter is being placed on unpaid leave because they have asked for a medical or religious exemption to the vaccine mandate. (See, e.g., (Girard Decl., ¶ 45; Everett Declaration, ¶¶ 9-12.)

C. Plaintiff's Hyperbole Does Not Help its Case

Plaintiff's "FACTS" section of its Motion begins with the statement, "The facts below are not disputed and can largely be established through judicial notice." (Motion, p. 2:15.) Plaintiff then asserts, without any citation to authority:

"Though nobody knew it at the time, the Covid-19 pandemic would lead to the greatest restrictions on liberty in American history." (Motion, MPA, p. 2:19-20.)

The Court notes that this is a mere assertion of counsel, and "an assertion is not evidence." (Paleski v. State Dept. of Health Services (2006) 144 Cal.App.4th 713, 732.)

More importantly, this assertion by counsel is just plain wrong. While COVID restrictions might impinge on the liberty of Americans, they pale in comparison to the enslavement of tens of millions of African Americans, the murder and forced relocation of millions of Native Americans, and the imprisonment of more than 115,000 Japanese Americans during World War II.

"An attorney's chief asset . . . is his or her credibility." (Christian Research Institute v. Alnor (2008) 165 Cal.App.4th 1315, 1326.) Such hyperbole undermines Plaintiff's counsel's credibility.

In addition, Plaintiff's Motion for a Preliminary Injunction sets up – and then proceeds to knock down – several straw men. The Motion spends several pages arguing that the City cannot terminate a Los Angeles Firefighter without affording him or her a Skelly hearing. (See Motion, p. 8:27 – 10:16.) However, this is irrelevant; under the City's vaccine mandate, no firefighter will be terminated without a Skelly hearing.

Similarly, Plaintiff states that "[t]he City does not explain how summarily firing hundreds of firefighters will solve the Covid-19 emergency." (Motion, p. 9:22-23.) Again, the City's

vaccination mandate does not result in the "summar[y] firing of hundreds of firefighters." Rather, under the mandate, those firefighters who are not vaccinated, or do not have a valid medical or religious exemption, will be placed on unpaid leave. (The Court also notes that Plaintiff's Reply states that there are 105 firefighters who may be placed on unpaid leave, not "hundreds" as stated in their Motion. (Cf. Reply, p. 2:23-24, p. 3:18-19; Motion, p. 9:22-23.)

D. FireFighters' Procedural Bill of Rights

Firefighters4Freedom argues that it is entitled to injunctive relief pursuant to the Firefighters' Procedural Bill of Rights. (Motion 3:17-25; Motion, pp. 2:10-13, 5:21, 6:23, 8:15, 9:1, 10:14-15, 11:14-28, 14:19 – p. 15:7.) This Court will not address Firefighters' Procedural Bill of Rights claims because these claims were not alleged in Firefighters4Freedom's First Amended Complaint.

III. BACKGROUND

On August 18, 2021, the Los Angeles City Council adopted Ordinance No. 187134, effective August 25, 2021. (Plaintiff's RJN, 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,

Ex. H; Girard Decl., ¶¶ 45-58, Ex. 11.)

On September 24, 2021, the Los Angeles Fire Department 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 failed to report their status. (Muus Decl., Exs. A, B.) On October 14, 2021, ongoing consultations with the City's various employee unions, including the United Firefighters Los Angeles City ("UFLAC") by the City Administrative Officer ("CAO") 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., ¶ 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., ¶ 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., 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., ¶ 22.) All 239 employees received at least 48-hours to respond to the notice. (Id.) As of December 9, 2021, no LAFD employee has been denied a requested medical or religious exemption. (Everett Decl., ¶ 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 the instant motion for a preliminary injunction. Defendant City of Los Angeles opposed the motion on December 10, 2021.

IV. ANALYSIS

21STCV34490 December 21, 2021
FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY vs CITY OF LOS ANGELES 10:09 AM

Judge: Honorable Michael P. Linfield
Judicial Assistant: R. Navarro
Courtroom Assistant: None
CSR: None
ERM: None
Deputy Sheriff: None

A. Requests for Judicial Notice

1. Firefighters4Freedom's Requests for Judicial Notice

Plaintiff Firefighters4Freedom requests that the Court take Judicial Notice of the following documents:

1. A report from the Congressional Research Service dated March 1, 2021, titled "Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials," a true and correct copy of which is attached hereto as Exhibit "A."

2. An Associated Press article dated September 16, 2020, titled "Biden says he trusts vaccines and scientists, not Trump," a true and correct copy of which is attached as Exhibit "B."

3. A Business Insider article dated October 7, 2020, titled "Kamala Harris says she will be 'first in line' for a coronavirus vaccine if health experts approve it, but 'if Donald Trump tells us we should take it, then I'm not taking it,'" a true and correct copy of which is attached as Exhibit "C."

4. A Reuters article dated October 19, 2020, titled "California says it will independently review coronavirus vaccine," a true and correct copy of which is attached as Exhibit "D."

5. A Good Day Sacramento report from June 1, 2019, titled "Gov. Newsom Has Doubts About Having Government Officials Sign Off On Vaccine Exemptions," a true and correct copy of which is attached as Exhibit "E."

6. A BBC report from December 5, 2020, titled "Joe Biden: Covid vaccination in US will not be mandatory," a true and correct copy of which is attached as Exhibit "F."

7. A Nature article dated February 16, 2021, titled "The coronavirus is here to stay — here's what that means," a true and correct copy of which is attached as Exhibit "G."

8. Ordinance No. 187134 adopted by the Los Angeles City Council on August 16, 2021, a true and correct copy of which is attached as Exhibit "H."

9. A memorandum from Los Angeles Mayor Eric Garcetti to all City Department Heads dated October 28, 2021, regarding "Mandatory Implementation of Non-Compliance with the Requirements of Ordinance No. 187134 ("COVID-19 VACCINATION REQUIREMENT FOR ALL CURRENT AND FUTURE CITY EMPLOYEES")," a true and correct copy of which is attached as Exhibit "I."

10. The order and opinion from the Fifth Circuit U.S. Court of Appeals dated November 12, 2021 affirming a stay on Biden's COVID-19 vaccine mandate, a true and correct copy of which is attached as Exhibit "J."

11. A Los Angeles Times article dated November 3, 2021, titled "'This could be my room for a few days': Garcetti tests positive, isolates in Scotland," a true and correct copy of which is attached as Exhibit "K."

12. A press release from California Governor Gavin Newsom's office, dated June 11, 2021, titled "As California Fully Reopens, Governor Newsom Announces Plans to Lift Pandemic Executive Orders," a true and correct copy of which is attached as Exhibit "L."

The Court GRANTS Plaintiff's requests as to Requests Nos. 1 and 8-10, and DENIES Plaintiff's requests as to Requests Nos. 2-7, 11 and 12. (Evid. Code, § 452, subd. (c).)

2. The City of Los Angeles' Requests for Judicial Notice

Defendant City of Los Angeles requests that the Court take Judicial Notice of the following documents:

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-ofvaccines. 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-testingnot-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).

The Court GRANTS Defendant's requests for judicial notice. (Evid. Code, § 452, subd. (c).)

B. Legal Standards

1. Preliminary Injunctions

"A preliminary injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefore." (CCP, § 527(a).) The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. (Jamison v. Department of Transportation (2016) 4 Cal.App.5th 356, 361; Major v. Miraverde Homeowners Ass'n. (1992) 7 Cal. App. 4th 618, 623.)

In deciding whether to issue a preliminary injunction, courts "should evaluate two interrelated factors . . . The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70; Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 633; Robbins v. Superior Court (1985) 38 Cal.3d 199, 206.)

As Plaintiff Firefighters4Freedom states, "[t]he ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." IT Corp. v. County of Imperial, 35 Cal.3d 63, 73 (1983)." (Motion, p. 5:26–28.)

"The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (Butt v. State of California (1992) 4 Cal.4th 668, 678.) "Before issuing a preliminary injunction, the trial court must 'carefully weigh the evidence and decide whether the facts require[] such relief.' [Citation.] The court evaluates the credibility of witnesses and makes factual findings on disputed evidence." (Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.)

"In seeking a preliminary injunction, [the party seeking the injunction] b[ears] the burden of demonstrating both likely success on the merits and the occurrence of irreparable harm." (Savage v. Trammell Crow Co. (1990) 223 Cal.App.3d 1562, 1571; Citizens for Better Streets v. Board of Sup'rs of City and County (2004) 117 Cal.App.4th 1, 6.) A plaintiff seeking injunctive relief must show the absence of an adequate damages remedy at law. (CCP §526(a)(4).) Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. (Pacific Designs Sciences Corp. v. Sup.Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110.) A preliminary injunction must not issue unless "it is reasonably probable that the moving party will prevail on the merits." (San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal.App.3d 438, 442.)

Irreparable harm occurs where someone will be significantly injured in a manner that cannot later be repaired. (People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118

Cal.App.3d 863, 870–871.) Threats of irreparable harm must be imminent. (Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal.App.4th 1069, 1084.) "Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties." (Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471; see also O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1464 ["In reviewing the injunction issued in this case, we must also bear in mind the extent to which separation of powers principles may affect the propriety of injunctive relief against state officials. In that context, our Supreme Court has emphasized that 'principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials.'"])

Code of Civil Procedure sections 525-533 "provide the primary statutory authority for injunctions pending trial." (Stevenson v. City of Sacramento (2020) 55 Cal.App.5th 545, 551.) Code of Civil Procedure section 527, together with Cal. Rules of Court Rules 3.1150 - 3.1151 outline basic injunction-seeking procedure. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2021) ¶ 9:501.) A preliminary injunction ordinarily cannot take effect unless and until the plaintiff provides an undertaking for damages which the enjoined defendant may sustain by reason of the injunction if the court finally decides that the plaintiff was not entitled to the injunction. (See Code Civ. Proc. § 529, subd. (a); City of South San Francisco v. Cypress Lawn Cemetery Assn. (1992) 11 Cal. App. 4th 916, 920.)

2. Skelly v. State Personnel Bd. and Related Cases

The California Supreme Court in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 determined that "the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process." (Id. at p. 206.) Thus, a

person who enjoys "a legally enforceable right to receive a government benefit provided certain facts exist" holds "a property right protected by due process." (Id. at p. 207.) However, "due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action." (Id. at p. 214.) Rather, minimum pre-removal due process procedure 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.)

Our cases recognize that "due process is flexible and calls for such procedural protections as the particular situation demands." (Morrissey v. Brewer (1972) 408 U.S. 471, 481.) "Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." (Id.) To determine what process is constitutionally due, courts balance three factors. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, 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, 334-335; see also Gilbert v. Homar (1997) 520 U.S. 924, 931–932.) Skelly "does not reject the concept that under extraordinary circumstances the governmental interest in prompt removal of its employees may outweigh the employee's right to a predismissal hearing." (Mitchell v. State Personnel Bd. (1979) 90 Cal.App.3d 808, 812.)

C. Discussion

Plaintiff Firefighters4Freedom moves the Court for a preliminary injunction to bar Defendant City of Los Angeles from "firing any firefighters employed by the City – or taking any other adverse action tantamount to termination, including placing the firefighters on unpaid leave – for non-compliance with the City's new Covid-19 vaccination mandate unless and until the City has

provided the firefighters with due process required by the California Supreme Court's decision in Skelly v. State Personnel Board, (1975) 15 Cal. 3d 194." (Motion, p. 2:5-10.)

To grant a preliminary injunction in this case, the Court must find that Firefighters4Freedom is both likely to succeed on the merits at trial and that the balance of harms weighs in Plaintiff's favor.

1. Plaintiff Firefighters4Freedom is Unlikely to Succeed on the Merits

a. Due Process

Firefighters4Freedom argues that its motion "should be granted because Firefighters4Freedom is likely to prevail on its claim that the City cannot fire the firefighters en masse without providing them due process, a right to adequately defend, and a pre-deprivation hearing before an impartial hearing officer, as required by Skelly and the Firefighters Bill of Rights." (Motion, p. 6:20-23.) The firefighters argue that although "the type of hearing that must be provided varies on the exigency and the severity of the proposed discipline, '[t]he potential deprivation of a person's means of livelihood demands a high level of due process.'" (Motion, p. 7:7-9, quoting Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal.App.4th 95, 110.)

The firefighters argue that the City's current procedures fall short of this standard, because "the Mayor's October 28 memo" informs municipal workers who do not comply with the City's Covid Vaccine Mandate by December 18, 2021 that they "shall be placed off duty without pay pending service of a Skelly package that includes a Notice of Proposed Separation." (Motion, p. 7:17-21; Plaintiff's Request for Judicial Notice, Ex. I.) Plaintiff argues that firefighters face a

choice between unpaid leave or complying with a policy with which they disagree – a policy that they contend violates their constitutional rights and their collective bargaining agreement. (Motion, p. 7:21-24.) The firefighters argue they face indefinite unpaid leave because "no one knows how long it will take the City to process the Skelly hearings for employees who do not obey the Covid Vaccine Mandate." (Motion, p. 8:7-9.) The firefighters argue (albeit without evidence) that the City "will take far longer than seven months to conduct Skelly hearings for most city employees, resulting in a far greater deprivation of liberty here than the one that violated due process in Bostean." (Motion, p. 8:11-13; cf. Ponte v. County of Calaveras (2017) 14 Cal.App.5th 551, 556 ["the arguments of counsel in a motion are not a substitute for evidence, such as a statutorily required affidavit." [emphasis in original]; Fuller v. Tucker (2000) 84 Cal.App.4th 1163, 1173 [absolutely no evidence was submitted to support this factual claim . . . . Argument of counsel is not evidence."])

Plaintiffs' citation to Bostean v. Los Angeles Unified School District does not help their argument. (See Motion, p. 7:25 – p. 8:5.) According to Plaintiffs' own summary of the case, Bostean, a "Los Angeles school district . . . employee[, was put] on unpaid medical leave for seven months due to a medical condition." (Motion, p. 7:28 – p. 8:1.) He then sued and was awarded his back pay. It is uncontested that the unvaccinated firefighters in this case will all be afforded a Skelly hearing; if the employees believe it is warranted, they will be able to sue for back pay.

"Although due process generally requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, the United States Supreme Court has 'rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property.' . . .

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands. This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process

satisfies the requirements of the Due Process Clause. 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, supra, 63 Cal.App.4th at pp. 112-113 [cleaned up].)

Firefighters4Freedom cites International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal.3d 191 to support its argument that "even if an emergency exists, the government must explain why it must terminate its employees without a Skelly hearing. (Motion, p. 9:12-13.) This citation is inapposite, because the IBEW court did not find that the labor dispute that gave rise to a strike among firefighters was an emergency. (Id., supra, 34 Cal.3d at p. 209 ["We need not consider whether some emergencies justify dispensing with predismissal safeguards for, even assuming the strike constituted an emergency, the city fails to explain how dismissing all of its striking employees without a hearing would alleviate the emergency."]) The City notes that Skelly "evolved from a nonemergency situation" and does not offer direct authority for an ongoing pandemic fueled by a highly communicable novel coronavirus that caused "over 49,000,000 cases of COVID-19 in the U.S., and nearly 800,000 deaths in the U.S., with the majority of those deaths having been in older adults." (Opposition, p. 7:11-13; Mitchell, 90 Cal.App.3d at 812; Manoukian Decl., ¶ 8.)

This Court must weigh the unvaccinated municipal employees' "significant private interest in the uninterrupted receipt of his paycheck" against the City's "significant interest in removing unvaccinated employees swiftly from the workplace to stem the spread of COVID-19 and protect other employees and the public." (See Bostean, 63 Cal.App.4th at p. 113; Opposition, p. 8:10-11.)

According to LAFD Battalion Chief Scott Quinn who is the Commander of the Risk Management Section of the Fire Department:

"LAFD firefighters work 24 hours on, then 24 hours off, then 24 hours on, then 24 hours off, then 24 hours on, followed by four days off, but may work additional days by working overtime or by trading days with other firefighters in the same or another firehouse;

"[A]s part of the LAFD efforts to protect firefighters in the workplace from COVID-19, firefighters are instructed to keep socially distant as much as possible and wear masks in the firehouse, except when eating and sleeping." (Quinn Declaration, ¶¶ 6, 7.)

Despite these precautions, 1,134 LAFD members tested positive for coronavirus between March 15, 2020 and December 8, 2021 and had to be sent home or told to remain at home. (Id., ¶¶ 8, 9.) Two firefighters have died from COVID. (Id., ¶ 18.) "[D]ata collected from the inception of the COVID-19 pandemic in March of 2020 through to the present supports a conclusion of firefighter to firefighter spread in the workplace." (Id., ¶ 14.)

To combat the spread of COVID-19, multiple effective vaccines have been developed and tested in the United States, European nations, China, and elsewhere. (Manoukian Decl., ¶¶ 9, 14.) "The Pfizer and Moderna mRNA vaccines also have provided exceptional protection against symptomatic COVID-19 cases, asymptomatic cases, and transmission. The vaccines are also highly efficacious against variants, particularly variants of concern such as the Delta variant. This success is due to the broad immune response elicited by the mRNA vaccines." (Manoukian Decl., ¶ 14.)

The Court finds that the first and third Mathews factors weigh in the City's favor. Evidence has been presented that COVID-19's exceptional communicability reduces the LAFD's available workforce and hence reduces the City's readiness to respond to emergency situations. The second Mathews factor, the risk of an erroneous deprivation of a private interest through the

procedures used, appears low. Ample notice of the City's vaccine mandate was provided to municipal employees. The Ordinance that "requires all City employees to report their vaccination status no later than October 19, 2021 and be fully vaccinated for COVID-19 – subject to a medical or religious exemption – by October 20, 2021" was passed by the City Council on August 18, 2021, and took effect on August 25, 2021. (Girard Decl., ¶ 5.) The City's unions were consulted about the Ordinance two days prior to its passage, and the City received input from several City unions regarding Ordinance language. (Girard Decl., ¶¶ 8-9.) Changes to the Ordinance were made as a direct result of that consultation. (Id.) Union consultation continued following passage of the Ordinance, including the United Firefighters of Los Angeles. (Girard Decl., ¶¶ 10-14.) After significant negotiation, the City presented to City unions its Last, Best, and Final Offer ("LBFO") regarding Ordinance noncompliance on October 14, 2021. (Girard Decl., ¶ 44.)

City employees "who refused to sign the Notice and/or failed to comply with its requirements" were "first given at least 48 hours to respond" before unpaid leave pending a formal Skelly hearing on their proposed separation from City service. (Opposition, p. 9:18-20; Everett Decl., ¶¶ 17-19.) This pre-removal opportunity to be heard satisfies both the minimum pre-removal due process procedure under Skelly and the due process flexibility, especially in emergency situations, envisioned by Morrissey and Mitchell.

For purposes of this Motion, the Court finds that the unvaccinated firefighters' due process rights are not violated by the City's Ordinance.

b. Abuse of Discretion

A plaintiff challenging a government's emergency ordinance "must assume the burden of showing its invalidity," which "includes surmounting all possible intendments, presumptions,

and reasonable doubts indulged in favor of the Ordinance's validity." (Sonoma County Organization etc. Employees v. County of Sonoma (1991) 1 Cal.App.4th 267, 275.)

Firefighters4Freedom must show that the City Council abused its discretion on October 26, 2021, when it declared an emergency in the Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134. (Girard Decl., Ex. 11.) This Resolution references the City Council's ratification of the Mayor's Declaration of Local Emergency, dated March 4, 2020, where "he declared that conditions of disaster or extreme peril to the safety of persons have arisen in the City of Los Angeles (City) as a result of the introduction of COVID-19, a communicable coronavirus disease." (Girard Decl., ¶ 3, Ex. 11.) In Sonoma County, the recitals contained within the ordinance that declared the existence of an emergency "constituted prima facie evidence of the fact of the emergency." (Sonoma County, supra, 1 Cal.App.4th at p. 276.)

Nonetheless, Firefighters4Freedom does not consider the ongoing COVID-19 pandemic an emergency sufficient to relieve the City of its Skelly obligations. (Motion, p. 8:27 – p. 10:16.) The firefighters argue that the City "does not explain how summarily firing hundreds of firefighters will solve the Covid-19 emergency." (Motion, p. 9:22-23.) Plaintiff further suggests that the City will not suffer harm from complying with its interpretation of Skelly, stating that the "only harm it could possibly assert is the alleged 'imminent threat' to public health posed by unvaccinated people that Mayor Garcetti mentioned, a political statement that has no evidentiary support and which is belied by the City's reliance on firefighters throughout the pandemic." (Motion, p. 11:20-23.)

The firefighters' evidentiary showing is insufficient to persuade the Court that the City's Declaration of Local Emergency was declared and ratified in error. The Resolution Implementing Consequences for Non-Compliance with the Requirements of Ordinance No. 187134 reference multiple recitals, including the following:

"WHEREAS, the City Council has repeatedly renewed the Mayor's March 4, 2020 Declaration of Local Emergency, most recently on September 21, 2021;

WHEREAS, extensively during the period of this local emergency, the Mayor of Los Angeles has exercised his emergency authority under the Los Angeles Administrative Code Section 8.29 by issuing Public Orders and Directives to City Departments in furtherance of the ongoing need to preserve life and property of individuals living and working in the City;

WHEREAS, the COVID-19 pandemic continues to change and evolve, and such emergency orders and directives will continue to be necessary;

WHEREAS, as of October 18, 2021, out of a total of 53,168 City employees, 37,524 employees have reported their status as "fully vaccinated", 1,250 employees have reported their status as "partially vaccinated", 4,872 employees have reported their status as "not vaccinated", 1,839 employees have reported their status as "decline to state", and 7,683 employees have failed to report their status." (Girard Decl., Ex. 11.)

It cannot be seriously argued that the City did not have sufficient evidence to declare a state of emergency. Over 97% of all COVID-19 hospitalizations in the United States occur among our unvaccinated population. (Manoukian Decl., ¶ 17.) Breakthrough infections are "typically associated with mild illness and no symptoms, and vaccinated individuals are less likely to transmit COVID-19 compared to those who are not vaccinated. (Id., ¶ 16.) Evidence of fire station COVID-19 outbreaks merely underscores the fact that the COVID-19 global pandemic continues to upend daily life and threaten public safety.

As indicated above, judicial review of a City's declaration of an emergency "is one of pronounced deference to the legislative decision." (Sonoma County, supra, 1 Cal.App.4th at p. 276.)

For purposes of this Motion, the Court finds that that the City did not abuse its discretion in declaring an emergency.

c. 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.) Defendant 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.)

Firefighters4Freedom considers the City's Covid-19 vaccination requirement a violation of its members' right to privacy, arguing that the City's Covid Vaccine Mandate "qualifies as a serious invasion of the firefighters right to bodily autonomy" under the California Constitution that calls into question any application of rational basis review. (Motion, p. 12:23 – p. 13:3.) In its opposition, the City cites to an extensive line of cases where courts have held that the United States Constitution and the California Constitution permit compulsory vaccinations. (Opposition, p. 1:21-25; Jacobson v. Massachusetts (1905) 197 U.S. 11, 39; Zucht v. King (1922) 260 U.S. 174, 176 ["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."]; French v. Davidson (1904) 143 Cal.658, 662 ["When we have determined that the act is within the police power of

the state, nothing further need be said."]; Brown v. Smith (2018) 24 Cal.App.5th 1135, 1143-1144; Abeel v. Clark (1890) 84 Cal. 226, 230 ["Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether [it should be required], and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class."]) The City further cites recent cases where courts "rejected attempts to enjoin COVID-19 vaccine mandates." (Opposition, p. 2:1; Klaassen v. Trs. Of Ind. Univ., 7 F.4th 592, 2021, U.S. App. LEXIS 22785 (7th Cir. Aug. 2, 2021) [denial of preliminary injunction seeking to enjoin student vaccine mandate]; Kheriaty v. Regents of the Univ. of California, 2021 U.S. Dist. LEXIS 196639, 2021 WL 5238586 (C.D. Cal. Sept. 29, 2021) [University of California's vaccine mandate upheld]; America's Frontline Doctors v. Wilcox, 2021 U.S. Dist. LEXIS 144477, 2021 WL 4546923 (C.D. Cal. July 30, 2021) [University of California's vaccine mandate upheld]; Bridges v. Houston Methodist Hosp., 2021 U.S. Dist. LEXIS 110382 (S.D. Tex. June 12, 2021) [denying TRO sought against hospital policy requiring COVID-19 vaccination for employees].)

One month ago, a unanimous opinion of the U.S. Court of Appeals for the Second Circuit upheld New York's vaccine mandate:

"Faced with an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of over 750,000 in the United States and some 55,000 in New York, the state decided as an emergency measure to require vaccination for all employees at health care facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated. This was a reasonable exercise of the State's power to enact rules to protect the public health." (We The Patriots USA v. Hochul (2d Cir. 2021) 17 F.4th 266, 290.)

Just two days ago, the U.S. Court of Appeals for the Sixth District reversed the U.S. Court of Appeals for the Fifth Circuit [Exh. 10 to Plaintiff's Request for Judicial Notice] and reinstated Pres. Biden's vaccine mandates for employers with over 100 employees. The Court found that "[v]accinated employees are significantly less likely to bring (or if infected, spread) the virus

into the workplace." Further, "mutations of the virus become increasingly likely with every transmission, contributing to uncertainty and greater potential for serious health effects. Based on this record, the symptoms of exposure are therefore neither "easily curable and fleeting" nor is the risk of developing serious disease speculative." (In re MCP No. 165 (2021 U.S.App. LEXIS 37349, 2021 FED App. 0287P, 6th Cir., December 17, 2021), available at https://int.nyt.com/data/documenttools/sixth-circuit-osha-ruling/86fd0c47a33a99ba/full.pdf)

Of course, none of these federal decisions are binding on this Court. "[F]ederal decisional authority is neither binding nor controlling in matters involving state law." (Howard Contracting, Inc. v. G.A. MacDonald Construction Co. (1998) 71 Cal.App.4th 38; Nagel v. Twin Laboratories, Inc. (2003) 109 Cal.App.4th 39, 55.) Nor is this court bound by the decisions of lower federal courts interpreting federal law. (People v. Williams (1997) 16 Cal.4th 153, 190.) Nonetheless, these decisions can be persuasive.

The United States Supreme Court in Jacobson "essentially applied rational basis review" to a law that criminalized the refusal to submit to a state ordinance requiring all adults to be inoculated against smallpox in Massachusetts. (Kheriaty, 2021 WL 5238586, at *6; see also Roman Catholic Diocese of Brooklyn v. Cuomo (2020) 141 S.Ct. 63, 70 (Gorsuch, J., concurring) ["Although Jacobson pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption."]) Citing Jacobson in the COVID-19 era, courts across the country have concluded that Jacobson established that there is no fundamental right to refuse vaccination. (Williams v. Brown (D. Or., Oct. 19, 2021, No. 6:21-CV-01332-AA) 2021 WL 4894264, at *8; see also Klaassen, 7 F.4th at 593 ["Given Jacobson v. Massachusetts, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."]; Johnson v. Brown (D. Or., Oct. 18, 2021, No. 3:21-CV-1494-SI) 2021 WL 4846060, at *13]"As Jacobson reveals, the right to refuse vaccination is not deeply rooted in this nation's history. . . In fact, the opposite is true."].) Like the plaintiff in Williams, Firefighters4Freedom "contend[s] that the vaccine mandates implicate a fundamental right to bodily integrity and privacy." (Motion, p. 13:2-3.) Unlike

Williams, the firefighters ask the Court to recognize the that "under California privacy law, the standard of review depends on the "specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests. (Motion, p. 12:24-26; Hill, supra, 7Cal.4th at p. 34.)

Over 130 years ago, our Supreme Court found that "[v]accination [is] the most effective method known of preventing the spread of the disease." (Abeel v. Clark (1890) 84 Cal. 226, 230.) The scientific consensus has not changed since then.

COVID-19 vaccines offer the public their best chance to avoid COVID infection and/or minimize its harms. The Managing Physician for the City of Los Angeles, Medical Services Division, notes a recent Oxford University study that examined nearly 150,000 contacts traced from roughly 100,000 initial cases found that "when infected with the Delta variant, a given contact was 65 percent less likely to test positive if the person from whom the exposure occurred was fully vaccinated with two doses of the Pfizer vaccine." (Manoukian Decl., ¶¶ 2, 16.) The firefighters' assertion that "natural immunity does actually provide immunity whereas the COVID vaccines do not" is, simply put, contrary to the current scientific consensus. "Antibodies generated by mRNA COVID-19 vaccines outperform natural immunity for potency against variants," as Dr. Manoukian attests. (Id., ¶ 18.)

To be clear, Jacobson does not endorse blind deference to the state during public health emergencies. The Jacobson court allowed individuals with legitimate medical concerns to oppose vaccine mandates that may threaten their health. (Jacobson, 197 U.S. at pp. 38-39.) But as indicated above, the Court has no evidence that any of the 105 suspended firefighters whom Plaintiff Firefighters4Freedom represents have requested a medical (or religious) exemption. No firefighter is being placed on unpaid leave because they have asked for a medical or religious exemption to the vaccine mandate. (See, e.g., (Girard Decl., ¶ 45; Everett Declaration, ¶¶ 9-12.)

The appropriate standard of review for the firefighters' right of privacy concerns is rational basis review. "[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (City of Cleburne, Tex. v. Cleburne Living Center (1985) 473 U.S. 432, 440.)

The City's goal "to have a vaccinated workforce" to aid in "stemming the spread of COVID–19 is unquestionably a compelling interest." (Ordinance No. 187134, Plaintiff's RJH, Ex. H, Sec. 4.702; Roman Catholic Diocese of Brooklyn v. Cuomo, supra, 141 S.Ct. at p. 67.)

The City's Vaccine Mandate requires that "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, no later than October 19, 2021." It further states that "employees will not have the option to 'opt out' of getting vaccinated and become subject to weekly testing." The Court finds that these requirements are rationally related to a legitimate municipal interest.

Firefighters4Freedom states that the right to privacy is expressly protected in the California Constitution, which they correctly note is more protective of privacy than federal constitutional law. However, the firefighters do not cite authority for their position that a reasonable expectation of privacy amid a global novel coronavirus pandemic excuses municipal employees from the vaccine mandates. Before the Hill burden may shift to the City, the firefighters must show they have a reasonable expectation of privacy in these circumstances. These circumstances include 50,636,126 total COVID-19 cases in the United States of America and 802,969 total COVID-19 deaths nationally as of December 18, 2021. (See Hill, supra, 7 Cal.4th at pp. 39-40; Centers for Disease Control and Prevention COVID Data Tracker; https://covid.cdc.gov/covid-data-tracker/#trends_dailycases.)

21STCV34490 December 21, 2021
FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY vs CITY OF LOS ANGELES 10:09 AM

Judge: Honorable Michael P. Linfield
Judicial Assistant: R. Navarro
Courtroom Assistant: None
CSR: None
ERM: None
Deputy Sheriff: None

Three years ago, the Court of Appeal rejected an argument that a vaccination requirement for students enrolling in public schools infringed on the students' substantive due process rights and right to bodily autonomy and to refuse medical treatment. (Love v. State Dept. of Education (2018) 29 Cal.App.5th 980.) The court held that "[i]t is well established that laws mandating vaccination of school-aged children promote a compelling government interest of ensuring health and safety by preventing the spread of contagious diseases." (Id. at p. 990.)

This Court finds that Plaintiff Firefighters4Freedom has not met its burden.

"A person's medical history and information and the right to retain personal control over the integrity of one's body is protected under the right to privacy. Although the right is important, it is not absolute; it must be balanced against other important interests and may be outweighed by supervening public concerns." (Love v. State Dept. of Education (2018) 29 Cal.App.5th 980, 993 [cleaned up].)

In the present case, "supervening public concerns" – namely the City's goal to "protect the City's workforce and the public that it serves" from COVID-19 transmission and infection – clearly outweigh Firefighters4Freedom's privacy rights. (Ordinance No. 187134, Plaintiff's RJH, Ex. H, Sec. 4.701(a).)

During oral argument, Plaintiff put much weight on Costa Mesa City Employees' Assn. v. City of Costa Mesa, arguing that the case held that the employees need only show " 'some possibility' that they will prevail on the merits." (See Reply, p. 9:28 – p. 10:1.) In Costa Mesa, the trial court found that the balance of equities required granting the preliminary injunction. (Costa Mesa City Employees' Assn. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305.) In Costa Mesa, the Court of Appeal found that the trial did not abuse its discretion in finding that "irreparable injury was met in this case" and also found that "the trial court did not abuse its discretion in

determining the equities favored the implementation of a preliminary injunction." (Id. at pp. 308, 309.) When a Court of Appeal finds that a trial court did not abuse its discretion, this does not mean that the Court of Appeal endorses the trial court's decision. It appears that the Costa Mesa court would also have upheld the trial court had it decided not to issue an injunction.

It is true, a Plaintiff argues, that Costa Mesa stated that plaintiffs needed to show "some possibility" of success of the merits. (Id. at p. 309.) For this conclusion, Costa Mesa cites to Butt v. State of California; but in that case, our Supreme Court found that "[t]he trial court expressly found '[t]here is a reasonable probability that plaintiffs will succeed on the merits of their case.'" (Butt v. State of California (1992) 4 Cal.4th 668, 678.) In this case, as stated earlier in this opinion, this Court has found that Plaintiff is unlikely to prevail on their case. (See, supra, § I, "Summary of Argument".) Further, Costa Mesa did not involve an emergency ordinance designed to save the lives of untold thousands of residents. Costa Mesa is not apposite.

The Court does not find a privacy violation under the California Constitution.

Plaintiff has failed to demonstrate a likelihood of prevailing on its due process, abuse of discretion or privacy claims. Therefore, the Court denies Plaintiff's request for a preliminary injunction.

2. Balancing of Hardships

Even if Plaintiff could show a likelihood of success on the merits, the balance of hardships weighs heavily in favor of denying Plaintiff's request for a preliminary injunction.

For this second factor, the court must consider "the interim harm that the plaintiff would be likely to sustain if the injunction were denied as compared to the harm the defendant would be

likely to suffer if the preliminary injunction were issued." (Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 749.) "Irreparable harm" generally means that the defendant's act constitutes an actual or threatened injury to the personal or property rights of the plaintiff that cannot be compensated by a damages award. (See Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal.App.3d 405, 410.)

"Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. . . . This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury." (Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471.)

Plaintiff argues that the balance of hardship tips in its favor because the firefighters it represents will lose their paychecks and benefits if a preliminary injunction is not granted. In support of this argument, Plaintiff cites Nelson v. National Aeronautics and Space Admin. (9th Cir. 2008) 530 F.3d 865. In that case, contract employees sued NASA alleging that NASA's requirement that such employees submit to in-depth background investigations seeking highly personal information was unlawful. (Id. at pp. 870-871.) The employees moved for a preliminary injunction to prevent NASA from terminating them for failing to answer highly invasive questionnaires. (Id.) The district court denied the request for preliminary injunction, but on appeal, the Ninth Circuit reversed, finding that some of the information sought by NASA "raised serious privacy issues." (Id. at p. 872.) On the issue of balancing harms, the Ninth Circuit explained that "monetary injury is not normally considered irreparable," but "constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." (Id. at pp. 881-882.) However, Nelson is not applicable to this case because, as discussed above, Plaintiff has failed to show that the City's vaccine mandate amounts to a due process, privacy, or other constitutional violation. The only potential harm that Plaintiff demonstrates is the temporary loss of paychecks and benefits, which is not irreparable; it can be remedied through damages such as backpay. Plaintiff also cites language in Nelson that "the loss

of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages." (Id. at p. 882.) Here, however, firefighters will not immediately lose their jobs, but rather will be placed on unpaid leave pending a formal Skelly hearing on their proposed separation.

More importantly, any harm to the firefighters who refuse to be vaccinated is vastly outweighed by the life-threatening harm of permitting over a hundred unvaccinated firefighters to continue living, eating, and sleeping with fellow firefighters at over 106 City firehouses. (Quin Dec., ¶¶ 4-6.) The COVID-19 vaccines "have the ability to prevent transmission of the virus in two ways: (1) by preventing infection altogether, or (2) by reducing the amount of infectious virus should somebody get sick." (Manoukian Dec., ¶ 14.) As a result, "vaccinated individuals are less likely to transmit COVID-19 compared to those who are not vaccinated." (Id., ¶ 16.) While breakthrough infections can occur, infected individuals are less likely to spread COVID-19 if they have been fully vaccinated. (Ibid.) Given the data showing the effectiveness of the COVID-19 vaccines, the potential harm to firefighters simply cannot compare to the potential loss of life that could result from issuance of the requested preliminary injunction.

The Court recognizes that Plaintiff has provided evidence from its own expert, Mr. Kaufman, that COVID-19 is not particularly dangerous and that vaccinations are not effective. However, Mr. Kaufman is not an epidemiologist. He is not a virologist. He is not even a doctor. He has a master's degree in Public Health; according to his own declaration, he is basically a public relations person who "translates scientific information for the public to understand." (Kaufman Declaration, ¶ 1.) While Mr. Kaufman may well have done excellent work communicating with the public on AIDS/HIV, Ebola and other infectious diseases, his qualifications regarding the COVID pandemic are meager. Mr. Kaufman concludes that "vaccination is not necessary to control the spread of COVID-19 and may be less effective than natural immunity and common-sense workplace practices that have been used for years to promote public health." (See Kaufmann Declaration, ¶ 25.) The Court must take his conclusions with a grain of salt; his conclusions are contrary to those of the vast majority of epidemiologists and coronavirus experts. (See, e.g., California Jury Instructions, CACI 221, "Conflicting Expert Testimony" ["If the expert witnesses disagreed with one another, you should weigh each opinion against the others.

You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications."])

The Court finds that the balance of harms weighs against granting the preliminary injunction. Plaintiff has not made the "significant showing" of irreparable harm necessary to enjoin a public entity in the performance of its duties.

V. CONCLUSION

Plaintiff Firefighters4Freedom's Motion for Preliminary Injunction is DENIED.

The Motion for Preliminary Injunction filed by Firefighters4freedom Foundation, a California Non-Profit Corporation on 11/16/2021 is Denied.

Clerk is to give notice.

Certificate of Mailing is attached.

EXHIBIT “D”

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Central Division – Stanley Mosk Courthouse)

FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY FIREFIGHTERS, Plaintiff, vs. CITY OF LOS ANGELES, Defendant.	Case No.: 21STCV34490 Judge: Michael P. Linfield, Dept. 34 **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Complaint filed: Sept. 19, 2021

Plaintiff Firefighters4Freedom alleges as follows:

INTRODUCTION

1. The Covid-19 pandemic has lasted nearly two years. For much of that time, schools were shut. Businesses were forced to close. Even government agencies operated remotely, meeting by phone or videoconference to conduct the public's business.

2. But while others sheltered in place, firefighters stepped to the frontlines of the pandemic, selflessly protecting citizens of this City. More than a thousand Los Angeles city firefighters contracted the COVID-19 virus. They performed their duties before any of the COVID-19 vaccines were available. Then, when the vaccines became available at the end of 2020, the city firefighters continued working without a vaccine mandate. They did not cause any harm to anybody. The City has no evidence of any unvaccinated firefighter infecting a member of the public with COVID-19.

3. Nonetheless, during the summer of 2021, the firefighters, like others, became embroiled in a political controversy over President Joe Biden's plan to use universal vaccination as the way to end the COVID-19 pandemic. Thus, in August 2021, the Los Angeles City Council adopted the City Vaccine Mandate (defined below), purportedly making vaccination against COVID-19 a condition of employment for all current and future city employees.

4. The City Vaccine Mandate suffers from many flaws. By making the mandate a condition of employment, the City was acting in its capacity as an employer, not as the sovereign, when it adopted the mandate. An employer cannot unilaterally change unionized public employees' conditions of employment and it cannot use its police powers to circumvent the restrictions on its employment powers. The mandate also violates the privacy rights of city firefighters who do not wish to get the COVID-19 vaccine, a right explicitly protected by the California Constitution. And, in enforcing the Vaccine Mandate, the City has violated the Due Process Clause by cutting off pay, without a hearing, to firefighters who have not complied with the mandate.

5. Firefighters4Freedom brings this action to vindicate the Constitution and to protect the careers of its members who have risked their lives to protect the people of Los Angeles—and, in

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doing so, earned the right to be heard about these important issues.

PARTIES, JURISDICTION AND VENUE

6. Firefighters4Freedom is a California non-profit 501(c)(3) corporation whose mission is to support the constitutional rights of firefighters in the City of Los Angeles during the COVID-19 pandemic. It is based in the County of Los Angeles. Firefighters4Freedom has standing to pursue the claims asserted in this action as the appointed agent for the 529 firefighters listed in **Exhibit "A"** and because it has a beneficial interest in the relief the SAC seeks.

7. The City of Los Angeles is a municipal corporation organized under the laws of this State.

8. Venue exists in Los Angeles County under sections 393(b) and 394(a) of the Code of Civil Procedure because the SAC alleges claims against a municipal entity that exists and operates in Los Angeles County and because the effects of the City's ordinance will be felt here.

FACTUAL ALLEGATIONS

9. Between late 2019 and early 2020, health officials discovered a novel coronavirus circulating in Wuhan, China. They named the virus "COVID-19."

10. During March 2020, California Governor Gavin Newsom issued a state of emergency related to COVID-19. Later that month, Governor Newsom issued a statewide "stay at home" order. Under this order, certain activities, deemed "essential," were allowed to continue while other activities, deemed "non-essential," were not.

11. Firefighting and other emergency services were deemed essential under the Governor's stay at home order and related orders issued by local officials. Thus, Los Angeles city firefighters did not shelter in place during the early stages of the pandemic. They did not work remotely. They served the public on the front lines during the initial emergency, as they always do.

12. During 2020, several pharmaceutical companies began developing shots to mitigate the spread of COVID-19. Then-president Donald Trump promised that the vaccines would be

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available within a year. Many people did not believe him, with several Democratic politicians—including Governor Newsom—saying they did not trust Trump and would review the vaccines' effectiveness and safety independently.

13. Then Mr. Biden won the presidency and many tunes changed. By the summer of 2021, tens of millions of Americans had received the COVID-19 shot, including more than half of adults in California. But the virus had not disappeared. Therefore, some government officials decided that the only way to eliminate COVID-19, and end the pandemic, is for everybody to get one of the COVID-19 shots.

14. To that end, on August 16, 2021, the Los Angeles City Council adopted Ordinance 187134, adding Article 12 to Chapter 7 of Division 4 of the Los Angeles Administrative Code to require, among other things, COVID-19 vaccination for all current and future city employees (the "City Vaccine Mandate"). A true and correct copy of the City's ordinance is attached as **Exhibit "B."**

15. The City Council said it adopted the City Vaccine Mandate because "[v]accination is the most effective way to prevent transmission and limit Covid-19 hospitalizations and deaths" and because "[u]nvaccinated employees are at a greater risk of contracting and spreading Covid-19 within the workplace, and risk transmission to the public that depends on City services." But, to date, the City has not turned over the information it relied on to make those findings. Moreover, the Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") recently stated in the *Federal Register* that "the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known."

16. The CMS issued that report last fall. Now we know more about the ineffectiveness of the COVID-19 vaccines. As the new year dawned, America averaged 486,000 new COVID-19 infections each day, the most ever. Roughly a quarter of people who tested in Los Angeles over the New Year's weekend were positive. This includes vaccinated and unvaccinated people. Among others, fully vaccinated County Supervisor Kathryn Barger recently tested positive for COVID-19.

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So have hundreds of city firefighters. As of January 4, at least 201 city firefighters were off-duty with COVID-19. Most of those (170) were vaccinated.

17. Thus, there is no evidence that receiving one of the COVID-19 shots makes an individual less likely to contract and transmit the novel coronavirus. The real-world evidence shows otherwise. The companies that created the vaccines admit it. And it is becoming increasingly clear that the COVID-19 vaccines are not cures, like the polio or smallpox vaccines, which can eradicate a disease. They may reduce the severity of an infected individual's symptoms. They may not. Like the flu shot, they may work better against some variants than others.

18. If the City had engaged in a meaningful and open-minded review of this issue last summer, it would have realized this. Instead, it simply decided to mandate the COVID-19 vaccines for all city employees and directed City staff to find evidence to support the decision, a quintessentially arbitrary and capricious action and an arbitrary decision-making process that deserves no deference in this action.

19. This is not a trivial issue. Although the City describes compulsory vaccination as commonplace, it has never required that city employees get a shot to keep their jobs before now. This is even true for firefighters who work in the most disease-ridden areas of Los Angeles. For example, city firefighters who work on Skid Row are regularly offered shots to combat the various contagions they encounter. Nobody has ever been disciplined, much less fired, for declining one of the injections.

20. Similarly, in 2018, America suffered one of its worst flu seasons in recent memory. The *Los Angeles Times* described hospitals as "war zones." Patients were treated in hallways and outdoor tents. But no city employees were fired for declining the flu shot.

21. Compulsory vaccination constitutes a serious invasion of the firefighters' right to bodily integrity. But, in issuing the City Vaccine Mandate, the City did not consider alternative measures that have a lesser impact on the firefighters' privacy rights, as it was required to do under Article I, section 1 of the California Constitution (the state constitutional right to privacy) and the California Supreme Court's decision in *Mathews v. Becerra*. Many such measures exist.

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22. Furthermore, city firefighters who have obtained permanent employment are not at-will employees but have a property interest in their employment. Thus, under *Skelly v. State Personnel Board*, they have a right to notice of their termination and an opportunity to be heard before a reasonably impartial hearing officer. They also have the right to conduct discovery before the hearing. They must be paid during that time and can challenge any adverse employment action as clearly excessive. That will cost an enormous amount of time and taxpayer money. In the meantime, social services will be cut. That is simply not warranted for vaccines that have proven to be ineffective in controlling the spread of COVID-19 and for a virus that is becoming endemic.

23. This should not be a political issue. It is not 1905. Constitutional law has evolved since then. And while the City cites the COVID-19 emergency as justification for its Vaccine Mandate, an emergency cannot last forever. The City has an ongoing obligation to review the facts and determine whether its Vaccine Mandate is necessary to protect the public health. It cannot bury its head in the sand and rely on old studies while ignoring the real-world data the Omicron variant has given us.

24. Nearly 800 firefighters had not complied with the City Vaccine Mandate when this case was filed last September. Many of them bowed to the City's pressure tactics and got the COVID-19 shot last fall. At least a hundred firefighters did not bow to the pressure and were put on unpaid administrative leave on December 9, 2021. They were not paid during December. Some have returned to duty—all they had to do was request a religious or medical exemption and they could work, even if unvaccinated—but others have not.

25. The City accused these non-compliant firefighters of being an imminent threat to public health and workplace safety. But it does not have any evidence of unvaccinated firefighters infecting the public and thus has no basis for that statement or for the aggressive adverse employment actions it has taken against those firefighters who challenged the City Vaccine Mandate.

FIRST CAUSE OF ACTION

(Declaratory and Injunctive Relief re *Ultra Vires* Legislation)

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26. Plaintiff incorporates the preceding paragraphs of this SAC as though set forth fully herein.

27. The City contends that it had the authority to adopt the City Vaccine Mandate under its police powers and that the mandate is reasonably related to promoting public health.

28. Plaintiff contends that, in making the COVID-19 vaccines a condition of employment, the City acted in its capacity as an employer, not the sovereign. The City does not have the authority, as their 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.

29. Plaintiff also contends that, even if the City does have the authority under its 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. Indeed, the City Vaccine Mandate is arbitrary and irrational, as evidence developed during the spread of the Omicron variant shows the COVID-19 vaccines do not prevent people from contracting or transmitting COVID-19.

30. Plaintiff desires a judicial declaration that the City Vaccine Mandate exceeds the City's power as a public employer and that the mandate is arbitrary given the increasing evidence that the COVID-19 vaccines do not prevent people from contracting or spreading COVID-19.

31. A judicial determination of these issues is necessary and appropriate because such a declaration will clarify the parties' rights and obligations, permit them to have certainty regarding those rights and potential liability, and avoid a multiplicity of actions.

32. The City's actions have harmed Plaintiff and those it represents, as alleged above.

33. Plaintiff and its members have no adequate remedy at law and will suffer irreparable harm if the Court does not enjoin the City from enforcing the vaccine mandate.

34. This action serves the public interest, justifying an award of attorneys' fees under section 1021.5 of the California Code of Civil Procedure.

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SECOND CAUSE OF ACTION

(Declaratory and Injunctive Relief under Article I, section 1 of Cal. Constitution)

35. Plaintiff incorporates the preceding paragraphs of this SAC as though set forth fully herein.

36. Many of Plaintiff's members have not taken the COVID-19 vaccines. They object to the forced medical treatment as a condition of their employment.

37. Individuals have a right to privacy under the California Constitution. This state law privacy right, which was added by voters in 1972, is far broader than the right to privacy that exists under the federal Constitution. It is the broadest privacy right in America and has been interpreted by the California Supreme Court to protect the right to bodily integrity.

38. City firefighters have a legally protected privacy interest in their bodily integrity, as the California Supreme Court recognized in *Hill v. NCAA*.

39. The firefighters' expectation of privacy is reasonable under the circumstances, as the City has never had a vaccination requirement for public employment before now and the City has never disciplined, much less fired, a firefighter for declining an injection. The only compulsory vaccination laws adopted in California during the past century concerned certain vaccines that children need to attend school. Those laws do not undermine city firefighters' expectation of privacy in their bodily integrity.

40. The City Vaccine Mandate constitutes a serious invasion of the firefighters' privacy rights, as alleged above.

41. Although the City may argue that the Vaccine Mandate serves a compelling interest in reducing the spread of COVID-19, there are feasible and effective alternatives to it that have a lesser impact on privacy interests. Furthermore, evidence now shows that the COVID-19 vaccines do *not* prevent people from contracting and transmitting COVID-19. Thus, the mandate does not serve its stated purpose.

42. On information and belief, the City contends that the Vaccine Mandate does not violate the privacy rights of city firefighters.

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43. Plaintiff desires a judicial declaration that the City Vaccine Mandate is unconstitutional because it violates city firefighters' right to privacy under Article I, section 1 of the California Constitution.

44. A judicial determination of these issues is necessary and appropriate because such a declaration will clarify the parties' rights and obligations, permit them to have certainty regarding those rights and potential liability, and avoid a multiplicity of actions.

45. The City's actions have harmed Plaintiff's members, as alleged above.

46. Plaintiff and its members have no adequate remedy at law and will suffer irreparable harm if the Court does not enjoin the City from enforcing the unconstitutional vaccine mandate.

47. This action serves the public interest, justifying an award of attorneys' fees under section 1021.5 of the California Code of Civil Procedure.

THIRD CAUSE OF ACTION

(Declaratory and Injunctive Relief under Due Process Clause/*Skelly*/Firefighter Bill of Rights)

48. Plaintiff incorporates the preceding paragraphs of this SAC as though set forth fully herein.

49. Plaintiff contends that the City does not have the power to put city firefighters who do not follow the City Vaccine Mandate on unpaid leave pending termination proceedings. The City must provide the firefighters with notice and an opportunity to challenge the action before it stops paying them, pursuant to the Due Process Clause and the California Supreme Court's decision in *Skelly*.

50. Plaintiff also contends 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. These rights go beyond the minimum due process rights that all public employees have under *Skelly*.

51. On information and belief, the City contends that it does not have to comply with *Skelly* or the Firefighter Bill of Rights before it stops paying city firefighters for not complying with the City Vaccine Mandate.

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52. Plaintiff desires a judicial declaration that the City cannot stop paying a city firefighter without providing that employee with due process under *Skelly* and the Firefighter Bill of Rights.

53. A judicial determination of these issues is necessary and appropriate because such a declaration will clarify the parties' rights and obligations, permit them to have certainty regarding those rights and potential liability, and avoid a multiplicity of actions.

54. The City's actions have harmed Plaintiff and its members, as alleged above.

55. Plaintiff and its members have no adequate remedy at law and will suffer irreparable harm if the Court does not enjoin the City from enforcing the City Vaccine Mandate without complying with *Skelly* and the Firefighter Bill of Rights.

56. This action serves the public interest, justifying an award of attorneys' fees under section 1021.5 of the California Code of Civil Procedure.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for relief as follows:

1. For an order declaring the City Vaccine Mandate void because the City did not have the power to issue it or, in the alternative, because the mandate is arbitrary;

2. For an order declaring the City Vaccine Mandate unconstitutional because it violates the privacy rights that city firefighters have under the California Constitution;

3. For an order declaring that the City cannot stop paying city firefighters without giving them a pre-deprivation Skelly hearing and without following the procedural requirements set forth in the Firefighter Bill of Rights;

4. For injunctive relief enjoining the City from further enforcing the City Vaccine Mandate;

5. For costs and attorneys' fees under section 1021.5 of the Code of Civil Procedure; and

6. For such other relief that the Court determines is just and proper.

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San Diego, California 92101

Dated: January 13, 2022

JW HOWARD/ ATTORNEYS, LTD.

By: _____

Scott J. Street
Attorneys for Plaintiff Firefighters4Freedom

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701 B Street, Suite 1725
San Diego, California 92101

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above entitled Court. The business address is:

JW Howard Attorneys LTD
701 B Street, Ste. 1725
San Diego, California 92101

☐ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

■ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic system and said documents were successfully transmitted via One Legal that same day.

☐ PERSONAL. The below described documents were personally served on date below via Knox Services.

On the date indicated below, I served the within as indicated:

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

TO:

Mike Feuer, Esq.
Los Angeles City Attorney
Cit Hall East, Ste. 800
200 N. Spring Street
Los Angeles, CA 90012

Vivienne A. Swanigan
Vivienne.swanigan@lacity.org
Jennifer Gregg
Jennifer.gregg@lacity.org
Erika Johnson-Brooks
erika.johnsonbrooks@lacity.org
Travis T. Hall
travis.t.hall@lacity.org

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on January 13, 2022, at San Diego, CA.

/S/ Dayna Dang
Dayna Dang, Paralegal
dayna@jwhowardattorneys.com

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San Diego, California 92101

EXHIBIT “A”

ATTACHMENT A (First Amended Complaint)

Fabela, David
Knox, John
Burmeister, Jeffrey
Cunningham, Michael
Tanguay, Richard
Muus, Mark
Samama, Marc
Zizi, Mark
Bailey, Brian
Lee, Matthew
Mauer, Timothy
Abeyta, Louie
Acedo, Nicholas
Acevedo, Erik
Acevedo, Francisco
Agueyo, Timothy
Ainilian, Timothy
Albert, Jack
Aldana, Salvador
Alexander, David
Alva, Matthew
Amaya, Edwin
Amin, Cherif
Anderson, Cliff
Anderson, Matthew
Angel, John
Arevalo, Jorge
Argumosa, Brian
Arnold, Benjamin
Ashburn, Jeffrey
Avila, Nicolas
Bachman, Evan
Ball, Brandon
Bannan, Joseph
Barassi, Antonio
Barraza, Fernando
Barrett, Steve
Bebek, Brittney
Beck, Jesse
Belknap, Barry
Bellendir, Jeremie
Bender, David A
Bennett, Deas
Birg, Jeffrey
Birnbaum, Nicholas
Blake, Jeffrey
Bochey, Michael
Boenzi, John
Bojorquez, Joey
Bonafede, Matthew
Bond, Jack
Booker, Anthony R.
Bos, Jonathan
Bowden, David
Boyd, Barry
Boyd, Brian
Bradford, Emily
Bradley, Morgan
Brinnon, Joshua
Briscoe, Nolan
Brockschmidt, Edward
Brooks, Bryan
Brower, Kenneth
Brown, Gregory
Brownell, Aaron
Bugarin, Eloy
Bunn, Jason
Burlingame, Ethan
Burton, Josh
Butts, Ryan
Byrne, David
Byrne, Leo
Cabunoc, Scott
Camarlinghi, Rocky
Campana, Michael
Campanella, Philip
Campos, Scott
Campuzano, Ray
Canata, Anthony
Carbajal, Jesus
Cardenas, John
Carbon, Travis
Carmona, Benjamin
Caro, Brandon
Caro, Michael
Carpenter, Caroline
Carr, Brian
Carranza, Armando
Carrera, Omar
Carter, Matthew
Carter, Scott
Cartier, Bret
Catalano, Michael
Cates, Daniel
Cavataio, Ron
Cervantes, Chipper
Cervantes, Richard
Chamberlain, Thomas
Chattong, Charles
Chavez, Carlos
Chavez, Daniel
Chavez, Martin
Cherry, Beau
Chitiea, Adam
Chitwood, Jeremy
Coates, Douglas
Colbert, Daniel
Coleman, Chase
Colfax, Doug
Collins, Bronson
Collins, Nicholas
Collyer, William
Combes, Nate
Cook, Darin
Cook, Derek
Cook, Gavin
Cooney, Brian
Cooper, Ian
Corcoran, Kelly
Cordero, Nathan
Cornassel, Brian
Corral, Kurt
Cremins, Todd
Cress, Cameron

Crouthamel, Chad
Curtis, Chris
Curtis, Ryan
D'arrigo, Patrick
Dahl, Derek
Darcy, Nicholas
Dayen, Blake
De La Torre, Roman
Degeeter, Dennis
Degele, Charles
Deierling, Matthew
Demott, Mark
Dickinson, Steve
Diede, Rich
Diem, Ryan
Dilbenberger, Donald
Divalerio, Christopher
Dominguez, Carlos
Duda, Zachary
Duke, Paul
Duran, David
Easton, Kevin
Edwards, Cody
Egizi, Mark
Esperza, Sinoeh
Estrada, Diego
Evans, Bill
Farris, Brian
Farris, Matthew
Faulkner, Curtis
Fenton, Lane
Ferrari, Chuck
Figueroa Jr, Arthur
Finch, Stephen
Fischer, William
Fisher, Adam
Fisher, Eric
Fitzgerald, Jeff
Foor, Timothy
Ford, Ephfriam
Foster, Jason
Foster, Shawn
Fowler, Jonathan
Frere, Brandon
Frye, Johnny
Fuette, Ryan
Gales, Devin
Galvez, Gregory
Gapuzan, Felix-Edmund
Garcia, Daniel
Garcia, Eric
Garcia, Keith
Gaspar, Cade
Gaul, Randall
Gelinas, Kevin
Generoso, Mario
Gentry, Christopher
Gikas, Thomas
Gilchrist, Mark
Gill, Shawn
Gillissie, Michael
Glenchur, Mark
Goetze, James
Gomez, Glen
Gomez, Pablo
Gomez, Ulysses
Gonzalez, Jacob
Gonzalez, Reuben
Gorrie, Brett
Gorski, Justen
Goshorn, John
Granucci, Cristian
Greer, Christi
Gregory, Haden
Hadley, Ryan
Hajjar, Austin
Halstead, Kyle
Halversen, Joshua
Hamilton, Jeffrey Bryan
Hamilton, Scott
Hammock, Jeremy
Hamson, Timothy
Harris, Scott
Hass, Cody
Hauck, Andrew
Hayes, Michael
Hazard, Stephen
Heagy, Derek
Helton, Nathan
Henry, Thomas
Hernandez, Anthony
Hernandez, Francisco
Hernandez, Riobec
Hessing, Scott
Hill, Celeste
Hill, Jason
Hinton, Steven
Hiserman, Stephen
Hix, Harold
Hoehn, Jesse
Hoki, Gary
Holland, Cameron
Holland, James
Hoon, Gregory
Horine, Jacob
Horst, Christopher
Hugo, Al
Hunter, Kenneth
Hutchinson, Tanner
Ibanez, Brad
Ilyalch, Denis
Jackson, Matthew
Jackson, William
Jaminal, Adelino
Janzen, Allen
Jeljoni, Hani Peter
Jeremica, Paul
Jimenez, Daniel
Johnson, Grady
Johnson, Mike
Jones, Leon
Jones, Michael
Kabey, Curtis
Kama, Garen
Kang, Eugene
Kearns, Brett
Keeler, Tanner
Kellers, John
Kelley, Shawn
Kelly, Andrew
Kelly, Charles
Kennedy, Sean
Kennison, Korey
Kerr, William
Kilpatrick, Robert

Kim, Lawrence
Kiss, Joshua
Kitratnee, Patrick
Kneisler, Brent
Kobe, Nicholas
Kobylka, Jared
Kokinski, Ray
Kratkin, Glen
Kroner, Brandon
Krylo, Joshua
Kunath, Cooper
Kusar, Jason
Kush, Daniel
Kuzmicz, Christopher
Lacina, Caleb
Ladue, Michael
Laier (Laifd), Darin
Lake, David
Landis, Jenifer
Largen, Nathan
Lavalle, Christopher
Lasar, Scott
Leamy, Denver
Leddy, Daniel
Lee, Daniel
Lemmond, David
Libby, John
Liberto, Daniel
Limon, Carlos
Logan, Chad
Lowe, Kevin
Lozano, Albert
Macdowell, Michael
Magana, Felix
Maloney, Brennan
Malray, Christopher
Mancillas, Eduardo
Mandahl, Michael
Marotta, Steven
Marquez, Joshua
Martin, Timothy
Mata, Raul
Matamoros, Eddie
Mattei, John
Mattei, Justin
Mattison, Mikel
Mccord, John
Mcgrady, Michael
Mclaren, Devin
Mclaren, Nicholas
Mclaren, Weston
Medina, Bryan
Medrano, Robert
Mena, Vince
Mendieta, Giselle
Mendoza, Joe
Meza, Miguel
Millman, Micah
Mills, Peter
Milroy, Luis
Miramontes, Chris
Molina, Ricardo
Molinar, Andrew
Monroy, Matthew
Monroy, Sean
Moon, Matthew
Moore, Daejon
Moore, Michael
Morlock, James
Mount, Richard
Mueller, Michael
Muro, Peter
Murphy, Zachary
Narvaez, David
Navarro, Elber
Nelson, Shane
Nevarez, Eric
Nevins, William
Newberry, Lawrence
Newon, Bryan
Nguyen, Tony
Nieves, Adrian
Nordquist, James
Nordquist, Thomas
Nunez, Matthew
Oberto, Thomas
Obryan, Corey
Ochoa, Jeffery
Ochoa, Luis
Olmedo, Gabriel
Omalau, John
Omelas, Joshua
Orozco, Jesus
Ortiz, Jason
Ortiz, Stephen
Padilla, Gustavo
Paez, Robert
Pagliuso, Michael
Park, Ban
Pashabezyan, Makar
Passmore, Russ
Peck, Alan
Pennington Ii, Stephen
Peralta, Rene C
Perelli-Minetti, Joshua
Perez, Eduardo
Perez, Jose L
Peterson, Keri
Phillips, Shawn
Pike, Scott
Pohl, Christopher
Polgar, Christopher
Poole, Leslie
Portis, Marcus
Poulson, Craig
Prian, Sean
Pritchett, Kevin
Prusa, Ryan
Pudwill, Jake
Puels, Richard
Pytell, Jefferson
Quach, Warren
Quick, Bryan
Ramirez, Ethan
Rankell, Nik
Raphael, Harold
Rappaport, Taylor
Reyes, Benjamin
Reynolds, Zach
Riggs, Thomas
Riles, David
Rindge, Thomas
Rivera, Carlos J
Rivera, Kristina
Roach, Craig

Roarty, Tim
Roberts, David
Roberts, Eric
Rodriguez, Jeffery
Rodriguez, Nestor
Rodriguez, Stephen
Romero, George
Romero, Johnny
Romero, Ryan
Randinella, Robert
Ros, Alberto
Rose, Nicholas
Ross, Jordan
Rubic, Caesar
Russell, Luke
Ryan, Brandon
Ryan, Philip
Sacramone, Brian
Saenz II, Andres
Saez, Jebediah
Salas, Jose
Salley, Bret
Sanders, Ryan
Sandoval, Michael
Sankey, Dwight
Santa Maria, Joe
Saure, Kyle
Scachetti, Marco
Schaller, Steve
Schmitz, Jason
Schroeder, Wes
Scott, Rob
Seers, Michael
Serpa, Alvin
Shaffer, Andrew
Shaw, Robert
Sibayan, Nick
Sissac Jr, Martin
Smith, Andrew
Smith, Dale
Smith, Joel
Smith, Joshua
Snyder, Zachary
Sokolowski, Jacob
Soto, Mark
Stabel, Kurt
Stadden, Jeffrey
Steele, Bradley
Steiger, Brent
Steiger, Eric
Steinman, David
Stephens, Brent
Stephenson, Mike
Stine, Christopher
Stoffel, Robert
Studenka, Craig
Stuhlman, John
Stump, David
Sullivan, Daniel
Susca, Daniel
Sutton, Warren
Taggart, Kelly
Tagliere, Peter
Tamayo, Jason
Tapia, Brent
Taulli, Brandon
Taylor, Michael
Terrazas, Brandon
Teter, Jason
Teter, Jedidiah
Theodore, Johnathan
Thibault, Corey
Thiebold, Brian
Thompson, Richard
Toapanta, Diego
Tomlin, Kelly
Tomlin, Scott
Toomey, Channing
Torres, Adrian
Tuzzolino, Terry
Tye, Nicholas
Urrea, Gilbert
Valadez, Daniel
Valdez, Travis
Vallejos, Timothy
Valles, Ray
Van Blarcom, Nick
Van Hoesen, John
Vandergeest, Mackenzie
Vardanian, Alanah
Verdenian, Bryan
Vargas, Alberto
Vasquez, Fernando
Vera, Carlos
Verdecia, Anthony
Verwey, Eric
Vigil, Joseph
Viglotta, Richard
Vilata, Michael
Voelker, Andre
Vonderharr, Nathan
Vriens, Jason
Wagoner, Mark
Ward, Dennis
Ward, Derrick
Ward, Robert
Warner, John
Watkins, Nicholas
Webb, Michael
Webb, Ryan
Weideman, August
Weng, Thomas
Werle, Tim
Western, Trent
Westmoreland, Matthew
Westphal, Mario
White, Steven
Whitmore, Greg
Wile, Brandon
Williams, Keith
Williams, Steven
Willis, Bryan
Willis, Kevin
Wilmarth, Nathan
Yoshimura, Westley
Zagorac, Ljubomir
Ziemer, Stephen
Zuniga, Carlos
Ramelli, Joel
Miyasato, Christian
Grigsby, Chelsey
Rochman, Matthew
Jones, Joshua
Nyberg, Thomas

Carter, Andrew
Kuzichev, Alfred
Elmore, Tyler
Corby, Shaun
Hart, Christopher
Paulin, David
Baker, Bryce

EXHIBIT “B”

ATTACHMENT B

ORDINANCE NO. 187134

An ordinance adding Article 12 to Chapter 7 of Division 4 of the Los Angeles Administrative Code to require COVID-19 vaccination for all current and future city employees.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS

Section 1. A new Article 12 is added to Chapter 7, Division 4 of the Los Angeles Administrative Code to read as follows:

ARTICLE 12

COVID-19 VACCINATION REQUIREMENT FOR ALL CURRENT AND FUTURE CITY EMPLOYEES

Sec. 4.700. Definitions.

The words and terms defined in this section shall have the following meanings as used in this article.

(a) "COVID-19" means the Novel Coronavirus disease 2019, the disease caused by the SARS-CoV-2 virus and that resulted in a global pandemic.

(b) "Employees" includes, full, part-time and as-needed City employees regardless of appointment type, volunteers, interns, hiring hall, appointed officers, board members and commissioners, 120-day retired employees, elected officials and at-will appointees of elected officials.

(c) "COVID-19 Vaccine": A COVID-19 vaccine satisfies the requirement of this policy if the U.S. Food and Drug Administration (FDA) has issued Emergency Use Authorization (EUA) or full Licensure for the COVID-19 Vaccine. Vaccines that currently meet this requirement include Moderna or Pfizer-BioNTech (two-dose COVID-19 vaccine series) and Johnson & Johnson/Janssen (single-dose COVID-19 vaccine).

(d) "Fully vaccinated" means 14 days or more have passed since an employee received the final dose of a two-dose COVID-19 vaccine series (Moderna or Pfizer-BioNTech) or a single dose of a one-dose COVID-19 vaccine (Johnson & Johnson/Janssen).

This definition may be expanded should booster shots for the COVID-19 vaccines be required in accordance with guidance provided by the U.S. Centers for Disease Control (CDC), FDA, Los Angeles County Department of Public Health and/or any other medical entity that provides health and safety guidance.

(e) "Partially Vaccinated" means employees who have received at least one dose of a COVID-19 vaccine, but do not meet the definition of fully vaccinated as defined herein.

(f) "Unvaccinated" means employees who have not received any doses of COVID-19 vaccine or whose status is unknown.

Sec. 4.701. Vaccination and Reporting Requirement.

(a) 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, no later than October 19, 2021.

(b) As of October 20, 2021, the COVID-19 vaccination and reporting requirements are conditions of City employment and a minimum requirement for all employees, unless approved for an exemption from the COVID-19 vaccination requirement as a reasonable accommodation for a medical condition or restriction or sincerely held religious beliefs. Any employee that has been approved for an exemption must still report their vaccination status.

(c) **Vaccination Requirements.**

(1) Employees must receive their first dose of a two-dose COVID-19 vaccine no later than September 7, 2021; second dose no later than October 5, 2021, of a two-dose COVID-19 vaccine series (Moderna or Pfizer-BioNTech).

(2) Employees must receive their single dose of a single-dose COVID-19 vaccine (Johnson & Johnson/Janssen) no later than October 5, 2021.

(3) Requests for exemption from the COVID-19 vaccination must be submitted no later than September 7, 2021.

(4) Effective October 20, 2021, any new contract executed by the City shall include a clause requiring employees of the contractor and/or persons working on their behalf who interact with City employees, are assigned to work on City property for the provision of services, and/or come into contact with the public during the course of work on behalf of the City to be fully vaccinated.

(d) **Reporting Requirements.**

(1) The City shall continue to collect and regularly report employees' vaccination status as long as such data is deemed necessary and useful. The City will collect data in accordance with the City's Workplace Safety Standards.

(2) Booster shots for the COVID-19 vaccines may be required in accordance with guidance provided by the CDC, FDA, Los Angeles County Department of Public Health and/or any other medical entity that provides health and safety guidance.

a. Employees will be required to report their COVID-19 booster status to the appointing authority should the City determine that COVID-19 boosters are required in conformity with being fully vaccinated.

b. The Personnel Department will be responsible for maintaining COVID-19 booster status in accordance with the method outlined in subsection (b), above.

Sec. 4.702. Qualified Exemptions.

All current and future City employees shall have the right to petition for a medical or religious exemption to be evaluated on a case-by-case basis, consistent with City procedures for reasonable accommodation requests. Documentation prescribed by the City shall be required.

(a) Employees with medical conditions/restrictions or sincerely held religious beliefs, practices, or observances that prevent them from receiving a COVID-19 vaccine shall qualify for COVID-19 vaccine exemption, upon approval of documentation provided by the employee to the appointing authority or designee. Employees who qualify for the medical or religious exemptions may be subject to weekly testing, as provided in (b)(1), below.

(b) Employees with medical or religious exemptions and who are required to regularly report to a City worksite shall be subject to weekly COVID-19 tests. Testing will be provided to the employees at no cost during their work hours following a process and timeline determined by the City.

(1) Employees with medical or religious exemptions who are telecommuting or teleworking shall be subject to ad hoc COVID-19 testing when they are asked to report to a worksite on an as-needed basis.

The City's goal is to have a vaccinated workforce. As such, employees will not have the option to "opt out" of getting vaccinated and become subject to weekly testing.

Only those with a medical or religious exemption and who are required to regularly report to a work location are eligible for weekly testing.

Sec. 4.703. Other Requirements.

(a) **Health Orders.** Nothing in this ordinance precludes the City from following any order issued by local, state, or county health officers regarding mask mandates or physical distancing. If any order the City has adopted is anticipated to change, the City shall alert labor organizations of the potential change at the earliest opportunity so as to begin impact bargaining over the potential change.

(b) **Masks and Physical Distancing**. Employees who are unvaccinated, partially vaccinated, or have an unreported status for any reason shall, in compliance with City standards and notwithstanding public policy guidelines, continue to wear masks and adhere to physical distancing protocols while present at any City worksite or facility or interacting with members of the public, except where it would be physically hazardous to do so due to the type of work performed.

(c) **COVID-19 Vaccine Training**. Beginning October 5, 2021, any Employee (as defined herein) who is not fully vaccinated shall be required to complete an online vaccination training course administered by the Personnel Department. The City will continuously assess the need for such training.

(d) **Policy Status**. The CAO will monitor status reports and progress of reported vaccination statuses and discuss such information with labor organizations on an ad hoc basis to determine the progress and update the policy as necessary toward achieving the City's goal of a fully vaccinated workforce. All data will be kept confidential, consistent with directions issued by the Personnel Department, outlined herein.

Sec. 4.704. Limitations on Promotions, Transfers, and Appointments.

(a) All candidates and applicants seeking initial City employment, promotions, or transfers, including regular appointments, emergency appointments, temporary appointments, intermittent appointments, limited appointments, exempt full-time and half-time and hiring hall employment, must meet the minimum qualification of being fully vaccinated or receive an exemption and report their vaccination status prior to the appointment, promotion, or transfer.

(1) All fully vaccinated employees that have reported their status to the appointing authority are eligible immediately for any promotion, or transfer.

(2) All employees whose vaccination status is unvaccinated, partially vaccinated, or unreported shall be ineligible to promote or transfer until the employee has reported to the appointing authority that they have been fully vaccinated.

(b) This section regarding the limitations on promotions and transfers shall become effective subject to the completion of the bargaining process with affected unions.

Sec. 4.705. Severability.

If any term or provision of this section is found to be in conflict with any City, State, or Federal law, the City will suspend said section as soon as practicable and the remainder of this Ordinance shall not be affected thereby.

Sec. 2. **Urgency Clause.** The City Council finds and declares that this ordinance is required for the immediate protection of the public peace, health, and safety for the following reasons: According to the Center for Disease Control, and the Los Angeles County Department of Public Health, COVID-19 continues to pose a significant public health risk, especially as cases surge with the highly infectious spread of the Delta variant. Vaccination is the most effective way to prevent transmission and limit COVID-19 hospitalizations and deaths. The City must provide a safe and healthy workplace, consistent with COVID-19 public health guidance and legal requirements, to protect its employees, contractors and the public as it reopens services and more employees return to the workplace. Unvaccinated employees are at a greater risk of contracting and spreading COVID-19 within the workplace, and risk transmission to the public that depends on City services. For all these reasons, the ordinance shall become effective upon publication pursuant to Los Angeles Charter Section 253.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall; one copy on the bulletin board located at the Main Street entrance to the Los Angeles City Hall East; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

Approved as to Form and Legality

MICHAEL N. FEUER, City Attorney

By _____
VIVIENNE SWANIGAN
Assistant City Attorney

Date August 16, 2021

File No. 21-0921

M:\Muni Counsel\COVID Vaccinations for City Employees (Final).docx

The Clerk of the City of Los Angeles hereby certifies that the foregoing ordinance was passed by the Council of the City of Los Angeles, **by a vote of not less than three-fourths of all its members.**

CITY CLERK

MAYOR

Ordinance Passed August 18, 2021

Approved 08/20/2021

Ordinance Published: 08-25-21
Ordinance Effective Date: 08-25-21

EXHIBIT “E”

DEPARTMENT 34 LAW AND MOTION RULINGS

The Court often posts its tentative several days in advance of the hearing. Please re-check the tentative rulings the day before the hearing to be sure that the Court has not revised the ruling since the time it was posted.

Please call the clerk at (213) 633-0154 by 4:00 pm. the court day before the hearing if you wish to submit on the tentative.

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.

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.

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.

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.)

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:

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).

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).

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).

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).

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).

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).

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).

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).

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).

. 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.

. 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).)

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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).)

CONCLUSION

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

EXHIBIT


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EXHIBIT “F”

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND DISTRICT

FIREFIGHTERS4FREEDOM,

Petitioner,

v.

LOS ANGELES SUPERIOR COURT,

Respondent.

CITY OF LOS ANGELES,

Real Party in Interest.

Superior Court Case No. 21STCV34490

Honorable Michael P. Linfield

VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES

IMMEDIATE RELIEF REQUESTED (*Palma* notice)

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

[Cal. Rules of Court, rule 8.208]

Petitioner Firefighters4Freedom is a non-profit foundation formed to advocate for the rights of Los Angeles city firefighters during the COVID-19 pandemic. It serves as the designated agent for the city firefighters listed in Attachment A to the underlying Complaint, which appears at pages 23 to 26 of the Appendix of Evidence.

DATED: January 20, 2022 JW HOWARD/ATTORNEYS, LTD.

By: _____
John W. Howard
Attorneys for Petitioner

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I.

INTRODUCTION

This Petition asks a simple question: can the City of Los Angeles stop paying its permanent public employees—in this case, city firefighters who have not complied with the City's COVID-19 vaccine mandate—without giving them a pre-deprivation hearing, as required by the Due Process Clause and the California Supreme Court's decision in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194?

The Superior Court said yes. In doing so, it ignored established law regarding the rights of public employees. Due process may be flexible, but it is not discretionary. An employee who is being put through the termination process must be given notice and a meaningful opportunity to challenge the proposed termination. The process cannot be fair if the City does not pay the person during it.

The Constitution demands and the California Supreme Court has commanded that public employees be extended full due process rights before any adverse employment action is taken against them, including full payment of wages and salaries while the process proceeds. The City of Los Angeles has deliberately – even proudly – refused to do so with respect to firefighters and other first responders who it

otherwise required to keep working directly with the public for the year during which no vaccine was available to protect either the firefighters or the public.

In ruling contrary to the strictures of *Skelly*, the Superior Court relied on a United States Supreme Court case that applied federal law, not California law, as clarified in *Skelly* and its progeny, and which held that a pre-deprivation hearing may not be required in limited cases involving disciplinary matters that an independent authority has determined have merit, such as a prosecutor deciding to charge a person with a crime. No such determinations have been made here and the unvaccinated firefighters were not suspended for disciplinary reasons, as doing so would plainly trigger the state law Firefighter Bill of Rights. Moreover, this situation is not "limited," as the City stopped paying 105 firefighters who had not complied with its vaccine mandate by December 2021. Thirty-three firefighters are still on unpaid leave. If left to stand, the Superior Court's reasoning will give the City the green light to stop paying hundreds, if not thousands, of public employees who have not complied with the mandate, without a prior *Skelly* hearing.

The Superior Court recognized the severity of this harm. It recognized the possibility that the City violated the

firefighters' due process rights by cutting off their pay without a prior *Skelly* hearing. But to the firefighters' simple request that it enforce the law, the court wrote, in an overwrought and emotional opinion: "We can reimburse a person for monetary losses for being put on unpaid leave. We cannot resurrect the dead."

That is a false comparison. The City did not present any evidence of a firefighter infecting a member of the public with COVID-19, much less evidence that anybody died as a result. In any event, the firefighters the City stopped paying on December 9, 2021, were not working. They did not pose any threat to the public or their co-workers. They did not ask the Superior Court to restore them to duty, to block enforcement of the City's vaccine mandate or to stop the *Skelly* process. They just asked the Superior Court to order that the City pay them until they receive a proper *Skelly* hearing.

A dispassionate court would have been able to recognize this distinction and apply the law fairly to enjoin the City's unlawful actions. The Superior Court's false comparison caused it to ignore settled law and to apply an incorrect standard. Its legal error warrants writ relief. So does its analysis of the merits. The Superior Court ignored

its own acknowledgment that the City may have to pay backpay to the firefighters it put on unpaid leave without a *Skelly* hearing. It also ignored *Matheus v. Becerra* (2019) 8 Cal.5th 756, a recent California Supreme Court case that precludes courts from deciding claims brought under the California Constitution's right to privacy at the pleading stage. Indeed, the Superior Court did not mention *Matheus* once in its 32-page decision, even though Petitioner discussed it at length in its moving and reply papers, and during oral argument.

Between the due process and privacy claims, Petitioner showed a possibility of success that, given the severe harm to the suspended firefighters, clearly justified preliminary injunctive relief. The Superior Court abused its discretion in concluding otherwise.

The Superior Court's decision was also laced with emotion, hyperbole and personal opinion. For example, the Court explicitly questioned the credibility of Petitioner's counsel because it disagreed with their statement about the scope of COVID-19 restrictions. The Court also attacked an expert witness who submitted a declaration to give context about the COVID restrictions, saying his statements, which were supported by documentary evidence, did not match the

"scientific consensus" and that the witness, who is an international expert in public health, is "not even a doctor." (The City's expert witness is a psychiatrist by training and has no apparent experience in public health.)

These comments went far beyond the issues raised in Petitioner's motion. They relied on materials outside the record—such as *New York Times* articles and the aforementioned "scientific consensus," unsupported by any evidence before the court —and reflect a bias toward a specific position (pro-vaccine and pro-mandate) that likely prevented the Superior Court from focusing on the narrow issue Petitioner raised below. The comments raise serious questions about the Superior Court's impartiality and ability to be fair in this case, which is just starting.

This is a serious matter. The lower court may not like Petitioner's members and lawyers for challenging the government on these issues. But the American Bar Association encourages lawyers to accept representation of "unpopular clients and causes" and to do so "(r)egardless of [their] personal feelings …." That principle applies during good times and bad, even during a pandemic. It also applies to judges. It requires that they be fair and open-minded. It requires that they follow the law and decide cases based on

the evidence before them, not based on emotion and what they read in *The New York Times* or see on CNN. The Superior Court violated that principle, leading it to misinterpret the law and to issue a decision that clearly exceeded the bounds of reason.

II.

PETITION

1. Early in 2020, California public health officials became aware that a novel respiratory virus—dubbed COVID-19—was spreading in the state and could trigger a pandemic.

2. On March 4, 2020, Los Angeles Mayor Eric Garcetti and California Governor Gavin Newsom both declared a state of emergency related to COVID-19. The City ratified the Mayor's emergency declaration two days later. Appendix of Evidence ("AOE") 279.

3. During the past two years, government officials have asserted unprecedented powers to fight COVID-19, including issuing a "stay at home" order that directed all Californians to stay inside their homes, indefinitely, unless they left to do something the government had deemed essential.

4. Firefighters were always deemed essential and thus have been working since the pandemic began. AOE 88.

5. During 2020, at the urging of then President Donald Trump, three vaccines were developed to help curb the effects and spread of COVID-19. AOE 207-210.

6. The COVID-19 shots were politically controversial, with some public health officials questioning whether such treatments could be developed so quickly and with many Democrats, including Joe Biden and Kamala Harris, questioning President Trump's recommendation that people take them. AOE 212-230.

7. As the COVID-19 vaccines became available at the end of 2020, many wondered whether the government would force Americans to take them. President-elect Biden said he would not mandate them. AOE 243-247.

8. In June 2021, Governor Newsom terminated California's stay at home order and said the state had turned the corner on the pandemic.

9. By that time, millions of Americans had gotten the COVID-19 shot. But the virus kept spreading and, during the summer of 2021, a new strain of the virus (called the "Delta variant") was detected.

10. On August 16, 2021, the Los Angeles City Council adopted Ordinance 187134, adding Article 12 to Chapter 7 of Division 4 of the Los Angeles Administrative Code to require, among other things, that all current and future city employees get one of the COVID-19 shots and report their vaccination status to the City as a condition of employment (the "Covid Vaccine Mandate"). AOE 27-32.

11. The City initially set a deadline of October 20, 2021, for employees to comply with the Covid Vaccine Mandate. It extended that deadline to December 18, 2021. AOE 92-103.

12. Petitioner filed the underlying action in the Superior Court on September 19, 2021. It challenged the validity and constitutionality of the Covid Vaccine Mandate under federal and state law, including the California Constitution's express right to privacy. AOE 7-34.

13. The First Amended Complaint was filed on November 5, 2021, and included additional allegations that the City was threatening to ignore city firefighters' due process rights by putting them on unpaid leave, without a hearing, if they did not comply with the vaccine mandate. The seventh cause of action alleged a claim for declaratory and injunctive relief that the City's threat to put non-

compliant firefighters on unpaid leave without a *Skelly* hearing violated the firefighters' rights to due process under *Skelly* and its progeny. AOE 36-61.

14. As of December 9, 2021, more than a hundred Los Angeles city firefighters had not complied with the Covid Vaccine Mandate. The City put them on unpaid administrative leave that day. AOE 678-681, 703.

15. None of the firefighters who were put on unpaid leave on December 9 received a *Skelly* hearing before the City stopped paying them. AOE 703.

16. Although the City cited the "imminent threat to public health and workplace safety" that the unvaccinated firefighters posed, there are hundreds of unvaccinated firefighters currently on duty in the City. All an unvaccinated firefighter had to do to stay on duty, and continue getting paid, was request a medical or religious exemption to the vaccine mandate. Many unvaccinated firefighters did that between the date this case was filed and December 9, 2021. AOE 703-704.

17. The City and the firefighters' union had been negotiating about the consequences of the Covid Vaccine Mandate since August 2021. Those negotiations broke down during late October 2021. AOE 88-89.

18. In response, the firefighters' union filed a grievance that accused the City of negotiating in bad faith and Petitioner filed a motion for a preliminary injunction in the Superior Court.

19. The motion for a preliminary injunction was scheduled to be heard on April 26, 2022, but Petitioner went to court during the week of Thanksgiving and asked to advance the hearing to a date in December.

20. The *ex parte* application was supposed to be heard by Judge Stephanie Bowick, the judge to whom the case was initially assigned. But, the day before the hearing, Judge Bowick recused herself because she knows several firefighters. The case was reassigned to Judge Michael Linfield on November 23, 2021, and Judge Linfield heard the *ex parte* application on November 24. He advanced the hearing on the motion for a preliminary injunction to December 20, 2021.

21. Judge Linfield heard oral argument on the motion for a preliminary injunction on December 20. AOE 714-747. He took the matter under submission but denied the motion the next day. AOE 749-780.

22. Following the Superior Court's ruling, several dozen unvaccinated firefighters requested religious or

medical exemptions and returned to active duty. On information and belief, roughly 33 unvaccinated firefighters did not request religious or medical exemptions and remain on unpaid administrative leave. They have not been paid since November. No *Skelly* hearings have been scheduled for them.

23. In his ruling, Judge Linfield recognized the severity of harm to the firefighters who were put on unpaid leave without a *Skelly* hearing, in violation of their due process rights. But he said that harm could be compensated later, through a lawsuit for back pay, and that their harm was outweighed by the chance of somebody dying from COVID-19. AOE 750.

24. Judge Linfield's ruling contained numerous legal errors. Judge Linfield also abused his discretion in framing the analysis as a choice between preventing monetary harm and saving lives, as the suspended firefighters did not ask to be put back on duty, to stop the *Skelly* process or block enforcement of the vaccine mandate. Moreover, Judge Linfield's ruling went far beyond the issues necessary to decide the motion for a preliminary injunction. It compared the number of COVID-19 deaths (a number that is constantly being revised) to the number of Americans killed

during the Civil War. AOE 751. It disparaged a public health expert hired by Petitioner to provide basic background information about the COVID-19 response while citing to an unidentified "scientific consensus" about issues that had no bearing on the legal analysis required to decide the motion. AOE 779-780.

25. The ruling also questioned the credibility of Petitioner's counsel for describing the COVID-19 restrictions as the "greatest" restrictions on liberty in American history, a rhetorical comment about the scope of the restrictions, which the World Health Organization and others have acknowledged as unprecedented. Judge Linfield said the comment is "just plain wrong" and that the COVID-19 restrictions "pale in comparison" to slavery and the internment of 125,000 Japanese-Americans during World War II. AOE 753

26. This emotional reaction to a rhetorical comment that the court admitted was "not evidence" obviously factored into Judge Linfield's decision, as he made a point of mentioning that "an attorney's credibility is his most important asset," and he suggested that Petitioner's counsel lack it. AOE 753.

27. Before the December 20 hearing, the City filed a Notice of Related Cases purportedly deeming this case related to an action the firefighters union had filed after the City stopped negotiating with it about the consequences of not complying with the Covid Vaccine Mandate (the "Union Case"). AOE 325-328. This case was filed first, while the Union Case was filed in November 2021, in the writs and receivers department. The City did not file the Notice within the 15-day period the Rules of Court require. It said the cases involved the same parties and the same claims, which was not true (only the City is a party in both cases and the Union Case challenged the City's use of the local state of emergency to stop the collective bargaining process over the consequences of not complying with the mandate while this case challenges the mandate itself). The City also filed the Notice after a different judge had denied the fire union's motion for a preliminary injunction and after the union said it would dismiss the case. Petitioner opposed the Notice on those grounds. AOE 329-334.

28. Nonetheless, Judge Linfield granted the City's request and he ordered that the dismissed Union Case be transferred from the writs and receivers department to his own department. AOE 784.

29. Petitioner brings this Petition to correct the Superior Court's erroneous ruling on the motion for a preliminary injunction. Writ relief is warranted. Petitioner cannot appeal from the Superior Court's order and time is of the essence, as 33 firefighters are still on unpaid leave with no *Skelly* hearings in sight. Petitioner and its members will suffer irreparable harm if the Court does not order the Superior Court to follow *Skelly* and require that the City restore the suspended firefighters' paychecks and give them a hearing before it stops paying them.

30. Furthermore, the Petition raises questions of great public importance about the procedures governments must follow before they seek to terminate public employees for not obeying COVID-19 vaccine mandates. These questions do not just affect the suspended Los Angeles firefighters. They affect all city employees who have not complied with the mandate. They affect public employees who have not complied with mandates from other government employers, including the County of Los Angeles and the City of Beverly Hills, both of which are defending mandate-related cases brought by public employees.

31. Judge Linfield should also be disqualified for cause and the case should be reassigned to a different

department. The emotional tone of Judge Linfield's ruling on the preliminary injunction motion raises questions about his ability to be impartial. So does his disparagement of Petitioner's counsel and expert witness. Indeed, Judge Linfield's ruling reads more like an opinion piece in *The Nation* than a reasoned judicial decision on the narrow legal issues presented in the motion for a preliminary injunction. Issuing such a decision at the end of a case, after a full presentation of evidence and argument, would be one thing. Doing so at the beginning, less than a month after receiving the matter and before the pleadings are even settled, indicates that Judge Linfield has prejudged the case and its participants.

32. This Petition is brought pursuant to section 1085 of the California Code of Civil Procedure and Rule 8.486 of the California Rules of Court.

33. Petitioner filed the Petition less than 60 days after the Superior Court denied its motion for a preliminary injunction. Thus, the Petition is timely.

34. Time of the essence. The suspended firefighters cannot live forever without a paycheck. They cannot afford to wait to file, much less adjudicate, multiple lawsuits for back pay, as the Superior Court suggested. Therefore, the Court

should issue a *Palma* notice and set this case for further briefing and argument, if needed, as quickly as possible.

Prayer for Relief

Therefore, Petitioner respectfully requests that the Court:

1. Grant the Petition;

2. Issue a writ of mandate ordering the Superior Court to grant Petitioner's motion for a preliminary injunction;

3. Order Judge Linfield to be disqualified and direct the Superior Court to reassign the case to a different department; and

3. Award Petitioners their costs and other appropriate relief, as well as any other relief the Court determines is just and proper.

Dated: January 20, 2022

JW HOWARD/ATTORNEYS, LTD.

By _____
John W. Howard
Attorneys for Petitioner

III.

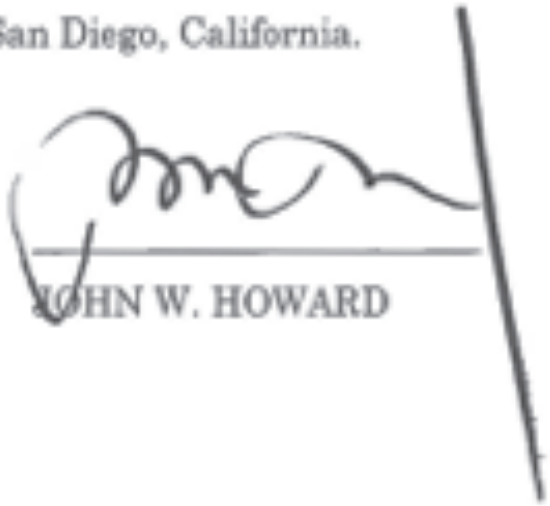
VERIFICATION

I, John W. Howard, declare as follows:

1. I am an attorney licensed to practice law before all courts in the state of California and am a partner with the law firm JW Howard/Attorneys, Ltd., counsel of record to Petitioner in this matter. As Petitioner's lawyer, I make this verification because I am familiar with the proceedings that gave rise to this petition.

2. I have read the foregoing petition for a writ of mandate. It is true of my own knowledge except as to those matters that are stated on information and belief. As to those matters, I believe them to be true. If called as a witness I could and would testify competently to these facts.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this verification was executed on January 20, 2022, at San Diego, California.



JOHN W. HOWARD

IV.

ARGUMENT

The Petition should be granted because cutting off a public employee's pay without a prior *Skelly* hearing violates the Due Process Clause and constitutes severe harm that warrants injunctive relief. To conclude otherwise, the Superior Court had to disregard the law and compare the suspended firefighters' monetary harm to people who die from COVID-19, an irrelevant comparison that raises serious questions about the court's ability to be impartial.

A. Petitioner Showed A Possibility of Succeeding on the Merits of Its Due Process and State Constitution Privacy Claims.

"The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73 [196 Cal.Rptr. 715].) Thus, "as a general matter, the question whether a preliminary injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff will prevail on the merits, and (2) the relative balance of

harms that is likely to result from the granting or denial of interim injunctive relief." (*White v. Davis* (2003) 30 Cal.4th 528, 554 [135 Cal.Rptr.2d 648].) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State* (1992) 4 Cal.4th 668, 678 [15 Cal.Rptr.2d 480].) Given the severity of job loss, at least one court has applied a lower burden when public employees seek a preliminary injunction to protect their jobs, requiring only that they show "'some possibility'" [they] will prevail on the merits of [their] action." (*Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal. App. 4th 298, 309, as modified (Oct. 10, 2012) [146 Cal.Rptr.3d 677], quoting *Butt, supra*, 4 Cal.4th at pp. 677-678.)

Petitioner met that standard by showing that the City's act of putting certain unvaccinated firefighters on unpaid leave without a prior *Skelly* hearing violated the Due Process Clause, the seventh cause of action alleged in the first amended complaint. Unlike private employment, the "California statutory scheme regulating civil service employment confers upon an individual who achieves the status of 'permanent employee' a property interest in the

continuation of his employment which is protected by due process." (*Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, 206 [124 Cal.Rptr. 14].) Although the type of hearing that must be provided varies based on the exigency and the severity of the proposed discipline, "[t]he potential deprivation of a person's means of livelihood demands a high level of due process." (*Bostean v. Los Angeles Unified Sch. Dist.* (1998) 63 Cal. App. 4th 95, 110 [73 Cal.Rptr.2d 523], quotations omitted.) Thus, a government cannot stop paying its permanent public employees without first giving them a hearing that satisfies *Skelly*. (*Id.* at pp. 109-111, citing cases.)

Skelly applies even though the City has not yet fired any of the suspended firefighters. Many courts have recognized that an unpaid leave, "even though only temporary," can be tantamount to termination if it subjects the employee "to a financial loss of a magnitude sufficient to constitute a deprivation of a property interest ...." (*Martin v. Itasca Cty.* (Minn. 1989) 448 N.W.2d 368, 370; see also *Civil Service Assn. v. City & Cty. of San Francisco* (1978) 22 Cal.3d 552, 560 [150 Cal.Rptr. 129] [hereafter "*CSA*"] [noting that "[s]uspension of a right or of a temporary right of enjoyment may amount to a taking for due process

purposes," cleaned up].) That is what happened in *Bostean*, where an employee successfully sued the Los Angeles Unified School District for back pay and other benefits after the district put him on unpaid medical leave for seven month. Like the City, the school district argued that it had to put Bostean on leave without a *Skelly* hearing because it was necessary to ensure "co-worker safety" but the Court of Appeal rejected those arguments, finding them to be unsupported by evidence and to be outweighed by Bostean's property interest in his employment. (*Bostean*, *supra*, 63 Cal. App. 4th at 114-117.)

Similarly, in *Mitchell v. State Personnel Board* (1979) 90 Cal. App. 3d 808, 812-814 [153 Cal.Rptr. 552], the Court of Appeal rejected a state hospital's argument that it could fire an employee (Mitchell) for allegedly mistreating a patient without giving him a *Skelly* hearing. The court explained that putting Mitchell on administrative leave "removed any emergency which might have been presented by [his] continued presence at the hospital." (*Id.* at p. 813.) Thus, "utilization of an emergency exception to the procedural requirements announced in *Skelly* [was] unwarranted." (*Ibid.*)

The same reasoning applies here. In fact, the City barely contested this point. All it said was that due process is "flexible" and that its action was justified by *Gilbert v. Homar* (1997) 520 U.S. 924 [138 L.Ed.2d 120], and *Gilbert v. City of Sunnyvale* (2005) 130 Cal. App. 4th 1264 [31 Cal.Rptr.3d 297]. But those cases involved punitive (disciplinary) action where a third party's independent determination of wrong doing "serve[d] to assure that the state employer's decision to suspend the employee is not baseless or unwarranted." (*Homar*, *supra*, 520 U.S. at p. 934, cleaned up [discussing prosecutor's decision to charge university police officer with felony drug possession as eliminating need for pre-deprivation hearing].)

The City did not put the firefighters on unpaid leave for disciplinary reasons. Thus, "the compelling reasons for short-cutting pre-removal safeguards in disciplinary cases [like the *Gilbert* cases] are not present" and cannot justify the City's action. (*Stearns v. Estes* (C.D. Cal. 1980) 504 F. Supp. 998, 1001-1002.)

Furthermore, the City interpreted the *Gilbert* cases far too broadly. In *Homar*, the U.S. Supreme Court merely recognized that "[a]n 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." (*Homar*, *supra*, 520 U.S. at p. 931, emphasis added, quotations omitted.) This is not a limited situation. The City cut off pay to more than a hundred city firefighters last month. In light of the Superior Court's ruling, the City could stop paying hundreds of other public employees without giving them a prior *Skelly* hearing, in clear violation of the employees' due process rights.

Most importantly, there is no assurance—much less a substantial one—that the City's proposal to terminate the unvaccinated firefighters is proper. The City spoke below about America's longstanding practice of compulsory vaccination. But the witness it produced for a deposition last month could not recall a firefighter ever being disciplined, much less fired, for declining a vaccine. AOE 688-691. And while compulsory vaccination may have been common during the late nineteenth and early twentieth century, when cases like *Abeel v. Clark* (1890) 84 Cal. 226 [24 P. 383], and *Jacobson v. Massachusetts* (1905) 197 U.S. 11 [49 L.Ed. 643], were decided, it has not been common recently, as constitutional law evolved to encompass privacy and due

process rights that would have shocked earlier jurists. Indeed, in 1972, California voters added an express privacy right to this state's Constitution, leading the California Supreme Court to create "a privacy doctrine that has no equivalent in federal constitutional law." (Goodwin Liu, *State Courts and Constitutional Structure* (2019) 128 Yale L.J. 1304, 1327, citations omitted.)

Justice Liu wrote the opinion in *Mathews v. Becerra* (2019) 8 Cal.5th 756 [257 Cal.Rptr.3d 2], overruling a demurrer to a declaratory relief claim that challenged a new child pornography law as violating the privacy rights of the therapist plaintiffs' patients. Although *Mathews* did not involve the right to bodily autonomy, the Court emphasized the need for "factual development" in all privacy cases and it remanded the matter to the trial court with instructions to develop that record through discovery. (*Id.* at pp. 783-787.)

Thus, there is no guarantee that the City can fire unvaccinated firefighters for not complying with the Covid Vaccine Mandate. The parties will have to conduct discovery and the Superior Court will have to exercise its independent judgment and decide whether the mandate violates the state constitutional right to privacy, among other laws. That factual development is even more important here than it was

in *Mathews* because the vaccine mandate affects the firefighters' right to bodily integrity. A higher standard of review applies when the "case involves an obvious invasion of an interest fundamental to personal autonomy" like bodily integrity. (*Hill v. Nat'l Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 34 [26 Cal.Rptr.2d 834].)

Moreover, because they are unionized, the City cannot unilaterally change the firefighters' conditions of employment. (See *NLRB v. Katz* (1962) 369 U.S. 736, 738-739 [8 L.Ed.2d 230] [recognizing that employer may not unilaterally change conditions of employment under negotiation with union].) The firefighters' union is still negotiating with the City about the consequences of non-compliance and it filed a grievance about the City's conduct in the collective bargaining process. AOE 88-89.

Therefore, Petitioner will likely succeed on the merits of its due process/*Skelly* claim and has a realistic chance of prevailing on its state law privacy claim.

B. The Superior Court Erroneously Compared the Suspended Firefighters' Severe Harm to Somebody Dying of COVID-19.

This probability of success matters because of the severity of harm the suspended firefighters face.

Deciding whether to grant a preliminary injunction is always a balancing act. "The goal is to minimize the harm that would be caused by an erroneous interim decision." (*People v. Uber Techs., Inc.* (2020) 56 Cal. App. 5th 266, 283, as modified on denial of reh'g (Nov. 20, 2020) [220 Cal.Rptr. 3d 290].) In the employment context, the balancing of harms usually favors the employee, as "the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages." (*Nelson v. Nat'l Aeronautics & Space Admin.* (9th Cir. 2008) 530 F.3d 865, 882, reversed on other grounds, 562 U.S. 134 (2011).)

The Superior Court correctly recognized the severity of the harm to the suspended firefighters. But it made three errors in its balancing analysis.

First, it compared the severity of the firefighters' economic harm to somebody dying from COVID-19, saying: "We can reimburse a person for monetary losses caused by being put on unpaid leave. We cannot resurrect the dead." AOE 723; see also AOE 779 (concluding that "any harm to the firefighters who refuse to be vaccinated is vastly outweighed by the life-threatening harm of permitting over a hundred unvaccinated firefighters to continue living, eating,

and sleeping with fellow firefighters at over 106 City firehouses"). But Petitioner did not seek to block the City's vaccine mandate and did not seek to restore any unvaccinated firefighters to active duty. Thus, the Superior Court's comparison of economic harm to sickness and death was irrelevant, emotional and ill-considered.

Second, the Superior Court relied on cases like *Tahoe Keys Property Owners Association v. State Water Resources Board* (1994) 23 Cal. App. 4th 1459, 1471 [28 Cal.Rptr.2d 734], where plaintiffs tried to block a government policy from taking effect. AOE 762. But, again, Petitioner did not ask the Superior Court block the City's COVID-19 vaccine mandate. Thus, the Superior Court's focus on the validity of the City's vaccine mandate was irrelevant to the narrow issue Petitioner raised below. Petitioner did not have to make a significant showing of success on its entire complaint to enforce *Skelly*.

Third, the Superior Court said the City did not plan to fire any unvaccinated firefighters without first giving them a *Skelly* hearing. AOE 753. That also missed the point. In *CSA*, the California Supreme Court held that a pre-deprivation hearing is not required in suspension cases because, "while the risk of error may be just as great as in a

termination case, the consequences are not. A short suspension is not a destruction of the employee's employment but rather is an interruption" in which the employee "does not face the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him." (*CSA*, *supra*, 22 Cal.3d at pp. 562-563 [also noting that "the state has historically treated suspensions of 10 days or less" as "short"]; see also *Townsel v. San Diego Metro. Transit Dev. Bd.* (1998) 65 Cal. App. 4th 940, 952 [77 Cal.Rptr.2d 231] [noting that "suspension and termination trigger significantly different due process protections"].)

That is not the case here. The suspended firefighters had their paychecks cut off on December 9 and they were told flatly that if they do not comply with the vaccine mandate they will not be paid again and they will be fired. Thus, their unpaid leave was not a "short suspension" like the one discussed in *CSA* but was tantamount to termination. The City could not take that action without giving the affected employees a prior *Skelly* hearing.

C. The Superior Court Abused Its Discretion in Denying Preliminary Injunctive Relief on This Important Issue That Affects Thousands of Public Employees in Los Angeles County.

These were not trivial errors. They caused the Superior Court to misapply the law and abuse its discretion in denying Petitioner's motion for a preliminary injunction.

"The decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*Boehm v. Superior Court (Cty. of Merced)* (1986) 178 Cal. App. 3d 494, 498 [223 Cal.Rptr.716, 718].) But the court has "no discretion to act capriciously." (*Gosney v. State* (1970) 10 Cal. App. 3d 921, 924 [89 Cal.Rptr. 390].) It must exercise its discretion "in favor of the party most likely to be injured." (*Ibid.*) "If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Boehm*, *supra*, 178 Cal. App. 3d at p. 498.)

This standard of review is deferential but it is not toothless. "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (*Dorman v. DWLC Corp.* (1995) 35 Cal. App. 4th 1808, 1815 [42 Cal.Rptr.2d 459], quotations omitted.) For example, "a court abuses its discretion where no reasonable basis for the action is shown." (*Coal. for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238

Cal. App. 4th 513, 519 [189 Cal.Rptr.3d 306]; see also *Westside Cmty. for Indep. Living, Inc. v. Obledo* (1983) 33 Cal. 3d 348, 355, [657 P.2d 365] [noting that trial court's power "is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles ... and to reversal on appeal where no reasonable basis for the action is shown"], quotations omitted.) Whatever the case, the analysis focuses on whether the trial court's decision "clearly appear[s] to effect injustice." (*Dorman*, *supra*, 35 Cal. App. 4th at p. 1815, cleaned up.)

The Superior Court's ruling qualifies. The court recognized the severity of the economic harm to the suspended firefighters. AOE 774. It also recognized the possibility that they would recover the money they are losing later. AOE 728, 765. Thus, it should have granted Petitioner's motion. It denied the motion by comparing the firefighters' economic harm to somebody dying from COVID-19. As explained above, that was an irrelevant comparison that alone constitutes an abuse of discretion.

The lower court also repeatedly cited the COVID-19 state of emergency as justifying the City's actions. But a grant of emergency power "cannot abridge the prerogative of the courts to grant an injunction to protect a party's

constitutional right." (*Saltonstall v. City of Sacramento* (2014) 231 Cal. App. 4th 837, 851 [180 Cal.Rptr.3d 342], as modified (Dec. 18, 2014).) That is especially true for firefighters, who have worked throughout the pandemic, serving the public while others sheltered in place. AOE 360. This public service is why the Legislature passed the Firefighter Bill of Rights in 2007, with the Legislature explicitly finding that firefighters "are deserving of due process rights and protections" even during emergency situations. 2007 Cal. Legis. Serv. Ch. 591 (A.B. 220) (West). This law explicitly authorizes preliminary injunctive relief to protect firefighters' jobs. (Gov't Code § 3260.)

The Superior Court did not consider the Firefighters Bill of Rights because Petitioner did not allege a claim based on it. That missed the point. The Firefighter Bill of Rights is relevant because it rebuts the City's argument that it can ignore the Due Process Clause during a state of emergency. It is relevant because, like the Police Officer Bill of Rights, it "promote[s] stable employer-employee relations." (*Heyenga v. City of San Diego* (1979) 94 Cal. App. 3d 756, 760 [156 Cal.Rptr. 496] [reversing denial of preliminary injunction motion for this reason in case brought by police officers].) It is relevant because, if the suspended firefighters have to file

lawsuits for back pay in the future, as the Superior Court contemplated, they *will* include claims under the Firefighter Bill of Rights, potentially subjecting taxpayers to additional liability. (See Gov't Code § 3260 [describing remedies available, including $25,000 civil penalty, actual monetary damages and legal fees].)

Granting the preliminary injunction eliminates this potential liability. It preserves the status quo. There is no reasonable basis to conclude otherwise.

The Superior Court also accused Petitioner of creating "straw men" arguments but, in fact, it was the court that did so. For example, the Superior Court said Petitioner did not show that the City abused its discretion in adopting the COVID-19 vaccine mandate. AOE 769. Petitioner did not raise that argument in its motion for a preliminary injunction. AOE 75-82. The court also ignored the fact that hundreds of unvaccinated firefighters were serving the public after December 9, directly undermining the City's argument that the 109 unvaccinated firefighters who were suspended posed an imminent threat to public health. AOE 703. In fact, all an unvaccinated firefighter had to do to go back to work after December 9 was request a religious or medical exemption. *Ibid.* (Many have since done that.) The

Superior Court recognized this anomaly but refused to consider it in its legal analysis, a quintessentially arbitrary action. (Cf. *Rancheria v. Jewell* (9th Cir. 2015) 776 F.3d 706, 714 [noting in similar context that agency action "is arbitrary and capricious if it ignores important considerations or relevant evidence on the record"]; see also *In re DeLuna* (2005) 126 Cal. App. 4th 585, 596 [24 Cal. Rptr. 3d 643], as modified (Feb. 16, 2005), as modified on denial of reh'g (Mar. 3, 2005) [same].)

Finally, the Superior Court ignored *Mathews*, a recent California Supreme Court decision that precludes courts from adjudicating state law privacy claims at the early stages of litigation, without a full evidentiary record. In fact, despite issuing a lengthy opinion with citations to dozens of irrelevant federal cases, the Superior Court did not mention *Mathews* once. It acted as though the case doesn't exist. It did that despite Petitioner discussing *Mathews* in its moving and reply papers and during oral argument. AOE 81-82, 619-620, 732-734. It is impossible to read *Mathews* and believe that this case can be decided as a matter of law, at the pleading stage, as the Superior Court concluded.

D. The Superior Court's Decision Reflects Improper Political Bias and Prejudice.

One would think that a dispassionate court would offer redress for the City's egregious violation of established, constitutionally based rights. But the court below was anything but dispassionate. In an overwrought and emotional—bordering on maudlin—ruling, it addressed everything but the law it was called upon to apply.

Indeed, the lower court's opinion started with the entirely irrelevant observation that payment of salaries paled in comparison to the loss of one life. AOE 751. This observation set the tone of the court's decision but it was irrelevant. As explained above, there was no evidence before the court that one, even one, citizen has ever been infected with the COVID-19 virus by a firefighter, let alone one death ascribable to that contact. In any event, connecting those two concepts was a *non sequitur* that certainly cannot soundly support judicial decision making. It is like saying that, because a member of the public could become infected by another random member of the public, judges should be prohibited from writing decisions in any case. One concept does not follow the other.

Moreover, the Superior Court based its decision on news reports and generic statements about an unidentified "scientific consensus" that no competent jurist would rely on.

AOE 751. It compared the COVID-19 pandemic to the Civil War and other American conflicts, as if one were connected, in some way, to the others. *Ibid.* It said COVID-19 poses the same threat to the community as it did in March 2020, *ibid.*, an irrational statement contradicted by the City's argument that the COVID-19 vaccines (which did not exist in March 2020) protect people from the virus. It distinguished cases Petitioner cited by saying they "did not involve an emergency ordinance designed to save the lives of untold thousands of residents ...." AOE 777.

These statements, and others like them, show that Judge Linfield has strong feelings about the COVID-19 pandemic and the government's response to it. Many people do. But a judge must be impartial. More importantly, a judge must *appear* to be impartial. Thus, a judge may be disqualified from hearing a matter because of "a particular combination of circumstances creating an unacceptable risk of bias." (*Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.* (2020) 52 Cal. App. 5th 141, 208 [265 Cal.Rptr.3d 752] review denied (Oct. 28, 2020), quotations omitted.)

Of course, a judge will not be "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute ...." (*Hortonville Joint School*

Dist. v. Hortonville Education Assn. (1976) 426 U.S. 482, 493 [49 L.Ed.2d 1], quotations omitted.) But "bias or prejudice against a party may be shown when a judge gratuitously offers an opinion on a matter not yet pending before him or her." (*Gerawan*, *supra*, 52 Cal. App. 4th at p. 209.) Bias may also be shown by "'a commitment to a result (albeit, perhaps, even a tentative commitment)'" that shows the judge has prejudged a matter. (*Id.* at p. 208, quoting *BreakZone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205, 1236 [97 Cal.Rptr.2d 467].) The analysis focuses on whether the judge's comments "impair the judge's impartiality so that it appears probable that a fair trial cannot be held." (*Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [171 Cal.Rptr. 590], quotations omitted.)

The gratuitous comments about COVID-19 in the Superior Court's decision raise serious questions about Judge Linfield's ability to be impartial in this case. They were not isolated, either. They may be what led Judge Linfield to ignore the narrow due process/*Skelly* issues Petitioner raised in its motion for a preliminary injunction. They may be what led him to issue a ruling on the validity of the City's COVID-19 vaccine mandate, which Petitioner did not raise below, and to conclude that the suspended

firefighters do not have a reasonable expectation of privacy in their bodily integrity during the COVID-19 pandemic without addressing binding Supreme Court authority on the scope of that right. They show a commitment to a certain result at an early stage, before the pleadings have been set or discovery done.

Judge Linfield's strong feelings about COVID-19 also may have led him to attack Petitioner's counsel for referring to the COVID-19 restrictions as the "greatest" restrictions on liberty in American history. AOE 751. The court acknowledged that this statement was not evidence but he said it "is just plain wrong. While COVID restrictions might impinge on the liberty of Americans, they pale in comparison to the enslavement of tens of millions of African Americans, the murder and forced relocation of millions of Native Americans, and the imprisonment of more than 115,000 Japanese Americans during World War II." AOE 753. He explicitly questioned the credibility of Petitioner's counsel for making the statement. AOE 753.

That was improper. Petitioner's counsel did not compare the COVID-19 restrictions to slavery, Manifest Destiny, Japanese-American internment camps or anything else. They made a rhetorical comment about the *scope* of the

restrictions, which have been widely recognized as unprecedented and which have applied to *all* Americans, not certain groups discriminated against because of their race.

This comment raises even more doubts about Judge Linfield's ability to be fair. Indeed, in one case, a judge was disqualified because his "comments strongly suggest[ed], if they [did] not directly state, that the court believed [one party's lawyer] was an attorney who lacked credibility ...." (*Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174 Cal. App. 4th 1441, 1448-1449 [95 Cal.Rptr.3d 734].) Here, Judge Linfield actually said that he does not trust Petitioner's counsel. Even if that distrust were warranted—and, to be clear, it is not—it undermines Judge Linfield's impartiality and would cause a reasonable person to question his ability to provide Petitioner with a fair trial.

So do the lower court's comments about Petitioner's expert, Sean Kaufman. Mr. Kaufman is an expert in public health. AOE 109-110. He has worked at the Centers for Disease Control and helped lead the response to the Ebola pandemic in America. *Ibid.* Now he owns a company that advises the public and private sectors about public health issues. *Ibid.* He submitted a declaration for the limited purpose of providing background information about COVID-

19 but Judge Linfield teed off on him, saying "[h]e is not even a doctor" and that his opinions "are contrary to those of the vast majority of epidemiologists and coronavirus experts." AOE 779. No such evidence was before the court, though, nor was it relevant to the narrow due process/*Skelly* issues that Petitioner raised below. Moreover, the only other testimony about COVID-19 that was before the court came from Dr. Arthur Manoukian, the City Physician. Although Dr. Manoukian has a medical degree, he specializes in psychiatry, not epidemiology, emergency medicine or, for that matter, ordinary physical medical care. AOE 376. He is not an epidemiologist and does not appear to have a background in public health. *Ibid.*[1]

Combined, these comments—and the opinion's advocacy-like tone—show that Judge Linfield believes the COVID-19 restrictions are trivial and that the City can do whatever it wants during the pandemic. It would be one thing to issue such a decision at the *end* of a case, after a full presentation of evidence and argument, but it is quite another to do so at the beginning. They reflect bias. Judge Linfield may disagree with the firefighters' decision to

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[1] Dr. Manoukian's deposition is scheduled for a date in February.

challenge the City's vaccine mandate. He may disagree with their counsels' decision to file this case. But the American Bar Association "urges every lawyer to accept representation of unpopular clients and causes ...." (*Andrews*, *supra*, 28 Cal.3d at p. 790 fn. 3, cleaned up.)

That principle applies even during a state of emergency. Indeed, Judge Linfield himself called "states of emergency" a "violation[ ] of basic democratic principles" that we associate "with totalitarian governments" but which the United States "has resorted to ... during every one of our wars" to violate the Bill of Rights. (Michael Linfield, Freedom Under Fire: U.S. Civil Liberties in Times of War (South End Press 1990) p. 1; see also *id.* at p. 170 [saying these conflicts include "'[l]ow-intensity warfare'—be it the contra war in Nicaragua or the 'war on drugs'" (and, presumably, the war against COVID)].) He has also argued that "true national security rests not on military might, domestic censorship or internal repression, but on a full realization of the freedoms guaranteed in the Constitution." (*Id.* at p. 171.)

Those freedoms include the California Constitution's express right to privacy. Judge Linfield cited school vaccine cases like *Love v. State Department of Education* (2018) 29

Cal. App. 5th 980 [240 Cal.Rptr.3d 861], and arcane decisions like *Jacobson* to hold that the firefighters do not have a reasonable expectation of privacy in their bodily integrity during the COVID-19 pandemic. AOE 773. Unlike public schools, there is no evidence in the record that the City of Los Angeles has ever required that city employees get a vaccine against their will. In any event, "we have never held that the existence of a long-standing practice or requirement of disclosure can, by itself, defeat a reasonable expectation of privacy in the circumstances." (*Mathews*, *supra*, 8 Cal.5th at p. 778.) This is a disputed issue, a mixed question of law and fact that is heart of this case. It requires an impartial judge who can put aside his or her political views and follow the law as it has evolved, not simply cite decades-old cases to justify a predetermined outcome.

Section 170.3 of the Code of Civil Procedure suggests that a judge should have a chance to disqualify himself before others intervene. (*See* Civ. Proc. Code § 170.3, subd. (c)(1) [discussing what happens "[i]f a judge who should disqualify himself or herself refuses to do so"].) Petitioner intends to ask Judge Linfield to disqualify himself before the February 7 hearing on the City's demurrer. Given the seriousness of the lower court's comments and the likelihood

that Judge Linfield will not disqualify himself, if this Court considers this Petition on its merits, it should also consider the disqualification issue and determine whether Judge Linfield's comments show an appearance of bias that justifies transferring the case to a different department.

E. The Suspended Firefighters Will Be Irreparably Harmed if this Court Does Not Intervene and Protect their *Skelly* Rights.

Writ relief is extraordinary but this situation qualifies. At least 33 firefighters are still on unpaid administrative leave and have not been paid since December 9, 2021. One fire chief has not been paid since November 12, 2021. AOE 707-709. These individuals will soon have to look for other jobs to pay their bills. Under *Skelly*, that is exactly what public employees are *not* supposed to endure.

"A writ of mandate should not be denied when the issues presented are of great public importance and must be resolved promptly." (*Corbett v. Superior Court (Bank of Am., N.A.)* (2002) 101 Cal. App. 4th 649, 657 [125 Cal.Rptr.2d 46], cleaned up.) Moreover, while not the normal course, courts "ha[ve] repeatedly recognized [that] the [early] intervention of an appellate court may be required to consider instances of a grave nature or of significant legal impact, or to review

questions of first impression and general importance to the bench and bar where general guidelines can be laid down for future cases." (*Anderson v. Superior Court* (1989) 213 Cal. App. 3d 1321, 1328 [262 Cal.Rptr. 405], citation omitted.)

For example, appellate courts have exercised original jurisdiction over a constitutional challenge to a ballot measure because it "involves issues of sufficient public importance to justify departing from our usual course." (*Legislature v. Eu* (1991) 54 Cal. 3d 492, 500 [286 Cal.Rptr. 283].) Similarly, in *Brown v. Fair Political Practices Commission* (2000) 84 Cal. App. 4th 137 [100 Cal.Rptr.2d 606], the First District Court of Appeal exercised original jurisdiction to decide whether state law precluded then Oakland Mayor Jerry Brown from participating in decisions concerning a redevelopment project near his property. (*Id.* at p. 140 fn. 2.) And appellate courts have utilized the expedited *Palma* procedure "when petitioner's entitlement to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue—for example, when such entitlement is conceded or when there has been clear error under well-settled principles of law and undisputed facts—or when there is an unusual urgency requiring acceleration of the normal process." (*Ng v.*

Superior Court (The People) (1992) 4 Cal. 4th 29, 35 [13 Cal.Rptr.2d 856].)

That is the case here. Petitioner showed that the City violated *Skelly* by putting the unvaccinated firefighters on unpaid leave without a hearing. The Superior Court committed clear error and abused its discretion in denying injunctive relief. Furthermore, this issue does not just affect the City of Los Angeles' employees. Similar vaccine mandates have been adopted elsewhere, including in the County of Los Angeles and the City of Beverly Hills. The Superior Court's decision will give governments across the State the green light to ignore *Skelly* and stop paying anybody who has not complied with the vaccine mandates. Thus, the Court should not delay its review of this important legal issue.

Finally, it bears repeating that "[t]he suspension of an employee's regular earnings for as long as a week can impose a serious deprivation upon the worker and his family." (*CSA*, *supra*, 22 Cal.3d at p. 569 [Tobriner, J., concurring and dissenting].) A pre-deprivation hearing also "serve[s] the important, if more subtle, purpose of according the accused individual a measure of respect and dignity, assuring him that he is not so insignificant that the government may

curtail his livelihood even for relatively short periods of time without giving him some opportunity to explain or rebut the charges against him." (*Id.* at pp. 569-570.) Those words echo today, two years into a pandemic that caught governments off-guard. Some people believe that compulsory medical treatments are a routine aspect of living in a civilized society. California state law has evolved during the past half century to state otherwise. At the very least, these state law questions will have to be litigated through discovery and potentially at a bench trial. In the meantime, individuals who have devoted their careers to public service deserve to get the due process they earned through that service. They deserve to be paid while they try to assert their rights.

The Superior Court's failure to recognize that was erroneous and will render the process unfair, as will its emotional reaction to the COVID-19 pandemic and its inability to focus on the law and evidence before it.

V.

CONCLUSION

Therefore, Petitioner respectfully requests that the Court grant the Petition.

Respectfully submitted,

Dated: January 20, 2022

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By _____
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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.204(c)]

This brief consists of 9,730 words as counted by the Microsoft Word version 2002 word processing program used to generate the brief.

Respectfully submitted,

Dated: January 20, 2022

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By _____
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Firefighter4freedom
Los Angeles Superior Court
Court of Appeals, Second District, Division One
Court of Appeals Case No.: _____
Los Angeles Superior Court Case No.: 21STCV34690

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above-entitled Court. The business address is:

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☐ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

■ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic system and said documents were successfully transmitted via Email that same day.

☐ PERSONAL. The below described documents were personally served on date below via Knox Services.

On the date indicated below, I served the within as indicated:

1. **VERIFIED PETITION FOR WRIT OF MANDATE; MEMORANDUMOF POINTS AND AUTHORITIES – Immediate Relief Requested (Palma Notice)**
2. **Appendix Part 1 – Pages 1-324**
3. **Appendix Part 2 – Pages 325-626**
4. **Appendix Part 3 – Pages 627-785**

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on January 21, 2022, at San Diego, CA.

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