THE HONORABLE BARBARA J. ROTHSTEIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZACHARY PILZ, et al.,

Plaintiffs,

v.

JAY INSLEE, et al.,

Defendants.

No. 3:21-cv-05735-BJR

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

NOTED FOR HEARING:
OCTOBER 15, 2021, 9:00 AM PST

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I. INTRODUCTION

Proclamation 21-14, issued by Governor Inslee on August 9, 2021, prohibits health care, education, and Washington State agency workers from "engaging in work" after October 18 if not "fully vaccinated against COVID-19."[1] The Proclamation seeks to increase vaccination rates in critical, public-facing workforces amidst a dangerous rise in COVID-19 cases, hospitalizations, and deaths driven by the Delta variant. This has been a resounding success: between September 6 and October 4, 2021, the state workforce's vaccination rate rose from under 50% to over 91%.

Nearly two months after the Governor issued the Proclamation, Plaintiffs filed this lawsuit challenging it as facially invalid under an array of poorly developed constitutional and statutory theories. Seeking a temporary restraining order (TRO) and a preliminary injunction, Plaintiffs' "Motion for Declaratory and Injunctive Relief" (the Motion) asks the Court to "declare the Mandate unconstitutional and void," Dkt. #2 at 24, and to "enjoin[]" Defendants "from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with" it, Dkt. #2-1 at 3. The Motion should be denied for at least four reasons.

First, Plaintiffs are highly unlikely to prevail under any of their various legal theories—none of which is supported even with persuasive authority and some of which are barred by binding Supreme Court precedent. As Judge Easterbrook recently explained, "Given *Jacobson v. Massachusetts,* 197 U.S. 11 . . . (1905), 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*." *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (emphasis added). Second, Plaintiffs have failed to establish a likelihood that any of them will suffer irreparable harm absent an injunction, for any temporary loss of employment is readily compensable in damages. Third, the equities and public interest strongly weigh against injunctive relief: epidemiological modeling projects that, without the Proclamation, Washington would have up to 113,000 more COVID-19 cases, 5,880 more hospitalizations, and 765 more deaths.

[1]Gov. Jay Inslee, Proclamation 21-14, Wash. State Office of Gov. (Aug. 9, 2021), https://bit.ly/3DI82F7. For a complete repository of the Governor's Proclamations, see https://bit.ly/3mQHzyb (last visited Oct. 13, 2021).

Murray Decl., Ex. B at 5. Finally, abstention doctrines counsel in favor of denying the Motion and dismissing this lawsuit in deference to parallel state judicial and administrative proceedings.

II. FACTUAL BACKGROUND

A. Background on the COVID-19 Pandemic and FDA-Approved Vaccines

The COVID-19 pandemic is a global public health disaster that has upended life as we know it for more than a year and a half. On February 29, 2020, the Governor declared a state of emergency due to COVID-19. *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 753 (9th Cir. 2021) (citing Procl. 20-05). That state of emergency remains in effect today.

The U.S. Food and Drug Administration (FDA) has approved three COVID-19 vaccines. Pfizer and BioNTech's vaccine received full FDA approval for people 16 and older on August 23, 2021. Lindquist Decl. ¶ 52. Before that, FDA had issued Emergency Use Authorizations (EUAs) for the Pfizer, Moderna TX, Inc., and Johnson & Johnson and Janssen (J&J) vaccines. *Id.* ¶¶ 41–43. Pfizer and Moderna require two doses for maximum immunity, to be received 21 days apart (Pfizer) or 28 days apart (Moderna), while the J&J vaccine requires only one dose. *Id.*

To receive EUAs, all three COVID-19 vaccines proved highly effective at preventing infection. Based on clinical trials involving more than one million volunteers, the Pfizer vaccine's efficacy was 95%; the Moderna vaccine, 94%; and the J&J vaccine, 67%—each well exceeding the 50% efficacy baseline for emergency use authorization set by FDA. *Id.* ¶¶ 47–49. Those clinical results held true in the real world: an April 2021 study showed the Pfizer vaccine had 91.3% efficacy against infection, based on measuring how well it prevented symptomatic infection seven days through up to six months after the second dose. *Id.* ¶ 50. In preventing "severe" disease, as defined by the CDC, the Pfizer vaccine was 100% effective. *Id.*

The COVID-19 vaccines are also extremely safe. Their mild side effects are comparable to those for a seasonal flu shot: most commonly soreness in the injection site, muscle aches, fatigue, chills, and fever—which subside within a few days. *See id.* ¶¶ 47–48. Although the J&J vaccine can very rarely cause a serious type of blood clots, this has occurred in fewer than one in

a million cases, and neither the Pfizer nor the Moderna vaccine is associated with serious or long-term side-effects. *Id.* ¶¶ 47–50. FDA has found that all three vaccines are safe for pregnant adults and moderately or severely immunocompromised adults, and the Pfizer vaccine for children age 12 and older. *Id.* ¶ 51. The only group for whom the vaccines are contraindicated are those acutely allergic to their ingredients—*i.e.*, polyethylene glycol or polysorbate—which represents about 2.5 to 11.1 cases per 1 million doses, or between 0.00025% and 0.001% of the population. *Id.*

B. Washington's Vaccination Campaign

In December 2020, the Washington Department of Health (DOH) introduced a phased eligibility system for administering the COVID-19 vaccines that initially prioritized health care workers and higher-risk individuals, and eventually made everyone 12 and older eligible. Lindquist Decl. ¶ 54. State government invested considerable resources into its vaccination campaign to ensure availability and access across the state. *Id.* ¶¶ 55–57. DOH's repository of COVID-19 data and informational materials[2] shows that the campaign succeeded at stemming the spread of COVID-19 in the spring of this year. By April 26, 2021, after everyone age 16 or older became eligible, the state was averaging more than 61,000 vaccine doses per day, and 29% of all Washingtonians had been fully vaccinated. *Id.* ¶ 60. Just over two weeks later, on May 19, more than 47% of people 16 or older were fully vaccinated and 59% had received at least one dose. *Id.*

As the number of people who had been vaccinated against COVID-19 went up, COVID-19 cases predictably went down. On May 19, the average daily new case rate was just 901—down from its peak of 3,112 on December 4, 2020. *Id.* ¶ 61. On June 30, Washington—buoyed by a continuing increase in vaccination rates—enjoyed a full economic "reopening" and return to semi-normal life. *See id.* ¶ 62. On July 12, Washington reached the milestone of having vaccinated 70% of the population 16 and older—often pegged as the minimum threshold for achieving herd immunity. *Id.* ¶ 63. At that time, the State was averaging 567 new cases per day. *Id.*

[2] *COVID-19 Data Dashboard* (updated Oct. 13, 2021, 3:38 PM), https://bit.ly/3mWBvEC.

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C. The Delta Variant and the Vaccines' Continuing Efficacy

The B.1.617.2 SARS-CoV-2 (or Delta) variant is more than twice as infectious as earlier strains. Lindquist Decl. ¶ 72. Spreading like wildfire, Delta caused Washington's daily new case rate to jump from a low of 349 on June 29 to 3,221 on August 27. *Id.* ¶ 77. Although Delta's dominance is due in part to its transmissibility among vaccinated people, such "breakthrough" infections are rare and almost never result in severe illness. The Pfizer and Moderna vaccines are over 90% effective in preventing severe disease; in Washington, breakthrough cases account for less than 10% of hospitalizations. *Id.* ¶¶ 93–94. But the unvaccinated remain vulnerable, and Delta has shown a greater propensity than earlier variants to infect young people. *Id.* ¶ 75.

Unfortunately, Delta's rise coincided with a steady decline in vaccinations. In Washington, doses administered daily declined from a high of 91,708 on April 16, 2021, to just 15,522 on September 1, 2021. *Id.* ¶ 103. Though COVID-19 vaccines for months have been widely available for anyone age 12 or older, as of October 8, nearly 1.5 million eligible residents had not received even a single dose. *Id.* ¶ 103. Despite the State's introduction of various incentives, vaccination rates continued to decline, as vaccine hesitancy persisted. *See id.* ¶¶ 58–59.

Although the reasons for such hesitancy (and downright refusal) are varied, one driving factor has been misinformation about the safety and development of vaccines propagated by conspiracy theorists, political groups, and foreign adversaries. For example, although the only current contraindication for the vaccines is a highly rare acute allergy to their ingredients, more than half of unvaccinated adults currently believe that "getting vaccinated posed a bigger risk to their health than getting infected with the coronavirus." *Id.* ¶ 66. Others may be hesitant based on certain vaccines' use of cells originally isolated from fetal tissues during research and development, even though the vaccines themselves contain no fetal tissue. *Id.* ¶ 69. Historically-derived fetal cell lines have been used to create and test vaccines for hepatitis A, rubella, and chickenpox, as well as many common medicines such as Tylenol, Tums, Lipitor, and Zoloft. *Id.*

Another driving factor has been the belief that people who have been infected with COVID-19 need not get vaccinated. But both the CDC and DOH recommend vaccination for

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several reasons. First, research has not yet shown how long a person who had COVID-19 will be protected after recovery. *Id.* ¶ 98. Second, studies show that being fully vaccinated provides better protection than having recovered from a COVID-19 infection. *Id.* ¶ 99. Third, there is emerging evidence that vaccination may provide a broader spectrum of protection to viral variants. *Id.* ¶ 100.

At the same time that vaccination rates declined, Washington experienced a sharp rise in COVID-19 case rates and related hospitalizations. In August and September, our health care system experienced extreme stress as hospitals across the State were near or at capacity. Statewide, ICU occupancy rates exceeded 90%, with COVID-19 patients making up over 29%. *Id.* ¶ 84. As of October 7, 2021, there were 1,207 COVID-19 patients in Washington hospitals; 185 are on ventilators. *Id.* More than 89% of the hospitalized COVID-19 patients in the State are not fully vaccinated. *Id.* As a result of the surge, hospitals expanded their intensive care units into nontraditional settings to accommodate the new patients requiring hospitalization. *Id.* ¶ 88.

D. Vaccination Requirements and Proclamation 21-14

In July and August 2021, federal, state, and local governments began to adopt vaccination requirements for certain population segments. The federal government announced vaccination requirements for all military personnel, Department of Health and Human Services health care workers, and Veterans' Administration personnel.[3] On July 29, President Biden announced a similar requirement for all federal employees and on-site contractors.[4] Other states have also instituted vaccination requirements for executive department employees or health care workers.[5]

On August 9, Governor Inslee issued Proclamation 21-14, prohibiting certain state agency workers and healthcare workers from performing work after October 18, 2021, without being fully

[3] *Memorandum for Senior Pentagon Leadership Commanders of the Combatant Commands Defense Agency and DOD Field Activity Directors* (Aug. 24, 2021), https://bit.ly/2ZWxw2K; *VA mandates COVID-19 vaccines among its medical employees including VHA facilities staff*, https://bit.ly/3oDh2Hf (July 26, 2021); *Secretary Becerra to Require COVID-19 Vaccinations for HHS Health Care Workforce* (Aug. 12, 2021), https://bit.ly/3oPlsL0.

[4] *Fact Sheet: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant*, The White House (July 29, 2021), https://bit.ly/3BIHjaH.

[5] *E.g.*, *California Implements First-in-the-Nation Measures to Encourage State Employees and Health Care Workers to Get Vaccinated* (July 26, 2021), https://bit.ly/2WPRE5u; *Baker-Polito Administration Announces COVID-19 Vaccine Requirement for Executive Department Employees* (Aug. 19, 2021), https://bit.ly/3BtvAgk; *Governor Lamont Clarifies Order Requiring State Employees, Childcare, and School Staff To Get Vaccinated or Tested for COVID-19* (Sept. 10, 2021), https://bit.ly/3AoGAtT; Mayor's Order 2021-099 (Aug. 10, 2021), https://bit.ly/3ajQEtr.

vaccinated against COVID-19, *i.e.*, at least two weeks post-final dose. Hughes Decl., Ex. G at 4; Lindquist Decl. ¶ 104. On August 20, Proclamation 21-14.1 extended the vaccination requirement to workers in educational settings. *See* Procl. 21-14.1 (Hughes Decl., Ex. H). On September 27, Proclamation 21-14.2 further extended the vaccination requirement to on-site contractors contracting with certain entities. *See* Procl. 21-14.2 (Hughes Decl., Ex. I).

The Proclamation applies to at least 681,000 workers across the three covered sectors—state government, health care, and education. Hughes Decl. ¶ 12. As the Proclamation notes, "healthcare workers face COVID-19 exposures in a variety of healthcare settings, with those involving direct patient care likely at higher risk." Hughes Decl., Ex. I at 2. Educators in K-12 schools work daily amidst mass gatherings of unvaccinated individuals—in classrooms, gymnasia, and cafeterias with kids under age 12. Likewise, any number of state employees—ranging from Department of Corrections and Washington State Patrol officers to Child Protective Service social workers to Liquor and Cannabis Board investigators—may "interact with the public on a regular basis," including in congregate environments. *Id.* at 3. Vaccination protects those most vulnerable to COVID-19 (like immunocompromised patients), those ineligible for vaccines (like children), those forced to interact with the workers (like prisoners or detainees), and the workers themselves.

The Proclamation does not create a freestanding medical or religious exemption separate from existing law, but it provides that covered workers need not get vaccinated if they are entitled under antidiscrimination statutes to "disability-related reasonable accommodations" or "sincerely held religious belief accommodations." *Id.* at 5 (referencing the Americans With Disabilities Act, 42 U.S.C. § 12122(b)(5)(A) (ADA), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), and the Washington Law Against Discrimination, RCW 49.60 (WLAD)).

E. Evaluations of Requests for Exemption and Accommodation

Pursuant to the Proclamation's provision for medical and religious exemptions, state agencies and other employers must evaluate requests for such exemptions. Many agencies use policies already in place for addressing requests for religious or medical job exemptions and

accommodations. *See* Dowler Decl. ¶ 10. Some agencies created accommodation forms to help process requests from employees, but the forms are not required to request an accommodation. *See, e.g.*, Ashley Decl. ¶ 5; McGarvie Decl. ¶ 4; Normoyle Decl. ¶ 4; Pelton Decl. ¶ 4.

After reviewing a religious exemption request, agencies may engage with the employee in an interactive process to determine whether an employee has a sincerely held religious belief. *See, e.g.*, Mance Decl. ¶ 8. Once a religious exemption is granted, agencies then determine whether a reasonable accommodation can be made without imposing an undue burden on the agency. Factors considered include an employee's position, essential job functions, and work environment, and the agency's needs. *See* Dowler Decl. ¶ 9; McGarvie Decl. ¶ 8; Normoyle Decl. ¶ 7; Ashley Decl. ¶ 9; Pelton Decl. ¶ 8; Gilbert Decl. ¶7.

Since the Proclamation, state employee vaccination rates have increased from just 49.1% on September 6, 2021, to 91.9% on October 4. Sullivan-Colglazier Decl. ¶ 5, Ex. A. Agencies have received 4,849 requests for religious exemptions, approving 4,219 and providing accommodations to 1,310 requesters. *Id.* ¶¶ 6–7. Agencies have received 1,220 requests for medical exemptions, approving 864 and providing accommodations to 253 requesters. *Id.* ¶¶ 8–9.

F. Plaintiffs' Lawsuit and Related State Court Litigation

Plaintiffs are 100 individuals who, though apparently united in their reluctance to get vaccinated against COVID-19 and their opposition to the Proclamation, otherwise face highly varied circumstances and seem to share little else in common as a group. According to their Complaint, Plaintiffs live in at least 21 different counties and work for at least 40 different employers, including 15 different state agencies, 12 different local government entities, and 12 different private health care providers. *See* Dkt. #1 ¶¶ 6–105. They filed their lawsuit on October 5, 2021—nearly two months after the Proclamation was issued, and the day *after* all covered workers must have received their final vaccine dose to be fully vaccinated by the October 18 deadline. Plaintiffs allege that the Proclamation is "[u]nconstitutional on its face and as applied," though they do not specify as applied to whom. *Id.* at 29, ¶ A. Plaintiffs' Motion requests that

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Defendants be "ENJOINED from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the [Proclamation]." Dkt. #2-1 at 3.

Some Plaintiffs are also plaintiffs in a related pending state court lawsuit, *Cleary, et al. v. Inslee, et al.*, No. 21-2-01674-34 (Thurston Cnty. Super. Ct.), which also facially challenges and seeks to enjoin the Proclamation. *See, e.g.*, Dkt. #1 ¶¶ 19, 100, 101; Hughes Decl., Ex. K ¶¶ 4, 194, 596. A hearing on the *Cleary* plaintiffs' motion for preliminary injunction is set for October 18, 2021. Plaintiffs here and the *Cleary* plaintiffs are represented by the same counsel.[6]

III. ARGUMENT

A. TRO and Preliminary Injunction Standard

A TRO, like a preliminary injunction, is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The standard for issuing a TRO is the same as the standard for issuing a preliminary injunction. *See* Fed. R. Civ. P. 65; *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A party seeking either form of relief must establish: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The last two factors merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

B. Plaintiffs Are Unlikely to Prevail on Any Claim in This Facial Challenge

Two features of Plaintiffs' claims are important to note at the outset. First, their Motion presents only a facial challenge to the Proclamation. A "facial challenge" asserts that a law "violate[s] the Constitution, while an as-applied challenge is a claim directed at the execution of the law." *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021) (en banc). To prevail in a facial challenge, "the plaintiff must show that no set of circumstances exists under which the [statute]

[6]Plaintiffs' counsel also represents the plaintiff in a third lawsuit challenging the Proclamation on state and federal constitutional grounds. Hughes Decl., Ex. O. After the Franklin County Superior Court denied the defendants' motion to change venue to Thurston County, the Washington Supreme Court summarily reversed the trial court's decision and remanded for transfer to Thurston County. *Id.*, Ex. P.

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would be valid," and the Court's "review of the [state law] would be limited to the text." *Id.* (cleaned up). Plaintiffs ask that "Defendants" be "enjoined from enforcing" or "threatening to enforce" the Proclamation against *anyone*. Dkt. #2-1 at 3. This is plainly a facial challenge because it "seeks to secure a declaration that a statute is utterly inoperative." *United States v. Frost*, 125 F.3d 346, 370 (6th Cir. 1997). Although Plaintiffs' declarations include a litany of individualized factual allegations, their Motion seeks to enjoin the Proclamation as a whole, not as applied to Plaintiffs alone or some similarly situated subset of them.

Second, although the Complaint lists eight causes of action, Plaintiffs' Motion argues only six: (1) due process ("The Governor Lacks Authority"), Dkt. #2 at 15; (2) free exercise; (3) privacy; (4) procedural due process (*Loudermill*); (5) Title VII; and (6) the ADA. Plaintiffs fail to present any "intelligible argument" on their claims under the Equal Protection and Contracts Clauses and for breach of contract, which are thus waived for the purposes of the Motion. *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923 (9th Cir. 1988). As for their unwaived claims, Plaintiffs' scattershot briefing ignores the applicable standards, offers sweeping conclusions with little or no analysis or citation of relevant authority, and overlooks case law directly on point—and totally at odds with their off-the-wall theories. Plaintiffs are unlikely to prevail on any claim.

1. The Proclamation is a valid exercise of the Governor's emergency powers and does not violate Plaintiffs' due process rights

a. Plaintiffs fail to make out a cognizable due process claim

Plaintiffs argue as "a threshold issue" that the Governor "lacks the legal authority to issue" the Proclamation under RCW 43.06.220, including the "authority to impose the penalties and enforcement mechanisms therein." Dkt. #2 at 15. Plaintiffs style this apparent state-law argument as a federal "Due Process claim[]," *id.*, without providing any authority for the notion that a gubernatorial executive order would violate the Fourteenth Amendment's Due Process Clause if inconsistent with *state* law. The Supreme Court and the Ninth Circuit have squarely rejected that proposition. *See, e.g.*, *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 584 F.3d 1232, 1236–37 (9th Cir. 2009) (rejecting plaintiff's claim that its "due process rights were violated *solely* by

virtue of the City's acting under an ordinance that is invalid under state law" and noting that "[i]t is a tenet of our federal system that state constitutions are 'not taken up into the 14th Amendment' such that federal courts may strike down a statute as invalid under state law") (quoting *Pullman Co. v. Knott*, 235 U.S. 23, 25 (1914)). In short, Plaintiffs' "threshold" due process claim, Dkt. #2 at 15, "is premised on an untenable notion of due process." *Lone Star*, 584 F.3d at 1237.[7]

b. RCW 43.06.220 authorizes the Proclamation, including its penalty

Plaintiffs' "due process" claim also fails because it rests on their assumption that the Proclamation is inconsistent with Washington law. They are mistaken. The Proclamation is well within the Governor's statutory emergency powers. Washington law authorizes the Governor to "proclaim a state of emergency" if he "find[s] that a public disorder" or "disaster . . . exists within this state . . . which affects life, health, property, or the public peace[.]" RCW 43.06.010(12). The Governor did so with respect to COVID-19—justifiably, as Plaintiffs concede. Dkt. #2 at 16 n.17.

During a declared emergency, the Governor's "powers are broad." *Colvin v. Inslee*, 195 Wn.2d 879, 895 (2020); Laws of 2019, ch. 472, § 1 ("The legislature finds that the governor has broad authority . . . to exercise emergency powers during the emergency."). One such power is the authority to "issue an order prohibiting . . . [s]uch other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). That is precisely what the Proclamation does, prohibiting unvaccinated individuals from engaging in certain types of work. The issuance of such an order is "by statute committed to the sole discretion of the Governor." *Colvin*, 195 Wn.2d at 895 (quotation marks and

[7]It would be equally untenable for Plaintiffs to claim that the Governor's Proclamation violated their substantive due process rights—an argument the Motion does not articulate. *See* Dkt. #2 at 20–21. Under a long and unbroken line of cases, public health measures like the Proclamation satisfy substantive due process. *E.g.*, *Zucht v. King*, 260 U.S. 174, 176 (1922) (holding that it is "settled that it is within the police power of a state to provide for compulsory vaccination"); *Jacobson*, 197 U.S. at 21 (rejecting due process challenge to requirement that all persons be vaccinated); *Slidewaters LLC*, 4 F.4th at 759 (rejecting substantive due process challenge to Governor's COVID-19 business closure orders); *Klaassen*, 7 F.4th at 593 (rejecting substantive due process claim because "vaccination requirements, like other public-health measures, have been common in this nation"); *accord Kheriaty v. Regents of the Univ. of Cal.*, No. SACV 21-01367 JVS (KESx), 2021 WL 4714664, at *9 (C.D. Cal. Sept. 29, 2021); *Maniscalco v. New York City Dep't of Educ.*, No. 21-cv-5055 (BMC), 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244-DJC, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021). Claims like this are reviewed under the rational basis standard—a test the Governor's Proclamation easily meets.

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citation omitted). Even if that exclusive discretion were judicially reviewable (and it is not), the Proclamation is well-supported by extensive medical evidence, recommendations by professional bodies, and similar measures in place in other government settings. Lindquist Decl. ¶¶ 93–94, 98.[8]

None of Plaintiffs' four arguments against the Proclamation's validity has merit. First, they argue that the Proclamation is not a "prohibition" because "it requires an affirmative act; an injection." Dkt. #2 at 16. That characterization is doubly inaccurate. First, the Proclamation does not even arguably "require" vaccination because it gives covered workers a choice: get vaccinated or (absent an exemption) find other work. Second, practically any prohibition can alternatively be characterized as a "mandate." The Governor's prohibition on congregating in indoor public spaces without a face-covering could be written as a mask *requirement*. His prohibitions on the resumption of various business operations during the "reopening" process could be written as requirements that businesses remain closed. And his prohibition on most residential evictions could be written to require landlords to allow tenants to remain in their homes. Yet courts have upheld all those proclamations as valid exercises of the Governor's prohibitory powers under RCW 43.06.220(1)(h). *See, e.g.*, *Slidewaters LLC*, 4 F.4th at 755–56; *Gonzales v. Inslee*, No. 20-2-02525 (Thurston Cnty. Super. Ct.); *Didier v. Inslee*, No. 20-2-01662-34 (Thurston Cnty. Super. Ct.). The Proclamation's prohibition on certain work by unvaccinated individuals is equally valid.

Second, Plaintiffs note that other Washington statutes governing matters such as influenza preparedness planning and school immunization do not "give the Governor the power to order anybody to take a vaccine." Dkt. #2 at 16. True enough, but the Governor does not rely on any of those statutes as the source of the Proclamation's authority. He relies on the emergency powers statute, RCW 43.06.220(1)(h), which the Legislature deliberately crafted to be broad and flexible enough to permit any prohibitions "reasonably believe[d]" to "help preserve and maintain life, health, property or the public peace." Plaintiffs do not contend that those other statutes somehow

[8] *See also AMA in support of COVID-19 vaccine mandates for health care workers*, Am. Med. Ass'n (July 26, 2021), https://bit.ly/3mR5ehZ; Celeste Busser, *NEA announces support for educator vaccine and testing requirement*, Nat'l Educ. Ass'n (Aug. 12, 2021), https://bit.ly/2Xa6Qup.

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prohibit the Proclamation, or that it conflicts with Washington statutory law.

Third, Plaintiffs suggest that the Proclamation conflicts with the Governor's own executive orders issued as many as seven years ago. *See* Dkt. #2 at 7–8, 18. Those executive orders require state agencies to maintain and implement written policies on telework and flexible work hours. Dkt. #3-1 at 731; Gov. Jay Inslee, *Exec. Order 16-07*, at 2 (June 3, 2016), https://bit.ly/2YQKyy8. Plaintiffs' theory that these executive orders conflict with the Proclamation is difficult to understand. But even assuming some conflict, Proclamation 21-14 was issued more recently, is more specific, and has the force of law. *See, e.g.*, *Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 813 (2000) (contrasting executive orders with "the force and effect of law, and then only if a statute or constitutional provision grants the Governor the authority to issue such orders," with executive order "[d]irectives, which serve to communicate to state agencies what the Governor would like them to accomplish"). The Governor's executive orders encouraging telework policies in state government do not remotely call the Proclamation's validity into doubt.

Finally, Plaintiffs' claim that "the mandate's enforcement mechanism is not authorized" because RCW 43.06.220(5) establishes criminal punishments for violation of an emergency order. Dkt. #2 at 18–19 (emphasis omitted). This argument, too, is undeveloped and ill-conceived. The only "enforcement mechanism" the Proclamation mentions is the one authorized by statute: "Violators of this order may be subject to criminal penalties pursuant to RCW 43.06.220(5)." Procl. 21-14.2 at 12. So long as it is in effect, the Proclamation prohibits covered employees from working unless they are fully vaccinated or granted an accommodation, but it does not require that any unvaccinated worker be discharged, nor otherwise "guarantee[] loss of much more than can ever be sentenced under a gross misdemeanor." Dkt. #2 at 19. Plaintiffs' gripe with the Proclamation's "enforcement mechanism" ignores its plain text.

c. *Pennhurst* bars an injunction based on Washington law

The Court lacks jurisdiction over Plaintiffs' claim that the Proclamation violates RCW 43.06.220. *See* Dkt. # 2 at 15–18. Based on the doctrine of state sovereign immunity and principles

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of federalism embodied in the Eleventh Amendment, a federal court lacks jurisdiction to enjoin a state official's actions on the basis that the official has violated state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). A federal court may intervene only when a state official is acting *ultra vires*, meaning that he or she "acts without any authority whatever." *Id.* at 101 n.11 (cleaned up). But Plaintiffs cannot—and do not—credibly argue that the Governor acted *ultra vires*, given the breadth of the Governor's emergency powers under RCW 43.06.220, which provides far more than a "colorable basis for the exercise of authority." *Id.* Other federal courts have rejected challenges by plaintiffs seeking redress from federal courts for grievances against COVID-19 executive orders that were grounded in state law. *See, e.g.*, *Heights Apts., LLC v. Walz*, 510 F. Supp. 3d 789, 804 (D. Minn. 2020) (applying *Pennhurst* to plaintiffs' *ultra vires* claim to eviction moratorium where governor had a colorable basis on which to issue the executive order). This Court should likewise conclude that the Eleventh Amendment bars Plaintiffs from seeking to enjoin the Proclamation based on Washington law.

2. The Proclamation complies with the Free Exercise Clause

More than 75 years ago, the Supreme Court explained that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds," for "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts,* 321 U.S. 158, 166–67 (1944). In the decades since, federal courts have consistently adhered to that principle in rejecting free exercise challenges to state and local vaccination requirements—including those that allowed *no religious exemptions*. *See, e.g.*, *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam) ("mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"; "New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs"); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1084–85 (S.D. Cal. 2016) ("it is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements") (collecting cases).

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Failing to address this precedent, Plaintiffs' free exercise challenge is especially groundless because the Proclamation *does* contain a religious exemption. Without so much as mentioning the applicable constitutional standard, Plaintiffs' argument consists of little more than inflammatory hyperbole, *e.g.*, Dkt. #2 at 22 ("Governor Inslee's executive fiat has effectively sought to ban all sincerely held religious beliefs from civil service"), unhelpful truisms, *e.g.*, *id.* ("the Free Exercise Clause protects against governmental hostility which is masked"), and appeals to inapt authority. Indeed, Plaintiffs even look for support to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb–2, *see* Dkt. #2 at 12–13—a statute the Supreme Court long ago struck down as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 534–36 (1997).[9]

Because RFRA does not apply, the governing standard is the "*Smith* rule": "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990)). While a law that "single[s] out houses of worship for especially harsh treatment" must meet strict scrutiny, a "law [that] is neutral and of general applicability . . . need only survive rational basis review." *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1140 (9th Cir. 2021) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam)). Plaintiffs offer no analysis whatsoever of the "neutrality" criterion in free exercise jurisprudence and do not even mention the phrase "generally applicable." It is easy to see why: the Proclamation satisfies both criteria.

a. The Proclamation is neutral and generally applicable

The Proclamation is neutral because its "object" is to stop the spread of COVID-19, not to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. In assessing neutrality, courts consider (1) whether the law is "facial[ly]" neutral and (2) whether

[9]Congress's response to *Boerne*, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (RLUIPA), applies to state land use regulations and prisoners only. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 357 (2015); *Pentecostal Church of God v. Douglas Cnty.*, 798 F. App'x 995, 997 (9th Cir. 2020).

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it is neutral in "real operation." *Id.* at 533, 535. A law is operationally non-neutral if "[t]he record . . . compels the conclusion that suppression of [religion] was the object." *Id.* at 534. The Proclamation passes both tests. First, it is facially neutral because it applies to all covered workers, unless they are granted an accommodation—the opposite of "restrict[ing] practices because of their religious motivation." *Id.* at 533. It would make little sense to say that a government policy designed to *accommodate* religious practice is somehow facially discriminatory because it specifically grants religious objectors more favorable treatment than secular ones. *See, e.g.*, *Freeman v. Texas Dep't of Crim. Just.*, 369 F.3d 854, 860–61 (5th Cir. 2004) (religious accommodations policy was "neutral" because it "operate[d] without regard to the content of the [religious] expression").

Second, the Proclamation is neutral in "real operation" because the record does not "compel[] the conclusion that suppression of [religion] was the object[.]" *Lukumi* at 508 U.S. at 534. Plaintiffs attempt to compare this case to *Roman Catholic Diocese*, in which New York allegedly "gerrymandered" neighborhoods with the most restrictive capacity limits for in-person gatherings to include "heavily Orthodox [Jewish] areas" and made statements that could be "viewed as targeting the ultra-Orthodox [Jewish] community." 141 S. Ct. at 66 (cleaned up).

No such evidence of animus exists here. To the contrary, the Governor decided to include a religious exemption to accommodate workers with genuine religious scruples. Because there is no equivalent exemption for political, personal, or any other objections, if anything the Proclamation affords preferential treatment to religious motivations as against secular ones. *See, e.g.*, *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 744 (7th Cir. 2015) ("A benefit to religion does not disfavor religion in violation of the Free Exercise Clause.").

For similar reasons, the Proclamation is also generally applicable. General applicability "addresses whether a law treats religious observers unequally," such as "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. Feb.

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12, 2020) (quoting *Lukumi*, 508 U.S. at 542–53). The Proclamation is generally applicable because it applies equally to all covered workers, regardless of their religious faith (or lack thereof), unless they receive an accommodation pursuant to antidiscrimination statutes. Federal courts, when confronted with COVID-19 vaccination requirements by government employers, schools, or universities, have all but unanimously concluded that such policies are neutral and generally applicable—and upheld them under rational basis review. *See, e.g.*, *Harris*, 2021 WL 3848012, at *7; *Am.'s Frontline Drs. v. Wilcox*, No. EDCV 21-1243 JGB (KKx), 2021 WL 4546923, at *4 (C.D. Cal. July 30, 2021); *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 WL 3073926, at *39 (N.D. Ind. July 18, 2021), *den'g injunction pending appeal*, 7 F.4th 592 (7th Cir.).

The single case that went the other way misapplies Supreme Court precedent in a fairly obvious respect. In *Dahl v. Board of Trustees of Western Michigan University*, --- F.4th ----, 2021 WL 4618519, at *4 (6th Cir. Oct. 7, 2021), the court held that a university's vaccination policy was not generally applicable because it *allowed* administrators to grant exemptions for medical *or religious* reasons. The court reasoned that, because the "University retains discretion to extend [such] exemptions in whole or in part," its vaccination "policy is not generally applicable." *Id.* (citing *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1881 (2021)). This conclusion misreads the law on "individualized exemptions," which undermine a policy's general applicability only when they allow for *secular* individualized exemptions, not *religious* exemptions. *See, e.g.*, *Fulton*, 141 S. Ct. at 1878 (city contract prohibiting foster care providers from rejecting prospective parents based on sexual orientation was not generally applicable where it gave Commissioner "sole discretion" to grant an "exception"); *id.* at 1921 (Alito, J., concurring in judgment) (noting "confusion" over the "special rule" on when a law is not "generally applicable" due to "*secular* exemptions") (emphasis added); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1206–07 (10th Cir. 2021) ("[T]he individualized exemption exception inquiry can be summarized as follows: as long as a law remains exemptionless, it is considered generally applicable and religious groups cannot claim a right to exemption; however, when a law has *secular* exemptions, a challenge by a

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religious group becomes possible.") (cleaned up; emphasis added). As the Sixth Circuit itself has observed, "[w]hat poses a problem" for a policy that is "[o]n its face . . . generally applicable," is "the implementation of the policy, permitting *secular* exemptions but not religious ones." *Ward v. Polite*, 667 F.3d 727, 738–39 (6th Cir. 2012) (Sutton, J.) (emphasis added).

The *Dahl* court misapplied the "individualized exemption exception" by concluding that the availability of a *religious* exemption rendered the university's vaccination policy not generally applicable. This counterintuitive conclusion would mean that the Western Michigan University need only *eliminate* its religious exemption to make its policy generally applicable—an undoubtedly constitutional change, but one that would leave religious objectors far worse off. *See, e.g.*, *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (mother who successfully sought religious waiver from state-mandated vaccinations for her children "has not been denied any legal right on the basis of her religion"; "[c]onstitutionally, [she] has no right to an exemption"). It makes no sense to subject a vaccination policy with a religious exemption to stricter scrutiny than a policy without one. Because both are neutral and generally applicable under the Supreme Court's free exercise jurisprudence, *Dahl* is a wrongly decided outlier that should not be followed.[10]

b. The Proclamation is rationally related to a legitimate state interest

Because the Proclamation is neutral and generally applicable, it "must be upheld if . . . rationally related to a legitimate governmental purpose." *Parents for Privacy*, 949 F.3d at 1238. The Proclamation easily meets this test, as Plaintiffs appear to concede. It is undisputed that protecting the public from COVID-19 is a compelling state interest. *Roman Cath. Diocese*, 141 S. Ct. at 67. Because vaccines are highly safe and effective, ensuring those who work in health

[10]In any event, *Dahl* is distinguishable because the relief sought and received there was much narrower. The injunction in *Dahl* "applies only to plaintiffs—sixteen people," each of whom sought a religious exemption from the university's vaccination policy. In contrast, the 100 Plaintiffs here, some of whom seek religious exemptions while others do not, seek a sweeping injunction against the Proclamation as a whole. This requested relief does not map onto any claim any Plaintiff may have for an "individual exemption," which obviously must turn on an *individualized* analysis. *See Fulton*, 141 S. Ct. at 1881 ("The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the plaintiff]."). Plaintiffs do not say which of them seek individual religious accommodations or what accommodations they request—nor do they provide sufficient facts to determine whether their employer agencies may justifiably deny them. In other words, Plaintiffs' facial challenge is the wrong posture for any claims for individualized exemptions.

care, schools, and state government to be vaccinated is rationally related to stemming the spread of the virus. Lindquist Decl. ¶ 94. The Proclamation complies with the Free Exercise Clause.[11]

3. The Proclamation respects workers' privacy rights

Plaintiffs' one-paragraph argument that the Proclamation violates their "right to body autonomy" appears to be based on an asserted right "to refuse treatment." Dkt. #2 at 23. This argument is easily refuted. The Proclamation does not compel *anyone* to be vaccinated without their consent or knowledge of the material risks; it merely makes vaccination a condition of employment in certain fields. This does not violate any federal privacy right to refuse treatment. *See, e.g.*, *Bridges v. Houston Methodist Hosp.*, No. H-21-1774, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021) (rejecting plaintiff's argument that she was being "coerced" by "being forced to be injected with a vaccine or be fired"; she "can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else"); *Klaassen*, 7 F.4th at 593 ("Vaccination is . . . a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere."); *Norris v. Stanley*, No. 1:21-cv-756, 2021 WL 3891615, at *3 (W.D. Mich. Aug. 31, 2021) (rejecting student's privacy challenge to university vaccination policy under "directly contradictory Supreme Court precedent") (citing *Jacobson*, 197 U.S. at 38). Covered workers have meaningful choices: become vaccinated, seek an accommodation, or obtain other employment during the pandemic. No one is being "battered" or vaccinated against their will, and Plaintiffs have not adduced evidence to the contrary.[12]

[11]Even if strict scrutiny applied—and it does not—the Proclamation would still be valid. Plaintiffs fail to demonstrate that the Proclamation is not the least restrictive means of stemming COVID-19's spread. Proclamation 21-14 follows previous, less restrictive proclamations that were insufficient to prevent the current alarming rates of COVID-19 infection, hospitalization, and death. Lindquist Decl. ¶¶ 82–88, 113. Data from state facilities that had previously adopted routine testing requirements established that this option did not sufficiently prevent COVID-19 outbreaks. Ashley Decl. ¶ 12. The Proclamation is a modest additional step, narrowly targeting specific sectors that are particularly essential to combatting the spread of COVID-19, stabilizing our health care system, and preventing needless deaths of Washingtonians. Plaintiffs' suggestion that antibody tests or remote work are equally effective alternatives lacks merit, especially in this facial challenge. For example, there is no plausible argument that correctional officers, responsible for safeguarding the public and incarcerated persons, can perform their essential functions remotely. Likewise, most of the essential functions of Washington State Patrol officers require close interpersonal contact with the public. Ashley Decl. ¶ 10. Thus, even if strict scrutiny applied, Plaintiffs' facial challenge under the Free Exercise Clause would still be unlikely to prevail on the merits.

[12]To the extent Plaintiffs' argument is based on "common law," Dkt. #2 at 23, it is undeveloped and defies a clear line of Washington cases upholding public health measures requiring individuals to submit to medical testing

The only two cases Plaintiffs cite in support of their privacy claim are far afield. *See* Mot. at 23 (citing *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270 (1990), and *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). In *Cruzan*, the Court considered whether an individual in a vegetative state "has a right under the United States Constitution which would require [a] hospital to withdraw life-sustaining treatment" as requested by her parents. 497 U.S. at 267–69. Similarly, *Union Pacific* held that a defendant cannot force a plaintiff in a personal injury action to undergo a surgical examination. *Union Pac. Ry. Co.*, 141 U.S. at 251. Neither case lends any support to Plaintiffs' claims here, which do not involve coerced medical care.

Plaintiffs have failed to show a likelihood of success on their right-to-privacy claim.

4. Plaintiffs' procedural due process claims are unripe and lack merit

Plaintiffs' due process claim is premised solely on their belief that some—but not all—Plaintiffs are entitled to a pre-disciplinary hearings under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Dkt. #2 at 20. Even were Plaintiffs correct—and as shown below, they are not—this claim of a procedural right as to how *some* Plaintiffs' employers implement the Proclamation is insufficient to carry their facial challenge to the validity of Proclamation itself.

There is no inherent constitutional property interest in continued employment. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). A property interest requires a "legitimate claim of entitlement" to continued employment. *Id*. at 577–78. Plaintiffs do not allege—nor could they credibly do so—that each of the more than 680,000 persons subject to the Proclamation has a legitimate claim of entitlement to continued employment. Indeed, they appear to concede the opposite, namely, that only "[p]ublic employees have due process rights in connection with adverse employment actions." Dkt. #2 at 20. This is fatal to their facial challenge. *Wash. State*

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and vaccination. *See, e.g.*, *State ex rel. McFadden v. Shorrock*, 104 P. 214 (1909) (upholding vaccination as condition precedent to attending schools); *State ex rel. Holcomb v. Armstrong*, 239 P.2d 545 (1952) (chest x-ray as condition of attending university); *see also State ex rel. McBride v. Super. Ct. for King Cnty.*, 174 P. 973 (1918) (approving examination and months-long quarantine of person with infectious disease); *see also In re Juveniles A, B, C, D, E*, 847 P.2d 455 (1993) (upholding HIV testing requirement against privacy claims). Those requirements were upheld in far lesser emergencies than the present one. The x-ray screen in *Holcomb* addressed a sufficiently "present, grave and immediate" danger based on between 9 and 23 cases of tuberculosis per year at the university. 239 P.2d at 548. By contrast, over the past 16 months, there have been over 680,000 confirmed cases of COVID-19 in Washington State.

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Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008) ("[A] plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications.") (cleaned up).[13]

Plaintiffs' due process claims are also not ripe. Assuming arguendo that some are entitled to pre-termination hearings, they "cannot allege that [they have] been denied such process, as [they have] not yet been terminated." *Echtenkamp v. Loudon Cnty. Pub. Schs.*, 263 F. Supp. 2d 1043, 1056 (E.D. Va. 2003). If Plaintiffs are discharged and believe they were denied due process, they may then sue to vindicate their rights. But they identify no basis in law to enjoin the Governor's Proclamation *in toto* because some believe they may suffer a due process violation in the future.

Even ignoring these threshold defects, Plaintiffs' claim fails on the merits because individualized *Loudermill* hearings are not required for generally applicable conditions of employment imposed by law. Rather, employees are entitled to the notice provided by enactment and publication, and nothing more. *See Valdez v. Grisham*, *Valdez v. Grisham*, --- F.Supp.3d ----, 2021 WL 4145746 (Sept. 13, 2021), *appeal docketed*, No. 21-2105 (10th Cir. Sep. 15, 2021) (rejecting procedural due process claim against governor's public health order requiring congregate care facility workers, hospital workers, and employees of the office of the governor be fully vaccinated); *Harris*, 2021 WL 3848012, at *5 (procedural due process claim against university vaccination policy unlikely to succeed because students were not entitled to process above and beyond notice provided by enactment and publication).

Additionally, *Loudermill* hearings only apply in the case of terminations *for cause*. 470 U.S. at 535. Here, any terminations are not "for cause," but rather because the employee no longer fulfills an essential job requirement—vaccination. Ashley Decl. ¶ 21. Thus, *Loudermill* does not apply. *See Hannon v. Turnage*, 892 F.2d 653, 658–59 (7th Cir. 1990) (*Loudermill* did not apply

[13]Plaintiffs' assertions that "City firefighters are afforded special protection under Washington Law" and that "[d]iscipline of the healthcare worker Plaintiffs is covered by RCW 18.130" are irrelevant. Dkt. #2 at 20. The State does not employ "city firefighters," nor are there *any* State-employee Plaintiffs identified as credentialed healthcare workers subject to RCW 18.130. Thus, any hypothetical claims city firefighter or healthcare worker Plaintiffs may have for alleged violation of procedural due process do not lie against the State.

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where employee was terminated "for failing to possess the necessary qualifications").

Furthermore, even if Plaintiffs were entitled to due process protections in connection with administrative discharges, they have already received "[t]he essential requirements of due process," namely "notice and an opportunity to respond." *Loudermill*, 470 U.S. at 545–46. As the *Loudermill* Court explained, "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)). To comply with due process, an employer need provide only "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." *Id.* at 546. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.*

Plaintiffs undisputedly received ample notice of the Proclamation and the steps required to maintain their employment. Nor is there any doubt that those who have elected not to comply have received notice of the termination process and the reason therefor. There is likewise no dispute that state employees who believe they should be exempt from the Proclamation—either on medical or religious grounds—have been given an opportunity to present their case. *See, e.g.*, Arnold Ex. 57, Gilbert Decl. ¶¶ 19–22; Coalman Decl. ¶ 5; Schiess Decl. ¶ 3; George Decl. ¶ 7. Some employees soon subject to termination are receiving yet a further opportunity to present their side of the case. For example, State Patrol has offered pre-separation hearings to each employee subject to separation, at which employees (along with a union representative) have an opportunity to tell their side of the story and present any mitigating evidence. Ashley Decl. ¶¶ 17–20. State Patrol is also making efforts to ensure that any employee who complies with the Proclamation, however belatedly, will not be separated from service, including by offering leave without pay to employees still in the process of becoming fully vaccinated. *Id.* ¶ 22. This is more than sufficient to meet the requirements of due process, particularly given the State's compelling interest in ensuring workers in key sectors have received lifesaving vaccines. *Loudermill*, 470 U.S. at 542–43.

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5. Plaintiffs are unlikely to prevail on their Title VII and ADA claims

Once again, Plaintiffs provide scant argument on their statutory antidiscrimination claims, each of which is unlikely to succeed. Plaintiffs have failed to (a) meet the prima facie requirements of a disparate impact claim; (b) exhaust their administrative remedies; and (c) explain how their highly fact-specific, individual failure-to-accommodate claims under the ADA could possibly justify an injunction against the Proclamation itself as to all 680,000 workers it covers.

a. Plaintiffs have no viable disparate impact claim under Title VII

The only Title VII liability theory Plaintiffs assert is for "disparate impact." Dkt. #2 at 21. To establish a "prima facie case of disparate impact under Title VII," Plaintiffs "must show that a facially neutral employment practice has a significantly discriminatory impact upon a group protected by Title VII." *Freyd v. Univ. of Or.*, 990 F.3d 1211, 1224 (9th Cir. 2021) (cleaned up). This prima facie showing requires "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Lyons v. Wash. State Dep't of Soc. & Health Servs.*, No. 3:18-cv-05874-RBL, 2020 WL 816017, at *3 (W.D. Wash. Feb. 19, 2020) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988)). "The plaintiff must also establish that the challenged practice is either (a) not job related or (b) 'inconsistent with business necessity.'" *Freyd*, 990 F.3d at 1224 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)). Finally, "[e]ven if the practice is job related and consistent with business necessity," a "plaintiff may still prevail 'by showing that the employer refuses to adopt an available alternative practice that has less disparate impact and serves the employer's legitimate needs.'" *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

Under that standard, Plaintiffs' Title VII disparate impact claim fails on multiple levels—most obviously because they have not "demonstrate[d] 1) a specific employment practice that 2) causes a significant discriminatory impact." *Id.* Even assuming *arguendo* that an emergency public health directive with the force of law qualifies as a specific "employment practice" under Title VII, Plaintiffs have provided no evidence of a "significantly discriminatory impact." Plaintiffs point to DOH data from April 2021 or earlier indicating that while Hispanic and Black

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Washingtonians comprised approximately 13% and 4% of the state population, respectively, they represented only 8% and 3% of those who had received COVID-19 vaccinations, respectively. Dkt. #2 at 11 (citing Dkt. #3-1 at 692). This six-month-old statewide snapshot does not remotely demonstrate that the Proclamation has a significant disparate impact, for two reasons. First, it says nothing about vaccination rates among the specific subset of workers actually covered by the Proclamation. *See Lyons*, 2020 WL 816017, at *4 ("[G]eneralized statistics . . . at the . . . state level" are "not sufficient to present evidence raising an inference of discrimination on a disparate impact claim.") (quoting *Stout v. Potter*, 276 F.3d 1118, 1122 (9th Cir. 2002)). Second, Plaintiffs' evidence is outdated. *Current* publicly available data show that Hispanic and Black Washingtonians make up 11% and 4%, respectively, of those who have initiated vaccination—the same percentages as each group's share of the eligible state population.[14] Lindquist Decl. ¶ 68.

To the extent Plaintiffs advance a *religious* discrimination claim under Title VII, their disparate impact evidence is equally inadequate. Plaintiffs claim that "[r]eligious exemptions are being granted at vastly lower rates than medical exemptions." Dkt. #2 at 21. In fact, the opposite is true. As of October 4, 2021, state agencies had approved 4,219 out of 4,849 religious exemption requests submitted (an 87% approval rate), compared with 864 out of 1,220 medical exemption requests (a 72.1% approval rate). Sullivan-Colglazier Decl. ¶¶ 6–8, Ex. A at 4–5.[15] Unable to establish even the prima facie requirements of a disparate impact claim, Plaintiffs are unlikely to prevail under the only Title VII theory they have even mentioned.[16]

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[14] *COVID-19 Data Dashboard*, *Vaccinations, Who is getting vaccinated? Race/Ethnicity*, https://bit.ly/3BFHBPI (updated Oct. 11, 2021). CDC data show that Hispanic Washingtonians have been vaccinated at a rate comparable to Whites (56% of the total white population versus 49% of the total Hispanic population) and Black Washingtonians have been vaccinated at a *higher* rate (58%). Nambi Ndugga, et al., *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KFF (Oct. 6, 2021), https://bit.ly/2X9bLf8. Under the "four-fifths rule" courts apply as a "rule of thumb," this difference would be insufficient to establish a disparate impact, even if this data *did* cover the relevant population. *Stout*, 276 F.3d at 1124 (quoting 29 C.F.R. § 1607.4(D) (2001)). But even this modest gap appears to overstate matters: the same report shows that the limited disparity appears to be driven primarily, if not entirely, by the fact that the Hispanic population tends to skew younger than the White population. Among those 12 and older, 64% of Hispanic Americans and 61% of white Americans had received at least one dose. Ndugga, *supra*.

[15] On October 5, 2021, the State filed an earlier version of Ms. Sullivan-Colglazier's declaration in *Cleary*, containing similar numbers, so Plaintiffs were aware that their claim lacked a factual basis before they made it here.

[16] Plaintiffs are also unlikely to succeed on the merits of their claim because the "business necessity" of the Proclamation "constitutes a defense to disparate-impact claims." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, 576 U.S. 519, 531 (2015). For the reasons above, the Proclamation bears "a 'manifest

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b. Plaintiffs have failed to exhaust administrative remedies

Finally, Plaintiffs cannot prevail on their Title VII and ADA claims because Plaintiffs have not exhausted their administrative remedies. "To assert a Title VII claim of discrimination in federal court, a plaintiff must first have timely filed a complaint of discrimination with his or her employing agency." *Norris v. Foxx*, No. C13-5928 BHS, 2014 WL 935304, at *3 (W.D. Wash. Mar. 10, 2014) (citing *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001)). "The same exhaustion requirement applies to ADA claims." *Gobin v. Microsoft Corp.*, No. C20-1044 MJP, 2021 WL 148395, at *4 (W.D. Wash. Jan. 15, 2021) (citing 42 U.S.C. § 12117(a) and *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000)). Notably, "discrete acts must be separately timely exhausted even if plaintiff alleges that the acts stem from 'a company-wide, or systemic, discriminatory practice[.]'" *Foxx*, 2014 WL 935304, at *5 (quoting *Cherosky v. Henderson,* 330 F.3d 1243, 1246–47 (9th Cir. 2003)). Plaintiffs' "failure to exhaust these claims justifies dismissal." *Gobin*, 2021 WL 148395, at *4.

c. Plaintiffs' ADA failure-to-accommodate claims do not support their facial challenge to the Proclamation

Plaintiffs' ADA claim turns entirely on their allegation that the State has "denied . . . accommodation[s]" to some unspecified subset of Plaintiffs with disabilities. Dkt. #2 at 24. But this allegation cannot possibly suffice to carry their burden of proving a facial challenge because any failure to accommodate a given Plaintiff necessarily flows not from the Proclamation itself, but from its implementation by his or her employer—whether it be a state agency, a local governmental entity, or a private health care provider. An employer is not liable under the ADA if no reasonable accommodation is possible. *See Snapp v. United Transp. Union*, 889 F.3d 1088, 1095 (9th Cir. 2018). And "[w]hether an accommodation is reasonable depends on the individual circumstances of each case, . . .requir[ing] a fact-specific, individualized analysis of the disabled

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relationship' to job performance" for the public-facing sectors it covers. *Id.*; *see also Contreras v. City of L.A.*, 656 F.2d 1267, 1276 (9th Cir. 1981) ("[A]n employer must demonstrate a significant relation between the challenged selection device or criteria and the important elements of the job or training program, … [h]owever, the employer need not establish a perfect positive correlation between the selection criteria and the important elements of work.").

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individual's circumstances and the [potential] accommodations." *Dunlap v. Liberty Nat'l Prods., Inc.*, 878 F.3d 794, 799 (9th Cir. 2017) (cleaned up). Even if Plaintiffs had established at this early stage of the case that any of them were denied a reasonable accommodation to which they were legally entitled (and they have not[17]), it would not remotely warrant entering a TRO or preliminary injunction against the Proclamation itself. *See Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) ("A preliminary injunction is appropriate when it grants relief of the same nature as that to be finally granted.") (citing *De Beers Consol. Mines v. United States,* 325 U.S. 212, 220 (1945)); *Acevedo v. City of Philadelphia*, 680 F. Supp. 2d 716, 740 (E.D. Pa. 2010) (prevailing on a failure-to-accommodate claim alone, "without a showing that [challenged regulation] routinely prohibits consideration of reasonable accommodations, would not render the Regulation facially invalid").

C. Plaintiffs Have Failed to Establish a Likelihood of Irreparable Harm

Plaintiffs' Motion must also be denied because they are not "likely to suffer irreparable harm" absent "preliminary relief." *Winter*, 555 U.S. at 20. Plaintiffs have not shown a likelihood of success on their constitutional claims; loss of employment is a quintessential compensable harm; and Plaintiffs' delay in seeking relief undermines any assertion of irreparability.

Plaintiffs argue that alleged violations of their constitutional rights establish irreparable harm. Dkt. #2 at 11–12. They are wrong. Although deprivation of a constitutional right *can* constitute irreparable injury, no such presumption is appropriate where Plaintiffs fail to show a likelihood of success on their claims. *See supra* at 9–21; *see, e.g.*, *Valdez*, 2021 WL 4145746, at

[17] Even as to the three plaintiffs specifically identified in their motion, Plaintiffs utterly fail to carry their burden of proving the State's alleged failure to accommodate. Plaintiff Hollingsworth is not even a state employee, and thus has no claim against the State. Hollingsworth Decl. ¶ 2. Plaintiff Pilz has not "suffered an[y] adverse employment action because of his disability," *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003), but is, to the contrary, *currently engaging* in an interactive process with his employer to identify a reasonable accommodation, Gilbert Decl. ¶¶ 19–23. Lastly, Plaintiff LeBlanc's own declaration confirms that no reasonable accommodation in his current position is possible. *See Snapp*, 889 at 1095. As he explains, State Patrol (WSP) engaged with him to accommodate his medical needs, but due to the "forward facing" nature of his "position (meaning [he] work[s] directly with our fire service and the public),… there was no way the WSP could accommodate [him]" in his current role or any other available position within the agency. LeBlanc Decl. ¶ 18; *see also* Ashley Decl. ¶ 10 (explaining that the "vast majority" of positions within WSP are public-facing). Because interacting with the public and co-workers is an "essential functions of [his] job," LeBlanc's inability to do so safely precludes a prima facie showing of failure to accommodate. *Allen*, 348 F.3d at 1114.

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*12; *Klaassen*, 2021 WL 3073926, at *44 (similar); *Rushia v. Town of Ashburnham*, 701 F.2d 7, 10 (1st Cir. 1983) (Breyer, J.) ("[T]he fact that [plaintiff] is asserting First Amendment rights does not automatically require a finding of irreparable injury."); *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 925 (N.D. Cal. 2019), *aff'd*, 963 F.3d 874 (9th Cir. 2020) (plaintiff "must demonstrate some likely irreparable harm . . . and not simply a constitutional violation"), *vacated on other grounds in light of changed circumstances*, --- S. Ct. ----, No. 20-138, 2021 WL 2742775 (July 2, 2021).

Plaintiffs' potential loss of employment also does not constitute irreparable harm. Dkt. #2 at 12–13. By definition, injuries capable of compensation by damages are not irreparable, including job termination. *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974) (absent "genuinely extraordinary situation," employment loss is not irreparable harm). Applying *Sampson* and its progeny, courts across the country have held that employees challenging COVID-19 vaccination policies do not face irreparable harm. *See, e.g.*, *Beckerich v. St. Elizabeth Med. Ctr.*, No. 21-105-DLB-EBA, 2021 WL 4398027, at *6 (E.D. Ky. Sept. 24, 2021); *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:21-cv-597, 2021 WL 4504245, at *4 (S.D. Ohio Sept. 30, 2021).

Likewise, purported privacy or health violations do not cause irreparable harm because any alleged injury can be "avoid[ed]" by refusing a vaccine and "accepting the resulting employment action." *Harsman*, 2021 WL 4504245, at *4; *see also Norris*, 2021 WL 3891615, at *2 (choice of receiving vaccine and giving up alleged privacy right or refusing vaccine and risking loss did not constitute irreparable harm because "Plaintiff can be properly compensated by monetary damages"). As in these cases, the Proclamation does not force employees to get vaccinated—it merely makes vaccination a condition of continued employment absent an exemption. Plaintiffs therefore have a choice: get vaccinated, seek an exemption and accommodation (if qualified), or seek employment elsewhere. If Plaintiffs decline vaccination and are terminated, damages would be an adequate remedy, assuming any viable claims. This forecloses injunctive relief.[18]

[18]Plaintiffs' limited case law is inapposite. *EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 928–29 (9th Cir. 2018) concerned denial of a job on the basis of a disability. Similarly, *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd sub nom. NASA v. Nelson*, 562 U.S. 134 (2011), concluded that plaintiffs showed irreparable harm because they

Finally, Plaintiffs' decision to wait two months after the Proclamation issued and less than two weeks before the October 18 deadline precludes any showing of irreparable harm. *See, e.g.*, *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (five-month "delay before seeking [injunctive relief] implies lack of urgency and irreparable harm."); *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (delay of "even only a few months . . . militates against a finding of irreparable harm."); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (two-month delay).

D. The Balance of Equities and Public Interest Weigh Against Injunctive Relief

Given the public health dangers that would result from enjoining the Proclamation, the balance of equities and the public interest weigh strongly against "employing the extraordinary remedy of injunction," *Winter*, 555 U.S. at 24, even if Plaintiffs' claims had merit. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018) (per curiam) ("[A] preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits.").

As courts have consistently recognized, preventing further spread of a virus that has taken the lives of so many Americans is undoubtedly in the public interest. *See, e.g.*, *Valdez*, 2021 WL 4145746, at *13 ("the balance of equities tips in Defendants' favor given the strong public interest here they are promoting—preventing further spread of COVID-19"). Given the Proclamation's public-health purpose—saving lives through increased vaccination—enjoining it is not in the public interest. Were this Court to grant Plaintiffs' Motion and allow unvaccinated state employees, health care workers, and teachers to continue working in their positions, more Washingtonians will contract the virus, fall ill, and die. The University of Washington's Institute for Health Metrics and Evaluation estimates that Washington would suffer up to 113,000 more COVID-19 cases, 5,880 more hospitalizations, and 765 more deaths. Murray Decl., Ex. B at 5.

Most of those avoidable losses would be among unvaccinated people, including those like children, infants, and people with legitimate medical or religious exemptions who cannot get the

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were required to provide constitutionally protected private information as a condition of employment. *See also Velasquez v. Croteau*, No. C 08-02520 JSW, 2009 WL 10676750, at *2 (N.D. Cal. Oct. 16, 2009).

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vaccine. Plaintiffs thus "are not asking to be allowed to make a self-contained choice to risk only their own health . . . ." *Klaassen*, 2021 WL 3073926, at *43 (quoting *Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021)). Rather, "their decision necessarily bears on the health of other[s]." *Id.* These impacts on others undoubtedly weigh against enjoining the Proclamation.

Plaintiffs' contrary assertion—that the Proclamation will result in "the loss of emergency and non-emergency services personnel and . . . more COVID infections," Dkt. #2 at 13 (emphasis omitted)—is wholly speculative and contrary to evidence. In the last six weeks, there has been a nearly 40% increase in vaccination rates among state workers that is still trending upward. Sullivan-Colglazier Decl. ¶ 5, Ex. A. For example, as of October 4, 2021, 92.8% of DOC employees and 89.9% of WSP employees have verified they are vaccinated against COVID-19,[19] belying Plaintiffs' speculation that the Proclamation will leave corrections facilities and law enforcement offices understaffed. Dkt. #2 at 8, 10. But even if some workers do choose to leave state employment rather than get vaccinated, the avoidable deaths of hundreds of Washingtonians far outweigh the temporary loss of some workers who refuse to protect themselves, their colleagues, and those in their care with the first and best defense against the virus.

E. Abstention Doctrines Favor Denial of the Motion and Dismissal of the Suit

When, as here, a suit "clearly involves basic problems of [state] policy," federal courts should exercise "equitable discretion … to give the [state] courts the first opportunity to consider them." *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943). The state policy issues at stake here—the scope of the Governor's authority, the State's requirements of its employees, and its efforts to prevent hundreds of deaths in a pandemic—should be left to state courts. The Ninth Circuit weighs *Burford* abstention using three factors: "1) the state must have concentrated suits involving the local issue in a particular court; 2) the federal issues must not be easily separable from complicated state law issues with which the state courts may have special competence; and 3) federal review might disrupt state efforts to establish a coherent policy." *Fireman's Fund Ins. Co. v.*

[19]These figures do not include employees who have accommodations.

Quackenbush, 87 F.3d 290, 296 (9th Cir. 1996) (citation omitted). All three warrant abstention.

First, the State has concentrated suits involving the Proclamation in Thurston County Superior Court. *See* RCW 4.12.020(2). As the Washington Supreme Court recently confirmed, that court is the mandatory venue for State actions challenging the Proclamation. Hughes Decl., Ex. P. Second, the issues here are primarily related to state law for which the Thurston County Superior Court is especially competent as the mandatory venue. Three challenges to the Proclamation—including two by Plaintiffs' own counsel—have already been filed in that court. The federal issues here—parallel constitutional claims and ancillary statutory claims—hinge on the same analysis of state law and are thus not "easily separable." Third, it is critical that the State's emergency public health directives be reviewed in the court most familiar with those efforts, helping avoid inconsistent results that could risk confusing the public as to which laws apply during an ongoing pandemic. The Court should abstain to allow the Thurston County Superior Court to speak with a singular voice on important state health policy questions.

This Court should also abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976), "due to the presence of [two] concurrent state proceeding[s]" seeking identical relief. The *Colorado River* factors are:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. St. & Co. v. Transp. Ins. Co., 656 F.3d 966, 978–79 (9th Cir. 2011). While no single factor is determinative, all favor abstention here, except factors (1) and (2) (which are neutral):

Factor 3. Abstention will avoid piecemeal litigation of Plaintiffs' challenge in multiple forums. Particularly as Plaintiffs seek to invalidate Proclamation 21-14 statewide, not just to exempt themselves, the risk of "reaching different results" is acute. *R.R. St.* at 979.

Factor 4. Plaintiffs' counsel filed the *Cleary* case on September 10, and it was transferred

to Thurston County Superior Court on September 29, 2021, a week before Plaintiffs filed here.

Factor 5. Plaintiffs' claims inevitably hinge on state law. They challenge the Governor's authority under the "Washington Constitution statute [sic]," Dkt. #1 at 2, argue that the Governor "lacks legal authority," *id.* ¶ 174, and argue they have been deprived of process under state statutes, *id.* ¶ 210. Though Plaintiffs include federal constitutional and statutory claims, they make largely the same arguments as the *Cleary* and *Johnson* plaintiffs in state court, identify no relevant difference in state constitutional standards, and they aim for the same relief.

Factor 6. Because Plaintiffs' claims mirror the state-court litigation—challenging the Governor's authority to issue Proclamation 21-14 and seeking statewide invalidation—Plaintiffs' rights are just as well protected in the Thurston County Superior Court.

Factor 7. Plaintiffs' forum shopping warrants abstention. They filed their complaint just a week after their counsel lost their second effort to keep the parallel *Cleary* case in an improperly chosen venue. *See supra* at 8. Their counsel's third attempt to maintain this litigation outside of the Thurston County Superior Court should be countenanced no more than the first two. *See Fireman's Fund*, 87 F.3d at 297; *Baseline Sports, Inc. v. Third Base Sports*, 341 F.Supp.2d 605, 611–612 (E.D. Va. 2004) (finding vexatious purpose where federal suit mirrored state court suit).

Factor 8. The Thurston County proceedings will resolve all essential issues present here: whether Proclamation 21-14 is within the Governor's authority, whether it is constitutional, and whether it will be enjoined or invalidated. Any minor differences do not weigh against abstention, as *Colorado River* requires only substantial similarity, not "exact parallelism." *R.R. St.* at 982.

IV. CONCLUSION

For the reasons above, Defendants respectfully ask the Court to deny Plaintiffs' Motion.

DATED this 14th day of October 2021.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 14th day of October 2021, at Seattle, Washington.

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