

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

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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

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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>)

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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:

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“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

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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,

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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

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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 placed 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

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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."

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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:

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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-vaccines-to-prevent-sars-cov-2-infection> (last updated Dec. 1, 2021).

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

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

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

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

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

8. Exhibit 8: "Morbidity and Mortality Weekly Report (MMWR): Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January-September 2021," Centers for Disease Control and Prevention, available at

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<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.)

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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

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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

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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

CSR: None

Judicial Assistant: R. Navarro

ERM: None

Courtroom Assistant: None

Deputy Sheriff: None

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 predissmissal 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

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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

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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

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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 predissmissal 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:

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“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

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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,

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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:

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“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.)

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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

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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

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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-osa-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

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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.)

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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.)

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

CSR: None

Judicial Assistant: R. Navarro

ERM: None

Courtroom Assistant: 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

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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

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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

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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.

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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.