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CITY AND COUNTY OF SAN FRANCISCO, ET AL.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

UNITED SF FREEDOM ALLIANCE, BHANU VIKRAM, CARSON R. SCHILLING, CHRISTA L. FESTA, CHRISTIANNE T. CROTTY, DENNIS M. CALLAHAN, JR., FAIMING CHEUNG, and JESSICA KWOK-BO LINDSEY,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation and administrative division of the State of California, et al., and Does 1 through 100, inclusive,

Defendants.

Case No. CGC-22-597428

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS CITY AND COUNTY OF SAN FRANCISCO, ET AL.'S DEMURRER TO THE SECOND AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND DECLARATORY AND INJUNCTIVE RELIEF

Hearing Date: June 21, 2022
Hearing Judge: Judge Richard B. Ulmer
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: January 4, 2022
Trial Date: None set

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INTRODUCTION

In the midst of a global pandemic that has killed millions, the City and County of San Francisco has distinguished itself in its overwhelmingly successful efforts to curb COVID-19. By quickly implementing science-based masking, social distancing, testing, and tracing measures, "San Francisco succeeded more than other U.S. cities in fighting the coronavirus."[1] To continue its success, San Francisco implemented its Vaccination Policy requiring all City employees to be vaccinated absent applicable medical or religious accommodations. San Francisco's principal goal is to "provide a safe and healthy workplace . . . to protect its employees and the public." (Second Amended Complaint (hereafter SAC) Ex. A at p. 1.)

Against this backdrop, Plaintiffs filed a Complaint brimming with distortions, conspiracies, and debunked theories. The Complaint's careless assertions masquerading as fact—such as that COVID-19 vaccines are not vaccines, hospitalization and death rates have been overinflated, and that hydroxychloroquine and ivermectin are effective treatments—are wrong as a scientific matter, and do nothing to overcome the rational basis for the Vaccination Policy. Plaintiffs contend that California's right to privacy prevents the City from even gathering information about their vaccination status, to say nothing of requiring vaccination. Plaintiffs also allege that the City contends that *Skelly* hearings are not required, has "published" the vaccine status of employees, and discriminates against persons with religious beliefs or medical conditions that prevent them from obtaining vaccinations. Nonsense.

For over a century, courts—including the United States and California Supreme Courts—have consistently upheld vaccination requirements. The Vaccination Policy does not implicate fundamental constitutional rights and easily meets rational basis review given the consensus among public health officials that COVID-19 vaccines are safe and effective. Plaintiffs remaining declaratory relief claims fail because Plaintiffs lack standing and cannot state meritorious claims in any event. The City respectfully requests that the Court sustain the demurrer without leave to amend.

[1] Farr, *How San Francisco succeeded more than other U.S. cities in fighting the coronavirus*, CNBC (Aug. 8, 2020) <https://www.cnbc.com/2020/08/08/how-san-francisco-beat-other-us-cities-in-fighting-the-coronavirus.html> (as of May 11, 2022).

BACKGROUND

I. VACCINES OFFER SAFE AND EFFECTIVE PROTECTION AGAINST COVID-19.

As of May 11, 2022, more than 995,747 Americans have died of COVID-19. (Request for Judicial Notice (hereafter RJN) Ex. A.) At present, three COVID-19 vaccines are widely available in the United States. The Pfizer and Moderna vaccines have received full approval from the U.S. Food and Drug Administration ("FDA"); the Johnson & Johnson vaccine has been approved through Emergency Use Authorization. (RJN Ex. B.) The Centers for Disease Control and Prevention ("CDC"), FDA, California Department of Public Health ("CDPH"), and San Francisco's Department of Public Health ("SFDPH") have all concluded that COVID-19 vaccines are safe. (RJN Ex. C.) The vaccines have also proven effective at reducing infections, serious illness, hospitalizations, and deaths from COVID-19. (RJN Ex. D.) Contrary to Plaintiffs' baseless allegations that the vaccines are mere "treatments" that do not decrease spread of COVID-19 (SAC ¶ 78), CDPH concluded that unvaccinated people are 5.4 times more likely to get COVID-19 than fully vaccinated people, 9.3 times more likely to be hospitalized, and 8.8 times more likely to die from COVID-19 than those who are fully vaccinated. (RJN Ex. E.)[2] And "because vaccinated individuals are less likely to become infected in the first place and also experience accelerated viral clearance," "[they] are less likely to infect others." (*Plata v. Newsom* (N.D. Cal., Nov. 17, 2021, No. 01-CV-01351-JST) 2021 WL 5410608, at p. 2.)

II. SAN FRANCISCO'S VACCINATION POLICY SEEKS TO PROTECT EMPLOYEES AND THE PUBLIC CONSISTENT WITH COVID-19 PUBLIC HEALTH GUIDANCE.

San Francisco issued its Vaccination Policy on June 23, 2021, and amended the policy most recently on January 4, 2022. (RJN Ex. F.)[3] The City's Vaccination Policy seeks to "provide a safe and healthy workplace, consistent with COVID-19 public health guidance and legal requirements," and "to protect its employees and the public as [the City] reopens services and returns more employees to workplaces." (*Id.* at p. 1.) Consistent with public health guidance from the CDC, FDA, CDPH and the San Francisco County Health Officer, the City generally requires employees to be vaccinated against COVID-19 as a minimum qualification of employment. (*Id.* at pp. 4-5.) Employees with a

[2] Fully vaccinated people are people who have received vaccinations plus their booster dose if they are eligible.

[3] The Second Amended Complaint contains an outdated version of the policy as Exhibit A.

medical restriction or a sincerely held religious belief that prohibits them from receiving a vaccine had the opportunity to request a reasonable accommodation to be excused from the vaccination requirement. (*Id.* at p. 6.) City employees are also required to comply with any applicable booster requirements set by state laws that prohibit the City from allowing employees to work in certain high-risk settings unless they are up-to-date on their vaccinations. (RJN Ex. G.)

Employees who fail to comply with the Vaccination Policy may face disciplinary action or non-disciplinary separation from employment for failure to meet the minimum qualifications for City employment. Permanent civil service employees who fail to comply with the Vaccination Policy "will be placed on paid administrative leave until their due process hearing takes place. Following due process deliberations, subsequent hearings to determine whether unvaccinated employees will be separated from city employment will take place." (RJN Ex. H.)

DISCUSSION

I. THE CITY'S VACCINATION POLICY DOES NOT VIOLATE THE RIGHT TO PRIVACY (2ND CAUSE OF ACTION).

Plaintiffs allege in their second cause of action that the constitutional right to privacy protects Plaintiffs from having to obtain a vaccine as a condition of employment and disclose their vaccination status to the City. (SAC ¶¶ 129-143.) Plaintiffs' privacy claims fail as a matter of law.

"The California Constitution sets a 'high bar' for establishing an invasion of privacy claim." (*In re Yahoo Mail Litig.* (N.D. Cal. 2014) 7 F.Supp.3d 1016, 1038, citation omitted.) To state a claim for a violation of privacy under the California Constitution, a plaintiff must allege facts demonstrating "(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, at pp. 39-40 (*Hill*).) "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed 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." (*Id*. at p. 40.) "Although the right [to privacy] 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 (*Love*), internal quotations omitted.) If the allegations "show no reasonable

expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370.) Further, where (as here) the government has acted to safeguard public health, review is under the rational basis standard. (*Love, supra,* 29 Cal.App.5th at p. 993.) "In the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of privacy has occurred." (*Ibid.*)

A. Plaintiffs Failed to Plead Facts Showing a Legally Protected Privacy Interest or a Reasonable Expectation of Privacy.

Plaintiffs' complaint offers nothing to overcome the presumption that the Vaccination Policy is constitutional. In *Jacobson v. Massachusetts* (1905) 197 U.S. 11, the Supreme Court upheld a Massachusetts law that allowed cities to require that their residents be vaccinated against smallpox. "[I]t has been settled since 1905 in *Jacobson* that it is within the police power of a State to provide for compulsory vaccination." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1143 (*Brown*), citations and internal punctuation removed; see also *Abeel v. Clark* (1890) 84 Cal. 226, 230 [upholding compulsory immunization requirement].) Indeed, "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases." (*Brown*, at p. 1146.) Since *Jacobson*, courts have consistently upheld state vaccination mandates under rational basis review, including vaccination requirements imposed during the COVID-19 pandemic. (See, e.g., *Brown,* at p. 1143; *Love, supra*, 29 Cal.App.5th at p. 993; *Zucht v. King* (1922) 260 U.S. 174, 176 [holding that it is "settled that it is within the police power of a state to provide for compulsory vaccination"]; *Klaassen v. Trustees of Ind. Univ*. (7th Cir. 2021) 7 F.4th 592, 593 (*Klaassen*) ["Given [*Jacobson*] . . . there can't be a constitutional problem with vaccination against [COVID-19]."]; *Phillips v. City of New York* (2d Cir. 2015) 775 F.3d 538, 542 (*Phillips)* [holding challenge to vaccination mandate was foreclosed by *Jacobson*]; *Kheriaty v. Regents of Univ. of Cal.* (C.D. Cal., Sept. 29, 2021, No. 21-01367 JVS) 2021 WL 4714664, at pp. 5-6; *Valdez v. Grisham* (D.N.M. 2021) 559 F.Supp.3d 1161, 1176-1177.) Given the broad authority of local governments to mandate vaccination among the *general public*, there is no question that local governments may make vaccination among their *employees* a condition of employment. Indeed, the California Department of Fair Employment and

Housing, Cal/OSHA, and the EEOC have all affirmed that employers may require vaccinations as a condition of employment. (Cal/OSHA, COVID-19 Emergency Temporary Standards FAQs (May 7, 2022) <https://www.dir.ca.gov/dosh/coronavirus/COVID19FAQs.html> (as of May 11, 2022) ["Q: May an employer require employees to be vaccinated against COVID-19? A: Yes."].)[4]

The Vaccination Policy easily satisfies rational basis review. (*Love, supra,* 29 Cal.App.5th at p. 993 [affirming dismissal of challenge to vaccine mandate under rational basis review].) Rational basis review is "a paradigm of judicial restraint." (*F.C.C. v. Beach Commun., Inc*. (1993) 508 U.S. 307, 314.) "To mount a successful rational basis challenge, a party must 'negative every conceivable basis'" that might support the government's action. (*Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 881 (*Johnson*), quoting *Heller v. Doe* (1993) 509 U.S. 312, 320.)

Here, the City's Vaccination Policy is indisputably related to the City's goal to protect the health of employees and the public by reducing the spread of COVID-19. (RJN Ex. F.) The evidence of the efficacy and safety of the COVID-19 vaccines is overwhelming—enough to leave one district court "dumbfounded that it even must engage in this discussion . . . . [since] *real* data show that these vaccines, like so many others before, are generally safe and effective." (*Streight v. Pritzker* (N.D. Ill., Sept. 22, 2021, No. 3:21-CV-50339) 2021 WL 4306146, at p. 7, original italics; *see* RJN Ex. A-E.) But the Court need not wade into the science to dismiss Plaintiffs' claims. The City concluded—based on guidance from federal, state, and local public health experts—that requiring vaccinations will protect the health of employees and the public during the ongoing COVID-19 pandemic. (RJN Ex. A-F.) That decision easily satisfies rational basis review, and indeed reflects the scientific consensus on the safety and efficacy of COVID-19 vaccines. (*Ibid.*; *Biden v. Missouri* (2022) 142 S.Ct. 647, 653-654 [rejecting argument that COVID-19 vaccine requirement for employees is arbitrary and capricious].) Although Plaintiffs disagree with that consensus, Plaintiffs' objections are all beside the point, because the law entrusts governmental officials to make rational choices about how to best protect public health.[5] (*Jacobson*, *supra,* 197 U.S. at pp. 30-31 [upholding right of local governments to choose

[4] See also RJN Ex. I at p. 7; RJN Ex. J.

[5] Thus, the Court can ignore Plaintiffs' falsehoods regarding the efficacy and safety of vaccines, as well as their proposed alternatives (SAC ¶¶ 93-101), all of which are unsupported, ineffective, and unsafe. (See RJN Ex. K.)

between "opposing theories" within medical and scientific communities in determining the most "effective . . . way in which to meet and suppress" public health threats]; *Phillips*, *supra,* 775 F.3d at p. 542 ["Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors."]; *Love, supra*, 29 Cal.App.5th at p. 994 [upholding vaccination requirement for school children under rational basis review].) Under rational basis review, if the governmental interest is at least "plausible," courts may not second-guess its "wisdom, fairness, or logic." (*Johnson*, *supra,* 60 Cal.4th at p. 881.) The Vaccination Policy certainly rests on a plausible foundation based on the conclusions of the FDA, CDC, CDPH, and SFDPH. (RJN Ex. A-E.)[6]

Ignoring the authorities cited above, Plaintiffs offer nothing to show that they have any legally protected privacy interest or any reasonable expectation that they will not face a vaccine mandate as a condition of employment during a pandemic. Plaintiffs note that they have rights to "bodily integrity" and to refuse unwanted medical treatment, but the Vaccination Policy does not burden any such rights. Plaintiffs are free to refuse vaccination, and seek employment elsewhere. (*Klaassen, supra*, 7 F.4th at p. 593 [upholding vaccine mandate where "[p]eople who do not want to be vaccinated may go elsewhere"]; *Bridges v. Houston Methodist Hospital* (S.D. Tex. 2021) 543 F.Supp.3d 525, 528 ["Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else."]) Plaintiffs are not guaranteed public employment.[7] At most, Plaintiffs allege that they face a difficult choice, but they have not alleged any forced intrusion on their bodily integrity. (*Johnson v. Brown* (D. Or., Oct. 18, 2021, No. 3:21-CV-1494-SI) 2021 WL 4846060, at p.18 ["The Vaccine Orders presents Plaintiffs with a difficult choice, but it is nevertheless a choice. Plaintiffs may either get the vaccine, apply for an exception, or look for employment elsewhere."].)

Plaintiffs contend—contrary to fact—that City employees reasonably expect that they will not face a vaccination requirement as a condition of employment because "the City has never had a

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[6] "Where an allegation is contrary to . . . a fact of which a court may take judicial notice, it is to be treated as a nullity." (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 955.)

[7] Plaintiffs do not have a fundamental right to work for the City. (*Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 313; *Marilley v. Bonham* (9th Cir. 2016) 844 F.3d 841, 854.)

vaccination requirement for public employment before now . . . ." (SAC ¶ 133.) That is simply false. Numerous job classifications in San Francisco require proof of vaccinations for diseases such as the flu, measles, mumps, rubella, varicella, and hepatitis B as a condition of employment.[8] Indeed, such requirements are commonplace. (*Biden, supra,*142 S.Ct. at p. 653 [recognizing that "[h]ealthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella"].) In any event, the fact that *some* employees may not have faced a vaccination requirement before says nothing about the reasonableness of such a requirement during a (hopefully) once-in-a-lifetime public health crisis. (*Ibid*. [upholding COVID-19 vaccination requirement; explaining that, while the "vaccine mandate goes further than what the Secretary has done in the past to implement infection control," the Secretary "has never had to address an infection problem of this scale and scope before."].)

The authorities on which Plaintiffs rely are all inapposite. Plaintiffs rely on *Mathews v. Becerra* (2019) 8 Cal.5th 756, in which the California Supreme Court held that therapists sufficiently stated a claim that a mandatory reporting requirement that would require them to report patients who admitted to viewing child pornography during therapy sessions violated reasonable expectations of privacy. *Mathews* holds that "for purposes of demurrer, plaintiffs have established that their patients have a reasonable expectation of privacy in admissions during voluntary psychotherapy that they have viewed or possessed child pornography." (*Id*. at pp. 776-777.) *Mathews* does not address employer vaccination requirements during a global pandemic, or suggest that Plaintiffs have any reasonable expectation of privacy in this case. Nor does *Mathews* undermine the well-established rule that vaccination requirements are subject to rational basis review.

Plaintiffs fare no better with their claim that the City cannot require its employees to disclose their vaccination status. (*Love, supra*, 29 Cal.App.5th at p. 993 [rejecting claim that vaccine mandate for school children violated privacy rights by requiring disclosure of personal medical information].) Plaintiffs offer nothing to show that they have a "reasonable expectation of privacy" concerning disclosing to one's employer the simple fact of whether one has received a COVID-19 vaccination or not. "Like any employee, [Plaintiffs have] a somewhat reduced expectation of privacy in the

[8] See, e.g., RJN Ex. L.

workplace, as well as vis-a-vis [their] employer." (*Yin v. State of Cal.* (9th Cir. 1996) 95 F.3d 864, 871 (*Yin*), citations omitted.) This is especially true for public employees, who are routinely required to disclose personal information (such as financial information) that their private counterparts need not divulge. (*Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347.) Plaintiffs cite a list of statutes that require medical information to be stored in a confidential manner, but none of those statutes undermine the well-established principle that employees may be required to disclose certain health and medical information as a condition of employment.[9] (See, e.g., *Yin*, at p. 868 [holding employer may require job-related medical examination of employee]; Gov. Code, § 19253.5; 42 U.S.C. § 12112, subd. (d)(3) ["A covered entity may require a medical examination after an offer of employment has been made . . . ."]; Cal/OSHA, COVID-19 Emergency Temporary Standards FAQs, *supra* ["Q: May an employer require employees to submit proof of vaccination? A: Yes."].)

B. Plaintiffs Failed to Plead Facts Showing Conduct by Defendant Constituting a Serious Invasion of Privacy.

For the same reasons, Plaintiffs also cannot show any "serious invasion" of any protected privacy interest. "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." (*Hill*, *supra,* 7 Cal.4th at p. 37, italics added.) They must be "highly offensive" to a reasonable person. (*Hernandez v. Hillsides Inc.* (2009) 47 Cal.4th 272, 295 (*Hernandez).*) "Even disclosure of *very* personal information has not been deemed an 'egregious breach of social norms' sufficient to establish a constitutional right to privacy." (*In re Yahoo Mail Litig.* (N.D. Cal. 2014) 7 F. Supp. 3d 1016, 1038, italics added.) Here, Plaintiffs do not allege any "egregious" or "highly offensive" conduct or any breach of social norms sufficient to establish a constitutional right to privacy. Indeed, the fact that multiple governmental agencies at the federal, state, and local levels provide that employers may collect information about vaccination status and may mandate

[9] Indeed, until recently, the City needed to obtain the vaccination status of its employees to comply with the different protocols prescribed by Cal/OSHA. For example, Cal/OSHA's Emergency Temporary Standards required the City to ascertain the vaccination status of employees to determine: (1) which employees may work indoors without a mask, 8 C.C.R. sections 3205, subdivision (b)(9), 3205, subdivision (c)(6)(A); (2) which employees must be provided with face coverings, *ibid.*; and (3) which employees must be excluded from the workplace based on a close contact, 8 C.C.R. section 3205, subdivision (c)(9)(B)(1). Plaintiffs cannot have a privacy interest in information the City needed to obtain to comply with the law.

vaccinations overwhelmingly indicates that the Vaccination Policy does not constitute an egregious breach of social norms.[10]

C. Any Invasion of Plaintiffs' Privacy Interests Is Justified Because It Substantively Furthers One or More Countervailing Interests.

Even if Plaintiffs had sufficiently pled all three elements for breach of privacy, their claim would still fail. "[N]o constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests." (*Hernandez*, *supra,* 47 Cal.4th at pp. 287-288.) "Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities . . . . Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Hill*, *supra,* 7 Cal.4th at p. 38.) Here, the City undoubtedly has an interest in doing its part to halt the devastating toll of the ongoing global pandemic. Even a *private* employer "has a serious (and compelling) interest in promoting the health and safety of its workforce; an employer may take steps to prevent its employees from getting sick, as employee sickness may cause staffing difficulties and increased health care costs (not to mention human suffering). Furthermore, this vaccination mandate is not solely about the health of individual employees, but the health of people with whom employees interact . . . ." (*United KP Freedom Alliance v. Kaiser Permanente* (N.D. Cal., Nov. 18, 2021, No. 21-CV-07894-VC) 2021 WL 5370951, at p. 1.) Such concerns are only augmented for a public entity like the City.

Accordingly, Plaintiffs have failed to state a claim under the California Constitution's right to privacy. The Vaccination Policy easily satisfies rational basis review and should be upheld as a matter of law. (*Love, supra*, 29 Cal.App.5th at p. 993.)

II. PLAINTIFFS CANNOT STATE A CLAIM FOR ULTRA VIRES ACTION (1ST CAUSE OF ACTION).

In their First Cause of Action, Plaintiffs allege that the "City issued the COVID-19 vaccine mandate pursuant to its powers under the California Emergency Services Act." (SAC ¶ 120, citing Gov. Code, § 8634.) That is simply false. The California Constitution grants charter cities such as San Francisco the power to set the "qualifications" of its employees, and to otherwise govern its municipal affairs. (Cal. Const. Art. XI Sec. 5; *Ector v. City of Torrance* (1973) 10 Cal.3d 129, 132

[10] See *infra* at pp. 6-7; see also RJN Ex. M; SAC Ex. B.

[explaining that the California Constitution grants "plenary authority" to charter cities to establish the "qualifications" of their employees].) Under San Francisco's Charter, the City's Civil Service Commission is delegated authority to "adopt rules… [that] govern… eligibility… for employees and officers" (S.F. Charter § 10.101), which require employees to meet "minimum qualifications" to obtain and hold employment within the City (S.F. Civil Service Rules 109.11.3). The City's Human Resources Director is in turn authorized to "assess the employee's ability to perform the level of duties and the essential functions of the [job]." (*Id.* at 109.11.4.) The Vaccination Policy is a personnel policy that imposes "the minimum qualifications" for City employment. (RJN Ex. F.) As such, it is an exercise of San Francisco's home rule powers and is not subject to state statutory law requirements. (*State Building & Construction Trades Council of California Cal. v. City of Vista* (2012) 54 Cal.4th 547, 555 [explaining that charter cities "are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs"].)

In any event, Plaintiffs offer nothing to show that the Vaccination Policy is arbitrary and capricious. (*Biden, supra*, 142 S.Ct. at pp. 653-654 [rejecting argument that COVID-19 vaccination requirement for employees is arbitrary and capricious].) As discussed above (at pp. 8-9, *ante*), it is rational for the City to formulate a vaccination policy appropriate for the City's workplaces based on the consensus in the scientific community that COVID-19 vaccines are safe and effective. Merely labeling the City's Vaccination Policy as "arbitrary and capricious" or "irrational" does not make it so. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300-301 (*Lungren*) [a demurrer admits only material facts properly pleaded, not contentions, deductions or conclusions of fact or law].) At its core, Plaintiffs' claim amounts to an attack on the *underlying* public health guidance on which the City's Vaccination Policy is based. But Plaintiffs' "disagreement with their policies [of state and local health authorities] does not constitute a justiciable controversy." (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 662 (*Zetterberg*).)

III. PLAINTIFFS CANNOT STATE A CLAIM BASED ON SKELLY RIGHTS (3RD CAUSE OF ACTION).

Plaintiffs Third Cause of Action fails at the outset because Plaintiffs lack standing. "[S]tanding to invoke the judicial process requires an actual justiciable controversy as to which the complainant

has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator." (*Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315, citing *Pacific Legal Foundation v. Cal. Coastal Com*. (1982) 33 Cal.3d 158, 169-172.) A plaintiff's injury must be "concrete and actual, and not conjectural or hypothetical." (*Id.* at p. 315.) Likewise, an association only has standing to bring suit on behalf of its members only if "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." (*Bhd. of Teamsters & Auto Truck Drivers v. Unemp. Ins. Appeals Bd*. (1987) 190 Cal.App.3d 1515, 1521.)

Plaintiffs cannot escape standing requirements by seeking declaratory and injunctive relief. "To obtain an injunction, a party must show injury *as to himself*." (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 748, original italics.) "Likewise, where declaratory relief is sought, there must be an 'actual controversy relating to the legal rights and duties of the *respective parties*.'" (*People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 496 (*Becerra*), original italics, quoting Code Civ. Proc. § 1060.) "[T]he fact that an issue raised in an action for declaratory relief is of broad general interest is not enough for the courts to grant such relief in the absence of a true justiciable controversy." (*Winter v. Gnaizda* (1979) 90 Cal.App.3d 750, 756 (*Winter*).)

Here, Plaintiffs allege in general terms that the law requires the City to continue to pay employees until the City provides the employees' "full *Skelly* rights and, for sworn personnel, the full panoply of rights provided by the Firefighters and Police Officer Bill of rights," and that the City contends otherwise. (SAC ¶¶ 147-148.) Any disagreement between Plaintiffs and the City about the applicability of statutes and *Skelly* procedures does not state a justiciable claim. (*Winter*, at p. 756 ["a difference of opinion as to the interpretation of a statute between a citizen and a government agency does not give rise to a justiciable controversy."].) Instead, Plaintiffs must allege that they face harm from the City's actions. (*Ibid.*) Despite that requirement, Plaintiffs do not allege they or any members of United SF have lost pay before having a *Skelly* hearing or have not received any protections they are entitled to receive under the Firefighters and Police Officer Bill of Rights. Nor do Plaintiffs allege that they or any of United SF members have faced any harm from the City's actions. Instead,

Plaintiffs allege a purely hypothetical claim based on their assertion that the City *would* violate the law "*if* the City fired thousands of public employees *en masse*." (SAC ¶ 150, original italics.)

Even if Plaintiffs had standing, their Third Cause of Action would still fail. Plaintiffs assert that the "City contends that it does not have to comply with *Skelly* or the Police Officer or Firefighter Bill of Rights" (SAC ¶ 147), but Plaintiffs offer no factual support for that conclusory allegation. The City's policy is that permanent civil service employees who do not comply with the Vaccination Policy "will be placed on paid administrative leave until their due process hearing takes place. Following due process deliberations, subsequent hearings to determine whether unvaccinated employees will be separated from city employment will take place." (RJN Ex. H.) Plaintiffs do not explain why that policy fails to satisfy *Skelly's* due process requirements. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.) Nor do Plaintiffs allege any facts to show that the City is not providing any procedural protections owed to firefighters or police officers. Plaintiffs' conclusory assertion that the City disagrees with them about the law is not sufficient to state a claim that can survive a demurrer. (*Lungren, supra,* 14 Cal.4th at pp. 300-301; *Zetterberg, supra,* 43 Cal.App.3d at p. 662.)[11]

IV. PLAINTIFFS CANNOT STATE A CLAIM BASED ON PUBLIC DISCLOSURE OF PRIVATE FACTS (4TH CAUSE OF ACTION).

Plaintiffs' Fourth Cause of Action also fails for lack of standing. Plaintiffs allege "on information and belief" that "several City departments" have "publicly published the vaccination status of City employees without the employees' consent." (SAC ¶ 155.) The individual Plaintiffs lack standing to pursue that claim because they do not allege any facts to show that any City departments have "publicly published" their vaccination status. To the contrary, Plaintiffs admit that they have not disclosed their vaccination status to the City, and therefore it could not have been "published." (*Id.* ¶ 130.) Likewise, United SF does not allege that the City has "publicly published" the vaccination status of any of its members. Plaintiffs appear to be alleging that City employees other

[11] To the extent Plaintiffs have concerns about the City's enforcement of the Vaccination Policy against them, those claims must be raised during the administrative process, and then any "adverse decision is reviewable by administrative mandate and not otherwise." (*Tejon Real Est., LLC v. City of L.A.* (2014) 223 Cal.App.4th 149, 155, quoting *Taylor v. Swanson* (1982) 137 Cal.App.3d 416, 418.) Declaratory relief is not available to challenge administrative action, or to interfere with administrative proceedings before they have concluded. (*Ibid.*; *Public Employees' Retirement System v. Santa Clara Valley Transportation Authority* (2018) 23 Cal.App.5th 1040, 1045.)

than the Plaintiffs have suffered some unspecified harm, but Plaintiffs cannot state a claim based on any harm experienced by third party City employees. (*Becerra*, *supra,* 29 Cal.App.5th at p. 499 [explaining that "a third party does not have standing to bring a claim asserting a violation of someone else's rights"].) "[T]he right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded." (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1131 (*Moreno).*)

Plaintiffs' Fourth Cause of Action also fails on the merits. "To establish tort liability for this type of invasion of privacy, the plaintiff must plead and prove (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) is not of legitimate public concern." (*Moreno, supra,* 172 Cal.App.4th at pp. 1129-1130.) Here, Plaintiffs have not alleged any factual allegations to support these elements. Indeed, Plaintiffs' conclusory contention that public disclosure has taken place lacks any information on what was actually published and to whom.[12] Additionally, Plaintiffs fail to allege anywhere that the City acted with knowledge of or reckless disregard for the offensiveness of such disclosure. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 222; *see also Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542-543.) Plaintiffs should not be permitted to further this cause of action for the *intentional* tort of public disclosure of private facts based on the absence of any material facts.

V. PLAINTIFFS CANNOT STATE A CLAIM BASED ON THE FAIR EMPLOYMENT AND HOUSING ACT (5TH AND 6TH CAUSES OF ACTION).

Plaintiff's Fifth and Sixth Causes of Action must be dismissed for failure to exhaust and failure to state a claim under California's Fair Employment and Housing Act ("FEHA"). As a threshold matter, our Supreme Court has held unequivocally that Plaintiffs "must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing [DFEH] and must obtain from the [DFEH] a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA." (*Romano v. Rockwell Internat., Inc.*

[12] That this contention is on the basis of information and belief further reveals its deficiency. Plaintiffs can plead on information and belief "as to matters which are peculiarly within the knowledge of the defendants and as to which plaintiffs could learn only from statements made to them by others." (*See Woodring v. Basso* (1961) 195 Cal.App.2d 459, 464-465.) That is not the case here.

(1996) 14 Cal.4th 479, 492.) Plaintiffs have failed to satisfy this "prerequisite." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 83; *see also Grant v. Comp USA, Inc.* (2003) 109 Cal.App.4th 637, 643.) The failure to exhaust their administrative remedies is fatal to the Fifth and Sixth Causes of Action.

Plaintiffs' Fifth and Sixth Causes of Action also fail for lack of standing. Plaintiffs allege the City has "blanket" policies to deny requests for accommodations based on religious beliefs and disability. (SAC ¶¶ 171, 179.) But the individual Plaintiffs do not allege that the City denied any request from any Plaintiff for a reasonable accommodation. Likewise, United SF does not allege that the City denied any request for a reasonable accommodation from any of its members. Aside from a conclusory allegation that the City's actions have "harmed Plaintiffs," which need not be considered when resolving this demurrer, Plaintiffs offer nothing to show that they have standing. (*Id.* ¶¶ 172, 182; *Lungren, supra*, 14 Cal.4th at pp. 300-301.)[13]

The Sixth Cause of Action also fails on the merits. Plaintiffs do not allege they have a disability or medical condition as defined by the FEHA. A "physical disability" is any "physiological disease, disorder or condition" that both affects a specific bodily system and limits a major life activity. (Gov. Code § 12926, subd. (m).) A "mental disability" is a "mental or psychological disorder or condition…that limits a major life activity." (*Id*. at § 12926, subd. (j)(1)(B).) And a "medical condition" means "[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer [or certain] genetic characteristics." (*Id*. at § 12926, subd. (i).) The choice to be unvaccinated against COVID-19 is none of these things. Accordingly, the Sixth Cause of Action must be dismissed.

VI. THE INDIVIDUALLY NAMED DEFENDANTS SHOULD BE DISMISSED.

Plaintiffs have sued seven City employees in their individual and official capacities, but allege no wrongdoing by any of those individual defendants, or any facts suggesting that the individual defendants have caused Plaintiffs any harm.[14] Likewise, Plaintiffs do not seek any remedies against

[13] Likewise, Plaintiffs allege that United SF "members are directly affected by the Mandate, and therefore would have standing in their own right," but those conclusory assertions are insufficient to overcome a demurrer. (*Lungren, supra,* 14 Cal.4th at pp. 300-301.)

[14] Plaintiffs' conclusory allegation that defendants "have personally undertaken actions under color of law that deprive or imminently threaten to deprive Plaintiffs of certain rights, privileges, and

the individual defendants. (SAC at p. 40-41.) Further, the individual public employees are immune from Plaintiffs' claims. Under the California Tort Claims Act ("CTCA"), "[n]either a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform *any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community* if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused." (Gov. Code § 855.4, subd. (a), italics added.) Plaintiffs' challenge the City official's decisions to promote public health during the COVID-19 emergency, and therefore the City officials are entitled to immunity under the CTCA.

CONCLUSION

As in *Love v. State Department of Education*, Plaintiffs' anti-vaccine "arguments are strong on hyperbole and scant on authority." (*Love, supra*, 29 Cal.App.5th at p. 985.) Defendants respectfully request that the Court sustain the demurrer to Plaintiffs' Second Amended Complaint without leave to amend.

Dated: May 13, 2022

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immunities under the laws and Constitution of the State of California" (SAC ¶ 27) is insufficient. (*Lungren, supra,* 14 Cal.4th at pp. 300-301.)