

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 18, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JANE ELIZABETH ROBERTS, JON
ALLEMAN, MICHELLE
ANDREWS, GINGER BENNETT,
LANI LAGANOWSKI, INGA
MILLER, FRANCISCO OQUENDO,
ERIN PALMER, MICHELLE
RICHARDSON, PETER SPRINGS,
KATHY WOLD, and JULIA
ZELEPUKHIN,

Plaintiffs,

v.

GOVERNOR JAY INSLEE,

Defendant.

NO. 2:23-CV-0295-TOR

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS & DENYING
PLAINTIFFS' MOTION TO FILE
AMENDED COMPLAINT

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1 employer from continuing to employ any unvaccinated worker past that date. ECF
2 No. 42 at 3-4 (citing Procl. 21-14 at 4, § 1(d)). An employee was considered “fully
3 vaccinated” either (1) two weeks after receiving “the second dose in a two-dose
4 series of a COVID-19 vaccine authorized for emergency use, licensed, or
5 otherwise approved by the FDA” or (2) two weeks after receiving “a single-dose
6 COVID-19 vaccine authorized for emergency use, licensed, or otherwise approved
7 by the FDA.” *Id.* at 4 (quoting Procl. 21-14 at 7, § 5(e)). The Proclamation carved
8 out specific exemptions for individuals with disabilities and sincerely held
9 religious beliefs. Procl. 21-14 at 4-5, § 2(a), (b). In accordance with this mandate,
10 Shriners Spokane circulated a staff-wide email notice instructing employees to
11 fully vaccinate against COVID-19 by the October 18 deadline. ECF No. 42 at 4
12 (citing ECF No. 1-5 at 6).

13 Prior to the promulgation of Proclamation 21-14, the United States Food and
14 Drug Administration (FDA) approved three COVID-19 vaccines for Emergency
15 Use Authorization (EUA), including Pfizer-BioNTech, a two-part vaccination
16 series.¹ *Id.* at 4-5 (citing FDA, *FDA Takes Key Action in Fight Against COVID-19*

17
18 ¹ In considering a motion to dismiss, the Court may take judicial notice of
19 facts “not subject to reasonable dispute,” Fed. R. Evid. 201(b), and matters of
20 public record, including the records and reports of administrative bodies, *Lee v.*

1 *by Issuing Emergency Use Authorization for First COVID-19 Vaccine*, U.S. FOOD
2 & DRUG ADMIN. (Dec 11, 2020), <https://perma.cc/2V4A-TNRK>). Under the EUA
3 statute, the FDA may authorize emergency use of a vaccine pending full agency
4 approval. *See* 21 U.S.C. § 360bbb-3(a)(2).

5 On August 23, 2021—approximately two weeks after Proclamation 21-14
6 was issued and two months before the October 18 vaccination deadline—the FDA
7 approved the first COVID-19 vaccine for individuals 16 years of age and older. *Id.*
8 at 5 (citing FDA, *FDA Approves First COVID-19 Vaccine*, U.S. Food & Drug
9 Admin. (Aug. 23, 2021), <https://perma.cc/4KJS-MBM2>). The agency explained
10 that the approved vaccine had previously been known as Pfizer-BioNTech and
11 would be marketed as “Comirnaty” going forward. *Id.* The FDA further explained
12 that the Pfizer-BioNTech and Comirnaty immunizations were composed of “the
13 same formulation” and therefore could “be used interchangeably . . . to provide the
14 COVID-19 vaccination series.” *Id.* at 5-6 (quoting ECF No. 34-1 at 2). Clinical

15 _____
16 *City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001) (citation omitted). A
17 matter is not subject to reasonable dispute where it “is generally known within the
18 trial court’s territorial jurisdiction” or “can be accurately and readily determined
19 from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
20 201(b)(1), (2).

1 trials showed the vaccine was 91% effective in preventing COVID-19. *Id.* at 5.

2 Plaintiffs’ employment was terminated for refusing to vaccinate by
3 Proclamation 21-14’s October 18, 2021 deadline. *Id.* at 6 (citing ECF No. 1 at 5, ¶
4 8). Plaintiffs believe they were unlawfully terminated and otherwise sanctioned
5 for refusing an “unlicensed investigational new drug.” *Id.* (citing ECF No. 1 at 75,
6 ¶ 280). Specifically, Plaintiffs maintain that the vaccine formula available to
7 them—Pfizer-BioNTech—by the October 18 deadline was still only provisionally
8 authorized under the EUA statute and that they could not be required to vaccinate
9 with a formula only authorized for emergency use. *Id.* In other words, Plaintiffs
10 assert that Comirnaty was the only FDA-approved drug that they could be
11 compelled to vaccinate with, and that the Comirnaty was legally distinct from the
12 Pfizer-BioNTech vaccine. *Id.*

13 On October 13, 2023, Plaintiffs filed a 104-page complaint against their
14 former employer and Defendant Inslee in this Court. *See* ECF No. 1. The
15 complaint raises six claims under 42 U.S.C. § 1983, including that: (1) Defendants
16 unlawfully “subjected [them] to investigational drug use”; (2) Defendants violated
17 the Equal Protection Clause of the Fourteenth Amendment; (3) Defendants
18 violated the Due Process Clause of the Fourteenth Amendment; (4) Defendants
19 violated the Spending Clause; (5) Defendants violated the unconstitutional
20 conditions doctrine; and (6) Defendants violated the Public Readiness and

1 Emergency Preparedness Act (PREP Act). *Id.* at 86-98. Plaintiffs separately
2 allege that (7) Defendants breached a contract to which Plaintiffs were a third-
3 party beneficiary; (8) Defendants violated “Washington State common law
4 employment torts”; (9) Defendants committed the tort of outrage; and (10) if the
5 Court does not find that Defendants were engaged in state action under issue (1),
6 then the Court should find that the EUA statute contains an implied right of action.
7 *Id.* at 98-102.

8 This Court previously considered and dismissed with prejudice all claims
9 against the Shriners Defendants. ECF No. 42. The Court now turns to Defendant
10 Inslee’s motion to dismiss (ECF No. 36) and Plaintiffs’ motion for leave to file an
11 amended complaint (ECF No. 45).

12 DISCUSSION

13 I. Defendant’s Motion to Dismiss

14 Defendant moves to dismiss all ten counts pending against him. The Court
15 grants the motion. Plaintiffs cannot prevail on their Section 1983 claims because
16 Defendant is immune from suit in his official capacity and entitled to qualified
17 immunity in his individual capacity. The remaining four claims each fail as a
18 matter of law.

19 A. Rule 12(b)(6) Standard

20 A motion to dismiss for failure to state a claim under Rule 12(b)(6) “tests the

1 legal sufficiency” of a plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th
2 Cir. 2001); *see also* Fed. R. Civ. P. 12(b)(6) (allowing defendants to bring a motion
3 to dismiss for “failure to state a claim upon which relief can be granted”). To
4 withstand a motion to dismiss, a complaint must “contain enough facts to state a
5 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
6 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
7 content that allows the court to draw the reasonable inference that the defendant is
8 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
9 (citation omitted). This requires the plaintiff to provide “more than labels and
10 conclusions, and a formulaic recitation of the elements.” *Twombly*, 550 U.S. at 550.
11 While a plaintiff need not establish a probability of success on the merits, he must
12 demonstrate “more than a sheer possibility that a defendant has acted unlawfully.”
13 *Iqbal*, 556 U.S. at 678.

14 When determining whether a claim has been stated, the Court may consider
15 the “complaint, materials incorporated into the complaint by reference, and matters
16 of which the court may take judicial notice.” *Metzler Inv. GMBH v. Corinthian*
17 *Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues*
18 *& Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain “a short and
19 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
20 Civ. P. 8(a)(2). A plaintiff’s “allegations of material fact are taken as true and

1 construed in the light most favorable to the plaintiff[,]” but “conclusory allegations
2 of law and unwarranted inferences are insufficient to defeat a motion to dismiss for
3 failure to state a claim.” *In re Stac Elecs. Secs. Litig.*, 89 F.3d 1399, 1403 (9th Cir.
4 1996) (citation and brackets omitted).

5 In assessing whether Rule 8(a)(2) is satisfied, the court must first identify the
6 elements of the plaintiff’s claims and then determine whether those elements could
7 be proven by the facts pled. The court may disregard allegations contradicted by
8 matters properly subject to judicial notice or by exhibit. *Sprewell v. Golden State*
9 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court may also disregard
10 conclusory allegations and arguments which are unsupported by reasonable
11 deductions and inferences. *Id.* A claim may only be dismissed if “it appears
12 beyond doubt that the plaintiff can prove no set of facts in support of his claim
13 which would entitle him to relief.” *Navarro*, 250 F.3d at 732.

14 **B. Section 1983 Claims: Official Capacity**

15 Plaintiffs bring multiple constitutional and statutory claims under 42 U.S.C.
16 § 1983. To stake a claim under Section 1983, Plaintiffs must allege Defendant is a
17 “person” who subjected them “to the deprivation of any rights, privileges, or
18 immunities secured by the Constitution and laws.” 42 U.S.C. § 1983. Such claims
19 are “limited by the scope of the Eleventh Amendment,” which immunizes the
20 States from suits brought in federal court absent a waiver by the State. *Doe v.*

1 *Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 839 (9th Cir. 1997). The United
2 States Supreme Court has determined that “a suit against a state official . . . is no
3 different from a suit against the State itself,” and that an official acting within his
4 official capacity is therefore not a “person” within the meaning of Section 1983.
5 *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). As an exception to
6 this general rule, a State official sued in his official capacity under Section 1983
7 for “prospective injunctive relief” does qualify as a “person” subject to suit. *Flint*
8 *v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

9 In this case, Plaintiffs do not dispute that they seek monetary damages rather
10 than prospective injunctive relief. ECF Nos. 41 at 10 (admitting Defendant cannot
11 be sued in his official capacity); 1 at 102-103, ¶¶ 410-16. Accordingly, the Section
12 1983 claims against Defendant Inslee in his official capacity are dismissed.

13 C. Section 1983 Claims: Individual Capacity

14 Plaintiffs also sue Defendant in his individual capacity for actions taken
15 under color of law. ECF No. 1 at 9, ¶ 19.9. Defendant answers that he is entitled
16 to qualified immunity on these issues because Plaintiffs have not established that
17 the Proclamation violated any clearly established constitutional or statutory rights.
18 ECF No. 36 at 55.

19 Qualified immunity shields government actors from civil damages unless
20 their conduct violates “clearly established statutory or constitutional rights of

1 which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S.
2 223, 231 (2009) (internal citation omitted). “Qualified immunity balances two
3 important interests—the need to hold public officials accountable when they
4 exercise power irresponsibly and the need to shield officials from harassment,
5 distraction, and liability when they perform their duties reasonably.” *Id.* In
6 evaluating a state actor’s qualified immunity assertion, a court must determine (1)
7 whether the facts, viewed in the light most favorable to the plaintiff, show that the
8 defendant’s conduct violated a statutory or constitutional right; and (2) whether the
9 right was clearly established at the time of the alleged violation such that a
10 reasonable person in the defendant’s position would have understood that his
11 actions violated that right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in*
12 *part by Pearson*, 555 U.S. at 227.

13 A court may, within its discretion, decide which of the two prongs should be
14 addressed first in light of the particular circumstances of the case. *Pearson*, 555
15 U.S. at 236. If the answer to either inquiry is “no,” then the defendant is entitled to
16 qualified immunity and may not be held personally liable for his conduct. *Glenn v.*
17 *Wash. Cnty.*, 673 F.3d 864, 870 (9th Cir. 2011). The Court analyzes each Section
18 1983 claim made by Plaintiffs in turn.

19 //

20 //

1 ***1. Investigational Drug Use Claims***

2 Plaintiffs assert that they were unlawfully “[s]ubjected to investigational
3 drug use” under “[t]he CDC COVID-19 Vaccination Program Provider
4 Agreement, and the implementing statutes and regulations found at 45 CFR Part
5 46, the Belmont Report, 21 U.S.C. § 360bbb-3, Article VII of the ICCPR Treaty,
6 Federal Wide Assurance, 10 U.S.C. § 980, EUA Scope of Authorization letters,
7 and the Fourteenth Amendment.” ECF No. 1 at 86, ¶ 316.

8 These claims fail from the outset because, as this Court and several others
9 have now concluded, Plaintiffs cannot establish that the Proclamation subjected
10 them to any kind of “investigational” drug use. As explained in this Court’s prior
11 Order on the Shriners Defendants’ motion to dismiss, the Pfizer-BioNTech vaccine
12 available to Plaintiffs before the October 18 deadline was not “investigational” but
13 instead fully approved by the FDA: the Pfizer-BioNTech and Comirnaty vaccines
14 were identical in all but name. ECF No. 42 at 15 (citing *Johnson v. Brown*, 567 F.
15 Supp. 3d 1230, 1247 (D. Or. 2021); *Curtis v. Inslee*, --- F. Supp. 3d ----, 2023 WL
16 8828753, at *2 (W.D. Wash. Dec. 21, 2023)). Moreover, because it is undisputed
17 that Plaintiffs rejected the FDA-approved Pfizer vaccine, Plaintiffs cannot claim
18 that they were unlawfully “subjected” to any investigational medical product or
19 procedure. ECF No. 1 at 87-88, ¶ 325. As such, the facts do not indicate that
20 Defendant’s conduct violated any constitutional or statutory right under the EUA

1 or related laws or treaties, and Defendant is entitled to qualified immunity on this
2 issue.

3 **2. Equal Protection Claim**

4 Plaintiffs also claim that Defendant violated the Equal Protection Clause of
5 the Fourteenth Amendment by penalizing healthcare workers who failed to receive
6 the full vaccination series by October 18. ECF No. 1 at 88, ¶ 329; *see* U.S. Const.
7 Amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the
8 equal protection of the laws.”).

9 The Equal Protection Clause applies “when the government makes class-
10 based decisions in the employment context, treating distinct groups of individuals
11 categorically differently.” *Engquist v. Oregon Dep’t of Agr.*, 553 U.S. 591, 605
12 (2008) (citations omitted). If there is no suspect class at issue, a government
13 policy “need only rationally further a legitimate state purpose to be valid.”
14 *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984). The
15 requirements of the Equal Protection Clause will be satisfied if “there is a plausible
16 policy reason for the classification, the government relied on facts that may have
17 been considered to be true, and the relationship of the classification to its goal is
18 not so attenuated as to render the distinction arbitrary or irrational.” *Williams v.*
19 *Brown*, 567 F. Supp. 3d 1213, 1228 (D. Or. 2021) (quoting *Nordlinger v. Hahn*,
20 505 U.S. 1, 11 (1992)) (internal quotations omitted). “Given the standard of

1 review, it should come as no surprise that the Court hardly ever strikes down a
2 policy as illegitimate under rational basis scrutiny.” *Trump v. Hawaii*, 585 U.S.
3 667, 705 (2018).

4 Plaintiffs have not alleged that they are members of suspect class, nor would
5 the Court entertain such argument. *See Valdez v. Grisham*, 559 F. Supp. 3d 1161,
6 1178 (D. N.M. 2021) (noting suspect and quasi-suspect classes include
7 classifications based on features such as race, national origin, sex, and
8 illegitimacy). Accordingly, rational basis review applies.

9 Defendant offered legitimate policy reasons for issuing Proclamation 21-14.
10 As this Court held in a similar Order challenging the lawfulness of Proclamation
11 21-14 in the context of a challenge brought by firefighters and other operational
12 employees employed by the City of Spokane, “While the Proclamation
13 differentiates between vaccinated and unvaccinated employees, the classifications
14 serve a legitimate government purpose, which is to slow the spread of COVID-19,
15 and the classifications are not arbitrary or irrational.” *Bacon v. Woodward*, 2:21-
16 CV-0296-TOR, 2022 WL 2381021, at *3 (E.D. Wash. June 30, 2022). “The Ninth
17 Circuit has recognized that reducing the spread of COVID-19 is a legitimate state
18 interest.” *Pilz v. Inslee*, 3:21-cv-05735-BJR, 2022 WL 1719172, at *5 (W.D.
19 Wash. May 27, 2022) (citing *Slidewaters LLC v. Washington State Dep’t of Lab. &*
20 *Indus.*, 4 F.4th 747, 758 (9th Cir. 2021); *Doe v. San Diego Unified Sch. Dist.*, 19

1 F.4th 1173, 1177 (9th Cir. 2021), *application for injunctive relief denied*, 142 S.
2 Ct. 1099 (2022)). In the context of challenges brought by former healthcare
3 workers employed by a children’s hospital, the rationale behind Proclamation 21-
4 14 is even more acute. *See* Procl. 21-14 at 2 (explaining vaccination protects
5 “youth who are not eligible to receive a vaccine, immunocompromised individuals,
6 and vulnerable persons including persons in health care facilities”). Thus, because
7 Plaintiffs have not stated any facts which show that Proclamation 21-14 was issued
8 beyond Defendant’s lawful authority, Defendant is entitled to qualified immunity
9 on this issue.

10 **3. Due Process Claims**

11 Plaintiffs present both substantive and procedural due process challenges.
12 The Court begins with the substantive due process claim. Plaintiffs assert that
13 Defendant ignored Plaintiffs’ right to refuse administration of “EUA drugs and
14 medical products . . . in an attempt to increase the number of participants in the
15 CDC COVID-19 Vaccination Program for purposes of greed.” ECF No. 1 at 89, ¶
16 334. Plaintiffs further aver that Proclamation 21-14’s “requirement that Plaintiffs
17 inject unlicensed drugs into their bodies as a condition to sell their labor is not a
18 legitimate exercise of the police power of the State.” *Id.* at 89-90, ¶ 336.

19 “The substantive component of the Due Process Clause forbids the
20 government from depriving a person of life, liberty, or property in such a way that

1 . . . interferes with rights implicit in the concept of ordered liberty.” *Engquist v.*
2 *Oregon Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007) (internal quotations and
3 citation omitted). As explained above, Defendant had a rational basis for issuing
4 the Proclamation.

5 Second, and contrary to Plaintiffs’ assertions, there is no fundamental right
6 to continued employment in a particular job. *Massachusetts Bd. of Ret. v. Murgia*,
7 427 U.S. 307, 313 (1976); *see also Culinary Studios, Inc. v. Newsom*, 517 F. Supp.
8 3d 1042, 1069 (9th Cir. 2021) (recognizing substantive due process violations only
9 where there has been “a complete prohibition of the right to engage in a calling”).

10 This Court has now ruled on several occasions that employees may be lawfully
11 terminated for refusing to vaccinate in accordance with the terms of Proclamation
12 21-14. *See e.g., Jensen v. Biden*, 4:21-CV-5119-TOR, 2021 WL 10280396, at *8
13 (E.D. Wash. Nov. 19, 2021) (holding that Plaintiff who refused vaccination did not
14 have a constitutionally protected interest in continued employment as an athletics
15 coach); *see also, e.g., Wise v. Inslee*, 2:21-CV-0288-TOR, 2022 WL 1243662, at
16 *5 (E.D. Wash. Apr. 27, 2022) (holding that state employees who refused to
17 vaccinate were not entitled to continued employment in their jobs). The result is
18 the same here. Despite the widespread availability of an FDA-approved
19 vaccination series, Plaintiffs refused vaccination and thereby failed to meet the
20 requirements to maintain their employment. Accordingly, the facts do not show

1 that Defendant’s conduct violated Plaintiff’s rights under the substantive due
2 process clause, and Defendant is entitled to qualified immunity on this claim.

3 Turning to the procedural due process challenge, Plaintiffs assert that
4 Defendant did not provide them “with a date, time, place, or procedure to defend
5 their right to refuse injection of an unlicensed drug before depriving them of their
6 liberty or their property.” ECF No. 1 at 89-90, ¶ 336.

7 “A section 1983 claim based upon procedural due process . . . has three
8 elements: (1) a liberty or property interest protected by the Constitution; (2) a
9 deprivation of the interest by the government; [and] (3) lack of process.” *Portman*
10 *v. Cnty. of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). However, as this Court
11 has explained:

12 [W]hen a policy is generally applicable, employees are not entitled to
13 process above and beyond the notice provided by the enactment and
14 publication of the policy itself. District courts around the country have
15 applied this principle to employer-issued vaccine mandates during the
COVID-19 pandemic, finding employees are not entitled to greater
service than what is provided by the enactment of the mandates
themselves.

16 *Wise*, 2022 WL 1243662 at *5 (internal quotations and citations omitted).

17 As in *Wise*, Defendant was not required to provide Plaintiffs “with more
18 process beyond what was provided by enacting the Proclamation.” *Id.* Further, as
19 this Court discussed in examining Plaintiffs’ substantive due process claim,
20 Plaintiffs have not identified a constitutionally protected liberty or property interest

1 in maintaining their employment at Shriners. Therefore, the Court finds that
2 Defendant is entitled to qualified immunity on this claim.

3 **4. Spending Clause Claim**

4 Next, Plaintiffs assert that Defendant violated the Spending Clause. ECF
5 No. 1 at 90-92. In their response briefing, Plaintiffs admit that “the Spending
6 Clause itself does not create a cause of action,” but argue that “conferred rights in
7 any spending legislation do.” ECF No. 41 at 23. Plaintiffs press that the CDC
8 Program “is spending legislation” because the EUA statute confers certain rights
9 and all vaccinations were purchased by the federal government using funding from
10 the Department of Defense. *Id.*

11 The Spending Clause authorizes Congress to “lay and collect Taxes, Duties,
12 Imposts, and Excises, to pay the Debts and provide for the common Defence and
13 general Welfare of the United States.” *See* U.S. Const., Art. I, § 8, cl. 1. “Incident
14 to this power, Congress may attach conditions on the receipt of federal funds, and
15 has repeatedly employed the power ‘to further broad policy objectives by
16 conditioning receipt of federal moneys upon compliance by the recipient with
17 federal statutory and administrative directives.’” *S. Dakota v. Dole*, 483 U.S. 203,
18 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

19 The Spending Clause may attach limits on the federal government’s ability
20 to condition use of federal funds, but Plaintiffs identify no authority for the

1 proposition that it likewise limits state governors or private employers. *See Curtis*
2 *v. Inslee*, 3:23-cv-5741-RJB, 2024 WL 810503, at *7 (W.D. Wash. Feb. 27, 2024)
3 (denying leave to file an amended complaint).

4 Additionally, as Defendant observes, Plaintiffs have not identified applicable
5 spending legislation giving rise to enforceable rights. *See Gonzaga Univ. v. Doe*,
6 536 U.S. 273. 280 (2002). The only arguable spending legislation Plaintiffs
7 discussed—10 U.S.C. § 980—provides that “[f]unds appropriated to the
8 *Department of Defense* may not be used for research involving a human being.”
9 (emphasis added). The statute by its plain terms does not apply to the Governor,
10 and neither does the Proclamation involve research on human beings. Thus,
11 because Plaintiffs cannot show Defendant’s conduct violated any of their rights
12 under the Spending Clause or applicable spending legislation, Defendant is entitled
13 to qualified immunity on this issue.

14 **5. Unconstitutional Conditions Doctrine Claim**

15 Plaintiffs contend that the Proclamation violated the unconstitutional
16 conditions doctrine. ECF No. 1 at 94-95. Under the unconstitutional conditions
17 doctrine, “even though a person has no ‘right’ to a valuable governmental benefit
18 and even though the government may deny him the benefit for any number of
19 reasons . . . [i]t may not deny a benefit to a person on a basis that infringes his
20 constitutionally protected interests.” *Bingham v. Holder*, 637 F.3d 1040, 1045-46

1 (9th Cir. 2011) (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). The
2 doctrine does not apply where a government benefit is not at issue or where at-will
3 employees have been terminated. *See Curtis*, 2023 WL 8828753 at *7 (citing
4 *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F. Supp. 3d 553, 566 (W.D. Va.
5 2022).

6 Plaintiffs assert that the unconstitutional conditions doctrine applies because
7 Defendant “established conditions requiring Plaintiffs to surrender their
8 Constitutional rights under the Fourteenth Amendment to enjoy privileges of the
9 State, such as the ability to sell their labors in the marketplace freely.” ECF No. 1
10 at 95, ¶ 365. Because Plaintiffs have not alleged a government benefit is at issue
11 and do not deny their status as at-will employees, Defendant’s conduct did not
12 amount to a violation of the unconstitutional conditions doctrine.

13 **6. PREP Act Claims**

14 Plaintiff’s final Section 1983 claim concerns the PREP Act. Plaintiffs argue
15 that Defendant established laws and policies which conflicted with the PREP Act
16 by requiring “Plaintiffs to participate in the use of a covered countermeasure under
17 threat of penalty.” ECF No. 1 at 96, ¶ 376.

18 Under the PREP Act, the Secretary of Health and Human Services may
19 authorize certain “covered countermeasures,” including drugs for emergency use
20 authorization, upon “a determination that disease or other health condition or other

1 threat to health constitutes a public health emergency.” 42 U.S.C. § 247d-6d(b)(1).
2 The PREP Act creates immunity for covered persons for “any claim for loss that
3 has a causal relationship with the administration to or use by an individual of a
4 covered countermeasure” upon the Secretary’s declaration that a disease
5 constitutes public health emergency. *Maney v. Brown*, 91 F.4th 1296, 1298 (9th
6 Cir. 2024) (citing 42 U.S.C. § 247d-6d(a)(2)(B)). Thus, as Defendant explains,
7 “rather than creating a cause of action, the PREP Act creates immunity.” ECF No.
8 36 at 46 (quotations and citations omitted); *see also Maney*, 91 F.4th at 1301
9 (“Several of the PREP Act’s provisions expressly show Congress’s intent to extend
10 immunity to persons who make policy-level decisions regarding administration or
11 use of covered countermeasures and do not directly administer countermeasures to
12 particular individuals.”). The “sole exception” to such immunity stems from “an
13 exclusive Federal cause of action against a covered person for death or serious
14 physical injury proximately cause by willful misconduct.” 42 U.S.C. § 247d-
15 6d(d)(1). A complaint under this exception must be filed and maintained in the
16 United States District Court for the District of Columbia and accompanied by a
17 physician’s affidavit and certified medical records documenting the injury.
18 § 247d-6d(e)(1), (e)(4).

19 Plaintiffs have not alleged that they were subject to death or any kind of
20 serious physical injury. Nor could any such physical injury have occurred because

1 it is conceded that Plaintiffs refused administration of the vaccine. As such, Court
2 finds that Defendant is entitled to qualified immunity on all claims raised under
3 Section 1983 on the basis that Plaintiffs have not pled any facts which establish
4 Defendant violated a constitutional or statutory right. The Court does not proceed
5 to consider the second step, and the claims are dismissed with prejudice. *Glenn*,
6 673 F.3d at 870.

7 **C. Implied Right of Action**

8 Separate from their Section 1983 claims, Plaintiffs urge that the EUA statute
9 contains a private right of action which permits them to sue. The Court addressed
10 this issue in its previous Order on the Shriners Defendants' motion to dismiss and
11 explained that the statute contains no such implied right. ECF No. 42 at 21-22.
12 That conclusion remains in force. The claim is dismissed with prejudice.

13 **D. Breach of Contract**

14 Plaintiffs claim that the CDC COVID Vaccination Program Provider
15 Agreement accorded them the benefit of choice—whether to vaccinate or not—
16 without “fear [of] the loss of benefits to which they are otherwise entitled when
17 considering participation.” ECF No. 1 at 98, ¶ 387. As this Court explained on the
18 Shriners Defendants' motion to dismiss, Plaintiffs' claim for breach of contract is
19 legally deficient because:

20 The Provider Agreement is concerned with vaccine administration and,
by all counts, Plaintiffs declined to receive a COVID-19 vaccination.

1 Thus, even if the Court were to accept that recipients of COVID-19
2 vaccinations were the intended third-party beneficiaries who the parties
3 contracted to protect, that would have no bearing on Plaintiffs' claims of
4 unlawful termination because Plaintiffs refused vaccination. At best, any
5 benefit to Plaintiffs resulting from this agreement was purely indirect or
6 incidental. Moreover, the alleged breach of contract that Plaintiffs
7 complain of did not in fact occur because an FDA-authorized vaccine—
8 Pfizer-BioNTech—was available to Plaintiffs at the time the
9 employment policy was in place.

6 ECF No. 42 at 22.

7 The same rationale applies here, and the claim is dismissed with prejudice.

8 **E. Employment Torts & Outrage**

9 Plaintiffs do not address their claim for Washington State common law
10 employment torts or outrage in their response briefing; the Court presumes the
11 argument is therefore waived. *See Atchley v. Pepperidge Farm, Inc.*, CV-04-0452-
12 FVS, 2008 WL 2074035, at *8 (E.D. Wash. May 14, 2008) (“[H]aving failed to
13 respond to this argument in their briefing, the Court has no choice but to consider
14 the issue conceded.”). Additionally, these claims are legally deficient for the
15 reasons outlined in the Court’s underlying Order on Defendants’ motion to
16 dismiss. ECF No. 42 at 24-25. The claims are dismissed with prejudice.

17 **II. Plaintiffs’ Motion to File an Amended Complaint**

18 Plaintiffs move to file an amended complaint. ECF No. 45. The motion
19 proposes to add information about, *inter alia*, the “CDC Playbook;” the State’s
20 duties per the EUA letter issued by the FDA; “[h]ow Gov. Inslee’s proclamation

1 unlawfully amended the FDCA;” the doctrine of fair warning as it relates to
2 qualified immunity; and “[f]acts supporting Plaintiffs’ claim to a property interest
3 in their right to refuse an EUA/PREP Act drug.” ECF No. 45 at 2-3.

4 Federal Rule of Civil Procedure 15(a) governs the amendment of pleadings
5 prior to trial. Rule 15(a)(2) provides that leave to amend a complaint should be
6 freely given when justice so requires. Although this standard is generous and
7 construed liberally to promote resolution of disputes on their merits, it is “subject
8 to the qualification that amendment of the complaint does not cause the opposing
9 party undue prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th
10 Cir. 1987). In addition to prejudice to the opposing party, the court may also
11 consider the timing of the motion, the presence or absence of bad faith by the
12 moving party, and the futility of the proposed amendment when ruling on a motion
13 to amend a complaint prior to trial. *United States v. Corinthian Colls.*, 655 F.3d
14 984, 995 (9th Cir. 2011).

15 The Court has ruled that Defendant Governor Inslee has immunity for all
16 claims pressed against him under Section 1983, and that the Shriners Defendants
17 were not state actors for purposes of Section 1983. The Court has further found
18 that Plaintiffs have failed to state a cause of action under their state law claims.
19 For the reasons articulated in this Order, the Court’s prior Order, and similar
20 Orders by the United States District Court for the Western District of Washington

1 in examining substantially similar claims brought by Plaintiff's counsel, the Court
2 finds that further amendment would be futile. Plaintiffs have not offered any set of
3 facts in the proposed amended complaint which undermine the conclusions set
4 forth herein or which would establish some new theory of liability.

5 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 6 1. Defendant Governor Jay Inslee's Motion to Dismiss (ECF No. 36) is
7 **GRANTED**. All pending claims against Defendant are dismissed with
8 prejudice.
9 2. Plaintiffs' Motion for Leave to File an Amended Complaint (ECF No.
10 45) is **DENIED**.

11 The District Court Executive is directed to enter this Order and Judgment,
12 furnish copies to counsel, and **CLOSE** the file.

13 DATED March 18, 2024.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge