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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION

**Joshua Williams, et al.,**

Case No. 6:21-cv-01332-AA

Plaintiffs,

v.

**Kate Brown, et al.,**

Defendants.

**PLAINTIFFS' MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

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**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that as soon as the matter may be heard before the Honorable Ann Aiken at the United States District Court for the District of Oregon, Plaintiffs Joshua Williams *et al.*, will and hereby do move that the Court issue the following relief:

1. A Temporary Restraining Order prohibiting Defendants Oregon Governor Kate Brown and the Oregon Health Authority, with its Director Patrick Allen and all agents or employees, from enforcing Executive Order No. 21-29 and OAR 333-019-1010, and OAR 333-019-1030 (“vaccine mandates”) by charging any fee or imposing any penalty for failure to obtain verification or proof of a COVID-19 vaccination;
2. A Preliminary Injunction preventing Defendants Oregon Governor Kate Brown and the Oregon Health Authority, with its Director Patrick Allen with all agents or employees, from enforcing the vaccine mandates requiring Plaintiffs to obtain COVID-19 vaccinations by charging any fee or penalty for failure to obtain verification or proof of a COVID-19 vaccination.

This Motion is based upon the Verified First Amended Complaint filed in this case, the Memorandum of Points and Authorities set forth below, the records and files in this action, and any oral and documentary evidence the Court may consider at the hearing on this matter.

Date: September 28, 2021

Respectfully submitted,

FREEDOM FOUNDATION

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs each previously contracted COVID-19 and recovered. Medical evidence indicates that Plaintiffs have natural immunity to the virus at least as robust, durable, and long-lasting as that artificially achieved through vaccination. Nonetheless, Plaintiffs are being forced to obtain COVID-19 vaccinations under Oregon’s vaccination mandates. The State requires Plaintiffs, as a condition of continued employment, to accept a vaccine injected into their body without their consent. The vaccine mandates deprive Plaintiffs of their ability to refuse unwanted medical care in violation of their constitutional right to privacy, bodily autonomy, and personal liberty.

The State has no compelling interest in coercing Plaintiffs into taking a COVID-19 vaccine, or in treating employees with natural immunity any differently from employees who obtained immunity from a vaccine, nor is mandatory vaccination of Plaintiffs an appropriate least-restrictive means for the State to achieve any compelling interest.

### II. STATEMENT OF FACTS

On August 13, 2021, Governor Kate Brown issued Executive Order No. 21-29 which, after October 18, 2021, prohibits employees from working for Executive Branch Agencies unless fully vaccinated. Executive Order No 21-29 (2). The mandate requires that “On or before October 18, 2021...[all Executive Branch] Employees must provide their employer with either (a) proof of vaccination ... or (b) a written request for exception...” Executive Order No 21-29 (3). Penalties for noncompliance include “personnel consequences up to and including separation from employment.” Executive Order No 21-29 (7). First Amended Verified Complaint Exhibit C.

The Oregon Health Authority issued a Temporary Administrative Order requiring proof of SARS-CoV-2 (“COVID-19”) vaccination for all individuals who work in healthcare settings, including temporary sites where healthcare is delivered (“provider vaccine mandate”). *See* First Amended Verified Complaint Exhibit A, OAR 333-019-1010, dated August 25, 2021. The Oregon Health Authority also issued a Temporary Administrative Order requiring proof of SARS-CoV-2 vaccination for all individuals who work in schools (“school vaccine mandate”). *See* Exhibit B, OAR 333-019-1030, dated August 25, 2021. The vaccine mandates require all employers to ensure that their employees have received a vaccination by October 18, 2021, meaning the employer must have proof of vaccination of all staff by that time or face civil penalties of \$500 per day per violation. OAR 333-019-1010(5) and (8); OAR 33-019-1030(6) and (15).

No exception to these mandates exists for persons who have already achieved immunity to COVID-19 by recovering from the virus. In fact, information provided by OHA indicates “Proof of history of COVID-19 disease as a substitute for vaccination is not allowed under the rule.” *See* Healthcare Provider and Healthcare Staff Vaccine Rule FAQs (Updated 9-02-2021) available at <https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/1e3879.pdf>.

The State of Oregon has not presented any evidence that the vaccinated are better protected than those with natural immunity. Defendants cannot show that granting an exception from the vaccination mandates to Plaintiffs would impose any more harm than what is currently posed by those who have been fully vaccinated.

Naturally acquired immunity developed after recovery from COVID-19 provides broad protection against severe disease from subsequent SARS-CoV-2 infection. In fact, just because an individual is vaccinated does not guarantee he is immune and just because he is not vaccinated

does not mean he is not immune. Instead of focusing its policy on blanket vaccination, therefore, a reasonably tailored policy would focus on immunity, regardless of how it is obtained.

Multiple studies comparing naturally acquired and vaccine-acquired immunity have concluded that the former provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna). These studies confirm the efficacy of natural immunity against reinfection of COVID-19 and show that almost all reinfections are less severe than first-time infections and almost never require hospitalization. Even those vaccinated can have reinfections, and those incidents are no less severe than those reinfections for the naturally immune.

Further, research indicates that vaccination presents a heightened risk of adverse side effects—including serious ones—to those who have previously contracted and recovered from COVID-19. The heightened risk of adverse effects results from “preexisting immunity to SARSCov-2 [that] may trigger unexpectedly intense, albeit relatively rare, inflammatory and thrombotic reactions in previously immunized and predisposed individuals.” *Angeli et al.*, SARS-CoV-2 Vaccines: Lights and Shadows, 88 EUR. J. INTERNAL MED. 1, 8 (2021).

As set forth in the compliant, each of the Plaintiffs objects to receiving the COVID-19 vaccination because of the risks to their personal safety inherent in obtaining the vaccination on top of their natural immunity. The Plaintiffs also pose no danger to themselves or others greater than is posed by any vaccinated person because natural immunity is at least as robust—if not more so—than the protection afforded by any vaccination. Further, each Plaintiff is in danger of losing their employment on or before October 18, 2021, because their employers will be required to pay \$500/per day per violation for any unvaccinated employee, and because Plaintiffs have not

received any applicable accommodation or exemption from the requirement that they receive the COVID-19 vaccination.

### III. ARGUMENT

This court may enjoin Defendants from penalizing Plaintiffs' employers if they choose not to force Plaintiffs to obtain the COVID-19 vaccine, because (1) Plaintiffs are "likely to succeed on the merits," (2) Plaintiffs are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [Plaintiffs'] favor," and (4) an injunction is in "the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

#### **A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE VACCINE MANDATE PLAINLY VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS.**

##### **1. The Vaccination Mandates Violate Procedural Due Process.**

Oregon's vaccination mandates represent a concurrent procedural due process violation and an unconstitutional condition burdening Plaintiffs' liberty interests to be free of unwanted medical intervention.

First, the State of Oregon cannot provide evidence that those with natural immunity pose any more of a threat of spreading COVID-19 than those who have been fully vaccinated. Further, the vaccination mandates are not merely a presumption that vaccination is superior to natural immunity, that Plaintiffs can try to overcome. Rather, the mandates are, in essence, a conclusive presumption that vaccination *is essential* unless a particular recipient can demonstrate a limited, special exception (based on religion or doctor's provision of medical exception). But Plaintiffs and others with natural immunity possess higher levels of antibodies than those who took one or more

of the various available vaccines. For example, studies have found that those who had received the Pfizer Vaccine were 6.72 times more likely to suffer a subsequent infection than those with naturally acquired immunity. David Rosenberg, *Natural Infection vs Vaccination: Which Gives More Protection?* ISRAELNATIONALNEWS.COM (Jul. 13, 2021), available at <https://www.israelnationalnews.com/News/News.aspx/309762> (last visited September 9, 2021).

And the State of Oregon has provided no evidence to support the idea that all vaccines are equally protective to natural immunity. Essentially, Oregon's approach places the burden on those with natural immunity, like Plaintiffs, and stacks the process with unwarranted presumptions as to the scientific value of vaccination for those with natural immunity.

Further, the State of Oregon has made the Plaintiffs' ability to get employment dependent on their willingness to give up their right to bodily autonomy. *See Perry v. Sinderman*, 408 U.S. 592, 597 (1972) (holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests"); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952) ("We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory"). The process Oregon has established in relation to taking COVID-19 vaccines poses dangers to Plaintiffs' health, to Plaintiffs' liberty interests, as well as threatening them with dismissal from their employment and disqualification for continued employment in their chosen profession.

Oregon's mandate makes a mockery of due process by preemptively denying any request for exception by a person with natural immunity. *See* Healthcare Provider and Healthcare Staff Vaccine Rule FAQs (Updated 9-02-2021) available at

<https://sharesystems.dhsoha.state.or.us/DHSForms/Served/le3879.pdf>.

## 2. The Vaccine Mandate Violates Substantive Due Process.

Oregon’s vaccination mandates violate Plaintiffs’ substantive due process rights to bodily integrity and privacy. Plaintiffs’ claims represent the liberty interests of all persons to be free of unconsented bodily intrusions and medical interventions. Oregon has not shown, and cannot show, that forcing Plaintiffs to take the vaccine reduces any risk that they will become infected with and spread the virus to others to any greater extent than the risk posed by those who are vaccinated. The State of Oregon cannot show that granting an exception from the vaccination mandates to Plaintiffs would impose any danger or threat of the spread of COVID-19 than what is currently posed by those who have been fully vaccinated.

The vaccine mandates implicate fundamental rights to bodily integrity and privacy. A “forcible injection ... into a nonconsenting person’s body represents a substantial interference with that person’s liberty[.]” *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Cruzan v. Dir., Mo. Dep’t of Public Health*, 497 U.S. 261, 278 (1990) (“At common law, even the touching of one person by another without consent and without legal justification was a battery”). See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *PROSSER AND KEETON ON LAW OF TORTS* § 9, pp. 39-42 (5th ed. 1984.); *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.”); see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (The Due Process Clause protects “liberty of the person both in its spatial and in its more transcendent dimensions”).

The Constitution protects a person’s right to “refus[e] unwanted medical care.” *Cruzan*,

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497 U.S. at 278; *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (recognizing same). This right to refuse unwanted medical care is “so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment.” *Washington v. Glucksberg*, 521 U.S. 702, 722 n.17 (1997). The Supreme Court has explained that the right to refuse medical care derives from the “well established, traditional rights to bodily integrity and freedom from unwanted touching.” *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

To pass constitutional muster, the vaccine mandates must “advance[] interests of the highest order and [b]e narrowly tailored to achieve those interests.” *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021) (internal quotations omitted). Further, narrow tailoring for purposes of strict scrutiny requires “showing that [the challenged rule] is the *least restrictive means*” of achieving a compelling interest. *Thomas v. Review Bd. of Indiana Emp. Security Div.*, 450 U.S. 707, 718 (1981) (emphasis added). The vaccine mandate fails both prongs here. Defendants cannot satisfy the narrow-tailoring test that “the government must show that it seriously undertook to address the problem with less intrusive tools readily available to it,” *Agudath Israel v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (executive Order’s fixed capacity limits were not narrowly tailored to address the State’s compelling interest in stemming spread of COVID-19, and thus violated the Free Exercise Clause).

Plaintiffs engaged in their work throughout the pandemic without vaccinations. They did so safely and efficiently. Yet now the State implausibly claims a dire threat if the Plaintiffs, who were never vaccinated before, are not vaccinated now, despite the fact that their natural immunity is as good – if not better – than the protection afforded by vaccination.

Defendants cannot demonstrate that the requirement of vaccination for Plaintiffs with natural immunity furthers the State’s interest in protecting against COVID-19, much less can they

demonstrate that the requirement is narrowly tailored to meet the State’s asserted interest.

### **3. The Vaccine Mandates Violate Equal Protection.**

Defendants cannot show that treating Plaintiffs (those with natural immunity to COVID-19) differently than those with vaccine-acquired protection from COVID-19 furthers the Government’s interest in protecting against the spread of the virus. Oregon’s vaccine mandates create government classifications that burden the fundamental right to privacy and bodily autonomy (as discussed more fully above). As such, the vaccine mandates are subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Additionally, government classifications must have at least a rational basis in furtherance of a legitimate interest. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, (1985); *see also Romer v. Evans*, 517 U.S. 620, 633 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek [protection] from the government is itself a denial of equal protection of the laws in the most literal sense.”)

The vaccine mandates flagrantly burden Plaintiffs’ rights to bodily integrity and privacy<sup>1</sup> and fail strict scrutiny, thereby violating the Equal Protection Clause.

The State of Oregon possesses a compelling interest in protecting against a pandemic disease, but this interest cannot justify its vaccination mandates with their inevitable unwarranted medical intrusions into the bodies of citizens who, because of their natural immunity, pose no threat to themselves or others. At bottom, the existence of natural immunity fully serves the supposed purposes of the public-health protection that Oregon says that it is pursuing.

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<sup>1</sup> The right to refuse unwanted medical care is “so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment.” *Washington*, 521 U.S. at 722 n.17.

**B. PLAINTIFFS SATISFY THE REMAINING FACTORS FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION**

Because the State of Oregon cannot show that granting an exception from the vaccination mandates to Plaintiffs would impose any more harm than what is currently posed by those who have been fully vaccinated, Plaintiffs easily satisfy the remaining three factors for an emergency Temporary Restraining Order and Preliminary Injunction: (1) irreparable harm; (2) balance of harms; and (3) public interest.

First, the vaccine mandates pose immediate and actual irreparable injury to Plaintiffs. They must receive full COVID-19 vaccination by October 18, 2021. *See* First Amended Verified Complaint ¶¶ 16-17. For some plaintiffs, this requirement means that they receive the Johnson and Johnson vaccine by October 4, 2021, in order to be fully vaccinated by October 18, 2021. First Amended Verified Complaint ¶¶ 52, 58. The consequence for failure to comply include personnel consequences, up to and including separation from employment. Termination of employment will, as a matter of course, deprive Plaintiffs of their incomes. It will also, in many instances, cause additional damage to Plaintiffs' careers, licensure, etc. For example, under the vaccine mandate, Plaintiff Joshua Williams cannot work as an EMP in any fire department within the State of Oregon without obtaining the vaccination. The same is true for any Plaintiff who works in a healthcare setting, in a school setting, or for an executive agency.

The State does not provide any opportunity to seek a reasonable exception for Plaintiffs because the State has refused to provide an exception to its vaccination mandate for those who have natural immunity to COVID-19. *See* Healthcare Provider and Healthcare Staff Vaccine

Rule FAQs (Updated 9-02-2021) available at

<https://sharedsystems.dhsoha.state.or.us/DHSForms/Served/1e3879.pdf>.

Plaintiffs have suffered and will continue to suffer irreparable damage from Defendants' conduct. Plaintiffs will lose their jobs because of the vaccine mandates unless they submit to the invasion of their bodies through a vaccination which carries inherent risks of serious side effects (when compared to those receiving a vaccination who have not previously contracted Covid-19) without a commensurate benefit. Any commensurate benefit is erased because Plaintiffs already possess immunity.

Further, once a vaccine is injected, there is no way to undo the vaccination, and it is Plaintiffs who must bear any bodily injury that may result. The State may claim this is a "temporary" rule, but its effects are permanent.

Most importantly, any unlikely award of damages that might be given to Plaintiffs cannot adequately compensate for the deprivation of their constitutional rights. They will suffer irreparable harm unless this Court enjoins Defendants from enforcing their vaccine mandate.

Second, as to the balance of harms, the likelihood of irreparable harm to Plaintiffs from the failure to grant them interim relief clearly outweighs the likelihood of any harm to Defendants from granting such relief. The vaccine mandates definitely and absolutely impose imminent irreparable harm on each of the Plaintiffs, and Defendants cannot show that enjoining the mandates will cause them any real harm. The vaccine mandates already allow limited exceptions for reasons of religious belief or medical necessity, presumably with reasonable accommodations, and there is no evidence those accommodations will undermine the government's asserted purposes.

Further, there is substantial evidence that the immunity provided by having COVID-19 and recovering from it, is stronger than that provided by the vaccinations themselves. The State admits

that many vaccinated individuals experience breakthrough infection. *See* Executive Order No. 21-29 paragraph three (“when [breakthrough] cases do occur, people infected with the Delta variant can pass it on to others.”)

Defendants cannot show that granting an exception from the vaccination mandates to Plaintiffs would impose any more harm than what is currently posed by those who have been fully vaccinated. Plaintiffs merely seek an injunction that appropriately permits them the same workplace freedom as that allowed to those who have received the vaccine. Thus, the balance of harms weighs heavily in favor of Plaintiffs.

Finally, as to public interest, the protection of bodily autonomy for every individual is of essential public interest. Further, the public has an interest in laws, regulations and mandates that are rationally related to the interests asserted. Since it is not rational to require those with natural immunity to acquire vaccinations, it also erodes public confidence in the vaccine to have it mandated in circumstances that do not promote its reasonable use. Thus, the public interest served by a robust vaccination campaign is actually harmed by indiscriminate vaccination mandates.

**C. IN THE EVENT THESE MOTIONS ARE DENIED, PLAINTIFFS SHOULD BE GRANTED AN INJUNCTION PENDING APPEAL.**

In the alternative, pursuant to Fed. R. App. P. Rule 8(a)(1)(C), Plaintiffs respectfully move that this Court for an order granting an injunction while appeal is pending because as demonstrated above, Plaintiffs meet the factors necessary for a stay, including the following: (1) the Plaintiffs have made a strong showing that they are likely to succeed on the merits, at least strong enough to present clear issues for appeal; (2) the Plaintiffs will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure the other parties interested in the proceeding; and (4) the public interest lies strongly in favor of granting a stay. *Hilton v. Braunskill*, 481 U.S. 770,

776 (1987). For the same reasons articulated above (supra, Sections I & II), Plaintiffs easily satisfy all four factors and are entitled to an injunction pending appeal should their motions for a Temporary Restraining Order and Preliminary Injunction be denied. If the requested injunctive relief is denied, Plaintiffs respectfully request an order denying an Injunction Pending Appeal as well in order to avoid unnecessary further motion practice.

#### IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motions to temporarily restrain and preliminary enjoin the vaccine mandates. Alternatively, if the requested injunctive relief is not granted, Plaintiffs respectfully request an injunction pending appeal or, failing that, an order denying same.

Date: September 28, 2021

By: *s/ Rebekah Millard*

Rebekah Millard, OSB #121199

Freedom Foundation

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Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on September 28, 2021, I electronically filed the foregoing First Amended Verified Complaint, and Exhibits; Notice of Motion for Temporary Restraining Order and Memorandum of Points and Authorities with the Clerk of the Court for the United States District of Oregon by using the CM/ECF system. I further sent copies of the same by email to the following individuals who have filed notice of appearance for all Defendants in this case: Marc Abrams and Christina L. Beatty-Walters, at the following email addresses: marc.abrams@doj.state.or.us and tina.beattywalters@doj.state.or.us.

September 28, 2021

/s/ Rebekah Millard  
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