UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRAVIS WISE, et al., Plaintiffs, v. GOVERNOR JAY INSLEE, et al., Defendants.	NO. 2:21-CV-0288-TOR ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

BEFORE THE COURT are Plaintiffs' Motion for Leave to File Second Amended Complaint (ECF No. 71) and Defendants' Motions for Judgment on the Pleadings (ECF Nos. 69, 72). These matters were submitted for consideration with oral argument on April 27, 2022. Milton Rowland and Grant Wolf appeared on behalf of Plaintiffs. Cristina Sepe appeared on behalf of the State Defendants and Elizabeth Kennar and J. Chad Mitchell appeared on behalf of Defendant Schaeffer. The Court has reviewed the record and files herein, considered the parties oral arguments, and is fully informed. For the reasons discussed below, Plaintiffs'

Motion for Leave to File Second Amended Complaint (ECF No. 71) is **DENIED,** and Defendants' Motions for Judgment on the Pleadings (ECF Nos. 69, 72) are **GRANTED**.

BACKGROUND

This matter relates to Governor Inslee's Proclamation 21-14 *et seq*. (the "Proclamation") regarding vaccination requirements for certain state employees. The factual background is discussed in detail in the Court's Order Denying Motion for Temporary Restraining Order. ECF No. 55. Plaintiffs allege the Proclamation violates a variety of state and federal laws, including constitutional law, statutory law, and state common law. ECF No. 26. Defendants Inslee, Clintsman, Batiste, and Millar (collectively "State Defendants") and Defendant Schaeffer move for judgment on the pleadings, arguing Plaintiffs have failed to state claims for which relief may be granted. ECF Nos. 69, 72. Plaintiffs oppose the motion, and also seek leave to file a Second Amended Complaint. ECF No. 71.

DISCUSSION

I. Motion for Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave," which "[t]he court should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). The Ninth Circuit has directed that this policy be applied with "extreme

1 liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.
2 2003) (citation omitted). In ruling upon a motion for leave to amend, a court must
3 consider whether the moving party acted in bad faith or unduly delayed in seeking
4 amendment, whether the opposing party would be prejudiced, whether an
5 amendment would be futile, and whether the movant previously amended the
6 pleading. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011).
7 "Absent prejudice, or a strong showing of any of the remaining [ ] factors, there
8 exists a *presumption* under Rule 15(a) in favor of granting leave to amend." *C.F.*
9 *ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir. 2011)
10 (citation omitted) (emphasis in original).

11 Here, Plaintiffs seek leave to file a Second Amended Complaint. ECF No.
12 71. Plaintiffs filed their First Amended Complaint as of right on October 15, 2021.
13 ECF No. 26. On that same day, Plaintiffs also filed a Motion for Temporary
14 Restraining Order/Preliminary Injunction. ECF No. 13. The Court denied the
15 motion, finding Plaintiffs had failed to establish a likelihood of success on the
16 merits. ECF No. 55. The parties communicated in November and December
17 regarding Plaintiffs' Proposed Second Amended Complaint ("PSAC"). ECF Nos.
18 71 at 4; 75 at 4. Despite assuring Defendants they would receive a copy of the
19 PSAC by November 31, 2021, Defendants did not receive a draft until sometime in
20 late December 2021 and the draft was incomplete. *Id.* In January 2022, Plaintiffs

1 advised Defendants a final draft was forthcoming but never provided an expected
2 completion date. ECF No. 75 at 4.
3 After extending the deadline to answer the First Amended Complaint three
4 times, Defendants filed their Answer on January 31, 2022. *Id*. Defendants filed
5 their Motions for Judgment on the Pleadings on March 3 and 4, 2022. ECF Nos.
6 69, 72. On March 3, 2022, Plaintiffs emailed Defendants a copy of the final
7 PSAC. ECF No. 75 at 4.
8 The Court finds Plaintiffs unduly delayed seeking leave to amend.
9 Plaintiffs' stated reasons for delay are insufficient to justify a months-long delay,
10 particularly where the PSAC does not appear to contain any facts or information
11 not already known to Plaintiffs at the time the First Amended Complaint was filed.
12 In any event, having reviewed the PSAC, the Court also finds amendment would
13 be futile.
14 First, neither the additional facts nor the new plaintiffs in the PSAC appear
15 to arise from newly discovered evidence, and Plaintiffs do not advance any
16 arguments as to why they could not have been included in the First Amended
17 Complaint. *See* ECF No. 71-2 at 7–12, ¶¶ 2.5.4–2.5.75; 14–15, ¶¶ 3.7–3.11.
18 Relatedly, many of Plaintiffs new factual allegations primarily concern their claims
19 under the ADA and Title VII, which are both untenable due to Plaintiffs' failure to
20

1 exhaust their administrative remedies. *See, e.g., id*. at 15, ¶¶ 3.10–3.11; at 19, ¶
2 3.29; at 26–29, ¶¶ 3.69–3.83.
3 Next, the new legal theories in the PSAC fail as a matter of law. First,
4 Plaintiffs' proposed preemption claim appears to allege the Proclamation is
5 preempted by the Food, Drug, and Cosmetics Act ("FDCA"), 21 U.S.C § 360bbb-
6 3, because the FDCA prohibits vaccines approved under emergency use
7 authorization from being forced upon individuals. ECF No. 71-2 at 51–52. As an
8 initial matter, the Proclamation does not require anyone to receive a vaccine; it
9 merely establishes employment requirements for certain state employees. Next,
10 the FDCA has an exhaustion requirement, and Plaintiffs have not indicated they
11 have taken any steps to exhaust their administrative remedies. *Ass'n of Am.*
12 *Physicians & Surgeons, Inc. v. Food & Drug Admin.*, 539 F. Supp. 2d 4, 21
13 (D.D.C. 2008) (citing 21 C.F.R. §§ 10.30, 10.25). Moreover, judicial review is
14 unavailable for decisions that are committed to agency discretion as a matter of
15 law. *City & Cty. of San Francisco v. U.S. Dep't of Transp.*, 796 F.3d 993, 1001
16 (9th Cir. 2015) (quoting 5 U.S.C. § 701(a)(2)). The provisions of the FDCA
17 expressly reserve decisions regarding emergency use authorizations for vaccines
18 and other medications to agency discretion. 21 U.S.C. §360bbb-3(i) ("Actions
19 under the authority of this section by the Secretary, by the Secretary of Defense, or
20 by the Secretary of Homeland Security are committed to agency discretion.").

1 Consequently, even if Plaintiffs presented cognizable preemption claim under the
2 FDCA, the Court would be unable to provide the relief Plaintiffs seek.
3 Next, Plaintiffs seek to add a claim for religious discrimination under Title
4 VII and a claim for violation of the Establishment Clause. ECF No. 71-2 at 49–51;
5 at 36, ¶ 6.7–6.25. Plaintiffs do not present any arguments regarding the validity of
6 either claim in their Motion for Leave to File Second Amended Complaint; instead,
7 Plaintiffs address the proposed claims in their Response to Defendants' Motions
8 for Judgment on the Pleadings. Therefore, the Court discusses the issues below.
9 *See infra* Section II.H.
10 Because Plaintiffs unduly delayed seeking amendment and because
11 amendment would be futile, Plaintiffs Motion for Leave to File Second Amended
12 Complaint is denied.
13 **II. Motion for Judgment on the Pleadings**
14 "After the pleadings are closed—but early enough not to delay trial—a party
15 may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). In reviewing a
16 12(c) motion, the court "must accept all factual allegations in the complaint as true
17 and construe them in the light most favorable to the non-moving party." *Fleming*
18 *v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). "Analysis under Rule 12(c) is
19 substantially identical to analysis under Rule 12(b)(6) because, under both rules, a
20 court must determine whether the facts alleged in the complaint, taken as true,

1 entitle the plaintiff to a legal remedy." *Chavez v. United States*, 683 F.3d 1102,
2 1108 (9th Cir. 2012) (internal quotation marks and citation omitted). "A judgment
3 on the pleadings is properly granted when, taking all the allegations in the non-
4 moving party's pleadings as true, the moving party is entitled to judgment as a
5 matter of law." *Marshall Naify Revocable Trust v. United States*, 672 F.3d 620,
6 623 (9th Cir. 2012) (quoting *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699
7 (9th Cir. 1999)).

8 "Federal pleading rules call for 'a short and plain statement of the claim
9 showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do
10 not countenance dismissal of a complaint for imperfect statement of the legal
11 theory supporting the claim asserted." *Johnson v. City of Shelby, Miss*., 574 U.S.
12 10, 11 (2014) (citation omitted).

13 **A. Supplemental Jurisdiction**

14 The Amended Complaint raises several state constitutional and common law
15 violations. ECF No. 26. In their Response to the present motions, Plaintiffs seek
16 to dismiss the state law tort claims, the takings claims under the State and federal
17 constitutions, the cruel punishment claims under the Washington and federal
18 constitutions, and the violation of the Commerce clause claims under Art. I, § 8, cl.
19 3 and the federal constitution. *See* ECF No. 81 at 3. However, other state law
20 causes of action remain. This Court may exercise supplemental jurisdiction over

1 state law claims pursuant to 28 U.S.C. § 1367, but the decision is discretionary.
2 *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997), *supplemented*,
3 121 F.3d 714 (9th Cir. 1997), *as amended*, (Oct. 1, 1997). In the interests of
4 judicial economy, convenience, fairness, and comity, the Court declines
5 supplemental jurisdiction over Plaintiffs' state law claims and will address only the
6 challenges to federal law.

7 Relatedly, the Court declines to address Plaintiffs' request to certify state
8 law questions to the Washington Supreme Court at this time. ECF No. 81 at 4.

9 **B. Free Exercise Clause**

10 Plaintiffs allege the Proclamation violates the Free Exercise Clause of the
11 United State Constitution because it impairs their ability to freely exercise their
12 sincerely held religious beliefs. ECF No. 26 at 20, ¶ 6.4. As an initial matter, the
13 Court notes that Plaintiffs continue to rely almost entirely on Washington caselaw
14 for their federal free exercise claim. ECF No. 81 at 17–20. More bizarrely,
15 Plaintiffs even go so far as to argue that federal constitutional validity can be
16 determined under either state or federal constitutional law. ECF No. 81 at 10; at
17 17. This argument is blatantly incorrect.

18 Plaintiffs concede the Proclamation is facially neutral but argue strict
19 scrutiny should apply, nonetheless. ECF No. 26 at 20, ¶ 6.4. The Supreme Court
20 has long endorsed state and local government authority to impose compulsory

1 vaccines. *See Jacobsen v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905);
2 *Prince v. Massachusetts*, 321 U.S. 158 (1944) ("The right to practice religion
3 freely does not include liberty to expose the community or the child to
4 communicable disease or the latter to ill health or death."). While challenges to
5 free exercise of religion are traditionally subject to strict scrutiny, facially neutral
6 and generally applicable state regulations need only support rational basis, even if
7 they incidentally burden religious practices. *Church of the Lukumi Babalu Aye,*
8 *Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Does 1-6 v. Mills,* 16 F.4th 20,
9 29 (1st Cir. 2021), *cert. denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022).
10 A law is not generally applicable if the record before the court "compels the
11 conclusion" that suppression of religion or religious practice is the object of the
12 law at issue. *Lukumi*, 508 U.S. at 534. The object of the Proclamation is clear:
13 slow the spread of COVID-19. There is no discriminatory animus or objective. As
14 this Court has previously noted, the Proclamation applies with equal force to all
15 educators, healthcare workers, and state employees and contractors, regardless of
16 religious affiliation—or lack thereof. ECF No. 55 at 7. Moreover, the
17 Proclamation recognizes exemptions for those who qualify for accommodations
18 due to their sincerely held religious beliefs; there are no comparable secular
19 exemptions. Plaintiffs have failed to allege facts that would "compel[] the
20 conclusion" that suppression of religion is the object of the Proclamation.

1 As challenges to COVID-19 vaccine mandates have progressed, this Court,
2 and others across the country, have held facially neutral and generally applicable
3 state vaccination mandates are subject only to rational basis. *See, e.g.*, ECF No.
4 55; *Bacon v. Woodward*, No. 2:21-CV-0296-TOR, 2021 WL 5183059 (E.D.
5 Wash., Nov. 8, 2021); *Does 1-6 v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021), *cert.*
6 *denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 1112 (2022); *Kane v. De Blasio*, 19
7 F.4th 152, 164 (2d Cir. 2021). Here, the State clearly has a legitimate government
8 interest in preventing the spread of COVID-19, an interest that has been endorsed
9 by the Ninth Circuit. *Slidewaters LLC v. Washington State Dep't of Lab. & Indus.*,
10 4 F.4th 747, 758 (9th Cir. 2021); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th
11 1173, 1177 (9th Cir. 2021), *reconsideration en banc denied,* 22 F.4th 1099 (9th
12 Cir. 2022). Additionally, the Proclamation is rationally related to that interest
13 because it is based on overwhelming evidence that the vaccines are safe and
14 effective, and increasing vaccination rates among those employees who come into
15 regular contact with vulnerable populations is a rational action to reduce the spread
16 of COVID-19. Accordingly, the Proclamation easily survives federal
17 constitutional scrutiny; Plaintiffs have failed to state a federal Free Exercise claim
18 upon which relief may be granted.
19 Plaintiffs also raise an Establishment Clause challenge in their Response to
20 Defendant Schaeffer's Motion for Judgment on the Pleadings. ECF No. 82 at 9–

1 12. This claim is not alleged in the Amended Complaint but is added to the PSAC.
2 ECF No. 36, ¶ 6.7–6.25. This claim also fails as a matter of law. In determining
3 whether a government action violates the Establishment Clause, the Ninth Circuit
4 applies the *Lemon* test. *Cath. League for Religious & C.R. v. City & Cty. of San*
5 *Francisco*, 567 F.3d 595, 599 (9th Cir. 2009), *on reh'g en banc,* 624 F.3d 1043
6 (9th Cir. 2010). "Government action will pass muster if it (1) has a secular
7 purpose; (2) has a principal or primary effect that neither advances nor disapproves
8 of religion; and (3) does not foster excessive governmental entanglement with
9 religion." *Id*.

10 Here, the Proclamation has a secular purpose: to slow the spread of COVID-
11 19. As to the second prong, the primary effect of the Proclamation is to increase
12 vaccine rates among the affected employees. Finally, the Proclamation does not
13 promote government entanglement with religion, nor do Plaintiffs attempt to argue
14 that is does. *See* ECF No. 82 at 12. There are no additional facts in the PSAC
15 from which the Court could infer an Establishment Clause violation. Thus,
16 Plaintiffs' proposed claim that the Proclamation violates the Establishment Clause
17 fails as a matter of law.

18 **C. Procedural Due Process**

19 Plaintiffs allege the Proclamation violates their procedural due process rights
20 because they were not afforded a meaningful opportunity to be heard regarding the

denial of their exemption and accommodation requests. ECF No. 26 at 23–24, ¶¶ 7.1–7.4.

The purpose of a *Loudermill* hearing is to provide an entitled employee notice and the opportunity to be heard prior to termination. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). However, when a policy is generally applicable, employees are not "entitled to process above and beyond the notice provided by the enactment and publication" of the policy itself. *Harris v. Univ. of Massachusetts, Lowell,* No. 21-CV-11244-DJC, 2021 WL 3848012, at *5 (D. Mass. Aug. 27, 2021). District courts around the country have 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 enactment of the mandates themselves. *See, e.g.*, *id.*; *Valdez v. Grisham*, --- F. Supp. 3d ---, No. 21-CV-783 MV/JHR, 2021 WL 4145746, at *9 (D.N.M. Sept. 13, 2021); *Bauer v. Summey*, --- F. Supp. 3d ---, No. 2:21-CV-02952-DCN, 2021 WL 4900922, at *7 (D.S.C. Oct. 21, 2021).

Here, Plaintiffs do not dispute that the Proclamation is generally applicable. Thus, Defendants were not required to provide Plaintiffs with more process beyond what was provided by enacting the Proclamation. Moreover, it appears some Plaintiffs received greater process than what was required. For instance, some Plaintiffs received letters from the Department of Social and Health Services

1 outlining an alternative process for requesting exemptions and accommodations.
2 *See, e.g.*, ECF No. 26 at 6–7, ¶¶ 3.5–3.6. Other Plaintiffs evidently participated in
3 "meetings somewhat like *Loudermill* hearings." ECF No. 81 at 5. Plaintiffs fail to
4 articulate how these processes, which are greater than the constitutional minimums
5 required, violate their procedural due process rights. Similarly, Plaintiffs have
6 failed to establish why they were entitled to process greater than what was
7 provided in the Proclamation's enactment. As such, Plaintiffs' have failed to state
8 a procedural due process claim upon which relief may be granted.

9 **D. Substantive Due Process**

10 Plaintiffs allege the Proclamation violates several of their other substantive
11 due process rights, including the right to "autonomy over one's medical care," the
12 "right to refuse treatment," and the right to be free from deprivation of "life,
13 liberty, or property." ECF No. 26 at 24–25, ¶¶ 8.1–8.6.

14 As previously stated, the Proclamation does not require individuals to get
15 vaccinated; it simply creates employment requirements for certain state workers.
16 Plaintiffs can choose to get vaccinated and remain employed by the State or they
17 can decline vaccination and seek an accommodation. Alternatively, they can
18 decline vaccination and seek employment elsewhere. Next, there is no
19 fundamental right to continued employment in a particular job. *Kupau v. U.S.*
20 *Dep't of Lab.*, 597 F. Supp. 2d 1113, 1123 (D. Haw. 2009) (citing *Massachusetts*

1 *Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976)). "When the state acts as
2 employer, the court must consider the 'crucial difference . . . between the
3 government exercising the power to regulate or license, as lawmaker, and the
4 government acting as proprietor, to manage [its] internal operation.'" *Burcham v.*
5 *City of Los Angeles*, No. 221CV07296RGKJPR, 2022 WL 99863, at *7 (C.D. Cal.
6 Jan. 7, 2022) (quoting *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 598 (2008)).
7 The Supreme Court has recognized that "government has significantly greater
8 leeway in its dealings with citizen employees" than when it exercises its sovereign
9 powers over its citizens at large. *Engquist*, 553 U.S. at 599.

10 The Ninth Circuit also has a narrow view of substantive due process
11 violations in the context of employment, recognizing violations only where there
12 has been "a complete prohibition of the right to engage in a calling." *Culinary*
13 *Studios, Inc. v. Newsom*, 517 F. Supp. 3d 1042, 1069 (9th Cir. 2021). Specifically,
14 such violations are limited to "extreme cases" in which "an employee has been
15 blacklisted, de-licensed, or stigmatized to such an extent that it is virtually
16 impossible for the employee to find new employment in his chosen field." *Moody*
17 *v. Cty. of Santa Clara*, No. 5:15-CV-04378-EJD, 2019 WL 6311406, at *4 (N.D.
18 Cal. Nov. 25, 2019) (quoting *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985,
19 997 (9th Cir. 2007), *aff'd sub nom. Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591,
20 (2008)) (internal quotations omitted). Where a fundamental right is not at issue,

1 rational basis is the applicable standard. *Culinary Studios, Inc*., 517 F. Supp. 3d at
2 1068.
3 Here, Plaintiffs are not completely prohibited from seeking employment in
4 their respective fields; they are free to seek employment with employers that do not
5 require vaccination or that have accommodations available for unvaccinated
6 employees. Plaintiffs have not asserted any facts indicating they have been
7 "blacklisted, de-licensed, or stigmatized." *Moody*, 2019 WL 6311406, at *4.
8 Moreover, the Proclamation survives rational basis review because it is rationally
9 related to the State's legitimate interest in stemming the spread of COVID-19
10 among its employees who come into close contact with vulnerable members of the
11 population. Accordingly, Plaintiffs have failed to state a claim for a substantive
12 due process violation upon which relief may be granted.
13 **E. Contract Clause**
14 Plaintiffs allege the Proclamation interferes with their collective bargaining
15 agreements in violation of the Contracts Clause. ECF No. 26 at 25–26, ¶¶ 9.6–
16 9.10.
17 To state a claim for a violation of the Contract Clause, plaintiffs must satisfy
18 a two-part inquiry. *Sveen v. Melin*, 138 S.Ct. 1815, 1821 (2018). First, plaintiffs
19 must show the law at issue "operated as a substantial impairment of a contractual
20 relationship." *Id*. at 1821–22. To determine whether there was a substantial

1 impairment, courts look to "the extent to which the law undermines the contractual
2 bargain, interferes with a party's reasonable expectations, and prevents the party
3 from safeguarding or reinstating his rights." *Id*. at 1822. If there is a substantial
4 impairment, courts next turn to whether the law at issue "is drawn in an appropriate
5 and reasonable way to advance a significant and legitimate public purpose."
6 *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 10 F.4th 905, 913
7 (9th Cir. 2021). When the government is a party to a contract, a heightened
8 scrutiny is applied. *Id*.

9 Although Plaintiffs argue the Proclamation has significantly changed the
10 terms of their employment, they have not provided copies of their collective
11 bargaining agreements or stated the material provisions that have allegedly been
12 modified. Rather, Plaintiffs have simply included hyperlinks to the agreements in
13 a footnote, indicating the "contracts are all public records and they can all be found
14 online." ECF No. 81 at 28 n.15. The Court will not go on a fishing expedition to
15 parse out Plaintiffs' arguments for them. Moreover, Plaintiffs' argument that
16 simply referring to the existence of the collective bargaining agreements is
17 sufficient to survive the minimum pleading standards is incorrect. ECF No. 81 at
18 27. Plaintiffs must allege enough facts to demonstrate they are entitled to relief.
19 Beyond a general recitation of caselaw, Plaintiffs do not allege any facts
20 demonstrating they are entitled to relief from a Contract Clause violation. ECF

1 Nos. 26 at 25–27, ¶¶ 9.1–9.10; 81 at 27–29.

2 In any event, the Court need not decide whether the Proclamation is a
3 substantial impairment of contractual relations because there is no doubt that it is
4 an appropriate and reasonable way to advance a significant and legitimate public
5 purpose, which is curbing the spread of COVID-19. *See Apartment Ass'n of Los*
6 *Angeles Cty., Inc*, 10 F.4th at 913 (declining to decide whether an eviction
7 moratorium during the COVID-19 pandemic constituted a substantial impairment
8 because the moratorium was appropriate and reasonable under the circumstances);
9 *see also Slidewaters LLC*, 4 F.4th at 758.

10 Even applying a heightened scrutiny, the Proclamation serves the State's
11 compelling interest in reducing COVID-19 infections. *See Roman Cath. Diocese*
12 *of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID–
13 19 is unquestionably a compelling interest."); *see also Auracle Homes, LLC v.*
14 *Lamont*, 478 F. Supp. 3d 199, 225–26 (D. Conn. 2020); *Jevons v. Inslee*, --- F.
15 Supp. 3d ---, No. 1:20-CV-3182-SAB, 2021 WL 4443084, at *10 (E.D. Wash.
16 Sept. 21, 2021); *Massachusetts Correction Officers Federated Union v. Baker*, ---
17 F. Supp. 3d ---, No. 21-11599-TSH, 2021 WL 4822154, at *5 (D. Mass. Oct. 15,
18 2021); *Valdez v. Grisham*, --- F. Supp. 3d ---, No. 21-CV-783 MV/JHR, 2021 WL
19 4145746, at *11 (D. N.M. Sept. 13, 2021).

20 Because Plaintiffs do not advance any cognizable arguments that the

1 Proclamation is an unreasonable and inappropriate response to COVID-19, they
2 have failed to allege a Contracts Clause violation upon which relief can be granted.

3 **F. Americans with Disabilities Act**

4 Beyond a general recitation of ADA statutory law and caselaw, the
5 Amended Complaint does not contain any facts alleging disability discrimination.
6 *See* ECF No. 26 at 27–30, ¶¶ 10.1–10.16. Regardless, Plaintiffs' ADA claim fails
7 as a matter of law because they have failed to exhaust their administrative
8 remedies, which is a threshold requirement for filing an ADA claim in federal
9 court. *See* ECF No. 55 at 9–11. The PSAC does not remedy this defect but instead
10 attempts to argue the administrative process would be futile due to the agency
11 backlog. ECF No. 71-2 at 48–49, ¶¶ 10.1–10.6. Plaintiffs' failure to file claims
12 with the EEOC before the agency became "inundated with claims" cannot
13 overcome the exhaustion requirement. Consequently, Plaintiffs have failed to state
14 an ADA claim upon which relief may be granted and amendment would be futile.

15 **G. Title VII**

16 Plaintiffs do not allege Title VII violations in their Amended Complaint;
17 however, if permitted to file their PSAC, Plaintiffs intend to replace their
18 Washington Law Against Discrimination ("WLAD"), RCW 49.60 *et seq*., claim
19 with a Title VII claim on the grounds that Title VII is "simply the federal
20 counterpart" to the Washington law. ECF No. 82 at 2. Alternatively, if the Court

1 finds the Title VII claim untenable, Plaintiffs argue the claim should be
2 incorporated under their § 1983 claim. *Id*. at 2 n.1.
3 The Court declines to exercise jurisdiction over Plaintiffs' WLAD claim but
4 will review the proposed Title VII claim for the purpose of evaluating Plaintiffs'
5 PSAC. The Court finds amending the WLAD claim to either a Title VII or § 1983
6 claim would be futile because the claim fails as a matter of law.
7 It is well settled law that exhaustion of administrative remedies is a
8 prerequisite to filing a Title VII claim in district court. *Gobin v. Microsoft Corp.*,
9 No. C20-1044 MJP, 2021 WL 148395, at *4 (W.D. Wash. Jan. 15, 2021) (citing 42
10 U.S.C. § 12117(a) and *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1176 (9th Cir.
11 2000), *overruled on other grounds*). Plaintiffs do not deny they have not
12 exhausted their administrative remedies. Instead, they attempt to circumvent the
13 requirement by incorporating the claim under their § 1983 claim, asserting
14 exhaustion is merely an affirmative defense, or claiming that exhaustion is futile.
15 ECF No. 82 at 3–4. Each argument is a clear misapprehension of the law.
16 First, while a discrimination claim can be brought under § 1983 without
17 exhausting administrative remedies (*see Roberts v. College of the Desert*, 870 F.2d
18 1411, 1415–16 (9th Cir. 1988)), courts evaluating the interplay between Title VII
19 and § 1983 have found that where a plaintiff fails to establish the prima facie
20 elements of a Title VII claim, the plaintiff will also fail to establish a § 1983 claim

1 premised on the same facts. *Lawson v. Washington*, 296 F.3d 799, 806 (9th Cir.
2 2002); *Shabazz v. Oakland Unified Sch. Dist.*, No. C 03-2071 VRW, 2005 WL
3 1513148, at *7 (N.D. Cal. June 22, 2005).

4 Here, Plaintiffs have failed to allege facts that would support the prima facie
5 elements for workplace discrimination because there is no indication that Plaintiffs
6 faced adverse employment decisions due to their sincerely held religious beliefs
7 rather than a failure to comply with the Proclamation. First, it is unclear whether
8 all Plaintiffs actually faced adverse employment decisions; some chose to get
9 vaccinated or to accept the available accommodations. *See, e.g.*, ECF No. 71-2 at
10 ¶¶ 3.9, 3.26, 3.31, 3.41. Those whose positions were terminated allege they
11 applied for accommodation, but accommodations were simply unavailable. *See,*
12 *e.g.*, *id.* at 15, ¶¶ 3.9, 3.11, 3.29. These facts do not support a failure-to-
13 accommodate claim under Title VII.

14 Next, it is well-settled that Title VII's exhaustion requirement is a
15 procedural prerequisite to filing suit in federal district court. *Fort Bend County,*
16 *Texas v. Davis*, 139 S. Ct. 1843 (2019). Plaintiffs' cited cases are inapplicable.
17 *Jones v. Bock*, 549 U.S. 199 (2007) related to administrative remedies under the
18 Prison Litigation Reform Act, not Title VII, and *DiPetto v. United States Postal*
19 *Service*, 383 Fed. Appx. 102 (2d Cir. 2010) related to federal employee claims
20 under Title VII, which are governed by different regulations. *Compare* 29 C.F.R.

§ 1601 *et seq*. *with* 29 C.F.R. § 1614 *et seq*.

Finally, Plaintiffs have failed to establish the futility exception applies to their situation, particularly where there are serious questions regarding the applicability of the exception to Title VII. *See Thomas v. McCarthy*, 714 Fed. Appx. 674, 676 (9th Cir. 2017) (declining to determine whether the futility exception should be read into the exhaustion requirements of Title VII); *You v. Longs Drugs Stores California*, LLC, 937 F. Supp. 2d 1237, 1250–51 (D. Haw. 2013) (collecting cases). Based on the foregoing, the Court finds permitting amendment to add a Title VII claim would be futile because it is not a claim upon which relief may be granted under the circumstances.

H. Section 1983

Plaintiffs cannot succeed on their claim for relief under 42 U.S.C. § 1983 because they have not established any violations of constitutional or federal law. "By its terms, . . . the statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Weiner v. San Diego Cty.*, 210 F.3d 1025, 1032 (9th Cir. 2000) (affirming summary judgment on § 1983 claim where plaintiff failed to establish a violation of a constitutionally protected right). Therefore, Plaintiffs have failed to state § 1983 claims upon which relief may be granted.

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

2 1. Plaintiffs' Motion for Leave to File Second Amended Complaint (ECF
3 No. 71) is **DENIED**.

4 2. Plaintiffs' voluntary dismissal of their state law tort claims, the takings
5 claims under the State and federal constitutions, the cruel punishment
6 claims under the Washington and federal constitutions, and the violation
7 of the Commerce clause claims under Art. I, § 8, cl. 3 and the federal
8 constitution, ECF No. 81 at 3, is **GRANTED**.

9 3. Defendants' Motions for Judgment on the Pleadings (ECF Nos. 69, 72)
10 are **GRANTED**. The claims asserted against State Defendants Inslee,
11 Clintsman, Batiste, and Millar, as well as the claims asserted against
12 Defendant Schaeffer, are **DISMISSED with prejudice**.

13 4. Any remaining state law claims are **DISMISSED without prejudice**.

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

16 DATED April 27, 2022.

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18 THOMAS O. RICE
United States District Judge

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