IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SCOTT TROOGSTAD, *et al.*, Plaintiffs, v. CITY OF CHICAGO and GOVERNOR JAY ROBERT PRITZKER, Defendants.	Case No. 1:21-cv-05600 Hon. Judge Thomas M. Durkin

DEFENDANT CITY OF CHICAGO'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

INTRODUCTION

In this action, 192 employees of the City of Chicago allege that the City of Chicago's mandatory COVID-19 Vaccination Policy violates their federal constitutional rights as well the Illinois Health Care Right of Conscience Act ("HCRCA") and Illinois Religious Freedom Restoration Act ("IRFRA"). On August 29, 2022, the Seventh Circuit Court of Appeals affirmed the district court's denial of Plaintiffs' Motion for Preliminary Injunction. In so holding, the circuit court found that the Plaintiffs did not have a likelihood of success on the merits of their constitutional substantive due process, procedural due process, and free exercise claims against the City and also held that the City's Vaccination Policy did not violate the HCRCA on its face. *Lukaszczyk v. Cook Cnty*., 47 F.4th 587 (7th Cir. 2022), *cert. denied sub nom. Troogstad v. City of Chicago,* No. 22-461, 2023 WL 192006 (U.S. Jan. 17, 2023). Plaintiffs' Second Amended Complaint reasserts the exact claims that the circuit court already held were not viable and also seeks to add a count under IRFRA.

For reasons thoroughly addressed in the circuit court's decision, Plaintiffs' substantive and procedural due process claims fail as a matter of law and are subject to dismissal under Federal Rule Civil Procedure 12(b)(6).

To the extent that Plaintiffs are still attempting to assert that the Vaccination Policy on its face unduly interferes with their religious beliefs in violation of the Free Exercise Clause of the First Amendment, their claims fail as a matter of law because the Vaccination Policy contains a process for seeking a religious based exemption, as the circuit court so held. *Id.* at 606. Plaintiffs also fail to state an actionable First Amendment Free Exercise Clause challenge to the Policy "as applied" because no Plaintiff identifies a religious belief they held that was infringed upon by the Policy and most of the Plaintiffs do not allege that they were denied an exemption from the Policy or otherwise harmed by its application. The availability of a religious exemption from the Vaccination Policy also forecloses a facial challenge to the Vaccination Policy under the IRFRA, because the City has a compelling interest in controlling the spread of COVID-19 among City employees, which it furthers using the least restrictive means by allowing for religious exemptions in appropriate cases. As with their First Amendment claims, Plaintiffs also do not allege a viable IRFRA challenge to the Policy "as applied" because most of them do not allege they were denied an exemption or otherwise harmed by the Policy's application.

Finally, Plaintiffs' HCRCA claim fails as a matter of law because the Illinois Appellate Court recently held that the HCRCA, as amended, does not apply to COVID-19 prevention and mitigation measures.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must dismiss a complaint unless it pleads facts, accepted as true, that are sufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also McReynolds v. Merrill Lynch & Co., Inc.*, No. 08-cv-6105, 2011 WL 1196859, *2 (N.D. Ill., Mar. 29, 2011).

However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555).

The complaint's factual allegations must "allow[] the court to draw the reasonable inference" that the defendant engaged in the conduct alleged and violated the law. *Iqbal*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)). And if the facts pled allow for an "obvious alternative explanation" for the defendant's conduct, the plaintiff has not plausibly alleged a violation of the law. *Id*. at 682.

II. PLAINTIFFS' DUE PROCESS CLAIMS ARE FORECLOSED BY THE SEVENTH CIRCUIT'S DECISION

The 14th Amendment substantive and procedural due process claims and related factual allegations in the Second Amended Complaint are substantively identical to the allegations in the Complaint and First Amended Complaint that the circuit court already held were not viable. *Lukaszczyk*, 47 F.4th at 599-603, 604-606. The circuit court's ruling, although technically not a final decision on the merits, clearly held that the 14th Amendment allegations were legally deficient on their face and failed as a matter of law. *See Id.*

In addition, Plaintiffs' prior argument that the Vaccination Policy infringed on a substantive due process right to "bodily autonomy" under *Roe v. Wade* 410 U.S. 113 (1973) and *Planned Parenthood Se. Pennsylvania v. Casey,* 505 U.S. 833, 847 (1992), has now been conclusively foreclosed by *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2284 (2022), so the legal basis upon which their substantive due process claims depended is even less sound. Accordingly, Plaintiffs' 14th Amendment claims should be dismissed with prejudice.

III. PLAINTIFFS' RELIGIOUS BASED CHALLENGES TO THE VACCINATION POLICY FAIL AS A MATTER OF LAW

A. Plaintiffs Do Not Assert a Viable First Amendment Free Exercise Claim

The Second Amended Complaint fails to state an actionable claim that the Vaccination Policy violated the Free Exercise Clause of the First Amendment either on its "face" or "as applied." When a religiously neutral and generally applicable law incidentally burdens free exercise rights, the law need only be rationally related to a legitimate governmental interest to withstand a constitutional challenge. *See Fulton v. City of Philadelphia, Penn.,* 141 S. Ct. 1868, 1876 (2021) (*citing Employment Div., Dept. of Human Res. of Oregon v. Smith,* 494 U.S. 872, 878–82 (1990)). The "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id*. at 1877. To be generally applicable, a law may not selectively burden religiously motivated conduct while exempting comparable secularly motivated conduct. *Id.* at 543. A "neutral law of general applicability is constitutional if it is supported by a rational basis. As held by the circuit court, the Vaccination Policy, on its face, does not impermissibly burden the free exercise of religious beliefs because it is neutral towards religion and provides a process for exempting from its requirements employees with sincere religious beliefs that conflict with the Vaccination Policy. *Lukaszczyk,* 47 F. 4th at 605-607.

Plaintiffs also fail to allege facts sufficient to challenge the Policy on First Amendment grounds "as applied." This court previously held that the "Plaintiffs . . . do not state a claim for an 'as applied challenge to any specific employee's denial of a religious exemption.'" *Troogstad v. City of Chicago,* 571 F.Supp.3d 901, 917 (N.D. Ill. 2021). Although the circuit court did not completely foreclose the possibility of an "as applied" challenge to the Vaccination Policy, it similarly held that the record on appeal was not sufficiently developed to raise such a challenge

because Plaintiffs did not assert that they sought a religious exemption that was wrongfully denied. *See Lukaszczyk,* 47 F.4th at 607. The Second Amended Complaint does not state a viable Free Exercise challenge to the Vaccination Policy "as applied" because it fails to cure these deficiencies.

As an initial matter, none of the Plaintiffs allege they held a sincere religious belief that was infringed by the requirements of the Vaccination Policy. They neither identify their particular religious belief nor explain how that belief conflicted with the requirements of the Vaccination Policy. While a plaintiff's religious beliefs need not necessarily fall under the tenets of a traditionally recognized religion or belief system to be protected by the First Amendment, given that most major organized religions have found no conflict between the tenets of their faith and COVID-19 vaccinations, Plaintiffs' conclusory allegations that the Vaccination Policy infringes on unidentified and unexplained religious beliefs fails to meet the plausibility threshold of *Twombly* and should be dismissed.

Most of the Plaintiffs also fail to allege that they sought and were wrongfully denied a religious exemption as required by both this Court and the Seventh Circuit's prior decision to state an "as applied" challenge. Of the 192 named Plaintiffs, only 24 Plaintiffs allege that they applied for a religious exemption from the Vaccination Policy that was not approved, and 10 Plaintiffs allege that they applied for a religious accommodation from the Vaccination Policy but do not allege whether their exemption request was granted or denied. The remaining Plaintiffs do not make any allegation whatsoever that they sought a religious exemption or that they were denied an exemption. Plaintiffs cannot maintain an "as applied" challenge absent allegations, which if proven, show that they sought an exemption from the Vaccination Policy on religious grounds that was denied. Accordingly, Plaintiffs' First Amendment claims should be dismissed with prejudice both as to a "facial" and "as applied" challenge.

B. Plaintiffs Have Not Stated a Viable IRFRA Challenge to the Vaccination Policy.

Under the IRFRA, the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15. Courts have repeatedly declared that controlling the spread of COVID-19 constitutes a compelling interest. *See Troogstad v. City of Chicago*, 576 F.Supp.3d 578, 585 (N.D. Ill. 2021) ("Combating the COVID-19 pandemic is 'unquestionably a compelling interest'"); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest..."); *Cassell v. Snyders*, 458 F. Supp. 3d 981, 1000 (N.D. Ill. May 3, 2020) ("in these exceptional circumstances, controlling the spread of COVID-19 counts as a compelling interest"); *see also United States v. Saleron*, 481 U.S. 739, 755 (1987) (recognizing that the government's interest in "the safety of [its] citizens" is "compelling").

The Supreme Court has recognized compelling public interests can override religious beliefs: "We do not read RLUIPA[1] to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate an accommodation must be measured so that it does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). The Vaccination Policy also furthers the interest of curtailing the spread of

[1] The Religious Land Use and Institutionalized Persons Act (RLIUPA) is a federal law passed after the Supreme Court held the federal RFRA to be unconstitutional as applied to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Courts apply the same standards under the federal RFRA, and RLIUPA in determining whether a particular government rules imposes a "substantial burden" on a religious belief. *See e.g. Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). Similarly, because the Illinois RFRA also was passed in direct response to the Supreme Court's *Boerne* decision specifically references pre-*Boerne* federal case law as the law to be applied in interpreting the IRFRA, federal cases interpreting the federal RFRA and RLIUPA directly apply in this case. *See Diggs v. Snyder*, 333 Ill. App. 3d 189, 194 (5th Dist. 2002); *World Outreach Conference Center v. City of Chi.*, 591 F.3d 531, 533 (7th Cir. 2009); *People v. Latin Kings Street Gang*, 2019 IL App (2d) 180610-U, ¶¶ 95, 113.

COVID-19 using the least restrictive means. Whether a practice is the "least restrictive means" turns on "whether [the government] could have achieved, to the same degree, its compelling interest" without interfering with religious activity. *Cassell*, 458 F. Supp. 3d at 1000; *Affordable Recovery Hous. v. City of Blue Island*, No. 12 C 4241, 2016 WL 5171765, at *8 (N.D. Ill. Sept. 21, 2016). Similar to the plaintiffs in *Cassell*, the Plaintiffs here fail to allege any less restrictive policy that would achieve the same result as the Vaccination Policy that requires all employees to become fully vaccinated against COVID-19 absent an approved religious exemption. As with their Free Exercise claims, the availability of a religious exemption in appropriate cases ensures that the Vaccination Policy does not unduly burden on any sincere religious beliefs and forecloses a facial challenge to the Vaccination Policy under IRFRA.

Plaintiffs also fail to assert a viable "as applied" challenge to the Vaccination Policy under the IRFRA. As noted above, no Plaintiff identifies a sincere religious belief that was burdened by the Vaccination Policy. Only 24 Plaintiffs allege they sought an exemption that was not granted, and only 10 additional Plaintiffs allege they sought an exemption without alleging whether the exemption was granted or denied. Absent factual allegations, which if true, would demonstrate that the Policy impermissibly burdened each individual Plaintiffs' sincere religious beliefs, Plaintiffs' IRFRA claims are deficient on their face and should be dismissed.

IV. THE HCRCA DOES NOT APPLY TO COVID-19 VACCINES

Plaintiffs' HCRCA claims should be dismissed because, as a matter of law, the HCRCA does not apply to COVID-19 mitigation measures. In *Krewoniak v. McKnight*, 2022 IL App (2d) 220078 ¶ 38 (Ex. A, attached hereto), the Illinois Appellate Court held that Section 13.5 of the Act, which amended the HCRCA to clarify that it does not apply to any measures or requirements undertaken to prevent the spread of COVID 19, applied to all claims "commenced or pending" on

or after the date of the amendment, and "in effect removes employer requirements from the protection of the Act." *Id.* at ¶ 38. This decision is binding and dispositive and forecloses Plaintiffs from challenging the City's Vaccination Policy under the HCRCA. *ADT Security Services, Inc. v. Lisle-Woodridge Fire Protection District*, 672 F.3d 492, 498 (7th Cir. 2012) ("In the absence of guiding decisions by the state's highest court, we consult and follow the decisions of intermediate appellate courts unless there is a convincing reason to predict the state's highest court would disagree."); *See also State Farm Fire and Cas. Co. v. Yapejian*, 152 Ill.2d 533, 539-40 (1992) ("A decision of the appellate court [] is binding on the circuit courts throughout the State").

CONCLUSION

The Seventh Circuit's prior decision in this matter forecloses Plaintiffs from maintaining their facial federal constitutional challenges to the City's Vaccination Policy, and the new allegations in the Second Amended Complaint fail to state an actionable First Amendment or IRFRA challenge to the Policy "as applied." Plaintiffs' HCRCA claims also fail as a matter of law because the HCRCA does not apply to COVID-19 mitigation measures such as the City's Vaccination Policy. Accordingly, the Second Amended Complaint should be dismissed with prejudice.

Dated: February 8, 2023

Respectfully submitted,

THE CITY OF CHICAGO

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 8, 2023, he caused a true and correct copy of the foregoing **DEFENDANT CITY OF CHICAGO'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** to be filed with the Clerk of the Court using the CM/ECF system which will send electronic notification to all counsel of record, namely:

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