

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JAMES R. HOGUE, EMILY PEYTON,)
KAREN EDDINGS, MORNINGSTAR PORTA,)
KATHLEEN M. TARRANT, and DEBORAH)
DAILEY,)

Plaintiffs,)

v.)

Civil No. 2:20-CV-218

PHILIP B. SCOTT, in his official capacity)
as Governor of the State of Vermont,)
T.J. DONOVAN, in his official capacity)
as Attorney General of the State of Vermont,)
and MARK LEVINE, in his official capacity)
as Commissioner of the Vermont Department of)
Health,)

Defendants.)

DEFENDANTS’ OPPOSITION TO PLAINTIFFS’ SECOND MOTION FOR PRELIMINARY INJUNCTION

Defendants Philip B. Scott, Thomas J. Donovan, Jr., and Mark Levine, each in his official capacity, by and through their attorneys, the Vermont Attorney General’s Office, oppose Plaintiffs’ “Urgent Request for an Immediate Emergency Injunction” (hereinafter “motion”) and submit the following Memorandum of Law.¹

1 Plaintiffs filed their original complaint on Dec. 23, 2020 and their First Amended Complaint (FAC) on Jan. 11, 2021. They also filed their first motion for a preliminary injunction on Jan. 11, 2021. Defendants moved to dismiss the First Amended Complaint under Rules 12(b)(1) and 12(b)(6) for lack of subject-matter jurisdiction and failure to state a claim on Jan. 25, 2021. Defendants also filed an opposition to Plaintiffs’ first motion for a preliminary injunction on Jan. 25, 2021. Plaintiffs did not file a reply to Defendants’ opposition to Plaintiffs’ first motion for a preliminary injunction, and the Court has not ruled on it. On Feb. 19, 2021, Plaintiffs filed a motion requesting an extension of time to respond to Defendants’ motion to dismiss. This Court granted that motion on Feb. 19, 2021, giving Plaintiffs until Apr. 15, 2021 to respond to Defendants’ motion to dismiss. Plaintiffs have not yet responded to Defendants’ motion to dismiss. Plaintiffs filed a second motion for a preliminary injunction—the motion at issue here—on Mar. 2, 2021. Plaintiffs moved for leave to amend their complaint again on Mar. 14, 2021.

MEMORANDUM OF LAW

Plaintiffs request that this Court issue a mandatory injunction requiring the State to publish misinformation about the COVID-19 vaccines.² They also request that the Court restrain the State from vaccinating people without first providing them with this misinformation. Finally, they request that the Court restrain the State from loosening quarantine and multi-household gathering restrictions for people who have been fully vaccinated.

Plaintiffs' motion should be denied. Plaintiffs have not begun to carry the burden of showing they are entitled to the extraordinary remedies requested. They have identified no harm they will suffer—aside from generalized grievances about the State's policy decisions—in the absence of an injunction. They have shown no likelihood of success on the merits, as the requested relief does not relate to the claims in their FAC; they lack standing and therefore this Court lacks subject-matter jurisdiction; and even if they *had* brought any claim regarding the State's vaccination program in the FAC, it would be meritless. Finally, the balance of the equities and the public interest weigh decisively against Plaintiffs' requested injunction.

ARGUMENT

I. Legal Standard

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Sussman v. Crawford*, 488 F.3d 136, 139–40 (2d Cir. 2007) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citations and internal quotation marks omitted). “[T]o obtain a preliminary injunction against governmental action taken pursuant to a

² See *infra* n.5.

statute, the movant has to demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction. The movant also must show that the balance of equities tips in his or her favor.” *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 176 (2d Cir. 2020) (quoting *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020)). A party seeking a mandatory injunction, that is, an injunction that would disrupt the status quo, “must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits.” *N. Am. Soccer League, LLC v. United States Soccer Fed’n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018).

II. Plaintiffs do not allege irreparable harm.

Plaintiffs have not borne their burden of showing that that they would likely suffer irreparable harm without an injunction. They do not even explain how irreparable injury to them might be possible.³ Plaintiffs’ motion does not explain how any action by Defendants has personally affected Plaintiffs. *See generally* Mtn., ECF Docket No. 26. Plaintiffs’ motion simply indicates that they disagree with Defendants’ policy decisions. Attachment 7 indicates that Plaintiff Peyton, an unsuccessful gubernatorial candidate, disagrees with Governor Scott and is “fleeing the state to retain [her] bodily autonomy” because she (incorrectly) perceives Vermont to be mandating vaccination against COVID-19. ECF Docket No. 26-8 at 5.

III. Plaintiffs have demonstrated no likelihood of success on the merits.

Plaintiffs cannot succeed on the merits for a number of reasons: the motion does not relate to claims in the FAC; the Court lacks subject-matter jurisdiction over Plaintiffs’ claims; the State has not mandated vaccinations; even if the State *were* mandating vaccination, the U.S. Supreme

³ Even if Plaintiffs had provided some theory as to the possibility of irreparable harm, “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm” would be inconsistent with the Supreme Court’s direction that injunctive relief is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

Court and Second Circuit have held doing so is constitutional; and to the extent Plaintiffs are arguing that differential treatment of vaccinated and unvaccinated individuals violates any constitutional right, courts have found such claims meritless.

Plaintiffs' motion fails first because it does not relate to the claims in Plaintiffs' FAC. *See, e.g., De Beers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 220 (1945) (preliminary injunction appropriate to grant intermediate relief of "the same character as that which may be granted finally," but inappropriate where the injunction "deals with a matter lying wholly outside of the issues in the suit"); *Williams v. N.Y.C. Dep't of Corr.*, No. 19CV3347LJLJLC, 2020 WL 7079497, at *2 (S.D.N.Y. Dec. 3, 2020) ("An injunction is a remedy for a violation alleged in a complaint."); *Cosby v. Tawana*, No. 3:19-CV-401 (MPS), 2019 WL 5299664, at *5 (D. Conn. Oct. 18, 2019) ("Because the plaintiff must demonstrate a likelihood of success on the merits of his claims in the complaint to obtain preliminary injunctive relief, the injunctive relief requested must relate to the claims in the complaint."). Plaintiffs' requested relief—that the Court enjoin the State from lifting quarantine requirements only for those who are vaccinated; order Defendants to publish statements specified by Plaintiffs; and enjoin vaccinations absent such publication—is not requested in the FAC nor is it related to the claims in the FAC. *See generally* FAC. In fact, the FAC expressly disclaims a claim regarding vaccination: "It is difficult to argue that the State of Vermont is not manipulating the public . . . to coerce Vermonters into accepting an experimental vaccine that for the first time in FDA history utilizes mRNA at this point, we are not addressing the lawfulness or lawlessness of these actions" FAC ¶ 59. Moreover, even if Plaintiffs were permitted to amend their complaint to include such claims, those claims are meritless and amendment would be futile. *See Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 633 (2d Cir. 2016) (noting that "[a]lthough district judges should, as a general matter, liberally

permit pro se litigants to amend their pleadings, leave to amend need not be granted when amendment would be futile” and rejecting “new allegations plaintiff wished to assert” as “merely conclusory”).

Second, Plaintiffs have no likelihood of success because as Defendants’ Motion to Dismiss, ECF Docket No. 20, explains in detail, this Court lacks subject-matter jurisdiction over all of Plaintiffs’ claims due to lack of standing. *See A.H. v. French*, No. 2:20-CV-151, 2021 WL 62301, at *9 (D. Vt. Jan. 7, 2021) (declining to issue preliminary injunction against defendant as to whom plaintiffs had not established standing). “Standing is a federal jurisdictional question ‘determining the power of the court to entertain the suit.’” *Carver v. City of N.Y.*, 621 F.3d 221, 225 (2d Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). “A party who fails to show a ‘substantial likelihood’ of standing is not entitled to a preliminary injunction.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Accordingly, “in order to seek injunctive relief, a plaintiff must show the three familiar elements of standing: injury in fact, causation, and redressability.” *Cacchillo v. Insmad, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011).

Moreover, when seeking a preliminary injunction, a plaintiff’s burden to demonstrate standing “will normally be no less than that required on a motion for summary judgment.” *Lujan v. Nat’l Wildlife Fed’n (Lujan I)*, 497 U.S. 871, 907 n.8 (1990). To establish standing for a preliminary injunction, a plaintiff cannot rest on allegations, but rather must establish standing by affidavit or other evidence. *Cacchillo*, 638 F.3d at 404. Plaintiffs have not done so for any of their claims. The purported affidavit⁴ accompanying the motion underscores that Plaintiffs’ policy concerns surrounding vaccination are “impermissible generalized grievance[s].” *Lujan v.*

⁴ To Defendants’ knowledge, Plaintiff Peyton has not yet filed a notarized version of the affidavit as she represented she would. *See* ECF Docket No. 26-8 at 7.

Defs. of Wildlife (Lujan II), 504 U.S. 555, 575 (1992) (quotation omitted). As this Court lacks subject-matter jurisdiction over Plaintiffs' claims, it cannot grant a preliminary injunction.

Third, Plaintiffs suggest the State has mandated vaccination because it has “prohibited travel” and “prohibited gatherings” for those who are unvaccinated. ECF Docket No. 26 at 3. The State has not prohibited travel, prohibited gatherings, or mandated vaccination. As the Agency of Commerce and Community Development guidance to which Plaintiffs cite makes clear, travel is not prohibited. Those coming into Vermont simply must complete either a fourteen-day quarantine or a seven-day quarantine followed by a negative test in their home state or upon arrival in Vermont. Lindsay Kurrle, *Update 45 – New Work Safe Additions to the Be Smart, Stay Safe Order*, Agency of Commerce & Community Development (Mar. 12, 2021).⁵ Those who have been vaccinated do not need to quarantine after they have passed fourteen days since their final vaccine dose. *Id.* Limited multi-household gatherings are permitted: Vaccinated individuals or households may get together with any other vaccinated individuals or households, and with one unvaccinated individual or household at a time. *Id.* Individuals and households who are not fully vaccinated may gather with vaccinated households, as well as with one other unvaccinated individual or household at a time. *Id.* Unvaccinated households or individuals may gather with more than one other unvaccinated household or individual, as long as there are only two unvaccinated households or individuals at any one gathering. *Id.* The State has therefore not prohibited travel or gatherings for people who are unvaccinated; it is simply requiring them to take precautions. Finally, the State has not mandated vaccination. The State is simply

⁵ <https://accd.vermont.gov/news/update-new-work-safe-additions-be-smart-stay-safe-order>

“offer[ing]” the vaccine.⁶ *About COVID-19 Vaccines in Vermont*, Vt. Dep’t of Health (Mar. 11, 2021).⁷

Even if the State *were* mandating vaccination, compulsory vaccination to protect the public from a dangerous disease is constitutional. *See Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (upholding regulation compelling smallpox vaccination).⁸ As *Jacobson* held, “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members” and accordingly the Court could not find that a regulation mandating vaccination “was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.” *Id.* at 27–28; *see also Phillips v. City of New York*, 775 F.3d 538, 542

⁶ Although Plaintiffs believe the vaccines are dangerous, ECF Docket No. 26 at 11, the three COVID-19 vaccines the State is currently offering—the Pfizer-BioNTech, Moderna, and Janssen-Johnson & Johnson vaccines—have all received Emergency Use Authorization from the Food and Drug Administration. *About COVID-19 Vaccines in Vermont*, Vt. Dep’t of Health (Mar. 11, 2021), <https://www.healthvermont.gov/covid-19/vaccine/about-covid-19-vaccines-vermont>; *see also COVID-19 Vaccines*, U.S. Food & Drug Admin., <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines> (last visited Mar. 11, 2020). They are all safe and effective. *COVID-19 Vaccines*, Ctrs. for Disease Control & Prevention (Mar. 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/safety-of-vaccines.html>. Some people have no side effects from the vaccine; many have mild side effects. *Selected Adverse Events Reported after COVID-19 Vaccination*, Ctrs. for Disease Control & Prevention (Mar. 9, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>. In rare cases, as with all vaccines, some people may experience anaphylaxis, but vaccine providers can quickly and effectively treat this. *Id.* Anaphylaxis occurs in only about two to five people per million vaccinated. *Id.* The CDC has no evidence of any COVID-19 vaccine contributing to any deaths. *Id.*

Judicial notice of each of these facts is appropriate. “Since the onset of the pandemic, courts in [the Second] circuit have routinely taken judicial notice of the likely risks and severity of COVID-19 and the potential efficacy of mitigation measures.” *Joffe v. King & Spalding LLP*, No. 17-CV-3392 (VEC), 2020 WL 3453452, at *7 (S.D.N.Y. June 24, 2020). Judicial notice of facts from government sources such as the CDC is appropriate. *See Delaney v. Baker*, No. CV 20-11154-WGY, 2021 WL 42340, at *7 (D. Mass. Jan. 6, 2021).

⁷ <https://www.healthvermont.gov/covid-19/vaccine/about-covid-19-vaccines-vermont>

⁸ *Jacobson* is still binding precedent. *Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 465437, at *5 (S.D.N.Y. Feb. 9, 2021).

(2d Cir. 2015) (“Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors. Plaintiffs’ substantive due process challenge to the mandatory vaccination regime is therefore no more compelling than *Jacobson*’s was more than a century ago.”).

Finally, to the extent Plaintiffs take issue with the State’s loosened quarantine and gathering restrictions for those who are vaccinated, they cite to no authority—and the State is aware of none—indicating that this distinction is not lawful. Courts have upheld different treatment of those who are vaccinated and unvaccinated against numerous constitutional challenges. *See Phillips*, 775 F.3d at 543 (holding mandatory vaccination as condition for admission to school did not violate Free Exercise Clause, substantive due process, or equal protection, and “New York could constitutionally require that all children be vaccinated in order to attend public school” (citing *Workman v. Mingo County Bd. of Educ.*, 419 F. App’x 348, 353–54 (4th Cir. 2011)); *W.D. v. Rockland Cty.*, No. 19 CIV. 2066 (JCM), 2021 WL 707065, at *35 (S.D.N.Y. Feb. 22, 2021) (dismissing due-process, freedom-of-assembly, equal-protection, and free-exercise challenges to vaccination requirement that, among other things, “prevented unvaccinated children from attending religious gatherings of ten or more persons,” as “it was temporary and did not cancel religious gatherings altogether”); *C.F. v. N.Y. City Dep’t of Health & Mental Hygiene*, 191 A.D.3d 52 (N.Y. App. Div. 2020) (holding requirement that any person living, working, or attending school or childcare in certain areas had to be immunized against measles, absent a medical exemption, “did not violate any right of the petitioners, including their freedom of religion”); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1088 (S.D. Cal. 2016) (“[T]here is a rational basis for treating children with [personal belief exemptions] differently

from other children: The former are not completely vaccinated, if at all, while the latter are fully vaccinated. Allowing the latter to attend school and excluding the former is rationally related to the State’s interest in protecting public health and safety.”). Thus, any claim that the State is impermissibly mandating vaccination or treating nonvaccinated persons differently fails as a matter of law.

IV. The balance of the equities and the public interest weigh against granting the injunction.

Plaintiffs request that this Court issue a mandatory injunction requiring the State of Vermont to publish misinformation.⁹ An injunction by a federal court compelling a State government to adopt a certain policy stance would violate the principles of federalism and separation of powers. *Cf. Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932 (PAC), 2021 WL 465437, at *10 (S.D.N.Y. Feb. 9, 2021) (holding that “principles of federalism, separation of powers, and judicial modesty demand that the Court respect Governor Cuomo’s policy decision”). It would also inflict harm on the public by, at a bare minimum, “inject[ing] ‘uncertainty into an area where uncertainty has human costs.’” *Id.* at *10 (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (Kagan, J., dissenting)). The public interest strongly weighs against Plaintiffs’ requested mandatory injunction.

⁹ To take a few examples, contrary to the language Plaintiffs ask the Court to require the State to publicize: the vaccines do not affect individuals’ DNA in any way. *Understanding mRNA COVID-19 Vaccines*, Ctrs. for Disease Control & Prevention (Mar. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/mRNA.html>. Recent studies suggest that a person who is vaccinated is less likely to infect other people with the virus. *Coronavirus (COVID-19) Frequently Asked Questions*, Vt. Dep’t of Health (Mar. 10, 2021), <https://apps.health.vermont.gov/COVID/faq/#vaccine>; see also *Interim Public Health Recommendations for Fully Vaccinated People*, Ctrs. for Disease Control & Prevention (Mar. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (recommending relaxed restrictions for vaccinated individuals, noting “a growing body of evidence suggests that fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others”). The COVID-19 vaccines are vaccines; and compensation for people injured by a vaccine is available. See *Fact Sheet for Recipients and Caregivers Emergency Use Authorization (EUA) of the Pfizer-Biontech Covid-19 Vaccine to Prevent Coronavirus Disease 2019 (Covid-19) in Individuals 16 Years of Age and Older*, U.S. Food & Drug Admin. (Feb. 25, 2021), <https://www.fda.gov/media/144414/download>.

Next, Plaintiffs “request that no vaccination shall occur” unless the State publishes the misinformation specified by Plaintiffs. Mtn., ECF Docket No. 26 at 1, 10-11. Enjoining the State’s efforts to offer all Vermonters COVID-19 vaccines would be a catastrophic setback to the State’s efforts to reduce the spread of COVID-19, save lives, prevent illness, and ultimately bring the pandemic to an end. As the Supreme Court held in *Jacobson* with regard to a smallpox outbreak, because “vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.” 197 U.S. at 35. Vaccination is no less critical to public health or strongly supported by science than it was when *Jacobson* was decided in 1905.

Plaintiffs also request an injunction prohibiting the State from loosening restrictions for people who have been vaccinated. Plaintiffs identify no personal harm that will befall them if looser restrictions on quarantining and multi-household gatherings are applied to vaccinated individuals. Indeed, Plaintiffs’ request that this Court enjoin the State from loosening its COVID-19-related restrictions appears to be at odds with Plaintiffs’ request in the FAC that the Court strike down and enjoin further COVID-19-related restrictions. *See, e.g.*, FAC ¶ 265.

Because Plaintiffs have identified no personal harm or injury that they would suffer absent this injunction, and because Plaintiffs’ requested injunctive relief could have potentially catastrophic consequences for the public health in Vermont, this final factor—like all of the other factors—weighs decisively against Plaintiff’s requested injunction. *Cf. Tandon v. Newsom*, No. 20-CV-07108-LHK, 2021 WL 411375, at *42 (N.D. Cal. Feb. 5, 2021) (“If the Court overrode the State’s and County’s public health officials and enjoined” measures to slow spread of

COVID-19, “then more deaths, more serious illnesses, and more strain on California’s already overburdened healthcare system would result. . . . Plaintiffs have not carried their burden of demonstrating that an injunction is in the public interest.”).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs’ motion for a preliminary injunction.

DATED at Montpelier, Vermont this 16th day of March 2021.

STATE OF VERMONT

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