Kevin McBride (SBN 11685)
McBRIDE LAW PC
700 S. Flower Street, Suite 1000
Los Angeles, CA 90017
Telephone: (213) 600-6077
Facsimile: (213) 600-6005
Email: km@mcbride-law.com

John W. Howard (SBN 80200)
Michelle D. Volk (SBN 217151)
JW HOWARD/ATTORNEYS, LTD.
701 B Street, Suite 1725
San Diego, California 92101
Telephone: 619-234-2842
Facsimile: 619-234-1716
Email: johnh@jwhowardattorneys.com

Scott J. Street (SBN 258962)
JW HOWARD/ATTORNEYS, LTD.
777 S. Figueroa Street, Suite 3800
Los Angeles, CA 90017
Email: sstreet@jwhowardattorneys.com

Attorneys for Plaintiff

Robert F. Kennedy, Jr. (*pro-hac vice* pending)
KENNEDY & MADONNA, LLP
48 Dewitt Mills Road
Hurley, NY 12443
Telephone: (845) 481-2622

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Central Division – Stanley Mosk Courthouse)

FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY FIREFIGHTERS,

Plaintiff,

vs.

CITY OF LOS ANGELES,

Defendant.

Case No.: 21STCV34490

Judge: Stephanie M. Bowick, Dept. 19

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND DECLARATORY AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Complaint filed: Sept. 19, 2021
Initial Case Mgmt. Conf.: Feb. 7, 2022

Plaintiff, for and on behalf of over 529 Los Angeles City Firefighters ("Firefighters"), alleges against Defendant the following claims and causes of action:

INTRODUCTION

1. The Covid-19 pandemic has been running for more than a year and a half. For the majority of that time, schools were shut. Businesses were forced to close. Even government agencies operated "remotely," meeting by phone or videoconference to conduct the public's business.

2. But while others were inside protecting their own health, firefighters stepped to the frontlines of the pandemic, selflessly protecting citizens of this City. For their trouble, 1,079 Los Angeles City firefighters either contracted or were impacted by Covid—one-third of the entire force. Aside from all else written below, these men and women have *earned* the right—through their willing acceptance of Covid risk in helping others—to have a say in whether to take the experimental Covid shots into their own bodies; particularly where: (a) reasonable accommodations clearly exist for a middle-ground solution between privacy rights and public rights, and (b) current evidence suggests the current therapies may actually exacerbate spread of the Delta variant of the Covid virus, not stop it.

3. Despite this, Firefighters are now pawns in a political chess match, ordered by thirteen politicians on the Los Angeles City Council to inject themselves with an experimental medical treatment, over their objections, or lose their jobs.

4. As will be shown at the time of trial and in preliminary hearings, the City does not have the Constitutional authority to force anyone to take an experimental vaccine against his or her will without considering, and granting where possible, reasonable accommodations for those

who chose to not take the vaccine. The City does not have that power as an employer. It does not have that power as the sovereign. It does not have that power under normal times, nor during an emergency.

5. Covid-19 no longer poses the immediate threat it may have posed last spring. The Los Angeles Metro System has returned to pre-pandemic service levels. Dodger Stadium was filled for the playoffs. Even the Governor has rescinded 90 percent of his emergency Covid orders. There is no basis for the City's rushed and ill-conceived mandate.

6. The City's vaccine mandate violates the Firefighters' right to privacy under the California Constitution. The California Constitution provides an *explicit* constitutional privacy right (compared to the *implicit* privacy right under the federal constitution) that has been applied to invalidate similar intrusions of a person's bodily integrity. To satisfy the California Constitution, the City must consider and offer reasonable accommodations as a middle ground between individual freedoms and collective rights. It did not do that. Instead, the City Council viewed this sensitive personal issue through the lens of partisan politics, saying they "want[ ] a vaccinated workforce." The California Constitution requires far more than that conclusory (and blatantly political) wish before invading the bodily integrity of thousands of public employees.

7. Even if the City had the power to order forced vaccinations of its employees or residents (which it does not), it must show that compulsory injection of the entire population is the least restrictive way to mitigate the effects of Covid-19. The City cannot show that because the evidence does not support it. In fact, there is mounting evidence that the Covid-19 shots do not prevent the virus from spreading and may only provide protection against serious illness, a benefit that does little, if anything, for firefighters. Thus, the vaccine mandate is both unnecessary and ineffective in protecting the public.

8. These are not trivial concerns. The Covid-19 shots may—or may not—be safe for most people. We won't know if they are safe until, at minimum, the 20 primary clinical trials underway to answer this very question are completed and time has passed to assess long-term effects. (See Attachment A)

9. As of August 31, 2021, 477,447 adverse reactions have been reported to the Department of Health and Human Services, many in otherwise healthy people (https://VAERS.hhs.gov). These statistics include 6,112 deaths, 7,829 life threatening illnesses and 28,035 hospitalizations. The people of Los Angeles cannot afford to put their firefighters at additional health risk when the force is already depleted and inadequately staffed. The people of Los Angeles cannot afford to lose the large percentage of their firefighters that the City has threatened to fire if they do not get a Covid shot, especially during the peak of fire season.

10. Firefighters4Freedom brings this action for declaratory and injunctive relief to declare the City's vaccine mandate unlawful and to enjoin the City from enforcing it.

PARTIES AND JURISDICTION

11. Plaintiff is a California non-profit 501(c)(3) corporation whose mission is to support all Firefighters' freedom of choice in employment and public union related matters, including but not limited to: freedom of speech, religion, assembly and privacy; and to act on behalf of public employees in this State to secure and protect these rights.

12. The City of Los Angeles is a municipal corporation organized under the laws of this State.

13. Venue exists in Los Angeles County under sections 393(b) and 394(a) of the Code of Civil Procedure because the Complaint alleges claims against a municipal entity that exists and operates in Los Angeles County and because the effects of the City's ordinance will be

felt here.

LOS ANGELES CITY ORDINANCE NO. 187134

14. On August 16, 2021, the Los Angeles City Council adopted Ordinance 187134, adding Article 12 to Chapter 7 of Division 4 of the Los Angeles Administrative Code to require, among other things, Covid-19 vaccination for all current and future city employees (the "Covid Vaccine Ordinance") (Attachment B).

15. In addition, the Ordinance requires that all City employees report their vaccination status in accordance with the City's Workplace Safety Standards, no later than October 19, 2021. (Covid Vaccine Ordinance §4.701(a))

16. As of October 20, 2021, the Covid-19 vaccination and reporting requirements are conditions of City employment and a minimum requirement for all employees, unless approved for an exemption from the Covid-19 vaccination requirement as a reasonable accommodation for a medical condition or restriction or sincerely held religious beliefs. Any employee that has been approved for an exemption must still report their vaccination status. (Covid Vaccine Ordinance §4.701(b))

17. As justification for passing this ordinance, the City Council asserted the following findings (the "Vaccine Ordinance Findings"):

- *Vaccination is the most effective way to prevent transmission and limit Covid-19 hospitalizations and deaths.*
- *Unvaccinated employees are at a greater risk of contracting and spreading Covid-19 within the workplace, and risk transmission to the public that depends on City services.*

(Covid Vaccine Ordinance §2)

18. On information and belief, in declaring the Vaccine Ordinance Findings, the City failed to engage in a meaningful scientific review of available data and evidence concerning: (a)

whether or not vaccination is, in fact, the most effective way to prevent transmission and limit Covid-19 hospitalizations and deaths; and (b) whether or not unvaccinated employees are, in fact, at a greater risk of contracting and spreading Covid-19 within the workplace, and risk transmission to the public that depends on City services.

19. Further, on information and belief, the City also failed to consider reasonable accommodations for the firefighting force who oppose mandatory vaccinations and failed to consider least restrictive alternatives.

COVID SPREAD CHARACTERISTICS AND TRANSMISSION RISK

20. LA City claims in the Ordinance Findings that unvaccinated employees are at a greater risk of contracting and spreading COVID-19 within the workplace, and risk transmission to the public that depends on City services. This assertion is contrary to the preponderance of scholarly evidence now emerging regarding the Delta variant of the Covid virus on both sides of the vaccine debate.

21. A preponderance of evidence shows an increased "viral load" after vaccination, which tends to actually increase the spread of Covid-19 by vaccinated people. A recent study found vaccinated individuals carry 251 times the load of Covid-19 viruses in their nostrils compared to the unvaccinated.

22. According to the CDC, for those who are fully vaccinated and get infected (i.e, "breakthrough infections"), there is still a risk of transmission to others. In July 2021, a CDC study CDC noted 469 cases of covid-19 where approximately three quarters (346; 74%) of cases occurred in fully vaccinated persons; i.e., those who had completed a 2-dose course of the

mRNA vaccine (Pfizer-BioNTech or Moderna) or had received a single dose of the Janssen (Johnson & Johnson) vaccine.

23. Current studies show that fully vaccinated people carry the same viral load as the unvaccinated, with the Delta variant—which is to say that current vaccines don't materially prevent transmission of the Delta variant.

24. If the goal is to prevent firefighters from contracting and spreading covid-19 within the workplace, and risk transmission to the public that depends on City services, the evidence shows that mandatory vaccination of all Firefighters will actually *thwart* that laudable goal.

THE COVID VACCINES

25. Three Covid vaccines were granted emergency use authorization by the FDA and are currently in use. One is manufactured by Moderna (the "Moderna Vaccine"), a second by Pfizer BioNTech (the "Pfizer Vaccine") and a third by Johnson & Johnson/Janssen (the "J&J Vaccine"). Collectively, the Moderna Vaccine, the Pfizer Vaccine, and the J&J Vaccine are sometimes hereafter referred to collectively as the "Covid Vaccines."

26. However, none of the currently available Covid Vaccines has been approved by the FDA under the statutory approval requirements of the Food, Drug and Cosmetics Act ("FDCA"). Rather, the Covid Vaccines have been authorized for emergency use under § 564 of the FDCA (21 U.S.C. § 360bbb-3) "during the effective period of a declaration [of emergency], of a drug, device, or biological product intended for use in an actual or potential emergency…" 21 U.S.C. § 360bbb-3(a)(1).

27. It is scientifically irrefutable that long term side effects of the Covid Vaccinations are presently unknown. Further, because the human body is a complex biological system, long-

term side effects cannot be accurately forecast using computational technology or statistics. Only laboratory experimental results, and vigilant long term human trial data accumulated over a statistically significant period of time, will allow scientists to reasonably predict the long-term side effects of the Covid Vaccines.

UNKNOWN RISKS OF THE COVID VACCINES

28. As of August 31, 2021, the Vaccine Adverse Effect Reporting System "VAERS Data" maintained by the US Dept. of Health & Human Services (https://VAERS.hhs.gov) has received 447,446 reported adverse effects following administration of a Covid Vaccination in the United States and 6,112 reported deaths. While these numbers are a fraction of the total number of Covid Vaccinations administered in this country, to date, they are not insignificant. The current statistics reported above also do not account for the possibility of ever-increasing adverse reports as the side effects of the Covid Vaccines may be expressed in the months and years ahead, and the likely under-reporting to the VAERS database.

29. While opinions on the efficacy and safety of the Covid Vaccines vary widely, one reasonable opinion is that because the Covid Vaccines are not yet proven safe, a Covid Vaccination should not be taken into a person's body unless and until potential short and long-term effects are better understood. This is the personal viewpoint held by each Firefighter.

FIRST CAUSE OF ACTION

Violation Of Constitutionally Protected Autonomous Privacy Rights

30. Plaintiff re-alleges Paragraphs 1-29, above as though fully set forth herein.

31. The California Constitution, section I, article 1, provides that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and

defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

32. The fundamental right to pursue and obtain safety, happiness, and privacy, as expressed through public policies of this State, is protected against all state action.

33. The right of individuals to determine what is done to their own bodies is one such expressed public policy of this State; and is an inalienable autonomy privacy right protected under the California Constitution and at common law.

34. In addition, the right to exercise informed consent to accept, or not accept, novel and unproven medical treatments without force, fraud, deceit, duress, coercion, or undue influence is another expressed public policy of this State; and is an inalienable autonomy privacy right protected under the California Constitution, section I, article 1; and at common law.

35. Firefighters have a legally protected privacy interest in their bodily integrity and their right to choose which medical treatment they receive. They also have a reasonable expectation of privacy in these circumstances, as the long-term side effects of the Covid vaccines are presently unknown to a reasonable degree of scientific certainty. Indeed, long-term side effects are typically studied for 10 years before FDA approval is granted to any proposed drug or medication. That level of rigorous experimental evaluation of safety and efficacy has not yet occurred with respect to the Covid vaccines. It is therefore fair and reasonable for Firefighters—or anyone—to object to a Covid injection until long-term side effects are understood.

36. Further, it is scientifically irrefutable that current vaccines available do not prevent spread of the Covid Delta virus and, in fact, might increase spread of the virus due to viral load factors Thus, firefighters are entitled to reasonable accommodations under law that

allow them to continue employment without taking a Covid vaccine, but the City has refused to provide such accommodations.

37. Given these issues and concerns, the City's act of mandating that firefighters take the Covid vaccine by October 15, 2021 or be fired—and their conditioning of future employment on proof of Covid vaccination—constitutes a serious invasion of the firefighters' privacy and violates the California Constitution.

38. In light of existing reasonably available accommodations that may be presented at the time of hearing or trial in this matter, Defendant have no legitimate employer interest in mandating vaccinations for City employees.

39. An existing justiciable controversy exists between Firefighters and Defendant with respect to Defendant's mandate for all City employees to receive a Covid Vaccination and Firefighters' objection to this mandate.

40. Pursuant to CCP §1060, and at common law, Firefighters are entitled to declaratory relief that:

a. Defendant's requirement that Firefighters must receive a Covid Vaccination as a condition of continued employment violates Firefighters' inalienable autonomous rights to determine what is done to their own bodies;

b. Defendant's requirement that Firefighters must receive a Covid Vaccination as a condition of continued employment violates Firefighters' inalienable autonomous rights to exercise informed consent to accept, or not accept, novel and unproven medical treatments without force, fraud, deceit, duress, coercion, or undue influence; and

c. Accommodations are reasonably available to Defendant that would allow continued employment without a Covid Vaccine.

41. Firefighters are entitled to preliminary and permanent injunctive relief:

a. prohibiting Defendant from enforcing its mandate that Firefighters must receive a Covid Vaccination as a condition of continued employment;

b. requiring Defendant to offer reasonable accommodations to Firefighters to allow continued employment without a Covid Vaccination;

c. prohibiting discrimination or retaliation.

42. Firefighters are entitled to a temporary restraining order prohibiting the Defendant' vaccination mandate from going into effect until a preliminary injunction hearing in this matter and further order of this Court.

43. Firefighters are entitled to costs and attorneys' fees in this action pursuant to CCP §1021.5.

SECOND CAUSE OF ACTION

Ultra-Vires Legislation

44. Plaintiff re-alleges and incorporates by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

45. California Constitution article XI, section 5(a) provides, in part, that a City "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

46. While a City's legislative authority under its police powers is broad, to be sure, it is not unlimited. Limitations on a City's legislative power arise in instances when legislation affecting certain specific rights: namely, those which either have been afforded express

constitutional protection or are of a character so fundamental or "implicit in the concept of ordered liberty" is subjected to a more searching level of scrutiny.

47. Such is the case here. At issue are Firefighters' constitutional rights to privacy guaranteed under the Constitution, article I, section 1, which are of a character so fundamental or "implicit in the concept of ordered liberty" as to be subjected to a more searching level of scrutiny.

48. The City ultra-vires adoption of the Covid Vaccine Ordinance fail to meet a more searching level of scrutiny. The City's rationale for the Covid Vaccine Ordinance does little more than repeat discredited political platitudes about the spread characteristics of Covid and the risk of contracting and spreading Covid. The "Findings" offered by the City in the Covid Vaccine Ordinance concerning spread characteristics and risk of contracting and spreading Covid are squarely refuted by highly reputable medical experts on both sides of the vaccine debate.

49. For these reasons, the City's adoption of the Covid Vaccine Ordinance exceeds its constitutional authority by failing to consider and adopt less restrictive alternatives than its blanket Covid mandate and is an ultra-vires, unconstitutional enactment.

50. Pursuant to CCP §1060, and at common law, Firefighters are entitled to declaratory relief that:

a. The City Ordinance exceeds legislative powers of the City Council by failing to account for constitutional protections provided each Firefighter under Constitution article I, section 1; and

b. The City has failed to consider and adopt the least restrictive alternatives to protect Firefighters' constitutional rights, in the context of protecting the public

during the Covid pandemic.

51. Firefighters are entitled to a temporary restraining order prohibiting Defendant' vaccination mandate from going into effect until a preliminary injunction hearing in this matter and further order of this Court.

52. Firefighters are entitled to costs and attorneys' fees in this action pursuant to CCP §1021.5.

THIRD CAUSE OF ACTION

Violation of Fourteenth Amendment

Substantive Due Process – 42 U.S.C. § 1983

53. Plaintiff realleges and incorporates by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

54. The Mandate and various City Departments' General Orders enforcing it violates the liberty protected by the Fourteenth Amendment to the Constitution, which includes rights of personal autonomy, self-determination, bodily integrity, and the right to reject medical treatment.

55. The ability to decide for oneself whether to accept or refuse medical treatment is a fundamental right.

56. The COVID vaccines are not vaccines, but are, as a factual matter, treatments. They are referred to herein as vaccines, but they are not. They are treatments.

57. Because the COVID vaccines are treatments – not vaccines – strict scrutiny applies. The High Court has recognized a "general liberty interest in refusing medical treatment." (Cruzan by Cruzan v. Director, Missouri Dept. of Health (1990) 497 U.S. 261, 278.) It has also recognized that the forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. (Washington v.

Harper (1990) 494 U.S. 210; see also id at 223 (further acknowledging in dicta that, outside of the prison context, the right to refuse treatment would be a "fundament right" subject to strict scrutiny."

58. Accordingly, the Mandate and various City Departments' General Orders enforcing it violates the Plaintiff's constitutional right to decisional privacy regarding medical treatment.

59. As mandated medical treatments are a substantial burden, Defendant must prove that the Mandate is narrowly tailored to meet a compelling interest.

60. No such compelling interest exists because, as alleged above, the COVID vaccines are not effective against the now dominant Delta variant of COVID in that they do not prevent the recipient from becoming infected, getting reinfected, or transmitting COVID to others. Indeed, evidence shows that vaccinated individuals have more COVID in their nasal passages than unvaccinated people do. The Delta variant is the current variant and accounts for over 90% of the COVID infections in the United States at this time.

61. The COVID vaccines may have been somewhat effective against the original COVID strain, but that strain has come and gone, and the COVID vaccines—designed to fight yesterday's threat—are simply ineffective against the current Delta variant.

62. Since the COVID vaccines are ineffective against the Delta variant, there can be no compelling interest to mandate their use at this time.

63. But even if there were a compelling interest in mandating the COVID vaccinations, the Mandate is not narrowly tailored to achieve such an interest.

64. The blanket Mandate ignores individual factors increasing or decreasing the risks that the plaintiff—indeed, all City employees—pose to themselves or to others.

65. Defendant entirely disregards whether employees have already obtained natural immunity despite the fact that natural immunity does actually provide immunity whereas the COVID vaccines do not.

66. Treating all employees the same, regardless of their individual medical status, risk factors, and natural immunity status is not narrowly tailored.

67. Pursuant to 42 U.S.C. § 1983, Plaintiff is entitled to temporary, preliminary, and permanent injunctive relief restraining Defendant from enforcing the Mandate.

FOURTH CAUSE OF ACTION

Violation of Fourteenth Amendment

Equal Protection 42 U.S.C. § 1983

68. Plaintiff realleges and incorporate by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

69. The Equal Protection Clause prohibits classifications that affect some groups of citizens differently than others. (Engquist v. Or. Dept. of Agric. (2008) 553 U.S. 591, 601.) The touchstone of this analysis is whether a state creates disparity between classes of individuals whose situations are arguably indistinguishable. (Ross v. Moffitt (1974) 417 U.S. 600,609.)

70. The Mandate creates two classes of City employees; vaccinated and unvaccinated, as well as employees who have reported their vaccination status to the City and those who have not. The members of one class, the unvaccinated, get terminated. The same is true for the non-reporting class irrespective of vaccination status. In either event they cannot advance their careers. They cannot provide for their families, pay their mortgages, or make a car payment. The other class, the vaccinated and reporting, gets to keep their job in their chosen profession, advance their careers, provide for their families, pay their mortgages, and make their car payments.

71. Yet the situations of these employees are indistinguishable because vaccinated and reporting City employees can become infected with COVID, become re-infected with COVID, and can transmit COVID to fellow employees, school visitors, and students. The vaccines make no difference in these respects. Their only function is to make symptoms less severe.

72. Discriminating against the unvaccinated and non-reporting controverts the goals of the Equal Protection Clause – i.e., to abolish barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

73. Pursuant to 42 U.S.C. § 1983, Plaintiff is entitled to temporary, preliminary, and permanent injunctive relief restraining Defendant from enforcing the Vaccine Mandate.

FIFTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

74. Plaintiff realleges and incorporate by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

75. Defendant's imposition of mandatory vaccination in violation of the Plaintiff's rights under Article 1, Section 1 of the Constitution of the State of California was accompanied by threats by Defendant of retaliation, termination of employment, loss of health and retirement benefits, loss of salary, and destruction of careers. The conduct as herein alleged was extreme and outrageous and was knowingly and deliberately carried out for purposes of intimidation and coercion to force the Plaintiff to accede to treatments the Defendant knew, or should have known, were neither fully tested nor safe and to which Plaintiff's members had a sincere and deeply held conscientious objection to receiving.

76. As a result of Defendant's extreme and outrageous conduct, the Plaintiff's members have suffered sleeplessness, anxiety, fear, apprehension, nausea and fatigue, to their

damage. Said conduct resulted in extreme emotional distress to an extent that has not yet been fully quantified. Plaintiff will seek leave to amend this complaint to allege the full extent of said damage when same has been fully ascertained. Defendant's conduct was a substantial factor in Plaintiffs' severe emotional distress, as herein alleged. Plaintiff seeks a preliminary and permanent injunctive relief prohibiting Defendant from threatening adverse employment action against Plaintiff as alleged herein, as well as for a temporary restraining order prohibiting this same conduct until a preliminary injunction hearing in this matter and further order of this Court.

SIXTH CAUSE OF ACTION

Invasion of Privacy

77. Plaintiff realleges and incorporates by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

78. Plaintiffs, and all of them, had a reasonable expectation of privacy in their medical information, the discovery and exposure of which would be highly offensive to a reasonable person.

79. Defendant intentionally, unreasonably and unnecessarily intruded on Plaintiff's medical information by requiring that they disclose their vaccination status to Defendant.

80. As a result of Defendant's unreasonable conduct in accessing said information, Plaintiffs have been harmed and injured to an extent that has not, as yet, been fully quantified. Plaintiffs will seek leave to amend this complaint to allege the full extent of said damage when same has been fully ascertained.

81. The Plaintiff's members have not complied with the City's Mandate, including the reporting of their vaccination status. They object to being compelled to turn over their private medical information to the City as a condition of their continued employment.

82. Individuals have a right to privacy under the California Constitution. This state

law privacy right, which was added by voters in 1972, is far broader than the right to privacy under the federal Constitution. It is the broadest privacy right in America and has been interpreted by the California Supreme Court to protect both the right to informational privacy and to bodily integrity.

83. City employees have a legally protected privacy interest not just in their bodily integrity, but in their private medical information as well. Their expectation of privacy is reasonable. The City's Mandate constitutes a serious invasion of those privacy rights, as alleged above. Defendant's intrusion into Plaintiff's private medical affairs would be highly offensive to a reasonable person.

84. Although the City may argue that the vaccine mandate and disclosure of vaccination status serves a compelling interest, there are feasible and effective alternatives that have a lesser impact on privacy interests. Thus, the City's mandate will not survive strict scrutiny.

85. On information and belief, the City contends that its mandate does not violate the privacy rights of City employees or satisfies strict scrutiny.

86. Plaintiff desires a judicial declaration that the City's Mandate is facially unconstitutional because it violates the City's employees' right to privacy under the California Constitution.

87. A judicial determination of these issues is necessary and appropriate because such a declaration will clarify the parties' rights and obligations, permit them to have certainty regarding those rights and potential liability, and avoid a multiplicity of actions.

88. The City's actions have harmed Plaintiff's members among other City employees, as alleged above. Defendant's conduct was a substantial factor in causing Plaintiff's harm.

89. Plaintiff has no adequate remedy at law and will suffer irreparable harm if the Court does not declare the Mandate unconstitutional. Thus, they seek preliminary and permanent injunctive relief enjoining the City from enforcing the mandate.

90. This action serves the public interest, justifying an award of attorneys' fees under section 1021.5 of the California Code of Civil Procedure.

SEVENTH CAUSE OF ACTION

Declaratory and Injunctive Relief under Americans with Disabilities Act

42 USC §§ 12101, *et seq*. – Disparate Treatment and Failure-To-Accommodate

91. Plaintiff realleges and incorporates by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

92. Defendant's enforcement of the Mandate through termination of non-compliant Plaintiff members without engaging in an interactive process with each employee to identify and implement appropriate reasonable accommodations enabling the employee to perform their job duties, directly violates and conflicts with their duties and obligations under the Americans with Disabilities Act ("ADA"). 42 USC §§ 12101, et seq.

93. Defendant has threatened to, and in several instances has, placed Plaintiff members on administrative leave and threatened termination from their employment because of Defendant's belief that Plaintiff's members' physical condition of being unvaccinated and/or having failed to report their vaccination status makes them incapable of performing the duties they previously performed competently for nearly two years since the COVID pandemic first appeared.

94. Defendant's mandatory vaccination is based on Defendant's perception that those

who are unvaccinated present a danger of infection to themselves from contact with others and a danger to others from contagion. As a consequence, it is apparently Defendant's view that without the safety of vaccination and reporting, Plaintiff's members are not capable of performing their work by reason of their physical condition and thus are regarded as being disabled.

95. Defendant's threat to terminate the Plaintiff's members' employment by reason of their physical condition constitutes discrimination on the basis of a perception of disability in violation of the ADA, 42 USC 126. See, §§ 12102(3) (forbidding discrimination on the basis of a person being regarded as having an impairment); and § 12112 (forbidding any impairment in the terms of employment of an individual on the basis of a perception of impairment.)

96. Further Plaintiff's members are qualified individuals with a disability, because they remain able, with or without reasonable accommodation, to perform the essential functions of the employment position that Plaintiff's members hold, as demonstrated by the fact Plaintiff has performed their essential job functions competently for nearly two years since the COVID pandemic first appeared and, in many instances, continued those operations without cessation during the worst of the pandemic as essential workers.

97. Further, assuming for the sake of argument, Plaintiff's members become unable to perform their essential job functions by virtue of Defendant's perception that as of the arbitrary and capricious deadlines specified in the Mandate unvaccinated and/or non-reporting employees then present a danger of infection to themselves from contact with others and a danger to others from contagion, there exists an abundance of reasonable accommodations designed to mitigate the risk of contagion that the City implemented, and relied on, such as remote work, social distancing, erecting transparent barriers, face masking, alternate shifts to alleviate crowding in

the work place, advanced cleaning protocols, and efforts to improve ventilation, among other things.

98. An actual controversy involving justiciable questions related to this controversy exists related to the rights and obligations of the respective parties with respect to the ADA.

99. Plaintiff seeks a judicial declaration that proceeding with the imposition of the threatened employment sanctions is a violation of the ADA and seek an order restraining and enjoining Defendant from violation of the ADA by employment sanction on the basis of perceived physical disability.

EIGHTH CAUSE OF ACTION

Violation of Due Process – *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194

100. Plaintiff realleges and incorporates by reference their allegations in each of the preceding paragraphs of the Complaint as if fully alleged herein.

101. Defendant has suspended various City employees, including Plaintiff's members by placing them on administrative leave for failure to comply with the Mandate.

102. Under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 and its progeny, Plaintiff has a property interest in continued employment with City protected by due process.

103. On information and belief, the City contends that it does not have to afford Plaintiff 's members a full and complete *Skelly* hearing and rights and has instead suspended its employees administratively, including Plaintiff's members, for five days or more, without a hearing within a reasonable time thereafter and providing written notice explaining: (i) the charge; (ii) proposed discipline; (iii) the policy or rule violated; (iv) the factual basis for the same; (v) produced the documents purporting to support the charge(s); (vi) containing a date for an in-person hearing; and (vii) the deadline for any response.

104. An actual controversy involving justiciable questions related to this controversy exists related to the rights and obligations of the respective parties with respect to Plaintiff's and City employees' rights under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 and its progeny

105. Plaintiff seeks a judicial declaration that proceeding with the imposition of the threatened employment sanctions is a violation of Skelly and seek an order restraining and enjoining Defendant from proceeding with the imposition of the threatened employment sanctions before affording due process under *Skelly*.

PRAYER

WHEREFORE, Plaintiff prays for relief from this Court as follows:

On the First Cause of Action:

1. Pursuant to CCP §1060, and at common law, a judicial declaration that:
    a. Defendant's requirement that Firefighters must receive a Covid Vaccination as a condition of continued employment violates Firefighters' inalienable autonomous rights to determine what is done to their own bodies; and
    b. Accommodations are reasonably available to Defendant that would allow continued employment without a Covid Vaccine.
2. For preliminary and permanent injunctive relief:
    a. prohibiting Defendant from enforcing its mandate that Firefighters must receive a Covid Vaccination as a condition of continued employment;
    b. requiring Defendant to offer reasonable accommodations to Firefighters to allow continued employment without a Covid Vaccination;
    c. prohibiting discrimination or retaliation;

3. For a temporary restraining order prohibiting the Defendant' vaccination mandate from going into effect until a preliminary injunction hearing in this matter and further order of this Court; and

4. For costs and attorneys' fees in this action pursuant to CCP §1021.5, together with all other relief deemed just and proper by this Court.

On the Second Cause of Action:

1. Pursuant to CCP §1060, and at common law, a judicial declaration that:

    a. The Covid Vaccine Ordinance exceeds legislative powers of the City Council by failing to account for constitutional protections provided each Firefighter under Constitution article I, section 1; and

    b. The City has failed to consider and adopt the least restrictive alternatives to protect Firefighters' constitutional rights, in the context of protecting the public during the Covid pandemic.

2. For preliminary and permanent injunctive relief:

    a. prohibiting Defendant from enforcing its mandate that Firefighters must receive a Covid Vaccination as a condition of continued employment;

    b. requiring Defendant to offer reasonable accommodations to Firefighters to allow continued employment without a Covid Vaccination;

    c. prohibiting discrimination or retaliation; and

3. For a temporary restraining order prohibiting the Defendant's vaccination mandate from going into effect until a preliminary injunction hearing in this matter and further order of this Court.

4. For costs and attorneys' fees in this action pursuant to CCP §1021.5;

On the Third Cause of Action:

1. Temporary, preliminary, and permanent injunctive relief restraining Defendant from enforcing the Mandate; and

2. For reasonable attorneys' fees.

On the Fourth Cause of Action:

1. Temporary, preliminary, and permanent injunctive relief restraining Defendant from enforcing the Mandate; and

2. For reasonable attorneys' fees.

On the Fifth Cause of Action:

1. For preliminary and permanent injunctive relief prohibiting Defendant from threatening adverse employment action against Plaintiff as alleged herein; and

2. For a temporary restraining order prohibiting the Defendant from threatening Plaintiff with adverse employment action until a preliminary injunction hearing in this matter and further order of this Court.

On the Sixth Cause of Action:

1. A judicial declaration that the City's Mandate is facially unconstitutional because it violates Plaintiff's and City employees' right to privacy under the California Constitution; and

2. Preliminary and permanent injunctive relief enjoining the City from enforcing the Mandate.

On the Seventh Cause of Action:

1. A judicial declaration that proceeding with the imposition of the threatened employment sanctions is a violation of the ADA; and

2. An order restraining and enjoining Defendant from violation of the ADA by employment sanction on the basis of perceived physical disability.

On the Eighth Cause of Action:

1. A judicial declaration proceeding with the imposition of the threatened employment sanctions is a violation of *Skelly*; and

2. An order restraining and enjoining Defendant from proceeding with the imposition of the threatened employment sanctions before affording due process under *Skelly*.

On all Causes of Action:

1. For judgment in favor of Plaintiff;

2. For costs of suit herein; and

3. For such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

Dated: November 3, 2021 **JW HOWARD/ ATTORNEYS LTD.**

By: */s/ John W. Howard*
JOHN W. HOWARD
Attorneys for Plaintiff

PROOF OF SERVICE

I, the undersigned, do declare that I am employed in the county aforesaid, that I am over the age of [18] years and not a party to the within entitled action; and that I am executing this proof at the direction of the member of the bar of the above entitled Court. The business address is:

JW Howard Attorneys LTD
701 B Street, Ste. 1725
San Diego, California 92101

■ MAIL. I am readily familiar with the business' practice for collection and processing of correspondence for mailing via the United States Postal Service and that the correspondence would be deposited with the United States Postal Service for collections that same day.

☐ FACSIMILE. I am readily familiar with the business' practice for collection and processing of correspondence for electronic transmission and that the correspondence was successfully transmitted by facsimile that same day in the ordinary course of business.

☐ OVERNIGHT. I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery/receipt next day via a major carrier such as UPS, FedEx, DHL or similar carrier, and same were deposited that same day.

☐ ELECTRONIC. I am readily familiar with the business' practice for collection and processing of documents via electronic system and said documents were successfully transmitted via One Legal/business email that same day.

☐ PERSONAL. The below described documents were personally served on date below via Knox Services.

On the date indicated below, I served the within as indicated:

FIRST AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND DECLARATORY AND INJUNCTIVE RELIEF

TO:

City of Los Angeles
Attn: Los Angeles City Clerk
200 North Spring Street, Room 395, City Hall
Los Angeles, CA 90012

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and was ***EXECUTED*** on November 3, 2021, at San Diego, CA.

/s/ Dayna Dang

Dayna Dang, Paralegal
dayna@jwhowardattorneys.com