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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES**  
12 **(Central Division – Stanley Mosk Courthouse)**

13 FIREFIGHTERS4FREEDOM FOUNDATION,  
14 A CALIFORNIA NON-PROFIT  
15 CORPORATION, AS APPOINTED AGENT  
16 FOR 529 INDIVIDUAL LOS ANGELES CITY  
17 FIREFIGHTERS,

16 Plaintiff,

17 vs.

18 CITY OF LOS ANGELES,

19 Defendant.

Case No.: 21STCV34490

Judge: Stephanie M. Bowick, Dept. 19

**PLAINTIFF'S NOTICE OF MOTION AND  
MOTION FOR PRELIMINARY  
INJUNCTION**

[Filed concurrently with Declarations of Sean  
Kaufman and Mark Muus and Request for  
Judicial Notice; [Proposed] Order lodged  
concurrently]

**Reservation No. 780368497618**

Date: April 26, 2022

Time: 8:30 a.m.

Dept.: 19

**Initial Case Mgmt. Conf.:**

Date: February 7, 2022

Time: 8:30 a.m.

Dept.: 19

Complaint filed: Sept. 19, 2021

1           **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2           **PLEASE TAKE NOTICE** that on April 26, 2022, at 8:30 a.m. in Department 19 of the  
3 above-referenced Court, located at 111 N. Hill Street in Los Angeles, California, before Judge  
4 Stephanie Bowick, Plaintiff Firefighters4Freedom Foundation (“Firefighters4Freedom”) will, and  
5 hereby does, move for a preliminary injunction barring Defendant City of Los Angeles from firing  
6 any firefighters employed by the City—or taking any other adverse action tantamount to termination,  
7 including placing the firefighters on unpaid leave—for non-compliance with the City’s new Covid-  
8 19 vaccination mandate unless and until the City has provided the firefighters with due process  
9 required by the California Supreme Court’s decision in *Skelly v. State Personnel Board*, (1975) 15  
10 Cal. 3d 194.

11           This Motion is brought pursuant to section 527 of the Code of Civil Procedure, section 3260  
12 of the Government Code, Rule 3.1150 of the California Rules of Court and Rule 2.8 of this Court’s  
13 Local Rules on the grounds that Firefighters4Freedom is likely to prevail on its claim that the mass  
14 firing of city firefighters for non-compliance with the City’s vaccine mandate without the impartial,  
15 pre-deprivation hearing that *Skelly* requires violates the firefighters’ property interest in their  
16 employment and thus is unlawful and unconstitutional.<sup>1</sup> The firefighters that Firefighters4Freedom  
17 represents will also suffer irreparable harm if the Court does not enjoin the City’s proposed mass  
18 termination of firefighters. They will lose their salary and could lose other benefits. Although a court  
19 could award them back pay and other monetary damages in a future wrongful termination lawsuit,  
20 that relief could take months, if not years, to obtain. In the meantime, these individuals have ongoing  
21 financial obligations including mortgage or rent payments, utilities, groceries, insurance premiums,  
22 medical costs, and other bills that they will not be able to pay for without a salary. In addition, it is  
23 impossible to gauge how their future careers might have proceeded; what promotions they might  
24 have received or how long they might have worked.

25           Furthermore, the firefighters object to the City’s Covid-19 vaccine mandate as violating their  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Rule 2.8(b) of the Court’s Local Rules states that a “noticed motion for a preliminary injunction,  
whenever made” shall be filed in the “department where the case is assigned ....” (Cleaned up.)

1 right to privacy, an express state constitutional right that California courts have construed to be much  
2 broader than the federal right to privacy. The potential loss of a constitutional right, even for a short  
3 time, presumptively constitutes irreparable harm and supports granting preliminary injunctive relief.  
4 *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009).

5 The public interest also supports granting this Motion. Public services are already stretched  
6 thin. The people of Los Angeles cannot afford to lose a third, or more, of their firefighting force.  
7 They are highly skilled workers—indeed, they are “essential” workers who have worked throughout  
8 the Covid-19 pandemic, while white-collar City officials worked at home—and cannot be effectively  
9 or quickly replaced. Moreover, it is not clear that there is any underlying benefit to the City’s  
10 vaccine mandate: the coronavirus is still spreading in California, despite mass masking and  
11 vaccination, while it spreads at lower rates in states that do not have such mandates. It has also been  
12 shown that vaccination does not preclude an individual from contracting Covid-19 or passing the  
13 virus to others, so the argument that unvaccinated pose a threat to public health greater than the  
14 vaccinated is not proven. Given the privacy interests at stake, it is not clear that the City’s vaccine  
15 mandate, even if a proper exercise of the City’s employment power (which Firefighters4Freedom  
16 disputes), is effective, much less necessary, to deal with the virus.

17 Finally, firefighters in California have due process rights that go beyond *Skelly* and which are  
18 set forth in the state law Firefighters Bill of Rights. According to the Legislature, the procedures set  
19 forth in the Firefighters Bill of Rights must be honored even “in these volatile emergency situations”  
20 and thus cannot be discarded during a pandemic. The Firefighters Bill of Rights provides specifically  
21 that, if a court finds a violation of its procedures, the court “shall render appropriate injunctive or  
22 other extraordinary relief to remedy the violation and to prevent future violations of a like or similar  
23 nature, including, but not limited to, the granting of a temporary restraining order or preliminary or  
24 permanent injunction prohibiting the employing department or licensing or certifying agency from  
25 taking any punitive action against the firefighter.” Cal. Gov’t Code § 3260.

26 The Motion is supported by this Notice of Motion and Motion, the attached Memorandum of  
27 Points and Authorities, the concurrently filed Declarations of Sean Kaufman and Mark Muus, the  
28 Request for Judicial Notice, all pleadings and papers on file in this action, any oral argument that

1 may be requested at the time of the hearing, and any other material the Court determines is relevant.

2  
3 Dated: November 16, 2021

JW HOWARD/ ATTORNEYS, LTD.

4  
5 

6 By: \_\_\_\_\_

7 Scott J. Street  
8 Attorneys for Plaintiff  
9 FIREFIGHTERS4FREEDOM

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

In March 2020, California locked down to slow the spread of the novel coronavirus, Covid-19. Businesses and schools were closed for months. Even government buildings just recently reopened. But firefighters did not stop working. They served heroically on the front lines of the pandemic while others sheltered in place. No one suffered harm for having been assisted by firefighters during this time and the City did not forbid them from contact with the public, providing emergency services, or fighting fires for lack of vaccination. Indeed, no vaccine was available until at least eight months after the state locked down.

The City responded to that courage by ordering the firefighters and other public employees to inject themselves with one of the experimental Covid-19 shots if they want to keep their jobs. Never mind that the firefighters are in excellent physical shape—they must be to do their jobs—and thus are at little risk from Covid-19. Never mind that many firefighters do not want the shot, whether because of their sincere religious beliefs or moral convictions or concerns about the short and long-term effects of the shots, which are unknown. These are not trivial concerns and the firefighters, like all Californians, have a constitutional right to privacy which protects them from invasions of their bodily integrity.

These objections led the firefighters, through their association, Firefighters4Freedom, to file this action. That did not deter the City. It ordered the firefighters to comply with the vaccine mandate by December 18, 2021. If they do not comply, the City has announced it will put them on unpaid leave while the City goes through the formal process of terminating them.

That is not proper. Public employees have a property interest in their employment. Thus, under the California Supreme Court’s decision in *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 206 (1975), the City must give the firefighters notice and an opportunity to fully contest their discipline with all due process rights *before* the City stops paying them. They must have the right to be represented by counsel; the right to develop a defense and a hearing before a neutral hearing officer, not the person who levied the punishment. And even that decision can be reviewed for arbitrariness and set aside by a court if it decides that the punishment—in this case, unpaid leave and

1 termination—clearly exceeds the harm from the firefighters’ non-compliance.

2 There is no dispute about this. The City concedes that it will not give the firefighters a pre-  
3 deprivation *Skelly* hearing. It cannot justify that under the law and the Constitution. The City may  
4 cite the Covid-19 state of emergency, but that has been in place for nearly two years and normal  
5 government operations resumed this fall. Moreover, courts construe the emergency exception to  
6 *Skelly* narrowly and will not apply it in a situation like this, where the proposed discipline is severe,  
7 and where the period of unpaid leave being imposed is indefinite. They will not do that for any  
8 public employees, much less firefighters who, by putting their lives on the line, have earned due  
9 process protections that go beyond *Skelly* and which, according to the Legislature when it enacted  
10 the Firefighter Bill of Rights, must be honored even “in these volatile emergency situations ....”

11 If the City believes that unvaccinated firefighters pose an imminent threat to public health  
12 and deserve to be fired, it must give them due process, while paying them, as *Skelly* and the  
13 Firefighters Bill of Rights require. That is all this Motion seeks. The Court should grant it.

14 **II. FACTS**

15 The facts below are not disputed and can largely be established through judicial notice.

16 **A. The Covid-19 Pandemic Hits and then Starts Receding.**

17 In early 2020, health officials discovered a novel coronavirus circulating in Wuhan, China.  
18 They named the virus “Covid-19.”

19 Though nobody knew it at the time, the Covid-19 pandemic would lead to the greatest  
20 restrictions on liberty in American history. Many of the restrictions started in California, including  
21 the first statewide “lockdown” and unprecedented mass closures of businesses and criminalization of  
22 ordinary activities that unelected health officials deemed too dangerous.

23 During 2020, at the urging of then President Donald Trump, several pharmaceutical  
24 companies began developing experimental treatments to mitigate the effects of Covid-19 and,  
25 potentially, reduce its spread. (Request for Judicial Notice, dated November 16, 2021 (“RJN”), Exh.  
26 A.) Although these treatments were called “vaccines” they did not meet the definition of a vaccine  
27 under federal law (the FDA later changed the definition). The Covid-19 shots were so controversial  
28 that then presidential candidate Joe Biden would not commit to receiving one, saying he did not trust

1 Trump. (*Id.*, Exh. B.) Then vice-presidential candidate Kamala Harris said flatly that she would not  
2 take it if Trump told her to. (*Id.*, Exh. C.) California Governor Gavin Newsom also questioned the  
3 treatments, saying he did not trust the Trump Administration and would review the treatments  
4 independently (he has also said that, as a parent, he would not want a bureaucrat to make medical  
5 decisions for his family). (*Id.*, Exhs. D, E.)

6 Then Mr. Biden won the presidency and many tunes changed. Still, President-elect Biden  
7 said he would not mandate that Americans get the Covid shots, three of which had been approved for  
8 emergency use by the FDA. (*Id.*, Exh. F.)

9 By the summer of 2021, tens of millions of Americans had taken the Covid-19 shots. But  
10 Covid-19 had not disappeared. That should not have surprised anybody. Public health officials have  
11 repeatedly said that eliminating a respiratory virus is impossible once it starts spreading in the  
12 community. According to one prominent epidemiologist, speaking to *Nature*: “Eradicating this virus  
13 right now from the world is a lot like trying to plan the construction of a stepping-stone pathway to  
14 the Moon. It’s unrealistic.” (*Id.*, Exh. G.)

15 Thus, the available evidence shows that those who get the Covid-19 shots can still contract  
16 and spread the Covid-19 virus. (Declaration of Sean Kaufman, dated November 15, 2021 (“Kaufman  
17 Decl.”), ¶¶ 12-18.) Like the flu, the world will have to learn to live with Covid-19.

18 **B. The City Council Votes to Require that All City Employees Get a Covid-19 Shot.**

19 Although the end of the pandemic is near, some government officials have decided that it  
20 cannot end until everybody has been injected with a Covid shot. To that end, on August 16, 2021,  
21 the Los Angeles City Council adopted Ordinance 187134, adding Article 12 to Chapter 7 of Division  
22 4 of the Los Angeles Administrative Code to require, among other things, that all current and future  
23 city employees get one of the Covid-19 shots and report their “vaccination status” to the City as a  
24 condition of employment (the “Covid Vaccine Mandate”). (RJN, Exh. H.)

25 The City initially set a deadline of October 20, 2021, for employees to comply with the  
26 Covid Vaccine Mandate. (*Id.*) Under pressure, the City decided to extend that deadline to December  
27 18, 2021. (Declaration of Mark Muus, dated November 15, 2021 (“Muus Decl.”), ¶ 6, Exh. C.) But it  
28 has continued pressuring employees to report their status and get the shot and it has refused to

1 negotiate with the public employee unions, including the firefighters’ union, with Mayor Eric  
2 Garcetti calling unvaccinated employees “an imminent threat to public health” that the “City cannot  
3 wait for exhaustion of collective bargaining impasse procedures (which take up to a year to  
4 complete) to address ....” (RJN, Exh. I.) Despite dealing with Covid-19 for nearly two years and  
5 approaching the end of the pandemic, the City still calls the coronavirus a “catastrophic public health  
6 emergency beyond the City’s control sufficient to excuse the City from its normal duty to complete  
7 the meet and confer process prior to acting on its decision to impose consequences for non-  
8 compliance with the Mandatory Reporting and Vaccination conditions of employment, as set forth in  
9 the City’s October 14, 2021 LBFO ....” (*Id.* at p. 2.) City employees must comply with the Covid  
10 Vaccine Mandate by the “end of the day on December 18, 2021. An employee that remains out of  
11 compliance shall be placed off duty without pay pending service of a *Skelly* package that includes a  
12 Notice of Proposed Separation.” (*Id.* at p. 3.)

13 The City’s refusal to follow its collective bargaining agreements caused the firefighters’  
14 union to file a grievance, which is still pending, and a lawsuit to enforce its members rights under the  
15 collective bargaining agreement. (Muus Decl., ¶ 4.) Firefighters4Freedom also filed this case to  
16 challenge the mandate under state law. The amended complaint specifically alleges that city  
17 firefighters have a property interest in their employment and cannot be fired without a pre-  
18 deprivation hearing conducted in accordance with the procedures laid out in *Skelly*. (First Am.  
19 Compl., ¶¶ 100-105.)

20 **C. The City Continues Pressuring the Firefighters to Get the Covid-19 Shots.**

21 Dozens of lawsuits have now been filed across the country, challenging Covid-19 vaccine  
22 mandates. The Fifth Circuit Court of Appeals recently stayed the federal mandates nationwide.  
23 (RJN, Exh. J.) These issues will almost certainly be litigated up through the United States Supreme  
24 Court and in the Supreme Courts of many states.

25 Despite these legal challenges and the growing evidence that the Covid shots are not a  
26 miracle cure that will stop the Covid-19 virus from spreading—indeed, fully vaccinated Mayor  
27 Garcetti contracted Covid-19 while attending a conference in Scotland last month (RJN, Exh. K)—  
28 the City has increased its efforts to force the shots on city employees. For example, on October 29,

1 the City Personnel Department sent an email to all employees with a Notice of Mandatory COVID-  
2 19 Vaccination Policy Requirements (the “VPR”). (Muus Decl., Exh. C.) The VPR requires that  
3 employees agree to its terms within 24 hours. (*Id.*) It also requires that each employee acknowledge  
4 that his or her “failure to sign, or if I disagree to any part of this Notice, will cause me to be placed  
5 off duty without pay, pending pre-separation due process procedures and I will be provided written  
6 notice of the proposed action of separation, or similar action shall be taken as applicable for sworn  
7 employees as provided above.” (*Id.*)

8 Similarly, on November 9, City Fire Chief Ralph Terrazas sent a notice to all unvaccinated or  
9 unreported firefighters directing them to complete the steps necessary to comply with the Covid  
10 Vaccine Mandate. (*Id.*, Exh. D.) The notice states that employees have 48 hours to (1) activate their  
11 “Bluestone” account (the account used for testing and vaccination reporting) and (2) agree to and  
12 sign the VPR. (*Id.*) If employees do not complete these requirements within 48 hours, the Notice  
13 says they “will be placed off-duty without pay pending disciplinary review for failure to meet a  
14 condition of employment.” (*Id.*) The Fire Chief sent another letter to all firefighters on November 10  
15 that repeated that message. (Muus Decl., Exh. E.) It states that non-compliant firefighters will  
16 receive a notice to comply within 48 hours and that those who fail to comply “will be placed off-  
17 duty pending corrective action.” (*Id.*) These letters were similar to direct orders the firefighters  
18 received on October 4 and October 12. (Muus Decl., Exhs. A, B.)

19 The City has made clear that it will not stop engaging in these coercive tactics and will not let  
20 the legal process follow its required course, including honoring the firefighters’ *Skelly* rights and  
21 their rights under the Firefighter Bill of Rights. Therefore, Firefighters4Freedom brings this Motion  
22 to enforce *Skelly* and to enjoin the City from firing any city firefighters—or taking other adverse  
23 employment action tantamount to termination—without providing each firefighter with a pre-  
24 deprivation hearing before a neutral hearing officer, as *Skelly* and state law require.

25 **III. LEGAL STANDARD**

26 “The ultimate goal of any test to be used in deciding whether a preliminary injunction should  
27 issue is to minimize the harm which an erroneous interim decision may cause.” *IT Corp. v. County of*  
28 *Imperial*, 35 Cal.3d 63, 73 (1983). Thus, “as a general matter, the question whether a preliminary

1 injunction should be granted involves two interrelated factors: (1) the likelihood that the plaintiff  
2 will prevail on the merits, and (2) the relative balance of harms that is likely to result from the  
3 granting or denial of interim injunctive relief.” *White v. Davis*, 30 Cal.4th 528, 554 (2003).

4 Although this is a discretionary matter, the likelihood of success “does affect the showing  
5 necessary to a balancing-of-hardships analysis. That is, the more likely it is that plaintiffs will  
6 ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does  
7 not issue. This is especially true when the requested injunction maintains, rather than alters, the  
8 status quo.” *King v. Meese*, 43 Cal.3d 1217, 1227 (1987). That last point is critical. Preliminary  
9 injunctions are designed to “preserv[e] ... the status quo until a final determination of the merits of  
10 the action.” *Continental Baking Co. v. Katz*, 68 Cal.2d 512, 528 (1968).

11 Preliminary injunctions are especially important in the employment setting as courts have  
12 recognized that “job loss qualifies as such an [irreparable] injury.” *Costa Mesa City Employees’*  
13 *Assn. v. City of Costa Mesa*, 209 Cal. App. 4th 298, 306 (2012), as modified (Oct. 10, 2012). Thus,  
14 public employees “may seek injunctive relief against the threatened infringement of their rights.” *Id.*  
15 at 305 (quotations omitted). Indeed, given the severity of losing one’s job, courts have applied a  
16 lower burden when employees seek a preliminary injunction to prevent their termination, requiring  
17 only that the employees show “some possibility” [they] will prevail on the merits of [their] action.”  
18 *Id.* at 309 (quoting *Butt v. State*, 4 Cal.4th 668, 677-78 (1992)).

19 **IV. ARGUMENT**

20 The Motion should be granted because Firefighters4Freedom is likely to prevail on its claim  
21 that the City cannot fire the firefighters *en masse* without providing them due process, a right to  
22 adequately defend, and a pre-deprivation hearing before an impartial hearing officer, as required by  
23 *Skelly* and the Firefighters Bill of Rights.

24 **A. The City Must Give the Firefighters a Fair Hearing Before Firing Them.**

25 Unlike private employment, the “California statutory scheme regulating civil service  
26 employment confers upon an individual who achieves the status of ‘permanent employee’ a property  
27 interest in the continuation of his employment which is protected by due process.” *Skelly v. State*  
28 *Personnel Board*, 15 Cal. 3d 194, 206 (1975). The “preremoval safeguards” needed to provide an

1 affected employee this due process include “notice of the proposed action, the reasons therefor, a  
2 copy of the charges and materials upon which the action is based, and the right to respond, either  
3 orally or in writing, to the authority initially imposing discipline.” *Id.* at 215.

4 “The Supreme Court’s directive gave rise to an administrative procedure known as a *Skelly*  
5 hearing, in which an employee has the opportunity to respond to the charges upon which the  
6 proposed discipline is based.” *Flippin v. Los Angeles City Bd. of Civ. Serv. Commissioners*, 148 Cal.  
7 App. 4th 272, 280 (2007). Although the type of hearing that must be provided varies based on the  
8 exigency and the severity of the proposed discipline, “[t]he potential deprivation of a person’s means  
9 of livelihood demands a high level of due process.” *Bostean v. Los Angeles Unified Sch. Dist.*, 63  
10 Cal. App. 4th 95, 110 (1998) (quotations omitted). Thus, courts have held that, at minimum, a public  
11 employee being threatened with termination must be given a pre-deprivation hearing before an  
12 impartial hearing officer. *See id.* at 109-11 (citing cases). Under *Skelly*, “although technical rules of  
13 evidence do not apply ... fundamental questions of competency and relevancy remain” and “must be  
14 considered in the context of a hearing” that satisfies due process principles of notice and opportunity  
15 to be heard before an impartial hearing officer. *Coburn v. State Personnel Board*, 83 Cal. App. 3d  
16 801, 812 (1978).

17 The City has not provided city firefighters with that due process. It has admitted that, with  
18 the Mayor’s October 28 memo saying that any city employee who has not complied with the Covid  
19 Vaccine Mandate by the end of the day on December 18, 2021, “shall be placed off duty without pay  
20 pending service of a *Skelly* package that includes a Notice of Proposed Separation.” (RJN, Exh. I,  
21 emphasis added.) The City repeated that mantra in the Fire Chief’s orders and the VPR, repeatedly  
22 ordering firefighters to comply with a policy they disagree with—and which they contend violates  
23 their constitutional rights and their collective bargaining agreement —and threatening to put officers  
24 on unpaid leave if they do not comply. (*Id.*; Muus Decl., Exhs. A-E.)

25 That is not proper. The California Supreme Court has held that even a “[s]uspension of a  
26 right or of a temporary right of enjoyment may amount to a taking for due process purposes ....”  
27 *Civil Service Assn. v. City & County of San Francisco*, 22 Cal.3d 552, 560 (1978) (cleaned up). For  
28 example, in *Bostean*, the Los Angeles school district put an employee (Bostean) on unpaid medical

1 leave for seven months due to a medical condition. After being reinstated, he sued to recover back  
2 pay and benefits he lost during the unpaid seven-month leave. Reversing the trial court, the court of  
3 appeal held that Bostean should have recovered the sums because he “had a protectable property  
4 interest in maintaining his job, which was impaired when he was involuntarily placed on an illness  
5 leave of absence without pay.” 63 Cal. App. 4th at 111.

6 The same reasoning applies here. Indeed, this situation is more egregious than *Bostean*, as  
7 the City says it will place non-compliant city firefighters on unpaid leave indefinitely. Nobody  
8 knows how long it will take the City to process the *Skelly* hearings for employees who do not obey  
9 the Covid Vaccine Mandate. Firefighters4Freedom represents hundreds of firefighters who say they  
10 will not comply. Thousands of police officers have also sued the City over the Vaccine Mandate.  
11 Other public employees have challenged the mandate as well. Thus, what *is* clear here is that it will  
12 take far longer than seven months to conduct *Skelly* hearings for most city employees, resulting in a  
13 far greater deprivation of liberty here than the one that violated due process in *Bostean*.

14 The firefighters also have rights that go beyond *Skelly* and which are set out in the  
15 Firefighters Procedural Bill of Rights, Cal. Govt’ Code § 3250 *et seq.* For example, “[a] firefighter  
16 shall not be subjected to punitive action, or denied promotion, or be threatened with that treatment,  
17 because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights  
18 under any existing administrative grievance procedure.” Cal. Gov’t Code § 3254(a). That rule  
19 applies here as the City wants to punish the firefighters for asserting their constitutional right to  
20 privacy. (Section IV.C, pp. 14-17, below.)

21 Firefighters also have a right to an administrative appeal before any punitive action not  
22 related to merit can be taken against them. Cal. Gov’t Code § 3254(b). This appeal must be  
23 conducted in accordance with state law and pursuant to the procedures set forth in the Memorandum  
24 of Understanding between the City and the firefighters’ union. *Id.* § 3254.5. The City does not intend  
25 to follow those procedures, one of many issues that led the union to file its grievance. (Muus Decl., ¶  
26 4.) That refusal provides an additional, and independent, basis to grant this Motion.

27 **B. The City Cannot Use the Covid-19 State of Emergency to Ignore *Skelly*.**

28 The City may say that it can put the firefighters on unpaid leave before completing the *Skelly*

1 process, or complying with the Firefighter Bill of Rights, due to the ongoing Covid-19 state of  
2 emergency. It is wrong.

3 *Skelly* is not discretionary. There “the California Supreme Court unanimously held that  
4 nonprobationary public employees were entitled to certain procedural safeguards *before* punitive  
5 action could be taken against them.” *Mitchell v. State Personnel Board*, 90 Cal. App. 3d 808, 812  
6 (1979). Of course, *Skelly* “does not reject the concept that under extraordinary circumstances the  
7 governmental interest in prompt removal of its employees may outweigh the employee’s right to a  
8 predissmissal hearing.” *Id.* But this is a narrow exception that courts rarely apply in situations like  
9 this, involving the proposed termination of hundreds, if not thousands, of public employees over a  
10 politicized issue that, as explained below, raises serious constitutional concerns. (Section IV.C, pp.  
11 14-17, below.)

12 Moreover, courts have held that, even if an emergency exists, the government must explain  
13 why it must terminate its employees without a *Skelly* hearing. For example, in *International*  
14 *Brotherhood of Electrical Workers v. City of Gridley*, 34 Cal. 3d 191 (1983), the City of Gridley  
15 summarily fired eighteen striking firefighters during a labor dispute. It did not give the firefighters a  
16 pre-deprivation *Skelly* hearing because it said the strike posed an emergency that required immediate  
17 action to resolve. The Court of Appeal rejected the argument, finding that, even if “the strike  
18 constituted an emergency, the city fails to explain how dismissing all of its striking employees  
19 without a hearing would alleviate the emergency. Indeed, the record here suggests that the city’s  
20 haste in firing its employees only prolonged the ‘emergency’ after the employees had offered to  
21 return.” *Id.* at 209.

22 So here. The City does not explain how summarily firing hundreds of firefighters will solve  
23 the Covid-19 emergency. In fact, since a local emergency can only be declared during conditions  
24 that “are or are likely to be beyond the control of the services, personnel, equipment, and facilities of  
25 that political subdivision and require the combined forces of other political subdivisions to combat,”  
26 Cal. Gov’t Code § 8558(c), firing a third or more of the City’s firefighters would exacerbate the  
27 emergency. Moreover, the City has not provided any evidence of unvaccinated firefighters  
28 unwittingly killing the people they serve. No such evidence exists, as vaccinated people can contract

1 and spread the virus too. (Kaufman Decl., ¶¶ 12-18.)

2 And while the mayor claims that unvaccinated firefighters now pose an “imminent threat” to  
3 public health, he never made such a claim *before* now. In fact, for the first year and a half of the  
4 pandemic, while others worked from home and before the vaccines even existed, the City demanded  
5 that firefighters keep working despite the risk that they would contract and transmit Covid-19.  
6 (Muus Decl., ¶ 2.) For nearly two years, the City depended on unvaccinated firefighters to respond to  
7 emergencies, including emergencies prompted by Covid-19. The City would not have allowed that if  
8 it had evidence that unvaccinated firefighters posed a threat to public health.

9 Moreover, the Covid-19 pandemic will soon end. Even Governor Newsom acknowledges  
10 that; he rescinded ninety percent of his emergency orders this fall and said California has “turn[ed]  
11 the page” in dealing with the coronavirus. (RJN, Exh. L.) Thus, the City cannot simply cite the state  
12 of emergency to do whatever it wants. It must follow the law and that means giving firefighters who  
13 do not comply with the Covid Vaccine Mandate an opportunity to challenge their termination before  
14 the City stops paying them. It means following the procedures set forth in the Firefighter Bill of  
15 Rights and the Memorandum of Understanding between the City and the fire union, not ignoring  
16 them.

17 **C. The Firefighters Will Be Irreparably Harmed Unless the Court Grants Relief.**

18 Given the firefighters’ strong likelihood of success, a lesser showing of irreparable harm can  
19 justify enjoining the City’s action. In any event, “job loss qualifies as such an [irreparable] injury.”  
20 *Costa Mesa*, 209 Cal. App. 4th at 306 (2012).

21 The balance of harms also weighs in Firefighters4Freedomn’s favor. “At this stage of the  
22 analysis, no hard and fast rule dictates which consideration must be accorded greater weight by the  
23 trial court. For example, if it appears fairly clear that the plaintiff will prevail on the merits, a trial  
24 court might legitimately decide that an injunction should issue even though the plaintiff is unable to  
25 prevail in a balancing of the probable harms.” *IT Corp.*, 35 Cal. 3d at 72-73. By contrast, “the harm  
26 which the defendant might suffer if an injunction were issued may so outweigh that which the  
27 plaintiff might suffer in the absence of an injunction that the injunction should be denied even  
28 though the plaintiff appears likely to prevail on the merits.” *Id.* at 73. “The goal is to minimize the

1 harm that would be caused by an erroneous interim decision. *People v. Uber Techs., Inc.*, 56 Cal.  
2 App. 5th 266, 302 (2020), as modified on denial of reh’g (Nov. 20, 2020).

3 Here there is no doubt. The firefighters that Firefighters4Freedom represents will suffer  
4 serious harm if the Court does not grant this Motion. They will lose their paychecks and benefits.  
5 Although “monetary injury is not normally considered irreparable ... constitutional violations cannot  
6 be adequately remedied through damages and therefore generally constitute irreparable harm.”  
7 *Nelson v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 881-882 (9th Cir. 2008) (quotations  
8 omitted), reversed on other grounds, 562 U.S. 134 (2011). “Moreover, the loss of one’s job does not  
9 carry merely monetary consequences; it carries emotional damages and stress, which cannot be  
10 compensated by mere back payment of wages.” *Id.* at 882; *see also Gigi’s Inc. v. Butler*, No.  
11 220CV03134ABPJWX, 2020 WL 5498068, at \*3 (C.D. Cal. July 14, 2020) (same).

12 That is especially true for firefighters, who put their lives on the line every day they go to  
13 work. Indeed, the important role firefighters play in providing public services is largely what led the  
14 Legislature to pass the Firefighters Bill of Rights in 2007, with the Legislature explicitly finding  
15 that: “(a) Firefighters are often called upon to render aid in hostile emergency situations rife with  
16 conflict and confrontation” and that “(c) Firefighters who trust their instincts in these volatile  
17 emergency situations are deserving of due process rights and protections should those circumstances  
18 arise.” 2007 Cal. Legis. Serv. Ch. 591 (A.B. 220) (West).

19 By contrast, the City will not suffer any harm from complying with *Skelly* and the Firefighter  
20 Bill of Rights. The only harm it could possibly assert is the alleged “imminent threat” to public  
21 health posed by unvaccinated people that Mayor Garcetti mentioned, a political statement that has no  
22 evidentiary support and which is belied by the City’s reliance on firefighters throughout the  
23 pandemic. Furthermore, a grant of emergency power “cannot abridge the prerogative of the courts to  
24 grant an injunction to protect a party’s constitutional right.” *Saltonstall v. City of Sacramento*, 231  
25 Cal. App. 4th 837, 851 (2014), as modified (Dec. 18, 2014). Even if it could, the Legislature adopted  
26 the Firefighters Bill of Rights *after* the Emergency Services Act and specifically required that  
27 firefighters receive their due process rights even in “volatile emergency situations” like those that  
28 have arisen during the Covid-19 pandemic.

1           These are not trivial concerns. The City may cite the United States Supreme Court’s decision  
2 in *Jacobson v. Massachusetts*, a case brought under the federal constitution, as broadly authorizing  
3 any vaccine mandate a government wishes to impose on its people. But, in the 116 years since that  
4 decision, California has extended some of the broadest rights imaginable to its citizens, including  
5 “an express right to ‘privacy’” that the California Supreme Court has interpreted to “craft [ ] a  
6 privacy doctrine that has no equivalent in federal constitutional law.” Goodwin Liu, *State Courts and*  
7 *Constitutional Structure*, 128 Yale L.J. 1304, 1327 (2019) (citations omitted).

8           To that end, in *Mathews v. Becerra*, 8 Cal. 5th 756 (2019), the California Supreme Court  
9 reversed the sustaining of a demurrer in a case brought by a group of therapists. The therapists  
10 sought a declaratory judgment that a provision in a new state law requiring therapists to report their  
11 patients for accessing child pornography violated the patients’ constitutional right to privacy. The  
12 Supreme Court spent a great deal of time discussing the relevant pleading rules in privacy cases,  
13 explaining that “a plaintiff alleging an invasion of privacy in violation of the state constitutional  
14 right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a  
15 reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a  
16 serious invasion of privacy.” *Hill v. Nat’l Collegiate Athletic Assn.*, 7 Cal.4th 1, 39-40 (1994). Then  
17 the burden shifts. “A defendant may prevail in a state constitutional privacy case by negating any of  
18 the three elements just discussed or by pleading and proving, as an affirmative defense, that the  
19 invasion of privacy is justified because it substantively furthers one or more countervailing interests.  
20 The plaintiff, in turn, may rebut a defendant’s assertion of countervailing interests by showing there  
21 are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy  
22 interests.” *Id.*

23           This distinction matters. The City will say the Covid Vaccine Mandate is subject to rational  
24 basis review but, under California privacy law, the standard of review depends on “the specific kind  
25 of privacy interest involved and the nature and seriousness of the invasion and any countervailing  
26 interests.” *Id.* at 34. “Where the case involves an obvious invasion of an interest fundamental to  
27 personal autonomy, ... a ‘compelling interest’ must be present to overcome the vital privacy interest.  
28 If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are

1 employed.” *Id.*

2 As in *Mathews*, the Covid Vaccine Mandate qualifies as a serious invasion of the firefighters’  
3 right to bodily autonomy. Thus, this Court will have to consider numerous questions to decide the  
4 merits, including whether the vaccine mandate actually serves the interests the City claims (the  
5 firefighters dispute this) and whether there are feasible and effective alternatives to the mandate.<sup>2</sup> As  
6 the Supreme Court explained in *Mathews*, those questions cannot be decided in the abstract. They  
7 require factual development and a bench trial. The firefighters should not have to go through that  
8 process without pay or benefits and under constant pressure from the City and fire department  
9 leaders to give up their freedom and get the Covid shot.

10 **D. The Public Interest Also Supports Granting the Motion.**

11 “It is well established that when injunctive relief is sought, consideration of public policy is  
12 not only permissible but mandatory.” *Teamsters Agricultural Workers Union v. International*  
13 *Brotherhood of Teamsters*, 140 Cal. App. 3d 547, 555 (1983). The public interest supports granting  
14 the Motion. After all, the Legislature has found that “effective law enforcement depends upon the  
15 maintenance of stable employer-employee relations, between public safety employees and their  
16 employers.” Cal. Gov’t Code § 3301. The same reasoning applies to firefighters, who have similar  
17 protections under state law. Thus, granting this Motion will “promote stable employer-employee  
18 relations.” *Heyenga v. City of San Diego*, 94 Cal. App. 3d 756, 760 (1979) (reversing denial of  
19 preliminary injunction motion for this reason in case brought by police officers).

20 Indeed, allowing the City to summarily fire hundreds of firefighters would devastate the  
21 public. California has suffered through some of the worst fire seasons in history during the past few  
22 years and another major blaze could occur at any time. The mass termination of city firefighters,  
23 highly skilled and trained employees who cannot easily be replaced, would undermine the City’s  
24 ability to respond to these inevitable brush fires and thousands of fire and medical emergency calls  
25 they handle on a daily basis, thereby jeopardizing public safety. The people of Los Angeles cannot

26 \_\_\_\_\_  
27 <sup>2</sup> This is not the only substantive claim Firefighters4Freedom raised but it is one that has not been  
28 adjudicated during the Covid-19 pandemic and which, under *Mathews*, cannot be dismissed or  
decided without creating an evidentiary record.

1 tolerate that; not at the end of a pandemic that has already stretched public services.

2 The City cannot dispute this. The only contrary public interest it cites is the unsubstantiated  
3 threat to public health posed by unvaccinated firefighters that Mayor Garcetti talks about. As  
4 explained above, the mayor’s statement has no evidentiary support and thus cannot support the  
5 City’s position. Even if it did have support, the mass termination of city firefighters during fire  
6 season poses a far greater threat to the public interest than the mayor’s vague reference to “public  
7 health” at the end of a pandemic.

8 Finally, the Court must consider “the damages recoverable for a *Skelly* violation. The remedy  
9 for the employee in these cases is to award back pay for the period of wrongful discipline.” *Barber v.*  
10 *State Personnel Board*, 18 Cal.3d 395, 402 (1976). Those costs could be enormous here, given that  
11 hundreds, if not thousands, of city employees have said they will not comply with the Covid Vaccine  
12 Mandate. In all, the City might spend millions of dollars of taxpayer money defending *Skelly*-based  
13 wrongful termination cases plus millions more in damages and legal fees. It could also be forced to  
14 defend hundreds of petitions for administrative mandamus, as a court may overturn a penalty that is  
15 “is found to be grossly excessive or a manifest abuse of discretion.” *Richardson v. Board of*  
16 *Supervisors*, 203 Cal. App. 3d 486, 494 (1988); *see also Ackerman v. State Personnel Board*, 145  
17 Cal. App. 3d 395, 399 (1983) (explaining that “overriding consideration” in reviewing disciplinary  
18 orders under *Skelly* is “extent to which the employee’s conduct resulted in, or if repeated is likely to  
19 result in harm to the public service” (cleaned up)). These remedies do not account for the additional  
20 remedies available to firefighters under the Firefighters Bill of Rights as it is “unlawful for any  
21 employing department or licensing or certifying agency to deny or refuse to any firefighter the rights  
22 and protections guaranteed by this chapter.” Cal. Gov’t Code § 3260(a). The remedies available  
23 under this section include a \$25,000 civil penalty, actual monetary damages and legal fees. *Id.* §  
24 3260(c)-(d).

25 California taxpayers should not be exposed to that potential liability. As the Firefighters Bill  
26 of Rights contemplates, the Court should enjoin the City’s current termination policy and order the  
27 City to give any employees facing discipline for refusing to comply with the Covid Vaccine  
28 Mandate their *Skelly* hearing and their full rights under the Firefighters Bill of Rights before the City

1 stops paying them.

2 **V. CONCLUSION**

3 For all the foregoing reasons, Firefighters4Freedom respectfully requests that the Court grant  
4 the Motion and enjoin the City from firing any city firefighters, or taking any other adverse  
5 employment action that could lead to termination, without providing the firefighters with a pre-  
6 deprivation hearing before an impartial hearing officer, as required by *Skelly* and the Firefighters Bill  
7 of Rights.

8 Dated: November 16, 2021

JW HOWARD/ ATTORNEYS, LTD.

9 

11 By: \_\_\_\_\_

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Reservation		
Reservation ID: 780368497618		
Reservation Type: Motion for Preliminary Injunction		
Case Number: 21STCV34490		
Case Title: FIREFIGHTERS4FREEDOM FOUNDATION, A CALIFORNIA NON-PROFIT CORPORATION, AS APPOINTED AGENT FOR 529 INDIVIDUAL LOS ANGELES CITY vs CITY OF LOS ANGELES		
Filing Party: Firefighters4freedom Foundation, a California Non-Profit Corporation (Plaintiff)		
Location: Stanley Mosk Courthouse - Department 19		
Date/Time: April 26th 2022, 8:30AM		
Status: RESERVED		
Number of Motions: 1		
Motions		
Motion for Preliminary Injunction		
Reschedule		>
Cancel		>
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Status Date	Status	Action
11/15/2021 1:56PM	Reserved by User Date: April 26th 2022, 8:30AM Location: Stanley Mosk Courthouse - Department 19 Motions: 1	<a href="#">\$ View Receipt</a>