IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JERI PEARSON, *et al.*, *Plaintiffs*, v. SHRINERS HOSPITALS FOR CHILDREN, *et al.*, *Defendants.*	§ § § § § § § § § § § § §	CIVIL ACTION NO.: 3:23-cv-00387

SHRINERS HOSPITALS FOR CHILDREN PARTIES' RULE 12 MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

DANIEL PATTON
S.D. Tex. Admission No. 26200
Texas Bar No. 24013302
dpatton@scottpattonlaw.com
SCOTT PATTON PC
5301 Katy Freeway, Suite 201
Houston, Texas 77007
Telephone: (281) 377-3311
Facsimile: (281) 377-3267

ATTORNEY IN CHARGE FOR
THE SHRINERS PARTIES

OF COUNSEL:

Michael K. Burke
S.D. Tex. Admission No. 24356
Texas Bar No. 24012359
mburke@scottpattonlaw.com
5301 Katy Freeway, Suite 201
Houston, Texas 77007
Telephone: (281) 377-3311
Facsimile: (281) 377-3267

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

I. SUMMARY OF ARGUMENT

The Court should grant the Shriners Parties' Rule 12 Motion to Dismiss Plaintiff's Second Amended Complaint because:

- **Personal jurisdiction over the Shriners Individuals is absent;**
- **Plaintiffs' 42 U.S.C. § 1983 ("§ 1983") claims are time-barred by statute of limitations;**
- **Even assuming, *arguendo*, Plaintiffs' claims are timely, Plaintiffs' underlying theories of the case are fundamentally flawed;**
- **None of the Shriners Parties are "state actors," and therefore, Plaintiffs fail to state claims under § 1983;**
- **Even assuming, *arguendo*, the Shriners Parties were state actors, Plaintiffs' Equal Protection, Due Process, and privacy claims fail as a matter of law;**
- **Even assuming, *arguendo*, the Shriners Parties were state actors, they are entitled to qualified immunity;**
- **Even assuming, *arguendo*, the Shriners Parties were state actors, the underlying provisions Plaintiffs rely upon do not create enforceable rights either as stand-alone claims or through § 1983;**
- **The CDC COVID-19 Vaccination Provider Agreement does not confer Plaintiffs third party beneficiary status; and**
- **The Court should dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction.**

II. PLAINTIFFS' FACTUAL ALLEGATIONS[1]

[1] Because this motion comes to the Court under Federal Rule of Civil Procedure 12(b)(6), the Court must accept all well-pleaded facts as true and view them in the light most favorable to Plaintiffs. *Williams v. Lakeview Loan Servicing LLC*, 509 F. Supp. 3d 676, 679 (S.D. Tex. 2020). Therefore, for purposes of this motion only, the Shriners Parties recite the facts as set out in Plaintiffs' Second Amended Complaint. The Shriners Parties reserve the right to dispute any factual allegations Plaintiffs have made outside the confines of this Court's consideration of the Shriners Parties' motion under Federal Rule of Civil Procedure 12(b)(6) and the proceedings related thereto.

Shriners Hospitals is a network of not-for-profit hospitals incorporated in Colorado and licensed to do business in Texas.[2] Plaintiffs are former employees of Shriners Hospital in Galveston, Texas.[3] On September 14, 2021, Shriners Hospitals issued an employment policy requiring its employees to become fully vaccinated from the COVID-19 virus (the "COVID-19 Policy") and informed its employees, including Plaintiffs, of the COVID-19 Policy's requirements.[4] The COVID-19 Policy required employees, including Plaintiffs, to become fully vaccinated no later than December 6, 2021, or face termination.[5] The COVID-19 Policy included limited exemptions for medical and religious reasons but no others.[6] Plaintiffs generally assert the COVID-19 Policy was illegal and—from the time of its enactment until the end of their respective employments—subjected employees to undue influence, coercion, or moral duress by pressuring their participation in a COVID-19 investigational drug trial in derogation of their federally-protected rights.[7] Shriners ultimately terminated Plaintiffs' at-will employments for refusing to comply with the COVID-19 Policy.[8] It is this alleged undue influence, coercion, or moral duress in derogation of Plaintiffs' federally-protected rights, ultimately concluding in the termination of Plaintiffs' respective employments, that Plaintiffs claim caused them harm in this lawsuit.[9]

---

[2] Dkt. No. 20, p. 19, ¶ 72.

[3] Dkt. No. 20, p. 19, ¶ 73.

[4] Dkt. No. 20, pp. 20-21, ¶¶ 81-82; *see also*, Shriners Hospitals for Children System COVID-19 Vaccination for Healthcare Personnel Policy, Dkt. No. 20-4.

[5] Dkt. No. 20, pp. 20-21, ¶¶ 81-82.

[6] Dkt. No. 20, pp. 20-21, ¶¶ 81-82.

[7] Dkt. No. 20, pp. 21-25, ¶¶ 83-100.

[8] Dkt. No. 20, p. 22, ¶ 89.

[9] Dkt. No. 20, pp. 21-25, ¶¶ 83-100.

III. RULE 12(b)(2) MOTION

This Court's exercise of personal jurisdiction over the Shriners Individuals would violate due process because none of them have sufficient contacts with the State of Texas to support either general or specific personal jurisdiction and Plaintiffs have not alleged facts supporting any such jurisdiction. Beverly Bokovitz, Frances Farley, John McCabe, and Phillip Grady are residents of Florida.[10] Jerry Gantt is a resident of North Carolina.[11] Plaintiffs make no allegations supporting this Court's exercise of either general or specific jurisdiction over any of the Shriners Individuals and the Court should dismiss the Shriners Individuals for lack of personal jurisdiction.

IV. RULE 12(b)(6) LEGAL STANDARD

In considering a motion under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), courts accept all well-pled facts in the complaint as true and construe all reasonable inferences from those facts in the light most favorable to the plaintiff.[12] The same is not true as to conclusory allegations, unwarranted factual inferences, or legal conclusions.[13, 14] In order to withstand a Rule 12(b)(6) motion to dismiss the pleaded facts and attendant inferences in the complaint must set out the plaintiff's grounds for entitlement to relief above the

---

[10] *See* Exhibits 1-4, Declarations of Beverly Bokovitz, Frances Farley, John McCabe, and Phillip Grady. Plaintiffs acknowledge the Florida residency of McCabe and Grady and make no residency allegations as to Bokovitz or Farley. *See* Dkt. No. 20, pp. 5-6, ¶¶ 20.3-20.7.

[11] *See* Exhibit 5, Declaration of Jerry Gantt. Gantt previously resided in Texas. *Id.*

[12] *White v. U.S. Corr., L.L.C.,* 996 F.3d 302, 306–07 (5th Cir. 2021) (citing *Heinze v. Tesco Corp.*, 971 F.3d 475, 479 (5th Cir. 2020)).

[13] *White*, 996 F.3d at 307 (citing *Heinze*, 971 F.3d at 479).

[14] To put it plainly, Plaintiffs' Second Amended Complaint is light on factual allegations and almost entirely comprised of legal conclusions supported only by unexplained logical leaps and assumptions. Pointing out every example would likely consume nearly the entirety of the Shriners Parties' thirty-page briefing allotment. In this motion the Shriners Parties will endeavor to distill for the Court the substance of Plaintiffs' theories—and the shortcomings therein which prevent Plaintiffs from plausibly articulating any claim for relief—as concisely and succinctly as possible.

speculative level.[15] Generally, a court must not look beyond the parties' pleadings in considering a motion under Rule 12(b)(6).[16] However, the court must consider documents attached to the complaint or incorporated therein by reference.[17] Although Rule 12(b)(6) motions are normally reserved for testing the legitimacy of a plaintiff's cause of action,[18] a statute of limitations defense may support dismissal under Rule 12(b)(6) "where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like."[19] Further, "'[w]hen a plaintiff seeks relief unavailable under 42 U.S.C. § 1983 or sues individuals or entities who are not proper parties under § 1983, it also seems appropriate to have an early determination of those issues.'"[20]

V. ARGUMENT AND AUTHORITY

A. Plaintiffs' § 1983 Claims Are Time-Barred By Statute Of Limitations

1. Section 1983 Claims Are Subject To A Two-Year Statute Of Limitations In Texas

"The statute of limitations for a suit brought under § 1983 is determined by the general statute of limitations governing personal injuries in the forum state."[21] "Texas has a two-year

---

[15] *White*, 996 F.3d at 307 (citing *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[16] *Robinson v. CSL Plasma Ctr.*, 2022 WL 4295252, *2 (N.D. Tex. Aug. 25, 2022), *report and recommendation adopted*, 2022 WL 4295340 (N.D. Tex. Sep. 16, 2022) (citing *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007); *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)).

[17] *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007).

[18] *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F. Supp. 2d 538, 549 (N.D. Tex. 2007).

[19] *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003) (citations omitted).

[20] *Toliver v. Thomas*, 2008 WL 3413140, *2 (N.D. Tex. Aug. 11, 2008) (quoting *Smithback v. Cockrell,* 2002 WL 1268031, *2 (N.D.Tex. June 3, 2002)).

[21] *Vodicka v. Ermatinger*, 2021 WL 1086979, *5 (N.D. Tex. Mar. 22, 2021) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001)).

statute of limitations for personal-injury claims."[22] As a result, Plaintiffs' § 1983 claims are subject to a two-year statute of limitations.

2. Section 1983 Claims Accrue At The Time Of An Allegedly Illegal Policy, Not Its *Consequences*

While state law determines the statute of limitations period under § 1983, when a cause of action *accrues* is matter of federal law.[23] The United States Supreme Court's opinion in *Chardon v. Fernandez*[24] provides the answer for when Plaintiffs' claims accrued. In *Chardon*, the plaintiffs/respondents were nontenured administrators in the Puerto Rico Department of Education.[25] At some point prior to June 18, 1977, each of them, respectively, was notified by letter that their appointments would terminate on specified dates between June 30 and August 8, 1977.[26] On June 19, 1978 (more than one year after the plaintiffs/respondents were informed of the termination of their appointments), one of the plaintiffs/respondents filed suit under § 1983 claiming the terminations of the plaintiffs'/respondents' appointments violated their federally-secured rights.[27] The applicable statute of limitations in Puerto Rico was one (1) year.[28] The district court dismissed the suit on grounds that the filing date was more than one (1) year after the plaintiffs/respondents were notified of their terminations of their respective appointments, and thus, the claims were time-barred.[29] The First Circuit

---

[22] *Vodicka*, 2021 WL 1086979 at *5 (citing TEX. CIV. PRAC. & REM. CODE § 16.003(a)).

[23] *Jones v. Honeywell Int. Inc.*, 295 F. Supp. 2d 652, 658–59 (M.D. La. 2003) (emphasis added).

[24] *Chardon v. Fernandez*, 454 U.S. 6 (1981).

[25] *Id.* at 6.

[26] *Id.* at 7.

[27] *Id.*

[28] *Id.*

[29] *Id.*

reversed the district court on grounds that the plaintiffs'/respondents' respective claims did not accrue until the actual date of termination.[30]

The *Chardon* court held that a cause of action for wrongful termination under § 1983 accrues *at the moment* that the plaintiff learns of the decision to terminate even if the actual termination occurs later.[31] According to *Chardon*, "the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. **The fact of termination is not itself an illegal act.**"[32] The "'[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.'"[33] The fact that reasonable time passed between the notice of, and actual date of,[34] the plaintiffs'/respondents' respective terminations did not extend the accrual date of their § 1983 claims.[35] **"Both the United States Supreme Court and the Fifth Circuit Court of Appeals have determined that a claim accrues on the date notice of termination was *given*, not the effective date of termination."**[36] "'The limitations period begins when an employee is unambiguously informed of an immediate or future termination.'"[37] "To qualify as the accrual date, it is only necessary that 'the employee reliably

---

[30] *Id.*

[31] *Id.* (emphasis added).

[32] *Id.* (italics in original; bold added) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)).

[33] *Chardon*, 454 U.S. at 8 (quoting *Ricks*, 449 U.S. at 257).

[34] *Id.*

[35] *Chardon*, 454 U.S. at 8; *see also*, *Sullivan v. City of Dallas, Texas*, 2022 WL 3648625, *4 (N.D. Tex. July 29, 2022), *report and recommendation adopted*, 2022 WL 3650743 (N.D. Tex. Aug. 24, 2022) ("'The limitations period begins when an employee is unambiguously informed of an immediate or future termination.'") (quoting *Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452, 455-56 (5th Cir. 2011)); *Rushing v. Yazoo Cnty. by & through Bd. of Supervisors of Yazoo Cnty.*, 861 F. App'x 544, 551 (5th Cir. 2021).

[36] *Sullivan*, 2022 WL 3648625 at *4 (citing *Chardon,* 454 U.S. at 8; *Phillips v. Leggett & Platt, Inc.*, 658 F.3d 452, 455-56 (5th Cir. 2011)) (emphasis added).

[37] *Sullivan*, 2022 WL 3648625 at *4 (citing *Phillips*, 658 F.3d at 455-56).

knew he had lost his job, **not the date when the employer dotted a particular 'i' or crossed a particular 't.'"**[38]

3. Plaintiffs Filed Suit More Than Two-Years After Their Claims Accrued

Plaintiffs' § 1983 claims accrued on September 14, 2021[39] when they knew that, absent an exemption from the COVID-19 Policy **for which none of Plaintiffs allege they ever applied or considered applying for**, they would need to get vaccinated or be terminated. Indeed, even according to Plaintiffs, the enactment of the COVID-19 Policy itself was illegal and violated Plaintiffs' federally-protected rights.[40] The enactment date corresponds to the accrual date in *Chardon*—the date the plaintiffs in that case first learned of the policy decision they would later challenge.[41] ***All*** of Plaintiffs' § 1983 claims are time-barred as a matter of law because Plaintiffs did not file their Original Complaint until December 5, 2023.[42] The Court should dismiss, with prejudice, all of Plaintiffs' § 1983 claims because these claims accrued on September 14, 2021, more than two (2) years before Plaintiffs filed any suit.

---

[38] *Ruiz-Sulsona v. Univ. of Puerto Rico*, 334 F.3d 157, 159 (1st Cir. 2003) (emphasis added; citation omitted).

[39] Dkt. No. 20, pp. 20-12, ¶ 81.

[40] *See* Dkt. No. 20, p. 24, ¶¶ 95-91.

[41] *Rushing*, 861 F. App'x at 552.

[42] *See* Dkt. No. 1.

B. Even Assuming, *Arguendo*, Plaintiffs' Claims Are Timely, Plaintiffs' Underlying Theories Of The Case Are Fundamentally Flawed

1. Plaintiffs Never Triggered Any "Informed Consent" Protections

According to Plaintiffs, when the Shriners Parties signed the CDC Provider Agreement they became "state actors."[43] Plaintiffs claim because the CDC Provider Agreement incorporated the EUA "informed consent" requirements, the Shriners Parties were bound thereby.[44] Plaintiffs assert, further, that once the Shriners Parties enacted the COVID-19 Policy, their duty to provide the EUA "informed consent" information to Plaintiffs was immediately triggered, giving Plaintiffs the right to reject the vaccination and remain employed.[45]

The cavernous analytical gap in Plaintiffs' reasoning is that the COVID-19 Policy did not require any of the Shriners Parties to actually administer the vaccine to Plaintiffs because Plaintiffs were free to seek vaccination from any healthcare provider of their choosing.[46] With this critical fact in mind, case law uniformly confirms Plaintiffs' theory is impotent. As the Sixth Circuit recently recognized, the relevant "informed consent" language addresses the interaction between a medical provider and a person ***actually receiving the vaccine***, not the interaction between an employer requiring vaccination as a condition of employment and an

---

[43] *See*, *e.g.*, Dkt. No. 20, p. 5, ¶ 20.1 ("Shriners Hospitals for Children, Inc. . . . who, when interacting with individuals, including Plaintiffs, regarding the federally owned COVID-19 EUA/PREP Act drugs under the terms of the CDC Provider Agreement, was acting under color of law").

[44] Dkt. No. 20, p. 19, ¶ 79 ("Shriners agreed with the State to administer the federally owned COVID-19 EUA/PREP Act drugs and agreed to Section 12(a) of the Provider Agreement to perform the ministerial function of accepting Plaintiffs' chosen option to accept or refuse [the vaccine] without penalty.") (editor's brackets added).

[45] Dkt. No. 20, p. 24, ¶ 95 ("The Policy deprived Plaintiffs of their fundamental right to refuse an investigational drug without penalty."); *see also*, *Id.* at p. 22, ¶ 85 ("[T]he Policy and its enforcement . . . were *ultra vires*, unlawful, and the direct cause of Plaintiffs' injuries.").

[46] *See* Shriners Hospitals for Children System COVID-19 Vaccination for Healthcare Personnel Policy, Dkt. No. 20-4, p. 2 of 7, ¶ F.

employee.[47] None of Plaintiffs allege that any of the Shriners Parties (or anyone else for that matter) forcefully injected him or her with the COVID-19 vaccine. None of Plaintiffs allege that any of the Shriners Parties (or, again, anyone else) administered the COVID-19 vaccine to him or her without first providing the requisite "informed consent" information. Indeed, not a single Plaintiff alleges that any of Shriners Parties administered the COVID-19 vaccine to him or her ***at all***. "Therefore, this informed consent requirement does not apply to [the Shriners Parties] because they are not 'directly administering the vaccine' to employees."[48]

This analytical failure alone is fatal to Plaintiffs' claims. As Plaintiffs set out, "Shriners, requiring that which Congress prohibits (nonconsensual injection of federally owned COVID-19 EUA/PREP Act investigational drugs and/or requiring medical or religious exemption requests from individuals who already have the right to refuse without penalty) ***is the direct and proximate cause of Plaintiffs' financial, emotional, and legal injuries***."[49] Plaintiffs' theory of direct and proximate cause ***requires*** that their right to refuse the vaccine arose the moment the Shriners Parties enacted the COVID-19 Policy. But as case law unvaryingly confirms, Plaintiffs espoused "right to refuse" never came into being because none of the

---

[47] *Norris v. Stanley*, 73 F.4th 431, 438 (6th Cir. 2023) (emphasis added); *see also*, Dkt. No. 20-2, CDC COVID-19 Vaccination Program Provider Agreement p. 2 of 8 ("***Before administering COVID-19 Vaccine***, Organization must provide an approved Emergency Use Authorization (EUA) fact sheet or vaccine information statement (VIS), as required, to each vaccine recipient, the adult caregiver accompanying the recipient, or other legal representative.") (emphasis added).

[48] *Evans v. New York City Health & Hosps. Corp.*, 2023 WL 5920189, *7 (S.D.N.Y. Aug. 7, 2023), *report and recommendation adopted*, 2023 WL 5561145 (S.D.N.Y. Aug. 29, 2023) (editor's brackets added) (quoting *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1256 (D. Or. 2021); *Curtis v. PeaceHealth*, 2024 WL 248719, *8 (W.D. Wash. Jan. 23, 2024) (informed consent provisions do not apply to employer enforcing COVID-19 mandate); *Valdez v. Grisham*, 559 F.Supp.3d 1161, 1172 (D.N.M. 2021); *Klaassen v. Trustees of Indiana Univ.*, 549 F. Supp. 3d 836, 870 (N.D. Ind. 2021) (same), *vacated on other grounds and remanded*, 24 F.4th 638 (7th Cir. 2022); *Brnovich v. Biden*, 562 F. Supp. 3d 123, 162 (D. Ariz. 2022), *judgment entered*, 2022 WL 19560411 (D. Ariz. Feb. 10, 2022), *rev'd sub nom. on other grounds*, *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023); *Rhoades v. Savannah River Nuclear Sols., LLC*, 574 F. Supp. 3d 322, 345 (D.S.C. 2021).

[49] Dkt. No. 20, pp. 24-25, ¶ 99 (emphasis added); *see also*, *Id.* at p. 22, ¶ 85 ("[T]he Policy and its enforcement . . . were *ultra vires*, unlawful, and the direct cause of Plaintiffs' injuries.").

Shriners Parties ever actually administered the COVID-19 vaccination to any of the Plaintiffs. In other words, "there is no unqualified right to decide whether to 'accept or refuse' an EUA product without consequence" as Plaintiffs posit.[50]

2. 45 C.F.R. Part 46 Does Not Apply To The CDC COVID-19 Vaccination Program

Cherry-picking various statutory and regulatory provisions with varying degrees of interrelation, Plaintiffs piece together a reticulated theory that the CDC COVID-19 Vaccination Program qualified as a research project designed to develop or contribute to generalizable knowledge regarding an "investigational" drug.[51] This is critical to Plaintiffs' claims because, unless the CDC COVID-19 Vaccination Program is "research" as defined by 45 C.F.R. Part 46, then the "informed consent" provisions of 45 C.F.R. Part 46 vanish from the scene. It is this "informed consent" requirement Plaintiffs claim (without authority) required the Shriners Parties to allow Plaintiffs the option to refuse the COVID-19 vaccination and still remain employed.[52] And it is imperative for Plaintiffs' claims that 45 C.F.R. Part 46 ***specifically*** applies because, although Plaintiffs treat the provisions of 45 C.F.R. Part 46 and 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III) as interchangeable and identical, ***only 45 C.F.R. Part 46 contains the "no penalty or loss of benefits . . ." language upon which Plaintiffs' hang the***

---

[50] *Children's Health Def., Inc. v. Rutgers, the State Univ. of New Jersey*, 93 F.4th 66, 76 (3d Cir. 2024).

[51] *See* Dkt. No. 20, p. 10, n.21 (arguing that "[t]he [National Research Act] required the Secretary [of Health and Human Services] to promulgate 45 C.F.R. Part 46 to protect persons involved in investigational new drugs under research conditions. 'Research' under the legal framework is not a clinical trial but an activity 'designed to develop or contribute to generalizable knowledge' about the product, theory, process, etc."); *see also*, *id.* at p. 11, n.23 (referring to the CDC COVID-19 Vaccination Program as "research activities").

[52] *See*, *e.g.*, Dkt. No. 20, p. 14, ¶ 49 ("The EUA statute, at 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III), expressly creates for Plaintiffs the option to accept or refuse [the vaccine] . . ."); *see also*, *Id.* at p. 20, ¶ 79 (referring to "Plaintiffs' chosen option to accept or refuse [the vaccine] without penalty"); *see also*, *Id.* at p. 24, ¶ 95 (referring to Plaintiffs' "fundamental right to refuse an investigational drug without penalty.").

entirety of their claims.[53] On the other hand, "21 U.S.C. § 360bbb-3's terms only require that [Plaintiffs] be 'informed . . . of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product.' It is without question those requirements were met [by the COVID-19 Policy]."[54]

Plaintiffs selectively focus on only a portion of Part 46 that expansively defines "research," namely 45 C.F.R. § 46.102. However, the same regulation enumerates certain activities as "deemed not to be research."[55] **Among these activities deemed not to be research are "[a]uthorized operational activities (as determined by each agency) in support of intelligence, homeland security, defense, *or other national security missions.*"**[56] As the Court knows from Plaintiffs' own filings, "the Secretary of the Department of Health and Human Services (HHS) determined that there is a public health emergency **that has a significant potential to affect national security** or the health and security of United States citizens living abroad, and that involves the virus that causes Coronavirus Disease 2019 (COVID-19)."[57] Because of the HHS Secretary's determination, on March 27, 2020, the HHS Secretary "declared that circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic, pursuant to section 564 of the [FD&C] Act (21 U.S.C. 360bbb-3), subject to terms

---

[53] *Compare* , 45 C.F.R. § 46.116(b) *with* 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III).

[54] *Villareal v. Rocky Knoll Health Ctr.*, 2021 WL 5359018, *3 (E.D. Wis. Nov. 17, 2021) (editor's brackets added); *Children's Health Def.*, 93 F.4th at 76.

[55] 45 C.F.R. § 46.102 (l).

[56] *Id.* at § 46.102(l)(4) (emphasis added).

[57] Dkt. No. 20-3, p. 1 of 13 (emphasis added); *see also*, 85 F.R. 7316-17, 2020 WL5 85145, Feb. 7, 2020.

of any authorization issued under that section."[58] Thereafter, on December 11, 2020, the FDA issued an EUA authorizing the emergency use of Pfizer-BioNTech COVID-19 Vaccine for the prevention of COVID-19 for individuals 16 years of age and older, and reissued the letter of authorization on December 23, 2020, February 25, 2021, May 10, 2021, June 25, 2021, and August 12, 2021.[59]

In other words, because the HHS Secretary (through delegation to the FDA) issued an EUA and scope of authorization for use of the Pfizer COVID-19 vaccination to address a national security threat, the CDC COVID-19 Vaccination Program is "deemed not to be research" under the very regulatory scheme upon which Plaintiffs rely. Plaintiffs fail to address this in their Second Amended Complaint, and hope the Court will overlook it, because it is outcome determinative to their underlying theory of the case.

3. The Pfizer-BioNTech COVID-19 Vaccine Was Not An "Investigational Drug"

Also figuring prominently into Plaintiffs' theory of the case is the notion that Pfizer-BioNTech COVID-19 Vaccine was an "investigational drug" at the time the Shriners Parties established the COIVD-19 Policy. Plaintiffs make their case that the COVID-19 vaccine was an "investigational drug" by relying heavily upon the regulatory definitions found in 21 C.F.R. Part 312. Part 312 of Title 21 itself is entitled "Investigational New Drug Application."[60] Plaintiffs point to the definitions of "investigational new drug" and "clinical investigation" in Part 312 and conclude confidently—but without authority—that the Pfizer COVID-19

[58] Dkt. No. 20-3, p. 1 of 13 (editor's brackets added); *see also*, 85 F.R. 18250-51, 2020 WL 1529677 Apr. 1, 2020.

[59] *Johnson v. Brown*, 567 F. Supp. 3d 1230, 1239 (D. Or. 2021).

[60] *See* 21 CFR Ch. I, Subch. D, Pt. 312.

vaccine and the CDC COVID-19 Vaccination Program, respectively, fit within those definitions.[61]

Plaintiffs fail to explain how definitions contained in Part 312 reach beyond that part and apply here.[62] But even assuming they do, Plaintiffs' argument stalls before it gets out of the gate. "Clinical investigation means any experiment in which a drug is administered or dispensed to, or used involving, one or more human subjects. For the purposes of this part, an experiment is any use of a drug except for the use of a marketed drug in the course of medical practice."[63] "Investigational new drug means a new drug or biological drug that is used in a clinical investigation."[64] **Thus, by definition, the Pfizer COVID-19 vaccine was only an "investigational new drug" at the time if it was "used in a clinical investigation."**[65]

Once again, Plaintiffs selectively ignore the most germane portion of the provisions upon which they rely, this time 21 U.S.C. § 360bbb-3. The statute declares that "[i]f a product is the subject of an authorization under this section, **the use of such product within the scope of the authorization shall not be considered to constitute a clinical investigation** for purposes of section 355(i), 360b(j), or 360j(g) of this title or any other provision of this

---

[61] Dkt. No. 20, p. 10, n.19 (relying upon definitions in 21 CFR § 312.3).

[62] *See* 21 CFR § 312.3(b) ("The following definitions of terms also apply to this part: . . .") (emphasis added); *see also*, *Bridges v. Houston Methodist Hosp.*, 543 F. Supp. 3d 525, 527 (S.D. Tex. 2021), *aff'd sub nom.*, *Bridges v. Methodist Hosp.*, 2022 WL 2116213 (5th Cir. Jun. 13, 2022) ("The hospital's employees are not participants in a human trial. They are licensed doctors, nurses, medical technicians, and staff members. The hospital has not applied to test the COVID-19 vaccines on its employees, it has not been approved by an institutional review board, and it has not been certified to proceed with clinical trials.").

[63] 21 CFR § 312.3(b).

[64] *Id.* (underscore added).

[65] *Id.* (emphasis added).

chapter or section 351 of the Public Health Service Act."[66] Stated another way, "[o]nce a drug receives an EUA, it is no longer considered under 'clinical investigation' under the [Public Health Service Act] or the FDCA."[67] When the Shriners Parties enacted the COVID-19 Policy, the Pfizer COVID-19 vaccine was not an "investigational new drug" because the CDC COVID-19 Vaccination Program was not a "clinical investigation." Rather, the Pfizer COVID-19 vaccine was distributed and administered as part of the CDC COVID-19 Vaccination Program within the scope of the HHS Secretary's authorization issued to address a national security threat.

C. None of the Shriners Parties Are "State Actors," And Therefore, Plaintiffs Fail To State Claims Under § 1983

For sake of argument, even if Plaintiffs' claims are not barred by limitations and their legal theory is viable, Plaintiffs' § 1983 claims still fail as a matter of law. Plaintiffs have not and cannot plausibly allege that any of the Shriners Parties were "state actors" acting "under color of state law" with regard to Plaintiffs' federally-protected rights. In this regard, Plaintiffs allege:

> At all times pertinent, Shriners acted under color of law when (1) interacting with individuals considering whether to be injected with one of the COVID-19 investigational drugs, (2) administering the federally owned COVID-19 EUA/PREP Act investigational drugs, (2) [sic] acting in accordance with Ms. Young's State-enforced custom, (3) conducting COVID-19 research activities for the State, (4) performing the ministerial duty of accepting an individual's chosen option, and (5) obtaining an individual's legally effective informed consent.[68]

---

[66] 21 U.S.C. § 360bbb-3(k) (emphasis added).

[67] *Doe #1—#14 v. Austin*, 572 F. Supp. 3d 1224, 1239 (N.D. Fla. 2021) (editor's brackets added) (citing 21 U.S.C. § 360bbb-3(k)).

[68] Dkt. No. 20 p. 19, ¶ 74.

1. Plaintiffs Must Plausibly Allege Each Separate Shriners Party Is A State Actor With Respect To The Specific Conduct Plaintiffs Claim Caused Them Harm

Plaintiffs must plead facts sufficient to plausibly allege the Shriners Parties acted under color of state law in allegedly abridging Plaintiffs' federally-protected rights.[69] In deciding whether a private party acted under color of state law, a court analyzes "'the *specific* conduct of which the plaintiff complains,'"[70] rather than an "investigation into all of a defendant's possible activities . . ."[71] "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint."[72]

(a). Plaintiffs Fail To Allege Sufficient "State Actor" Facts Regarding The Shriners Individuals

As to the individual Shriners Parties, Plaintiffs fail to allege any *facts* to credibly demonstrate any of them were state actors. Regarding Beverly Bokovitz and Frances Farley, Plaintiffs make the conclusory allegation that they were "aware and responsible for duties owed to Plaintiffs under the organization's FWA, IRB, CDC COVID-19 Vaccination Program Provider Agreement on behalf of Shriners."[73] Regarding Jerry Gantt, John McCabe, and Phillip Grady, Plaintiffs allege they were each "a signatory to Shriners' COVID-19 policy"[74] and that Gantt and McCabe "issued and signed an unlawful directive to 'all Shriners

---

[69] *Floyd v. City of Kenner, La.*, 351 F. App'x 890, 897 (5th Cir. 2009) (citing *Ashcroft v. Iqbal,* 566 U.S. 662, 676 (2009)).

[70] *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

[71] *Holly v. Scott*, 434 F.3d 287, 293 (4th Cir. 2006) (citing *American Mfrs.*, 526 U.S. at 51).

[72] *Blum*, 457 U.S. at 1003.

[73] Dkt. No. 20, p. 5, ¶¶ 20.2, 20.3.

[74] Dkt. No. 20, p. 6, ¶¶ 20.5, 20.6, 20.7

Hospitals for Children Employees and Contract Staff" regarding a new company policy titled, 'COVID-19 Vaccine Policy' ('Policy')."[75] Beyond these scant allegations, Plaintiffs employ a global pleading lumping all Shriners Parties together with no differentiation at all.[76]

"'[A] plaintiff bringing a section 1983 action must specify the personal involvement of each defendant."[77] "It is black-letter law that "[w]here a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent to the defendant except for his name appearing the caption, the complaint is properly dismissed, even under [a] liberal [pleading] construction . . ."[78] Here, "Plaintiffs have not asserted plausible factual allegations against any [individual defendant] other than [the Shriners Hospital defendant]. Plaintiffs' only individual allegations are conclusory statements, which the Court need not accept as true."[79] The non-conclusory facts Plaintiffs have pleaded against the individual Shriners Parties are patently deficient to allege that any of them were "state actors" in order to sustain a § 1983 action against them. Based on the foregoing, the Court should dismiss the claims against the individual Shriners Parties for this reason alone.

(b). Plaintiffs Fail To Tie The COVID-19 Policy To The State

In *Cornish v. Correctional Servs. Corp.*,[80] the plaintiff sued his former employer, a private

---

[75] Dkt. No. 20, p. 20, ¶ 81.

[76] *See*, *e.g.*, Dkt. No. 20, p. 1 n.1.

[77] *Kirschstein v. Bowie County, Tex.*, 2008 WL 11449195, *2 (E.D. Tex. Jan. 3, 2008) (quoting *Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992)).

[78] *Mayo v. Bankers Life & Cas. Co.*, 2010 WL 4363392, *2 (S.D. Miss. Oct. 27, 2010) (quoting *Potter v. Clark,* 497 F.2d 1206, 1207 (7th Cir. 1974); and citing *Krych v. Metzen,* 83 Fed. Appx. 854, 855 (8th Cir. 2003) (plaintiff "failed to state any claim whatsoever against [defendants] because he merely listed these individuals as defendants in his complaint."); and collecting cases).

[79] *Zimmerman v. PeaceHealth*, 2023 WL 7413650, *13 (W.D. Wash. Nov. 9, 2023).

[80] 402 F.3d 545 (5th Cir. 2005).

corporation that operated a juvenile detention facility in Dallas County, Texas, under § 1983 for terminating his employment.[81] The plaintiff alleged he was terminated because he reported numerous operational violations by the defendant to management and to state and local officials.[82] The defendant moved for dismissal under Rule 12(b)(6) on grounds that the plaintiff had not plausibly alleged the defendant acted under color of state law in terminating the plaintiff's employment.[83] Echoing *American Mfrs. Mut. Ins. Co. v. Sullivan*, the *Cornish* court first endeavored to identify "'the specific conduct'" underlying the plaintiff's complaint.[84] The plaintiff claimed—and the defendant conceded—that, in providing juvenile correctional services, the defendant was a state actor.[85] But the *Cornish* court reasoned that the issue concerned whether the defendant's termination of the plaintiff's employment—rather than the defendant's provision of juvenile correctional services—was under color of state law. "Considering this, the court held that the "plaintiff's complaint alleges no facts concerning why [the defendant's] role *as an employer* constituted state action."[86] The *Cornish* court, therefore, affirmed the district court's grant of dismissal under Rule 12(b)(6).[87]

Curtis v. Peacehealth[88] squares with *Cornish*'s reasoning and is on all fours with the present case. In *Curtis*, healthcare workers sued their former employer—a private healthcare facility—

---

[81] *Id.* at 547.

[82] *Id.*

[83] *Id.* at 549.

[84] *Id.* (quoting *American Mfrs.*, 526 U.S. at 51).

[85] *Cornish*, 402 F.3d at 550.

[86] *Id.* (emphasis in original, editor's brackets added, internal citation omitted); *see also, Curtis v. PeaceHealth*, 2024 WL 248719, *5 (W.D. Wash. Jan. 23, 2024) ("**The Plaintiffs frequently conflate PeaceHealth's obligations as an entity that administers vaccines with PeaceHealth's actions as an employer**.") (emphasis added).

[87] *Cornish*, 402 F.3d at 551.

[88] 2024 WL 248719 (W.D. Wash. Jan. 23, 2024).

under the same theories, same causes of action, and, indeed, with the same counsel as Plaintiffs in this case.[89] On the issue of "state action," the *Curtis* court observed:

> Before the Court can answer the question of whether the PeaceHealth Defendants acted as a state actor, the Court 'must identify the specific conduct' of which the Plaintiffs complain. In the Amended Complaint and their response, the Plaintiffs engage in lengthy discussions about PeaceHealth's obligations as an entity that gives COVID-19 vaccines. The Plaintiffs frequently conflate PeaceHealth's obligations as an entity that administers vaccines with PeaceHealth's actions as an employer. The Plaintiffs' arguments related to the PeaceHealth Defendants' role as an entity that gives COVID-19 vaccines are not relevant to whether it was a state actor for its § 1983 based claims.[90]

The import of *Cornish* and *Curtis* is clear—an entity or a person "'may be a state actor for some purposes but not for others.'"[91] In such an instance, a § 1983 plaintiff must tie the specific conduct allegedly making the defendant a state actor to the harm the plaintiff claims to have suffered.[92] Relying on conduct unrelated to that which makes a defendant a "state actor" will not support any claim under § 1983.

The gravamen of Plaintiffs' claims is that the Shriners Parties infringed on Plaintiffs' rights by enacting the COVID-19 Policy and further infringed on their rights by terminating Plaintiffs' respective employments for non-compliance with the COVID-19 Policy. Plaintiffs attempt to artfully plead around *Cornish* and *Curtis*, arguing that "Plaintiffs did not suffer injury for refusing to comply with a company vaccine policy or mandate. Plaintiffs suffered injury for exercising their right to refuse the federally owned COVID-19 EUA/PREP Act drugs . .

---

[89] *See Id.*

[90] *Curtis*, 2024 WL 248719 at *5 (internal citations omitted).

[91] *Cornish*, 402 F.3d at 550 (quoting *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996), *cert. denied*, 519 U.S. 1081 (1997)).

[92] *See*, *Cornish*, 402 F.3d at 550-51.

."[93] Plaintiffs' semantic argument begs the question, though: "How else did the Shriners Parties allegedly put Plaintiffs in the position exercising their alleged rights to refuse the COVID-19 vaccination but for enactment of the COVID-19 Policy?" Based on Plaintiffs' pleadings, of course, the answer is simple: "There is no other way."

Enacting and enforcing the COVID-19 Policy is unmoored from the conduct Plaintiffs' allege made the Shriners Parties a state actor—agreeing to participate in the administration of the State's COVID-19 emergency immunization program by becoming a party to the COVID-19 Provider Agreement. Plaintiffs allege no facts suggesting that a private employer requiring its employees to be vaccinated as a condition of continued employment constitutes state action.[94] This is the specific conduct Plaintiffs must attribute to that of the State—and this Plaintiffs have not and cannot plausibly accomplish.

2. Plaintiffs Have Not And Cannot Plausibly Allege The Shriners Parties Performed A Function Traditionally And Exclusively Reserved To The State

In limited cases, the United States Supreme Court has found that "a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the State.'"[95] "It is not enough that the government has exercised, or still does exercise, the alleged function, or "that the function serves the public good or the public interest." [96] "Rather, to

---

[93] Dkt. No. 20, p. 23, ¶ 92.

[94] *See*, *e.g.*, *Johnson v. Tyson Foods, Inc.*, 607 F. Supp. 3d 790, 802 (W.D. Tenn. 2022) ("**Because Plaintiff has failed to show that Defendants' actions in requiring employees to be vaccinated is equivalent to government or state action, the claims requiring state action must be dismissed**.") (emphasis added).

[95] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019) (editor's brackets added) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)); *see also Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974); *see also*, *Nat'l Broad. Co. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1026 (11th Cir. 1988) ("The public function test for state action has been limited strictly . . .").

[96] *Halleck*, 139 S.Ct. at 1928-29.

qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function."[97]

"'[V]ery few" functions fall into this category.[98] Among these scarce functions the Supreme Court has recognized are running elections,[99] running company towns,[100] the exercise of eminent domain,[101] operation of a municipal park,[102] providing health care to state inmates,[103] and, perhaps most obviously, defining and enforcing the criminal law, *i.e.*, "police power."[104] Other functions found not traditionally *and* exclusively performed by the state include: running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, supplying electricity,[105] and education.[106] **Though the Supreme Court has not spoken directly on the issue, the courts that have done so have found that "[a] private business's implementation of an employee vaccination policy is <u>not</u> akin to any of 'those limited activities—for example running a city—that have**

---

[97] *Id.* (emphasis in original; collecting cases).

[98] *Halleck*, 139 S.Ct. at 1929 (collecting cases).

[99] *Id.* (collecting cases).

[100] *Id.* (collecting cases).

[101] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974).

[102] *Evans v. Newton*, 382 U.S. 296 (1966).

[103] *West v. Atkins*, 487 U.S. 42 (1988).

[104] *See*, *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (citing *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *see also*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power, and virtually all state and local governments employ a uniform police force to aid in the accomplishment of that purpose.").

[105] *Halleck*, 139 S.Ct. at 1929 (collecting cases).

[106] *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

'traditionally *and exclusively*' been performed by the government.'"[107] This truth does not change even when the employer is a private hospital imposing a COVID-19 mandate.[108]

Plaintiffs have not—and cannot—plausibly allege that the Shriners Parties' imposition of the COVID-19 Policy was a traditional and exclusive role of the State. Thus, Plaintiffs have failed to plausibly allege "state action" by the Shriners Parties under the "public function" theory and no pleadings amendment can cure this failure.

3. Plaintiffs Have Not And Cannot Plausibly Allege The Shriners Parties Were In A Symbiotic Relationship With The State

Under the "symbiotic relationship" theory, "'[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.'"[109] "In *Rendell-Baker v. Kohn,* the United States Supreme Court stressed that the key factor in determining the existence of a symbiotic relationship is whether the *state* profited from the discriminatory activity."[110]

---

[107] *Johnson v. Tyson Foods, Inc.*, 607 F. Supp. 3d 790, 800 (W.D. Tenn. 2022) (emphasis in original) (quoting *United States v. Miller*, 982 F.3d 412, 423 (6th Cir. 2020) (quoting *Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 341 (6th Cir. 2006)); *see also*, *Anderson v. United Airlines, Inc.*, 577 F. Supp. 3d 1324, 1333 (M.D. Fla. 2021) ("To the extent Anderson alleges that United has taken on a public function under this test, his allegations do not rise to a sufficiently plausible level."); *Leitgeb v. Sark Wire Corp. - GA*, 2022 WL 18777380, *5 (N.D. Ga. Sept. 21, 2022) (same) (emphasis added).

[108] *See*, *e.g.*, *Together Employees v. Mass Gen. Brigham Inc.*, 19 F.4th 1, 3 (1st Cir. 2021) (**private hospital was not a state actor governed by the First Amendment and, thus, its mandatory policy requiring all employees to be vaccinated against COVID-19 did not violate Constitution**); *Finkbeiner v. Geisinger Clinic*, 623 F. Supp. 3d 458, 467 (M.D. Pa. 2022) (**private hospital implementing COVID-19 vaccine mandate did not perform a function traditionally and exclusively reserved to the State**); *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, 2021 WL 4504245, *3 (S.D. Ohio Sept. 30, 2021) (**private hospital not a state actor**); *Beckerich v. St. Elizabeth Med. Ctr.*, 2021 WL 4398027, *2-3 (E.D. Ky. Sept. 24, 2021) (**finding similar constitutional claims challenging private healthcare employer's COVID-19 vaccination policy have "zero likelihood of success on the merits" because employer was not a state actor**) (emphasis added).

[109] *Frazier v. Board of Trustees of Nw. Mississippi Reg'l Med. Ctr.*, 765 F.2d 1278, 1285 (5th Cir.), *amended*, 777 F.2d 329 (5th Cir. 1985) (quoting Evans v. Newton, 383 U.S 296, 299 (1966)).

[110] *Ponce v. Basketball Fed'n of Com. of Puerto Rico*, 760 F.2d 375, 382 (1st Cir. 1985) (emphasis added, internal citations omitted).

In *Jatoi v. Hurst–Euless–Bedford Hospital Authority*, a doctor brought suit against a hospital under § 1983 (among other claims) claiming the hospital discriminatorily terminated his medical staff privileges without due process.[111] The hospital was originally constructed by a hospital authority which was organized as a municipal corporation created by Texas statute.[112] The hospital authority raised the funds necessary to construct the hospital by issuing bonds.[113] Initially, the hospital authority operated the hospital, but a year later, the hospital authority entered into an agreement with a non-profit corporation to provide additional funds and operate the hospital.[114] The hospital authority initially leased, and eventually sold, the hospital to the non-profit corporation.[115] Nevertheless, the district court granted the defendant's summary judgment on the doctor's § 1983 claim finding no state action.[116]

On appeal, the Fifth Circuit reversed, and detailed the facts it found significant in finding state action. The hospital was originally constructed and run by a governmental authority with the use of public funds.[117] Further, after turning over operation of the hospital to a private party under a lease arrangement, the hospital authority continued to derive a direct financial benefit from the operation of the hospital.[118] Successful operation of the hospital was critical to the government authority's ability to repay the bonds it issued and the mortgages

---

111 *Jatoi v. Hurst–Euless–Bedford Hospital Authority,* 807 F.2d 1214, 1217 & 1220 (5th Cir. 1987).

112 *Id.* at 1217.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 1221.

118 *Id.*

it took on in order to initially build the hospital.[119] The hospital authority continued to finance the hospital through bonds, mortgages, and fundraising efforts.[120] The non-profit corporation took over management of the hospital directly from the State.[121] In light of these facts, the *Jatoi* court held that the defendant and the State of Texas were in a symbiotic relationship.[122]

The facts of *Jatoi* are wholly dissimilar to the present case. Plaintiffs make no allegation—nor can they—that the State of Texas (or any arm, agency, or official thereof) profited at all from the operations of the Shriners Hospital in Galveston or by implementation or enforcement of the COVID-19 Policy. In addition, Plaintiffs have not made any allegation—nor can they—that any arm, agency, or official of the State of Texas jointly participated with the Shriners Parties in operating the hospital, in making or approving personnel decisions, or in implementing or enforcing the COVID-19 Policy. As a result, Plaintiffs have failed to plausibly allege "state action" by the Shriners Parties under the "symbiotic relationship" theory and no pleadings amendment can cure this failure.

4. Plaintiffs Have Not And Cannot Plausibly Allege The Shriners Parties Were Compelled By The State To Implement And Enforce The COVID-19 Policy

The United States Supreme Court articulates the "state compulsion" or "state coercion" test as follows: "'a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 1221-22.

overt or covert, that the choice must in law be deemed to be that of the State.'"[123] "A state's mere acquiescence in private conduct, even where authorized by statute, will not transform that conduct into state action."[124] In other words, a state's indifference to, or even approval of, a private party's conduct where the state has not asserted itself by *ordering* the conduct does not imply state action.[125]

Plaintiffs have not and cannot allege the State of Texas compelled the Shriners Parties to implement and enforce the COVID-19 Policy against them. At best, Plaintiffs' claim Defendant Cecile Erwin Young acquiesced or turned a blind eye to the Shriners Parties' implementation and enforcement of the COVID-19 Policy, but this is not enough.[126] Therefore, Plaintiffs have failed to plausibly allege "state action" by the Shriners Parties under the "state compulsion" theory and no pleadings amendment can cure this failure.

D. Even If The Shriners Parties Were State Actors, Plaintiffs' Equal Protection, Due Process, And Privacy Claims Fail As A Matter Of Law

Even if the Shriners Parties were state actors, Plaintiffs' Equal Protection claims fail because the Shriners Parties had a rational basis to make vaccination a condition of employment—ensuring the health and safety of its workers and patients. In *Biden v. Missouri*, for example, the United States Supreme Court held that the federal nationwide COVID-19 vaccination mandate imposed on medical facilities receiving federal funds was not arbitrary or capricious.[127]

---

[123] *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999) (quoting *Blum v. Yaretsky,* 457 U.S. 991 (1982)).

[124] *Bass*, 180 F.3d at 242 (citing *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978)).

[125] *See Flagg Bros.*, 436 U.S. at 164.

[126] *See*, *Bass*, 180 F.3d at 242 (citing *Flagg Bros.*, 436 U.S. at 164).

[127] *Biden v. Missouri*, 142 S. Ct. 647, 653-54 (2022).

Plaintiffs' Due Process claims fail because they have alleged no protected interest. "The guarantee of due process has been limited to situations where a state officer deliberately chooses to deprive a person of life, liberty, or property."[128] In reviewing the damages Plaintiffs are claiming (*i.e.*, front pay, back pay, loss of benefits, loss of sick pay, loss of retirement accounts, lost earnings on retirement funds, vacation time, compensatory time, paid time off, negative tax consequences, emotional distress, mental, psychological, and physical harm, loss of income, loss of enjoyment of life),[129] it clearly demonstrates that this is an employment case masquerading as an "informed consent" case. Put simply, "the plaintiffs were never physically compelled to receive a vaccine; rather, they were given an option between following the COVID-19 Policy and getting vaccinated, or getting terminated for not complying with the COVID-19 Policy. This matters because 'termination of employment does not constitute 'interference' with a constitutional right where . . . the employee was at-will.'"[130] For these same reasons, Plaintiffs' "Unconstitutional Conditions Doctrine" claims fail.[131]

The Constitutional right to privacy is limited to only disclosures of the most intimate aspects of human affairs.[132] The privacy right Plaintiffs claim (the right to consider whether

---

[128] *Saenz v. Heldenfels Bros.*, 183 F.3d 389, 391 (5th Cir. 1999).

[129] *See* Dkt. No. 20, p. 38, ¶ 180.

[130] *McEntee v. Beth Israel Lahey Health, Inc.*, 2023 WL 4907617, *5 (D. Mass. Aug. 1, 2023) (quoting *Nolan v. CN8*, 2010 WL 3749466 *3, 2010 WL 3749466, *3 (D. Mass. Sept. 21, 2010), *aff'd*, 656 F.3d 71, 77 (1st Cir. 2011)) (other citations omitted).

[131] *Curtis*, 2024 WL 248719 at *9 (COVID-19 mandate does not implicate Unconstitutional Conditions Doctrine because at-will employees of a private employer cannot plead sufficient facts for claim that government benefit has been denied) (underscore in original) (citing *Antunes v. Rector & Visitors of Univ. of Va.*, 627 F.Supp.3d 553, 566 (W.D. Va. 2022) (same)).

[132] *Zaffuto v. City of Hammond*, 308 F.3d 485, 490 (5th Cir.), *on reh'g in part*, 313 F.3d 879 (5th Cir. 2002) (citing *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988)).

to accept the COVID-19 vaccine[133]) does not implicate the confidentiality branch of the Fourteenth Amendment.[134]

E. Even If The Shriners Parties Were State Actors, They Are Entitled To Qualified Immunity

Even if the Shriners Parties were state actors, Plaintiffs' § 1983 claims would still fail because the Shriners Parties would be entitled to qualified immunity.[135] "When a defendant asserts a qualified-immunity defense in a motion to dismiss, the court has an obligation to carefully scrutinize [the complaint] before subjecting public officials to the burdens of broad-reaching discovery."[136] Plaintiffs challenge the COVID-19 Policy, but courts have routinely *rejected* such challenges.[137] Neither the Fifth Circuit nor the United States Supreme Court has ever struck a policy like the COVID-19 Policy on the federal grounds Plaintiffs present here or found that promoting and enforcing such a policy violated any of those federal grounds.[138] None of the Shriners Parties "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," so if they are state actors, they are "entitled to qualified immunity."[139]

---

133 *See* Dkt. No. 20, p. 14, ¶ 155.

134 *Norris v. Stanley*, 558 F. Supp. 3d 556, 558 (W.D. Mich. 2021).

135 *See generally Filarsky v. Delia*, 566 U.S. 377, 392 (2012) (holding that qualified immunity extends beyond government employees to those performing government functions under the government's supervision).

136 *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 263-64 (5th Cir. 2019).

137 *See supra*, at n. 105 & n. 106.

138 *See, e.g.*, *Biden*, 142 S. Ct. at 653-54.

139 *Longoria*, 942 F.3d at 264.

F. Even If The Shriners Parties Were State Actors, The Underlying Provisions Plaintiffs Rely Upon Do Not Create Enforceable Rights Either As Stand Alone Claims Or Through § 1983

1. 21 U.S.C. 360bbb-3 Does Not Provide Plaintiffs A Private Right Of Action

Every federal court in the nation to consider this issue—specifically in relation to COVID-19 mandates—has agreed that there is no private right of action under 21 U.S.C. 360bbb-3, either through the statute itself or under § 1983.[140] Indeed, there is no private right of action at all under the FDCA of which 21 U.S.C. 360bbb-3 is part.[141] Inexplicably, even though the FDCA expressly forecloses any private right of action, including under 21 U.S.C. 360bbb-3, Plaintiffs claim the Court should find that they have an implied private right of action under the statute. However:

> [T]he FDCA explicitly 'forbids private rights of action.' As such, the Court need not conduct a detailed analysis of the remedial devices provided for in the FDCA in order to 'infer' whether Congress had an intent to foreclose a private remedy. Congress's intent is plain: there is no private right of action under the FDCA. Accordingly, Plaintiffs may not use § 1983 as a means to enforce the FDCA . . ."[142]

As a matter of law and by express mandate, Plaintiffs cannot pursue § 1983 claims to enforce rights arising under the FDCA generally or 21 U.S.C. 360bbb-3 specifically.

2. The Prep Act Does Not Provide Plaintiffs A Private Right Of Action

The only private right of action under the PREP Act allows an eligible plaintiff to sue

---

[140] *See, e.g.*, *Bird v. Martinez-Ellis*, 2022 WL 17973581, *5 (10th Cir. Dec. 28, 2022); *Curtis*, 2024 WL 248719 at *7; *Berutti v. Bumb*, 2023 WL 5020542, *6 (D.N.J. Aug. 4, 2023); *Romero v. Bellevue Hosp.*, 2023 WL 4081540, *4 (S.D.N.Y. Jun. 20, 2023); *Jackson v. Methodist Health Servs. Corp.*, 2023 WL 2486599, *5 (C.D. Ill. Feb. 10, 2023); *Freeman v. Raytheon Techs. Corp.*, 2023 WL 1927985, *8 (D. Colo. Feb. 10, 2023), *report and recommendation adopted*, 2023 WL 3086032 (D. Colo. Mar. 24, 2023) (citing *Crosby v. Austin*, 2022 WL 603784, *1 (M.D. Fla. March 1, 2022)); *Berutti v. Wolfson*, 2023 WL 1071624, *5 (D.N.J. Jan. 27, 2023); *Navy Seal 1 v. Biden*, 574 F. Supp. 3d 1124, 1130 (M.D. Fla. 2021).

[141] *Scott v. Pfizer Inc.*, 182 F. App'x 312, 315 (5th Cir. 2006).

[142] *Foli v. Metro. Water Dist. of S. California*, 2012 WL 1192763, *2–3 (S.D. Cal. Apr. 10, 2012).

"'a covered person 'for *death or serious physical injury* proximately caused by [that person's] willful misconduct.'"[143] What's more, even if Plaintiffs could articulate a claim under the PREP Act (and they can't), any such claim "*shall* be *filed and maintained* in United States District Court for the District of Columbia,"[144] "'and even those claims require administrative exhaustion before they may be filed in federal court.'"[145] Even if Plaintiffs could allege claims for death or serious physical injury—and they cannot—they cannot seek redress for any such injuries in this Court, nor can they proceed under § 1983 in any court.

3. 10 U.S.C. § 980 Does Not Provide Plaintiffs A Private Right Of Action

10 U.S.C. § 980 is part of Chapter 49 of Title 10 of the United States Code which applies to the United States Armed Forces. As Plaintiffs point out in the Second Amended Complaint, this particular provision prohibits funds appropriated to the Department of Defense from being used for research involving a human being as an experimental subject unless one of two conditions is met.[146] Even if this statue provided an individual private right of action—and it does not—Plaintiffs have not and cannot plausibly allege they—private citizens and not members of the military—could enforce any such a right under § 1983 or otherwise.[147]

---

[143] *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 243 (5th Cir. 2022) (quoting 42 U.S.C. § 247d-6d(d)(1)).

[144] 42 U.S.C. § 247d-6d(e)(1) (emphasis added).

[145] *Eaton v. Woodlawn Manor*, 2021 WL 4901811, *7 (W.D. La. Oct. 5, 2021), *report and recommendation adopted*, 2021 WL 4900996 (W.D. La. Oct. 20, 2021) (quoting *Bolton v. Gallatin Ctr. for Rehabilitation & Healing, LLC*, 2021 WL 1561306, *7 (M.D. Tenn. Apr. 21, 2021)).

[146] *See* 10 U.S.C. § 980 (a)(1) & (2).

[147] *Curtis*, 2024 Wl 248719 at *8.

4. 45 C.F.R. Part 46 Does Not Provide Plaintiffs A Private Right Of Action

Plaintiffs cannot bring any claim under 45 C.F.R. § 46.101, *et seq.* First, courts throughout the country have found that (like the Prep Act and the FDCA) 45 C.F.R. § 46.101, *et seq.*, does not confer a private right of action.[148] Second, and of more force, **no** administrative regulation from an executive agency of government can be enforced through § 1983.[149]

5. None Of The FWA, The CDC COVID-19 Vaccination Provider Agreement, Or The EUA Scope Of Authorization Letter Provides Plaintiffs A Private Right Of Action

Like administrative agency regulations, none of the Federal Wide Assurance Agreement (the "FWA"), the CDC COVID-19 Vaccination Provider Agreement, or the EUA Scope of Authorization Letter is a creature of Congress. Therefore, they cannot confer rights enforceable under § 1983.[150]

6. The ICCPR Treaty Does Not Provide Plaintiffs A Private Right Of Action

Generally, "international treaties do not create rights that are privately enforceable in federal courts."[151] Specifically, the ICCPR Treaty does not create a private right of action.[152]

---

[148] *See Thomas v. Catlin*, 141 F. App'x 673 (9th Cir. 2005) ("The district court properly held [Plaintiff] failed to state a claim under 45 C.F.R. §§ 46.101, *et seq.*, the federal statute regulating research involving human subjects, because the statute does not confer a private right of action."); *Wright v. Fred Hutchinson Cancer Research Ctr*, 269 F. Supp. 2d 1286, 1290 (W.D. Wash. 2002) ("Because plaintiffs have not identified any statutory basis for the private rights of action they seek to assert, their claims under . . . 45 C.F.R. § 46 must fail.").

[149] *Thurman v. Med. Transportation Mgmt., Inc.*, 982 F.3d 953, 955 (5th Cir. 2020).

[150] *See Id.*

[151] *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000).

[152] *Ralk v. Lincoln Cnty., Ga.*, 81 F.Supp.2d 1372, 1380 (S.D. Ga. 2000).

7. The Belmont Report Does Not Provide Plaintiffs A Private Right Of Action

Succinctly, the Belmont Report is not a federal law that creates individual rights but a "statement of principles" that does not create a private right of action.[153]

G. The CDC COVID-19 Vaccination Provider Agreement Does Not Confer Plaintiffs Third Party Beneficiary Status

In order to create third party beneficiaries a "'contract must include 'a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party,' and any implied intent to create a third-party beneficiary is insufficient.'"[154] First, "According to the allegations in the [Second] Amended Complaint, the Plaintiffs did not receive a COVID-19 vaccine from [Shriners]. The Plaintiffs have not shown that they are entitled to relief under the Provider Agreement because the Provider Agreement does not apply to them."[155] Second, "the Plaintiffs cite no authority that they are entitled to enforce a contract—the Provider Agreement—between the federal government and [Shriners] on a matter (failure to comply with § 360bbb-3) which is unrelated to their claimed harm (being fired for failing to comply with the vaccine Policy)."[156] Finally, "assuming the Plaintiffs could claim some benefit from the Provider Agreement, '[p]arties that benefit from a [federal] government[al] contract are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. The Plaintiffs fail to point to any clear intent in either the Provider

---

153 *Kriley v. Northwestern Mem'l Healthcare*, 2023 WL 371643, *2 (7th Cir. Jan. 24, 2023).

154 *Sojitz Energy Venture, Inc. v. Union Oil Co. of California*, 394 F. Supp. 3d 687, 710 (S.D. Tex. 2019) (quoting *First Bank v. Bruitt*, 519 S.W.3d 95, 103 (Tex. 2017) (citing *Taws v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011)).

155 *Curtis*, 2024 Wl 248719 at *8 (editor's brackets added).

156 *Id.* (editor's brackets added).

Agreement that they are any more than incidental beneficiaries. Accordingly, they are not entitled to enforce the Provider Agreement."[157]

H. The Court Should Dismiss Plaintiffs' State Law Claims For Lack Of Subject Matter Jurisdiction

Without the anchor of Plaintiffs' § 1983 claims, this Court would be without subject matter jurisdiction over Plaintiffs' state law claims.[158] Because Plaintiffs cannot plausibly state any federal claims, the Court should dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction.

VI. CONCLUSION

Based on the foregoing, the Shriners Parties request the Court grant their Motion to Dismiss, dismiss all of Plaintiffs' claims with prejudice, and grant all other relief the Court deems appropriate.

Respectfully submitted,

By: */s/ Daniel Patton*

Daniel Patton
S.D. Tex. Admission No. 26200
Texas Bar No. 24013302
dpatton@scottpattonlaw.com

ATTORNEY IN CHARGE FOR
THE SHRINERS PARTIES

OF COUNSEL:

Michael K. Burke
S.D. Tex. Admission No. 24356
Texas Bar No. 24012359

[157] *Id.* (editor's brackets in original).

[158] *See, e.g., Searcy v. Samy*, 2023 WL 3663548 (N.D. Tex. May 5, 2023), *report and recommendation adopted*, 2023 WL 3669390 (N.D. Tex. May 25, 2023), *aff'd*, 2023 WL 5133290 (5th Cir. Aug. 10, 2023) ("Federal courts have no jurisdiction over state law claims in the absence of diversity jurisdiction under 28 U.S.C. § 1332.").

mburke@scottpattonlaw.com
SCOTT PATTON PC
5301 Katy Freeway, Suite 201
Houston, Texas 77007
Phone: (281) 377-3311
Fax: (281) 377-3267

CERTIFICATE OF CONFERENCE

I conferred in good faith with opposing counsel regarding the foregoing motion. Plaintiffs' counsel is opposed to the relief sought.

/s/ Michael K. Burke
MICHAEL K. BURKE

CERTIFICATE OF SERVICE

I certify that on April 8, 2024, a true and correct copy of this document was filed and served on all registered counsel for the parties by the Court's ECF filing system.

David J. Schexnaydre
SCHEXNAYDRE LAW FIRM
2895 Highway 190, Suite 212
Mandeville, Louisiana 70471
david@schexnaydre.com

/s/ Daniel Patton
Daniel Patton