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Daina A. Vitolins
Circuit Court Judge

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Twenty-Second Judicial District

October 7, 2021

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RE: *Oregon Fraternal Order of Police et al vs. Katherine Brown, State of Oregon*
Jefferson County Circuit Court Case No. 21CV35125

Counsel:

Governor Kate Brown issued Executive Order (EO) 21-29 on August 13, 2021. It requires state Executive-branch employees obtain COVID-19 vaccinations, including a two-week post-vaccination period, by October 18, 2021. The order allows for exceptions "for individuals unable to be vaccinated due to disability, qualifying medical condition, or a sincerely held religious belief." Employees who fail to comply with the vaccination requirement "will face personnel consequences up to and including separation from employment."

Plaintiffs are 33 individual employees of the Oregon State Police and two associations, one of which claims more than 100 members who are employees of the OSP and the other of which represents firefighters in Klamath County. The majority of the individual plaintiffs have no medical, religious, or disability-based basis for an exception from the vaccination requirement of the order. Nevertheless, they do not wish to be vaccinated. They filed a complaint against Governor Brown and the State of Oregon seeking a declaration that EO 21-29 is unlawful on a number of grounds: 1) it violates ORS 433.416(3) in requiring immunization as a condition of employment; 2) it violates Article I, section 22, of the Oregon Constitution, as well as Article III separation of powers principles; 3) it violates plaintiffs' rights of free expression guaranteed in Article I, section 8, of the Oregon Constitution; 4) it violates the equal privileges and immunities guarantee of Article I, section 20, of the Oregon Constitution; and 5) it amounts to wrongful discharge from employment.

Plaintiffs moved for a temporary restraining order and order to show cause why a preliminary injunction should not be entered. Defendants opposed the motion. On October 6, 2021, this court held a hearing on the motions, during which the parties offered testimony of witnesses and offered concluding arguments. After careful consideration of the record and the arguments of the parties, I deny plaintiffs' motion.

Whether to grant such relief is a matter committed to the discretion of the court. *Wilson v. Parent*, 228 Or 354, 369 (1961). That said, such relief is "extraordinary," and discretion to grant it should be exercised "only upon clear and convincing proof." *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or 469, 473 (1978). *See also Gidlow v. Smith*, 153 Or App 648, 653 (1998) ("An injunction is an extraordinary remedy, to be granted only on clear and convincing proof of irreparable harm where there is no adequate legal remedy. It does not issue as a matter of right but is within the discretion of the court."). The Oregon Supreme Court recently explained in *Elkhorn Baptist Church v. Brown*, 366 Or 506, 518-19 (2020), that, in determining whether to exercise discretion to grant such extraordinary relief, courts are required to consider the following factors: 1) the likelihood of success on the merits; 2) the likelihood of imminent and irreparable harm; and 3) the balance of any harms to the moving party against the opposing party and the public interest.

1. *Likelihood of success on the merits*

Plaintiffs advance five legal theories in support of their contention that EO 21-29 is unlawful. For the reasons that follow, I conclude that plaintiffs have not shown a likelihood of success under any of those theories.

a. ORS 433.416

ORS 433.416 provides:

> "(1) An employer of a health care worker at risk of contracting an infectious disease in the course of employment shall provide to the worker preventive immunization for infectious disease if such preventive immunization is available and is medically appropriate.
>
> "(2) Such preventive immunization shall be provided by the employer at no cost to the worker.
>
> "(3) A worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule, or regulation"

A "worker," for the purposes of ORS 433.416 is statutorily defined to include law enforcement officers. ORS 433.407(3).

Plaintiffs contend that EO 21-29 violates ORS 433.416(3). They argue that the statute prohibits a worker from being required to be vaccinated as a condition of work unless required by state or federal law. According to plaintiffs, because the legislature has not statutorily required

vaccinations, the governor's order – which does require vaccinations – violates the law. The argument is unavailing.

ORS 433.416(3) prohibits requiring affected workers to be immunized *"unless such immunization is otherwise required by federal or state law, rule, or regulation."* (Emphasis added.) In other words, if "federal or state law, rule or regulation" does otherwise require immunization, the prohibition in ORS 433.416(3) does not apply. In this case, immunization is in fact otherwise required by state law. It is required by EO 21-29, which the legislature has said has the effect of state law. The governor's order was expressly issued under ORS 401.168 and "the emergency invoked in Executive Order 20-03," which in turn was also based on ORS chapter 401. ORS 401.192(1) provides that "[a]ll rules and orders issued by ORS 401.165 to 401.236 shall have the full force and effect of law."

Plaintiffs argue that, notwithstanding ORS 401.192(1), the governor's order does not have the full force and effect of state law because it is an unconstitutional usurpation of legislative authority, in violation of Article I, section 22, and Article III separation of powers principles.

b. Article I, section 22, and Article III separation of powers principles

Article I, section 22, provides that "[t]he operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly." Plaintiffs contend that EO 21-29 violates that provision by, in effect, suspending laws such as ORS 433.416(3). Plaintiffs appear to assume that the upshot of Article I, section 22, is that if the operation of laws is suspended, it must be the legislature that does it. That is not quite what Article I, section 22, says. Instead, that constitutional provision says that the operation of the laws may not be suspended "except by the *Authority* of the Legislative Assembly." (Emphasis added.) The legislature, in other words, may grant the authority to suspend the laws. That is what the legislature did in ORS 401.192(1) when it granted the governor significant powers during a declared emergency and then provided that "[a]ll existing laws, ordinances, rules and orders inconsistent with" the authority exercised by the governor "shall be inoperative." Thus, if any laws are suspended under EO 21-29, it is because the governor's order does so "by the Authority of the Legislative Assembly."

Plaintiffs argue that, even so, the legislative grant of such authority to the governor violates separation of powers principles. According to plaintiffs, the legislature cannot constitutionally delegate the authority "to determine what the law is." That argument fails as well, for at least two reasons.

First, the nondelegation principle applies to legislative acts purporting to grant to another branch unbridled legislative authority. In this case, ORS 401.168(1) does confer on the governor "the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of this chapter." The state's "police power" refers to "the whole sum of inherent sovereign power which the state possesses." *Elkhorn Baptist*, 366 Or at 524. On the surface, that certainly is a broad delegation of authority. But plaintiffs have not challenged the constitutionality of ORS 401.168(1), only the constitutionality of EO 21-29.

Second, even if plaintiffs intend indirectly to challenge the constitutionality of the statute that authorizes the issuance of the order, their argument remains unavailing. Article III separation of powers principles do not foreclose all delegations of legislative authority. *See State v. Davilla*, 234 Or 637, 645 (2010) ("The constitutional prohibition on delegation of legislative powers is not absolute."). Legislative delegation of authority to the executive branch is permissible so long as there are adequate limitations and safeguards against the arbitrary exercise of the delegated power. *MacPherson v. Department of Administrative Services*, 340 Or 117, 135-36 (2006). Here, the authority granted by ORS 401.168(1), although broad, is not without adequate limitations and safeguards against arbitrary action. As the Supreme Court noted in *Elkhorn Baptist*:

> "The governor's emergency powers under ORS chapter 401 are limited by statute in several ways. First, they are required to be exercised in a manner consistent with the reason for which they are granted; that is, they must be exercised to address the declared emergency. As quoted above, ORS 401.168(1) provides that the governor can exercise the state's police powers 'to effectuate the purposes of this chapter.' . . . Second, the governor's emergency powers under chapter 401 may be exercised only during a declared state of emergency, which ORS 401.204(1) requires the governor to "terminate by proclamation when the emergency no longer exists, or when the threat of an emergency has passed." Third, the governor's emergency powers are limited in that they can be terminated by the legislature. ORS 401.204(2) provides, 'the state of emergency proclaimed by the Governor may be terminated at any time by joint resolution of the Legislative Assembly,' which can convene itself to issue such a resolution."

366 Or at 525-26. ORS 401.168(1) does not violate constitutional separation of powers principles.

c. Article I, section 8

Article I, section 8, prohibits restraints of speech based on the content of that speech, unless the restraint is wholly contained within a historical exception. *State v. Babson*, 355 Or 383, 393-94 (2014). Here, there is no restraint of speech; as plaintiffs concede, nothing in EO 21-29 prohibits them from saying anything they want about COVID vaccinations. Plaintiffs argue, though, that their refusal to get vaccinated itself is "inextricably intertwined with deeply held political, social, philosophical, and religious beliefs" and thus is protected expression, which EO 21-29 punishes. At the outset, I note that, to the extent that the refusal to get vaccinated is based on religious beliefs, the governor's order expressly provides an exemption. But apart from that, plaintiffs' argument incorrectly assumes that their refusal to get vaccinated is expressive conduct protected by Article I, section 8. Under *Huffman & Wright Logging Co. v. Wade*, 317 Or 445 (1993), not all conduct is protected expression. There, the court held that trespass as a form of protest is a crime, not protected speech; the act of trespass caused the disturbance of another's possession of property, wholly apart from any motivating opinion or underlying message. In short, otherwise unlawful conduct is not converted to protected expression merely because one engages in that conduct to express an opinion. *Id.* at 458; *see also State v. Babson*, 249 Or App 278 (2012) (Standing in the middle of a street obstructing

traffic or illegally parking a car are not immunized merely because they are intended as expressions of opinion.) Here, EO 21-29 imposes the vaccination requirement as a measure to protect the public health. Failing to comply with that requirement poses a risk to public health, wholly apart from any motivating opinion about the wisdom of the order. Just as the expressive motivation for committing trespass did not convert an offense into protected speech in *Huffman & Wright*, so also here an expressive motivation for failing to comply with a public health directive does not convert that act into protected expression.

d. Article I, section 20

Article I, section 20, provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." The guarantee applies only to a "citizen" or a "class of citizens." For purposes of Article I, section 20, a "class" (sometimes called a "true class") is one that exists apart from the law that is under challenge, for example, gender, race, ethnicity, sexual orientation, legitimacy, alienage, residence, military service, and religious affiliation. *Tanner v. Oregon Health Sciences University*, 157 Or App 502, 520-21 (1998). Here, plaintiffs contend that EO 21-29 "splits the workforce into two classes, those who have received a COVID-19 vaccine and those who have not." In plaintiffs' view, one class is "afforded the privilege of retaining their employment," while the other is not. That, they contend, is unconstitutional.

There are at least two problems with that argument. First, by plaintiffs' own description, the relevant "classes" are those defined by the challenged order itself, not by characteristics apart from the order. Such classes are not cognizable under Article I, section 20. *Kramer v. City of Lake Oswego*, 365 Or 422, 453 (2019). A law, for example, may require certain professions to obtain a license. That, in effect, creates a classification between those who choose to comply with the licensing requirement and those who do not. But it is a classification that is created by the law itself. *State v. Clark*, 219 Or 231, 240 (1981). Here, the classification between those who comply with the vaccination requirement and those who do not is similarly one that is created by EO 21-29 itself and is thus not a true class for Article I, section 20, purposes.

Plaintiffs insist that the classification at issue here is not created by the executive order itself, but rather by the preexisting religious views and medical conditions of those who do not want to get vaccinated. Even assuming for the sake of argument that plaintiffs are correct in that respect, the fact remains that EO 21-29 expressly creates exemptions based on religion and medical conditions.

Second, even if plaintiffs are members of a true class for purposes of Article I, section 20, they have made no attempt to explain why the classification is not constitutionally permissible. The fact that a law creates classifications does not, by itself, offend Article I, section 20. Whether the classification violates the constitution depends on the nature of the classification and the justification for it. If, for example, the classification is "suspect" in nature – that is, the classification is based on "invidious social or political premises," *Hewitt v. SAIF*, 294 Or 33, 45-46 (1982) – it is permissible only if the classification reflects legitimate differences. *Id.* at 46. If, on the other hand, the classification is non-suspect, it is permissible if it is minimally rational. *Kramer*, 365 Or at 453.

At the hearing on the motion, plaintiffs suggested that the classification at issue here is suspect in nature, because it is based on the religious views or medical conditions of those who do not wish to comply with EO 21-29. Again, however, EO 20-29 does not require vaccinations of those who are exempt based on their religious views or medical conditions. Plaintiffs have not otherwise explained why the classifications are constitutionally impermissible.

e. Wrongful discharge

Oregon law provides that, in general, employees work "at will," that is, they may be terminated by their employer at any time. *Nees v. Hocks*, 272 Or 210, 218 (1975). There are exceptions to that general rule, among them that an employer may not terminate an employee for a reason that violates public policy. *Walker v. State by and through Oregon Travel Information Council*, 367 Or 761, 772 (2021). In this case, plaintiffs contend that the EO violates that exception, in that it essentially terminates employees for exercising their constitutional rights not to get vaccinated. That argument fails for at least two reasons. First, at this point, no one has been terminated; such a claim is untimely. Second, in any event, plaintiffs' contention incorrectly assumes that refusal to get vaccinated implicates the sort of public policy that meets the requirements of a wrongful discharge claim. Oregon appellate case law recognizes two categories of wrongful termination bases: 1) when an individual was discharged for "fulfilling a societal obligation"; and 2) when the individual was fired for "pursuing a statutory right." *Delaney v. Taco Time Int'l*, 297 Or 10, 15-16 (1984). (The cases often include a third category, of cases that will *not* support a wrongful termination claim, that is, cases in which there is an adequate existing remedy that protects the interests of society. *Id.*) In this case, plaintiffs do not explain how their claim fits into either of the two categories of recognized bases for a wrongful termination claim. Should they be terminated because of their refusal to get vaccinated, it will not be because they "fulfull[ed] a societal obligation." Instead, they would be terminated because of their *refusal* to fulfill a societal obligation. Similarly, any such firing would not occur because plaintiffs had pursued a statutory right. Plaintiffs certainly have identified no statute that entitles them to refuse to comply with EO 21-29. (They have cited ORS 433.416(3), but as I have noted, that statute does not apply here.)

In short, plaintiffs have shown no likelihood of success on the merits under any of the five legal theories that they have alleged.

2. Irreparable injury

Temporary injunctive relief is not granted unless the claimant will suffer irreparable injury. *Gildow*, 153 Or App at 653. "Irreparable injury" ordinarily refers to injury for which "'no certain pecuniary standard exists for the measurement of damages'" and for which plaintiffs "'cannot receive reasonable redress in a court of law.'" *Arlington School Dist. No. 3 v. Arlington Educ. Ass'n*, 184 Or App 97, 101 (2002) (quoting *Black's Law Dictionary* 924-25 (4th ed 1968)). The injury must not be a matter of speculation. The party requesting extraordinary relief "must at least demonstrate that irreparable injury *probably* would result if a stay is denied." *Id.* at 102 (emphasis in original).

Here, plaintiffs contend that EO 21-29 places them at risk of irreparable harm in what I understand to be two respects. First, they contend that they are risk of losing their jobs.

Second, they contend that, because the federal Department of Health and Human Services has issued a declaration pursuant to the Public Readiness and Emergency Preparedness Act, 42 USC § 247d-6d, in March 2020, 85 Fed Reg 15198 (March 17, 2020) – which has the effect of providing immunity to claims of loss arising out of the administration of COVID vaccines – they are without any legal recourse if they comply with the vaccination order and later suffer adverse medical effects as a result. Neither satisfies the requirement of irreparable injury.

First, as to the risk of plaintiffs losing their jobs, wrongful discharge is commonly remedied by an action for money damages. *See, e.g., Walker v. State by and through Oregon Travel Information Council*, 367 Or 761, 777 (2021) (remedies for common-law wrongful discharge are economic and non-economic damages); *Reddy v. Cascade General, Inc.*, 227 Or App 559, 571 (2009) (remedies for wrongful discharge include damages). This in no way diminishes the very real and significant harm that the individual plaintiffs and their families may suffer if plaintiffs lost their jobs. But the fact remains that, under Oregon law, the threatened loss of plaintiffs' employment is not the sort of irreparable injury that would warrant the issuance of a temporary restraining order.

At the hearing, plaintiffs argued that, even if wrongful termination claims may generally be remedied by an award of money damages, the specialized nature of plaintiffs' employment, its importance to public safety, and the years that they have invested in their training require an exception to the general rule. No one contests the specialized and demanding nature of plaintiffs' work, its importance to the safety of the citizens of this state, or the years that the individual plaintiffs may have invested in their public service careers. Nevertheless, there is no legal principle of which I am aware that authorizes the recognition of such an exception to the general rule.

Plaintiffs insist that they have a liberty and property interest in their continued employment under the Due Process Clause of the federal Constitution, and those interests elevate their harm above what can be remedied by a later judgment for damages. To begin with, as plaintiffs themselves concede, they have not alleged a claim for relief under the Due Process Clause. Moreover, the United States Supreme Court has held that the Due Process Clause does not create property interests, in employment or otherwise. *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532, 538 (1985) ("Property interests are not created by the Constitution."). Rather, property rights are created, defined, and limited by state law. *Id.* In addition, although the United States Supreme Court has said that the liberty component of the Due Process Clause "includes some generalized due process right to choose one's field of private employment," *Conn v. Gabbert*, 526 US 286, 291-92 (1999), the same Supreme Court has also held that the right is "subject to reasonable government regulation." *Id.* at 92. Moreover, the applicable liberty component of the Due Process Clause creates "the liberty to pursue a calling or occupation, and not the right to a specific job." *Draghi v. County of Cook*, 184 F3d 689 (7th Cir 1999); *see also Maniscalco v. New York City Department of Education*, ___ F Supp ___, 2021 WL 4344267 (Sept 23, 2021) (state education department order requiring COVID vaccinations for all school employees did not violate Due Process because the Constitution does not secure the right to a specific job).

Plaintiffs also contend that, apart from monetary damages they might suffer in losing their jobs, state regulations require employers of police officers to notify the Department of Public Safety

Standards and Training of the termination, and that could possibly lead to a recommendation that the department revoke their certification. That such a possibility exists, however, is insufficient to satisfy plaintiffs' burden to prove the sort of harm that will *likely* occur in the absence of a temporary restraining order. *Arlington School Dist. No. 3*, 184 Or App at 101.

Second, as to the immunity of those who administer vaccines, plaintiffs' contentions appear to be based on speculation. They assert that *if* they chose to comply with the governor's executive order, and *if* an adverse medical reaction were to occur, and *if* they attempted to sue the manufacturers of the vaccines, they would have no ability to obtain any remedy at law. As I have noted, the sort of irreparable injury that justifies injunctive relief is an injury that "*probably* would result if a stay is denied." *Id.* Plaintiffs have failed to demonstrate any such probability. Moreover, the immunity that the federal legislation confers does not leave parties who suffer adverse vaccination effects without a remedy. Among other things, the law provides for the creation of a fund to compensate those who suffer any such injuries. *See* Countermeasures Injury Compensation Program: Administrative Implementation, Interim Final Rule, 75 Fed Reg 63656 (Oct 15, 2010).

3. Balance of equities

In determining whether to grant temporary injunctive relief, "courts balance the equities between the parties." *Hickman v. Six Dimension Custom Homes, Inc.*, 273 Or 894, 898 (1975). Also weighed in that balance is the public interest. *Elkhorn Baptist Church*, 366 Or at 518-19.

Here, plaintiffs rely on the possibility that they will lose their jobs or, if they comply with the governor's order and suffer adverse medical effects, they will lose a cause of action against vaccine manufacturers. As I have noted, however, such possible harms are either not irreparable in nature or insufficiently likely to occur to significantly weigh in the balance of equities.

Plaintiffs contend that the equities still favor injunctive relief because their constitutional rights to free expression and to control their medical destinies are threatened by the governor's executive order. The constitutional nature of plaintiffs' interests is not conclusive, however. There is no question that the Oregon Constitution protects rights to free expression, privacy, and bodily integrity. See, e.g., *Babson*, 355 Or at 593-94 (Article I, section 8, of the Oregon Constitution protects a right of free expression); *State v. Lien*, 364 Or 750, 760-61 (2019) (Article I, section 9, of the Oregon Constitution protects a right to privacy); *State v. Stephens*, 311 Or App 588, 598 (2021) (Article I, section 9, protects against compelled extraction of bodily fluids).

None of those rights is absolute. For example, Article I, section 8, of the state constitution protects a right of free expression. Yet courts have long held that the right is subject to the authority of the state to impose reasonable time, place, and manner restrictions in the interests of public order and safety. *Babson*, 355 Or at 407-08; *Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275, 292 (2006). Likewise, although Article I, section 9, protects a right of privacy and freedom from compelled extraction of bodily fluids, the state nevertheless may invade a person's privacy rights to, say, obtain a compelled blood draw if the action is

supported by a lawful obtained search warrant or the existence of probable cause and exigent circumstances. *State v. Kelly*, 305 Or App 493, 496-97 (2020).

This is all part of a long and well-established tradition in our constitutional system that individual rights are not absolute and may, in appropriate circumstances, yield to overriding considerations of public interest – in particular, public health. Public health laws date back at least to the time of early American colonial settlements. *See generally*, John Fabian Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID 19* at 15-32 (2020). Massachusetts enacted the first smallpox vaccination law in 1809. Phoebe E. Arde-Acquah, *Salus Populi Suprema Lex Esto ("The health of the people is the supreme law"): Balancing Civil Liberties and Public Health Interventions in Modern Vaccination Policy*, 7 Wash U Jurisp Rev 337, 343 (2015). In 1905, in *Jackson v. Massachusetts*, 197 US 11 (1905), the United States Supreme Court upheld the authority of states to require vaccinations to protect public health. There – as here – the plaintiff argued that the vaccination requirement violated "the inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id.* at 26. The Supreme Court disagreed. "The liberty secured by the Constitution," the Court said, "does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Id.* Among such manifold restraints, the Court explained, are "reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id.*

As a result, states and municipalities today commonly have enacted measures that – although they constrain individual liberties to a degree – are designed to protect public health. The State of Oregon, for instance, requires Diphtheria, Tetanus, Pertussis, Polio, Varicella, Measles, Mumps, Rubella, and Hepatitis A and B vaccinations of children as a condition of attending school, subject to applicable exemptions. *See* OAR 333-050-0050.

And Oregon courts have long upheld the lawfulness of such measures designed to protect the public interest at the expense of some limitations on the exercise of individual rights. Especially instructive in that regard is the Oregon Supreme Court's decision in *Baer v. City of Bend*, 206 Or 221 (1956), in which plaintiff challenged the authority of a municipality to introduce inorganic fluoride chemicals into the water supply for the purpose of reducing tooth decay. The plaintiff argued that the mandatory fluoridation ordinance violated the basic liberties of all citizens "to guard the health of their children and . . . to determine for themselves whether they shall submit to medications thus furnished by the city." *Id.* at 226. The court rejected the argument, citing *Jacobson* and explaining that, "[u]pon the general subject of the liberties protected by the Constitution it should be first observed that they are not held absolutely but only subject to reasonable constraints imposed for the general welfare." *Id.* at 226-27. The liberty safeguarded by our constitution, the court continued, "is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people." *Id.* at 227 (quoting *West Coast Hotel Company v. Parrish*, 300 US 379, 391 (1937)).

Plaintiffs acknowledge the foregoing authorities, in particular, *Jacobson*. But they insist that those decisions rest "on shaky constitutional ground." Moreover, they argue, such cases involve restrictions imposed by elected legislative bodies, not the executive branch. According

to plaintiffs, here "the Governor has unilaterally acted through executive order," and so authorities like *Jacobson* are "irrelevant."

First, plaintiffs do not explain why precedents such as *Jacobson* rest "on shaky constitutional ground." Moreover, whatever arguments might be advanced that *Jacobson* is in some way suspect, the fact remains that the decision has yet to be overruled. In fact, the Oregon Supreme Court relied on it as recently as last year, in *Elkhorn Baptist Church*, 366 Or at 509. And the Oregon Appellate Commissioner cited it as recently as this week. *Oregon Healthcare Workers for Medical Freedom v. Oregon Health Authority* (A176900), Order Denying Motion to Stay (Oct 5, 2021).

Second, and aside from that, plaintiffs' argument that such cases are distinguishable because they involve legislatively adopted public health restrictions – and not "unilateral" executive action – is unpersuasive. The upshot of decisions like *Jacobson* and *Baer* is that the police power of the state includes the authority to enact public health laws that may have the effect of curtailing individual rights. *See Jacobson*, 197 US at 25 (the police power includes "the authority of the state to enact quarantine laws and health laws of every description"); *Baer*, 206 Or at 226 (municipal fluoridation law is a "valid exercise of the police power"). Here, ORS 401.168(1) confers on the governor during a state of emergency "all police powers vested in the state by the Oregon Constitution." Invoking that law, Governor Brown issued EO 21-29. Clearly, the governor did not do so "unilaterally." Quite the contrary, the governor acted pursuant to authority expressly conferred by the legislature.

Against the infringement on plaintiffs' inherently qualified rights must be weighed the interests of the state and of the public. The governor and the State of Oregon have an unquestioned interest in protecting the health and wellbeing of the state's employees. Likewise, they have an undeniable interest in protecting the public from the dangers posed by the COVID-19 virus. The magnitude of those dangers is plainly in evidence in the mounting death toll, as well as the social and economic disruption of the last year and a half. There is no question that vaccination is an effective tool to deal with COVID-19. And, while statewide vaccination rates are relatively high, the fact remains that case numbers and hospitalizations have surged in recent months, and the substantial majority of those people hospitalized were not vaccinated.

Plaintiffs contest none of this. Rather, they argue that "the state is ignoring other effective routes to immunity." In particular, they contend that the governor has "refused to consider the natural immunity" of those who had COVID-19 and now possess antibodies to protect them from future infections. The role of the courts, however, is not to second-guess the governor about how best to respond to the pandemic. Instead, in evaluating the balance of equities, courts are cautioned to afford "especially broad" latitude to state officials who are attempting to protect the public in areas "fraught with medical and scientific uncertainties." *Elkhorn Baptist Church*, 366 Or at 546-47 (Garrett, J., concurring) (quoting *South Bay United Pentecostal Church v. Newsom*, 592 US ___, 140 S Ct 1613, 1613-14 (2020) (Roberts, C.J., concurring)); *see also Baer*, 206 Or at 225-27 (whether there are better ways to protect public health is "not a judicial question").

Plaintiffs also argue that any interest in protecting the public from COVID-19 must be balanced against the potential harm that would result from significant numbers of state police

employees choosing to leave their jobs rather than comply with EO 21-29. Plaintiffs point to testimony at the hearing about informal polls of employees who would make just that choice. That strikes me as a fair point, but not a dispositive one. An informal poll is hardly a basis on which to determine the likelihood of widespread departures from the ranks of the Oregon State Police. Indeed, the testimony showed that, as the October 18 deadline nears, the number is shrinking. And witnesses conceded that there is no way to tell how many employees will leave their jobs rather than comply with EO 21-29. Aside from that, the fact remains that any potential public harm from a reduction in Oregon State Police staffing must be weighed against the known risk of death, disease, and disruption posed by an inadequate response to COVID-19. I conclude that the balance weighs heavily in favor of public health.

Taking all the relevant factors into account, plaintiffs have not shown any of the requirements for obtaining a temporary restraining order: They have shown no likelihood of success on the merits under any of the legal theories alleged in their complaint. They have not shown that a failure to enter temporary injunctive relief is necessary to avoid irreparable harm that otherwise will likely occur. And they have not shown that any injuries that they will suffer as a result of enforcement of EO 21-29 outweigh the harm that would result to the state and the public at large if the state is enjoined from enforcing the order. Plaintiffs' motion for a temporary restraining order is denied. I would appreciate it if defendants would prepare an appropriate form of order.

Sincerely,

Jack L. Landau
Senior Judge

JLL/jm