

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

STATE OF MISSOURI, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, et al.

Defendants.

No. 4:21-cv-01300-DDN

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants hereby notify this Court of a decision issued today by the United States District Court for the Eastern District of Washington in *Donovan v. Vance*, No. 4:21-cv-5148-TOR (E.D. Wash., Dec. 17, 2021) (“Order”) denying a request to preliminarily enjoin Executive Order 14042. A copy of the Order is attached to this notice.

DATED: December 17, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Hanford Security Police Officers  
DAVID G. DONOVAN and  
CHRISTOPHER J. HALL, United  
States Department of Energy  
employee STEPHEN C. PERSONS,  
Safety Bases Compliance Officer  
THOMAS R. ARDAMICA, et al.,

Plaintiffs,

v.

BRIAN VANCE as Manager of the  
UNITED STATES DEPARTMENT  
OF ENERGY Hanford Site,  
VALERIE MCCAIN as Vit Plant  
Project Director, SCOTT SAX  
BECHTEL as President and Project  
Manager of CENTRAL PLATEAU  
CLEANUP COMPANY, ROBERT  
WILKINSON as President and  
Program Manager of HANFORD  
MISSION INTEGRATED  
SOLUTIONS, LLC, DON HARDY  
as Manager of HANFORD  
LABORATORIES MANAGEMENT  
AND INTEGRATION 222-S  
LABORATORY MANAGER,

NO. 4:21-CV-5148-TOR

ORDER DENYING PLAINTIFFS’  
MOTION FOR DECLARATORY  
RELIEF, TEMPORARY  
RESTRAINING ORDER, AND A  
PRELIMINARY INJUNCTION

1 HIRAM SETH WHITMER as  
2 President and Program Manager,  
3 HPM CORPORATION, STEVEN  
4 ASHBY as Laboratory Director,  
5 PACIFIC NORTHWEST  
6 NATIONAL LABORATORY, JOHN  
7 ESCHENBERG as President and  
8 Chief Executive Officer of  
WASHINGTON RIVER  
PROTECTION SOLUTIONS,  
JOSEPH R. BIDEN, President of the  
United States of America,  
Defendants.

9 BEFORE THE COURT is Plaintiffs’ Motion for Declaratory Relief,  
10 Temporary Restraining Order, and a Preliminary Injunction (ECF No. 11). This  
11 matter was submitted for consideration with telephonic oral argument on  
12 December 17, 2021. Nathan J. Arnold and Simon Peter Seranno appeared on  
13 behalf of Plaintiffs. Molly M.S. Smith and John T. Drake appeared on behalf of  
14 Federal Defendants. Mark N. Bartlett and Kevin C. Baumgardner appeared on  
15 behalf of Contractor Defendants. The Court has reviewed the record and files  
16 herein, considered the parties’ oral arguments, and is fully informed. For the  
17 reasons discussed below, Plaintiffs’ Motion for Declaratory Relief, Temporary  
18 Restraining Order, and a Preliminary Injunction (ECF No. 11) is **DENIED**.

## PROCEDURAL BACKGROUND

This matter relates to President Biden's Executive Orders issued on September 9, 2021. As an initial matter, the Court notes the present motion and the operative Complaint are riddled with procedural and substantive deficiencies, which is curious given Plaintiffs' counsels' recent experience in this Court. In October 2021, one of Plaintiffs' counsels, Nathan J. Arnold, filed a similar action and motion with the Court, challenging the Washington State vaccine mandates. *See Bacon et al. v. Woodard et al.*, 2:21-CV-0296-TOR, ECF Nos. 1, 2. The Court issued a detailed Order denying the motion on November 8, 2021, ten days before the present action was filed, outlining the legal and factual deficiencies in Mr. Arnold's motion. *Bacon*, 2:21-CV-0296-TOR, ECF No. 63. Oddly, Mr. Arnold and his co-counsel, Simon Peter Serrano, have now filed a nearly identical motion in this matter but have failed to correct any of the legal and factual inadequacies that proved fatal to the motion in *Bacon*. Compare ECF No. 11 with *Bacon*, 2:21-CV-0296-TOR, ECF No. 2. When asked by the Court during oral argument whether Mr. Serrano had read the Order from *Bacon*, Mr. Serrano acknowledged he had "looked at it," but it is clear from the present briefing that he did not look at it closely enough.

Next, the Court notes Plaintiffs' Complaint is improperly captioned pursuant to Rule 10(a); Plaintiffs may not generally refer to the parties using "et al." until all

1 parties have been named in the pleadings. Fed. R. Civ. P. 10(a). Additionally,  
2 while Plaintiffs name nine defendants from whom Plaintiffs seek relief, seven of  
3 those defendants (“Contractor Defendants”) are improper defendants for the type  
4 of claims raised in this action. Those individuals, named in their official  
5 capacities, are private employees of private companies, which did not, and could  
6 not, promulgate the challenged Executive Orders. Moreover, those seven private  
7 individuals do not employ Plaintiffs; Plaintiffs are employed by private companies,  
8 which are not named as defendants. In any event, private employers cannot be  
9 liable for constitutional violations. At oral argument, the Court indicated the seven  
10 private defendants were subject to dismissal but would wait for briefing on the  
11 issue before making a ruling.

12 Plaintiffs also identify Brian Vance and President Biden, both acting in their  
13 official capacities, as defendants (“Federal Defendants”). However, Plaintiffs do  
14 not state a claim for relief against Defendant Vance. Consequently, the only  
15 defendant from whom Plaintiffs may seek relief is President Biden, and even then,  
16 Plaintiffs may only seek injunctive relief against the Executive Orders, not  
17 President Biden himself. *Rosebud Sioux Tribe v. Trump*, 428 F. Supp. 3d 282, 291  
18 (D. Mont. 2019) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992)  
19 (plurality)).

20 In any event, Plaintiffs’ attempts at injunctive relief fall woefully short, just

1 as they did in Mr. Arnold’s prior case before this Court. *See Bacon*, 2:21-CV-  
2 0296-TOR, ECF No. 63. Because the claims raised in the present motion are  
3 nearly identical to those raised in *Bacon*, for judicial economy, the Court will  
4 incorporate by reference its reasoning from *Bacon* in this Order. Finally, the Court  
5 indicated at oral argument it would entertain motions for Rule 11 sanctions due to  
6 the egregious deficiencies in this matter.

### 7 **FACTS**

8 There are 292 purported Plaintiffs in this action, all but seven of whom are  
9 employed by several private companies holding contracts with the federal  
10 government to carry out various duties related to the Hanford nuclear site in  
11 Richland, Washington. ECF Nos. 41 at 7; 44 at 3. The remaining seven Plaintiffs  
12 are employed by the Department of Energy (“DOE”), and also work at the Hanford  
13 site. ECF No. 41 at 9. Plaintiffs oppose the vaccination requirements being  
14 imposed by their employers pursuant to Executive Orders 14042 and 14043  
15 (“Executive Orders”).

16 The Executive Orders were issued on September 9, 2021. ECF No. 41 at 6.  
17 Executive Order 14043 requires all federal employees to be fully vaccinated; the  
18 Safer Federal Workforce Task Force (the “Task Force”) issued guidance clarifying  
19 the deadline for federal employees to be fully vaccinated was November 22, 2021,  
20 unless they obtained an exemption. *Id.* Executive Order 14042 essentially

1 requires employers who contract with the federal government to ensure their  
2 employees are fully vaccinated. ECF No. 44 at 8–9. This is achieved by requiring  
3 federal departments and agencies to introduce new contractual clauses that require  
4 covered contractors and subcontractors to comply with the guidance provided by  
5 the Task Force. *Id.* The Task Force issued guidance on September 24, 2021  
6 stating that covered contractor employees who did not receive an exemption  
7 needed to be fully vaccinated by December 8, 2021. *Id.* at 9. The deadline for  
8 compliance is now January 18, 2022. *Id.* at 10.

9 Pursuant to Executive Order 14042, DOE modified its contracts, including  
10 the contracts held by the private entities that employ Plaintiffs. *Id.* at 12–18.  
11 Those private entities then adopted processes through which employees could seek  
12 vaccination exemptions and accommodations. *Id.* Some Plaintiffs have completed  
13 the process, some are still going through the process, and others have not applied at  
14 all. ECF Nos. 1 at 4–41, ¶¶ 16–308; 41 at 9; 44 at 12–18.

15 Plaintiffs filed the present motion on November 19, 2021, seeking injunctive  
16 relief. ECF No. 11. Contractor Defendants and Federal Defendants (collectively,  
17 “Defendants”) oppose the motion, primarily because Plaintiffs’ claims are not yet  
18 ripe. ECF Nos. 41 at 8; 44 at 27.

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1 **DISCUSSION**

2 **I. Judicial Notice**

3 In support of their opposition to Plaintiffs’ motion, Contractor Defendants  
4 request this Court take judicial notice of several public records relating to the  
5 challenged Executive Orders. ECF No. 54. A district court may take judicial of “a  
6 fact that is not subject to reasonable dispute because it . . . can be accurately and  
7 readily determined from sources whose accuracy cannot reasonably be  
8 questioned.” Fed. R. Evid. 201(b). To that end, courts may take judicial notice of  
9 court filings and other matters of public record, including government documents  
10 available from reliable sources on the internet. *Cross Culture Christian Ctr. v.*  
11 *Newsom*, 445 F. Supp. 3d 758, 764 (E.D. Cal. 2020) (internal quotations and  
12 citations omitted).

13 The documents submitted by Contractor Defendants are government notices  
14 and records that are publicly accessible from reliable sources on the internet and  
15 are not reasonably subject dispute. The Court finds the documents are properly  
16 subject to judicial notice.

17 **II. Legal Standard—Temporary Restraining Order**

18 Pursuant to Federal Rule of Civil Procedure 65, a district court may grant a  
19 temporary restraining order (TRO) to prevent “immediate and irreparable injury.”  
20 Fed. R. Civ. P. 65(b)(1)(A). The analysis for granting a temporary restraining



1 order is “substantially identical” to that for a preliminary injunction. *Stuhlbarg*  
2 *Int’l Sales Co., Inc. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).  
3 It “is an extraordinary remedy never awarded as of right.” *Winter v. Nat. Res. Def.*  
4 *Council, Inc.*, 555 U.S. 7, 24 (2008).

5 To obtain this relief, a plaintiff must demonstrate: (1) a likelihood of success  
6 on the merits; (2) a likelihood of irreparable injury in the absence of preliminary  
7 relief; (3) that a balancing of the hardships weighs in plaintiff’s favor; and (4) that  
8 a preliminary injunction will advance the public interest. *Winter*, 555 U.S. at 20;  
9 *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). Under the *Winter* test, a  
10 plaintiff must satisfy each element for injunctive relief.

11 Alternatively, the Ninth Circuit also permits a “sliding scale” approach  
12 under which an injunction may be issued if there are “serious questions going to  
13 the merits” and “the balance of hardships tips sharply in the plaintiff’s favor,”  
14 assuming the plaintiff also satisfies the two other *Winter* factors. *All. for the Wild*  
15 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (“[A] stronger showing of  
16 one element may offset a weaker showing of another.”); *see also Farris v.*  
17 *Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (“We have also articulated an  
18 alternate formulation of the *Winter* test, under which serious questions going to the  
19 merits and a balance of hardships that tips sharply towards the plaintiff can support  
20 issuance of a preliminary injunction, so long as the plaintiff also shows that there is

1 a likelihood of irreparable injury and that the injunction is in the public interest.”  
2 (internal quotation marks and citation omitted)).

3 **A. Likelihood of Success on the Merits**

4 Plaintiffs’ Complaint alleges the vaccination requirements imposed by the  
5 Executive Orders violate state and federal law. ECF No. 1. As an initial matter,  
6 while this Court may exercise supplemental jurisdiction over state law claims  
7 pursuant to 28 U.S.C. § 1367, the decision is discretionary. *Acri v. Varian Assocs.,*  
8 *Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997), *supplemented*, 121 F.3d 714 (9th Cir.  
9 1997), *as amended*, (Oct. 1, 1997). In the interests of judicial economy,  
10 convenience, fairness, and comity, the Court declines supplemental jurisdiction  
11 over Plaintiffs’ state law claims and will address only the challenges to federal law.

12 Plaintiffs’ Complaint raises 17 causes of action, but the present motion  
13 raises only nine. Thus, the Court’s Order will be limited only to the issues  
14 currently raised. The Court also notes that Plaintiffs attempt to raise an additional  
15 cause of action in the present motion that is not pleaded in the Complaint,  
16 specifically the Washington State theory of economic battery. ECF No. 11 at 17–  
17 19. That cause of action will not be addressed as it is insufficiently pleaded. *Pac.*  
18 *Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 633 (9th Cir. 2015).

19 As a final matter, throughout the present motion, Plaintiffs rely heavily on  
20 the holding and analysis in *BST Holdings, L.L.C. v. Occupational Safety and*

1 *Health Administration, United States Dep’t of Lab.*, 17 F.4th 604 (5th Cir. 2021).  
2 That case is not binding on this Court, nor is it persuasive or even instructive  
3 because it involved a challenge to the statute implementing the emergency  
4 temporary standard (“ETS”) issued by the Occupational Safety and Health  
5 Administration (“OSHA”). *See id.* Challenges to administrative actions and  
6 decisions are subject to wholly different legal standards than the challenges raised  
7 here. Plaintiffs’ arguments that the holding and reasoning from *BST Holdings*,  
8 *L.L.C.* should apply here are misplaced.

9 To obtain injunctive relief, Plaintiffs must show that there are “serious  
10 questions going to the merits” of their claims, and that they are likely to succeed on  
11 the merits. *Cottrell*, 632 F.3d at 1131; *Farris*, 677 F.3d at 865.

12 *1. Ripeness*

13 Defendants argue Plaintiffs’ claims are not yet ripe for judicial adjudication.  
14 ECF Nos. 41 at 9; 44 at 27. Plaintiffs’ allegations generally hinge on their belief  
15 that they will be terminated from employment should they fail to comply with the  
16 vaccination requirements implemented by their employers pursuant to the  
17 Executive Orders. ECF No. 1 at 42–44, ¶¶ 313–323. Because the time to comply  
18 with the Executive Orders has been extended, Plaintiffs are not currently subject to  
19 any enforcement action that may arise from non-compliance; thus, Plaintiffs raise a  
20 pre-enforcement challenge.

1           The doctrine of ripeness is a threshold issue that is designed to “prevent the  
2 courts, through avoidance of premature adjudication, from entangling themselves  
3 in abstract disagreements.” *Thomas v. Anchorage Equal Rights Comm’n*, 220  
4 F.3d 1134, 1138 (9th Cir. 2000) (citation omitted). The doctrine is grounded in  
5 both “Article III limitations on judicial power” (the Constitutional component) and  
6 “prudential reasons for refusing to exercise jurisdiction” (the prudential  
7 component). *Id.* (citation omitted).

8           a. Constitutional Component

9           Ripeness overlaps with the injury-in-fact requirement for standing and is  
10 essentially a temporal inquiry. *Id.* at 1139. Like the injury-in-fact requirement,  
11 ripeness requires issues that are “definite and concrete, not hypothetical or  
12 abstract.” *Id.* (citation omitted). In the pre-enforcement context, while a plaintiff  
13 need not wait until “the consummation of threatened injury to obtain preventative  
14 relief,” the plaintiff must still face a “*genuine threat of imminent prosecution.*”  
15 *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) (citation omitted)  
16 (emphasis in original). To determine whether a threat of prosecution is imminent,  
17 courts consider: “(1) whether the plaintiff has articulated a concrete plan to violate  
18 the law in question; (2) whether the prosecuting authorities have communicated a  
19 specific warning or threat to initiate proceedings; and (3) the history of past  
20 prosecution or enforcement under the challenged statute.” *Id.* Injuries or harms

1 that are too speculative are insufficient to support jurisdiction. *Thomas*, 220 F.3d  
2 at 1139.

3 Plaintiffs here have failed to articulate any facts from which the Court can  
4 infer an imminent threat of harm or adverse enforcement action. As to Plaintiffs'  
5 plans for future noncompliance, only a handful of Plaintiffs explicitly state their  
6 precise vaccination status. *See, e.g.*, ECF No. 1 at 10, ¶ 60, at 14, ¶ 88, at 22, ¶  
7 157. The remaining Plaintiffs do not indicate whether they have received any  
8 vaccine doses or whether they plan to in the future. *Id.* at 4–41, ¶¶ 16–308. Next,  
9 many Plaintiffs are in various stages of the exemption and accommodations  
10 process; some have completed the process, some have applications that are still  
11 pending, and others have not even applied. *See, e.g.*, ECF Nos. 1 at 6, ¶¶ 28, 30;  
12 41 at 9; 45 at 4, ¶ 13; 46 at 11, ¶¶ 35–36; 49 at 6–7, ¶ 20. Those who have not  
13 applied do not indicate whether they plan to apply in the future. Thus, Plaintiffs  
14 have failed to articulate a clear plan to violate the vaccination requirement.

15 Regarding a specific warning or threat to initiate enforcement proceedings,  
16 Plaintiffs do not allege they have received any communication that employment  
17 termination is imminent. Conversely, several Contractor Defendants have  
18 affirmatively stated that Plaintiffs do not face imminent adverse employment  
19 action. ECF Nos. 45 at 5, ¶ 16; 46 at 11, ¶ 34; 53 at 4–5, ¶ 11. Similarly,  
20 Defendant DOE has affirmatively stated that the seven Plaintiffs it employs do not

1 face imminent adverse employment action. ECF No. 42 at 6, ¶ 11. Other  
2 Contractor Defendants continue to review and revise the availability of  
3 accommodations but have not indicated they plan to initiate adverse employment  
4 action. *See, e.g.*, ECF Nos. 48 at 4, ¶¶ 15–16; 52 at 4, ¶¶ 11–12.

5 Finally, because the vaccine mandates under the Executive Orders are new  
6 and not yet enforceable, there can be no history or evidence of past enforcements  
7 that would imply Defendants plan to take immediate adverse action against  
8 Plaintiffs once the mandates are enforceable.

9 Plaintiffs’ beliefs that they face imminent termination if they fail to comply  
10 with the vaccine requirements are unfounded and insufficient to demonstrate a  
11 genuine threat of imminent harm. Therefore, Plaintiffs have failed to allege a  
12 claim that is ripe for adjudication under the constitutional component.

13 b. Prudential Component

14 Plaintiffs’ claims are unripe for prudential reasons as well. Whether a case  
15 is ripe for judicial adjudication under the prudential component is guided by two  
16 overarching considerations: “the fitness of the issues for judicial decision and the  
17 hardship to the parties of withholding court consideration.” *Thomas*, 220 F.3d at  
18 1141.

19 Here, the time for compliance with the vaccination requirements has not yet  
20 arrived. If Plaintiffs decide to obtain vaccines in the interim, or they are approved

1 for exemptions, their issues may not ever require judicial review. *See Am.*  
2 *Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 387 (D.C. Cir. 2012). It is simply too  
3 early to know with any degree of certainty whether Plaintiffs’ fears of termination  
4 will come into fruition. Additionally, postponing review of Plaintiffs’ claims will  
5 not impose an undue hardship to the parties. Plaintiffs have failed to demonstrate  
6 they face any imminent threat of harm and delaying review will allow more time  
7 for Plaintiffs to complete the exemption and accommodation process. Delay will  
8 also provide Defendants the opportunity to review and reevaluate exemption  
9 applications already filed.

10 The Court finds Plaintiffs’ claims are unripe for judicial review because  
11 Plaintiffs’ fears may never come into fruition, and because delaying review will  
12 not unduly burden the parties.

13 Next, the Court need not reach the substance of Plaintiffs’ claims; however,  
14 given Mr. Arnold’s and Mr. Serrano’s bewildering attempt to relitigate nearly  
15 identical claims that the Court has previously struck down, the Court will briefly  
16 address the current legal and factual deficiencies for clarity.

17 2. *Commerce Clause, Non-Delegation Clause, Separation of Powers*  
18 *Clause, Tenth Amendment*

19 Plaintiffs argue the Executive Orders “likely” exceed the federal  
20 government’s constitutional authority under the Commerce Clause, “run afoul” of

1 the doctrines of non-delegation and separation of powers, and violate the Tenth  
2 Amendment. ECF No. 11 at 11. Aside from a single case citation broadly  
3 discussing the principles of federalism, Plaintiffs do not provide any legal or  
4 factual analysis for these issues nor do Plaintiffs explain how these legal theories  
5 relate to their circumstances. Therefore, Plaintiffs have failed to demonstrate there  
6 are serious questions going to the merits of these claims or that are they likely to  
7 succeed on the merits of the claims.

### 8 *3. Procurement Act*

9 Plaintiffs seem to allege Executive Order 14042 violates the Procurement  
10 Act, 40 U.S.C. § 121(a). *Id.* Federal Defendants argue Executive Order 14042 is a  
11 valid exercise of the President’s authority to direct federal contracting.

12 The purpose of the Procurement Act is “to provide the Federal Government  
13 with an economical and efficient system” for “procuring and supplying property  
14 and nonpersonal services.” 40 U.S.C. § 101. Under the Act, the President “may  
15 prescribe policies and directives . . . necessary to carry out” the provisions of the  
16 Act, so long as the policies are consistent with the Act. 40 U.S.C. §121(a). Courts  
17 have interpreted this to mean the executive order must have a “sufficiently close  
18 nexus to the values of providing the government an economical and efficient  
19 system for procurement and supply.” *UAW-Lab. Emp. & Training Corp. v. Chao*,  
20 325 F.3d 360, 366 (D.C. Cir. 2003) (citation and internal quotation omitted).



1 However, courts have also recognized the “necessary flexibility and broad-ranging  
2 authority” granted to the President under the Act, and courts will find a nexus even  
3 where the connection seems attenuated or where arguments claiming the opposite  
4 effect may be advanced. *Id.*

5 Executive Order 14042 easily satisfies the nexus requirement. The express  
6 language of the Order states that it promotes federal government economy and  
7 efficiency by ensuring federal contractors implement adequate COVID-19  
8 safeguards to protect their workers, which helps reduce the spread of COVID-19,  
9 thereby decreasing worker absences, reducing labor costs, and improving work  
10 efficiency at federal contractor worksites. ECF No. 41 at 22. The Taskforce  
11 explained these goals are achieved by increasing vaccination among federal  
12 contractors. *Id.*

13 Federal Defendants submitted ample evidence demonstrating how the  
14 Hanford site benefits from these goals and purposes. See ECF No. 44 at 24.  
15 Plaintiffs, on the other hand, have not advanced any arguments that would  
16 undermine the President’s broad authority under the Act to issue the Executive  
17 Orders nor have they presented any salient arguments that would overcome the  
18 lenient standard by which courts judge the nexus requirement.

19 Plaintiffs have failed to demonstrate they are likely to succeed on the merits  
20 of their Procurement Act claim or that there are serious questions going to the

1 merits of that claim.

2 4. *Free Exercise of Religion*

3 Similar to the free exercise claim alleged in *Bacon*, it is unclear from  
4 Plaintiffs’ briefing what argument they are attempting to advance. ECF No. 11 at  
5 12–15; *see Bacon*, 2:21-CV-0296-TOR, ECF No. 63 at 10. However, the  
6 Complaint appears to raise both facial and as-applied challenges to the Executive  
7 Orders. ECF No. 1 at 2, ¶ 3.

8 To avoid First Amendment violations under the Free Exercise Clause, a law  
9 must be facially neutral and generally applicable. *Church of the Lukumi Babalu*  
10 *Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Laws that satisfy these  
11 requirements need not be justified by a compelling governmental interest. *Id.* This  
12 is true even where the laws have an incidentally burdening effect on religious  
13 practice. *Id.* However, laws that are not facially neutral and generally applicable  
14 must be justified by a compelling governmental interest and must be narrowly  
15 tailored to advance that interest. *Id.*

16 Facial challenges are more difficult to prove than as-applied challenges.  
17 *Young v. Hawaii*, 992 F.3d 765, 779 (9th Cir. 2021). “To succeed on a facial  
18 challenge, the challenger must establish that no set of circumstances exists under  
19 which the regulation would be valid.” *Doe v. Zucker*, 496 F. Supp. 3d 744, 754  
20 (N.D.N.Y. 2020) (internal brackets omitted). Judicial review of facial challenges

1 is limited to the text of the law or regulation itself. *Young*, 992 F.3d at 779.  
2 Challenges to general applicability will succeed if the record before the court  
3 “compels the conclusion” that suppression of religion or religious practice is the  
4 object of the law at issue. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534.

5 Here, Plaintiffs’ free exercise challenge to the Executive Orders fails for the  
6 same reasons the plaintiffs in *Bacon* failed: the Executive Orders are facially  
7 neutral and as applied. *Bacon*, 2:21-CV-0296-TOR, ECF No. 63 at 10–13. On  
8 their faces, neither identifies or singles out any religion or religious practice, and  
9 they are generally applicable because they apply with equal force to all federal  
10 government employees and contractors, regardless of their religious affiliation—or  
11 lack thereof. Moreover, Plaintiffs have not alleged sufficient facts demonstrating  
12 their sincerely held religious views have been affected by the Executive Orders.  
13 Consequently, Plaintiffs have failed to demonstrate they are likely to succeed on  
14 the merits of their free exercise claim or that there are serious questions going to  
15 the merits of the claim.

16 5. *Title VII; Americans with Disabilities Act (ADA)*

17 As the Court previously explained in *Bacon*, Plaintiffs’ claims cannot  
18 proceed in district court because they have failed to exhaust their administrative  
19 remedies. *Bacon*, 2:21-CV-0296-TOR, ECF No. 63 at 8–10. Mere attempts at  
20 exhaustion are insufficient. Therefore, Plaintiffs cannot demonstrate a likelihood

1 of success on the merits or that there are serious questions going to the merits of  
2 those claims.

### 3 **B. Irreparable Harm**

4 Similar to *Bacon*, it is once again difficult to decipher the irreparable harm  
5 Plaintiffs allege they will suffer. ECF No. 11 at 7. The heading to this section of  
6 Plaintiffs’ brief seems to imply a loss of “free exercise and medical freedom,” but  
7 the analysis focuses almost entirely on a loss of employment. ECF No. 11 at 7. In  
8 any event, the Court finds Plaintiffs have failed to demonstrate they will suffer  
9 irreparable harm for the same reasons discussed in *Bacon*. *Bacon*, 2:21-CV-0296-  
10 TOR, ECF No. 63 at 14–16.

### 11 **C. Balancing of Equities and Public Interest**

12 Plaintiffs imply that a failure to enjoin the Executive Orders will expose the  
13 Hanford site to a “national security risk or environmental catastrophe.” ECF No.  
14 11 at 8. Plaintiffs grossly overstate the possibility of a safety or security threat to  
15 the Hanford site, as they have provided no facts or evidence to support their  
16 assertion. Conversely, Defendant DOE confirmed there are sufficient Hanford  
17 Patrol Security Police Officers who have attested to being fully vaccinated and  
18 who will continue protecting the national security assets at the Hanford site. ECF  
19 No. 43 at 3, ¶ 8. Moreover, Defendant DOE has a contingency plan in place that  
20 will ensure the Hanford site remains protected even if all current fully vaccinated

1 officers become unavailable for service. *Id.* at ¶ 9. Plaintiffs’ unsubstantiated  
2 allegations are insufficient to show the public interest would best be served by an  
3 injunction. *See also Bacon*, 2:21-CV-0296-TOR, ECF No. 63 at 17.

4 Plaintiffs do not address the balancing of equities. Nonetheless, the balance  
5 of equities tips heavily in Defendants’ favor. Plaintiffs’ Complaint and present  
6 motion are replete with procedural, factual, and legal deficiencies that cannot  
7 support the extraordinary remedy of injunctive relief. Thus, the balance of equities  
8 tips in favor of Defendants and the public interest would not be served by  
9 enjoining the Executive Orders.

10 **CONCLUSION**

11 The Court finds that Plaintiffs have failed to satisfy either the *Winter* test or  
12 the *Cottrell* sliding scale test. Plaintiffs are not entitled to the relief they seek.

13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

14 Plaintiffs’ Motion for Declaratory Relief, Temporary Restraining Order, and  
15 a Preliminary Injunction (ECF No. 11) is **DENIED**.

16 The District Court Executive is directed to enter this Order and furnish  
17 copies to counsel.

18 DATED December 17, 2021.



20 A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
United States District Judge