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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN DIEGO - CENTRAL**

13 PROTECTION FOR THE EDUCATIONAL
14 RIGHTS OF KIDS, a California 501(c)(3) non-
15 profit corporation; MANUEL DEL TORO, an
16 individual; JONATHAN WIESE, an individual;
17 and JUSTUS NORGDOR, an individual,

18 Plaintiffs,

19 v.

20 CITY OF SAN DIEGO, a charter city and
21 municipal corporation; and DOES 1 through 20,
22 inclusive,

23 Defendant.

Case No.:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

24 Plaintiffs, Protection for the Educational Rights of Kids (“PERK”), Manuel Del Toro,
25 Jonathan Wiese, and Justus Norgord, allege as follows:

26 **INTRODUCTION**

27 1. The Covid-19 pandemic has lasted nearly two years. For much of that time, schools
28 were shut. Businesses were forced to close. Even government agencies operated remotely, meeting
by phone or videoconference to conduct the public’s business.

1 State of California that advocates for civil rights issues, bodily autonomy, medical freedom and other
2 rights. PERK has dedicated considerable resources to advocating for individual rights during the
3 COVID-19 pandemic, has hundreds of members who are First Responders and employees of the
4 City of San Diego and thus has a beneficial interest in the relief sought in this action.

5 7. Plaintiff Manuel Del Toro (“Del Toro”) is, and at all times relevant hereto was, an
6 individual residing in the City and County of San Diego. Del Toro is a Captain in the San Diego
7 Police Department with thirty-one (31) years of service. Del Toro opposes the City’s Mandatory
8 COVID-19 Vaccination Policy. He believes the mandate infringes upon the rights and freedoms
9 City employees have over their own bodies and that the termination of non-compliant police officers
10 will compromise his ability to provide the high level of service San Diego citizens have grown to
11 expect from the San Diego Police Department.

12 8. Plaintiff Jonathan Wiese is, and at all times relevant hereto was, an individual
13 residing in the City and County of San Diego. Wiese is a San Diego Police Officer assigned to the
14 K-9 unit. Wiese has been with the San Diego Police Department for over twenty-three (23) years.
15 Wiese previously contracted COVID-19, has natural, durable immunity, and does not want to be
16 administered any of the currently available COVID-19 vaccines. Wiese submitted a religious
17 exemption that is currently pending.

18 9. Plaintiff Justus Norgord is, and at all times relevant hereto was, an individual residing
19 in the City and County of San Diego. Norgord is Captain/Paramedic and Battalion Medical Officer
20 with the San Diego Fire-Rescue Department and has not demonstrated compliance with the City’s
21 Mandatory COVID-19 Vaccination Policy. Norgord has been a firefighter since he was twenty (20)
22 years old and has now been a firefighter for approximately thirty (30) years. Norgord previously
23 contracted COVID-19 and has submitted a request for a religious exemption.

24 10. The City is a municipal corporation organized under the laws of this State.

25 **FACTUAL ALLEGATIONS**

26 11. Between late 2019 and early 2020, health officials discovered a novel coronavirus
27 circulating in Wuhan, China. They named the virus “COVID-19.”
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1 12. During March 2020, California Governor Gavin Newsom issued a state of emergency
2 related to COVID-19. Later that month, Governor Newsom issued a statewide “stay at home” order.
3 Under this order, certain activities, deemed “essential,” were allowed to continue while other
4 activities, deemed “non-essential,” were not.

5 13. Police, firefighters, and other emergency personnel were deemed essential under the
6 Governor’s stay at home order and related orders issued by local officials. Thus, San Diego police
7 officers and firefighters did not shelter in place during the early stages of the pandemic. They did not
8 work remotely. They served the public on the front lines during the initial emergency, as they always
9 do.

10 14. During 2020, several pharmaceutical companies began developing shots to mitigate
11 the spread of COVID-19. Then-president Donald Trump promised that the vaccines would be
12 available within a year. Many people did not believe him, with several Democratic politicians—
13 including Governor Newsom—saying they did not trust Trump and would review the vaccines’
14 effectiveness and safety independently.

15 15. Then Mr. Biden won the presidency and many tunes changed. By the summer of
16 2021, tens of millions of Americans had received the COVID-19 shot, including more than half of
17 adults in California. But the virus had not disappeared. Therefore, some government officials
18 decided that the only way to eliminate COVID-19, and end the pandemic, is for everybody to get
19 one of the COVID-19 shots.

20 16. To that end, on November 29, 2021 the City Council adopted Ordinance O-21398,
21 which it “declared to be an emergency measure required for the immediate preservation of the public
22 peace, safety, health, and welfare pursuant to Charter section 295” that took immediate effect. It
23 required current City employees, newly hired employees, and certain City contractors to “be fully
24 vaccinated against COVID-19 and provide proof of their full vaccination” (the “City Vaccine
25 Mandate”). A true and correct copy of the City’s ordinance is attached as **Exhibit “A.”**

26 17. The Council said it adopted the City Vaccine Mandate because “multiple COVID-19
27 vaccines, approved by the FDA or authorized for emergency use by the FDA or the WHO, are
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1 currently available and have proven to be safe and highly effective in protecting individuals against
2 serious illness, hospitalization, and death from COVID-19 infection” and because “the City of San
3 Diego’s workforce, residents, and visitors include individuals who are particularly vulnerable to
4 serious COVID-19 infection and those who cannot receive a COVID-19 vaccine[.]” But, to date, the
5 City has not turned over the information it relied on to make those findings. Moreover, the
6 Department of Health and Human Services’ Centers for Medicare and Medicaid Services (“CMS”)
7 recently stated in the *Federal Register* that “the duration of vaccine effectiveness in preventing
8 COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the
9 vaccine to prevent disease transmission by those vaccinated are not currently known.”

10 18. The CMS issued that report last fall. Now we know more about the ineffectiveness of
11 the COVID-19 vaccines. As the new year dawned, America averaged 486,000 new COVID-19
12 infections each day, the most ever. Roughly a quarter of people who tested in Los Angeles over the
13 New Year’s weekend were positive. This includes vaccinated and unvaccinated people. So have
14 many City police officers. As of January 5th, at least 200 members of the San Diego Police
15 Department (“SDPD”), including police officers were off-duty with COVID-19.¹ The SDPD states
16 that approximately seventy-three percent (73%) of the City’s police officers are fully vaccinated.
17 The firefighters’ numbers are comparable with about 127 firefighters quarantining and around 88%
18 of the City’s firefighters being fully vaccinated. (*Ibid.*)

19 19. Thus, there is no evidence that receiving one of the COVID-19 shots makes an
20 individual less likely to contract and transmit the novel coronavirus. The real-world evidence shows
21 it does not. The companies that created the vaccines admit it. And it is becoming increasingly clear
22 that the COVID-19 vaccines are not cures, like the polio or smallpox vaccines, which can eradicate a
23 disease. They may reduce the severity of an infected individual’s symptoms. They may not. Like the
24 flu shot, they may work better against some variants than others.

25 20. If the City had engaged in a meaningful and open-minded review of this issue, it
26 would have realized this. Instead, it simply decided to mandate the COVID-19 vaccines for all city

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28 ¹ <https://www.sandiegouniontribune.com/news/public-safety/story/2022-01-05/almost-200-san-diego-police-employees-in-insolation-or-quarantine-because-of-covid-19> (Last visited January 27, 2022)

1 employees and directed City staff to find evidence to support the decision, a quintessentially
2 arbitrary and capricious action and an arbitrary decision-making process that deserves no deference
3 in this action.

4 21. This is not a trivial issue. Although the City describes compulsory vaccination as
5 commonplace, it has never required that city employees get a shot to keep their jobs before now.
6 This is even true for city employees who work in the most disease-ridden areas of San Diego. For
7 example, on information and belief, the City regularly offered shots to employees who work directly
8 with San Diego’s homeless population to combat the various contagions they encounter. Nobody has
9 ever been disciplined, much less fired, for declining one of the injections.

10 22. Similarly, in 2018, America suffered one of its worst flu seasons in recent memory.
11 The *Los Angeles Times* described hospitals as “war zones.” Patients were treated in hallways and
12 outdoor tents. But no city employees were fired for declining the flu shot.

13 23. Compulsory vaccination constitutes a serious invasion of the Plaintiffs’ right to
14 bodily integrity. But, in issuing the City Vaccine Mandate, the City did not consider alternative
15 measures that have a lesser impact on the firefighters’ and police officers’ privacy rights, as it was
16 required to do under Article I, section 1 of the California Constitution (the state constitutional right
17 to privacy) and the California Supreme Court’s decision in *Mathews v. Becerra*. Many such
18 measures exist.

19 24. Furthermore, city police officers and firefighters who have obtained permanent
20 employment are not at-will employees but have a property interest in their employment. Thus, under
21 *Skelly v. State Personnel Board*, they have a right to notice of their termination and an opportunity to
22 be heard before a reasonably impartial hearing officer. They also have the right to conduct discovery
23 before the hearing. They must be paid during that time and can challenge any adverse employment
24 action as clearly excessive. That will cost an enormous amount of time and taxpayer money. In the
25 meantime, social services will be cut. That is simply not warranted for vaccines that have proven to
26 be ineffective in controlling the spread of COVID-19 and for a virus that is becoming endemic.

27 25. This should not be a political issue. It is not 1905. Constitutional law has evolved
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1 since then. And while the City cites the COVID-19 emergency as justification for its Vaccine
2 Mandate, an emergency cannot last forever. The City has an ongoing obligation to review the facts
3 and determine whether its Vaccine Mandate is necessary to protect the public health. It cannot bury
4 its head in the sand and rely on old studies while ignoring the real-world data the Omicron variant
5 has given us.

6 26. A substantial number of firefighters and police officers have not complied with the
7 City Vaccine Mandate as of the filing of this action. Many of them bowed to the City’s pressure
8 tactics and got the COVID-19 shot. Yet other firefighters and police officers did not bow to the
9 pressure and recently received an “Advance Notice of Termination – Failure to Comply with
10 Mandatory COVID-19 Vaccination Policy”. Some have returned to duty—all they had to do was
11 request a religious or medical exemption and they could work, even if unvaccinated—but others
12 have not.

13 27. The City accused these non-compliant firefighters of being an imminent threat to
14 public health and workplace safety. But it does not have any evidence of unvaccinated firefighters
15 infecting the public and thus has no basis for that statement or for the aggressive adverse
16 employment actions it has taken against those firefighters who challenged the City Vaccine
17 Mandate.

18 **FIRST CAUSE OF ACTION**

19 **(Declaratory and Injunctive Relief re *Ultra Vires* Legislation)**

20 28. Plaintiffs incorporate each of the preceding paragraphs as though set forth fully
21 herein.

22 29. The City contends that it had the authority to adopt the City Vaccine Mandate under
23 its police powers and that the mandate is reasonably related to promoting public health.

24 30. Plaintiff contends that, in making the COVID-19 vaccines a condition of
25 employment, the City acted in its capacity as an employer, not the sovereign. The City does not have
26 the authority, as their employer, to unilaterally change the conditions of employment for city
27 firefighters and police officers, who are represented by a labor union and whose employment is
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1 governed by a Memorandum of Understanding between the City and the union.

2 31. Plaintiff also contends that, even if the City does have the authority under its police
3 power to adopt the Vaccine Mandate, the mandate is not reasonably related to promoting public
4 health and that the means used is not reasonably appropriate under the circumstances. Indeed, the
5 City Vaccine Mandate is arbitrary and irrational, as evidence developed during the spread of the
6 Omicron variant shows the COVID-19 vaccines do not prevent people from contracting or
7 transmitting COVID-19.

8 32. Plaintiff desires a judicial declaration that the City Vaccine Mandate exceeds the
9 City's power as a public employer and that the mandate is arbitrary given the increasing evidence
10 that the COVID-19 vaccines do not prevent people from contracting or spreading COVID-19.

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

14 34. The City's actions have harmed Plaintiff and those it represents, as alleged above.

15 35. Plaintiff and its members have no adequate remedy at law and will suffer irreparable
16 harm if the Court does not enjoin the City from enforcing the vaccine mandate.

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

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20 **SECOND CAUSE OF ACTION**

21 **(Declaratory and Injunctive Relief under Article I, section 1 of Cal. Constitution)**

22 37. Plaintiffs incorporate each of the preceding paragraphs as though set forth fully
23 herein.

24 38. Many police officers and firefighters, including JONATHAN WIESE and JUSTUS
25 NORGORD have not taken the COVID-19 vaccines. Other firefighters and police officers, such as
26 MANUEL DEL TORO who have chosen to be vaccinated, join those firefighters and police offers
27 who have not been vaccinated in opposing the City's Vaccine Mandate, believing it to be a personal
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1 choice that when mandated infringes upon their rights and freedoms. Together, they object to the
2 forced medical treatment as a condition of their employment.

3 39. Individuals have a right to privacy under the California Constitution. This state law
4 privacy right, which was added by voters in 1972, is far broader than the right to privacy that exists
5 under the federal Constitution. It is the broadest privacy right in America and has been interpreted by
6 the California Supreme Court to protect the right to bodily integrity.

7 40. City firefighters and police officers have a legally protected privacy interest in their
8 bodily integrity, as the California Supreme Court recognized in *Hill v. NCAA*.

9 41. The firefighters' and police officers' expectation of privacy is reasonable under the
10 circumstances, as the City has never had a vaccination requirement for public employment before
11 now and the City has never disciplined, much less fired, a firefighter or police officer for declining
12 an injection. The only compulsory vaccination laws adopted in California during the past century
13 concerned certain vaccines that children need to attend school. Those laws do not undermine city
14 firefighters' and police officers' expectation of privacy in their bodily integrity.

15 42. The City Vaccine Mandate constitutes a serious invasion of the firefighters' privacy
16 rights, as alleged above.

17 43. Although the City may argue that the Vaccine Mandate serves a compelling interest
18 in reducing the spread of COVID-19, there are feasible and effective alternatives to it that have a
19 lesser impact on privacy interests. Furthermore, evidence now shows that the COVID-19 vaccines
20 do *not* prevent people from contracting and transmitting COVID-19. Thus, the mandate does not
21 serve its stated purpose.

22 44. On information and belief, the City contends that the Vaccine Mandate does not
23 violate the privacy rights of city firefighters and police officers.

24 45. Plaintiffs desire a judicial declaration that the City Vaccine Mandate is
25 unconstitutional because it violates city firefighters' and police officers' right to privacy under
26 Article I, section 1 of the California Constitution.

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

3 47. The City’s actions have harmed Plaintiffs, as alleged above.

4 48. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if the
5 Court does not enjoin the City from enforcing the unconstitutional vaccine mandate.

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

8 **THIRD CAUSE OF ACTION**

9 **(Declaratory and Injunctive Relief under Due Process Clause/Skelly/Firefighter Bill of Rights)**

10 50. Plaintiffs incorporate each of the preceding paragraphs as though set forth fully
11 herein.

12 51. Plaintiffs contends that the City does not have the power to put city firefighters and
13 police officers who do not follow the City Vaccine Mandate on unpaid leave pending termination
14 proceedings. The City must provide the firefighters and police officers with notice and an
15 opportunity to challenge the action before it stops paying them, pursuant to the Due Process Clause
16 and the California Supreme Court’s decision in *Skelly*.

17 52. Plaintiffs also contend that the City cannot take any adverse employment action
18 against city firefighters and police officers without providing them with the rights they have under
19 the state law Firefighters Procedural Bill of Rights Act and the Public Safety Officers Procedural
20 Bill of Rights Act. These rights go beyond the minimum due process rights that all public employees
21 have under *Skelly*.

22 53. On information and belief, the City contends that it does not have to comply with
23 *Skelly* or the Firefighters Procedural Bill of Rights Act and the Public Safety Officers Procedural Bill
24 of Rights Act before it stops paying city firefighters and police officers for not complying with the
25 City Vaccine Mandate.

26 54. Plaintiffs desire a judicial declaration that the City cannot stop paying a city
27 firefighters and police officers without providing that employee with due process under *Skelly*, the
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1 Firefighter Procedural Bill of Rights Act, and the Public Safety Officers Procedural Bill of Rights
2 Act.

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

6 56. The City's actions have harmed Plaintiffs, as alleged above.

7 57. Plaintiffs have no adequate remedy at law and will suffer irreparable harm if the
8 Court does not enjoin the City from enforcing the City Vaccine Mandate without complying with
9 *Skelly*, the Firefighter Procedural Bill of Rights Act, and the Public Safety Officers Procedural Bill
10 of Rights Act

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

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14 **PRAYER FOR RELIEF**

15 Wherefore, Plaintiffs pray for relief as follows:

16 1. For an order declaring the City Vaccine Mandate void because the City did not have
17 the power to issue it or, in the alternative, because the mandate is arbitrary;

18 2. For an order declaring the City Vaccine Mandate unconstitutional because it violates
19 the privacy rights that city firefighters and police officers have under the California Constitution;

20 3. For an order declaring that the City cannot stop paying city firefighters and police
21 officers without giving them a pre-deprivation *Skelly* hearing and without following the procedural
22 requirements set forth in the Firefighter Procedural Bill of Rights Act and the Public Safety Officers
23 Procedural Bill of Rights Act;

24 4. For injunctive relief enjoining the City from further enforcing the City Vaccine
25 Mandate;

26 5. For costs and attorneys' fees under section 1021.5 of the Code of Civil Procedure;
27 and

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6. For such other relief that the Court determines is just and proper.

Dated: January 28, 2022

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By: _____

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