IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Ravago, et al.,

Plaintiffs,

v.

Lightfoot, et al.,

Defendants.

Case No. 1:22-cv-00745

Memorandum Supporting Plaintiffs' Motion for Preliminary Injunction

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INTRODUCTION

Despite the fact that the world knew in mid-December 2021 that vaccination was no barrier to transmitting Omicron,[1] the President of the Cook County Board of Commissioners and Mayor of Chicago nevertheless imposed vaccine passport requirements on residents patronizing restaurants, bars, gyms, concerts, ballets, and sporting events, in order to supposedly stop the spread of Omicron. Such a passport requirement is useless, and thus fails even the rational basis test by its irrational discrimination between vaccinated and unvaccinated citizens.

The orders fail a variety of other legal standards as well: they are not authorized by the City and County's own ordinances, they provide no due process protections before depriving liberty, they steamroll over the State of Illinois' constitutional guarantee of privacy, and Cook County's mandate, which exempts sports stars and music acts but not people of faith, violates the religious liberty that the First Amendment to the U.S. Constitution guarantees.

Plaintiffs are likely to succeed on the merits that vaccine passports violate constitutional rights and also satisfy the remaining requirements for a preliminary injunction. Therefore, a preliminary injunction should be entered promptly to ensure that all residents of the City of Chicago and Cook County do not have to live any longer under these burdensome mandates.

FACTS

The attached documents provide for the necessary relevant facts needed for a preliminary injunction. Accurate copies of the orders are attached to the Complaint as Exhibits A and B.[2] And

[1] S. Nolen, *Most of the World's Vaccines Likely Won't Prevent Infection From Omicron*, N.Y. Times (Dec. 19, 2021); H. Scribner, *3 COVID-19 vaccine shots won't stop omicron variant, BioNTech leader says*, Deseret News (Dec. 26, 2021); *COVID-19 vaccines may be less effective against Omicron – WHO*, Reuters (Dec. 15, 2021); H. Scribner, *Can fully vaccinated people spread the omicron variant to others? What the CDC says*, Deseret News (Dec. 28, 2021).

[2] Exhibit A, the Cook County Order, was downloaded from https://cookcountypublichealth.org/wp-content/uploads/2022/01/CCDPH-COVID-Order-2021-11_12-23-21_Amended-01-03-22.pdf; Exhibit B, the Chicago Order, was downloaded from https://www.chicago.gov/content/dam/city/sites/covid/health-

the Plaintiffs' declarations, attached as Exhibits B–I, establishing that Plaintiffs are all unvaccinated residents of the City of Chicago or suburban Cook County who formerly dined at restaurants and visited public venues until the passport mandate went into effect;[3] and that several Plaintiffs have or would qualify for religious exemptions from the vaccine mandate.[4]

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). While Plaintiffs' burden for showing that they will succeed on the merits is more than a "'better than negligible' standard," they "need not show that [they] definitely will win the case." *Id*.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

A. Both orders violate the Fourteenth Amendment's equal protection guarantee because they are not rational.

The Fourteenth Amendment's Equal Protection Clause prohibits a state from exercising power in an arbitrary manner. "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another,

orders/Health%20Order%202021-2_12-30-21_FINAL.pdf. This Court may take judicial notice of information on official government websites. *Clear Spring Prop. & Cas. Co. v. Victory Ins. Co.*, No. 21-cv-01162, 2021 U.S. Dist. LEXIS 189726, at *18 (N.D. Ill. Oct. 1, 2021) ("information published on a government website is the proper subject of judicial notice," *citing Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003)).

[3] Wager Decl., ¶¶ 3-8; Knorr Decl. ¶¶ 4-8; Doe Decl. ¶¶ 3-14; Ravago Decl. ¶¶ 3-9; Connolly Decl. ¶¶ 3-9; Peterson Decl. ¶¶ 3-9; Kawalkowski Decl. ¶¶ 3-7, 10-13; Hauser Decl., ¶¶ 3-9.

[4] Knorr Decl. ¶¶ 9-11; Doe Decl. ¶¶ 15, 18; Peterson Decl. ¶¶ 10-13; Kawalkowski Decl. ¶¶ 8-9.

seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

While the Court generally reviews social and economic legislation deferentially under the Equal Protection Clause, that review "is not a toothless one." *Mathews v. De Castro*, 429 U.S. 181, 185 (1976). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Further, those challenging a law have "a right to present evidence of irrationality and a law will fail the rational basis test if it relies upon factual assumptions that exceed the 'limits of rational speculation.'" *Halgren v. City of Naperville*, No. 21-cv-05039, 2021 U.S. Dist. LEXIS 241777, *71 (N.D. Ill. Dec. 19, 2021) (citation omitted). "'[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality' and any 'hypothetical rational, even post hoc, cannot be fantasy.'" *Id.* at *67–68 (quoting *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013)). Thus, rational basis review is not a "'rubber stamp,' and 'there must be a role for active fact-finding, and it must be possible for a plaintiff to prove facts to overcome the presumption of constitutionality.'" *Halgren*, 2021 U.S. Dist. LEXIS 241777, *75 (quoting *Pittsfield Dev., LLC v. City of Chi.*, No. 17 C 1951, 2017 U.S. Dist. LEXIS 194860, *10-11 (N.D. Ill. Nov. 28, 2017)). Accordingly, courts hold that laws are unconstitutional even on rational basis scrutiny. *See Hicks v. Peters*, 10 F. Supp. 2d 1003, 1004 (N.D. Ill. 1998).

Not only must the government's means be rationally related to its ends, those ends themselves must be legitimate. Thus, "some objectives — such as 'a bare . . . desire to harm a politically unpopular group,' . . . are not legitimate state interests." *City of Cleburne*, 473 U.S. at 446–47

(quoting *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973)). "The 'rational basis' inquiry under substantive due process and equal protection is essentially the same, with the minor exception that instead of determining the rationality of the state's impingement upon a protected right (substantive due process), the court must determine the rationality of making a distinction or classification between two groups of people for differential treatment (equal protection)." *Halgren*, S. Dist. LEXIS 241777, *64 n.59.

Here, the government claims that slowing community transmission of Omicron justifies the vaccine passports. Cook County's sole "whereas" clause of substance states "the United States and the State of Illinois are in the early stages of a large surge of COVID-19 cases due to the Omicron variant." Compl. Ex. A. In a press release announcing the new order, Dr. Rachel Rubin, Cook County Senior Medical Officer, said, "Omicron is here in suburban Cook County, and it spreads incredibly quickly and easily, so CCDPH must take measures to contain the spread. We are concerned about how easily the Omicron variant can spread among people, especially in crowded indoor settings. It is very important that we implement these measures to help lower the risk of transmission."[5] Similarly, in a FAQ accompanying the Order, the City answers the question why this is necessary: "This new requirement is in response to an alarming rise in COVID-19 cases both locally and nationally, driven in part by the Omicron variant . . ."[6] In the next FAQ, the Department explains the requirement "will remain in effect until the City of Chicago is through this Omicron-driven surge . . ."

[5] https://cookcountypublichealth.org/2021/12/23/cook-county-department-of-public-health-issues-new-mitigation-orders-amid-latest-covid-19-surge/. Again, judicial notice of government websites is appropriate.

[6] https://www.chicago.gov/content/dam/city/sites/covid-19-vaccine/Documents/vaccine_requirement/Chicago_Vaccine_Requirement_FAQ.pdf.

But as shown below, the vaccine passports violate equal protection for three reasons. First, they have no rational relationship to the Defendants' asserted goal of stopping transmission of Omicron. Second, they are an irrational means to slow hospitalizations to the extent the Defendants rely on that justification (which appears nowhere in Defendants' public statements about the orders). Third, the irrational connection between the means and asserted ends of vaccine passports expose that they amount to irrational prejudice towards the unvaccinated, which is not a legitimate state interest.

1. Vaccine passports are not rationally related to slowing Omicron transmission.

The CDC's statements belie the Defendants' claim that vaccine passports will stop unvaccinated individuals from spreading COVID-19. As early as August 2021, CDC Director Rochelle Walensky acknowledged "what [the vaccines] can't do anymore is prevent transmission." Tim Hains, *CDC Director: Vaccines No Longer Prevent You From Spreading COVID*, RealClearPolitics (Aug. 6, 2021).[7] Indeed, the CDC now says that "anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms." *Omicron Variant: What You Need to Know*, CDC (Dec. 20, 2021).[8] Pfizer's CEO recently stated that the Pfizer vaccine (without a booster) is "not enough for omicron." Spencer Kimball, *Pfizer CEO says two COVID vaccine doses aren't 'enough for omicron'*, CNBC (Jan. 10, 2022).[9]

These conclusions are confirmed by Exhibit A to this motion, an expert witness report from Dr. Andrew Bostom of Brown University. Analyzing data from the city, county, and state health departments, Dr. Bostom finds "Covid-19 case numbers in Chicago, suburban Cook County, and

[7] https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html#!.
[8] https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html.
[9] https://www.cnbc.com/2022/01/10/pfizer-ceo-says-two-covid-vaccine-doses-arent-enough-for-omicron.html.

Illinois were at all-time highs during the Omicron surge, despite high vaccination rates." Ex. A, p. 4–5. He concludes, "Covid-19 vaccination cannot and has not stopped transmisssion of SARS-CoV-2, nor has it prevented the Omicron variant of SARS-CoV-2 from becoming dominant and prevalant in Illinois, Cook County, & Chicago." Ex. A, p. 15.

These new developments concerning Omicron distinguish this case from *Halgren* where the Court upheld a vaccine mandate for healthcare workers because vaccines "*might reduce the rate* of transmission." *Halgren*, S. Dist. LEXIS 241777, *79 (emphasis in original). When *Halgren* was decided, it was focused on the Delta variant because Omicron had not yet taken hold in the United States. *Id.* at *4 ("The CDC's estimates also suggest that the Delta variant now accounts for more than 90 percent of all sequenced coronavirus infections in the United States."). But now Omicron is the dominant variant, accounting for 98% of cases in January nationwide,[10] and 100 percent of cases in Chicago. Ex. A, p. 2. Therefore, *Halgren's* conclusion that it was rational for the government to speculate that vaccines might reduce transmission does not apply in this case concerning Omicron.

This case is also different from *Kozlov v. Chicago,* 1:21-cv-06904 (N.D.Ill.), Dkt. 24 & 34. Though Mr. Kozlov attacks the City's order, this case presents a variety of arguments he did not raise and new evidence in support of them. Not only is this Court not bound by the holding of another district court judge, but more basically, "[j]udicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed." *Legal Serv. Corp. v. Valazquez*, 531 U.S. 533, 537 (2001) (Scalia, J., dissenting); *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993).

[10] https://covid.cdc.gov/covid-data-tracker/#variant-proportions.

Likewise, *Klassen v. Trustees of Indiana University* upholding COVID-19 vaccination requirements for public university students is distinguishable for at least three reasons. 7 F.4th 592, 594 (7th Cir. 2021). First, it did not focus on Omicron given that it was decided before Omicron emerged and the subsequent discovery that vaccines do not stop Omicron. *Id.* at 593-94. Second, it also reasoned that when the government runs a school, it may impose "conditions on enrollment" that helps the school to operate. *Id.* But the government's unique powers when operating a public school in its proprietary capacity are different then when it regulates society at large in its governmental capacity. Lastly, *Klassen* reasoned that "[p]eople who do not want to be vaccinated may go elsewhere" and that they "have ample educational opportunities" at universities that do not require vaccination. *Id.* But here, the government usurped private choice on vaccines because those who have not taken the vaccine cannot simply go to a different restaurant or gym. The Defendants effectively exiled them from the City of Chicago and Cook County.

There is no relationship between vaccine passports and the governments' goal of stopping transmission of Omicron. In other words, they arbitrarily discriminate against individuals who have made different health choices than Mayor Lightfoot.

2. Vaccine passports are not rationally related to reducing the demand for hospital care.

To the extent that the government asserts an unpublicized goal that vaccine passports will increase vaccinations, which will thereby reduce crowded hospitals, that too would be irrational. The prevalent wave of Omicron actually reduces the likelihood of hospitalization compared to Delta or prior versions. Reviewing a number of different studies from across the globe, Dr. Bostom concludes, "While cases may rise sharply as a wave of Omicron sweeps through a region, hospitalizations and deaths do not follow." Ex. A, p. 8. Indeed, he says, "Multiple studies indicate

that the risk of hospitalization and death from Omicron infection is dramatically reduced from previous variants." Ex. A, p. 15.

Specific to Illinois, Cook County, and Chicago, this trend has held true: hospital capacity is actually better today under Omicron than previously under Delta or other variants. Dr. Bostom's analysis of the data shows that "Chicago hospitals did not see increases in total bed use during the Omicron peak. In fact, the number of available beds appears to be slightly higher than they were before the city increased surge capacity in the midst of the spring 2020 shutdown." Ex. A, p. 12. In fact, the State recently acknowledged that COVID-19 hospitalizations in Illinois declined by almost 10% in just the last few weeks. Jake Griffin, *Pritzker 'cautiously optimistic' about nearly 10% drop in COVID-19 hospitalizations*, Daily Herald (Jan. 19, 2022).[11] Chicago is not an exception to the national or global trend: Omicron is less likely to lead to severe symptoms requiring hospitalization. Concern about hospital bed availability under Omicron flies in the face of all available data.

3. Conversely, vaccine passports are related to harming a politically unpopular group, the unvaccinated.

The lack of a relationship between vaccine passports and the government's stated goals exposes that the vaccine passport is irrational at best and really just pretext for harming a politically unpopular group at worst. Chicago Mayor Lori Lightfoot boasted that Chicago's vaccine passport order would "pose an inconvenience to the unvaccinated, and in fact, it is inconvenient by design." Rachel Treisman, *Chicago and Boston will require proof of vaccination in indoor settings*, NPR (Dec. 22, 2021).[12] Mayor Lightfoot's comments simply reflect a broader societal prejudice against

[11] https://www.dailyherald.com/news/20220119/pritzker-cautiously-optimistic-about-nearly-10-drop-in-covid-19-hospitalizations.
[12] https://www.npr.org/2021/12/22/1066879001/chicago-and-boston-will-require-proof-of-vaccination-in-indoor-settings.

the unvaccinated that is found on both sides of the political aisle. For example, Alabama's governor said in July 2021 that "It's the unvaccinated folks that are letting us down." Erik Ortiz, *As Covid cases surge, unvaccinated Americans trigger scorn, resentment from many vaccinated people*, NBC News (July 28, 2021).[13] This is not much different than President Biden's remarks to the unvaccinated that "our patience is wearing thin" and that "your refusal has cost all of us." Zeke Miller, *Analysis: Biden Takes Fight to Unvaccinated in Virus Battle*, U.S. News & World Report (Sept. 10, 2021).[14] But a bare desire to harm a politically unpopular group like "the unvaccinated" is not a legitimate state interest and cannot be used to pass rational basis scrutiny. *City of Cleburne*, 473 U.S. at 446-47.

Indeed, the vaccine passports targeting the unvaccinated is similar to the targeting of hippie communities in *Moreno*. There, impoverished individuals challenged a food stamp requirement that they not have anyone living in their household that was unrelated to them. *Moreno*, 413 U.S. at 530–31. The law's stated purposes were stimulating agriculture and ensuring that the poor had adequate nutrition. *Id.* at 535. The government also asserted a post hoc basis for the law when it argued that "Congress might rationally have thought" that mixed households used food stamps for fraudulent reasons. *Id.*

Applying rational basis scrutiny, the Court analyzed the law's classification of "households of related persons versus households containing one or more unrelated persons" and held that it had nothing to do with stimulating agriculture or nutrition. *Id.* at 534. The Court then reasoned that the legislative history suggested that the classification was meant to "prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* at 535. The Court held that

[13] https://www.nbcnews.com/news/us-news/covid-cases-surge-unvaccinated-trigger-scorn-resentment-vaccinated-n1275210.

[14] https://www.usnews.com/news/health-news/articles/2021-09-10/analysis-bidens-war-on-virus-becomes-war-on-unvaccinated.

a desire to "harm a politically unpopular group" is not a legitimate governmental interest. *Id.* at 534. Rather than blindly deferring to the government's post hoc arguments for the law, the Court concluded that the law was not rationally related to preventing fraud because it excluded "*all*" households containing unrelated members, rather than taking a targeted approach. *Id.* at 535–36.

Even rational basis review, then, requires a skepticism of government's motives when it acts against the clear weight of the scientific evidence. As shown above, vaccine passports do not slow community transmission of COVID-19. But vaccine passports do make life more "inconvenient" for the unvaccinated, as Chicago's mayor boasted. *Moreno's* reasoning that it is not a legitimate government interest to harm a "politically unpopular group" like the hippies of the 1970s applies the same to harming the unvaccinated, who are a politically unpopular minority today. This Court should follow *Moreno's* lead and not blindly defer to the government's stated purposes for the passports and any post hoc rationalization.

B. Cook County's order violates Plaintiffs' free exercise right.

1. The First Amendment's strict scrutiny test applies to the Cook County Order.

Under the First Amendment to the U.S. Constitution, as incorporated against the states and their localities by the Fourteenth, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis original). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id*. *Accord Fulton v. City of Phila*., 141 S. Ct. 1868, 1876 (2021) (stating that a law cannot "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.").

Cook County's order is not generally applicable. It includes exemptions for athletic teams, musical or other artistic performers, and their entourages. Compl. Ex. A.[15] A business interest in permitting entertainment venues to complete their contracts or sports teams to finish their seasons as scheduled is no more important than the religious beliefs of people of faith. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting) ("there is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel."). The asserted governmental interest is the same: combatting the spread of COVID-19. Plaintiffs are no more likely to spread COVID with a religious exemption than Aaron Rodgers drinking Gatorade might do so at Soldier's Field. Because Cook County's order is not generally applicable, but has comparable secular exemptions, it is subject to strict scrutiny. *Tandon*, 141 S. Ct. at 1296.[16]

2. Cook County's Order burdens Plaintiffs' faith.

Under the First Amendment, Plaintiffs must establish that the Order "burdens" religious exercise. *Fulton*, 141 S. Ct. at 1877. Several Plaintiffs, as part of their deeply-held religious faith, oppose abortion and the use of aborted fetal tissue in research, development, or production of vaccines and thus have sincere religious objections to the current vaccines. Forcing them to obtain the COVID-19 vaccine would substantially burden their religious exercise because it would require them to obtain the vaccine in violation of their sincere religious beliefs.

[15] The Court can reach this conclusion without having to enter into the contested legal space around whether religious and medical exemptions are comparable. *Compare Dr. A. v. Hochul*, 211 L.Ed.2d 414, 418 (U.S. 2021) (Gorusch, J., dissenting) ("allowing [a person] to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones.") *with Doe v. Mills*, No. 21-1826, 2021 U.S. App. LEXIS 31375, at *17 (1st Cir. Oct. 19, 2021) (upholding a policy that provides a medical exemption but not a religious objector exemption).

[16] Plaintiffs also bring a claim under the Illinois Religious Freedom Restoration Act, 775 ILCS 35/15. The Act guarantees strict scrutiny to any state or local government regulation that substantially burdens free exercise. Plaintiffs believe Cook County's order violates both IRFRA and the First Amendment, as the tests are almost identical, but they only press their federal constitutional claim on the preliminary injunction for the convenience of the Court and parties.

Plaintiffs are put to a choice: sacrifice their religious beliefs, or forgo the opportunity to participate in normal life.[17] *Dahl v. Bd. of Trs. of W. Mich. Univ.*, No. 21-2945, 2021 U.S. App. LEXIS 30153, at *7 (6th Cir. Oct. 7, 2021). This is plainly a burden: "denying a person 'an equal share of the rights, benefits, and privileges enjoyed by other citizens' because of her faith discourages religious activity." *Id.* at *5 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)).

3. Cook County's Order cannot survive strict scrutiny.

Because the order is not generally applicable and burdens Plaintiffs' religious exercise, it cannot survive strict scrutiny, "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), survived "only in rare cases." *Church of the Lukumi Babaly Aye v. Hialeah*, 508 U.S. 520, 546 (1993). It is now the government's burden to show that its mandate is justified by a compelling interest and that the mandate is the least restrictive means of furthering that compelling interest. *Holt v. Hobbs*, 574 U.S. 352, 353 (2015).

For an interest to be compelling, it must rise to the same high level the law requires for race-based classifications to be legal, *see Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and must guard against "only the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

The compelling interest test is satisfied through application of the challenged law "to the person—the particular claimant." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) Here, the County cannot generally allege health and safety concerns,

[17] In the words of Mayor Lightfoot, "If you wish to live life as normally as possible, with the ease to do the things that you love, you must be vaccinated in the city of Chicago starting Jan. 3. This health order may pose an inconvenience to the unvaccinated, and in fact, it's inconvenient by design." Amanda Vinicky, *Chicago to Require Proof of Vaccination in Bars, Restaurants and Gyms*, WTTW/PBS (Dec. 21, 2021), https://news.wttw.com/2021/12/21/chicago-requiring-proof-vaccination-bars-restaurants-and-gyms.

but must show a nexus between whatever health and safety concerns it asserts as compelling and the requirements imposed on these Plaintiffs. *Id*. at 432.

Cook County cannot assert a compelling interest in stopping religious objectors from receiving an exemption, for three separate reasons. First, Plaintiffs do not concede that government has a compelling interest in preventing the spread of Omicron through pressure to vaccinate. As explained at length above, Omicron is spreading regardless of vaccination. *Supra* p. 7. And it is not resulting in hospitalizations at nearly the same rate as prior variants. *Supra* p. 9. The county obviously has an interest in public health, and even in fighting COVID-19, but it does not have a compelling interest in this passport policy.

Second, religious objectors make up a sliver of the overall Illinois population. First, over 75 percent of Illinois adults are fully vaccinated.[18] Many persons in the remaining minority who are unvaccinated have reasons unrelated to religion.[19] Cook County must show a compelling interest in getting that final five percent vaccinated. That it cannot do; even if fighting COVID-19 is a compelling interest as to the population overall, even Dr. Fauci pegs the number for herd immunity at 75–85 percent of the population being vaccinated.[20] In other words, the government's goal of herd immunity can be achieved without forcing the final five percent to compromise their religious beliefs.

Third, Cook County has undermined its supposedly compelling interests with its other exemptions. "A law cannot be regarded as protecting an interest of the highest order when it leaves

[18] Illinois Department of Public Health dashboard, https://dph.illinois.gov/covid19/vaccine/vaccine-data.html?county=Illinois (data as of January 26, 2022).
[19] "Vaccination Coverage Among Children in Kindergarten — United States, 2012–13 School Year," Morbidity & Mortality Weekly Report (Aug. 2, 2013), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6230a3.htm.
[20] Donald G. McNeil, Jr., *Covid-19: How much herd immunity is enough?*, N.Y. Times (Sept. 22, 2021), https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html.

appreciable damage to that supposedly vital interest unprohibited.'" *Church of Lukumi Babalu Aye*, 508 U. S. at 547 (cleaned up). An exception such as the sports stars and musical artists exemption "seriously undermines" the supposed interest of the County. *Pickett v. Brown*, 462 U.S. 1, 18 (1983). A particularly good guide here is *O Centro*, where the Court found that where exceptions were permitted in the law for similarly situated persons to Plaintiffs, the compelling interest asserted by the government is not satisfied. 546 U.S. at 433. In *O Centro*, certain Native American Tribes were granted an exception from the application of a drug law for religious use, but the plaintiff was not granted the same exception. The Court said the government could not claim an interest in preventing the plaintiff from using the drug in its religious ceremonies based on public health and safety considerations. *Id*. at 434. Similarly, here, where Cook County provides numerous exceptions to its vaccine requirement—for health reasons, for professional and college athletes, for nonresident performing artists, and for voters—Cook County's purported interest is not satisfied.

Nor can the government satisfy the second prong of the compelling interest test—that the mandate is the least restrictive means of furthering the government's compelling interest. First, "nearly every other State has found that it can satisfy its COVID-19 public health goals without coercing religious objectors to accept a vaccine." *Dr. A. v. Hochul*, 211 L.Ed.2d 414, 418 (U.S. 2021) (Gorsuch, J., dissenting). Most obviously, the fact that the City has included a religious exemption in its order shows this is not the least restrictive means of achieving these goals. Second, because it already provides exceptions to the mandate, the government has demonstrated its own belief that alternate measures can provide sufficient safeguards in special cases, or that it is simply willing to accept the risk for persons it prioritizes. The Constitution commands that Cook County extend equal priority to people of faith.

C. Both the Chicago and Cook County Orders violate the Illinois Constitution's right to privacy guarantee.

"[T]he Illinois Constitution goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and that the protection of that privacy is stated broadly and without restrictions." *Kunkel v. Walton*, 689 N.E.2d 1047, 1055 (Ill. 1997). That protection is found in the Illinois Bill of Rights: "The people have the right to be secure in their persons . . . against unreasonable searches, seizures, [or] invasions of privacy." Ill. Const. art. I, § 6. The secrecy component of privacy includes "the right to keep certain information confidential." *West Bend Mutual Ins. Co. v. Krishna Schaumburg Tan, Inc.,* 2021 IL 125978, ¶ 45.

"The confidentiality of personal medical information is, without question, at the core of what society regards as a fundamental component of individual privacy." *Kunkel,* 689 N.E.2d at 1055. The Privacy Clause protects against infringements on "the zone of personal privacy" including infringements that "reveal private medical information," *People v. Caballes,* 851 N.E.2d 26, 54 (Ill. 2006), as basic as "the fact of her pregnancy." *Hope Clinic for Women, Ltd. v. Flores*, 2013 IL 112673, ¶ 67.

The key test is whether the state's invasion of privacy is reasonable. *Id*. "The reasonableness of [the intrusion] is determined by balancing the need for official intrusion against the constitutionally protected interest of the private citizen." *In re Will County Grand Jury,* 604 N.E.2d 929, 935 (Ill. 1992). Therefore, a court must "first determine whether [a party] has a reasonable privacy expectation . . . and, if so, [the Court] must then decide whether [the challenged policy] unreasonably invades that privacy expectation." *People v. Cornelius,* 821 N.E. 2d 288, 298 (Ill. 2004).

1. The Plaintiffs have a reasonable expectation of privacy.

Here the plaintiffs have a reasonable expectation of privacy with respect to their medical records because Illinois law plainly treats medical records as private information. *See, e.g.,* 5 ILCS 140/2(c-5) ("private information" includes "medical records" for purposes of FOIA), 410 ILCS 50.3(d) (Medical Patient Rights Act prohibits unauthorized disclosure of medical records); 735 ILCS 5/8-802 (prohibiting disclosure of patient medical records in a civil proceeding, absent a specific exception such as medical malpractice proceedings, contested wills, custody or child abuse proceedings, or with the patient's express consent).

Indeed, the City Order itself recognizes the importance of medical informational privacy; it requires "[a]ll covered entities shall comply with OSHA standards 1910.501(e) & (g) relating to employee vaccination status and testing at covered locations . . ." Compl. Ex. A § 6. The standards state that employee vaccination and testing records "are considered to be employee medical records and . . . must not be disclosed except as required or authorized by the ETS or other federal law." Though the City's order identifies *employee* testing and vaccination results as medical records subject to protection from disclosure, neither the City nor Cook County have any protection mandated for *customer* testing and vaccination information.

2. The Orders unreasonably invade that privacy expectation.

Whether an invasion of privacy is reasonable "is determined by balancing the need for official intrusion against the constitutionally protected interest of the private citizen." *In re Will Cty. Grand Jury*, 604 N.E.2d at 935. Whether seen as a "reasonableness" test or a "balancing" test, either way this standard is higher and harder for the government to meet than mere rational basis. *See Riker v. Lemmon,* 798 F.3d 546, 558 n.22 (7th Cir. 2015) ("reasonableness" "requires a more searching inquiry into the justifications supporting the regulation" than rational basis); *Valenti v. Lawson*,

889 F.3d 427, 430 (7th Cir. 2018) ("balancing test" "higher" than rational basis scrutiny).[21] The balancing test accords great respect to the citizen, even if privacy is an ephemeral value: "the individual's privacy interest in his physical person must be protected." *Kunkel*, 689 N.E.2d at 1055 (cleaned up).

The Orders unreasonably invade Plaintiffs' privacy expectation. First, as established above, the Orders fail even rational basis scrutiny, as the vaccines simply do not prevent Omicron transmission. *Supra* pp. 7–10. But when held to the more searching standard of reasonableness, the Orders are even more likely to fail. While the City and County may have an interest in preventing the spread of disease, they cannot hope to use that interest as a justification for the Orders when the vaccines that the Orders compel do not prevent the spread of disease. In other words, whether one is vaccinated or not has "no bearing" on their ability to spread Omicron, and, by extension, no relation to the state's interest in preventing the spread. *See Kunkel*, 689 N.E.2d at 1056 ("disclosure of highly personal medical information having no bearing on the issues . . . is a substantial and unjustified invasion of privacy.").

Because Illinois citizens have a reasonable expectation of privacy with respect to their medical records, and the Orders unreasonably invade that privacy, and make no provision for privacy, the Orders violate the Illinois Constitution's privacy clause.

D. The Orders violate the City and County's own municipal codes.

"[A] municipality must follow its own ordinances. If a municipality violates its own valid ordinance, the municipality's action is illegal and courts have jurisdiction to enjoin the illegal action." *Tierney v. Schaumburg*, 182 Ill. App. 3d 1055, 1059, 538 N.E.2d 904, 907 (1989) (citations omitted).

[21] If the test is alternatively phrased as "a valid reason," *Will County Grand Jury*, 604 N.E.2d at 935, this is similarly a higher bar than the rational basis test's "any conceivable reason."

1. The Chicago Order violates Municipal Code § 2-112-150.

Chicago has adopted a specific city ordinance limiting the ability of the Commissioner of Public Health to compel immunizations, and that ordinance blocks the Chicago Order. *See* Chicago, Ill., Code § 2-112-150. The ordinance reads in full:

> The Commissioner shall not pass any rule which will compel any person to submit to immunization or to any medication against his will or without his consent, or in the case of a minor or other person under disability, without the consent of his parent, guardian, or conservator, except when there shall be an epidemic of a disease, or an epidemic is or appears to be imminent, and such a rule is necessary to arrest the epidemic and safeguard the health of the City.

Id. The default rule is that compelled immunizations are prohibited. The only exception occurs during an epidemic, and it requires that the rule be "necessary to arrest the epidemic and safeguard the health of the City." *Id*. The Chicago Order is not "necessary" to arrest the epidemic and safeguard the health of the City because, as stated above, COVID-19 immunization does not stop the spread of the disease.

Necessary is a word that "must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." Necessary, Black's Law Dictionary (6th ed. 1990). Here, necessary means "really actually necessary," not merely convenient or helpful; no other reading fits the liberty-limiting principle embodied in the quarantine statute. *Accord Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, Nos. 21A244, 21A247, 2022 U.S. LEXIS 496 (Jan. 13, 2022) (stating that to enact an emergency temporary standard, OSHA must show actual necessity not convenience).

Therefore, the Commissioner must make a showing that the Chicago Order is absolutely needed to arrest the epidemic. Quite the contrary, recent science shows that the Order will not arrest the epidemic at all. *Supra,* p. 7. Moreover, the Chicago Health Commissioner failed to

engage in any narrow tailoring, did not document any narrower alternatives and why she rejected them as inadequate, and did not provide evidence that the *issued* order would address the problem. *See* Compl. Ex. B "Whereas" clauses. Therefore, the Chicago Order is an even more egregious violation of the "necessary" requirement than the one enjoined by the Supreme Court.

The City vaccine passport is nothing but a vaccine mandate by another name, just as the OSHA requirement was a vaccine mandate even though it had an exception for those who wanted to test weekly, and it conditioned employment on vaccination. *See Nat'l Fed'n of Indep. Bus.*, 2022 U.S. LEXIS 496 at *1. The City Order conditions participation in public life on vaccination; therefore, it, too, compels immunization. Because it compels immunization and because the Commissioner has not met the required showing that the Order is "necessary," the Order violates the city ordinance and should be enjoined.

2. The Cook County Order violates its regulations governing quarantine and isolation measures and Cook Co. Ordinance § 38-33.

Cook County has specific ordinances for quarantine and isolation and closure of businesses for public health reasons. Cook County Regulations Governing Quarantine and Isolation Measures (the "Regulations") and Cook County Ordinance § 38-33. Those ordinances have in place specific safeguards for liberty and due process protections. This order is essentially an order of quarantine and isolation in reverse: rather than saying "You must stay in your home," it says "You may not come out in public," which is the same thing phrased differently. Rather than saying to business owners, "Your restaurant is closed," it says, "Your restaurant is closed to some people." Cook County should not be allowed to use this verbal sleight-of-hand to evade the safeguards provided in the ordinance. Because the Cook County order is an order of quarantine/isolation/closure, the County must make the findings and go through the due process necessary for each unvaccinated

individual being forcibly isolated. Because the County has not done so, it violates its own ordinances.

First, the Regulations require that "each person who is the subject of a [quarantine] Order consent to the measures described in the order." Regulations V. C. at 5. Plaintiffs do not consent.[22] When individuals do not consent, the Department "shall file a petition in the Circuit Court of Cook County seeking a court determination of the matter." *Id*. The Department has failed to go through this mandatory due process; therefore, the Order violates the Regulations.

Similarly, the Order violates Cook County Ordinance § 38-33 for the same reason. The ordinance requires the Department to receive consent of those affected by a public health order or, alternatively, to seek a court determination: "[T]he Department shall, as soon as practicable thereafter, obtain the consent of the person or owner or file a petition requesting a court order authorizing the continuation of the order of the Department." Cook Co., Ill., Code § 38-33(a). The Department has done no such thing and has, therefore, violated its own ordinance.

Second, the Cook County Order constitutes a "closure" of all businesses under its jurisdiction because it "render[s] off limits of premises to persons other than those persons authorized by the Department." Regulations II. at 1 (definition of "Closure"). It constitutes a "closure" because it renders businesses off limits to all but the vaccinated. When the Department issues such an Order of closure, it must "set forth the facts supporting the need for the closure order." Regulations V. E. at 7. In this case, the Department has made no findings of fact regarding closing businesses to the unvaccinated. Therefore, it has violated the Regulations.

Third, under the Regulations, a person may be "isolated during the infectious period" only if the "individual is considered to be potentially infectious." Regulations VIII. D. at 9. An isolation

[22] Wager Decl., ¶¶ 9-10; Knorr Decl. ¶¶ 12-13; Doe Decl. ¶¶ 20-21; Ravago Decl. ¶¶ 10-11; Connolly Decl. ¶¶ 10-11; Peterson Decl. ¶¶ 14-15; Kawalkowski Decl. ¶¶ 14-15; Hauser Decl. ¶¶ 8-9.

order "shall . . . set forth the clinical and/or circumstantial facts supporting the need for the isolation order [and] any required monitoring, observation or medical examinations . . . ." Regulations VI. A. at 6; *see also* Regulations VI. B. at 6 (same requirement for quarantine order). In the Cook County Order, there is no finding that unvaccinated people are, per se, potentially infectious, and in fact it is known that the overwhelming majority are not. Therefore, they cannot be isolated during an infectious period if no infectious period exists.

Fourth, the Regulations require that an Order of quarantine, isolation, or closure "shall be based upon the determination of the [Department] that a less restrictive and equally efficacious measure is not reasonably available." Regulations V. A. at 4–5; *see also* Regulations V. F. at 6. The Order violates the Regulations because the Department made no such determination. It failed to consider whether, for example, requiring masks, requiring the showing of a negative COVID test, or requiring the showing of anti-bodies—all of which are less restrictive—were equally efficacious to the prohibition it adopted. Without such consideration and for all four of the reasons listed herein, the Order is in violation of the Regulations and Cook County Ordinance § 38-33 and should be enjoined.

In reading these requirements, this Court should not lose sight of the narrow construction that courts give quarantine laws because of their impact on individual liberty. *See, e.g., People ex rel. Baker v. Strautz*, 54 N.E.2d 441, 444 (Ill. 1944); *People ex rel. Barmore v. Robertson*, 134 N.E. 815, 819 (Ill. 1922); *People v. Tait*, 103 N.E. 750, 753-54 (Ill. 1913); *In re Smith*, 40 N.E. 497, 499 (N.Y. 1895). Particularized findings, hearings, and other due-process protections safeguard basic constitutional values.

E. The Orders constitute a procedural due process violation of the Fourteenth Amendment.

For the reasons stated above in Section D, the Orders violate the procedural Due Process clause of the Fourteenth Amendment. Both the Chicago and the Cook County Orders deprive individuals of their liberty by restricting them from public life. The Cook County Regulations explicitly recognize that an infectious disease quarantine and isolation order "results in a deprivation of the liberty of one or more individuals." Regulations I. at 1. Such a deprivation can only take place after the affected individuals have had a chance to object to the application of the order to themselves. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (cleaned up). In this instance, none of the Plaintiffs were given notice or a hearing prior to the Order restricting their liberty. Instead, the head of each department issued the Orders with no notice, no hearing, no ratification by any legislative body, and no judicial determination. Because of this failure, the Orders violate the minimum procedure required under the Fourteenth Amendment Due Process clause.

II. Plaintiffs are likely to suffer irreparable harm.

Vaccine passports will inflict irreparable harm on Plaintiffs because "the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'" *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, *24 (5th Cir. Nov. 12, 2021). More specifically, violations of Plaintiffs' constitutional right to equal protection, *Iglesias v. Fed. Bureau of Prisons*, No. 19-CV-415-NJR, 2021 U.S. Dist. LEXIS 245517, at *78 (S.D. Ill. Dec. 27, 2021), and religious liberty, *Cassell v. Snyders*, 990 F.3d 539, 545 (7th Cir. 2021), are presumed to be irreparable harms.

The vaccine passport orders' irreparable harm is especially acute here because it prevents residents from engaging in the day-to-day activities of life, such as meeting friends for dinner at a restaurant, going to the gym, or seeing a music concert in-person. No amount of money damages could compensate a resident for being deprived, even temporarily, of the joys of sharing a meal with a friend, hitting a new personal record at the gym, or seeing one's favorite band in-person, or the burden on conscience between regular participation in public life and one's faith.

III. The balance of equities tips in Plaintiffs' favor.

When a constitutional right hangs in the balance, "'even a temporary loss' [of that right] usually trumps any harm to the defendant." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (citation omitted). This is especially so when the harm claimed is not being able to enforce an unconstitutional law. *Planned Parenthood of Ind. & Ky., Inc. v. Adams*, 937 F.3d 973, 991 (7th Cir. 2019); *see also Free the Nipple-Fort Collins*, 916 F.3d at 806 ("[T]he City has no interest in keeping an unconstitutional law on the books."). Indeed, in *BST Holdings*, the Fifth Circuit stayed the OSHA vaccine mandate relying on similar equitable principles that govern preliminary injunctions and held that any interest the government had in enforcing an "unlawful" vaccine mandate was "illegitimate." No. 21-60845, 2021 U.S. App. LEXIS 33698, at *8, 25 (5th Cir. Nov. 12, 2021).

Additionally, the interests of those living in Chicago and Cook County to not be outcasts of society far outweigh any hypothetical interest the government might have in enforcing vaccine passports. Just as the district court observed when enjoining the federal contractor vaccine mandate, an injunction still allows the government to "encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated." *Georgia v. Biden*, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, *36 (S.D. Ga. Dec. 7, 2021). So too here. If the Court

enters a preliminary injunction, the Defendants would still be free to encourage vaccination and residents are still free to get vaccinated if they so choose.

IV. A preliminary injunction is in the interest of all the residents of the City of Chicago and Cook County.

"[P]reliminarily enjoining the enforcement of a statute that is probably unconstitutional" serves the public interest. *Higher Soc'y of Ind. v. Tippecanoe Cty.*, 858 F.3d 1113, 1116 (7th Cir. 2017). This is because "[e]nforcing a constitutional right is in the public interest." *Whole Woman's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019). This reasoning applies here too to Plaintiffs' constitutional rights.

CONCLUSION

For the foregoing reasons, a preliminary injunction should issue promptly.[23]

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Respectfully Submitted,

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[23] Plaintiffs are not unaware that some news reports have suggested that the City's Order will soon be lifted, perhaps at the same time as the Governor's statewide mask mandate (February 28). However, City officials have subsequently indicated February 28 is not a hard deadline. Jessica D'Onoforio, *Chicago business owners frustrated; city's restrictions may not lift with Illinois mask mandate end*, WLS (Feb. 16, 2022), https://abc7chicago.com/mask-mandate-illinois-chicago-lifting-vaccine/11569729/ ("Mayor Lori Lightfoot won't commit to eliminating the mask and vaccine mandate in indoor spaces by the end of the month, in line with the state's plan."). Instead, Dr. Arwady has said that the decision will be made based on various metrics specific to the City. *Id*. Moreover, by tying the order to metrics, the City raises the possibility that the order will be reinstated if the metrics are transgressed in the future.