

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

FRATERNAL ORDER OF)	
POLICE, METROPOLITAN)	
POLICE DEPARTMENT)	
LABOR COMMITTEE, D.C.)	
POLICE UNION, et al.)	
)	
Plaintiffs,)	Case Number: 2022 CA 000584 B
)	
vs.)	
)	Judge Maurice A. Ross
DISTRICT OF COLUMBIA, et al.)	
)	
Defendants.)	
)	

ORDER AND OPINION

Before this Court is Plaintiffs, Fraternal Order of Police, Metropolitan Police Department Labor Committee D.C. Police Union, Officer Larry Reed, Sergeant Todd Korson, Sergeant Jeremy Kniseley, and Officer David Wallace’s (collectively, the “Plaintiffs”) *Motion for Summary Judgment* filed on April 1, 2022, Defendants the District of Columbia and Mayor Muriel E. Bowser’s *Opposition to Plaintiffs’ Motion for Summary Judgment and Cross-Motion to Dismiss Plaintiffs’ Complaint* filed on May 5, 2022, *Plaintiffs’ Reply to Defendants’ Opposition to Motion for Summary Judgment and Plaintiffs’ Opposition to Defendants’ Cross-Motion to Dismiss* filed on May 19, 2022, and *Defendants’ Reply in Support of Motion to Dismiss Plaintiffs’ Complaint* filed on June 9, 2022. Accordingly, the Motions are ripe for resolution.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On January 31, 2020, the United States Department of Health and Human Services declared a public health emergency existed in the United States since January 27, 2020, due to confirmed cases of the 2019 Novel Coronavirus (“COVID-19”). Defs. Opp’n. at 4. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. *Id.* That same day, Mayor Muriel Bowser declared a public emergency in the District of Columbia due to the COVID-19 pandemic. *Id.* On May 27, 2020, D.C. Council amended D.C. Code § 7-2304 granting the Mayor additional powers regarding executive branch subordinate agencies in response to the COVID-19 pandemic. Pls. Mot. Sum. J. at 7.

In 2021, two vaccines for COVID-19, the Pfizer-BioNtech vaccine and the Moderna vaccine received authorization from the Food and Drug Administration, and a third vaccine, the Janssen vaccine was made available under emergency use authorization. Defs. Opp’n. at 5. The Centers for Control and Disease Prevention recommended booster shots for vaccinated individuals after a certain period of time had elapsed for continued protection against COVID-19. *Id.* at 6.

On August 10, 2021, Mayor Muriel Bowser issued Mayor’s Order (“MO”) 2021-099 requiring District employees to provide proof of vaccination by September 19, 2021. Pls. Mot. Sum. J. at 3; Defs. Opp’n. at 7. The order provided exemptions to the vaccination rule on religious and medical grounds or if the employee agreed to be tested weekly for COVID-19. Defs. Opp’n. at 7. Thereafter, the D.C. Police Union (“FOP”) engaged in bargaining with the D.C. Office of Labor Relations and Collective Bargaining and the D.C. Metropolitan Police Department (“MPD”) concerning the implementation of MO 2021-099. Pls. Mot. Sum. J. at 3-4. On September 17, 2021, MPD issued Executive Order 21-022, which allowed unvaccinated

MPD members to undergo weekly COVID-19 testing in lieu of receiving COVID-19 vaccinations. Pls. Mot. Sum. J. at 4; Defs. Opp'n. at 7. On November 23, 2021, MPD issued Executive Order 21-026, which replaced Executive order 21-022, but retained the bargained-for right of unvaccinated MPD members to undergo weekly COVID-19 testing. Pls. Mot. Sum. J. at 4.

On December 20, 2021, the Mayor issued MO 2021-147 which, among other measures, directed the City Administrator to formulate a plan to remove the test-out option identified in MO 2021-99 and imposed a mandatory vaccine requirement for all District employees. Pls. Mot. Sum. J. at 4-5; Defs. Opp'n. at 7-8. The D.C. Council did not extend MO 2021-147 and the order expired on January 4, 2022. Pls. Mot. Sum. J. at 5. On January 21, 2022, D.C. Department of Human Resources ("DCHR") issued a notice of proposed rulemaking amending 6-B DCMR § 2001 to add an additional subsection. Defs. Opp'n. Ex. A. On January 24, 2022, the DCHR released Issuance I-2022-03, Covid-19 Vaccination and Booster Requirement, requiring all District government employees to receive a complete course of vaccination against COVID-19, including a booster shot when eligible and providing proof of vaccination status no later than February 15, 2022. Pls. Mot. Sum. J. at 5-6; Defs. Opp'n. at 8. Employees who failed to comply with the policy by February 15, 2022, could be subject to discipline. Pls. Mot. Sum. J. at 6.

On January 27, 2022, the Mayor requested that the D.C. Council pass emergency legislation to extend D.C. Code § 7-2304(b)(16). Pls. Mot. Sum. J. at 8. The D.C. Council rejected the Mayor's request to extend D.C. Code § 7-2304(b)(16). *Id.* On January 31, 2022, the Mayor again proposed legislation to the D.C. Council that would extend D.C. Code § 7-2304(b)(16) or in the alternative, legislation that would amend the statute to include a new subsection providing her with the authority to "implement vaccine, testing, and masking

requirements for District employees.” *Id.* The D.C. Council rejected both requests. *Id.* On February 1, 2022, DCHR took final action to adopt the proposed rule amending 6-B DCMR § 2001 and the rule became effective upon its publication in the District of Columbia Register on February 18, 2022. Defs. Opp’n. at 9; Defs. Opp’n. Ex. A. That same day, FOP provided a comment by email regarding the proposed rule. Pls. Reply Ex. 1.

On February 4, 2022, D.C. Code § 7-2304(b)(16) expired. Pls. Mot. Sum. J. at 8. That same day, Plaintiffs filed a Complaint for Declaratory Judgment naming the District of Columbia and the Mayor as Defendants. On February 9, 2022, Plaintiffs filed an Emergency Motion for a Temporary Restraining Order. On February 14, 2022, the District filed an Opposition to Plaintiffs’ Motion for a Temporary Restraining Order. On February 14, 2022, Mayor Bowser issued MO 2022-29 notifying “the public of the end of the public health emergency.” *Id.* at 9.

On February 15, 2022, the Honorable Judge Joan Zeldon, the presiding Judge in Chambers, heard oral arguments on Plaintiffs’ Motion for Temporary Restraining Order. On February 19, 2022, Judge Zeldon issued an Order Denying Plaintiffs’ Motion for a Temporary Restraining Order. T.R.O. at 6. Judge Zeldon found Plaintiffs’ were unlikely to succeed on the merits of their contention that the Mayor lacked the authority to issue the vaccination requirements at issue. *Id.* at 4. Judge Zeldon found the harms alleged by Plaintiffs were potential, speculative, and fell far short of imminent harm. *Id.* at 5. Finally, Judge Zeldon found the vaccine mandate served the public interest. *Id.* at 6.

On February 21, 2022, Plaintiffs filed a Motion for Preliminary Injunction. On March 7, 2022, the District filed an Opposition to Plaintiffs’ Motion for Preliminary Injunction. On March 11, 2022, Plaintiffs filed a Reply to the District Opposition. On March 14, 2022, this Court heard oral arguments on Plaintiffs’ Motion for Preliminary Injunction. On March 17, 2022,

Mayor Bowser issued MO 2022-043 noting the “emergency first declared by Mayor’s Order 2020-045 (dated March 11, 2020) is hereby extended through April 16, 2022.” Defs. Opp’n. at 9. On March 21, 2022, this Court ordered the parties to explain the legal significance, if any, of the Mayor’s March 17, 2022 Order and D.C. Act 24-346. On March 22, 2022, the parties filed supplemental briefs in response to this Court’s order.

On March 29, 2022, this Court issued an Order Denying Plaintiff’s Motion for Preliminary Injunction. Prelim. Inj. Order at 8. This Court found Plaintiffs were likely to prevail on the merits of their claims. *Id.* at 5-7. However, this Court found Plaintiffs’ assertion of irreparable harm was merely speculative. *Id.* at 7. Lastly, this Court determined that the balance of equities and public interest weighed heavily in favor of the imposition of a vaccine mandate. *Id.* at 7-8.

On April 1, 2022, Plaintiffs filed a Motion for Summary Judgment. On April 13, 2022, the City Administrator authorized certain District of Columbia agencies to delay enforcement of the COVID-19 booster requirements for their employees. Defs. Opp’n. at 9. That same day, DCHR issued updated guidance “that agencies may deviate from disciplinary guidelines to enforce the vaccine mandate for operational or legal reasons with the approval of the City Administrator.” *Id.*

On May 5, 2022, the District filed an Opposition to Plaintiffs’ Motion for Summary Judgment and a Cross Motion to Dismiss Plaintiffs’ Complaint. On May 19, 2022, Plaintiffs’ filed a Reply to the District’s Opposition to Motion for Summary Judgment and Plaintiffs’ Opposition to the District’s Cross-Motion to Dismiss Plaintiffs’ Complaint. On June 9, 2022, the District filed a Reply in Support of Motion to Dismiss Plaintiffs Complaint. Accordingly, the Motion is ripe for resolution.

LEGAL STANDARD

To prevail on a motion for summary judgment, the moving party has the burden of demonstrating based on the pleadings, discovery, and any affidavits submitted, that there is no genuine issue as to any material fact. Super. Ct. Civ. R. 56(c); *Wash. Inv. Ptnrs. Of Del., LTC v. Sec. House*, 28 A.3d 566, 573 (D.C. 2011); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “A genuine issue of material fact existed if the record contains ‘some significant probative evidence...so that a reasonable fact-finder would return a verdict for the non-moving party.” *Brown v. 1301 K St. Ltd. P’ship*, 31 A.3d 902, 908 (D.C. 2011).

In ruling on a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. *Rustin v. District of Columbia*, 491 A.2d 496, 500 n.7, *cert denied* (1985). The Court cannot "resolve issues of fact or weigh evidence at the summary judgment stage." *Barrett v. Covington & Burling, LLP*, 979 A.2d 1239, 1244 (D.C. 2009). “A movant is entitled to summary judgment when the evidence is such that a reasonable jury, drawing all reasonable inferences in the non-movant’s favor, could not return a verdict for the non-movant.” *See Walker v. Johnson*, 798 F.3d 1085, 1091 (D.C. Cir. 2015) (*citing Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 255 (1986)).

CONCLUSIONS OF LAW

When a public health emergency exists, governmental entities, including local authorities possess a recognized right to require vaccinations when authorized by the law. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27-28 (1905). The primary question this Court must answer is whether the Mayor possessed the legal authority to impose a vaccine mandate upon Plaintiffs. Even construing all of the facts in the light most favorable to the Mayor, it is clear the Mayor did not.

The Mayor lacked authority to impose a vaccine mandate through emergency executive orders. Pursuant to D.C. Code § 7-2304, the Mayor may issue an emergency executive order for the immediate preservation of the public peace, health, safety, and/or welfare. Emergency executive orders issued by the Mayor shall be effective for a period of no more than 15 calendar days from the day they are signed. D.C. Code § 7-2306(a). An emergency executive order may be extended for up to an additional 15-day period, only upon request by the Mayor for, and the adoption of, an emergency act by the D.C. Council. D.C. Code § 7-2306(b).

On December 20, 2021, the Mayor issued MO 2021-147, stating, “District Government employees, contractors, interns, and grantees shall obtain a booster shot against COVID-19 and shall submit documentation of their booster shot.” Pls. Mot. Sum. J. Ex. 1. As an emergency executive order, the Mayor’s legal authority, if any, to impose a vaccine through D.C. Code § 7-2304, expired on January 4, 2022. *See* D.C. Code § 7-2306(a). The D.C. Council did not pass an emergency act to extend MO 2021-147. *See* D.C. Code § 7-2306(b). Even if the D.C. Council had, the Mayor’s legal authority would have then expired on January 19, 2022.

The subsection the Mayor primarily relied upon to impose the vaccine mandate through emergency executive orders, D.C. Code § 7-2304(b)(16), has also expired. On May 27, 2020, the D.C. Council issued the Coronavirus Support Emergency Amendment Act of 2020. Pls. Mot. Sum. J. at 7. The act added subsection (b)(16) to D.C. Code § 7-2304, which empowered the Mayor with additional authority to address the pandemic. The new subsection stated:

(16) Notwithstanding any provision of Chapter 6 of Title 1, or the rules issued pursuant to Chapter 6 of Title 1, the subchapter 1-A of Chapter 5 of Title 1, or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:

- (A) Redeploying employees within or between agencies;
- (B) Modifying employees’ tours of duty;

- (C) Modifying employee's places of duty;
- (D) Mandating telework;
- (E) Extending shifts and assigning additional shifts;
- (F) Providing appropriate meals to employees required to work overtime or work without meal breaks;
- (G) Assigning additional duties to employees;
- (H) Extending existing terms of employees;
- (I) Hiring new employees into the Career, Education and Management Supervisory Services without competition;
- (J) Eliminating any annuity offsets established by any law; or
- (K) Denying leave or rescinding approval of previously approved leave.

D.C. Code § 7-2304 (b)(16).

In early 2022, D.C. Code § 7-2304 (b)(16) was set to expire. Pls. Mot. Sum. J. at 8. On January 27, 2022, the Mayor requested emergency legislation to extend the legal effect of D.C. Code § 7-2304 (b)(16). *Id.* The D.C. Council did not take any legislative action on the Mayor's proposed extension of D.C. Code § 7-2304 (b)(16). *Id.* On January 31, 2022, the Mayor again proposed legislation to D.C. Council to extend D.C. Code § 7-2304 (b)(16). *Id.* The Mayor also submitted an "alternative request" to D.C. Council that requested the Mayor be given the authority to "implement vaccine, testing, and masking requirements for District employees." Pls. Mot. Sum. J. Ex. 7. The D.C. Council failed to pass any legislation extending D.C. Code § 7-2304 (b)(16) or granting the Mayor's "alternate request". Pls. Mot. Sum. J. at 8. On February 4, 2022, the Coronavirus Support Emergency Amendment Act of 2020 expired. Pls. Mot. Sum. J. at 8. Thus, any attempt to impose a vaccine mandate through D.C. Code § 7-2304(b)(16) was invalid beyond February 4, 2022.

Even if MO 2021-147 and the vaccine mandate therein had not expired, no part of D.C. Code § 7-2304 and subsection (b)(16) specifically authorized a vaccine mandate. The District contends it was authorized to implement a vaccine mandate as § 7-2304(b)(16) "expressly empowered the Mayor to modify employee tours and places of duty and assign additional duties

to employees.” Defs. Opp’n. at 18 (citing D.C. Code § 7-2304(b)(16)(B)-(C), (G)). Moreover, the District asserts nothing in the statute forbids a vaccine mandate. This Court disagrees.

A vaccine mandate is not an everyday exercise of power. *Nat. Fed. Of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin*, 142 S. Ct. 661, 665 (2022) (“*NFIB*”) (citing *MCP No. 165 v. Dep’t of Labor*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting)). It is instead a significant encroachment into the life—and health—of an employee. *NFIB*, 142 S. Ct. at 665. It is strikingly unlike other workplace regulations typically imposed, as it “cannot be undone at the end of the workday.” *NFIB*, 142 S. Ct. at 665 (citing *MCP No. 165*, 20 F. 4th at 274 (Sutton, C. J., dissenting)). Thus, there is an expectation that a vaccine mandate must come from a legislative body. *See Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (the Secretary’s imposition of a vaccine mandate fell within the authority Congress had conferred upon him); *see also Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”); *Jacobson*, 197 U.S. at 25 (“According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”).

Here, there is no indication the D.C. Council had even considered a vaccination mandate for District employees when it created subsection (b)(16) of § 7-2304. The Coronavirus Support Emergency Amendment Act of 2020 was issued on May 27, 2020, months before vaccinations against COVID-19 were authorized and over a year before booster shots were recommended. The D.C. Council has passed numerous statutes relating to vaccines and COVID-19, but no statute explicitly requires COVID-19 vaccinations for District employees. *See Council Vaccination Policy Enforcement Emergency Amendment Act of 2021, Act A24-0204*, 68 DCR

11650 (November 5, 2021) (setting vaccination requirements for all members of the D.C. Council and members of the Council’s staff); *see also* D.C. Code § 7-311 (limiting the liability of healthcare providers for injuries resulting from the administration of COVID-19 treatments); § 7-1651.01 (requiring the Mayor to administer an educational campaign concerning vaccinations against human papillomavirus); § 32-141.02 (requiring employers in the District to adopt social distancing and masking policies to prevent the transmission of COVID-19 in the workplace). Thus, the Mayor’s attempt to impose a vaccine mandate through D.C. Code § 7-2304(b)(16) is rejected.

Failing to impose a vaccine mandate through emergency executive orders, the Mayor now primarily argues she has authority to levy a vaccine mandate through District regulations. Pursuant to D.C. Code § 1-604.04, the Mayor is empowered to issue rules and regulations to implement the provisions of certain enumerated subchapters of the Comprehensive Merit Personnel Act (“CMPA”). Before the adoption of any rule, interested persons shall be afforded a fair opportunity to comment on the proposed rule. D.C. Code § 2-505(a); *see McLouth Steel Prods. Corp. v. EPA*, 838 F.2d 1317, 1325 (D.C. Cir. 1988) (“Adequate notice and opportunity to comment must be provided before the promulgation of a rule, not later.”). The notice and comment period of the proposed rule shall be “not less than 30 days” from the date of the proposed rule’s adoption, except for good cause shown. D.C. Code § 2-505(a); *See e.g. Junghans v. Dep’t of Human Resources*, 289 A.2d 17, 24-25 (D.C. 1972).

On January 21, 2022, on behalf of the Mayor, DCHR issued a notice of proposed rulemaking amending 6-B DCMR § 2001 to add a new subsection. Defs. Opp’n. Ex. A. The proposed subsection was to be adopted “in not less than thirty (30) days from the date of

publication of this notice in the District of Columbia Register.” D.C. Reg. Vol. 69. No. 3 (January 21, 2022). The subsection stated:

§ 2001.2 Consistent with § 2004, and notwithstanding § 2001.1(a), the Director of the D.C. Department of Human Resources may establish vaccination requirements for uniformed positions in the Fire and Emergency Medical Services Department and Metropolitan Police Department.

6-B DCMR § 2001.2.

On February 1, 2022, DCHR took final action to adopt the proposed rule and DCHR asserted the rule would become effective upon its publication in the District of Columbia Register on February 18, 2022. Defs. Opp’n. Ex. A. The District claims “plaintiffs had an opportunity to provide comments if they opposed this change in the regulations.” Defs. Opp’n. at 16 n. 2. The District notes that “no public comments were received.” *Id.* Plaintiffs contend FOP submitted a timely comment that opposed the regulation, DCHR and the Mayor ignored it, and D.C. Code § 2-505(a) was not satisfied. Pls. Reply at 4.

Here, the record shows, DCHR on behalf of the Mayor failed to wait the required 30 days to adopt the rule. FOP provided a comment by email on Friday, February 18, 2022, well within the 30-day period to submit a comment. Pls. Reply Ex. 1. It is not clear if DCHR and the Mayor had received FOP’s comment before the publication of the rule in the District of Columbia Register. However, it is clear that DCHR and the Mayor did not address Plaintiff’s timely filed comment. Thus, the Mayor’s attempt to amend 6-B DCMR § 2001 did not comply with D.C. Code § 2-505(a).

As to the substance of 6-B DCMR § 2001.2, the Mayor asserts she has the authority impose a vaccine mandate through D.C. Code §§ 1-620.02; 1-620.04(a); and 5-101.03(4). D.C. Code §§ 1-620.02, 1-620.04(a), permits the Mayor to issue rules and regulations regarding “Employee safety and health, inclusive of physical welfare at the work site and environmental

control of occupational diseases.” D.C. Code § 5-101.03(4) states: “it shall be the duty of the Mayor of the District of Columbia...to guard the public health.” In other words, the Mayor claims she can impose a vaccine mandate on Plaintiffs through her power to regulate the occupational safety and health of District employees and her duty to protect the general public health.

The Mayor claims she can impose a vaccine mandate through her power to regulate the occupational safety and health of District employees is without merit. Significantly, the Supreme Court has provided relevant guidance on this issue. In *NFIB*, the Supreme Court considered a rule issued by the Occupational Safety and Health Administration (“OSHA”), which required any employer with at least 100 employees to “develop, implement, and enforce a mandatory COVID-19 vaccination policy.” *NFIB*, 142 S. Ct. at 664. The employer was required to “verify the vaccination status of each employee and maintain proof of it.” *Id.* Employers were allowed (but not required) to adopt a policy offering an alternative to vaccination, which would require unvaccinated workers to “undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination.” *Id.* Employees who did not comply with the policy were to be removed from the workplace and/or fined. *Id.*

The Supreme Court stayed enforcement of the rule, holding that the applicants were likely to prevail in their argument that OSHA lacked authority to impose the rule *Id.* at 663. The District argues *NFIB* does not apply as it involved “occupational health and safety standards the federal government was attempting to impose on a private workplace, not its own.” Defs. Reply at 5.

This Court disagrees with the Districts characterization of *NFIB*. The Supreme Court’s ruling did not turn on whether the regulations imposed involved a private business or

government employees. Instead, the Supreme Court emphasized the “crucial distinction” between occupational risks and universal risks. *NFIB*, 142 S. Ct. at 666. Workplace safety and health standards can only address occupation-specific risks and hazards that employees face at work. *Flower World, Inc. v. Sacks*, No. 21-35641, Lexis 22254, *14 (9th Cir. June 10, 2022) (citing *NFIB*, 142 S. Ct. at 665)). “Such dangers must be tethered in a ‘casual sense’ to the workplace, and they differ ‘in both degree and kind’ from everyday risks that all persons face.” *Id.* By contrast, public health measures may address universal risks, like “crime, air pollution, or any number of communicable diseases.” *NFIB*, 142 S. Ct. at 665. Such threats do not have a causal relationship to the workplace but, instead, are “hazards of daily life.” *Id.*

Applying this framework, the Mayor cannot impose a vaccine mandate through D.C. Code §§ 1-620.02 and 1-620.04(a). Although COVID-19 is a risk that can occur in many workplaces, it is not an occupational hazard in most. Moreover, it is not an occupational health hazard for Plaintiffs. The CMPA does not provide the Mayor with the authority to promulgate a general public health law, like a vaccine mandate. Therefore, the Mayor does not possess statutory authority to impose a vaccine mandate through D.C. Code §§ 1-620.02 and 1-620.04(a).

The Mayor’s claim she can impose a vaccine mandate as she possesses a general duty to “guard the public health” and that none of the relevant D.C. Code provisions relating to public health forbid a vaccine mandate is unavailing. *See* D.C. Code § 5-101.03(4) (it shall be the duty of the Mayor to guard the public health); § 1-617.08(a)(6) (the respective personnel authorities shall take whatever actions may be necessary to carry out the mission of the District government in emergency situations); § 7-131 (regulations to prevent the spread of communicable diseases). The power to issue a vaccine mandate must come from a legislative body. *See e.g. Biden*, 142 S. Ct. at 652; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *Jacobson*, 197 U.S. at 25.

Significantly, the Mayor has conceded the power to impose a vaccine mandate belongs exclusively to the D.C. Council. On January 31, 2022, the Mayor asked the D.C. Council to extend D.C. Code § 7-2304(b)(16), or in the alternative pass legislation that would amend the statute to include a new subsection providing her with the authority to “implement vaccine, testing, and masking requirements for District employees.” Pls. Mot. Sum. J. Ex. 7. The Mayor noted that without the D.C. Council’s authorization “the hard-fought progress we’ve made could be lost as the validity of the vaccine mandate could be challenged.” *Id.*

Since the onset of the pandemic, the D.C. Council has enacted several pandemic-related measures. However, when it was asked to defend the “validity of the vaccine mandate”, the D.C. Council rejected the Mayor’s request. Pls. Mot. Sum. J. at 8. The D.C. Council’s clear rejection of the Mayor’s request persuades this Court that the Mayor has not been conferred any authority to impose a vaccine mandate. *Compare Brnovich v. Biden*, 562 F. Supp. 3d 123, 154 (D. Ariz. 2022) (congressional silence, while not dispositive, counsels against reading 40 USCS § 121(a) as impliedly conferring on the President broad authority to mandate compulsory vaccinations). Therefore, the Mayor does not possess legal authority to impose a vaccine mandate through D.C. Code §§ 5-101.03(4); 5-107.04; 1-617.08(a)(6); and 7-131.

The Mayor’s attempt to impose a vaccine mandate through 6-B DCMR § 2001.2 also fails for being in direct violation of D.C. Code § 5-107.3. D.C. Code § 5-107.3 establishes the D.C. Police Officers Standards and Training Board (“POST”) to determine the physical fitness and health standards for MPD officers. The POST shall establish minimum application and appointment criteria for employment as a D.C. police officer that includes establishing “health standards.” D.C. Code § 5-107.04(a)(4). The statute does not preclude MPD from establishing higher or additional health standards. D.C. Code § 5-107.04(k).

Pursuant to D.C. Code § 5-107.04(a)(4), regulations were created that included a reiteration that POST is charged with establishing “health standards” for the MPD. 6-B DCMR § 874.11(d-e). It is for this reason that 6-B DCMR § 2001.1 explicitly exempts MPD officers from regulations concerning health and fitness that are applicable to other District employees as they are already covered by 6-B DCMR § 874.11(d-e):

§ 2001.1 Unless otherwise provided by law, this chapter shall apply to all District government applicants, candidates, employees, and volunteers, except for

(a) Uniformed members and applicants for uniformed positions in the Fire and Emergency Medical Services Department and the Metropolitan Police Department, who shall be covered by Chapter 8.

6-B DCMR § 2001.1(a).

Plaintiffs argue the Mayor’s effort to issue a vaccine mandate through 6-B DCMR § 2001.2, is nothing more than an attempt to abrogate statutory law that provides POST exclusive authority to create health standards for MPD officers. *See* 6-B DCMR § 2001.2 (“*notwithstanding* § 2001.1(a), the Director of the D.C. Department of Human Resources may establish vaccination requirements”) (emphasis added). In contrast, the District claims nothing in D.C. Code § 5-107.04(a)(4) gives the POST exclusive authority to set health standards for MPD officers and the “statute does not explicitly preclude other agencies from establishing additional requirements for officers.” Def. Reply at 6.

D.C. Code § 5-107.04 does not provide POST exclusive authority to create health standards for MPD officers. Instead, the text of the statute extends the ability to establish health standards for MPD officers to one other agency, MPD. D.C. Code § 5-107.04(k). No carve-out was provided to DCHR, the Mayor, or any other D.C. agency, thus, it is clear, that the ability to establish health standards for MPD officers is reserved exclusively to POST and MPD.

The Mayor's attempt to circumvent POST and MPD through 6-B DCMR § 2001.2 is but an attempt to abrogate a governing statute. It is indisputable that the Mayor has a strong interest in combating the spread of COVID-19. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. However, our system does not permit the Mayor to act unlawfully even in the pursuit of desirable ends. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 582, 585-586, (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization)). Here, the Mayor lacks legal authority to impose a vaccine mandate on Plaintiffs. Accordingly, based on the entire record herein, it is this 25th day of August 2022

ORDERED that the Motion for Summary Judgment is **GRANTED**, and it is further **ORDERED** that the Cross-Motion to Dismiss Plaintiff's Complaint is **DENIED AS MOOT**¹, and it is further

ORDERED that the Mayor is permanently enjoined from implementing, imposing, and/or enforcing the COVID-19 vaccine mandate that has been established in MO 2021-147, DCHR Issuance No. I-2022-3, the DCHR's variance to 6-B DCMR § 2001, and the DCHR's rule amending 6-B DCMR § 2001, against Plaintiffs and it is further

ORDERED that all disciplinary actions initiated, proposed, or taken pursuant to the COVID-19 vaccine mandate that has been established in MO 2021-147, DCHR Issuance No. I-2022-3, the DCHR's variance to 6-B DCMR § 2001, and the DCHR's rule amending 6-B DCMR § 2001, shall immediately cease and be dismissed, with full reimbursement to be provided to all FOP members for any loss of benefits, pay, or rights and all related disciplinary proceedings to be expunged from their records, and it is further

¹ This Court only makes this point for clarity of the record, as the District's Motion to Dismiss is not properly before the Court because a party cannot seek affirmative relief in an opposition brief.

ORDERED that the Scheduling Conference Hearing set on August 26, 2022, is
VACATED, and it is further

ORDERED that this case is closed.

SO ORDERED.

Maurice A. Ross

Judge Maurice A. Ross

Copies To: Counsel of Record.