

No. 26-127

**In the United States Court of Appeals
for the Ninth Circuit**

SCOTT CARLSON, TYLER PARNELL, ALISON HALLIFAX, SHARON DAVIS, BRIAN
ROBILLARD, JOSHUA FREI, MATTHEW PETERSON, and ARTEM TETERIN,

Plaintiff-Appellants,

v.

CITY OF REDMOND,

Defendant-Appellee.

*On Appeal from the United States District Court for the Western District of
Washington, Seattle, No. 2:22-cv-01739, Hon. Jamal N. Whitehead*

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TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
JURISDICTION	5
ISSUES	5
STATEMENT	5
A. Statutory Background	5
B. Factual Background	8
C. Procedural History	16
STANDARD OF REVIEW	24
SUMMARY	24
ARGUMENT	28
I. Plaintiffs Are Entitled To Summary Judgment on Their Failure-To-Accommodate Claims.....	28
A. The City Made No Good Faith Effort To Reasonably Accommodate Plaintiffs.....	28
B. The City Failed To Carry Its Burden of Showing Undue Hardship.....	34
1. The City Waived Its Undue Hardship Defense	34
2. The City Could Have Accommodated Plaintiffs in Four Different Ways Without Suffering Any Undue Hardship.....	38
C. At Minimum, the City Should Have Accommodated Robillard ..	63
II. Disputes of Material Fact Prevent Summary Judgment on Plaintiffs' Retaliation Claims	65
CONCLUSION.....	70

TABLE OF AUTHORITIES

Page

CASES

<i>Am. Postal Workers Union v. Postmaster Gen.</i> , 781 F.2d 772 (9th Cir. 1986) (per curiam)	6, 7
<i>Ames v. Ohio Dep't of Youth Servs.</i> , 605 U.S. 303 (2025)	66
<i>Bolden-Hardge v. Off. of Cal. State Controller</i> , 63 F.4th 1215 (9th Cir. 2023)	34
<i>Bostock v. Clayton County</i> , 590 U.S. 644 (2020)	8, 67, 68
<i>Brown v. Gen. Motors Corp.</i> , 601 F.2d 956 (8th Cir. 1979)	44, 54
<i>Camarillo v. McCarthy</i> , 998 F.2d 638 (9th Cir. 1993)	35
<i>Chavis v. Wal-Mart Stores, Inc.</i> , 265 F. Supp. 3d 391 (S.D.N.Y. 2017)	67
<i>Cherry v. Wash. Dep't of Fish & Wildlife</i> , 188 F.4th 1170 (9th Cir. 2026)	<i>passim</i>
<i>Crestwood Cap. Corp. v. Andes Indus., Inc.</i> , 771 F. App'x 383 (9th Cir. 2019)	35
<i>Cross v. Cent. Contra Costa Transit Auth.</i> , 2026 WL 92280 (9th Cir. Jan. 13, 2026)	66
<i>Desire, LLC v. Manna Textiles, Inc.</i> , 986 F.3d 1253 (9th Cir. 2021)	24
<i>EEOC v. Ctr. One, LLC</i> , 2024 WL 379956 (3d Cir. Feb. 1, 2024)	33
<i>EEOC v. Townley Eng'g & Mfg. Co.</i> , 859 F.2d 610 (9th Cir. 1988)	44
<i>Eshom v. King County</i> , 812 F. Supp. 3d 1190 (W.D. Wash. 2025)	62
<i>Golan v. Saada</i> , 596 U.S. 666 (2022)	46
<i>Green v. Sun Life Assur. Co. of Can.</i> , 259 F. App'x 42 (9th Cir. 2007)	37
<i>Groff v. DeJoy</i> , 600 U.S. 447 (2023)	<i>passim</i>
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015)	63
<i>Innova Sols., Inc. v. Baran</i> , 983 F.3d 428 (9th Cir. 2020)	24
<i>Jiglov v. Hotel Peabody, G.P.</i> , 719 F. Supp. 2d 918 (W.D. Tenn. 2010)	61
<i>Jorgensen v. Cassidy</i> , 320 F.3d 906 (9th Cir. 2003)	37
<i>Koch v. UNUM Grp.</i> , 2025 WL 3124478 (9th Cir. Nov. 7, 2025)	68
<i>Leake v. Raytheon Techs. Corp.</i> , 2024 WL 1854287 (9th Cir. Apr. 29, 2024)	70
<i>Lewis-Williams v. S.F. Bay Area Rapid Transit Dist.</i> , 2026 WL 2674526 (9th Cir. Sep. 11, 2026)	<i>passim</i>
<i>M & K Emp. Sols., LLC v. Trs. of IAM Nat'l Pension Fund</i> , 608 U.S. 264 (2026)	63

Cases—continued:

<i>Magana v. Northern Mariana Islands</i> , 107 F.3d 1436 (9th Cir. 1997)	37
<i>McGinest v. GTE Serv. Corp.</i> , 360 F.3d 1103 (9th Cir. 2004)	66
<i>McNeill v. Tyson Fresh Meats, Inc.</i> , 2023 WL 8532408 (N.D. Tex. Dec. 8, 2023)	67
<i>Opuku-Boateng v. California</i> , 95 F.3d 1461 (9th Cir. 1996)	40, 41
<i>Owens v. Kaiser Found. Health Plan, Inc.</i> , 244 F.3d 708 (9th Cir. 2001)	34
<i>Passantino v. Johnson & Johnson Consumer Prods., Inc.</i> , 212 F.3d 493 (9th Cir. 2000)	8, 66
<i>Petersen v. Snohomish Reg'l Fire & Rescue</i> , 150 F.4th 1211 (9th Cir. 2025)	<i>passim</i>
<i>Rizzo v. Ins. Co. of Pa.</i> , 632 F. App'x 889 (9th Cir. 2015)	45
<i>Smith v. City of Atlantic City</i> , 138 F.4th 759 (3d Cir. 2025)	47
<i>Strother v. S. Cal. Permanente Med. Grp.</i> , 79 F.3d 859 (9th Cir. 1996)	69
<i>Twitter, Inc. v. Taamneh</i> , 598 U.S. 471 (2023)	50
<i>U.S. EEOC v. Consol Energy, Inc.</i> , 860 F.3d 131 (4th Cir. 2017)	33
<i>United States v. Manzo</i> , 675 F.3d 1204 (9th Cir. 2012)	35
<i>Video Software Dealers Ass'n v. Schwarzenegger</i> , 556 F.3d 950 (9th Cir. 2009)	24
<i>Williams v. Legacy Health</i> , 174 F.4th 1201 (9th Cir. 2026)	7, 34
<i>Wyler Summit P'ship v. Turner Broad. Sys., Inc.</i> , 235 F.3d 1184 (9th Cir. 2000)	58
<i>Yartsoff v. Thomas</i> , 809 F.2d 1371 (9th Cir. 1987)	68, 69
<i>Yeager v. Bowlin</i> , 693 F.3d 1076 (9th Cir. 2012)	45

STATUTES AND RULES

28 U.S.C.	
§ 1291	5
§ 1331	5
29 U.S.C. § 2614	65
42 U.S.C.	
§ 2000-e	2, 6
§ 2000e-2	5, 61
§ 2000e-3	6, 7

	Page
Statutes and Rules—continued:	
Fed. R. App. P. 4.....	5
Fed. R. Civ. P.	
8.....	35
30.....	18, 45

OTHER AUTHORITIES

U.S. EEOC, Compliance Manual Section 12: Religious Discrimination	
§ 12-V.B (2008)	67
5 Wright & Miller, <i>Federal Practice and Procedure</i> § 1278 (3d ed.	
1998)	35

INTRODUCTION

This case involves claims for religious discrimination and retaliation under Title VII of the Civil Rights Act of 1964. Plaintiffs are eight firefighters who collectively served the City of Redmond for more than a century. Each believes that he or she has a sacred obligation not to receive certain vaccines. So when the City imposed a COVID vaccine mandate in September 2021, Plaintiffs requested religious accommodations under Title VII.

Although the City initially granted Plaintiffs' requests, permitting them to mask and test as COVID precautions, the City almost immediately reversed course. Revoking the accommodations it had just granted, the City said it needed to consider unspecified "additional factors." The City took that stance even though firefighters had an "exceptional" record of compliance with masking and testing measures, such that the City had no record of firefighters transmitting the virus to those they served or vice versa.

From that moment on, the City made no good-faith effort to accommodate Plaintiffs. Instead, the City gave Plaintiffs an ultimatum: get vaccinated or get fired. Two days after the deadline for Plaintiffs to make that choice had passed—and weeks after most Plaintiffs had taken medical leave to cope with the stress of being forced to vaccinate—the City offered six Plaintiffs the

chance to apply for reassignment to positions that did not require vaccination. Although Plaintiffs repeatedly expressed interest, the City never reassigned them, instead awarding many of the jobs earmarked as accommodations to vaccinated firefighters. Because Plaintiffs still refused the vaccine, the City terminated them in spring 2022. Remarkably, the City did so even though it had by then relaxed other COVID precautions, including for firefighters.

The City's efforts fall well short of what Title VII requires. Under Title VII, employers must reasonably accommodate employees' religious practices unless doing so would inflict an "undue hardship." 42 U.S.C. § 2000e(j). The City failed to comply with that mandate because it neither made a good faith effort to accommodate Plaintiffs nor demonstrated that it would have faced undue hardship in doing so. The district court erred in granting the City's motion for summary judgment, not Plaintiffs' cross motion.

For starters, the City's proposed "accommodation" was nothing more than "an opportunity for reassignment." *Cherry v. Wash. Dep't of Fish & Wildlife*, 188 F.4th 1170, 1181 (9th Cir. 2026). Offering a reassignment process with only an "unlikely" possibility of "success" is not "a good faith effort to reasonably accommodate" under Title VII. *Id.* This Court should reverse the district court's unreasoned conclusion to the contrary.

Nor would the City have faced an undue hardship—*i.e.*, “substantial,” “excessive,” or “unjustifiable” costs, *Groff v. DeJoy*, 600 U.S. 447, 469 (2023)—in accommodating Plaintiffs. The City could have: (1) asked other employees in positions that did not require vaccination if they were willing to swap roles with Plaintiffs; (2) offered Plaintiffs two vacant positions in Fire Prevention—a unit primarily responsible for fire inspections, not emergency response; (3) given Plaintiffs the roles it set aside as possible accommodations rather than awarding those roles to vaccinated firefighters; or (4) allowed Plaintiffs to remain in their current roles while masking and testing.

The district court *failed to address* the first two possibilities. Had the court not whistled past those possible accommodations, it would have been forced to enter summary judgment for Plaintiffs. First, voluntary shift swaps do not pose undue hardship as a matter of law, and the record shows that vaccinated firefighters would have swapped positions. Second, the City successfully accommodated another unvaccinated firefighter inside Fire Prevention, proving that it could have similarly accommodated Plaintiffs.

As to the two accommodations the court addressed, the record contains no evidence of any unjustifiable burden. When asked to justify the City’s de-

cision to give the positions set aside as accommodations to *vaccinated* firefighters, not Plaintiffs, the City's 30(b)(6) witness came up blank. Offering no explanation at all cannot carry the City's burden. Likewise, the City cannot show, as it must, that masking and testing as "alternatives to vaccination would be not only less safe, but less safe by a 'substantial,' 'excessive,' or 'unjustifiable' margin." *Lewis-Williams v. S.F. Bay Area Rapid Transit Dist.*, 2026 WL 2674526, at *3-4 (9th Cir. Sep. 11, 2026) (citation omitted).

Finally, the district court also erred by awarding summary judgment for the City on Plaintiffs' Title VII retaliation claims. The City subjected Plaintiffs to adverse employment actions (including termination) *because* they engaged in a protected activity (requesting accommodations). The court's conclusion that Plaintiffs failed to adduce evidence of causation is demonstrably false given that the City itself cited Plaintiffs' accommodation requests as a reason for taking a hardline stance on vaccination. Evidence that City decisionmakers were "frustrated" and wished to impose "consequences for being unvaccinated" proves the point. The record clearly raises triable issues of fact.

This Court should reverse and remand for the district court to (1) enter summary judgment for the Plaintiffs as to liability on their failure-to-accommodate claims, and (2) deny summary judgment for the City on retaliation.

JURISDICTION

The district court had jurisdiction over Plaintiffs' federal Title VII claims under 28 U.S.C. § 1331. The district court entered a final judgment on December 5, 2025, 1-ER-2, and Plaintiffs timely noticed an appeal on January 4, 2026, 5-ER-959; *see* Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES

1. Whether the district court erred in granting summary judgment for the City of Redmond, not Plaintiffs, on Plaintiffs' Title VII failure-to-accommodate claims.

2. Whether the district court erred in granting summary judgment for the City of Redmond on Plaintiffs' Title VII retaliation claims.

STATEMENT

A. Statutory Background

1. Title VII of the Civil Rights Act of 1964 prohibits religious discrimination by making it unlawful for covered employers “to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... religion.” 42 U.S.C. § 2000e-2(a)(1). The statute defines the term

“religion” to “includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate ... an employee’s ... religious observance or practice without undue hardship on the conduct of the employer’s business.” *Id.* § 2000e(j). Together, those provisions “requir[e] an employer to reasonably accommodate the religious beliefs and practices of its employees, short of incurring an ‘undue hardship.’” *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (per curiam) (citation omitted).

Under that framework, an employee bears the burden of pleading and proving a prima facie case of religious discrimination. To carry that burden, the employee must show that “(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement.” *Lewis-Williams*, 2026 WL 2674526, at *3 (citation omitted).

Once an employee has made that prima facie showing, “the burden shifts to the employer to prove that it made good faith efforts to accommodate that

employee’s religious belief.” *Am. Postal Workers*, 781 F.2d at 776. An employer makes a good faith effort where it attempts to “reasonably preserve [the] employee’s employment status” while removing the “religious conflict” faced by the employee. *Id.* But “[i]f the accommodation proposed by the employer” does not “reasonably preserve an employee’s status ... then the employer has not satisfied its duties under Title VII.” *Cherry*, 188 F.4th at 1180.

Where an employer fails to make good-faith efforts to accommodate, it is liable under Title VII unless it can demonstrate “any and all reasonable accommodations would have imposed an undue hardship.” *Williams v. Legacy Health*, 174 F.4th 1201, 1208 (9th Cir. 2026) (cleaned up). An undue hardship, the Supreme Court recently clarified, is “more than a de minimis cost”—it is a “substantial additional cos[t]” or a “substantial expenditur[e].” *Groff*, 600 U.S. at 469-70 (citation omitted). An “employer c[annot] escape liability simply by showing that an accommodation would impose additional costs”—to count as an *undue hardship*, those costs must “rise to an ‘excessive’ or ‘unjustifiable’ level.” *Id.* at 469.

2. Title VII also prohibits employers from retaliating against employees for engaging in protected activities. *See* 42 U.S.C. § 2000e-3(a). Plaintiffs may

prevail on a Title VII retaliation claim by demonstrating that: “(1) [they] engaged in activity protected under Title VII, (2) the employer subjected [them] to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer’s action.” *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000). A plaintiff may establish causation by showing that his protected activity was *a* cause, if not the sole cause, of the adverse employment decision. Defendants thus “cannot avoid liability just by citing some other factor that contributed to [their] challenged ... decision[s].” *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020).

B. Factual Background

1. Plaintiffs were long-serving firefighters with the Redmond Fire Department. The Redmond Fire Department serves over 100,000 community members in the City of Redmond, Washington, and parts of King County. 2-ER-233. The Department has seven fire stations and over \$25 million in annual revenue. 2-ER-238; 2-ER-251.

The Department’s firefighters work in the most treacherous and demanding conditions. Each day, their lives and others depend on split-second decisions made amid sweltering smoke, flames, and debris. *See* 2-ER-237.

Firefighters respond to thousands of emergency calls every year. 2-ER-236. Beyond “fire suppression,” the Department also “delivers ... fire prevention, emergency medical services, hazardous materials (HazMat) response, and rescue services.” 2-ER-237. Accordingly, alongside putting out fires, firefighters transport patients to hospitals and assist in the emergency treatment of injured individuals. 2-ER-238, 2-ER-242.

Plaintiff-appellants are eight former Redmond firefighters who collectively served the City for more than a century. Plaintiffs are also men and women of faith. For most of their careers, Plaintiffs’ service never required them to compromise their beliefs.¹

That remained true when Redmond firefighters began to handle the very first known infections of COVID-19 in the country. 4-ER-733-34. When the Fire Department asked its firefighters to wear personal protective equipment (PPE), Plaintiffs showed “exceptional” compliance with COVID-exposure controls such that the City was not “aware” of “any known transmissions of COVID-19 from a firefighter to a patient,” or vice versa. 2-ER-187-88; *see*

¹ *See* 3-ER-485 (Parnell Decl.); 3-ER-528 (Robillard Decl.); 4-ER-567 (Peterson Decl.); 4-ER-606 (Carlson Decl.); 4-ER-682 (Teterin Decl.); 4-ER-688 (Hallifax Decl.); 4-ER-657-59 (Frei Decl.); 4-ER-715 (Davis Decl.).

3-ER-423. And when many firefighters later chose to vaccinate, Plaintiffs served alongside them, “providing exceptional service while controlling widespread transmission within the fire station.” 2-ER-244.

2. *The City imposes a vaccine mandate.* On August 9, 2021, Governor Jay Inslee issued a Proclamation requiring Washington healthcare workers to vaccinate against COVID-19. 5-ER-795. The Proclamation expressly exempted workers “entitled under ... Title VII ... [to] a sincerely held religious belief accommodation.” 5-ER-798.

The City resolved on August 20 to “follow the State’s directive.” 5-ER-805. Adrian Sheppard, the City Fire Chief, informed firefighters that vaccination would become a condition of employment after October 18, 2021. 5-ER-805. Like the Proclamation, Sheppard’s notice provided that “[e]xemptions may be granted for religious ... reasons.” 5-ER-805.

Plaintiffs submitted formal requests for religious accommodations to the City. *See* 5-ER-806-40. In their requests, Plaintiffs explained that vaccination conflicted with their sincerely held religious beliefs. 5-ER-806-40. They also committed to adhere to alternative precautions like testing before every shift, wearing PPE, and monitoring their symptoms—more stringent measures than the ones the Department had successfully used to navigate the pandemic

before imposing its vaccine mandate. 5-ER-806-40; *see* 2-ER-187-89. By September 20, 2021, the City had granted Plaintiffs' accommodation requests. 5-ER-806-40.

But just hours after the City approved the last of those requests, it changed course. On September 21, 2021, the Union representing Redmond firefighters emailed Chief Sheppard because it had learned that the City no longer viewed masking and pre-shift testing as acceptable precautions for unvaccinated firefighters. *See* 2-ER-109. And in a meeting with Plaintiff Frei on September 27, City Mayor Angela Birney stated that masking and testing was insufficient because "extremely low risk of transmission" is not enough, "only zero risk of transmission is acceptable." 4-ER-660.

The City memorialized that new policy in a September 30 Executive Order. 3-ER-446. Citing requests by "several Redmond firefighters ... for religious accommodations" alongside new public health guidance, the Order explained that the City needed to "consider" unspecified "additional factors" in evaluating accommodation requests and thus "terminated" all existing "accommodations." 3-ER-446-47.

3. *The City fails to offer Plaintiffs any other accommodation.* The same day as the Executive Order, the City and the Union signed a Letter of

Understanding about the City's new vaccine mandate. 5-ER-924. The letter explained that, absent new accommodations, firefighters had two choices: vaccinate by October 18, 2021, or voluntarily resign. 5-ER-925. During the next few weeks, several Plaintiffs individually met with Chief Sheppard, who reiterated that firefighters could not continue to work unvaccinated. *See, e.g.*, 4-ER-685; 4-ER-718.

Under the impression the City could not accommodate them, seven Plaintiffs applied for and received medical leave under the Family and Medical Leave Act. Six Plaintiffs requested leave to deal with the emotional distress of being forced to choose between their faith and their jobs. *See* 5-ER-850-69. Another Plaintiff, Sharon Davis, requested leave to care for her unexpectedly sick parent. *See* 5-ER-846-49.

The final Plaintiff, Artem Teterin, did not take FMLA leave. 4-ER-686. After representing that it could not accommodate Teterin within the Fire Department, on October 18, 2021, the City placed him on administrative leave and began the process of terminating him. 4-ER-686. Teterin's termination became effective on November 2. 5-ER-919.

On October 22—days *after* the City's October 18 deadline to vaccinate or voluntarily resign, and a week after Plaintiffs had taken medical leave—the

Fire Department identified possible accommodations for unvaccinated firefighters. In a “Letter of Agreement” with the Union, the City identified five open positions that the City deemed suitable for unvaccinated employees because the roles did not involve contact with medical patients. *See, e.g.*, 3-ER-489. On November 15, the City reduced that number to four. 5-ER-928-30.

Each of the positions the City identified required an accommodated firefighter to accept a 3% pay reduction. 5-ER-929. Two of the positions—a “Training Lieutenant” job and a “Telestaff” assignment—were “temporary” and set to expire within months. 5-ER-929. Notably, one of the permanent positions—another “Training Lieutenant” role—was the job that one Plaintiff, Robillard, held when the City told him to vaccinate or resign. 3-ER-534. And *vaccinated* firefighters were eligible to apply for both the permanent and temporary Training Lieutenant roles in competition with their unvaccinated colleagues. 5-ER-929.

In October and November, the City twice emailed six Plaintiffs—but not Teterin or Davis—asking if they were interested in the accommodation positions. *See, e.g.*, 2-ER-89-97 (October emails); 4-ER-580, 624, 672, 703 (November emails); *see also* 4-ER-718 (Davis Decl.); 4-ER-687 (Teterin Decl.). Plaintiffs who received the emails timely responded and expressed their interest.

See, e.g., 4-ER-577, 622, 666 (email replies); *see also* 4-ER-626 (completed online form). The City promised to inform those Plaintiffs by December 17, 2021, whether they were selected for an assignment. *See, e.g.*, 4-ER-672.

Throughout December, those six Plaintiffs waited to learn whether the City had reassigned them. But days *after* the date when Plaintiffs were told to expect an update, the City told them that they were ineligible to receive offers until they returned from medical leave. *See, e.g.*, 4-ER-631-32, 669. Per the City's instructions, Plaintiffs waited for their return-to-work in spring 2022.

Meanwhile, Davis—who never received the City's emails about a possible reassignment—returned from leave in January. 4-ER-718. On January 6, 2022, the City emailed Davis with “two options: vaccinate or resign.” 4-ER-719. The email did not mention any accommodation position. Under the impression she had to vaccinate or face termination, Davis retired under protest. 4-ER-719-20.

In March 2022, weeks before the remaining six Plaintiffs were due to return from medical leave, the City emailed them to ask whether they planned to vaccinate, seek an accommodation position, or request a disability accommodation. *See, e.g.*, 4-ER-585-86, 636, 677-78. Plaintiffs—for a third time—

promptly stated their interest in the accommodation positions. *See, e.g.*, 4-ER-585, 638, 677.

The City, however, erroneously told Plaintiffs that no positions were available. *See, e.g.*, 4-ER-674. During Plaintiffs' medical leave, three positions had expired or been filled. *See* 5-ER-929. For instance, the City had offered one of the training positions to a vaccinated firefighter—even though he expressly asked the City to withdraw his application if an unvaccinated firefighter wanted the job. 4-ER-725. Still, one training position remained open for applications, despite the City's contrary statement to Plaintiffs. *See* 4-ER-674. Six Plaintiffs asked for this position in March 2022, but Chief Sheppard told them it was unavailable and instead awarded the position to a vaccinated firefighter who applied *after* Plaintiffs expressed their interest. *See* 3-ER-351-56; 3-ER-408-09.

When six Plaintiffs returned from leave in March and April 2022, the City held interactive meetings with five of them. 3-ER-491; 3-ER-537; 4-ER-572; 4-ER-662; 4-ER-693; *see* 4-ER-615-16. The City reiterated accommodation positions were not available and refused to grant other accommodations like masking and testing. *See, e.g.*, 4-ER-663-64. A few days after these meetings, the City sent some Plaintiffs a list of open non-firefighter jobs in other

City departments, but Plaintiffs did not have the requisite education or training to apply for those positions. *See, e.g.*, 4-ER-693.

The City refused to reconsider its view even though it had relaxed *other* COVID measures. For instance, in February 2022, the City required remote employees to return to work in person unless they had a medical exemption. 2-ER-45-46. On March 1, the City removed “COVID-19 vaccine verification requirements ... for visitors in its recreational facilities and community centers.” 2-ER-46. And on March 15, the Fire Department relaxed COVID masking and testing precautions for firefighters because “[d]aily COVID positivity rates throughout King County [had] continue[d] to decline.” 2-ER-226.

Having refused to reconsider its position or grant any accommodation, by May 25, 2022, the City terminated all Plaintiffs. 5-ER-882-922.

C. Procedural History

On December 8, 2022, Scott Carlson filed suit in the United States District Court for the Western District of Washington, alleging that the City violated Title VII by failing to accommodate him and by retaliating against him

for engaging in protected activity. D. Ct. Dkt. No. 1.² As additional firefighters received right-to-sue letters from the United States Equal Employment Opportunity Commission, Plaintiffs twice amended their complaint to add parties. D. Ct. Dkt. No. 22; 5-ER-943.

1. The City prematurely moves for summary judgment. On February 28, 2025, the City moved for summary judgment asserting, among other things, that it could not have accommodated Plaintiffs without suffering an undue hardship. *See* D. Ct. Dkt. No. 69.

But the district court held that the City's motion was "premature." 4-ER-787-91. The City had not raised an affirmative undue-hardship defense in its Answer, instead asserting the defense for the first time at summary judgment. As a result, Plaintiffs had not had the opportunity to conduct discovery, including "key depositions," on the issue. 4-ER-788. So the district court denied the City's motion without prejudice and allowed the parties to continue with discovery. 4-ER-790.

The additional discovery the court envisaged, however, went awry. The

² Plaintiffs also asserted claims for violations of the Washington Law Against Discrimination and for breach of contract. Those claims are not at issue on appeal.

City initially designated Chief Sheppard to speak on its behalf under Rule 30(b)(6). But after requesting a month-long extension to prepare Sheppard on topics including undue hardship, the City withdrew him as its designee—selecting the City’s Medical Services Administrator, Jim Whitney, to testify instead. 2-ER-153. Then, when Plaintiffs’ counsel took Whitney’s 30(b)(6) deposition on April 18, 2025, Whitney explained that he was not prepared to testify on “topic 19”—*i.e.*, undue hardship. 2-ER-59; *accord* 2-ER-153-54. Plaintiffs asked the City how it would “remedy this,” 2-ER-82, but the City responded that discovery into undue hardship—a defense it planned to raise at summary judgment—was “neither relevant nor proportionate.” 2-ER-81.

2. *The parties cross move for summary judgment.* Despite the incomplete record, on May 19, 2025, the City once again moved for summary judgment. D. Ct. Dkt. No. 86. The City did not contest that Plaintiffs had established a *prima facie* case of religious discrimination under Title VII. Instead the City argued that it had made good-faith efforts to accommodate Plaintiffs and that any other accommodations would have presented an undue hardship by increasing the risk of COVID transmission. Citing an expert report from Dr. John Lynch, the City contended that masking and testing would not have provided sufficient protection. *See* 4-ER-729. The City also sought summary

judgment on Plaintiffs' retaliation claims, asserting that Plaintiffs could not show a "causal link" between their firings and any protected activity.

Plaintiffs cross-moved for summary judgment. D. Ct. Dkt. No. 111. On the failure-to-accommodate claim, Plaintiffs argued that the City had failed to carry its burden of showing good-faith efforts to accommodate or an undue hardship.

As to good-faith efforts, Plaintiffs observed that the City made no real attempt to preserve their employment. Instead, the City offered *six* Plaintiffs the chance to apply for just *four* reassignment positions, never contacted two other Plaintiffs about the positions, gave some of those jobs to *vaccinated* firefighters, then conducted an ever-shifting process that did not give any Plaintiff a real shot at receiving reassignment.

As to undue hardship, Plaintiffs argued that the City had waived its defense by raising it for the first time at summary judgment, prejudicing Plaintiffs' ability to obtain meaningful discovery. And even if the defense was not waived, Plaintiffs maintained, the City failed to present any evidence that it would have suffered any excessive or unjustifiable costs by accommodating Plaintiffs through (1) asking other employees in non-patient-facing roles to

voluntarily swap shifts; (2) exploring positions in the Department's non-patient-facing Fire Prevention unit; (3) offering Plaintiffs, not vaccinated firefighters, the positions earmarked as accommodations; and (4) keeping Plaintiffs in their existing positions subject to masking and testing.

The lack of any undue hardship was especially obvious for Robillard, Plaintiffs contended. *Id.* at 15. Robillard worked as a Training Lieutenant—a non-patient-facing position that did not require vaccination. The City nonetheless asked Robillard to vaccinate or resign by mid-October. Then, just days after Robillard departed on medical leave, the City inexplicably offered *his position* to other firefighters as a possible accommodation. Though Robillard later expressed interest in his own job on three separate occasions, the City ultimately gave the position to a vaccinated firefighter. *See* 3-ER-551-56.

To rebut the City's assertion of undue hardship from increased risk of COVID transmission, Plaintiffs provided expert testimony from Dr. Michael Mina—a physician who had advised both the Biden and Trump Administrations on COVID policy. *See* 3-ER-448 (Mina Decl.). Dr. Mina explained that masking and testing in lieu of vaccination would not have meaningfully increased the risk of transmission. Plaintiffs also pointed to testimony from the City's own Medical Services Director and Human Resources Director, both of

whom conceded that firefighters had served safely while masking and testing for months before the vaccine mandate came into effect. *See, e.g.*, 2-ER-199-200. And Plaintiffs supplied evidence that the City had not imposed a vaccine mandate on other first responders like police officers, who also provided first aid, without experiencing increased COVID infections. 3-ER-297, 304, 325-26.

Lastly, Plaintiffs moved for summary judgment on their retaliation claims. Plaintiffs asserted that the City had terminated them (an adverse employment action) *because* they had engaged in protected activity (requesting accommodations). Ample evidence supplied a causal link, Plaintiffs noted. For instance, Mayor Birney’s Executive Order revoking their initial accommodations expressly called out unvaccinated firefighters who had submitted accommodation requests. And HR employees reported that City decisionmakers were “frustrated,” “annoyed,” and wished to impose “consequences for being unvaccinated.”

3. *The district court grants summary judgment for the City.* On Plaintiffs’ accommodation claims, the court “assum[ed] Plaintiffs ha[d] established their prima facie case,” and addressed the City’s good-faith and undue hardship defenses. 1-ER-23.

With no independent explanation or analysis, the court asserted that

“the City has demonstrated that it engaged in good-faith efforts to accommodate Plaintiffs.” 1-ER-30. The court did not mention, much less explain away, Plaintiffs’ evidence to the contrary.

The court also accepted the City’s undue-hardship defense. Addressing waiver, the court acknowledged that the City failed to plead the defense in its Answer. But the court held that this failure had not prejudiced Plaintiffs because the court had “extended the discovery deadline.” 1-ER-16. Although the court was “troubled by the City’s conduct” in discovery, the court refused to find prejudice. 1-ER-18.

The court then considered the defense on the merits. The court explained that masking and testing in lieu of vaccination would pose “significant health and safety risks to both the workforce and the public.” 1-ER-26. The court dismissed evidence indicating otherwise as “conclusory,” “anecdotal,” or rooted in “hindsight.” 1-ER-28. The court further held that the City could not have accommodated Plaintiffs by reassigning them to the positions the City created because Plaintiffs took medical leave. 1-ER-29. The court did not address the undisputed fact that the City still had one accommodation position remaining when Plaintiffs returned from leave. Nor did the court mention two

other possible accommodations Plaintiffs raised: voluntary shift swaps or re-assignment to the Department's Fire Prevention unit.

Despite accepting that Robillard's case presented a more "complex fact pattern," because he "serv[ed] as a Training Lieutenant—an administrative, non-patient-facing position"—the court held that the City could not have accommodated him either. 1-ER-32-33. Because Robillard took medical leave, the court explained, the City had no obligation to accommodate him by holding his position open—even though failing to do so was "perhaps" unlawful "FMLA interference." 1-ER-34. The court did not consider whether the City could simply have allowed Robillard to remain in his position without receiving the vaccine when the Executive Order terminating existing accommodations went into effect on September 30, 2021—before he went on leave.

Finally, the court granted summary judgment for the City on Plaintiffs' retaliation claim. 1-ER-34. The court did not question that Plaintiffs had suffered adverse employment actions, and "assum[ed]" that "requesting a religious accommodation constitutes protected activity." 1-ER-34. Even so, the court held that no evidence established causation. The court failed to mention Mayor Birney's Executive Order—which specifically called out Plaintiffs' existing requests as a reason for her new hardline approach to vaccination—or

evidence that City decisionmakers were frustrated and annoyed.

Plaintiffs appealed. 5-ER-959.

STANDARD OF REVIEW

This Court reviews a district court’s decision to grant or deny summary judgment de novo. *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021); *see Innova Sols., Inc. v. Baran*, 983 F.3d 428, 431 (9th Cir. 2020) (same standard when reviewing cross motions for summary judgment). Summary judgment is appropriate if “viewing the evidence in the light most favorable to the nonmoving party” and drawing “all reasonable inferences ... in [that] party’s favor,” there are no “genuine issues of material fact.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009) (citation omitted).

SUMMARY

I. Plaintiffs are entitled to summary judgment as to liability on their failure-to-accommodate claim. There is no dispute that Plaintiffs have established a prima facie case of religious discrimination. And the City cannot show, as it must, that it either made a good-faith effort to accommodate Plaintiffs or that accommodating them would have resulted in an undue hardship—*i.e.*, unjustifiable or excessive costs.

A. The City made no good-faith effort to accommodate Plaintiffs. At most, the City told *six* of the *eight* Plaintiffs they could apply for *four* jobs, all of which came with a 3% salary deduction. The City never even offered the remaining two Plaintiffs that chance. And when Plaintiffs expressed interest in the positions, the City missed its own deadlines and moved the goalposts. “[O]ffering nothing more than an opportunity for reassignment” does not count as “a good faith effort to reasonably accommodate.” *Cherry v. Wash. Dep’t of Fish & Wildlife*, 188 F.4th 1170, 1181 (9th Cir. 2026).

B. Nor has the City carried its burden on undue hardship.

1. For starters, the City waived its undue hardship defense by waiting until summary judgment to assert it, prejudicing Plaintiffs. The district court refused to find waiver because, in its view, additional discovery had cured any prejudice. Yet additional discovery was no panacea: at every turn the City engaged in a pattern of obstruction that blocked Plaintiffs’ inquiries.

2. Even if the City did not waive the defense, the City would have suffered no undue hardship in accommodating Plaintiffs in any one of four different ways. *First*, the City could have simply asked other employees in non-patient-facing positions if they would be willing to swap roles with Plaintiffs.

Voluntary shift swapping does not entail undue hardship as a matter of law. *Groff v. DeJoy*, 600 U.S. 447, 473 (2023).

Second, the City could have offered Plaintiffs two vacant positions in Fire Prevention—a unit primarily responsible for fire inspections, not emergency response. Doing so would have imposed no excessive costs, as demonstrated by the fact that the City accommodated another unvaccinated firefighter inside Fire Prevention without issue.

Third, the City could have given Plaintiffs the roles it set aside to accommodate unvaccinated firefighters rather than giving those roles to vaccinated employees. Plaintiffs’ medical leave was no obstacle, contrary to the district court’s suggestion, because the City *itself* asked Plaintiffs whether they were interested in the positions while they were on leave. In any case, the City still had one position available when Plaintiffs returned.

Fourth, the City could have accommodated Plaintiffs in their current jobs by allowing them to mask and test. The City cannot show, as it must, that “the alternatives to vaccination would be not only less safe, but less safe by a ‘substantial,’ ‘excessive,’ or ‘unjustifiable’ margin.” *Lewis-Williams v. S.F. Bay Area Rapid Transit Dist.*, 2026 WL 2674526, at *3-4 (9th Cir. Sep. 11, 2026) (citation omitted). Quite the contrary, the City successfully deployed

masking as a protective measure before issuing its vaccine mandate. And by the time the Plaintiffs returned from leave in April 2022, the City had dropped many of the precautions it had previously required firefighters to take.

C. At the very least, the City would have faced no undue hardship in accommodating Robillard by simply keeping him in his existing job—a non-patient-facing Training Lieutenant role that the City later offered as a possibility to accommodate other unvaccinated firefighters.

II. Plaintiffs are entitled to trial on their retaliation claims. Taken in the light most favorable to Plaintiffs, the facts would allow a reasonable jury to conclude that the City subjected Plaintiffs to an adverse employment action (termination) *because* they engaged in a protected activity (requesting accommodations). The district court’s contrary conclusion sidelined evidence showing causation. The Executive Order imposing the City’s vaccine mandate *expressly* cited Plaintiffs’ initial accommodation requests as a reason for the City’s new hardline stand. Testimony from the City’s employees reveals that City decisionmakers were “frustrated,” “annoyed,” and wished to impose “consequences for being unvaccinated.” And the City went out of its way to ensure that Plaintiffs’ repeated efforts to secure accommodations were unsuccessful. The district court erred in granting summary judgment for the City.

ARGUMENT

I. Plaintiffs Are Entitled To Summary Judgment on Their Failure-To-Accommodate Claims

All agree that Plaintiffs have established their prima facie case of religious discrimination. 1-ER-23; *see Lewis-Williams v. S.F. Bay Area Rapid Transit Dist.*, 2026 WL 2674526, at *3 (9th Cir. Sep. 11, 2026) (stating elements). And because undisputed facts show that the City neither made a good-faith effort to accommodate Plaintiffs nor faced any undue hardship in offering accommodations, Plaintiffs are entitled to summary judgment—not the City, as the district court erroneously held. This Court should confirm as much now, or at a minimum, hold that disputes of material fact render summary judgment inappropriate.

A. The City Made No Good Faith Effort To Reasonably Accommodate Plaintiffs

To count as a good-faith effort to accommodate under Title VII, an accommodation must “effectively eliminat[e] the religious conflict faced by a particular employee.” *Cherry v. Wash. Dep’t of Fish & Wildlife*, 188 F.4th 1170, 1180 (9th Cir. 2026) (citation omitted). The City’s offer of a trivial chance at reassignment did not.

1. At most, the City offered *six* of the *eight* Plaintiffs in this case the opportunity to compete for *four* jobs, all of which came with a 3% salary deduction. *See* 5-ER-929.³ Even then, the City obstructed Plaintiffs’ ability to apply for those positions. The City did not tell Plaintiffs that it had accommodation positions available until October 22, 2021—days *after* the City’s October 18, 2021, deadline for firefighters to get the vaccine. *See* 2-ER-89-97. As a result, Plaintiffs had already elected to use medical leave to cope with the stress of being forced to vaccinate. *See* 5-ER-850-69. Then, in December 2021, after the six Plaintiffs the City had notified twice expressed interest in the positions, the City moved the goalposts, informing them that it planned to fill the positions with those “available to work.”⁴ And when Plaintiffs returned from medical leave and expressed interest in a position the City had advertised, Chief Sheppard inexplicably told them that no such position existed (it did), then awarded the job to a *vaccinated* firefighter. 3-ER-355.

The City’s offer of an illusory shot at reassignment is not a good-faith effort to accommodate—a point this Court recently underscored in *Cherry*,

³ The City did not offer the opportunity to apply for reassignment to Teterin or Davis. *See infra* pp. 31-33.

⁴ 3-ER-488 (Parnell); 3-ER-553 (Robillard); 4-ER-582 (Peterson); 4-ER-669 (Frei); 4-ER-710 (Hallifax).

188 F.4th 1170. There, as here, the employer offered an accommodation process that did not guarantee reassignment, required a pay reduction as a condition of reassignment, and ultimately told employees who tried to engage in the process that positions were unavailable. *See id.* at 1177, 1183-84. Reversing the district court's grant of summary judgment for the employer, this Court held that "offer[ing] ... nothing more than an opportunity for reassignment, couched in language that made success appear unlikely," does not count as "a good faith effort to reasonably accommodate." *Id.* at 1181. As in *Cherry*, the City's "reassignment process offered little more than a fig leaf," and yielded only a remote possibility of accommodation. *Id.* at 1176. That is not enough.

2. Although the record demonstrates that the City's halfhearted efforts were inadequate, the district court concluded otherwise. 1-ER-30. The court supplied no reasoning in support of that conclusion, instead appending a drive-by holding to its undue-hardship analysis. The only applicable analysis the court offered elsewhere in its opinion is the suggestion that Plaintiffs "did not apply for the ... assignments after they were announced." 1-ER-29. But that does not help the City.

For one, Plaintiffs repeatedly expressed their interest in the assignments at every juncture—as the City concedes. D. Ct. Dkt. No. 117, at 24 (“Redmond does not dispute that at various times the Plaintiffs emailed their interest in some or all the positions”). To the extent Plaintiffs failed to fill out any specific application form, as the City argued below, *see id.* at 40, the City never informed them that this was a requirement. Quite the opposite, the City repeatedly *acknowledged* Plaintiffs’ interest.

For another, *Cherry* confirms that an employee’s failure to participate does not transmute an unreasonable accommodation process into a reasonable one. The employees in *Cherry* “did not fully participate in” the reassignment process, yet this Court held that the employer could not “excuse itself from having to propose an actual accommodation” by pointing to employees’ “understandab[le]” decisions not to fully pursue a “limited” chance of accommodation. 188 F.4th at 1178, 1180, 1182. Here, Plaintiffs did much more—actively engaging with the City’s process for months.

3. Even if the Court concludes that the City’s reassignment process was a reasonable accommodation, that would not show the City made good-faith efforts to accommodate the two Plaintiffs—Teterin and Davis—to whom the City did not offer the possibility of reassignment.

Start with Teterin. The City resolved to terminate Teterin on October 18, 2021—days before the City offered any firefighter the opportunity to apply for reassignment. *See* 4-ER-686; 5-ER-919. And although the City met with Teterin to discuss accommodations before his termination, the City “could not identify a reasonable accommodation for a non-vaccinated member within the Fire department.” 5-ER-921.

The district court acknowledged that the City never offered Teterin the chance to apply for any accommodation position, but suggested that was immaterial because Teterin had already “withdrawn from the process” by the time those positions became available. 1-ER-31. However, Teterin declined an additional meeting with the City only because it told him there was nothing he could say or do “to change the outcome.” 4-ER-686. Employees need not pursue such “unlikely” prospects of accommodation to prevail on a failure-to-accommodate claim. *Cherry*, 188 F.4th at 1181. Regardless, the reasonable-accommodation analysis looks to the “actual accommodation” offered by the employer. *Id.* at 1182. The City offered Teterin nothing.

Now consider Davis. After the City imposed its vaccine mandate on September 20, 2021, Davis had an “impromptu meeting with Chief Sheppard” who

informed Davis that “he didn’t think [the City] [was] going to be able to accommodate [her].” 4-ER-718. Faced with a “choice” between “get[ting] vaccinated or get[ting] fired,” Davis chose to “retire under duress.” 4-ER-718-19. At no time between September 2021 and Davis’s retirement in January 2022 did the City make *any* effort to accommodate Davis, never so much as notifying her that it had identified possible reassignment positions. 4-ER-718-19.

The district court suggested—without record citation—that the City did not constructively discharge Davis because “she has not shown that her situation at work was so unbearable that a reasonable person in her position would have felt compelled to resign.” 1-ER-32. But, as other circuit courts have recognized, an employee is put in just such an “intolerable position” when an employer forces her to choose between religious obligations and continued employment. *E.g., U.S. EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 145 (4th Cir. 2017). “[T]he whole point of the constructive discharge theory” is that “an employee who is seeking religious accommodation” can avoid “the indignity and emotional discomfort of awaiting his inevitable termination” by resigning before he is “actually ... fired.” *EEOC v. Ctr. One, LLC*, 2024 WL 379956, at *3 (3d Cir. Feb. 1, 2024) (citation omitted). That is exactly what Davis did here.

B. The City Failed To Carry Its Burden of Showing Undue Hardship

Nor can the City demonstrate “that ‘any and all [other] accommodations would have imposed an undue hardship,” *Williams v. Legacy Health*, 174 F.4th 1201, 1208 (9th Cir. 2026) (citation omitted)—*i.e.*, “substantial,” “excessive,” or “unjustifiable” costs. *Groff v. DeJoy*, 600 U.S. 447, 469 (2023). First, the City waived its undue hardship defense by failing to raise it in its Answer. Second, undisputed record evidence shows that the City could have accommodated Plaintiffs in four different ways without suffering any “excessive” burden. *Id.*

1. The City Waived Its Undue Hardship Defense

Reviewing the district court’s decision not to find waiver “de novo,” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001), this Court should reverse and remand with instructions to dismiss the City’s undue hardship defense.

“Undue hardship is an affirmative defense.” *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1224-25 (9th Cir. 2023); accord *Lewis-Williams*, 2026 WL 2674526, at *2. And “[i]t is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver

of that defense and its exclusion from the case.” *United States v. Manzo*, 675 F.3d 1204, 1211 n.3 (9th Cir. 2012) (quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1278 (3d ed. 1998)); see, e.g., *Crestwood Cap. Corp. v. Andes Indus., Inc.*, 771 F. App’x 383, 383 (9th Cir. 2019) (“[T]his defense ha[s] been waived because [defendant] failed to plead it in its answer.”).

Despite those clear rules, the City did not *mention* undue hardship in its Answer to Plaintiffs’ Second Amended Complaint—let alone raise undue hardship as an affirmative defense. See 5-ER-931. The City concedes that it failed to plead undue hardship but nevertheless asserts that it may raise the defense for the first time at summary judgment because doing so would not “prejudice” Plaintiffs. See D. Ct. Dkt. No. 117, at 35; see *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (“In the absence of a showing of prejudice ... an affirmative defense may be raised for the first time at summary judgment”). The district court accepted that argument, refusing to find prejudice because the court had previously “extended the discovery deadline” so that Plaintiffs might depose the City’s witnesses on undue hardship. See 1-ER-16.

But the district court’s own opinion reveals exactly why additional discovery did not cure Plaintiffs’ prejudice. As the court acknowledged, “[t]he record reflects a troubling pattern” concerning the City’s efforts to prevent

meaningful discovery into undue hardship. 1-ER-17. The City initially designated Chief Sheppard as its 30(b)(6) witness, but then “withdrew [his] designation three days before his scheduled 30(b)(6) deposition—after obtaining a month-long extension to prepare him—and substituted Jim Whitney,” who then testified that he could not speak to several topics, including undue hardship. 1-ER-17; *see* 2-ER-59. The City’s other 30(b)(6) deponent, HR Director Laird, “similarly disclaimed competence on multiple topics.” 1-ER-17. And although the City agreed to be “bound by Chief Sheppard’s testimony,” defense counsel “told Plaintiffs before Sheppard’s deposition that he was unprepared on the 30(b)(6) topics, leading Plaintiffs to limit their questioning.” 1-ER-17; 2-ER-151.⁵

The district court refused to act on this “troubling” pattern because “dismissal of an affirmative defense is a severe sanction reserved for bad faith or willfulness.” 1-ER-18. But the standard for dismissing a defense as a *sanction* is not the same as the standard for dismissing a defense based on *waiver*. This

⁵ Indeed, during his deposition, Sheppard repeatedly failed to answer questions relevant to undue hardship. *See, e.g.*, 3-ER-358-59 (“Q. Did anything ever prevent you from asking a firefighter in the training division if they would be willing to swap shifts with an unvaccinated firefighter in order to accommodate the unvaccinated firefighter? ... A. I don’t know.”).

Court's precedents are clear that a finding of waiver is appropriate where, as here, a defendant's failure to timely raise a defense prejudices the plaintiff. *See, e.g., Magana v. Northern Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997) (reversing district court for failing to analyze prejudice); *Green v. Sun Life Assur. Co. of Can.*, 259 F. App'x 42, 45 (9th Cir. 2007) (finding waiver).

In any event, it is hard to imagine clearer evidence of bad faith than the City's conduct here. Failing to timely plead a defense, then refusing to prepare witnesses to testify on the topic in defiance of a court-ordered extension of discovery deadlines—only to assert the defense on summary judgment—is the epitome of willful obstruction. *See* 2-ER-81 (counsel for the City claiming that information on undue hardship was “neither relevant nor proportionate”). “Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault.” *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (citation omitted).

Because there is no question that the City's failure to plead its undue hardship defense prejudiced Plaintiffs, this Court should find waiver and remand with instructions for the district court to dismiss the defense.

2. The City Could Have Accommodated Plaintiffs in Four Different Ways Without Suffering Any Undue Hardship

If this Court overlooks the City’s waiver of its undue hardship defense and reviews the record, it should grant summary judgment *for Plaintiffs*—not the City, as the district court held.

The City could have accommodated Plaintiffs in four different ways: (1) asking vaccinated firefighters to swap job responsibilities so that Plaintiffs could serve in non-patient-facing roles; (2) giving Plaintiffs Fire Prevention roles; (3) reassigning Plaintiffs to the positions the City identified as accommodations, rather than awarding those jobs to vaccinated firefighters; or (4) allowing Plaintiffs to continue in their existing roles with masking and testing as COVID precautions.

Remarkably, the district court did not engage with the first *two* possibilities, instead myopically focusing on whether the City could have accommodated Plaintiffs through masking and testing or by reassigning them to other roles. The court even acknowledged that the “City’s failure to offer Fire Prevention positions ... bears on [the] accommodation [analysis]”—but never discussed that failure in assessing undue hardship. 1-ER-36.

Had the district court not ignored these two possible accommodations, the court would have been forced to award summary judgment for the Plaintiffs because the City offered no evidence of undue hardship associated with either option. Even as to the two accommodations the district court did address, the court erred in granting summary judgment for the City because the record contains no evidence of any “excessive” or “unjustifiable” burden. *Groff*, 600 U.S. at 469.

a. Shift Swaps

“Faced with an accommodation request” employers must consider “other options, such as voluntary shift swapping.” *Groff*, 600 U.S. at 473. Yet here, the City never asked whether other firefighters might be willing to swap shifts with Plaintiffs so that they could work in roles (*e.g.*, training positions) that did not require contact with medically vulnerable individuals. Had the City done so, it could have accommodated Plaintiffs without suffering undue hardship. *See id.* at 471 (“no undue hardship is imposed by ... voluntary shift swapping”).

Multiple City officials confirmed that the City never considered shift swapping. Chief Sheppard testified that he did not ask “anybody” whether they would be willing to swap, even though nothing “prevent[ed] [him] from

inquiring.” 3-ER-357-58. Whitney and Laird, the City’s 30(b)(6) witnesses, likewise appeared unaware of any such effort. 3-ER-383 (Laird); 2-ER-185 (Whitney).

Had the City asked, it would have found that other firefighters *were* prepared to swap. For example, Ben Norton, a vaccinated firefighter who received one of the Training Lieutenant positions that the City had earmarked as an accommodation, testified that he “would [have been] willing to give up [his] training position so an unvaccinated firefighter could be accommodated” and even twice volunteered that information to City officials. 4-ER-725; 4-ER-728. Given that one firefighter was willing to switch, “it is not unreasonable to assume that other employees would have been willing to trade” too. *Opuku-Boateng v. California*, 95 F.3d 1461, 1470-74 (9th Cir. 1996).

At no point during this litigation has the City identified any burden associated with voluntary shift swaps. Although Chief Sheppard expressed concern that shift swaps might have involved “displac[ing] somebody,” 3-ER-357, that concern evaporates where the swap is entirely *voluntary*. Regardless, “not all impacts on coworkers ... are relevant” to the undue-hardship analysis—only those “co-worker impacts that go on to affect the conduct of the business.” *Groff*, 600 U.S. at 472 (cleaned up). And here the City has produced no

evidence that co-worker dissatisfaction would have impacted the Fire Department as a whole.

This Court has for decades acknowledged that an employer's failure to explore shift swaps can amount to a Title VII violation. In *Opuku-Boateng*, 95 F.3d at 1470-74, the Court held that an employer did not face an undue hardship by accommodating a Sabbath observant employee through a "combination" of "scheduling arrangement[s] [and] voluntary trading of shifts." *Id.* The "hypothetical morale problems" cited by the employer, this Court reasoned, were "clearly insufficient to establish undue hardship." *Id.* at 1473. The same is true here.

b. Fire Prevention Positions

The City could also have accommodated Plaintiffs by offering them positions in the Department's Fire Prevention unit.

Fire Prevention operates out of City Hall, not a fire station. 2-ER-204. Staff members are responsible for "plan[ning] review and inspection services for construction-related activity," conducting "fire and life safety inspections to verify code requirements," community education "regarding fire and safety," and investigation of "suspicious fires." 2-ER-249. Those responsibilities are amenable to "remote work" and do not involve routine patient care.

2-ER-182, 249. As a result, Fire Prevention roles were a natural fit for accommodating Plaintiffs.

But the City never offered Fire Prevention positions to Plaintiffs—despite having two deputy fire marshal vacancies in Fire Prevention available. 2-ER-212-13; *see* 2-ER-182; 2-ER-191 (Whitney disclaiming awareness of “discussions about the remote work that fire prevention was doing as a way to accommodate [the] unvaccinated firefighters”); *accord* 2-ER-222 (similar).

Nor would the City have faced an undue hardship in accommodating Plaintiffs in Fire Prevention. Again, Fire Prevention sat within the Fire Department’s “support services” branch, 2-ER-234, which does not “take emergency calls,” 2-ER-182. Confirming the lack of any hardship, the City accommodated an unvaccinated firefighter in Fire Prevention without issue. After firefighter Mitch Pearson hewed to his religious beliefs by declining the COVID vaccine, the City accommodated him “inside ... fire prevention” in a role which required him to perform “inspections in the field.” 2-ER-69-70.⁶

⁶ The record contains conflicting evidence about Pearson’s precise responsibilities. Norton said Pearson’s job title was “Training Firefighter,” but explained that he was “assigned to a work location in City Hall” where Fire Prevention operated. 4-ER-726. And Whitney testified that Pearson was “tied to training, but he was working at City Hall with prevention.” 2-ER-204. Regardless of

Absent from the record is any suggestion that Pearson’s accommodation provoked safety concerns. Quite the contrary, Pearson took *greater* precautions than other City Hall employees. He was the “only” City Hall employee who wore “an N-95 mask”—even though other employees in City Hall were presumably also unvaccinated since “[t]he City of Redmond did not have a vaccination mandate for ... City Hall employees.” 4-ER-726.

The undisputed fact that the City had two open positions in the same department where it accommodated another unvaccinated firefighter without incident should have ended the undue-hardship inquiry. Where, as here, “the proposed accommodation has been tried and the postulated hardship did not arise,” an employer stands on “precarious” ground when asserting “hypothetical” hardships. *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979); accord *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) (“A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships.” (citations omitted)).

Pearson’s exact job, however, Sheppard, Norton, and Whitney all confirmed that Pearson worked alongside Fire Prevention officers at City Hall—undercutting the notion that the City could not have accommodated other firefighters inside that same team.

Recognizing the absence of undue-hardship evidence anywhere in the record, the City resorted to filing a new declaration from Chief Sheppard alongside its summary-judgment reply brief. *See* 2-ER-99. There, Sheppard asserted for the first time that Redmond “evaluated whether” Fire Prevention positions “could serve as accommodations,” and determined that they could not because fire marshals must (1) administer “first aid ... if called upon,” (2) “interact with the public,” and (3) serve as backup “traditional firefight[ers]” under the City’s “degradation plan” if regular officers were “lost” due to a severe COVID outbreak. 2-ER-100-01.

Chief Sheppard’s late-breaking assertions are insufficient to generate a genuine dispute of material fact. For starters, this Court’s “sham affidavit” rule prohibits giving any weight to Chief Sheppard’s inappropriate declaration. That rule provides that a “party who has been examined at length on deposition,” cannot “rais[e] an issue of fact simply by submitting an affidavit contradicting his own prior testimony.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (citation omitted). Here, Chief Sheppard testified at his deposition that Mitch Pearson “could be accommodated in ... fire prevention”—“even though he was not vaccinated for COVID.” 2-ER-69-70. That statement

is incompatible with Sheppard’s sweeping new claim that the City determined fire prevention positions could not “serve as accommodations.” 2-ER-100.

Compounding the problem, the person the City designated to speak to its position on undue hardship under Rule 30(b)(6), Whitney, said that he did not “know for sure” whether the City held discussions “about having unvaccinated firefighters do remote work in fire prevention.” 2-ER-191; *see* 2-ER-182 (similar). Having offered a 30(b)(6) witness to testify on undue hardship—and having failed to adequately prepare that witness, *see supra* p. 36—the City should not now be allowed to produce wholly different testimony in a last-minute declaration. *See Yeager*, 693 F.3d at 1080 (“A declaration c[an] be considered a sham if the declarant provides information which he had testified he could not recall” at his deposition.).⁷

Even setting that point aside, the burdens asserted in Chief Sheppard’s affidavit fall far short of an undue hardship. Although the core day-to-day

⁷ This Court reviews a district court’s application of the “sham affidavit rule” for “abuse of discretion.” *Yeager*, 693 F.3d at 1080. Here, the district court failed to address Plaintiffs’ sham-affidavit argument. *See* D. Ct. Dkt. No. 127, at 20-21. That was an abuse of discretion. *See, e.g., Golan v. Saada*, 596 U.S. 666, 679 (2022) (“[A] district court exercising its discretion is still responsible for addressing and responding to nonfrivolous arguments.”); *Rizzo v. Ins. Co. of Pa.*, 632 F. App’x 889, 892 (9th Cir. 2015) (“[the] district court abused its discretion in failing to address [plaintiff’s] argument.”).

responsibilities of Fire Prevention officers do not involve providing first aid or EMS services, 2-ER-182, 249-50, Sheppard asserts that the remote possibility that officers could be called upon to provide those services as backups to regular firefighters meant that any added risk that Plaintiffs might spread COVID while occupying Fire Prevention positions was intolerable, *see* 2-ER-100-01. But firefighters in the Department’s Training Division could *also* be called out to deal with “larger incidents,” 2-ER-183—yet the City evidently deemed those positions suitable as accommodations anyway, 5-ER-929. The same must follow for Fire Prevention.

Regardless, the City’s risk is much too speculative to count as an undue hardship. Employers asserting “safety risk resulting from an accommodation” must show the risk is “significant” or “unjustifiable.” *Lewis-Williams*, 2026 WL 2674526, at *4 (citations omitted). Accordingly, it is insufficient for an employer to assert that “*any* increase in safety risk resulting from an accommodation is an undue hardship.” *Id.*; *accord Smith v. City of Atlantic City*, 138 F.4th 759, 775 (3d Cir. 2025) (“vanishingly small risk” not enough to show undue hardship). All the City offered here was a tenuous chain of improbable events: Frontline firefighters would have to be unavailable, Plaintiffs (rather than other members of the Department) would have to be called up to replace

them, and Plaintiffs' other precautions against COVID infection would have to fail. That is nowhere near concrete enough.

c. Reassignment To Accommodation Positions

The City could have reassigned Plaintiffs to the positions it created to accommodate unvaccinated firefighters—rather than awarding those positions to *vaccinated* firefighters who did not need accommodating. Each of the district court's reasons for concluding otherwise lacks record support.

First, the court observed that Plaintiffs were on medical leave and so could not “demand placement in a position.” 1-ER-29. This argument fails for by-now familiar reasons. To recap: The City itself did not seem to regard Plaintiffs' absence as an obstacle because it repeatedly asked them whether they were interested in the positions *after* they left work. *Supra* pp. 13-16. And in any case, the City had at least one position still available after Plaintiffs returned from leave. *Id.*

Second, the district court cited the insufficient number of positions the City created as a reason why the City could not accommodate Plaintiffs. 1-ER-29. But the record shows that the City could have done more without suffering any undue hardship.

Notably, the City failed to explain why it allowed *vaccinated* firefighters to apply for the accommodation positions. 3-ER-404 (“Q. Okay. And is there is a reason why the City allowed ... vaccinated staff to also apply for the positions it identified could accommodate the unvaccinated. A. I do not know.”). Nor would offering Plaintiffs the positions have disrupted the Fire Department’s collectively bargained seniority-based system for allocating new roles. Had the City merely communicated that the positions were needed to accommodate religious beliefs, some senior officers would have agreed to reserve the positions. 4-ER-728 (Norton email inquiring about “flexibility” in “award[ing] [positions] by seniority” and explaining that he would “gladly” make way for an “unvaccinated person”). “[T]he administrative costs of coordination” are not an undue hardship. *Groff*, 600 U.S. at 473.

Tellingly, too, the City failed to follow through on its own plan to identify additional positions. Jim Whitney explained that the letter setting forth the four available accommodation positions was supposed to be a “continuous document,” such that as the Department “fill[ed] these positions” it would “add additional positions” to the list. 2-ER-222. Certainly, the Union would have supported finding additional positions, given that it “advocat[ed]” throughout negotiations “to make sure [the City] had enough positions for the individuals

that were unvaccinated.” 2-ER-140. Absent from the record, however, is explanation for why following through on the plan to identify additional positions would have presented a burden for the City. To be sure, as the district court noted, “Title VII does not require employers to create unlimited accommodation positions,” 1-ER-29—but it does require employers to “[c]onside[r]” all “options.” *Groff*, 600 U.S. at 473. The City plainly did not.

d. Masking and Testing

The district court devoted the bulk of its opinion to assessing whether the City could have accommodated Plaintiffs in their existing positions with a masking-and-testing mandate. In the court’s view, doing so would have presented an undue hardship because “the possibility of an unvaccinated individual getting others sick” was a “non-speculative risk” that masking and testing would not adequately have guarded against. 1-ER-24.⁸

⁸ In addition to this safety concern, the district court cited the “financial and personnel costs” the City would purportedly incur “from backfilling patient-care positions vacated by unvaccinated firefighters.” 1-ER-26-27. But if anything, that point *supports* Plaintiffs’ accommodation claim. The City would incur the cost of filling Plaintiffs’ positions only if it failed to accommodate them in those roles. In other words, accommodating Plaintiffs in their positions would have *saved* the City “financial and personnel costs”—a saving that helps offset any other costs the City might incur in accommodating Plaintiffs and makes those costs less consequential “in the overall context of [the City’s] business.” *Groff*, 600 U.S. at 468.

In reaching that decision, the district court reasoned that “[t]his case is just like” *Petersen v. Snohomish Regional Fire & Rescue*, 150 F.4th 1211 (9th Cir. 2025)—a decision in which this Court affirmed summary judgment on Title VII claims in favor of a fire department that had refused accommodations for firefighters who objected to vaccines on religious grounds. 1-ER-25. But it should go without saying that “cases presenting different allegations and different records may lead to different conclusions.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 507 (2023) (Jackson, J., concurring). And the district court overlooked important factual differences between this case and *Petersen* that warrant a different outcome here.

Most critically, the *Petersen* plaintiffs “fail[ed] to provide any evidence that their proposed accommodation”—masking and testing—“would have been a reasonable alternative to vaccination.” 150 F.4th at 1219-20. Instead, plaintiffs offered “general assertions” and “anecdotal” testimony that they could “safely perform their job[s]” without providing any supporting “medical evidence.” *Id.* (cleaned up). Here, by contrast, Plaintiffs offered hard facts—including a report from a medical expert and testimony from the City’s own

designated 30(b)(6) witnesses—establishing that the City could have accommodated them through masking-and-testing without suffering an undue hardship. *See infra* pp. 52-63.

The better comparator for this case is *Lewis-Williams*, 2026 WL 2674526, at *4—a Title VII case involving a vaccine mandate for transit workers. Upholding the district court’s decision to deny judgment as a matter of law for the defendant employer on undue hardship, this Court held that the employer “had to show that the alternatives to vaccination would be not only less safe, but less safe by a ‘substantial,’ ‘excessive,’ or ‘unjustifiable’ margin.” *Id.* (quoting *Groff*, 600 U.S. at 468-70). Accordingly, the employer’s reliance on public health guidance identifying safety benefits of the vaccine was not “dispositive” because “safety risks, like any other category of risk, are capable of justification.” *Id.* And the employer failed to adduce any “evidence suggesting that [the plaintiffs] would have been unable or unwilling to wear a mask or take other appropriate measures.” *Id.* at *6.

The record here likewise falls far short of demonstrating undue hardship based on safety risk. The evidence Plaintiffs presented, at the very least, presents a question of material fact unsuited for summary judgment.

Successful past accommodations. The fact that the City accommodated Plaintiffs in their patient-facing roles between mid-September and mid-October 2021, before the Plaintiffs took medical leave, without any indication of additional COVID infections—strongly undercuts any suggestion that the City would have faced an undue hardship in continuing a masking-and-testing accommodation.

After the Governor’s Proclamation required vaccines for healthcare workers, Plaintiffs submitted—and the City approved—requests for religious accommodations. 5-ER-806-40. Those accommodations permitted Plaintiffs to continue working in their patient-facing roles provided they took a COVID test “within three hours of every start of shift” and agreed to “wear an approved face covering.” *E.g.*, 5-ER-808. Although Plaintiffs worked while masking and testing for about a month, there is no evidence of any resultant COVID infections. *See, e.g.*, 4-ER-684-85; 4-ER-717.

In fact, the opposite: the City’s 30(b)(6) witness testified to the absence of any infections. Whitney explained that fire crews did “an exceptional job of executing established best practices to support their safety and taking all precautions to mitigate the spread of COVID-19 within the workforce.” 2-ER-

187-88.⁹ As a result, the City was not “aware” of “any known transmissions of COVID-19 from a firefighter to a patient,” or vice versa. 2-ER-188. Others agreed with Whitney’s account. Scott Carlson recounted that “from the beginning of the pandemic until the vaccine mandate took effect on October 18, 2021, [he] was never aware of any fire personnel contracting COVID from a patient or infecting a patient with COVID.” 4-ER-608. Norton likewise explained that the City’s “measures” “were working” and that he was “not aware of” any infections. 4-ER-727.

The established track record of these precautions *succeeding* is powerful evidence that the City would not have faced undue hardship by permitting Plaintiffs to continue working while masking and testing. *See Brown*, 601 F.2d at 960; *see also Lewis-Williams*, 2026 WL 2674526, at *7 (relying on employee compliance with masking and testing guidelines as part of the undue-hardship analysis); *cf. Petersen*, 150 F.4th at 1218 (noting that plaintiffs often did not comply with masking and testing).

⁹ Although Plaintiffs agreed to take COVID tests as a condition of their initial accommodations, the City did not require other firefighters to test until December 23, 2021—well after the City imposed its vaccine mandate. 2-ER-226.

The City’s reliance on public-health reports indicating “extremely high” levels of COVID in September 2021 when the City’s mandate went into effect does not show that masking and testing had somehow lost all effectiveness. 3-ER-446. In fact, the guidance on which the City relied implicitly acknowledged the effectiveness of those measures by encouraging vaccinated individuals to use “personal protective equipment” and to “tes[t].” 2-ER-86. The guidance, too, affirmatively recommended that the City “notify employees that they may make requests for a reasonable accommodation.” 2-ER-86.

In any case, reliance on public-health guidelines is not “dispositive” of undue hardship, *Lewis-Williams*, 2026 WL 2674526, at *4—especially where, as here, an employer exhibited selective reliance, *see id.* at *10 n.1 (Nelson, J., concurring) (failing to “follow public health guidance consistently” weakens reliance on that guidance in showing undue hardship); 3-ER-361 (observing that the City did not follow Dr. Rea’s recommendation for “booster vaccination[s]”).

The City relaxed other COVID measures. When the City terminated six Plaintiffs in April and May 2022,¹⁰ the City had relaxed a slew of other

¹⁰ Davis retired under duress on January 15, 2022. 4-ER-720. The City terminated Teterin on November 2, 2021. 5-ER-919.

COVID measures. That the City felt able to justify other policy changes that did not maximally prioritize safety shows that a masking-and-testing accommodation likewise would have been “capable of justification.” *Lewis-Williams*, 2026 WL 2674526, at *4. Consider the measures the City relaxed.

- In February 2022, the City required remote employees to return to work unless they had a medical exemption. 2-ER-44-45. The City refused to exempt “[v]accinated employees [who were] concerned about working around unvaccinated employees.” 2-ER-44.
- On March 1, 2022, the City removed “COVID-19 vaccine verification requirements ... for visitors in its recreational facilities and community centers.” 2-ER-46.
- On March 12, 2022, after Governor Inslee relaxed state-wide mask mandates, the City followed suit, permitting “non-uniform vaccinated and unvaccinated employees ... to work indoors without a mask.” 2-ER-42. The City also removed vaccination, masking, and testing requirements for members of the public visiting City facilities—including senior-center programs, which catered to a vulnerable population. 2-ER-48.
- On March 15, 2022, the Fire Department relaxed COVID precautions for firefighters because “[d]aily COVID positivity rates throughout King

County [had] continue[d] to decline.” 2-ER-226. The Department stopped testing all firefighters at the start of each shift and instead made “testing ... available for individuals who are experiencing symptoms.” 2-ER-226. The Department also “no longer required” “[m]asking around the stations, while riding in apparatus [i.e., firetrucks and ambulances], in city buildings, or in public locations.” 2-ER-226; *see* 2-ER-203 (acknowledging that the City relaxed these measures because “the Omicron surge was declining”).

The district court found that the City’s own contemporaneous decisions to relax COVID precautions did not create a genuine dispute of material fact on undue hardship for four reasons. None persuades. The court first asserted that “Governor Inslee’s Proclamation” requiring vaccines “remained in effect through the termination dates.” 1-ER-30. But, if anything, that *supports* Plaintiffs’ claims because the Proclamation *expressly permitted* religious accommodations. 5-ER-798-99.

No more convincing is the court’s reliance on the fact that Chief Shepard “considered” changes in COVID rates between October 2021, when the mandate went into effect, and spring 2022, when the City terminated Plaintiffs. 1-ER-30; *see, e.g.*, 5-ER-917 (Robillard termination letter). That the City

“considered” the data does not speak to whether that data *demonstrates* undue hardship. And the record strongly suggests that the data does not, given the City’s March 2022 acknowledgment that “COVID positivity rates throughout King County [had] continue[d] to decline.” 2-ER-226.

Likewise flawed is the court’s suggestion that “relaxed protocols for non-healthcare employees and the public” do not establish that the City could have relaxed measures for “patient facing firefighters.” 1-ER-30. After all, the City *did relax* protocols for firefighters on March 15. 2-ER-226.

Finally, the court missed the mark by faulting Plaintiffs for seeking to judge the City’s decisionmaking with the benefit of “hindsight.” 1-ER-30. True, a court cannot “judge [employers] with the clarity of hindsight” based on new data or information. *Petersen*, 150 F.4th at 1222. But it does not require hindsight to identify inconsistencies in the decisions the City made in the spring of 2022.

Expert testimony. Unlike the plaintiffs in *Petersen*, who left “unrebutted” testimony from the fire department’s expert, 150 F.4th at 1218, Plaintiffs in this case produced an expert report of their own.

Plaintiffs’ expert, Dr. Mina, is a Harvard trained vaccine researcher who “advised ... leadership within the White House” on COVID policy during both

President Trump and President Biden’s administrations. 3-ER-449-50. In a 31-page report replete with dozens of citations to academic literature, Dr. Mina explained at length that “[n]on-pharmaceutical interventions, including daily rapid antigen testing and consistent use of properly fitted N95 respirators, would have offered superior or comparable mitigation of SARS-CoV-2 transmission during the relevant period” when compared to vaccines. 3-ER-453.

Although “[w]eighing the credibility of conflicting expert witness testimony is the province of the jury,” *Wyer Summit P’ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir. 2000), the district court credited the City’s expert, Dr. Lynch, and held that Dr. Mina’s conflicting report “fail[ed] to create a triable issue.” 1-ER-27-28. But each of the court’s two stated reasons for rejecting Dr. Mina’s testimony is deeply flawed.

First, after recognizing Dr. Mina’s testimony that “non-pharmaceutical interventions could provide superior protection” to vaccines, the court reasoned that Dr. Mina had failed to “rebut Dr. Lynch’s central point [that] vaccination combined with other mitigations is superior to those mitigations alone.” 1-ER-28. That explanation badly misunderstands both the law and the facts.

On the law: The district court failed to apply the undue-hardship test correctly. To reiterate: For undue hardship, the question is not “whether a risk exists, but whether it is significant” or “unjustifiable.” *See Lewis-Williams*, 2026 WL 2674526, at *4, *6-7 (citation omitted). And as to that question, Dr. Mina provided relevant testimony. If the jury credited Dr. Mina’s view that by August 2021 “COVID-19 vaccines no longer conferred meaningful reduction in either acquisition of infection or onward transmission” for new COVID variants, 3-ER-464, the jury could reasonably conclude that any safety benefit of vaccination was so small that unvaccinated firefighters did not pose an “unjustifiable” or “excessive” risk if they masked and tested.

On the facts: Even if, as the district court posited, masking and testing plus vaccination is in some sense “superior” to masking and testing “alone,” the undisputed facts show that the City *did not require masking and testing* when it terminated six Plaintiffs in April and May 2022. As discussed, on March 15, 2022, the Fire Department stopped daily testing and “no longer required” “[m]asking.” 2-ER-226. The City cannot win summary judgment by comparing Plaintiffs’ requested accommodation (masking and testing) to precautions (masking and testing alongside vaccination) the City did not require when it terminated them. For the same reason, the City’s expert failed to

generate a factual dispute. As the district court put it, Dr. Lynch’s “central point” was the irrelevant proposition that “vaccination ... combined with other mitigations is superior to those mitigations alone.” 1-ER-28; *see* 4-ER-757 (Lynch Decl.).

Second, the district court bizarrely faulted Dr. Mina for relying on “studies published in late 2021 and 2022,” 1-ER-28—*i.e.*, the timeframe most relevant to the undue hardship inquiry. The City initially refused to accommodate Plaintiffs in September 2021, then terminated them between November 2021 and May 2022. The state of the science on vaccination during that period thus speaks directly to the “costs faced” by the City “at the time” it made the employment decisions that Plaintiffs challenge in this case. *See Petersen*, 150 F.4th at 1222. The district court’s decision to ignore studies published after “the City made its accommodation decisions” in September 2021, but before it terminated Plaintiffs, lacks any basis in Title VII. Indeed, the statute itself indicates that the time of “discharge” is the relevant moment at which a court must measure undue hardship. *See* 42 U.S.C. § 2000e-2(a)(1); *see Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918, 932 (W.D. Tenn. 2010) (Courts must consider even “eleventh hour” changes in “circumstance[s].”).

The City accommodated other similarly situated employees. The City did not require its police officers—who, like firefighters, rode in ambulances and provided life-saving care—to receive the COVID vaccine. 3-ER-297, 304, 325-26. Indeed, the City did not so much as inquire whether its police officers were vaccinated, yet allowed them to administer first aid and visit nursing homes, hospitals, and schools, while masking and testing. 3-ER-292-93, 310-12.

That the City did not require vaccination for police officers, yet saw no explosion of COVID transmissions, strongly suggests that accommodating Plaintiffs would not have produced the decline in public safety that the City feared. Underscoring the import of that evidence, the same district judge who decided this case recently recognized that police “[d]eputies arguably face even more intimate public contact” than firefighters “when conducting arrests, executing search warrants, and interviewing victims in confined spaces.” *Eshom v. King County*, 812 F. Supp. 3d 1190, 1203-04 (W.D. Wash. 2025).

The district court nevertheless dismissed evidence about the City’s treatment of police officers as irrelevant because the decisions of “other employers” do not bear on the “employer-specific” undue-hardship analysis. 1-ER-29. But police officers are *City* employees—not employees of some

“other” employer not before the Court. And evidence about the City’s *own* experience with its *own* employees masking and testing is obviously probative of whether it could have allowed Plaintiffs to do the same.¹¹

To be sure, Plaintiffs *also* supplied evidence that neighboring fire stations successfully accommodated similarly situated employees. For instance, Plaintiffs showed that Snohomish County Fire District 22 gave “75 percent of [its] membership” religious accommodations without suffering “undue hardship,” 2-ER-277-79, and that the City of Tacoma Fire Department successfully accommodated firefighters despite also being subject to Governor Inslee’s Proclamation, 2-ER-270. Contrary to the district court’s suggestion, 1-ER-29, the consequences faced by those other employers *do* bear on the undue-hardship analysis. Yes, the “reasonableness of others’ decisions is not before [the court].” *Petersen*, 150 F.4th at 1222. But as the Supreme Court has recognized, when “many [others] offer an accommodation, [the defendant] must, at

¹¹ The district court’s retaliation analysis finally appeared to appreciate that City police officers are City employees. 1-ER-36. But even then, the court missed the mark, suggesting that the City’s treatment of its police officers was irrelevant because Governor Inslee’s Proclamation did not apply to them. 1-ER-36. Regardless of *why* the officers were unvaccinated, it is significant that they administered first aid and visited hospitals without provoking an explosion of COVID cases.

a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (discussing the Religious Land Use and Institutionalized Persons Act).

Where, as here, an employer’s theory of undue hardship rests on a perceived risk—not a realized cost—it is highly relevant that the risk did not materialize for similar employers who offered accommodations. Although evidence about other employers did not inform the undue hardship analysis on the record in *Petersen*, the Court did not purport to adopt an iron-clad rule precluding such evidence in every case. 150 F.4th at 1222. Nor would a blanket rule find any support in Title VII’s text. *See M & K Emp. Sols., LLC v. Trs. of IAM Nat’l Pension Fund*, 608 U.S. 264, 274 (2026) (“We generally do not read limitations into statutes that do not appear in their text”).

C. At Minimum, the City Should Have Accommodated Robillard

Even if the Court concludes that the City could not have accommodated other Plaintiffs without suffering undue hardship, it should find that Robillard is nevertheless entitled to summary judgment.

Because Robillard served as a Training Lieutenant—a non-patient-facing position that did not require vaccination, 3-ER-534, the City could have accommodated him simply by permitting him to remain in his job. Doing so

would have occasioned no undue hardship, as evidenced by the undisputed fact that the City itself offered Robillard's position to *other unvaccinated firefighters* as a possible accommodation almost immediately after Robillard went on medical leave. 5-ER-929.

The district court nevertheless granted summary judgment *for the City* on Robillard's claim, reasoning that the City had no obligation to hold Robillard's position open for him while he was on leave. 1-ER-32-34. That contention fails for two reasons. For one, Robillard's leave does not explain why the City could not have immediately accommodated him on September 30, 2021—weeks before he went on leave—when the Executive Order terminating existing accommodations went into effect. *See* 3-ER-532-33. Yet on October 11 the City instead told Robillard that “there were no jobs in the Fire Department for any unvaccinated employees.” 3-ER-532.

Even setting that point aside, the City itself asked Robillard whether he was interested in his own job *after* he went on leave, 3-ER-534, suggesting that the City itself did not view Robillard's absence as an insuperable obstacle. Robillard then expressed interest in his job on three separate occasions, yet

the City would not give it back to him. 3-ER-534-37. In fact, Robillard’s position was *still* vacant when he returned from leave in March 2022—but Chief Sheppard erroneously told him the job was not available. 3-ER-536-37.

Confirming that Robillard is entitled to summary judgment, the district court admitted that the City’s failure to hold Robillard’s position open may have amounted to unlawful “FMLA interference.” 1-ER-34; *see* 29 U.S.C. § 2614(a) (protecting employees’ right to be restored to their original positions after FMLA leave). An employer may not show undue hardship under Title VII by pointing to its own unlawful conduct.

II. Disputes of Material Fact Prevent Summary Judgment on Plaintiffs’ Retaliation Claims

To establish Title VII retaliation, Plaintiffs must show: (1) they engaged in a protected activity under Title VII; (2) the City subjected them to an adverse employment action; and (3) there was a causal link between the protected activity and the City’s action. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000). The undisputed facts

demonstrate that Plaintiffs have satisfied the first two elements, and disputes of material facts remain on causation—prohibiting summary judgment.¹²

To begin, the district court did not question that Plaintiffs had engaged in a protected activity by requesting accommodations. 1-ER-34. Nor could it. EEOC guidance has long provided that “requesting religious accommodation is protected activity” under Title VII. U.S. EEOC, Compliance Manual Section 12: Religious Discrimination § 12-V.B (2008); *see also Chavis v. Wal-Mart Stores, Inc.*, 265 F. Supp. 3d 391, 407 n.6 (S.D.N.Y. 2017) (collecting cases holding that “a request for a religious accommodation itself constitutes protected activity”); *McNeill v. Tyson Fresh Meats, Inc.*, 2023 WL 8532408, at *5 & n.4 (N.D. Tex. Dec. 8, 2023) (similar).

¹² This Court sometimes applies the so-called *McDonnell Douglas* burden-shifting framework to retaliation claims, *see, e.g., Cross v. Cent. Contra Costa Transit Auth.*, 2026 WL 92280, at *2 (9th Cir. Jan. 13, 2026), but “nothing compels the parties to invoke” that framework, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (citation omitted). Neither the parties nor the district court mentioned burden shifting below, instead analyzing whether any direct or circumstantial evidence established retaliation. *See* 1-ER-34. This Court should adopt the same mode of analysis on appeal. *See Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 326 (2025) (Thomas, J., concurring) (“Litigants and lower courts are free to proceed without the *McDonnell Douglas* framework.”).

The court likewise did not question that Plaintiffs had suffered adverse employment actions. The City revoked Plaintiffs' accommodations (itself an adverse action), then terminated seven Plaintiffs and forced the eighth, Sharon Davis, into retirement by making her choose between her religious beliefs and her job. *See supra* pp. 32-33.

As to the third element—causation—however, the district court erroneously granted summary judgment for the City because, in the court's view, "the but-for cause of Plaintiffs' termination was ... Plaintiffs' refusal to comply" with a vaccine mandate that the City "neutrally imposed on all non-vaccinated employees." 1-ER-35 (citation omitted).

But the court's overly simplistic analysis overlooks that "[o]ften, events have multiple but-for causes." *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020). "When it comes to Title VII, ... a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision." *Id.*; *Koch v. UNUM Grp.*, 2025 WL 3124478, at *2 (9th Cir. Nov. 7, 2025) (reversing where the district court insisted that a Title VII plaintiff establish that "his protected activity was ... the sole but-for caus[e] of his termination."). Here, Plaintiffs offered ample evidence creating a triable issue over

whether the City retaliated against them *because* they requested religious accommodations.

Most notably, the City did not take a hardline stance on vaccination until *immediately after* Plaintiffs requested religious accommodations. “Causation sufficient to establish the third element of the prima facie case may be inferred from ... the proximity in time between the protected action and the allegedly retaliatory employment decision.” *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Here, although the Governor’s Proclamation expressly permitted religious accommodations—and Plaintiffs initially requested and received them—the City abruptly reversed course. In doing so, the City’s Executive Order *expressly cited* Plaintiffs’ accommodation requests as a reason for the change. 3-ER-446. While the City was apparently happy to offer accommodations in the abstract, it rapidly changed its tune once faced with real requests that it perceived as problematic. That timing supports the inference that the City retaliated against Plaintiffs for filing their initial accommodation requests. *See Strother v. S. Cal. Permanente Med. Grp.*, 79 F.3d 859, 870 (9th Cir. 1996) (holding that “temporal proximity” was sufficient to let retaliation go to the jury).

Having revoked Plaintiffs' initial accommodations, the City never made any serious effort to offer alternatives—instead forcing Plaintiffs to choose between the job and their jobs. *See supra* pp. 28-33. While the district court brushed aside the City's lackluster efforts as “imperfections in an accommodation process,” 1-ER-36, those “imperfections” *are* evidence of retaliatory animus. *See Yartzoff*, 809 F.2d at 1376 (inferring causation from “circumstantial evidence”). Particularly glaring is Chief Sheppard's refusal to offer any Plaintiff an undisputedly open accommodation position when they returned from medical leave. Six Plaintiffs informed the City that they wanted the job. *See supra* pp. 13-16. The City's HR Department confirmed that it was available. 3-ER-406-09. Yet Chief Sheppard inexplicably told Plaintiffs that no such open position existed, even as he awarded the job to a vaccinated firefighter. 3-ER-353-57.

Statements from the City's decisionmakers only serve to confirm retaliation—yet the district court did not address them. For instance, Laird told Plaintiff Peterson that the City needed to show that there was a “consequence for being unvaccinated,” “that the unvaccinated were uncomfortable” and that they were “treated differently” from other employees. 4-ER-569-70. Kelsey Allen-Wesley, an HR Analyst, likewise recalled that Laird and Sheppard

“seemed very frustrated with the unvaccinated firefighters” and were “upset that the unvaccinated firefighters were pushing back and would not just get vaccinated.” 3-ER-481. Indeed, it “appeared to [Allen-Wesley] that” Laird and Sheppard “were hesitant to bring the unvaccinated firefighters back to work” and that Sheppard was “annoyed with [them].” 3-ER-481. Sheppard himself seemed exasperated during his deposition, suggesting that Plaintiffs “chose to terminate themselves” by refusing the vaccine. 3-ER-419.¹³

Taking these facts in the light most favorable to Plaintiffs, a reasonable jury could find that the City terminated Plaintiffs *because* they requested accommodations—a protected activity under Title VII. This Court should remand for trial.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with

¹³ The district court suggested that this Court had “rejected [Plaintiffs’] theory” of retaliation in *Leake v. Raytheon Technologies Corp.*, 2024 WL 1854287, at *2 (9th Cir. Apr. 29, 2024); 1-ER-35. That is false. In *Raytheon*, the plaintiffs’ own allegations demonstrated that the “but-for cause of [their] termination was not their religious objections to the vaccine, but rather [their] refusal to comply with the conditions that Raytheon neutrally imposed on all non-vaccinated employees.” 2024 WL 1854287, at *2 (citation omitted). Here, by contrast, Plaintiffs have presented extensive evidence demonstrating that the City retaliated against them *because* they engaged in a protected activity—*i.e.*, making religious accommodation requests.

instructions for the district court to (1) grant Plaintiffs' motion for summary judgment on the failure-to-accommodate claim; and (2) deny the City's motion for summary judgment on the retaliation claim.

Respectfully submitted,

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DATED: OCTOBER 15, 2026

STATEMENT OF RELATED CASES

Appellants are aware of one related case: *Carlson v. Birney*, No. 26-3345. On June 3, 2026, this Court coordinated the briefing schedule in this case with *Birney* and calendared both cases for consideration by the same panel. *See* Dkt. No. 10.

/s/ Edward Pickup
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DATED: OCTOBER 15, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Cir. R. 32-1(a) because this brief contains 13,940 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 and Century ExpdBT 14-point font.

/s/ *Edward Pickup*

EDWARD L. PICKUP

DATED: OCTOBER 15, 2026

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Edward Pickup*

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DATED: OCTOBER 15, 2026