25 S.Ct. 358
Supreme Court of the United States.

HENNING JACOBSON, *Plff. in Err.*,
v.
COMMONWEALTH OF MASSACHUSETTS.

No. 70.
|
Argued December 6, 1904.
|
Decided February 20, 1905.

Synopsis

IN ERROR to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered on a verdict of guilty in a prosecution under the compulsory **vaccination** law of that State, after defendant's exceptions were overruled by the Massachusetts Supreme Judicial Court. *Affirmed*.

See same case below, 183 Mass. 242, 66 N. E. 719.

The facts are stated in the opinion.

West Headnotes (3)

[1] **Federal Courts** State constitutions, statutes, regulations, and ordinances

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, are conclusive on the federal Supreme Court in determining, on writ of error to the state court, the question of the validity of the statute under the federal Constitution.

46 Cases that cite this headnote

[2] **Health** **Vaccination** and immunization

Rev.Laws, c. 75, § 137, authorizes the board of health of a city or town, if, in its discretion, it is necessary for the public health, to require the **vaccination** and revaccination of all of the inhabitants thereof, and requires them to provide means of free **vaccination**, and declares that whoever, being over 21 years of age, and not under guardianship, refuses or neglects to comply with such requirement, shall forfeit $5. Held, that such act was a valid exercise of police power as defined by M.G.L.A. Const. c. 1, § 1, art. 4, providing that the general court shall have power to establish all manner of wholesome orders, laws, statutes, etc., not repugnant to the Constitution, which they shall judge to be for the welfare of the commonwealth.

445 Cases that cite this headnote

[3] **Health** Contagious and Infectious Diseases

A state Legislature, in enacting a statute purporting to be for the protection of local communities against the spread of smallpox, is entitled to choose between the theory of those of the medical profession who think **vaccination** worthless for this purpose, and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with common belief and is maintained by high medical authority, and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury.

503 Cases that cite this headnote

Attorneys and Law Firms

****358** *Messrs.***George Fred Williams** and *James A. Halloran* for plaintiff in error.

*Messrs.***Frederick H. Nash** and *Herbert Parker* for defendant in error.

Opinion

Mr. Justice **Harlan** delivered the opinion of the court:

***12** This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to **vaccination**.

The Revised Laws of that commonwealth, chap. 75, § 137, provide that 'the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the **vaccination** and revaccination of all the inhabitants thereof, and shall provide them with the means of free **vaccination**. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5.'

An exception is made in favor of 'children who present a certificate, signed by a ****359** registered physician, that they are unfit subjects for **vaccination**.' § 139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: 'Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by **vaccination** should be **vaccinated**; and whereas, in the opinion of the board, the public health and safety require the **vaccination** or revaccination of all the inhabitants of Cambridge; be it ordered, that ***13** all the inhabitants habitants of the city who have not been successfully **vaccinated** since March 1st, 1897, be **vaccinated** or revaccinated.'

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the **vaccination** of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the **vaccination** and revaccination of all the inhabitants thereof who had not been successfully **vaccinated** since the 1st day of March, 1897, and provided them with the means of free **vaccination**; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be **vaccinated**, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to **vaccinate** the defendant without expense to him; and that the offer was declined, and defendant refused to be **vaccinated**.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That § 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United ***14** States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of defendant's prayers for instructions was rejected, and he duly excepted. The defendant requested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed structed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. Santa Fé Pacific Railroad Company, the exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of $5. And the court ordered that he stand committed until the fine was paid.

***22** We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, chap. 75) is in derogation of rights secured

by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power ****360** to be properly implied therefrom. 1 Story, Const. § 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550, 'the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words.' We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the ***23** scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: 'Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what **vaccination** consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Com.* v. *Connolly*, 163 Mass. 539, 40 N. E. 862; *Com.* v. *Has*, 122 Mass. 40; *Reynolds* v. *United States*, 98 U. S. 145, 25 L. ed. 244; *Reg.* v. *Downes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of **vaccination**. The defendant 'offered to prove and show be competent evidence' these socalled facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com.* v. *Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession ***24** have regarded **vaccination**, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.' *Com.* v. *Jacobson*, 183 Mass. 242, 66 N. E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,—and such is our duty. *Leffingwell* v. *Warren*, 2 Black, 599, 603, 17 L. ed. 261. 262; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466,

45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423,—we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under the guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this statute is to be ***25** referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained frained ****361** from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 530; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Lawson* v. *Stecle*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot* v. *Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as ***26** interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to **vaccination**; that a compulsory **vaccination** law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to **vaccination**, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 471, 24 L. ed. 527, 530; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 628, 629, 42 L. ed. 878–883, 18 Sup. Ct. Rep. 488; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625. In *Crowley* v. *Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty ***27** itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' In the Constitution of Massachusetts adopted in 1780 it was laid

down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.' The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Com.* v. *Alger*, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature ****362** of Massachusetts required the inhabitants of a city or town to be **vaccinated** only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was ***28** the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach, any value whatever to the knowledge which, it is safe to affirm, in common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. §§ 319–325, and authorities in notes; Freurid, Police Power, §§ 63 *et seq.* In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 471–473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and, under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,—if nothing more could be reasonably ***29** affirmed of the statute in question,—the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be

compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness **363 to submit to reasonable regulations established by the constituted authorities, under the *30 sanction of the state, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the *31 evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota* v. *Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin* v. *Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. † And the principle of vaccination **364 as a means to *32 prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. *Blue* v. *Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *33 *Morris* v. *Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State* v. *Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Abeel* v. *Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell* v. *Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Hazen* v. *Strong*, 2 Vt. 427; *Duffield* v. *Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742.

*34 The latest case upon the subject of which we are aware is *Viemester* v. *White*, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vacinated. One contention was that the statute and the regulation adopted in exercise **365 of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying,

among other things: 'Smallpox is known of all to be a dangerous and contagious disease. If **vaccination** strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been **vaccinated**. The appellant claims that **vaccination** does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that **vaccination** is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is ***35** generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, **vaccination**; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.. . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that **vaccination** is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' 179 N. Y. 235, 72 N. E. 97.

Since, then, **vaccination**, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to ***36** claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in **vaccination** as a means of preventing the spread of smallpox, or who thought that **vaccination**, without benefiting the public, put in peril the health of the person **vaccinated**. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that **vaccination** 'quite often' caused serious and permanent injury to the health of the person **vaccinated**; that the operation 'occasionally' resulted in death; that it was 'impossible' to tell 'in any particular case' what the results of **vaccination** would be, or whether it would injure the health or result in death; that 'quite often' one's blood is in a certain condition of impurity when it is not prudent or safe to **vaccinate** him; that there is no practical test by which to determine 'with any degree of certainty' whether one's blood is in such condition of impurity as to render **vaccination** necessarily unsafe or dangerous; that **vaccine** matter is 'quite often' impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test; that the defendant refused to submit to **vaccination** for the reason that he had, 'when a child,' been caused great and extreme suffering for a long period by a disease produced by **vaccination**; and that he had witnessed a similar result of **vaccination**, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of **vaccination**; and it is suggested—and we will not say without reason—that such is the case with some adults. But the defendant did not offer to prove that, by ****366** reason of his then condition, he was in fact not a fit subject of **vaccination** ***37** at the time he was informed of the requirement of the regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of **vaccination**, and

that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because 'quite often,' or 'occasionally,' injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, ***38** then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health ***39** or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable ****367** certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

All Citations

197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Am.Ann.Cas. 765

Footnotes

† ‘State-supported facilities for **vaccination** began in England in 1808 with the National **Vaccine** Establishment. In 1840 **vaccination** fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vacinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint **vaccination** officers. The guardians also appoint a public **vaccinator**, who must be duly qualified to practise medicine, and whose duty it is to **vaccinate** (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the **vaccination** officer the fact of **vaccination** or of insusceptibility. . . . **Vaccination** was made compulsory in Bavarla in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Württemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium. Norway, Austria, Turkey. . . . **Vaccination** has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for **vaccination**. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to **vaccination** and revaccination in the several German states were consolidated in an imperial statute of 1874.’ 24 Encyclopaedia Britannica (1894), ***Vaccination***.

‘In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of **vaccination**, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870–71. At this time in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were **vaccinated**, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those **vaccinated** 953, or 1.77 per cent, became affected with smallpox, and of the uninocculated 2,643, or 46.3 per cent, had the disease. In the **vaccinated** the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated, as in the **vaccinated**. Statistics derived from the civil population are in general not so instructive as those derived from armies, where **vaccination** is usually more carefully performed, and where statistics can be more accurately collected. During the Franco-German war (1870–71) there was in France a widespread epidemic of smallpox,

but the German army lost during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where **vaccination** was not carefully carried out, the number of deaths from smallpox was 23,400.' , Johnson's Universal Cyclopaedia (1897), ***Vaccination***.

'The degree of protection afforded by **vaccination** thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which **vaccination** is carried out In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where **vaccination** was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where **vaccination** was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been **vaccinated** were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly **vaccinated** many years previously. 16 American Cyclopedia, ***Vaccination*** (1883).

'Dr Buchanan, the medical officer of the London Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons **vaccinated** was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among **vaccinated** children under five years of age, 42 1/2 per million; whereas among unvaccinated children of the same age it was 5,950 per million.' Hardway, Essentials of **Vaccination** (1882). The same author reports that, among other conclusions reached by the Académie de Médicine of France, was one that, 'without **vaccination**, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox.' *Ibid*.

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. 'Without **vaccination**, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. **Vaccination** is always an inoffensive operation when practised with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that **vaccination** should be rendered compulsory.' Edwards, ***Vaccination*** (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of **vaccination** in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: 'We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,—of a milder and less severe type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of **vaccination**.'

KeyCite Yellow Flag - Negative Treatment
Distinguished by Brnovich v. Biden, D.Ariz., January 27, 2022

142 S.Ct. 647
Supreme Court of the United States.

Joseph R. BIDEN, Jr., President of the United States, et al., Applicants
v.
MISSOURI, et al.
Xavier Becerra, Secretary of Health and Human Services, et al., Applicants
v.
Louisiana, et al.

Nos. 21A240 and 21A241
|
January 13, 2022

Synopsis

Background: In first action, several States brought action against President and other federal defendants, challenging Centers for Medicare and Medicaid Services' (CMS) interim final rule imposing COVID-19 **vaccination** mandate applicable to staff of healthcare facilities participating in Medicare and Medicaid. The United States District Court for the Eastern District of Missouri, Matthew T. Schelp, J., 2021 WL 5564501, granted States' motion for preliminary injunction, and denied, 2021 WL 5631736, defendants' motion for stay pending appeal. In second action, several States brought action against the Secretary of Health and Human Services and other federal defendants challenging same CMS interim final rule. The United States District Court for the Western District of Louisiana, Terry A. Doughty, J., 2021 WL 5609846, granted nationwide preliminary injunction, and denied defendants' motion for stay pending appeal. The United States Court of Appeals for the Fifth Circuit, 20 F.4th 260, granted in part and denied in part defendants' motion for stay pending appeal. In both cases, the federal government filed applications to stay preliminary injunctions.

Holdings: The Supreme Court held that:

[1] Secretary of Health and Human Services did not exceed his statutory authority in issuing rule;

[2] rule was not arbitrary and capricious;

[3] Secretary had requisite good cause to forgo notice-and-comment procedures;

[4] Secretary was not required to consult with appropriate State agencies on participation conditions before issuing rule; and

[5] rule did not violate statutory directive that federal officials may not exercise any supervision or control over manner in which medical services are provided or over selection or tenure of any officer or employee of any participating facility.

Applications granted.

Justice Thomas filed dissenting opinion, in which Justices Alito, Gorsuch, and Barrett joined.

Justice Alito filed dissenting opinion, in which Justices Thomas, Gorsuch, and Barrett joined.

Procedural Posture(s): Motion for Stay.

West Headnotes (7)

[1] **Health** **Vaccination** and immunization
Health Providers
Health Providers

Secretary of Health and Human Services did not exceed his statutory authority in issuing interim final rule that amended conditions of participation in Medicare and Medicaid to add requirement that participating healthcare facilities ensure that their staff were **vaccinated** against COVID–19; Congress authorized Secretary to impose conditions that Secretary found necessary in interest of health and safety of individuals who were furnished services, COVID-19 was highly contagious, dangerous, and deadly disease, especially for Medicare and Medicaid patients, Secretary determined that **vaccine** mandate would substantially reduce likelihood that healthcare workers would contract virus and transmit it to their patients, and imposing

conditions that related to worker qualifications was not new. Social Security Act §§ 1819, 1832, 1861, 1905, 1919, 42 U.S.C.A. §§ 1395i-3(d)(4)(B), 1395k(a)(2)(F)(i), 1395x(e)(9), 1395x(cc)(2)(J), 1396d(l)(1), 1396d(o), 1396r(d)(4)(B); 42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b).

3 Cases that cite this headnote

[2] **Health** Vaccination and immunization
Health Providers
Health Providers

Interim final rule that amended conditions of participation in Medicare and Medicaid to add requirement that participating healthcare facilities ensure that their staff were **vaccinated** against COVID–19 was not arbitrary and capricious; rulemaking record demonstrated that Secretary of Health and Human Services examined relevant data and articulated satisfactory explanation for his decision to impose **vaccine** mandate instead of testing mandate, require **vaccination** of employees with immunity from prior COVID-19 illness, and depart from agency's prior approach of merely encouraging **vaccination**, and did not fail to consider that rule might cause staffing shortages, including in rural areas. 42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b).

1 Cases that cite this headnote

[3] **Administrative Law and Procedure** Review for arbitrary, capricious, unreasonable, or illegal actions in general

The role of the courts in reviewing arbitrary and capricious challenges to administrative decisions is to simply ensure that the agency has acted within a zone of reasonableness.

[4] **Health** Vaccination and immunization
Health Providers
Health Providers

Secretary of Health and Human Services had requisite good cause to forgo notice-and-comment procedures in issuing interim final rule that amended conditions of participation in Medicare and Medicaid to add requirement that participating healthcare facilities ensure that their staff were **vaccinated** against COVID–19; Secretary found that accelerated promulgation of interim final rule in advance of winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths, and the two months the agency took to prepare 73-page rule did not constitute a delay that was inconsistent with the Secretary's finding of good cause. 5 U.S.C.A. § 553(b)(B); 42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b).

1 Cases that cite this headnote

[5] **Health** Vaccination and immunization
Health Providers
Health Providers

Secretary of Health and Human Services was not required to consult with appropriate State agencies with respect to developing conditions for participation by healthcare facilities in Medicare and Medicaid before issuing interim final rule that amended conditions of participation in Medicare and Medicaid to add requirement that participating healthcare facilities ensure that their staff were **vaccinated** against COVID–19; Secretary properly invoked good cause exception to notice-and-comment procedures, such that consultation with appropriate State agencies during the deferred notice-and-comment period was permissible, not mandatory. 5 U.S.C.A. § 553(b)(B); Social Security Act § 1863, 42 U.S.C.A. § 1395z; 42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b).

2 Cases that cite this headnote

[6] **Health** **Vaccination** and immunization
Health Providers
Health Providers

Interim final rule that amended conditions of participation in Medicare and Medicaid to add requirement that participating healthcare facilities ensure that their staff were **vaccinated** against COVID–19 did not violate statutory directive that federal officials may not exercise any supervision or control over manner in which medical services are provided or over selection or tenure of any officer or employee of any participating facility; reading requirement in manner that would result in violation by interim rule would render nearly every existing condition of participation unlawful. Social Security Act § 1801, 42 U.S.C.A. § 1395; 42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b).

[7] **Health** Rules and Regulations in General
Health Rules and Regulations in General

The requirement that the Secretary of Health and Human Services prepare a regulatory impact analysis discussing a Medicare or Medicaid rule's effect on small rural hospitals applies only where the Secretary proceeds on the basis of a notice of proposed rulemaking followed by a final version of the rule, not when he acts through an interim final rule. Social Security Act § 1102, 42 U.S.C.A. §§ 1302(b)(1), 1302(b)(2).

West Codenotes

Negative Treatment Reconsidered

42 C.F.R. §§ 416.51(c), 418.60(d), 441.151(c), 460.74(d), 482.42(g), 483.80(d)(3)(v), (i), 483.430(f), 483.460, 484.70(d), 485.58, 485.70(n), 485.640(f), 485.725(f), 485.904(c), 486.525(c), 491.8(d), 494.30(b)

***650** ON APPLICATIONS FOR STAYS

Opinion

Per Curiam.

The Secretary of Health and Human Services administers the Medicare and Medicaid programs, which provide health insurance for millions of elderly, disabled, and low-income Americans. In November 2021, the Secretary announced that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff—unless exempt for medical or religious reasons—are **vaccinated** against COVID–19. 86 Fed. Reg. 61555 (2021). Two District Courts enjoined enforcement of the rule, and the Government

now asks us to stay those injunctions. Agreeing that it is entitled to such relief, we grant the applications.

I

A

The Medicare program provides health insurance to individuals 65 and older, as well as those with specified disabilities. The Medicaid program does the same for those with low incomes. Both Medicare and Medicaid are administered by the Secretary of Health and Human Services, who has general statutory authority to promulgate regulations "as may be necessary to the efficient administration of the functions with which [he] is charged." 42 U. S. C. § 1302(a).

One such function—perhaps the most basic, given the Department's core mission—is to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety. Such providers include hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and more. To that end, Congress authorized the Secretary to promulgate, as a condition of a facility's participation in the programs, such "requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution." 42 U. S. C. § 1395x(e)(9) (hospitals); see, *e.g.*, §§ 1395x(cc)(2)(J) (outpatient rehabilitation facilities), 1395i–3(d)(4)(B) (skilled nursing facilities), 1395k(a)(2)(F)(i) (ambulatory surgical centers); see also §§ 1396r(d)(4)(B), 1396d(*l*)(1), 1396d(*o*) (corresponding provisions in Medicaid Act).

Relying on these authorities, the Secretary has established long lists of detailed conditions with which facilities must comply to be eligible to receive Medicare and Medicaid funds. See, *e.g.*, 42 CFR pt. 482 (2020) (hospitals); 42 CFR pt. 483 (long-term care facilities); 42 CFR §§ 416.25–416.54 (ambulatory surgical centers). Such conditions have long included a requirement ***651** that certain providers maintain and enforce an "infection prevention and control program designed ... to help prevent the development and transmission of communicable diseases and infections." § 483.80 (long-term care facilities); see, *e.g.*, §§ 482.42(a) (hospitals), 416.51(b) (ambulatory surgical centers), 485.725 (facilities that provide outpatient physical therapy and speech-language pathology services).

B

On November 5, 2021, the Secretary issued an interim final rule amending the existing conditions of participation in Medicare and Medicaid to add a new requirement—that facilities ensure that their covered staff are **vaccinated** against COVID–19. 86 Fed. Reg. 61561, 61616–61627. The rule requires providers to offer medical and religious exemptions, and does not cover staff who telework full-time. *Id.*, at 61571–61572. A facility's failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs. *Id.*, at 61574.

The Secretary issued the rule after finding that **vaccination** of healthcare workers against COVID–19 was "necessary for the health and safety of individuals to whom care and services are furnished." *Id.*, at 61561. In many facilities, 35% or more of staff remain unvaccinated, *id.*, at 61559, and those staff, the Secretary explained, pose a serious threat to the health and safety of patients. That determination was based on data showing that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated. *Id.*, at 61558–61561, 61567–61568, 61585–61586. He also explained that, because Medicare and Medicaid patients are often elderly, disabled, or otherwise in poor health, transmission of COVID–19 to such patients is particularly dangerous. *Id.*, at 61566, 61609. In addition to the threat posed by infacility transmission itself, the Secretary also found that "fear of exposure" to the virus "from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care," creating a further "ris[k] to patient health and safety." *Id.*, at 61588. He further noted that staffing shortages caused by COVID–19-related exposures or illness has disrupted patient care. *Id.*, at 61559.

The Secretary issued the rule as an interim final rule, rather than through the typical notice-and-comment procedures, after finding "good cause" that it should be made effective immediately. *Id.*, at 61583–61586; see 5 U. S. C. § 553(b)(B). That good cause was, in short, the Secretary's belief that any "further delay" would endanger patient health and safety

given the spread of the Delta variant and the upcoming winter season. 86 Fed. Reg. 61583–61586.

C

Shortly after the interim rule's announcement, two groups of States—one led by Louisiana and one by Missouri—filed separate actions challenging the rule. The U. S. District Courts for the Western District of Louisiana and the Eastern District of Missouri each found the rule defective and entered preliminary injunctions against its enforcement. *Louisiana v. Becerra*, —— F.Supp.3d ——, 2021 WL 5609846 (Nov. 30, 2021); *Missouri v. Biden*, —— F.Supp.3d ——, 2021 WL 5564501 (Nov. 29, 2021). In each case, the Government moved for a stay of the injunction from the relevant Court of Appeals. In *Louisiana*, the Fifth Circuit denied the Government's motion. 20 F.4th 260 (2021). In *Missouri*, the Eighth Circuit did so as ***652** well. See Order in No. 21–3725 (Dec. 13, 2021). The Government filed applications asking us to stay both District Courts' preliminary injunctions, and we heard expedited argument on its requests.

II

A

[1] First, we agree with the Government that the Secretary's rule falls within the authorities that Congress has conferred upon him.

Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." 42 U. S. C. § 1395x(e)(9).* COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID–19 **vaccine** mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557–61558. He accordingly concluded that a **vaccine** mandate is "necessary to promote and protect patient health and safety" in the face of the ongoing pandemic. *Id.*, at 61613.

The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the "very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19." *Florida v. Department of Health and Human Servs.*, 19 F.4th 1271, 1288 (CA11 2021).

The States and Justice THOMAS offer a narrower view of the various authorities at issue, contending that the seemingly broad language cited above authorizes the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid. But the longstanding practice of Health and Human Services in implementing the relevant statutory authorities tells a different story. As noted above, healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting. Such requirements govern in detail, for instance, the amount of time after admission or surgery within which a hospital patient must be examined and by whom, 42 CFR § 482.22(c)(5), the procurement, transportation, and transplantation of human kidneys, livers, hearts, lungs, and pancreases, § 482.45, the tasks that may be delegated by a physician to a physician assistant or nurse practitioner, § 483.30(e), and, most pertinent here, the programs that hospitals ***653** must implement to govern the "surveillance, prevention, and control of ... infectious diseases," § 482.42.

Moreover, the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves. See, *e.g.*, §§ 482.42(c)(2)(iv) (requiring training of "hospital personnel and staff " on "infection prevention and control guidelines"), 483.60(a)(1)(ii) (qualified dieticians must have completed at least 900 hours of supervised practice), 482.26(b)–(c) (specifying personnel authorized to use radiologic equipment). And the Secretary has always justified these sorts of requirements by citing his authorities to protect patient health and safety. See, *e.g.*, §§ 482.1(a)(1)(ii), 483.1(a)(1)(ii), 416.1(a)(1). As these examples illustrate, the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper.

Indeed, respondents do not contest the validity of this longstanding litany of health-related participation conditions. When asked at oral argument whether the Secretary could, using the very same statutory authorities at issue here, require hospital employees to wear gloves, sterilize instruments, wash their hands in a certain way and at certain intervals, and the like, Missouri answered yes: "[T]he Secretary certainly has authority to implement all kinds of infection control measures at these facilities." Tr. of Oral Arg. 57–58. Of course the **vaccine** mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before. In any event, there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does.

And his response is not a surprising one. **Vaccination** requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be **vaccinated** for diseases such as hepatitis B, influenza, and measles, mumps, and rubella. CDC, State Healthcare Worker and Patient **Vaccination** Laws (Feb. 28, 2018), https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html. As the Secretary explained, these pre-existing state requirements are a major reason the agency has not previously adopted **vaccine** mandates as a condition of participation. 86 Fed. Reg. 61567–61568.

All this is perhaps why healthcare workers and public-health organizations overwhelmingly support the Secretary's rule. See *id.*, at 61565–61566; see also Brief for American Medical Assn. et al. as *Amici Curiae*; Brief for American Public Health Assn. et al. as *Amici Curiae*; Brief for Secretaries of Health and Human Services et al. as *Amici Curiae*. Indeed, their support suggests that a **vaccination** requirement under these circumstances is a straightforward and predictable example of the "health and safety" regulations that Congress has authorized the Secretary to impose.

We accordingly conclude that the Secretary did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be **vaccinated** against COVID–19.

B

[2] **[3]** We also disagree with respondents' remaining contentions in support of the injunctions entered below. First, the interim rule is not arbitrary and capricious. Given the rulemaking record, it cannot be maintained that the Secretary failed to "examine the relevant data and articulate a satisfactory explanation for" his decisions ***654** to (1) impose the **vaccine** mandate instead of a testing mandate; (2) require **vaccination** of employees with "natural immunity" from prior COVID–19 illness; and (3) depart from the agency's prior approach of merely encouraging **vaccination**. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); see 86 Fed. Reg. 61583, 61559–61561, 61614. Nor is it the case that the Secretary "entirely failed to consider" that the rule might cause staffing shortages, including in rural areas. *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856; see 86 Fed. Reg. 61566, 61569, 61607–61609. As to the additional flaws the District Courts found in the Secretary's analysis, particularly concerning the nature of the data relied upon, the role of courts in reviewing arbitrary and capricious challenges is to "simply ensur[e] that the agency has acted within a zone of reasonableness." *FCC v. Prometheus Radio Project*, 592 U. S. ——, ——, 141 S.Ct. 1150, 1158, 209 L.Ed.2d 287 (2021).

[4] **[5]** **[6]** **[7]** Other statutory objections to the rule fare no better. First, Justice ALITO takes issue with the Secretary's finding of good cause to delay notice and comment. But the Secretary's finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID–19 infections, hospitalizations, and deaths, 86 Fed. Reg. 61584–61586, constitutes the "something specific," *post*, at 660 (dissenting opinion), required to forgo notice and comment. And we cannot say that in this instance the two months the agency took to prepare a 73-page rule constitutes "delay" inconsistent with the Secretary's finding of good cause. Second, we agree with the Secretary that he was not required to "consult with appropriate State agencies," 42 U. S. C. § 1395z, in advance of issuing the interim rule. Consistent with the existence of the good cause exception, which was properly invoked here, consultation during the deferred notice-and-comment period is permissible. We similarly concur with the Secretary that he need not prepare a regulatory impact analysis discussing a rule's effect on small rural hospitals when he acts through an interim final rule; that

requirement applies only where the Secretary proceeds on the basis of a "notice of proposed rulemaking," § 1302(b)(1), followed by a "final version of [the] rule," § 1302(b)(2). Lastly, the rule does not run afoul of the directive in § 1395 that federal officials may not "exercise any supervision or control over the ... manner in which medical services are provided, or over the selection [or] tenure ... of any officer or employee of " any facility. That reading of section 1395 would mean that nearly every condition of participation the Secretary has long insisted upon is unlawful.

* * *

The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have. Because the latter principle governs in these cases, the applications for a stay presented to Justice ALITO and Justice KAVANAUGH and by them referred to the Court are granted.

The District Court for the Eastern District of Missouri's November 29, 2021, order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Eighth Circuit and the disposition of the Government's petition for a writ of certiorari, if such writ is ***655** timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

The District Court for the Western District of Louisiana's November 30, 2021, order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Fifth Circuit and the disposition of the Government's petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

It is so ordered.

Justice THOMAS, with whom Justice ALITO, Justice GORSUCH, and Justice BARRETT join, dissenting.

Two months ago, the Department of Health and Human Services (HHS), acting through the Centers for Medicare and Medicaid Services (CMS), issued an omnibus rule mandating that medical facilities nationwide order their employees, volunteers, contractors, and other workers to receive a COVID–19 **vaccine**. Covered employers must fire noncompliant workers or risk fines and termination of their Medicare and Medicaid provider agreements. As a result, the Government has effectively mandated **vaccination** for 10 million healthcare workers.

Two District Courts preliminarily enjoined enforcement of the omnibus rule, and the Government now requests an emergency stay of those injunctions pending appeal. Because the Government has not made a strong showing that it has statutory authority to issue the rule, I too would deny a stay.

To obtain a stay, the Government must show that there is (1) a reasonable probability that we would grant certiorari; (2) a fair prospect that we would reverse the judgments below; and (3) a likelihood that irreparable harm will result from denying a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (*per curiam*). Because there is no real dispute that this case merits our review, our decision turns primarily on whether the Government can make a "strong showing" that it is likely to succeed on the merits. *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). In my view, the Government has not made such a showing here.

The Government begins by invoking two statutory provisions that generally grant CMS authority to promulgate rules to implement Medicare and Medicaid. The first authorizes CMS to "publish such rules and regulations ... as may be necessary to the efficient administration of the [agency's] functions." 42 U. S. C. § 1302(a). The second authorizes CMS to "prescribe such regulations as may be necessary to carry out the administration of the insurance programs" under the Medicare Act. § 1395hh(a)(1).

The Government has not established that either provision empowers it to impose a **vaccine** mandate. Rules carrying out the "administration" of Medicare and Medicaid are those that serve "the practical management and direction" of those programs. Black's Law Dictionary 58 (3d ed. 1933). Such

rules are "necessary" to "administration" if they bear "an actual and discernible nexus" to the programs' practical management. ***656** *Merck & Co., Inc. v. United States Dept. of Health and Human Servs.*, 962 F.3d 531, 537–538 (CADC 2020) (internal quotation marks omitted). Here, the omnibus rule compels millions of healthcare workers to undergo an unwanted medical procedure that "cannot be removed at the end of the shift," *In re MCP No. 165*, 20 F.4th 264, 268 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). To the extent the rule has any connection to the management of Medicare and Medicaid, it is at most a "tangential" one. *Merck & Co., Inc.*, 962 F.3d at 538.

At oral argument, the Government largely conceded that § 1302(a) and § 1395hh(a)(1) alone do not authorize the omnibus rule. See Tr. of Oral Arg. 7, 10. Instead, it fell back on a constellation of statutory provisions that each concern one of the 15 types of medical facilities that the rule covers. See 86 Fed. Reg. 61567 (2021). Several of those provisions contain language indicating that CMS may regulate those facilities in the interest of "health and safety." In the Government's view, that language authorizes CMS to adopt any "requirements that [CMS] deems necessary to ensure patient health and safety," including a **vaccine** mandate applicable to all facility types. Application in No. 21A240, p. 19. The majority, too, treats these scattered provisions as a singular (and unqualified) delegation to the Secretary to adopt health and safety regulations.

The Government has not made a strong showing that this agglomeration of statutes authorizes any such rule. To start, 5 of the 15 facility-specific statutes do not authorize CMS to impose "health and safety" regulations at all. See 42 U. S. C. §§ 1396d(d)(1), (h)(1)(B)(i), 1395rr(b)(1)(A), 1395x(iii)(3)(D)(i)(IV), 1395i–4(e). These provisions cannot support an argument based on statutory text they lack. Perhaps that is why the Government only weakly defends them as a basis for its authority. See Tr. of Oral Arg. 25–28.

Next, the Government identifies eight definitional provisions describing, for example, what makes a hospital a "hospital." These define covered facilities as those that comply with a variety of conditions, including "such other requirements as the Secretary finds necessary in the interest of ... health and safety." § 1395x(e)(9); see also §§ 1395x(dd)(2)(G), (*o*)(6), (ff)(3)(B)(iv), (cc)(2)(J), (p)(4)(A)(v), (aa)(2)(K), 1395k(a)(2)(F)(i). The Government similarly invokes a saving clause for "health and safety" regulations applicable to "all-inclusive care" programs for the elderly, see §§ 1395eee(f)(4), 1396u–4(f)(4), and a requirement that long-term nursing facilities "establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment ... to help prevent the development and transmission of disease," § 1395i–3(d)(3).

The Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide **vaccine** mandate. We presume that Congress does not hide "fundamental details of a regulatory scheme in vague or ancillary provisions." *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Yet here, the Government proposes to find virtually unlimited **vaccination** power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities' sanitation procedures. The Government has not explained why Congress would have used these ancillary provisions to house what can only be characterized as a "fundamental detail" of the statutory scheme. Had Congress wanted to grant CMS power to impose a **vaccine** mandate across all facility types, it would have done what it has done elsewhere—specifically ***657** authorize one. See 22 U. S. C. § 2504(e) (authorizing mandate for "such immunization ... as necessary and appropriate" for Peace Corps volunteers).

Nonetheless, even if I were to accept that Congress could have hidden **vaccine**-mandate power in statutory definitions, the language in these "health and safety" provisions does not suggest that Congress did so. Take, for example, 42 U. S. C. § 1395x(e), which defines "hospital" for certain purposes. Three subsections define hospitals as providers of specific patient services, see §§ 1395x(e)(1), (4), (5), and five describe administrative requirements that a facility must meet to qualify as a covered hospital, see §§ 1395x(e)(2)–(3), (6)–(8). The final subsection then provides that a "hospital" must also "mee[t] *such other* requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." § 1395x(e)(9) (emphasis added).

Contrary to the Government's position, this kind of catchall provision does not authorize every regulation related to "health and safety." As with all statutory language, context must inform the scope of the provision. See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 408, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (THOMAS, J., concurring in part and dissenting in part) (citing *Neal v. Clark*, 95 U.S. 704, 708, 24 L.Ed. 586 (1878)). "[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Epic Systems Corp.* v. *Lewis*, 584 U. S. ——, ——, 138 S.Ct. 1612, 1625, 200 L.Ed.2d 889 (2018) (internal quotation marks omitted). That presumption is particularly forceful where the statutory catchall refers to "such other" requirements, signaling that the subjects that come before delimit any residual authority. See *ibid.* Here, in § 1395x(e), none of the myriad subsections preceding the "health and safety" subsection suggests that the Government can order hospitals to require virtually all hospital personnel to be **vaccinated**. Rather, these subsections show that HHS' residual authority embraces only administrative requirements like those that precede it—including "provid[ing] 24-hour nursing service," "maintain[ing] clinical records on all patients," or having "bylaws in effect." §§ 1395x(e)(2), (3), (5). A requirement that all healthcare workers be **vaccinated** is plainly different in kind. The same reasoning applies to almost all of the Government's proposed facility-specific statutes. See §§ 1395x(aa)(2), (dd)(2), (*o*)(6); see also §§ 1395x(ff)(3)(B), (p)(4)(A), (cc)(2), 1395eee, 1396u–4(f)(4).

Only one facility-specific provision is arguably different. It regulates long-term care facilities and mandates an "infection control program" among its "health and safety" provisions. § 1395i–3(d)(3). But that infection-control provision focuses on sanitizing the facilities' "environment," not its personnel. *Ibid.* In any event, even if this statutory language justified a **vaccine** mandate in long-term care facilities, it could not sustain the omnibus rule. Neither the "infection control" language nor a reasonable analog appears in any of the other facility-specific provisions. Basic interpretive principles would thus suggest that CMS lacks **vaccine**-mandating authority with respect to the other types of facilities. See *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). And, of course, the omnibus rule cannot rest on the long-term care provision alone. By CMS' own estimate, long-term care facilities employ only 10% of the 10 million healthcare workers that the rule covers. 86 Fed. Reg. 61603. Put simply, the oblique reference to "infection control" in ***658** the definitional provision for long-term care facilities cannot authorize an omnibus **vaccine** mandate covering *every* type of facility that falls within CMS' purview.

For its part, the Court does not rely on the Government's proffered statutory provisions. Instead, it asserts that CMS possesses broad **vaccine**-mandating authority by pointing to a handful of CMS regulations. To begin, the Court does not explain why the bare existence of these regulations is evidence of what Congress empowered the agency to do. Relying on them appears to put the cart before the horse.

Regardless, these regulations provide scant support for the sweeping power the Government now claims. For example, CMS regulations that mandate the number of hours a dietician must practice under supervision, *ante*, at 652 – 653 (citing 42 CFR § 483.60 (2020)), or that prescribe "the tasks that may be delegated ... to a physician assistant or nurse practitioner," *ante,* at 652 (citing § 483.30(e)), cannot support a **vaccine** mandate for healthcare personnel.

The Court also invokes a regulation requiring hospitals to implement programs that "govern the 'surveillance, prevention, and control of ... infectious diseases,' " *ante,* at 652 – 653 (quoting § 482.42), as well as a few regulations that require "infection and prevention control programs" at some (but apparently not all) facility types. See *ante*, at 651 (citing, *inter alia*, § 482.42). But many of these infection-control regulations, like the infection-control program set out at 42 U. S. C. § 1395i–3(d)(3), are far afield from immunization. See, *e.g.*, 42 CFR §§ 485.725(b)–(e) (specifying requirements for "aseptic techniques," "housekeeping services," "[l]inens," and "[p]est control"). And insofar as they do touch on immunization, they require only that facilities *offer* their *residents* the opportunity to obtain a **vaccine**, along with "the opportunity to refuse" it. § 483.80(d)(1). These regulations are not precedents for CMS' newfound authority *mandating* that all *employees* be **vaccinated**.

Finally, our precedents confirm that the Government has failed to make a strong showing on the merits. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). And we expect Congress to use "exceedingly clear language if it wishes to significantly alter the balance between state and federal power." *Ibid.* (internal quotation marks omitted). The omnibus rule is undoubtedly significant—it requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a **vaccine** they have rejected for months. **Vaccine** mandates also fall squarely within a State's police power, see *Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194 (1922), and, until now, only rarely have been a tool of the Federal Government. If Congress had wanted to grant CMS authority to impose a nationwide **vaccine** mandate, and consequently alter the state-federal balance, it would have said so clearly. It did not.

* * *

These cases are not about the efficacy or importance of COVID–19 **vaccines**. They are only about whether CMS has the statutory authority to force healthcare workers, by coercing their employers, to undergo a medical procedure they do not want and cannot undo. Because the Government has not made a strong showing that Congress gave CMS that broad authority, I would deny the stays pending appeal. I respectfully dissent.

Justice ALITO, with whom Justice THOMAS, Justice GORSUCH, and Justice BARRETT join, dissenting.

***659** I join Justice THOMAS's dissent because I do not think that the Federal Government is likely to be able to show that Congress has authorized the unprecedented step of compelling over 10,000,000 healthcare workers to be **vaccinated** on pain of being fired. The support for the argument that the Federal Government possesses such authority is so obscure that the main argument now pressed by the Government—that the authority is conferred by a hodgepodge of scattered provisions—was not prominently set out by the Government until its reply brief in this Court. Before concluding that the Federal Government possesses this authority, we should demand stronger statutory proof than has been mustered to date.

But even if the Federal Government has the authority to require the **vaccination** of healthcare workers, it did not have the authority to impose that requirement in the way it did. Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people. Elected representatives solicit the views of their constituents, listen to their complaints and requests, and make a great effort to accommodate their concerns. Today, however, most federal law is not made by Congress. It comes in the form of rules issued by unelected administrators. In order to give individuals and entities who may be seriously impacted by agency rules at least some opportunity to make their views heard and to have them given serious consideration, Congress has clearly required that agencies comply with basic procedural safeguards. Except in rare cases, an agency must provide public notice of proposed rules, 5 U. S. C. § 553(b); the public must be given the opportunity to comment on those proposals, § 553(c); and if the agency issues the rule, it must address concerns raised during the notice-and-comment process. *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (CA2 1977); see also *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The rule may then be challenged in court, and the court may declare the rule unlawful if these procedures have not been followed.

In these cases, the relevant agency did none of those things, and the Court rewards this extraordinary departure from ordinary principles of administrative procedure. Although today's ruling means only that the Federal Government is likely to be able to show that this departure is lawful, not that it actually is so, this ruling has an importance that extends beyond the confines of these cases. It may have a lasting effect on Executive Branch behavior.

Because of the importance of notice-and-comment rulemaking, an agency must show "good cause" if it wishes to skip that process. 5 U. S. C. § 553(b)(3)(B). Although this Court has never precisely defined what an agency must do to demonstrate good cause, federal courts have consistently held that exceptions to notice-and-comment must be " 'narrowly

construed and only reluctantly countenanced.' " *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (CADC 2012) (quoting *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (CADC 2001)); see also C. Koch & R. Murphy, Good Cause for Avoiding Procedures, 1 Admin. L. & Prac. § 4:13 (3d ed. 2021).

The agency that issued the mandate at issue here, *i.e.*, the Centers for Medicare and Medicaid Services (CMS), admits it did not comply with the commonsense ***660** measure of seeking public input before placing binding rules on millions of people, but it claims that "[t]he data showing the vital importance of **vaccination**" indicate that it "cannot delay taking this action." 86 Fed. Reg. 61555, 61583 (2021). But CMS's generalized justification cannot alone establish good cause to dispense with Congress's clear procedural safeguards. An agency seeking to show good cause must "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." *United States v. Brewer*, 766 F.3d 884, 890 (CA8 2014) (internal quotation marks omitted).

Although CMS argues that an emergency justifies swift action, both District Courts below held that CMS fatally undercut that justification with its own repeated delays. The **vaccines** that CMS now claims are vital had been widely available 10 months before CMS's mandate, and millions of healthcare workers had already been **vaccinated** before the agency took action. President Biden announced the CMS mandate on September 9, 2021, nearly two months before the agency released the rule on November 5, and the mandate itself delayed the compliance deadline further by another month until December 6. 86 Fed. Reg. 61555; *id.*, at 61573 (making implementation of the **vaccine** mandate begin "30 days after publication" and completed "60 days after publication"). This is hardly swift.

CMS argues that its delay, "even if true," does not provide a "reason to block a rule" that it claims will protect patient health. Application in No. 21A241, p. 36. It claims that its departure from ordinary procedure after extraordinary delay should be excused because nobody can show they were prejudiced by the lack of a comment period before the rule took effect. But it is CMS's affirmative burden to show it has good cause, not respondents' burden to prove the negative. *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (CA10 1987). Congress placed procedural safeguards on executive rulemaking so agencies would consider "important aspect[s] of the problem[s]" they seek to address before restricting the liberty of the people they regulate. *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. Because CMS chose to circumvent notice-and-comment, States that run Medicaid facilities, as well as other regulated parties, had no opportunity to present evidence refuting or contradicting CMS's justifications before the rule bound them. And because CMS acknowledged its own "uncertainty" and the "rapidly changing nature of the current pandemic," 86 Fed. Reg. 61589, it should have been *more* receptive to feedback, not less. "[A]n utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 96 (CADC 2002).

Today's decision will ripple through administrative agencies' future decisionmaking. The Executive Branch already touches nearly every aspect of Americans' lives. In concluding that CMS had good cause to avoid notice-and-comment rulemaking, the Court shifts the presumption against compliance with procedural strictures from the unelected agency to the people they regulate. Neither CMS nor the Court articulates a limiting principle for why, after an unexplained and unjustified delay, an agency can regulate first and listen later, and then put more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment.

Therefore, I respectfully dissent.

All Citations

142 S.Ct. 647, Med & Med GD (CCH) P 307,219, 22 Cal. Daily Op. Serv. 562, 2022 Daily Journal D.A.R. 559, 29 Fla. L. Weekly Fed. S 62

Footnotes

* While this provision pertains only to hospitals, the Secretary has similar statutory powers with respect to most other categories of healthcare facilities covered by the interim rule. See *supra*, at 650 – 651. Justice THOMAS points out that for five such kinds of facilities, the relevant statute does not contain express "health and safety" language. *Post*, at 656 (dissenting opinion). But employees at these facilities—which include end-stage renal disease clinics and home infusion therapy suppliers—represent less than 3% of the workers covered by the rule. See Tr. of Oral Arg. 25. And even with respect to them, the pertinent statutory language may be read as incorporating the "health and safety" authorities applicable to the other 97%. See, *e.g.*, 42 U. S. C. § 1396d(d)(1). We see no reason to let the infusion-clinic tail wag the hospital dog, especially because the rule has an express severability provision. 86 Fed. Reg. 61560.

142 S.Ct. 661
Supreme Court of the United States.

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, et al., Applicants
v.
DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, et al.
Ohio, et al., Applicants
v.
Department of Labor, Occupational Safety and Health Administration, et al.

Nos. 21A244 and 21A247
|
January 13, 2022

Synopsis

Background: States, businesses, trade groups, nonprofit organizations, and others filed separate petitions for review of emergency temporary standard (ETS) issued by Secretary of Labor, acting through Occupational Safety and Health Administration (OSHA), mandating that employers with more than 100 employees require the employees to undergo COVID-19 **vaccination** or take weekly COVID-19 tests at their own expense and wear a mask in workplace. The United States Court of Appeals for the Fifth Circuit, Engelhardt, Circuit Judge, 17 F.4th 604, stayed enforcement pending judicial review of petitioners' motions for permanent injunction. Government notified judicial panel on multidistrict litigation of petitions across multiple circuits, invoking lottery procedure to consolidate all petitions in single circuit, and panel designated the United States Court of Appeals for the Sixth Circuit to review the petitions. The United States Court of Appeals for the Sixth Circuit, Stranch, Circuit Judge, 2021 WL 5989357, granted federal government's motion to dissolve the stay, and denied rehearing en banc, 20 F.4th 264. States and a business organization applied for stay pending judicial review.

Holdings: The Supreme Court held that:

[1] petitioners were likely to succeed on claim that ETS exceeded Secretary's statutory authority, and

[2] equities did not justify withholding interim relief through a stay.

Applications granted; rule stayed.

Justice Gorsuch filed a concurring opinion, in which Justices Thomas and Alito joined.

Justices Breyer, Sotomayor, and Kagan filed a dissenting opinion.

Procedural Posture(s): Motion for Stay; Review of Administrative Decision.

West Headnotes (5)

[1] Labor and Employment Judicial review

States and business organization were likely to succeed on merits, supporting issuance of stay pending judicial review, as to their claim that Secretary of Labor, acting through Occupational Safety and Health Administration (OSHA), lacked authority under Occupational Safety and Health Act to issue emergency temporary standard (ETS) mandating that employers with more than 100 employees require the employees to undergo COVID-19 **vaccination** or take weekly COVID-19 tests at their own expense and wear a mask in workplace; Congress would be expected to speak clearly when authorizing an agency to exercise powers of vast economic and political significance, and the Act, which empowered Secretary to set workplace safety standards, but not broad public health measures, and to issue emergency temporary standards to protect employees from grave danger in workplace, did not plainly authorize the ETS. Occupational Safety and Health Act of 1970 § 6, 29 U.S.C.A. § 655(b), (c)(1); 29 C.F.R. §§ 1910.501, 1910.504, 1910.505, 1910.509, 1915.1501, 1917.31, 1918.110, 1926.58, 1928.21.

6 Cases that cite this headnote

[2] **Administrative Law and Procedure** Statutory basis and limitation

Federal administrative agencies are creatures of statute, and they accordingly possess only the authority that Congress has provided.

4 Cases that cite this headnote

[3] **Administrative Law and Procedure** Statutory basis and limitation

Congress is expected to speak clearly when authorizing a federal agency to exercise powers of vast economic and political significance.

2 Cases that cite this headnote

[4] **Labor and Employment** Exposure in general

In absence of occupation-specific risks related to COVID-19, the risk of employees contracting COVID-19 is not a work-related danger, for purposes of provision of Occupational Safety and Health Act authorizing Secretary of Labor to issue an emergency temporary standard (ETS) that was necessary to protect employees against grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; while COVID–19 was a risk that occurred in many workplaces, it was not an occupational hazard in most workplaces, and instead it was a universal risk that was part of daily life. Occupational Safety and Health Act of 1970 § 6, 29 U.S.C.A. § 655(b), (c)(1); 29 C.F.R. §§ 1910.501, 1910.504, 1910.505, 1910.509, 1915.1501, 1917.31, 1918.110, 1926.58, 1928.21.

3 Cases that cite this headnote

[5] **Labor and Employment** Judicial review

Equities did not justify withholding interim relief through a stay pending judicial review, upon court's determination that States and business organization were likely to succeed on merits of their claim that Secretary of Labor, acting through Occupational Safety and Health Administration (OSHA), lacked statutory authority to issue emergency temporary standard (ETS) mandating that employers with more than 100 employees require the employees to undergo COVID-19 **vaccination** or take weekly COVID-19 tests at their own expense and wear a mask in workplace; stay applications asserted that States and employers would be forced to incur billions of dollars in unrecoverable compliance costs, and that hundreds of thousands of employees would leave their jobs, and while federal government asserted that over 6,500 lives would be saved and hundreds of thousands of hospitalizations would be prevented, it was not the court's role to weigh such tradeoffs. Occupational Safety and Health Act of 1970 § 6, 29 U.S.C.A. § 655(b), (c)(1); 29 C.F.R. §§ 1910.501, 1910.504, 1910.505, 1910.509, 1915.1501, 1917.31, 1918.110, 1926.58, 1928.21.

3 Cases that cite this headnote

West Codenotes

Validity Called into Doubt

29 C.F.R. §§ 1910.501, 1910.504, 1910.505, 1910.509, 1915.1501, 1917.31, 1918.110, 1926.58, 1928.21

Opinion

***662** Per Curiam.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a **vaccine** mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 **vaccine**, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also

wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure ***663** similar to what OSHA has promulgated here.

Many States, businesses, and nonprofit organizations challenged OSHA's rule in Courts of Appeals across the country. The Fifth Circuit initially entered a stay. But when the cases were consolidated before the Sixth Circuit, that court lifted the stay and allowed OSHA's rule to take effect. Applicants now seek emergency relief from this Court, arguing that OSHA's mandate exceeds its statutory authority and is otherwise unlawful. Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

I

A

Congress enacted the Occupational Safety and Health Act in 1970. 84 Stat. 1590, 29 U.S.C. § 651 *et seq.* The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." § 651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. § 655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." § 652(8) (emphasis added). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. § 655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." § 655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." *Ibid.* They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." *Ibid.* Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full. See *BST Holdings, L.L.C. v. Occupational Safety and Health Admin.*, 17 F.4th 604, 609 (CA5 2021).

B

On September 9, 2021, President Biden announced "a new plan to require more Americans to be **vaccinated**." Remarks on the COVID–19 Response and National **Vaccination** Efforts, 2021 Daily Comp. of Pres. Doc. 775, p. 2. As part of that plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully **vaccinated** or show a negative test at least once a week." *Ibid.* The purpose of the rule was to increase **vaccination** rates at "businesses all across America." *Ibid.* In tandem with other planned regulations, the administration's goal was to impose "**vaccine** requirements" on "about 100 million Americans, two-thirds of all workers." *Id.,* at 3.

After a 2-month delay, the Secretary of Labor issued the promised emergency standard. 86 Fed. Reg. 61402 (2021). Consistent with President Biden's announcement, the rule applies to all who work for employers with 100 or more employees. There are narrow exemptions for employees who work remotely "100 percent of the time" or who "work exclusively outdoors," but those exemptions are largely illusory. ***664** *Id.,* at 61460. The Secretary has estimated, for example, that only nine percent of landscapers and groundskeepers qualify as working exclusively outside. *Id.,* at 61461. The regulation otherwise operates as a blunt instrument. It draws no distinctions based on industry or risk of exposure to COVID–19. Thus, most lifeguards and linemen face the same regulations as do medics and meatpackers. OSHA estimates that 84.2 million employees are subject to its mandate. *Id.,* at 61467.

Covered employers must "develop, implement, and enforce a mandatory COVID–19 **vaccination** policy." *Id.*, at 61402. The employer must verify the **vaccination** status of each employee and maintain proof of it. *Id.*, at 61552. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of **vaccination**." *Id.*, at 61402. But employers are not required to offer this option, and the emergency regulation purports

to pre-empt state laws to the contrary. *Id.,* at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." *Id.,* at 61532. And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one. 29 C.F.R. § 1903.15(d) (2021).

C

OSHA published its **vaccine** mandate on November 5, 2021. Scores of parties—including States, businesses, trade groups, and nonprofit organizations—filed petitions for review, with at least one petition arriving in each regional Court of Appeals. The cases were consolidated in the Sixth Circuit, which was selected at random pursuant to 28 U.S.C. § 2112(a).

Prior to consolidation, however, the Fifth Circuit stayed OSHA's rule pending further judicial review. *BST Holdings*, 17 F.4th 604. It held that the mandate likely exceeded OSHA's statutory authority, raised separation-of-powers concerns in the absence of a clear delegation from Congress, and was not properly tailored to the risks facing different types of workers and workplaces.

When the consolidated cases arrived at the Sixth Circuit, two things happened. First, many of the petitioners—nearly 60 in all—requested initial hearing en banc. Second, OSHA asked the Court of Appeals to vacate the Fifth Circuit's existing stay. The Sixth Circuit denied the request for initial hearing en banc by an evenly divided 8-to-8 vote. *In re MCP No. 165*, 20 F.4th 264 (2021). Chief Judge Sutton dissented, joined by seven of his colleagues. He reasoned that the Secretary's "broad assertions of administrative power demand unmistakable legislative support," which he found lacking. *Id.,* at 268. A three-judge panel then dissolved the Fifth Circuit's stay, holding that OSHA's mandate was likely consistent with the agency's statutory and constitutional authority. See *In re MCP No. 165*, 21 F. 4th 357 (CA6 2021). Judge Larsen dissented.

Various parties then filed applications in this Court requesting that we stay OSHA's emergency standard. We consolidated two of those applications—one from the National Federation of Independent Business, and one from a coalition of States—and heard expedited argument on January 7, 2022.

II

The Sixth Circuit concluded that a stay of the rule was not justified. We disagree.

A

[1] **[2]** **[3]** Applicants are likely to succeed on the merits of their claim that the Secretary ***665** lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 **vaccine** or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C. J., dissenting). It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. See 29 U.S.C. § 655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, *e.g.*, §§ 651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." *Post*, at 673 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational"

hazards and the safety and health of "employees." See, *e.g.*, 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c).

[4] The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." Response Brief for OSHA in No. 21A244 etc., p. 45 (OSHA Response). She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. See *post*, at 673 – 674. But a **vaccine** mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A **vaccination**, after all, "cannot be undone at the end of the workday." *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C. J., dissenting). Contrary to the dissent's contention, imposing a **vaccine** mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for." *Post*, at 675.

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, ***666** targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U.S.C. § 655(b) (emphasis added).

In looking for legislative support for the **vaccine** mandate, the dissent turns to the American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. See *post*, at 673 – 674. That legislation, signed into law on March 11, 2021, of course said nothing about OSHA's **vaccine** mandate, which was not announced until six months later. In fact, the most noteworthy action concerning the **vaccine** mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S. J. Res. 29, 117th Cong., 1st Sess. (2021).

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (internal quotation marks omitted). [1]

B

[5] The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. See Application in No. 21A244, pp. 25–32; Application in No. 21A247, pp. 32–33; see also 86 Fed. Reg. 61475. For its part, the Federal Government says that the mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations. OSHA Response 83; see also 86 Fed. Reg. 61408.

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the **vaccination** of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category.

* * *

The applications for stays presented to Justice KAVANAUGH and by him referred to the Court are granted.

OSHA's COVID–19 **Vaccination** and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition ***667** of the applicants' petitions for writs of certiorari, if such writs are timely sought. Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari are granted, the order shall terminate upon the sending down of the judgment of this Court.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the **vaccination** or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

*

I start with this Court's precedents. There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (opinion of ROBERTS, C. J.); U.S. Const., Amdt. 10. And in fact, States have pursued a variety of measures in response to the current pandemic. *E.g.*, Cal. Dept. of Public Health, All Facilities Letter 21–28.1 (Dec. 27, 2021); see also N. Y. Pub. Health Law Ann. § 2164 (West 2021).

The federal government's powers, however, are not general but limited and divided. See *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U.S. ——, ——, 141 S.Ct. 2485, 2489, 210 L.Ed.2d 856 (2021) (*per curiam*) (internal quotation marks omitted). We sometimes call this the major questions doctrine. *Gundy* v. *United States*, 588 U.S. ——, ——, 139 S.Ct. 2116, 2141, 204 L.Ed.2d 522 (2019) (GORSUCH, J., dissenting).

OSHA's mandate fails that doctrine's test. The agency claims the power to force 84 million Americans to receive a **vaccine** or undergo regular testing. By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to OSHA. Approximately two years have passed since this pandemic began; **vaccines** have been available for more than a year. Over that span, Congress has adopted several major pieces of legislation aimed at combating COVID–19. *E.g.*, American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. But Congress has chosen not to afford OSHA—or any federal ***668** agency—the authority to issue a **vaccine** mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation. See S.J. Res. 29, 117th Cong., 1st Sess. (2021). It seems, too, that the agency pursued its regulatory initiative only as a legislative " 'work-around.' " *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 (CA5 2021). Far less consequential agency rules have run afoul of the major questions doctrine. *E.g.*, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (eliminating rate-filing requirement). It is hard to see how this one does not.

What is OSHA's reply? It directs us to 29 U.S.C. § 655(c)(1). In that statutory subsection, Congress authorized OSHA to issue "emergency" regulations upon determining that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically

harmful" and "that such emergency standard[s] [are] necessary to protect employees from such danger[s]." According to the agency, this provision supplies it with "almost unlimited discretion " to mandate new nationwide rules in response to the pandemic so long as those rules are " reasonably related " to workplace safety. 86 Fed. Reg. 61402, 61405 (2021) (internal quotation marks omitted).

The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. See *ante*, at 5–6. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. See *In re: MCP No. 165*, 20 F.4th 264, 276 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Brief for Department of Labor, *In re: AFL–CIO*, No. 20–1158, pp. 3, 33 (CADC 2020). Yet that is precisely what the agency seeks to do now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate **vaccinations**, it has done so expressly. *E.g.*, 8 U.S.C. § 1182(a)(1)(A)(ii). We have nothing like that here.

*

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs —with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. *E.g.*, *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (plurality opinion). Both are designed to ***669** protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to "reduc[e] the degree to which they will be held accountable for unpopular actions." R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. Pub. Pol'y 147, 154 (2017). But the Constitution imposes some boundaries here. *Gundy*, 588 U.S., at ——, 139 S.Ct., at 2131 (GORSUCH, J., dissenting). If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives. *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61, 135 S.Ct. 1225, 191 L.Ed.2d 153 (2015) (ALITO, J., concurring); see also M. McConnell, The President Who Would Not Be King 326–335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1502 (2021).

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. *E.g.*, *King v. Burwell*, 576 U.S. 473, 485–486, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015). Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." *United States*

Telecom Assn. v. FCC, 855 F.3d 381, 417 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); see also N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent Major Questions Doctrine, 49 Conn. L. Rev. 355, 359 (2016).

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, A Note on the Benzene Case, American Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. *Touby v. United States*, 500 U.S. 160, 166–167, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991). OSHA would become little more than a "roving commission to inquire into evils and upon discovery correct them." *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (Cardozo, J., concurring). Either way, the point is the same ***670** one Chief Justice Marshall made in 1825: There are some "important subjects, which must be entirely regulated by the legislature itself," and others "of less interest, in which a general provision may be made, and power given to [others] to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 43, 6 L.Ed. 253 (1825). And on no one's account does this mandate qualify as some "detail."

*

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces. The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* **vaccination** *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. 29 U.S.C. § 655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time. 86 Fed. Reg. 61408 (2021).

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. We respectfully dissent.

I

In 1970, Congress enacted the Occupational Safety and Health Act (Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources,"

including "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." 29 U.S.C. §§ 651(b), (b)(5). To that end, the ***671** Act empowers OSHA to issue "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." § 651(b)(3). Still more, the Act requires OSHA to issue "an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." § 655(c)(1).

Acting under that statutory command, OSHA promulgated the emergency temporary standard at issue here. The Standard obligates employers with at least 100 employees to require that an employee either (1) be **vaccinated** against COVID–19 or (2) take a weekly COVID–19 test and wear a mask at work. 86 Fed. Reg. 61551–61553. The Standard thus encourages **vaccination**, but permits employers to adopt a masking-or-testing policy instead. (The majority obscures this choice by insistently calling the policy a "**vaccine** mandate." *Ante,* at 662, 664, 665 – 666, 666.) Further, the Standard does not apply in a variety of settings. It exempts employees who are at a reduced risk of infection because they work from home, alone, or outdoors. See 86 Fed. Reg. 61551. It makes exceptions based on religious objections or medical necessity. See *id.*, at 61552. And the Standard does not constrain any employer able to show that its "conditions, practices, means, methods, operations, or processes" make its workplace equivalently "safe and healthful." 29 U.S.C. § 655(d). Consistent with statutory requirements, the Standard lasts only six months. See § 655(c)(3).

Multiple lawsuits challenging the Standard were filed in the Federal Courts of Appeals. The applicants asked the courts to stay the Standard's implementation while their legal challenges were pending. The lawsuits were consolidated in the Court of Appeals for the Sixth Circuit. See 28 U.S.C. § 2112(a)(3). That court dissolved a stay previously entered, thus allowing the Standard to take effect. See *In re MCP No. 165*, 21 F. 4th 357 (2021). The applicants now ask this Court to stay the Standard for the duration of the litigation. Today, the Court grants that request, contravening clear legal principles and itself causing grave danger to the Nation's workforce.

II

The legal standard governing a request for relief pending appellate review is settled. To obtain that relief, the applicants must show: (1) that their "claims are likely to prevail," (2) "that denying them relief would lead to irreparable injury," and (3) "that granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. ——, ——, 141 S.Ct. 63, 66, 208 L.Ed.2d 206 (2020) (*per curiam*). Moreover, because the applicants seek judicial intervention that the Sixth Circuit withheld below, this Court should not issue relief unless the applicants can establish that their entitlement to relief is "indisputably clear." *South Bay United Pentecostal Church* v. *Newsom*, 590 U.S. ——, ——, 140 S.Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (ROBERTS, C. J., concurring in denial of application for injunctive relief) (internal quotation marks omitted). None of these requirements is met here.

III

A

The applicants are not "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, ***672** that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (11th ed. 2005) (defining "hazard" as a "source of danger"); *id.*, at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); *id.*, at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. See 86 Fed. Reg. 61408, 61424; see also CDC, COVID Data Tracker Weekly Review: Interpretive Summary for Nov. 5, 2021 (Jan. 12, 2022), https://cdc.gov/coronavirus/2019–ncov/covid-data/covidview/past-reports/11052021.html. Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#cases_deathsinlast7days. And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces. See 86 Fed. Reg. 61411, 61424.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or **vaccination**, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and **vaccination** are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their **vaccinated** peers. *Id.*, at 61403, 61411–61412, 61417–61419, 61433–61435, 61438–61439. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would.

OSHA's determinations are "conclusive if supported by substantial evidence." 29 U.S.C. § 655(f). Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. Their decisions, we have explained, should stand so long as they are supported by " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 522, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Given the extensive evidence in the record supporting OSHA's determinations about the risk of COVID–19 and the efficacy of masking, testing, and **vaccination**, a court could not conclude that the Standard fails substantial-evidence review.

***673** B

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or **vaccination** policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[ ]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the workplace. *Ante,* at 669 – 670. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator, see *ante,* at 669 – 670: It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. See *supra*, at 664 – 665. And the Act requires nothing more: Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible ... safe and healthful working conditions." 29 U.S.C. § 651(b). That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. The same is true of the provision at issue here demanding the issuance of temporary emergency standards. Once again, that provision kicks in when employees are exposed in the workplace to "new hazards" or "substances or agents" determined to be "physically harmful." § 655(c)(1). The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress "enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can" do, the Court cannot "impos[e] limits on an agency's discretion that are not supported by the text." *Little Sisters*

of the Poor Saints Peter and Paul Home v. *Pennsylvania*, 591 U.S. ——, ——, 140 S.Ct. 2367, 2380–81, 207 L.Ed.2d 819 (2020)(alteration and internal quotation marks omitted). That is what the majority today does—impose a limit found no place in the governing statute.

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (*e.g.,* stadiums, schools, hotels, even homes). See 29 C.F.R. § 1910.155 (2020) (fire); §§ 1910.302–1910.308 (electrical installations); §§ 1910.34–1910.39 (exit routes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the workplace. See § 1910.95 (noise); § 1910.141 (water). A biological hazard—here, the virus causing COVID–19—is no different. Indeed, Congress just last year made this clear. It appropriated $100 million for OSHA "to carry out COVID–19 related worker protection activities" in work environments of all kinds. American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 30. That legislation refutes the majority's view that workplace exposure ***674** to COVID–19 is somehow not a workplace hazard. Congress knew—and Congress said—that OSHA's responsibility to mitigate the harms of COVID–19 in the typical workplace do not diminish just because the disease also endangers people in other settings.

That is especially so because—as OSHA amply established—COVID–19 poses special risks in most workplaces, across the country and across industries. See 86 Fed. Reg. 61424 ("The likelihood of transmission can be exacerbated by common characteristics of many workplaces"). The majority ignores these findings, but they provide more-than-ample support for the Standard. OSHA determined that the virus causing COVID–19 is "readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time." *Id.,* at 61411. In other words, COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees usually have little or no control in those settings. "[D]uring the workday," OSHA explained, "workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure to" the virus. *Id.*, at 61408. The agency backed up its conclusions with hundreds of reports of workplace COVID–19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices. *Id.*, at 61412–61416. But still, OSHA took care to tailor the Standard. Where it could exempt work settings without exposing employees to grave danger, it did so. See *id.*, at 61419–61420; *supra*, at 663 – 664. In sum, the agency did just what the Act told it to: It protected employees from a grave danger posed by a new virus as and where needed, and went no further. The majority, in overturning that action, substitutes judicial diktat for reasoned policymaking.

The result of its ruling is squarely at odds with the statutory scheme. As shown earlier, the Act's explicit terms authorize the Standard. See *supra,* at 664 – 665. Once again, OSHA must issue an emergency standard in response to new hazards in the workplace that expose employees to "grave danger." § 655(c)(1); see *supra,* at 662 – 664. The entire point of that provision is to enable OSHA to deal with emergencies—to put into effect the new measures needed to cope with new workplace conditions. The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute's beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees. See, *e.g.*, 29 C.F.R. § 1910.141. It has previously regulated infectious disease, including by facilitating **vaccinations**. See § 1910.1030(f). And it has in other contexts required medical examinations and face coverings for employees. See §§ 1910.120(q)(9)(i), 1910.134. In line with those prior actions, the Standard here requires employers to ensure testing and masking if they do not demand **vaccination**. Nothing about that measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command ***675** that OSHA protect employees from grave workplace harms.

If OSHA's Standard is far-reaching—applying to many millions of American workers—it no more than reflects the scope of the crisis. The Standard responds to a workplace health emergency unprecedented in the agency's history:

an infectious disease that has already killed hundreds of thousands and sickened millions; that is most easily transmitted in the shared indoor spaces that are the hallmark of American working life; and that spreads mostly without regard to differences in occupation or industry. Over the past two years, COVID–19 has affected—indeed, transformed—virtually every workforce and workplace in the Nation. Employers and employees alike have recognized and responded to the special risks of transmission in work environments. It is perverse, given these circumstances, to read the Act's grant of emergency powers in the way the majority does—as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.

IV

Even if the merits were a close question—which they are not—the Court would badly err by issuing this stay. That is because a court may not issue a stay unless the balance of harms and the public interest support the action. See *Trump v. International Refugee Assistance Project*, 582 U.S. ——, ——, 137 S.Ct. 2080, 2087, 198 L.Ed.2d 643 (2017) (*per curiam*) ("Before issuing a stay, it is ultimately necessary to balance the equities—to explore the relative harms" and "the interests of the public at large" (alterations and internal quotation marks omitted)); *supra,* at 664. Here, they do not. The lives and health of the Nation's workers are at stake. And the majority deprives the Government of a measure it needs to keep them safe.

Consider first the economic harms asserted in support of a stay. The employers principally argue that the Standard will disrupt their businesses by prompting hundreds of thousands of employees to leave their jobs. But OSHA expressly considered that claim, and found it exaggerated. According to OSHA, employers that have implemented **vaccine** mandates have found that far fewer employees actually quit their jobs than threaten to do so. See 86 Fed. Reg. 61474–61475. And of course, the Standard does not impose a **vaccine** mandate; it allows employers to require only masking and testing instead. See *supra*, at 663 – 664. In addition, OSHA noted that the Standard would provide employers with some countervailing economic benefits. Many employees, the agency showed, would be more likely to stay at or apply to an employer complying with the Standard's safety precautions. See 86 Fed. Reg. 61474. And employers would see far fewer work days lost from members of their workforces calling in sick. See *id.*, at 61473–61474. All those conclusions are reasonable, and entitled to deference.

More fundamentally, the public interest here—the interest in protecting workers from disease and death—overwhelms the employers' alleged costs. As we have said, OSHA estimated that in six months the emergency standard would save over 6,500 lives and prevent over 250,000 hospitalizations. See *id.,* at 61408. Tragically, those estimates may prove too conservative. Since OSHA issued the Standard, the number of daily new COVID–19 cases has risen tenfold. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#trends_ ***676** dailycases (reporting a 7-day average of 71,453 new daily cases on Nov. 5, 2021, and 751,125 on Jan. 10, 2022). And the number of hospitalizations has quadrupled, to a level not seen since the pandemic's previous peak. CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions (reporting a 7-day average of 5,050 new daily hospital admissions on Nov. 5, 2021, and 20,269 on Jan. 10, 2022). And as long as the pandemic continues, so too does the risk that mutations will produce yet more variants—just as OSHA predicted before the rise of Omicron. See 86 Fed. Reg. 61409 (warning that high transmission and insufficient **vaccination** rates could "foster the development of new variants that could be similarly, or even more, disruptive" than those then existing). Far from diminishing, the need for broadly applicable workplace protections remains strong, for all the many reasons OSHA gave. See *id.,* at 61407–61419, 61424, 61429–61439, 61445–61447.

These considerations weigh decisively against issuing a stay. This Court should decline to exercise its equitable discretion in a way that will—as this stay will—imperil the lives of thousands of American workers and the health of many more.

* * *

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages **vaccination**, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the "grave danger" that workplace exposure to the "new hazard[ ]" of COVID–19 poses to employees across the Nation. 29 U.S.C. § 655(c)(1). The agency's Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[ ] the background, competence, and expertise to assess" workplace health and safety issues. *South Bay United Pentecostal Church*, 590 U.S., at ——, 140 S.Ct., at 1614 (opinion of ROBERTS, C. J.). When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so ***677** in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

All Citations

142 S.Ct. 661, 22 Cal. Daily Op. Serv. 568, 2022 Daily Journal D.A.R. 549, 29 Fla. L. Weekly Fed. S 66

Footnotes

1 The dissent says that we do "not contest," *post*, at 672 – 673, that the mandate was otherwise proper under the requirements for an emergency temporary standard, see 29 U.S.C. § 655(c)(1). To be clear, we express no view on issues not addressed in this opinion.

End of Document

2021 WL 4398027
United States District Court, E.D. Kentucky, Northern Division.
at Covington.

Christy BECKERICH, et al., Plaintiffs

v.

ST. ELIZABETH MEDICAL CENTER, et al., Defendants

CIVIL CASE NO. 21-105-DLB-EBA
|
Signed 09/24/2021

Synopsis

Background: Healthcare workers currently and formerly employed by medical center brought action alleging that medical center's policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption violated the Americans with Disabilities Act (ADA), Title VII, and employees' constitutional rights. Healthcare workers moved for a temporary restraining order and/or preliminary injunction.

Holdings: The District Court, David L. Bunning, J., held that:

[1] healthcare workers could not succeed on merits of their constitutional claims;

[2] healthcare workers were unlikely to succeed on merits of their ADA claim;

[3] healthcare workers were unlikely to succeed on merits of their Title VII claim;

[4] healthcare workers would not suffer irreparable harm absent a preliminary injunction and/or temporary restraining order; and

[5] public interest weighed against granting a preliminary injunction and/or temporary restraining order.

Motion denied.

West Headnotes (30)

[1] **Injunction** Discretionary Nature of Remedy

Decision to grant or deny injunctive relief falls solely within discretion of district court.

[2] **Injunction** Relation or conversion to preliminary injunction

The same factors are considered in determining whether to issue a temporary restraining order or preliminary injunction; thus the district court can evaluate both the temporary restraining order and the preliminary injunction by the same analysis.

[3] **Injunction** Grounds in general; multiple factors

Injunction Grounds in general; multiple factors

The four factors used in evaluating temporary restraining orders and/or preliminary injunctions are: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable harm without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order.

1 Cases that cite this headnote

[4] **Injunction** Balancing or weighing factors; sliding scale

Injunction Balancing or weighing factors; sliding scale

The four factors used in evaluating temporary restraining orders and/or preliminary injunctions are not prerequisites that must be met, but are interrelated concerns that must be balanced against one another.

[5] **Injunction** Extraordinary or unusual nature of remedy

Injunction Extraordinary or unusual nature of remedy

Temporary restraining orders and preliminary injunctions are extraordinary and drastic remedies, never awarded as of right.

[6] **Injunction** Factors Considered in General

Injunction Factors Considered in General

A party must demonstrate the legal factors that necessitate the granting of a preliminary injunction or temporary restraining order, if not fully, then at least to the extent that the factors cumulatively weigh in the moving party's favor.

[7] **Injunction** Likelihood of success on merits

Injunction Serious or substantial question on merits

A party seeking to demonstrate a strong likelihood of success on the merits for the purpose of its motion for a preliminary injunction is not required to prove its case in full; it is ordinarily sufficient if the plaintiff has raised questions going to the merits that are serious, substantial, difficult, and doubtful.

[8] **Federal Civil Procedure** Absence of genuine issue of fact in general

Injunction Standard of proof in general

The proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion, which merely requires establishing a genuine issue of material fact.

[9] **Injunction** Likelihood of success on merits

If a plaintiff can demonstrate a strong likelihood of success on the merits for the purposes of a preliminary injunction by merely raising questions going to the merits of the action, those questions must be exceptionally significant, and grounded in actual legal disputes, not conjectures and conspiracies.

[10] **Civil Rights** Employment practices

Civil Rights Employment practices

Healthcare workers currently and formerly employed by medical center could not succeed on merits of their claim that medical center's policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption violated workers' constitutional rights, for purpose of workers' motion for a preliminary injunction and/or temporary restraining order prohibiting medical center from enforcing mandatory vaccination policy; medical center was a private hospital, and thus not a state actor for purpose of constitutional questions. U.S. Const. Amend. 14.

[11] **Constitutional Law** Fourteenth Amendment in general

There exists a line between state action subject to Fourteenth Amendment scrutiny and private conduct, however exceptionable, that is not; this principle is generally known as the "state action doctrine." U.S. Const. Amend. 14.

[12] **Constitutional Law** Fourteenth Amendment in general

A private entity may qualify as a state actor for the purposes of the Fourteenth Amendment state action doctrine when it exercises powers traditionally exclusively reserved to the state. U.S. Const. Amend. 14.

[13] **Constitutional Law** Fourteenth Amendment in general

The fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor for purposes of the Fourteenth Amendment state action doctrine, unless the private entity

is performing a traditional, exclusive public function; the same principle applies if the government funds or subsidizes a private entity. U.S. Const. Amend. 14.

[14] **Constitutional Law** Fourteenth Amendment in general

Private hospitals, no matter how much federal funding they may receive, are generally not state actors for purposes of the Fourteenth Amendment state action doctrine. U.S. Const. Amend. 14.

[15] **Civil Rights** Preliminary injunction

Requirements of administrative exhaustion under the ADA and Title VII cut against the likelihood of success on the merits for the purposes of injunctive relief. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1); Americans with Disabilities Act of 1990 § 107, 42 U.S.C.A. § 12117(a).

[16] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Title VII's administrative exhaustion requirement is not jurisdictional. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[17] **Civil Rights** Preliminary injunction

Healthcare workers currently and formerly employed by medical center were unlikely to succeed on merits of their claim that medical center's policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption violated ADA, for purpose of workers' motion for a preliminary injunction and/or temporary restraining order prohibiting medical center from enforcing mandatory vaccination policy; medical center granted either full exemptions or deferments to 75% of employees who requested a medical accommodation to vaccination requirement, including some healthcare workers who filed action against medical center, and no healthcare worker who was a party to that action suffered an adverse employment decision because of a disability. Americans with Disabilities Act of 1990 § 3, 42 U.S.C.A. § 12102(2)(A); 29 C.F.R. § 1630.2(j)(1)(iii).

[18] **Civil Rights** Practices prohibited or required in general; elements

The ADA broadly prohibits discrimination against a qualified individual on the basis of disability as it applies to aspects of employment, including hiring, advancement, and firing. Americans with Disabilities Act of 1990 § 107, 42 U.S.C.A. § 12117(a).

[19] **Civil Rights** In general; elements of accommodation claims

The ADA requires employers to provide disabled employees with reasonable accommodations to avoid discrimination; thus, if an employer does not provide reasonable accommodations to disabled employees, an employee has an actionable claim under the ADA. Americans with Disabilities Act of 1990 § 107, 42 U.S.C.A. § 12117(a).

1 Cases that cite this headnote

[20] **Civil Rights** Practices prohibited or required in general; elements

A person seeking relief under the ADA for termination must establish (1) that she is a disabled person within the meaning of the Act, (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision because of her disability. Americans with Disabilities Act of 1990 § 3, 42 U.S.C.A. § 12102(2)(A).

[21] **Civil Rights** Discrimination by Reason of Handicap, Disability, or Illness

A court's role in assessing an ADA claim is whether employers have complied with their obligations and whether discrimination has

occurred, not whether an individual's impairment is a disability. Americans with Disabilities Act of 1990 § 107, 42 U.S.C.A. § 12117(a); 29 C.F.R. § 1630.2(j)(1)(iii).

[22] **Civil Rights** Preliminary injunction

Healthcare workers currently and formerly employed by medical center were unlikely to succeed on merits of their claim that medical center's policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption violated Title VII, for purpose of workers' motion for a preliminary injunction and/or temporary restraining order prohibiting medical center from enforcing mandatory vaccination policy; medical center had granted over 57% of requests for religious exemptions to vaccine requirement, 11 of 40 healthcare workers who brought action against medical center had been granted religious exemptions, no worker who was a party to that action had been denied a religious exemption, and workers who did not seek exemptions did not inform medical center of religious conflict. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); 42 U.S.C.A. § 2000e-2(j).

[23] **Civil Rights** Accommodations

Analysis of any religious accommodation case under Title VII begins with question of whether employee has established prima facie case of religious discrimination. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); 42 U.S.C.A. § 2000e-2(j).

[24] **Civil Rights** Practices prohibited or required in general; elements

To establish prima facie case of religious discrimination under Title VII, employee must show that (1) she holds sincere religious belief that conflicts with employment requirement, (2) she has informed employer about conflicts, and (3) she was discharged or disciplined for failing to comply with conflicting employment requirement. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); 42 U.S.C.A. § 2000e-2(j).

[25] **Injunction** Adverse employment actions
Injunction Health

Healthcare workers currently and formerly employed by medical center would not suffer irreparable harm absent a preliminary injunction and/or temporary restraining order prohibiting medical center from enforcing policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption; healthcare workers who had not sought medical or religious exemptions from vaccine requirement recognized that they could be terminated from their employment, at least one worker who was party to action against medical center had already found other employment after voluntarily leaving employment with medical center, no worker who was party to action was being forcibly vaccinated against his or her will, and any injuries stemming from termination were compensable by monetary damages.

4 Cases that cite this headnote

[26] **Injunction** Irreparable injury

Irreparable harm is indispensable requirement for preliminary injunction, and in absence of irreparable harm, injunctive relief cannot be granted.

10 Cases that cite this headnote

[27] **Injunction** Irreparable injury

An inquiry into irreparable harm for the purpose of injunctive relief is focused on the group for whom the policy is a restriction, not the group for whom the policy is irrelevant.

1 Cases that cite this headnote

[28] **Injunction** Irreparable injury
Injunction Recovery of damages

For an injury to be irreparable for the purpose of injunctive relief, the injury resulting from

the denial of injunctive relief cannot be fully compensable by monetary damages.

3 Cases that cite this headnote

[29] **Injunction** Adverse employment actions

Loss of employment is not considered to be an irreparable injury for the purpose of injunctive relief because it is fully compensable by monetary damages.

8 Cases that cite this headnote

[30] **Injunction** Employment and Compensation

Injunction Health

Public interest weighed against granting a preliminary injunction and/or temporary restraining order prohibiting medical center from enforcing policy mandating that employees be vaccinated against COVID-19 or obtain a valid exemption, although healthcare workers presented opinions of medical professionals supporting their suspicions about efficacy and safety of COVID-19 **vaccines**; public had a substantial interest in ending COVID-19 pandemic, which constituted an international public health crisis, and medical center, as a private employer, had a right to set conditions of employment for its employees.

2 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM ORDER

David L. Bunning, United States District Judge

***1** This matter is before the Court on Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction. (Doc. # 7). Pursuant to the Court's Order (Doc. # 8), the Motion has been fully briefed (Docs. # 15 and 22), and an Oral Argument was held before the Court on Wednesday, September 22, 2021. (Doc. # 31). Alan Statman argued for Plaintiffs, and Mark Guilfoyle argued for Defendants. Having heard the oral arguments, and having reviewed the filings and accompanying affidavits and exhibits submitted by both parties, the Court **denies** Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction, for the reasons stated herein.

I. BACKGROUND

At its core, this case is about conditions of employment, and whether a private employer can modify its employment conditions to require employees to be vaccinated in response to an unprecedented global pandemic. Within that framework, the Court has been asked to determine if the law requires preliminary enjoinment of a mandatory vaccination policy. For the reasons that follow, the Court concludes that it does not, and denies the motion.

Plaintiffs are a group of healthcare workers, some past and others presently employed by Defendants St. Elizabeth Medical Center and Summit Medical Group, d/b/a St. Elizabeth Physicians (both hereinafter "St. Elizabeth"). (*See* Doc. # 7). Plaintiffs are seeking injunctive relief from the Court to prohibit St. Elizabeth from enforcing a mandatory vaccination policy it enacted in response to the COVID-19 pandemic. (*See id.*) Under that policy, St. Elizabeth employees are required to "either receive a COVID-19 vaccine or submit a request for a medical exemption or exemption for sincerely held religious beliefs" before October 1, 2021. (Doc. # 1-17).[1] The policy further states that "[f]ailure to comply ... without an accepted exemption may result in termination ...." (*Id.*).

Plaintiffs have raised numerous causes of action under both state and federal law in their Complaint. (Doc. # 1). But in support of their motion for injunctive relief, Plaintiffs have concentrated on their positions that the vaccination policy infringes upon their constitutional rights (Doc. # 7 at 3), and that Defendants have not approved religious and medical accommodations to the vaccination policy in accord with the

Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). (Doc. # 22 at 11).

II. ANALYSIS

[1] **[2]** The decision to grant or deny injunctive relief falls solely within the discretion of the district court. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008). In the Sixth Circuit, the "same factors [are] considered in determining whether to issue a TRO or preliminary injunction." *Id.* Thus, the Court can evaluate both the temporary restraining order and the preliminary injunction by the same analysis. *See also id.* (applying the aforementioned factors to a temporary restraining order); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't.*, 305 F.3d 566, 573 (6th Cir. 2002) (applying the same to a preliminary injunction).

***2** **[3]** **[4]** **[5]** **[6]** The four factors used in evaluating temporary restraining orders and/or preliminary injunctions are: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable harm without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Id.* (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)). The four factors are not prerequisites that must be met, but are interrelated concerns that must be balanced against one another. *Ne. Ohio Coal. for Homeless and Serv. Emps. Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). Lastly, temporary restraining orders and preliminary injunctions are "extraordinary and drastic remed[ies], ... never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 690-91, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008) (internal citations omitted). Rather, a party must demonstrate the legal factors that necessitate the granting of a preliminary injunction or temporary restraining order—if not fully, then at least to the extent that the factors cumulatively weigh in the moving party's favor. *See id.; see also Blackwell*, 467 F.3d at 999.

(a) Strong Likelihood of Success on the Merits

[7] **[8]** **[9]** The first factor requires the moving party to demonstrate a "strong likelihood of success on the merits," *Overstreet*, 305 F.3d at 573. Oftentimes, this factor is determinative, *Wilson v. Williams*, 961 F.3d 829, 837 (6th Cir. 2020), which warrants its analysis being first and foremost. Plaintiffs are correct that at this stage, they are not required to "prove [their] case in full," and that "it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful...." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012). However, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion," *Leary*, 228 F.3d at 739, which merely requires establishing a "genuine issue of material fact." *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 613 (6th Cir. 1998). Thus, if Plaintiff can satisfy this factor by merely raising questions – those questions must be exceptionally significant, and grounded in actual legal disputes, not conjectures and conspiracies. Unfortunately for Plaintiffs, here, they have not raised sufficiently significant questions where they seek to do so, and they have otherwise not established a strong likelihood of success on any of their claims.

(1) St. Elizabeth is not a state actor, and Plaintiffs' constitutional claims are thus inapplicable.

[10] In their Complaint and in their briefings on the instant motion, Plaintiffs have raised numerous constitutional concerns. (*See* Doc # 1 ¶ 463, 570, 584 *et seq.*, Doc. # 7 at 3; Doc. # 22 at 7). Furthermore, in support of the instant motion, Plaintiffs have cited numerous cases noting the importance of their constitutional concerns, primarily in terms of an allegedly irreparable injury. (*See* Doc. # 7 at 3 and 22 at 6-8). None of these cases, however, were brought against a singular private, non-government actor.[2]

***3** **[11]** Notably, a well settled principle of constitutional law is that there exists "a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 297, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988)). Because of that principle, generally known as the state action doctrine, the Court sees Plaintiffs' constitutional assertions as bearing more on their likelihood of success than on the irreparable harm factor. Put simply, without establishing that Defendants are state actors, Plaintiffs' constitutional claims cannot stand, and thus have zero likelihood of success on the merits.

[12] **[13]** **[14]** The Supreme Court has made clear that "a private entity may qualify as a state actor when it exercises 'powers traditionally exclusively reserved to the state.' " *Manhattan Cmty. Access Corp. v. Halleck*, —— U.S. ——, 139

S. Ct. 1921, 1928, 204 L.Ed.2d 405 (2019) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477, (1974)). Furthermore, "the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor – unless the private entity is performing a traditional, exclusive public function. The same principle applies if the government funds or subsidizes a private entity." *Id.* at 1931-32 (internal citations omitted). Private hospitals, no matter how much federal funding they may receive, are generally not state actors for purposes of constitutional questions. *See, e.g. Thomas v. Nationwide Children's Hosp.*, 882 F.3d 608, 612 (6th Cir. 2018). Plaintiffs' attempts to turn Defendants into state actors, based on Plaintiffs' counsel's statements during oral argument that a hospital can become a "quasi-state actor" by how much government funding it receives is unavailing. Not only is such a claim in direct conflict with controlling precedent, *Halleck*, 139 S. Ct. at 1928, Plaintiffs have been unable to provide a case in support of that assertion. For these reasons, Plaintiffs' likelihood of success on the merits of their constitutional claims is virtually nonexistent, weighing heavily against granting injunctive relief.

(2) Plaintiffs have not established a strong likelihood of success on the merits with respect to their claims under the ADA and Title VII.

In their Complaint, Plaintiffs have labeled their claim brought under the ADA as their "strongest claim." (Doc. #1 at 9). They are correct that under the ADA and Title VII, private employers such as St. Elizabeth are required to offer medical and religious accommodations to its mandatory vaccination policy. *See, e.g., Norman v. NYU Langone Health Sys.*, 492 F. Supp. 3d 154, 165 (S.D.N.Y. 2020) ("Doubtless, some reactions to **vaccines** can be severe enough ... to rise to the level of a disability under the ADA."); *Fallon v. Mercy Cath. Med. Ctr.*, 877 F.3d 487, 490 (3d Cir. 2017) (analyzing a religious objection to an employer's vaccine mandate by Title VII framework).

[15] **[16]** Initially, the Court recognizes that employment discrimination claims brought under the ADA and Title VII both require exhaustion of administrative remedies before the filing of a lawsuit. 42 U.S.C. § 12117(a); 42 U.S.C. § 2000e-5(e)(1). While both statutes' requirements of administrative exhaustion cut against the likelihood of success on the merits from the outset, "Title VII's [administrative exhaustion requirement] is not jurisdictional," *Fort Bend Cty. v. Davis*, —— U.S. ——, 139 S. Ct. 1843, 1846, 204 L.Ed.2d 116 (2019), and so the Court will evaluate the likelihood of success on the merits of Plaintiffs' ADA and Title VII claims by focusing on the prima facie elements of each.

(i) ADA Claim

***4** **[17]** **[18]** **[19]** The Americans with Disabilities Act "broadly prohibits discrimination against a qualified individual on the basis of disability as it applies to aspects of employment, including hiring, advancement, and firing." *Hostettler v. College of Wooster*, 895 F.3d 844, 848 (6th Cir. 2018). Put simply, the ADA requires employers to provide disabled employees with "**reasonable accommodations**" to avoid discrimination. *See, e.g., Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir. 2007). With specific respect to vaccination mandates, the Equal Employment Opportunity Commission has advised employers that the ADA does require employers to provide a process by which a disabled employee can seek a **medical exemption** to a COVID-19 vaccine requirement. (Doc. # 15-6 at 33). Thus, if an employer does not provide **reasonable accommodations** to disabled employees, an employee has an actionable claim under the ADA. *Kleiber*, 485 F.3d at 868.

Here, as their "strongest claim," Plaintiffs have asserted that in violation of the ADA, Defendants have "corrupted" the process by which they are required to provide reasonable accommodations to disabled employees. (Doc. # 1 at 9). Plaintiffs also assert that Defendants have provided them with no right to appeal the denial of a requested exemption. For the reasons that follow, Plaintiffs have failed to demonstrate a strong likelihood of success on an ADA violation claim against Defendants.

[20] "A person seeking relief under the ADA for termination must establish (1) that she is a disabled person within the meaning of the Act, (2) that she is qualified to perform the essential functions of her job with or without reasonable accommodation, and (3) that she suffered an adverse employment decision because of her disability." *McKay v. Toyota Motor Mfg., U.S.A, Inc.*, 110 F.3d 369, 371 (6th Cir. 1997) (internal citations omitted). The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities of [the affected] individual." 42 U.S.C. § 12102(2)(A).

[21] A court's role in assessing an ADA claim is " 'whether [employers] have complied with their obligations and whether discrimination has occurred', not whether an individual's impairment is a disability." *Hostettler*, 895 F.3d at 853 (quoting 29 C.F.R. § 1630.2(j)(1)(iii)). In this case, Plaintiffs simply have not shown that Defendants have not complied with the ADA in providing necessary medical accommodations to the vaccination requirement. The following table shows the status of Defendants' processing of medical accommodations through September 21, 2021, provided by Defendants at oral argument.

MEDICAL EXEMPTIONS

Requests Received	**232**	
Granted Fully	31	13.36 %
Granted Deferments	143	61.64 %
Denied	34	14.66 %
Pending	24	10.34 %

Of 232 requests received by Defendants for medical accommodations, they have fully granted 31 requests, granted 143 deferment requests, denied 34 requests, and have 24 pending requests. These statistics reveal that Defendants have either granted full exemptions or granted deferments to 75 percent of employees who have requested a medical accommodation to the vaccine requirement.

In support of the allegedly "corrupt" process, Plaintiffs posited at oral argument that it is an apparently common practice of defense attorneys to "poach" members of a class of plaintiffs into cooperating with the defendants, so that the defense counsel can show an earnest effort in making **accommodations**. The Court is not convinced. In granting 31 **medical exemptions** and in granting 143 deferments, Defendants have granted more medical **accommodations** than there are Plaintiffs in this case. In their Reply in support of the instant motion, Plaintiffs attest that Defendants are misrepresenting the number of applications for religious **accommodations**, writing that "[they] understand over 5,000"[3] medical and religious exemptions have been filed. (Doc. # 22 at 3). However, Plaintiffs provide no evidence in support of that assertion.

***5** Furthermore, no Plaintiff in this case has suffered an adverse employment decision because of a disability, which is the third element of a prima facie case under the ADA. In fact, Plaintiff April Hoskins has received a medical exemption, and another Plaintiff, Veronica Crump, was approved for a medical exemption after initially being denied a religious exemption. (Doc. # 32, Plaintiffs' Exh. 1). The complete lack of adverse employment effects suffered by Plaintiffs inhibits their ability to establish a prima facie case under the ADA. In the absence of the claim's prima facie elements, their ADA claim has very little likelihood of success, and accordingly, Plaintiffs have not shown a strong likelihood of success on the merits with respect to their ADA claim.

(ii) Title VII Claim

[22] **[23]** **[24]** Much like the ADA, Title VII makes it unlawful to discriminate against an employee, but on the basis of religion, instead of disability. *See* 42 U.S.C. § 2000e-2(a). The statute broadly defines "religion" to mean "all aspects of religious observance and practice, as well as belief." *Id.* at § 2000e-2(j). "The analysis of any religious accommodation case begins with the question of whether the employee has established a prima facie case of religious discrimination." *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987), *cert. denied*, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988). To establish a prima facie case of religious discrimination, a plaintiff must show that (1) she holds a sincere religious belief that conflicts with an employment requirement; (2) she has informed the employer about the conflicts; and (3) she was discharged or disciplined for failing to comply with the conflicting employment requirement. *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007).

Applied to the relevant facts here, those elements would require a plaintiff to show (1) a sincere religious belief in conflict with the vaccine requirement; (2) that she informed Defendants of the conflict by filling out a religious exemption form, and (3) that she was discharged or disciplined for

failing to comply with the requirement. After a prima facie case is established, a burden shifting framework is applied to adjudicate the claim on its merits. *Tepper*, 505 F.3d at 514. But in the absence of a prima facie case, a claim has no likelihood of success on the merits – let alone a strong likelihood of success.

In this case, Plaintiffs have failed to even suggest that they could raise a prima facie case of religious discrimination, weighing against the granting of injunctive relief. According to a document provided by Plaintiffs at oral argument, 11 of the 40 Plaintiffs have been granted religious exemptions to the vaccine requirement and thus will not be required to obtain the vaccine. (Doc. # 32, Plaintiff's Exhibit 1). Furthermore, according to the same document, no Plaintiff has been denied a religious exemption, and only one was marked still pending (*id.*), but corroborating documents provided by Defendants show that even the pending religious exemption has been granted. (Doc. # 32, Defendants' Exh. 1). Because none of the Plaintiffs in this case have been denied a religious exemption, they are unable to establish the third element, which requires discharge or discipline from their employer.

Furthermore, with respect to the second element, to the extent that there are Plaintiffs who have not sought a religious exemption, they have not informed or notified their employer about a potential religious conflict. In reference to one of the granted religious exemptions, Plaintiffs state that "The applicant's beliefs are shared by many, many Christians, and ... Defendants should be granting vast numbers of similar requests." (Doc. # 22 at 11). The below chart summarizes the current status of Defendants' processing of religious exemptions, as of September 21, 2021, and based on Defendants' attestations at oral argument.

RELIGIOUS EXEMPTIONS

Requests Received	**739**	
Granted	425	57.51 %
Denied	39	5.28 %
Pending	275	37.21 %

***6** As Plaintiffs have failed to show a strong likelihood of success on their claims of religious discrimination under Title VII, this factor does not support the granting of injunctive relief.

(b) Irreparable Harm by the Moving Party

[25] **[26]** **[27]** Irreparable harm is an "indispensable" requirement for a preliminary injunction, and in the absence of irreparable harm, injunctive relief cannot be granted. *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 326 (6th Cir. 2019). Furthermore, an inquiry into irreparable harm is focused on "the group for whom the [policy] is a restriction, not the group for whom the [policy] is irrelevant." *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 894, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Thus, in this case, the Plaintiffs need to show "certain and immediate" harm, not "speculative or theoretical" harm that would result in the absence of granting injunctive relief. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (quoting *D.T.*, 942 F.3d at 327 (internal quotations omitted)). Here, Plaintiffs have failed to show that irreparable harm will result in the absence of injunctive relief, weighing heavily against the granting of injunctive relief.

[28] **[29]** First, for an injury to be irreparable, the injury resulting from the denial of injunctive relief cannot be "fully compensable by monetary damages." *Overstreet*, 305 F.3d at 578. Furthermore, loss of employment is not considered to be an irreparable injury. *See, e.g., Aluminum Workers Int'l. Union, AFL-CIO, Loc. Union No. 215 v. Consol. Aluminum Corp.*, 696 F.2d 437, 443 (6th Cir. 1982).[4] Loss of employment is not irreparable because it is fully compensable by monetary damages. *See Hayes v. City of Memphis*, 73 F.App'x 140, 141 (6th Cir. 2003). In fact, wrongful termination claims exist for that very reason—whether brought under the ADA, Title VII, or some other state or federal law, a wrongfully terminated plaintiff can receive monetary damages to compensate their loss of employment. In this case, the remaining Plaintiffs who have not sought accommodations recognize that they may be terminated from employment. (Doc. # 8).

However, Plaintiffs also assert that injuries arising from "their constitutional right to privacy, their [in]ability to obtain employment in any other appropriate job, and emotional and physical wellbeing" establishes irreparable injury. (*Id.* at 8-9). As previously stated, constitutional rights are not at question here, as Defendants are not state actors. *See supra* Part II(a)(1). Thus, Plaintiffs' "constitutional right to privacy" falls short of establishing irreparable harm. With respect to an inability to obtain other employment, Plaintiffs themselves have shown that at least one Plaintiff has, in fact, been able to obtain another job after voluntarily leaving employment with Defendants. (Doc. #13-1 at 38, *Affidavit of Erin Marshall*). Otherwise, emotional injuries stemming from wrongful termination claims are routinely compensated by monetary damages in this Court and in courts across the country. Lastly, with respect to the "national consequences" referred to by Plaintiffs in their reply (Doc. # 22 at 1) and with respect to the broader implications on the community implied by Plaintiffs' counsel at oral argument, those concerns are irrelevant to this question, as the irreparable harm suffered in the absence of injunctive relief must be actually suffered by the plaintiffs in question. *Casey*, 505 U.S. at 894, 112 S.Ct. 2791.

***7** Lastly, no Plaintiff in this case is being forcibly vaccinated. *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2019), relied upon heavily by Plaintiffs, dealt with the "right to bodily integrity" with respect to access to clean drinking water in a case against the Michigan state government. *Guertin* cites forcible injection cases, including *Winston v. Lee*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985), which involved the government seeking a warrant to surgically remove a bullet from someone's chest, and *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), which involved an inmate being forcibly injected with antipsychotic drugs that had known side effects. Guertin refers to the forcible injections as a "foreign substance," in analogizing the forcible vaccination cases to its own issue. 912 F.3d at 919. To be clear, though, the "foreign substance" at issue in *Guertin* was lead contamination of the municipal drinking water in Flint, Michigan. *Id.* at 915. The *Guertin* plaintiffs and other Flint residents bathed in and drank the lead-contaminated water without knowledge of its contamination, and suffered from lead poisoning as a result. *Id.* Their hair fell out, they developed rashes, they tested positive for E. coli, many died from Legionnaire's Disease, and children in their community had lethally-high levels of lead in their blood. *Id.* Here, no Plaintiff is being imprisoned and vaccinated against his or her will. Nor is any Plaintiff unknowingly ingesting lead-contaminated water. Rather, these Plaintiffs are choosing whether to comply with a condition of employment, or to deal with the potential consequences of that choice. Even if they believe the condition or the consequences are wrong, the law affords them an avenue of recourse – and that avenue is not injunctive relief on this record. Thus, no Plaintiff in this case will suffer irreparable harm, as that term has been clearly defined by the law, in the absence of injunctive relief.

(c) Substantial Harm to Others and Public Interest Factors

[30] The last two factors in the injunctive relief framework involve the interests of nonparties, whereas the first two factors deal with the interests of the parties in the lawsuit. Oftentimes, balancing these two factors against the first two is referred to as "balancing equities." *Entm't Prods., Inc. v. Shelby Cnty.*, 588 F.3d 372, 395 (6th Cir. 2009). Specifically, the equities being balanced are private equities and public equities, which have both been prominently raised in this case.

The "greater good" is a somewhat vague concept. In today's world, determining the "greater good" depends on whom you ask. Plaintiffs here suggest that perhaps, the greater good is not that important to us at all, as it is not mentioned in the Bill of Rights, and as it has nothing to do with individual liberties. (Doc. # 22 at 4). To the contrary, Defendants suggest that the greater good in this case has to do with "the thousands of people ... who will benefit from additional vaccinations in the community[.]" (Doc. # 15 at 15). Still, it is not lost on the Court that Plaintiffs also believe their case will "help save these workers, and by extrapolation, this country." (Doc. # 1 at 7). So perhaps, the best way to categorize the Plaintiffs' position on the greater good is not that it is unimportant, but rather, that their individual liberties are *more* important.

Specifically, Plaintiffs believe that their individual liberties include a right to be employed by a private hospital, and without that employment being conditioned upon their receiving of a COVID-19 vaccine. No matter any individual stance on COVID-19, every person, including the parties in this case, can agree that ending the COVID-19 pandemic is in our collective best interest—and in the public's best interest, as well, for purposes of balancing equities.

The point at which we all start to diverge, however, is where we begin to discuss *how* to end the pandemic. Some, such as the affiants provided by Plaintiffs, believe that the

best way to end the pandemic is to simply return to life as usual and let natural immunity take its course. (Doc. # 1-10 at 2-3). Defendants, however, made their own choice about how to end the pandemic – they chose to require their employees to get vaccinated, to "assist our community in becoming the healthiest in America and to safeguard the health and well-being of associates, [their] patients, visitors, and others who spend time in [their] facilities." (Doc. # 15-9 at 2). Plaintiffs, in opposition, believe that their individual choices about the pandemic—their individual liberties—should override Defendants' choice to require vaccination of their employees, in furtherance of a goal to protect its business and its community. And thus, the question at hand returns to the "greater good." Is the "greater good" made up of many different individual liberties, is it a singular collective liberty, or is it both?

***8** For more than 200 years, the American courts have attempted to answer that question. Justice Marshall wrote in *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. 137, 163, 1 Cranch 137, 2 L.Ed. 60 (1803). This Court recognizes that essence, and it accordingly celebrates Plaintiffs' rights to zealously claim the protection of the laws. But the Court is nonetheless limited to the law, and the law states that vaccination mandates, both public and private, are permissible with appropriate exceptions.

More than a century ago, Justice John Marshall Harlan, a great Kentuckian born in this judicial district, wrote in *Jacobson v. Massachusetts* about a state-imposed vaccination mandate:

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own ... regardless of the injury that may be done to others.

197 U.S. 11, 26, 25 S.Ct. 358, 49 L.Ed. 643 (1905). *Jacobson* and its holding have not been overturned by the Supreme Court, and this Court will thus abide by it and its principles. Actual liberty for all of us cannot exist where individual liberties override potential injury done to others. For that reason, the state of Massachusetts was permitted to impose a vaccine mandate without exception, and with a penalty of imprisonment, during the smallpox pandemic. *See id.* The case before this Court deals with a private actor, and with no actual coercion. Being substantially less restrictive than the *Jacobson* mandate, and being enacted by a private actor, Defendants' policy is well within the confines of the law, and it appropriately balances the public interests with individual liberties. *See, e.g., Valdez v. Grisham*, No. 1:21-CV-783-MV-JHR, —— F.Supp.3d ——, 2021 WL 4145746 (D. N.M. Sept. 13, 2021).

Plaintiffs have made clear that they are suspicious about the efficacy and safety of the COVID-19 **vaccines**. They have also presented the opinions of medical professionals who share the same suspicions. But unfortunately, suspicions cannot override the law, which recognizes Defendants' right to set conditions of employment. In *Jacobson*, the Supreme Court "emphasized that the 'possibility that the belief [in the efficacy of **vaccines**] may be wrong, and that science may yet show it to be wrong' was 'not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.' " *Valdez*, —— F.Supp.3d at ——, 2021 WL 4145746 at *6 (quoting *Jacobson*, 197 U.S. at 35, 25 S.Ct. 358). Furthermore, as is the case here, the *Jacobson* plaintiffs also presented the opinions of medical professionals in support of their case. But nonetheless, the Supreme Court "considered *and rejected* the defendants 'offers of proof' of 'those in the medical profession' " who cast doubt on the efficacy of smallpox **vaccines**, in favor of a prevailing public interest. *Id.*

More plainly, the Supreme Court in *Jacobson* upheld state legislative action in the face of doubt (from both laypeople and professionals) on the efficacy of the smallpox vaccine, because the state had a rational basis for its decision—preventing the spread of contagious diseases. *See Jacobson*, 197 U.S. at 35, 25 S.Ct. 358. That holding still stands, and if legislative action to prevent the spread of contagious diseases must be upheld, even in spite of doubt—and in spite of individual liberties—then private action must be upheld, too, because "[i]ndeed, 'this case is easier than *Jacobson*.' "[5] *Valdez*, —— F.Supp.3d at ——, 2021 WL 4145746 at *8 (quoting *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021)).

***9** In these cases "easier" than *Jacobson*, which deal with private, non-state actors, courts have rationalized that each of us trade off our individual liberties every day in exchange for employment. Alongside Judge Easterbrook in the Seventh Circuit, "[w]e assume with plaintiffs that they have a right in bodily integrity. They also have a right to hold property." *Klaassen*, 7 F.4th at 593. Yet, to work at St. Elizabeth, Plaintiffs agree to wear a certain uniform, to arrive at work at a certain time, to leave work at a certain time, to park their vehicle in a certain spot, to sit at a certain desk and to work on certain tasks. They also agree to receive an **influenza** vaccine, which Defendants have required of their employees for the past five years. These are all conditions of employment, and "every employment includes limits on the worker's behavior in exchange for his remuneration." *Bridges v. Houston Methodist Hosp.*, No. H-21-1774, —— F.Supp.3d ——, ——, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021). If an employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment.

Finally, and in close, the Court recognizes that the COVID-19 pandemic has become unfortunately political and vitriolic, on all sides. But the Court expressly refuses to adjudicate the political assertions raised in this case. Irrespective of politics, the Court has evaluated and analyzed the law and the legal arguments raised by both sides. Unfortunately for Plaintiffs, they have not stated a viable legal theory in support of injunctive relief, as each of the factors required to be considered, individually and collectively, weigh against the denial of injunctive relief.

Accordingly, **IT IS ORDERED** that Plaintiffs' Motion for a Temporary Restraining Order and/or Preliminary Injunction (Doc. # 7) is **DENIED.**

All Citations

--- F.Supp.3d ----, 2021 WL 4398027, 64 NDLR P 23

Footnotes

1 The cited document is the vaccination policy from St. Elizabeth Physicians, but Defendants have noted that the policy is "substantially the same" for both St. Elizabeth Physicians and St. Elizabeth Medical Center. (Doc. # 15 at 5 n.3). After reviewing both policies, the Court agrees, and refers to them as one. The quote included here is contained in both policies.

2 *Elrod v. Burns*, 427 U.S. 347, 349, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (Doc. # 7 at 3; brought by public employees against county sheriff's office); *Obergefell v. Kasich*, No. 1:13-CV-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013) (Doc. # 7 at 3; "The issue is whether the *State of Ohio* can discriminate....") (emphasis added); *Jacobson v. Mass.*, 197 U.S. 11, 24, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (Doc. # 22 at 6; "The power of *the State* [of Massachusetts] to enact this statute....") (emphasis added); *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (Doc. # 22 at 6; brought against Pennsylvania governor and other officials); *Guertin v. Mich.*, 912 F.3d 907, 915 (6th Cir. 2019) (Doc. # 22 at 7; brought against "numerous state, city, and private-actor defendants"); *Washington v. Harper*, 494 U.S. 210, 213, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (Doc. # 22 at 8; "The central question before us is whether ... *the State* may treat ....") (emphasis added).

3 Defendants attested at oral argument that they have approximately 11,000 employees, and that approximately 971 had requested either a medical or religious exemption, representing approximately 11 percent of their workforce.

4 *See also Doe v. Ronan*, No. 1:09-CV-105, 2009 WL 10679456, at *2 (S.D. Ohio Apr. 20, 2009) ("It is well settled law that the loss of employment is not irreparable harm.").

5 In the alternate, even if this case were not an "easier case" than *Jacobson* and state action were present, St. Elizabeth would still have a rational basis for its policy, in the same way as the state of Massachusetts did in 1905 – preventing the spread of contagious diseases. *Jacobson*, 197 U.S. at 35, 25 S.Ct. 358.

178 F.Supp.3d 819
United States District Court, D. Nebraska.

Stephen CAVANAUGH, Plaintiff,
v.
Randy BARTELT, et al., Defendants.

4:14-CV-3183
|
Signed April 12, 2016

Synopsis

Background: State prisoner brought § 1983 action against prison officials, alleging that they refused to accommodate his religion in violation of Religious Land Use and Institutionalized Persons Act (RLUIPA), the First and Fourteenth Amendments, and the Nebraska Constitution. Officials moved to dismiss.

Holdings: The District Court, John M. Gerrard, J., held that:

prisoner's belief system did not constitute a religion under RLUIPA;

prisoner's ability to practice his religion was not substantially burdened;

officials were entitled to qualified immunity;

prisoner failed to state a Free Exercise claim;

prisoner did not have standing to bring Establishment Clause claim;

prisoner failed to state an Equal Protection Claim; and

prisoner's state constitutional claims necessarily failed because they were based on state provisions coextensive with federal counterparts, under which prisoner's claims had failed.

Motion granted.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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MEMORANDUM AND ORDER

John M. Gerrard, United States District Judge

The plaintiff, Stephen Cavanaugh, is a prisoner in the Nebraska State Penitentiary. Cavanaugh says he is a "Pastafarian," *i.e.*, a believer in the divine "Flying Spaghetti Monster" who practices the religion of "FSMism." He is suing the defendants, who are all prison officials, because of their refusal to accommodate his religious ***824** requests. Filing 1. The defendants move to dismiss his claims. Filing 20.

The Court finds that FSMism is not a "religion" within the meaning of the relevant federal statutes and constitutional jurisprudence. It is, rather, a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education. Those are important issues, and FSMism contains a serious argument—but that does not mean that the trappings of the satire used to make that argument are entitled to protection as a "religion." Nor, the Court finds, has Cavanaugh sufficiently alleged how the exercise of his "religion" has been substantially burdened. The Court will grant the defendants' motion to dismiss.

I. BACKGROUND

Cavanaugh's complaint actually contains very little detail on FSMism or its purported requirements—perhaps because the deliberate absurdity of its provisions would undermine his argument. So, before addressing Cavanaugh's specific allegations, it will be helpful to examine FSMism in more detail.

1. FSMISM

FSMism can only be understood in the context in which it arose: as a response to the theory that the origins of life on Earth can be found in "intelligent design." *See generally*

Kitzmiller v. Dover Area Sch. Dist., 400 F.Supp.2d 707 (2005).

> The religious movement known as Fundamentalism began in nineteenth century America as a response to social changes, new religious thought and Darwinism. Religiously motivated groups pushed state legislatures to adopt laws prohibiting public schools from teaching evolution, culminating in the Scopes "monkey trial" of 1925.
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> In 1968, a radical change occurred in the legal landscape when in *Epperson v. Arkansas*, the Supreme Court struck down Arkansas's statutory prohibition against teaching evolution. Religious proponents of evolution thereafter championed "balanced treatment" statutes requiring public-school teachers who taught evolution to devote equal time to teaching the biblical view of creation; however, courts realized this tactic to be another attempt to establish the Biblical version of the creation of man.
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> Fundamentalist opponents of evolution responded with a new tactic ... which was ultimately found to be unconstitutional under the First Amendment, namely, to utilize scientific-sounding language to describe religious beliefs and then to require that schools teach the resulting "creation science" or "scientific creationism" as an alternative to evolution.
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> In *Edwards v. Aguillard*, ... the Supreme Court held that a requirement that public schools teach "creation science" along with evolution violated the Establishment Clause. The import of *Edwards* is that the Supreme Court turned the proscription against teaching creation science in the public school system into a national prohibition.

Kitzmiller, 400 F.Supp.2d at 711–12 (citations omitted). The concept of "intelligent design" was then promoted; generally described, it maintains that Earth's ecosystem displays complexity suggesting intelligent design by a "master intellect." *Id.* at 718. But unlike its predecessors, the "official position" of intelligent design is that the designer is not expressly identified as a deity. *Id.* at 718–19.

FSMism is a riposte to intelligent design that began with a letter to the Kansas State Board of Education when it was considering intelligent design. *See*, Bobby Henderson, *The Gospel of the Flying Spaghetti Monster* 111-13 (2006) (FSM Gospel). The primary criticism of intelligent ***825** design—and the basis for excluding it from school science classes—is that although it purports to be "scientific," it is actually "an interesting theological argument" but "not science." *Kitzmiller*, 400 F.Supp.2d at 745–46. The conceit of FSMism is that, because intelligent design does not identify the designer, its "master intellect" could just as easily be a "Flying Spaghetti Monster" as any Judeo-Christian deity —and, in fact, that there is as much scientific evidence for a Flying Spaghetti Monster as any other creator. *See* FSM Gospel at 3-4.[1] As the FSM Gospel explains, "[w]e are entering into an exciting time, when no longer will science be limited to natural explanations. ... Propelled by popular opinion and local government, science is quickly becoming receptive to all logical theories, natural and supernatural alike." *Id.* at 11.

> Consider the theory of Evolution. To their credit, Intelligent Design advocates have successfully argued that their alternative theory deserves as much attention as Evolution, since neither can be considered fact. This is a valid point, but Evolution is hardly the only theory in trouble.
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> It seems strange that Evolution is singled out as "just a theory" when there are so many basic ideas in science that remain unproven, yet are still taught as fact. The objections to teaching Evolution have only illustrated this point further: *Alternative theories must be taught in order to give our young students' minds a broad foundation.* The Intelligent Design proponents make a compelling, and totally legitimate, argument that if a theory has not been proven, then one suggested theory is just as good as another.
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> Take gravity, for example: the force of attraction between massive particles. We know a great deal about the properties of gravity, yet we know nothing about the cause of the force itself. Why are particles attracted to one other? If we review the literature, we find a lot of material dealing with the properties of gravity, but very little dealing with the underlying cause of this attraction. Until we have a proven answer to this question, it seems irresponsible to instruct students in what is, ultimately, just a theory. However, if we must discuss the theory of gravity at all, then it's reasonable that all suggested theories should be given equal time, since none have been proven or disproven. Therefore, I formally submit that the Flying Spaghetti Monster is behind this strange and often misunderstood force.

> What if it is He, pushing us down with His Noodly Appendages, that causes this force? He is invisible, remember, and is undetectable by current instruments, so in theory it is possible. And the fact that the gravitational powers of the Spaghetti Monster haven't been disproven makes it all the more likely to be true. We can only guess as to His motives, but it's logical to assume that if He is going to such trouble, there is a good reason. It could be that He doesn't want ***826** us floating off earth into space, or maybe just that He enjoys touching us—we may never know.
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> And while it's true that we don't have any empirical evidence to back up this theory, keep in mind the precedent set by Intelligent Design proponents. Not only is observable, repeatable evidence not required to get an alternative theory included in the curriculum, but simply poking holes in established theory may be enough. In this case, the established theory of gravity makes no mention as to the *cause* of the force; it merely presents the properties of it. I fully expect, then, that this FSM theory of gravity will be admitted into accepted science with a minimum of apparently unnecessary bureaucratic nonsense, including the peer-review process.
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> ....
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> No one is saying that the FSM theory of gravity is necessarily true, but at the very least, it's based on sound science, sound enough to be included in the curriculum with the other nonproven theories. Until the currently taught theory of gravity, known as Newtonism, is proven as fact, alternatives should be taught as well.

Id. at 3–5 (emphasis in original). FSMism is, then, a comedic extrapolation of the philosophical argument known as "Russell's Teapot": it rejects the idea that a hypothesis can be proved by an absence of evidence disproving it. [2]

But the FSM Gospel does not stop there: it sets forth—or, at least, follows the form of—a catechism of FSMism. *Id. passim*. The blurb on back of the FSM Gospel conveys the flavor:

> Can I get a "Ramen" from the congregation?!
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> Behold the Church of the Flying Spaghetti Monster (FSM), today's fastest-growing carbohydrate-based religion. According to church founder Bobby Henderson, the universe and all life within it were created by a mystical and divine being: the Flying Spaghetti Monster. What drives the FSM's devout followers, aka Pastafarians? Some say it's the assuring touch from the FSM's Noodly Appendage. There are those who love the worship service, which is conducted in Pirate-Speak and attended by congregants in dashing buccaneer garb. Still others are drawn to the Church's flimsy moral standards, religious holidays *every* Friday, and the fact that Pastafarian Heaven is *way* cooler. Does *your* Heaven have a Stripper Factory and a Beer Volcano? Intelligent Design has finally met its match—and it has nothing to do with apes or the Olive Garden of Eden.
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> Within these pages, Bobby Henderson outlines the true facts—dispelling such malicious myths as Evolution ("only a theory"), science ("only a lot of theories"), and whether we're really descended from apes (fact: Humans share 95 percent of their DNA with chimpanzees, ***827** but they share 99.9 percent with Pirates!).

2. CAVANAUGH'S CLAIMS

Cavanaugh alleges that he is a Pastafarian: that he has "openly declared his beliefs for many years" and "has several tattoos proclaiming his faith." Filing 1 at 8. He began requesting that prison officials afford his "faith" the same rights and privileges as religious groups, including "the ability to order and wear religious clothing and pendants, the right to meet for weekly worship services and classes and the right to receive communion." [3] Filing 1 at 8. His requests were rejected, because prison officials determined that FSMism was a parody religion. Filing 1 at 8-9. Cavanaugh says he was insulted by this conclusion. Filing 1 at 8. He has sued several prison officials in their official and individual capacities, pursuant to 42 U.S.C. § 1983, seeking injunctive relief and money damages. *See*, filing 1; filing 10; filing 11.

Cavanaugh's complaint invokes the religious freedom provisions of the First Amendment to the U.S. Constitution and art I, § 4 of the Nebraska constitution, as well as the Equal Protection provisions of the U.S. Constitution and art. I, § 3 of the Nebraska constitution. Filing 1 at 9-10. And the Court has also construed Cavanaugh's complaint as raising a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. Filing 8.

II. STANDARD OF REVIEW

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The complaint need not contain detailed factual allegations, but must provide more than labels and conclusions; and a formulaic recitation of the elements of a cause of action will not suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). For the purposes of a motion to dismiss a court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.*

And to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Determining whether a complaint states a plausible claim for relief will require the reviewing court to draw on its judicial experience and common sense. *Id.* at 679, 129 S.Ct. 1937. The facts alleged must raise a reasonable expectation that discovery will reveal evidence to substantiate the necessary elements of the plaintiff's claim. *See* *Twombly*, 550 U.S. at 545, 127 S.Ct. 1955. The court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may proceed, even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely. *Id.* at 556, 127 S.Ct. 1955.

III. DISCUSSION

The Court will begin with RLUIPA, because its protections are broader than ***828** those of the Constitution, and the resulting analysis will provide the basis for addressing Cavanaugh's other claims. *See* *Van Wyhe v. Reisch*, 581 F.3d 639, 658 (8th Cir.2009).

1. RLUIPA

RLUIPA provides that in a program that receives federal financial assistance, [4]

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
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> (1) is in furtherance of a compelling governmental interest; and
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> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a). A "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A). The statute is to be "construed in favor of a broad protection of religious exercise, to the maximum extent" permitted by the statute and the Constitution. 42 U.S.C. § 2000cc–3(g).

But, of course, a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation. *Holt v. Hobbs*, —— U.S. ——, 135 S.Ct. 853, 862, 190 L.Ed.2d 747 (2015). In other words, the prisoner must show that the government's conduct "imposes (1) a substantial burden (2) on a *religious* exercise." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 749 (8th Cir.2014) (emphasis in original). And those are two discrete burdens, *see* *id.* that the Court will consider separately.

(a) Religious Exercise

Courts must not presume to determine the plausibility of a religious claim. *See* *Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. ——, 134 S.Ct. 2751, 2778, 189 L.Ed.2d 675 (2014). Prison officials may, however, appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. *Cutter*, 544 U.S. at

725 n. 13, 125 S.Ct. 2113. Although RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion, it does not preclude inquiry into the sincerity of a prisoner's professed religiosity. *Id.* The "truth" of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held. *Id.*; *see* *Burwell*, 134 S.Ct. at 2779.

But that principle must have a limit, as courts have found when confronted with cultural beliefs; secular philosophies such as scientism, evolutionism, and objectivism; and institutions like the "Church of Cognizance" or "Church of Marijuana." *See, e.g., Daniel Chapter One v. Fed. Trade Comm'n*, 405 Fed.Appx. 505, 506 (D.C.Cir.2010); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir.1994); *United States v. Zielinski*, No. 1:11–cr–533, 2013 WL 2636104, at *13–15 (N.D.N.Y. June 11, 2013); *Harrison v. Watts*, 609 F.Supp.2d 561, 572–73 (E.D.Va.2009); *United States v. Quaintance*, 471 F.Supp.2d 1153, 1161 (D.N.M.2006), *aff'd*, 608 F.3d 717 (10th Cir.2010); *United States v. Meyers*, 906 F.Supp. 1494, 1508 (D.Wyo.1995); *aff'd*, 95 F.3d 1475 (10th Cir.1996). "Because RLUIPA is a guarantor of sincerely held religious beliefs, it may not be invoked simply to protect any 'way of life, however virtuous and admirable, if it is based on purely secular considerations.'" ***829** *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir.2008) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). And "'an asserted belief might be so bizarre, so clearly non-religious in motivation, as not to be entitled to protection.'" *Zielinski*, 2013 WL 2636104, at *13 (quoting *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 n. 2, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989)). In such instances, the initial inquiry is whether the belief at issue is genuinely "religious."

The Court is well-aware of the risks of such an endeavor: it might be too restrictive, and unduly exclusive of new religions that do not fit the criteria derived from known religious beliefs. *See* *Meyers*, 906 F.Supp. at 1509. But that risk is inherent in the statute (and for that matter in the First Amendment): RLUIPA's scope is defined in terms of "religious" belief, so the term must have meaning. *See* *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997) (statutes must be interpreted, if possible, to give each word some operative effect).

Courts have taken different approaches to such inquiries. However, the Court can start with these indicia:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Love v. Reed, 216 F.3d 682, 687 (8th Cir.2000) (quoting *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3rd Cir.1981)); *accord* *Meyers*, 95 F.3d at 1483. Such "deep and imponderable matters" may include existential matters, such as humankind's sense of being; teleological matters, such as humankind's purpose in life; and cosmological matters, such as humankind's place in the universe. *Meyers*, 95 F.3d at 1483; *accord* *Quaintance*, 471 F.Supp.2d at 1156; *see also* *Zielinski*, 2013 WL 2636104, at *13 (citing *Patrick v. LeFevre*, 745 F.2d 153, 158 (2d Cir.1984)). But that is not a rigid test for defining a religion, and flexibility and careful consideration of each belief system are needed. *Love*, 216 F.3d at 687.

This case is difficult because FSMism, as a parody, is designed to look very much like a religion. Candidly, propositions from existing caselaw are not particularly well-suited for such a situation, because they developed to address more *ad hoc* creeds, not a comprehensive but plainly satirical doctrine. Nonetheless, it is evident to the Court that FSMism is not a belief system addressing "deep and imponderable" matters: it is, as explained above, a satirical rejoinder to a certain strain of religious argument. Nor, however, does FSMism advocate for humanism or atheism, which the Court acknowledges have been found to be "religious" for similar purposes. *See*, *Kaufman v. McCaughtry*, 419 F.3d 678, 681–82 (7th Cir.2005); *Jackson v. Crawford*, No. 12–4018, 2015 WL 506233, at *7 (W.D.Mo. Feb. 6, 2015); *Am. Humanist Ass'n v. United States*, 63 F.Supp.3d 1274, 1283

(D.Or.2014). Those belief systems, although not theistic, still deal with issues of "ultimate concern" and take a position "on religion, the existence and importance of a supreme being, and a code of ethics." *See* *Kaufman*, 419 F.3d at 681–82 (quotations omitted). FSMism takes no such position: the only position it takes is that others' religious beliefs should not be presented as "science." Despite touching upon religion, that is a secular argument. [5] "[W]hile the belief in a divine ***830** creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not." *Peloza*, 37 F.3d at 521 (citing *Edwards v. Aguillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)).

It is not clear from Cavanaugh's complaint whether his professed adherence to FSMism is grounded in that argument, or in a literal reading of the FSM Gospel. But to read the FSM Gospel literally would be to misrepresent it—and, indeed, to do it a disservice in the process. That would present the FSM Gospel as precisely the sort of Fundamentalist dogma that it was meant to rebut.

It bears emphasizing that the Court is not engaged in—and has been careful to avoid—questioning the validity of Cavanaugh's beliefs. The Court is well aware that it "should not undertake to dissect religious beliefs because the believer admits that he is struggling with his position or because his beliefs are not articulated with clarity and precision that a more sophisticated person might employ." *United States v. Ali*, 682 F.3d 705, 710 (8th Cir.2012) (quoting *Love*, 216 F.3d at 688) (citations and quotations omitted). It is worth noting, however, that aside from identifying the FSM Gospel, Cavanaugh has not alleged anything about what it is that he actually believes—leaving the Court to read the book. And it is no more tenable to read the FSM Gospel as proselytizing for supernatural spaghetti than to read Jonathan Swift's "Modest Proposal" as advocating cannibalism. *Compare* Jonathan Swift, *A Modest Proposal*, *in Ireland in the Days of Dean Swift* 193, 194-203 (J. Bowles Daly ed., 1887) (1729).

This is not a question of theology: it is a matter of basic reading comprehension. The FSM Gospel is plainly a work of satire, meant to entertain while making a pointed political statement. To read it as religious doctrine would be little different from grounding a "religious exercise" on any other work of fiction. A prisoner could just as easily read the works of Vonnegut or Heinlein and claim it as his holy book, and demand accommodation of Bokononism or the Church of All Worlds. [6] *See*, Kurt Vonnegut, *Cat's Cradle* (Dell Publishing 1988) (1963); Robert A. Heinlein, *Stranger in a Strange Land* (Putnam Publ'g Grp. 1961). Of course, there are those who contend—and Cavanaugh is probably among them—that the Bible or the Koran are just as fictional as those books. It is not always an easy line to draw. But there must be a line beyond which a practice is not "religious" simply because a plaintiff labels it as such. The Court concludes that FSMism is on the far side of that line.

Because FSMism is not a "religion" for RLUIPA purposes, Cavanaugh has failed to allege a "religious exercise" was burdened.

(b) Substantial Burden

A prisoner also bears the burden, under RLUIPA, of establishing that a government practice puts a "substantial burden" on his exercise of a religious practice. *Holt*, 135 S.Ct. at 862; *Native Am. Council*, 750 F.3d at 749; *Van Wyhe*, 581 F.3d at 657; *Singson v. Norris*, 553 F.3d 660, 662 (8th Cir.2009). Under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*,

> [i]n order for a government practice to substantially burden a religious exercise, it must significantly inhibit or constrain conduct or expression that manifests ***831** some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Native Am. Council, 750 F.3d at 749 (citations and quotation omitted). But although this definition may be applied in the RLUIPA context, the Court must be mindful that RLUIPA's broad protection of "religious exercise" may protect beliefs that are not be "central" or "fundamental" to the prisoner's faith because RLUIPA extends even to religious

practices are not "compelled by, or central to" a certain belief system. *Van Wyhe*, 581 F.3d at 656; *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814 n. 7 (8th Cir.2008).

The primary focus of Cavanaugh's complaint, however, is that he is being discriminated against—that FSMism is not being treated the same as other faiths. He says very little about how his exercise of FSMism has been significantly burdened by that alleged discrimination. The closest he comes is alleging that the "wearing of special religious clothing is particularly important in FSMism" because, according to Cavanaugh, the FSM Gospel says that the Flying Spaghetti Monster "becomes angry if we don't." Filing 1 at 8-9. Cavanaugh does not, however, identify that religious clothing: a pirate costume. FSM Gospel at xiii. The passage relied upon by Cavanaugh originally comes from Bobby Henderson's initial letter to the Kansas Board of Education, found between a claim that scientific measurements are skewed by the Flying Spaghetti Monster "changing the results with His Noodly Appendage" and correlative data suggesting that global warming is caused by the decreasing number of pirates on the high seas. FSM Gospel at 108-09. The FSM Gospel states:

> I'm sure you now realize how important it is that your students are taught this alternate theory. It is absolutely imperative that they realize that observable evidence is at the discretion of the Flying Spaghetti Monster.
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> Furthermore, it is disrespectful to teach our beliefs without wearing His chosen outfit, which of course is full Pirate regalia. I cannot stress the importance of this enough, and unfortunately cannot describe in detail why this must be done as I fear this letter is already becoming too long. The concise explanation is that He becomes angry if we don't.

FSM Gospel at 112. So, this began as an attempt to vex the Kansas Board of Education by demanding, not only that students be taught about a Flying Spaghetti Monster, but that teachers dress as pirates to do so. In other words, it is a joke, at the expense of proponents of intelligent design.

Cavanaugh's contention seems to be that denying him a pirate outfit prevents him from evangelizing about FSMism.[7] But it is not clear to the Court how such a limitation significantly burdens *Cavanaugh's* practice of his "religion," as opposed to constraining his ability to preach to others. Cavanaugh does not specifically identify the other "religious" practices he seeks; they would presumably include such things ***832** as grog, a parrot, a seaworthy vessel, a "Colander of Goodness," and to take off every Friday as a "religious holiday." *See id.* at 67–68, 74, 110, 124–25, 170. But even if denying those accommodations would make it more difficult for Cavanaugh to practice FSMism, it would not make him effectively unable to do so, or coerce him into acting contrary to his beliefs. *See*, *Kaufman v. Pugh*, 733 F.3d 692, 699 (7th Cir.2013); *Lagar v. Tegels*, 94 F.Supp.3d 998, 1008–09 (W.D.Wisc.2015); *LaPlante v. Mass. Dep't of Corr.*, 89 F.Supp.3d 235, 251 (D.Mass.2015); *see also Oklevueha Native Am. Church v. Lynch*, —— Fed.Appx. ——, No. 14–15143 (9th Cir. Apr. 6, 2016). A "burden" is not enough—that burden must be "substantial." *See* *Van Wyhe*, 581 F.3d at 657. And even at the pleading stage, the Court finds that Cavanaugh has not alleged sufficient facts to suggest that his ability to practice FSMism—whatever that means—is *substantially* burdened. *See*, *Williams v. City of St. Louis*, 626 Fed.Appx. 197, 198–99 (8th Cir.2015); *Sanchez v. Earls*, 534 Fed.Appx. 577, 578–79 (8th Cir.2013). His claims are simply not facially plausible. *See* *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937.

(c) Immunity Defenses

Because Cavanaugh has alleged neither a "religious" exercise, nor a "substantial burden" upon it, his RLUIPA claim will be dismissed. However, it is still important to address how that claim affects each of the official- and individual-capacity defendants, in order to be clear about the grounds for each dismissal.

Cavanaugh's claims may only be asserted against the official-capacity defendants to the extent that Cavanaugh is seeking prospective injunctive relief. *See*, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir.2011); *Treleven v. Univ. of Minn.*, 73 F.3d 816, 819 (8th Cir.1996). Under RLUIPA and § 1983, there is no cause of action for money damages against state officials acting in their official capacities. *Sossamon v. Texas*, 563 U.S. 277, 293, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011); *Zajrael v. Harmon*, 677 F.3d 353, 355 (8th Cir.2012). Therefore, Cavanaugh's claim for money damages against the defendants in their official capacities is barred by sovereign immunity. And obviously, because Cavanaugh failed to state a claim for relief, injunctive relief will not be forthcoming either.

The disposition of Cavanaugh's claims against the individual defendants is even clearer, because they are entitled to qualified immunity. Qualified immunity shields public officials performing discretionary functions from liability for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Parker v. Chard*, 777 F.3d 977, 979 (8th Cir.2015); *see, Messerschmidt v. Millender*, —— U.S. ——, 132 S.Ct. 1235, 1244, 182 L.Ed.2d 47 (2012); *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson*, 555 U.S. at 231, 129 S.Ct. 808. It gives officials breathing room to make reasonable but mistaken judgments about open legal questions and protects all but the plainly incompetent or those who knowingly violate the law. *Parker*, 777 F.3d at 979–80.

In determining whether an official is entitled to qualified immunity, the Court asks (1) whether the facts alleged establish a violation of a constitutional or statutory right and (2) whether that right ***833** was clearly established at the time of the alleged violation, such that a reasonable official would have known that his actions were unlawful. *Johnson v. Phillips*, 664 F.3d 232, 236 (8th Cir.2011); *see Parker*, 777 F.3d at 980. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Messerschmidt*, 132 S.Ct. at 1245; *Pearson*, 555 U.S. at 244, 129 S.Ct. 808. The protection of qualified immunity applies regardless of whether the official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Messerschmidt*, 132 S.Ct. at 1245.

For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Parker*, 777 F.3d at 980. Clearly established law is not defined at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. *Id.* Essentially, the law must be certain enough to give a "fair and clear warning." *Saylor v. Nebraska*, 812 F.3d 637, 643 (8th Cir.2016) (quoting *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)). If a plaintiff can show relevant case law in the jurisdiction at the time of the incident that should have put the government employee on notice, qualified immunity is improper. *Id.* But to conclude that official conduct violates clearly established rights, the Court must find some factual correspondence with precedent, which requires a fact-intensive inquiry that must be undertaken in light of the specific context of the case. *Mountain Pure, LLC v. Roberts*, 814 F.3d 928, 935 (8th Cir.2016).

The Court has little difficulty in finding that the defendants are entitled to qualified immunity in this case. The facts alleged in Cavanaugh's complaint are, to say the least, unique. Even if RLUIPA were to provide some protection to FSMism, the Court can find no authority that would have put the defendants on notice of that possibility. "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Luckert v. Dodge County*, 684 F.3d 808, 817 (8th Cir.2012). A prisoner claiming accommodation for a religious parody is at worst a gray area, and nothing in the law clearly establishes the rights that Cavanaugh is claiming. In addition to lacking merit, Cavanaugh's RLUIPA claim against the individual-capacity defendants is barred by qualified immunity.

2. CONSTITUTIONAL CLAIMS

Cavanaugh's allegations also implicate the Free Exercise and Establishment Clauses of the First Amendment and the Equal Protection Clause. Filing 8. He also specifically raises certain provisions of the Nebraska constitution. Filing 1 at 4. Each of those claims is without merit.

(a) First Amendment

To begin with, where an inmate has not met his burden under RLUIPA to demonstrate a substantial burden on his religious exercise, his claim fails under the Free Exercise Clause of the First Amendment as well. *Van Wyhe*, 581 F.3d at 657–58. And Cavanaugh lacks standing to raise an Establishment Clause claim. Such standing may be found where the plaintiff is a taxpayer—which Cavanaugh does not allege—or where the plaintiff alleges an injury of "direct and unwelcome personal contact with the alleged establishment

of religion." *Patel*, 515 F.3d at 816 (quotation omitted). Prisoners may establish an injury if they allege they altered ***834** their behavior and had direct, offensive, and alienating contact with a government-funded religious program. *Id.* at 817. Cavanaugh's complaint reflects only his "affirmative request that the prison accommodate his religious beliefs." *See id.* He does not allege that he altered his behavior or had direct, offensive, and alienating contact as a result of any accommodation given to another professed religion. *See id.* Absent an alleged injury, he does not have standing for an Establishment Clause claim. *See id.*

(b) Equal Protection Clause

In order to establish an equal protection claim, a prisoner must show that he is treated differently from similarly situated inmates and that the different treatment is based upon either a suspect classification or a fundamental right. *Id.* at 815. Based on its discussion of FSMism above, the Court finds that Cavanaugh is not similarly situated to other inmates who profess a religious faith. And the allegations set forth in Cavanaugh's complaint to not suggest invidious discrimination: rather, they establish that prison officials considered Cavanaugh's request in good faith and concluded, reasonably, that FSMism was satirical and required no accommodation.

(c) State Constitutional Claims

Cavanaugh's complaint also relies upon art. I, §§ 3 and 4 of the Nebraska constitution. But Nebraska law does not permit a direct cause of action for violation of a state constitutional provision. *See McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384, 391 (2009). And in any event, the relied-upon state constitutional provisions have been held to be coextensive with their federal counterparts. *See*, *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10, 18–19 (2008); *Citizens of Decatur for Equal Educ. v. Lyons–Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742, 762 (2007); *see also State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169, 221 (2000), *abrogated on other grounds by State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008). Cavanaugh's state constitutional claims will be dismissed as well.

IV. CONCLUSION

The Court concludes Cavanaugh has failed to state a claim under RLUIPA or under the state or federal constitution that is plausible on its face. *See Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Specifically, he has failed to allege facts showing that the defendants have substantially burdened a religious exercise, or that the defendants' conduct violated his constitutional rights. And Cavanaugh's claims for money damages are barred by sovereign or qualified immunity. Cavanaugh's complaint will be dismissed.

The Court has considered whether Cavanaugh should be given leave to amend his complaint, but Cavanaugh has not requested such leave, and the Court's conclusion that FSMism is not a "religion" is, in the Court's view, an insuperable bar to relief for each of Cavanaugh's claims. Accordingly, the Court will enter a final judgment.

IT IS ORDERED:

1. The defendants' motion to dismiss (filing 20) is granted.

2. Cavanaugh's complaint is dismissed.

3. Cavanaugh's motion for hearing (filing 38) is denied.

4. A separate judgment will be entered.

All Citations

178 F.Supp.3d 819

Footnotes

1 The Court has considered whether it is appropriate to consider this text, given the procedural posture of this case. But the Court finds that it is judicially noticeable—the contents of the book are capable of certain

verification, see Fed. R. Evid. 201, and Cavanaugh's complaint expressly refers to the text as a basis for his claims. Filing 1 at 8. Given Cavanaugh's reliance on the book, the Court views judicial notice of it as effectively the same as taking judicial notice of the Bible. *See* *Nevius v. Africa Inland Mission Int'l*, 511 F.Supp.2d 114, 119 (D.D.C.2007). In fact, if the Court had not considered the text, Cavanaugh's claims would fail for a more mundane reason: he would not have stated a claim for relief because, from his complaint, it would be impossible to tell what he had actually asked for, or why, or anything about his purported beliefs other than their name.

2 British philosopher Bertrand Russell wrote:

> Many orthodox people speak as though it were the business of sceptics to disprove received dogmas rather than of dogmatists to prove them. This is, of course, a mistake. If I were to suggest that between the Earth and Mars there is a china teapot revolving about the sun in an elliptical orbit, nobody would be able to disprove my assertion provided I were careful to add that the teapot is too small to be revealed even by our most powerful telescopes. But if I were to go on to say that, since my assertion cannot be disproved, it is intolerable presumption on the part of human reason to doubt it, I should rightly be thought to be talking nonsense.

Bertrand Russell, *The Collected Papers of Bertrand Russell, Vol. 11: Last Philosophical Testament* 547-48 (John G. Slater, ed., Routledge 1997) (1952).

3 Although Cavanaugh does not explain this in detail, it is clear from the FSM Gospel that "religious clothing" means a pirate costume and "communion" is, not surprisingly, "a large portion of spaghetti and meatballs." FSM Gospel at 38, 160.

4 Every State accepts federal funding for state prisons. *Cutter v. Wilkinson*, 544 U.S. 709, 716 n. 4, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005).

5 The Court recognizes that secular and religious beliefs may overlap, and that religious beliefs are still entitled to protection where the secular and religious coincide. See *Meyers*, 906 F.Supp. at 1508. This is not such a case.

6 Not that such a thing would be impossible: Heinlein's fictional church, at least, inspired foundation of a pagan church of the same name. *See* Church of All Worlds, http://www.caw.org (last visited Apr. 9, 2016). But Cavanaugh does not allege allegiance to any comparable organization—he simply relies on the FSM Gospel, taken at face value.

7 Although the Court does not ultimately address whether Cavanaugh's beliefs are sincere, it bears noting that his pleading strategy is not entirely consistent with authentic religious convictions. Cavanaugh's claims, as will be seen below, hinge primarily on his desire to proselytize his purported faith, and yet in neither his complaint nor his briefing does he bring himself to explain even its most basic tenets. His vagueness looks less like inadvertent omission and more like an attempt to prevent the Court from recognizing FSMism for what it is.

2015 WL 11086253
Only the Westlaw citation is currently available.
Supreme Court of New Hampshire.

The CHURCH OF THE SWORD
v.
TOWN OF WESTMORELAND

Case No. 2015–0250
|
December 14, 2015

Order

***1** Having considered the parties' briefs and oral arguments, the court concludes that a formal written opinion is unnecessary in this case.

The plaintiff, The Church of the Sword, appeals an order of the Superior Court (*Kissinger*, J.) granting the defendant, the Town of Westmoreland (Town), summary judgment. In April 2014, the plaintiff applied for a property tax exemption under RSA 72:23, III (2012), claiming that its real estate in Westmoreland was a parsonage. The Town denied the exemption, the plaintiff appealed to superior court pursuant to RSA 72:34–a (2012), and the Town moved for summary judgment, which the court granted. On appeal, the plaintiff challenges the court's order on a number of procedural, statutory, and State and Federal constitutional grounds. We affirm.

The following facts are derived from the record. The plaintiff is a nonprofit organization incorporated in New Hampshire as a church; it states that its members believe in "life-long learning, self-ownership, ... independent thought," and Part I, Article X of the New Hampshire Constitution (Right of Revolution). The plaintiff conducts weekly "services," which consist of "[c]onfrontation ... with swords, [a]nnouncements of members in hospital or otherwise afflicted, [c]ommunion, [r]eadings and [m]onologues, [i]nstrumentals, the [o]ffertory, and pie." The plaintiff's foundational works include *The Book of Five Rings* by Miyamoto Musashi, *The Tao de Ching* by Lao Tsu, *The Art of War* by Sun Tzu, and a work by Max Stirner. To become a "pastor" of the plaintiff, one must, among other things, run a service, organize an "approved event," and win six of ten sword "bouts."

"When reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and inferences properly drawn from them, in the light most favorable to the non-moving party." *Sabinson v. Trustees of Dartmouth College,* 160 N.H. 452, 455 (2010). "If this review does not reveal any genuine issues of material fact, *i.e.,* facts that would affect the outcome of the litigation, and if the moving party is entitled to judgment as a matter of law, we will affirm." *Id.*

The plaintiff's principal argument is that the trial court misapplied RSA 72:23, III in granting the Town's motion for summary judgment. The plaintiff also argues that the trial court impermissibly considered its "doctrines," "primary mission," and "weekly services" individually as secular activities. According to the plaintiff, the court should have found those activities, taken as a whole, to be religious activities. Finally, the plaintiff proposes that we adopt a multifactor test similar to the Internal Revenue Service's (IRS) guidelines for determining "whether an organization is considered a church for federal tax purposes" as the metric for determining whether that organization's real estate is exempt from New Hampshire property taxes. We reject each of these arguments.

RSA 72:23, III exempts many types of religious properties from taxation, including:

> ***2** [h]ouses of public worship, parish houses, church parsonages occupied by their pastors, convents, monasteries, buildings and the lands appertaining to them owned, used and occupied directly for religious training or for other religious purposes by any regularly recognized and constituted denomination, creed or sect, organized, incorporated or legally doing business in this state and the personal property used by them for the purposes for which they are established.

RSA 72:23, III. RSA 72:23–m places the burden of proof on the organization that is seeking the tax exemption to show that it meets the exemption's requirements. RSA 72:23–m (2012).

In most of our decisions concerning RSA 72:23, III, there has been no dispute as to the religious nature of the organizations that have claimed the exemption. Rather, the organizations in those cases objected to how the local government apportioned the tax-exempt and nontax-exempt areas of their properties. *See Appeal of Liberty Assembly of God,* 163 N.H. 622, 624 (2012) (affirming an order of the Board of Tax and Land Appeals that only sixty percent of a religious organization's property was used for religious purposes and was therefore tax-exempt); *Appeal of Emissaries of Divine Light,* 140 N.H. 552, 554 (1995). In one case, however, we affirmed the outright denial of a religious property tax exemption. *See Haas v. Town of Ashland,* 122 N.H. 865, 865 (1982) (affirming the denial of an exemption to a "church" whose stated purpose was to "search for the holy grail and other treasures").

Using *Haas* as a guide, the trial court determined that the plaintiff simply had not met its burden of showing that it qualified for an exemption under RSA 72:23, III. The court stated that, like the plaintiff in *Haas,* the plaintiff here "does not fall into the grey area of what might be considered a 'church' or 'religious' under the plain and ordinary meaning of" the statute. The court explained that, to qualify for the exemption, "an organization must do more than simply have a set of beliefs about something and apply traditionally religious vocabulary to its practices." We agree, and therefore decline the plaintiff's invitation to establish expanded parameters for the definition of "religion." Contrary to the plaintiff's assertion, the trial court did not engage in impermissible evaluation of the merits of the plaintiff's beliefs and practices. Rather, the court concluded that the plaintiff had failed to show that it had not merely assigned religious nomenclature to its beliefs and practices. Based upon our review of the record and the parties' arguments, we find no error in the trial court's ruling.

The plaintiff cites *Emissaries of Divine Light* in support of its position that we should overturn the trial court's grant of summary judgment to the Town. In that case, we upheld the constitutionality of RSA 72:23, III because it did not "establish or advance religion, but rather [it] foster[ed] beneficial and stabilizing influences in community life." *Emissaries of Divine Light,* 140 N.H. at 558 (quotation omitted). Pointing to this language, the plaintiff asserts that any organization, including itself, that "foster[s] beneficial and stabilizing influences in community life [is] religious," and therefore exempt from paying property taxes. In so arguing, the plaintiff misapplies our ruling. Not every organization that has a beneficial influence on the community is necessarily a religious organization that is entitled under the statute to a property tax exemption.

***3** Given our narrow ruling in this case, we need not address the plaintiff's argument that we should adopt a multifactor test similar to the IRS's guidelines as the standard for whether an organization is a religious organization exempt from paying New Hampshire property taxes. We note, however, that we have held that the IRS's interpretation of the tax code is not authoritative with respect to tax exemption for educational institutions under RSA 72:23. *See New Canaan Academy v. Town of Canaan,* 122 N.H. 134, 138 (1982).

Neither need we address the plaintiff's federal and state constitutional arguments asserting "excessive governmental entanglement" with religion. Because the trial court conducted no impermissible evaluation of the merits of the plaintiff's beliefs and practices, "excessive entanglement" is not implicated.

The plaintiff argues that genuine issues of material fact precluded the trial court from granting the Town's motion for summary judgment. In its brief, the plaintiff asserts that one of these issues is the determination of "whether the Church of the Sword[,] as a new religious organization[,] should be held to the same standard only an established church can satisfy." Another, according to the plaintiff, is the determination of the definition of "church" or "religious" for purposes of statutory tax exemption. Contrary to the plaintiff's assertion, however, these are questions of law, the resolution of which was unnecessary to the trial court's ruling.

Finally, the plaintiff contends that the trial court should not have granted summary judgment prior to the completion of discovery. We disagree. "A party against whom a claim, counterclaim, or crossclaim is asserted ... may, at any time, move for a summary judgment...." RSA 491:8–a, I (2010). Here, the Town moved for summary judgment after it received the plaintiff's answers to the interrogatories, and

the plaintiff objected. In its objection, the plaintiff had the opportunity to explain why additional discovery was necessary, but it failed to do so. Further, as the Town represented at oral argument and the plaintiff did not deny, the plaintiff made no effort to engage in its own discovery prior to the filing of the Town's summary judgment motion, or the trial court's ruling on that motion. Thus, the plaintiff's discovery argument fails.

We have reviewed the plaintiff's remaining arguments and conclude that they warrant no further discussion or are insufficiently developed for our review. *See Vogel v. Vogel,* 137 N.H. 321, 322 (1993); *Sabinson,* 160 N.H. at 459 (declining to address arguments that are insufficiently developed for appellate review). Because we find no error in the trial court's conclusion that the plaintiff failed to meet its burden of proving that its property is a tax-exempt parsonage under RSA 72:23, III, we affirm.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, LYNN, and BASSETT, JJ., concurred.

All Citations

Not Reported in Atl. Rptr., 2015 WL 11086253

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311 F.Supp.2d 190
United States District Court, D. Massachusetts.

Kimberly M. CLOUTIER, Plaintiff
v.
COSTCO WHOLESALE, Defendant

No. CIV.A. 02–30138–MAP.
|
March 30, 2004.

Synopsis

Background: Former retail store clerk sued store's operator, claiming she was discharged for wearing facial jewelry in violation of religious discrimination provisions of Title VII and state law. Operator moved for summary judgment.

Holdings: The District Court, Ponsor, J., held that:

[1] operator had no liability, under Title VII, after offering reasonable accommodation of clerk's religious belief in body piercing by granting permission to wear transparent retainers over scars, in lieu of jewelry, and

[2] offer of accommodation barred liability under state statute.

Judgment for operator.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (6)

[1] **Civil Rights** Accommodations

The accommodation offered by the employer, seeking to avoid commission of religious discrimination under Title VII, does not have to be the best accommodation possible, and the employer does not have to demonstrate that alternative accommodations would be worse or impose an undue hardship. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e–2(a).

3 Cases that cite this headnote

[2] **Civil Rights** Accommodations

Although the employer is required under Title VII to accommodate an employee's religious beliefs, the employee has a duty to cooperate with the employer's good faith efforts to accommodate. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e–2(a).

10 Cases that cite this headnote

[3] **Civil Rights** Accommodations

If an employer declines to offer an accommodation for an employee's religious beliefs, under Title VII employer then must demonstrate that any accommodation would have caused it undue hardship. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e–2(a).

8 Cases that cite this headnote

[4] **Civil Rights** Particular cases

Title VII prohibition against workplace religious discrimination was not violated when operator of retail store, which had policy against wearing of facial jewelry, offered reasonable accommodation to clerk who claimed that display of body piercings was required by her religion, by allowing use of transparent retainers over scars formed where jewelry was attached. Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C.A. § 2000e–2(a).

2 Cases that cite this headnote

[5] **Civil Rights** Employment practices

Massachusetts statute prohibiting imposition on employee of condition requiring employee to violate his religion assigns to employee burden of proof as to required practice of religion and to employer burden of proof to show undue hardship if accommodation were required. M.G.L.A. c. 151B, § 4, subd. 1A.

[6] **Civil Rights** Particular cases

Massachusetts statutory prohibition against workplace religious discrimination, as interpreted by federal court, was not violated when operator of retail store, which had policy against wearing of facial jewelry, offered reasonable accommodation to clerk who claimed that display of body piercings was required by her religion, by allowing use of transparent retainers over scars formed where jewelry was attached. M.G.L.A. c. 151B, § 4, subd. 1A.

Attorneys and Law Firms

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MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO CERTIFY A QUESTION OF LAW (Docket Nos. 35 & 39)

PONSOR, District Judge.

I. *INTRODUCTION*

Plaintiff Kimberly Cloutier is a member of the Church of Body Modification, a national organization of some thousand members that emphasizes, as part of its religious doctrine, spiritual growth through body modification. [1] Defendant Costco, plaintiff's former employer, terminated Cloutier after she violated Costco's dress code by insisting on wearing facial piercings while working as a cashier and by refusing an accommodation (originally suggested by Cloutier herself) that would have allowed her to continue wearing her piercings in a less noticeable manner.

Cloutier has sued Costco, claiming that her termination violated her rights under Title VII, 42 U.S.C. § 2000e–2(a), and under chapter 151B, § 4(1A) of the Massachusetts General Laws. Costco has moved for summary judgment claiming that the facts of this case, even viewed in the light most favorable to the plaintiff, will not support a claim under either statute. [2]

For the reasons set forth below, the defendant's motion will be allowed. Before summarizing the court's reasoning, however, it is important to emphasize one point. This decision is not intended in any way to offer an opinion on the substance or validity of the belief system of the Church of Body Modification. While its tenets may be viewed by some as unconventional, or even bizarre, the respect afforded by our laws to individual conscience, particularly in regard to religious beliefs, puts any deconstruction of the Church's doctrine beyond the purview of the court. Indeed, as the Supreme Court has noted, "[Individuals] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *United States v. Ballard,* 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

As will be seen, even if the belief system of the Church of Body Modification is accepted on its own terms, the undisputed facts of record demonstrate that the accommodation offered by Costco, and ultimately rejected by the plaintiff, was reasonable as a matter of law. Given this, the controlling authorities require entry of judgment in favor of the defendant. [3]

II. *STANDARD OF REVIEW*

Summary judgment is proper where the moving party, here the defendant, has demonstrated that there are no material facts in dispute and that, therefore, it is entitled to a judgment as a matter of law. ***192** *Dasey v. Anderson,* 304 F.3d 148, 153 (1st Cir.2002). The defendant bears the burden of demonstrating to the court that the evidence does not support the nonmoving party's case. *Sands v. Ridefilm Corp.,* 212 F.3d 657, 661 (1st Cir.2000). "After such a showing, the 'burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor.' " *Id.* (citation omitted). In performing this analysis, the court must examine

the facts in the light most favorable to the nonmoving party and draw all reasonable inferences in her favor. *Id.* If there is sufficient evidence favoring the nonmoving party for a trier of fact to return a verdict for that party, the court must deny the motion for summary judgment.

III. *FACTUAL BACKGROUND*

Viewing the case in the light most favorable to the plaintiff, a jury might find the following facts.

In July of 1997, Costco hired Cloutier as a front end assistant for its West Springfield, Massachusetts store. At the time, Cloutier had eleven ear piercings, but no facial piercings. Cloutier also had four tattoos on her upper arms, though these were concealed under the clothing she wore during her interview and for the duration of her employment with Costco. Cloutier did not notify Costco during her interview or upon beginning her employment of her religious beliefs or practices. Shortly before her first day of work, Cloutier received her first copy of the Costco Wholesale Handbook, also referred to as the employment agreement, containing the employee dress code.

In September 1997, two months after hiring her, Costco moved Cloutier to the deli department, where part of her responsibilities included handling food. In 1998, during Cloutier's time in the deli department, Costco revised its dress code policy and the provisions of its employment agreement to prohibit food handlers from wearing jewelry. Cloutier's supervisor at the deli, Laura Ostrander, told Cloutier that she would have to comply with the company's policy and remove her earrings and other jewelry. Cloutier replied that she would not take them out. She neither mentioned her membership in any church or any personal religious beliefs, nor requested an accommodation for her jewelry wearing. However, because she did not want to remove her earrings, Cloutier sought a transfer out of the deli department. Costco accommodated this request for transfer.

In June of 1998, Cloutier returned to the position of front end assistant. Around this time, Cloutier got her eyebrow pierced. She has not removed her eyebrow ring since. Cloutier continued working as a front end assistant until July 2000, when she was promoted to cashier. Throughout this two-year period, Cloutier engaged in the practices of tattooing, piercing, cutting, and scarification, [4] though not as part of any sectarian religious practice or belief. Nonetheless, Cloutier testified in her deposition that she engaged in these practices because they had meaning to her.

At some point in January of 2001, Cloutier learned of the Church of Body Modification ("CBM") from friends and acquaintances. The CBM is a congregation whose goal is to "achieve acceptance in this given society so that [members of the Church] may celebrate [their] bodies with body modification." Docket. No. 37, App. D. ***193** According to the mission statement on the CBM website, members of the CBM believe that the practice of body modification and body manipulation strengthens the bond between mind, body, and soul, thus ensuring that adherents live as spiritually complete and healthy individuals. *See* www.uscobm.com. Among the practices of members of the CBM are body modifications such as piercing, tattooing, branding, transdermal [5] or subcutaneous [6] implants, and body manipulation, such as flesh hook suspensions and pulling. At one time, the CBM listed as one of its tenets that members should "seek to be confident models in learning, teaching and displaying body modification." [7] Docket No. 37, App. D. Although it does not appear that CBM doctrine demands the practice, Cloutier has personally interpreted this tenet as requiring her to display her body modifications at all times.

After reviewing the CBM's website, Cloutier decided to join. Costco disputes the timing of Cloutier's membership in the CBM. It obtained from the CBM a copy of Cloutier's application form, which is dated June 27, 2001. However, during her deposition, Cloutier testified that she actually joined the CBM three months earlier, in March 2001. She stated that she attempted to submit her membership application on-line, but due to a computer glitch the application was not processed. Cloutier further testified that she had a number of phone conversations with someone from the CBM about the status of her application. Eventually, after Cloutier resubmitted her application in June 2001, her membership was formally processed, and she received her membership card that July.

In March of 2001, Costco again revised its employment agreement, and on March 27, 2001, Cloutier received a copy of Costco's new dress code policy, which forbade the wearing of any facial jewelry. [8] Cloutier testified at her deposition that she first became aware of the new dress code policy shortly after receiving a copy in March of 2001. She did not, however, request a religious accommodation for the wearing of her facial jewelry at that time but simply continued to wear her

facial jewelry despite the dress code policy. Costco did not begin to enforce the facial jewelry policy until June.

On June 25, 2001, Cloutier and her co-worker, Jennifer Theriaque reported to work wearing their eyebrow rings. Two supervisors, Todd Cunningham and Michele Callaghan, called Cloutier and Theriaque into an office and advised them that their facial piercings would have to be removed in order for the two women to continue to work for Costco. Cloutier did not say anything to her supervisors about her religion at that time. Theriaque, on the other hand, informed Cunningham and Callaghan of her own membership in the CBM, as well as Cloutier's. Both Theriaque and Cloutier returned to work after this discussion.

The following day, June 26, 2001, Cloutier and Theriaque returned to work still ***194** wearing their facial jewelry. Again, Callaghan notified the women of the dress code policy against facial jewelry. This time, Cloutier herself presented Callaghan with information about the CBM from its website. Both Cloutier and Theriaque claimed that wearing their facial jewelry constituted a practice required by their religion. After reviewing the material, Callaghan consulted with her supervisor, Andy Mulik. Mulik ordered Cloutier and Theriaque to remove the jewelry or leave work. Both Cloutier and Theriaque went home. Cloutier filed a complaint with the EEOC the following day.

On June 29, 2001, her next scheduled shift, Cloutier went to work wearing her facial jewelry. She was again ordered to remove her jewelry or leave work. This time, Cloutier met with the store manager, Mark Schevchuck, about her EEOC complaint and once more produced the CBM documents about her religion. In addition, Cloutier offered to wear a band-aid over her jewelry instead of removing it. Schevchuck replied that this was not acceptable. Cloutier went back home.

Theriaque also returned to work on June 29, 2001, wearing her facial jewelry. When approached by her supervisors, Theriaque inquired about wearing a retainer in place of her jewelry. The retainer, an unobtrusive clear plastic spacer, would prevent Theriaque's piercing from healing and closing, and at the same time would be far less noticeable than her usual facial jewelry.

Cloutier and Costco dispute what occurred next. It is Costco's position that it immediately accepted this compromise, and Theriaque was permitted to return to work with a retainer in the place of jewelry in her eyebrow. It is Cloutier's position that Theriaque returned to work without her eyebrow jewelry but, somehow, kept hidden the fact that she was wearing a retainer or fishing wire in place of the jewelry. Cloutier believes that Theriaque's subterfuge continued for three or four weeks until Costco capitulated and allowed Theriaque to wear a retainer.

Somewhat inconsistently, Cloutier also testified that sometime during the week of July 2, 2001, she learned of Theriaque and Costco's resolution of the piercing controversy. In other words, it is undisputed that Cloutier was aware within about one week of the genesis of the dispute that she could, in fact, return to work if she wore a retainer instead of her facial jewelry.

Nevertheless, Cloutier did not report for any of her scheduled shifts after July 1, 2001. Cloutier testified at her deposition that Schevchuck told her not to return to work until he found out how Costco was going to respond to her EEOC complaint. Accordingly, she waited at home for a phone call from Schevchuck, all the while under the impression that her absences from work would not count against her attendance record.

On July 14, 2001, Cloutier received her termination notice. Costco took the position that the CBM was not a religion as the term is defined in state and federal anti-discrimination laws. Moreover, even if the CBM were a religion, Costco did not believe that CBM doctrine required Cloutier to wear her facial jewelry *at all times.* Consequently, in Costco's view, Cloutier's absences from work due to violations of the dress code were unexcused absences. Since its employment agreement authorized termination after three or more unexcused absences, Costco fired Cloutier. As noted, Cloutier contends that she was told to wait at home for a call to inform her of Costco's decision—a call she never received. Her first notice of Costco's final position on her religious practice, she says, was the termination notice.

Approximately three weeks later, on August 10, 2001, during the EEOC negotiation ***195** between Costco and Cloutier, Costco presented Cloutier with an unconditional offer to return to work if she complied with the dress code and wore either a band-aid over her facial jewelry or a retainer in place of the jewelry. This offer was memorialized and reiterated in an August 29, 2001 letter from Costco to Cloutier. Notably, this band-aid accommodation was the same compromise that Cloutier had herself suggested in June. The August 29th letter requested that Cloutier respond to Schevchuck by September

6, 2001. Costco contends that Cloutier never responded to its offer to accommodate. Cloutier testified that she placed a call to Schevchuck on September 6, 2001, but he was not available. Cloutier maintains that he never returned her phone call, and she never tried to reach him again.

In any event, Cloutier now argues that wearing a band-aid over her facial piercing, or replacing her jewelry during working hours with a clear plastic retainer, would violate her personal religious convictions. Cloutier avers that it is her sincere belief that her religion, the CBM, requires that she *display* her facial jewelry at *all* times. Short of excusing her from the dress code policy entirely, Cloutier does not believe there is any accommodation that Costco could offer that would satisfy the tenets of her religion. Costco asserts that allowing Cloutier to be exempted from its neutral dress code policy would be an undue hardship on its business in that an exemption would undermine Costco's interest in presenting a professional appearance to its customers.

IV. *DISCUSSION*

Plaintiff brings both a federal claim and a state claim for religious discrimination. Because the analysis under Title VII and chapter 151B differs somewhat, the court will discuss each statute separately below.

A. *Title VII Claim*

Title VII of the Civil Rights act of 1964, as amended in 1972, prohibits employers from discriminating against an employee based on that employee's religion. 42 U.S.C. § 2000e–2(a). The term "religion," as used within the provisions of Title VII, encompasses "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Thus, where an employee's bona fide religious belief or practice conflicts with an employment requirement, Title VII requires the employer "to accommodate [the belief or practice], within reasonable limits." *E.E.O.C. v. Union Independiente De La Autoridad De Acueductos Y Alcantarillados De P.R.,* 279 F.3d 49, 55 (1st Cir.2002).

The First Circuit applies a two-part framework, developed in other Title VII contexts, to analyze a Title VII claim for religious discrimination. *Union Independiente,* 279 F.3d at 55. First, the plaintiff must "establish a *prima facie* case of religious discrimination based on a failure to accommodate."[9] ***196** *Union Independiente,* 279 F.3d at 55. The plaintiff must show that "(1) a bona fide religious practice conflicts with an employment requirement, (2) he or she brought the practice to the [employer's] attention, and (3) the religious practice was the basis for the adverse employment decision." *Id.* (internal quotations and citations omitted). Second, if the plaintiff establishes a *prima facie* case, then the burden shifts to the employer "to show that it made a reasonable accommodation of the religious practice or show that any accommodation would result in undue hardship." *Id.*

The first element of the plaintiff's *prima facie* case requires a demonstration that the plaintiff's belief or practice is religious *and* that it is sincerely held. *Id.* at 56. At the summary judgment stage, the defendant will ordinarily face a difficult task in challenging the contention that the plaintiff's belief is religious, no matter how unconventional the asserted religious belief may be. The First Circuit has stated that Title VII "leaves little room for a party to challenge the religious nature of an employee's professed beliefs." *Id.*

The difficulty for an employer on this point derives not only from the elusiveness of the term "religious" but also from the fact that the employee's religious beliefs need not be espoused by a formal religion or conventionally organized church. As the EEOC's guidelines on religious discrimination recognize, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee." 29 C.F.R. § 1605.1.

Moreover, the Supreme Court has recognized that Title VII's protections are not limited to beliefs and practices that courts perceive as "acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Indeed, it is well recognized that courts are poor arbiters of questions regarding what is religious and what is not. *Daniels v. City of Arlington, Tex.,* 246 F.3d 500, 505 (5th Cir.2001) (stating that "it is improper for a court to assess what activities are mandated by religious belief").

Within this broad framework, courts have grappled somewhat awkwardly with the question of what makes a particular belief "religious." One district court has taken the approach that while "the court may not look to whether the [employee's] religion mandates or requires the practice in question, the court may nonetheless note whether there is any connection between the [employee's] religion and the asserted belief or practice." *Vetter v. Farmland Indus., Inc.,* 884 F.Supp. 1287, 1307 (N.D.Iowa 1995).

Other courts have seemed to suggest that the existence of this "connection" is for the individual, and not the judge, to determine. Where some defendants have been unsuccessful in challenging an employee's belief on the ground that it is not part of a bona fide religion, other defendants have been successful in proving, even at the summary judgment stage, that the belief or practice as asserted by the plaintiff is not mandated by the religion to which the employee supposedly adheres. *Hussein v. The Waldorf–Astoria,* 134 F.Supp.2d 591, 597 (S.D.N.Y.2001) (granting employer's summary judgment claim after finding that evidence did not support employee's claim of a bona fide religious belief). *Contra* *Vetter,* 884 F.Supp. at 1307, 1313 (concluding that there was a sufficient "connection" between the plaintiff's asserted belief and his religion and denying defendant's motion for summary judgment); *Lambert v. Condor Mfg., Inc.,* 768 F.Supp. 600, 602 (E.D.Mich.1991) (denying ***197** defendant's motion for summary judgment because there existed a question of fact regarding whether plaintiff's opposition to nude pictures of women was "religious").

Courts have noted the obvious fact that Title VII does not afford protection for "what amounts to a 'purely personal preference.' " *Union Independiente,* 279 F.3d at 56 (citation omitted); *see* *Tiano v. Dillard Dep't Stores, Inc.,* 139 F.3d 679, 683 (9th Cir.1998) (finding that the plaintiff failed to prove that her religious belief mandated that she embark on a pilgrimage during the precise time frame demanded). Again, however, in any close case a court is bound to confront the near impossibility (at least at the summary judgment stage) of distinguishing between a plaintiff's strongly felt personal preference and that same plaintiff's self-styled "religious" belief.

No one would disagree that aspects of dress or appearance are often strongly felt. Despite this, Title VII surely cannot be invoked to permit an employee to apotheosize a dress or grooming preference, merely upon his or her own say-so. It would seem equally clear that the submission of an affidavit describing a custom of dress or grooming as "religious" should not automatically inoculate a complaint from summary judgment and entitle an employee to an inevitable jury trial. Yet the difficulty in making this analysis appears to have convinced some courts simply to withhold scrutiny where a plaintiff asserts that a belief or practice is "religious." *Heller v. EBB Auto Co.,* 8 F.3d 1433, 1438 (9th Cir.1993) (stating that Title VII protects more than the "practices specifically mandated by an employee's religion" and that courts are not to determine what is or is not a religious activity).

While the "religious" basis of a challenged belief or practice is tricky to challenge as a matter of law, the *sincerity* of a practitioner's purported belief (once the belief is accepted as "religious") is virtually unassailable in the Rule 56 context. The First Circuit has stated explicitly that the sincerity of an employee's religious belief "ordinarily should be reserved 'for the factfinder at trial, not for the court at summary judgment.' " *Union Independiente,* 279 F.3d at 56; *Vetter v. Farmland Indus., Inc.,* 120 F.3d 749, 751 (8th Cir.1997) (stating that "a finding on the [element of sincerity] generally will depend on the factfinder's assessment of the employee's credibility"). *But see, Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.,* 164 F.Supp.2d 1066, 1075 (N.D.Ind.2001)(holding that a court may consider whether a particular belief is in fact "religious" and sincerely held at the summary judgment stage).

Assuming a plaintiff satisfies the first criterion, the second element of a *prima facie* case requires that employees notify their employers of their religious beliefs or practices. *Union Independiente,* 279 F.3d at 55; *See* *Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012, 1019 (4th Cir.1996). The parties here do not dispute that Cloutier provided adequate notice.

The final element of a *prima facie* case requires the plaintiff to show that her religious practice was the basis for the adverse employment decision. The defendant here has not proffered a reason for discharging Cloutier other than her absences from work resulting from her refusal to remove her facial piercing. Though the defendant vigorously disputes the characterization of Cloutier's facial piercing as a "religious" practice, it does not dispute that the facial piercing was the reason for the adverse employment decision.

Once a plaintiff establishes a *prima facie* case of religious discrimination based ***198** on a failure to accommodate, the burden shifts to the employer to show that it offered the employee a reasonable accommodation of her religious practice or that any accommodation would result in undue hardship for the employer. *See* *Union Independiente,* 279 F.3d at 55; 42 U.S.C. § 2000e(j). The statute does not define the term "reasonable accommodation." Likewise, the statute's legislative history and EEOC guidelines provide no guidance in determining the extent of an employer's accommodation obligation. *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 75, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) ("[T]he employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship, is clear, but the reach of that obligation has never been spelled out by Congress or by EEOC guidelines.").

Courts facing the issue of whether an accommodation is "reasonable" have fashioned some rules or guidelines for the inquiry. The Seventh Circuit has held that an employer's accommodation is not reasonable if the accommodation "does not eliminate the conflict between the employment requirement and the religious practice." *E.E.O.C. v. Ilona of Hungary, Inc.,* 97 F.3d 204, 211 (7th Cir.1996). The Fifth Circuit has suggested that a determination of reasonableness should focus on the cost to the employer, while also trying to balance the needs of the employer with the needs of the employee. *E.E.O.C. v. Universal Mfg. Corp.,* 914 F.2d 71, 72–73 & n. 3 (5th Cir.1990) ("The range of acceptable accommodation under Title VII moderates the conflicting interests of both the employee and the employer: (1) it protects the employee by requiring that the accommodation offered be 'reasonable;' and (2) it protects the employer by not requiring any accommodation which would impose an 'undue hardship.' "). Not surprisingly, the courts of appeals have observed that the question of the reasonableness of an accommodation is to be determined on a case by case basis. *Beadle v. Hillsborough County Sheriff's Dep't,* 29 F.3d 589, 592 (11th Cir.1994); *U.S. v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir.1976). In a typical case, the issue of "reasonableness" may be left to the fact finder. *Universal Mfg.,* 914 F.2d at 73.

[1] Once an employer offers a reasonable accommodation, its obligations under Title VII are satisfied. *Philbrook,* 479 U.S. at 68, 107 S.Ct. 367. Title VII does not require that an accommodation be absolute. *Universal Mfg.,* 914 F.2d at 73. In other words, the accommodation offered by the employer does not have to be the best accommodation possible, and the employer does not have to demonstrate that alternative accommodations would be worse or impose an undue hardship. *Wright v. Runyon,* 2 F.3d 214, 217 (7th Cir.1993) (citing *Philbrook,* 479 U.S. at 68, 107 S.Ct. 367).

[2] It is important to underline that the search for a reasonable accommodation goes both ways. Although the employer is required under Title VII to accommodate an employee's religious beliefs, the employee has a duty to cooperate with the employer's good faith efforts to accommodate. *Daniels v. City of Arlington, Tex.,* 246 F.3d 500, 506 & n. 30 (5th Cir.2001); *see* *Philbrook,* 479 U.S. at 69, 107 S.Ct. 367 (recognizing that the search for a reasonable accommodation requires "bilateral cooperation" between the employer and the employee); *Beadle,* 29 F.3d at 593 (stating that an employee has a "duty to make a good faith attempt to accommodate his religious needs through means offered by the employer"); *Brener v. Diagnostic Ctr. Hosp.,* 671 F.2d 141, 145–46 (5th Cir.1982) (upholding judgment for employer where ***199** the employee failed to cooperate with the measures suggested by his employer to accommodate his religious practice); *Chrysler Corp. v. Mann,* 561 F.2d 1282, 1286 (8th Cir.1977) (stating that where an employee does not "cooperate with his employer in its conciliatory efforts, he may forgo the right to have his beliefs accommodated").

[3] Finally, if the employer declines to offer an accommodation, the employer then must "demonstrate that any accommodation would have caused it undue hardship." *Ilona of Hungary,* 97 F.3d at 211; *Draper v. U.S. Pipe & Foundry Co.,* 527 F.2d 515, 520 (6th Cir.1975) (stating that employers must demonstrate actual undue hardship because courts are "somewhat skeptical of hypothetical hardships"). "Undue hardship" has been defined by the Supreme Court as anything greater than a *de minimis* cost to the employer

in accommodating the religious beliefs of an employee. *Hardison,* 432 U.S. at 84, 97 S.Ct. 2264. Again, in a typical case, the question of what constitutes undue hardship will usually be left to the finder of fact. *Universal Mfg.,* 914 F.2d at 74.

[4] Applying these principles to the pending motion, the weakness of the evidence supporting a *prima facie* case is fairly striking. Accepting the CBM as a bona fide religion—a point that defendant hotly disputes—the plaintiff appears to agree, and the court's own examination of the materials available seems to confirm, that the CBM in no way requires a *display* of facial piercings *at all times*. The requirement that she display her piercings, openly and always, represents the plaintiff's personal interpretation of the stringency of her beliefs.

Of course, the fact that the CBM does not mandate the practice that the plaintiff insists on is not, by itself, fatal to Cloutier's claim. *See Union Independiente,* 279 F.3d at 56; *Seshadri v. Kasraian,* 130 F.3d 798, 800 (7th Cir.1997). If Cloutier's belief that she must constantly display her body modifications is her *religious* belief, then it would appear she is entitled to accommodation pursuant to Title VII. Here again, however, the evidence of record fails to support Cloutier's position. As noted above, when she first brought her religious practice to the attention of Costco, she herself offered the accommodation of her wearing a band-aid over her facial piercing. The outset of this lawsuit witnessed the first occasion when Cloutier took the position that any concealment of her piercings would violate her religious scruples. [10]

All these facts suggest strongly that, while Cloutier may have a strong ***personal*** **preference** to display her facial piercings at all times—her preference does not constitute a **sincerely held** *religious* **belief**.

It is not necessary for the court to wrestle with this troubling question, however, since Costco's offer of accommodation was manifestly reasonable as a matter of law. The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos. The alternative of a clear plastic retainer does not even require plaintiff to cover her piercings. Neither of these alternative accommodations will compel plaintiff to violate any of the established tenets of the CBM. Significantly, Cloutier herself suggested an accommodation along these lines in June of 2001.

***200** Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance. The defendant's proffered accommodation reasonably respected the plaintiff's expressed religious beliefs while protecting this interest. In contrast, the plaintiff, after backing off from her original proposal, has offered no accommodation whatsoever, insisting instead that the defendant may not limit her piercings in any way, either in nature or number, without compelling her to disregard her religious scruples and thereby violating Title VII.

Title VII does not demand that this reasonable accommodation be favored, or even accepted, by plaintiff. So long as the accommodation reasonably balances the employee's observance of her religion with the employer's legitimate interest, it must be deemed acceptable. *See Philbrook,* 479 U.S. at 70, 107 S.Ct. 367.

Courts have repeatedly recognized dress and grooming requirements as bona fide occupational qualifications. *Daniels,* 246 F.3d at 506 (finding that an evangelical Christian police officer suffered no violation of Title VII when the police chief declined to allow him to wear a cross on his uniform and where the officer failed to fulfill his duty to cooperate in working out a reasonable accommodation); *Hussein,* 134 F.Supp.2d at 598 (involving a no-beard policy in catering); *E.E.O.C. v. Sambo's of Ga., Inc.,* 530 F.Supp. 86, 91 (N.D.Ga.1981) (involving a clean-shaven policy in restaurant). [11] Enforcing these kinds of dress restrictions is not discriminatory "as long as the employer's grooming requirement is not directed at a religion." *Hussein,* 134 F.Supp.2d at 599. There is no evidence here that Costco's dress policy was directed at any religion.

In sum, accepting the doubtful proposition that the record would support a *prima facie* case here, no reasonable jury could conclude that Costco's proposal to Cloutier was anything other than a reasonable accommodation. [12] Hence, the court will allow the defendant's summary judgment motion as to this count.

B. *Chapter 151B*

[5] Chapter 151B, § 4(1A) forbids an employer from imposing on an individual as a condition of employment any terms or conditions, "compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion." Where there is a conflict between an employee's creed or religion and an employment requirement, the statute directs that the employer "make reasonable accommodation to the religious needs" of the employee. *Id.* Reasonable accommodation is defined as "such accommodation to an employee's ... religious observance or practice as shall not cause undue hardship in the conduct of the employer's business." *Id.* The statute assigns to the employee the burden of proof as to the required practice of his creed or religion and to the ***201** employer the burden of proof to show undue hardship.

[6] As originally construed, the language of the statute "limit[ed] the application of the statute to persons whose practices and beliefs mirror those required by the dogma of established religions." *Pielech v. Massasoit Greyhound, Inc.,* 423 Mass. 534, 539–40, 668 N.E.2d 1298 (1996). Consequently, the Supreme Judicial Court of Massachusetts ("SJC") held that chapter 151B, § 4(1A) violated the establishment clause of the First Amendment because the protections of the statute preferred some religions over others and promoted excessive governmental entanglement with religion. *Id.* at 540, 668 N.E.2d 1298. Specifically, the SJC held that statute in its earlier form "effectively compell[ed] courts, in cases where the dogma of an established church or religion is disputed, to ascertain the requirements of the religion at issue.... These are not proper matters for the courts to decide." *Id.* at 542, 668 N.E.2d 1298.

In response to *Pielech,* the Massachusetts Legislature amended ch. 151B, § 4(1A). [13] St.1997, c. 2, § 2 (effective February 27, 1997). The amendment added language to define "creed or religion" as "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." *Id.* Thus, the protected religious practice need not be one endorsed by any organized church or sect; it need only be a *sincerely held* religious belief. *Opinion of the Justices,* 423 Mass. 1244, 1246, 673 N.E.2d 36 (1996) ("A sincerely held religious belief would be protected by § 4(1A) without regard to whether that belief was one approved or required by any established church or other religious institution or organization."). The amended statute, nonetheless, still places on the employee the burden of proof as to the required practice of the religion.

Even before the amendment, the language of the statute itself "essentially outlines a three-part inquiry in any case involving allegations of religion-based discrimination." *N.Y. & Mass. Motor Serv., Inc. v. Mass. Comm'n Against Discrimination,* 401 Mass. 566, 575–76, 517 N.E.2d 1270 (1988). First, the employee must prove that "the employer required the [employee] to violate a religious practice which is required by the [employee's sincerely held religious belief]." *See id.;* chapter 151B, § 4(1A). As the language of chapter 151B, § 4(1A) states, it is of no consequence whether the employee's belief is "approved, espoused, prescribed or required by an established church or other religious institution or organization." There is little room for an employer to challenge the religious basis or mandate of an employee's belief. *Sagar v. Sagar,* 57 Mass.App.Ct. 71, 74, 781 N.E.2d 54 (2003) (stating that a court "may not examine the truth behind a person's religious beliefs"). On the other hand, "[i]nquiry as to whether an employee's belief is sincere is constitutionally appropriate." *Opinion of the Justices,* 423 Mass. at 1246, 673 N.E.2d 36; *Sagar,* 57 Mass.App.Ct. at 74, 781 N.E.2d 54.

The second stage of the inquiry requires that an employee who needs time off to observe her Sabbath or other holy day must give at least ten days notice to her ***202** employer. *N.Y. & Mass. Motor Serv.,* 401 Mass. at 576, 517 N.E.2d 1270; Ch. 151B, § 4(1A). This stage is clearly inapplicable to this case.

The final stage of the three-part inquiry involves the employer's obligation to accommodate the employee's religious needs. *N.Y. & Mass. Motor Serv.,* 401 Mass. at 576, 517 N.E.2d 1270; Ch. 151B, § 4(1A). Reasonable accommodation is defined as such an accommodation to the employee's practice "as shall not cause undue hardship in the conduct of the employer's business." Ch. 151B, § 4(1A). The employer bears the burden of proof to show undue hardship, which is defined in the statute as including circumstances where accommodation would result in the employer's inability "to provide services which are required by and in compliance with all federal and state laws" or "where the health and safety of the public would be unduly

compromised by the absence of [the] employee." Ch. 151B, § 4(1A). Upon a showing of undue hardship, "the employer is not obliged to accommodate the employee's religious observance or practice." *Opinion of the Justices,* 428 Mass. at 1247, 702 N.E.2d 8.

Regrettably, there is little case law addressing chapter 151B, § 4(1A). Thus, where there are gaps in the interpretation or application of the statute, this court will turn to case law interpreting Title VII, whose protections mirror those of chapter 151B, § 4(1A). *Wheatley v. Am. Tel. & Tel. Co.,* 418 Mass. 394, 397, 636 N.E.2d 265 (1994) (stating that it is the practice of the Massachusetts courts "to apply Federal case law construing the Federal anti-discrimination statutes in interpreting G.L. c. 151B").

As with plaintiff's Title VII claim, her chapter 151B claim must fail. Arguably, the language of chapter 151B casts a broader net than Title VII in covering purely personal beliefs that may be entitled to protection from discrimination. Chapter 151B specifically states that whether a formal religious organization espouses or requires such belief is irrelevant.

Whatever minor differences may exist between the federal and state laws on the issue of belief, however, the two statutes appear to treat the question of reasonable accommodation identically. For purposes of 151B, the court must therefore conclude that Costco's offer of accommodation was reasonable as a matter of law. Cloutier's preferred arrangement, unlimited permission to wear her piercings at any time and in any manner, was obviously no accommodation at all. Accordingly, the court will allow the defendant's motion for summary judgment as to this count. [14]

V. *CONCLUSION*

Because the law supporting summary judgment in favor of defendant is reasonably clear, no need exists to certify a question to the SJC. For the reasons set forth above, defendant's Motion for Summary Judgment is hereby ALLOWED, and the plaintiff's Motion to Certify a Question of Law is hereby DENIED. The clerk will ***203** enter judgment for the defendant; the case may now be closed.

All Citations

311 F.Supp.2d 190, 93 Fair Empl.Prac.Cas. (BNA) 1157

Footnotes

1 Docket No. 41, App. I & J.

2 Earlier, the court allowed defendant's motion to dismiss as to plaintiff's third count, a claim under Mass. Gen. Laws chapter 12, § 111. Docket No. 8.

3 As discussion below will reveal, the evidence of record also substantially supports an alternate ground for summary judgment: that plaintiff's position regarding her piercings reflected not **sincerely held** "religious" **belief**, but merely strong **personal preference**. Because entry of summary judgment is mandated based on defendant's offer of a reasonable accommodation, however, it is not necessary to base the court's ruling on this more uncertain legal foundation.

4 Scarification involves wounding oneself and removing the scabs so as to leave a more prominent scar. Docket 41, App. C.

5 An transdermal implant is a piece of metal that goes underneath the skin and comes through the skin. Docket No. 41, App. J.

6 A subcutaneous implant is stainless steel inserted under the skin. Docket No. 41, App. J.

7 This tenet was listed in the CBM materials that Cloutier provided to Costco in June of 2001.

8 The new policy stated that "[a]ppearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times.... No visible facial or tongue jewelry (earrings permitted)." Docket No. 37, App. B.

9 In addition to asserting a religious discrimination claim based on failure to accommodate, plaintiffs may also proceed under a disparate treatment theory—alleging, for example, that the practices of one religion are being accommodated but not the practices of another. *See* *Peterson v. Hewlett Packard Co.,* 358 F.3d 599, 603 (9th Cir.2004); *Chalmers v. Tulon Co. of Richmond,* 101 F.3d 1012, 1017 (4th Cir.1996). No such alternate theory has been offered here. In her memorandum, plaintiff does characterize her termination as an act of "retaliation" against her based on her religious belief, but this claim has not been pled separately and, in the context of this case, would fall within the recognized "failure to accommodate" analysis in any event.

10 It is perhaps significant that plaintiff does not insist that *all* her body modifications, for example her tattoos, be visible at all times.

11 In other contexts, courts have not hesitated to uphold an employer's right to promote an appearance standard among its employees. *Cf.* *Woods v. Safeway Stores, Inc.,* 420 F.Supp. 35, 42 (E.D.Va.1976) (holding that employer's no-beard policy served a legitimate business purpose and did not discriminate against a black employee who suffered from a skin condition that was severely aggravated by shaving); *Willingham v. Macon Tel. Publ'g Co.,* 507 F.2d 1084, 1088 (5th Cir.1975) (holding that employer's no long hair on males policy did not discriminate on the basis of gender).

12 Because the court's decision is based on the existence of a reasonable accommodation, it is unnecessary to address the defendant's assertion that undue hardship would result from exempting the plaintiff from Costco's dress code.

13 Before passing the bill, the legislature submitted questions to the SJC regarding the constitutionality of the proposed amendment. One of the questions asked if the law as amended would violate the establishment clause of the First Amendment, to which the SJC responded in the negative. *Opinion of the Justices,* 423 Mass. 1244, 1246, 673 N.E.2d 36 (1996).

14 In rendering this decision the court is aware that the record would support the conclusion that plaintiff was terminated on July 14, 2001, whereas Costco's offer of reasonable accommodation was not made until approximately four weeks later, on August 10, 2001. This delay does not justify denial of the motion for summary judgment. First, the record is unclear whether Costco's offer included the possibility of pay for some or all of the four weeks. Second, the delay in transmitting the offer emerged as much from a failure of cooperation by plaintiff as from any intransigence on the part of the defendant. Finally, the court assumes that plaintiff would not be trying this case with damages limited to four weeks' pay.

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Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

Alicia GEERLINGS, et al., Plaintiffs,
v.
TREDYFFRIN/EASTTOWN
SCHOOL DISTRICT, Defendant.

Civil Action No. 21-cv-4024
|
Filed 09/27/2021

Attorneys and Law Firms

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MEMORANDUM OPINION

GOLDBERG, District Judge

***1** In response to the continuing coronavirus (COVID-19) pandemic, Pennsylvania's Acting Secretary of Health recently ordered that all schools require face coverings. Plaintiffs Alicia Geerlings, Andrew McLellan, Sarah Marvin, and David Governanti ("Plaintiffs") oppose masking and on behalf of their children, have moved for emergency injunctive relief, which if granted, would prohibit Defendant Tredyffrin/Easttown School District (the "District") from implementing the Secretary's Order while this lawsuit proceeds.

Immediately following the filing of Plaintiffs' Motion and several phone conferences with counsel, a hearing was held on September 14, 2021, wherein the four Plaintiffs and a District official testified. Plaintiffs have requested that this hearing continue so that they may further question the District representative and offer the testimony of a physiologist regarding the alleged unsafe effects of masks. But having carefully examined Plaintiffs' claims, as well as their proffers regarding further testimony, I conclude that none of this additional evidence would assist Plaintiffs in meeting the high burden of proof necessary to obtain the type of extraordinary emergency relief they seek. Consequently, for the reasons stated below, I will deny Plaintiffs' Motion.

In so ruling, I do not decide whether Plaintiffs' claims will ultimately succeed or fail. Rather, I find that, at this early stage of this litigation, Plaintiffs have not shown that the District's policy should be set aside before a full adjudication of the merits.

I. PROCEDURAL HISTORY

On September 8, 2021, Plaintiffs filed their Complaint and moved for a temporary restraining order prohibiting the District from enforcing its policy that students wear face masks while in school.

Although Plaintiffs have been somewhat vague about the precise legal theories under which they challenge the District's policy, I understand Plaintiffs' claims to be the following: First, Plaintiffs contend the Secretary's school mask Order infringes on their constitutional right to practice their religious beliefs pursuant to the First Amendment. Second, Plaintiffs argue the District cannot require students to wear masks because, under the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., masks are "medical devices," which have not been approved by the Food and Drug Administration. Third, Plaintiffs insist the District's policy cannot be enforced because the Pennsylvania Secretary of Health lacked authority to issue the Order that the District is implementing.

As noted above, on September 14, 2021, I held a hearing where all four Plaintiffs and one District official testified. At the close of the day's testimony, I reserved decision on whether Plaintiffs would be allowed to call an expert physiologist and further question the District official. (Notes of Testimony ("N.T.") 176:8-177:2, 197:23-198:4.) The following day, the District moved to exclude the physiologist, and I directed that Plaintiffs' response clearly explain how the proffered expert testimony would support Plaintiffs' claims. (ECF Nos. 12, 14.) Plaintiffs filed their response on September 17, 2021. (ECF No. 17.)

II. SUMMARY OF THE SEPTEMBER 14, 2021 HEARING TESTIMONY

***2** The District requires all students in its schools to wear masks to prevent the spread of COVID-19. The District believes it is required to implement such a policy based on an Order from Pennsylvania's Secretary of Health, who,

curiously, is not a party to this lawsuit. That Order, issued August 31, 2021 and effective September 7, 2021, states, in relevant part:

> Each teacher, child/student, staff, or visitor working, attending, or visiting a School Entity shall wear a face covering indoors, regardless of vaccination status, except as set forth in [various exceptions].

(ECF No. 2-6 at 4.) The Order also permits eight exceptions where face coverings are not required, including for medical conditions, hearing impairments, and extracurricular activities such as sports and music. (Id.) There is no exception for religious practices. (Id.)

Plaintiffs are four parents of students in the District who seek to have their children attend schools in the District in person but without wearing masks. (N.T. 28:25-29:2, 80:20-22, 118:1-3, 137:23-24.) In one of their claims, Plaintiffs posit that the School District should excuse their children from the mask mandate on First Amendment religious grounds. Plaintiffs raise "strong objections" to wearing masks and describe these objections as religious or spiritual in nature. These beliefs (as well as other evidence of record) are summarized below.

A. Plaintiffs' Testimony

1. Sarah Marvin

Ms. Marvin is a Christian and previously attended a Presbyterian church in Devon, Pennsylvania, where she was and still is a deacon. Ms. Marvin recently left the church when it started requiring masks. Ms. Marvin explained that she does not share all beliefs with her church, instead following the Christian Bible. (N.T. 52:15-22, 53:18-21, 54:21-55:7.)

Ms. Marvin believes people are made in the image of God and it therefore dishonors God to cover our faces. The only part of the body Ms. Marvin believes should not be covered is the head. (N.T. 29:20-24, 55:20-22.) Ms. Marvin stated that the Bible—specifically, one of the Epistles of Paul to the Corinthians—instructs that face coverings dishonor God, though she did not name a specific book or verse. (N.T. 55:22-24, 75:20-76:12.) Ms. Marvin said her opposition to face coverings was "not necessarily" a new belief, but acknowledged that, before the pandemic, no one had asked her to wear a mask. (N.T. 30:2-14.)

2. Alicia Geerlings

Ms. Geerlings is also a Christian. She used to attend an Episcopal church in Wayne, Pennsylvania, but, like Ms. Marvin, recently left when the church started requiring masks. (N.T. 81:11-25.)

Ms. Geerlings believes the body is a temple and must not be harmed, and in her view, masks violate the prohibition on harming the body because they are unhealthy. (N.T. 82:7-11, 83:17-18, 84:18-19, 97:1-6, 99:1-2.) She explained that wearing a mask caused "maskne" (mask acne) and sinus infections for which she has been taking antibiotics, and her son has experienced severe headaches on the days he has worn a mask. (N.T. 82:11-18, 84:12-18, 87:1-10.)

On cross examination, Ms. Geerlings acknowledged her son would voluntarily wear a mask to enter a clubhouse to play squash, though he removed the mask while playing. (N.T. 110:12-111:8.) Ms. Geerlings also agreed that communicable diseases are harmful and that God, in her view, would want us to protect ourselves from communicable diseases. (N.T. 102:5-11.)

3. David Governanti

***3** Mr. Governanti does not belong to any organized religion, does not pray to God, and stated that he could not pin his religious beliefs on a Bible or church. However, he does believe there is "something else out there" and that it is not "just us." Mr. Governanti arrived at his beliefs through research and forming his own opinions. (N.T. 119:2-7, 120:3-5.)

In this manner, Mr. Governanti came to believe that he must not harm his daughter, which, in his view, means he must not allow his daughter to wear a mask. Mr. Governanti has seen his daughter come home from school lethargic and suffering from headaches and anxiety, which he concluded was due to wearing a mask. (N.T. 119:2-25, 120:22-23, 121:6-20.) Mr. Governanti acknowledged that his daughter went to school and wore a mask last school year, but Mr. Governanti objects

to her wearing a mask this year because he now knows more about the harmful effects of masks. (N.T. 129:22-131:2.)

4. Andrew McLellan

Although Mr. McLellan believes that "Jesus ... [is] the son of God" and "died for our sins," he described his beliefs as less of a "religion" and more of a "spirituality." He does not go to church. (N.T. 128:12-13, 138:13-14, 162:1-3, 152:11-13.)

Mr. McLellan believes God intervened in his life to save him from certain trauma, and that masks are a mockery of the gift of life because they cover what makes us human and show a lack of gratitude to the creator. (N.T. 138:14-139:24, 161:13-22.) Mr. McLellan acknowledged that his son wears a helmet for football and a head covering for wrestling. (N.T. 153:12-19.)

B. Medical and Disability Issues

Plaintiffs have not pleaded a claim related to their children's medical conditions. Nor have they formally submitted applications for such exemptions to the District. Nonetheless, two Plaintiffs—Sarah Marvin and Alicia Geerlings—press that their children should receive a medical or disability exemption from the mask mandate. (N.T. 31:9-11, 85:17-21.)

Plaintiff Sarah Marvin testified that her son has an auditory processing and speech language disorder and the mask impedes his ability to communicate. Ms. Marvin also stated that wearing a mask has made her son feel nauseous and that he almost fainted, though she acknowledged her son does not have a diagnosed respiratory condition. (N.T. 33:10-34:11, 35:1-3, 37:6-11.) Ms. Marvin's son is in a vocational program that she believes is important to his future success given that his disability prevents him from attending college. (N.T. 34:22-24, 46:23-47:7, 47:21-23, 49:18-19.) Because Ms. Marvin's son has opted to stay home from school rather than wear a mask to attend in person, she believes he is at imminent risk of being removed from the vocational program. (N.T. 43:6-11, 49:20-24.)

Ms. Geerlings would also like a medical exemption for her son because he experiences sinus issues and migraines. According to Ms. Geerlings, on the days her son has worn a mask, he has come home with severe headaches. (N.T. 87:2-10, 95:22-96:2.) [1]

***4** The Secretary's Order specifically allows for medical exemptions to the mask policy. (ECF No. 2-6 § 3(B).) But before the District will consider a medical exemption, it requires a waiver of the student's medical privacy rights under the Health Insurance Portability and Accountability Act (HIPAA) so that it can obtain information about the alleged medical condition. (N.T. 62:12-20.) However, none of the Plaintiffs seeking medical exemptions are willing to waive their children's rights under HIPAA. (N.T. 32:7-13, 114:7-12, 116:4-12, 123:2-9.)

C. Other Evidence

As for other testimony, Plaintiffs called a District official, Chris Groppe, as if on cross examination. Dr. Groppe, as the Director of Safety and Student Services for the District, serves as its "pandemic coordinator" and is in charge of administering the mask policy. He acknowledged having no medical training. (N.T. 184:2-14.)

Dr. Groppe conceded that the District will not consider any request for a religious exemption because the Secretary's Order does not allow it. (N.T. 199:7-20.) Dr. Groppe explained that when the District receives a request for a medical exemption, it is reviewed by administrators and school nurses. (N.T. 185:21-186:17, 187:4-13, 190:25-191:14.)

At the September 14, 2021 hearing, Plaintiffs' counsel also requested that he be able to further question Dr. Groppe regarding the history of negotiations between Plaintiffs and the District over the District's mask policy. (N.T. 195:11-14.) Because the negotiations between the parties are not germane to the relief requested by Plaintiffs, I will not permit further questioning of this witness. (N.T. 197:23-198:4.)

Plaintiffs also offered to present the testimony of Shannon Grady, who Plaintiffs claim is an expert in physiology (the study of the functioning of the human body). (N.T. 167:6-10.) Ms. Grady proposed to demonstrate, using a portable carbon dioxide meter, that the concentration of carbon dioxide under a face mask exceeds levels normally accepted for indoor air quality. (N.T. 168:10-169:21; ECF No. 17-2.) In a brief report, Ms. Grady refers to scientific literature regarding the adverse effects of breathing elevated levels of carbon dioxide on the functioning of the human body. (ECF No. 17-2.) Ms. Grady's testimony is the subject of the District's pending motion to exclude. (ECF No. 12.)

I have carefully reviewed the evidence submitted thus far, with the view that the issue before me is not a merits decision but a request for emergency injunctive relief. As explained below, I find I have enough information before me to rule on Plaintiffs' claims and request for interim injunctive relief.

III. LEGAL STANDARD

As noted above, Plaintiffs' Motion seeks an order setting aside the District's mask policy during the pendency of this litigation. This type of emergency, interim relief constitutes "an extraordinary remedy, which should be granted only in limited circumstances." Ferring Pharms., Inc. v. Watson Pharms., Inc., 765 F.3d 205, 210 (3d Cir. 2014) (quotation marks omitted). A plaintiff seeking such an injunction must establish:

> [1] that he is likely to succeed on the merits,
>
> [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
>
> [3] that the balance of equities tips in his favor, and
>
> [4] that an injunction is in the public interest.

Id.

A movant is "likely to succeed on the merits" if she has a "reasonable probability of eventual success in the litigation." Fam. Inada Co. v. FIUS Distributors LLC, No. 19-cv-925, 2019 WL 5295178, at *4 (D. Del. Oct. 18, 2019). The movant does not need to show that her success is more likely than not. Id.

***5** A ruling on a request for a temporary restraining order or preliminary injunction is not a ruling on the ultimate merits of the case. See Oburn v. Shapp, No. 75-1189, 1975 WL 11794, at *9 (3d Cir. Aug. 4, 1975). Rather, the question at this early stage is only whether the movant has met the high standard necessary to order a remedy before a full trial of the movant's claims. Ferring Pharms., 765 F.3d at 210.

IV. DISCUSSION

Having heard the evidence presented at the hearing, and considering the additional evidence Plaintiffs propose to offer, I find that Plaintiffs cannot meet their burden to show that they are reasonably likely to succeed on the merits of their claims. Absent such a showing, Plaintiffs are not entitled to the "extraordinary remedy" of a preliminary injunction. Ferring Pharms., 765 F.3d at 210. My reasons for so finding are discussed below for each of Plaintiffs' claims.

A. Religious Discrimination

Plaintiffs' first claim is that the District's policy mandating masks infringes their constitutional rights and those of their children to practice their respective religions. Although Plaintiffs do not say so, I will consider this to be a claim under 42 U.S.C. § 1983 for violation of Plaintiffs' First Amendment rights.

Claims of religious discrimination present a unique and difficult challenge for judges. As the Third Circuit has observed,

> Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment. Judges are ill-equipped to examine the breadth and content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs.... Nonetheless, when an individual invokes the first amendment to shield himself or herself from otherwise legitimate state regulation, we are required to make such uneasy differentiations.

Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1981).

The First Amendment to the United States Constitution, made applicable to states through the Fourteenth Amendment, protects the right of the people to practice their religion. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876 (2021). All four Plaintiffs ask that the District grant their children religious exemptions from having to wear masks in school. Some Plaintiffs sought religious accommodation and

were denied, while others declined to ask after being told that no religious accommodations were available. (N.T. 29:13-17, 80:25-81:2, 109:23-110:5, 118:19-23, 138:6-9.)

The District will not grant any religious exemption to any student, and takes the position that it is prohibited from doing so by the Secretary's Order. While the District's intention to comply with state mandates is understandable, federal law takes precedence, and the District's obligation to protect students' legitimate constitutional right to practice their religion cannot be set aside by an order from the Secretary of Health of Pennsylvania. See U.S. Const., art. VI, cl. 2; Pennsylvania v. Porter, 659 F.2d 306, 314-15 (3d Cir. 1981) ("The fourteenth amendment is the supreme law of the land in all of Pennsylvania."). Indeed, several health and safety measures, including those aimed at combating the spread of COVID-19, have been ruled unconstitutional because they denied accommodation for religious practice even though they allowed exceptions for secular activities deemed "essential." E.g., Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66 (2020). In particular, the United States Supreme Court recently halted California's restrictions on indoor gatherings because the state exempted secular activities but not comparable religious ones. Tandon, 141 S. Ct. at 1297.

***6** But the fact that the District's policy may raise constitutional issues does not automatically provide Plaintiffs with a clear path to successfully challenge that policy. Before a person can obtain relief from government action based on religious objections, that person must come forward with a sincere religious belief that is contrary to the challenged action. Africa, 662 F.2d at 1030. Accordingly, before I consider whether the District should be required to accommodate religious objections to mask-wearing, I must determine whether Plaintiffs have sincere religious beliefs that are burdened by the policy.

A sincere religious belief must satisfy two requirements. First, the belief must be "sincerely held." Africa, 662 F.2d at 1030. "Without some sort of required showing of sincerity on the part of the individual or organization seeking judicial protection of its beliefs, the first amendment would become a limitless excuse for avoiding all unwanted legal obligations." Id. (quotation marks omitted). Whether a belief is sincerely held is a question of fact. United States v. Seeger, 380 U.S. 163, 185 (1965).

Second, the belief must be "religious in nature, in the claimant's scheme of things." Africa, 662 F.2d at 1030. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). It is therefore not sufficient for Plaintiffs to hold a "sincere opposition" to mask-wearing; Plaintiffs "must show that [their] opposition" to mask-wearing "is a religious belief." Brown v. Children's Hosp. of Philadelphia, 794 F. App'x 226, 227 (3d Cir. 2020) (quotation marks omitted) (finding healthcare worker's objection to receiving a flu vaccine not to be a religious belief).

To add some structure to the question of which beliefs count as religious, The Third Circuit has offered three guideposts. "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs." Africa, 662 F.2d at 1032. These observations are only indicia, and must be applied with flexibility. Id. at 1032 n.13.

Based on this precedent and the testimony presented to me at the September 14, 2021 hearing, I conclude that, although each of the four Plaintiffs has a passionate objection to wearing masks, none of them has a belief that warrants First Amendment protection.

1. Sarah Marvin

Ms. Marvin testified that she objects to wearing masks because she believes people are made in the image of God and it therefore dishonors God to cover our faces. (N.T. 29:20-24.) However, I am unable to conclude that this belief is a sincere tenet of Ms. Marvin's religion.

Initially, I note that Ms. Marvin offered few details about how she came to believe face masks were incompatible with her faith. The church where she is a deacon does not teach that

face masks should not be worn—in fact it requires them. (N.T. 53:18-21.) And, while Ms. Marvin did reference a verse in the Christian Bible, she seemed unclear as to the verse or its content. (N.T. 55:22-24, 75:20-76:12 ("THE COURT: ... Is it Corinthian 1 or 2 and what verse? And give me a little more detail. [Ms. Marvin]: ... I can't—I'm going to not right now remember exactly, but there— ... are specific—multiple specific lines in The Bible where it talks about that we are made in the image of God— ... and that head coverings and covering our face is a mark of dishonor.").) Ms. Marvin is not required, as a legal matter, to hold the same beliefs as any other person, church, or organization. Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 834 (1989). But the fact that Ms. Marvin arrived at her feelings toward face coverings on her own and in response to the recent pandemic contributes to an impression that her belief is an "excuse for avoiding ... unwanted legal obligations." Africa, 662 F.2d at 1030.

***7** It is not easy for me to pass on the delicate question of whether another person's professed religious beliefs are sincere, and I do so mindful and respectful of Ms. Marvin's position. However, "the very concept of ordered liberty" under the First Amendment requires me to draw such distinctions. Yoder, 406 U.S. at 215-16. Having carefully considered Ms. Marvin's testimony, I find she has not shown, at this stage of the proceedings, that her objection to masks is a sincere religious belief.

Even were I to accept that Ms. Marvin sincerely believes she and her son should not wear masks, I would still not be persuaded that refusing to wear a mask is a tenet of her religion. Religious adherents often profess that faith inspires much of their secular lives, but those activities are still secular. As the Third Circuit observed:

> The notion that all of life's activities can be cloaked with religious significance is, of course, ... [not] foreign to ... established religions. Such a notion by itself, however, cannot transform an otherwise secular, one-dimensional philosophy into a comprehensive theological system. It is one thing to believe that, because of one's religion, day-to-day living takes on added meaning and importance. It is altogether different, however, to contend that certain ideas should be declared religious and therefore accorded first amendment protection from state interference merely because an individual alleges that his life is wholly governed by those ideas. We decline to adopt such a self-defining approach to the definition-of-religion problem.

Africa, 662 F.2d at 1035.

In Ms. Marvin's case, she has not demonstrated that she practices keeping her face uncovered the way followers of Catholicism practice communion or those of Jewish faith practice eating unleavened bread on Passover. Her decision to eschew masks corresponds to no teaching of her community, upbringing, or other "comprehensive ... belief-system," nor does she practice it through "formal and external signs" such as holidays, ceremonies, or clergy. Africa, 662 F.2d at 1032. It is, rather, an "isolated moral teaching" that reflects the circumstances of the ongoing pandemic and seems to be more associated with health restrictions. Id.

Having heard and weighed the testimony, I find that it is not reasonably likely that Ms. Marvin will prevail on her claim that masks violate her sincerely held religious beliefs.

2. Alicia Geerlings

Ms. Geerlings objects to wearing masks because she believes it is immoral to harm the body, and masks, in her view, harm the body. (N.T. 82:7-11, 83:17-18, 84:18-19, 97:1-6, 99:1-2.) In support, she referenced physical ailments that she and her son have suffered that she believes were caused by wearing masks. (N.T. 82:11-18, 84:12-18.)

As with Ms. Marvin, I am not persuaded that Ms. Geerlings sincerely objects to wearing masks on religious grounds. Her belief seems to be tethered to the ongoing pandemic and its associated health restrictions. Moreover, Ms. Geerlings has not pointed to anything in her community, church, or past experiences that would substantiate her contention that she has a religious practice of not wearing masks.

Even if I were to accept that Ms. Geerlings sincerely believes the body is a temple and should not be harmed, it would be a step too far to count everything she believes about healthy living as a religious practice. The notion that we should not harm our bodies is ubiquitous in religious teaching, but a "concern that [a treatment] may do more harm than good[ ] is a medical belief, not a religious one." Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania, 877 F.3d 487, 492 (3d Cir. 2017). Even though the two may sometimes overlap, such as where a prohibition on eating pork serves both sanitary and spiritual ends, it takes more than a generalized aversion to harming the body to nudge a practice over the line from medical to religious.

***8** Ms. Geerlings's belief that masks are harmful is a pragmatic one founded on her experience with acne and a sinus infection. While it may be understandable that Ms. Geerlings would believe masks are harmful after suffering these ailments, this belief does not "address[ ] fundamental and ultimate questions" the way a religion does. Africa, 662 F.2d at 1032. Ms. Geerlings's moral concern for the body seems to be an "isolated teaching" rather than a "belief-system," and corresponds to no "formal and external signs." Id. And her acknowledgment that her son voluntarily wears a mask at a private squash club undermines her position that masking violates her family's religion.

I am thus unable to conclude, at this stage of the proceedings, that Ms. Geerlings's opposition to wearing masks is religious in nature.

3. David Governanti

Like Ms. Geerlings, Mr. Governanti opposes wearing masks because he believes it is immoral to harm people and masks harm people. (N.T. 119:2-25.) As with Ms. Geerlings, I find that this belief is more rooted in medical, not religious, concerns.

Mr. Governanti has no church affiliation and does not subscribe to any Bible. (N.T. 119:2-4.) He described his religion as a set of personal beliefs based on his own research. (N.T. 119:2-7.) His personal belief is that masks will harm his daughter and that his daughter therefore should not wear them. (N.T. 119:2-25.)

It is clear from this testimony that Mr. Governanti's feelings about masks are not part of any comprehensive belief system that could be called a religion. His worldview based on independent research "has no functional equivalent of the Ten Commandments, the New Testament Gospels, the Muslim Koran, Hinduism's Veda, or Transcendental Meditation's Science of Creative Intelligence." Africa, 662 F.2d at 1033. Rather, Mr. Governanti's views are his personal understandings of right and wrong.

Such a "personal moral code," while commendable, is not afforded the protection of the Free Exercise Clause. Id. at 1034. "An individual or group may adhere to and profess certain political, economic, or social doctrines, perhaps quite passionately. The first amendment, though, has not been construed, at least as yet, to shelter strongly held ideologies of such a nature, however all-encompassing their scope." Africa, 662 F.2d at 1034. Indeed, "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Yoder, 406 U.S. at 215-16. I therefore find that Mr. Governanti is unlikely to succeed on the merits of his claim.

4. Andrew McLellan

Like Ms. Marvin, Mr. McLellan opposes masks because they cover the body. (N.T. 139:17-24.) Mr. McLellan believes the body is a gift from the creator and, therefore, to cover that gift makes a mockery of it. (Id.)

I am not persuaded that Mr. McLellan has a sincere religious practice of not covering his face. He objects only to covering the face, but yet, for sporting events, does not oppose his son wearing a football helmet or wrestling headgear. (N.T. 153:15-19.) Mr. McLellan also did not identify any source for his belief that masks disrespect the creator nor did he testify to having considered this belief before the current pandemic. Rather, his objection to masks appears to be an isolated concept that is personal to him and not part of any "comprehensive ... belief-system." Africa, 662 F.2d at 1032.

Moreover, an abstract belief that life is a gift from God, like a generalized opposition to harming the body, cannot by itself make everything one does to appreciate life part of a religion. Cf. Fallon, 877 F.3d at 492. Although Mr. McLellan offered a powerful story of how his faith transformed his life, the task

before me is a legal one that requires "objective guidelines in order to avoid ad hoc justice." Africa, 662 F.2d at 1032 n.13. Within the confines of that legal task, Mr. McLellan's religion cannot be defined so amorphously as to encompass everything he considers to be transformative in his life.

***9** Having heard and considered Mr. McLellan's testimony, I find that Mr. McLellan is not likely to prevail on his claim that he has a sincere religious opposition to wearing masks.

B. Unapproved Medical Device

Plaintiffs' second claim is that the District cannot require students to wear masks because, under the Food, Drug and Cosmetic Act (FDC Act), masks are "medical devices," and the Food and Drug Administration (FDA) has not approved them.

Although not cited by Plaintiffs, they appear to be referring to 21 U.S.C. § 351(f), which declares certain unapproved medical devices to be "adulterated" within the meaning of the FDC Act. The Act further makes it unlawful to sell adulterated medical devices in interstate commerce, 21 U.S.C § 331(a), and grants the FDA authority to seize adulterated medical devices, 21 U.S.C. § 334.

These provisions, however, do not limit the ability of the District to require that students wear masks. The District is not engaged in manufacturing, marketing, or selling masks, making the restrictions set out in 21 U.S.C § 331(a) inapplicable. And, even if mask vendors were subject to certain regulatory obligations, those obligations apparently do not impede the ability of students to obtain masks to comply with the mandate because masks are readily available. Nor do Plaintiffs explain why they, as opposed to the FDA, are the appropriate party to flag and remedy any violations of the FDC Act that might be occurring.

For these reasons, I find that Plaintiffs are not likely to succeed on this claim.

C. The Secretary of Health's Authority

Plaintiffs' third and final claim is that the District cannot require students to wear masks because the Pennsylvania Secretary of Health lacked authority to issue her August 31, 2021 Order mandating masks in all Pennsylvania schools.

Plaintiffs have not explained why it would be appropriate for a federal court to issue a remedy regarding a state executive order. The scope of the Secretary's authority is a question of state law normally resolved in state court. See Herman v. Clearfield Cty., Pa., 836 F. Supp. 1178, 1187 (W.D. Pa. 1993) ("Violations of state law ... do not equate to constitutional injuries...."), aff'd, 30 F.3d 1486 (3d Cir. 1994); Vill. of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 883 (N.D. Ill. 2020) ("[E]ven if Plaintiffs are ultimately correct that the Governor should have complied with the procedures set out in the [state statute] in implementing his response to COVID-19, they still will not have established a federal constitutional violation."). In fact, the Secretary's authority to issue the August 31 Order is the subject of ongoing litigation in the Pennsylvania Commonwealth Court. See Corman v. Beam, No. 294 MD 2021 (Pa. Cmmw. Ct. filed Sept. 3, 2021). And if Plaintiffs mean to bring a state-law claim under this court's supplemental jurisdiction, they have not identified that claim or cited any applicable Pennsylvania cause of action. Therefore, even if I were to delve into whether the Secretary's Order was somehow invalid, Plaintiffs have not shown how I would have authority to prohibit the District from enforcing it.

For these reasons, I find that Plaintiffs have not, at this time, met their burden to show that they are likely to succeed on the merits of this claim.

V. REMAINING EVIDENTIARY ISSUES

***10** I find it unnecessary to rule on the admissibility of the further testimony Plaintiffs propose to offer because the proffered testimony would not affect whether Plaintiffs have met the standard for preliminary injunctive relief.

First, Plaintiffs propose to offer the testimony of Shannon Grady, a physiologist, that the concentration of carbon dioxide under a mask exceeds limits ordinarily applicable to indoor air quality. Even if I were to hear and accept this testimony, at this stage of the proceedings it would not change my ruling on Plaintiffs' claims and their request for an injunction. Despite my directive that they do so, Plaintiffs have not explained how the concentration of carbon dioxide under a mask is relevant to any of the three claims they have raised. Whether masks are overall helpful or harmful in light of all potential health effects is a complex policy question that belongs to policymakers like the Secretary and the District, and Plaintiffs have not advanced a claim that these policies are so arbitrary as to amount to a violation of their rights. I therefore find it

unnecessary to consider the District's motion to exclude Ms. Grady's testimony, and will deny that motion as moot.

Second, Plaintiffs have requested further questioning of the District's pandemic coordinator, Dr. Groppe, regarding negotiations between Plaintiffs and the District. This evidence is unnecessary because the District readily acknowledges that it has, thus far, refused to consider any religious exemption. As such, even assuming Dr. Groppe's testimony would show that the District treated Plaintiff's unfairly, the course and details of these negotiations has no bearing on any of the three claims Plaintiffs raise.

VI. CONCLUSION

Because Plaintiffs have not shown that they are likely to succeed on the merits of their claims, Plaintiffs are not entitled to the extraordinary remedy of a preliminary injunction. I will therefore deny Plaintiffs' Motion.

An appropriate order follows.

All Citations

Slip Copy, 2021 WL 4399672

Footnotes

1 Mr. Governanti was unclear as to whether he is seeking a medical exemption to the mask mandate for his daughter. Mr. Governanti believes masks are harmful to his daughter's mental state and have caused her to suffer anxiety. (N.T. 127:4-17, 128:17-21.) However, Mr. Governanti acknowledged that his daughter has no diagnosed medical condition. (N.T. 133:14-15.)
Mr. McLellan has not sought a medical exemption for his son, but is nonetheless concerned his son might be suffering from medical issues related to masks. (N.T. 140:14-18, 141:6-8.) Specifically, Mr. McLellan is concerned about his son's respiratory issues and that his son needs an inhaler for allergies. (N.T. 141:15-142:8.)

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946 F.3d 787
United States Court of Appeals, Fifth Circuit.

Brett HORVATH, Plaintiff - Appellant
v.
CITY OF LEANDER, Texas; Bill Gardner, Fire Chief, in his official and individual capacities, Defendants - Appellees

No. 18-51011
|
FILED January 9, 2020
|
REVISED January 13, 2020

Synopsis

Background: Firefighter brought action against city and fire chief, alleging religious discrimination and retaliation in violation of Title VII and the Texas Commission on Human Rights Act (TCHRA), and violations of § 1983 premised on violations of his First Amendment Free Exercise rights. The United States District Court for the Western District of Texas, Robert Pitman, J., granted summary judgment to defendants on all claims. Firefighter appealed.

Holdings: The Court of Appeals, Dennis, Circuit Judge, held that:

[1] city offered firefighter a reasonable **accommodation** for his **religious**-based objection to **vaccination** requirement;

[2] city's legitimate, non-discriminatory reason for firefighter's termination was not pretext for retaliation; and

[3] requirement that firefighter wear a respirator mask in lieu of taking required **vaccination** did not violate his right to freely practice his **religious** beliefs.

Affirmed.

James C. Ho, Circuit Judge, concurred in part and dissented in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (12)

[1] **Federal Courts** Summary judgment

Court of Appeals reviews a grant of summary judgment de novo.

[2] **Federal Courts** Summary judgment

When reviewing a summary judgment, appellate court view the facts in the light most favorable to the nonmoving party.

[3] **Civil Rights** Accommodations

Under Title VII, an employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but it is not required to incur undue hardship. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

[4] **Civil Rights** Accommodations

Title VII's requirement that employer provide reasonable accommodation for an employee's religious observances does not restrict an employer to only those means of accommodation that are preferred by the employee. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

1 Cases that cite this headnote

[5] **Civil Rights** Accommodations

Once an employer has established that it offered a reasonable accommodation for an employee's religious observances, even if that alternative is not the employee's preference, it has satisfied its obligation under Title VII as a matter of law. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

[6] **Civil Rights** Accommodations

Under Title VII, an employer's offer of a reasonable accommodation for employee's religious beliefs triggers an accompanying duty for the employee; the employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

[7] **Civil Rights** Effect of prima facie case; shifting burden

Civil Rights Employment practices

Title VII and Texas Commission on Human Rights Act (TCHRA) religious discrimination claims are subject to the burden-shifting framework announced in *McDonnell Douglas*, under which a plaintiff must first establish a prima facie case of religious discrimination, and if the plaintiff makes such a showing, the burden shifts to the employer to demonstrate either that it reasonably accommodated the employee, or that it was unable to do so without undue hardship. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Tex. Labor Code Ann. § 21.001 et seq.

1 Cases that cite this headnote

[8] **Civil Rights** Particular cases

Under Title VII and Texas Commission on Human Rights Act (TCHRA), city offered reasonable **accommodation** to firefighter who objected to required **vaccination** that immunized from tetanus, diphtheria, and pertussis on **religious** grounds, where city offered firefighter the opportunity to transfer to code enforcement position, which offered same salary and benefits as his current position and did not require him to receive **vaccinations**, even if employee believed code enforcement officer position was least desirable position in the department. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Tex. Labor Code Ann. § 21.001 et seq.

1 Cases that cite this headnote

[9] **Civil Rights** Retaliation claims

Civil Rights Employment practices

Employer's burden in the second step of the *McDonnell Douglas* framework for Title VII and Texas Commission on Human Rights Act (TCHRA) retaliation claims is one of production, not proof, as the ultimate burden of persuasion always remains with the employee. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1); Tex. Labor Code Ann. § 21.001 et seq.

2 Cases that cite this headnote

[10] **Civil Rights** Motive or intent; pretext

Municipal Corporations Grounds for removal

Public Employment Motive and intent; pretext

City's legitimate, non-discriminatory reason for firefighter's termination, his defiance of a direct order by failing to select an **accommodation** to **vaccination** policy, which he objected to on **religious** grounds, was not pretext for retaliation in violation of Title VII and Texas Commission on Human Rights Act (TCHRA); firefighter was not terminated for engaging in a protected activity by opposing a discriminatory practice, but for failing to comply with a directive that conflicted with his **religious** beliefs. Civil Rights Act of 1964, § 706(e)(1), 42 U.S.C.A. § 2000e–5(e)(1); Tex. Labor Code Ann. § 21.001 et seq.

1 Cases that cite this headnote

[11] **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

Municipal liability under § 1983 requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[12] **Civil Rights** Particular cases

Requirement that firefighter wear a respirator mask in lieu of taking required **vaccination** that he objected to on **religious** grounds did not violate firefighter's right to practice his **religion**, but rather, enabled him to freely exercise his **religion** while maintaining his current job, thus precluding his § 1983 claim against city and fire chief; respirator requirement was not an official policy, but one of two **accommodations** offered to firefighter in light of his **religious** object to **vaccination** directive. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

***789** Appeal from the United States District Court for the Western District of Texas, Robert L. Pitman, U.S. District Judge

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Before HIGGINBOTHAM, DENNIS, and HO, Circuit Judges. [1]

Opinion

JAMES L. DENNIS, Circuit Judge:

Brett Horvath was employed as a driver/pump operator by the City of Leander Fire Department. In 2016, the Fire Department began requiring TDAP vaccinations, to which Horvath objected on religious grounds. He was given a choice between two accommodations: transfer to a code enforcement job that did not require a vaccination, or wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing. He did not accept either accommodation and was fired by Fire Chief Bill Gardner for insubordination. Horvath filed suit against Chief Gardner and the City, alleging discrimination and retaliation in violation of Title VII and the Texas Commission on Human Rights Act (TCHRA), and violations of 42 U.S.C. § 1983 premised on violations of his First Amendment Free Exercise rights. The district court granted summary judgment to defendants on all claims. We affirm.

***790 I.**

Brett Horvath is an ordained Baptist minister and objects to vaccination as a tenet of his religion. He was hired as a firefighter by the City of Leander Fire Department on April 7, 2012. In 2014, the Department adopted an infection control plan that directed fire department personnel to receive flu vaccines. Horvath sought an exemption from the directive on religious grounds, and the exemption was approved by Chief Gardner on the condition that Horvath use increased isolation, cleaning, and personal protective equipment to prevent spreading the flu virus to himself, co-workers, or patients with whom he may come into contact as a first responder.

In 2015, Horvath was promoted from firefighter to driver/pump operator, which involved driving fire personnel to the scene of an emergency, plus general firefighter duties such as responding to rescue and fire suppression scenes and performing first responder duties for medical and non-medical emergencies. In 2015, as driver/pump operator, Horvath sought and received another exemption from the flu vaccine directive.

In 2016, the City mandated that all personnel receive a TDAP vaccine, which immunizes from tetanus, diphtheria, and pertussis or whooping cough. On January 14 and 20, 2016, Horvath sought an exemption from the directive on religious grounds. After months of discussions, on March 17, 2016, the City finalized its accommodation proposal and gave Horvath two options—he could be reassigned to the position of code enforcement officer, which offered the same pay and benefits and did not require a vaccine, and the City would cover the cost of training; or he could remain in his current position if he agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature. The City gave Horvath until March 24, 2016 to decide.

On March 21, Horvath declined the code enforcement job and suggested an alternative accommodation that would allow him to remain a driver/pump operator. He agreed with all of the City's requirements except the requirement that he wear a respirator at all times; he instead proposed to wear it when encountering patients who were coughing or had a history of communicable illness. Chief Gardner refused to renegotiate and sent a letter to Horvath that day, repeating the original proposal and giving Horvath until March 28 to decide whether he "agree[d] to the accommodations as presented or [would] receive the vaccines."

On March 23, Horvath again rejected both options and re-urged his alternative proposal—wearing the mask only at times he thought it was medically necessary. He stated that he could not find any evidence based on medical authority that wearing the mask constantly is recommended infection control procedure in lieu of a TDAP vaccine, but if Chief Gardner had evidence to the contrary, he was willing to review it and consider changing his position. As for the code enforcement position, Horvath believed it involved a much less favorable work schedule and less desirable job duties and therefore was not a reasonable accommodation.

On March 28, Chief Gardner asked the assistant fire chief to investigate and determine if Horvath's failure to select one of the City's accommodations, or to decline them, was in violation of a directive given by the fire chief, constituting willful disobedience or deliberate refusal to obey a directive from a supervisor, in violation of the City's Code of Conduct. Later that same day, the assistant fire chief interviewed ***791** Horvath and determined that Horvath deliberately refused to obey a directive from a supervisor, which constituted insubordination in violation of the City's Code of Conduct. The next day, on March 29, Chief Gardner terminated Horvath's employment for violating the Code of Conduct.

Horvath filed suit, alleging discrimination and retaliation in violation of Title VII and the TCHRA, and a violation under 42 U.S.C. § 1983 of his First Amendment right to freely exercise his religion.[2] The City and Chief Gardner moved for summary judgment, which the district court granted. Horvath timely appealed.

II.

[1] **[2]** We review a grant of summary judgment de novo. *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). We view the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III.

A.

[3] **[4]** **[5]** **[6]** We begin with Horvath's claim of religious discrimination under Title VII and the TCHRA:[3] that the City and Chief Gardner failed to offer a reasonable accommodation of his religious beliefs. Title VII makes it unlawful for an employer to discriminate against an employee on the basis of religion. 42 U.S.C. § 2000e-2(a)(1). "An employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but it is not required to incur undue hardship." *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000). "Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee." *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001). Once an employer has established that it offered a reasonable accommodation, even if that alternative is not the employee's preference, it has satisfied its obligation under Title VII as a matter of law. *Id.* The employer's offer of a reasonable accommodation triggers an accompanying duty for the employee: "An employee has a duty to cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end." *Id.* at 503.

[7] Title VII and TCHRA claims are subject to the burden-shifting framework announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, a plaintiff must establish a prima facie case of religious discrimination. *Davis v. Fort Bend Cty.*, 765 F.3d 480, 485 (5th Cir. 2014). If the plaintiff makes such a showing, the burden shifts to the employer "to demonstrate either that it reasonably accommodated the employee, or that it was unable

to [do so] without undue hardship." *Id.* (quoting *Antoine v. First Student, Inc.*, 713 F.3d 824, 831 (5th Cir. 2013)).

The City concedes that Horvath established a prima facie case of religious discrimination but argues that it offered Horvath ***792** two reasonable accommodations. The district court found that the City provided a reasonable accommodation by offering to transfer Horvath to the code enforcement position in the department. [4]

In *Bruff*, we held that a medical center offered a reasonable accommodation to a counselor who sought to be excused from counseling on subjects that conflicted with her religious beliefs by "giv[ing] [her] 30 days, and the assistance of its in-house employment counselor, to find another position at the Center where the likelihood of encountering further conflicts with her religious beliefs would be reduced." *Bruff*, 244 F.3d at 501. The City's accommodation of Horvath here was more generous than that offered in *Bruff*. Rather than simply permitting Horvath to apply for different positions in the department, the City offered Horvath the opportunity to transfer to a code enforcement position that would not require him to receive vaccinations. The position offered the same salary and benefits as the driver/pump operator position.

Horvath argues, however, that fact questions exist as to whether the accommodation was reasonable because he believes the code enforcement officer position is the least desirable position in the department because of its duties and hours. [5] He also argues that the position was unreasonable because the schedule would prevent his continuing his secondary employment running a construction company, which would reduce his total income by half.

[8] Neither of these arguments is convincing. While Horvath and other Leander firefighters may prefer the hours and duties of traditional firefighting jobs, "Title VII does not restrict an employer to only those means of accommodation that are preferred by the employee." *Id.* And Horvath's reduction in his income due to loss of an outside job does not render the accommodation unreasonable. We found the accommodation reasonable in *Bruff* even though transferring would require the plaintiff "to take a significant reduction in salary." *Id.* at 502 n.23. It follows that allowing transfer to a position with equivalent salary, which may indirectly result in the loss of outside income, cannot be faulted. Though reasonableness may often be a question for the jury, the facts here "point so strongly and overwhelmingly in favor of [the City] that reasonable [jurors] could not arrive at a contrary verdict." *Id.* at 503. Summary judgment in favor of the City and Chief Gardner on Horvath's Title VII and TCHRA discrimination claims was proper and, accordingly, we affirm the district court in this respect. [6]

B.

[9] We turn next to Horvath's Title VII and TCHRA retaliation claims: that he was fired not for his refusal to accept the offer of accommodation but for his letter ***793** that sought further to negotiate a reasonable accommodation of his religious beliefs. We again apply the *McDonnell Douglas* burden-shifting framework. *See Davis*, 765 F.3d at 489. Assuming, as the district court did, that Horvath stated a prima facie case of retaliation, the City must respond with a legitimate, non-discriminatory reason for the firing. *Davis*, 765 F.3d at 490. This burden is one of production, not proof, as the ultimate burden of persuasion always remains with the employee. *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224, 235 (5th Cir. 2016).

[10] The City argues that its legitimate, non-discriminatory reason for Horvath's termination was his defiance of a direct order by failing to select an accommodation to the TDAP vaccine policy. The district court found that "Horvath was terminated not for engaging in protected activity by opposing a discriminatory practice in a letter, but for failing to comply with a directive that conflicted with his religious beliefs." We agree. The City has proffered a legitimate, non-discriminatory reason for Horvath's firing—his defiance of a direct order by failing to select an accommodation. *See LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 390 (5th Cir. 2007) (finding that employer's stated reason for suspending employee—his failure to obey a direct order from his superiors—satisfied the second prong of *McDonnell Douglas*). Accordingly, we affirm the district court's grant of summary judgment on Horvath's retaliation claims.

C.

We last turn to Horvath's Free Exercise claim that the City and Gardner violated his right to practice his religion through

a policy requiring him to wear a respirator mask in lieu of taking the TDAP vaccine. The Free Exercise Clause, applied to the states by incorporation into the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I; *Fairbanks v. Brackettville Bd. of Educ.*, 218 F.3d 743 (5th Cir. 2000).

[11] Municipal liability under § 1983 requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose moving force is the policy or custom. *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Horvath argues that (1) Chief Gardner was the policymaker; (2) the official policy was "that any fire fighter who declined a Tdap booster on religious grounds would have to wear an N95 respirator for the entirety of each work shift in order to remain a fire fighter"; and (3) the policy violated Horvath's constitutional right to freely exercise his religion.

[12] The district court found that the respirator requirement was not an official policy, but one of two accommodations offered to Horvath in light of his religious objection to the TDAP directive, and alternatively, even if the respirator requirement was an official policy, Horvath's right to freely exercise his religious beliefs was not burdened by the respirator requirement. We agree. While Horvath has a constitutional right to exercise his religion by refusing the TDAP vaccine because it conflicts with his sincerely held religious beliefs, he is able to exercise his religious beliefs while working for the City—either by remaining a firefighter and wearing a respirator or working as a code enforcement officer. We agree with the district court that the respirator proposal did not ***794** violate Horvath's right to freely exercise his religion—instead, it would have enabled him to freely exercise his religion while maintaining his current job. Accordingly, the district court properly entered summary judgment on Horvath's free exercise claims. [7]

* * *

For the foregoing reasons, the judgment of the district court is AFFIRMED.

JAMES C. HO, Circuit Judge, concurring in the judgment in part and dissenting in part:

Civil rights leaders and scholars have derided *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), as "the *Dred Scott* of First Amendment law." [1] At least ten members of the Supreme Court have criticized *Smith*. [2] It is widely panned as contrary to ***795** the Free Exercise Clause and our Founders' belief in religion as a cornerstone of civil society.

Smith is nevertheless binding precedent. But we should not apply it where it does not belong. Under *Smith*, government may regulate religious activity, without having to satisfy strict scrutiny, so long as the regulation is a "neutral law of general applicability." 494 U.S. at 879, 110 S.Ct. 1595. That rule does not apply, however, where government grants exemptions to some but not to others. Religious liberty deserves better than that—even under *Smith*.

Based on the record in this case, it is far from clear that the city's policy is a "neutral law of general applicability." There are factual disputes that make summary judgment inappropriate. I would accordingly vacate the judgment as to the Free Exercise claim against the city and remand for further proceedings.

But I would affirm the judgment as to the Free Exercise claim against the fire chief, because the doctrine of qualified immunity bars that claim. Under that doctrine, a plaintiff cannot recover against a public official unless (1) the official violated the plaintiff's rights, and (2) the law is "clearly established" at the time of the violation.

I would welcome a principled re-evaluation of our precedents under both prongs. *See Cole v. Carson*, 935 F.3d 444, 477 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting). The second prong has been widely criticized, and for good reason:

Neither the text nor the original understanding of 42 U.S.C. § 1983 supports the "clearly established" requirement. *Cf. Wilson v. City of Southlake*, 936 F.3d 326, 333 (5th Cir. 2019) (Ho, J., concurring in the judgment) (declining to extend exigent circumstances defense for police officers where text contains no such defense). In addition, courts too often misuse the first prong, finding constitutional violations

where none exist as an original matter. *See*, *e.g.*, *Cole*, 935 F.3d at 477–78. In sum, we grant immunity when we should deny—and we deny immunity when we should grant.

But be that as it may, I am duty bound to faithfully apply established qualified immunity precedents, just as I am duty bound to faithfully follow *Smith*. I concur in the judgment in part and dissent in part.

I.

At the time of the Founding, every state except Connecticut provided constitutional protection for religious freedom. But the degree of protection seemed to vary. Eight states—Delaware, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, and South Carolina—protected the right to "worship," often accompanied by language specifically protecting worship according to the dictates of one's "conscience." By contrast, the constitutions of Georgia, Maryland, Rhode Island, and Virginia provided more robust coverage by protecting the "free exercise" of religion—the language later adopted in the First Amendment. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1416, 1455–60 (1990).

As Judge McConnell articulated in his influential work on the subject, understanding the distinction between "worship" and "conscience," as opposed to "free exercise," is critical. "The word 'worship' usually signifies the rituals or ceremonial acts of religion, such as the administration of sacraments or the singing of hymns, and thus would indicate a more restrictive scope for the free exercise provisions." *Id.* at 1460 (citing 4 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 888 (Philadelphia ***796** 1805)). And "conscience" referred to private thoughts, opinions, and beliefs. 1 JOHNSON, *supra*, at 372–73. For example, Johnson treated "conscience" as synonymous with "knowledge," "[r]eal sentiment; veracity; private thoughts," "[s]cruple; difficulty," and "reason; reasonableness." McConnell, *supra*, at 1489.

By contrast, the word "exercise" strongly connoted action. *See* 2 JOHNSON, *supra*, at 250. Johnson defined "exercise" as "[p]ractice; outward performance," "[u]se; actual application of any thing," "[t]ask; that which one is appointed to perform," or an "[a]ct of divine worship, whether public or private." *Id.* Similarly, "Noah Webster's American dictionary defined 'exercise' as 'employment.' " McConnell, *supra*, at 1489. And "James Buchanan's 1757 dictionary defined 'exercise' as '[t]o use or practice.' " *Id.*

The broader scope of "exercise"—in contrast to "worship" and "conscience"—indicates that, at the time of the Founding, the public would have understood the right to "free exercise" to extend beyond mere ritual and private belief to cover any action motivated by faith. Consistent with that conclusion, Congress amended the draft language that later became the First Amendment, replacing the original phrase "rights of conscience" with the "free exercise of religion." 1 ANNALS OF CONG. 729–32, 766 (1789). "[I]t would be difficult on this evidence to conclude that the framers of the free exercise clause intended it to be confined to acts of 'worship.' " McConnell, *supra*, at 1461.

The Founders understood that the right to free exercise would require more than simply neutrality toward religion. Rather, when government regulation and religious activity conflict, the right to free exercise would require that the government accommodate the religious practice, rather than the reverse. As James Madison later wrote, the right to religious exercise should prevail over government regulation "in every case where it does not trespass on private rights or the public peace." *Letter from James Madison to Edward Livingston* (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON 98, 100 (G. Hunt ed. 1901). After all, "[a] person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion." *Smith*, 494 U.S. at 893, 110 S.Ct. 1595 (O'Connor, J., concurring in the judgment). "[T]hat person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons." *Id.*

As Justice O'Connor observed, limiting the Free Exercise Clause to a neutrality principle akin to equal protection would impoverish religious liberty. "If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice." *Id.* at 894, 110 S.Ct. 1595. That would "relegate[ ] a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." *Id.* (quotations omitted).

It would be of little solace to the person of faith that a non-believer might be equally inconvenienced. For it is the person of faith whose faith is uniquely burdened—the non-believer, by definition, suffers no such crisis of conscience. This recalls Anatole France's mordant remark about "the majestic quality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread." ANATOLE FRANCE, THE RED LILY 87 (1910).

Not surprisingly, then, "around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation ***797** of religious practice." *City of Boerne v. Flores*, 521 U.S. 507, 544, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (O'Connor, J., dissenting). States provided religious exemptions in various areas during the Founding Era. Both Quakers and Jews conscientiously refused to take oaths when called to testify in court—Quakers because they believed that the Bible forbade the taking of oaths, and Jews because they did not want to take oaths premised "on the faith of a Christian." So the colonies excused them from that obligation and allowed them to testify by affirmation instead of by oath. McConnell, *supra*, at 1467. Quakers were similarly excused from mandatory military service due to their religious objections to bearing arms. *Id.* at 1468.

Consistent with the Founders' understanding of free exercise, the Supreme Court held in a series of cases that government may not regulate in a manner that burdens religious activity, unless the regulation is narrowly tailored to further a compelling governmental interest.

For example, in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), South Carolina denied a Seventh-day Adventist unemployment compensation because of her refusal to work on Saturdays—her Sabbath. *Id.* at 399–401, 83 S.Ct. 1790. The Court found that the denial clearly "imposes [a] burden on the free exercise of appellant's religion." *Id.* at 403, 83 S.Ct. 1790. It held that a "colorable state interest" was insufficient to justify the burden and granted relief on the ground that the State failed to provide a compelling interest. *Id.* at 406–09, 83 S.Ct. 1790.

In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), Amish parents challenged a state law requiring children to attend school until the age of sixteen. *Id.* at 207, 92 S.Ct. 1526. The parents had a firm and sincere religious objection to higher education. *Id.* at 209, 92 S.Ct. 1526. Wisconsin responded that its "interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the [parents'] undisputed claims." *Id.* at 219, 92 S.Ct. 1526.

Notably, the Court acknowledged "the general applicability of the State's compulsory school-attendance statutes." *Id.* at 236, 92 S.Ct. 1526. It nevertheless required the state to grant a religious exemption in the absence of a compelling governmental interest. *See*, *e.g.*, *id.* at 220, 92 S.Ct. 1526 ("[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.").

But the Court dramatically altered its course in *Smith*—announcing an exception to *Sherbert* and *Yoder* that the parties had not even requested, let alone briefed. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990). *Smith* establishes a substantial exception to the strict *Sherbert* and *Yoder* standard. After *Smith*, the government may burden religious exercise so long as the burden arises from a "neutral law of general applicability." 494 U.S. at 879, 110 S.Ct. 1595. Under those circumstances, the government would no longer need to show that the regulation is narrowly tailored to further a compelling governmental interest. *Id.* at 882, 110 S.Ct. 1595. *See also* *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (same).

The reaction to *Smith* was unusually negative. The other two branches of government united in criticizing *Smith* as inconsistent with a proper understanding of the First Amendment. In 1993, Congress overwhelmingly passed the Religious Freedom Restoration Act by a 97-3 vote in ***798** the Senate and a voice vote in the House of Representatives. The Act contained legislative findings expressly disavowing *Smith*, stating that "governments should not substantially burden religious exercise without compelling justification,"

and that "in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(3)–(4). The Act vowed to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

President Clinton agreed. In signing RFRA, he explained that "this act reverses the Supreme Court's decision [in *Smith*] and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision." *Remarks on Signing the Religious Freedom Restoration Act of 1993*, 2 PUB. PAPERS OF THE PRESIDENT 2000 (1993). "One of the reasons [our Founders] worked so hard to get the first amendment into the Bill of Rights ... [t]hey knew that religion helps to give our people the character without which a democracy cannot survive." *Id.*

RFRA does not govern this case, however. The Supreme Court has held that Congress did not have the power under Section 5 of the Fourteenth Amendment to apply RFRA to the states. *See* *Flores*, 521 U.S. at 535, 117 S.Ct. 2157. In response to *Flores*, the State of Texas enacted a state law version of RFRA. TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 *et seq.* But Horvath presents no such claim here.

The district court thus held that Horvath's claim is foreclosed by *Smith*. To quote: "The requirement is not aimed at a specific religious practice; it is an attempt to address concerns raised by transmitting infectious diseases by health care workers. *Cf.* *Smith*, 494 U.S. at 894, 110 S.Ct. 1595." *Horvath v. City of Leander*, 1:17-cv-256-RP, at *14 (W.D. Tex. Oct. 10, 2018). The court thus concluded that the city's policy is "neutral and generally applicable" under *Smith*. *Id.*

I disagree with the district court's reliance on *Smith*—and applaud the majority for declining to affirm based on *Smith*. For it is far from clear that the city's vaccination policy is a "neutral law of general applicability." 494 U.S. at 879, 110 S.Ct. 1595. And if it is not, then the policy is subject to the strict standard employed in *Sherbert* and *Yoder*. For even after *Smith*, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. I would therefore remand for further proceedings to determine whether the city policy is a neutral law of general applicability—and if not, whether the policy satisfies strict scrutiny—because the record appears to be disputed on both questions.

To begin with, the record is unclear whether the city's TDAP vaccine policy provides exemptions for some, while denying exemptions for people of faith like Horvath. The district court opinion indicates that the city does offer such exemptions, citing the fire chief's own testimony. *Horvath*, 1:17-cv-256-RP, at *2, *10. Counsel seemed less certain of this fact, however, when asked at oral argument. If the city does permit exemptions to the vaccine policy, then the policy is not neutral or generally applicable. *See* ***799** *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. Remand would allow the parties to clarify the record on this point.

In addition, the record confirms that the city is apparently willing to grant exemptions in arguably analogous situations, such as under its flu vaccine policy. Yet for no reason—or at least none that is apparent from the record—the city denied that same request for a religious exemption on behalf of the same firefighter when it came to the TDAP vaccine. Remand would give the city the opportunity to demonstrate either that the flu vaccine is somehow not analogous to the TDAP vaccine (and that the vaccine policy is therefore neutral and generally applicable)—or that it has a compelling interest in insisting that Horvath take the TDAP vaccine, but not the flu vaccine.

The majority offers an alternative basis for affirming the district court. Instead of relying on *Smith* as the district court did, the majority holds that the city's policy does not substantially burden religion, because the city offered Horvath the option of wearing a respirator instead of taking the vaccine.

But Horvath responds that the city's offer forces him to choose between sacrificing his faith or working under unequal conditions. Other firefighters are not required to wear respirators. And Horvath offered expert testimony that a respirator would impair his ability to do his job well.

The right to free exercise means that government cannot force citizens to choose between one's faith and one's livelihood, absent a compelling reason. In *Sherbert*, the state tried to "force [Adell Sherbert] to choose between following the precepts of her religion and forfeiting benefits ... and abandoning one of the precepts of her religion in order to accept work." 374 U.S. at 404, 83 S.Ct. 1790. The Supreme Court unequivocally rejected that proposition. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406, 83 S.Ct. 1790.

The Court has applied the same principle in the RFRA context, holding that government substantially burdens religious liberty when it "put[s] family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014). After all, "it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers," if forced to drop insurance coverage to vindicate their faith. *Id.* at 722, 134 S.Ct. 2751.

Whether the respirator requirement similarly forces Horvath to make an untenable choice is, at best, a fact dispute that the parties can likewise address on remand. *See*, *e.g.*, *Horvath*, 1:17-cv-256-RP, at *14 (observing that it is "not clear" whether the respirator requirement burdens Horvath's religion).

I take no position on any of these record issues. They turn on fact disputes that the district court must determine in the first instance. I would simply hold that the Free Exercise Clause entitles Horvath to litigate those issues, even under *Smith*.

II.

Although I would remand Horvath's Free Exercise claim against the city, I agree that we must affirm his Free Exercise claim against the fire chief, under the doctrine of qualified immunity.

*800 A.

Qualified immunity forecloses most suits for money damages from government officials. To overcome qualified immunity, Horvath must satisfy two prongs. The first prong should be uncontroversial on its face—Horvath cannot recover unless he first establishes a violation of his legal rights. But that is not enough to overcome qualified immunity. Horvath must also satisfy a second prong—the right must not only be established, but " '*clearly* established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (emphasis added).

The "clearly established" requirement is controversial because it lacks any basis in the text or original understanding of § 1983. Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a "clearly established" requirement. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, § 1, 17 Stat. 13 (1871); 42 U.S.C. § 1983. *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 50 (2018) ("Neither version of the text, you will notice if you wade through them, makes any reference to immunity.").

By contrast, Congress has expressly adopted a "clearly established" requirement in other contexts. For example, in the Antiterrorism and Effective Death Penalty Act of 1996, Congress imposed special burdens on habeas petitioners who seek relief from convictions. AEDPA requires habeas petitioners not only to establish a violation of law, but to identify "*clearly* established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphasis added). The qualified immunity doctrine imposes a similar "clearly established" standard in § 1983 cases—

but without any corresponding textual basis. That is troubling because, in other contexts, the Supreme Court has declined to read language into a statute if Congress explicitly included the same language in other statutes. [3]

Nor is there any other basis for imputing such a requirement to Congress, such as from the common law of 1871 or even from the early practice of § 1983 litigation. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted."); *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1871, 198 L.Ed.2d 290 (2017) (Thomas, J., concurring in part and concurring in judgment) ("We have not attempted to locate [the "clearly established"] standard in the common law as it existed in 1871 ... and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.") (citing Baude, *supra*, at 52–62).

***801** In sum, there is no textualist or originalist basis to support a "clearly established" requirement in § 1983 cases.

B.

One of the primary justifications for the "clearly established" requirement is that the fear of litigation not only deters bad conduct, but chills good conduct as well. That is a valid but, I believe, ultimately misplaced concern. For if courts simply applied the *first* prong of the doctrine in a manner more consistent with the text and original understanding of the Constitution, we might find that the second prong is unnecessary to prevent chilling, as well as unwarranted by the text.

Law enforcement officials and other public officials who engage in misconduct should be held accountable. "Nothing is more corrosive to public confidence in our criminal justice system than the perception that there are two different legal standards." *United States v. Taffaro*, 919 F.3d 947, 949 (5th Cir. 2019) (Ho, J., concurring in the judgment). Public officials who violate the law without consequence "only further fuel public cynicism and distrust of our institutions of government." *Id.*

But there is also concern that the fear of litigation chills public officials from lawfully carrying out their duties. After all, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.)). *See also, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 562, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007) (same). "The specter of personal liability for a mistake in judgment may cause a prudent police officer to close his eyes." *Malley v. Briggs*, 475 U.S. 335, 353, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (Powell, J., concurring in part and dissenting in part). "Law enforcement is ill-served by this *in terrorem* restraint." *Id.* at 354, 106 S.Ct. 1092. [4]

Much of the chilling problem, however, stems from misuse of the first prong of the doctrine. Simply put, courts find constitutional violations where they do not exist.

For example, the Fourth Amendment does not prohibit reasonable efforts to protect law-abiding citizens from violent criminals—it forbids only "*unreasonable* searches and seizures." U.S. CONST. amend. IV (emphasis added). As those words were understood at the time of the Founding, the Fourth Amendment allows police officers to take the steps necessary to apprehend and prevent felons from harming innocent citizens.

Courts often look "to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity." *Tennessee v. Garner*, 471 U.S. 1, 13, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The common law "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon." *Id.* at 12, 105 S.Ct. 1694. *See also, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *292 (same). And although the Court has not ***802** embraced the full force of the common law, it has recognized the constitutionality of deadly force where an officer has "probable cause to believe that the suspect poses

a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3, 105 S.Ct. 1694.

So if chilling police conduct is the concern, there is no need for an atextual "clearly established" requirement. The Constitution should be enough—if we get the substantive Fourth Amendment analysis right.

Our court's recent debates about qualified immunity illustrate this point. In *Winzer v. Kaufman County*, 916 F.3d 464 (5th Cir. 2019), no member of our court claimed that the officers violated "clearly established" law. We all agreed that the officers involved in the death of a suspected active shooter were entitled to qualified immunity under the second prong. *See id.* at 482 (Clement, J., dissenting in part) ("Fortunately, the majority at least gets the second prong of the qualified immunity analysis right."). What divided us was the first prong—whether the plaintiff established a violation of the Fourth Amendment. Four members of our court dissented from the denial of rehearing en banc, writing that, "[i]f we want to stop mass shootings, we should stop punishing police officers who put their lives on the line to prevent them"—echoing the same chilling concerns previously expressed by the Supreme Court. *Winzer v. Kaufman County*, 940 F.3d 900, 901 (5th Cir. 2019) (Ho, J., dissenting from denial of rehearing en banc). But we did so under the first prong, not the second. *See id.* ("The Fourth Amendment prohibits 'unreasonable searches and seizures'—not reasonable efforts to protect citizens from active shooters.").

So too in *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc). There we again divided over whether the officers violated the Fourth Amendment—the first prong of the qualified immunity doctrine—in taking steps to prevent a distraught and armed teenager from shooting up a nearby school. *See*, *e.g.*, *id.* at 478 (Ho & Oldham, JJ., dissenting) ("Does the majority seriously believe that it is an 'unreasonable seizure,' *as those words were originally understood at the Founding*, for a police officer to stop an armed and mentally unstable teenager from shooting innocent officers, students, and teachers?"). Once again, so long as the substantive analysis under the first prong is right, there is no need for the second prong.

There is an additional reason why the fear of chilling public officials does not justify a "clearly established" requirement unsupported by text. When it comes to the First Amendment, for example, we are concerned about government chilling the citizen—not the other way around. [5]

Consider *Sause v. Bauer*, —— U.S. ——, 138 S. Ct. 2561, 201 L.Ed.2d 982 (2018) (per curiam). Two police officers, acting on a noise complaint, entered the home of Mary Anne Sause. Fearful of the police presence, she asked if she could pray. According to her complaint, the officers responded abusively and ordered her not to pray. *Id.* at 2562. The Free Exercise Clause plainly protects the right to pray in one's own home. *Id.* Yet two federal courts held that it was not "clearly established" at the time of the violation and granted qualified ***803** immunity. *Id.* It took summary reversal by the Supreme Court to get Mary Anne Sause her day in court.

Our court addressed a similar situation in *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc). Two children wanted to hand out religiously-themed candy-canes and pencils to their classmates during Christmas. But the school principals stopped them. A majority of the court held that this conduct violated the First Amendment. *Id.* at 412 (Elrod, J., writing for the majority in part). But a different majority of the court held that the conduct did not violate "*clearly* established" law. *Id.* at 389 (Benavides, J.).

C.

A similar justification for the "clearly established" requirement might be described as "two wrongs make a right." Baude, *supra*, at 63. As the theory goes, courts too often impose liability on public officials under the first prong—so the second prong is needed to limit judicial adventurism. *See* *id.* ("Two wrongs, Justice Scalia might have said, can make a right.").

But that is a false choice—not to mention a troubling one. To avoid *Winzer* and *Cole*, Sause and Morgan should not have to suffer. We can walk and chew gum at the same time. Courts can faithfully interpret the Fourth Amendment as well as § 1983. We can get *both* prongs of the doctrine right. *Cf.* *Cole*, 935 F.3d at 477 (Ho & Oldham, JJ., dissenting) ("A principled originalist would fairly review decisions that favor plaintiffs as well as police officers."). [6]

* * *

Smith does not foreclose Horvath's Free Exercise claim against the city. But qualified immunity requires us to affirm the judgment as to the fire chief. I would vacate the judgment as to the Free Exercise claim against the city and remand to allow Horvath to proceed on that claim. I dissent in part for that reason. In all other respects, I concur in the judgment.

All Citations

946 F.3d 787, 2020 Fair Empl.Prac.Cas. (BNA) 11,387

Footnotes

1 Judge Ho concurs in the judgment as to Sections III.A and III.B and dissents as to Section III.C, for the reasons expressed in his separate opinion.

2 Horvath originally filed suit in Texas state court against only the City of Leander. After the City of Leander removed the case to federal court, Horvath amended his complaint to add claims against Chief Gardner, in both his official and individual capacity.

3 We apply the same analysis to Title VII and TCHRA claims. *See* *NME Hasps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999).

4 Concluding that the first accommodation was reasonable, the district court declined to assess the reasonableness of the second proposed accommodation: wearing the respirator at all times during his shifts, keeping a log of his temperature, and submitting to additional medical testing.

5 A code enforcement officer works Monday to Friday during normal business hours, with occasional overtime on Saturdays, while driver/pump operators and other firefighters work twenty-four-hour shifts.

6 Because we determine that the City offered Horvath a reasonable accommodation by allowing him to transfer positions, we do not consider whether the City's second accommodation option, which involved wearing a respirator mask for twenty-four-hour periods, was reasonable, or if Horvath's request for a religious exemption created an undue hardship.

7 The dissent argues that *Smith* should not apply to Horvath's claim and would "remand for further proceedings to determine whether the city policy is indeed a neutral law of general applicability." We do not rely on *Smith* in deciding Horvath's claim, instead concluding, as the district court did, that Horvath's right to freely exercise his religious beliefs was not burdened at all by the proposed respirator accommodation that Horvath challenges.
The dissent also claims there are fact disputes as to whether the proposed respirator accommodation forces Horvath to make an "untenable choice" between sacrificing his faith or working under unequal conditions. A brief review of the cases relied on by the dissent reveals that they are inapposite. In both *Sherbert* and *Hobby Lobby*, the plaintiffs were forced to choose between compromising their religious beliefs and facing serious consequences—in *Sherbert*, foregoing unemployment compensation benefits; and in *Hobby Lobby*, forfeiting hundreds of millions of dollars a year by continuing to offer healthcare plans to employees without contraceptive coverage, or facing a competitive disadvantage in attracting skilled workers by dropping insurance coverage altogether. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); *Sherbert*, 374 U.S.398, 400, 404-05 (1963). Here, Horvath was not faced with such an "untenable choice"—in lieu of getting a vaccine, Horvath could remain a firefighter and wear a respirator throughout his shift *or* become a code enforcement officer and maintain the same pay and benefits as his current position. We have already determined that the code enforcement position was a reasonable

accommodation, and Horvath does not argue that this accommodation violates his free exercise rights. Moreover, the plaintiffs in the cases cited by the dissent challenged the policy that infringed on their free exercise rights; here, Horvath challenges not the City's general **vaccine** requirement that would require him to violate a sincerely held **religious** belief, but one of two **accommodations** the City proposed so that Horvath could avoid such a dilemma. Simply put, Horvath was not forced to choose between compromising his religious beliefs and "pay[ing] a very heavy price." *Hobby Lobby Stores, Inc.*, 573 U.S. at 691, 134 S.Ct. 2751.

1 *Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on Judiciary*, S. Hrg. 102-1076, at 171 (Sep. 18, 1992) (statement of Nadine Strossen, President of the ACLU). *See also id*. at 42 (statement of Oliver S. Thomas on behalf of the Baptist Joint Committee and the American Jewish Committee) (same); Garrett Epps, *Elegy for a Hero of Religious Freedom*, THE ATLANTIC, Dec. 9, 2014 (comparing Alfred Smith to Dred Scott).

2 *See*, *e.g.*, *Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 139 S. Ct. 634, 637, 203 L.Ed.2d 137 (2019) (Alito, J., respecting the denial of certiorari) ("In [*Smith*], the Court drastically cut back on the protection provided by the Free Exercise Clause."); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, —— U.S. ——, 138 S. Ct. 1719, 1734, 201 L.Ed.2d 35 (2018) (Gorsuch, J., concurring) ("*Smith* remains controversial in many quarters."); *City of Boerne v. Flores*, 521 U.S. 507, 544–45, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (O'Connor, J., dissenting) ("*Smith* was wrongly decided."); *id.* at 565, 117 S.Ct. 2157 (Souter, J., dissenting) ("I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."); *Smith*, 494 U.S. at 891, 110 S.Ct. 1595 (O'Connor, J., concurring in the judgment); *id.* at 907, 110 S.Ct. 1595 (Blackmun, J., dissenting).

3 *See*, *e.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176–77, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so. ... If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."); *Pinter v. Dahl*, 486 U.S. 622, 650, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) ("When Congress wished to create such liability, it had little trouble doing so."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) ("Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) ("When Congress wished to provide a remedy ... , it had little trouble in doing so expressly.").

4 *Compare* *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior"), *with* *Rudolph v. Babinec*, 939 F.3d 742, 756 (6th Cir. 2019) (Thapar, J., concurring in part and dissenting in part) ("Qualified immunity exists to insulate these difficult judgment calls. We would all be ill-served if it did not.").

5 *See*, *e.g.*, *Multimedia Holdings Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301, 1304, 125 S.Ct. 1624, 161 L.Ed.2d 590 (2005) ("[S]pecial First Amendment concerns" are raised when a regulation "may chill protected speech."); *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

6 As Justice Scalia, joined by Justice Thomas, fairly observed in *Crawford-El*, 523 U.S. at 611–12, 118 S.Ct. 1584 (Scalia, J., dissenting), we must also get *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), right. But that turns out to be a closer call. Justices Scalia and Thomas question *Monroe*. But Professor Baude offers a robust response. *Compare* *Crawford-El*, 523 U.S. at 611, 118 S.Ct. 1584, *with* Baude, *supra*, at 63–66. Professor Baude also suggests that, even if *Monroe* was incorrectly decided, a proportionate response would look very different from the judicially invented "clearly established" requirement. Baude, *supra*, at 66–69; *see*, *e.g.*, *id.* at 69 (suggesting a requirement of exhaustion of state law remedies instead).

305 F.Supp.3d 984
United States District Court,
N.D. Iowa, Western Division.

Michael Eric MIAL, Plaintiff,
v.
Jerry R. FOXHOVEN, et al., Defendants.

No. C17–4007–LTS
|
Signed 04/04/2018

Synopsis

Background: State employee brought action against state agency employer, alleging religious discrimination in violation of Title VII and the Iowa Civil Rights Act (ICRA) stemming from his termination after supervisors learned that he used "In Christ" valediction in work e-mail. Employer moved for summary judgment.

Holdings: The District Court, Leonard T. Strand, Chief Judge, held that:

[1] fact issue existed as to whether employee use of the valediction was sincerely connected to his religion;

[2] fact issue existed as to whether employee provided sufficient notice to employer that his use of the valediction was connected to his religious beliefs; and

[3] fact issues existed as to whether employer was prevented from offering accommodation and whether use of the valediction caused any disruption in the workplace or violated any neutral, generally applicable rules or procedures.

Motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (10)

[1] **Civil Rights** Effect of prima facie case; shifting burden
Civil Rights Employment practices

Under burden shifting method applicable to religious discrimination claims under Title VII and the Iowa Civil Rights Act (ICRA), if plaintiff establishes a prima facie case, then the burden shifts to the employer to produce evidence showing that it can not reasonably accommodate the employee without incurred undue hardship. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[2] **Civil Rights** Accommodations

Determinations of what constitutes an undue hardship, as would relieve employer of obligation under Title VII and the Iowa Civil Rights Act (ICRA) to provide reasonable accommodation for employee's religious practices, must be made on a case-by-case basis. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[3] **Federal Civil Procedure** Civil rights cases in general

Genuine issues of material fact as to whether state employee's use of work e-mail valediction "In Christ" was merely a personal preference or whether it was sincerely connected to his religion precluded summary judgment on sincerity element necessary for employee to establish prima facie case of religious discrimination under Title VII and the Iowa Civil Rights Act (ICRA) stemming from his termination. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[4] **Civil Rights** Beliefs and activities protected; sincerity

In considering whether a particular practice or belief of an employee is covered by Title VII and the Iowa Civil Rights Act (ICRA), a court may neither determine what the tenets of a particular

religion are, nor determine whether a particular practice is or is not required by the tenets of the religion; however, because employers are not required to accommodate purely personal preferences, the court is allowed, at a minimum, to ascertain whether the practice asserted by the plaintiff is purely personal, or does indeed have some connection with the plaintiff's religion. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j); Iowa Code Ann. § 216.6(1)(a).

[5] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact as to whether state employee provided sufficient notice to employer that his use of e-mail valediction "In Christ" was connected to his religious beliefs precluded summary judgment on notice element necessary for employee to establish prima facie case of religious discrimination under Title VII and the Iowa Civil Rights Act (ICRA) stemming from his termination. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[6] **Civil Rights** Notice to employer

Notice requirement for establishing prima facie case of religious discrimination under Title VII and the Iowa Civil Rights Act (ICRA) is not particularly stringent, as it requires only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[7] **Federal Civil Procedure** Employees and Employment Discrimination, Actions Involving

Genuine issues of material fact as to whether the Establishment Clause prevented state agency from offering accommodation to employee's religious practices and whether employee's use of valediction "In Christ" in work e-mail caused any disruption in the workplace or violated any neutral, generally applicable rules or procedures precluded summary judgment on question whether duty to accommodate applied, for purposes of employee's claim that he was discharged in violation of Title VII and the Iowa Civil Rights Act (ICRA) because agency refused to accommodate his request to use valediction "In Christ" in his e-mail. U.S. Const. Amend. 1; Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1); Iowa Code Ann. § 216.6(1)(a).

[8] **Civil Rights** Practices prohibited or required in general; elements

A plaintiff does not establish a Title VII religious discrimination claim if he or she refuses to comply with a generally applicable rule or procedure. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

[9] **Civil Rights** Practices prohibited or required in general; elements

Government employers do not violate Title VII's anti-discrimination provisions by preventing religious use of government time or resources. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

[10] **Civil Rights** Practices prohibited or required in general; elements

An employer may prevent an employee from proselytizing without violating Title VII's prohibition on religious discrimination if the employee's actions disrupt business, alienate customers or are contrary to a state employer's policy of not endorsing religion. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Leonard T. Strand, Chief Judge

I. INTRODUCTION

***986**

This case is before me on a motion (Doc. No. 26) for summary judgment filed by defendants Jerry Foxhoven, in his official capacity as Director of the Iowa Department of Human Services, Richard Shults, in his official capacity as Administrator of the Division of Mental Health and Disability Services, Cory Turner, in his individual capacity and in his official capacity as Superintendent of the Civil Commitment Unit for Sexual Offenders (CCUSO), Brad Wittrock, in his individual capacity and in his official capacity as Deputy Superintendent of CCUSO, and Dan Pingel, in his individual capacity and in his official capacity as Treatment Program Supervisor at CCUSO. Plaintiff Michael Eric Mial (Mial) has filed a resistance (Doc. No. 29) and defendants have replied (Doc. No. 30). I find that oral argument is not necessary. *See* N.D. Ia. L.R. 7(c).

II. PROCEDURAL HISTORY

Mial commenced this action by filing a complaint (Doc. No. 2) on January 23, 2017. The complaint included several constitutional claims and claims under federal and Iowa law against various state employees. All of the claims relate to an allegation of unlawful discrimination on the basis of religious beliefs, allegedly culminating in the termination of Mial's employment at CCUSO.

Defendants responded with a pre-answer motion (Doc. No. 8) to dismiss for failure to state a claim, which I granted in part and denied in part. *See* Doc. No. 19. Counts VI and XI were dismissed in their entirety, as was Mial's request for declaratory relief. Certain other claims were dismissed in part. Defendants filed an answer (Doc. No. 20) on November 20, 2017, denying all remaining claims. Defendants then filed their motion for summary judgment on February 16, 2018. In his resistance, Mial states that he "does not resist entry of summary judgment with respect to all claims other than his religious discrimination claims under Title VII and the Iowa Civil Rights Act (Counts VII and VIII of the Complaint)." Doc. No. 29 at 1. Thus, Counts VII and VIII of the complaint set forth the only claims that remain for consideration. [1]

III. RELEVANT FACTS

Unless otherwise noted, the parties do not dispute the following facts:

Mial applied for and was awarded the position of Psychiatric Security Specialist (PSS) at CCUSO. His first day of work was December 7, 2015. Doc. No. 26–3 at 44, 165. State employees, including Mial, are considered probationary for the first six months of employment. *Id.* at 8, 58. The PSS position involves working directly ***987** with CCUSO patients, [2] as set out in the position description questionnaire. *Id.* at 7, 165–69. Among other things, a PSS employee: "[p]rovides care and treatment of patients by implementing program policies," "[p]erforms essential security functions, such as conducting unit counts and security checks and maintaining order and discipline on the unit," "[o]bserves and accurately documents information relating to each patient," "[a]ttends treatment team meetings" and "[f]ollows written and supervisory directives, personnel policies, and departmental policies." *Id.* at 165–66.

After a probationary employee has worked for six months, CCUSO supervisors must decide whether to retain or discharge the employee. Factors considered in this decision include how the probationary employee engaged with patients and other employees, as well as the employee's ability to follow work rules, policies and supervisory directives. *Id.* at 58. CCUSO employees are required to follow work rules, including those applicable to the use of employee email accounts. [3] *Id.* at 58, 166.

Mial sent 49 emails using his CCUSO email account between December 22, 2015, and April 27, 2016. *Id.* at 87–153. These emails discussed administrative matters (*id.* at 87, 89–90, 92–98, 104–05, 114–18, 142, 144), scheduling issues (*id.* at

88, 99–102, 106, 119–25, 127, 130–39, 143, 148–53), and personal matters (*id.* at 91, 126, 128). On two occasions, Mial used his CCUSO email account to forward incident reports about CCUSO patients to the next shift of employees. *Id.* at 140, 145. Beginning March 5, 2016, Mial signed the majority of his emails sent through his CCUSO email account with the valediction "In Christ." *Id.* at 120, 123–53. The two emails containing patient information also included the valediction "In Christ." *Id.* at 140, 145.

Mial admits that he first used "In Christ" in his CCUSO email signature on March 5, 2016. Doc. No. 29–3 at 2 (¶ 12). He has not explained why he did not use that phrase before that date, or why he began doing so on that date. *See, e.g.*, Doc. No. 26–3 at 209. Mial has stated, however, that he uses the "In Christ" valediction for the purpose of proclaiming his faith in all he does. Pastor Steve Britton of Cavalry Baptist Church in Estherville, Iowa, testified that while Mial is not a member of his church, he and his family have attended services at the church "probably half a dozen times total." *Id.* at 34. Pastor Britton testified that members of his church believe that they are to "give out the gospel" and that his church "normally tr[ies] to train people to go out and knock on doors, give out gospel, give the gospel message." *Id.* at 34–35. When asked whether it would be necessary to use "In Christ" in a work email to proclaim one's faith, Pastor Britton responded:

> A: It would be up to the boss.
>
> Q: Okay.
>
> A: You know. It—whatever—whatever the company policy is. If they tell you not to do it, then you don't do it. You know, we're to—we're to obey the authorities over us.
>
> Q: And that would include the employer?
>
> A: Yeah.

***988** *Id.* at 35. Pastor Britton also testified that there are "several ways" available for followers to proclaim their faith to others. *Id.*

Mial's valediction came to the attention of his supervisors in April 2016. Turner emailed Wittrock regarding the use of the "In Christ" valediction on an email containing a patient incident report. *Id.* at 176. Turner testified that he made this decision because he thought the valediction "could potentially be an issue." *Id.* at 65. Specifically, Turner thought that the valediction implicated issues of keeping church and state separate, and promoting one specific religion over another. *Id.* Turner testified that CCUSO policy directly addressed this issue, which he considered to be rules governing "the use of e-mail in a professional fashion."[4] *Id.* at 66.

On April 11, 2016, Wittrock asked Pingel, Mial's direct supervisor, to address Mial's valediction. *Id.* On April 12, 2016, Wittrock sent an email memorandum to all staff at CCUSO stating: "Email signatures need to contain business related information only and employees shall not include any personal messages." *Id.* at 177. While other staff stopped using non-business-related email signatures, Mial continued to use the "In Christ" valediction. *Id.* at 84. On April 20, 2016, Pingel and Mial met to discuss Mial's non-compliance with the email signature rule. At this meeting, Mial requested to keep his email without any changes. *Id.* at 82. Pingel testified that Mial did not explain in great detail why he wished to keep using the valediction, stating only that "religion should be in every component of your life or something to that extent." *Id.* at 82. Pingel's notes from that meeting state:

> PSS Mial ... explain[ed] that his religious views were so important to him, that he cannot separate business from religious views ....
>
> PSS Mial explained that he anticipated that supervisory staff would eventually speak with him about the "In Christ" signature line. Mial remarked "fire me if you have to, I am not removing it." PSS Mial stated further that he has already discussed the potential ramifications of this decision with his wife, and he is willing to "accept the consequences."

Id. at 179.

After the April 20, 2016, meeting, Turner and Wittrock consulted with Janelle Bertrand, a human resources employees from the Iowa Department of Administrative Services (DAS) as to how they should resolve Mial's failure to follow supervisory directives. *Id.* at 50–51, 177. On April 21, 2016, Wittrock sent a follow-up email to all staff repeating the directive to refrain from inserting personal messages in their email signatures. *Id.* at 178.

On April 28, 2016, Mial had a second meeting with Turner and Wittrock to discuss his non-compliance with the email signature rule. Mial secretly recorded the audio of this meeting on his cell phone. *Id.* at 14 (the recording has been provided to the court on a DVD–R disc). During this meeting, Turner and Wittrock explained the purpose of the email policy (keeping personal lives and business separate), as well as

the importance of CCUSO employees following supervisory directives. Recording at 1:00–1:48. Further, they explained their belief that all email at CCUSO was potentially subject to a discovery or an open records request. During this meeting, Mial explained that his use of the valediction was a result of his strong religious beliefs, as he used the valediction to proclaim his faith. *Id.* at 2:19–2:32. Mial did not request or propose any accommodations and stated simply that he would continue to use the valediction. *Id.* at 4:12–18.

***989** Mial repeated his earlier statement that he understood that his position may cost him his job (*id.* at 4:25–30) and asked whether he needed to turn in his keys now (*id.* at 6:28–39). The parties appear to have left this meeting with the understanding that Mial would be discharged if he did not comply with the email signature rule and, in fact, Mial's employment ended that day. Doc. No. 26–3 at 180. Mial filed a complaint with the Equal Employment Opportunity Commission (EEOC) and the Iowa Civil Rights Commission (ICRC) approximately two weeks after he was fired. *Id.* at 183–84.

Mial testified that he essentially has not worked since he was discharged from CCUSO, barring a brief stint at Life Connections, a family counseling center in Marshalltown, Iowa. Doc. No. 26–3 at 6, 17, 22–27, 184–200. Mial testified that he was discharged from Life Connections because they refused to accommodate his request to use the same "In Christ" valediction in his email. *Id.* at 6. However, email communications between Mial and various employees at Life Connections indicate that the disagreement may have been more complicated. *Id.* at 184–200. Currently, Mial spends his time as a volunteer firefighter and attending online classes in furtherance of a Ph.D. in Emergency Management. *Id.* at 4. Mial still uses "In Christ" to sign emails for school or other purposes, but he does not use "In Christ" when he authors papers for school or on other forms that do not have a signature block. *Id.* at 17–18.

IV. SUMMARY JUDGMENT STANDARDS

Any party may move for summary judgment regarding all or any part of the claims asserted in a case. Fed. R. Civ. P. 56(a). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.* "An issue of material fact is genuine if it has a real basis in the record," *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)), or "when 'a reasonable jury could return a verdict for the nonmoving party' on the question," *Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 990 (8th Cir. 2005) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). Evidence that only provides "some metaphysical doubt as to the material facts," *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348, or evidence that is "merely colorable" or "not significantly probative," *Anderson*, 477 U.S. at 249–50, 106 S.Ct. 2505, does not make an issue of material fact genuine. Put another way, " '[e]vidence, not contentions, avoids summary judgment.' " *Reasonover v. St. Louis Cnty.*, 447 F.3d 569, 578 (8th Cir. 2006) (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003)). The parties "may not merely point to unsupported self-serving allegations." *Anda v. Wickes Furniture Co.*, 517 F.3d 526, 531 (8th Cir. 2008).

As such, a genuine issue of material fact requires "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' ***990** differing versions of the truth at trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505 (quotations omitted). The party moving for entry of summary judgment bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548). Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue

for trial. *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005). The nonmovant must show an alleged issue of fact is genuine and material as it relates to the substantive law. *Id.* If a party fails to make a sufficient showing of an essential element of a claim or defense with respect to which that party has the burden of proof, then the opposing party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

To determine whether a genuine issue of material fact exists, I must view the evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88, 106 S.Ct. 1348. Further, I must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id.* However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004) (citing *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376–77 (8th Cir. 1996)). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick*, 90 F.3d at 1377.

IV. DISCUSSION

As noted above, Mial does not resist the entry of summary judgment as to all remaining claims other than his religious discrimination claims under Title VII and the ICRA, which are set forth in Counts VII and VIII. As such, I will grant defendants' motion for summary judgment on Counts I, II, III, IV, V, IX, and X.

Count VII alleges religious discrimination against the individual capacity defendants (Wittrock, Pingel and Turner) in violation of the Iowa Civil Rights Act (ICRA), while Count VIII alleges religious discrimination in violation of Title VII against the defendants in their official capacities. The basis for both claims is the defendants' alleged failure to accommodate Mial's preferred email valediction.

A. Religious Discrimination Standards

[1] **[2]** Federal and state laws forbid an employer from discriminating against an employee because of that employee's religion. *See* 42 U.S.C. § 2000e–2(a)(1), (j); Iowa Code § 216.6(1)(a). In the context of a Title VII claim, the Eighth Circuit Court of Appeals has explained:

> To establish a prima facie case of religious discrimination, a plaintiff must show he (1) has a bona fide religious belief that conflicts with an employment requirement, (2) informed the employer of such conflict, and (3) suffered an adverse employment action.

Ollis v. HearthStone Homes, Inc., 495 F.3d 570, 575 (8th Cir. 2007) (citing *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (per curiam)). If the plaintiff establishes a prima facie case, then "the burden shifts to the employer to produce evidence showing that it can not reasonably accommodate the employee without incurring undue hardship." *Cook v. Chrysler Corp.*, 779 F.Supp. 1016, 1022 (E.D. Mo. 1991), *aff'd*, 981 F.2d 336 (8th Cir. 1993), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2963, 125 L.Ed.2d 663 (1993). "Determinations of what constitutes an 'undue hardship' ***991** must be made on a case-by-case basis." *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011) (citing *Brown v. Polk Cnty., Iowa*, 61 F.3d 650, 655 (8th Cir. 1995) (en banc)). In *Harrell*, the Eighth Circuit noted that an accommodation that violates a collective bargaining agreement imposes an undue hardship. 638 F.3d at 980. The court also explained that any accommodation that "causes more than a de minimis impact on co-workers" creates an undue hardship. *Id.* (citing *Brown*, 61 F.3d at 655).

The Iowa Supreme Court has adopted the Title VII analysis for religious discrimination claims arising under the Iowa Civil Rights Act. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983).

B. Analysis

Defendants contend they are entitled to summary judgment because Mial has failed to establish the first two elements ("sincerity" and "notice") of his prima facie case. They also argue that even if Mial can establish a prima

facie case, CCUSO could not have accommodated his desired valediction without violating the First Amendment's Establishment Clause. I will address these issues separately.

1. Sincerity

[3] Defendants argue that Mial has failed to make the required prima facie showing of discrimination because his use of the email valediction is merely a personal preference that is not sincerely connected to religion. *Brown v. General Motors Corp.*, 601 F.2d 956, 960 (8th Cir. 1979) (Title VII "does not require an employer to reasonably accommodate the purely personal preferences of its employees."). In support of this argument, defendants point to the following facts: (1) Mial did not use this valediction during his first three months of employment with CCUSO, (2) Mial provided no explanation as to why he started using it and (3) Mial does not use the valediction on all documents or communications. Further, defendants note that the pastor of the church Mial occasionally attends testified that the use of the valediction is not required and that there are several other ways for followers to proclaim their faith.

[4] Title VII protects "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). In considering whether a particular practice or belief of an employee is covered by Title VII, a court may neither determine what the tenets of a particular religion are, nor determine whether a particular practice is or is not required by the tenets of the religion. *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S.Ct. 526, 97 L.Ed. 828 (1953) ("it is no business of courts to say ... what is a religious practice or activity"); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). However, because employers are not required to accommodate purely personal preferences, "the court [is] allowed, at a minimum, to ascertain whether the practice asserted by the plaintiff is purely personal, or does indeed have some connection with the plaintiff's religion." *Vetter v. Farmland Indus., Inc.*, 884 F.Supp. 1287, 1307 (N.D. Iowa 1995), *rev'd on other grounds*, 120 F.3d 749 (8th Cir. 1997). The two issues are not strictly tied together. Thus, the fact that a practice or belief may be connected to religion does not compel the conclusion that it is not a personal preference, or that it is in fact sincerely held. *See, e.g.*, *Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682–83 (9th Cir. 1998) (timing of religious pilgrimage was a matter of **personal preference**, although need to attend pilgrimage was certainly a **sincerely held** religious **belief**); *Vetter*, 120 F.3d at 752 (because there was evidence that the plaintiff chose to live in Ames as a matter of **personal preference**, rather than in compliance with a practice of his religion ***992** to live in an active Jewish community with a synagogue, it was for the jury to resolve whether the religious **belief** was **sincerely held**).

Here, the undisputed facts establish that Mial's practice of signing his emails with the valediction "In Christ" was connected with Mial's religious belief that he must proclaim his faith in everything he does. However, the sincerity issue is less clear. As noted above, there is evidence in the record that the practice was merely a personal preference. For example, Mial began using the valediction during his third month of employment, he has not explained why he did not use it before that point, he does not use it in instances in which he signs his name and his pastor testified that the email valediction is not required. Further, there is some evidence that Mial began using the email valediction with the expectation that it would lead to discharge and, potentially, a lawsuit.

Despite the fact that there is some evidence casting doubt on the issue of sincerity, I am unable to resolve this issue as a matter of law. Mial's testimony concerning his faith and his commitment to proclaiming Christ in everything he does is sufficient to raise a jury question as to whether his use of the valediction "In Christ" was sincerely connected to religion. As such, defendants are not entitled to summary judgment on this basis.

2. Notice

[5] Defendants argue that they are entitled to summary judgment because Mial did not provide sufficient notice to trigger their duty to accommodate. Specifically, defendants state: "Mr. Mial did assert that he wanted to continue to use the email sign off, but he never explained how it fit in with his religious practice. Mr. Mial did not explore alternatives or even request that alternatives be explored." Doc. No. 30 at 3.

[6] The notice requirement is not particularly stringent, as it requires "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Vetter*, 884 F.Supp. at 1308 (citing *Heller*, 8 F.3d at 1439). The undisputed evidence indicates that Mial informed CCUSO that his email valediction was connected to his religious beliefs. For example: (1) Pingel's notes from the April 20,

2016 meeting indicate that Mial stated his religious beliefs were so important to him that he could not separate them from business and (2) during the April 28 meeting with Turner and Wittrock, Mial stated that the email valediction was his way of proclaiming his faith in everything he does. As such, I am unable to conclude that Mial failed to provide sufficient notice as a matter of law.

3. Accommodation

[7] **[8]** **[9]** **[10]** Finally, defendants argue that even if Mial can establish a prima facie case of religious discrimination, they could not offer a reasonable accommodation without violating the Establishment Clause. As I wrote previously in this case:

> Although the defendants' obligations under the Establishment Clause are relevant in determining whether accommodating Mial would result in hardship, a talismanic invocation of the Establishment Clause is not sufficient at this stage of the case to resolve the claim on a motion to dismiss. *See* [*Brown v. Polk Cnty*, 61 F.3d 650, 659 (8th Cir. 1995)] ("The defendants would have us hold that their 'interest' in avoiding a claim against them that they have violated the establishment clause allows them to prohibit religious expression altogether in their workplaces. Such a position is too extravagant to maintain ....").
>
> * * *
>
> ***993** Employers are not required to accommodate every religious activity. In some situations, religious expression in the workplace can conflict with employer policies aimed at curbing speech in the workplace that could disrupt or offend coworkers. A plaintiff does not establish a Title VII claim if he or she refuses to comply with a generally applicable rule or procedure. *See, e.g.*, *Walden v. Ctrs. for Disease Control and Prevention*, 669 F.3d 1277 (11th Cir. 2012) (EAP counselor could not establish prima facie religious discrimination claim when she was terminated after refusing to counsel LGBT co-workers due to her religious beliefs); *Peterson v. Hewlett–Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employer not required to accommodate plaintiff's anti-gay and lesbian views in the workplace by allowing employee to post discriminatory posters or removing its own anti-discrimination posters). Government employers do not violate Title VII's provisions by preventing religious use of government time or resources. *See, e.g.*, *Brown*, 61 F.3d at 655–56. An employer may prevent an employee from proselytizing if the employee's actions disrupt business, alienate customers or are contrary to a state employer's policy of not endorsing religion. *See, e.g.*, *Daniels*, 246 F.3d at 504 (state need not accommodate request to wear a cross pin on exterior of police officer's uniform); *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (state employer need not accommodate chaplain counselor's religion by changing policy to allow religious counseling techniques); *Spratt v. Cnty. of Kent*, 621 F.Supp. 594 (W.D. Mich. 1985).
>
> Doc. No. 19 at 21–22.

Defendants have submitted evidence to suggest that at least some emails sent by CCUSO employees are subject to discovery and open records requests. Also, while no written policies have been provided, deposition testimony suggests that CCUSO maintains relevant policies about professionalism in the workplace and work emails, as well as respecting coworkers' and patients' rights. However, there is scant evidence that Mial's use of "In Christ" at the end of work-related email messages (such as in various requests for shift changes or time off) would lead the public to assume CCUSO was endorsing a religion. Nor have defendants come forward with conclusive evidence that incident reports of the type Mial sent on April 9, 2016, and April 20, 2016, are frequently discoverable and are likely to be interpreted as CCUSO endorsing Christianity.

Thus, defendants have not shown as a matter of law that the Establishment Clause prevented them from offering an accommodation. Nor have they demonstrated, as a matter of law, that Mial's email valediction caused any disruption in the workplace or violated any neutral, generally applicable rules or procedures. Of course, the jury could decide that Mial's use of the valediction violated neutral policies about professional conduct and following supervisory directives. If so, then a duty to accommodate may not apply. However, I am not able to reach such a conclusion as a matter of law. Defendants' motion for summary judgment must be denied.

V. CONCLUSION

For the reasons discussed above, defendants' motion for summary judgment (Doc. No. 26) is **granted** in part and **denied** in part, as follows:

1. The motion is **granted** as to Counts I (Free Speech), II (Free Association), III (Free Exercise), IV (Establishment Clause), V (Procedural Due Process), IX (ICRA Retaliation) and X (Title VII Retaliation). Those claims are **dismissed**.

2. The motion is **denied** as to Counts VII (ICRA Religious Discrimination) and ***994** VIII (Title VII Religious Discrimination). Trial on those two counts will proceed as scheduled beginning January 14, 2019.

IT IS SO ORDERED.

All Citations

305 F.Supp.3d 984, 2018 Fair Empl.Prac.Cas. (BNA) 118,371

Footnotes

1 As I noted in my previous order, Count VIII (religious discrimination under Title VII) is cognizable only against an employer, not against individual employees. Doc. No. 19 at 23. Mial has not named his actual employer as a defendant but has sued Foxhoven and Shults in their official capacities. In seeking summary judgment as to Count VIII, defendants do not contend that naming Foxhoven and Shults in their official capacities is insufficient for purposes of a Title VII claim. As such, for purposes of the pending motion I will assume that Mial has directed his Title VII claim against the appropriate parties.

2 Patients at CCUSO have completed a term of imprisonment following conviction for a violent sexual offense, but in a separate civil proceeding have been found likely to commit further violent sexual offenses. As such, CCUSO is a secure facility which employs a mix of security and treatment personnel. *Civil Commitment Unit for Sexual Offenders*, Iowa Department of Human Resources, http://dhs.iowa.gov/mhds/mental/in-patient/ccuso.

3 Neither party has submitted a CCUSO policy or directive related to regulating CCUSO email accounts, beyond an April 12, 2016, email that will be discussed further below.

4 Again, no actual, written policy has been provided to the court.

2021 WL 5234394
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

TOGETHER EMPLOYEES, by individual representatives, Roberta Lancione, Joyce Miller, Maria DiFronzo, Michael Saccoccio, Elizabeth Bigger, Natasha DiCicco, Nicholas Arno, and Ruben Almeida, Plaintiffs,

v.

MASS GENERAL BRIGHAM INCORPORATED, Defendant.

Civil Action No. 21-11686-FDS
|
Signed 11/10/2021
|
As Amended 11/12/2021

Synopsis

Background: Unincorporated association of unvaccinated employees who were denied religious or **medical exemptions** from employer's mandatory COVID-19 vaccination policy brought action against employer which operated multiple hospitals challenging policy, alleging claims religious discrimination and retaliation under Title VII and failure to accommodate under the Americans with Disabilities Act (ADA) and seeking to enjoin employer from enforcing its vaccination policy. Employees moved for preliminary injunction.

Holdings: The District Court, F. Dennis Saylor IV, Chief Judge, held that:

[1] unincorporated association likely did not have standing to bring claims against employer under ADA and Title VII on behalf of its members;

[2] employees likely did not have disabilities that substantially limited them from working;

[3] employees did not demonstrate that they were likely to succeed on claim that they were qualified individuals under ADA;

[4] there was insufficient nexus between requested accommodations purported disabilities of unvaccinated employees;

[5] employer established likelihood of success on its contention that granting accommodations requested by unvaccinated employees would cause undue hardship;

[6] providing reasonable accommodation to unvaccinated employees who were denied religious exemption would have caused undue hardship;

[7] employees failed to establish prima facie case of retaliation under the ADA or Title VII;

[8] employees did not show that they would suffer irreparable harm absent preliminary injunction;

[9] balance of equities weighed in favor of denying preliminary injunction; and

[10] enjoining employer from enforcing COVID-19 vaccination mandate was not in public interest.

Motion denied.

West Headnotes (83)

[1] Injunction Extraordinary or unusual nature of remedy

A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.

[2] Injunction Grounds in general; multiple factors

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction serves the public interest.

[3] **Injunction** Likelihood of success on merits

A plaintiff's likelihood of success on the merits weighs most heavily in the court's determination on a motion for a preliminary injunction; without it, the remaining factors ultimately become matters of idle curiosity.

[4] **Injunction** Likelihood of success on merits

Injunction Scope of inquiry and matters considered

On a motion for preliminary injunction, an inquiring court need not conclusively determine the merits of the movant's claim; it is enough for the court simply to evaluate the likelihood that the movant ultimately will prevail on the merits.

[5] **Federal Civil Procedure** In general; injury or interest

Standing to sue is threshold issue in every federal case.

[6] **Federal Civil Procedure** In general; injury or interest

If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case.

[7] **Federal Civil Procedure** In general; injury or interest

Plaintiffs have the burden of adducing facts necessary to support standing.

[8] **Associations** Suits on Behalf of Members; Associational or Representational Standing

Unincorporated association has standing to sue on behalf of its members if at least one of members possesses standing to sue in his or her own right, interests that suit seeks to vindicate are pertinent to objectives for which organization was formed, and neither claim asserted nor relief demanded necessitates personal participation of affected individuals.

[9] **Civil Rights** Preliminary injunction

Unincorporated association of unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy likely did not have standing to bring claims against employer under ADA and Title VII on behalf of its members, and thus association did not show that it was likely to succeed on merits of its claims, for purposes of association's motion for preliminary injunction seeking to enjoin enforcement of vaccination policy; claims asserted and relief demanded required personal participation of each affected member, each member had her own unique medical or religious issues, and use of unincorporated association as plaintiff would have effectively operated as end-run around strict requirements of class action rule. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111 et seq.; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); Fed. R. Civ. P. 23.

[10] **Civil Rights** In general; elements of accommodation claims

To establish a claim for failure to reasonably accommodate under the ADA, a plaintiff must produce sufficient evidence for a reasonable jury to find that (1) he was disabled within the meaning of the ADA, (2) he was a qualified individual, and (3) the employer, despite knowing of the plaintiff's disability, did not reasonably accommodate it. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

1 Cases that cite this headnote

[11] **Civil Rights** Discrimination by reason of handicap, disability, or illness

McDonnell Douglas model does not apply to ADA discrimination claims based on failure to reasonably accommodate. Americans with

Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

[12] **Civil Rights** Discrimination by reason of handicap, disability, or illness

For the purposes of a claim for failure to accommodate under the ADA, whether accommodation requested by employee is reasonable or whether it imposes undue hardship are questions typically proved through direct, objective evidence. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(b)(5)(A).

[13] **Civil Rights** Impairments in general; major life activities

Courts apply a three-prong test to determine disability under the ADA, considering (1) whether plaintiff has a physical or mental impairment; (2) whether the life activities plaintiff relies upon are major or of central importance to daily life; and (3) whether the impairment substantially limits plaintiff's major life activities. Americans with Disabilities Act of 1990 § 3, 42 U.S.C.A. § 12102(1).

[14] **Civil Rights** Weight and Sufficiency of Evidence

Under the ADA, evidence of a medical diagnosis of impairment, standing alone, is insufficient to prove a disability. Americans with Disabilities Act of 1990 § 3, 42 U.S.C.A. § 12102(4)(D).

[15] **Civil Rights** Preliminary injunction

Named employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy likely did not have disabilities that substantially limited them from working, and thus employees did not demonstrate likelihood of success on their claim for failure to accommodate under ADA, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; employees only offered conclusory statements that their conditions of post-traumatic stress disorder (PTSD), pregnancy, angio-edema/leukemia, and mental anguish substantially impaired their ability to work, employees had been working for employer notwithstanding various medical conditions, and no employee had condition for which vaccine was contraindicated. Americans with Disabilities Act of 1990 § 3, 42 U.S.C.A. §§ 12102(1), 12102(4)(D).

[16] **Civil Rights** Employment qualifications, requirements, or tests

To be a "qualified individual" under the ADA, an employee must show (1) that she possesses the requisite skill, experience, education and other job-related requirements for the position, and (2) that she is able to perform the essential functions of the position with or without reasonable accommodation. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(8).

[17] **Civil Rights** Presumptions, Inferences, and Burdens of Proof

Plaintiffs bear the burden of showing that they are "qualified" under the ADA. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(8).

[18] **Civil Rights** Employment qualifications, requirements, or tests

When determining whether employee is "qualified individual" under ADA, a significant degree of deference is given to an employer's own business judgment about the necessities of the job. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(8).

[19] **Civil Rights** Employment qualifications, requirements, or tests

Where plaintiff's essential job functions necessarily implicate safety of others, plaintiff must demonstrate that she can perform those functions in way that does not endanger others in order to be qualified individual under ADA.

Americans with Disabilities Act of 1990 § 103, 42 U.S.C.A. § 12113(b).

[20] **Civil Rights** Preliminary injunction

It was likely that essential job functions of unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy necessarily implicated safety of others, and thus employees did not demonstrate that they were likely to succeed on claim that they were qualified individuals under ADA for purposes of failure-to-accommodate claim, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; though employees did not currently have disease, COVID-19 was highly contagious disease transmitted in proximity to infected people, and it was reasonable for employer to conclude that unvaccinated employees, who were most likely to become infected, posed direct threat to patients and others. Americans with Disabilities Act of 1990 § 103, 42 U.S.C.A. § 12113(b).

[21] **Civil Rights** Communicable diseases

In determining whether an individual with a contagious disease is otherwise qualified under the ADA, courts consider: findings of facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. Americans with Disabilities Act of 1990 § 103, 42 U.S.C.A. § 12113(b).

[22] **Civil Rights** Communicable diseases

When determining whether an individual with a contagious disease is otherwise qualified under the ADA, courts normally should defer to the reasonable medical judgments of public health officials. Americans with Disabilities Act of 1990 § 103, 42 U.S.C.A. § 12113(b).

[23] **Civil Rights** Handicap, Disability, or Illness

In the context of a discrimination claim under the ADA, the court should not second-guess the hospital's judgment in matters of patient safety. Americans with Disabilities Act of 1990 § 102, 42 U.S.C.A. § 12112(a).

[24] **Civil Rights** In general; elements of accommodation claims

In order to prevail on a claim for failure to accommodate under the ADA, plaintiffs must show that the employer was aware of their disabilities and did not reasonably accommodate them. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[25] **Civil Rights** In general; elements of accommodation claims

In order to prevail on a claim for failure to accommodate under the ADA, plaintiffs must demonstrate in the first instance what specific accommodations they needed and how those accommodations were connected to their ability to work.

[26] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Under the ADA, plaintiffs must provide sufficient information to put the employer on notice of the need for accommodation and explain how the accommodation is linked to plaintiff's disability. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[27] **Civil Rights** Accommodations in general

Under the ADA, a requested accommodation must be reasonable on its face. Americans with

Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[28] **Civil Rights** What are reasonable accommodations; factors considered

One element in the reasonableness equation under the ADA is the likelihood of success; plaintiffs must demonstrate that the proposed accommodations would enable them to the perform the essential functions of their job and would be feasible for the employer under the circumstances. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[29] **Civil Rights** What are reasonable accommodations; factors considered

Civil Rights Discrimination by reason of handicap, disability, or illness

In order to prove reasonable accommodation under the ADA, a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances; if plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[30] **Civil Rights** Preliminary injunction

There was insufficient nexus between requested accommodation of not getting vaccine and purported disabilities of unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy, and thus employees did not demonstrate that they were likely to succeed on claim that their requested accommodation was reasonable under ADA, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; purported disabilities of post-traumatic stress disorder (PTSD), pregnancy, angio-edema/leukemia, and mental anguish were not contraindications to vaccination. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[31] **Civil Rights** What are reasonable accommodations; factors considered

For purposes of determining whether an employee's requested accommodation is reasonable under the ADA, where a claimed disability is not a contraindication for a vaccine, the requested accommodation of being exempt from receiving a required vaccine does not sufficiently relate to the claimed disability. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[32] **Civil Rights** Preliminary injunction

To extent unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy requested masking, social distancing, or periodic testing as reasonable accommodations, there was insufficient nexus between requested accommodations and employees' purported disabilities, and thus employees did not demonstrate that they were likely to succeed on claim that their requested accommodations were reasonable under ADA, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; after consulting with experts, employer determined that requested accommodations were not adequate to meet urgent health and safety priorities and protect vulnerable patient population. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[33] **Civil Rights** Preliminary injunction

To extent unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy requested remote work as reasonable accommodation, there was insufficient nexus

between requested accommodations and employees' purported disabilities, and thus employees did not demonstrate that they were likely to succeed on claim that their requested accommodation was reasonable under ADA, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; employees had not provided evidence that their positions could be performed remotely, or that such accommodations would be reasonable under the circumstances. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

2 Cases that cite this headnote

[34] **Civil Rights** What are reasonable accommodations; factors considered

Civil Rights Discrimination by reason of handicap, disability, or illness

If plaintiffs have made necessary showing that they are disabled, that they are qualified individuals, and that employer failed to accommodate their disabilities under ADA, employer has burden of demonstrating undue hardship on operation of its business; undue hardship inquiry must take into account context of particular employer's business and nature of operations. Americans with Disabilities Act of 1990 §§ 101, 103, 42 U.S.C.A. §§ 12111(8), 12111(a), 12113(b).

[35] **Civil Rights** Preliminary injunction

Hospital employer established likelihood of success on its contention that granting accommodations requested by unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy would cause undue hardship, and thus employees did not demonstrate that they were likely to succeed on their claim under ADA, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; granting exemption from vaccination would have created greater risk of COVID-19 infection, and heightened risk would have undermined hospital's responsibility to maintain highest level of patient care and would have placed additional stresses on already overburdened healthcare system. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111.

1 Cases that cite this headnote

[36] **Civil Rights** What are reasonable accommodations; factors considered

Under the ADA, it is possible for an employer to prove that granting an accommodation would cause undue hardship without actually having undertaken any of the possible accommodations. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111.

[37] **Civil Rights** What are reasonable accommodations; factors considered

Under the ADA, in determining whether granting an accommodation would cause under hardship, it is appropriate to consider aggregate effects when multiple employees are granted the same accommodation. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[38] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Under the ADA, an employee's request for accommodation may create a duty on the part of the employer to engage in an interactive process, requiring bilateral cooperation and communication; both the employee and employer must act in good faith, but empty gestures on the part of the employer will not satisfy the good faith standard. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[39] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Under the ADA, both the employee and employer must act in good faith with regard to

requests for accommodation, but empty gestures on the part of the employer will not satisfy the good faith standard. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[40] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

Under the ADA, a refusal to give a requested accommodation does not by itself amount to bad faith, so long as the employer makes an earnest attempt to discuss other potential reasonable accommodations; importantly, liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

2 Cases that cite this headnote

[41] **Civil Rights** Requesting and choosing accommodations; interactive process; cooperation

When considering a claim for failure to accommodate under the ADA, courts do not reach the issue of failure to engage in an interactive process when plaintiff cannot demonstrate that the requested accommodation was reasonable under the circumstances. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

1 Cases that cite this headnote

[42] **Civil Rights** Preliminary injunction

Unvaccinated employees who were denied **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy were unlikely to succeed on their claims that hospital employer failed to engage in interactive process when it denied their requested accommodations, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; employer assembled two clinical panels to review claims, and employer communicated with employees, followed up for additional information as needed, and rendered individualized decisions on accommodations in accordance with guidelines provided by Centers for Disease Control (CDC). Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[43] **Civil Rights** Accommodations

Civil Rights Effect of prima facie case; shifting burden

Claims of religious discrimination under Title VII are analyzed under a two-part framework: first, a plaintiff must make a prima facie case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action; second, if the plaintiff establishes a prima facie case, the burden then shifts to the employer to show that it offered a reasonable accommodation, or if it did not, that doing so would have resulted in undue hardship. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

1 Cases that cite this headnote

[44] **Civil Rights** Accommodations

To establish a prima facie case of religious discrimination under Title VII based on failure to accommodate, a plaintiff must assert that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

1 Cases that cite this headnote

[45] **Civil Rights** Beliefs and activities protected; sincerity

For the purposes of a claim for religious discrimination under Title VII, to qualify as a bona fide religious practice, plaintiff must show both that the belief or practice is religious and that it is sincerely held. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

1 Cases that cite this headnote

[46] **Civil Rights** Beliefs and activities protected; sincerity

Beliefs need not be acceptable, logical, consistent, or comprehensible to others to qualify as religious for purposes of Title VII. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[47] **Civil Rights** Weight and Sufficiency of Evidence

For purposes of Title VII religious discrimination analysis, determining whether employee's belief is sincerely held is fact-intensive inquiry, turning on fact finder's assessment of employee's credibility. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a).

[48] **Civil Rights** Admissibility of evidence; statistical evidence

Evidence that employee acted inconsistently with his or her professed belief is relevant in assessing whether belief is sincerely held, for purposes of claim for religious discrimination under Title VII. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a).

[49] **Civil Rights** Weight and Sufficiency of Evidence

In determining whether employee's belief is sincerely held, for purposes of claim for religious discrimination under Title VII, fact finder can consider whether alleged conflict between employment requirement and religious belief is moving target, although such evidence might simply reflect evolution in employee's religious views. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a).

[50] **Civil Rights** Beliefs and activities protected; sincerity

When determining whether a religious belief is sincerely held for purposes of a claim for religious discrimination under Title VII, courts should be wary of the real danger, in evaluating both the nature of a belief and its sincerity, that they may tend to favor well-established or widely practiced religions and the expense of new or disfavored ones. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a).

[51] **Civil Rights** Beliefs and activities protected; sincerity

Civil Rights Weight and Sufficiency of Evidence

Title VII's capacious definition of religion leaves little room for a party to challenge the religious nature of an employee's professed beliefs, and that sincerity depends on a fact-intensive assessment of credibility. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[52] **Civil Rights** Religious Discrimination

Courts confronted with Title VII religious discrimination issues often assume that plaintiffs have established a prima facie case and resolve matters on other grounds. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(j).

[53] **Civil Rights** Particular cases

Hospital employer failed to provide reasonable accommodation to unvaccinated employees who were denied religious exemption to mandatory COVID-19 vaccination policy, for purposes of employees' claim against employer for religious discrimination under Title VII based on failure to accommodate; only specific request made by employees for accommodation was that they not receive vaccine, and employer did not offer any accommodation to employees such as increased COVID-19 testing or masking. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[54] **Civil Rights** Effect of prima facie case; shifting burden

Once plaintiffs establish a prima facie case of religious discrimination under Title VII based on failure to accommodate, the burden shifts to defendant to show that it offered a reasonable accommodation, or if not, that doing so would have resulted in undue hardship. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[55] **Civil Rights** Accommodations

Title VII cases involving religious discrimination based on failure to provide reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[56] **Civil Rights** Particular cases

Providing reasonable accommodation to unvaccinated employees who were denied religious exemption to hospital employer's mandatory COVID-19 vaccination policy would have caused undue hardship, for purposes of employees' claim against employer for religious discrimination under Title VII based on failure to accommodate; permitting employees to continue to work at hospitals without being vaccinated would have materially increased risk of spreading disease and undermined public trust and confidence in facilities, and though harms were difficult to measure in terms of dollar amounts, they were not de minimis. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

1 Cases that cite this headnote

[57] **Civil Rights** Accommodations

Under Title VII, an accommodation of a religious belief is an undue hardship if it would impose more than a de minimis cost on the employer. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[58] **Civil Rights** Accommodations

Although bilateral cooperation is appropriate in search for acceptable reconciliation of needs of employee's religion and exigencies of employer's business, liability under Title VII for failure to engage in interactive process depends on finding that parties could have discovered and implemented reasonable accommodation through good faith efforts. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[59] **Civil Rights** Particular cases

Hospital employer engaged in interactive process in good faith when it considered and denied unvaccinated employees' request for religious exemption to mandatory COVID-19 vaccination policy, for purposes of employees' claim against employer for religious discrimination under Title VII based on failure to accommodate; employer formed review committee to evaluate requests for religious exemptions, after initial consideration of accommodation requests, committee often sent employees follow-up questions that were tailored to particular religious objections of each employee, and employees were free to submit whatever supporting documentation they wanted. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a).

[60] **Civil Rights** Periods applicable

Civil Rights Deferral to state agencies; time

To bring an action for employment discrimination under Title VII, an employee must first file a charge with either (1) the Equal Employment Opportunity Commission within 180 days of the alleged unlawful employment practice or (2) a parallel state agency within 300 days of that practice. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[61] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Civil Rights Right to sue letter or notice; official inaction

Plaintiffs may seek relief in federal court for employment discrimination under Title VII only if the Equal Employment Opportunity Commission (EEOC) dismisses the administrative charge, does not bring civil suit, or does not enter into a conciliation agreement within 180 days of the filing of the administrative charge. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[62] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Plaintiffs who have failed to exhaust their administrative remedies are not entitled to judicial relief under Title VII. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[63] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

A plaintiff seeking to bring charges of employment discrimination under the ADA must exhaust administrative remedies under the same standard articulated for Title VII. Americans with Disabilities Act of 1990 § 107, 42 U.S.C.A. § 12117(a); Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

[64] **Civil Rights** Exhaustion of Administrative Remedies Before Resort to Courts

Civil Rights Right to sue letter or notice; official inaction

There are two basic components to administrative exhaustion under Title VII: (1) timely filing a charge with the Equal Employment Opportunity Commission (EEOC), and (2) receipt of a right to sue letter from the EEOC. Civil Rights Act of 1964 § 706, 42 U.S.C.A. § 2000e-5(e)(1).

1 Cases that cite this headnote

[65] **Civil Rights** Preliminary injunction

While it was unclear whether unvaccinated employees who were denied religious exemption to hospital employer's mandatory COVID-19 vaccination policy exhausted their administrative remedied prior to filing claim for religious discrimination under Title VII based on failure to accommodate, employees did not make showing of irreparable injury sufficient in kind and degree to justify disruption of the prescribed administrative process, and thus employees did not demonstrate likelihood of success on their claim, as required for grant of preliminary injunction enjoining enforcement of vaccination policy. Civil Rights Act of 1964 §§ 703, 706, 42 U.S.C.A. §§ 2000e-2(a), 2000e-5(e)(1).

1 Cases that cite this headnote

[66] **Civil Rights** Practices prohibited or required in general; elements

To establish a prima facie case of retaliation under Title VII or the ADA, plaintiffs must establish (1) that they engaged in protected conduct; (2) that they suffered an adverse employment action; and (3) that there was a causal connection between the protected conduct and adverse action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[67] **Civil Rights** Retaliation claims

If plaintiffs make a prima facie showing of retaliation under Title VII or the ADA, the burden shifts to defendant to articulate a legitimate, non-retaliatory reason for the challenged employment action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

1 Cases that cite this headnote

[68] **Civil Rights** Motive or intent; pretext

Civil Rights Retaliation claims

Plaintiffs bringing a retaliation claim under either the ADA or Title VII bear the ultimate burden of showing that defendant's explanation was, in fact, pretextual and that the challenged employment action was the result of defendant's retaliatory animus. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[69] **Civil Rights** Practices prohibited or required in general; elements

An employment retaliation claim under the ADA does not depend on the success of plaintiffs' disability claims. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[70] **Civil Rights** Activities protected

Health Vaccination and immunization

Unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy engaged in protected activity when they requested accommodation of not receiving vaccine, for purposes of determining whether employees established prima facie case of retaliation under the ADA or Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[71] **Civil Rights** Discharge or layoff

Civil Rights Discipline

Health Vaccination and immunization

Unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy suffered adverse employment actions by being placed on unpaid leave and subsequently terminated, for purposes of determining whether employees established prima facie case of retaliation under the ADA or Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[72] **Civil Rights** Causal connection; temporal proximity

Health Vaccination and immunization

Unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy could not show causal connection between protected activity of requesting accommodation of not receiving vaccine and adverse employment action of being placed on unpaid leave and subsequently terminated, and thus employees failed to establish prima facie case of retaliation under the ADA or Title VII; employer contended that employees were subject to such adverse action not because they requested exemption but because they were not approved and remained noncompliant with vaccination policy, employer averred that it would welcome employees back to work if they received COVID-19 vaccine, and employees did not put forth specific facts to demonstrate true motive of retaliation. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[73] **Civil Rights** Activities protected

Requesting a reasonable accommodation from an employer under the ADA is a protected activity. Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12111(a).

[74] **Civil Rights** Retaliation claims

To establish a causal connection between protected activity and adverse employment action at the preliminary injunction stage of a retaliation claim under the ADA, mere conjecture and unsupported allegations will not suffice; rather, plaintiffs must demonstrate the existence of specific facts that would enable a finding that explanatory reasons offered were mere pretext for a true motive of retaliation.

Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[75] **Civil Rights** Preliminary injunction

In event that unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy could establish prima facie case of retaliation under ADA or Title VII, employer articulated non-retaliatory reason for challenged employment action, and thus employees failed to show likelihood of success on merits of retaliation claim, as required for grant of preliminary injunction enjoining enforcement of vaccination policy; employer alleged that its policy was neutral one of general applicability and consequences for non-compliance were based on employees' vaccination status and not on their religion, disability, or whether or not they applied for exemption. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12112.

1 Cases that cite this headnote

[76] **Civil Rights** Preliminary injunction

Unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy did not show that they would suffer irreparable harm absent preliminary injunction enjoining enforcement of vaccination policy; money damages were appropriate remedy for discrimination and retaliation claims under ADA and Title VII, loss of employment did not constitute irreparable harm, and there were no First Amendment claims at issue as employer was private employer rather than state actor. U.S. Const. Amend. 1; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a); Americans with Disabilities Act of 1990 § 101, 42 U.S.C.A. § 12112.

[77] **Injunction** Likelihood of success on merits

When plaintiff fails to meet his burden to show likelihood of success on merits, failure to do so is itself preclusive of requested relief of preliminary injunction.

[78] **Injunction** Balancing or weighing factors; sliding scale

For purposes of determining whether to grant a preliminary injunction, irreparable harm is measured on a sliding scale, working in conjunction with a moving party's likelihood of success on the merits, such that the strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown.

[79] **Injunction** Irreparable injury

Injunction Adequacy of remedy at law

For purposes of determining whether to grant a preliminary injunction, irreparable harm most often exists where a party has no adequate remedy at law.

[80] **Injunction** Adverse employment actions

The loss of employment is not considered irreparable for the purposes of an injunction.

[81] **Civil Rights** Injunction in general

While employee may recover compensation for her emotional distress claim if she prevails on merits of a claim under the ADA, fact that employee may be psychologically troubled by adverse job action does not usually constitute irreparable injury warranting injunctive relief.

[82] **Injunction** Adverse employment actions

Balance of equities weighed in favor of denying preliminary injunction sought by unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy which would have enjoined enforcement of policy; though

employees would certainly have faced economic hardship if they lost their jobs, employer had strong interest in protecting its patients, visitors, and staff from exposure to COVID-19.

[83] Injunction Adverse employment actions

Enjoining hospital employer from enforcing COVID-19 vaccination mandate for its employees which was intended to curb the spread of COVID-19 was not in public interest, which weighed in favor of denying injunction sought by unvaccinated employees who were denied religious or **medical exemptions** from hospital employer's mandatory COVID-19 vaccination policy; COVID-19 virus had infected and taken lives of thousands of Massachusetts residents, and dismantling vaccination policy would have undermined employer's efforts to combat pandemic.

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MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CORRECTED

SAYLOR, C.J.

***1** This is a case challenging a mandatory COVID-19 vaccination policy. Defendant Mass General Brigham, Inc. ("MGB") is a Massachusetts corporation and major hospital and healthcare network that operates, among other facilities, Massachusetts General Hospital and Brigham and Women's Hospital in Boston. Plaintiff Together Employees is an unincorporated association of 229 employees of MGB who were denied a religious or **medical exemption** from a COVID-19 vaccination policy. The remaining plaintiffs are eight individual employees whose exemption requests were denied.

On June 24, 2021, MGB announced a mandatory COVID-19 vaccination policy for all its employees. It later set a deadline for that policy, providing that non-complying employees would be placed on unpaid leave on October 20, 2021, and thereafter terminated on November 5, 2021.

On October 17, 2021, plaintiffs brought this lawsuit, alleging claims of discrimination and retaliation under Title VII and the ADA and seeking to enjoin MGB from enforcing its vaccination policy. The Court held hearings on plaintiffs' motion for preliminary injunction on October 20 and November 4, 2021, and orally denied the motion from the bench. The following memorandum sets forth the reasoning of the Court in greater detail.

I. Background

Except where noted, the Court relies on the parties' briefs, affidavits, documentary evidence, and oral argument to decide the present motion.

A. Factual Background

Plaintiff Together Employees is an unincorporated association of 229 employees who were denied a religious or **medical exemption** from the MGB COVID-19 vaccination policy. The remaining plaintiffs are individual employees of MGB who were denied religious or medical accommodations. (Pl. Exs. J-M; O-R).[1]

Defendant Mass General Brigham, Inc. is a Massachusetts corporation with a principal place of business in Massachusetts. MGB owns and operates hospitals and other facilities throughout the Commonwealth of Massachusetts. (Klompas Dec. ¶¶ 5-7). Among other things, it owns and operates Massachusetts General Hospital; Brigham and Women's Hospital; Faulkner Hospital; McLean Hospital; Massachusetts Eye and Ear Hospital; Newton-Wellesley Hospital; Cooley Dickinson Hospital; and Spaulding Rehabilitation Hospital. Each year, MGB provides medical care for 1.5 million patients. (*Id.* ¶ 6).

1. COVID-19 Pandemic

COVID-19 is a contagious viral disease that can cause serious illness and death. (*Id.* ¶ 19). As of this writing, approximately 750,000 Americans have died from the disease. Ctr. for Disease Control & Prevention, COVID-19 Mortality Overview: Provisional Death Counts for Coronavirus Disease 2019 (2021) (last updated Nov. 3, 2021). In the summer of 2021, after several months of declining infection rate, the highly contagious Delta variant of the virus caused a significant further outbreak.

***2** In 2020 and early 2021, three COVID-19 vaccines were approved by the Food and Drug Administration as safe and effective. The three vaccines were developed and produced by Pfizer, Moderna, and Johnson & Johnson. U.S. Food & Drug Admin., COVID-19 Vaccines (2021) (last updated Oct. 29, 2021). The Pfizer and Moderna vaccines employ messenger RNA (mRNA) technology; the Johnson & Johnson does not. (*See id.*). Both the federal and Massachusetts state governments prioritized the early vaccination of all hospital workers, recognizing the importance of protecting the healthcare workforce during the pandemic. (Klompas Dec. ¶ 25).

2. MGB's COVID-19 Vaccination Policy

In June 2021, MGB announced it would require its employees to obtain a COVID-19 vaccination. (Pl. Ex. A). In light of the outbreak of COVID-19 caused by the Delta variant, MGB determined that such a vaccination policy was critical to keeping safe its medically vulnerable patient population, employees, and visitors. (Klompas Dec. ¶¶ 20-21, 27). MGB required that employees receive the COVID-19 vaccine by October 15, 2021. (*Id.* ¶ 13). Employees were told that noncompliance with the policy would result in unpaid leave, and ultimately, termination. The announcement also explained that certain exemptions would be available for medical or religious reasons. (*Id.*).

Employees seeking a religious exemption were required to fill out an online form. (*Id.*). The form asked several questions and contained a text box stating:

> In the space provided, please (1) identify your sincerely held religious belief, practice or observance and (2) explain why it prevents you from receiving a COVID-19 vaccine. Please note that you may be required to provide additional information or supporting documentation to support your request for an exemption.

(Pl. Ex. C). The online form did not provide an option to attach supporting documentation. However, the text box response field did not have a character limit, and the instructions noted that "the text box would expand as needed." (Nichols Dec. ¶ 9). The online form advised employees that they "may be required to provide additional information or supporting documentation to support [their] request for an exemption." (*Id.* ¶ 8).

Employees seeking a **medical exemption** were provided a form to be completed by a physician. (Hashimoto Dec. ¶ 6). The exemption form contained several check boxes to be filled by the employee's physician to indicate whether the employee had one of several conditions indicated by the Centers for Disease Control (CDC) that might merit a deferral of vaccination. (*Id.* ¶ 7). One of the check boxes asked the physician to identify "other medical reasons," and instructed the physician to explain his or her reasoning elsewhere on the form. (*Id.* ¶ 11).

MGB created two separate committees to review requests for exemption. The first committee, the Religious Exemption Review Committee, was "led by a senior attorney in MGB's Office of the General Counsel and comprised of trained Human Resources professionals." (Nichols Dep. ¶¶ 11, 19). The members of the committee were "trained in responding to accommodation requests and given additional training in responding to religious exemption requests." (*Id.* ¶¶ 10, 19). Employees who raised "substantive religious objection[s]" to the vaccination policy received follow-up questions from the committee, often individualized to the particular objection of the employee. (*Id.* ¶¶ 25-28). Employees who received follow-up questions were directed to send their responses to a dedicated MGB e-mail box and were free to submit whatever supporting documentation they wanted. (*Id.* ¶ 29). In some cases, the committee sent additional follow-up questions to employees after determining more information was needed. (*Id.* ¶ 31).

***3** The second committee, the **Medical Exemption** Review Committee, was directed by Dr. Dean Hashimoto, the Chief Medical Officer for Workplace Health and Wellness. (Hashimoto Dec. ¶ 3). MGB assembled two panels to review these requests: one focused on occupational health, and the other focused on infection control. (*Id.* ¶¶ 13-15). The Occupational Health Clinical Panel was comprised

of three nurse practitioners serving as occupational health clinical directors. (*Id.* ¶ 14). The Infection Control Panel was comprised of five physicians with expertise in infection control and disease. (*Id.* ¶ 15). The two panels worked together with Dr. Hashimoto to develop an interactive process. (*Id.* ¶¶ 24-26). The Occupational Health Clinical Panel would review exemption requests with Human Resources when accommodation issues arose, and would consult as needed with medical experts at MGB. (*Id.* ¶¶ 25, 28). When the panels had additional questions for employees or their physicians, they would solicit additional information by e-mail. (*Id.* ¶¶ 30-31).

3. Plaintiffs' Requested Accommodations

The eight named individual plaintiffs requested exemptions and accommodations from MGB's COVID-19 vaccination policy. Either the Religious Exemption Review Committee, the **Medical Exemption** Review Committee, or both denied all plaintiffs' requests. (Pl. Exs. O-R). Summarized below are each plaintiff's objections to the COVID-19 vaccine and the committees' relevant responses.[2]

Elizabeth Bigger is a physician specializing in oncology. She requested a religious exemption, contending that she is a Christian who opposes abortion and that she objects to the use of fetal cell lines in the development of the vaccines. (Def. Ex. 29). The Religious Exemption Review Committee denied her request. It stated, among other things, that (1) the Pfizer and Moderna vaccines "did not use a fetal cell line to produce and manufacture the vaccine"; (2) numerous religious organizations publicly support COVID-19 vaccination; and (3) she had a history of receiving other vaccines in the past without objection. (Def. Exs. 30-32).

Natasha DiCicco is a technical supervisor in radiology. She requested a religious exemption, contending that according to her religious beliefs she should "treat [her] body as a temple and refrain from putting anything into [her] body that [she has] moral objections or health concerns with." (Def. Ex. 33). The committee denied her request, noting that she did not request an exemption from taking the influenza vaccine. (Def. Exs. 34-36).

Nicholas Arno is an electrician. He requested a religious exemption on the basis of his Christian religious belief that he should not use vaccines that "interfere with our bodies [sic] own immune systems that God created." (Def. Ex. 25). The committee requested additional information, noting that (1) his religion "has publicly supported vaccination"; (2) he had received other vaccinations without objection in the past; and (3) he failed to explain how his religious beliefs prevented him from getting vaccinated. (Def. Ex. 26). The committee denied his request after reviewing additional information. (Pl. Ex. 3).

Ruben Almeida is a technologist in radiology. He requested a religious exemption on the basis of his Christian religious belief that he must keep his "body as pure of any foreign substances as humanly possible." (Def. Ex. 21). The committee denied his request after raising concerns that he did not avoid the use of "over the counter or prescription man-made medications or other products." (Def. Exs. 22-24).

***4** Roberta Lancione is a registered nurse. She requested a religious exemption on the basis of (1) her religious objection to use of aborted fetal cell lines in the development of the Johnson & Johnson vaccine and (2) the fact that the function of the Pfizer and Moderna **vaccines** was adverse to her religious belief that "God's creation ... was made complete." (Def. Ex. 41). The Religious Exemption Review Committee denied her religious exemption after noting that (1) the Pfizer and Moderna **vaccines** did not use a fetal cell line to produce and manufacture the vaccine and (2) she had in the past submitted to vaccine requirements without objection on the basis of religion. (Def. Exs. 42-44).[3] She also requested a medical **accommodation** on the basis of a history of chronic lymphocytic leukemia and angio-edema in response to other **vaccines**. (Def. Ex. 11). In denying her **medical exemption**, the Occupational Health Clinical Panel recommended that she consult an allergist to evaluate whether she should consider using a non-mRNA vaccine. (Def. Ex. 12)

Joyce Miller is a manager of information desks. She requested a religious exemption on the basis of her belief that "all products offered to [her] by [her] employer or workplace be ... entirely ... removable from [her] body." (Def. Ex. 45). After expressing concerns regarding her prior vaccinations against influenza, the Religious Exemption Review Committee denied her exemption request. (Def. Exs. 46-48). Her requested **medical exemption** for "severe mental anguish/ anxiety" was denied by the Occupational Health Clinical Panel because she did not "demonstrate a sufficient medical reason or contraindication to support an exemption." (Def. Exs. 13-14).

Maria DiFronzo is a medical imaging clinical instructor and radiologic technologist. She requested a **medical exemption** on the basis of her pregnancy. (Def. Ex. 9). The Occupational Health Clinical Panel denied her request on the basis of updated guidance from the CDC recommending that pregnant individuals obtain a COVID-19 vaccination. (Def. Ex. 10).

Michael Saccoccio is a registered nurse. He requested a **medical exemption** on the basis of his anxiety and post-traumatic stress disorder. (Def. Ex. 15). After a preliminary denial and request from the Occupational Health Clinical Panel for more specific information, his physician informed the panel that his PTSD was due to severe childhood trauma. (Def. Exs. 16-18). The panel then upheld its earlier denial on the ground that Saccoccio had not demonstrated "a sufficient medical reason or contraindication to support an exemption." (Def. Exs. 16, 19).

B. Procedural Background

On October 17, 2021, plaintiffs brought this lawsuit against MGB. The complaint asserts three claims: (1) failure to make reasonable accommodations in violation of the Americans with Disabilities Act; (2) religious discrimination in violation of Title VII; and (3) retaliation. Also on October 17, 2021, plaintiffs moved for preliminary injunction to enjoin MGB from enforcing the COVID-19 vaccination policy. The motion alleged that plaintiffs face imminent adverse action by being placed on unpaid leave on October 20, 2021, and subsequently terminated on November 5, 2021. The Court held an initial hearing on October 20, 2021, and orally denied the motion for the reasons stated on the record. The parties were directed to submit additional memoranda and affidavits. The Court then held a second hearing on the motion on November 4, 2021, which it again denied from the bench.

II. Legal Standard

[1] **[2]** **[3]** **[4]** A preliminary injunction is an "extraordinary and drastic remedy" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008) (quoting *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 88 L.Ed. 834 (1944)). A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). A plaintiff's likelihood of success on the merits "weighs most heavily" in the court's determination; without it, the remaining factors "become matters of idle curiosity." *Ryan v. U.S. Immigr. & Customs Enf't*, 974 F.3d 9, 18 (1st Cir. 2020) (citing *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)). "[A]n inquiring court need not conclusively determine the merits of the movant's claim; it is enough for the court simply to evaluate the likelihood ... that the movant ultimately will prevail on the merits." *Id.*

III. Analysis

A. Standing of Plaintiff Together Employees

***5** **[5]** **[6]** **[7]** Standing to sue is a threshold issue in every federal case. "If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case." *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992). Plaintiffs have the burden of "adducing facts necessary to support standing." *Id.* at 114.

[8] An unincorporated association has standing to sue on behalf of its members if three requirements are met: "(1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals." *Id.* at 115.

[9] Here, the complaint alleges that Together Employees is an unincorporated association of 229 unvaccinated MGB employees. It is highly doubtful that Together Employees has standing to sue on behalf of its members, because the claims asserted and relief demanded clearly require the personal participation of each affected employee. At a minimum, each member will have his or her own unique medical or religious issues, which almost certainly will implicate highly personal matters (that, in turn, may raise substantial privacy concerns). It is unclear how Together Employees can properly represent their interests under the circumstances. Furthermore, the use of an unincorporated association as a plaintiff in this context would effectively operate as an end-run around the strict requirements of Fed. R. Civ. P. 23. The Court therefore concludes that Together Employees is not likely to succeed on the merits of its claims.

B. Likelihood of Success on the Merits

1. Claims of Disability Discrimination under the ADA

The Americans with Disability Act prohibits employers from discriminating against "a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Discrimination under the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified ... employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business." 42 U.S.C. § 12112(b)(5)(A).

[10] **[11]** **[12]** To establish a claim for failure to reasonably accommodate, "a plaintiff must produce sufficient evidence for a reasonable jury to find that (1) he was disabled within the meaning of the ADA, (2) he was a qualified individual, and (3) the [employer], despite knowing of the plaintiff's disability, did not reasonably accommodate it." *Flaherty v. Entergy Nuclear Operations, Inc.*, 946 F.3d 41, 55 (1st Cir. 2019).[4]

a. Disability

***6** **[13]** A disability is a physical or mental impairment that substantially limits one or more of an individual's major life activities. 42 U.S.C. § 12102(1). Courts apply a three-prong test to determine disability, considering (1) whether plaintiff has a physical or mental impairment; (2) whether the life activities plaintiff relies upon are "major" or "of central importance to daily life"; and (3) whether the impairment substantially limits plaintiff's major life activities. *Carroll v. Xerox Corp.*, 294 F.3d 231, 238 (1st Cir. 2002) (internal citations omitted).

[14] An impairment that is sporadic or in remission can qualify as a disability "if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D). However, "[e]vidence of a medical diagnosis of impairment, standing alone, is insufficient to prove a disability." *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 187 (1st Cir. 2011). There must also be evidence that the impairment substantially limits one or more of an individual's major life activities.

Major life activities include basic tasks such as working, seeing, hearing, speaking, and breathing. 42 U.S.C. § 12102(2)(A). They also include "the operation of a major bodily function," including immune system functions, digestion, and normal cell growth. 42 U.S.C. § 12102(2)(B).

[15] Here, four named plaintiffs allege disabilities that preclude them from receiving the COVID-19 vaccine. The alleged physical or mental impairments are PTSD (Saccoccio), pregnancy (DiFronzo), angio-edema/leukemia (Lancione), and severe mental anguish (Miller). Without much elaboration, plaintiffs contend that the major life activity affected is "working" and that "the taking of vaccines would significantly limit their major life activities." (Plaintiffs' Mem. at 15-17).

There is considerable doubt as to whether any of the named plaintiffs have a "disability" that substantially limits them from "working." Plaintiffs have only offered conclusory statements that their conditions substantially impair their ability to work. *See Lebron-Torres v. Whitehall Lab'ys*, 251 F.3d 236, 241 (1st Cir. 2001) (concluding that "failure to proffer any evidence specifying the kinds of jobs that [plaintiff's] ... condition prevented her from performing dooms her ADA claim"); *Carroll*, 294 F.3d at 239 (finding insufficient evidence of disability where plaintiff did not "show that he or she is significantly restricted in his or her ability to perform a class of jobs or a broad range of jobs in various classes") (internal quotation marks omitted).

Furthermore, and in any event, all four plaintiffs are, and have been, working for MGB, notwithstanding their various medical conditions.[5] None of them are medically precluded from taking the vaccine; none have a condition for which the vaccine is contraindicated. And in the case of plaintiff DiFronzo, pregnancy alone is not a "disability" within the meaning of the ADA (although complications resulting from pregnancy may be). *See Navarro v. Pfizer Corp.*, 261 F.3d 90, 97 (1st Cir. 2001); U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2015-1, Enf't Guidance on Pregnancy Discrimination & Related Issues (2015) (stating that "[a]though pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA").

***7** In *Hustvet v. Allina Health Sys.*, 910 F.3d 399, 411 (8th Cir. 2018), the Eighth Circuit considered whether the

plaintiff who requested exemption from the measles, mumps, and rubella vaccine had a disability within the meaning of the ADA. One of the claimed impairments was an "immune system disability" stemming from chemical sensitives and allergies. *Id.* The court noted that there was insufficient evidence in the record to conclude that the plaintiff's allergies substantially impaired her ability to perform major life activities—she never sought any medical attention when she experienced a chemical sensitivity, she had never been hospitalized due to an allergic reaction, and she never "had to leave work early because of a reaction." *Id.* Those facts were "not enough for a reasonable fact-finder to conclude she is disabled." *Id.*; *see Eubanks v. Mercy Med. Ctr., Inc.*, 2015 WL 9255326, at *6 (D. Md. Dec. 17, 2015) (dismissing ADA claim because plaintiff seeking flu shot exemption did not supply facts showing that her allergies substantially limited major life activity).[6]

In short, plaintiffs have not demonstrated a likelihood of success on their claims that they are "disabled" within the meaning of the ADA.

b. Qualified Individual

[16] **[17]** **[18]** To succeed on a claim under the ADA, plaintiffs must further prove that they are "qualified" individuals. A qualified individual is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To be a qualified individual, an employee must show "(1) 'that she possesses the requisite skill, experience, education and other job-related requirements for the position'; and (2) 'that she is able to perform the essential functions of the position with or without reasonable accommodation.' " *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 126 (1st Cir. 2017) (quoting *Mulloy v. Acushnet Co.*, 460 F.3d 141, 147 (1st Cir. 2006)). Plaintiffs bear the burden of showing that they are "qualified." *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997). A "significant degree of deference" is given to an employer's own business judgment about the necessities of the job. *Jones v. Walgreen Co.*, 679 F.3d 9, 14 (1st Cir. 2012).

[19] Plaintiffs are not, however, qualified individuals if they pose a "direct threat" to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(b). "Where [plaintiff's] essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others." *Amego*, 110 F.3d at 144; *see also Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287 n.16, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (stating, in case concerning Rehabilitation Act, that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk").[7]

***8** The EEOC's recent guidance on COVID-19 vaccination mandates for employers is instructive:

> To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job .... The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. *Statements from the CDC provide an important source of current medical knowledge about COVID-19*, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.
>
> If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, *absent undue hardship*, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

See U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: § K (2021) (emphasis added).

[20] Here, plaintiffs are employees of a major hospital and healthcare network. On this record, it appears very likely that their "essential job functions necessarily implicate the safety of others." *Amego*, 110 F.3d at 144. Among the four plaintiffs requesting medical accommodations, two are registered nurses, one serves as a manager of information desks, and the remaining is a medical imaging clinical instructor and radiologic technologist. The registered nurses almost certainly interact with patients as part of their job functions. It is unclear from the record how much the instructor/technologist and manager interface with patients, visitors, and staff, but it appears unlikely that they hold back-office positions requiring no physical presence at any hospital. Furthermore, and in any event, defendant notes that "all MGB employees are expected to be deployable to the hospital[s] as needed." (Klompas Dec. ¶ 28).

***9** **[21]** **[22]** Plaintiffs nevertheless contend that they would pose no direct threat in the workplace. They cite to a portion of *Arline* stating that "[t]he fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the [ADA] all persons with actual or perceived contagious diseases." 480 U.S. at 285, 107 S.Ct. 1123 (emphasis omitted). However, in determining whether an individual with a contagious disease is otherwise qualified, the *Arline* court endorsed use of the following factors:

> [Findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

Id. at 288, 107 S.Ct. 1123. The court also advised that "courts normally should defer to the reasonable medical judgments of public health officials." *Id.*

Although plaintiffs brush aside the direct-threat analysis by arguing that plaintiffs do not currently have a contagious disease, that is surely not the end of the inquiry. How COVID-19 is transmitted, how long infected persons are contagious, and the potential risks to other employees, visitors, and staff, are all relevant factors. It is undisputed that COVID-19, and particularly the Delta variant, is a highly contagious disease, transmitted in large part through proximity to infected people. Nor is it disputed that COVID-19 is often serious and sometimes fatal, or that the disease can be transmitted by infected persons who are entirely asymptomatic.

[23] Under the circumstances, it was reasonable for MGB to conclude that unvaccinated employees—who are more likely to become infected—pose a direct threat to patients and others. "[T]his court should not second-guess the hospital's judgment in matters of patient safety." *Griel v. Franklin Med. Cen.*, 71 F. Supp. 2d 1, 9 (D. Mass. 1999), *aff'd sub nom., Griel v. Franklin Med. Ctr.,* 234 F.3d 731 (1st Cir. 2000); *cf. Giles v. Sprouts Farmers Mkt., Inc.*, 2021 WL 2072379, at *6 (S.D. Cal. May 24, 2021) (holding that defendant's masking policy did not amount to discrimination under Title III of ADA because defendant considered "direct threat posed by Plaintiff by her unwillingness to wear a face mask or face shield"); *Hernandez v. W. Texas Treasures Est. Sales, LLC*, 2021 WL 4097148, at *5 (W.D. Tex. Aug. 19, 2021) (same).

In summary, the Court finds that plaintiffs have not shown a likelihood of success on their claims that they are "qualified" individuals within the meaning of the ADA.

c. Reasonable Accommodation

[24] **[25]** **[26]** **[27]** Even assuming plaintiffs could prove they are qualified individuals, they must further show that the employer was aware of their disabilities and did not reasonably accommodate them. *Flaherty*, 946 F.3d at 55.[8] Plaintiffs must "demonstrate in the first instance what specific accommodations [they] needed and how those accommodations were connected to [their] ability to work." *Ortiz-Martínez v. Fresenius Health Partners, PR, LLC*, 853 F.3d 599, 605 (1st Cir. 2017) (citing *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 89 (1st Cir. 2012)). That is, plaintiffs must "provide sufficient information to put the employer on notice of the need for accommodation" and "explain how the accommodation is linked to plaintiff's disability." *Jones*, 696 F.3d at 89. The requested accommodation must be "reasonable on its face." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002); *see Reed*, 244 F.3d at 259.

***10** **[28]** **[29]** Another "element in the reasonableness equation is the likelihood of success." *Evans v. Fed. Express Corp.*, 133 F.3d 137, 140 (1st Cir. 1998). Plaintiffs must

demonstrate that the proposed accommodations "would enable [them] to the perform the essential functions of [their] job[s]" and would be "feasible for the employer under the circumstances." *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 136 (1st Cir. 2009) (quoting *Reed*, 244 F.3d at 259).[9]

[30] **[31]** Here, the **accommodation** requested by all four named plaintiffs is simply that they not receive the vaccine. Defendant's **Medical Exemption** Review Committee deployed two panels to review plaintiffs' purported disabilities, consulted with "various world-renowned specialists at MGB, including in Obstetrics, Allergy, and Neurology," and adhered to the CDC's guidance regarding the very few recognized medical contraindications to COVID-19 vaccination. (Hashimoto Dec. ¶¶ 28-29). Contraindications to the COVID-19 vaccine include a history of severe allergic reaction to **vaccines** or certain vaccine ingredients like polyethylene glycol. (Def. Ex. 8). Other considerations include "myocarditis or pericarditis, autoimmune diseases, Guillain-Barré Syndrome, and Bell's palsy." (*Id.*). Given those guidelines, defendant concluded that the four named plaintiffs' purported disabilities were not contraindications to vaccination. And where the claimed disability is not a contraindication for the vaccine, the requested **accommodation** does not sufficiently relate to the claimed disability. *Hustvet*, 910 F.3d at 411.

[32] According to the present record, the four named plaintiffs did not request any other specific workplace accommodation, such as remote work, masking, social distancing, screening, and testing. Some plaintiffs did not mention such accommodations at all in their affidavits; others made only general allegations concerning religion, such as, "I was more than willing to discuss what accommodation would allow me to practice my religion while at the same time ensure the safety of myself and others while at work." (Pl. Exs. 1-3).[10] It is plaintiffs' burden to demonstrate what specific accommodations they needed and how those accommodations were connected to their ability to work. *See Ortiz-Martínez,* 853 F.3d at 605.

***11** **[33]** In any event, to the extent plaintiffs are requesting masking, socially distancing, or periodic testing as reasonable accommodations, MGB is justified in concluding that doing so would present an undue hardship. After consulting with experts, MGB determined that "allowing any employee to decide instead just to mask, engage in periodic testing, and socially distance was not adequate to meet [its] urgent health and safety priorities and protect its vulnerable patient population." (Klompas Dec. ¶ 29). To the extent plaintiffs are requesting remote work as reasonable accommodations, they have not provided evidence that their positions could be performed remotely, or that such accommodations would be reasonable under the circumstances. *See Reed*, 244 F.3d at 259.

In summary, because there is an insufficient nexus between the accommodation requests and plaintiffs' purported disabilities, it is unlikely that plaintiffs can prove that the requested accommodations were reasonable at this stage.

d. Undue Hardship

[34] If plaintiffs have made the necessary showing that they are disabled, that they are qualified individuals, and that the employer failed to accommodate their disabilities, defendant has the burden of demonstrating an undue hardship on the operation of its business. *Reed*, 244 F.3d at 258-60. The undue hardship inquiry must take into account the context of the particular employer's business and the nature of operations. *See Barnett*, 535 U.S. at 402, 122 S.Ct. 1516.[11]

Considerations include not only direct economic costs, but indirect ones related to health and safety. *See* U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: § L (2021) (stating that costs include "the burden on the conduct of the employer's business – including, in this instance, the risk of the spread of COVID-19 to other employees or to the public").

The First Circuit recently confronted the issue of undue hardship in *Does 1-6 v. Mills*, 16 F.4th 20, 35-36 (1st Cir. Oct. 19, 2021). In *Mills*, unvaccinated healthcare workers sought a preliminary injunction based on, among other things, a Title VII claim against their hospital employers. *Id.* Evaluating the likelihood of success on the merits, the First Circuit concluded that "hospitals need not provide [a COVID-19 vaccination] exemption ... because doing so would cause them to suffer undue hardship." *Id.*; *see also Robinson,* 2016 WL 1337255, at *10 (finding that, in Title VII case, "accommodating [plaintiff's] desire to be vaccine-free in her role [as intake employee at Boston Children's Hospital emergency department] would have been an undue hardship because it would have imposed more than a *de minimis* cost"). Reputational effects on an employer can also impose an undue hardship. *See Cloutier,* 390 F.3d at 136 (finding

undue hardship in Title VII case where accommodation would "adversely affect the employer's public image").

[35] On the record before the Court, it appears that MGB has established a reasonable likelihood of success on its contention that providing plaintiffs an exemption from the vaccination policy would impose an undue hardship. MGB is essentially in the business of providing medical care to patients, many of whom are medically vulnerable to COVID-19 infection. It contends that permitting the requested accommodations would create a greater risk of COVID-19 infection in its facilities. (Klompas Dec. ¶ 29). That heightened risk, in turn, would undermine its "responsibility to maintain the highest level of patient care" and "protect patients, staff and visitors." (Klompas Dec. ¶ 19). It would also place "additional stresses on [defendant's] already overburdened system created by the highly contagious Delta variant." (*Id.*).

***12** After consulting with experts, MGB determined that the alternatives to vaccines, such as masking, periodic testing, and social distancing, would impose an undue hardship. Specifically, it concluded that (1) social distancing from other staff, patients, and visitors is not always practicable; (2) testing is inadequate because, among other reasons, it misses infections on days not tested and conveys a false sense of security to healthcare workers; and (3) vaccinated individuals who become infected with COVID-19 are "at least 50% less likely to transmit infection compared to unvaccinated people." (Klompas Dec. ¶ 29).[12] The policy also was designed to minimize staff absences, so that defendant's workforce could continue to combat the COVID-19 pandemic. (Klompas Dec. ¶ 35).[13] And MGB has a strong interest in maintaining public trust and confidence in its ability to provide a reasonably safe environment for its patients, and to assure the public that they may seek health care in its facilities without an unnecessary risk of infection.

[36] In response, plaintiffs first contend that any undue hardship is hypothetical because defendant never actually contemplated or attempted an accommodation. While it is true that courts are "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that has never been put into practice," defendant's undue hardship here is far from hypothetical. *Cloutier*, 390 F.3d at 135 (quoting *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975)). Indeed, the First Circuit has noted that it "is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations." *Id.* (quoting *Draper*, 527 F.2d at 520). That is particularly true here, where MGB owns and operates a hospital network, and is surely capable of balancing the risks of different strategies to combat the spread of disease. Certainly, it is not required to attempt any actions that it has concluded may materially compromise patient safety.

Plaintiffs further contend that defendant would not be unduly burdened because it allows unvaccinated patients into its hospitals, and the addition of a few unvaccinated employees would not materially alter the overall risk. However, unvaccinated patients implicate substantially different concerns than unvaccinated employees. MGB physicians have an ethical duty to treat all patients requiring medical care, including the unvaccinated. *See* AMA, Code of Medical Ethics Op. 1.1.2 (stating that physicians "have an ethical obligation to provide care in cases of medical emergency" and may not decline patients solely based on "infectious disease status"). MGB cannot simply turn away unvaccinated patients. But even if it must accept those patients, it is entitled to manage the risk of infectious disease as best it can. And, in any event, the issue is whether granting *employees* an accommodation from the COVID-19 vaccine would impose an undue hardship; the vaccination status of defendant's patients or visitors is not material.

***13** Plaintiffs also point to MGB's alleged profits during the COVID-19 pandemic, arguing that it could not be financially burdened because MGB is "swimming in money" and "brought in $4.1 billion in revenues last quarter." (Plaintiffs' Mem. at 12). For present purposes, and without further comment, it is enough to note that issue of undue hardship cannot be resolved simply by reference to an employer's financial capabilities.

Plaintiffs next argue that a reasonable accommodation would not unduly burden MGB because it is facing staffing shortages that would only be exacerbated by "[r]idding [itself] of over two hundred employees and having to pay crisis rates and overtime to the employees that have remained." (Plaintiffs' Mem. at 13-14). It is for MGB to decide how to operate its business, balance competing interests, and respond to staffing issues; again, the immediate question is simply whether any undue hardship would be imposed by granting the requested accommodation.

Plaintiffs further argue that there is no undue hardship because defendant accommodated the requests of other employees

for religious or **medical exemptions** from the COVID-19 vaccine. The record contains very little information about the basis for accommodations that were granted by defendant. MGB counsel stated during oral argument that it received 2,402 requests for accommodation, including 1,976 religious exemption requests and 426 **medical exemption** requests (with some overlap). Of those requests for accommodation, MGB apparently granted 234 total. It is unclear on this record why those requests were granted, and what accommodations were provided. At a minimum, the position of the employee is surely relevant; it is likely that an employee working (for example) in billing or accounting is better able to work remotely than a physician treating cancer patients, or a registered nurse administering medications to patients. Regardless, defendant does not have to show that it eliminated all risk from all possible sources of COVID-19 infection. That is simply not possible, given the realities of operating a major hospital organization during a worldwide pandemic.

[37] Finally, plaintiffs argue that they are not currently spreading COVID-19. But it cannot be true, as plaintiffs contend, that MGB faces no undue hardship simply because "none of [plaintiffs] are COVID positive" at this precise moment. (Plaintiffs' Mem. at 14). The First Circuit in *Mills* certainly did not conclude as such, nor have other courts confronted with COVID-19 vaccination questions. *Does 1-6*, 16 F.4th at 35-36; *Barrington*, —— F.Supp.3d at ——, 2021 WL 4840855, at *4 (discussing "greater *risk* of contracting COVID-19 if [other employees of United Airlines] are required to come in contact with unvaccinated coworkers") (emphasis added). Moreover, in determining undue hardship, it is appropriate to consider aggregate effects when multiple employees are granted the same accommodation. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n.15, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: § L (2021) (stating that "[a] relevant consideration is the number of employees who are seeking a similar accommodation ... [that is,] the cumulative cost or burden on the employer"). Therefore, defendant's undue hardship is not just accommodating one unvaccinated employee with a higher risk of spreading COVID-19, but potentially hundreds.

***14** In summary, defendant has established a likelihood of success on its contention that granting the requested accommodations would cause an undue hardship.

e. Interactive Process

[38] **[39]** **[40]** **[41]** Finally, an employee's request for accommodation *may* create a duty on the part of the employer to engage in an interactive process, requiring "bilateral cooperation and communication." *EEOC v. Kohl's Dep't Stores, Inc.*, 774 F.3d 127, 132 (1st Cir. 2014).[14] Both the employee and employer must act in good faith, but "empty gestures on the part of the employer will not satisfy the good faith standard." *Id.* A refusal to give a requested accommodation does not by itself amount to bad faith, "so long as the employer makes an earnest attempt to discuss other potential reasonable accommodations." *Id.* at 133. Importantly, "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts." *Trahan v. Wayfair Me., LLC*, 957 F.3d 54, 67 (1st Cir. 2020)

[42] Here, defendant contends that it engaged in an interactive process. Dr. Dean Hashimoto, MGB's Chief Medical Officer of Workplace Health and Wellness, was tasked with developing and leading MGB's process for considering **medical exemptions** from the COVID-19 vaccine. (Hashimoto Dec. ¶ 3). Two clinical panels were assembled to review these requests. (*Id.* ¶ 13). The Occupational Health Clinical Panel included the expertise of occupational health clinical directors with substantial experience in disability evaluation and management. (*Id.* ¶ 14). The Infection Control Panel was comprised of five physicians with specialized expertise in infection control and disease. (*Id.* ¶ 15).

Dr. Hashimoto contends that "[e]ach **medical exemption** request was given an individualized, thoughtful, case-by-case review." (*Id.* ¶ 25). As necessary, the panels would consult with specialists at MGB in fields such as Obstetrics, Allergy, and Neurology. (*Id.* ¶ 28). Dr. Hashimoto alleges that the CDC's published guidance concerning medical contraindications to the vaccine was a pivotal standard that the panels used to assess the **medical exemption** requests. (*Id.* ¶ 29). The panels solicited and provided further individualized information as needed using follow-up e-mails to employees. (*Id.* ¶ 30). For example, upon denying plaintiff Lancione a **medical exemption** for her angio-edema, the panel recommended she consult an allergist for her concerns. (Def. Ex. 12). When denying **medical exemptions** to employees, the panels allowed the employees to submit

additional information for consideration at an Occupational Health and Safety e-mail address. (Def. Exs. 10, 12, 14, 16). Plaintiff Saccoccio, after being denied in the first instance, submitted additional materials to the reviewing panel, and the panel considered those materials before affirming its denial. (Def. Exs. 17-19).

***15** Given those assertions, the present record does not support a finding of bad faith on the part of MGB in considering plaintiffs' accommodation requests.[15] The evidence to date indicates that defendant communicated with plaintiffs, followed up for additional information as needed, and rendered individualized decisions on accommodations in accordance with CDC guidelines. Plaintiffs are therefore unlikely to succeed on their claims that defendant failed to engage in an interactive process.

In summary, and for all of the foregoing reasons, plaintiffs have not demonstrated a likelihood of success on the merits on their claims for disability discrimination in violation of the ADA.

2. Claims of Religious Discrimination under Title VII

Plaintiffs further assert that MGB violated Title VII of the Civil Rights Act of 1964 by refusing to grant them religious accommodations under COVID-19 vaccination policy.

[43] Title VII prohibits employers from discriminating against employees on the basis of religion, among other things. 42 U.S.C. § 2000e-2(a). Claims of religious discrimination under Title VII are analyzed under a two-part framework. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 133 (1st Cir. 2004). First, a plaintiff must make a *prima facie* case "that a *bona fide* religious practice conflicts with an employment requirement and was the reason for the adverse employment action." *Id.* Second, if the plaintiff establishes a *prima facie* case, "the burden then shifts to the employer to show that it offered a reasonable accommodation," or if it did not, "that doing so would have resulted in undue hardship." *Id.*

a. *Prima Facie* Case

[44] **[45]** To establish a *prima facie* case of religious discrimination based on failure to accommodate, a plaintiff must assert "that a *bona fide* religious practice conflicts with an employment requirement and was the reason for the adverse employment action." *Sanchez-Rodriguez v. AT&T Mobility P.R., Inc.*, 673 F.3d 1, 12 (1st Cir. 2012) (quoting *Cloutier*, 390 F.3d at 133). To qualify as a *bona fide* religious practice, plaintiff must show "both that the belief or practice is religious and that it is sincerely held." *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002).

[46] Title VII defines "religion" as including "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to qualify as religious. *Union Independiente*, 279 F.3d at 56 (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)).

***16** **[47]** **[48]** **[49]** Determining whether a belief is sincerely held is a fact-intensive inquiry, turning on the "factfinder's assessment of the employee's credibility." *Id.* Evidence that an employee acted inconsistently with his or her professed belief is relevant in assessing whether a belief is sincerely held. *Id.* at 57. The factfinder can also consider whether the alleged conflict between an employment requirement and religious belief is a "moving target," although "such evidence might simply reflect an evolution in [plaintiff's] religious views." *Id.* at 57 & n.8.

Here, the Court is presented with a series of affidavits, each alleging that the employee holds a sincere religious belief that precludes COVID-19 vaccination. Attempting to determine whether plaintiffs have established a *prima facie* case is far from an easy task.

First, there is the question of whether plaintiffs' assertions constitute *religious* beliefs—as opposed to philosophical, medical, or scientific beliefs, or personal fears or anxieties —that conflict with the vaccination policy. In a somewhat analogous case, the Third Circuit considered whether a hospital employee's opposition to influenza vaccination constituted a religious belief. *Fallon v. Mercy Cath. Med. Ctr. of Se. Pa.*, 877 F.3d 487, 488 (3d Cir. 2017). The court ultimately determined that plaintiff did not establish a *prima facie* case that his objection to vaccination was a religious belief, reasoning as follows:

> It does not appear that [plaintiff's] beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, nor are they comprehensive in nature. Generally, [plaintiff] simply worries about

> the health effects of the flu vaccine, disbelieves the scientifically accepted view that it is harmless to most people, and wishes to avoid this vaccine. In particular, the basis of his refusal of the flu vaccine—his concern that the flu vaccine may do more harm than good—is a medical belief, not a religious one. He then applies one general moral commandment (which might be paraphrased as, "Do not harm your own body") to come to the conclusion that the flu vaccine is morally wrong. This one moral commandment is an "isolated moral teaching"; by itself, it is not a comprehensive system of beliefs about fundamental or ultimate matters.

Id. at 492. While that analysis appears to be entirely correct, the principle articulated is difficult to apply in practice. Few beliefs are entirely isolated from a belief system, and in any event there are not always bright lines that would readily permit beliefs to be sorted into the categories of "religious" and "non-religious."

[50] An additional complication arises from the fact that the professed religious beliefs here do not appear to comport entirely with the doctrine of any organized religion. It appears that most, if not all, organized religions of any size in the United States do not oppose COVID-19 vaccination. That does not end the inquiry, but surely bears on it to some degree. *See* U.S. Equal Emp. Opportunity Comm'n, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: § L (2021) (noting that "[a]n employer should not assume that an employee is insincere simply because some of the employee's practices deviate from the commonly followed tenets of the employee's religion, or because the employee adheres to some common practices but not others."); *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) (stating, in First Amendment context, that "although sincerity rather than orthodoxy is the touchstone, a prison still is entitled to give *some* consideration to an organization's tenets. For the more a given person's professed beliefs differ from the orthodox beliefs of his faith, the less likely they are to be sincerely held"); *Caviezel v. Great Neck Pub. Schs.*, 701 F. Supp. 2d 414, 429 (E.D.N.Y. 2010), *aff'd*, 500 F. App'x 16 (2d Cir. 2012) (concluding, in case about New York vaccination requirements for school children, that plaintiff's objection to vaccine was not sincerely held religious belief, in part because church to which plaintiff belonged did not oppose vaccination). But courts should also be wary of the real danger, in evaluating both the nature of a belief and its sincerity, that they may tend to favor well-established or widely practiced religions and the expense of new or disfavored ones.

***17** **[51]** **[52]** In any event, the basic inquiry is whether the belief at issue is religious, and whether it is sincerely held. The record includes multiple affidavits that allege sincerely held religious beliefs that would preclude the particular employee from receiving the vaccine. It appears that MGB accepted some professions of religious sincerity, but not all, and did not accept those from the named plaintiffs. It is difficult on this record, and at this preliminary stage, for this Court to make any kind of deeper inquiry. The Court is mindful that Title VII's "capacious definition" of religion "leaves little room for a party to challenge the religious nature of an employee's professed beliefs," and that sincerity depends on a fact-intensive assessment of credibility. *Union Independiente*, 279 F.3d at 56. Indeed, courts confronted with Title VII religious discrimination issues often assume that plaintiffs have established a *prima facie* case and resolve matters on other grounds. *See, e.g.*, *Robinson v. Children's Hosp. Bos.*, 2016 WL 1337255, at *6 (D. Mass. Apr. 5, 2016) (assuming at summary judgment stage, "that [plaintiff] can establish a *prima facie* case that her refusal to take the influenza vaccination is based on a sincerely held, bona fide religious belief"); *Barrington v. United Airlines, Inc.*, —— F.Supp.3d ——, ——, 2021 WL 4840855, at *2 (D. Colo. Oct. 14, 2021) (stating that "the Court will presume that this [*prima facie*] requirement has been met" to examine COVID-19 vaccination policy at TRO stage).

With some misgivings, this Court will do the same here. It will assume, for the sake of argument, that plaintiffs can establish a *prima facie* case that a *bona fide* religious belief prevents them from taking the COVID-19 vaccine.

b. Reasonable Accommodation

[53] **[54]** **[55]** Once plaintiffs establish a *prima facie* case, the burden shifts to defendant to show that it offered a reasonable accommodation, or if not, that doing so would have resulted in undue hardship. *Cloutier*, 390 F.3d at 133. "Cases involving reasonable accommodation turn heavily upon their facts and an appraisal of the reasonableness of the parties' behavior." *Sanchez-Rodriguez*, 673 F.3d at 12 (quoting *Rocafort v. IBM Corp.*, 334 F.3d 115, 120 (1st Cir. 2003)). Here, as noted, the only specific request made by plaintiffs for an accommodation is that they not receive the vaccine. And it is undisputed that defendant did not offer any accommodation to plaintiffs, such as increased COVID-19 testing or masking.

c. Undue Hardship

[56] **[57]** Because defendant did not offer a reasonable accommodation, it must prove that doing so would have resulted in undue hardship. Under Title VII, an accommodation is an undue hardship "if it would impose more than a *de minimis* cost on the employer." *Cloutier*, 390 F.3d at 134. For the reasons set forth above, defendant has shown a likelihood of success on the merits of that contention —that is, permitting the named plaintiffs to continue to work at MGB without being vaccinated would materially increase the risk of spreading the disease and undermine public trust and confidence in the safety of its facilities. Those likely harms to MGB—while perhaps difficult to measure in terms of dollar amounts—are certainly not *de minimis*.[16]

d. Interactive Process

[58] Finally, plaintiffs argue that defendant failed to engage in a meaningful interactive process. The Supreme Court has noted that "bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69, 107 S.Ct. 367, 93 L.Ed.2d 305 (1986) (internal citation omitted). However, "liability for failure to engage in an interactive process depends on a finding that the parties could have discovered and implemented a reasonable accommodation through good faith efforts." *Mills*, 16 F.4th at 36 (quoting *Trahan*, 957 F.3d at 67).

[59] Here, defendant formed a Religious Exemption Review Committee to evaluate requests for religious exemptions. After initial consideration of accommodation requests, the committee often sent employees follow-up questions that were tailored to the particular religious objections of each employee. (Nichols Dep. ¶¶ 25-28). Employees who received follow-up questions were directed to send their responses to a dedicated MGB e-mail box and were free to submit whatever supporting documentation they wanted. (*Id.* ¶ 29). In some cases, the committee sent additional follow-up questions to employees after determining more information was needed. (*Id.* ¶ 31). Given the record at this stage, it seems likely that defendant engaged in an interactive process.

***18** As the First Circuit concluded in *Mills* on similar facts, the evidence suggests that MGB engaged in an interactive process in good faith. 16 F.4th at 36; *see also Barrington*, —— F.Supp.3d at ——, 2021 WL 4840855, at *5 (holding that plaintiff was unlikely to succeed in establishing violation of Title VII for failure to engage in interactive process where defendant represented "that employees who had requested accommodation were notified via email of the proposed accommodation and given five days to respond").

e. Exhaustion of Administrative Remedies

[60] **[61]** **[62]** **[63]** A further potential issue remains. To bring an action for employment discrimination under Title VII, an employee must first file a charge with either (1) the Equal Employment Opportunity Commission (within 180 days of the alleged unlawful employment practice) or (2) a parallel state agency—here, the Massachusetts Commission Against Discrimination (within 300 days of that practice). 42 U.S.C. § 2000e-5(e)(1); *Aly v. Mohegan Council, Boy Scouts of America*, 711 F.3d 34, 41 (1st Cir. 2013).[17] Plaintiffs may seek relief in federal court only if "the EEOC dismisses the administrative charge, does not bring civil suit, or does not enter into a conciliation agreement within 180 days of the filing of the administrative charge." *Aly*, 711 F.3d at 41. In other words, plaintiffs who have failed to exhaust their administrative remedies are not entitled to judicial relief under Title VII. *Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005). When the EEOC takes any of the listed actions, the agency issues a right-to-sue notice, notifying the charging party of his right to bring suit within 90 days. 29 C.F.R. § 1601.28 (2020).

[64] There are thus two basic components to administrative exhaustion under Title VII: (1) timely filing a charge with the EEOC (the "timeliness requirement"); and (2) receipt of a right to sue letter from the EEOC (the "verification requirement"). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Vazquez-Rivera v. Figueroa*, 759 F.3d 44, 48 (1st Cir. 2014). In *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 112-13, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002), the Supreme Court clarified that the purpose of the time limitation on the charging party is to "encourage ... raise[ing] a discrimination claim before it gets stale" while the purpose of requiring EEOC verification is "to protect[ ] employers from the disruption and expense of responding to a claim unless a complainant is serious."

***19** Title VII provides a private right of action only after the verification requirement has been satisfied. 42 U.S.C. § 2000e-5(f)(1). The statute authorizes federal district courts to grant preliminary relief if requested by the EEOC after the filing of the charge. *Id.* § 2000e-5(f)(2) ("Whenever a charge is filed with the Commission and the Commission concludes ... that prompt judicial action is necessary ... the Commission ... may bring an action for appropriate temporary or preliminary relief").

That framework is somewhat at odds with the ability of a Title VII plaintiff to obtain preliminary injunctive relief. In *Bailey v. Delta Air Lines, Inc.*, the First Circuit in *dicta* implied that a showing of irreparable harm may justify the granting of a preliminary injunction in a Title VII case even where plaintiffs did not obtain a right-to-sue letter. 722 F.2d 942, 944-45 (1st Cir. 1983) ("We need not decide the jurisdictional issue here, for the plaintiffs in the present case have made no showing of anything even approaching the irreparable injury required to obtain preliminary relief.... [W]e do not reach the question of what circumstances would justify a district court in granting preliminary relief in other cases."). The court concluded that "the procedural requirements of Title VII should be considered in the equitable balancing process which would attend any grant of injunctive relief" and that to obtain such relief, a claimant would have to, at a minimum, make a showing of "irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process." *Id.*[18]

[65] Here, it is unclear whether plaintiffs have exhausted their administrative remedies. The only information plaintiffs have supplied on this topic is that "the EEOC has already issued right to sue letters for many plaintiffs, stating that it is unlikely that the agency can complete the administrative processing within 180 days." (Plaintiffs' Mem. at 18, n. 8). There is insufficient evidence in the record to determine whether each named plaintiff has met the timeliness and verification requirements under Title VII. In any event, plaintiffs have not made "a showing of irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process." *Bailey*, 722 F.2d at 944.[19]

In summary, and for the foregoing reasons, plaintiffs have not shown a likelihood of success on their claims for religious discrimination in violation of Title VII.

3. Retaliation

[66] **[67]** **[68]** **[69]** To establish a *prima facie* case of retaliation under Title VII or the ADA, plaintiffs must establish (1) that they engaged in protected conduct; (2) that they suffered an adverse employment action; and (3) that there was a causal connection between the protected conduct and adverse action. *Colón-Fontánez v. Mun. of San Juan*, 660 F.3d 17, 36 (1st Cir. 2011).[20] If plaintiffs make such a showing, the burden shifts to defendant to articulate a legitimate, non-retaliatory reason for the challenged employment action. *Walgreen Co.*, 679 F.3d at 20. Then, plaintiffs bear "the ultimate burden of showing that [defendant's] explanation was, in fact, pretextual" and that the challenged employment action was the result of "defendant's retaliatory animus." *Id.* at 21 (quoting *Collazo v. Bristol-Myers Squibb Mfg. Inc.*, 617 F.3d 39, 46 (1st Cir. 2010)).

***20** **[70]** **[71]** **[72]** **[73]** **[74]** Here, plaintiffs likely can only meet the first two elements of their *prima facie* case. Requesting a reasonable accommodation is a protected activity. *Colón-Fontánez*, 660 F.3d at 36. And they have suffered adverse employment actions by being placed on unpaid leave and subsequently terminated. Third, however, they likely cannot show a causal connection between the protected activity and adverse employment action. To establish a causal connection at the preliminary injunction stage, "[m]ere conjecture and unsupported allegations will not suffice. Rather, [plaintiffs] must demonstrate the existence of specific facts that would enable a finding that explanatory reasons offered ... were mere pretext for [a] true motive of retaliation." *Shalala*, 135 F.3d at 65 (affirming no likelihood of success on merits of ADEA retaliation claim). Defendant contends that "plaintiffs are subject to unpaid leave and potential termination not because they requested exemption, but because they were not approved and remain noncomplaint with the Vaccination Policy." (Defendant's Opp. at 28). Defendant further avers that it would "welcome Plaintiffs back to work" if they received the COVID-19 vaccine. (*Id.*). Critically, plaintiffs have not put forth specific facts that demonstrate a true motive of retaliation.

[75] Even if plaintiffs could make a *prima facie* case, defendant has articulated a legitimate, non-retaliatory reason for the challenged employment action. According to defendant, its policy is a neutral one of general applicability, and "consequences for non-compliance are based on the employees' vaccination status, not whether or not they

applied for an exemption (and not on their religion or disability)." (Defendant's Opp. at 28-29). At this stage, it seems unlikely that plaintiffs will be successful on the merits of their retaliation claim. *See Barrington*, —— F.Supp.3d at —— – ——, 2021 WL 4840855, at *6-7 (finding, at TRO stage, that Title VII retaliation claim related to COVID-19 vaccine policy would likely fail).

C. Potential for Irreparable Harm

[76] **[77]** When a plaintiff fails to meet his burden to show a likelihood of success on the merits, "failure to do so is itself preclusive of the requested relief." *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 158 (1st Cir. 2021). However, for completeness, the Court will consider the remaining factors, which also counsel against injunctive relief.

[78] **[79]** Irreparable harm is measured "on a sliding scale, working in conjunction with a moving party's likelihood of success on the merits, such that the strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown." *Braintree Labs., Inc. v. Citigroup Glob. Mkts., Inc.*, 622 F.3d 36, 42-43 (1st Cir. 2010). "Irreparable harm most often exists where a party has no adequate remedy at law." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004).

In *Mills,* the First Circuit held that plaintiffs moving to enjoin a COVID-19 vaccine policy could not show irreparable harm in the form of loss of employment. 16 F.4th at 35-36.[21] The court noted that money damages are generally an appropriate remedy, and that appellants had failed to show a "genuinely extraordinary situation" as set forth in *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). *Id.*; *see also Shalala*, 135 F.3d at 63 (salary loss, emotional distress, and loss of prestige "[n]either in sum nor in individual parts ... amount to irreparable injury ....").

[80] Another judge in this district recently denied a motion for preliminary injunction by the Massachusetts Correction Officers Federated Union to prevent enforcement of a COVID-19 vaccine requirement. *Mass. Corr. Officers Federated Union v. Baker*, —— F.Supp.3d ——, ——, 2021 WL 4822154, at *1 (D. Mass. Oct. 15, 2021). There, the court found that irreparable harm was lacking because "it is well settled that the loss of employment is not considered irreparable for the purposes of an injunction." *Id.* at ——, at *7; *see also Beckerich v. St. Elizabeth Medical Center*, —— F.Supp.3d ——, ——, 2021 WL 4398027, at *6 (E.D.Ky. 2021) (stating that loss of employment due to failure to comply with COVID-19 vaccine policy was "not considered an irreparable injury" because wrongful termination claims exist for the very reason to recover "monetary damages to compensate their loss of employment"); *Bauer v. Summey*, —— F.Supp.3d ——, ——, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021) (finding that economic harm from loss of employment due to COVID-19 vaccination mandate was not irreparable); *Valdez v. Grisham*, —— F.Supp.3d ——, ——, 2021 WL 4145746, at *12 (D.N.M. Sept. 13, 2021) (holding that being terminated or prevented from working as nurse based on COVID-19 vaccination mandate does not constitute irreparable harm); *Norris v. Stanley*, 2021 WL 3891615, at *3 (W.D. Mich. Aug. 31, 2021) (finding that plaintiff-employee failed to show irreparable injury would result if defendant-employer terminated her employment for failure to comply with COVID-19 vaccination mandate); *Johnson v. Brown*, —— F.Supp.3d ——, —— – ——, 2021 WL 4846060, at *20-22 (D. Or. Oct. 18, 2021) (finding no irreparable harm where plaintiffs faced temporary harm to jobs and benefits relating to Oregon executive order requiring healthcare and educational workers to be vaccinated against COVID-19).

***21** **[81]** Plaintiffs also claim irreparable harm on the ground that two employees are pursuing treatment for emotional distress. However, while an employee "may recover compensation for her emotional distress claim if she prevails on the merits, the fact that an employee may be psychologically troubled by an adverse job action does not usually constitute irreparable injury warranting injunctive relief." *Shalala*, 135 F.3d at 64.

Finally, plaintiffs contend that they are faced with an "impossible choice" to "forsake their religious convictions, or, in the case of the disability discrimination plaintiffs, potentially put themselves in danger of physical harm." (Plaintiffs' Mem. at 21-22). They cite to a variety of state action cases, arguing that irreparable harm results from a "loss of First Amendment freedoms." (*Id.*). However, MGB is a private employer, not a state actor. There are no First Amendment claims at issue. *See Beckerich*, —— F.Supp.3d at ——, 2021 WL 4398027, at *6.

Therefore, for the reasons stated, plaintiffs will not suffer irreparable harm in the absence of injunctive relief.

D. Balance of Equities

[82] The Court must next consider the balance of equities. Plaintiffs will certainly experience economic hardship if they

lose their jobs (although, again, that injury can be addressed with monetary damages if they prevail). MGB has a strong interest in protecting its patients, visitors, and staff from exposure to COVID-19. As the court noted in *Baker*, "[e]ven considering the economic impact on the Plaintiffs if they choose not to be vaccinated, when balancing that harm against the legitimate and critical public interest in preventing the spread of COVID-19 by increasing the vaccination rate ... the Court finds the balance weighs in favor of the broader public interests." —— F.Supp.3d at ——, 2021 WL 4822154, at *8. The Court here similarly concludes that the balance of equities weighs in defendant's favor.

E. The Public Interest

[83] Finally, the Court must consider whether granting a preliminary injunction would serve the public interest. Other courts confronted with similar requests have generally considered the public interest in curbing the spread of the COVID-19 pandemic. *See, e.g.*, *Does 1-6 v. Mills*, —— F.Supp.3d ——, ——, 2021 WL 4783626, at *17 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021) (finding that vaccine mandate promotes public interest); *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 789 (W.D.N.Y. 2020) (holding that injunction against "enforcing measures employed specifically to stop the spread of COVID-19 is not in the public interest"); *Harris v. Univ. of Mass.*, 2021 WL 3848012, at *8 (D. Mass. Aug. 27, 2021) (concluding that enjoining vaccine mandate at University of Massachusetts is not in public interest); *Beckerich*, —— F.Supp.3d at ——, 2021 WL 4398027, at *7 (reasoning that "ending the COVID-19 pandemic" is in public's best interest).

Here, enjoining defendant from enforcing a vaccination mandate intended to curb the spread of COVID-19 is not in the public interest. This virus "has infected and taken the lives of thousands of Massachusetts residents," and dismantling this vaccination policy would undermine defendant's efforts to combat the pandemic. *Harris*, 2021 WL 3848012, at *8. That factor similarly weighs against the issuance of a preliminary injunction.

IV. Conclusion

For the foregoing reasons, and the reasons set forth on the record during the hearings on October 20 and November 4, 2021, plaintiffs have not shown a likelihood of success on the merits of their claims, that they will suffer immediate irreparable harm if the injunction does not issue, that the balance of equities favors issuance of the injunction, or that an injunction would be in the public interest. Accordingly, plaintiffs' motion for a preliminary injunction is DENIED.

***22 So Ordered.**

All Citations

--- F.Supp.3d ----, 2021 WL 5234394

Footnotes

1 Plaintiffs' exhibits are designated as Exhibits A-S with the complaint; Exhibits A-B with the motion for preliminary injunction; and Exhibits 1-19 filed separately. Because the two exhibits attached to the motion for preliminary injunction are not referenced in this opinion, the Court will refer to plaintiffs' Exhibits A-S and 1-19 where relevant.

2 The Court briefly notes a few inconsistencies in the record. According to defendant's exhibits, plaintiffs Saccoccio and DiFronzo requested religious accommodations and were denied. (Def. Exs. 37-40, 49-52). However, the complaint does not allege religious discrimination on the basis of those denials. In addition, although the complaint alleges disability discrimination against plaintiff Saccoccio, his affidavit does not assert that he sought a **medical exemption**. (Pl. Ex. L).

3 Lancione's response to MGB's request for more information explained that she had not requested religious exemptions to other vaccines because she had consistently been granted a **medical exemption** in the past. (Def. Ex. 43).

4 Plaintiffs cite the *McDonnell Douglas* burden-shifting framework, which is used in cases that lack direct evidence of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). However, the First Circuit has found that the "*McDonnell Douglas* model does not apply to ADA discrimination claims based on failure to reasonably accommodate." *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 n.3 (1st Cir. 2001) (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999)). Instead, "whether a requested accommodation is reasonable or whether it imposes an undue hardship are questions typically proved through direct, objective evidence." *Id.*

5 It appears that plaintiff Miller was granted leave under the Family and Medical Leave Act beginning on October 15, 2021. (Pl. Ex. M).

6 The Southern District of New York also recently applied the ADA's definition of "disability" in a case where plaintiff sought an influenza vaccination exemption from her employer. *Norman v. NYU Langone Health Sys.*, 492 F. Supp. 3d 154, 158 (S.D.N.Y. 2020). The plaintiff asserted that her allergy to the flu vaccine was a disability. *Id.* at 163. She claimed that she had two prior adverse reactions to the influenza vaccine that caused anxiety, difficulty breathing, and stress. *Id.* Although the court assumed that the plaintiff's allergy could qualify as an impairment that limited the major life activity of breathing, it concluded that she "nevertheless failed to show that this impairment substantially limited her breathing at the time she sought an **accommodation**" many years later. *Id.* at 163-64. The court left open the possibility that "some reactions to **vaccines** can be severe enough in intensity, duration, frequency, or after-effects to rise to the level of a disability under the ADA." *Id.* at 165.

7 The statute, 42 U.S.C. § 12113(b), states that "the term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." "Direct threat" is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." § 12111(3). The language concerning "qualification standards" is in a section of Title I called "defenses," which suggests that the defendant, not the plaintiffs, bears the burden of proof as to that issue. The First Circuit has concluded, however, that plaintiffs bear the burden of demonstrating that they are not a direct threat in cases where their "essential job functions necessarily implicate the safety of others." *Amego*, 110 F.3d at 144. The plaintiff in *Amego* cared for disabled patients in a residential program, and one of her essential functions was administering medications to patients, which implicated the safety of others. *Id.* at 137. However, the *Amego* court cautioned that "[t]here may be other cases under Title I where the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden." *Id.* at 144. Here, although the record is not clear on each of the named plaintiffs' job responsibilities, it appears that their job functions at MGB implicate the safety of others.

8 The statute provides as follows:

> The term "reasonable accommodation" may include--
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(a).

9 Much confusion has resulted from two conceptually similar ideas: (1) plaintiff's burden to prove a reasonable accommodation that "is feasible for the employer" and (2) defendant's burden to prove undue hardship. The First Circuit has attempted to reconcile that tension as follows:

> [W]e believe the best way to distinguish between the two burdens is to follow in essence the lead of our sister circuits: In order to prove "reasonable accommodation," a plaintiff needs to show not only that the proposed accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances. If plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that the proposed accommodation is not as feasible as it appears but rather that there are further costs to be considered, certain devils in the details.

Reed, 244 F.3d at 259.

10 In their memorandum, counsel for plaintiffs contend that "they are willing to abide by any reasonable accommodations," including staying at home if they have an illness, wearing a mask, washing their hands frequently, and screening for COVID-19 daily. (Plaintiffs' Mem. at 12-13). However, statements by counsel are not part of the evidentiary record.

11 The EEOC's guidelines note that undue hardship is not just "financial difficulty, but ... reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business." U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2003-1, Enf't Guidance on Reasonable Accommodation and Undue Hardship under the ADA (2002).

12 In an attempt to rebut the claim of undue hardship, plaintiffs cite to several articles authored by Dr. Michael Klompas, a Hospital Epidemiologist at Brigham and Women's Hospital, and Dr. Dean Hashimoto, Chief Medical Officer of Workplace Health and Wellness at Mass General Brigham. According to plaintiffs, those articles suggest a low probability of COVID-19 transmission from healthcare workers and emphasize the benefits of masking. (Plaintiffs' Reply at 8-9). It is notable that the three reports were published in 2020, prior to the emergence of the Delta variant. Those early reports also do not preclude updated findings by defendant and its experts that COVID-19 vaccinations are now necessary to protect patients and staff. (Klompas Dec. ¶ 17-29).

13 Although the record does not reflect the actual cost of COVID-19 testing for MGB, it appears likely that the cost of administering tests to hundreds of employees on a routine basis, including the hours spent reviewing and transmitting results, is not insubstantial.

14 Courts do not reach the issue of failure to engage in an interactive process when plaintiff cannot demonstrate that the requested accommodation was reasonable under the circumstances. *See* *Jones*, 696 F.3d at 91 (rejecting claim of failure to engage in interactive process because "[a]n employer's duty to accommodate does not arise unless (at a bare minimum) the employee is able to perform the essential functions of [his] job with an accommodation") (quoting *Walgreen Co.*, 679 F.3d at 19).

15 Plaintiffs contend that defendant's process was not interactive because it rubber-stamped the CDC's guidance and discouraged network physicians from writing **medical exemption** requests. However, plaintiffs do not point to any law that would prohibit employers from considering medical guidance during an interactive process. Indeed, the EEOC's guidelines advise that employers may rely on CDC recommendations. *See* U.S. Equal Emp. Opportunity Comm'n, What You Should Know About Covid-19 and the Ada, the Rehabilitation Act, and Other EEO Laws: § K (2021). Furthermore, defendant's e-mails to network physicians were apparently based on guidance from the Massachusetts Board of Registration of Medicine, which "warned that a physician who grants an exemption outside the acceptable standard of care may be subject to discipline." Mass. Bd. of Registration in Med. Guidance on COVID Exemptions (Sept. 20, 2021), https://www.mass.gov/news/the-massachusetts-board-of-registration-in-medicine-guidance-on-covid-exemptions.

16 To the extent that plaintiffs seek to impose additional financial costs, such as screening and testing of hundreds of employees multiple times per week, the record does not reflect the exact size or nature of the burden. As noted, however, plaintiffs have not specifically requested such an accommodation.

17 Although the parties discuss exhaustion of administrative remedies with respect to Title VII, the same requirements are also present for plaintiffs' ADA claims. Title I of the ADA incorporates the powers, remedies, and procedures set forth in Title VII of the Civil Rights Act by reference. 42 U.S.C. § 12117(a). Therefore, a plaintiff seeking to bring charges of employment discrimination under the ADA must exhaust administrative remedies under the same standard articulated for Title VII. *See* *Farris v. Shinseki*, 660 F.3d 557, 562 (1st Cir. 2011) ("Claims of employment discrimination arising under the ADA are subject to the same remedies and procedures as those under Title VII of the Civil Rights Act of 1964. Under Title VII, a[n] ... employee must exhaust her administrative remedies before initiating a complaint of discrimination in federal court. The same is true for claims under the ADA.") (internal citations omitted); *Bonilla v. Muebles J. J. Alvarez, Inc.*, 194 F.3d 275, 277-78 (1st Cir. 1999) (applying 42 U.S.C. § 2000e-5(e) exhaustion requirements in Title I ADA employment discrimination case).

18 The First Circuit has elaborated that the required showing of "genuinely extraordinary" irreparable harm is "subject to a sliding scale analysis, such that the showing of irreparable harm required of a plaintiff increases in the presence of factors, including the failure to exhaust administrative remedies, which cut against a court's traditional authority to issue equitable relief." *Gately v. Com. of Mass.*, 2 F.3d 1221, 1232 (1st Cir. 1993); *see* *DeNovellis v. Shalala*, 135 F.3d 58, 62 (1st Cir. 1998).

19 On somewhat similar facts, the First Circuit in *Mills* recently affirmed the district court's conclusion that unvaccinated healthcare workers "had not exhausted their administrative remedies." 16 F.4th at 36.

20 A retaliation claim does not depend on the success of plaintiffs' disability claims. *See* *Colon-Fontanez*, 660 F.3d at 36.

21 During oral argument, plaintiffs attempted to distinguish the lack of irreparable harm in *Mills* by arguing that here, plaintiffs made a greater showing in the form of mental anguish, loss of income, and impending homelessness. Even assuming the existence of those harms, they all stem from loss of employment and emotional distress, which do not qualify as irreparable harm under First Circuit precedent.

End of Document

17 F.4th 266
United States Court of Appeals, Second Circuit.

WE THE PATRIOTS USA, INC., Diane Bono, Michelle Melendez, Michelle Synakowski, Plaintiffs-Appellants,
v.
Kathleen HOCHUL, Howard A. Zucker, M.D., Defendants-Appellees.
Dr. A., Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., Physician Liaison X., Plaintiffs-Appellees,
v.
Kathy Hochul, Governor of the State of New York, in her official capacity, Dr. Howard A. Zucker, Commissioner of the New York State Department of Health, in his official capacity, Letitia James, Attorney General of the State of New York, in her official capacity, Defendants-Appellants.

Docket No. 21-2179, Docket No. 21-2566
|
August Term, 2021
|
Argued: October 27, 2021
|
Decided: November 4, 2021

Synopsis

Background: Healthcare workers and membership organization brought actions alleging that state's emergency rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19, with no religious exemption, violated Free Exercise Clause, Supremacy Clause, and Fourteenth Amendment. The United States District Court for the Eastern District of New York, William F. Kuntz, J., denied plaintiffs' motion for preliminary injunction, and the United States District Court for the Northern District of New York, David N. Hurd, J., 2021 WL 4734404, granted plaintiffs' motion for preliminary injunction. Appeals were taken.

Holdings: The Court of Appeals held that:

[1] plaintiffs failed to establish that rule was not facially neutral;

[2] plaintiffs failed to establish that rule was not generally applicable;

[3] plaintiffs failed to establish likelihood of success on merits of their free exercise claim;

[4] plaintiffs failed to establish likelihood of success on merits of their claim that absence of religious exemption impermissibly conflicted with Title VII's religious accommodation requirement;

[5] plaintiffs failed to establish likelihood of success on merits of their claim that rule violated their fundamental rights to privacy, medical freedom, and bodily autonomy;

[6] plaintiffs failed to establish irreparable harm; and

[7] public interest and balance of equities did not favor issuance of preliminary injunction.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (36)

[1] Evidence Material from Other Cases

Court may take judicial notice of existence of affidavits filed in another court.

[2] Injunction Pleadings and affidavits as evidence

Injunction Hearsay

Courts may consider hearsay evidence such as affidavits when determining whether to grant preliminary injunction.

[3] **Injunction** Extraordinary or unusual nature of remedy

Issuance of preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right.

1 Cases that cite this headnote

[4] **Injunction** Extraordinary or unusual nature of remedy

Preliminary injunctive relief should not be routinely granted.

[5] **Injunction** Extraordinary or unusual nature of remedy

Injunction Public interest considerations

When deciding whether to issue preliminary injunction, courts should pay particular regard for public consequences in employing extraordinary remedy of injunction.

[6] **Injunction** Injunctions against government entities in general

To obtain preliminary injunction that will affect government action taken in public interest pursuant to statute or regulatory scheme, moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) likelihood of success on merits, and (3) public interest weighing in favor of granting injunction.

4 Cases that cite this headnote

[7] **Injunction** Injunctions against government entities in general

To obtain preliminary injunction that will affect government action taken in public interest pursuant to statute or regulatory scheme, movant must show that balance of equities supports issuance of injunction.

1 Cases that cite this headnote

[8] **Federal Courts** Preliminary injunction; temporary restraining order

Court of Appeals reviews grant or denial of motion for preliminary injunction for abuse of discretion.

[9] **Federal Courts** Abuse of discretion in general

District court has exceeded permissible bounds of its discretion when its decision rests on error of law, such as application of wrong legal principle, or clearly erroneous factual finding or cannot be located within range of permissible decisions.

[10] **Federal Courts** Theory and Grounds of Decision of Lower Court

Court of Appeals may affirm on any ground supported by record.

[11] **Constitutional Law** Neutrality; general applicability

Neutral law of general applicability is subject to rational basis review under Free Exercise Clause even if it incidentally burdens particular religious practice. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[12] **Constitutional Law** Strict scrutiny; compelling interest

If law that incidentally burdens particular religious practice is not neutral towards religion or is not generally applicable, then, for such law to survive challenge under Free Exercise Clause, it must be justified by compelling governmental interest and must be narrowly tailored to advance that interest. U.S. Const. Amend. 1.

[13] **Civil Rights** Preliminary Injunction

In context of First Amendment claim, plaintiffs seeking preliminary injunction must show that they are likely to succeed on their claim that

challenged rule is not neutral or generally applicable rule; if they succeed at that step, burden shifts to state to show that it is likely to succeed in defending challenged rule under strict scrutiny. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[14] **Constitutional Law** Neutrality; general applicability

Law may be not neutral, for purposes of Free Exercise Clause, if it explicitly singles out religious practice, but even facially neutral law will run afoul of neutrality principle if it targets religious conduct for distinctive treatment. U.S. Const. Amend. 1.

[15] **Civil Rights** Employment practices

Healthcare workers failed to establish that state rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19 was not facially neutral, for purposes of evaluating healthcare workers' motion for preliminary injunction in their action alleging that rule violated their rights under Free Exercise Clause, even though prior emergency order contained religious exemption; order and rule were issued through two separate processes, rule applied whether employee was eager to be vaccinated or strongly opposed, and it applied whether employee's opposition or reluctance was due to philosophical or political objections to vaccine requirements, concerns about vaccine's efficacy or potential side effects, or religious beliefs. U.S. Const. Amend. 1; N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

2 Cases that cite this headnote

[16] **Constitutional Law** Neutrality; general applicability

Law may not be "generally applicable," for purposes of determining whether it violates Free Exercise Clause, if it invites government to consider particular reasons for person's conduct by providing mechanism for individualized exemptions or if it prohibits religious conduct while permitting secular conduct that undermines government's asserted interests in similar way. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[17] **Constitutional Law** Neutrality; general applicability

Free Exercise Clause's general applicability requirement protects religious observers against unequal treatment, and inequality that results when legislature decides that governmental interests it seeks to advance are worthy of being pursued only against conduct with religious motivation. U.S. Const. Amend. 1.

[18] **Constitutional Law** Neutrality; general applicability

Law is not generally applicable, for purposes of Free Exercise Clause, if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to legitimate government interests purportedly justifying it. U.S. Const. Amend. 1.

[19] **Constitutional Law** Neutrality; general applicability

Whether two activities are comparable for Free Exercise Clause purposes, such that a regulation must be neutral and generally applicable, must be judged against asserted government interest that justifies regulation at issue. U.S. Const. Amend. 1.

[20] **Civil Rights** Employment practices

Healthcare workers failed to establish that state rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19 was not generally applicable, for purposes of evaluating healthcare workers' motion for preliminary injunction in their action alleging that rule violated their rights under Free Exercise Clause, even though rule contained medical exemption; applying rule to

those subject to medical contraindications or precautions would undermine state's asserted interest in protecting health of covered personnel, medical exemption was limited in duration, it could pose significant barrier to effective disease prevention to permit much greater number of permanent religious exemptions, and rule did not create mechanism for individualized exemptions. U.S. Const. Amend. 1; N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

2 Cases that cite this headnote

[21] **Constitutional Law** Neutrality; general applicability

General applicability of law may be absent, for Free Exercise Clause purposes, when law provides mechanism for individualized exemptions because it creates risk that administrators will use their discretion to exempt individuals from complying with law for secular reasons, but not religious reasons. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[22] **Constitutional Law** Neutrality; general applicability

Exemption is not individualized, for purposes of determining its general applicability for Free Exercise Clause purposes, simply because it contains express exceptions for objectively defined categories of persons. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[23] **Constitutional Law** Neutrality; general applicability

Mere existence of exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render law not generally applicable under Free Exercise Clause. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[24] **Civil Rights** Employment practices

Healthcare workers failed to establish likelihood of success on merits of their claim that New York rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19, with no religious exemption, violated Free Exercise Clause, for purposes of evaluating their motion for preliminary injunction; faced with especially contagious variant of virus in midst of pandemic that had claimed lives of over 750,000 in United States and 55,000 in New York, rule was reasonable exercise of state's power to enact rules to protect public health. U.S. Const. Amend. 1; N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

[25] **States** Conflicting or conforming laws or regulations

To succeed on conflict preemption claim, plaintiffs must show that local law conflicts with federal law such that it is impossible for party to comply with both or that local law is obstacle to achievement of federal objectives. U.S. Const. art. 6, cl. 2.

1 Cases that cite this headnote

[26] **States** Preemption in general

In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for party to comply with both or local law is obstacle to achievement of federal objectives. U.S. Const. art. 6, cl. 2.

1 Cases that cite this headnote

[27] **States** Federal Supremacy; Preemption

Supremacy Clause does not create independent cause of action. U.S. Const. art. 6, cl. 2.

[28] **Civil Rights** Preliminary injunction

Healthcare workers failed to establish likelihood of success on merits of their claim that absence of **religious** exemption to New York rule requiring healthcare facilities to ensure that certain employees were **vaccinated** against COVID-19 impermissibly conflicted with Title VII's **religious** **accommodation** requirement, in contravention of Supremacy Clause, for purposes of evaluating their motion for preliminary injunction; rule did not bar employers from providing employees with reasonable **accommodations** allowing them to continue working consistent with rule while avoiding **vaccination** requirement, and there was no evidence that such **accommodations** were not possible. U.S. Const. art. 6, cl. 2; Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

[29] **Civil Rights** Accommodations

To avoid Title VII liability for religious discrimination, employer need not offer accommodation that employee prefers; instead, employer must offer reasonable accommodation that does not cause employer undue hardship. Civil Rights Act of 1964 §§ 701, 703, 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1).

1 Cases that cite this headnote

[30] **Civil Rights** Employment practices

Healthcare workers failed to establish likelihood of success on merits of their claim that New York rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19 violated their fundamental rights to privacy, medical freedom, and bodily autonomy under Due Process Clause, for purposes of evaluating their motion for preliminary injunction. U.S. Const. Amend. 14; N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

[31] **Constitutional Law** Public health

Due Process Clause embodies no fundamental right that in and of itself would render vaccine requirements imposed in public interest, in face of public health emergency, unconstitutional. U.S. Const. Amend. 14.

7 Cases that cite this headnote

[32] **Civil Rights** Preliminary Injunction

In seeking preliminary injunctive relief, religious adherents are not required to establish irreparable harm independent of showing Free Exercise Clause violation because presumption of irreparable injury flows from violation of constitutional rights. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[33] **Injunction** Adverse employment actions

Adverse employment consequences are not type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages.

5 Cases that cite this headnote

[34] **Civil Rights** Employment practices

Civil Rights Preliminary injunction

Healthcare workers failed to establish irreparable harm absent preliminary injunctive relief in their action alleging that New York rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19 violated Free Exercise Clause, Title VII, and Fourteenth Amendment, even though they faced significant employment consequences if they refused on religious grounds to be vaccinated; workers failed to establish likelihood of success on their constitutional claims, and their economic harms under Title VII could be remedied with money damages. U.S. Const. Amends. 1, 14; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

2 Cases that cite this headnote

[35] **Civil Rights** Employment practices

Civil Rights Preliminary injunction

Public interest and balance of equities did not favor issuance of preliminary injunction in healthcare workers' action alleging that New York rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19 violated Free Exercise Clause, Title VII, and Fourteenth Amendment; state had compelling interest in ensuring that employees who cared for hospital patients, nursing home residents, and other medically vulnerable people in its healthcare facilities were vaccinated against COVID-19, not just to protect them and those with whom they come into contact from infection, but also to prevent overburdening of healthcare system, and workers did not show likelihood of demonstrating that their constitutional rights were violated by rule. U.S. Const. Amends. 1, 14; Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

2 Cases that cite this headnote

[36] **Injunction** Injunctions Sought by Government in General

Injunction Injunctions against government entities in general

In evaluating motion for preliminary injunction when government is party to suit, court's inquiries into public interest and balance of equities merge.

2 Cases that cite this headnote

***271** Appeal from the United States District Court for the Eastern District of New York (Kuntz, *J.*)

Appeal from the United States District Court for the Northern District of New York (Hurd, *J.*)

Attorneys and Law Firms

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Before: Walker, Sack, and Carney, Circuit Judges.

Opinion

PER CURIAM:

***272** In these two cases on appeal, which we consider in tandem, federal district courts in New York State considered applications for preliminary injunctive relief that would restrain the State from enforcing its emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19. *See* 10 N.Y.C.R.R. § 2.61 (Aug. 26, 2021) ("Prevention of COVID-19 transmission by covered entities") ("Section 2.61" or "the Rule"). The State issued the Rule in response to rapidly increasing

infection rates related to the Delta variant of the SARS-CoV-2 virus, a virus that has caused widespread suffering in the State, country, and world since early 2020. The State described the Rule's purpose as primarily to preserve the health of healthcare workers, and from that narrow purpose, more broadly, to keep patients and the public safe from COVID-19. The Rule establishes a medical exemption to the vaccination requirement, but—consistent with New York's prior vaccination requirements for healthcare workers—does not include an exemption based on religious belief. The Rule permits, but does not require, employers to make other **accommodations** for individuals who choose not to be **vaccinated** based on their sincere **religious** beliefs.

The moving parties—primarily healthcare workers allegedly affected by the Rule—challenge the Rule's omission of a religious exemption by asserting claims under the First Amendment, the Supremacy Clause, and the Fourteenth Amendment. Both groups of Plaintiffs moved to enjoin enforcement of the Rule. One district court granted the preliminary relief requested, enjoining the Rule insofar as it prevented healthcare workers from being eligible for an exemption based on religious belief; the other denied it. *See* *Dr. A. v. Hochul*, No. 21-cv-1009, —— F.Supp.3d ——, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (granting preliminary injunction) ("*Dr. A.*"); *We The Patriots USA, Inc. v. Hochul*, No. 21-cv-4954, 2021 WL 4048670 (E.D.N.Y. Sept. 12, 2021) (denying preliminary injunction) ("*We The Patriots*" or "*WTP*").

The individual plaintiffs in *Dr. A.* are nurses, doctors, and other personnel employed by healthcare facilities in New York State; in *We The Patriots*, they are three nurses similarly employed and a related nonprofit organization. All individual plaintiffs aver that to receive any one of the three currently available vaccines against COVID-19 (Pfizer-BioNTech, Moderna, and Johnson & Johnson) would violate their religious beliefs because those vaccines were developed or produced using cell lines derived from cells obtained from voluntarily aborted fetuses. They assert ***273** that their employers have threatened them with adverse employment consequences if they refuse to be vaccinated.

Plaintiffs argue, and the district court in *Dr. A.* held, that they are likely to succeed in establishing that Section 2.61 violates their rights under the Free Exercise Clause of the First Amendment and under the Supremacy Clause. As to the Free Exercise Clause, Plaintiffs submit that because the State has afforded a medical exemption to its requirement, the Free Exercise Clause requires the State also to afford a religious exemption. With respect to the Supremacy Clause, the *Dr. A.* Plaintiffs argue that the non-discrimination obligations placed on employers by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") preempt the State's vaccination Rule. As a third basis for relief, the *WTP* Plaintiffs allege that the Rule infringes their rights to privacy and bodily integrity under the Fourteenth Amendment. Under the familiar standards for a preliminary injunction that Plaintiffs must meet to obtain such relief, Plaintiffs allege that, in addition to showing a likelihood of success on the merits, they will suffer irreparable harm absent immediate relief and that the balance of the equities and the public interest lie in their favor.

The State resists, contending primarily that Section 2.61 is a neutral provision of general applicability to those covered by the Rule; that the Rule serves its goal and compelling need to preserve the health of healthcare workers; that the medical and religious exemptions would not be comparable for purposes of the Free Exercise Clause analysis required by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and its progeny; and that Plaintiffs have not shown a likelihood of success on the merits on any of their claims or otherwise satisfied the prerequisites for entry of the exceptional relief of a preliminary injunction at this phase of the litigation.

Following oral argument, on October 29, 2021, this Court entered an Order disposing of the appeals and advising that an Opinion would follow. This Opinion explains the basis for that Order.

As to Plaintiffs' Free Exercise claim, we conclude that Plaintiffs have not met their burden to show that they are likely to succeed in establishing (1) that Section 2.61 is not a neutral law of general applicability under *Smith*, or (2) that—in the resulting inquiry—Section 2.61 does not satisfy rational basis review. Next, we determine that Plaintiffs have not demonstrated a likelihood of success on their Supremacy Clause claim on the record before us, as Plaintiffs have not shown that it would likely be impossible for employers to comply with both Section 2.61 and Title VII. Finally, we decide that Plaintiffs are not likely to succeed on their claim that the Rule contravenes the Fourteenth Amendment.

In light of these conclusions and of our further assessment of the irreparability of the harm Plaintiffs allege, the balance of the hardships, and the public interest in enforcing or not enforcing the Rule, we AFFIRM the order of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction in *We The Patriots*; and we REVERSE the order of the United States District Court for the Northern District of New York granting Plaintiffs' motion for the same relief in *Dr. A.* and VACATE the related preliminary injunction entered by that court. Finally, we REMAND both cases to their respective district courts for further proceedings consistent with our October 29, 2021 Order, and this Opinion. We stress that we do not now decide the ultimate merits of Plaintiffs' ***274** legal claims or of the State's defenses; rather, we make a limited determination with respect to preliminary relief based on the limited factual record presently before this Court.

BACKGROUND

I. New York's Emergency Rule

On August 26, 2021, New York's Department of Health adopted an emergency rule directing hospitals, nursing homes, hospices, adult care facilities, and other identified healthcare entities to "continuously require" certain of their employees to be fully vaccinated against COVID-19 beginning on September 27, 2021, for "general hospitals" and nursing homes, and on October 7, 2021, for all other "covered entities" as defined in the Rule. 10 N.Y.C.R.R. § 2.61.[1] The vaccine requirement applies not to all employees, but only to those covered by the Rule's definition of "personnel": those employees, staff members, and volunteers "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." *Id.* § 2.61(a)(2).

The Rule was issued by the State's Public Health and Health Planning Council, a group of 25 healthcare professionals, including the Commissioner of Health, that state law charges with issuing regulations "affecting the security of life or health or the preservation and improvement of public health," including those addressing the control of communicable diseases. N.Y. Pub. Health L. § 225(4), (5).

As required by New York law, the notice of emergency rulemaking included the Council's findings and a Regulatory Impact Statement (the "Statement"). *See* NYS Admin. Proc. Act § 202(6). The Statement explained that the Rule responded to the "significant public health threat" caused by the increasing circulation of the Delta variant: "Since early July, cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant." *Dr. A.* Sp. App'x at 39. It also referenced data purporting to show "that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals" and that "[t]hose who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19." *Id.* It described vaccination as critical to controlling the spread of the disease at healthcare facilities and in congregate care settings, which "pose increased challenges and urgency for controlling the spread of this disease because of [their] vulnerable patient and resident populations," determining that "[u]nvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications." *Id.* As an emergency rule, Section 2.61 is in effect for a maximum of 90 days, expiring on November 23, 2021, unless renewed. *See id.* at 38; NYS Admin. Proc. Act § 202(6)(b).

Section 2.61 exempts from the vaccination requirement "personnel" for whom "immunization with COVID-19 vaccine is detrimental to [their] health ..., based upon a pre-existing health condition" as more specifically defined and limited by the Rule. 10 N.Y.C.R.R. § 2.61(d)(1).[2] The ***275** medical exemption applies "only until such immunization is found no longer to be detrimental to [their] health." *Id.* It must be supported with a certification by a licensed physician or certified nurse practitioner issued in accordance with generally accepted medical standards, including recommendations of the Advisory Committee on Immunization Practices ("ACIP") of the U.S. Department of Health and Human Services. *Id.*; *see also* N.Y. State Department of Health, *Frequently Asked Questions (FAQs) Regarding the August 26, 2021 – Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation*, https://coronavirus.health.ny.gov/system/files/documents/2021/09/faqs-for-10-nycrr-section-2.61-9-20-21.pdf (last visited November 2, 2021) ("*FAQs*"). Section 2.61 contains no "exemption" for personnel who oppose **vaccination** on **religious** or any other grounds not covered by the medical exemption; however, as we discuss below, the Rule does not prohibit employers from providing **religious** objectors with **accommodations**.

On August 18, 2021, eight days *before* the Council promulgated Section 2.61, New York State Commissioner of Health Dr. Howard A. Zucker, acting alone, had issued an "Order for Summary Action" ("the August 18 Order" or "the Order") under the authority vested in him by New York Public Health Law § 16. *See Dr. A.* Sp. App'x at 41–47. Section 16 permits the Commissioner to issue a short-term order—effective for a maximum of 15 days—if he identifies a condition that in his view constitutes a "danger to the health of the people." N.Y. Pub. Health Law § 16. After making findings about the dangers of COVID-19, the Order similarly required certain healthcare facilities to ensure that certain personnel were fully vaccinated against COVID-19 by September 27, 2021, but differed from Section 2.61, which superseded it, in several respects. Most relevant here, the Order included a religious exemption for personnel who "hold a genuine and sincere religious belief contrary to the practice of immunization." *Dr. A.* Sp. App'x at 45–46. In addition, the Order could be effective for only a very brief period of time—for up to 15 days—whereas the Rule could be in effect for up to 90 days, subject to extensions. Further, the Order applied only to "general hospital[s]" and nursing homes; Section 2.61 applies more broadly, to all hospitals, nursing homes, diagnostic and treatment centers, home healthcare agencies and similar programs, hospices, and adult care facilities. *Id.* at 43; 10 N.Y.C.R.R. § 2.61(a)(1).

[1] **[2]** In affidavits appended to its briefing to this Court and filed in other ***276** pending proceedings,[3] the State has provided preliminary vaccination data from the months of August through October 2021. It reflects a significant increase in vaccination rates among covered healthcare personnel that occurred after the Rule's effective date on September 27 (even though the Rule was subject to the temporary restraining order and later injunction issued in *Dr. A.*). As of August 24, the State's declarant reported, 71% of workers at nursing homes and 77% of workers at adult care facilities had received at least one dose of the vaccine; 77% of workers at hospitals were fully vaccinated. *See WTP* Appellees' Add. at 14–15 (Decl. of Elizabeth Rausch-Phung). As of October 19, 97.4% of workers at nursing homes and 96.7% of workers at adult care facilities had received at least one dose of the vaccine, and 91.4% of workers at hospitals were fully vaccinated. *See Serafin v. New York State Dep't of Health*, Index No. 908296-21, Doc. Nos. 56. (Decl. of Valerie A. Deetz), 57 (Decl. of Dorothy Persico) (Sup. Ct. Albany County Oct. 20, 2021). Also as of October 19, between 0.4% and 0.5% of workers at each facility type were medically ineligible to receive the COVID-19 vaccine, whereas 1.9% of workers at nursing homes and adult care facilities and 1.3% of workers at hospitals claimed "other" exemptions, which the State describes as reflecting religious exemptions permitted by the injunction entered in *Dr. A*. *Id.*

II. The District Court Proceedings

Plaintiffs in *We The Patriots* are a membership organization and three nurses working in hospital facilities in New York State.[4] Plaintiffs in *Dr. A.* are nurses, doctors, and others employed at healthcare facilities in New York State. In both cases, the defendants include Governor Kathleen Hochul and Commissioner Zucker; the *Dr. A.* Plaintiffs also named New York Attorney General Letitia James as a defendant.

All Plaintiffs assert that they object on religious grounds to receiving the COVID-19 vaccines as briefly described above. As public health authorities have explained, in the 1970s and 1980s, cell lines were derived from fetal cells obtained from elective abortions or miscarriages.[5] These ***277** cell lines have since been used in the development of various vaccines.[6] They were used for testing in the research and development phase of the mRNA (Pfizer-BioNTech and Moderna) COVID-19 vaccines and in the production of the Johnson & Johnson COVID-19 vaccine.[7] Plaintiffs assert that, in these circumstances, receiving any of the three available COVID-19 vaccines would conflict with their deeply held religious beliefs.

A. *We The Patriots USA, Inc. v. Hochul*

In *We The Patriots*, the three individual plaintiffs are registered nurses. Diane Bono and Michelle Melendez are employed at Syosset Hospital in Syosset, and Michelle Synakowski is employed at St. Joseph's Hospital in Syracuse. On September 2, 2021, one week after the Rule was adopted, Plaintiffs sued Governor Hochul and Commissioner Zucker in the United States District Court for the Eastern District of New York, alleging that the Rule violates their First Amendment right to exercise their religion freely. They also charged that it violates their rights to privacy and "medical freedom," which they locate in the First, Fourth, Fifth, and Fourteenth Amendments. They asked the district court to declare Section 2.61 unconstitutional and permanently enjoin the State from enforcing it.

Ten days later, the *WTP* Plaintiffs moved for a temporary restraining order and a preliminary injunction immediately enjoining the State from enforcing the Rule. They argued that immediate relief was essential because Section 2.61 puts them at imminent risk of losing their jobs if they persist in refusing vaccination. In support of their motion, they provided letters from Nurse Bono's and Nurse Melendez's employer, Northwell Health, a private entity. [8] In the letter received by Nurse Bono, dated August 31, Northwell Health advised that her "continued employment ***278** will be at risk" if she did not receive the vaccine by the deadline. *WTP* App'x 32. In its letter to Nurse Melendez, dated August 30, Northwell Health wrote only that Nurse Melendez would be required to undergo weekly PCR testing and would be unable to participate in certain meetings, gatherings, and events based on her vaccination status. [9]

The district court denied Plaintiffs' motion on September 12, the day it was filed, without explanation and without ordering or receiving a response from the State. Plaintiffs timely appealed.

B. *Dr. A. v. Hochul*

In *Dr. A.*, 17 medical professionals who work in New York sued Governor Hochul, Commissioner Zucker, and Attorney General James on September 13 in the United States District Court for the Northern District of New York, seeking declaratory and injunctive relief preventing the enforcement of the Rule. [10] In their verified complaint, they alleged three bases of unconstitutionality. First, they contended that the Rule infringes on religious rights secured by the Free Exercise Clause by requiring that they be vaccinated, contrary to their religious beliefs. Second, they claimed that Section 2.61 violates the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment based on religion. Third, they claimed that Section 2.61 runs afoul of the Equal Protection Clause because it prevents them from seeking a religious accommodation while at the same time allowing similarly situated healthcare workers to seek a medical accommodation.

The *Dr. A.* Plaintiffs simultaneously moved for a temporary restraining order and preliminary injunction. They sought immediate injunctive relief, citing "imminent irreparable harm from loss of employment and professional standing" as a result of their "religiously motivated refusal to be vaccinated." *Dr. A.* App'x at 207.

On September 14, the district court granted Plaintiffs' motion for a temporary restraining order, enjoining the State from enforcing any requirement that employers deny religious exemptions from the vaccine requirement or that employers revoke any religious exemption already granted, and directed the State to file its opposition to Plaintiffs' request for a preliminary injunction. Six days later, the district court extended the temporary restraining order for 14 days, pending its written opinion on Plaintiffs' request for a preliminary injunction to be issued on or before October 12.

On October 12, the district court issued the requested preliminary injunction, resting in part on its determination that Plaintiffs were likely to succeed on their Free Exercise claim. The district court concluded that Plaintiffs had established that Section 2.61 is neither a neutral law nor one of general applicability. It also ruled that Section 2.61 is likely to fail strict scrutiny. *See* *Dr. A.*, —— F.Supp.3d at —— – ——, 2021 WL 4734404, at *8–9. The district court further concluded that Plaintiffs were likely to succeed on their Title VII preemption claim, reasoning that Section 2.61 "effectively foreclose[s] the pathway to seek[ ] a religious accommodation ***279** that is guaranteed under Title VII." *Id.* at ——, 2021 WL 4734404 at *6. [11]

The State timely appealed. [12]

DISCUSSION

[3] **[4]** **[5]** Issuance of a preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 129 (2d ed. 1995)). Preliminary injunctive relief "should not be routinely granted." *Hanson Tr. PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985) (quoting *Medical Soc. of State of N.Y. v. Toia*, 560 F.2d 535, 537 (2d Cir. 1977)). When deciding whether to issue a preliminary injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008).

[6] **[7]** **[8]** **[9]** To obtain a preliminary injunction that "will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." [13] *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (internal quotation marks omitted). ***280** The movant must also show that the balance of equities supports the issuance of an injunction. *See Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020). We review the grant or denial of a motion for a preliminary injunction for abuse of discretion. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). A district court has exceeded the permissible bounds of its discretion when its "decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding" or "cannot be located within the range of permissible decisions." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 88 (2d Cir. 2006) (internal quotation marks omitted).

[10] Because the issues and arguments presented by these two appeals overlap substantially, we consider them together, issue by issue, differentiating between them only as we think necessary. [14]

I. Likelihood of Success on the Merits: Free Exercise of Religion Claim

Plaintiffs contend that Section 2.61 violates their rights under the Free Exercise Clause of the First Amendment because it does not include an exemption for employees who oppose receiving the vaccine on religious grounds.

On a motion for preliminary injunction, the movants must show that they are likely to prevail on their claim that the challenged government action is unlawful. On the record before us, we conclude that neither the *Dr. A.* Plaintiffs nor the *WTP* Plaintiffs have established a likelihood of success on their Free Exercise claims such that they are entitled to the "extraordinary relief" of a preliminary injunction. The district court's conclusion to the contrary in *Dr. A.* was legal error and rested on clearly erroneous findings of fact.

A. The *Smith* Standard

The First Amendment forbids the enactment of laws, either state or federal, that "prohibit[ ] the free exercise" of religion. [15] U.S. Const., amend. I. But not all laws that burden an individual's exercise of religion contravene this deeply rooted prohibition. Nor do they always trigger heightened scrutiny. The Supreme Court has long applied the standard set out by Justice Scalia for the Court in *Employment Division v. Smith* to determine whether a democratically enacted law that burdens religious practice is properly considered under rational basis review or strict scrutiny. *See* 494 U.S. at 879, 110 S.Ct. 1595; *Fulton v. City of Philadelphia*, —— U.S. ——, 141 S. Ct. 1868, 1876, 210 L.Ed.2d 137 (2021).

[11] **[12]** Under *Smith*, a "neutral law of general applicability" is subject to rational basis review even if it incidentally burdens a particular religious practice. 494 U.S. at 878–79, 110 S.Ct. 1595; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). We have observed that "[t]he teaching of *Smith* is that a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." ***281** *Central Rabbinical Congress of the U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014). But if a law is not neutral towards religion or is not generally applicable, it falls outside the boundaries of *Smith.* Then, for such a law to survive, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32, 113 S.Ct. 2217.

[13] Because they seek a preliminary injunction, Plaintiffs bear the initial burden of establishing a likelihood of success on the merits. In the context of their First Amendment claim, this means that Plaintiffs must show that they are likely to succeed on their claim that Section 2.61 is not a neutral or generally applicable rule. If they succeed at that step, the burden shifts to the State to show that it is likely to succeed in defending the challenged Rule under strict scrutiny. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial."). We conclude that, at this stage,

Plaintiffs have not carried their initial burden of showing that Section 2.61 is likely not neutral or generally applicable.

B. Neutrality

[14] The State "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877; *see also* *Lukumi*, 508 U.S. at 532, 113 S.Ct. 2217 (First Amendment protections apply when "the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). A law may be not neutral if it explicitly singles out a religious practice, but even a facially neutral law will run afoul of the neutrality principle if it "targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 533–34, 113 S.Ct. 2217.

[15] The Supreme Court has explained that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533, 113 S.Ct. 2217. Section 2.61 is facially neutral because it does not single out employees who decline vaccination on religious grounds. It applies to all "personnel," as carefully defined in the Rule, aside from those who qualify for the narrowly framed medical exemption.

Plaintiffs nonetheless maintain that the regulation "targets" them because of their religious opposition to receiving any one of the three currently available COVID-19 vaccines. In support, they point to events preceding the enactment of Section 2.61 and to several of Governor Hochul's public comments during the month of September as reflective of discriminatory intent on the part of the State. We take these claims in order.

First, Plaintiffs argue that the fact that the August 18 Order contained a religious exemption, but Section 2.61 does not, demonstrates that in Section 2.61 the State intended to "target" those who object to vaccination on religious grounds, and that this reflects anti-religion animus. The district court in *Dr. A.* agreed, finding that the difference between the two government actions amounted to a "religious gerrymander." *Dr. A.*, —— F.Supp.3d at ——, 2021 WL 4734404, at *8 (quoting *Lukumi*, 508 U.S. at 535, 113 S.Ct. 2217). Specifically, the district court determined that Section 2.61, enacted eight days after the August 18 Order, intentionally "amended the [August 18 Order] to eliminate the religious exemption." *Id.* As a result, the district court concluded that Plaintiffs had established a likelihood ***282** that Section 2.61 was non-neutral based on their argument that it "effectively targets religious opposition to the available COVID-19 vaccines." *Id.*

In *Lukumi*, the Supreme Court determined that the municipal ordinance at issue, which prohibited animal sacrifice, was not neutral because it effectively prohibited conduct only undertaken by adherents to the Santeria religion as a part of their religious practice. *See* 508 U.S. at 534–35, 113 S.Ct. 2217. In contrast, Section 2.61 requires all covered employees who can safely receive the vaccine to be vaccinated. It applies whether an employee is eager to be vaccinated or strongly opposed, and it applies whether an employee's opposition or reluctance is due to philosophical or political objections to vaccine requirements, concerns about the vaccine's efficacy or potential side effects, or religious beliefs. The absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required.

Further, that the August 18 Order contained a religious exemption, while Section 2.61 does not, falls short of rendering Section 2.61 non-neutral. The historical background of Section 2.61, to be determined following discovery, may be relevant to fully discerning the State's intent, but the evidence before the district courts failed to raise an inference that the regulation was intended to be a "covert suppression of particular religious beliefs." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Lukumi*, 508 U.S. at 534, 113 S.Ct. 2217). In suggesting that Section 2.61 "eliminated" the religious exemption, *WTP* Appellants' Br. at 10, Plaintiffs misconstrue the connection between the August 18 Order and the August 26 Rule. [16] The August 18 Order was issued by Commissioner Zucker alone as an emergency measure, intended to be in place for a maximum of 15 days, in response to reports of the surging Delta variant. Section 2.61, in contrast, was issued following collective deliberation by the 25-member Public Health and Health Planning Council under the emergency rulemaking procedures set forth in New York law, which provided more process, public input, and support for a measure that would be effective for 90 days subject to renewal. These procedures required the Council, among other things, to develop and issue specific findings and a

regulatory impact statement. NYS Admin. Proc. Act § 202(6)(iv), (viii). After this extensive process, the full Council came to the conclusion that the vaccine requirement should apply to a broader set of healthcare entities and, consistent with the State's highly effective existing vaccine requirements for measles and rubella (issued with no religious exemption), *see* 10 N.Y.C.R.R. §§ 405.3, 415.26, 751.6, 763.13, 766.11, 794.3, 1001.11, should not contain a religious exemption. The Council did not amend the August 18 Order: rather, it ***283** independently promulgated a new Rule. The record before the district courts does not demonstrate that the Rule was intended to "target" individuals opposed to receiving the COVID-19 vaccines because of their religious beliefs.

Additionally, much occurred in the time between August 18 and August 26: former Governor Andrew Cuomo resigned and Governor Hochul assumed office;[17] the FDA gave full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older;[18] and the Delta variant continued its spread, becoming the dominant strain of the virus in the State.[19] Even if the differing August 18 and August 26 requirements can be said to represent a shift in the State's policy position, Plaintiffs have not adduced facts establishing that the change stemmed from religious intolerance, rather than an intent to more fully ensure that employees at healthcare facilities receive the vaccine in furtherance of the State's public health goals.[20]

Second, on appeal, Plaintiffs assert that certain comments made by Governor Hochul in September reveal that Section 2.61 was intended to target them because of their religious opposition to the required vaccination.[21] Some of those comments, however, did not relate to Section 2.61 or workplace vaccine requirements at all, including Governor Hochul's statements at church services in which she urged those in attendance to get vaccinated.[22] Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions "non-neutral" under *Smith*. At a press briefing on September 15, in which she responded to the temporary restraining order issued in *Dr. A.*, Governor Hochul stated her "personal opinion" that no religious exemption is required and that she was "not aware of" any "sanctioned religious exemption from any organized religion."[23] This comment simply mirrors the State's litigation position and conveys ***284** the fact—which Plaintiffs do not contest—that many religious leaders have stated that vaccination is consistent with their faiths.[24] Governor Hochul's comments may more reasonably be understood to express general support for religious principles that she believes guide community members to care for one another by receiving the COVID-19 vaccine.

Altogether, Governor Hochul's comments, even considered in light of the differing approaches taken by Commissioner Zucker in the August 18 Order and the full Council in the Rule, do not evince animosity towards particular religious practices or a desire to target religious objectors to the vaccine requirement *because of* their religious beliefs. Rather, they suggest that the State wanted more people to obtain the vaccine out of a deep concern for public health, which is a religion-neutral government interest.

We therefore conclude that Plaintiffs at this stage have not carried their burden of establishing that Section 2.61 is likely not neutral. The district court's contrary conclusion in *Dr. A.* was based on a clearly erroneous assessment of the record before it.

C. General Applicability

[16] As the Supreme Court recently explained in *Fulton v. City of Philadelphia*, a law may not be "generally applicable" under *Smith* for either of two reasons: first, "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or, second, "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877 (internal quotation marks and alterations omitted). Here, Plaintiffs' argument, in substance, is that because Section 2.61 includes a medical exemption, it is not "generally applicable."

1. Whether Section 2.61 Permits "Comparable" Secular Conduct

[17] **[18]** **[19]** The general applicability requirement "protects religious observers against unequal treatment, and inequality that results when a legislature decides that the

governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Central Rabbinical Congress*, 763 F.3d at 196–97 (alterations omitted) (quoting *Lukumi*, 508 U.S. at 542–43, 113 S.Ct. 2217). [25] "A law is therefore not generally applicable if it is substantially underinclusive ***285** such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Id.* at 197. As the Supreme Court stated in a recent order, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1296, 209 L.Ed.2d 355 (2021). "Comparability is concerned with the risks various activities pose." *Id.* Notably, in *Smith*, a law criminalizing controlled substance possession was deemed generally applicable even though it contained an exception for substances prescribed for medical purposes. 494 U.S. at 874, 878–82, 110 S.Ct. 1595.

The State alleges that the following interests underlie its adoption of Section 2.61. First, it seeks to prevent the spread of COVID-19 in healthcare facilities among staff, patients, and residents. Second, by protecting the health of healthcare employees to ensure they are able to continue working, it aims to reduce the risk of staffing shortages that can compromise the safety of patients and residents even beyond a COVID-19 infection. Thus, the State maintains, the medical and any religious exemption differ in an important respect: applying the Rule to those who oppose vaccination on religious grounds furthers the State's asserted interests, whereas applying the Rule to those subject to medical contraindications or precautions based on pre-existing conditions would undermine the government's asserted interest in protecting the health of covered personnel. *Cf.* *Does 1-6 v. Mills*, —— F.4th ——, ——, 2021 WL 4860328, at *6 (1st Cir. Oct. 19, 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021). Vaccinating a healthcare employee who is known or expected to be injured by the vaccine would harm her health and make it less likely she could work. The State identified these objectives in the Regulatory Impact Statement accompanying the emergency rulemaking, and Plaintiffs do not point to any evidence suggesting that the interests asserted are pretextual or should otherwise be disregarded in the comparability analysis. Accordingly, the State makes a reasonable case that Section 2.61 contains a medical exemption not because it determined that "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation," *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217, but because applying the vaccination requirement to individuals with medical contraindications and precautions would not effectively advance those interests. Indeed, applying the vaccine to individuals in the face of certain contraindications, depending on their nature, could run counter to the State's "interest in protecting the integrity and ethics of the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)); *see also* *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (recognizing that the state may not be permitted to require vaccination of individuals with contraindications).

***286** Importantly, the State has also presented evidence that raises the possibility that the exemptions are not comparable in terms of the "risk" that they pose. *See* *Tandon*, 141 S. Ct. at 1296. It notes that the medical exemption is defined to be limited in duration, as the vaccine requirement is "inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health." 10 N.Y.C.R.R. § 2.61(d)(1). Although some of the contraindications and precautions identified by ACIP and incorporated into the Department of Health guidance are long-term health conditions, others are in fact explicitly temporary, such as having a current moderate-to-severe acute illness. [26] In contrast, a sincerely held religious belief that vaccination is inconsistent with one's religion is unlikely to change to permit vaccination in the future, absent the approval of new vaccines that are developed in a different way. The statistics provided by the State further indicate that medical exemptions are likely to be more limited in number than religious exemptions, and that high numbers of religious exemptions appear to be clustered in particular geographic areas. *See Dr. A.* Appellants' Reply Br. at 13 (citing *Serafin*, Index No. 908296-21, Doc. No. 57 (Decl. of Dorothy Persico)) (ratios of religious exemptions to medical exemptions among Erie County and Monroe County hospital workers were 18 to 1 and 23 to 1, respectively). [27]

[20] As a result, it may be feasible for healthcare entities to manage the COVID-19 risks posed by a small set of objectively defined and largely time-limited medical exemptions. In contrast, it could pose a significant barrier to effective disease prevention to permit a much greater number of permanent religious exemptions, which, according to the State's evidence, appear more commonly sought in certain locations. *See Serafin*, Index No. 908296-21, Doc. No. 57 (Decl. of Dorothy Persico). Although these differences may, after factual development, be shown to be too insignificant to render the exemptions incomparable, the limited evidence now before us suggests that the medical exemption is not "as harmful to the legitimate government interests purportedly justifying" the Rule as a religious exemption would be. *Central Rabbinical Congress*, 763 F.3d at 197.

In their efforts to show a likelihood of success on the merits, Plaintiffs counter that Section 2.61, by providing a medical but not a religious exemption, effectively prohibits religion-based refusals of vaccination while permitting "comparable" refusals on secular grounds. To establish comparability under *Smith*, Plaintiffs rely heavily on the general—and reasonable—proposition that any individual unvaccinated employee is likely to present statistically comparable risks of both contracting and spreading COVID-19 at any given healthcare facility, irrespective of the reason that the employee is unvaccinated. In Plaintiffs' view, the Supreme Court's orders in *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom* require us to confine our analysis to evaluating the risk of COVID-19 transmission posed by each unvaccinated individual.

Both of those cases involved challenges to occupancy limits placed on religious services, in an effort to curb COVID-19 transmission indoors, which were not applied to secular businesses with similarly high capacities. *See* ***287** *Roman Catholic Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 67, 208 L.Ed.2d 206 (2020); *Tandon*, 141 S. Ct. at 1297. Unlike Plaintiffs' proposed analysis here, however, *Roman Catholic Diocese* and *Tandon* did not involve a one-to-one comparison of the transmission risk posed by an individual worshipper and, for example, an individual grocery shopper. The Supreme Court's discussion in those cases, which compared the risks posed by groups of various sizes in various settings, suggests the appropriateness of considering aggregate data about transmission risks. *See, e.g.*, *Roman Catholic Diocese*, 141 S. Ct. at 66–67 (comparing "a large store in Brooklyn that could literally have hundreds of people shopping there on any given day" with "a nearby church or synagogue [that] would be prohibited from allowing more than 10 or 25 people for a worship service"). We doubt that, as an epidemiological matter, the number of people seeking exemptions is somehow excluded from the factors that the State must take into account in assessing the relative risks to the health of healthcare workers and the efficacy of its vaccination strategy in actually preventing the spread of disease. The record before us contains only limited data regarding the prevalence of medical ineligibility and religious objections, but what data we do have indicates that claims for religious exemptions are far more numerous.

Further, *Tandon* expressly instructs courts to consider "the asserted government interest that justifies the regulation at issue" when determining whether two activities are comparable for Free Exercise Clause purposes. *Tandon*, 141 S. Ct. at 1296. By confining their discussion of comparability to individual risk of transmission alone, Plaintiffs fail to engage with the reasons above, persuasive to us, that substantially distinguish the medically ineligible from the religious objectors in light of the State's asserted purposes. At this stage, Plaintiffs do not meaningfully challenge the legitimacy of the government's asserted interest in protecting the health of workers and maintaining staffing levels, or the proposition that requiring those who have been granted a medical exemption to be vaccinated would undermine those interests to a lesser degree than would a religious exemption.

As counsel for the *WTP* Plaintiffs acknowledged at oral argument, Plaintiffs here essentially contend that *all* existing vaccination mandates without a religious exemption necessarily fail the general applicability test because they likely all contain medical exemptions. At the same time, it appears that for decades, those charged with protecting the public health against infectious disease in New York State have required vaccination of *all* medically eligible employees and treated the requirement as a condition of employment in the healthcare arena. For example, the State has required healthcare employees to be vaccinated against rubella and measles since 1980 and 1991, respectively, without a religious exemption. Many of these vaccines, including the rubella vaccine, appear from the information available to us (and not to date contested by Plaintiffs) to have connections to the same fetal cell lines that form the basis for Plaintiffs' religious objections here. *See* Los Angeles County Dep't of

Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines*, *supra* note 5. Thus, if accepted, Plaintiffs' arguments would go beyond just being inconsistent with past practices: they would have potentially far-reaching and harmful consequences for governments' ability to enforce longstanding public health rules and protocols.

With a record as undeveloped on the issue of comparability as that presented here, we cannot conclude that the above vaccination requirements are *per se* not generally applicable, as Plaintiffs' argument would have it, so as to support a ***288** preliminary injunction at this time. *See* *Smith*, 494 U.S. at 888–89, 110 S.Ct. 1595 (counting "compulsory vaccination laws" among those generally applicable civic obligations for which no religious exemption is required); *see also* *Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 88 L.Ed. 645 (1944) ("[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease ...." (footnote omitted)); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam) (maintaining that religious exemptions to vaccine mandates are not constitutionally required).

The record before the district courts was sparse. It does not support a conclusion that Plaintiffs have borne their burden of demonstrating that the medical exemption provided in Section 2.61 and the religious exemption sought are likely comparable.

2. Whether Section 2.61 Provides for a System of Individualized Exemptions

[21] General applicability may be absent when a law provides "a mechanism for individualized exemptions," *Smith*, 494 U.S. at 884, 110 S.Ct. 1595, because it creates the risk that administrators will use their discretion to exempt individuals from complying with the law for secular reasons, but not religious reasons. For instance, in *Smith*, the Supreme Court distinguished generally applicable laws from an unemployment compensation statute under which applicants were eligible for benefits if they presented "good cause" for their unemployment, which allowed administrators, in their discretion, to refuse an exemption if an applicant could not work for religious reasons, but to grant an exemption if an applicant could not work for other personal reasons. 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Bowen v. Roy*, 476 U.S. 693, 708, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (plurality opinion) and citing *Sherbert v. Verner*, 374 U.S. 398, 401 & n.4, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)). The Court observed that the context of the unemployment compensation system "lent itself to individualized government assessment of the reasons for the relevant conduct." *Id.* Similarly, the Court recently found a system of individualized exemptions to exist where an official had "sole discretion" to grant or deny exemptions to the anti-discrimination provision in contracts between the City of Philadelphia and adoption service providers. *Fulton*, 141 S. Ct. at 1878–79.

[22] **[23]** As other Circuits have noted, however, "an exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) (internal quotation marks and alteration omitted); *see also* *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015) (finding that the challenged "rules do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria"), *cert. denied*, —— U.S. ——, 136 S. Ct. 2433, 195 L.Ed.2d 870 (2016); *cf.* *Intercommunity Ctr. for Justice & Peace v. I.N.S.*, 910 F.2d 42, 45 (2d Cir. 1990) (concluding that immigration law that prohibited knowingly employing an unauthorized immigrant did "not provide for a discretionary exemption that is applied in a manner that fails to accommodate free exercise concerns" despite its inclusion of an exemption for employing certain household employees hired before November 1986). The "mere existence of an exemption ***289** procedure," absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007).

The *WTP* Plaintiffs argue that the medical exemption in Section 2.61 creates a mechanism for individualized exemptions. They are mistaken. The medical exemption here does not " 'invite' the government to decide which reasons for not complying with the policy are worthy of

solicitude." *Fulton*, 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884, 110 S.Ct. 1595). Instead, the Rule provides for an objectively defined category of people to whom the vaccine requirement does not apply: employees who present a certification from a physician or certified nurse practitioner attesting that they have a pre-existing health condition that renders the vaccination detrimental to their health, in accordance with generally accepted medical standards, such as those published by ACIP,[28] for the period during which the vaccination remains detrimental to their health. *See* 10 N.Y.C.R.R. § 2.61(d)(1). A written description of the nature and duration of the condition must be furnished, and the exemption must be documented. On its face, the Rule affords no meaningful discretion to the State or employers, and Plaintiffs have not put forth any evidence suggesting otherwise. For example, Plaintiffs have not plausibly alleged or offered evidence to suggest that employees are requesting, or that the State is allowing, medical exemptions that do not conform to the Rule or applicable standards.

That physicians and nurse practitioners must use their medical judgment to determine whether a particular individual has a contraindication or precaution against receiving the vaccine does not render the exemption discretionary. Indeed, *Smith* itself ***290** specifically held that a scheme that included a type of medical exemption—by not criminalizing the use of controlled substances when prescribed by a medical practitioner—was nonetheless generally applicable under the Free Exercise Clause. *See* *Smith*, 494 U.S. at 874, 110 S.Ct. 1595. If the State can lawfully choose to apply the vaccination requirement to those with religious objections but not those medically unable to get vaccinated because the two are not comparable—and, as explained above, Plaintiffs have not established a likelihood of success on their argument to the contrary—then Section 2.61 appears to leave no room for the State to favor impermissible secular reasons for declining vaccination over religious reasons.[29]

* * *

[24] Based on the foregoing, Plaintiffs have not established, at the preliminary injunction stage, that they are likely to succeed in showing that Section 2.61 is not neutral or generally applicable. Accordingly, rational basis review applies. *See* *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82, 110 S.Ct. 1595). Section 2.61 easily meets that standard, which requires that the State have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal. *See* *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 191 (2d Cir. 2017). Faced with an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of over 750,000 in the United States and some 55,000 in New York, the State decided as an emergency measure to require vaccination for all employees at healthcare facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated. This was a reasonable exercise of the State's power to enact rules to protect the public health.[30] *See* *Jacobson*, 197 U.S. at 25, 25 S.Ct. 358; *Phillips*, 775 F.3d at 542–43.

II. Likelihood of Success on the Merits: Supremacy Clause and Title VII Claim

[25] **[26]** The *Dr. A.* Plaintiffs contend that Section 2.61 contravenes the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment on the basis of religion. ***291** 42 U.S.C. § 2000e-2(a)(1)–(2). To succeed on this type of preemption claim, plaintiffs must show that "local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).[31]

[27] Plaintiffs construe Section 2.61 to prohibit healthcare employers from making reasonable accommodations as otherwise required by Title VII. Plaintiffs cite the absence of an express religious exemption in Section 2.61 in support of their position that the Rule simply leaves "no room for Plaintiffs' employers even to consider their reasonable religious accommodation requests as required by federal law under Title VII." *Dr. A.* Appellees' Br. at 29 (emphasis omitted).[32]

The District Court for the Northern District of New York agreed, ruling that Plaintiffs were likely to succeed on the merits of this claim. *See* *Dr. A.*, —— F.Supp.3d at ——, 2021 WL 4734404, at *6. The district court held that Section 2.61 "do[es] not make room for 'covered entities' to consider requests for reasonable **religious** **accommodations**," and instead requires all personnel at covered entities to be

vaccinated. *Id.* The district court observed that the employers of some Plaintiffs had revoked previously afforded religious exemptions or religious accommodations to COVID-19-vaccine requirements, citing the State's adoption of Section 2.61. *Id.* In the district court's view, Plaintiffs adequately demonstrated that Section 2.61 "effectively foreclose[s] the pathway to seeking a religious exemption that is guaranteed under Title VII." *Id.*

Title VII makes it unlawful for employers "to discharge ... or otherwise to discriminate against any individual" in his or her employment "because of such individual's ... religion." 42 U.S.C. § 2000e-2(a)(1). The statute defines "religion" to include "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 employer's business." *Id.* § 2000e(j); *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); *cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015).

[28] The *Dr. A.* Plaintiffs argue, as described above, that the absence of a religious exemption in Section 2.61 prohibits them from seeking reasonable accommodations from their employers under Title ***292** VII for their sincerely held religious beliefs. Section 2.61 is silent, however, on the employment-related actions that employers may take in response to employees who refuse to be vaccinated for religious reasons. The State observes that "[n]othing in [Section 2.61] precludes employers from accommodating religious objectors by giving them ... assignments—such as telemedicine—where they would not pose a risk of infection to other personnel, patients, or residents." *Dr. A.* Appellants' Br. at 62. We agree with the State.

Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule. Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious ***accommodation*** allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement. *See also Mills*, —— F.4th at ——, 2021 WL 4860328, at *10 ("The appellants' Supremacy Clause argument rests on their assertion that the hospitals ... have claimed that the protections of Title VII are inapplicable in the State of Maine. The record simply does not support that argument. ... [T]he hospitals merely dispute that Title VII requires them to offer the appellants the religious exemptions they seek." (internal quotation marks and alteration omitted)).

[29] Contrary to the *Dr. A.* Plaintiffs' interpretation of the statute, Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated. To avoid Title VII liability for religious discrimination, an employer "need not offer the accommodation the employee prefers." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). Instead, an employer must offer a *reasonable* accommodation that does not cause the employer an undue hardship. Once "any reasonable accommodation is provided, the statutory inquiry ends." *Id.* Because Section 2.61's text does not foreclose all opportunity for Plaintiffs to secure a reasonable accommodation under Title VII, the Rule does not conflict with federal law. Therefore, the district court's conclusion to the contrary constituted legal error.

The district court's conclusion also turned on clearly erroneous factual findings. At this stage, the *Dr. A.* Plaintiffs have submitted little in support of their broad allegations about the effect of Section 2.61. The district court reached the conclusion that accommodation by their employers was foreclosed upon the *Dr. A.* Plaintiffs' say-so, without any documentation supporting Plaintiffs' allegations that they were denied reasonable accommodations from their employers. The district court granted the *Dr. A.* Plaintiffs' motion for a preliminary injunction without a hearing and without knowing the identities of Plaintiffs' employers or the substance of Plaintiffs' interactions with their employers. It may turn out that the opportunities for a reasonable accommodation under Title VII for religious objectors to the vaccine are numerous, or it may be that there are so few as to be illusory. Perhaps accommodations for the medically ineligible leave few available for the religious objectors.[33] Or perhaps the requests for accommodations ***293** in each category will vary by employer, by part of the State, or by employee demographics. But without any data

in the record, we cannot conclude that Plaintiffs have met their burden to show a likelihood of success on the merits, and we decline to draw any conclusion about the availability of reasonable accommodation based solely on surmise and speculation.

At this preliminary stage, we therefore conclude that the district court erred by finding that Plaintiffs are likely to succeed on their claim that Section 2.61 is preempted by Title VII and therefore violative of the Supremacy Clause.

III. Likelihood of Success on the Merits: Rights to Privacy, Medical Freedom, and Bodily Autonomy Claim

[30] The *WTP* Plaintiffs maintain on appeal that they are likely to succeed in establishing that Section 2.61 violates their fundamental rights to privacy, medical freedom, and bodily autonomy under the Fourteenth Amendment. [34] This argument also fails.

[31] Both this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional. *See* *Jacobson*, 197 U.S. at 25–31, 37, 25 S.Ct. 358; *Phillips*, 775 F.3d at 542–43. Plaintiffs' argument that the Supreme Court's decision in *Roman Catholic Diocese* "expressly overruled" *Jacobson* is a mystery, given that the majority did not even mention *Jacobson*. *WTP* Appellants' Br. at 35; *see generally* *Roman Catholic Diocese*, 141 S. Ct. 63.

Their alternative contention that *Jacobson* and *Phillips* have been implicitly overruled by the Supreme Court likewise finds no support in caselaw. In *Cruzan*, a case relied upon by Plaintiffs for the proposition that they have a fundamental constitutional right to refuse medical treatment, the Court expressly recognized its holding in *Jacobson* that "an individual's liberty interest in declining an unwanted smallpox vaccine" was outweighed there by "the State's interest in preventing disease." *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). Plaintiffs provide no basis for concluding that the vaccination requirement here, considerably narrower than the city-wide mandate in *Jacobson*, violates a fundamental constitutional right. [35] Although individuals who object ***294** to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice. Vaccination is a condition of employment in the healthcare field; the State is not forcibly vaccinating healthcare workers. As in *Phillips*, the instant "challenge to the mandatory vaccination regime is therefore no more compelling than Jacobson's was more than a century ago." 775 F.3d at 542. *Cf.* *Klaassen v. Trs. of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("[S]uch [a substantive due process] argument depends on the existence of a fundamental right ingrained in the American legal tradition. Yet *Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack such a right.").

Accordingly, the *WTP* Plaintiffs have not established that they are likely to succeed on the merits of their Fourteenth Amendment claim.

IV. Irreparable Harm, the Public Interest, and the Balance of Equities

Plaintiffs are not entitled to a preliminary injunction because they cannot, on the present record, show a likelihood of success on the merits. We nonetheless briefly address the remaining preliminary injunction requirements: "irreparable harm absent injunctive relief"; the "public interest weighing in favor of granting the injunction"; and "the balance of equities tip[ping] in [the movant's] favor," *Yang*, 960 F.3d at 127, and determine that Plaintiffs have not successfully met them.

A. Irreparable Harm

[32] The law recognizes the harm that necessarily results when the State unconstitutionally burdens religious exercise. "Religious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation because a presumption of irreparable injury flows from a violation of constitutional rights." *Agudath Israel*, 983 F.3d at 636 (internal quotation marks and alteration omitted); *see also* *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction."). Although Plaintiffs are subject to meaningful burdens on their religious practice if they choose

to obtain the COVID-19 vaccine, because they have failed to demonstrate a likelihood of success on their First Amendment or other constitutional claims, their asserted harm is not of a constitutional dimension. Thus, Plaintiffs fail to meet the irreparable harm element simply by alleging an impairment of their Free Exercise right.

[33] **[34]** Plaintiffs also contend that they face imminent irreparable harm from loss of employment and professional standing if they refuse the COVID-19 vaccine on religious grounds. We acknowledge that Plaintiffs may possibly suffer significant employment consequences if they refuse on religious grounds to be vaccinated. It is well settled, however, that adverse employment consequences are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages. *See* *Sampson v. Murray*, 415 U.S. 61, 91–92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) ("[L]oss of income and ... the claim that her reputation ***295** would be damaged ... falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction[.]"); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief."). Because Plaintiffs' economic harms under Title VII could be remedied with money damages, and reinstatement is a possible remedy as well, we conclude that Plaintiffs have failed to demonstrate that they will suffer irreparable harm absent injunctive relief.

We pause to recognize, should the issue remain on remand, that this case raises difficult, apparently unusual questions as to imminent irreparable harm. Perhaps, if they prevail at the conclusion of this litigation, Plaintiffs would seek lost wages, but it is not at all clear who would pay them. To the extent Plaintiffs allege that they will suffer adverse employment consequences or loss of professional standing if not provided accommodations under Title VII, Plaintiffs might seek money damages from their employers. Private medical-provider employers might make a persuasive argument that they should not have to pay because they were in effect compelled by law to terminate the employment. Absent a waiver, however, sovereign immunity would likely prevent Plaintiffs from obtaining money damages from the State. *See* *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254, 131 S.Ct. 1632, 179 L.Ed.2d 675 (2011).

We emphasize, however, that we do not place any weight on the issue of remediation of Plaintiffs' financial losses at this preliminary injunction stage. The district courts can consider the issue, should it be necessary to do so, upon a determination of the permanent injunction request, presumably upon further factual development and findings.

B. Public Interest and Balance of Equities

[35] **[36]** Plaintiffs have also failed to demonstrate that the public interest weighs in favor of enjoining enforcement of Section 2.61. When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge. *See* *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 58–59 (2d Cir. 2020). Here, the State has an indisputably compelling interest in ensuring that the employees who care for hospital patients, nursing home residents, and other medically vulnerable people in its healthcare facilities are vaccinated against COVID-19, not just to protect them and those with whom they come into contact from infection, but also to prevent an overburdening of the healthcare system. Although Plaintiffs undoubtedly face a difficult choice if their employers deny **religious accommodations**—whether to be **vaccinated** despite their **religious** beliefs or whether to risk termination of their jobs—such hardships are outweighed by the State's interest in maintaining the safety within healthcare facilities during the pandemic.

Plaintiffs assert that the State "will suffer no harm as the New York healthcare system has operated for the last year without interruption or catastrophe" without requiring vaccination for healthcare workers. *WTP* Appellants' Br. at 11. Defining the relevant time frame in this way notably omits the first wave of the pandemic, during which New York hospitals were in crisis, with frontline nurses and physicians reportedly experiencing some of the highest rates of infection and death; New York City nursing homes experienced such a ***296** high number of deaths that their morgue capacity was exceeded. *See* Br. for *Amicus Curiae* Greater New York Hospital Association ("GNYHA *Amicus* Br.") at 3 (citing Miriam Mutambudzi et al., *Occupation and Risk of Severe COVID-19: Prospective Cohort Study of 120 075 UK Biobank Participants*, 78 Occupational & Envt'l Med. 307, 311 (2021)); New York State Office of the Attorney General, *Nursing Home Response to COVID-19 Pandemic* 12 (Jan. 30, 2021), https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf.

But even within the past year, healthcare facilities in the State have been under strain. According to *amicus* Greater New York Hospital Association, not only has transmission of the virus continued in hospitals even with the use of personal protective equipment, testing, and other measures, *see* GNYHA *Amicus* Br. at 9, 12–14, but hospital workers have also experienced a "parallel pandemic" of burnout, anxiety, depression, and other mental health issues, *id.* at 16. Researchers have found that this phenomenon stems from "a perceived lack of control, treatment of other healthcare workers for COVID-19, and uncertainty about colleagues' infection status," and it has been accompanied by increased rates of resignation and retirement as well as incidents of self-harm. *Id.* at 16–17 (citing Ari Schechter et al., *Psychological Distress, Coping Behaviors, and Preferences for Support among New York Healthcare Workers During the COVID-19 Pandemic*, 66 Gen. Hosp. Psychiatry 1, 3 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7297159, and Wendy Dean, *Suicides of Two Health Care Workers Hint at the COVID-19 Mental Health Crisis to Come*, STAT News (Apr. 30, 2020), https://www.statnews.com/2020/04/30/suicides-two-health-care-workers-hint-at-covid-19-mental-health-crisis-to-come), 19 (citing Bridget Balch, *"Worst Surge We've Seen": Some Hospitals in Delta Hot Spots Close to Breaking Point*, AAMC (Aug. 24, 2021), https://www.aamc.org/news-insights/worst-surge-we-ve-seen-some-hospitals-delta-hot-spots-close-breaking-point).

Therefore, Plaintiffs have not demonstrated that "the balance of equities tips in [their] favor." *Yang*, 960 F.3d at 127. Because Section 2.61 furthers the State's compelling interest and Plaintiffs have not shown a likelihood of demonstrating that their constitutional rights are violated by the Rule, they have also failed to show that a preliminary injunction preventing the Rule's implementation serves the public interest. Whether this issue will ultimately carry any weight when the district courts decide Plaintiffs' entitlement to a permanent injunction on remand, we need not and do not decide.

CONCLUSION

For the foregoing reasons, the order of the United States District Court for the Eastern District of New York is **AFFIRMED**. The order of the United States District Court for the Northern District of New York is **REVERSED**, and the preliminary injunction entered by that court is **VACATED**. These tandem cases are **REMANDED** to their respective district courts for further proceedings consistent with the Order entered on October 29, 2021, and this Opinion.

APPENDIX

Section 2.61. Prevention of COVID-19 transmission by covered entities

<Emergency action effective Aug. 26, 2021>

(a) Definitions.

(1) *Covered entities* for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in ***297** section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

(2) *Personnel*, for the purposes of this section, shall mean all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.

(3) *Fully vaccinated*, for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

(i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department.

(c) [FN1] Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must ***298** be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (1) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

(1) the number and percentage of personnel that have been vaccinated against COVID-19;

(2) the number and percentage of personnel for which medical exemptions have been granted;

(3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face

covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

Credits

Emergency rulemaking eff. Aug. 26, 2021, expires Nov. 23, 2021.

[FN1]

So in original.

Current with amendments included in the New York State Register, Volume XLIII, Issue 40 dated October 6, 2021. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61, 10 NY ADC 2.61

All Citations

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Footnotes

1 The complete text of Section 2.61 is provided in an Appendix to this Opinion.

2 The full text of this medical exemption under Section 2.61(d)(1) reads as follows:

> (1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

10 N.Y.C.R.R. § 2.61(d)(1).

3 We may take judicial notice of the existence of affidavits filed in another court. *See* *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). In addition, our Court has ruled that courts may consider hearsay evidence such as affidavits when determining whether to grant a preliminary injunction. *See* *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010); *see also* *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (observing that preliminary injunctive determinations may be based on "procedures that are less formal and evidence that is less complete than in a trial on the merits"). Thus, we consider the State's data submitted in affidavits filed in other courts. Although this data was not before the district court in *WTP*—and therefore Plaintiffs have not had an opportunity to contest its accuracy before the district court—they have not raised such a concern in their reply brief in *WTP* or at oral argument, nor have they challenged this Court's ability to consider the State's submissions. More broadly, Plaintiffs do not appear to contest the State's assertion derived from this data that religious exemptions are more common than medical exemptions, but instead consider this fact irrelevant.

4 Plaintiff We The Patriots USA, Inc., states that it is a section 501(c)(3) organization that "is dedicated to promoting constitutional rights and other freedoms through education, outreach, and public interest litigation,

thereby advancing religious freedom, medical freedom, parental rights, and educational freedom for all." *WTP* App'x at 8.

5 *See, e.g.*, Los Angeles County Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines* (Apr. 20, 2021), http://publichealth.lacounty.gov/media/coronavirus/docs/vaccine/VaccineDevelopment_FetalCellLines.pdf; Michigan Dep't of Health & Human Servs., *COVID-19 Vaccines & Fetal Cells* (Apr. 21, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf; North Dakota Dep't of Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), https://www.health.nd.gov/sites/www/files/documents/COVID% 20Vaccine% 20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf.

6 These cell lines "have been used to create vaccines for diseases such as hepatitis A, rubella, and rabies. Abortions from which fetal cells were obtained were elective and were not done for the purpose of vaccine development." Los Angeles County Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines*, *supra* note 5.

7 The use of these cell lines was explained in press statements and publicly available research during the development of the COVID-19 vaccines. *See* Press Release, Johnson & Johnson, Johnson & Johnson Announces a Lead Vaccine Candidate for COVID-19; Landmark New Partnership with U.S. Department of Health & Human Services; and Commitment to Supply One Billion Vaccines Worldwide for Emergency Pandemic Use (Mar. 30, 2020), https://www.jnj.com/johnson-johnson-announces-a-lead-vaccine-candidate-for-covid-19-landmark-new-partnership-with-u-s-department-of-health-human-services-and-commitment-to-supply-one-billion-vaccines-worldwide-for-emergency-pandemic-use (describing use of PER.C6 cell line in Johnson & Johnson vaccine); Annette B. Vogel et al., *A Prefusion SARS-Cov-2 Spike RNA Vaccine Is Highly Immunogenic and Prevents Lung Infection in Non-human Primates*, bioRxiv (Sept. 8, 2020), https://doi.org/10.1101/2020.09.08.280818 (referencing use of HEK293 cell line in early testing stages of Pfizer-BioNTech vaccine); Kizzmekia S. Corbett et al., *SARS-CoV-2 mRNA Vaccine Design Enabled by Prototype Pathogen Preparedness*, 586 Nature 567, 572 (Oct. 22, 2020), https://doi.org/10.1038/s41586-020-2622-0 (referencing use of HEK293 cell line in testing of Moderna vaccine).

8 They did not name Northwell Health as a defendant or seek relief against it.

9 In their brief on appeal, the *WTP* Plaintiffs state that Northwell Health terminated Nurse Bono's employment on September 29. The *WTP* Plaintiffs also assert that Nurse Synakowski was informed by her employer that her employment would be terminated by September 21 if she was not vaccinated by then, but in their briefs filed since that date they have not stated whether that came to pass.

10 The district court granted a request by the *Dr. A.* Plaintiffs to proceed pseudonymously. The *Dr. A.* Plaintiffs do not identify their employers in their complaint.

11 The district court declined to consider the merits of Plaintiffs' Equal Protection claim. Plaintiffs do not pursue this claim on appeal.

12 Having lost before the district court in the Eastern District on September 12—before the *Dr. A.* court entered its temporary restraining order (on September 14) or its preliminary injunction (on October 12)—the *WTP* Plaintiffs successfully sought interim relief from the September 28 motions panel in this Court. Motion Order, *WTP*, No. 21-2179, Dkt. No. 65 (Sept. 30, 2021). Oral argument on their appeal from the denial of a preliminary injunction was scheduled to be heard on an expedited basis on October 14 by a duly convened regular argument panel—the panel that now files this opinion per curiam. Case Calendaring, *WTP*, No. 21-2179, Dkt. No. 68. When the district court in the Northern District granted the *Dr. A.* Plaintiffs' request for a preliminary injunction on October 12, the State promptly appealed. Notice of Appeal, *Dr. A.*, No. 21-2566, Dkt. No. 1. Because the two cases request virtually identical relief and offer overlapping arguments, we determined not to hear the *WTP* Plaintiffs' appeal on October 14, separate from the State appeal in *Dr. A.*, but rather to hear the cases in tandem. We scheduled the combined oral argument for October 27, again on an expedited

basis and with full briefing by the *Dr. A.* Plaintiffs and the State. Order, *WTP*, No. 21-2179, Dkt. No. 116; *Dr. A.*, No. 21-2566, Dkt. No. 8. The parties helpfully coordinated their oral argument presentations to avoid needless repetition.

13 In *Dr. A.*, the district court applied the likelihood-of-success standard, and the *Dr. A.* Plaintiffs do not now argue that this was error. The parties in *WTP*, in contrast, cite our Court's alternative, less demanding "serious questions" standard for obtaining preliminary injunctive relief, which authorizes injunctive relief if the movant has shown imminent irreparable harm as well as "sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). But we have consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme, including in cases involving emergency regulations and orders. *See*, *e.g.*, *Agudath Israel*, 983 F.3d at 631; *Alleyne v. New York State Educ. Dep't*, 516 F.3d 96, 99–101 (2d Cir. 2008). The *WTP* parties have not explained why the "serious questions" standard should nonetheless govern here. Accordingly, in our review of both appeals, we apply the likelihood-of-success standard.

14 Although the district court's order denying the *WTP* Plaintiffs' motion did not state the basis for its decision, we may "affirm on any ground supported by the record." *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004).

15 In relevant part, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The stricture has been held to limit the authorities of the states as well. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

16 In a recent decision, the First Circuit similarly misunderstood the connection between the August 18 Order and August 26 Rule when attempting to distinguish the New York vaccination mandate from the Maine vaccination mandate. *See* *Does 1-6 v. Mills*, —— F.4th ——, 2021 WL 4860328 (1st Cir. Oct. 19, 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, No. 21A90, 2021 WL 5027177(Oct. 29, 2021). The First Circuit mistakenly wrote, "Eight days after New York officials promulgated a version of the regulation containing a religious exemption, they amended the regulation to eliminate the religious exemption." *Id.* —— F.4th at ——, 2021 WL 486032 at *9. However, as we explain above, there was no "amending" of the regulation to remove a religious exemption. Rather, the August 18 Order and the August 26 Rule were issued through two separate processes.

17 New York State Governor's Office, Video, Audio, Photos & Rush Transcript: Kathy Hochul Is Sworn in as 57th Governor of New York State (Aug. 24, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-kathy-hochul-sworn-57th-governor-new-york-state.

18 Press Release, U.S. Food and Drug Administration, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

19 *See Dr. A.* Sp. App'x at 39.

20 This is another area in which factual development can be expected to shed more light on the circumstances surrounding the creation of both the Order and the Rule and validate or disprove Plaintiffs' allegations.

21 Governor Hochul made the statements at issue after both the *Dr. A.* Plaintiffs and the *WTP* Plaintiffs filed their preliminary injunction motions.

22 *See* New York State Governor's Office, Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center (Sept. 26, 2021), https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center; New York State Governor's Office, Video, Audio, Photos & Rush Transcript: Governor Hochul Attends Services at Abyssinian Baptist Church in Harlem (Sept. 12, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-attends-services-abyssinian-baptist-church.

23 *See* New York State Governor's Office, Video & Rush Transcript: Governor Hochul Holds Q&A Following COVID-19 Briefing (Sept. 15, 2021), https://www.governor.ny.gov/news/video-rough-transcript-governor-hochul-holds-qa-following-covid-19-briefing.

24 *See, e.g.*, Devin Watkins, *Pope Francis Urges People to Get Vaccinated Against Covid-19*, Vatican News (Aug. 18, 2021), https://www.vaticannews.va/en/pope/news/2021-08/popefrancis-appeal-covid-19-vaccines-act-of-love.html; Chairmen of the Committee on Doctrine and the Committee on Pro-Life Activities, *Moral Considerations Regarding the New COVID-19 Vaccines*, U.S. Conf. of Catholic Bishops (Dec. 11, 2020), https://www.usccb.org/moral-considerations-covid-vaccines.

25 Plaintiffs suggest that our decision in *Central Rabbinical Congress* was overruled by the Supreme Court's orders in *Roman Catholic Diocese* and *Tandon*. But *Central Rabbinical Congress*'s formulation of the standard for identifying "comparable secular activity"—"secular conduct that is at least as harmful [as religious conduct] to the legitimate government interests purportedly justifying it," 763 F.3d at 197—is consistent with the Supreme Court's statements in both of those cases. *See* *Roman Catholic Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 67, 208 L.Ed.2d 206 (2020) (stating that less-regulated factories, schools, and shopping centers were much more crowded than churches and synagogues or had contributed to the spread of COVID-19, in contrast to the religious institutions' "admirable safety records"); *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1297, 209 L.Ed.2d 355 (2021) (considering secular activities comparable where they were not found to "pose a lesser risk of transmission than [plaintiffs'] proposed religious exercise at home").

26 *See FAQs*, *supra* at 10.

27 As discussed, Plaintiffs do not contest the State's assertion that higher numbers of employees claim religious exemptions than medical exemptions. *See supra* note 3.

28 Under the generally accepted medical standards published by ACIP, cognizable contraindications to the COVID-19 vaccines are limited to "[s]evere allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine" and "[i]mmediate (within 4 hours) allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine." *FAQs*, *supra* at 10 (citing ACIP standards). Precautions to the vaccines are limited to "[c]urrent moderate to severe acute illness[,] ... [h]istory of an immediate allergic reaction to any other (not COVID-19) vaccine or injectable therapy (excluding allergy shots)[, and] [h]istory of myocarditis or pericarditis after receiving the first dose of an mRNA COVID-19 vaccine." *Id.* (citing ACIP standards). Additionally, individuals with a "contraindication to one type of COVID-19 vaccine (e.g., mRNA COVID-19 vaccines) have precautions to another type of COVID-19 vaccine (e.g., Janssen/Johnson & Johnson vaccine)." *Id.* (citing ACIP standards). An individual who has a contraindication to the vaccine cannot be safely vaccinated, but "[m]ost people deemed to have a precaution to a COVID-19 vaccine at the time of their vaccination appointment can and should be administered vaccine" after conducting a risk assessment with a healthcare provider. Centers for Disease Control and Prevention, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States: Contraindications and Precautions* (Oct. 25, 2021), https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#Contraindications. The specificity of these limitations stands in contrast to the absence of limitations and specificity in the medical exemption provided in the Maine statute recently subject to review and consideration by the Supreme Court. *See* *Mills*, —— F.4th at ——, 2021 WL 4860328, at *5 (construing Me. Rev. Stat. tit. 22, § 802); *Mills*, —— U.S. at ——, —— S.Ct. ——, 2021 WL 5027177, at *2 (Gorsuch, *J.*, dissenting from the denial of application for injunctive relief) (stating that the law does not "limit what may qualify as a valid 'medical' reason to avoid inoculation").

29 In *Dahl v. Bd. of Trustees of Western Michigan Univ.*, 15 F.4th 728 (6th Cir. 2021) (per curiam), the Sixth Circuit, under different factual circumstances, ruled that a student-athlete vaccine mandate that provided that medical and religious exemptions would be considered on an individual basis at the discretion of the University

meant that the school's vaccine mandate was not generally applicable under *Fulton*. *Id.* at 729–30, 733–34. We of course are not bound by that analysis, and we believe *Dahl* to have addressed a factual setting significantly different from that presented here. In *Dahl*, the University was afforded so much discretion to rule on individual cases, and so few standards governed the exercise of that discretion, as to leave room for the University to apply potentially discriminatory standards, or at least to avoid a neutral application of generally applicable principles. *See id.* at 733–34. Here, we think the standards articulated by ACIP and binding the State employers are sufficiently well-defined to avoid grossly pretextual or discriminatory application—and Plaintiffs have not met their burden to show that is not the case. Examined at a proper perspective—one suitable to dealing with large populations in a public health crisis—we see no basis for adopting the *Dahl* court's approach here.

30 We also observe that, irrespective of whether Section 2.61 is ultimately upheld at the conclusion of this litigation, private healthcare institutions may impose vaccination requirements of their own, subject to any relevant limitations imposed by Title VII and other applicable law but regardless of the limitations that the First Amendment imposes on the State.

31 "In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship*, 612 F.3d at 104 (internal quotation marks omitted). Plaintiffs here invoke conflict preemption.

32 Although the *Dr. A.* Plaintiffs style their preemption claim as a challenge brought pursuant to the Supremacy Clause, the Supreme Court has held that the Supremacy Clause does not create an independent cause of action. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015) ("[T]he Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.") (internal quotation marks and citations omitted).

33 Although the Rule does not prevent healthcare entities from taking additional precautions to minimize the transmission risk posed by medically exempt employees, healthcare entities may permit a medically exempt employee to continue normal job responsibilities provided they comply with requirements for personal protective equipment. *See FAQs*, *supra* at 10.

34 The *WTP* Plaintiffs' complaint describes these rights as arising from the First, Fourth, Fifth, and Fourteenth Amendments, but on appeal they assert that these rights are derived from either the Fourteenth Amendment alone or a combination of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Because the *WTP* Plaintiffs do not make any particularized argument for why the fundamental rights they assert may be implicated by constitutional provisions other than the Fourteenth Amendment, we evaluate only their challenge as to the Fourteenth Amendment.

35 Plaintiffs' reliance on *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), also fails to persuade. These cases do not establish a broad fundamental privacy right for all medical decisions made by an individual—and particularly not for a decision with such broad community consequences as declining vaccination against a highly contagious disease while working in contact with vulnerable people at healthcare facilities. This Court cannot find an overriding privacy right when doing so would conflict with *Jacobson*. Although in 1905, when it was decided, *Jacobson* might have been read more narrowly, for over 100 years it has stood firmly for the proposition that

the urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination. *Jacobson* remains binding precedent.

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17 F.4th 368
United States Court of Appeals, Second Circuit.

WE THE PATRIOTS USA, INC., Diane Bono, Michelle Melendez, Michelle Synakowski, Plaintiffs-Appellants,
v.
Kathleen HOCHUL, Howard A. Zucker, M.D., Defendants-Appellees.
Dr. A., Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., Physician Liaison X., Plaintiffs-Appellees,
v.
Kathy Hochul, Governor of the State of New York, in her official capacity, Dr. Howard A. Zucker, Commissioner of the New York State Department of Health, in his official capacity, Letitia James, Attorney General of the State of New York, in her official capacity, Defendants-Appellants.

Docket No. 21-2179
|
August Term, 2021
|
Docket No. 21-2566
|
Argued: October 27, 2021
|
Decided: November 12, 2021

Synopsis

Background: Healthcare workers and membership organization brought actions alleging that state's emergency rule requiring healthcare facilities to ensure that certain employees were vaccinated against COVID-19, with no religious exemption, violated Free Exercise Clause, Supremacy Clause, and Fourteenth Amendment. The United States District Court for the Eastern District of New York, William F. Kuntz, J., denied plaintiffs' motion for preliminary injunction, and the United States District Court for the Northern District of New York, David N. Hurd, J., 2021 WL 4734404, granted plaintiffs' motion for preliminary injunction. Appeals were taken. The Court of Appeals, 2021 WL 5121983, affirmed in part, reversed in part, and remanded.

Holdings: In clarifying its prior opinion, the Court of Appeals held that:

[1] it may be possible under the rule for an employer to accommodate, not exempt, employees with religious objections by employing them in a manner that removes them from the rule's definition of "personnel," and

[2] if a medically eligible employee's work assignments mean that she qualifies as "personnel" under the rule, she is covered by the rule, and her employer must continuously require that she is vaccinated against COVID-19.

Ordered accordingly.

Procedural Posture(s): On Appeal; Motion for Preliminary Injunction.

West Headnotes (2)

[1] Health Vaccination and immunization

It may be possible under New York's emergency rule requiring healthcare facilities to ensure that certain employees are **vaccinated** against COVID-19 for an employer to accommodate, not exempt, employees with **religious** objections by employing them in a manner that removes them from the rule's definition of "personnel"; such an **accommodation** would have the effect under the rule of permitting such employees to remain unvaccinated while employed. N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

[2] Health Vaccination and immunization

If a medically eligible employee's work assignments mean that she qualifies as "personnel" under New York's emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19, she is covered by the rule, and her employer must continuously require that she is vaccinated against COVID-19. N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61.

1 Cases that cite this headnote

***369** Appeal from the United States District Court for the Northern District of New York

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Before: Walker, Sack, and Carney, Circuit Judges.

Opinion

Per Curiam:

***370** We write to clarify our opinion in *We The Patriots USA, Inc. v. Hochul,* No. 21-2179, and *Dr. A. v. Hochul*, No. 21-2566, which we heard and decided in tandem. —— F.4th ——, 2021 WL 5121983 (2d Cir. Nov. 4, 2021). We do so in light of the text of the recent order of the district court in *Dr. A. v. Hochul*, vacating the preliminary injunction at issue. No. 1:21-CV-1009 (N.D.N.Y. Nov. 5, 2021). The district court there wrote that the *Dr. A*. Plaintiffs "no longer need" a preliminary injunction because Section 2.61 "does not prevent employees from seeking a **religious accommodation** allowing them to continue working consistent with the Rule, while avoiding the **vaccination** requirement." *Id*. (quoting *We the Patriots USA, Inc.*, —— F.4th at ——, 2021 WL 5121983, at *17).

[1] A reader might erroneously conclude from this text that, consistent with our opinion, employers may grant religious accommodations that allow employees to continue working, unvaccinated, at positions in which they "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61 (definition of "personnel"). In our opinion, however, we stated that "Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation *that removes the individual from the scope of the Rule*." —— F.4th at ——, 2021 WL 5121983, at *17 (emphasis added). In other words, it may be *possible* under the Rule for an employer to *accommodate*—not *exempt*—employees with religious objections, by employing them in a manner that removes them from the Rule's definition of "personnel." *Id.* Such an accommodation would have the effect under the Rule of permitting such employees to remain unvaccinated while employed.

[2] Of course, Title VII does not obligate an employer to grant an accommodation that would cause "undue hardship on the conduct of the employer's business." *See* 42 U.S.C. § 2000e(j). And, as we also observed in our opinion, "Contrary to the *Dr. A*. Plaintiffs' interpretation of the statute, Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated." —— F.4th at ——, 2021 WL 5121983, at *17. To repeat: if a medically eligible

employee's work assignments mean that she qualifies as "personnel," she is covered by the Rule and her employer must "continuously require" that she is vaccinated against COVID-19. 10 N.Y.C.R.R. § 2.61. As we observed, this requirement runs closely parallel to the longstanding New York State requirements, subject to no religious exemption, that medically eligible healthcare employees be vaccinated against rubella and measles. —— F.4th at ——, 2021 WL 5121983, at *13.

The preliminary injunction entered by the district court in *Dr. A. v. Hochul* on ***371** October 12, 2021, has been vacated. *See We The Patriots USA, Inc. v. Hochul*, No. 21-2179, and *Dr. A. v. Hochul*, No. 21-2566, 2021 WL 5103443, at *1 (2d Cir. Oct. 29, 2021). New York State's emergency rule requiring that healthcare facilities "continuously require" that certain medically eligible employees—those covered by the Rule's definition of "personnel"—are vaccinated against COVID-19, is currently in effect. 10 N.Y.C.R.R. § 2.61. We caution further that our opinion addressed only the likelihood of success on the merits of Plaintiffs' claims; it did not provide our court's definitive determination of the merits of those claims.

In the interest of judicial economy, we direct the Clerk of Court to refer any further proceedings in these two matters to this panel.

All Citations

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End of Document

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

INTRODUCTION

Technical Assistance Questions and Answers - Updated on March 14, 2022.

- *All EEOC materials related to COVID-19 are collected at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** .*
- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act. Note: Other federal laws, as well as state or local laws, may provide employees with additional protections.
- Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards under Title I of the ADA also apply to federal agencies under Section 501 of the Rehabilitation Act. Basic background information about the ADA and the Rehabilitation Act is available

on EEOC's **disability page (https://www.eeoc.gov/disability-discrimination)** .

- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the **guidelines and suggestions made by the CDC or state/local public health authorities (https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html)** about steps employers should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.** This includes evolving guidance found in the CDC publication, "**Interim Public Health Recommendations for Fully Vaccinated People (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html)** ." Many common workplace inquiries about the COVID-19 pandemic are addressed in the CDC publication "**General Business Frequently Asked Questions (https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html)** ."

- The EEOC has provided guidance (a publication entitled **Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act)** [**PDF version (https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf)**]) ("Pandemic Preparedness"), consistent with these workplace protections and rules, that can help employers implement strategies to navigate the impact of COVID-19 in the workplace. This pandemic publication, which was written during the prior H1N1 outbreak, is still relevant today and identifies established ADA and Rehabilitation Act principles to answer questions frequently asked about the workplace during a pandemic. It has been updated as of March 19, 2020 to address examples and information regarding COVID-19; **the new 2020 information appears in bold and is marked with an asterisk**.

- On March 27, 2020 the EEOC provided a webinar ("3/27/20 Webinar") which was recorded and transcribed and is available at **www.eeoc.gov/coronavirus (https://www.eeoc.gov/coronavirus)** . The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. The EEOC pandemic

publication includes a **separate section (https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#secB)** that answers common employer questions about what to do after a pandemic has been declared. Applying these principles to the COVID-19 pandemic, the following may be useful:

A. Disability-Related Inquiries and Medical Exams

*The ADA has restrictions on when and how much medical information an employer may obtain from any applicant or employee. Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category. For more information on the timing of disability-related inquiries and medical examinations for applicants, see **Section C.** Once an employee begins work, any disability-related inquiries or medical exams must be job related and consistent with business necessity. For information on disability-related questions and COVID-19 vaccinations, see **K.7.** - **K.9.***

A.1. How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic? *(3/17/20)*

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

A.2. When screening employees entering the workplace during this time, may an employer only ask employees about the COVID-19 symptoms EEOC has identified as examples (https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1) , or may it ask about any symptoms identified by public health authorities as associated with COVID-19? *(4/9/20)*

K. Vaccinations – Overview, ADA, Title VII, and GINA

The availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Rehabilitation Act, the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act (Title VII) (see also ***Section J, EEO rights relating to pregnancy*** and **Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates**.*)*

This section was originally issued on December 16, 2020, and was updated on October 25, 2021. Note that the Centers for Disease Control and Prevention (CDC) has ***issued guidance (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html)*** *for fully vaccinated individuals that addresses, among other things, when they need to wear a mask indoors.*

The EEOC has received many inquiries from employers and employees about the type of authorization granted by the U.S. Department of Health and Human Services (HHS) Food and Drug Administration (FDA) for the administration of COVID-19 vaccines. On August 23, 2021, the FDA approved the Biologics License Application for the Pfizer-BioNTech COVID-19 vaccine for use in individuals 16 years of age and older. Previously, the FDA granted Emergency Use Authorizations (EUAs) for the two other vaccines—one made by Moderna and the other by Janssen/Johnson & Johnson—authorizing them for use in the United States for individuals 18 years of age and older. The Pfizer-BioNTech vaccine is authorized under an EUA for individuals 12 years of age and older and for the administration of a ***third dose (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html)*** *in certain immunocompromised individuals.* For the current status of vaccines authorized or approved by the FDA, please visit: **https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html (https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html)**

Also of note, on July 6, 2021, the U.S. Department of Justice's Office of Legal Counsel issued a Memorandum Opinion concluding that section 564 of the Federal Food, Drug, and Cosmetic Act does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an EUA.

Other federal, state, and local laws and regulations govern COVID-19 vaccination of employees, including requirements for the federal government as an employer. The federal government as an employer is subject to the EEO laws. Federal departments and agencies should consult the website of the ***Safer Federal Workforce Task Force*** **(https://www.saferfederalworkforce.gov/)** *for the latest guidance on federal agency operations during the COVID-19 pandemic.*

This technical assistance on vaccinations was written to help employees and employers better understand how federal laws related to workplace discrimination apply during the COVID-19 pandemic. The EEOC questions and answers provided here set forth applicable EEO legal standards consistent with the federal civil rights laws enforced by the EEOC and with EEOC regulations, guidance, and technical assistance, unless another source is expressly cited. In addition, whether an employer meets the EEO standards will depend on the application of these standards to particular factual situations.

COVID-19 Vaccinations: EEO Overview

K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated against COVID-19? ***(Updated 10/13/21)***

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be fully vaccinated against COVID-19, subject to the **reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below**. (See **Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates**).

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated against COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business. The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccination requirement may need to respond to allegations that the requirement has a disparate impact on —or disproportionately excludes—employees based on their race, color, religion,

sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act [40+]). Employers should keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccination, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy? *(5/28/21)*

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business. For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Employees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees. These modifications may be the same as the accommodations made for an employee based on disability or religion.

K.3. How can employers encourage employees and their family members to be vaccinated against COVID-19 without violating the EEO laws, especially the ADA and GINA? *(Updated 10/13/21)*

Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns. Employers also may work with local public health authorities, medical providers, or pharmacies to make vaccinations available for unvaccinated workers in the workplace. Also, under

certain circumstances employers may offer incentives to employees who receive COVID-19 vaccinations, as discussed in K.16 - K.21. The federal government is providing COVID-19 vaccines at no cost to everyone 5 years of age and older.

There are many resources available to employees seeking more information about how to get vaccinated against COVID-19:

- The federal government's online **vaccines.gov (https://www.vaccines.gov/)** site can identify vaccination sites anywhere in the country (or **https://www.vacunas.gov (https://www.vacunas.gov)** for Spanish). Individuals also can text their ZIP code to "GETVAX" (438829)–or "VACUNA" (822862) for Spanish–to find three vaccination locations near them.

- Employees with disabilities (or employees**'** family members with disabilities) may need extra support to obtain a vaccination, such as transportation or in-home vaccinations. The HHS/Administration for Community Living has launched the Disability Information and Assistance Line (DIAL) to assist individuals with disabilities in obtaining such help. DIAL can be reached at: 888-677-1199 from 9 am to 8 pm (Eastern Standard Time) Mondays through Fridays or by emailing **DIAL@n4a.org**.

- CDC's website offers a link to a listing of **local health departments (https://www.cdc.gov/publichealthgateway/healthdirectories/index.html)** , which can provide more information about local vaccination efforts.

- In addition, CDC provides a complete communication "tool kit" for employers to use with their workforce to educate people about getting a COVID-19 vaccine. Although originally written for essential workers and employers, it is useful for all workers and employers. *See* **Workplace Vaccination Program | CDC (https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html)** .

- Some employees may not have reliable access to the internet to identify nearby vaccination locations or may speak no English or have limited English proficiency and find it difficult to make an appointment for a vaccination over the phone. CDC operates a toll-free telephone line that can provide assistance in many languages for individuals seeking more information about vaccinations: 800-232-4636; TTY 888-232-6348.

- Some employees also may require assistance with transportation to vaccination sites. Employers may gather and disseminate information to their employees on low-cost and no-cost transportation resources serving vaccination sites available in their community and offer paid time-off for vaccination, particularly if transportation is not readily available outside regular work hours.
- Employers should provide the contact information of a management representative for employees who need to request a reasonable accommodation for a disability or religious belief, practice, or observance, or to ensure nondiscrimination for an employee who is pregnant.

The ADA and COVID-19 Vaccinations

K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA? *(Updated 10/13/21)*

Yes. The ADA requires an employer to maintain the confidentiality of employee medical information. Although the EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(Updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. **29 C.F.R. 1630.2(r)**

(https://www.govinfo.gov/content/pkg/CFR-2012-title29-vol4/xml/CFR-2012-title29-vol4-sec1630-2.xml) . This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation

based on disability on an individualized basis. (See also **K.12** recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(Updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that the employee needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know **how to recognize an accommodation request from an employee with a disability (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#requesting)** and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the **Job Accommodation Network (JAN) website (https://www.askjan.org)** as a resource for different types of accommodations. JAN's materials about COVID-19 are available at **https://askjan.org/topics/COVID-19.cfm (https://askjan.org/topics/COVID-19.cfm)** .

Employers also may consult applicable **Occupational Safety and Health Administration (OSHA) COVID-specific resources (https://www.osha.gov/SLTC/covid-19/)** . Even if there is no reasonable

accommodation that will allow the unvaccinated employee to be physically present to perform the employee's current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on **CDC recommendations (https://www.cdc.gov/coronavirus/2019-ncov/)** when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer **to disclose that an employee is receiving a reasonable accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li42)** or **to retaliate against an employee for requesting an accommodation (https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#li19)** .

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? *(Updated 5/28/21)*

Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An **employer's agent (https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2)** is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely

to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

However, because the pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be "job related and consistent with business necessity" when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace. (See general discussion in **Question K.5**.) Therefore, when an employer requires that employees be vaccinated by the employer or its agent, the employer should be aware that an employee may challenge the mandatory pre-vaccination inquiries, and an employer would have to justify them under the ADA.

The ADA also requires employers to keep any employee medical information obtained in the course of an employer vaccination program confidential.

Voluntary Employer Vaccination Programs

K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine *without* needing to satisfy the "job-related and consistent with business necessity" standard? *(Updated 5/28/21)*

Yes. If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary. (See also Questions **K.16 – 17**.) The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

K.9. Does the ADA prevent an employer from inquiring about or requesting documentation or other confirmation that an employee obtained a COVID-19

vaccination? *(Updated 10/13/21)*

No. When an employer asks employees whether they obtained a COVID-19 vaccination, the employer is not asking the employee a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination besides having a disability. Therefore, requesting documentation or other confirmation of vaccination is not a disability-related inquiry under the ADA, and the ADA's rules about making such inquiries do not apply.

However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential, as discussed in K.4.

K.10. May an employer offer voluntary vaccinations only to certain groups of employees? *(5/28/21)*

If an employer or its agent offers voluntary vaccinations to employees, the employer must comply with federal employment nondiscrimination laws. For example, not offering voluntary vaccinations to certain employees based on national origin or another protected basis under the EEO laws would not be permissible.

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that the employee faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated? *(5/28/21)*

Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.

When an employee asks for a reasonable accommodation, whether the employee is fully vaccinated or not, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals.

If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to employees who communicate that they are unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*Updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests. For more information on requests for religious accommodations related to COVID-19 vaccination requirements, see **Section L, Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates**.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see **question and answer K.6.**, above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(Updated 10/13/21)*

CDC recommends (https://emergency.cdc.gov/han/2021/han00453.asp) COVID-19 vaccinations for everyone aged 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or planning to become pregnant in the future. Despite these recommendations, some pregnant employees may seek job adjustments or may request exemption from a COVID-19 vaccination requirement.

If an employee seeks an exemption from a vaccination requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid **disparate treatment in violation of Title VII**.

GINA And COVID-19 Vaccinations

Title II of GINA prohibits covered employers from using the genetic information of employees to make employment decisions. It also restricts employers from requesting, requiring, purchasing, or disclosing genetic information of employees. Under Title II of GINA, genetic information includes information about the

manifestation of disease or disorder in a family member (which is referred to as "family medical history") and information from genetic tests of the individual employee or a family member, among other things.

K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? *(Updated 5/28/21)*

No. Requiring an employee to receive a COVID-19 vaccination administered by the employer or its agent would not implicate Title II of GINA unless the pre-vaccination medical screening questions include questions about the employee's genetic information, such as asking about the employee's family medical history. As of May 27, 2021, the pre-vaccination medical screening questions for the first three COVID-19 vaccines to receive Emergency Use Authorization (EUA) from the FDA do not seek family medical history or any other type of genetic information. See **CDC's Pre-vaccination Checklist (https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf)** (last visited May 27, 2021). Therefore, an employer or its agent may ask these questions without violating Title II of GINA.

The act of administering a COVID-19 vaccine does not involve the use of the employee's genetic information to make employment decisions or the acquisition or disclosure of genetic information and, therefore, does not implicate Title II of GINA.

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a health care provider *that is not affiliated with their employer* (such as from the employee's personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. An employer requiring an employee to show documentation or other confirmation of vaccination from a health care provider unaffiliated with the employer, such as the employee's personal physician or other health care provider, a pharmacy, or a public health department, is not using, acquiring, or disclosing genetic information and, therefore, is not implicating Title II of GINA. This is the case even if the medical screening questions that must be asked before vaccination include questions about genetic information, because documentation or other confirmation of vaccination would not reveal genetic information. Title II of GINA does not prohibit an employee's *own* health care provider from asking questions

about genetic information. This GINA Title II prohibition only applies to the employer or its agent.

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Does the ADA limit the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination from a health care provider *that is not affiliated with their employer* (such as the employee's personal physician or other health care provider, a pharmacy, or a public health department)? *(Updated 10/13/21)*

No. The ADA does not limit the incentives an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine *is not the employer or its agent*. By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination *administered by the employer or its agent*, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive. See K.17.

As noted in K 4., the employer is required to keep vaccination information confidential under the ADA.

K.17. Under the ADA, are there limits on the value of the incentive employers may offer to employees for voluntarily receiving a COVID-19 vaccination *administered by the employer or its agent*? *(Updated 10/13/21)*

Yes. When the employer or its agent administers a COVID-19 vaccine, the value of the incentive (which includes both rewards and penalties) may not be so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information to their employers or their agents. As explained in K.16., however, this incentive limit does not apply if an employer offers an incentive to encourage employees to be voluntarily vaccinated by a health care provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Does GINA limit the value of the incentive employers may offer employees if employees or their family members get a COVID-19 vaccination from a health care provider *that is not affiliated with the employer* (such as the employee's personal physician or other health care provider, a pharmacy, or a public health department)? (*Updated 10/13/21*)

No. GINA does not limit the incentives an employer may offer to employees to encourage them or their family members to get a COVID-19 vaccine or provide confirmation of vaccination if the health care provider administering the vaccine is not the employer or its agent. If an employer asks an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as "family medical history" under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See **K.14** for more about GINA and pre-vaccination medical screening questions.

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent? *(5/28/21)*

No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member.

Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history *of the employee*. The regulations implementing Title II of GINA prohibit employers from providing incentives in exchange for genetic information. Therefore, the employer may not offer incentives in exchange for the family member getting vaccinated. However, employers may still offer an employee's family member the opportunity to be vaccinated by the employer or its agent, if they take certain steps to ensure GINA compliance.

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated *without* offering the employee an incentive? *(5/28/21)*

Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated. Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees. In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about the family member's medical conditions. If these requirements are met, GINA permits the collection of genetic information.

L. Vaccinations – Title VII Religious Objections to COVID-19 Vaccine Requirements

The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on religion. This includes a right for job applicants and employees to request an exception, called a religious or reasonable accommodation, from an employer requirement that conflicts with their sincerely held religious beliefs, practices, or observances. If an employer shows that it cannot reasonably accommodate an employee's religious beliefs, practices, or observances without undue hardship on its operations, the employer is not required to grant the

This document contains excepts from EEOC guidance on Religious Discrimination that can be found here: https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftnref27

Section 12: Religious Discrimination

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

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Section 12: Religious Discrimination

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This document addresses Title VII's prohibition against religious discrimination in employment, including topics such as religious harassment, and workplace accommodation of religious beliefs and practices.

Citation:

Title VII

Document Applicant:

Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

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Yes. This document replaces previously existing guidance by the same title issued 7/22/08.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

EEOC	***DIRECTIVES TRANSMITTAL***	Number 915.063
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SUBJECT:	Compliance Manual on Religious Discrimination
PURPOSE:	This sub-regulatory document supersedes the Commission's Compliance Manual on Religious Discrimination issued on July 22, 2008. **The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. Any final document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.**
EFFECTIVE DATE:	Upon Publication.
EXPIRATION DATE:	Until rescinded.

SECTION 12: RELIGIOUS DISCRIMINATION

OVERVIEW[1]

This Section of the Compliance Manual focuses on religious discrimination under Title VII

of the Civil Rights Act of 1964 (Title VII). Title VII protects workers from employment discrimination based on their race, color, religion, sex (including pregnancy, sexual orientation, and transgender status),**[2]** national origin, or protected activity. Under Title VII, an employer is prohibited from discriminating because of religion in hiring, promotion, discharge, compensation, or other "terms, conditions or privileges" of employment, and also cannot "limit, segregate, or classify" applicants or employees based on religion "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."**[3]** The statute defines "religion" as including "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business."**[4]** "Undue hardship" under Title VII is not defined in the statute but has been defined by the Supreme Court as "more than a de minimis cost"**[5]** – a lower standard for employers to satisfy than the "undue hardship" defense under the Americans with Disabilities Act (ADA), which is defined by statute as "significant difficulty or expense."**[6]**

These protections apply whether the religious beliefs or practices in question are common or non-traditional, and regardless of whether they are recognized by any organized religion.**[7]** The test under Title VII's definition of religion is whether the beliefs are, in the individual's "own scheme of things, religious."**[8]** Belief in God or gods is not necessary; nontheistic beliefs can also be religious for purposes of the Title VII exemption as long as they "'occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons.'"**[9]** The non-discrimination provisions of the statute also protect employees who do not possess religious beliefs or engage in religious practices.**[10]** EEOC, as a federal government enforcement agency, and its staff, like all governmental entities, carries out its mission neutrally and without any hostility to any religion or related observances, practices, and beliefs, or lack thereof.**[11]**

The number of religious discrimination charges filed with EEOC has increased significantly from fiscal years 1997 to 2019, although the total number of such charges remains relatively small compared to charges filed on other bases.**[12]** Many employers seek legal guidance in managing equal employment opportunity ("EEO") issues that arise from religious diversity as well as the demands of the modern American workplace. This document is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff on Title VII's prohibition against religious discrimination. It explains the variety of issues

considered in workplace-related religious discrimination claims, discusses typical scenarios that may arise, and provides guidance to employers on how to balance the rights of individuals in an environment that includes people of varying religious faiths, or no faith.**[13] However, this document does not have the force and effect of law and is not meant to bind the public in any way. It is intended to provide clarity to the public on existing requirements under the law and how the Commission will analyze these matters in performing its duties**.

For ease of reference this document is organized by the following topics:

I – Coverage issues, including the types of cases that arise, the definition of "religion" and "sincerely held," the religious organization exemption, and the ministerial exception.
II – Employment decisions based on religion, including recruitment, hiring, segregation, promotion, discipline, and compensation, as well as differential treatment with respect to religious expression; customer preference; security requirements; and bona fide occupational qualifications.
III – Harassment, including harassment based on religious belief or practice as a condition of employment or advancement, hostile work environment, and employer liability issues.
IV – Reasonable accommodation, including notice of the conflict between religion and work where applicable, scope of the accommodation requirement and "undue hardship" defense, and common methods of accommodation.
V – Related forms of discrimination, such as discrimination based on national origin, race, or color, as well as retaliation.

12-I COVERAGE

Types of Cases

Title VII prohibits covered employers, employment agencies, and unions**[14]** from engaging in disparate treatment and from maintaining policies or practices that result in unjustified disparate impact based on religion. Historically, courts and the Commission characterized denial of accommodation as a separate cause of action. **[15]** In *EEOC v. Abercrombie & Fitch Stores, Inc*., the Supreme Court stated that there are only two causes of action under Title VII: "disparate treatment" (or "intentional

discrimination") and "disparate impact."**[16]** It treated a claim based on a failure to accommodate a religious belief, observance, or practice (absent undue hardship) as a form of disparate treatment.**[17]** The Commission recognizes that harassment and denial of religious accommodation are typically forms of disparate treatment in the terms and conditions of employment. Different types of fact patterns may arise in relation to Title VII religious discrimination, including:

- treating applicants or employees differently (disparate treatment) by taking an adverse action based on their religious beliefs, observances, or practices (or lack of religious beliefs, observances or practices) in any aspect of employment, including recruitment, hiring, assignments, discipline, promotion, discharge, and benefits;
- taking adverse action motivated by a desire to avoid accommodating a religious belief, observance, or practice that the employer knew or suspected may be needed and would not pose an undue hardship;
- denying a needed reasonable accommodation sought for an applicant's or employee's sincerely held religious beliefs, observances, or practices if an accommodation will not impose an undue hardship on the conduct of the business;
- intentionally limiting, segregating or classifying employees based on the presence or absence of religious beliefs, observances, or practices (also a form of disparate treatment), or enforcing a neutral rule that has the effect of limiting, segregating, or classifying an applicant or employee based on religious beliefs, observances, or practices and that cannot be justified by business necessity (disparate impact);
- subjecting employees to harassment because of their religious beliefs, observances, or practices (or lack of religious beliefs, observances or practices) or because of a belief that someone of the employee's religion should not associate with someone else (e.g., discrimination because of an employee's religious inter-marriage, etc.);
- retaliating against an applicant or employee who has opposed discrimination on the basis of religion, or participated in any manner in an investigation, proceeding, or hearing regarding discrimination on the basis of religion, including by filing an equal employment opportunity (EEO) charge or

testifying as a witness in someone else's EEO matter, or complaining to a human resources department about alleged religious discrimination.

Although more than one of these issues may be raised in a particular case, they are discussed in separate parts of this manual for ease of use.

· NOTE TO EEOC INVESTIGATORS ·

Charges involving religion, like charges filed on other bases, may give rise to more than one theory of discrimination (e.g., termination, harassment, denial of reasonable accommodation, or other forms of disparate treatment, as well as retaliation). Therefore, these charges could be investigated and analyzed under all theories of liability to the extent applicable.

A. Definitions

Overview: Religion is very broadly defined for purposes of Title VII. The presence of a deity or deities is not necessary for a religion to receive protection under Title VII. Religious beliefs can include unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs. Individuals who do not practice any religion are also protected from discrimination on the basis of religion or lack thereof. Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer.

1. Religion

Title VII defines "religion" to include "all aspects of religious observance and practice as well as belief," not just practices that are mandated or prohibited by a tenet of the individual's faith.**[18]** Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Sikhism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or

sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.**[19]** Further, a person's religious beliefs "need not be confined in either source or content to traditional or parochial concepts of religion."**[20]** A belief is "religious" for Title VII purposes if it is "religious" in the person's "own scheme of things," i.e., it is a "sincere and meaningful" belief that "occupies a place in the life of its possessor parallel to that filled by . . . God."**[21]** The Supreme Court has made it clear that it is not a court's role to determine the reasonableness of an individual's religious beliefs, and that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."**[22]** An employee's belief, observance, or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it.**[23]** **(https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033730953&pubNum=0000708&originatingDoc=I28471550e10611e7b393b8b5a0417f3d&refType=RP&fi=co_pp_sp_708_2779&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_sp_708_2779)**

Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."**[24]** Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious,**[25]** beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death."**[26]**

Courts have looked for certain features to determine if an individual's beliefs can be considered religious. As one court explained: "'First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.'"**[27]**

Social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII.**[28]** However, overlap between a religious and political view does not place it outside the scope of Title VII's religion protections, as long as that view is part of a comprehensive religious belief system and is not simply an "isolated teaching."**[29]** Religious observances or practices

include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, and refraining from certain activities. Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons.**[30]** Whether the practice is religious is therefore a situational, case-by-case inquiry, focusing not on what the activity is but on whether the employee's participation in the activity is pursuant to a religious belief.**[31]** For example, one employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (e.g., health or environmental) reasons.**[32]** In that instance, the same practice in one case might be subject to reasonable accommodation under Title VII because an employee engages in the practice for religious reasons, and in another case might not be subject to reasonable accommodation because the practice is engaged in for secular reasons.**[33]** However, EEOC and courts must exercise a "light touch" in making this determination.**[34]**

The following examples illustrate these concepts:

EXAMPLE 1

Employment Decisions Based on "Religion"

An otherwise qualified applicant is not hired because he is a self-described evangelical Christian. A qualified non-Jewish employee is denied promotion because the supervisor wishes to give a preference based on religion to a fellow Jewish employee. An employer terminates an employee based on his disclosure to the employer that he has recently converted to the Baha'i Faith. Each of these is an example of an employment decision based on the religious belief or practice of the applicant or employee, and therefore is discrimination based on "religion" within the meaning of Title VII.

EXAMPLE 2

Religious Practice versus Secular Practice

A Seventh-day Adventist employee follows a vegetarian diet because she believes it is religiously prescribed by scripture. Her vegetarianism is a religious practice, even though not all Seventh-day Adventists share this belief or follow this practice, and even though many individuals adhere to a vegetarian diet for purely secular reasons.

EXAMPLE 3

Types of Religious Practice or Observance

A Catholic employee requests a schedule change so that he can attend a church service on Good Friday. A Muslim employee requests an exception to the company's dress and grooming code allowing her to wear her headscarf, or a Hindu employee requests an exception allowing her to wear her bindi (religious forehead marking). An employee asks to be excused from the religious invocation offered at the beginning of staff meetings because he objects on religious grounds or does not ascribe to the religious sentiments expressed. An adherent to Native American spiritual beliefs seeks unpaid leave to attend a ritual ceremony. An employee who identifies as Christian but is not affiliated with a particular sect or denomination requests accommodation of his religious belief that working on his Sabbath is prohibited. Each of these requests relates to a "religious" belief, observance, or practice within the meaning of Title VII. The question of whether the employer is required to grant these requests is discussed in the section below addressing religious accommodation.

EXAMPLE 4

Supervisor Considers Belief Illogical

Morgan asks for time off on October 31 to attend the "Samhain Sabbat," the New Year observance of Wicca, her religion. Her

supervisor refuses, saying that Wicca is not a "real" religion but an "illogical conglomeration" of "various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting, which are not religious practices." The supervisor's refusal to accommodate her on the ground that he believes her religion is illogical or not a "real religion" violates Title VII unless the employer can show her request would impose an undue hardship. The law applies to religious beliefs even though others may find them "incorrect" or "incomprehensible."**[35]**

EXAMPLE 5

Unique Belief Can Be Religious

Edward practices the Kemetic religion, based on ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than ten members. He states that he believes in various deities, and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a rejection of Ra. These can be religious beliefs and practices even if no one else or few other people subscribe to them.**[36]**

EXAMPLE 6

Personal Preference That Is Not a Religious Belief

Sylvia's job has instituted a policy that employees cannot have visible tattoos while working. Sylvia refuses to cover a tattoo on her arm that is the logo of her favorite band. When her manager asks her to cover the tattoo, she states that she cannot and that she feels so passionately about the importance of the band to her life that it is

> essentially her religion. However, the evidence demonstrates that her tattoos and her feelings do not relate to any "ultimate concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Simply feeling passionately about something is not enough to give it the status of a religion in someone's life. Therefore, her belief is a personal preference that is not religious in nature.**[37]**

2. Sincerely Held

Title VII requires employers to accommodate those religious beliefs that are "sincerely held."**[38]** Whether or not a religious belief is sincerely held by an applicant or employee is rarely at issue in many types of Title VII religious claims. **[39]** For example, with respect to an allegation of discriminatory discharge or harassment, it is the motivation of the discriminating official, not the actual beliefs of the individual alleging discrimination, that is relevant in determining if the discrimination that occurred was because of religion. A detailed discussion of reasonable accommodation of sincerely held religious beliefs appears in § 12-IV, but the meaning of "sincerely held" is addressed here.

Like the religious nature of a belief, observance, or practice, the sincerity of an employee's stated religious belief is usually not in dispute and is "generally presumed or easily established."**[40]** Further, the Commission and courts "are not and should not be in the business of deciding whether a person holds religious beliefs for the 'proper' reasons. We thus restrict our inquiry to whether or not the religious belief system is sincerely held; we do not review the motives or reasons for holding the belief in the first place."**[41]** The individual's sincerity in espousing a religious observance or practice is "largely a matter of individual credibility."**[42]** Moreover, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance,"**[43]** although "[e]vidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity."**[44]** Factors that – either alone or in combination – might undermine an employee's credibility include: whether the employee has behaved in a manner markedly inconsistent with the professed belief;**[45]** whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;**[46]** whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons);**[47]** and whether

the employer otherwise has reason to believe the accommodation is not sought for religious reasons.

However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.**[48]** Similarly, an individual's belief may be to adhere to a religious custom only at certain times, even though others may always adhere,**[49]** or, fearful of discrimination, he or she may have forgone his or her sincerely held religious practice during the application process and not revealed it to the employer until after he or she was hired or later in employment.**[50]** An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion, or because the employee adheres to some common practices but not others.**[51]** As noted, courts have held that "Title VII protects more than . . . practices specifically mandated by an employee's religion."**[52]**

3. Employer Inquiries into Religious Nature or Sincerity of Belief

Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information. *See infra* § 12-IV-A-2.

· NOTE TO EEOC INVESTIGATORS ·

If the Respondent (R) disputes that the Charging Party's ("CP's") belief is "religious," consider the following:

⇒ **Begin with the CP's statements.** What religious belief, observance, or practice does the CP claim to have that conflicts with an employment requirement? In most cases, the CP's

credible testimony regarding his belief, observance, or practice will be sufficient to demonstrate that it is religious. In other cases, however, the investigator may need to ask follow-up questions about the nature and tenets of the asserted religious beliefs, and/or any associated practices, rituals, clergy, observances, etc., in order to identify a specific religious belief, observance, or practice or determine if one is at issue, which conflicts with an employment requirement.

⇒ **Since religious beliefs can be unique to an individual, evidence from others is not always necessary.** However, if the CP believes such evidence will support his or her claim, the investigator could seek evidence such as oral statements, affidavits, or other documents from CP's religious leader(s) if applicable, or others whom CP identifies as knowledgeable regarding the religious belief, observance, or practice in question that conflicts with an employment requirement.

⇒ **Remember, where an alleged religious observance, practice, or belief is at issue, a case-by-case analysis is required.** Investigators should not make assumptions about the nature of an observance, practice, or belief. In determining whether CP's asserted observance, practice, or belief is "religious" as defined under Title VII, the investigator's general knowledge will often be sufficient; if additional objective information has to be obtained, the investigator should nevertheless recognize the intensely personal characteristics of adherence to a religious belief.

⇒ **If the Respondent disputes that CP's belief is "sincerely held," the following evidence may be relevant:**

⇨ Oral statements, an affidavit, or other documents from CP describing his or her beliefs and practices, including information regarding when CP embraced the belief, observance, or practice, as well as when, where, and how CP has adhered to the belief, observance, or practice; and/or,

⇨ Oral statements, affidavits, or other documents from potential witnesses identified by CP or R as having knowledge of whether CP adheres or does not adhere to the

belief, observance, or practice at issue (e.g., CP's religious leader (if applicable), fellow adherents (if applicable), family, friends, neighbors, managers, or coworkers who may have observed his past adherence or lack thereof, or discussed it with him).

B. Covered Entities

Overview: Title VII coverage rules apply to all religious discrimination claims under the statute. However, specially defined "religious organizations" and "religious educational institutions" are exempt from certain religious discrimination provisions, and the ministerial exception bars EEO claims by employees of religious institutions who perform vital religious duties at the core of the mission of the religious institution.

Title VII's prohibitions apply to employers, employment agencies, and unions,**[53]** subject to the statute's coverage.**[54]** Those covered entities must carry out their activities in a nondiscriminatory manner and provide reasonable accommodation unless doing so would impose an undue hardship.**[55]** Unions also can be liable if they knowingly acquiesce in employment discrimination against their members, join or tolerate employers' discriminatory practices, or discriminatorily refuse to represent employees' interests, and employment agencies can be liable for participating in the client-employer's discrimination.**[56]**

C. Exceptions

1. Religious Organizations

What Entities are "Religious Organizations"? Under sections 702(a) and 703(e)(2) of Title VII, "a religious corporation, association, educational institution, or society," including a religious "school, college, university, or educational institution or institution of learning," is permitted to hire and employ individuals "of a particular religion . . . ."**[57]** This "religious organization" exemption applies only to those organizations whose "purpose and character are primarily religious," but to determine whether this statutory exemption applies, courts have looked at "all the facts," considering and weighing "the religious and secular characteristics" of the entity.**[58]** Courts have articulated different factors to determine whether an entity is a religious organization, including (1) whether the entity operates for a profit; (2)

§ 1630.2 Definitions.

(a) *Commission* means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(b) *Covered Entity* means an employer, employment agency, labor organization, or joint labor management committee.

(c) *Person, labor organization, employment agency, commerce and industry affecting commerce* shall have the same meaning given those terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(d) *State* means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(e) *Employer*—(1) *In general.* The term employer means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, from July 26, 1992 through July 25, 1994, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person.

(2) *Exceptions.* The term employer does not include—

(i) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) A bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(f) *Employee* means an individual employed by an employer.

(g) *Definition of "disability."*

(1) *In general. Disability* means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an

impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the “actual disability” and/or “record of” prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (**g**):
See § 1630.3 for exceptions to this definition.

(h) *Physical or mental impairment* means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes). Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(j) *Substantially limits*—

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment “substantially limits” a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term “substantially limits” shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for “substantially limits” applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) *Non-applicability to the "regarded as" prong.* Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) *Predictable assessments*—(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) *Condition, manner, or duration*—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) *Examples of mitigating measures*—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) *Ordinary eyeglasses or contact lenses — defined.* Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) *Has a record of such an impairment —*

(1) *In general.* An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) *Reasonable accommodation.* An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

(l) "*Is regarded as having such an impairment."* The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment

(2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

(m) The term "*qualified,"* with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See § 1630.3 for exceptions to this definition.

(n) *Essential functions* —(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the “actual disability” prong (paragraph (g)(1)(i) of this section), or “record of” prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the “regarded as” prong (paragraph (g)(1)(iii) of this section).

(p) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

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Raising the Bar on Diversity

Attorney Peter Nieves helps spearhead a scholarship for UNH Franklin Pierce School of Law Students

Peter Nieves with his children Skye, Sierra, and his wife Bonnie. Courtesy photo/ Peter Nieves

By Scott Merrill

The comfort of knowing someone has your back during hard times is one of those intangible qualities that lawyers often provide their clients.

For minorities in NH, having an attorney who can also relate to their personal experiences and heritage is an added comfort that shouldn't be underestimated, according to attorney Peter Nieves.

Nieves, a patent attorney at Sheehan Phinney and former adjunct professor at UNH Franklin Pierce School of Law, has been working to make sure minorities in the future will be represented by a more diverse population of lawyers in the state.

As part of the SBA/Dean's Task Force on Racial Justice, Diversity, and Inclusion at the law school, he has been central to the creation of a scholarship program with the hopes of raising the number of underrepresented students at the school.

Nieves recalls an experience with a woman he'd met through Hispanic community events he'd attended that made him aware of this need for representation.

The woman had asked for a referral to a local attorney who could handle a family law matter and she was emotionally drained by the situation, he says.

"I referred her to an outstanding attorney who clearly could handle her matter and she later called me and asked if I would attend the meeting with the attorney because she wanted someone 'like her' there, specifically, someone Hispanic," Nieves says.

Nieves, who is Puerto Rican and grew up in Brooklyn, N.Y., attended the meeting and remembers how grateful the woman was to have him with her.

"Her point was that she desired to have an attorney present who could relate to her, the family unit, her heritage, and more. While hesitant, I attended her initial meeting with the attorney so as to make her more comfortable. I do not know if she became a client of that law firm or not, and I did not know her personally, but she was extremely grateful for my attendance."

Though New Hampshire remains far less diverse than much of America, diversity is growing in the state according to a report by the Carsey School of Public Policy at the University of New Hampshire.

While in 2018, 90.0 percent of the state's population was non-Hispanic white, making New Hampshire one of the nation's least diverse states, this change represents a 5.1 percentage point decrease from 2000. Overall, the shift created a doubling of the proportion of the state that is minority, from 61,600 in 2000 to 136,000 in 2018.

The growing population of minorities combined with the call for racial justice following the killings of a number of Black men and women last summer is what compelled law school Dean Megan Carpenter to put together the task force which released its report and recommendations in September.

The report seeks to increase diversity of the law school's students, staff, and faculty; create a welcoming, inclusive, and diverse community – both inside the

DIVERSITY *continued on page 18*

The Race for COVID-19 Injury Benefits

By Scott Merrill

As new cases of COVID-19 and hospitalizations continue to rise, the news that a vaccine will be available by the beginning of the year couldn't have come at a better time for Granite Staters.

Of course, for every bit of good news these days, many unknowns remain.

Laying aside issues of whether enough vaccines will be available and how many people will agree to take them, one issue not being talked about, according to personal injury attorney Heather Menezes of Shaheen and Gordon P.A., are benefits for those who experience long-term side effects from a vaccine or other injuries from procedures related to the pandemic.

Attorney Menezes represents individuals injured by vaccines in the Vaccine Injury Compensation Program (VICP). The VICP is a federal program that was established after lawsuits against vaccine manufacturers and healthcare providers threatened to cause vaccine shortages and reduce vaccination rates. The VICP began accepting petitions (also called claims) in 1988.

The VICP is a no-fault system that compensates individuals injured by certain vaccines.

However, currently, the COVID-19 vaccine will not be part of the VICP. Instead, any injuries resulting from the COVID-19 vaccine will be covered under a different program that provides fewer benefits to those injured by any countermeasure to the COVID-19 pandemic.

The federal program that provides some relief for those seeking benefits related to long-term side effects from vaccines and other pandemic related issues is the Counter Measures Injury Compensation Program (CICP). The CICP is administered by the Health Resources and Services Administration, an agency of the DHHS.

The problem, Menezes said, is that the program isn't being openly promoted, and there is a one-year statute of limitations for claiming benefits. The law states:

> *The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.*

"The statute says that the government is supposed to promote the coun-

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PRACTITIONER PROFILE

Margaret "Maggie" Goodlander: A Local Attorney With Global Reach

By Kathie Ragsdale

Fittingly, Margaret "Maggie" Goodlander was born on Election Day 1986, her mother's water having broken while still in the voting booth.

Politics have been in her blood practically ever since.

The Portsmouth attorney, 34, has worked alongside U.S. Sens. Joseph Lieberman and the late John McCain, has clerked for Judge Merrick Garland and U.S. Supreme Court Justice Stephen Breyer, has traveled to dozens of countries as part of bipartisan congressional delegations, and has helped craft landmark legislation regarding immigrants and human rights violations.

She also served as counsel for the U.S. House Judiciary Committee and House Managers during the impeachment trial of President Donald Trump.

These experiences have left her with strong feelings about what she sees as the erosion of constitutional norms, the politicization of the Supreme Court, the interrelationship between foreign and domestic

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Comparison of Benefits under the Vaccine Injury Compensation Program and the Countermeasures Injury Compensation Program

Vaccine Injury Compensation Program (VICP)	Countermeasures Injury Compensation Program (CICP)
3 Year statute of limitation from first symptom onset or 2 years from the date of death. 42 USC 300aa-16.	1 year Statute of limitation from date of countermeasure. 42 CFR 110.42.
Burden of proof: preponderance of the evidence. 42 USC 300aa-13.	Burden of proof: compelling scientific evidence of direct causal connection. 42 CFR 110.20.
Administered through the Court of Federal Claims. 42 USC 300aa-12.	Administered though an administrative agency of Health and Human Services; no judicial review. 42 USC 247d-6e.
Benefits include past and future pain and suffering (capped at $250,000). 42 USC 300aa-15.	No pain and suffering damages. 42 CFR 110.2.
Funded by excise tax on covered vaccines. 42 USC 300aa-15. (Compensation is through the Vaccine Injury Compensation Trust Fund)	Countermeasures generally funded by emergency appropriation of Congress. 42 USC 247d-6e.
Can reject award in the program and file a civil lawsuit. 42 USC 300aa-21.	No lawsuit unless fits the willful misconduct exception. 42 USC 247d-6d.
Attorneys' fees and costs paid for by the program for claims filed with a reasonable basis. 42 USC 300aa-15.	No provision for payment of attorneys fees and costs. 42 CFR 110.44.

Created by Heather Menezes, Shaheen and Gordon.

Benefits from page 1

ter measures fund so that people know about it. But who knows about it? No one knows about it," she said. "They're likely not going to promote the CICP because of concern people won't get the vaccine. But the biggest thing is that there is a one-year statute of limitations for filing."

Menezes also explained that someone injured by a countermeasure, such as a COVID-19 vaccine, right now, could not seek recovery from the manufacturer.

"Potentially liable parties such as vaccine manufacturers are immune from liability under the Public Readiness and Emergency Preparedness Act. That individual could also not seek relief under the VICP. The only recovery available for that person is the CICP. If he or she does not make a claim within 1 year, then that person has no other course of action for that injury. So people need to know about this program."

The one-year statute of limitations for the CICP runs from the time the countermeasure was administered.

"A lot of people don't know they're dealing with an injury caused by a vaccine and they're not immediately thinking, 'let's call a lawyer.' I think most people wait and hope that their pain will go away. But if a person's injury is from a pandemic countermeasure, then that person will be out of luck if he or she doesn't file within a year, period."

While most vaccine-related side effects would be apparent within six weeks to two months, Menezes explained, it is unknown if this would be the case for a COVID-19 vaccine. And the compensation provided by the CICP applies to more than vaccines, she stressed.

"Benefits can apply to any countermeasure that's applied to the pandemic. This includes vaccines but also ventilators, medications, antibody treatments—anything that could conceivably be considered a countermeasure to the pandemic falls under this counter measures fund," Menezes said.

One difficulty with receiving benefits for countermeasures vaccinations and procedures is the result of the PREP Act that Menezes mentioned, which addresses liability immunity.

A declaration under the PREP Act was made by the Secretary of Health and Human Services on March 10 and made effective February 4, 2020, for certain medical products to be used against COVID-19.

Countermeasures include any vaccination, medication, device, or other item recommended to diagnose, prevent or treat a declared pandemic, epidemic or security threat.

The PREP Act, enacted on December 30, 2005, is the law which authorizes the CICP to provide benefits to individuals or the estates of individuals who sustain a covered serious physical injury as the direct result of countermeasures under a PREP Act declaration.

According to Menezes, the VICP is the better of the two programs because it provides more benefits and protections to individuals than does the CICP. (See comparison chart above)

The *Bar News* filed a FOIA request with the Health Resources and Services Administration, the agency responsible for administering both the VICP and the CICP, asking for records regarding any benefits paid for COVID-19 related injuries from these programs.

While there have been claims filed, according to the DICP, a records search conducted by the agency stated they have not compensated any COVID-19 related claims at this time.

Menezes believes the public has a right to know how these programs are being administered and that the issue is highly time sensitive. For many, the financial consequences of not receiving benefits, given the one-year statute of limitations could be catastrophic.

"If someone is hospitalized for months and he or she is trying to learn to walk again, how could that person file a claim in one year? A one-year statute of limitations is simply unjust," she says.
"I was appalled to learn that vaccine manufacturers are immune from any liability for the COVID-19 vaccine and that any injuries from the COVID-19 vaccine will not be part of the VICP."

While most vaccines are administered as a public health necessity and very few people experience injuries, Menezes said there is no denying that there can "sometimes be very serious injuries from vaccines."

"Regarding the COVID-19 vaccine, it's horrible that the public is expected to gamble on these vaccines but if there is an injury, there is little available to help with an injury."

NHLAP from page 3

lot more referrals.

What are the challenges ahead?

The fact that we don't have adequate resources in New Hampshire to keep up with this potential surge is the biggest challenge ahead. I think it has the potential to create a crisis. New Hampshire has an overall inadequate number of mental health providers to meet demand.

What is being done to deal with this shortage?

One thing I'm doing is having volunteer trainings over Zoom in January. I think we're going to need to rely on mentors and volunteers to get people through safety checks until they can see professionals because there's such a wait list. I've also done extra training dealing with suicide prevention. Our board has also been talking about whether it's feasible to get extra funds to help people through a crisis and whether this is something we should be doing. I see this as one big barrier right now. Big LAPS have in-house services. Tomorrow if I had my wish list and we had a budget of a couple of million dollars I'd have a LADAC on staff and someone to do counseling, but we don't. Those are some things we've identified. And it's just hard when the phones aren't ringing and I know there are people that need help. Even before the pandemic we weren't reaching the number of people that the statistics say we should be.

Do you think Bar leadership is listening?

I think Bar leaders are finally understanding all these different things we're talking about because they're experiencing the isolation and the anxiety for themselves as well as the lack of social stimulation and support. I think people are understanding what it's like to be depressed because this whole thing feels like depression without being depressed.

Are there any programs in the works?

One is the volunteer training program I mentioned. We have a lot of people who have become sober and want to give back. I'd like to find more people who have dealt with anxiety and depression as well. Another program will deal with lawyers who have been through these different scenarios and have come out the other side. Their stories show that these issues don't have to ruin your career. Right now we have four people committed and we're looking for one more.

How high have the number of referrals been lately?

The numbers are a little bit higher right now. I think people are realizing that this pandemic is lasting longer and that people are at the end of their reserves. We're getting a lot of calls about mental health and I do think it's helpful that, generally, the press is talking about these issues during the shutdown. The statistics I've been reading is that over half of Americans are presenting with anxiety and depression that meets diagnostic criteria. So if we have a population of lawyers that are higher than the national average for anxiety and depression, my guess is we are looking at the potential for a full blown crisis.

Workers' Compensation Coverage of Vaccine Injuries

By Heather Menezes

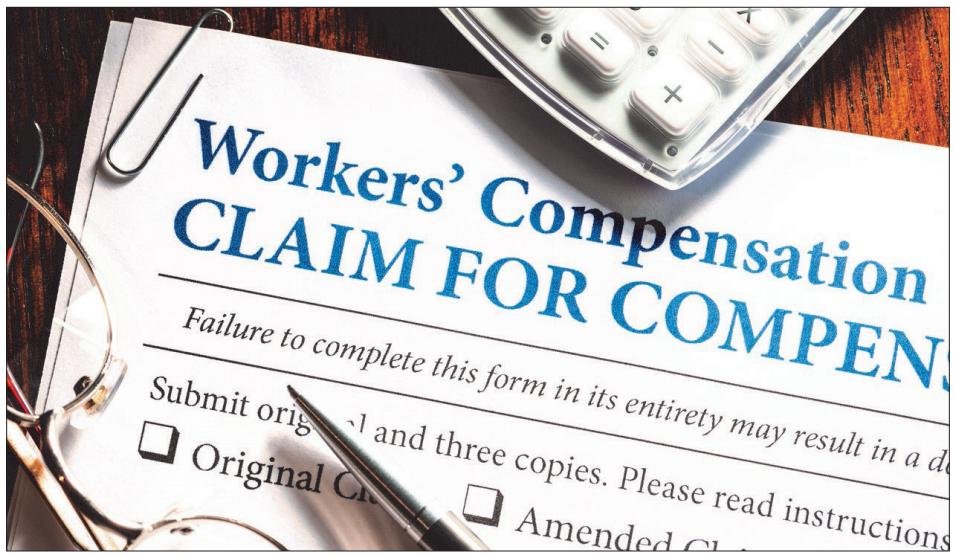
Vaccines are a public health necessity.[1] The vast majority of vaccinations are given and there are no side effects. However, rarely, vaccine injuries occur. If a person is required to have the vaccination as a condition of employment and suffers an injury as a result, there is no doubt that the injury would be compensable under the Workers' Compensation Law. However, a vaccine injury may still be compensable even if an employer does not require vaccination.

An individual who is injured by certain vaccines can seek compensation through the National Vaccine Injury Compensation Program (VICP). If a vaccine injured person consults an attorney about her rights, the attorney must inform the person of the VICP.[2] 42 U.S.C. § 300aa-10(b) provides, "It shall be the ethical obligation of any attorney who is consulted by an individual with respect to a vaccine-related injury or death to advise such individual that compensation may be available under the program for such injury or death." Injuries from COVID-19 vaccines are not part of the VICP but are currently covered under the Countermeasures Injury Compensation Program (CICP), which provides very limited benefits.[3] Both programs are payors of last resort. Therefore, all other available benefits, such as workers' compensation, should be pursued in addition to the benefits provided under the VICP or CICP.

Many employers are starting to require that their employees get vaccinated with a COVID-19 vaccine. Any injuries from an employer-mandated COVID-19 vaccine are a compensable work injury.[4] However, workers' compensation coverage is not limited to mandated vaccinations. There are circumstances where injuries from a voluntary vaccination may be considered compensable.

An injury is compensable under the Workers' Compensation Law if it "arises out of and in the course of employment."[5] Our Supreme Court has found:

> First, the claimant must prove the causal connection between the injury and the employment: that the injury resulted from a risk to which the employment subjected him or her, and thus arose out of employment. Second, the claimant must show that the injury arose in the course of employment: that the injury occurred within the time and space boundaries of employment, and during an activity whose purpose was related to employment.[6]



The fact that a claimant "was not actually engaged upon the work she was hired to perform does not preclude application of the statute."[7] "Rather, injuries which result from the conditions and obligations of employment are compensable, including injuries which occur during an activity of a personal nature, not forbidden and reasonably expected, and a natural incident of employment."[8]

Courts in other jurisdictions have found that even injuries from voluntary vaccinations are compensable. For example, in *Freedman v. Spicer Manufacturing Corporation,* the Court found that death following voluntary vaccination during the 1918 Influenza Pandemic was compensable.[9] Courts have found vaccine injuries compensable where there is a combination of strong urging by the employer and a mutual benefit to the employee and employer from the vaccination. In *Saintsing v. Steinbach,* the New Jersey Superior Court found injuries from a voluntary smallpox vaccination compensable.[10] In that case, the Court observed that, during a smallpox epidemic, the employer distributed the following notice to its employees:

> On April 22, 1947, we will provide free inoculation to all those who choose to be immunized against smallpox. We are sure that everyone is aware of the current spread of smallpox and we strongly urge that you take advantage of this service, which we are glad to provide in the interest of your health.[11]

The claimant was a department store employee who suffered permanent injuries as a result of the vaccination.[12] The Court found the vaccination was a mutual benefit because "it aided in the prevention of smallpox within the employee group" and "protected the employer against possibly disastrous business consequences."[13] The Court further found, "it would be unrealistic to find that they were for the exclusive benefit of the employees and were not additionally designed to further a sound employer-employee relationship and safeguard the employer against the serious effects of a case of smallpox amongst its employees."[14]

New Hampshire has adopted the Mutual Benefit doctrine. In *New England Telephone Company v. Ames,* the employee sustained an injury while negotiating on behalf of the union.[15] The Court reasoned that the union activity at issue in the case was a mutual benefit to the employee and the employer and that the injury arose in the course of employment.[16]

Whether the employer strongly urged the vaccination may be irrelevant in cases involving health care workers. In In *re Hick's Case,* the Massachusetts Appeals Court found that a health care worker who suffered optic neuritis and blindness following a voluntary influenza vaccination suffered a compensable injury.[17] The employer, Boston Medical Center, offered voluntary vaccinations to employees on site and the employee got the vaccination on her lunch break.[18] The employer argued that the influenza vaccination was a purely personal activity and it did not compel or strongly urge the employee to receive the vaccine.[19] The Court rejected the employer's argument, finding "the link between the activity and the employment is particularly strong."[20] Further, the Court observed, "Here, the employee was a health care worker employed by a hospital. In contrast, none of the cases requiring the employee to show either employer compulsion or

INJURIES *continued on page 36*

Goal Setting from page 32

more fully into, life;

- Ask your close friends and spouse what they think about your desire to slow down or start something new;
- Read the Bar's new Succession Planning Guide or a law firm launching book to see what's really involved;
- Ask yourself: Am I happy with my work situation? If I could do whatever I wanted, what would that look like and how would I get there?

Example goal: Write a new firm business plan by October 31, 2021 by researching and drafting for at least 30 minutes beginning at 5:30pm every day.

In the end, Covid-19 has shut down so much, at least temporarily, but that doesn't mean we can't use the current slowdown to propel ourselves forward. If you take some time to think about what you really want, write it down smarter, review it regularly and keep at it, we, as personal injury lawyers may end up out earning, by better than tenfold, 97% of all MBA's.

Kirk became a lawyer because he didn't like the way lawyers treated his family, especially his Deaf mother, when his pedestrian father was killed, while reaching to shake Kirk's hand, by a hit and run drunk driver. Kirk runs Red Sneaker Law, PLLC, a personal tragedy firm, in Nashua.

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prospect of a safety risk (in order to avoid liability), thereby undermining the competing legislative goal of keeping families together, and therefore sometimes needlessly inflicting emotional distress on the removed child.

Most of the other states' highest courts that have considered these, and other similar arguments, have sided with imposing liability against the state. Rather than framing the cause of action as one of the government failing to protect against third party malefactors, the courts find governmental liability predicated on the "special relationship" created between the state and the children who depend on it for protection For example, in New Hampshire the law requires the report of suspected child abuse the New Hampshire Department of Health and Human Services web site poses the question to the public: "What do I do if I suspect child abuse or neglect?" The answer: "NH Law requires any person who suspects that a child under age 18 has been abused or neglected must report that suspicion immediately to DCYF." Put otherwise, abuse cases (and the responsibility for protecting abused children) are channeled to DCYF from reporters like nurses, doctors, neighbors, school guidance counselors, the police, clergy and others. Mandatory reporting and the balance of the network of child protection statutes creates a "special relationship" and therefore liability.

The imposition of liability provides compensation to the child harmed by the Department's neglect of duty. Perhaps most important, liability also imposes a cost on negligent behavior. So, while taxpayers do not have standing to have the courts address perceived deficiencies in the funding of DCYF, one can hope that a similar message can be conveyed by the tort system. Liability should provide one more reason among many for the legislature to fund fully the State's efforts to protect the community's most vulnerable.

1. https://www.cdc.gov/violenceprevention/childabuseandneglect/EconomicCost.html.

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that the employer strongly urged its employees to receive the inoculation involved situations where the employer and the employee provide health care services to the public."[21] It further found the employee's job required direct contact with patients and "in this case, the employer is a hospital that, as a matter of law, has an interest in, and commitment to, promoting the public health."[22] The Court held, "In light of the nature of BMC's business, the prevention or limitation of the potential that its own employees might spread a contagious illness necessarily benefits BMC as a matter of law."[23] The Court reasoned:

"The employee's receipt of the vaccination, which was both encouraged by BMC and offered on its premises, was consistent with her status as a health care worker providing direct patient care so as to warrant the conclusion that her injury arose out of her employment. Moreover, because the employer's business interests, the benefit BMC received in this case was separate from and beyond "some element of mutual benefit in the form of lessened absenteeism and improved employee relations."[24]

Thus, vaccinations for health care workers, strongly encouraged or not, arise out of employment because the promotion of health and prevention of spreading disease are intertwined with the employer's business.

Workers injured by a vaccine may be entitled to workers' compensation benefits, even if the vaccination was not mandatory. Vaccine injured health care workers have an even stronger case that their injuries are compensable because of the nature of the work that they do. This is a very fact-specific inquiry and the circumstances of the vaccination must be explored. Further, even if compensable, the attorney should consider whether there is also coverage under the VICP or CICP.

Endnotes

1. This article discusses vaccine injuries. This article in no way should be construed to advocate against getting any vaccine, including the COVID-19 vaccine. Vaccines save countless lives. If you are not vaccinated against COVID-19, please talk to your doctor and reconsider your decision.
2. See 42 U.S.C. § 300aa-10, et. seq.
3. The CICP is authorized by the Public Readiness and Emergency Preparedness Act (PREP Act). See 42 U.S.C. §§ 247d-6d, 247d-6e.
4. See 1 Lex K. Larson, Larson's Workers' Compensation, Desk Ed. § 27.03[2] (Matthew Bender Rev. Ed.)("If there is an element of actual compulsion emanating from the employer, the work connection is beyond question, as when the company requires the employee to submit to vaccination by the company's doctor as soon as the employee is hired, or during an epidemic tells the workers that unless they are vaccinated they cannot work until the epidemic is over.").
5. RSA 281-A:2, XI; New England Tel. Co. v. Ames, 124 N.H. 661, 662 (1984).
6. Ames, 124 N.H. at 662-63 (citations omitted).
7. *Id*. at 663.
8. *Id.* (citations omitted).
9. 116 A. 427 (N.J. 1922).
10. 64 A.2d 99, 101 (N.J. Super. Ct. App. Div. 1949).
11. *Id.* at 99.
12. *Id.*
13. *Id*. at 101.
14. *Id.*
15. 124 N.H. at 662.
16. *Id*. at 664.
17. 820 N.E. 2d 826, 835-36 (Mass. App. Ct. 2005).
18. *Id.* at 828.
19. *Id*. at 833.
20. *Id.* at 834.
21. *Id.*
22. *Id.* at 835.
23. *Id.*
24. *Id.* (quoting Larson, Workers' Compensation § 27.03[2], at 27-30 (1999)).

Heather is an attorney at Shaheen and Gordon in Concord, N.H., where she represents injured individuals in a wide array of personal injury cases, including motor vehicle accidents, bicycle accidents, uninsured and underinsured motor vehicle accidents, wrongful death, workers' compensation, medical malpractice, and vaccine injury cases.

Comparison of Benefits under the Vaccine Injury Compensation Program and the Countermeasures Injury Compensation Program

Vaccine Injury Compensation Program (VICP)	Countermeasures Injury Compensation Program (CICP)
3 Year statute of limitation from first symptom onset or 2 years from the date of death. 42 USC 300aa-16.	1 year Statute of limitation from date of countermeasure. 42 CFR 110.42.
Burden of proof: preponderance of the evidence. 42 USC 300aa-13.	Burden of proof: compelling scientific evidence of direct causal connection. 42 CFR 110.20.
Administered through the Court of Federal Claims. 42 USC 300aa-12.	Administered though an administrative agency of Health and Human Services; no judicial review. 42 USC 247d-6e.
Benefits include past and future pain and suffering (capped at $250,000). 42 USC 300aa-15.	No pain and suffering damages. 42 CFR 110.2.
Funded by excise tax on covered vaccines. 42 USC 300aa-15. (Compensation is through the Vaccine Injury Compensation Trust Fund)	Countermeasures generally funded by emergency appropriation of Congress. 42 USC 247d-6e.
Can reject award in the program and file a civil lawsuit. 42 USC 300aa-21.	No lawsuit unless fits the willful misconduct exception. 42 USC 247d-6d.
Attorneys' fees and costs paid for by the program for claims filed with a reasonable basis. 42 USC 300aa-15.	No provision for payment of attorneys fees and costs. 42 CFR 110.44.

Created by Heather Menezes, Shaheen and Gordon.