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

NEELIE PANOZZO, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-02292-CSB-EIL**
	)	
RIVERSIDE HEALTHCARE, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Confronted with a global pandemic, the possibility (if not the likelihood) of understaffing and high patient loads during the fall and winter and dozens, if not hundreds, of patient-facing staff claiming exemptions from COVID-19 vaccines, Riverside made a decision that many other health systems have made—not to permit unvaccinated staff to treat patients. Instead, Riverside gave those staff the opportunity to apply for non-patient facing positions, but none of the Plaintiffs did.

The situation that Riverside feared is now becoming reality. COVID-19 infection rates are rising in Illinois and Kankakee County where Riverside is located and are likely to continue rising given the emergence of the Omicron variant. Influenza and other dangerous viruses that strict mitigation measures largely abated last winter have also returned in force. And a significant portion of Riverside's patient facing staff are not vaccinated against COVID-19 and therefore are at increased risk of spreading infection to other staff and to Riverside's patient population. Riverside's ability to provide quality care to the community is thereby imperiled and granting further injunctive relief against Riverside's COVID-19 vaccination policy (the "Policy") will exacerbate these risks.

Plaintiffs admit that their basis for obtaining a state court temporary restraining order to avoid compliance with Riverside's COVID-19 vaccination policy is no longer valid due to federal preemption. Thus, Plaintiffs now resort to a fleeting argument for relief under Title VII. But Plaintiffs tellingly concede they will abandon this argument if their original basis for relief is no longer preempted in the future.

Federal courts nationwide, including several appellate courts, have rejected Plaintiffs' contention that religious objections to the COVID-19 vaccine create an "impossible choice." To the contrary, Plaintiffs always retain the choice to adhere to their religious beliefs and refuse the vaccine. There is no risk of Plaintiffs being "forced" to compromise their beliefs. The mere fact that Plaintiffs may face adverse consequences because they have chosen to be unvaccinated (and not apply for a non-patient facing job) does not establish irreparable harm.

Moreover, Plaintiffs concede they never took advantage of the opportunity provided by Riverside to apply for a non-patient facing position, and under controlling Seventh Circuit precedent, Riverside had no obligation to provide or consider any additional accommodation beyond the one that it had already offered. Plaintiffs also cannot overcome the "undue hardship" defense, as Riverside can easily establish a "more than *de minimis*" burden if it were forced to allow dozens of unvaccinated staff to interact with patients, employees, and other stakeholders. Without a viable cause of action, Plaintiffs cannot sustain their request for injunctive relief.

Lastly, any irreparable harm that Plaintiffs may bear is vastly outweighed by the potential harms to Riverside, including loss of patient confidence and goodwill, the possibility of spreading infectious disease to vulnerable patients and other community members, inability to properly staff its hospital and other facilities, and inability to provide proper patient care. These same harms impact the community at large if community members are unable to access Riverside or must risk

potentially deadly infections from an unvaccinated staff member in order to do so. Therefore, the public interest strongly weighs against an injunction. For these reasons, there is no basis to further forestall implementation of the Policy.

I. FACTUAL BACKGROUND

Defendants incorporate, as if fully set forth herein, their statement of Relevant Facts within their Opposition in Response to Plaintiffs' Motion for Preliminary Injunction and accompanying exhibits filed with the State Court. *See* Exhibit 1 attached hereto; *see also* Dkt. 1-8 at pp. 65-77, 97-114. In addition, Defendants submit the First Supplemental Declaration of Rebecca Hinrichs ("Supp. Hinrichs Decl."), which is attached hereto as Exhibit 2.

II. PROCEDURAL BACKGROUND

On October 13, 2021, six of the current Plaintiffs filed a Complaint against Defendants in Kankakee County Circuit Court (the "State Court") seeking injunctive relief and asserting that Defendants violated the Illinois Health Care Right to Conscience Act ("IHRCA") in the implementation of the Policy. On October 19, 2021, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, which the State Court heard on an emergency basis on October 25, 2021. The State Court entered an order temporarily restraining Defendants from taking adverse employment actions against the four presently employed Plaintiffs[1] (the "TRO"). Plaintiffs then filed an Amended Complaint (the "FAC") on October 29, 2021 and the State Court extended the TRO to most of the approximately 50 new plaintiffs which the FAC added.

On November 10, 2021, Defendants filed an Emergency Motion to Dissolve Temporary Restraining Order or, in the Alternative, to Set Bond ("Motion to Dissolve") on the basis that the Centers for Medicaid and Medicare Interim Final Rule (the "CMS Rule") preempted the IHRCA

[1] Panozzo, Kietzman, Busato, and Hamblen.

and, additionally, the Illinois Legislature had amended the IHRCA to clarify that it was not intended to restrict employers from "tak[ing] workplaces measures intended to prevent the spread of deadly, communicable diseases like COVID-19." Based upon this motion and the agreement of the parties, on November 19, 2021 the State Court ordered that the TRO would expire on December 5, 2021, which was Riverside's first compliance deadline under the CMS Rule.

On or around November 24, 2021, Plaintiffs filed a Second Amended Complaint ("SAC"). In addition to adding 10 former Riverside employees and interns as named plaintiffs to this action, Plaintiffs also asserted, for the first time, a claim under Title VII. As a result of this federal claim, Defendants timely removed this action to this Court. Dkt. 1.

Shortly after removal, a ruling in *Louisiana, et al. v. Becerra, et al.*, No. 3:12-CV-3970 (W.D. La. Nov. 30, 2021) enjoined the CMS Rule nationwide. Based upon this development, Defendants agreed to continue to abide by the TRO until 5 p.m. on December 23, 2021. Dkt. 3. On December 15, 2021, the Fifth Circuit stayed the nationwide injunction of the CMS Rule,[2] making it effective in Illinois and 25 other states. Despite this, Plaintiffs requested that Defendants continue the TRO indefinitely pending a ruling on their Motion for Preliminary Injunction. As Riverside has already delayed implementation of the Policy three times and the legal basis for the TRO no longer exists, it declined to extend it by agreement.

III. ARGUMENT

A. Legal Standard

Both a TRO and a preliminary injunction are extraordinary and drastic remedies "that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion."

[2] *Louisiana, et al. v. Becerra, et al.*, No. 21-30734 (5th Cir. Dec. 15, 2021).

Goodman v. Ill. Dep't of Fin. & Prof. Reg., 430 F.3d 432, 437 (7th Cir. 2005) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (internal citations omitted)).

To obtain an injunction, Plaintiffs must first show that: (1) they will suffer irreparable harm without the injunction; (2) traditional legal remedies are inadequate; and (3) their claims have some likelihood of success on the merits. *Goodman,* 430 F.3d at 437. If Plaintiffs meet this threshold burden, the Court should proceed to weigh the remaining factors "to determine whether the balance of harms weighs in favor of the moving party or whether the nonmoving party or public interest will be harmed sufficiently that the injunction should be denied." *Coronado v. Valleyview Public School District 365-U*, 537 F.3d 791, 795 (7th Cir. 2008) (citation omitted).

B. <u>The Court Cannot Issue A TRO or Preliminary Injunction Because Plaintiffs Have An Adequate Remedy At Law And Will Not Suffer Irreparable Harm</u>.

"Harm is irreparable if legal remedies are inadequate to cure it." *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021). Conversely, "[a] plaintiff who can be fully compensated by money damages 'has an adequate remedy at law and has not suffered an irreparable injury.'" *Yeh v. Prairie E&L Mgmt., LLC*, 2020 WL 2612703, at *10 (C.D. Ill. May 22, 2020) (quoting *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983)).[3]

1. Loss of Employment Does Not Establish Irreparable Harm Because An Adequate Remedy at Law Exists.

Here, the essence of Plaintiffs' claim is that they will be subject to adverse employment actions by Defendants, in particular termination of employment and its associated consequences,

[3] Plaintiffs have also essentially requested an indefinite TRO, which is improper. Federal Rule of Civil Procedure 65(b)(2) limits the duration of a TRO to 14 days. After removal, a TRO granted by a state court remains in force no longer than the limitations of Rule 65(b). *Granny Goose Foods, Inc. v. Local No. 70, Brotherhood of Teamsters,* 415 U.S. 423, 439–440, n.15 (1974) (discussing the example of a state court issuing a 15-day TRO, the case being removed on day 2 of the TRO, and the TRO expiring on day 12, as at that time, Rule 65 limited TROs to 10 days). This duration may only be extended once for "good cause shown" or by party consent. *Savis, Inc. v. Cardenas*, No. 18 CV 6521, 2018 WL 5279311, at *7 (N.D. Ill. Oct. 24, 2018) (citing Fed.R. Civ. P. 65(b)(2)) (other citations omitted). Here, in addition to the other defects in their application for injunctive relief, Plaintiffs make no argument as to why there is "good cause" to extend the nearly two-month long TRO entered by the State Court.

if they continue to refuse to comply with the Policy.[4] These alleged harms are either fully compensable with money damages or purely speculative. *See Troogstad et al., v. City of Chicago, et. al.,* No. 21 C 5600, 2021 WL 6049975, at *7 (N.D. Ill. Dec. 21, 2021) (no irreparable harm in COVID-19 vaccine mandate case because "termination of employment is typically redressable through money damages") (citations omitted); *Cook Cty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705, 722 (N.D. Ill. 2020) (noting that the request for injunction was a policy disagreement on how best to handle the COVID-19 pandemic, was based on speculation and was insufficient).[5]

Both federal district courts and appellate courts have repeatedly held that healthcare workers challenging COVID-19 vaccine mandates cannot show irreparable harm. *See Doe v. NorthShore University Health System*, 2021 WL 5578790, *6–8 (N.D. Ill. Nov. 30, 2021) (denying preliminary injunction for IHRCA claims challenging hospital-employer's mandatory COVID-19 vaccination policy because plaintiffs failed to establish irreparable harm); *see also Together Employees v. Mass General Brigham Inc.*, --- F.4th ---, 2021 WL 5368216 (1st Cir. Nov. 18, 2021) (affirming denial of healthcare workers' request for preliminary injunction related to employer's vaccine mandate and finding no irreparable harm); *We The Patriots USA, Inc. v. Hochul*, 2021 WL 5121983, at *19 (2d Cir. Nov. 4, 2021) ("[I]t is well settled . . . 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."); *Doe v. Mills*, 2021 WL 4860328, at *36 (1st Cir. Oct. 19, 2021) (affirming denial of preliminary

[4] All the current Plaintiffs are presently employed except Plaintiff Amy Memenga, Brittany Pommier, Melissa Harms, Sierra Sims, Liam O'Connor, Gabriel O'Connor, Nicole Boersma, Mindy Miller who is the parent or legal guardian of minor C.M. who allegedly performed a clinical rotation at Riverside, Nichole Bednarz, Michael Keen, and Stephanie Green. *See* SAC at ¶¶ 6, 18, 63-72.

[5] *See also Whitby v. Dr. John Warner Hosp.*, 2011 WL 1670458, at *1 (C.D. Ill. Apr. 29, 2011) ("[m]ore than speculation of irreparable harm is necessary to afford a party preliminary injunctive relief"); *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 83 (8th Cir. 1995) ("The loss of a job is quintessentially reparable by money damages.").

injunction filed by healthcare workers related to COVID-19 vaccine mandate because "[w]hen litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy").[6] The Supreme Court has also recently weighed in, rejecting at least three separate emergency writs of injunction in healthcare worker mandatory COVID-19 vaccination cases, thereby upholding the aforementioned opinions. *See Mills*, 142 S. Ct. 17; *We The Patriots USA,* 2021 WL 5873122; *Together Employees*, Case No. 21-1909, Application No. 21A175.

2. Plaintiffs' "Impossible Choice" Theory of Irreparable Harm Fails.

Although they attempt to characterize their employment as itself a sort of "religious belief,"[7] the crux of Plaintiffs' argument is that they face an impossible choice: compromise their religious beliefs or lose their jobs. Doc. 7 at p. 9-10, n.7. This "impossible choice" theory, however, has been roundly rejected by federal courts in vaccine mandate cases. *See Sambrano et al. v. United Airlines, Inc.*, 2021 WL 5176691, at *4 (N.D. Tex. Nov. 8, 2021) (denying employees' request for a preliminary injunction), *aff'd*, 2021 WL 5881819 (5th Cir. Dec. 13, 2021); *NorthShore University Health System*, 2021 WL 5578790, *6–7 (rejecting plaintiff's "Impossible

[6] *See also Harsman v. Cincinnati Children's Hosp. Medical Center*, 2021 WL 4504245, at *4 (S.D. Ohio Sept. 30, 2021) (finding that threats to healthcare workers' ""careers," "reputations," and the risk of "bankruptcy" or "foreclosure" are quintessentially compensable injuries. They are not irreparable. As for the threat to Plaintiffs' "privacy" or "health," Plaintiffs avoid these issues by refusing to comply with the mandate and accepting the resulting employment action."); *Beckerich v. St. Elizabeth Medical Center*, 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*, 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*, 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*, 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).

[7] Plaintiffs' creative but desperate argument that their employment with Riverside is part of their "religious beliefs" may have been viable under the IHRCA (which protects certain refusals contrary to an individual's "conscience"). Title VII's protection is much more limited, as it is well-established that "only *religious* beliefs, observances, and practices must be accommodated." *Adeyeye v. Heartland Sweeteners*, LLC, 721 F.3d 444, 451 (7th Cir. 2013).

Choice" theory as "too speculative to compel the extraordinary of injunctive relief" and finding the alleged harms to be "quintessentially reparable") (quoting *Bilyeu v. UT-Battelle, LLC*, Case No. 3:21-cv-352, 2021 WL 4859932 (E.D. Tenn. Oct. 15, 2021)).[8]

Sambrano is highly instructive. There, United Airlines employees challenged their employer's COVID-19 vaccination policy due to their religious objections. 2021 WL 5176691, at *1. The *Sambrano* court initially granted the plaintiffs' request for a TRO, but subsequently denied the plaintiffs' request for a preliminary injunction. The *Sambrano* court rejected the plaintiffs' "impossible choice" argument, pointing out that the plaintiffs could simply choose (and in fact, have already chosen) to not take the vaccine. *Id.* at *4-*5. The mere fact that such a decision could cause some plaintiffs adverse consequences or personal difficulties does not establish that it was an "impossible choice" or that plaintiffs suffered irreparable harm. *Id.* at *5. The Fifth Circuit also recently adopted this reasoning and declined to issue an injunction pending an appeal. *See Sambrano, et al. v. United Airlines, Inc.*, No. 21-11159 (5th Cir. Dec. 13, 2021).

Put simply, Plaintiffs are not "[b]eing forced to compromise [their] religious beliefs." They always have the freedom to choose to work for another employer or to apply to work for Riverside in a non-patient facing role. (*See* Hinrichs Decl. at ¶ 39). Yet, none of the Plaintiffs have exercised this latter option, which would allow them to remain unvaccinated and continue to work in

[8] *See also Beckerich*, 2021 WL 4398027, at *7 ("[N]o Plaintiff in this case is being forcibly vaccinated. . . . [N]o Plaintiff is being imprisoned and vaccinated against his or her will. . . . 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."); *Harsman*, 2021 WL 4504245, at *4 ("As for the threat to Plaintiffs' 'privacy' or 'health,' Plaintiffs avoid these issues by refusing to comply with the mandate and accepting the resulting employment action. . . . Injuries that Plaintiffs elected to sustain cannot be irreparable."); *Together Employees*, 2021 WL 5234394, at *21 ("[P]laintiffs contend that they are faced with an 'impossible choice' to 'forsake their religious convictions, or . . . potentially put themselves in danger of physical harm.' . . . However, [Defendant] is a private employer, not a state actor. There are no First Amendment claims at issue.").

healthcare for Riverside. *See id.* Plaintiffs do not have an unfettered right (under Title VII or otherwise) to maintain their exact position and not adhere to their private employer's policies.

3. Plaintiffs Cannot Establish Irreparable Harm Because Riverside Is Not A State Actor And Thus Cannot Infringe On Their Constitutional Rights.

Recognizing that their impending job loss fails to establish irreparable harm, Plaintiffs also argue that "compromising one's religious beliefs is the sort of harm that is irreparable." Dkt. 9 at p. 14. To support this proposition, Plaintiffs mainly cite cases concerning the Free Exercise Clause of the First Amendment to argue that courts recognize irreparable harm "where a plaintiff asserts a chill on ***free exercise rights***." *Id.* (quoting *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 494-95 (2008)) (emph. added). However, these cited cases all involved claims of religious infringement brought against **state actors**. In such cases involving plaintiffs suing and seeking to preliminarily enjoin state actors, courts often find irreparable harm because "the loss of First Amendment rights for even minimal periods of time, unquestionably constitutes irreparable injury." *Korte v. Sebelius*, 528 Fed. Appx. 583, 588 (7th Cir. 2012).

But here, Defendants are not state actors, and as such, it is a ***legal impossibility*** for Defendants to infringe upon Plaintiffs' constitutional rights. *See Beckerich.*, 2021 WL 4398027, at *3 ("Put simply, without establishing that Defendants are state actors, Plaintiffs' constitutional claims cannot stand, and thus have zero likelihood of success on the merits.").[9]

Plaintiffs acknowledge that their arguable "protection is statutory rather than constitutional," but suggest that a violation of the Religious Freedom Restoration Act ("RFRA") satisfies the irreparable harm factor. Dkt. 9 at p. 14. However, the RFRA again ***only*** applies to

[9] The Seventh Circuit recently held that mandatory COVID vaccinations do not present a constitutional problem even when promulgated by a state actor. *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("Given *Jacobson v. Massachusetts*, 197 U.S. 11 [ ] (1905), which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2.").

state actors, and the rights protected by the RFRA are directly tied to the First Amendment's free exercise rights. *See* 42 U.S.C. § 2000bb(b) ("The purposes of this chapter are . . . to provide a claim or defense to persons whose religious exercise is substantially burdened ***by government***.") (emph. added). As such, Plaintiff's RFRA cases discussing "statutory rights" are likewise inapplicable and easily distinguishable from this case.[10] Accordingly, Plaintiffs cannot rely on the First Amendment, the free exercise clause or other constitutional rights to show irreparable harm.

C. Plaintiffs Cannot Make A "Strong Showing" That They Are Likely To Succeed On The Merits.

"[A]n applicant for preliminary relief bears a significant burden" and must make a "***strong showing*** that she is likely to succeed on the merits" as well as a "demonstration of how . . . to prove the key elements of [the] case." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) (emph. added). To establish a likelihood of success on their failure to accommodate religion claim under Title VII, Plaintiffs must at a minimum show how they can prove the following elements: "(1) a bona fide religious practice conflicts with an employment requirement, (2) [they] brought the practice to the employer's attention, and (3) the religious practice was the basis for the adverse employment decision." *E.E.O.C. v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996). If Plaintiffs can establish a prima facie case, then the employer may respond "either by proving that it was unable to provide a reasonable accommodation without undue hardship or that it offered a reasonable accommodation which was not accepted by the employee." *Id.* at 318.

[10] Only two of Plaintiffs' cited cases on "irreparable harm" involved non-state actors, but both unpublished cases were decided over 40 years ago and thus of limited persuasive value, especially since federal courts have near-unanimously agreed that private actors requiring employees to receive COVID-19 vaccinations do not implicate irreparable harm. *See* Dkt. 9 at p. 13 (citing *Davis v. S.F. Mun. Ry.*, 1975 U.S. Dist. LEXIS 16947, at *5 (N.D. Cal. Dec. 8, 1975); *Scott v. S. Cal. Gas Co.*, 1973 U.S. Dist. LEXIS 13142, at *21 (C.D. Cal. June 15, 1973)). Plaintiffs also cite to *U.S. EEOC v. Elec. Data Sys.*, 1983 U.S. Dist. LEXIS 19293 (W.D. Wash. Feb. 14, 1983), but that case turned on the court's conclusion that the computer programmer plaintiff would suffer an "erosion of his job skills" in a "highly technical and rapidly changing science; the alleged irreparable harm upon which the court relied had nothing to do with the plaintiff's religious freedom. *See id.* at *4.

1. Plaintiffs Cannot Establish A Prima Facie Failure-to-Accommodate Claim Under Title VII Because Riverside Offered Them The Opportunity For Reassignment To A Non-Patient-Facing Role, Which They Rejected.

It is well-settled that employees seeking reasonable accommodation are not entitled to the accommodation of their choice or the "satisfaction of [their] every desire." *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993). Consistent with that principle, Title VII only requires employers to provide *one* reasonable accommodation as long as it "eliminates the conflict between employment requirements and religious practices[.]" *Id.* "[O]nce the employer has offered an alternative that reasonably accommodates the employee's religious needs, the statutory inquiry is at an end." *Porter v. City of Chicago*, 700 F.3d 944, 951–52 (7th Cir. 2012) (internal punctuations omitted).

In *Wright*, the Seventh Circuit held that an employee was reasonably accommodated when the employer invited him to "bid" on four "weekends off" positions that would have enabled the employee to obtain a position that did not interfere with his religious practices. 2 F.3d at 217. Even though the *Wright* plaintiff viewed the offered positions as "nonpreferable," the Seventh Circuit held that such opportunities for reassignment were reasonable accommodation because the available positions required similar skill and the employee was not required to "accept a reduction in pay or some other loss of benefits." *Id.*

Here, Riverside similarly offered its unvaccinated, patient-facing employees the opportunity to apply for non-patient facing roles after their religious declination requests were denied. Despite this accommodation, only one patient-facing employee applied for a non-patient facing role after Riverside denied his religious declination. Riverside hired this employee (who is not a Plaintiff) into the non-patient facing role for which he applied and continues to employ him while he adheres to all of Riverside's other COVID-19 safety protocols. (Hinrichs Decl. at ¶ 39).

Plaintiffs, by contrast, never availed themselves of this accommodation, even though they cannot dispute that it would have "eliminate[d] the conflict between [Riverside's] employment requirements and [their] religious practices." *Wright*, 2 F.3d at 217. As such, "the statutory inquiry is at an end," and the Court need not address whether Riverside would have suffered an undue hardship if it had to accommodate any other requests. *Porter*, 700 F.3d at 952 (7th Cir. 2012) (internal punctuations omitted); *see Wright*, 2 F.3d at 217.[11]

2. Plaintiff Cannot Overcome Riverside's "Undue Hardship" Defense.

To establish "undue hardship," Riverside must merely show that the accommodation "would impose more than minimal hardship on the employer or other employees." *Adams v. Retail Ventures, Inc.*, 325 Fed. Appx. 440, 443 (7th Cir. 2009). Applying this "*de minimis*" standard to employee vaccine cases, federal courts have consistently held that accommodating an employee's desire to be vaccine-free poses an undue burden on healthcare employers in particular. *See, e.g., Together Employees*, 2021 WL 5234394, at *11 (D. Mass. Nov. 10, 2021) ("[P]ermitting the requested accommodations would create a greater risk of COVID-19 infection in [the hospital's] facilities . . . [and] would undermine its responsibility to maintain the highest level of patient care and protect patients, staff and visitors.") (internal quotations omitted); *see also Mills*, 16 F.4th 20, 36 (1st Cir. 2021) ("[T]he hospitals need not provide the exemption the appellants request because doing so would cause them to suffer undue hardship.").

Plaintiffs' central argument against "undue hardship" is that Riverside allegedly "did not conduct an individualized assessment of each request for each of Plaintiffs' religious exemptions," and instead, implemented a broad rule denying all religious exemptions for patient-facing staff.

[11] In their Motion, Plaintiffs argue that Riverside simply extended "an offer of an opportunity to apply for another position" which "is not the same thing as offering plaintiffs another position." Dkt. 9 at p. 7. This self-serving speculation ignores the fact that the Plaintiffs never applied for non-patient facing roles and that at least one of their colleagues successfully did so, as well as the Seventh Circuit authority cited above.

But Riverside has **never** made blanket determinations as to all religious / strongly held belief (or medical)-based declination requests. (Hinrichs Decl. at ¶ 34; Moss Decl. at ¶ 18). In fact, Riverside has granted 38 sincerely held religious belief, practice or observance exemptions for employees in non-patient facing roles. (Hinrichs Decl. at ¶ 35; Moss Decl. at ¶ 19). Riverside's declination request assessment process is also personalized and detailed, includes an appeal process and allows for employee accommodations in the event that a request is denied. (Hinrichs Decl. at ¶ 36; Moss Decl. at ¶ 20). This is true even for employees who submit religious declination requests and are charted to be in a patient-facing position. (Hinrichs Decl. at ¶ 36).[12]

Moreover, when analyzing undue hardship under Title VII, "it is appropriate to consider aggregate effects when multiple employees are granted the same accommodation." *Together Employees*, 2021 WL 5234394, at *13; (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 n.15 (1977)).[13] To that end, Riverside determined in September 2021, after receiving 207 religious exemption requests, that it would face a number of potentially irreparable harms and hardships, including loss of patient confidence and goodwill, the possibility of spreading infectious disease to vulnerable patients and other community members, inability to properly staff its hospital and other facilities, and inability to provide proper patient care, if it were to allow the 169 patient-facing employees who submitted religious declination requests to continue treating patients while being unvaccinated. (*Id.*, ¶12; Hinrichs Decl. at ¶ 29).

[12] For example, a patient-facing employee whose religious declination request is denied may appeal and state that they believe their role is not patient-facing. Riverside then will conduct a supplemental and individualized assessment as to the employee's duties and responsibilities to determine if the employee's role is in fact patient-facing. To date, Riverside has granted religious declination requests of at least three employees after determining that the employee is not in fact truly patient-facing. (Hinrichs Decl. at ¶ 37).

[13] *See also* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws, accessed December 21, 2021 ("Another relevant consideration is the number of employees who are seeking a similar accommodation (i.e., the cumulative cost or burden on the employer).").

Plaintiffs' cases regarding "individualized assessment" merely stand for the proposition that reasonable accommodation and undue burden must be assessed on a "case-by-case" basis. *See* Dkt. 9 at pp. 5–6 (citing multiple cases). But in a situation where dozens of employees seek the same accommodation under nearly identical circumstances, no controlling authority requires employers like Riverside to conduct a *separate* "undue hardship" assessment for *each* individual. This is especially true here because the risk of contracting and spreading COVID-19 is inherently a concern of public health, thus examining undue hardship purely from an individualized perspective is short-sighted and fails to adequately account for the undue burden of aggregate risks, or the potential for collectivist solutions. Moreover, courts have repeatedly expressed their reluctance to override the decisions of trained healthcare professionals in assessing medical risk. *See, e.g., Americana Healthcare Corp. v. Schweiker,* 688 F.2d 1072, 1086-87 (7th Cir. 1982) ("Deference to the expertise of professionals who are trained and experienced in evaluating the compliance of Medicare or Medicaid facilities with federal regulations is consistent with recent decisions of the United States Supreme Court cautioning against a substitution of a judge's opinion for that of a professional."). Riverside's assessment of undue burden in this public health context is wholly appropriate and necessary to protect patient, staff and community health and safety.

D. <u>The Balance Of Harms And Public Interest Weigh Strongly Against Issuance Of A Preliminary Injunction</u>.

Here, the balance of harms weighs strongly in favor of denying injunctive relief. The only harm that Plaintiffs attempt to articulate is a speculative and legally dubious right to "religious liberty" in a private workplace (not subject to the First Amendment). On the other hand, if injunctive relief is granted, there will be, *inter alia*, heightened risks to patient welfare, impacts on Riverside's patient relationships and goodwill, and heightened risks to Riverside's ability to properly staff its facilities and provide the highest standard of care to the community. (Moss Decl.

at ¶¶ 11-15). Plaintiffs' individual interests in retaining their patient-facing roles and incomes without complying with the Policy cannot outweigh these potential harms to Riverside.

Here, Riverside's medical staff has determined that requiring all patient-facing staff to be vaccinated is in the best interests of the institution, its patients, its staff and the community. (*See* Moss Decl. at ¶¶ 6-15; Hinrichs Decl. at ¶¶ 9-21). Riverside did not make this decision rashly. It surveyed the policies and practices of healthcare providers nationwide and considered its past vaccination practices as well as the state of the pandemic and the medical, social and religious needs of its patients, employees, visitors, contractors, and its facilities and community as a whole over the course of several months before deciding on and implementing its Policy. *Id.* It assessed state and looming federal legal requirements for vaccination of healthcare providers. *Id.* It also took into account that Riverside serves a prominent role in the Kankakee healthcare system, and as such there is a strong public interest in allowing it to maintain proper staffing levels, to be able to provide proper care during what will be a difficult winter, and to maintain a robust healthcare system and avoid the patient care crises that have visited other communities throughout the United States. (Moss Decl. at ¶ 14). It was only after weighing all of these factors Riverside gave its employees time to comply with the Policy's requirements and accommodations in the event they elected to or could not comply for medical or religious reasons. (Hinrichs Decl. at ¶¶ 18-33).

In short, Riverside's healthcare professionals have determined that the Policy is the best way to balance all of these factors, including patient and employee protection from COVID-19. (*See* Moss Decl. at ¶¶ 6-15; Hinrich Decl. at ¶¶ 9-21). In deference to their judgment and following well-settled Illinois and federal law, Plaintiff's Motion should be denied.

E. CONCLUSION

Based on the foregoing reasons, Defendants respectfully request that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction be denied in its entirety.

Dated: December 22, 2021

Respectfully Submitted,

RIVERSIDE HEALTHCARE AND
PHILLIP M. KAMBIC

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CERTIFICATE OF SERVICE

I certify that on December 22, 2021, I filed and served the foregoing document through the Court's electronic filing system, which will serve notice upon all counsel of record.

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