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

NEELIE PANOZZO, *et al*., Plaintiffs, v. RIVERSIDE HEALTHCARE, *et al.*, Defendants.	Case No.: 2:21-cv-02292-CSB-EIL **Plaintiffs' Memorandum of Law in Support of their Motion for TRO and Preliminary Injunction**

INTRODUCTION

Since the Plaintiffs filed their first motion for a preliminary injunction, the U.S. Court of Appeals for the Fifth Circuit has lifted the nationwide injunction on the federal Centers for Medicaid & Medicare Services (CMS) vaccination mandate, finding CMS was unlikely to succeed on the merits but nevertheless limiting the relief only to the plaintiff states (of which Illinois is not one). *Louisiana v. Becerra*, No. 21-30734 (5th Cir. Dec. 15, 2021).[1] As a result, Plaintiffs' argument in their first motion for an exemption under the Illinois Health Care Right of Conscience Act is preempted by the CMS Rule.[2] However, the CMS Rule still requires Medicaid and Medicare recipients like Riverside to provide exemptions when Title VII requires. Because Riverside has failed to comply with Title VII as to these employees, injunctive relief is appropriate.

PROCEDURAL HISTORY

This case began on October 13, 2021, when six nurses employed by Riverside Healthcare filed a complaint in the State of Illinois' Circuit Court for the 21st Circuit, Kankakee County, against

[1] https://www.ca5.uscourts.gov/opinions/pub/21/21-30734-CV0.pdf.
[2] The United States has appealed to the Supreme Court. *Louisiana v. Becerra*, No. 21A241 (U.S. emergency application filed Dec. 16, 2021). It is possible the Supreme Court could reinstate the nationwide injunction before this Court's decision on these motions, in which case Plaintiffs would withdraw this alternate motion and rely on their first motion under the Illinois Health Care Right of Conscience Act.

the hospital and its CEO, Philip Kambic, alleging violations of the Illinois Health Care Right of Conscience Act, 745 ILCS § 70/1, et seq. (the "HCRCA"). The complaint alleged that Riverside was forcing Plaintiffs to choose between compromising their sincerely held religious beliefs by obtaining the COVID-19 vaccine in accordance with Riverside's COVID-19 vaccine mandate and termination for failing to obtain the COVID-19 vaccine.

Plaintiffs immediately filed for a temporary restraining order, which Judge Nicholson granted on October 25, 2021 as to the four nurses then employed by Riverside. **Exhibit A.** Plaintiffs then were granted leave and filed an Amended Complaint adding 56 additional Riverside employees to the case. Plaintiffs promptly sought to extend the TRO to those additional plaintiffs, which Defendants did not oppose. They only submitted a declaration pointing out three individual plaintiffs with unique circumstances that did not justify inclusion. The Court then extended the TRO to 53 additional plaintiffs and set a briefing schedule for a preliminary injunction, to be heard on January 11, 2022. The Court held that no bond was needed but if necessary, setting a bond could be incorporated into the preliminary injunction decision. **Exhibit B.**

The federal Centers for Medicaid & Medicare Services (CMS) then issued a rule requiring vaccination of employees of Medicaid/Medicare-participating employers like Riverside, with an initial deadline for the first dose of vaccination on December 5, 2021. Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,583 (Nov. 5, 2021). Defendants promptly moved to dissolve the stay based on this federal preemption. The Court adopted an agreement by the parties to set the stay to dissolve on December 5, 2021. **Exhibit C.** The Court also granted Plaintiffs leave to amend their complaint.

Plaintiffs filed a Second Amended Complaint, alleging that Defendants were not complying with the religious nondiscrimination requirements of Title VII of the federal Civil Rights Act of

1964, which was not preempted by the CMS Rule. They also added an additional ten plaintiffs whose religious objections were denied by Riverside and who were no longer employed by Riverside. With the introduction of a federal claim into the case, Defendants removed the case to this Court on November 29, 2021. Plaintiffs and Defendants have agreed to observe the terms of the existing TRO to give them time to brief and the Court time to hear this motion. However, Defendants have told Plaintiffs and opposing counsel that they will end their voluntary continuation of the TRO on January 3, 2022, and will fire all Plaintiffs at that time. Thus, regrettably, prompt consideration by this Court is necessary to preserve the status quo.

FACTS

A proposed numbered statement of facts accompanies this filing.

JURISDICTION

Courts may grant injunctive relief to prevent irreparable harm under Title VII when to make an employee wait on the administrative process would defeat the value of injunctive relief. *Halczenko v. Ascension Health, Inc.,* No. 1:21-cv-02816-JPH-DML, 2021 U.S. Dist. LEXIS 218975, at *4 (S.D. Ind. Nov. 12, 2021). Securing such injunctive relief requires demonstrating the usual aspects for a temporary restraining order or preliminary injunction in order to preserve the status quo. *Saint-Fleur v. Barretto*, No. 1:18-CV-01517-LJO-SAB, 2019 U.S. Dist. LEXIS 86416, at *19 (E.D. Cal. May 22, 2019); *Less v. Berkshire Hous. Servs.*, Civil Action No. 00-30033-MAP, 2000 U.S. Dist. LEXIS 13700, at *9 (D. Mass. Aug. 18, 2000). *See generally Bailey v. Delta Air Lines, Inc*., 722 F.2d 942, 944-45 (1st Cir. 1983); *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981); *Drew v. Liberty Mut. Ins. Co.*, 480 F.3d 69, 74 (5th Cir. 1973).

STANDARD OF REVIEW

When considering a motion for preliminary injunction, the Court employs a familiar test: the plaintiff has the burden to show (1) a likelihood of success on the merits; (2) irreparable harm; and (3) that the balance of the equities and the public interest favors emergency relief. *Troogstad v. City of Chi.*, No. 21 C 5600, 2021 U.S. Dist. LEXIS 226665, at *7 (N.D. Ill. Nov. 24, 2021).

ARGUMENT

a. The Plaintiffs are likely to succeed on their Title VII claim.

Title VII prohibits employers from discriminating against their employees on the basis of their sincerely held religious beliefs. *See* 42 U.S.C. § 2000e-2(a). More specifically, Title VII prohibits employers from failing or refusing to hire or to discharge any individual, or to otherwise discriminate with respect to an employee's compensation, terms, conditions, or privileges of employment, because of the employee's race, color, *religion*, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Yet, Plaintiffs are about to be fired by Defendants based on their religion. Title VII does not demand "mere neutrality with regard to religious practices . . . rather, it gives them favored treatment." *Dr. A. v. Hochul*, No. 1:21-CV-1009- DNH-ML, 2021 WL 4734404, *9 (N.D.N.Y. Sept. 14, 2021). Thus, under certain circumstances, Title VII "requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

Title VII defines "religion" as "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 or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). *See Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013). The Seventh Circuit has held that "a plaintiff must show that the observance or practice conflicting with an employment requirement is religious in nature, that [he] called the religious observance or practice to [his] employer's attention, and

that the religious observance or practice was the basis for [his] discharge or other discriminatory treatment." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1996) (citations omitted). "[O]nce the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any accommodation would result in undue hardship." *Id.*

Here, Plaintiffs have established a prima facie case of discrimination: their religious beliefs conflict with Defendants' vaccination requirement, and they have been give the options of either complying with their employer's vaccine requirement to the detriment of their beliefs or stick to their devout, religious faiths and lose their employment. Indeed, the Kankakee Circuit Court already found that Plaintiffs had sincere religious beliefs, and Defendants have never questioned the sincerity of Plaintiffs' beliefs, or undertaken any program of investigation into their sincerity.

"Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to make a reasonable accommodation of the religious practice or to show that any reasonable accommodation would result in undue hardship." *Porter v. City of Chi.*, 700 F.3d 944, 951 (7th Cir. 2012). In order to determine whether a reasonable accommodation is possible or whether an undue burden would result, an individualized assessment of each employee's needs and role is necessary. *See* EEOC, Compliance Manual on Religious Discrimination, (Jan. 15, 2021) (quoting *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981): "The determination of whether a particular proposed accommodation imposes an undue hardship must be made by considering the particular factual context of each case."). *Accord Tabura v. Kellogg USA*, 880 F.3d 544, 551 (10th Cir. 2018) ("Determining what is reasonable is a fact-specific determination that must be made on a case-by-case basis"); *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011); *see also* "No Magic Words: EEOC Clarifies Guidance on Religious

Accommodations to Vaccine Mandates," McGuire Woods (Oct. 29, 2021) ("Employers must approach each request on an individualized, fact-specific basis and weigh the requested accommodation against any undue hardship it may cause.").[3] In conducting such an individualized assessment, "employers must engage in a dialogue with an employee seeking an accommodation," seeking "bilateral cooperation" toward a mutually agreeable accommodation where possible. *Porter*, 700 F.3d at 953. *See E.E.O.C. v. Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009) (after an accommodation request, employer should "engage in an interactive process—a meaningful dialogue with the employee.") (cleaned up). "Under Title VII, an employer should thoroughly consider all possible reasonable accommodations." EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," K.12.[4]

Defendants have failed on both of these procedural steps required by Title VII. Defendants did not conduct an individualized assessment of each request for each of Plaintiffs' religious exemptions. To date, Defendants have, as a rule, denied all religious exemption requests to the COVID 19 vaccine from patient-facing staff. The Declaration of Riverside's president, Mr. Kambic, accompanying their emergency motion to dissolve TRO, states that "[a]s part of the Policy, Riverside implemented a declination request assessment process which as to non-patient facing religious declination requests is personalized and detailed, includes an appeal process and allows for employee accommodations in the event that a request is denied." Kambic Decl. ¶ 10. In other words, as to patient-facing staff, which includes all Plaintiffs, there is no "personalized and

[3] https://www.mcguirewoods.com/client resources/Alerts/2021/10/eeoc-clarifies-guidance-religious-accommodations-vaccine-mandates. The underlying EEOC guidance is available at https://www.eeoc.gov/wysk/what-you-should know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (L.3: "An employer will need to assess undue hardship by considering the particular facts of each situation." L.4: "The determination of whether a particular proposed accommodation imposes an undue hardship on the conduct of the employer's business depends on its specific factual context.").

[4] Available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

detailed" assessment system, but instead a blanket and automatic rejection. Yet each employee is unique in his or her position, and the burdens associated with each could be different. *See* Alisha Marie Mays, *Taking Hospital Employees Down from their Pedestals: Why Title VII Religious Discrimination Should Not Be Applicable for Immunizations*, Nat. L. Rev. (May 6, 2014) ("A reasonable accommodation could possibly depend on the size of the hospital and the employee's position as well. For example, a small versus large hospital, and a nurse versus a neurosurgeon. There may be an additional cost to the hospital for having to actually bring in a second physician who is immunized to treat that specific patient, or just to have as a backup physician.").[5] Moreover, the risk posed by each unvaccinated employee may be different based on considerations like natural immunity from prior exposure to COVID. *See BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *16 (5th Cir. Nov. 12, 2021) ("a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus."). And there is certainly no meaningful engagement or thorough consideration to consider accommodations; there is only blanket rejection by form letter with a threat to terminate.

Second, although Defendants did not make any reasonable accommodations for Plaintiffs or *any* employee whose religious faith precludes vaccination, it cannot establish that providing any such accommodations would result in an undue burden to Defendants. Defendants claim that it offered Plaintiffs the opportunity to apply for non-patient facing positions with the assistance of Human Resources. *See* **Exhibit E** (originally filed as Decl. Moss, Ex. A to Defs' Opp. to Mot. TRO). But that is not a reasonable accommodation because it was simply an offer of an opportunity to apply for another position. That is not the same as offering plaintiffs another position. Nothing in the record shows that Defendants made any reasonable accommodation for Plaintiffs, although

[5] https://www.natlawreview.com/article/taking-hospital-employees-down-their-pedestals-why-title-vii-religious-discriminatio.

many are possible. EEOC, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," K.2.[6] ("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."). Indeed, the EEOC notes, "In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances." *Id*. at K.12.

Thus, because there is a prima facie case and because no reasonable accommodations were offered and rejected by the employee, Defendants must prove that they face an undue hardship. Such a hardship must be "real" and not merely "speculative," "conceivable," "hypothetical," or based on "assumptions" or "opinions." *Brown v. Polk Cty.*, 61 F.3d 650, 655 (8th Cir. 1995) (collecting cases). "Grumbling" by a coworker or customer is not enough; an "actual imposition . . . or disruption of the work routine" is necessary. *Id*. (quoting *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 407 (9th Cir. 1978)).

Defendants cannot bear this burden for several reasons. (1) Defendants have refused to provide religious accommodations, yet Defendants accommodated pregnant employees in patient-facing roles by allowing them to forego vaccination and instead partake in COVID testing and the wearing of face masks. *See* **Exhibit F** (originally filed as Ex. D, Pls' Mot. TRO). This is in direct defiance of the CDC, which "recommends COVID-19 vaccination for all people aged 12 years and older, including people who are pregnant . . . ." *COVID-19 Vaccination for Pregnant People to Prevent Serious Illness, Deaths, and Adverse Pregnancy Outcomes from COVID-19*, CDCHAN-00453,

[6] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

September 29, 2021.[7] It is also against the recommendation of the American College of Obstetricians & Gynecologists and the Society of Maternal-Fetal Medicine[8] and the U.S. Department of Veterans Affairs' Health Care Administration.[9] Despite this accommodation that appears to not have created an undue hardship on Defendants and is inconsistent with CDC guidelines, Defendants have not extended the same reasonable accommodation to religious employees. Though Title VII does not incorporate the comparable-treatment test of the free-exercise clause, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), it substantially undermines Defendants' credibility to extend accommodations to certain secular activities but not religious activities.

(2) Defendants granted religious exemptions from their requirement that employees be vaccinated against influenza. *See* **Exhibit G** (originally filed as Ex. A, Pls' Brief in Opp. to Mot. Dissolve TRO). Those exempt employees can continue to work and see patients so long as they wear masks.[10] Influenza is contagious in the same way as COVID, and especially dangerous among older and medically vulnerable populations like COVID,[11] yet apparently Defendants believe a mask is sufficient to protect patients from influenza spread by unvaccinated employees. Defendants have not made the same accommodation available to Plaintiffs or other patient-facing employees with religious objections to the COVID-19 vaccine. *See Horvath v. City of Leander*,

[7] https://emergency.cdc.gov/han/2021/han00453.asp. Plaintiffs request that the Court take judicial notice of this fact, as it appears on a website maintained by the federal government. *Clear Spring Prop. & Cas. Co. v. Victory Ins. Co.*, No. 21-cv-01162, 2021 U.S. Dist. LEXIS 189726, at *18 (N.D. Ill. Oct. 1, 2021) ("[I]n *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003), the Seventh Circuit collected cases and found that information published on a government website is the proper subject of judicial notice.").

[8] *See* https://www.acog.org/news/news-releases/2021/07/acog-smfm-recommend-covid-19-vaccination-for-pregnant-individuals.

[9] *See* https://www.va.gov/health-care/covid-19-vaccine/about-covid-19-vaccine/#vaccines-during-pregnancy-or-b.

[10] Illinois law requires healthcare providers, such as Riverside to provide their healthcare workers the influenza vaccine. Only healthcare workers with a medical reason, religious objection, or who have already received the vaccine may decline. Ill. Admin. Code tit. 77 § 956.30.

[11] *See* "Similarities and Differences between Flu and COVID-19," U.S. Centers for Disease Control & Prevention, https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm.

946 F.3d 787, 799 (5th Cir. 2020) (Ho, J., concurring/dissenting) (city's refusal to grant religious exemption for TDAP vaccine but grant of flu exemptions undermines its credibility). This inexplicable double-standard, like the pregnancy exemption, shows that granting exemptions is not an undue hardship.

(3) Under the EEOC's guidance on when exemption from a vaccination requirement poses an undue hardship on the employer, Defendants cannot bear their burden here. In a March 5, 2012, letter from the EEOC's general counsel, the Commission addressed "whether Title VII requires hospitals to accommodate their employees' religious objections to receiving influenza and other vaccines, and under what circumstances such accommodation would not be required. Facts relevant to undue hardship in this context would presumably include, among other things, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation." EEOC, Informal Discussion Letter (Mar. 5, 2012).[12]

The assessment of the public risk must be that it is declining. "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination," 86 Fed. Reg. 61,555, 61,583 (Nov. 5, 2021) (noting "newly reported COVID-19 cases, hospitalizations, and deaths have begun to trend downward at a national level"); *Missouri v. Biden*, No. 4:21-cv-01329-MTS, 2021 U.S. Dist. LEXIS 227410, at *15 (E.D. Mo. Nov. 29, 2021) ("CMS's evidence shows COVID no longer poses the dire emergency it once did.").

The availability of effective alternative means of infection control is also clear. The Emergency Technical Standard ("ETS") issued by the Occupational Health and Safety Administration ("OSHA") on November 4, 2021, requires employers with 100 employees or more to require all

[12] https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250.

employees to vaccinate or to require those workers who are not vaccinated to obtain weekly COVID-19 tests and wear masks while at work. Pmbl.-61402. And indeed, during the pendency of this litigation in state court, the Defendants have required unvaccinated employees protected by the TRO to wear masks and submit to twice-weekly testing.

The proportion of employees already vaccinated also favors Plaintiffs. According to Defendants, as of October 26, 2021, 90% of their employees are vaccinated. **Exhibit H** (originally filed as Ex. 57, Motion to Amend the Complaint). Since then, Defendants have fired any other employees who did not obtain the vaccine or a pregnancy exemption, leaving only the Plaintiffs seeking injunctive relief in this case as the only unvaccinated persons. Plaintiffs represent less than 2% of Riverside's over 3,000 employees, making it unlikely that they would cause a disruption in operations by being accommodated. Even if there were patients who have demanded being treated by vaccinated employees, since Plaintiffs represent less than 2% of the workforce, it should not be difficult for Defendants to accommodate such requests, even assuming they exist.

(4) Defendants are also outliers in their industry. The American Hospital Association Board of Trustees urged its members "implementing mandatory COVID-19 vaccination policies to: Provide exemptions for medical reasons and accommodations consistent with Federal Equal Employment Opportunity Commission guidelines (e.g., a sincerely held religious belief, practice or observance)."[13] As one medical news website noted, after evaluating 174 healthcare systems with mandates in place, "Across the board, the policies of these and other providers include exemptions for medical, religious or other legally protected reasons."[14] Indeed, many large hospital systems

[13] AHA, Policy Statement, July 21, 2021, https://www.aha.org/public-comments/2021-07-21-aha-policy-statement-mandatory-covid-19-vaccination-health-care.

[14] Dave Munio, *As CMS' requirement looms, at least 174 health systems currently mandate vaccination for their workforces*, Fierce Healthcare (Sept. 14, 2021), https://www.fiercehealthcare.com/hospitals/40-health-systems-requiring-mandatory-covid-19-vaccines-for-their-workforces.

are dropping their vaccine mandates entirely. Robbie Whelan and Melanie Evans, *Some Hospitals Drop Covid-19 Vaccine Mandates to Ease Labor Shortages*, Wall St. J. (Dec. 13, 2021).[15]

Since Defendants have not made any accommodations available to Plaintiffs or other patient-facing employees with religious objections to the COVID-19 vaccine, Defendants have the burden of proving that any such accommodation would place an undue burden on Defendants. Defendants cannot explain why allowing the same accommodations with respect to the flu vaccine and to pregnant employees with respect to COVID would pose an undue burden on them when it comes to accommodating Plaintiffs' religious beliefs.

b. Plaintiffs will be irreparably harmed and cannot be made whole with monetary damages alone.

Normally, courts do not find irreparable harm from the loss of a job, because such loss is compensable with money damages. However, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable harm might be found." *Sampson v. Murray*, 415 U.S. 61, 103 n.68 (1974). This is one such case, because these Plaintiffs face an impossible choice, not between their job and their beliefs, but between two equally sincere religious beliefs.

Plaintiffs believe their job is a "vocation" or "calling" that is a divine charge to pursue their profession as a ministry of healing. In the attached declarations, *see* **Exhibit D**, numerous Plaintiffs testify movingly to their view of their work at Riverside as a vocation or ministry, describing times that they pray with or for patients, share Bible verses, and comfort them through the most difficult times in life. They describe their job as not merely a job, but a God-given calling to serve. In the words of lead plaintiff Neelie Panozzo, a nurse practitioner, "It is impossible for me to choose

[15] https://www.wsj.com/articles/some-hospitals-drop-covid-19-vaccine-mandates-to-ease-labor-shortages-11639396806.

between my faith over career or career over my faith as my passion for healthcare and my service to others through my strong faith are inseparable. One cannot exist without the other." Ex. D. Or nurse Ashley Goodman: "Choosing not to receive the COVID vaccine is not just a choice between my faith and my job, it is also a choice between two faith convictions, my convictions regarding the vaccine, and my convictions regarding my job as my ministry." Ex. D.

When forced to choose between vaccination or their job, the state court agreed that these Plaintiffs are not being forced to choose faith or work, but between two competing faith commitments. *See* Order, Oct. 25, 2021 ("The Court finds that having to choose between two deeply held moral obligations: their religious convictions and their employment is enough to create irreparable harm and Plaintiffs have no adequate remedy at law.").

The U.S. District Court for the Northern District of California confronted an analogous situation of religious discrimination in violation of Title VII that would result in firing. Though acknowledging that money damages are the normal recourse for fired employees, the Court nevertheless granted preliminary injunctive relief because of the effect on the employee's religious liberty, which the Court recognized was a preeminent value under the First Amendment. *McGinnis v. United States Postal Serv.*, 512 F. Supp. 517, 525 (N.D. Cal. 1980). *See U.S. EEOC v. Elec. Data Sys*., Civil Action No. C83-151C, 1983 U.S. Dist. LEXIS 19293, at *4 (W.D. Wash. Feb. 14, 1983) (finding irreparable injury to stop religious discrimination under Title VII); *Davis v. S.F. Mun. Ry.*, No. C 75 2077 SW, 1975 U.S. Dist. LEXIS 16947, at *5 (N.D. Cal. Dec. 8, 1975) (same); *Scott v. S. Cal. Gas Co*., No. 73-172-F., 1973 U.S. Dist. LEXIS 13142, at *21 (C.D. Cal. June 15, 1973) (same). *See also Sambrano v. United Airlines,* No. 21-11159, 2021 U.S. App. LEXIS 36679, at *5 (5th Cir. Dec. 13, 2021) (Ho, J., dissenting from denial of an injunction pending appeal) ("Forcing individuals to choose between their faith and their livelihood imposes

an obvious and substantial burden on religion. . . . it is a quintessentially irreparable injury . . .").

It is blackletter law that "courts routinely find not just harm, but *irreparable* harm, where a plaintiff asserts a chill on free exercise rights." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 494-95 (2008) (emphasis original). In this instance, though the protection is statutory rather than constitutional, the principle remains: compromising one's religious beliefs is the sort of harm that is irreparable. *Korte v. Sebelius*, 528 F. App'x 583, 588 (7th Cir. 2012). "[A]lthough the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). And being forced to vaccinate against one's religious beliefs "burdens their free exercise rights." *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). A preliminary injunction is necessary in this case to prevent the coercive impact of Riverside's mandate on these employees' religious beliefs.[16]

c. Any balancing of the interests and equities weighs in the employees' favor.

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The same is true of Title VII. It is especially needed in times like these, when the urge to override minority beliefs is strongest; the judiciary's "protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). It is when

[16] Plaintiffs also note that other courts are recognizing irreparable harm in cases where the government is forcing a choice between one's job and vaccination outside the faith context. *See, e.g., BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *24 (5th Cir. Nov. 12, 2021) ("the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)."); *Louisiana v. Becerra,* No. 3:21-CV-03970, 2021 U.S. Dist. LEXIS 229949, at *42 (W.D. La. Nov. 30, 2021) ("citizens will suffer irreparable injury by having a substantial burden placed on their liberty interests because they will have to choose between losing their jobs or taking the vaccine."). And as Judge Ho has pointed out, it is anomalous to suggest that loss of a job is irreparable harm when imposed by an employer enforcing a government mandate, but is not irreparable harm when imposed by an employer enforcing its own mandate, since the focus of the irreparable harm inquiry is on the impact on the employee. *Sambrano v. United Airlines*, No. 21-11159, 2021 U.S. App. LEXIS 36679, at *7-8 (5th Cir. Dec. 13, 2021) (Ho, J., dissenting from denial of an injunction pending appeal).

times are hard and majoritarian demands strong that judicial protection is needed most.

Several other interests also weigh in favor of plaintiffs. First is maintaining the status quo. *Walgreens Co. v. Peters*, No. 21 C 2522, 2021 U.S. Dist. LEXIS 140740, at *10 (N.D. Ill. July 28, 2021) ("A preliminary injunction acts to maintain the status quo pending a final hearing on the case's merits."). Here, an injunction "would, essentially, do nothing more than maintain the status quo; entities will still be free to encourage their employees to get vaccinated, and the employees will still be free to choose to be vaccinated." *Georgia v. Biden*, No. 1:21-cv-163, 2021 U.S. Dist. LEXIS 234032, at *36 (S.D. Ga. Dec. 7, 2021). *Accord Louisiana v. Becerra*, No. 21-30734, at *4 (5th Cir. Dec. 15, 2021) ("preserving the status quo is an important equitable consideration in the stay decision. Here, the Secretary's vaccine rule has not gone into effect.").

The equities also favor the Plaintiffs for the reasons explained on undue hardship. Riverside's exemption for pregnant and nursing employees undermines its declared interest. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2393 (2020) (Alito, J., concurring) ("the regulatory exemptions created by the Departments and HRSA undermine any claim that the agencies themselves viewed the provision of contraceptive coverage as sufficiently compelling."). Additionally, Riverside can impose reasonable accommodations of its choice such as regular testing and N95 masking for unvaccinated employees to minimize their risk of transmission, as it had done since the imposition of the TRO. It may even go so far as to transfer Plaintiffs to other job duties. These safeguards provide reasonable tools to protect employee conscience rights and public health.

CONCLUSION

This Court should preserve the status quo with a TRO and then a preliminary injunction.

Dated: December 17, 2021

Respectfully Submitted,

NEELIE PANOZZO, et al.

By: /s/ Jeffrey M. Schwab
One of their attorneys

Jeffrey M. Schwab
Daniel R. Suhr*
James McQuaid
Liberty Justice Center
141 West Jackson Blvd., Suite 1065
Chicago, Illinois 60604
Phone: (312) 637-2280
Fax: (312) 263-7702
jschwab@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Attorneys for Plaintiffs

*application for admission pending

CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, certify that I served the foregoing Plaintiffs' Memorandum of Law in Support of their Motion for TRO and Preliminary Injunction on all parties on December 17, 2021, via the Court's electronic filing system.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab