VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

Kaycee McCoy Amherst, Virginia An individual, Plaintiff, v. Rector and Visitors of the University of Virginia Charlottesville, Virginia University of Virginia Health System Charlottesville, Virginia Defendants.	)	CASE No: CL21-544

APPLICATION FOR A TEMPORARY INJUNCTION AND MEMORANDUM OF LAW IN SUPPORT OF INJUNCTIVE RELIEF

COMES NOW your Plaintiff, Kaycee McCoy, by counsel, and files this Application for a Temporary Injunction supported by a Memorandum of Law, and prays this honorable Court to enjoin Defendants from terminating Plaintiff's employment or any other adverse employment actions in violation of her freedom of religion as protected by Article I, Section 16 of the Virginia Constitution, and based on an arbitrary and capricious act of Defendants. As time is critically of the essence, Plaintiff seeks urgently expedited review. In support thereof, Plaintiff states as follows:

FILED
11/10/21 @ 4:20p
(Date & Time)
City of Charlottesville
Circuit Court Clerk's Office
Llezelle A. Dugger, Clerk
By _____
Deputy Clerk

INTRODUCTION

Plaintiff has filed a complaint seeking a declaratory judgment and injunctive relief, barring Defendants from terminating Plaintiff or taking adverse employment action against her, in response and retaliation for her opting not to agree to invasive medical treatment that would offend her deeply held religious beliefs — a COVID-19 vaccination — in violation of Article I, Section 16 of the Virginia Constitution

BACKGROUND

Plaintiff Kaycee McCoy is a 10-year employee in good standing of Defendant University of Virginia Health System ("the University"). In August, 2021, the University ordered all employees to receive injections against the COVID-19 vaccination. Failure to comply would lead to discipline, up to and including termination.

Plaintiff, a devout Christian and a Methodist, filed her application for a religious exemption to the injection requirement via the University's VaxTrax system on September 12, 2021. The application outlined Plaintiff's comprehensive scriptural objections based on her understanding of the Bible, and was accompanied by a letter from Plaintiff's minister, the Rev. Nancy C. Johnson, attesting to the sincerity of Plaintiff's belief.

On September 30, 2021, without explanation, Defendant denied Plaintiff's request for religious exemption. On October 4, 2021, Plaintiff sent an email asking why her exemption was denied, and requesting to submit additional supporting evidence for her exemption claim. However, on October 14, 2021, Plaintiff received an email from Defendant stating that all decisions of the "vaccine religious exemption committee" were final, and that no appeal process

would be allowed. The email stated that after November 1, 2021, any employees not in "compliance" would be subject to adverse employment action, including termination. On November 9, 2021, Plaintiff was suspended effectively immediately, that she was suspended effective immediately, and that she would be terminated in five days. Defendant has refused to give Plaintiff any reason as to why her request was denied, what hardship her exemption would impose upon Defendant. To this date she does not know the standard that was applied, who applied it, or why it was denied. *See* Affidavit of Kaycee McCoy.

Plaintiff immediately filed suit against Defendant, and an accompanying motion seeking an injunction to preserve the status quo until this Court can adjudicate her claims to religious freedom pursuant to Article I, Section 16 of the Virginia Constitution, and claims of arbitrary and capricious action.

STANDARD OF REVIEW

In granting a temporary injunction, the Court must look to the following criteria: (1) the likelihood of success on the merits; (2) whether the Plaintiff is likely to suffer irreparable harm if the injunction is not granted; (3) whether the balance of equities tips in Plaintiff's favor; and (4) a showing that the injunction would not be adverse to the public interest. *See The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) (applying the test set forth in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008)). *See also McEachin v. Bolling*, 84 Va. Cir. 76, 77 (Richmond Cir. Ct. 2011).

Virginia courts have widely adopted the *Real Truth* analysis in the absence of any specific elemental test from the Supreme Court of Virginia or applicable statutes. *See, e.g., BWX Techs., Inc. v. Glenn*, 2013 Va. Cir. LEXIS 213 (Lynchburg Cir. Ct. 2013); *McEachin* at 77. *See also*

CPM Va., L.L.C. v. MJM Golf, L.L.C., 94 Va. Cir. 404, 405 (Chesapeake Cir. Ct. 2016) (listing several Virginia Circuit Courts which have used the federal four-part test).

Plaintiff seeks a temporary injunction, enjoining UVA from administering, enforcing, and otherwise imposing the COVID-19 vaccine mandate upon her, including terminating Plaintiff's employment for exercising a religious exemption against the mandate.

A temporary injunction allows a court to preserve the *status quo* while litigation is ongoing. *Iron City Sav. Bank v. Isaacsen*, 158 Va. 609, 625, 164 S.E. 520, 525 (1932); *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 822 S.E.2d 358 (2019). In this case, the status quo is that Plaintiff was employed by UVA, and the only reason that the University of Virginia has terminated Plaintiff's employment is because of the COVID-19 vaccine mandate.

ARGUMENT

I. Plaintiff has a substantial likelihood of success on the merits

A. Count I

Plaintiff is likely to succeed on the merits, given that the challenged statute directly and significantly infringes a constitutionally enumerated and protected right set out in Article I, Section 16 of the Constituiton of Virginia. Plaintiff also has a substantial likelihood of success, as the ostensible harm sought to be alleviated by the Commonwealth — addressing the spread of COVID-19 — is not resolved by the COVID-19 vaccines, in addition to being facially violative of Article I, Section 16. The history and text of Article I, Section 16 of Virginia's Constitution is abundantly clear.

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise

> of religion, according to the dictates of conscience..... No man shall be .... be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief.... [Va. Const. Art. I, Sec. 16.]

Yet that prohibited conduct is precisely the effect of the mandate of Defendant University and its University of Virginia Health System, the medical wing of a Virginia public university, upon Plaintiff. In her application for religious exemption, Plaintiff laid out her detailed religious objections to taking the COVID-19 objection, including the scriptures from the Bible on which she based her objections. She included a letter from her pastor attesting to the sincerity of her religious beliefs. Yet the University, without so much as an explanation, denied her application out of hand, and has threatened to terminate her from her employment in retaliation for her faithful exercise of her beliefs.

Religious liberty has been among the most cherished freedoms for Virginia's entire existence. As Professor A.E. Dick Howard explained the development of the Virginia Declaration of Rights:

> George Mason's original draft stated ... "that all Men should enjoy the fullest Toleration in the Exercise of Religion according to the Dictates of Conscience...." [citation omitted.] The emphasis on toleration ... could be taken to mean only a limited form of religious liberty: toleration of dissenters in a state where there was an established church. James Madison thought that stronger language was needed and drafted a substitute declaring that "all men are equally entitled to the full and free exercise" of religion... Madison's draft, **substituting the language of entitlement for toleration** sounded more of a **natural right** than did Mason's version. [A.E. Dick Howard, Commentaries on the Constitution of Virginia (Univ. Press of Virginia: 1974) at 290 (emphasis added).]

James Madison's Memorial and Remonstrance Against Religious Assessments (June 20, 1785) reiterated the jurisdictional limitation on the state:

> Because we hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**, can be directed only by **reason and conviction**, not by **force or violence**." **The Religion then of every man must be left to the conviction and conscience of every man**; and it is the right of every man to exercise it as these may dictate. This right is in its nature an **unalienable right**. It is unalienable, because **the opinions of men**, depending only on the evidence contemplated by their own minds **cannot follow the dictates of other men**: It is unalienable also, because what is here a right towards men, is a **duty towards the Creator**. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is **precedent**, both in order of time and in degree of obligation, **to the claims of Civil Society**. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe. [Emphasis added].

Thomas Jefferson's Virginia Statute for Establishing Religious Freedom (January 19, 1786) embraced the same distinction:

> Whereas, **Almighty God hath created the mind free**; that all attempts to influence it by **temporal punishments or burthens**, or by **civil incapacitations** tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord, both of body and mind yet chose not to propagate it by coercions on either.... **[T]o suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy** which at once destroys all religious liberty....

In *District of Columbia v. Heller*, Justice Scalia set out the rule by which constitutional provisions are to be understood:

> The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. **Constitutional rights are enshrined with the scope they were understood to have when the people adopted them**, whether or not future legislatures or (yes)

> even future judges think that scope too broad. [*District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (emphasis added).]

In Virginia, the conviction of Jefferson and Madison still holds true today. As the Virginia Supreme Court stated in *Reid v. Gholson*, "The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed. These principles **prohibit the civil courts from resolving ecclesiastical disputes** which depend upon inquiry into questions of faith or doctrine." 229 Va. 179, 187, 327 S.E. 2d 107 (1985) (emphasis added).

Most recently, in *Bowie v. Murphy*, the Virginia Supreme Court described the "free exercise" jurisdictional principle, as follows:

> [C]ourts **lack subject matter jurisdiction** to resolve issues of **church governance** and disputes over **religious doctrine**. This prohibition arises from the religion clauses of the Constitution of the United States **and the Constitution of Virginia**. *Bowie v. Murphy*, 271 Va. 126, 133, 624 S.E. 2d 74 (2006). [Emphasis added].

Under Article I, Section 16, Defendants have no right to impose a religious test on Plaintiff to determine whether her Religious Exemption Application was truly worthy of being acknowledge.

Accordingly, Plaintiff is likely to prevail at trial and vindicate her right to the free exercise of her religion.

B. Count II

The same is true with respect to the claim of arbitrary and capricious denial of her request for a 85. If the purpose of mandates is to prevent the spread of the coronavirus, Defendant's mandate is arbitrary and capricious, due to the pervasive evidence that both vaccinated and unvaccinated individuals can spread the virus.

"Actions are defined as arbitrary and capricious when they are 'willful and unreasonable' and taken 'without consideration or in disregard of facts or law or without determining principle.' Black's Law Dictionary 105 (6th ed. 1990)." *Loudoun Hosp. Ctr.,* 50 Va. App. at 504-05.

Plaintiff is 35 years old, and has no significant health conditions known to make her more susceptible to COVID infection. Most students range from 18-24 years old. It is widely known that older people and people with respiratory problems may be more susceptible to COVID infection. However, none of those risk factors apply to Plaintiff. 88. "An 'arbitrary and capricious' decision was defined in *State Board of Health v. Godfrey*, 223 Va. 423, 433-4, 290 S.E.2d 875 (1982), as 'one made through abuse of discretion, bad faith, unfairness or one tainted by unfair prejudice or animosity.'" *Sweeny v. Commonwealth*, 11 Va. Cir. 274, 1988 Va. Cir. LEXIS 23 *2 (Richmond Cir. Ct. 1988).

There is no conceivable determining principle whereby Defendants could, while granting most or all student requests for religious exemption, question the sincerity of Plaintiff's sincerely

held religious beliefs or deny Plaintiff's well-documented request.[1] Her Religious Exemption was even supported by a letter from her pastor.

As to employees, where a system for obtaining religious exemptions was established, if all exemptions were denied, the system would be a meaningless exercise, and if some exemptions were denied, there would be no reason to reject plaintiffs' exemption.

In addition, Defendants have refused, despite Plaintiff's request, to provide any rationale for its decision to terminate her or identified the standards by which such determinations are made, or by whom they are made. Despite two letters sent by counsel for Plaintiff dated October 15, 2021 and November 1, 2021, Defendant elected not to provide Plaintiff with any response nor any rationale for their decision to deny her religious exemption.

II. Plaintiff has Established That She Will Suffer Irreparable Harm in the Absence of an Injunction.

It is well established that the loss of a constitutionally enumerated and protected right, for even minimal periods of time, unquestionably constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Without relief from this Court, Plaintiff and countless other Virginians will be irreparably denied their right to exercise their religious liberties as guaranteed by Article I, Section 16 of the Virginia Constitution. By being forced to choose between violating their religious conscience by taking the mandated vaccine or losing their jobs, Virginians are being denied their ability to exercise their enumerated rights. It is also clear from the facts set forth in

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[1] *See also Sch. Bd. v. Wescott*, 254 Va. 218, 224 (1997). The Supreme Court found that a school board's termination of an employee was *not* arbitrary and capricious because (unlike in the case at bar) there was no evidence that the plaintiff was subjected to a different standard than other employees.

this case that no adequate remedy at law exists, as monetary damages would be both inappropriate and incalculable for the harm inflicted by the challenged statute.

Plaintiff and her husband are paying a mortgage on their home. They also recently purchased a farm, which is also heavily mortgaged. They depend on Plaintiff's income to pay both mortgages. Should Plaintiff be fired from her job and unable to contribute, it is highly possible and perhaps probable that Plaintiff may lose both her home and the farm to foreclosure.

In addition, should Plaintiff be forced to receive the injection for fear of losing her job, any potential negative health effects she may suffer cannot be undone with monetary damages. According to Wisconsin Senator Ron Johnson, the CDC's own Vaccine Adverse Effects Reporting System ("VAERS") admitted reports of over 384,000 adverse effects among recent patients who received the COVID injection in the first six months of its use, including over 4800 deaths. *See* Affidavit of Kaycee McCoy. [https://www.ronjohnson.senate.gov/ services/files/ A4A76F9A-9B29-4CF9-B987-F9097A3F4CB7].

The vaccine still has yet to receive full FDA approval, but the CDC admits that at least five deaths have likely been caused by Thrombosis with thrombocytopenia syndrome (TTS) sparked by COVID-19 injections. [https://www.cdc.gov/vaccines/acip/meetings/downloads/ slides-2021-10-20-21/06-COVID-Shimabukuro-508.pdf].

III. The balance of equities favors granting a temporary injunction pending the outcome of this case.

Unlike the real and concrete irreparable harm that will befall Plaintiff and other Virginians under the COVID-19 vaccine mandate, the basis for the mandate is nothing but purely hypothetical and speculative, and based on vague conjecture about the safety and efficacy of the

vaccine. Indeed, there is little proof that the vaccine prevents acquiring and spreading the SARS-CoV-2 virus. However, in addition to violating the religious beliefs of Plaintiff, there is evidence that the vaccines cause significant adverse reactions, particularly among younger people who have a high recovery rate against the virus. The issuance of a temporary injunction would merely maintain the *status quo* with respect to the rights of Plaintiff.

IV. The granting of a temporary injunction is in the public interest.

The broader adoption of the COVID-19 vaccine has not resulted in significant effect on the ebbs and surges of COVID-19 infections. However, the vaccine mandate results in an significant infringement on an enumerated right, under the pretense of trying to reduce the a pandemic. It also has resulted in large numbers of adverse reactions and some deaths. The public interest in such a mandate is pre-textual and non-existent. Not issuing a temporary injunction, on the other hand, would immediately, undoubtedly, and substantially infringe the enumerated rights of Plaintiff and countless other state employees throughout Virginia.

RELIEF REQUESTED

Accordingly, Plaintiff Kaycee McCoy respectfully prays this honorable Court to grant a preliminary injunction including the following relief:

1. Enjoining Defendant from requiring Plaintiff to receive unwanted medical treatmen in the form of a COVID-19 vaccinationt;

2. Enjoining Defendant from taking any adverse employment action, including suspending or terminating Plaintiff from employment, on account of her decision to exercise for free exercise of religion and opt not to receive the injection;

3. Should Defendant take adverse employment action against Plaintiff before this Court can rule on Plaintiff's motion, ordering Defendant to fully reverse the action, including if necessary reinstating Plaintiff to her position with full back pay and benefits;

4. Such other and further relief as shall seem to this Court to be appropriate and in the interests of justice.

Respectfully Submitted
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By Counsel

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