VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

Kaycee McCoy, Plaintiff, v. Rector and Visitors of the University of Virginia, University of Virginia Health System, Defendants.	)	CASE No: CL21000544-00

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF INJUNCTIVE RELIEF

COMES NOW Plaintiff, Kaycee McCoy, by counsel, and propounds this Reply Memorandum in response to "Defendant's Response in Opposition to Plaintiff's Memorandum of Law in Support of Injunctive Relief" filed December 1, 2021, and states as follows:

I. Plaintiff's Article I, § 16 Constitutional Claim Exists apart from the Virginia Human Rights Act and Title VII of the Civil Rights Act.

Defendants describe Plaintiff's Article I, § 16 claim (Complaint, Count I) as "cloaking herself in the Virginia Constitution in an attempt to evade federal and state administrative exhaustion requirements ... under Title VII and the Virginia Human Rights Act." Opposition at 1. Plaintiff agrees that she is cloaked in the protections provided by the state constitution. Defendants apparently also are contending that the potential availability of a federal and a state statutory claim at some future time prevents Plaintiff from bringing a claim for a violation of the Virginia Constitution at this time. Defendant cites no authority for the proposition that enactment of a federal or state statute eviscerates enforcement of a state constitutional right. It is likewise irrelevant whether or not Plaintiff also availed herself of statutory remedies.

Article I, § 16 is a self-executing provision of the Virginia Bill of Rights. *See Gray v. Va. Sec'y of Transportation*, 276 Va. 93, 106 (2008). A right of action established by statute is different from and cannot preclude the assertion of the constitutional claim.

Defendants assert that Title VII provides "the exclusive remedy for violations of the statute." Opposition at 7. In this suit, Plaintiff is not claiming a violation of Title VII statute, and thus it does not provide a remedy for a constitutional violation. Defendants rely on *Onan v. County of Roanoke*, 52 F.3d 321 (4th Cir. 1995) (unpublished *per curiam* opinion) (Title VII claim dismissed for failure to name County as defendant timely). That case involved the named party requirement in Title VII that "precludes a plaintiff from stating a claim against any defendant not named as a respondent in an EEOC charge." *Id*. at *9. The district court in *Onan* dismissed the Title VII claim brought pursuant to 42 U.S.C. § 1983 because the only basis for the claim was a Title VII violation, which may not be asserted under § 1983. *Id*. at *5. Defendants ignore two decisions of the Fourth Circuit that are at odds with their argument based on *Onan*. In a footnote in the *Onan* opinion, the court noted that it had previously held that "Title VII does not preempt a 1983 action based on a Fourteenth Amendment right, rather than on a right created by Title VII." *Id*. at *11 n.8. *Beardsley v. Webb*, 30 F.3d 524, 526-27 (4th Cir. 1994); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987). Here, there is an even stronger justification for rejecting Defendants' preemption argument because her claims are not identical to statutory claims but are independent constitutional claims.

In their analysis of the Virginia Human Rights Act ("VHRA"), Defendants fail to identify any provision which imposes a bar to a constitutional claim, and indeed there is no such provision. *See* Opposition at 7-8. Indeed, a claim under the VHRA addresses only "[c]onduct

that violates any Virginia or federal statute or regulation governing discrimination" (*Virginia Code*, § 2.2-3902) — not conduct that violates the Virginia Constitution.

II. Defendants Explain The Religious Test They Imposed on Plaintiff.

Defendants admit that they expressly imposed a religious test on Plaintiff, and describe why she failed that test and thus was subject to termination, belittling the Biblical foundation for her religious views. *See* Opposition at 11. By recategorizing Plaintiff's Biblically based views as "personal opinions" and "personal preferences," UVA believes it may disregard them.

First, Defendants' argument that previously accepting vaccines negates Plaintiff's current view that "vaccines are 'unclean'" (Opposition at 11). Plaintiff's Memorandum in Support of Injunction lays out in detail the **differences between the COVID-19 shot and all prior vaccines** (Plaintiff's Memorandum at 38-39), but this was entirely disregarded by UVA. Acceptance of a dead or attenuated pathogen as a traditional vaccine is wholly different from the experimental gene therapy, altering our God-designed DNA, which is the mechanism by which the COVID shot supposedly works. Moreover, many vaccines were not developed, tested and manufactured using aborted fetal tissue — but it is clearly established that the COVID shots were. *See* Plaintiff's Memorandum at 21. It should be no surprise that a Christian would not want to benefit from the taking of innocent human life through abortion, or inject abortion-contaminated substances into their bodies.

Second, Defendants believe they could reject Plaintiff's Religious Exemption even if grounded in sincerely held religious objections due to her **also** having medical reasons to oppose the shot. Opposition at 11. Under Defendants' reasoning, if Plaintiff held a religious belief grounded in Holy Writ against "cutting" (Leviticus 19:28; Leviticus 21:5; Jeremiah 16:6 KJV),

she could not, at the same time entertain a non-religious view that cutting oneself causes medical harm. In fact, Bible-following Christians seek to live their lives according to Biblical principles, conforming their own view to Scripture where necessary based on the foundational belief in the inerrancy of Scripture. UVA may not understand Biblical Christianity, but it must not be allowed to punish it.

UVA explains that the religious exemptions were evaluated by human resources personnel — with no indication that those persons had any personal religious views, or religious education, or religious experience. Defendants do not state that the views of any pastors, priests or rabbi's were sought. Thus, it is likely that secular employees evaluated and negated the religious rights of Virginians through a religious test in blatant violation of the Article I, § 16 prohibition on "prescrib[ing] any religious test whatever."

III. Federal First Amendment Case Law Does not Control Virginia Court's Interpretation of Article I, Section 16.

Defendants contend that federal court interpretations of the First Amendment is "controlling" on Virginia courts interpreting Article I, § 16. Defendants rely on *Virginia Coll. Bldg. Auth. v. Lynn*, 260 Va. 608 (2000). *See* Opposition at 8.

First, the *Lynn* Court referred to the Establishment Clause and Article I Section 16 as "parallel provisions" and stated that Virginia's Court has "been **informed** by the United States Supreme Court Establishment Clause jurisprudence." *Id.*, 260 Va. 608, 626 (2000) (emphasis added). This is a far cry from a claim that state courts are "**controlled**" by federal courts in interpreting a state constitution.

Second, the *Lynn* Court (like the Court in *Habel v. Industrial Dev. Auth*., 241 Va. 96 (1991) cited by Defendants) was ruling on an establishment question, not a free exercise question. Even if the two Constitutions treat "establishment" identically, is indisputable that the understanding of "free exercise" under the federal and state Constitutions was not treated identically in 2000 when the *Lynn* Court ruled.

Defendants' reliance on *Digiacinto v. Rector & Visitors of George Mason Univ*., 281 Va. 127 (2011) is also misplaced, since Article I, § 13 "**incorporated the specific language** of the Second Amendment." *Id*. (internal citation omitted) (emphasis added).

IV. Defendants' Firing of Plaintiff Fails Any Balancing Test.

Plaintiff contends that an interest balancing test such as "strict scrutiny" or "rational basis" should apply. Plaintiff disagrees with the use of either of these atextual tests rather than a search for the meaning of the text. "Rational basis" and other interest balancing tools are used primarily in First Amendment Speech cases and were developed by judges to empower themselves to decide whether "the right is really worth insisting upon." *See DC v. Heller*, discussed in Plaintiff's Memorandum at 9. *See also* Chief Justice Robert's description of these interest balancing tests as "baggage" the First Amendment picked up which should not be defaulted to when the Court considers a Constitutional claim afresh. *DC v. Heller*, Oral Argument at 44 (Mar. 18, 2008). In *Heller*, the new issue being addressed afresh was the Second Amendment's protection of individual rights; here it is the Madisonian/Jeffersonian understanding of the jurisdictional limit on the power of government imposed by Article I, § 16. There is no reason for a Virginia state court to now employ interest-balancing "baggage," but rather should search for the original public meaning of Article I, § 16, through an examination of

"text, history, and tradition." However, in response to Defendants' claims, even if this Court were to apply atextual interest balancing tests, Defendants position would fail under both tests discussed.

UVA argues that the vaccine mandate meets the very low "rational basis" review standard that it claims should be used to evaluate a claim under Article I, § 16, claiming that "Even if Plaintiff could establish a *bona fide* religious belief, a 'neutral law of general applicability is constitutional if it is supported by a rational basis,' including when applied to religious beliefs." Opposition at 11 (footnote and citations omitted).

The UVA mandate fails rational basis for two reasons. First, despite what may not have been known when the UVA policy was adopted, it is now well established that vaccinated persons can spread COVID-19 as can "unvaccinated" persons. Second, "vaccinated" persons can get COVID-19 as can "unvaccinated persons." The following medical authorities establish these propositions.

UVA has failed to even attempt to demonstrate the correctness of its apparent assumption that unvaccinated persons present a danger of transmissions, and vaccinated persons are not. This assumption cannot be proven, and each week new medical evidence demonstrates that the vaccinated can acquire and transmit the COVID-19 infection.

Cardiologist Dr. Peter McCullough referred to a pre-print study in The Lancet that observed that "Viral loads of breakthrough Delta variant infection cases were 251 times higher than those of cases infected with old strains detected between March-April 2020." "Transmission of SARS-CoV-2 Delta Variant Among Vaccinated Healthcare Workers, Vietnam" (Oct. 11, 2021).

Dr. Paul Elias Alexander recently compiled scientific studies of the COVID vaccines which raise serious doubts about the efficacy of the vaccines. *See* P. Alexander, "31 Studies on Vaccine Efficacy that Raise Doubts on Vaccine Mandates" (Oct. 28, 2021).

The *Morbidity and Mortality Weekly Report* of August 6, 2021, issued by the Centers for Disease Control and Prevention, compared COVID-19 breakout infections of the vaccinated with infections of the unvaccinated, and concluded:

> Real-time reverse transcription–polymerase chain reaction (RT-**PCR**) cycle threshold (Ct) **values in specimens from 127 vaccinated persons with breakthrough cases were similar to those from 84 persons who were unvaccinated**, not fully vaccinated, or whose vaccination status was unknown.... ["Outbreak of SARS-CoV2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021," *MMWR* (July 30, 2021) (emphasis added).]

An early draft of a report from the United Kingdom studying the impact of vaccination on transmission, not yet peer reviewed, concluded that while vaccination still lowers risk, it is less effective in addressing the Delta variant, as "**similar viral loads** in vaccinated and unvaccinated individuals infected with Delta question how much vaccination prevents onward transmission." D. Eyre, et al. "The impact of SARS-CoV-2 vaccination on Alpha & Delta variant transmission" (Sept. 29, 2021) (emphasis added). *See also* C. Acharya, et al. "No Significant Difference in Viral Load Between Vaccinated and Unvaccinated, Asymptomatic and Symptomatic Groups Infected with SARS-CoV-2 Delta Variant."

The *New England Journal of Medicine* published a letter to the editor on "Resurgence of SARS-CoV-2 Infection in a Highly Vaccinated Health System Workforce" (Sept. 1, 2021) by a group of physicians led by Nancy J. Binkin of the University of California San Diego, which concluded that when the Delta variant circulated in early 2021, infections spread through the

workforce and "130 of the 227 workers (57.3%)" who tested positive and had one symptom, "were fully vaccinated." Moreover, "[s]ymptoms were present in 109 of the 130 fully vaccinated workers (83.8%) and in 80 of the 90 unvaccinated workers (88.9%)." One can conclude that to the extent that vaccinated workers show fewer symptoms that could cause them to leave work, vaccinated workers can be more dangerous to hospital patients.

The *European Journal of Epidemiology* (9/30/21) looked at fully vaccinated persons in 68 countries and in 2,947 US counties using official sources of confirmed Covid cases for a one week period for "fully vaccinated" persons. For US counties, high vaccination rates do not equate to low transmission rates:

- substantial county variation in new COVID-19 cases within categories of percentage population fully vaccinated;
- There also appears to be no significant signaling of COVID-19 cases decreasing with higher percentages of population fully vaccinated;
- Of the top 5 counties that have the highest percentage of population fully vaccinated (99.9–84.3%), the … CDC identifies 4 of them as "High" Transmission counties;
- of the 57 counties … classified as "low" transmission … by the CDC, 26.3% (15) have percentage of population fully vaccinated below 20%.

Defendant's firing of Plaintiff for objecting to the injection (especially given that other co-workers who also objected were not fired) has no rational connection to its objective.

V. Defendants' Firing of Plaintiff was Arbitrary and Capricious.

When a governmental decision bears no reasonable and substantial relation to a legitimate governmental interest, it is arbitrary and constitutes a violation of the Constitution of Virginia. *See Board of Supervisors v. Carper*, 200 Va. 653, 662. 167 S.E.2d 390, 396-97 (1959). The opposition brief discusses McCoy's request for retroactive relief at pages 15-18. UVA argues that she can practice her religion until final resolution of the case when relief can be granted, if

appropriate. This ignores the immediate and ongoing injury she suffers from the violation of her right under Article I, § 16.

VI. UVA's Ostensible Purpose for Imposing the Vaccine Mandate Has Been Enjoined by a Federal Court.

While most of the early cases elevated exaggerated claims of a public health crisis over the need to protect the constitutional rights of Americans, the judicial trend appears to be turning. On November 29, 2021, the Eastern District of Missouri issued a preliminary injunction against the Centers for Medicare and Medicaid Services against enforcement of that agency's COVID vaccine mandate for healthcare facilities which receive any federal funding within the 10 plaintiff states. *See Missouri v. Biden*, 2021 U.S. Dist. LEXIS 227410 (E.D. Mo. Nov. 29, 2021). On November 30, 2021, the Western District of Louisiana issued a preliminary injunction against the same rule, but applied the injunction nationwide, excluding the 10 states in the Missouri case. *See Louisiana v. Becerra*, 2021 U.S. Dist. LEXIS 229949 (W.D. La. Nov. 30, 2021). Also on November 30, 2021, the Eastern District of Kentucky issued a preliminary injunction in three plaintiff states against Executive Order 14042, which imposed a vaccine mandate on federal government contractors. *See Commonwealth v. Biden*, 2021 U.S. Dist. LEXIS 228316 (E.D. Ky. Nov. 30, 2021).

CONCLUSION

For the reasons stated, injunctive relief should be granted. "The liberty interests of the unvaccinated requires nothing less." *Louisiana v. Becerra* at * 44.

Respectfully Submitted,

Kaycee McCoy
Plaintiff,
by Counsel

Rick Boyer, VSB No. 80154
INTEGRITY LAW FIRM, PLLC
P.O. Box 10953
Lynchburg, VA 24506
Telephone: (434) 401-2093
Facsimile: (434) 239-3651
rickboyerlaw@gmail.com

William J. Olson, VSB # 15841
Robert J. Olson, VSB # 82488
WILLIAM J. OLSON, P.C.
114 Creekside Lane
Winchester, Virginia 22180
Telephone: (540) 450-8777
Fascilmilie (504) 450-8771
wjo@mindspring.com

Patrick M. McSweeney, VSB # 5669
MCSWEENEY, CYNKAR & KACHOUROFF, PLLC
3358 John Tree Hill Road
Powhatan, Virginia 23139
Telephone: (703) 621-3300
Facsimile: (703) 365-9395
patrick@mck-lawyers.com

Christopher M. Collins, VSB # 28770
VANDERPOOL, FROSTICK & NISHANIAN, P.C.
9200 Church Street, Suite 400
Manassas, Virginia 20110
Telephone: (703) 369-4738
Facsimile: (703) 369-3653
ccollins@vfnlaw.com

David Browne, VSB #65306
SPIRO & BROWNE, PLC
2400 Old Brick Road
Glen Allen, Virginia 23060
Telephone: (840) 573-9220

Facsimile: (804) 836-1855
dbrowne@sblawva.com

Attorneys for Plaintiff Kaycee McCoy

CERTIFICATE OF SERVICE

I, Rick Boyer, Esq., counsel for Plaintiff in this matter, hereby certify that I caused a true and accurate copy of this Memorandum of Law to be sent by electronic mail to the following counsel, this 3rd day of December, 2021:

Bret Daniel, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
901 East Byrd Street, Suite 1300
Richmond, VA 23219
Telephone: 804-663-2403
Fax: 804-225-8641
Email: bret.daniel@ogletree.com

Elizabeth Ebanks, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
901 East Byrd Street, Suite 1300
Richmond, VA 23219
Telephone: 804-663-2403
Fax: 804-225-8641
elizabeth.ebanks@ogretreedeakins.com
Counsel for Defendants

Rick Boyer,
Counsel for Plaintiff