VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF INJUNCTIVE RELIEF

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I. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF BECAUSE ARTICLE I, § 16 IS A JURISDICTIONAL BAR TO UVA'S INTRUSION INTO PLAINTIFF'S RELIGIOUS BELIEF.

Defendants incorrectly argue that the fundamental protection of the free exercise of religion in Virginia's Bill of Rights are equivalent to — or at least no stronger than — the guarantees in the Bill of Rights in the United States Constitution. Defendants are simply wrong. The First Amendment no longer retains the vitality it had at its writing. In contrast, Article I, § 16 has not been judicially diluted, and it remains a jurisdictional bar. Plaintiff has made no First Amendment claim in her Complaint. This case cannot properly be decided under the First Amendment case law, and must instead be decided with reference to Article I, § 16 of the Virginia Constitution. Article I, § 16 neither contains nor requires any "balancing tests." The only showing it requires of Plaintiff is that the government denied her benefits on the basis of her exercise of her sincerely held religious beliefs. Defendant has made that showing, and is entitled to injunctive relief.

A. Unlike the U.S. Supreme Court's View of the First Amendment to the Federal Constitution, Virginia's Article I, § 16 Is Not Applied Using a Balancing Test but as a Jurisdictional Bar.

Article I, § 16 of the Virginia Constitution protects the "free exercise of religion":

> 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; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, **nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief**; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And **the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination**, or pass any law requiring or authorizing any religious society, or the people of any district within this

> Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please. [Va. Const. Art. I § 16 (emphasis added).]

The Virginia Supreme Court has set out the different texts of the "free exercise" provisions in Article I, Section 16 of the Virginia Constitution and the First Amendment of the U.S. Constitution, but it does not appear to have distinguished between the free exercise clauses in these constitutions. *See Bowie v. Murphy*, 271 Va. 126, 133, 624 S.E.2d 74 (2006).

B. Article I § 16 Must First be Understood in Light of its Text, History, and Tradition.

There is substantial authority for the proposition that the protection afforded the free exercise of religion by Article I, Section 16 is more robust than the protection afforded under the First Amendment.

In *Reid v. Gholson*, the Virginia Supreme Court stated: "The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed." *Id.*, 229 Va. 179, 187 (1985). Therefore, a proper understanding of Article I, Section 16 must be based on a view of the text, history and tradition of the Virginia Constitution, rather than simply seeking guidance from federal cases analyzing the First Amendment's free exercise guarantee.

The Original 1776 Text of the Statute of Religious Liberties separated the civil and religious jurisdictions. Those duties "Which We Owe to Our Creator, and the Manner of Discharging [Them] Can Be Directed Only by Reason and Conviction," were expressly defined to constitute "religion."

Those duties owed to the state are enforceable by "Force" or "Violence." The two spheres are jurisdictionally separate and distinct.

As Professor A.E. Dick Howard explained the development of the Virginia Declaration of Rights in his Commentaries on the Constitution of Virginia:

> 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. Howard, Commentaries on the Constitution of Virginia, 290 (Univ. Press of VA.: 1974) (emphasis added).]

Section 16 of the Virginia Declaration of Rights, as adopted by Virginia constitutional Convention (June 12, 1776), as modified by James Madison, clearly recognized this jurisdictional division by defining the term "religion":

> 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; and that it is the mutual duty of all to practise Christian forbearance, love, and charity toward each other. [Emphasis added.]

Thus, the Virginia Bill of Rights was fundamentally different compared with other state constitutions, such as the Massachusetts Constitution of 1780 crafted by John Adams. In fact, it provides greater protection than the First Amendment.

Professor Robert Louis Wilken explains that religious freedom is more robust than mere religious toleration.

> Toleration is forbearance of that which is not approved, a political policy of restraint toward those whose beliefs and practices are objectionable. [R]eligious freedom, or

> liberty of conscience, [is] a natural right that belongs to all human beings, not an accommodation granted by ruling authorities. [R.L. Wilken, Liberty and the Things of God at 5, Yale U. Press: (2021).]

Madison had a clear understanding that the civil and religious jurisdictions are clearly separated. "He found freedom of religion written into the fundamental law 'with equal solemnity, or rather studied emphasis.' Either the legislature could 'sweep away all our fundamental rights; or … they are bound to leave this particular right *untouched and sacred*.'" Howard, Commentaries at 291-292 (quoting Papers of James Madison, II, 91) (emphasis added).

Section 16 of the Virginia Declaration of Rights now appears as the first portion of Article I, Section 16, of the Virginia Constitution. That section reads in part:

> 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; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other contract as he shall please. [Va. Const. Art. I, § 16 (emphasis added)].

Less than a month after the Virginia Declaration of Rights was drafted, on July 4, 1776 the Declaration of Independence reaffirmed these truths.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed....

(As stated in her complaint, Plaintiff is not basing her claim on the First Amendment Declaration of Independence, and includes this discussion here only for a full historical presentation.)

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: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that **in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance**. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority. [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, as was in his Almighty power to do, that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; ... that **our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry**, that therefore the proscribing any citizen as unworthy the public confidence, by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving

> him injuriously of those privileges and advantages, to which, in common with his fellow citizens, he has a natural right…. that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order…. [Emphasis added.]

Madison wrote of the Virginia Statute for Religious Liberty:

> This act is a true standard of religious liberty its principle the great barrier [against] usurpations on the rights of conscience. As long as it is respected & no longer, these will be safe. Every provision for them short of this principle, will be found to leave crevices at least thro' which bigotry may introduce persecution; a monster, that, feeding & thriving on its own venom, gradually swells to a size and strength overwhelming all laws divine and human. [James Madison, "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," in "Madison's 'Detached Memorandum,'" 3 Wm. & Mary Q., (3rd Ser.) 534, 554-55 (1946).]

Although the Virginia Supreme Court has not yet been asked to recognize and honor the jurisdictional principle on which Article I, Section 16 is based, to constrain the state's power over colleges and universities, that Court has repeatedly and faithfully recognized that jurisdictional principle in other contexts.

In *Reid v. Gholson*, the Virginia Supreme Court explained, "The constitutional guarantees of religious freedom have no deeper roots than in Virginia, where they originated, and nowhere have they been more scrupulously observed." *Id.*, 229 Va. 179, 187, 327 S.E. 2d 107 (1985).

In *Cha v. Korean Presbyterian Church*, the Virginia Supreme Court ruled:

> It is well established that a civil court may neither interfere in matters of church governance nor in matters of faith and doctrine....
>
> It has thus become established that the decisions of religious entities about the appointment and removal of ministers and persons in other positions of similar theological significance are beyond the ken of civil courts. Rather, such courts must defer to the decisions of religious organizations 'on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law.'
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> Indeed, most courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that

question in the affirmative. [*Id.*, 262 Va. 604, 611-12, 615, 553 S.E.2d 511, 513-515 (2001) (citation omitted).]

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." *Id.*, 271 Va. 126, 133, 624 S.E. 2d 74 (2006).

In *District of Columbia v. Heller*, Justice Scalia set out the rule by which all constitutional provisions — including state constitutional provisions — should 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).]

The "free exercise" clauses in other state constitutions do not have the same text, history, and tradition, possibly leaving the matter in some doubt in those states, but it is unmistakable that in Virginia, the government's role is not limited by a duty to "tolerate" the exercise of religion, or to regulate it, but rather the Commonwealth of Virginia has no jurisdiction whatsoever over the "free exercise" of religion due to Article I, Section 16.

C. Virginia has Historically Treated Fundamental Rights as More Inviolable than has the Federal Government.

When Congress passed the Alien and Sedition Acts in 1798, Virginia's leaders were the first to denounce them as violative of fundamental rights. The Kentucky and Virginia resolutions, penned

by Jefferson and Madison respectively, mounted vigorous defenses of the fundamental right of free speech.

The Kentucky resolution stated in part:

> That this commonwealth does upon the most deliberate reconsideration declare, that the said alien and sedition laws, are in their opinion, palpable violations of the said constitution; and however cheerfully it may be disposed to surrender its opinion to a majority of its sister states in matters of ordinary or doubtful policy; yet, in momentous regulations like the present, which so vitally wound the best rights of the citizen, it would consider a silent acquiesecence as highly criminal. [The Kentucky Resolution].[1]

The Virginia resolution stated in part:

> That this state having by its Convention, which ratified the federal Constitution, expressly declared, that among other essential rights, "the Liberty of Conscience and of the Press cannot be cancelled, abridged, restrained, or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other states, recommended an amendment [the First Amendment] for that purpose, which amendment was, in due time, annexed to the Constitution; it would mark a reproachable inconsistency, and criminal degeneracy, if an indifference were now shewn, to the most palpable violation of one of the Rights, thus declared and secured; and to the establishment of a precedent which may be fatal to the other…. [The Virginia Resolution].[2]

As Professor A.E. Dick Howard has explained:

> state courts are free to give stricter readings to the religion clauses of state constitutions than might be required even under the First Amendment. So many of the milestones of religious liberty, such as Jefferson's Bill for Religious Liberties and Madison's Memorial and Remonstrance, have sprung from Virginian sources that it is not surprising if the Virginia courts see Virginia's religious guarantees as having a vitality independent of the Federal Constitution. [Howard, Commentaries at 303 (emphasis added).]

With regard to free exercise in particular, the Virginia Supreme Court:

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[1] Available at: https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions.

[2] Available at: https://billofrightsinstitute.org/primary-sources/virginia-and-kentucky-resolutions.

> has tended to place greater reliance on the Virginia Constitution in cases calling for religious protection than in speech and press cases, where the First Amendment guarantee is largely cited. This may be at least in part a recognition of Virginia's role as the national leader in religious liberty. From the first, Virginia courts were at home in protecting religious liberty…. [*Id.* at 196.]

In *Jones v. Commonwealth*, the Virginia Supreme Court struck down a trial court's order that two juvenile delinquents must attend church and Sunday School for a year as violative of the jurisdictional divide between civil government and religious exercise. The Court stated, "No State has more jealously guarded and preserved the questions of religious belief and religious worship as questions between each individual man and his Maker than Virginia." *Id.*, 185 Va. 335, 343 (1946). As Professor Howard has noted, "[a]lthough the Court alluded to federal constitutional requirements, it placed primary emphasis on the Virginia Bill of Rights and Jefferson's Statute of Religious Freedom." Howard, Commentaries at 300.

Article I, § 16 was designed as a jurisdictional bar totally preventing the state from burdening the free exercise of religion. Its text remained undiminished in the latest constitutional convention in 1902. Nothing since 1902 has weakened its vitality or application.

The text of Article I, § 16 reflects a clear jurisdictional divide. "[T]he 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…. No man … shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief…"

The history and tradition of Article I, § 16 support the continued applicability of that jurisdictional bar. Accordingly, Defendants may not "restrain, molest, or burden" Plaintiff or make her "otherwise suffer on account of her religious opinions or belief." That is precisely what Defendants have done. Under Virginia's Constitution, that is precisely what they may not do. Plaintiff is entitled

to an injunction preserving the status quo as it existed when she filed her motion for injunction with this Court.

D. UVA's Discretionary Evaluation of Asserted Religious Exemptions Violates Virginia's Constitutional Prohibition on Religious Tests.

In 1830, the Virginia constitutional convention added language "specifically prohibiting the Legislature from prescribing any religious test [or] conferring special advantages on any one sect." That language, now part of Article I, § 16: "the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination."

In their initial argument to this Court, Defendants expressly claimed the right to divine whether Plaintiff's beliefs — expressed clearly in two pages laden with scriptural quotations – were in nature "religious" or merely "conscience." Thus, Defendants have admitted that they have imposed a purely "religious test."

The facts support this admission. By assigning staff to review and evaluate religious exemption claims in order to evaluate the "sincerity" of the religious beliefs of Plaintiff and her fellow employees, Defendants have explicitly imposed a religious test. Here the arbitrary nature of this test is made clear by the fact that UVA has not disclosed what the criteria employed were, or who made the evaluation. Empowering secular bureaucrats to determine the sincerity of an employee's religious beliefs, and conditioning continued employment on passage of an unstated and likely undetermined standard, is the very essence of what Article I, § 16's prohibition on "religious tests" forbids.

It may be that Defendants have granted exemptions in to certain religious sects or denominations. but not those of other faiths. If this is revealed by discovery, it would further illustrates the validity of the policy behind the constitutional prohibition on religious tests being

imposed by Defendants. Defendants' retaliatory firing against Plaintiff for "failing" UVA's religious test should be struck down as unconstitutional.

II. PLAINTIFF IS ENTITLED TO RELIEF BECAUSE THE DECISION TO ISSUE THE VACCINATION MANDATE AND ITS ADMINISTRATION WAS ARBITRARY AND CAPRICIOUS.

Count II of Plaintiff's complaint alleges that the challenged vaccination mandate is invalid and its implementation should be enjoined because it was arbitrary and capricious. Complaint ¶ 80, ¶¶ 85-86. 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 mandate has also been applied arbitrarily because it unreasonably discriminates against Plaintiff as a member of a class — employees of Defendants — whose applications for a religious exemption often have been denied, while members of another class within the Defendants' community who are similarly situated — University students — routinely have been granted a religious exemption. Complaint ¶¶ 82-84. *See Williams v. City of Richmond*, 177 Va. 477, 492, 14 S.E.2d 287, 292 (1947).

A. The mandate is arbitrary because it does not serve its asserted purpose and has no reasonable and substantial relation to any legitimate governmental interest.

"Arbitrary and capricious powers are contrary to the genius of our government…." *Taylor v. Smith*, 140 Va. 217, 231, 124 S.E. 259, 263 (1924). An arbitrary decision by a governmental entity that has no reasonable and substantial relation to a legitimate governmental interest has no principled justification and must be invalidated as a violation of an affected person's due process right. *Assaid v. City of Roanoke*, 179 Va. 47, 50-52, 18 S.E.2d 287, 288-89 (1942). Arbitrariness of this kind, therefore, has constitutional implications. *Cf. Byrum v. Board, of Supervisors*, 217 Va. 37, 40, 225

S.E.2d 368, 372 (1976). It involves the exercise of a capricious power that is beyond the legitimate scope of governmental authority. The "law of the land" requirement that was introduced by Article 39 of the Magna Carta has been a foundation of Virginia's constitutional concept of due process since the Declaration of Rights was adopted in 1776. It proscribes unprincipled, capricious and willful actions. *See* I Howard, Commentaries, 189-90, 200-01.

The purpose of the mandate is to prevent those who are vaccinated from spreading COVID-19 to patients and others. It is now generally understood that the available COVID-19 shots do not prevent the spread or the contraction of COVID-19. *See* Section IV, *infra*. Both those who receive, and those who refuse, the COVID-19 shot can spread and contract the virus. *See* Complaint, ¶ 85. The mandate, therefore, does not achieve the purpose for which it was adopted. Because the purpose of the mandate cannot be achieved, the decision to adopt it was irrational and without a principled justification. *See Matthews v. Board of Zoning Appeals*, 218 Va. 270, 280, 282-83, 237 S.E.2d 128, 134-35 (1977); *Assaid*, 170 Va. at 51-52, 18 S.E.2d at 288-89.

The arbitrariness test adopted by the Supreme Court of Virginia is consistent with the jurisprudence of the U.S. Supreme Court on the subject. *See United States v. Carmack*, 329 U.S. 230, 243-44 n.14 (1946); *Dismuke v. United States*, 297 U.S. 167, 172 (1936); *Nebbia v. New York*, 291 U.S. 502, 539 (1934); *Federal Radio Comm'n v. Nelson Bros. Bond & Mtge Co.*, 289 U.S. 266, 277 (1933); *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 91 (1918); *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 373-74 (1886). In *Assaid*, the Supreme Court of Virginia adopted the reasoning of *Yick Wo,* 179 Va. 51-52, 18 S.E.2d at 288-89.

B. The discriminatory treatment of Plaintiff's class compared to the treatment of the class of UVA students in the granting and denial of religious exemptions is arbitrary and unconstitutional.

The Complaint charges as a separate and independent basis for its claim of Defendants' arbitrary and capricious action that the refusal to consider and grant Plaintiff's application for a religious exemption from the effect of the vaccination mandate while considering and granting a religious exemption to students of the University violates her right to due process. Complaint ¶8 2-84, ¶¶ 87-94. *Williams*, 177 Va. at 293, 14 S.E.2d at 292. Article I, § 11 of the Constitution of Virginia prohibits arbitrary discrimination. *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).

Defendants have refused to grant a religious exemption to Plaintiff and have declined to provide any explanation for such refusal. Complaint ¶¶ 83, 87, 89. Most of the applications for a religious exemption submitted by students of the University have been granted. Complaint ¶ 82. There is no justification or principled basis for the discrimination between Plaintiff's class of employees of the Health System and the class of University students in the granting and denial of a religious exemption. Complaint ¶ 84, ¶¶ 87-90. For purposes of a religious exemption, Plaintiff and University students are similarly situated. *See Dawson v. Steager*, 139 S.Ct. 698, 705 (2019) (addressing whether persons are similarly situated for purposes of receiving a benefit depends on the criteria for receiving the benefit and not on other factors, such as job responsibilities.) Any difference between them that does not relate specifically to the qualifications for a religious exemption is irrelevant.

III. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF BASED ON THE FOUR *WINTER* FACTORS.

A. Plaintiff Is Likely to Prevail at Trial on the Merits.

For all the reasons discussed above, Defendants' actions violate Article I, § 16 of the Constitution of Virginia (Section I, *supra*), and are arbitrary and capricious such that they infringe

Plaintiff's due process rights (Section II, *supra*). Accordingly, Plaintiff is likely to prevail on the merits and is entitled to injunctive relief.

B. Plaintiff will suffer irreparable harm if her fundamental rights are denied.

Although Plaintiff brings this case under the Virginia Constitution rather than the federal Constitution, a brief review of First Amendment case law clarifies the issue at stake here. At oral argument, Defendants in effect claimed the proposition that this case is a simple matter of employment law, and that loss of employment can never be irreparable harm or the subject of injunctive relief.

In *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014), the Fourth Circuit was ruling specifically on the fundamental right **to vote**, the case it cited referred to constitutional rights generally. "When constitutional rights are threatened or impaired, irreparable injury is presumed." See *ACLU of Ky. v. McCreary County, Ky*., 354 F.3d 438, 445 (6th Cir. 2003). *See also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). "Violations of first amendment rights constitute *per se* irreparable injury." *Johnson v. Bergland*, 586 F.2d 993, 995 (1978). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (emphasis added).

Virginia courts are in accord. "[T]he temporary violation of a constitutional right itself is enough to establish irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")." *Lynchburg Range & Training, LLC v. Northam*, 105 Va. Cir. 159, 2020 Va. Cir. LEXIS 57 ** at *12 (Lynchburg Cir. Ct. 2020).

The Culpeper Circuit Court, in its 2021 *Young v. Northam* decision, vitiates Defendants' argument that the instant case is only about employment law, and that loss of employment is never irreparable harm. The Young Court makes clear that the harm here is the injury to constitutional rights:

> In the context of the Free Exercise Clause, the Fourth Circuit has defined substantial burden as one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," or one that forces a person to "choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand. [*Young v. Northam*, 2021 Va. Cir. LEXIS 35, at *9-10 (Culpeper Cir. Ct. 2021).]

What Defendants have done here is precisely to "put substantial pressure on Plaintiff to modify her behavior and to violate her beliefs." If she does not, she is precisely forced to "choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand." This case has employment law characteristics. But at bottom, it is a clear case of the government burdening the free exercise of religion.

The loss, however, of First Amendment freedoms, for even minimal periods of time, rises to the level of irreparable injury. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206, 2020 WL 6948354; *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). A "presumption of irreparable injury flows from a violation of constitutional rights." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). In this case, it is extremely difficult, if not impossible, to calculate the monetary damages that would ensue from a loss of First Amendment rights. The ability to worship as one chooses is sacrosanct in the United States of America. Any restriction on that right potentially causes irreparable harm.

Therefore, the Petitioners have met the element of lacking an adequate remedy at law for a temporary injunction. *Young v. Northam*, 2021 Va. Cir. LEXIS 35, at *14-15.

What Defendants have done here is precisely what the *Young* Court warned of – and precisely what Article I, § 16 of the Virginia Constitution was designed to forbid. Plaintiff's right of free exercise has been severely burdened, she has been punished and denied government benefits for exercising it, she has suffered irreparable harm, and she is entitled to an injunction to restore the status quo as of the filing of her Complaint.

C. The Public Interest Favors an Injunction for Plaintiff.

[T]he balance of the equities favors preliminary relief because "[Fourth Circuit] precedent counsels that 'a state is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *See Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)). Finally, it is well-established that the public interest favors protecting constitutional rights. *See id.* ("It also teaches that 'upholding constitutional rights surely serves the public interest.'") (quoting *Giovani Carandola*, 303 F.3d at 521). [*Leaders of a Beautiful Struggle v. Balt. Police Dep't*., 2 F.4th 330, 346 (2021)].

"It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law." *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611, 627 (W.D. Va. 2000) (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa 1999) (rev'd on other grounds)).

Virginia courts agree. "[T]he public interest and balance of equities favor the granting of injunctive relief. '[U]pholding constitutional rights surely serves the public interest.' *Giovani*

Carandola, Ltd. v. Bason, 303 F.3d 507 (4th Cir. 2003)." *Lean on McLean v. Showalter*, 2020 Va. Cir. LEXIS 74 at *6 (Richmond Cir. Ct. 2020).

Accordingly, the public interest favors injunctive relief for Plaintiff.

D. Defendants' Treatment of Plaintiff has been Inequitable.

First, the University has granted numerous religious exemptions. Therefore, it can scarcely argue that granting Plaintiff's request would have somehow imposed an undue hardship on UVA.

According to the *Washington Post*, the University granted permanent religious and medical exemptions to at least 335 students.[3] Other news outlets report that at least some employees received exemptions as well. "An undisclosed number of employees were granted either a medical or religious exemption for the vaccine mandate. A UVA Health spokesperson said the system would not provide 'a breakdown of how many team members received medical or religious exemptions.'"[4]

It is difficult to imagine what standard Defendants could have used to approve 335 student applications while denying Plaintiff's. It is difficult to imagine why the religious beliefs of the favored "undisclosed number" were apparently deemed acceptable, and Plaintiff's were dismissed as – according to Defendants' counsel at oral argument – "conscience" only and not "religious" in nature.

Plaintiff, along with many other employees, repeatedly asked to speak to an actual person somewhere in the medical department or Human Resources. Repeatedly, she and many others have been denied any opportunity to present evidence in support of their religious exemption requests.

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[3] Lumpkin, Lauren, "University of Virginia disenrolls unvaccinated students ahead of fall semester," *Washington Post*, Aug. 20, 2021.

[4] Higgins, Jessie, "UVA Health dismissing 121 employees for refusing to be vaccinated against COVID-19," *Charlottesville Tomorrow,* Nov. 19, 2021, available at https://www.cvilletomorrow.org/articles/uva-health-dismissing-121-employees-for-refusing-to-be-vaccinated-against-covid-19/.

Plaintiff was repeatedly directed to impersonal, "No Reply" email addresses, and told not to call Human Resources, who were apparently too busy to consider the evidence Plaintiff desired to submit. Plaintiff received a form email that read simply, "your request is denied." Plaintiff was flatly told that the decision is final and there is no route of appeal – but never why her religious beliefs were deemed to be merely "conscience."

"An arbitrary or capricious decision is subject to many definitions throughout the law but the central theme running through all of them is that it is a decision made by an administrative agency without any reasons being given for its decision or without any facts upon which to make its decision." *Keefer v. City of Virginia Beach Dep't of Soc. Servs*., 6 Va. Cir. 256, 1985 Va. Cir. LEXIS 132 *3 (Virginia Beach Cir. Ct. 1985). Yet at oral argument, when this Court asked whether Plaintiff was entitled to any explanation for the denial of her religious exemption and its attendant effect on her free exercise rights, counsel for Defendants replied in the negative. Defendants' position runs counter to Virginia law.

Defendants' actions are the dictionary definition of "arbitrary and capricious" acts. Defendants should lose on the balance of equities prong on this alone.

Defendants initially told Plaintiff in October that her religious exemption request was denied. But only on Tuesday, November 16 did they tell her when the shoe would drop. They told her she would be terminated in five days. Of course, two of those days were weekends, and one was a court holiday. Plaintiff filed her complaint and motion for injunction the very next day, but the Court's secretary had left for the day. Defendants could easily have given Plaintiff 10 days, or even seven, but instead chose to set a deadline of five days, with the court closed on three of those.

The timing of Defendants' actions appear calculated to beat this Court to the punch; to fire Plaintiff before she had opportunity to argue to this Court to maintain the *status quo* until trial on the merits; to put Plaintiff in as unfavorable a position as possible. Defendants essentially admitted as much at oral argument, stating that as of now the *status quo* is that Plaintiff has been fired, so the Court cannot by restoring her to her position preserve the *status quo*. This calls to mind the unclean hands doctrine, and strongly argues against any ruling in equity in Defendants' favor.

On the other hand, Plaintiff has acted in good faith throughout. She has followed all masking and testing rules dutifully and without protest. She turned in her religious exemption request in a timely fashion. It is some two pages long. She supported it with numerous Scriptural arguments, each backed by specific Scripture references. She attached a letter from her pastor attesting to the sincerity of her religious convictions. The Rev. Nancy Johnson articulated that my client believes it would be a sin to receive a vaccine tested on stem cell lines from aborted human babies. She articulated that "requiring her to receive the vaccine violates her right to fully exercise and live out her religious beliefs." Yet this was not good enough for Defendants, who somehow divined that two pages' worth of scriptural citations supported only a "conscience" objection and not a "religious" one.

As such, this Court should grant an injunction restoring Plaintiff to her position and restoring the status quo as it existed before Defendants' arbitrary and bad faith decision to fire Plaintiff with barely two business days' notice, in an effort to deny this Court timely means to provide injunctive relief.

E. Defendants' Position that "Public Health" Concerns Trump the Right of Free Exercise has no Limiting Principle.

As proud a tradition of religious freedom as Virginia has, at the other end of its historical spectrum it also has a chillingly shameful history of denying the fundamental rights of its citizens in the name of "public health." The three great examples since the end of slavery are the eugenics movement and its forcible sterilization laws, its "anti-miscegenation" laws forbidding citizens of different races to marry, and its near statistical obliteration of tribes of indigenous peoples by requiring their designation as "Negro" on birth certificates. These dark chapters were closely linked, all were based on accepted "science" of the day, and all three were carried out in the name of "public health."

> By the 1920s, eugenics had become a "full-fledged intellectual craze" in the United States, particularly among progressives, professionals, and intellectual elites. Imbeciles 2; see *Id.*, at 2-4, 55-57; Cohen, Harvard's Eugenics Era, Harvard Magazine, pp. 48-52 (Mar.-Apr. 2016) (Harvard's Eugenics Era). Leaders in the eugenics movement held prominent positions at Harvard, Stanford, and Yale, among other schools, and eugenics was taught at universities and colleges. Imbeciles 4; see also Harvard's Eugenics Era 48. Although eugenics was widely embraced, Harvard was "more central to American eugenics than any other university," with administrators, faculty members, and alumni "founding eugenics organizations, writing academic and popular eugenics articles, and lobbying government to enact eugenics laws." *Ibid.*; see *id.*, at 49-52. One Harvard faculty member even published a leading textbook on the subject through the Harvard University Press, Genetics and Eugenics. *Id.* at 49. [*Box v. Planned Parenthood of Ind. & Ky., Inc*., 139 S. Ct. 1780, 1784-85 (2019) (Thomas, J., concurring).]

> Many eugenicists believed that the distinction between the fit and the unfit could be drawn along racial lines, a distinction they justified by pointing to anecdotal and statistical evidence of disparities between the races. Galton, for example, purported to show as a scientific matter that "the average intellectual standard of the negro race is some two grades below" that of the Anglo-Saxon, and that "the number among the negroes of those whom we should call half-witted men, is very large." Hereditary Genius at 338-339. Other eugenicists similarly concluded that "the Negro . . . is in the large eugenically inferior to the white" based on "the relative achievements of the race" and statistical disparities in educational outcomes and life expectancy in North America, among other factors. [*Id.* at 1786.]

F. "Public Health" and Virginia's Statute for Forced Sterilization.

Some of the most shameful cases in history came from the Virginia Supreme Court – and in the name of "public health."

In 1925, the Virginia Supreme Court ruled in the case of *Buck v. Bell*. Carrie Buck was born in 1906. Her mother was diagnosed as "feeble-minded," and forcibly placed in the Virginia State Colony for Epileptics and Feeble-Minded in Lynchburg, while Buck was placed in a foster family.[5] In 1923, Buck became pregnant; according to her, after a rape by a nephew of her foster family. *Id.* After she gave birth she, like her mother, was deemed "feeble-minded," and institutionalized at the State Colony. *Id.* She was then ordered to be sterilized pursuant to Virginia's new 1924 forced sterilization statute. *Id.*

R.G. Shelton, Buck's guardian and next friend, instituted suit on her behalf trying to stop the involuntary sterilization. The law stated that sterilization could be ordered:

> if the said special board shall find that the said inmate is insane, idiotic, imbecile, feeble-minded, or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization…. [*Buck v. Bell*, 143 Va. 310, 313 (1925)].

The *Buck* Court held that:

> The purpose of the legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and **raising the average standard of intelligence of the people of the State**. [*Id.* at 318 (emphasis added).]

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[5] Smith, David J, "Buck, Carrie (1906–1983)," EncyclopediaVirginia.org, available at https://encyclopediavirginia.org/entries/buck-carrie-1906-1983/.

Notably, the *Buck* Court referenced the U.S. Supreme Court's decision in *Jacobson v. Massachusetts*, upholding forcible vaccination statutes, as justification for its ruling against Buck.

> In *Barbier v. Connolly*, Mr. Justice Field, referring to the effect of the fourteenth amendment to the Federal Constitution upon the exercise by a State of its police power, says: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe **regulations to promote the health, peace, morals, education and good order of the people**, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." Under statutes providing for compulsory vaccination, a surgical operation is performed, as in the instant case, for the good of the individual and of society. Such statutes, although they applied to school children only, have been upheld. In *Jacobson v. Massachusetts*, the court, in sustaining a compulsory vaccination statute, said: "According to settled principles, the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will **protect the public health and the public safety**." [*Id.* at 319-20 (internal citations omitted) (emphasis added).]

The United States Supreme Court upheld the Virginia Court's decision, and Buck was forcibly sterilized after her daughter was born:

> [The Supreme] Court threw its prestige behind the eugenics movement in its 1927 decision upholding the constitutionality of Virginia's forced-sterilization law, *Buck v. Bell*…. The plaintiff, Carrie Buck, had been found to be "a feeble minded white woman" who was "the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble minded child." In an opinion written by Justice Oliver Wendell Holmes, Jr., and joined by seven other Justices, the Court offered a full-throated defense of forced sterilization:
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> "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. **The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes**. Three generations of imbeciles are enough." [*Box*, 139 S. Ct. 1784-85 (Thomas, J, concurring) (emphasis added)].

Perhaps to the surprise of Justice Holmes, Buck's "third-generation imbecile" daughter was actually an honor student when she died at the age of eight from an illness.[6]

"Tragically, it is estimated that between 7,200 and 8,300 people were sterilized in Virginia from 1927-1979 because they were deemed by the Commonwealth at the time to be unworthy or unfit to procreate."[7]

Finally, in 2015, the General Assembly agreed to make $25,000 payments to any surviving sterilization victims who sought reparations.[8] But over a period of 70 years, not ending until the 1970s, more than 7,000 people lost their basic human rights in Virginia in the name of "public health."

G. "Public Health" and Virginia's Ban on Interracial Marriage.

In 1955, within the lifetime of many Virginians today, the Virginia Supreme Court decided *Naim v. Naim*, upholding Virginia's anti-interracial marriage law. The *Naim* Court held, in language that is chilling today:

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement

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[6] Smith, David J, "Buck, Carrie (1906–1983)," EncyclopediaVirginia.org, available at https://encyclopediavirginia.org/entries/buck-carrie-1906-1983/.

[7] Wong, Elizabeth, "A Shameful History: Eugenics in Virginia," American Civil Liberties Union, Jan. 11, 2013, available at https://acluva.org/en/news/shameful-history-eugenics-virginia.

[8] Portnoy, Jenna, "Va. General Assembly agrees to compensate eugenics victims," Washington Post, Feb. 27, 2015, available at https://www.washingtonpost.com/local/virginia-politics/va-general-assembly-agrees-to-compensate-eugenics-victims/2015/02/27/b2b7b0ec-be9e-11e4-bdfa-b8e8f594e6ee_story.html.

> that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it *weaken or destroy the quality of its citizenship*. [*Id.*; 197 Va. 80, 89-90 (1955) (emphasis added)].

In 1958, Richard Loving, a white man, married Mildred Jeter, a black woman, in the District of Columbia. The couple moved to Virginia in 1959. The couple were criminally charged for violating Virginia's law against interracial marriage. "On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years." *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

The law was eventually overturned by the United States Supreme Court in *Loving v. Virginia*, as obviously violative of the Fourteenth Amendment's guarantee of equal protection of the laws. Richard Loving passed away in an auto accident in 1975; Mildred Loving lived in Virginia until her death in 2008 at age 68.

H. "Public Health" and Virginia's "Statistical Genocide on Native Americans."

The first head of Virginia's Bureau of Vital Statistics was a doctor and scientist, Dr. Walter Plecker. Born the son of a slave owner in 1861:

> [t]ogether with John Powell, a renowned pianist from Richmond who founded the Anglo-Saxon Clubs of America, and Earnest Sevier Cox, another white supremacist and author of White America (1923), Plecker successfully advocated for the Virginia General Assembly to pass the Racial Integrity Act of 1924. The legislation prohibited whites from marrying non-whites, and explicitly defined racial classifications: "The term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian." All others were "colored."[9]

[9] Talbot, Tori, "Plecker, Walter Ashby (1861–1947)," EncyclopediaVirginia.org, available at https://encyclopediavirginia.org/entries/plecker-walter-ashby-1861-1947/.

"Plecker was drawn to *the eugenics movement, which held that society and mankind's future could be improved by promoting better breeding*. He was among eugenics adherents who believed in the supremacy of white genetic stock, the inferiority of other races and the threat that mixing with the white race would lead to decline or destruction."[10]

"'Two races as materially divergent as the white and the negro, in morals, mental powers, and cultural fitness, cannot live in close contact without injury to the higher,' he told an American Public Health Association session in 1924. 'The lower never has been and never can be raised to the level of the higher.'" *Id.*

Plecker "described the Racial Integrity Act as "the most perfect expression of the white ideal, and the most important eugenical effort that has been made in 4,000 years."[11]

> In 1930 the General Assembly updated the Racial Integrity Act to define a white person using the "one-drop" rule. Now, a "colored" person was anyone "in whom there is ascertainable any Negro blood." Already believing that all Virginia Indians were in part African American, Plecker now had the go-ahead to officially classify Indians as "colored" and, in effect, define them out of existence. He applied to this process the smooth polish of scientific rationalism. In the Washington Post on January 6, 1945, he described his efforts at "tracing very carefully the ethnology of the so-called Indians in Virginia. We have been able to trace many of the persons now asserting themselves as Indians back to census records of 1830, where their ancestors were listed as free Negroes." He went on to assert that "there are no descendants of Virginia Indians claiming or reputed to be Indians who are unmixed with Negro blood." *Id.*
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> In aggressively policing the color line, he classified "pseudo-Indians" as black and even issued in 1943 a hit list of surnames belonging to "mongrel" or mixed-blood families suspected of having Negro ancestry who must not be allowed to pass as Indian or white.

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[10] Hardin, Peter, "Documentary Genocide: Families' Surnames on Racial Hit List," Richmond Times-Dispatch, Mar. 5, 2000, available at http://www.mixedracestudies.org/?p=17153.

[11] Talbot, Tori, "Plecker, Walter Ashby (1861–1947)," EncyclopediaVirginia.org, available at https://encyclopediavirginia.org/entries/plecker-walter-ashby-1861-1947/.

> With hateful language, he denounced their tactics. ". . . Like rats when you are not watching, [they] have been `sneaking' in their birth certificates through their own midwives, giving either Indian or white racial classification," Plecker wrote.[12]

"Plecker changed racial labels on vital records to classify Indians as "colored," investigated the pedigrees of racially "suspect" citizens, and provided information to block or annul interracial marriages with whites. He testified against Indians who challenged the law." *Id.*

"[S]aid Gene Adkins, assistant chief of the Eastern Chickahominy Tribe…. '[w]e want people to know that he did damage the Indian population here in the state. And it's taken us years, even up to now, to try to get out from under what he d*Id.* It's a sad situation, really sad.' Said Chief William P. Miles of the Pamunkey Tribe: 'He came very close to committing statistical genocide on Native Americans in Virginia.'" *Id.*

> For people of Indian heritage, Plecker's name "brings to mind a feeling that a Jew would have for the name of Hitler," said Russell E. Booker Jr., Virginia registrar from 1982 to 1995. That view "certainly is justified."
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> Indeed, one of Plecker's most chilling letters mentioned Adolf Hitler - and not unfavorably.
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> "Our own indexed birth and marriage records showing race reach back to 1853," Plecker wrote U.S. Commissioner of Indian Affairs John Collier in 1943. "Such a study has probably never been made before.
>
> "Your staff member is probably correct in his surmise that Hitler's genealogical study of the Jews is not more complete." *Id.*

Plecker continued as head of the Bureau of Vital Statistics until his retirement in 1946, within the lifetimes of many Virginians still living. His shameful legacy lives on in Virginia.

In a 2000 article in the *Richmond Times-Dispatch*, writer Peter Hardin sums up Plecker's dark legacy perfectly. "Today, [Plecker's preserved] letters offer a rare record of *a bureaucrat*

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[12] Hardin, Peter, "Documentary Genocide: Families' Surnames on Racial Hit List," Richmond Times-Dispatch, Mar. 5, 2000, available at http://www.mixedracestudies.org/?p=17153.

intruding in individual lives, harassing and intimidating citizens, bullying local officials and stamping out civil rights." *Id.* (emphasis added).

I. "Public Health Emergencies" are an Insufficient Basis for Subverting Constitutional Rights.

The Virginia Constitution does not provide for suspension of the Bill of Rights during an emergency, and indeed, any such suspension is expressly forbidden by Article I, § 7. That proscription exists because of the historical tendency of governments to use emergency powers to violate fundamental rights. As Justice Robert Jackson explained in a leading case circumscribing executive power:

> The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. **They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation**. We may also suspect that **they suspected that emergency powers would tend to kindle emergencies**. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. **I do not think we rightfully may so amend their work**, and, if we could, I am not convinced it would be wise to do so, although many modern nations have forthrightly recognized that war and economic crises may upset the normal balance between liberty and authority. [*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring) (emphasis added).]

Justice Jackson's opinion is highly persuasive as it was written shortly after he served as Chief Prosecutor of the Nuremberg Trials, studying what had happened in Germany under the Weimar Constitution, which expressly empowered the President of the German Republic "to suspend any or all individual rights if public safety and order were seriously disturbed or endangered." *Id.* at 651. After the burning of the Reichstag in 1933, German

President Hindenburg used that power to suspend most civil liberties in Germany, and those rights were not reinstated until after World War II. *See Id.*

Herein lies the vast danger of Defendants' position. Should the courts adopt their desired position that the fundamental free exercise right must yield to "public health emergencies" in the case of the coronavirus vaccine, where can the courts naturally stop?

According to the National Resources Defense Council, "[t]oday's scientists point to climate change as 'the biggest global health threat of the 21st century.'"[13] Some scientists and philosophers are warning that climate change is being exacerbated to crisis levels by overpopulation. Travis Reider, a philosopher with the Berman Institute of Bioethics at Johns Hopkins University in Baltimore, "proposes that richer nations do away with tax breaks for having children and actually penalize new parents. He says the penalty should be progressive, based on income, and could increase with each additional child."[14] Indeed, Great Britain has already given 166 million British pounds of financial aid to forced sterilization programs in India, in an effort to fight climate change.[15] Should a couple's religious beliefs as to the number

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[13] Denchak, Melissa, "Are the Effects of Global Warming Really that Bad?", Mar. 15, 2016, National Resources Defense Council, available at https://www.nrdc.org/stories/are-effects-global-warming-really-bad.

[14] Ludden, Jennifer, "Should We Be Having Kids In The Age Of Climate Change?" National Public Radio, Aug. 18, 2016, available at https://www.npr.org/2016/08/18/479349760/should-we-be-having-kids-in-the-age-of-climate-change.

[15] Chamberlain, Gethin, "UK aid helps to fund forced sterilisation of India's poor," Apr. 14, 2012, available at https://www.theguardian.com/world/2012/apr/15/uk-aid-forced-sterilisation-india.

of children they should have be subject to a governmentally imposed limit, such as India's forced sterilization policy, to combat the climate change "emergency"?

Defendants' proposed position has no rational limiting principle. The warning of Justice Jackson is particularly pointed during times of emergencies, and ought to be heeded here.

In his dissent of the denial of Supreme Court review of Maine's vaccine mandate, Justice Gorsuch cautioned against:

> an error this Court has long warned against—restating the State's interests on its behalf, and doing so at an artificially high level of generality…. [W]hen judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's actually asserted interests as applied to the parties before it count—not post-hoc reimaginings of those interests expanded to some society-wide level of generality. *Fulton*, 593 U. S., at ___, 141 S. Ct. 1868, 210 L. Ed. 2d 137; *Tandon*, 593 U. S., at ___, 141 S. Ct. 1294, 209 L. Ed. 2d 355; *Lukumi*, 508 U. S., at 544-545. "At some great height, after all, *almost any state action might be said to touch on '. . . public health and safety' . . .* and *measuring a highly particularized and individual interest" in the exercise of a civil right "'directly against . . . these rarified values inevitably makes the individual interest appear the less significant*.'" [*Doe v. Mills*, 2021 U.S. LEXIS 5340 at *8 (Gorsuch, J., dissenting from denial of review) (emphasis added).]

This is the error this Court must guard against. Defendants here claim a generalized "public health emergency" interest on behalf of all potential University Health System patients, attempting by sheer numbers to overwhelm Plaintiff's basic human right. The error suggests that somehow constitutional rights are not also generalized to the public at large, and obscures the fact that if infringement of Plaintiff's constitutional rights is allowed, the rights of the public at large can be just as easily subverted. This Court should not make that mistake.

In the instant case, the balance of equities favors Plaintiff. The interest asserted by the government is at best uncertain, undefined, subject to heated scientific debate and prone to invidious and unfettered expansion. The right of free exercise is defined, fundamental, and —

under the command of Article I, § 16 — outside the jurisdiction of the state to dictate. The equities favor the Plaintiff. The basic human right recognized and protected by the Virginia Constitution must control.

IV. THE UNIVERSITY OF VIRGINIA COVID-19 MANDATES ARE IN NO WAY JUSTIFIED BY CURRENT COVID-19 CONDITIONS.

As stated in Section I *supra*, Article I § 16 is a jurisdictional bar to Defendants interfering with or punishing Plaintiff's free exercise of religion in declining to receive the injection. It leaves no ground for a balancing of Plaintiff's basic right with any alleged "public health" concern. Nonetheless, without waiving that jurisdictional bar, Plaintiff asserts that the "public health" claims made by Defendants are not justified scientifically. As such they are unreasonable, arbitrary and - even if Article I § 16 did not control - would still fail to pass constitutional muster.

A. The University of Virginia's COVID-19 Mandates.

The University of Virginia ("UVA") has adopted at least three COVID-19 shot mandates: (i) for students; (ii) for Health System employees (the one applicable to plaintiff here); and (iii) for Academic employees.

Students. On May 20, 2021, UVA announced that it was going to require all students who "live, learn, or work in person" at UVA must receive the COVID-19 vaccine before returning to the grounds. *See* "UVA to Require Vaccination for Students As In-person Operations Resume in Fall," (May 20, 2021). Students were required to upload proof of vaccination by July 1, 2021, and UVA provided for a process to request a medical or religious exemption. From what can be known publicly, UVA granted all or nearly all student religious exemptions.

Health Systems Employees. On August 25, 2021, UVA announced that all UVA Health System employees must receive the COVID-19 shot by November 1, 2021.[16] Although UVA provided for a process to approve a request for a medical or religious exemption, UVA has not disclosed who reviewed these religious exemptions, or what religious test criteria were applied. UVA refused to honor Plaintiff Kaycee McCoy's asserted religious exemption, without providing any reason. From what can be known publicly, very few religious exemptions were granted to Health System employees.

Academic Personnel. In October 2021, UVA imposed a requirement that all academic personnel to receive the COVID-19 shot by January 4, 2022 in order to comply with President Biden's Executive Order 14042, which forces a vaccine mandate on recipients of certain federal contracts. UVA explained "Compliance with President Biden's Executive Order is vital to ensure that we do not risk losing millions in federal contract dollars that support important research and education work here at UVA."[17]

Purpose of Mandates. UVA explained that the rationale for imposing the mandates on a page entitled "Employee COVID-19 Vaccine Information," but the language of the purpose appears to focus on students:

> According to the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA), the COVID-19 vaccines are **safe and effective**; studies have shown they **prevent severe illness and death** from the virus. Like hundreds of colleges and universities around the country, the University is following this public health guidance and the advice of our medical experts by mandating vaccination for **students**. This approach will allow us to return to

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[16] *See* https://hr.virginia.edu/news/uva-health-covid-19-vaccination-requirement.

[17] *See* https://hr.virginia.edu/covid-19/academic-covid-vaccine-requirement

in-person instruction and **student** residential life and **keep our community safe**. [https://coronavirus.virginia.edu/vaccinations (emphasis added).]

For the reasons set out below, neither the assumptions on which the mandates were based nor the objectives that these mandates were designed to achieve withstand scrutiny.

B. Many Factors Have Compromised the Objectivity of the University of Virginia in Imposing COVID-19 Shot Mandates.

While the objectives stated by UVA (quoted above) to justify its mandates should be treated seriously, that is not to say those objectives tell the whole story. Often financial considerations dictate policy.

A significant source of revenue for the University of Virginia is state funding.[18] For the past two years, the governor, attorney general, and a majority of both branches of the General Assembly generally have been supportive of COVID-19 mandates of various types. UVA would have a financial motivation to yield to the perceived view of those government officials who provide substantial funding for its operations.

Additionally, like most all American universities, UVA is heavily funded by the federal government. As just one small source of revenue in the health area, UVA usually receives between $100,000 and $200,000 annually from NIH.[19] During his campaign, President Biden

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[18] According to a somewhat dated source: "For all university divisions, state appropriations accounted for $154.4 million of a $2.6 billion budget, or 5.8 percent. For the academic division, state appropriations were $139.5 million of a $1.36 billion budget, or 10.2 percent." Jenna Johnson, "How much state funding does the University of Virginia receive?" *Washington Post* (Sept. 12, 2013).

[19] *See* NIH, https://report.nih.gov/award/index.cfm?ot=DH&fy=2020&state=VA&ic=&fm=&orgid=1526402&distr=&rfa=&om=n&pid=&view=state.

committed that vaccine mandates would **not** be imposed,[20] but has imposed mandates on anyone he could exercise power over, including on the military,[21] civilian federal government employees,[22] federal government contractors,[23] recipients of funds from the Center for Medicare and Medicaid,[24] and private employers through OSHA-proposed regulations.[25]

However, there is no need to speculate about one factor that motivated UVA, as in October 2021. UVA admitted that it imposed its COVID-19 shot mandate on academic personnel in order to "ensure that we do not risk losing millions in federal contract dollars...." UVA made clear it valued federal money over the religious liberties of its employees, declaring: "Compliance with President Biden's Executive Order [14042] is vital to ensure that we do not risk losing millions in federal contract dollars that support important research and education work here at UVA."[26]

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[20] *See* BBC, "Joe Biden: Covid vaccination in US will not be mandatory," (Dec. 5, 2020).

[21] *See Military.com*, "Biden Orders Military to Move Toward Mandatory COVID Vaccine," (July 29, 2021).

[22] *See* Executive Order 14043, "Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," (Sept. 9, 2021).

[23] *See* Safer Federal Workforce Task Force, "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors" (Updated Nov. 10, 2021).

[24] *See* Centers for Medicare & Medicaid Services, "Biden-Harris Administration Issues Emergency Regulation Requiring COVID-19 Vaccination for Health Care Workers," (Nov. 4, 2021).

[25] *See* OSHA, "COVID-19 Vaccination and Testing; Emergency Temporary Standard," (Nov. 5, 2021).

[26] *See* https://hr.virginia.edu/covid-19/academic-covid-vaccine-requirement

Lastly, UVA receives significant funding from the Pharmaceutical industry. Over the past seven years, UVA Medical Center has received almost $3.7 million in research grants, as well as almost $150,000 in general payments.[27] Discovery may demonstrate that these amounts are the tip of the iceberg.

Additionally, health care providers may have their compensation from the Centers for Medicare and Medicaid Services reduced by allowing unvaccinated persons on the payroll or fines imposed by OSHA, in ways that are not yet fully understood, but there are some reports that the penalty could be $14,000 per whatever is considered a violation, or possibly $14,00 per unvaccinated employee, with unknown frequency for continued violations. *See* "Background Press Call on OSHA and CMS Rules for Vaccination in the Workplace, " *The White House* (Nov. 4, 2021).

But on the other side of the coin, federal law has immunized those involved in pushing the COVID-19 shots. UVA appears to risk no liability whatsoever for the consequences of its mandate — for causing injuries to or death of employees who "voluntarily" take the COVID-19 shot. The worst likely outcome is that an employee could have a Workers Compensation claim which would provide limited compensation, causing the premiums for UVA to increase in the future. Thus, with all financial upside and little risk UVA can be reckless in imposing the mandate, and arbitrary in allowing exemptions.[28]

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[27] *See* CMS, Open Payments Data, Pfizer Inc., https://openpaymentsdata.cms.gov/company/100000000286.

[28] In recent days, it appears that there has been a reconsideration of mandates by some Virginia employers as employees increasingly are learning about and rebelling against unsafe and ineffective COVID-19 shots. *See, e.g.*, "Newport News Shipbuilding COVID-19 vaccine deadline suspended for employees," WTKR (Nov. 17, 2021).

C. Key Facts Concerning the Public Health Crisis Surrounding COVID-19 Have Been Misrepresented by Government Officials.

Plaintiff urges that, as a matter of law, no public health crisis can empower the government to exercise powers over the bodies of Virginians that no government should have — powers that violate the God-given, pre-existing rights of Virginians, as expressly recognized and protected by Article I, Section 16 of the Constitution of Virginia. *See* Complaint, Count One; Section I, *supra*. The Virginia Constitution was not just written for normal times, but for all times. It was not written to be disregarded during "times of emergency," or its words would be little more than the "parchment barrier" that James Madison described. *See* Federalist No. 48, G.Carey and J. McClellan, The Federalist (Liberty Fund: 2001). Public health is no exception to this rule. The Framers knew of plagues and diseases, but gave government no special powers in such situations.

If what Justice Scalia termed "judge-empowering" balancing tests are employed,[29] which cannot be found in Article I, Section 16, courts often defer to other branches of government. Balancing tests allow courts to abdicate, for when does the Government not try to assert what has come to be called a "compelling government justification" to violate the rights of its citizens? However it is the responsibility of courts to safeguard constitutional rights. Judicial abdication to the other branches seeking to exercise power over the bodies of Virginians could bring on the end to the most basic protections provided by our Constitution. Because courts have deferred to governmental actions based on perceived public health emergencies, plaintiff feels compelled to argue the merits of such an anticipated claim. Accordingly, the Plaintiff asserts that even if it

[29] *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

were believed that the Constitution of Virginia could be violated due the existence of some extraordinary public health emergency, the facts surrounding COVID-19 come nowhere close to providing any such justification. If that is to be UVA's claim, then UVA should bear the burden of proving that the COVID-19 crisis can only be dealt with by the destruction of the constitutionally protected liberties of Virginians. As this issue arises in the context of supplemental briefing in support of Plaintiff's Application for a Preliminary Injunction, it is impossible to know at this stage how UVA might try to meet that burden, which may require a reply to UVA's Opposition. Although the current body of medical knowledge did not exist when many public health officials and employers adopted policies in the past, much evidence has been assembled to prove that as of now, the COVID-19 public health threat does not support government mandates for COVID-19 shots, for the following reasons.

1. The COVID-19 Shots Did Not Qualify as Vaccines Until the Definition of Vaccine was Modified.

Vaccines have always involved the use of a dead or attenuated pathogen to trigger the body to create immunity. Until the dictionary definition of the word "vaccine" was changed on February 5-6, 2021 to include the experimental gene therapy used in all three COVID-19 shots, they would not have been considered vaccines. *See* "Merriam-Webster Dictionary Quietly Changes Definition of 'Vaccine' to Include COVID-19 mRNA Injection," *The Red Elephants.com* (March 2, 2021). This change in definition was necessary to "sell" the COVID-19 shots to the public. Stefan Oelrich, Preident of Pharmaceuticals at Bayer, explained this rhetorical device at the World Health Summitt:

> ULTIMATELY, the mRNA vaccines are an example for that sort of gene therapy. I always like to say, if we had surveyed, two years ago, the public,"**would you be**

> **willing to take gene or cell therapy and inject it into your body?**" we probably would have had a 95 per cent refusal rate. I think this pandemic has opened many people's eyes to innovation in a way that was maybe not possible before.' [Paul Craig Roberts, "Big Pharma Executive Admits the Covid "vaccine" is Gene Therapy," *Institute for Political Economy* (Nov. 21, 2021).]

The CDC also changed the definition of "vaccine" to accommodate the reality that the COVID-19 shots do not actually prevent disease — only produce some degree of immunity:

> The Centers for Disease Control (CDC) has carefully "evolved" the definition of vaccination to meet the declining ability of some of today's "vaccines," including the Covid-19 vaccines. "The original definition, prior to 2015, stated that vaccines "**prevent...disease**." Starting in 2015, the definition was altered to say that vaccines "produce immunity," without necessarily preventing disease. [Sharyl Attkisson, "CDC changes definition of "vaccines" to fit Covid-19 vaccine limitations," *Full Measure* (Sept. 8, 2021) (emphasis added).]

For these reasons, plaintiff refers to the COVID-19 shot, rather than the COVID-19 vaccine. If Virginians were required to take "gene therapy" or a "drug" on the orders of an employer, the acceptance rate would be a percentage of the rate when that product is termed a "vaccine," to fool the public.

2. UVA's Policy Disregards Robust Natural Immunity.

UVA's mandate that all Health Systems employees receive the COVID-19 shot makes no exception for those who already have had COVID-19, and thus have natural immunity. It has been estimated that 100 million Americans have had COVID-19, and have no need whatsoever for any COVID-19 shot.[30] A recent analysis of 130 studies on natural immunity have

[30] "More than 100 million people in the United States – 31% of the population — have been infected with COVID-19 by end of 2020, an analysis published ... by the journal *Nature* estimated." Brian Dunleavy, "More than 100M in U.S. may have had COVID-19 by by end of 2020, study estimates, UPI (Aug. 26, 2021). The CDC Data Tracker reports over 47 million cases as of November 22, 2021. https://covid.cdc.gov/covid-data-tracker/# cases_casesper100k.

demonstrated that natural immunity is real, and is believed by many to be superior to COVID-19 shot immunity.

> **Public health officials** and the medical establishment with the help of the politicized media **are misleading the public** with assertions that the **COVID-19 shots provide greater protection than natural immunity**. CDC Director Rochelle Walensky, for example, was deceptive in her October 2020 published LANCET statement that "there is no evidence for lasting protective immunity to SARS-CoV-2 following natural infection" and that "the consequence of waning immunity would present a risk to vulnerable populations for the indefinite future."
>
> Immunology and virology 101 have taught us over a century that **natural immunity confers protection** against a respiratory virus's outer coat proteins, and not just one, e.g. the SARS-CoV-2 spike glycoprotein. There is even strong evidence for the persistence of antibodies. Even the **CDC recognizes natural immunity for chicken-pox and measles, mumps, and rubella, but not for COVID-19**.
>
> The vaccinated are showing viral loads (very high) similar to the unvaccinated (Acharya et al. and Riemersma et al.), and **the vaccinated are as infectious**. Riemersma et al. also report Wisconsin data that corroborate how the vaccinated individuals who get infected with the Delta variant can potentially (and are) transmit(ting) SARS-CoV-2 to others (potentially to the vaccinated and unvaccinated). [Paul Elias Alexander, "130 Research Studies Affirm Naturally Acquired Immunity to Covid-19: Documented, Linked, and Quoted," *Brownstone Institute* (Oct. 17, 2021) (emphasis added).]

This analysis of the 130 studies demonstrates that the UVA position requiring even employees with natural immunity to be vaccinated is fundamentally wrong. For these reasons, any COVID-19 shot mandate that does not exempt those with natural immunity is not just "arbitrary and capricious," but over-inclusive, and irrational.

3. Enormous Numbers of Persons Receiving The COVID-19 Shot Have Died or Had Serious Adverse Reactions.

On November 2, 2021, U.S. Senator Ron Johnson (R-WI) held a conference on Capitol Hill at which numerous clinicians, scientists, lawyers, and injured persons presented their stories. The event was almost entirely ignored by the legacy media. The messages from those injured

from the COVID-19 shot are heart breaking. If there had been an appropriate way to achieve this, plaintiff would have urged that the President and Rector of UVA should be required to view this video and report to the Court whether it would want to continue to defend this case. *See* Megan Redshaw, "Vaccine-Injured Speak Out, Feel Abandoned by Government Who Told Them COVID Shot Was Safe," *The Defender* (Nov. 3, 2021).

The VAERS vaccine injury reporting system, which is understood to vastly underreport vaccine injuries, shows the following adverse consequences of the COVID-19 vaccines from December 2020 through November 5, 2021:

- Number of Adverse Reactions – 894,145
- Number of Life-Threatening Events – 21, 088
- Number of Hospitalizations – 94,537
- **Number of Deaths – 18,853**
- Number of Permanent Disabilities after vaccination – 30,010
- Number of Office Visits – 139,951
- Number of Birth Defects after vaccination – 658

See "VAERS Summary for COVID-19 Vaccines through 11/05/2021," VAERS Analysis.

4. Persons Who Receive the COVID-19 Shot Are Not Immunized From and Can Contract COVID-19, and Possibly With Worse Outcomes.

Earlier in his presidency, "President Joe Biden offered an absolute guarantee Wednesday that people who get their COVID-19 vaccines are completely protected from infection, sickness and death from the coronavirus." *See* Calvin Woodward and Hope Yen, "Biden goes too far in assurances on vaccines," *YahooNews* (July 21, 2021). In response, even AP generously stated that these comments went too far. *Id*. Yet many continue to erroneously believe that the COVID-19 shot is highly effective in preventing any infection, hospitalization, serious injury, or

death. As Mark Twain observed: "A lie can travel halfway around the world before the truth puts on its shoes."

To sell the COVID-19 program to the public, persons who received the one J&J/Janssen one-shot regimen[31] or the Moderna and Pfizer two-shot regimen were considered "fully vaccinated." Since then, at least one booster is being required by many for one to be considered "fully vaccinated."[32] Soon, another booster may be required, in a never ending effort to generate a fraction of the benefit of natural immunity.

In testimony on November 4, 2021, National Institute of Allergy and Infectious Diseases Director Anthony Fauci acknowledged "that COVID-19 hospitalizations are rising among those who are vaccinated and haven't received the booster shot." Also, Centers for Disease Control and Prevention ("CDC") Director Rochelle Walensky testified that "her agency is seeing a decline in vaccine efficiency among elderly recipients and those who live in long-term care facilities. This matches with CDC data released last month." Jack Phillips, "Fauci: COVID-19 Hospitalizations Rising Among Vaccinated People," *NTD Television* (Nov. 18, 2021).

In a November 12, 2021, New York Times Podcast *The Daily*, Dr. Fauci reported:

> officials are now starting to see some waning immunity against both infection and hospitalization several months after initial vaccination. The infectious disease

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[31] After millions of the J&J/Jansen vaccines were administered without any CDC warning, the CDC issued a warning that the J&J/Jansen shot has been followed by reports of Thrombosis with Thrombocytopenia Syndrome. "Updated Recommendations from the Advisory Committee on Immunization Practices for Use of the Janssen (Johnson & Johnson) COVID-19 Vaccine After Reports of Thrombosis with Thrombocytopenia Syndrome Among Vaccine Recipients — United States," (April 30, 2021).

[32] U.S. News & World Report, "Fully Vaccinated? A Booster Shot May Become a Requirement," (Nov. 23, 2021).

> expert pointed toward incoming data from Israel, which he noted tends to be about a month to a month and a half ahead of us in terms of the outbreak.
>
> They are seeing a **waning of immunity not only against infection but against hospitalization and to some extent death**, which is starting to now involve all age groups. It isn't just the elderly," Fauci said. "It's waning to the point that you're seeing **more and more people getting breakthrough infections**, and more and more of those people who are getting breakthrough infections are winding up in the hospital." [quoted in Jim Hoft, "Dr. Fauci Admits Vaccines Did Not Work as Advertised and that Vaccinated Are in Great Danger Today," *Gateway Pundit* (Nov. 14, 2021) (emphasis added).]

The problem goes beyond the rapidly waning efficacy of the COVID-19 shot. Even before the vaccine rollout, many predicted that the COVID-19 shot would cause a subsequent infection from COVID-19 to be much more serious: "Disease Enhancement," "Antibody Dependent Enhancement," and "Pathogenic Priming." Lyons-Weiler J., "Pathogenic priming likely contributes to serious and critical illness and mortality in COVID-19 via autoimmunity." *J Transl Autoimmun* (Apr. 9, 2020).

There is good reason to believe that this is occurring. In Belgium, 100 percent of ICU admissions are for persons who received the COVID-19 shot, but only 40 percent of the Belgium population is vaccinated. James Lyons-Weiler, "Pathogenic Priming in Belgium - 100% ICU Admissions are Vaccinated," *Popular Rationalism*. Dr. Kristiaan Deckers, GZA Hospitals in Antwerp, Belgium explained:

> even more radical about for those who would faithfully think that the intensive care now follows with not vaccinated that is no longer correct us right now we see a large majority are so-called breakthrough infections and that is different from to me a few weeks ago indeed not a majority vaccinated patients in intensive had at the moment that is no longer the case have the patients we have now put on intensive. I checked it yesterday are actually all vaccinated. [Google translated.]

Public Health Scotland publishes a weekly report on COVID-19 data. A release of data on November 10, 2021, shows that "the **fully vaccinated accounted for 89% of Covid-19**

deaths in the past four weeks, whilst also accounting for 77% of Covid-19 hospitalisations and 65% of alleged Covid-19 cases from October 9th through to November 5th." ["89% of Covid-19 deaths in the past 4 weeks were among the Fully Vaccinated according to the Latest Public Health data," *DailyExpose.uk* (Nov. 11, 2021).]

> Data from Sweden is even more shocking:
>
> > In Sweden, a new study followed 840,000 people who were double vaccinated for nine months which is longer than any previous study. The researchers matched them or "paired them" with another 840,000 people who were the same, age, sex and from the same area. Out of this 1.6 million pooled sample, **27,000 people went on to get infected, and most of them were unvaccinated** (21,000). So that's not surprising, but underlying this data was **an extraordinary trend showing efficacy falling month after month**. In the first two to four weeks, the double vaccinated were very well protected. But **by nine months later, the efficacy was not just zero, but negative**.
> >
> > The study considered protection against severe disease too, which lasts for longer, but after 6 months, **the older men and people most at risk of Covid (sadly) were more likely to catch Covid that the matched same-age unvaccinated controls** they were paired with. Nine months after vaccination, the average person is still less likely to end up in hospital, but protection is trending downwards for everyone. ["Swedish study of 840,000 shows vaccine efficacy at 7 months at, wow, zero," *JoNova* (emphasis added).]

See also Peter Nordstrom & Marcel Ballin, "Effectiveness of Covid-19 Vaccination Against Risk of Symptomatic Infection, Hospitalization, and Death Up to 9 Months: A Swedish Total-Population Cohort Study," *The Lancet* ("Whether vaccine effectiveness against Coronavirus disease 2019 (Covid-19) lasts longer than 6 months is unclear.").

One might reasonably ask why current data on the incidence of COVID-19 cases among those receiving the COVID-19 shot in these new reports conclusions are not extensively addressed by the U.S. government and covered in the U.S. media. One reason may be that the CDC has not updated data on what are called "breakthrough cases" since September 4, 2021. Its

reports of breakthrough hospitalizations by vaccination status is current only through the end of August, 2021. *See* Sophie Putka, "CDC Hasn't Updated COVID Vax Breakthrough Data," *MedPage Today* (Nov. 11, 2021).

The Melbourne Cup event in Victoria, Australia required a "vaccine passport," requiring double vaccinations, for admission. Nevertheless, "[u]p to 15 partygoers who attended the official function [of 100 persons] have tested positive." even though "there was rapid antigen testing on the night of the [victory party], and no positive tests were recorded." "Victoria sees 1069 new COVID-19 cases amid fears of Melbourne Cup 'super spreader event'" *PressNewsAgency* (Nov. 8, 2021).

Without clear evidence that the COVID-19 shots have long term benefits, and with increasing evidence that these shots can exacerbate illness, any employer mandate is "arbitrary and capricious," and irresponsible.

D. Why Is the True Story of the High Risk and Low Benefit of the COVID-19 Shot Not Being Recognized By Regulators and the Media.

1. FDA Regulatory Capture.

With broad immunity for vaccine manufacturers, distributors, and those who administer the shots, the product liability system provides consumers no protection from dangerous vaccine products. Therefore, the full burden of protection of the public falls on regulators. Sadly, in recent years, a considerable body of evidence has been accumulated addressing the problem of "regulatory capture" of various government regulatory agencies by those that the agency was established to regulate.[33] Since the profits of — and even the existence of — regulated

[33] *See, e.g.*, D. Carpenter & D. Moss, Preventing Regulatory Capture: Special Interest Influence and How to Limit it, (Cambridge U. Press: 2013).

companies are determined by those regulators, the regulated have enormous incentive to seek to control the activities of the regulators. The companies manufacturing the COVID-19 shots are earning enormous revenue. *See e..g.,* Darcy Jimenez, "Pfizer forecasts $26b of Covid-19 vaccine revenue after first-quarter success." *Pharmaceutical Techology* (May 5, 2021).

Although there are public lobbies that focus on certain agencies, their funding is vastly outmatched by the regulated companies. This concern applies to the FDA.

> The FDA has been captured for quite a while. In a 2016 study published in the British Medical Journal, the majority of the FDA's hematology-oncology reviewers who left the agency ended up working or consulting for the biopharmaceutical industry. In another investigation by Science magazine, 11 of 16 FDA reviewers who worked on 28 drug approvals and subsequently left the agency are working or consulting for the companies they recently regulated.....
>
> A 2006 survey of FDA scientists indicated that 18.4 percent of them had "been asked, for non-scientific reasons, to inappropriately exclude or alter technical information or their conclusions in a FDA scientific document." ["The Regulatory Capture of the FDA," *The American Conservative* (June 12, 2021).]

Moreover, "[a]bout 45% of the FDA's budget, or $2.7 billion, comes from industry user fees, according to a fact sheet released by the FDA in November 2020. The other 55%, or $3.2 billion, comes from federal funding." Miriam Fauzia, "Fact check: Some, but not all, of FDA's funding comes from the companies whose products it approves," *USA Today* (Aug. 27, 2021). *See also,* Fran Hawthorne, Inside the FDA: The Business and Politics Behind the Drugs We Take and the Food We Eat," (John Wiley & Sons: 2005); Life Extension Institute, FDA: Failure, Deception, Abuse: The Story of an Out-of-Control Government Agency and What it Means for Your Health (Praktikos Books: 2010).

The legacy media has worked hard to deny that Nobel Laureate Kary B. Mullis, the inventor of the PCR test used to diagnose COVID-19, who died suddenly in August 2019,

explained that it was utterly useless for such a purpose. *See* "Video: Dr. Kary B. Mullis. No Infection or Illness Can be Accurately Diagnosed with the PCR Test" *Global Research* (June 3, 2021). However, it is not disputed that COVID-19 testing has proven remarkably inaccurate. For example, Elon Musk tested twice positive and twice negative for COVID on the same day *See* "Elon Musk tests positive and negative for COVID on the same day," *The Post Millenial* (Nov. 13, 2020). On July 21, 2021, the CDC announced that the EUA for the PCR would be withdrawn, but allowed this flawed test to be used until the end of December 2021, nonetheless. *See* CDC Division of Laboratory Systems, "Lab Alert: Changes to CDC RT-PCR for SARS-CoV-2 Testing" (July 21, 2021).

The government appears to provide many financial incentives to those that facilitate its program and embrace its narrative. For example, payments of $28.39 to $40.00 per shot are paid, with $75 paid for in home shots.[34] Apparently FEMA pays $9,000 in funeral costs for those who die IF their death certificate says COVID-19 — a bonus seemingly designed to ensure the over-reporting of COVID-19 deaths.[35]

2. Government Suppression of Opposing Views Raises a Strong Inference that Lies Are Being Perpetrated.

UVA states that it is following federal policy. The first indication that the threat from COVID-19 and the merits of the COVID-19 shot are being misrepresented is that those who dissent from the NIH/CDC/Anthony Fauci "vaccines are the only way to survive the pandamic" narrative are routinely censored by government and its agents. The evidence that details the

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[34] *See* COVID-19 Coverage Assistance Fund, Health Resources & Services Administration, https://www.hrsa.gov/covid19-coverage-assistance

[35] *See* FEMA to Help Pay Funeral Costs for COVID-19-Related Deaths (March 24, 2021)

benefits of supplementation with Vitamin A, D3, Zinc, Quercitin, Melatonin, etc. is routinely suppressed. Doctors are being told by hospitals and licensing authorities that they should not use therapeutics such as Ivermectin and Hydroxychloroquine even though clinicians have been using these drugs successfully across the world.[36] Pharmaceutical companies have enormous incentives to deny the therapeutic value of such drugs, because if there were treatment alternatives, it would have been illegal for the FDA to grant "Emergency Use Authorizations," to the three COVID-19 shots.

"Big Tech" has shut down social media groups of persons suffering adverse effects from the COVID-19 shot. Americans are being told that the **only** effective way to address COVID-19 is through three "vaccines," all approved under Emergency Use Authorizations. The one COVID-19 shot that has received FDA Approval — Pfizer's Comirnaty product — is not commercially available in the United States at this time. *See* "Sen. Ron Johnson: There is not an FDA approved COVID vaccine in the US," *Fox News* (Oct. 1, 2021).

Despite this shocking unconstitutional exercise of government censorial powers, exercised directly through means including licensing authorities, or indirectly through Silicon Valley, social media as well as the legacy press, almost every claim of public health officials about COVID-19 has been disproved — sometimes by "alternative media" but often by scientific journals and mainline publications. Virginians are repeatedly told that the COVID-19 shot is

[36] *See, e.g.*, COVID-19 treatment studies for Ivermectin, available at https://c19ivermectin.com/; Front Line Critical Care Alliance, "The Latest Results of Ivermectin's Success in Treating Outbreaks of COVID-19," available at https://covid19criticalcare.com/ivermectin-in-covid-19/epidemiologic-analyses-on-covid19-and-ivermectin/; "HCQ For COVID-19," https://c19hcq.com/

"safe and effective," when it is neither. Moreover, it achieves none of the objectives asserted by the University of Virginia to justify its mandates.

3. The Legacy Media and Big Pharma Are Intertwined.

The nation's leading media companies uniformly defend COVID-19 shots as being "safe and effective," while ignoring stories of harm. One reason was exposed in an article by Dr. Joseph Mercola, making the interconnections between the mainstream (*i.e.*, legacy) media, and Big Pharma. The highlights of the article are:

- Big Pharma and mainstream media are largely owned by two asset management firms: BlackRock and Vanguard.
- Drug companies are driving COVID-19 responses — all of which, so far, have endangered rather than optimized public health — and mainstream media have been willing accomplices in spreading their propaganda, a false official narrative that leads the public astray and fosters fear based on lies.
- Vanguard and BlackRock are the top two owners of **Time Warner, Comcast, Disney and News Corp**, four of the six media companies that control more than 90% of the U.S. media landscape.... [Joseph Mercola, "Who Owns Big Pharma + Big Media? You'll Never Guess," *The Burning Platform*.]

E. Important Lessons Can Be Learned from The Totalitarian Public Health Powers Being Exercised by Foreign Governments Over Their People.

Should the judiciary not intervene to protect the constitutional rights of Virginians, it should be expected that the government mandates will become more and more irrational and draconian. Consider developments in other countries.

A reported 141,000 French citizens demonstrated against the COVID-19 health pass on Saturday, September 4, 2021. That pass is required to access most public places, including restaurants, cafes, sports stadiums, and gyms. "More than 140,000 French citizens protest against health pass for 8th straight weekend," *Fox News* (Sept. 4, 2021).

On September 15, 2021, it was reported that the Slovenian government ordered that drivers cannot refuel at petrol stations unless they have been vaccinated or tested negative. "In Slovenia, it is not possible to refuel without a health certificate" *24YACA.bg* (Sept. 15, 2021).

On November 18, 2021, the Prime Minister of Greece, Kyriakos Mitsotakis announced new policies to go into effect November 22, 2021, by which the estimated one-third of the nation now refusing the COVID-19 shot would be banned from entering many public indoor spaces, including gyms, bars, theaters, and museums until December 6, 2021. Access will be allowed to churches, supermarkets, pharmacies, hair salons, shops, and hairdressers. The prior policy allowed persons with a negative test result to enter public spaces. James Murphy, "Greece Bans Unvaccinated People From Indoor Public Spaces," *The New American* (Nov. 23, 2021).

Austrian Chancellor Alexander Schallenberg announced on November 19, 2021, that "the country is enforcing a nationwide lockdown and plans to require COVID-19 vaccinations for its entire population as of February [1, 2021]." Schallenberg noted that the lockdown will start on Nov. 22 and will last up to 20 days. The reason he offered for mandating the vaccinations: "We have not succeeded in convincing enough people to get vaccinated," Lorenz Duchamps, "Austria Enforces National Lockdown, Plans to Make COVID-19 Vaccinations Mandatory" *Epoch Times* (Nov. 19, 2021).

"The Australian government of the Northern Territories is now using military soldiers and army trucks to forcibly round up indigenous people who have merely been near someone else who tested 'positive' for covid. With families being separated at gunpoint, one of the most horrifying predictions we made has now come true: Military / medical martial law where innocent civilians are being rounded up at gunpoint and taken to what are essentially covid

concentration camps." "Australia begins covid ETHNIC CLEANSING with military roundups of indigenous people." *NaturalNews* (Nov. 23, 2021).

What distinguishes these countries from America — and Virginia — is our Bill of Rights, which protects freedom of religion. Plaintiff now respectfully urges the Court to protect her right to protect her freedom of religion, and grant the requested injunction.

Respectfully Submitted,

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by Counsel

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CERTIFICATION

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 24th day of November, 2021:

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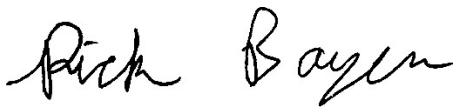

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