VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

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

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING EXECUTIVE DIRECTIVE NO. 2 (2022)

COMES NOW your Plaintiff, Kaycee McCoy, by counsel, and files this Supplemental Brief with regard to Executive Directive No. 2, entered by Governor Glenn Youngkin on January 15, 2022. Plaintiff prays this honorable Court maintain jurisdiction in this matter and enter an injunction in her favor against Defendants, as Executive Directive No. 2 establishes that Defendant UVA has no authority to terminate employees who decline to be vaccinated against COVID-19, but that Directive does not address all of Plaintiff's claims for relief based on free exercise of religion under Article I, Section 16 of the Constitution of Virginia and arbittrary and capricious actions. In support thereof, Plaintiff states as follows:

Executive Directive No. 2

Executive Directive No. 2 ("E.D. 2" or "the Directive"), issued by Governor Glenn Youngkin on January 15, 2022, his first day in office, notes correctly that any "requirement of state employees to receive the COVID-19 vaccination and disclose their vaccination status or engage in mandatory testing is harmful to their individual freedoms and privacy." See Appendix

A. The Directive orders that "[n]o Executive Branch employees shall be required to be vaccinated or required to disclose their vaccination status as a condition of their employment." The Directive expressly applies to "employees in ... Institutions of Higher Education" which includes defendant UVA. However, while E.D. 2 recognizes the threat to privacy implicit in an injection mandate, it neither references nor redresses the denial of religious exercise that is the greatest injury to Plaintiff in this matter, or the arbitrary nature of her discharge.

In response to the Directive, Defendants suspended their vaccination requirement for employees of the educational wing of the University of Virginia.[1] The Richmond Times-Dispatch reported on January 19, 2021 that "[e]mployees of UVA Health [such as Plaintiff was] are still required to be vaccinated under a mandate by the Centers for Medicare and Medicaid Services."[2] That "mandate" is detailed in the "Omnibus COVID-19 Health Care Staff Vaccination Interim Final Rule (IFR)," recorded in 86 Fed. Reg 212, p. 61555. However, the IFR contains a Religious Exemption clause. "Under Federal law, including the ADA and Title VII of the Civil Rights Act of 1964 as noted previously, workers who cannot be vaccinated or tested because of an ADA disability, medical condition, or sincerely held religious beliefs, practice, or observance may in some circumstances be granted an exemption from their employer." *Id*. at p. 61572.

Given the recognition of the religious exemption right in the federal law, Defendants, as a state employer, are still bound to the constitutional guarantees of Article I, Section 16 of

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[1] See Kolenich, Eric, "UVA, VSU suspend vaccine mandate for employees, joining other colleges," *Richmond Times-Dispatch*, p. A6 (Jan. 19, 2022) (the article states that "[e]mployees of UVA Health are still required to be vaccinated under a mandate by the Centers for Medicare and Medicaid Services").

[2] *Id.*

Virginia's Constitution, regardless of the status of UVA Health System as a Medicare/Medicaid provider. There is no Supremacy Clause preemption of Virginia's Constitution at stake.

But with the existence of the IFR mandate, the apparent position of Defendants that UVA Health System employees must continue to receive the injection, while Defendants continue refusing to recognize religious exemption requests of Plaintiff and her former co-workers, continues to work an unredressed constitutional injury to Plaintiff.

ARGUMENT

I. The Harm Already Inflicted by Punishing Plaintiff for her Free Exercise of Religion is no Less Real and Irreparable Due to E.D. 2

"[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). Even if Defendants were to offer today to rehire Plaintiff on her previous terms of employment, the harm inflicted by Defendants has already occurred, and is already irreparable.

> 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 what the court was addressing — 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."

The injury was already suffered; the wrong was already done. Defendants appear to retain the position that in order to work for UVA Health Systems, employees must receive the injection, and Defendants will grant religious exemption requests only on the most minimal and arbitrary of bases. The appropriate remedy is a judgment from the Court that Defendants violated Article I Section 16, and an order restoring her to her position, as well as other relief.

II. Constitutional Guarantees Cannot be Subordinated to Executive Directives

The constitutional question at stake is not mooted by E.D. 2, but rather highlighted. . Without an injunction from this Court, even should Plaintiff be rehired by Defendants or any other state agency, the dichotomy in real life between E.D. 18 and E.D. 2 demonstrates that in practical effect, Virginia's constitutional guarantee of free exercise is no stronger than the commitment to it of a given occupant of the Governor's Mansion. The threat to the free exercise rights of Plaintiff and thousands of other Virginians is real, demonstrated, and imminent. Given the lesson of recent history that Virginia's governors may not feel bound to the promise of Article I, Section 16, it is incumbent on this Court to deliberate this cause and to ensure that Virginians both present and future have a Constitution that is more than just what Mr. Jefferson called "a mere thing of wax...."[3] Jefferson was concerned that judges not "twist and shape [it] into any form they please." *Id*. This Court should ensure that governors cannot do so either.

III. This Case is not Mooted by E.D. 2, as Plaintiff's Injury is "Capable of Repetition yet Evading Review."

The Supreme Court has been clear that an injury that is "capable of repetition yet evading review" is not therefore mooted. This exception to the mootness doctrine applies "where the

[3] Thomas Jefferson, "Letter to Spencer Roane" (Sept. 6, 1819), available at https://founders.archives.gov/documents/Jefferson/03-15-02-0014

following two circumstances [are] simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.'" *Spencer v. Kemna*, 523 U.S. 1, 17 (1998).

Since her firing by Defendants, Plaintiff has obtained employment with Sentara Martha Jefferson Health Systems doing similar work to her prior duties with University of Virginia Health System, but only on a limited part-time basis. Particularly now that E.D. 2 has been issued, Plaintiff seeks to regain her employment with University of Virginia Health System in an effort to obtain similar employment as before. But Defendants appear to retain their position that the injection is required to work for UVA Health System.

And as Plaintiff is painfully aware, even should she be successful in obtaining employment with Defendants again, her job status is no more secure than a new executive order based on changed circumstances from the current or a future governor undoing E.D.2, just as the Directive itself undid E.D. 18 (2021) issued by former Governor Ralph Northam.

Accordingly, Plaintiff has suffered a continuing injury at the hands of Defendants. And Defendants' apparent position that the injection is essentially a condition of employment, regardless of religious objections, means that even if Defendant were to be rehired, it is likely that she would again be subjected to a violation of her free exercise on similar terms as she has already suffered at the hands of Defendants.

CONCLUSION

Plaintiff respectfully requests this Court to find that the injury to her in this case has occurred and not fully remedied by E.D. 2, and then to maintain jurisdiction over this case, and grant the relief requested in her Complaint.

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 20th day of January, 2022:

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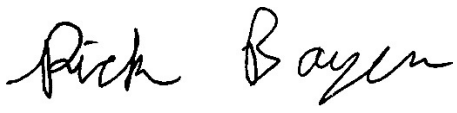

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