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

NEELIE PANOZZO, *et al*.,

Plaintiffs,

v.

RIVERSIDE HEALTHCARE, *et al.*,

Defendants.

Case No. 2:21-cv-02292-CSB-EIL

Plaintiffs' Memorandum of Law in Support of their Motion for Preliminary Injunction

INTRODUCTION

The plaintiffs in this case are over 70 workers at Riverside Healthcare in Kankakee, Illinois, with sincerely-held religious beliefs that compel them to object to the currently available COVID-19 vaccines. The Illinois Health Care Rights of Conscience Act protects them from being forced to choose between their sincerely-held religious belief that they have a vocation to health care ministry and their sincerely held-religious belief that they cannot accept the vaccine.[1] Plaintiffs respectfully request that this Court issue a preliminary injunction while the Court considers Plaintiffs' claims on the merits.

PROCEDURAL HISTORY

This case began on October 13, 2021, when six plaintiff nurses employed by Riverside Healthcare filed a complaint in the State of Illinois' Circuit Court for the 21st Circuit, Kankakee County, against the hospital and its CEO, Philip Kambic, alleging violations of the Illinois Health

[1] When the U.S. Centers for Medicaid & Medicare Services (CMS) published a rule mandating vaccination unless an employee received a federal Title VII exemption, this rule preempted the Illinois state law basis for their existing case. Plaintiffs thus amended their complaint to include a Title VII component, which Defendants promptly removed to this Court. However, with the CMS Mandate subject to a nationwide injunction, see *Louisiana v. Becerra*, 3:21-CV-03970, ECF No. 28 (Nov. 30, 2021), the Illinois state law is no longer preempted. Thus, because it was the basis for the original TRO issued in this case, Plaintiffs make it the basis for their motion here.

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

Plaintiffs immediately filed for a temporary restraining order. After briefing by both sides and oral argument, on October 25, 2021, Judge Nicholson of the Circuit Court of the 21st Circuit of Illinois entered a TRO as to the four nurses then employed by Riverside, finding they had raised at least a fair question as to their likelihood of success on the merits of their HCRCA claim. **Order attached as Exhibit A**. The Court further found that forcing them to choose between their religious beliefs and their employment constituted irreparable harm justifying a TRO.

Plaintiffs then were granted leave and filed their First Amended Complaint adding 56 additional Riverside employees to the case. Plaintiffs promptly sought to extend the TRO to those additional plaintiffs in advance of a pending Riverside vaccination deadline. Without conceding that the TRO was properly entered, the Defendants did not file a brief in opposition to adding new plaintiffs into the TRO, and only submitted a declaration pointing out three individual plaintiffs with unique circumstances that did not justify inclusion. The Court then extended the TRO to 53 additional plaintiffs and set a briefing schedule for a preliminary injunction, to be heard on January 11, 2021. The Court determined no bond was needed at this juncture and setting a bond could be, if necessary, incorporated into the preliminary injunction decision. **Order attached as Exhibit B**.

The federal Centers for Medicaid & Medicare Services (CMS) then issued a rule requiring vaccination of employees of Medicaid/Medicare-participating employers like Riverside, with an initial deadline for the first dose of vaccination on December 5, 2021. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,583 (Nov.

5, 2021). Defendants promptly moved to dissolve the stay based on this federal preemption. The Court held a hearing, and the parties agreed to set the stay to dissolve on December 5, 2021, the final day before the CMS Rule required employees to receive the first dose of a vaccine. **Order attached as Exhibit C**. The Court also granted Plaintiffs leave to amend their complaint.

Plaintiffs filed a Second Amended Complaint, alleging that Defendants were not complying with the religious nondiscrimination requirements of Title VII of the federal Civil Rights Act of 1964, which was not preempted by the CMS Rule. They also added ten additional Plaintiffs whose religious objections were denied by Riverside and who were no longer employed by Riverside. With the introduction of a federal claim into the case, Defendants removed the case to this Court on November 29, 2021.

On November 30, 2021, the U.S. District Court for the Western District of Louisiana issued a nationwide preliminary injunction against the CMS Rule. *Louisiana v. Becerra*, 3:21-CV-03970, ECF No. 28 (Nov. 30, 2021). In doing so, it joined the U.S. District Court for the Eastern District of Missouri in concluding the CMS Rule was likely illegal. *Missouri v. Biden*, 4:21-cv-01329, ECF No. 28 (Nov. 29, 2021).

With the issuance of a nationwide preliminary injunction against the CMS Rule, Plaintiffs and Defendants have agreed to observe the terms of the existing TRO (**Exhibit C**) to give them time to brief and the Court time to hear this motion.

FACTS

A proposed numbered statement of facts accompanies this filing.

JURISDICTION

This Court may exercise pendent or supplemental jurisdiction over the state-law claim under the Illinois Health Care Right of Conscience Act. 28 U.S.C. § 1367.

STANDARD OF REVIEW

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

ARGUMENT

I. The Plaintiffs are likely to succeed on the merits.

The state court previously hearing this case already correctly concluded that the Plaintiffs had met the standards on likelihood of success and irreparable harm necessary for a temporary restraining order. Order, Oct. 25, 2021 (Exhibit A). Though this Court is not bound by the state court's determination on the TRO for a preliminary injunction, it should grant it great weight, especially as it represents a state court's opinion about the correct interpretation of state law.

HCRCA provides, in relevant part, that "[i]t shall be unlawful for any . . . private institution . . . to discriminate against any person in any manner . . . because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience." 745 ILCS 70/5. The HCRCA defines "conscience" as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths[.]" *Id*. at 70/3(e). The Act defines "health care" as "any phase of patient care, including but not limited to testing; diagnosis; prognosis; ancillary research; instructions; family planning . . .; medication; surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-

being of persons." *Id*. at 70/3(a).[2]

The plain language of the Act applies to this case. Riverside is a private institution, and so is covered by the Act. The plaintiff-employees are among the "any person" covered by the Act. And firing an employee solely because of their refusal to accept vaccination for religious reasons is axiomatically a manner of discrimination. *See Raintree Health Care Ctr. v. Ill. Human Rights Comm'n*, 173 Ill. 2d 469, 480 (1996). *See also Rojas v. Martell*, 2020 IL App (2d) 190215, ¶ 32, 443 Ill. Dec. 212, 222, 161 N.E.3d 336, 346 ("'Discrimination' is the 'failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.") (cleaned up); *Rojas v. Martell*, 2016-L-160, Memorandum Opinion (Cir. Ct. of the 17th Cir., Winnebago County, Oct. 25, 2021), at *6.[3]

The mandatory injection of a vaccine is the "receipt" or "acceptance" of "health care services." *See Vandersaand*, 525 F. Supp. 2d at 1057 (finding that "[h]ealth care includes any phase of patient care, and specifically includes medication."). "Health care" is defined under the act as "any phase" of care, "including but not limited to" any "care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental

[2] Though the General Assembly has voted to change the terms of the Act, those changes do not take effect until June 1, 2022, and thus do not affect this case. Pub. Act 102-0667, Nov. 8, 2021. To the extent the General Assembly's action is asserted to be a clarification or statement of legislative intent as to how the prior version should be interpreted, this Court should "have grave doubts that post-19[77] legislative history is of any value in construing its provisions, for we have often observed that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Wright v. West*, 505 U.S. 277, 316 (1992) (plurality) (ultimately quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). *Accord Massachusetts v. EPA*, 549 U.S. 497, 560 n.27 (2007) (quoting approvingly from *Cobell* v. *Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005), "[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight"). In other words, "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). The amendment reflects the will of this General Assembly, responding to the pressures and problems of today, and not the General Assembly acting in 1977 which it seeks to speak for. *Kitson v. Bank of Edwardsville*, No. 06-528-GPM, 2006 U.S. Dist. LEXIS 85285, at *39 (S.D. Ill. Nov. 22, 2006) ("subsequent legislative history may in fact be revisionist history.").

[3] https://adflegal.org/sites/default/files/2021-11/Rojas-v-Martell-17th-Judicial-Circuit-Court-Opinion-10-25-21.pdf.

well-being of persons."

Vaccination is obviously health care—it is a prophylactic phase of care, it is "care or treatment," it is "rendered by a physician" or nurse or a paraprofessional at a doctor's office or pharmacy, and it is "intended for the physical well-being of persons." *See Beno v. Sec'y of Health & Human Servs.*, No. 90-2899V, 1994 U.S. Claims LEXIS 218, at *8 (Fed. Cl. Nov. 15, 1994) ("under the ordinary usage of the terms 'medical care' and 'medical treatment,' Dr. Kaplan's medical decision to vaccinate Korynne, along with his actual act of administering the vaccine, did constitute part of Dr. Kaplan's 'medical care and treatment' of the infant."); *N.J. Div. of Child Prot. & Permanency v. J.B.*, 459 N.J. Super. 442, 457-58, 212 A.3d 444, 454 (Super. Ct. App. Div. 2019) (describing vaccination as "prophylactic medical care").

Nothing in the Act's language limits it to the provision of health care by employees. The provisions of the HCRCA do not solely apply to healthcare workers, but prohibit discrimination against *any person* because of such person's conscientious refusal to receive or obtain *any particular form* of health care services. Throughout, the Act uses incredibly, intentionally broad language: "against any person," "in any manner," "in any way," "in any particular form." To suddenly impose an artificial gloss on the text that limits it to patient-facing services but not employee-facing vaccination mandates would be to "depart from the plain language of the Right of Conscience Act by reading into it conditions that conflict with the express legislative intent or by adding provisions that are not found in the statute." *Rojas*, 2020 IL App (2d) 190215, ¶ 51.

Giving the Act a broad reading comports with how other courts have read it and the Legislature intended it, which is to protect people just like Plaintiffs. *Rojas*, 2020 IL App (2d) 190215 at ¶ 56 ("by prohibiting discrimination against one who exercises the right of personal conscience, the statute reflects an intent to protect that right in the provision of health care services."); *Morr-Fitz,*

Inc. v. Quinn, 2012 IL App (4th) 110398, ¶ 54 ("The General Assembly, in enacting the Conscience Act, did not substantially burden a person's exercise of religion, but instead bolstered it, by offering protections to those who seek not to act in the health-care setting due to religious convictions."); *Morr-Fitz, Inc. v. Blagojevich*, 371 Ill. App. 3d 1175, 1185 (2007) (Turner, J., dissenting)[4] ("The Right of Conscience Act purports to protect their beliefs and prevent 'all forms' of coercion on the part of the government to alter those beliefs."); *Moncivaiz v. Dekalb*, No. 03 C 50226, 2004 U.S. Dist. LEXIS 3997, at *9 (N.D. Ill. Mar. 12, 2004) ("The HCRCA prohibits discrimination in promotion by any person or public entity because of an employees [sic] conscientious refusal to participate in 'any particular health care services contrary to his or her conscience.'"). Legal scholarship confirms that the language is one of the broadest, most conscience-protective statutes of its kind in the nation.[5]

Giving the Act a broad reading also supports its legislative purpose, as spelled out by the General Assembly at the beginning of the Act: "It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care." 745 ILCS 70/2. Again, the refusal to "receive or accept" medical care, like a vaccination, is just as protected as the refusal to engage in the delivery of medical care.

[4] The Illinois Supreme Court reversed the panel majority and vindicated Justice Turner's dissent on appeal.
[5] Bryan A. Dykes, Note: *Proposed Rights of Conscience Legislation*, 36 Ga. L. Rev. 565, 593 (2002) ("The Illinois Act and the Kansas and Arizona proposals would permit and protect conscience-based refusals in a wide variety of health care related conduct."); Jessica D. Yoder, Note: *Pharmacists' Right of Conscience*, 41 Val. U.L. Rev. 975, n.89 (2006) ("Illinois has one of the broadest conscience clauses in the nation."); M. Kevin Bailey, Note: *The Conscience Conflict,* 2 Liberty U. L. Rev. 587, 591 (2008) ("The Illinois Conscience Clause was adopted in 1977 and has since been considered one of the country's broadest and strongest right of conscience statutes."); Jacqueline Gilbert, Note: *When Rights Collide: In a Battle Between Pharmacists' Right of Free Exercise and Patients' Right to Access Contraception, Who Wins? - A Possible Solution for Nevada*, 7 Nev. L.J. 212, 223 (2008) ("Illinois has one of the broadest conscience clause statutes in the country.").

The policy statements, documents, and memoranda from Riverside provide a consistent rationale for denial: that these employees are in "patient-facing" positions and extending an exemption to such employees would create an "undue hardship" for Riverside. Mot. for TRO & PI, Exhibits I and J. As Riverside said in its denial letter to Panozzo's appeal: "While your request may have met the technical standard for an exemption, the granting of these exemption requests would place an undue hardship on the organization . . ." Mot. for TRO & PI, Exhibit M. Nevertheless, this rationale for denial still violates Plaintiffs' rights under the HCRCA.

As a defense to Plaintiffs' claims under the HCRCA, this policy makes two fundamental mistakes. First, the language of "undue hardship" is derived from the federal Title VII law, which permits employers to deny a reasonable accommodation for an employee's religious beliefs when doing so would create an "undue hardship." *See EEOC Guidance on Religious Exemptions for COVID-19 Vaccination.*[6] However, the Illinois Court of Appeals has explicitly held that the HCRCA is broader than Title VII of the federal antidiscrimination law; it contains no "undue hardship" exception. *Rojas*, 2020 IL App (2d) 190215 at ¶ 44. Riverside cannot hide behind the language of "undue hardship" when that standard has already been rejected by Illinois courts.

Second, the HCRCA already contains a limited exception for "patient-facing" interactions: emergencies. "Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care." 745 ILCS 70/6. And an emergency truly means an emergency: "an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response." *Morr-Fitz, Inc*., 2012 IL App (4th) 110398 at ¶ 75 (quoting *Gaffney v. Board of Trustees of the Orland Fire Protection*

[6] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws. Plaintiffs also maintain that the Defendants cannot establish an undue hardship under Title VII, but for purposes of the preliminary injunction need not argue that point, since they only rely on the HCRCA for this motion.

District, 2012 IL 110012, ¶ 64). Having a broader exception for any "patient-facing" employee or interaction would totally gut the Act and undermine its legislative goals, which include protecting health care employees called upon to offer certain services *to patients*. *See Vandersaand*, 525 F. Supp. 2d at 1057. Thus, the General Assembly made a policy choice to only carve out truly emergency situations from the conscience protections it confers. In short, Riverside's asserted rationale cannot hold up to the Act's language.

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

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

Plaintiffs believe their job is a "vocation" or "calling" that is a divine charge to pursue their profession as a ministry of healing. In the attached declarations, numerous Plaintiffs testify movingly to their view of their work at Riverside as a vocation or ministry, describing times that they pray with or for patients, share Bible verses, and comfort them through the most difficult times in life. *See* **Exhibit D**. They describe their job as not merely a job, but a God-given calling to serve. In the words of lead plaintiff Neelie Panozzo, a nurse practitioner, "It is impossible for me to choose between my faith over career or career over my faith as my passion for healthcare and my service to others through my strong faith are inseparable. One cannot exist without the other." Exhibit D. Or in the similar words of nurse Ashley Goodman, "Choosing not to receive the

COVID vaccine is not just a choice between my faith and my job, it is also a choice between two faith convictions, my convictions regarding the vaccine, and my convictions regarding my job as my ministry." Exhibit D.

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

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

warranting preliminary injunctive relief.").

It is blackletter law that "courts routinely find not just harm, but *irreparable* harm, where a plaintiff asserts a chill on free exercise rights." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 494-95 (2008) (emphasis original) (citing *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007)). In this instance, though the protection is statutory rather than constitutional, the principle remains: compromising one's religious beliefs is the sort of harm that is irreparable. *Korte v. Sebelius*, 528 F. App'x 583, 588 (7th Cir. 2012); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) ("establishing a likely RFRA violation satisfies the irreparable harm factor"); *Eternal Word TV Network, Inc. v. Sec'y, United States HHS*, 756 F.3d 1339, 1350 (11th Cir. 2014) (Pryor, J., concurring). "[A]lthough the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). And being forced to vaccinate against one's religious beliefs "burdens their free exercise rights." *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). A preliminary injunction is necessary in this case to prevent the coercive impact of Riverside's mandate on these employees' religious beliefs.[7]

[7] Plaintiffs also note that other courts are recognizing irreparable harm in cases where the government is forcing a choice between one's job and vaccination outside the faith context. *See, e.g., BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *24 (5th Cir. Nov. 12, 2021) ("the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)."); *Louisiana v. Becerra,* No. 3:21-CV-03970, 2021 U.S. Dist. LEXIS 229949, at *42 (W.D. La. Nov. 30, 2021) ("citizens will suffer irreparable injury by having a substantial burden placed on their liberty interests because they will have to choose between losing their jobs or taking the vaccine.").

III. Any balancing of the interests weighs in the employees' favor, because the General Assembly has already made clear the priority is protecting conscience rights.

The General Assembly has already determined that giving people a right to obey their consciences when it comes to health care is within the public interest. 745 ILCS 70/2. That right clearly applies in this case. It is clearly in the public interest to enforce the right that the legislature has protected via the Act. The Act does not require this Court to weigh the Plaintiffs' conscience rights against the public health. The legislature has already made the determination that the public interest weighs in favor of protecting those rights by passing the Act.

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

Additionally, Riverside's asserted rationales and interests do not justify its actions. Riverside issued its first memorandum to all staff on August 27, 2021, creating a vaccine mandate in compliance with Governor Pritzker's executive order mandate for health care workers, issued August 26, 2021. Mot. for TRO & PI, Exhibit A. The Governor's order includes a religion exemption.[8] The initial August policy from Riverside created a committee to review religious exemption requests. Mot. for TRO & PI, Exhibit D. Plaintiffs submitted requests as outlined in Riverside's August policy.

[8] https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-20.2021.html.

On September 10, Riverside sent another memo stating "President Biden announced last evening new requirements for healthcare workers and other private sector employers of 100 of more. The details of this new executive order have not been released but are expected in an OSHA Emergency Temporary Standard." Mot. for TRO & PI, Exhibit H. The memo continues, "Until we receive the ETS and can review its contents in light of the existing emergency order issued by Governor Pritzker, Riverside will be temporarily suspending the decisions on pending religious and medical exemption requests . . ." *Id*. At the time, the Biden OSHA ETS had not been released.[9] Yet after promising to wait on any action until the ETS was released, Riverside reversed course a week later and blanketly denied all religious exemptions without ever seeing the text of the ETS. Mot. for TRO & PI, Exhibits I and J. After saying on September 10 that Riverside would also be "temporarily suspending . . . any further action with respect to employee suspension or separation of employment," Riverside on September 17 decided to go forward with firing Plaintiff Memenga and others in management ("LEM") positions on September 20. Riverside's flip-flops and shifting stories, even accepted at face value today, do not create a strong interest in their favor. If Riverside could operate with religious exemptions for patient-facing employees from August 27 to September 17, it can do so while this case is litigated to summary judgment.

Third, Riverside's exemption for pregnant and nursing employees undermines its declared interest. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2393 (2020) (Alito, J., concurring) ("the regulatory exemptions created by the Departments and HRSA undermine any claim that the agencies themselves viewed the provision of contraceptive

[9] The OSHA ETS was released on November 5, 2021. It does not require employers to fire unvaccinated employees so long as those employees submit to weekly testing and wear masks in the workplace. COVID-19 Vaccination and Testing; Emergency Temporary Standard, OSHA, 86 Fed. Reg. 61,402 (Nov. 5, 2021), https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard.

coverage as sufficiently compelling."). Riverside's policy provides an exemption for pregnant and nursing employees, including in patient-facing positions. *See* Defs' Ex. A to Moss Decl. and Pls' Mot. for TRO & PI, Ex. D. This is against the explicit guidance of the federal Centers for Disease Control and Prevention, which state, "COVID-19 vaccination is recommended for all people 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or might become pregnant in the future."[10] It is also against the recommendation of the American College of Obstetricians & Gynecologists and the Society of Maternal-Fetal Medicine[11] and the U.S. Department of Veterans Affairs' Health Care Administration.[12] If Riverside can grant exemptions to pregnant women, it can grant them to conscientious objectors.

Fourth, Riverside's policy is an outlier in its industry. The American Hospital Association Board of Trustees urged its members "implementing mandatory COVID-19 vaccination policies to: Provide exemptions for medical reasons and accommodations consistent with Federal Equal Employment Opportunity Commission guidelines (e.g., a sincerely held religious belief, practice or observance)."[13] As one medical news website noted, after evaluating 174 healthcare systems with mandates in place, "Across the board, the policies of these and other providers include exemptions for medical, religious or other legally protected reasons."[14] Indeed, many large hospital systems are dropping their vaccine mandates entirely.[15] And if Riverside is truly worried about

[10] *See* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html.
[11] *See* https://www.acog.org/news/news-releases/2021/07/acog-smfm-recommend-covid-19-vaccination-for-pregnant-individuals.
[12] *See* https://www.va.gov/health-care/covid-19-vaccine/about-covid-19-vaccine/#vaccines-during-pregnancy-or-b.
[13] AHA, Policy Statement, July 21, 2021, https://www.aha.org/public-comments/2021-07-21-aha-policy-statement-mandatory-covid-19-vaccination-health-care.
[14] Dave Munio, *As CMS' requirement looms, at least 174 health systems currently mandate vaccination for their workforces*, Fierce Healthcare (Sept. 14, 2021), https://www.fiercehealthcare.com/hospitals/40-health-systems-requiring-mandatory-covid-19-vaccines-for-their-workforces.
[15] Robbie Whelan and Melanie Evans, *Some Hospitals Drop Covid-19 Vaccine Mandates to Ease Labor Shortages*, Wall St. J. (Dec. 13, 2021).https://www.wsj.com/articles/some-hospitals-drop-covid-19-vaccine-mandates-to-ease-labor-shortages-11639396806.

staffing shortages, it should think twice before it lays off dozens of employees in one fell swoop.[16]

Finally, Riverside can adopt reasonable accommodations such as regular testing and N95 masking for unvaccinated employees to minimize their risk of transmission, as identified in its initial policy. *See* Exhibit A to Moss Declaration. It may even go so far as to transfer Plaintiffs to other job duties. *Rojas*, 2020 IL App (2d) 190215, ¶ 58.[17] These safeguards provide reasonable tools to protect employee conscience rights and public health. *See* U.S. Equal Opportunity Employment Comm'n, Technical Assistance, Oct. 28, 2021[18] ("For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.").

In sum, the Illinois General Assembly has made clear the priority it places on protecting employees' rights of conscience. Riverside is obligated to respect those rights. *Accord Darnell v. Quincy Physicians and Surgeons Clinic, S.C.*, No. 2021 MR 193 (Cir. Ct. of the 8th Cir., Adams Cty., Sept. 30, 2021) (issuing TRO based on HCRCA against vaccine mandate).

CONCLUSION

The state trial court, interpreting only state law, correctly concluded that Plaintiffs had met the standards necessary for a temporary restraining order based on the Health Care Rights of Conscience Act. Given that the standard for a TRO and a PI is the same, this Court should conclude that the state court was correct in its interpretation and issue a preliminary injunction.

[16] Riverside's email on October 26, 2021, included in Exhibit 57 to the Motion to Amend the Complaint, stated that 90% of employees were vaccinated.

[17] Plaintiffs reserve the right to argue on appeal that the *Rojas* Court misconstrued the statutory term "transfer" and created an absurd-results exception where one did not exist.

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

Dated: December 14, 2021

Respectfully Submitted,

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