

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARK AYOTTE, KEN MAUER, and JASON
PHILLIPS,

Plaintiffs,

v.

The NATIONAL BASKETBALL
ASSOCIATION and NBA SERVICES CORP.,

Defendants

Civil Action No.: 1:22-CV-09666 (VSB)

**THIRD AMENDED COMPLAINT
AND JURY DEMAND**

Plaintiffs MARK AYOTTE, KEN MAUER and JASON PHILLIPS, by and through their attorneys, LAW OFFICES OF SHELDON KARASIK, P.C., as and for their Complaint against Defendants, the NATIONAL BASKETBALL ASSOCIATION and NBA SERVICES CORP., state as follows:

PARTIES

1. Plaintiff MARK AYOTTE (“Mark”) is an individual residing in Maricopa County in Arizona State.
2. Plaintiff KENNETH MAUER (“Kenny”) is an individual residing in Lee County in

Florida State.

3. Plaintiff JASON PHILLIPS (“Jason”) is an individual residing in Parker County in

Texas State.

4. Defendant NBA SERVICES CORPORATION is an entity incorporated in the State of Washington with its principal place of business located at 100 Plaza Drive, Secaucus, NJ 07094.

5. Defendant NATIONAL BASKETBALL ASSOCIATION, an unincorporated association, is a men’s professional basketball league with its principal place of business located at 645 5th Avenue, New York, NY 10022.

JURISDICTION AND VENUE

6. Jurisdiction in this Court is based upon 28 U.S.C. § 1331 as it involves a federal question pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”). Additionally, this Court has jurisdiction pursuant to 28 U.S.C. § 1332 as it involves an action between citizens of different states and the matter in controversy exceeds \$75,000. Further, this Court has supplemental jurisdiction over Plaintiffs’ state law claims pursuant to 28 U.S.C. § 1391(c)(2) and (d).
7. Venue lies in this federal judicial district pursuant to 28 U.S.C. § 1391 (b)(2).

BACKGROUND

8. Plaintiffs are three longtime NBA officials who were employed by Defendant NBA

Services Corp. (the “NBA”) for decades prior to being fired, in May and September of 2022, because they did not comply with the NBA’s policy of requiring all employees (except for players) to obtain an approved Covid-19 inoculation (the “inoculation mandate”).

- a. Mark Ayotte was an NBA referee and a lifelong Catholic. Prior to his termination, Ayotte had worked as an NBA referee since 2004. He previously worked for the Women’s National Basketball Association from 1999 to 2004 and the NBA’s affiliated league, the Continental National Basketball Association, from 1995 to 1999.
 - b. Kenneth “Kenny” Mauer began his employment as an NBA referee in 1986, making him one of the longest-serving referees in NBA history. Kenny is a lifelong Christian and attends church services weekly.
 - c. Jason Phillips, a practicing Baptist, served as an NBA referee for 19 years before being promoted to the position of Vice President of Referee Operations. He also served as a Replay Operations Principal in the Replay Center.
9. During the 2020-2021 season, before the prophylactic Covid-19 therapies developed by Pfizer, Moderna, or Johnson & Johnson (“Covid-19 inoculations,” the “shots” or the “jab”) were widely available, the NBA was able to operate without an inoculation mandate.
10. Prior to the 2021-2022 season, the NBA established a company-wide inoculation mandate through a mixture of collective bargaining agreements and administrative fiat. All three plaintiffs were subject to this inoculation mandate.
- a. The NBA mandated that all employees (except for players) be inoculated against Covid-19 via a CDC-approved Pfizer, Moderna, or Johnson & Johnson (“J&J”)

shot.

- b. In August 2021, the NBA and the National Basketball Referees Association (“NBRA”) negotiated an amendment to their Collective Bargaining Agreement (“CBA”) such that referees would have to “be fully vaccinated with a CDC-approved vaccination against COVID-19 (including Pfizer, Moderna, or Johnson & Johnson)”.

11. The NBA’s official policy was that those with sincerely held religious objections to the available Covid-19 inoculations would not be required to obtain one in violation of their religious beliefs. As such, the NBA offered all employees the opportunity to apply for a religious exemption to the inoculation mandate.

- a. This promise allowed the NBA to institute its mandates with little internal resistance and lowered the risk of a legal challenge.
- b. For NBA referees, this was written expressly into the CBA, which stipulated that the “vaccination” requirement was “subject to the exemptions agreed to” including exemptions for “sincerely held religious belief(s).”

12. At the same time, however, NBA decisionmakers assumed (based on the then-common but nonetheless debunkable misperception that the “vaccines” provided “immunity” to Covid-19) that it was in the organization’s best administrative and financial interest to minimize the number of “unvaccinated” individuals in their organization. Consequently, NBA executives sincerely (albeit mistakenly) believed that the organization had a financial incentive to deny religious exemption requests.

13. Mark, Kenny, and Jason applied for religious exemptions from the NBA’s inoculation mandate. All three plaintiffs submitted timely exemption requests that expressed (1)

sincere conscientious objections to the Pfizer, Moderna, and Johnson & Johnson therapies, (2) a sincerely held conviction that those conscientious objections were religious in nature, and (3) a request for an accommodation.

14. Religious objections to the Pfizer, Moderna, and J&J jabs are exceedingly common in America. Deepa Shivaram, *1 in 10 Americans say the COVID-19 vaccine conflicts with their religious beliefs* (NPR December 9, 2021) (<https://www.npr.org/2021/12/09/1062655300/survey-religion-vaccine-hesitancy-exemptions>).

15. Many religious objections to the Covid-19 “vaccines” – including those of the plaintiffs here – center on the role of human embryonic stem cell products (“fetal cell lines”) in the development and/or production of the treatments. *See, e.g.*, Meredith Wadman, *Abortion opponents protest COVID-19 vaccines’ use of fetal cells* (Science, 5 Jun 2020) (www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells).

a. Pharmaceutical companies’ use of embryonic stem cells derived from aborted fetuses is a longstanding and widespread concern voiced by religious adherents, especially (though not exclusively) by those who oppose the practice of abortion on religious grounds. *See, e.g.*, Alvin Wong, *The Ethics of HEK 293*, Nat’l Catholic Bioethics Quarterly 473 (Autumn 2006).

b. The cell lines sold under the trade names HEK 293 and PER.C6 are derived from the cells of human fetuses. Wong, *supra*; F. L. Graham et al., *Characteristics of a Human Cell Line Transformed by DNA from Human Adenovirus Type 5*, 36 J. Gen. Virol. 59 (1977); U.S. Patent no. 8,221,971 B2, *Serotype of Adenovirus and Uses Thereof* (Jul. 17, 2012).

- c. Pfizer, Moderna, and Johnson & Johnson used HEK 293 and/or PER.C6 cell lines in the development and/or production of their Covid-19 shots. North Dakota Department of Health, *COVID-19 Vaccines & Fetal Cell Lines* (updated August 17, 2022) (www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf).
16. In response to their accommodation requests, all three plaintiffs were interviewed in an adversarial manner, without counsel present, by Neal Stern, Senior Vice President and Assistant General Counsel, and Melissa Dean, Assistant Vice President and Senior Counsel for Employment & Benefits. Stern and Dean conducted these interviews and reached their conclusions in accordance with their impression that the sincerely held religious belief standard “is a high standard to meet.”
17. Apparently, zero NBA referees or replay center personnel met that “high standard” – Stern, Dean, and the NBA denied *every single application* for a religious exemption by such employees, including those submitted by Mark, Kenny, and Jason.
18. The NBA instructed plaintiffs to comply with the inoculation mandate in full and made clear that, if they were to remain “unvaccinated”, they would face consequences up to and including termination (the “jab or job” ultimatum). There was no flexibility or legitimate interactivity whatsoever.
19. The coercive nature of this ultimatum was particularly acute because of the NBA’s virtual monopoly on plaintiffs’ present and future career opportunities as professional basketball referees.
20. Of course, because plaintiffs actually *do* have sincerely held religious beliefs that prevent them from receiving the Pfizer, Moderna, or Johnson & Johnson shots, this “jab or job”

ultimatum was not much of a choice: they were compelled to follow their conscience and remained “unvaccinated.”

21. Because they remained “unvaccinated,” plaintiffs’ responsibilities were taken away, their pay was reduced or eliminated, and they were ultimately terminated by the NBA.
22. In the end, the NBA got exactly what it wanted: for 100% of NBA officials to be 100% “vaccinated” against Covid-19.
23. Ironically, because the “vaccines” did not provide immunity to Covid-19 or its variants, 100% compliance came with none of the administrative or financial benefits that NBA decisionmakers originally assumed: during the 2021-2022 season, 65 out of the NBA’s 73 fully vaccinated referees (89%) tested positive for Covid.
24. The NBA nixed the inoculation mandate for the 2022-2023 season. Nonetheless, it refuses to reconsider plaintiffs’ terminations.

Mark Ayotte

25. Mark Ayotte was an NBA referee for nearly two decades and worked for the NBA and its affiliates for the better part of three. He is a lifelong Catholic.
26. In a letter dated September 7, 2021, Mark applied for a religious exemption from the inoculation mandate. “My reasoning for this exemption is based on my personal religious beliefs,” he wrote. “I was born and raised Catholic, as was my wife and our two children.” A copy of the letter is attached hereto as Exhibit 1.
27. In his letter, Mark credited his Catholic faith for his opposition to “so-called fetal therapy, in which [a] human fetus in various stages of its development is aborted and used ... to treat various disease[s].” As he noted (correctly): “All three of the currently available

COVID-19 vaccines are produced by, derived from, manufactured with, tested on, developed with, or otherwise connected to aborted fetal cell lines.”

28. On September 16, 2021, Mark was advised that the NBA wished to question him regarding this application.
29. On September 17, Mark met with NBA attorneys Neal Stern and Melissa Dean for approximately 30 minutes.
30. The meeting began with Stern’s portentous preface: “I don’t want you to feel like we are attacking you.” Stern and Dean then proceeded to interrogate Mark on topics ranging from Vatican trivia to how he reconciled his “pro-life” beliefs with the ostensible fact that small, unvaccinated children might *die* as a result of his failure to take the Covid-19 jab.
31. During the meeting, Mark admitted that he was not up-to-date on the Pope’s guidance regarding Covid-19 “vaccines.” Stern and Dean jumped on this admission as a “gotcha!” moment.
32. Their “gotcha!” centered upon the Vatican’s December 17, 2020, *Note on the morality of using some anti-Covid-19 vaccines*, which states that “when ethically irreproachable Covid-19 vaccines are not available . . . it is morally acceptable to receive Covid-19 vaccines that have used cell lines from aborted fetuses in their research and production process.” (emphasis added).
33. Skipping the part of the Vatican’s *Note* that spoke to the Church’s unequivocal condemnation of the available “vaccines” as a “cooperation in evil”¹ and its declaration “that vaccination is not, as a rule, a moral obligation and that, therefore, *it must be*

¹ Specifically “in cases where cells from aborted fetuses are employed to create cell lines for use in scientific research.”

voluntary”² (emphasis added), Stern and Dean took Ayotte to task on whether the Vatican’s acknowledgement that it is “morally acceptable” for Catholics to take the Covid-19 shots, notwithstanding their association with fetal cell lines, would impact his decision.

34. “I know what the Church’s position on abortion is,” Mark replied. “My belief is based on that. I don’t know what the Pope has released on abortion, but I can’t imagine it goes against that.” Throughout the interview, Mark consistently reaffirmed his religious conviction that abortion is wrong and that the use of aborted fetal cells to create medicines is, to his conscience, “troubling.”

35. On October 11, 2021, the NBA denied Mark Ayotte’s request for a religious exemption.

- a. The sole basis for this denial was Mark’s alleged failure to articulate a proper understanding of the Catholic Church’s current position on vaccination.
- b. In the words of the rejection memo: “The NBA does not find Ayotte to be credible with respect to his understanding of the Vatican’s position, which calls into doubt his reliance on the Church’s views on the use of fetal cells. Accordingly, based on the record before us, the NBA finds that Ayotte’s asserted religious belief is not sincerely held, and the NBA denies his request for a religious exemption”.
- c. A copy of the letter is attached hereto as Exhibit 2.

36. As a direct result of the NBA’s rejection of his religious exemption request, Mark was subject to § A.3 of the amended CBA: “A referee who refuses to receive a vaccination (including any required booster) will be suspended without pay or medical benefits for the

² “Those who, however, for reasons of conscience, refuse vaccines produced with cell lines from aborted fetuses, must do their utmost to avoid, by other prophylactic means and appropriate behavior, becoming vehicles for the transmission of the infectious agent.”

period of up to one year... If the Referee has not been vaccinated by September 1, 2022, he/she will be terminated ‘without cause’ ”.

37. Mark, in accordance with his conscience (and in a manner entirely consistent with the teachings of the Catholic Church and the practices of many Catholics worldwide), continued to refuse the “vaccine” on religious grounds.
38. Consequently, he was suspended without pay or retirement benefits for the entirety of the 2021-2022 season. It would have been his 18th season as an NBA referee.
39. On September 1, 2022, at the outset of what would have been his 27th year with the NBA and its affiliates, Mark was summarily terminated.

Kenny Mauer

40. Kenneth “Kenny” Mauer began his employment as an NBA referee in 1986, making him one of the longest-serving referees in NBA history.
41. A self-described “gentleman who was raised Catholic” who attended church every Sunday, “even while traveling on the road” for NBA games, Kenny found himself “having a difficult time accepting the Pope’s stance in promoting this vaccine.” As a result, he “attend[s] different denominations from week to week.” As a result, in addition to attending Catholic services, Kenny is a member of the Baptist Evangelical Eagle Brook megachurch community.
42. In August 2021, the NBA and NBRA added a requirement that referees get “a CDC-approved vaccination against COVID-19 (including Pfizer, Moderna, or Johnson & Johnson)” to the collective bargaining agreement. Per the CBA, the NBA promised to offer medical and religious exemptions for referees.

43. In a letter dated September 2, 2021, Kenny requested an exemption from the NBA's mandate. In that letter, he cited two issues.

- a. First, the "vaccines" in question "utilize aborted fetal tissue," which conflicts with Kenny's belief that life begins at conception.
- b. Second, the shots are "unnatural and will pollute my body forever with synthetic mRNA." This is objectionable given Kenny's belief that "God's name is on every human chromosome."
- c. A copy of the letter is attached hereto as Exhibit 3.

44. Kenny also submitted a separate letter, dated September 7, 2021, from senior pastor Jason Strand of Eagle Brook Church.

- a. "As his pastor," Strand wrote, "I can speak to the sincerity of his faith and his request. Ken told me that after the directive to accept the COVID vaccine came out, he started searching the Scriptures as to how he should respond, and if he should accept the shot... Because some vaccines use aborted fetal cell lines and because Ken's conscience convicts him regarding this issue, Ken believes that if he were to accept the Covid shot, he would be in sin."
- b. A copy of the letter is included in the Exhibit 3 attachment.

45. On September 16, 2021, Kenny was advised that the NBA wished to question him regarding his exemption request. Although NBRA representative John Goble attended, Ken was flatly forbidden from bringing personal legal representation.

46. On September 17, 2021, Kenny Mauer was “interviewed” by two NBA attorneys, Neal Stern and Melissa Dean, for approximately 30 minutes. Kenny has likened the experience to an “inquisition.”
47. During the interview-cum-interrogation, Stern and Dean quizzed Kenny on diverse topics ranging from legal trivialities to trolley problems to his medical history.
- a. At one point, he was asked whether getting the vaccine is a civil liberty issue or a religious issue. Kenny’s answer – “both” – is correct as a matter of fact and law.
 - b. Kenny was also asked about reconciling the risk COVID-19 poses to unvaccinated children with his concern about the sanctity of life – a question that reveals more about the ignorance of the questioners than its answer reveals about the sincerity of the questionee (Covid-19 has never posed an appreciable risk to children, a fact that should have been known to NBA’s counsel at the time).
48. Finally, Stern and Dean honed in on Kenny’s medical history and, after unsuccessfully pressing him on his vaccination history, extracted an “admission” that Kenny took Hydroxychloroquine and Ivermectin as a prophylactic measure against Covid. According to Stern and Dean, Kenny’s use of these drugs was a “gotcha!” moment because, in their view, their use *logically* conflicts with his stated belief that vaccination “pollutes” the human body.³
49. On October 11, 2021, the NBA denied Kenny’s request for a religious exemption. A copy of the letter is attached hereto as Exhibit 4. The letter cited two reasons for the denial.

³ Of course, it should be noted that Hydroxychloroquine and Ivermectin are soluble compounds that the body digests and expels, while mRNA and viral vector “vaccines” (by design) leave a biological imprint that lasts for years or even indefinitely. But for Stern and Dean, logic is the domain of religious adherents, not employment lawyers.

50. First, the NBA concluded that “Mauer’s use of substances [Hydroxychloroquine and Ivermectin] to attempt to immunize himself from COVID-19 indicates that he does not in fact believe solely in divine healing and the healing abilities of the human body.” NBA’s Denial of KM’s RE.

- a. At the outset, this is an overstatement of Kenny’s beliefs, which are not a categorical prohibition on any and all medical interventions. Indeed, as Kenny repeatedly asserted, his objections to the “vaccines” stem from (1) the use of fetal stem cells in their development and (2) the long-term or permanent biophysical changes that these “vaccines” would induce.
- b. Hydroxychloroquine and Ivermectin are non-invasive alternatives to the Pfizer, Moderna, and J&J shots. Though the efficacy of these medications as a Covid-19 prophylactic is debated, it cannot be contested that neither of these “WHO essential medicines list” staples offends either of the concerns Kenny cited as the basis of his objections to the “vaccines.” *See, e.g.,* Formiga et al., *Ivermectin: an award-winning drug with expected antiviral activity against COVID-19*, 329 *J. of Controlled Release* 758–761 (2021) www.ncbi.nlm.nih.gov/pmc/articles/PMC7539925/;
- c. Hydroxychloroquine and Ivermectin were developed before the technology of fetal cell lines was even an option for medical researchers; both are passed naturally and neither contains mRNA. *See, e.g.,* Formiga et al., *supra*; Schrezenmeier & Dörner, *Mechanisms of action of hydroxychloroquine and chloroquine: implications for rheumatology*, 16 *Nature Reviews Rheumatology* 155–166 (2020) <https://doi.org/10.1038/s41584-020-0372-x>.

51. Second, “the Johnson & Johnson vaccine does not rely on synthetic mRNA” and therefore (according to the NBA) evades Kenny’s “objection to what he described as the use of aborted fetal tissue in the mRNA vaccines and concern that synthetic mRNA will pollute his body.”

- a. While it is true that the J&J shot does not contain synthetic mRNA, it is equally true that each dose is manufactured using Johnson & Johnson’s proprietary Human Primary Embryonic Retinal Cells (“PER.C6”), derived from cells originally harvested from the retina of an aborted fetus in 1985. Meredith Wadman, *Abortion opponents protest COVID-19 vaccines’ use of fetal cells* (Science, 5 Jun 2020) (www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells).
- b. Consequently, as far as the use of abortion-derived cell lines are concerned, the J&J shot is the *most* objectionable of the three Covid-19 “vaccines” available to the American public. *See, e.g.*, U.S. Conference of Catholic Bishops, *U.S. Bishop Chairmen for Doctrine and for Pro-Life Address the Use of the Johnson & Johnson Covid-19 Vaccine* (March 2, 2021) (“Pfizer and Moderna’s vaccines raised concerns because an abortion-derived cell line was used for testing them, but not in their production. The Johnson & Johnson vaccine, however, was developed, tested and is produced with abortion-derived cell lines raising additional moral concerns.”)

52. The NBA’s denial of Kenny’s religious exemption request effected a complete repudiation of his right to a religious accommodation regarding § A.3 of the amended CBA: “A referee who refuses to receive a vaccination (including any required booster) will be suspended

without pay or medical benefits for the period of up to one year... If the Referee has not been vaccinated by September 1, 2022, he/she will be terminated ‘without cause’”.

53. Because Kenny *does* sincerely object to the available Covid-19 shots on religious grounds, his conscience compelled him to remain unvaccinated. Consequently, he was suspended without pay or retirement benefits for the entirety of the 2021-2022 season.

54. On September 1, 2022, at the outset of what would have been his 37th year as an NBA referee, Kenny was summarily terminated.

Jason Phillips

55. Jason Phillips was a longtime NBA official. He served as an NBA referee for 19 years when, at the height of his officiating career, the NBA recruited him to join the Replay Center. He then served as Vice President of Referee Operations and Replay Center Principal.

56. Jason was a longtime member of the Greenwood Baptist Church and now attends Chapel Creek Fellowship.

57. In or around August 2021, the NBA mandated that all non-player NBA employees be “vaccinated” against Covid-19 by obtaining a full regiment of the Pfizer, Moderna, or Johnson & Johnson shots. The NBA promised to provide religious exemptions to this inoculation mandate for those with a sincere religious objection to the available prophylactic Covid-19 therapies.

58. On September 21, 2021, Jason submitted a request for a religious exemption.

- a. “I am writing this email for a religious exemption from the NBA’s Covid shot directive,” he wrote. “I understand that the manufactures of these shots have used

aborted fetal cells as a part of their development and/or testing. The Bible teaches us that life begins at conception and that the taking of human life at any stage is wrong. Exodus 20:13 and Deuteronomy 5:17 both command us not to murder and as a faithful Christian who believes in the Bible and its teachings, I cannot in good conscience use any product that takes its origin in abortion.”

b. A copy of the letter is attached hereto as Exhibit 5.

59. Jason also submitted a September 10, 2021, letter written by his pastor, Pastor Sonny Grissom of the Greenwood Baptist Church.

a. “Greenwood Baptist Church has a long history of being active in the fight for protecting the unborn,” Grissom wrote. “We believe, support, and teach the sanctity of human life from conception to natural death. Our Biblical stance on the COVID-19 vaccines currently available is based on religious and ethical grounds. Whether the use of fetal stem cells were used in the development phase for proof of concept or in the actual production of the vaccine, we object to any use of aborted fetuses for these vaccines. Therefore we do not support the research, production or receiving of any COVID-19 vaccine that uses stem cells from aborted fetuses.”

b. A copy of the letter is attached hereto as Exhibit 5.

60. Jason was invited to discuss his religious exemption application by Neal Stern and Melissa Dean on September 27, 2021. Jason was not represented by counsel or other representation; he expected a conversation with Stern and Dean centering on ways to eliminate or minimize any health and safety concerns management might have regarding his

unvaccinated status. Instead, his religious statement and personal religious beliefs were micro-analyzed while the NBA's top attorneys impugned his sincerity and integrity.

61. Stern and Dean said nothing about health and safety or about ways to ameliorate any possible burden that his exemption might create. In fact, the NBA's lawyers refused to engage Jason's attempts to bring up the subject.

- a. They dodged his inquiry as to why they had not considered it a health and safety risk for "unvaccinated" replay officials to work with "unvaccinated" referees in close proximity for the entire 2020-2021 season.
- b. Nor did they engage when he asked whether and why they thought the 2020-2021 Covid-19 testing protocol was inadequate for the 2021-2022 season.

62. At the conclusion of the interrogation, Stern and Dean asked Jason to sign a release document waiving his right to sue for discrimination.

63. On Monday April 4, 2022, Jason received a call from Byron Spruell, President of League Operations. Spruell informed Jason that he would be terminated effective April 28, 2022.

- a. Jason expressed his disappointment and disagreement with the termination and requested a more in-depth explanation.
- b. Spruell acknowledged that Jason's termination was the consequence of his choice to remain unvaccinated.
- c. However, Spruell refused to specify whether Jason's application for religious exemption had been processed and/or denied. When pressed, Spruell replied only that Human Resources would be in contact with additional information.

64. Jason spoke with Spruell again on April 14, 2022. On this call, for the first time, Jason was informed that his application for a religious exemption had indeed been denied; but Spruell was not able to give a reason for the denial.

65. On May 5, 2022, Spruell sent Jason an email to “confirm that the NBA has denied [Jason’s] request for a religious exemption from the NBA’s requirement that all NBA employees must be vaccinated for COVID-19.”

- a. “As reported to me,” Spruell wrote, “during your September 27, 2021 interview with Neal Stern and Melissa Dean, you acknowledged that neither your pastor nor your church objected to the COVID-19 vaccine and that several prominent Baptist ministers, in fact, advised congregants to get the vaccine. You also told them that even if a vaccine that had no connection to fetal stem cells were developed (fetal stem cells being your stated basis your objection), you would still have concerns about a vaccine being used as an identifier to move across the country or eat dinner. Accordingly, we did not find a sincerely held religious belief that warranted an exemption.”
- b. Jason made no such statements. His church’s opposition to the Covid-19 vaccine is well-documented in Pastor Grissom’s letter. That religious objection is the basis of his request for religious accommodation.
- c. Spruell’s May 5 email concluded that, “consistent with other unvaccinated NBA employees who do not have exemptions from the COVID-19 vaccination requirement, we are ending your employment effective May 9, 2022.”
- d. A copy of the email is attached hereto as Exhibit 6.

66. On May 9, 2022, Jason Phillips was terminated from his position as Vice President of Referee Operations and Replay Center Principal.

Plaintiffs’ Religious Objections to Available “Vaccines”

67. Plaintiffs Mark Ayotte, Kenny Mauer, and Jason Phillips believe that use of the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines” would conflict with important tenets of their faith.

68. Tens of millions of Americans, representing a substantial minority of many different faiths, object to the “vaccines” on faith-based grounds. *E.g.*, Deepa Shivaram, *1 in 10 Americans say the COVID-19 vaccine conflicts with their religious beliefs* (NPR December 9, 2021) (<https://www.npr.org/2021/12/09/1062655300/survey-religion-vaccine-hesitancy-exemptions>).

69. All three plaintiffs object to the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines” due to the use of embryonic stem cells derived from aborted human fetuses (“fetal cell lines”) in development stages (in the case of the Pfizer and Moderna mRNA-based therapies) and/or the production stage (in the case of the J&J viral vector shot).

a. As Mark wrote: “All three of the currently available COVID-19 vaccines are produced by, derived from, manufactured with, tested on, developed with, or otherwise connected to aborted fetal cell lines.” Exhibit 1.

b. In Kenny’s words: “The current COVID-19 vaccines based on mRNA utilize aborted fetal tissue and being subjected to this vaccine would assault the body God created for me”. Exhibit 2.

- c. “I understand that the manufactures of these shots have used aborted fetal cells as a part of their development and/or testing...” according to Jason. “I cannot in good conscience use any product that takes its origin in abortion.” Exhibit 3.

70. Plaintiffs’ faith-based belief in the sanctity of fetal life is at the heart of this conscientious objection. To wit:

- a. Mark, Kenny, and Jason believe, fundamentally, that a fetus is a human life with a soul and an identity; that it is, in other words, a *person*.
- b. They believe that any medical procedure that results in the killing of a healthy fetus constitutes the killing of an unborn person by another person (i.e., that feticide is infanticide).
- c. They believe that the carcass of an aborted fetus is not mere medical waste, but rather the body of a deceased person killed by another person.
- d. They believe that harvesting human embryonic cells from the flesh of an aborted three-to-four-month-old fetus is an unconscionable act.
- e. They believe that medical research products and bioengineering inputs derived from human embryonic cells harvested from the corpse of an infanticide victim without consent (“fetal cell lines”) are the product of sin.
- f. They believe that medical research and biomanufacturing that relies on these “products of sin” are complicit in the original evil; and that medical products that derive from such complicity (including the Covid-19 “vaccines” produced by Pfizer, Moderna, and Johnson & Johnson) have a provenance in sin.

- g. They believe that partaking of medical products that have their provenance in sin would be a ratification of the entire process: the original feticide, the harvesting of cells from the fetal corpse, the modification and cloning of those harvested cells into cell lines, the commodification of those fetal cell lines, the use of commodified fetal cell lines in medical research or biomanufacturing, and the laws, policies, and social norms that facilitate such “evil” conduct.⁴

71. Although it is not necessary for faith-based beliefs to be well-founded or even coherent to be worthy of solicitude, plaintiffs’ concerns about the use of fetal cell lines have a sound basis in fact: fetal cell lines (specifically, HEK-293 and PER.C6) were instrumental in bringing the Pfizer, Moderna, and Johnson & Johnson Covid-19 shots to market:

- a. Human Embryonic Kidney 293 (“HEK-293”) is the immortalized progeny of cells harvested from the kidney of a second-trimester fetus aborted in 1972 or 1973. HEK-293 cells were used in the development of mRNA vaccine technology to characterize and produce the SARS-CoV-2 spike protein for proof-of-concept and for efficacy testing.⁵ Without HEK-293, the Pfizer and Moderna “vaccines” simply would not exist.
- b. Human primary embryonic retinal cells (“PER.C6”) were originally sourced from the retina of an 18-week-old fetus aborted in 1985. Johnson & Johnson uses

⁴ The analogous ethical principle, as explained in Catholic doctrine: “When the illicit action is endorsed by the laws which regulate healthcare and scientific research, it is necessary to distance oneself from the evil aspects of that system in order not to give the impression of a certain toleration or tacit acceptance of actions which are gravely unjust. Any appearance of acceptance would in fact contribute to the growing indifference to, if not the approval of, such actions in certain medical and political circles.” Congregation for the Doctrine of the Faith, *Instruction Dignitas Personae* (8th December 2008), n. 35; AAS (100), 884.

⁵ North Dakota Department of Health, *COVID-19 Vaccines & Fetal Cell Lines* (last updated August 17, 2022) (www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf).

PER.C6 cells to produce and manufacture the J&J viral vector “vaccine.” PER.C6 is a necessary and critical manufacturing input in the production of each and every J&J Covid-19 shot.⁶

72. Additionally, Kenny harbors a concern that the shots are “unnatural and will pollute my body forever with synthetic mRNA” and that “God’s name is on every human chromosome.” *See* Exhibit 3.

- a. This reflects Kenny’s belief that the long-lasting imprint of the mRNA “vaccines” represents an alteration of the natural human corpus in a manner displeasing to God.
- b. “We were made in his image and sealed with his name,” Kenny articulated. “I fear that pollution of his creation may make me an unacceptable sacrifice [to Him].” *See* Exhibit 3.

State Actor

73. The big picture: The NBA was entwined with the military, due in part to its direct relationships with the military and due in part to its indirect relationship to the military. Paragraphs 82 - 116 detail the NBA’s direct entwinement with the military; Exhibit 1 details the NBA’s indirect involvement with the military due to the NBA’s direct relationship with Disney and ESPN and their involvement with the military.

74. The United States Military was singular, as an entity, in its overwhelming denial of religious exemptions, with its having granted only 15 of its service members religious

⁶ *Id.* *See also* Meredith Wadman, *Abortion opponents protest COVID-19 vaccines’ use of fetal cells* (Science, 5 Jun 2020) doi: 10.1126/science.abd1905 (www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells).

exemption requests out of “approximately 16000” requests.⁷

75. It was considerably surpassed in uptake rates only by the likes of the NBA.⁸ (Uptake rates refer to the rate of Covid-19 vaccination).

76. The United States Military has been quite public about its symbiotic relationship with the NBA, the military’s need for it and the benefits for both the NBA and the military.⁹ For example, on or about April 17, 2014, General Martin Dempsey, the Chairman of the Joint Chiefs of Staff, as summed up by a defense department article titled, “Dempsey Praises Military Partnership With Pro Basketball,” stated “I’m excited about partnering with the NBA and USA Basketball in finding innovative ways to serve the communities in which we live and work” ... “This partnership will be a slam dunk -- two groups who are the best in the world at what they do giving back to the communities that support them.”¹⁰ This was while Dempsey was in his government role.

77. Dempsey described the partnership between USA Basketball, the NBA, and the Department of Defense as “a comprehensive partnership for a robust commitment to service.”¹¹

78. While much of the military-NBA partnership revolves around community service and “assisting veterans in the transition back to civilian life,” as described by NBA

⁷ Oren Liebermann and Ellie Kaufman, *US military has approved religious exemptions to vaccine mandate for 15 service members out of 16,000 requests*, CNN, Feb. 17, 2022, <https://www.cnn.com/2022/02/17/politics/us-military-religious-exemptions-covid-vaccine/index.html>.

⁸ See *infra* paragraphs 97 and 99.

⁹ Jim Garamone, *Dempsey Praises Military Partnership With Pro Basketball*, AMERICAN FORCES PRESS SERVICE, May 5, 2014, <https://www.jcs.mil/Media/News/News-Display/Article/571678/dempsey-praises-military-partnership-with-pro-basketball/#:~:text=%22I'm%20excited%20about%20partnering,the%20communities%20that%20support%20them.%2>

¹⁰ *Id.*

¹¹ *Id.*

Commissioner Adam Silver, regarding the announcement of the partnership,¹² the partnership does in fact aid the military in a much broader campaign.

79. General Dempsey explained that partnerships, such as the one with the NBA, are designed to promote the military's (and the government's) values. Dempsey explained "he's concerned about the public's lack of understanding of the military's role not only in war, but during 'the everyday business of protecting our national interests and promoting our values.'" ¹³

80. The military's everyday business of promoting values, while laudatory in its own right, begins to constitute entanglement once it works hand in hand with the NBA, as delineated herein and in Exhibit 1.

a. As only one prefatory example of the influence, and what promoting values includes, it includes imparting and landing messages to coaches at the Pentagon after they met with President Obama. In the words of University of Connecticut's world championship college basketball coach, Geno Auriemma, "When you start taking everything you're supposed to do as seriously as those kids your age take their job in the military, then you'll understand what passion is and what commitment to detail is, and when your teammate expects you to do something, you do it."¹⁴ If that last phrase has a familiar ring to it, it may be that it's reminiscent of the famous line in the "Did you order a code red" segment of the movie "A Few

¹² *Supporting Armed Forces Members And Their Families, Commitment To Service Will Focus On Four Pillars: Transition, Community, Leadership And Health*, May 5, 2014, <https://www.usab.com/news-events/news/2014/05/usa-basketball-nba-and-department-of-defense-partner-on-a-commitment-to-supporting-armed-forces.aspx>.

¹³ Jim Garamone, *General Dempsey January 14, 2014 speaking to students at the National Defense University*, AMERICAN FORCES PRESS SERVICE, <https://www.jcs.mil/Media/News/News-Display/Article/571640/dempsey-leaders-can-make-a-difference-in-challenging-world/>.

¹⁴ Ari Mason and Kevin Nathan, May 7, 2014, Updated on May 8, 2014, *UConn Coaches Speak to Military at Pentagon* <https://www.nbcconnecticut.com/news/sports/huskies-uconn-ollie-auriemma-pentagon-oval-office-hoops-for-troops/52496/>.

Good Men,” in which Colonel Jessup on the witness stand, in answer to Lieutenant Kaffee’s question “When Kendrick spoke to the platoon and ordered them not to touch Santiago, any chance they ignored him?” famously professes: “Have you ever spent time in an infantry unit, son? ... Ever served in a forward area? ... Ever put your life in another man's hands, ask him to put his life in yours? ... We follow orders, son. We follow orders or people die. It's that simple. Are we clear?”¹⁵

- b. The meeting at the Pentagon was part of the Hoops for Troops program, which was described as being “part of an ‘expanding relationship’ between the basketball organizations and U.S. Department of Defense, focusing on ‘commitment to service.’”¹⁶

81. The activities of the NBA, with the government’s involvement reflect, coercive power, significant encouragement, joint action, agency control, and symbiosis.¹⁷

82. The professed intention, of Dempsey, for such partnerships, is to achieve the government’s and military’s aims, as such partnerships fit into a “whole-of-government” approach, as opposed to a solely military “tool” approach.¹⁸ The latter depends heavily on the physical power of the military but has the associated risks and harms, the former enables the achievement of the government and military aims without such harms.

83. Such whole-of-government approach, evidently, and logically, includes partnerships with business. The military and the whole-of-government approach qualifies not only as

¹⁵ Aaron Sorkin, *A Few Good Men*, Jul. 15, 1991, <https://imsdb.com/scripts/A-Few-Good-Men.html>.

¹⁶ See *supra* note 14.

¹⁷ Note, the two seminal cases on state action have involved sports and athletic associations. *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 302 (2000) and *National Collegiate Athletic Assn. v. Tarkanian*, 488 U. S. 179 (1988).

¹⁸ Jim Garamone, *Dempsey Talks Caution, Whole-of-Government Approach*, DOD NEWS, Sept. 22, 2015, <https://www.defense.gov/News/News-Stories/Article/Article/618120/dempsey-talks-caution-whole-of-government-approach/>.

partnership but also as pervasive entwinement, particularly with respect to vaccination mandates.

84. The United States military has inherently “coercive power” in any mission it pursues with rigor.

85. General Martin Dempsey, on or about October 2, 2015, one week after “stepping down as the military’s top officer” became an advisor to the NBA. The NY Times reported Dempsey “was expected to counsel Mr. Silver on matters of leadership and service, as well as to advise N.B.A. owners and executives on how franchises can connect with communities. He will also head a new leadership council for the league’s global youth basketball initiative, the Jr. N.B.A.”¹⁹

86. General Martin Dempsey as the former Chairman of the Joint Chiefs of Staff was the “nation’s highest ranking military officer” and “the principal military advisor to the President, Secretary of Defense, and National Security Council.”²⁰ Stepping into the role as advisor to the NBA he brought with him not only the aims of a private individual but also those he carried with him as the top-ranking military official for the United States of America. They did not get checked at the door. His role would grow beyond advisor.

87. On or about November 14, 2016, Retired General Dempsey became the Chairman of USA Basketball.²¹

88. On or about March, 2017, General Dempsey became a member of the NBA’s Officiating

¹⁹ Zach Schonbrun, *Former Head of Joint Chiefs Will Advise N.B.A. and Adam Silver*, N.Y. TIMES, Oct. 2, 2015, <https://www.nytimes.com/2015/10/02/sports/basketball/former-head-of-joint-chiefs-will-advise-nba-and-adam-silver.html>.

²⁰ See e.g., <https://www.jcs.mil/portals/36/Documents/150429cjcshort.pdf>.

²¹ He was reelected to the position in 2017 and 2020, serving until 2024. See *Retired General Martin E. Dempsey Re-elected Chairperson of USA Basketball*, Oct 25, 2021, <https://www.usab.com/news-events/news/2021/10/bod-announced.aspx>.

Advisory Council along with former Secretary of Education Arne Duncan.²²

89. USA Basketball, and General Dempsey, interfaced considerably with the NBA.
90. The interface of the former Chairman with the NBA included intimate involvement. Such intimate involvement included, beyond carrying the inherently coercive power of the most powerful military in the world, with the objectives and means of a man at the top of that military, engaging in “significant encouragement,” “joint action,” “agency control,” and “symbiosis,” both indirect and direct with respect to the Covid-19 vaccination mandate.
91. This role, while characterized as a “whole-of-government” approach is better described as a “whole-of-society” approach, wherein government actors exiting government continue to promote, using the power of their government roles, the aims of government.
92. In or about February 2019, the whole-of-government/whole-of-society approach would include former President Obama working with the NBA’s Mark Tatum (Chief Operating Officer and Deputy Commissioner of the NBA, who currently sits on the board of USA Basketball,²³ as well) to open a basketball league in Africa. The opening up of a basketball league, with the aid of a former president, would involve significant financial incentives and benefits for the NBA. It also was a recognized way to influence synergistic government objectives, as described by former President Obama: “Glad to see this expansion into Africa because for a rising continent, this can be about a lot more than what happens on the court.”²⁴ It’s unfathomable that Obama’s post presidency role is distinct from being aligned with governmental objectives. More than what happens on the court includes, quite

²² Dan Feldman, *NBA to use virtual reality to train referees*, NBC SPORTS, Mar 2, 2017, <https://nba.nbcsports.com/2017/03/02/nba-to-use-virtual-reality-to-train-referees/>.

²³ See 2021-2024 USA Basketball Board of Directors, <https://www.usab.com/about/about-usa-basketball/board.aspx>.

²⁴ Des Bieler, *Barack Obama reportedly set for role with NBA-backed African basketball league*, WASHINGTON POST, Feb. 18, 2019, <https://www.washingtonpost.com/sports/2019/02/18/barack-obama-reportedly-set-role-with-nba-backed-african-basketball-league/>.

obviously, the types of objectives Obama had as a President of the United States and as an ongoing extremely powerful man with regard to those objectives.²⁵

93. Further, as to the suggested benefits of the role of the former president,

“the Associated Press reported Saturday that Obama is ‘among those who are expected to have direct involvement with the league’s plan to keep growing the game in Africa through the league and other initiatives.’ In a tweet, Obama said that he’s ‘always loved basketball because it’s about building a team that’s equal to more than

²⁵ General Dempsey makes clear his position on whether he continues to act as a representative of the government: “Generals and admirals are generals and admirals for life.” Martin Dempsey, *Keep Your Politics Private, My Fellow Generals and Admirals; We must not compromise our military’s special role in democracy, nor hinder those who come after us*. Aug. 1, 2016, <https://www.defenseone.com/ideas/2016/08/keep-your-politics-private-my-fellow-generals-and-admirals/130404/>.

He explains that even a retired General plays a role in military relations with civil servants such as Congresspeople:

“Moreover, if senior military leaders—active and retired—begin to self-identify as members or supporters of one party or another, then the inherent tension built into our system of government between the executive branch and the legislative branch will bleed over into suspicion of military leaders by Congress and a further erosion of civil-military relations.”

Id.

He’s essentially saying there is no such thing as a private military opinion, or a private military person’s objective, only a governmental military opinion or objective, as even retired military leaders’ views are perceived as representing the military and what it stands for.

Dempsey’s weight as a military influence, after retiring, was also captured by Joseph Solosky, Managing Director for Nascar, in a one-on-one interview with General Dempsey:

“It is clear that General Dempsey is aware of the weight his military career carries into his post-retirement life. When asked what he envisioned as his biggest challenge in transitioning from the military to a civilian career, he was clear about one thing, ‘I want to use the professional reputation that I’ve accumulated for good service, and it’s always in the back of my mind. The pressure of finding the right touch points and places to contribute is heavy, and weighs on me.’”

Joseph Solosky, *From Advising President Obama to Commissioner Silver; A One-On-One with Former Chairman of the Joint Chiefs of Staff General Martin Dempsey*, Nov. 11, 2015, <https://medium.com/@jolosky5/from-advising-president-obama-to-commissioner-silver-bbdac9c55587>.

This continues into retirement the synergistic goal Dempsey described in April 2014 before the NBA Board of Governors meeting in NYC.

“‘My prediction for us is that as these wars in Iraq and Afghanistan begin to fade and begin to pass into the rear-view mirror of American life, we’re going to have to increase our efforts to connect with America,’ he said.

The U.S. military cooperating with the NBA brings a different synergy to both organizations, and helps both to partner and better connect with American people, Dempsey said.”

Supra note 9.

the sum of its parts.”²⁶

The government clearly was “building a team” with the NBA. State action can be overt or covert,²⁷ and the government’s involvement here evidences covert state action.²⁸ In this context, the definition of covert as per the 50 USC § 3093(e) definition is essentially tantamount to whole-of-government/whole-of-society activities by a former president and the highest ranking General in the United States military.

94. Two years later, on May 25, 2021, the NBA announced the formation of NBA Africa, worth one billion dollars, at the time of announcement.²⁹

95. Such financial entwinement between former (or continuing) top government officials and the NBA shows there exists “significant encouragement,” “joint action,” “agency control,”

²⁶ *Id.*

²⁷ Cases referring to the criteria of: “significant encouragement, either overt or covert”; “willful participant in joint activity with the State or its agents”; “entwined with governmental policies,” and others are cited in the seminal state action case:

“Our cases have identified a host of facts that can bear on the fairness of such an attribution. We have, for example, held that a challenged activity may be state action when it results from the State’s exercise of ‘coercive power,’ *Blum*, 457 U. S., at 1004, when the State provides ‘significant encouragement, either overt or covert,’ *ibid.*, or when a private actor operates as a ‘willful participant in joint activity with the State or its agents,’ *Lugar, supra*, at 941 (internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an ‘agency of the State,’ *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U. S. 230, 231 (1957) (*per curiam*), when it has been delegated a public function by the State, cf., e. g., *West v. Atkins, supra*, at 56; *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 627-628 (1991), when it is ‘entwined with governmental policies,’ or when government is ‘entwined in [its] management or control,’ *Evans v. Newton*, 382 U. S. 296, 299, 301 (1966).”

Brentwood Academy v. Tennessee Secondary School Athletic Assn., 531 U.S. 288, 296 (2000).

²⁸ Covert action is defined in 50 USC § 3093(e):

(e)“COVERT ACTION” DEFINED

As used in this subchapter, the term “covert action” means an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent...

<https://www.law.cornell.edu/uscode/text/50/3093#e>.

²⁹ Jabari Young, NBA forms Africa business entity valued at nearly \$1 billion, luring players and investors, CNBC, May 24, 2021, <https://www.cnbc.com/2021/05/24/nba-lures-players-and-investors-to-form-africa-business-entity.html>.

and “symbiosis,” the likes of which qualify the NBA as a state actor. The entwinement pertains to the Covid-19 vaccination, among other things, and establishes a “close nexus”³⁰ between the government’s actions and objectives and that of the private party with which it became entwined.

96. Certainly, financial benefits, and massive ones, flowing from the government (or because of the government’s involvement) to the private party, the NBA, regardless of whether those financial benefits are earmarked for the private party achieving a particular vaccination uptake rate, reflect an entwinement and a close nexus between the government and the private party if the private party’s actions (mandating a vaccine) could be reasonably considered as in service of (as opposed to coincident to) the government’s objectives.

97. The NBA’s uptake rate would make the military proud, in that it is consistent with the extremely hard line that both the military and the government have drawn in carrying out what is traditionally a public function.

98. On or about September 30, 2021, the NBA’s uptake rate among players was 95 percent.³¹

99. On or about November 12, 2021, the NBA’s uptake rate among players was 97 percent.³²

100. No other industry has such a high rate.³³

101. In addition to the NBA’s directly entwined relationship with the military, the NBA, which has a close relationship with ESPN and Disney, is indirectly entwined with the

³⁰ See *supra* note 17.

³¹ See *e.g.*, *NBA reaches 95% vaccination rate among players*, Kurt Helin, NBC SPORTS, Sep 30, 2021, <https://nba.nbcsports.com/2021/09/30/report-nba-reaches-95-vaccination-rate-among-players/>.

³² Tim Reynolds, *In memo, NBA tells players and coaches to act on booster shots* *Health*, PBS NEWS HOUR, Nov. 12, 2021, <https://www.pbs.org/newshour/health/in-memo-nba-tells-players-and-coaches-to-act-on-booster-shots>.

³³ See *infra* note 40.

military by virtue of Disney/ESPN's close relationship with the military (detailed in Exhibit 1), which bears heavily on the NBA's vaccination uptake and treatment of the Plaintiffs.³⁴

102. Commissioner Adam Silver considers himself connected to the Disney ESPN conglomerate. Silver, for example, has noted of the NBA's relationship to Disney, "I'm a big Bob Iger fan. Of course, Disney is one of our huge partners." The point of huge partners is that Disney (and its relationship to the military – see Exhibit 1) matters.

103. The Disney conglomerate, along with its subsidiary ESPN, is tied very closely, and entwined, as we explain (Exhibit 1), with the government; the question is whether the Disney / ESPN relationship with the NBA is an extension of such entwinement, such that it too is entwined with the government, -- it is.

104. The long story short is that the NBA's Covid-19 vaccination rates are not the result of a special management capability among NBA management executive talent but rather the result of an entwinement between the government and private enterprise, principally Disney/ESPN and the NBA, among other sports leagues. (Spelled out in Exhibit 1.)

105. Dempsey speaking to the USA Basketball team, with Adam Silver present, and noting to the team that Dempsey is the highest-ranking officer in the military and what an honor it is to have him present,³⁵ stated:

³⁴ A relationship which has recently been asserted in counsels' recent lawsuit against ESPN and Disney (excerpts included herein). *See Faber et al v. ESPN Productions, Inc. et al.*

³⁵ Dempsey speaking to USA Basketball.

“I like to think that this partnership, and that’s what it is, a partnership, brings together members of the best military in the world with members of the best basketball teams in the world. I mean, I think it’s actually quite a remarkable partnership and one that makes sense to America because, thankfully, the military enjoys a great esteem among the American people, as do these athletes, so if we can bond together and commit to give back, I think that we’ll be doing a lot of good, not just for ourselves, collaboratively, but also for the country, and that’s our goal.”³⁶

It’s this issue of esteem by the American public and the branding of the military that becomes relevant alongside the Covid-19 vaccination requirements. Dempsey, in his 2014 pregame speech to the USA Basketball FIBA World Cup players, remarks to the basketball players that they are essentially doing it for the military³⁷. Of course, Dempsey stated this in front of the USA Basketball coach, Mike Krzyzewski, well known for his highly successful career with the Duke Blue Devils, and lesser known for his graduating from The United States Military Academy at West Point, the only coach, among both NCAA and NBA coaches to hold that distinction.

106. Dempsey’s role reflects a significant entwinement, as Dempsey himself observes his significant role in this regard. He explains in his talk and teaching on Civil-Military



Photo credit: General Dempsey Addresses Men's National Team; General Martin Dempsey, Chairman of the Joint Chiefs of Staff, addressed the Men's National Team before their game Wednesday night against the Dominican Republic, and told them how important the World Cup is considered all over the world. Aug. 22, 2014, <https://www.usab.com/basketball/media/videos/2014/08/general-dempsey-addresses-mens-national-team.aspx>.

³⁶ Jason Schott, NBA’s Silver, *General Dempsey discuss Hoops for Troops*, NY SPORTS TODAY (Aug. 21, 2014), <https://www.nysportsday.com/2014/08/21/nbas-silver-general-dempsey-discuss-hoops-for-troops/>.

³⁷See *supra* note 35.

Relations, a course he teaches at Duke University:

“In the course of my duties as chairman of the Joint Chiefs of Staff, I saw the hidden hand of culture at work frequently. There was a point where I began to describe myself as the dash that separates the words civil and military in references to civil-military relations.”³⁸

He’s referring, in this talk, to his role in connecting the civil realm and the military realm.

To call and consider oneself the dash connecting the military to anything would ordinarily seem unlikely and impossible, even outlandish, however, when the individual making such a claim is the highest ranking military officer in the nation, the Chairman of the Joint Chiefs of Staff, we can recognize it for what it is, an acknowledgment of the very real role he plays, a role which is evident in his work with the NBA. There is no spatial separation. By design. The two entities are separated only by a dash, a dash joining them together to form one concept.³⁹

³⁸ General Martin Dempsey, *Civil-Military Relations: “What Does It Mean?”*, STRATEGIC STUDIES QUARTERLY – POLICY FORUM (Summer 2021), https://www.airuniversity.af.edu/Portals/10/SSQ/documents/Volume-15_Issue-2/Dempsey.pdf.

³⁹ That role as a dash included a hand in bringing additional military personnel aboard. Though nothing can compare to the role of President or the role of the Chairman of the Joint Chiefs of Staff, rather uniquely powerful positions that dwarf all others in their ability to influence, and though her stint with the NBA was only from 2017 to 2019, it is worth noting that the quite distinguished and by all other accounts, powerful, Air Force Lt. Gen. Michelle D. Johnson, the first woman to head the United States Air Force Academy, and one of the Air Force Academy’s top women’s basketball players in school history, left the military and was named head of NBA Referee Operations in October 2017 shortly after General Dempsey was elected Chairman of USA Basketball. As to her distinguished career, and highly powerful influence, prior to heading the Academy,

“Johnson spent two years as NATO’s Deputy Chief of Staff for Operations and Intelligence (2011-13) and served stints at the Pentagon as the Air Force’s Deputy Director for Information and Cyberspace Policy (2007-09) and Director of Public Affairs (2005-07). A command pilot with more than 3,600 flight hours, she was the Air Force aide to Presidents George H.W. Bush and Bill Clinton from 1992-94.”

Retired Air Force Lieutenant General Michelle D. Johnson named NBA Senior Vice President and Head of Referee Operations, Oct. 12, 2017, <https://www.nba.com/news/nba-michelle-johnson-senior-vice-president-referee-operations>.

She also received several awards:

“Upon retirement in August, Johnson received the Distinguished Service Medal. Her awards and decorations also include the Defense Superior Service Medal with three oak leaf clusters, the Legion of Merit with two oak leaf clusters and the Meritorious Service Medal with oak leaf cluster. In addition, she earned the Aerial Achievement Medal, the Air Force Commendation Medal, the Air Force Achievement Medal and the Global War on Terrorism Service Medal.”

Id.

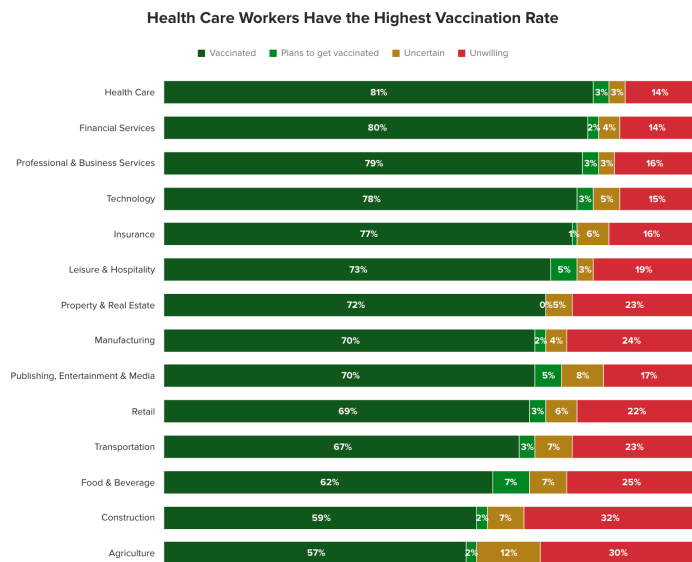
107. The indirect relationship between the NBA and the military through the NBA’s relationship with Disney and ESPN, which are closely related to the military is as important as the direct relationship between the NBA and the military. The NBA is, of course, deeply entwined with ESPN and Disney, by virtue of the multibillion-dollar agreement they have, a nine-year agreement for 2.6 billion dollars per year.⁴⁰ The NBA

There is nothing inherently wrong with high level military personnel migrating from the military to the NBA, and working with the NBA, but when their roles and involvement involve furthering government objectives, values and approaches, state action applies.

⁴⁰ The number of ESPN employees who took the vaccine is unknown, however the major professional sports associations have been very public in reporting their extraordinary uptakes. *See e.g.*,

“Around 67% of eligible Americans are fully vaccinated, according to the Centers for Disease Control and Prevention. Meanwhile, leagues such as the NBA, NFL and MLS have rates greater than 90%, with the NHL and WNBA at over 99%.”

Meredith Deliso, *How professional sports leagues got most players vaccinated -- without mandates, A small number of holdouts have made headlines for not getting the shot.* ABC NEWS, Oct. 21, 2021, 5:48 AM, <https://abcnews.go.com/Sports/professional-sports-leagues-players-vaccinated-mandates/story?id=80668945>.



Latest survey conducted between Dec. 6 and 12, 2022, among 27,450 U.S. adults, with a margin of error of +0.6%.
Figures may not add up to 100% due to rounding.

Of course, funding for professional sports comes from the leaders in the communications industry, leaders such as ESPN and ABC Sports owned by Disney. For example, ESPN reportedly pays to the NBA \$2.6 billion per year. “This nearly triples what the NBA currently makes off of TV and digital rights.” KPCC, *New NBA TV deal is a cash injection for league and players*, Jun. 8, 2014, <https://www.kpcc.org/show/take-two/2014-10-07/new-nba-tv-deal-is-a-cash-injection-for-league-and-players>. There is obviously a ripple effect with the influence of the government relationship on Disney and ESPN flowing to the sports leagues that depend upon them. The Disney/ESPN clout with and influence over the NBA was increased during the Covid-19 pandemic. Disney/ESPN teamed up with the NBA, of course, to bring

receives from ESPN and Disney those billions of revenue, without which the NBA would not be what it is. Let's turn to Disney and its relationship to the Defense Department, as it pertains to its influence over the NBA and its vaccination requirements.

108. ESPN is influenced by Disney/ESPN by virtue of the financial benefits and extensive involvement. Exhibit 1 details the relationship between the military and Disney / ESPN, and their entwinement with each other, which flows over to the Defendants here.

FIRST CAUSE OF ACTION

Title VII Religious Discrimination

109. Plaintiffs repeat and re-allege the foregoing allegations contained in the preceding paragraphs as if fully set forth herein.

110. Plaintiffs are protected under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e- 2 et seq.) from discrimination in the workplace based on their religious beliefs.

111. The NBA is Plaintiffs' "employer" under Title VII and falls within the jurisdiction of the statute.

112. As further described herein, Plaintiffs were subjected to discrimination from Defendant based on their religious beliefs.

113. Plaintiffs were qualified for their positions. Mark, Kenny, and Jason were highly regarded NBA officials with over seventy years of combined experience. Their work withstood the constant scrutiny of millions of basketball fans for decades.

the playoffs to "the Bubble" as it was called, where the NBA held the final regular season games and playoffs of the 2020-2021 season, utilizing the ESPN Wide World of Sports Complex at Walt Disney World for games and Disney hotels for the players to stay.

114. Plaintiffs suffered adverse action by being terminated from their employment due to their religious beliefs. It is undisputed that these longtime NBA employees would not have been fired but for their failure to comply with the inoculation mandates.
115. Defendant failed to reasonably accommodate Plaintiffs' religious beliefs, as required by law, and terminated Plaintiffs under circumstances that were discriminatory in nature.
116. Plaintiffs are men of faith. Each falls into a classification protected under Title VII: Mark Ayotte is lifelong Catholic, Kenny Mauer a multidenominational Christian, and Jason Phillips is an avowed Baptist.
117. Plaintiffs do not share a denominational affiliation. What they share is a common religious belief: the belief that human life is sacred from the moment of conception. Mark, Kenny, and Jason sincerely believe that this faith-based conviction is at the heart of their conscientious objection to the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines.”
118. At the time that the NBA enacted its Covid-19 inoculation mandates in August 2021, the vast majority of “unvaccinated” employees were individuals who, like Mark, Kenny, and Jason, objected to the available Covid-19 “vaccines” on religious grounds. Although facially neutral, the NBA’s mandates were targeted primarily (perhaps exclusively) at such employees.
- a. Any legitimate objectives of the mandate could have been achieved by other, less intrusive means such as testing. Testing is relatively cheap and was, by all accounts, successful during the 2020-2021 season. At no point in 2021 did the NBA or its agents have access to scientific substantiation for the notion that “vaccination” without testing is more effective at preventing transmission than testing without

“vaccination.”

- b. The mandate also failed to take account of previous infection, even though it was known at the time that “Individuals who have had SARS-CoV-2 infection are unlikely to benefit from COVID-19 vaccination.” Nabin K. Shrestha et al., *Necessity of COVID-19 vaccination in previously infected individuals*, medRxiv (June 2021) (<https://doi.org/10.1101/2021.06.01.21258176>).⁴¹
- c. The mandate was *actually* tailored toward an impermissible objective: forced compliance with hygienic norms.
 - i. That is, the NBA divided its workforce into two camps: “vaccinated” (hygienic) and “unvaccinated” (unclean) and purged the latter – a group disproportionately comprised of individuals with a particular religious belief – almost entirely from its payrolls.
 - ii. Indeed, the metric that the NBA tracked most meticulously with regard to this policy had nothing to do with employee health or the number of game cancellations; it was the “vaccination rate” among the NBA workforce.

119. Thus, because the NBA mandate was targeted at individuals who espoused particular religious beliefs, and because it was not narrowly tailored to any legitimate interest, it is discriminatory on its face.

120. Furthermore, the NBA refused to update its policy in response to changing facts that rendered its policies irrational during the 2021-2022 season. Indeed, the NBA removed the

⁴¹ See also Thomas Leon et al., *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California and New York, May–November 2021*, CDC (<https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm>) (“By early October [2021], [unvaccinated] persons who survived a previous infection had lower case rates than persons who were vaccinated alone.”)

inoculation mandate for referees in 2022-2023 (although it inexplicably excluded *suspended* referees such as Mark and Kenny from the policy change). The new 7-year NBA/NBRA CBA precludes inoculation mandates for NBA referees.

121. At its inception, the averred basis of the inoculation policy and the consequences stemming therefrom were that the NBA ostensibly believed that Mark, Kenny, and Jason posed a greater risk of contracting Covid-19 and of transmitting the virus to coworkers than did their “vaccinated” peers.

122. This belief was a hygiene heuristic – it was not substantiated by any reliable scientific evidence.

123. Even if that belief *had* been well-founded at the time the suspensions were levied, it was debunked over the course of the coming months.

a. Breakthrough cases became increasingly common in the fall/winter of 2021, and the highly transmissible Omicron variant ripped through the “vaccinated” and “unvaccinated” populations alike.

b. By January 2022, CDC head Dr. Anthony Fauci acknowledged that “Omicron, with its extraordinary, unprecedented degree of efficiency of transmissibility, will, ultimately, find just about everybody.” *Fireside Chat with Dr. Anthony Fauci: Is the Pandemic in Transition?* January 11, 2022 (transcript) (<https://www.csis.org/analysis/fireside-chat-dr-anthony-fauci-pandemic-transition>)

124. Furthermore, the NBA had actual knowledge that their mandate was completely ineffectual at curbing the spread of Covid-19.

a. During the 2020-2021 season, with no vaccine mandate in place and vaccines

largely unavailable, only 6 referees tested positive for Covid-19. By contrast, during the 2021-2022 season, 65 out of 73 of the NBA's fully vaccinated referees tested positive.

- b. At one point in late 2021, over one third of all NBA referees were in Covid-19 protocols and were unable to officiate. Adrian Wojnarowski, *More than one-third of NBA referees are in COVID-19 protocols, sources say* (ESPN, Dec 30, 2021).

125. Yet even as the futility of the “vaccine” mandate became ineluctable and the NBA had to call up less qualified officials from its G League to officiate NBA games, the league never lifted plaintiffs’ suspensions or offered plaintiffs the opportunity to return to their jobs. To the contrary, the NBA dug in its heels.

126. Under *Lukumi* and *Fulton*, the NBA cannot cure the flaws in its inoculation mandate by providing an exemption system that accommodates some religious adherents (but not others) based on subjective criteria. However, the NBA attempted to do exactly this by offering a religious exemption from the Covid-19 inoculation mandate.

127. Per NBA policy, persons with “sincere religious beliefs” that cannot be reconciled with the inoculation mandate would be exempted from the policy. Exempted officials would still have to take precautionary measures, including the testing protocols that had been successfully implemented during the 2020-2021 season.

128. The NBA offered this exact accommodation to some employees, including at least one minor league referee.

129. However, when Plaintiffs made their sincere religious beliefs known to the NBA and articulated that they could not, in good conscience, comply with the organization’s Covid-19 inoculation mandate, the NBA withheld that accommodation from them.

130. The basis for that withholding? The NBA’s lawyers, after a pointed interrogation, adjudged plaintiffs’ beliefs to be illogical, unorthodox, and/or not entirely religious and therefore insufficient to satisfy the “high standard” of a sincerely held religious belief. This adjudication flies in the face of fundamental hornbook law. To wit:

- a. An employee’s “sincerely held religious belief” is not held to a “high standard” at all – it is held to an exceedingly *low* standard requiring only sincerity.
- b. A religious belief need not be logical, orthodox, or entirely religious in order to merit solicitude under Title VII. A belief need not even be religious to merit Title VII protections, so long as it occupies the same *métier* as a religious conviction.
- c. An exemption system cannot accommodate some religious adherents, but not others, based on the degree to which a decision-maker grants solicitude to a particular adherent’s belief system.
- d. The only legitimate functions of a meeting regarding a requested accommodation are (1) to determine whether the employee *sincerely believes* that his sincere beliefs are religious in nature or (2) to have an “interactive dialogue” regarding alternative accommodations.
- e. Because the NBA’s rejection of plaintiffs’ applications for religious exemptions had no objective basis in logic, they represent arbitrary and capricious determinations that must be vetted for illicit prejudices, including racial discrimination, age discrimination, and personal vendettas.

131. Throughout this entire process, defendants manifested actual hostility toward plaintiffs and toward all others espousing the same particular religious belief – which constitutes a sizable minority of Americans. *See* Deepa Shivaram, *1 in 10 Americans say the COVID-19 vaccine*

conflicts with their religious beliefs (NPR December 9, 2021) (<https://www.npr.org/2021/12/09/1062655300/survey-religion-vaccine-hesitancy-exemptions>).

132. Discrimination can be inferred from the NBA's statements and conduct, including:

- a. The policy itself.
- b. The pandemic-era climate of hostility towards religious abstainers from Covid-19 "vaccines," especially in New York.
- c. Statements made by Adam Silver and other top NBA officials regarding "vaccination" status and compliance with "vaccine" mandates.
- d. The hostile interrogation by Neal Stern ("Stern"), Senior Vice President and Assistant General Counsel, and Melissa Dean ("Dean"), Assistant Vice President and Senior Counsel for Employment & Benefits.
- e. The sparse, illegitimate, and clearly pretextual reasons for the NBA's denial of plaintiffs' applications for religious exemptions.
- f. The granting of religious exemptions to another on-court official who applied for similar reasons.
- g. The NBA's continued persecution of plaintiffs for failing to obtain a Covid-19 "vaccine" long after the mandate became obviously moot.

133. Mark, Ken, and Jason were injured by the NBA's enactment of the discriminatory inoculation mandate and were further victimized by the organization's zealous enforcement of this discriminatory policy. Had the NBA not taken upon itself to force faith-based conscientious objectors to adhere to secular norms, none of plaintiffs' complained-

of injuries would have manifested.

134. The wrongful denial of their requested accommodations was also a but-for cause of plaintiffs' injuries. Had the NBA not withheld from plaintiffs their requested religious accommodation, Mark, Kenny, and Jason would still be employed as NBA officials. Instead, as a direct and proximate consequence of the NBA's decision to deny their requested accommodation, these longtime employees were suspended and fired for refusing to compromise their religious beliefs.
135. Retaliation can be inferred from the NBA's failure to reverse its baseless policy during the 2021-2022 season, from its continued penalization of Mark, Kenny, and Jason even after it had actual knowledge that there was no valid reason to do so, from its failure to reinstate plaintiffs for the 2022-2023 season (*after* the inoculation mandate was lifted), and from all affirmative adverse employment actions that occurred after the "vaccine" mandate became moot. This includes Jason's termination on May 9, 2022, and Mark and Kenny's termination on September 1, 2022.
136. In sum: Plaintiffs were persecuted. They were suspended without pay, barred from doing important aspects of their profession, and ultimately terminated from employment.
137. Consequently, plaintiffs lost their primary source of income and benefits. They also suffered reputational damages, experienced emotional trauma and distress, were deprived of fundamental rights, were subjected to discrimination, and were effectively barred from pursuing their profession.
138. Plaintiffs have obtained a right to sue from the U.S. Equal Employment Opportunity Commission ("EEOC").
 - a. Mark Ayotte received a right to sue on September 22, 2022.

- b. Kenny Mauer received a right to sue on September 26, 2022.
- c. Jason Phillips received a right to sue on October 21, 2022.

SECOND CAUSE OF ACTION

New York State Human Rights Law (NYSHRL)

139. Plaintiffs repeat and re-allege the foregoing allegations contained in the preceding paragraphs as if fully set forth herein.
140. Plaintiffs are protected by New York State Executive Law § 296 (the “New York State Human Rights Law” or “NYSHRL”) because they worked in New York State and the discrimination they experienced had an impact in the jurisdiction.
141. The NBA was Plaintiffs’ “employer” for purposes of NYSHRL.
142. The elements of a *prima facie* cause of action for discrimination under NYSHRL are substantially similar to those of Title VII. Thus, because the NBA’s discrimination and retaliation violates federal law, it necessarily violates NYSHRL. However, NYSHRL is more broadly protective of employees than federal law and offers more comprehensive non-economic damages than federal law.
143. Plaintiffs Mark Ayotte, Kenny Mauer, and Jason Phillips were highly regarded NBA officials with over seventy years of combined experience. These longtime employees would not have been fired but for their failure to comply with the inoculation mandates.
144. Plaintiffs are religious Christians who share a common religious belief: the belief that human life is sacred from the moment of conception.

145. Plaintiffs sincerely believe that this faith-based conviction is at the heart of their conscientious objection to the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines.”
146. The NBA’s inoculation mandate was discriminatory: it was particularly targeted at individuals who, like plaintiffs, were “unvaccinated” for religious reasons and it was tailored with an eye toward forcing faith-based conscientious objectors to adhere to secular hygienic norms.
147. The NBA’s decision to withhold religious accommodations from plaintiffs must have been arbitrary and wrongful because plaintiffs *do* have sincere religious objections to the available Covid-19 shots and *should* have been granted the religious exemptions for which they were eligible.
148. The NBA’s words, actions, and inactions manifested actual animus against individuals who espoused a faith-based belief that life begins at conception or the belief that the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines” violate a religious taboo.
149. Because of their religious beliefs, plaintiffs were subjected to a hostile work environment, endured harassment, were suspended or otherwise barred from doing their job, and were ultimately terminated.
150. Consequently, plaintiffs lost their primary source of income and benefits. They also suffered reputational damages, experienced emotional trauma and distress, were deprived of fundamental rights, were subjected to discrimination, and were effectively barred from pursuing their profession.

THIRD CAUSE OF ACTION

New York City Human Rights Law (NYCHRL)

151. Plaintiffs repeat and re-allege the foregoing allegations contained in the preceding paragraphs as if fully set forth herein.
152. Plaintiffs are protected New York City Administrative Code § 8-107 (the “New York City Human Rights Law” or “NYCHRL”) because they worked in New York City and the discrimination they experienced had an impact in the jurisdiction.
153. The NBA was Plaintiffs’ “employer” for purposes of NYCHRL.
154. The elements of a *prima facie* cause of action for discrimination under NYCHRL are substantially similar to those of Title VII. Thus, because the NBA’s discrimination and retaliation violates federal law, it necessarily violates NYCHRL. However, NYCHRL is more broadly protective of employees than federal law and offers more comprehensive non-economic damages than federal law.
155. Plaintiffs Mark Ayotte, Kenny Mauer, and Jason Phillips were highly regarded NBA officials with over seventy years of combined experience. These longtime employees would not have been fired but for their failure to comply with the inoculation mandates.
156. Plaintiffs are religious Christians who share a common religious belief: the belief that human life is sacred from the moment of conception.
157. Plaintiffs sincerely believe that this faith-based conviction is at the heart of their conscientious objection to the Pfizer, Moderna, and Johnson & Johnson Covid-19 “vaccines.”
158. The NBA’s inoculation mandate was discriminatory: it was particularly targeted at individuals who, like plaintiffs, were “unvaccinated” for religious reasons and it was tailored with an eye toward forcing faith-based conscientious objectors to adhere to secular

hygienic norms.

159. The NBA's decision to withhold religious accommodations from plaintiffs must have been arbitrary and wrongful because plaintiffs *do* have sincere religious objections to the available Covid-19 shots and *should* have been granted the religious exemptions for which they were eligible.
160. The NBA's words, actions, and inactions manifested actual animus against individuals who espoused a faith-based belief that life begins at conception or the belief that the Pfizer, Moderna, and Johnson & Johnson Covid-19 "vaccines" violate a dietary taboo.
161. Because of their religious beliefs, plaintiffs were subjected to a hostile work environment, endured harassment, were suspended or otherwise barred from doing their job, and were ultimately terminated.
162. Consequently, plaintiffs lost their primary source of income and benefits. They also suffered reputational damages, experienced emotional trauma and distress, were subjected to discrimination, and were effectively barred from pursuing their profession.

FOURTH CAUSE OF ACTION

**(Violation of Religious Liberty Under the First, Fifth and Fourteenth Amendments Pursuant to 42 USC §1983 - U.S. Constitution)
(Free Exercise)**

163. Plaintiffs hereby incorporate all of the allegations contained in the previous paragraphs of this complaint as though fully set forth herein.
164. Defendants, as a state actor, have imposed an unconstitutional burden on Plaintiffs' exercise of religion through their imposition of the vaccine mandate. The burden imposed on Plaintiffs' exercise of religious is substantial, in that the Defendants' mandate *inter alia*

affect Plaintiffs' ability to: maintain employment, seek future employment, abide by the principles, beliefs, morals, values, or practices of their religion, ostracizes Plaintiffs in society, discriminates against Plaintiffs because of their religion, and causes other economic and non-pecuniary injuries including the loss of promotional opportunity, benefits and insurance, and causes Plaintiffs to endure mental anguish and emotional distress concerning their ability to abide by their faith and further mental anguish and emotional distress related to fear of physical or mental injury that has been and continues to be directly and proximately caused by the Defendants' mandate.

165. The mandate is not narrowly tailored to meet a compelling interest.

166. As alleged above, there were less restrictive alternatives available to the Defendants to achieve the aims of safety.

167. Accordingly, under the First, Fifth and Fourteenth Amendments, Plaintiffs seek all relief available under the law.

FIFTH CAUSE OF ACTION
(Violation of the Religious Freedom and Restoration Act)

168. Plaintiffs repeat and re-allege the foregoing allegations contained in the preceding paragraphs as if fully set forth herein.

169. Defendants are a state actor, entwined with the government and doing the work of the federal government.

170. In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., which provides a statutory right to challenge substantial burdens on

religious exercise. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Congress found that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2). “RFRA was designed to provide very broad protection for religious liberty” and it reaches “far beyond what [...] is constitutionally required” by the First Amendment. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014). RFRA requires that the federal government provide exceptions or accommodations to people whose religious practices are unduly burdened by federal law or policy. See *Gonzales*, 546 U.S. 418; *Hobby Lobby*, 573 U.S. 682.⁴²

⁴² The Congressional Research Service issued a CSR Legal Sidebar, prepared for Members of and Committees of Congress, entitled COVID-19 Vaccination Requirements: Potential Constraints on Employer Mandates Under Federal Law, in which it discussed the application of RFRA:

Considerations Under the Religious Freedom Restoration Act and Other Laws

Under the federal laws discussed above, if an employer cannot reasonably accommodate a worker’s disability or religious practice, the employer may exclude the employee from the workplace. But before terminating an unvaccinated worker, employers must consider other potential employee protections.

The Religious Freedom Restoration Act (RFRA) prohibits the federal government and other covered entities like the District of Columbia and Puerto Rico from “substantially burden[ing]” a person’s exercise of religion except in limited circumstances. RFRA authorizes a person “whose religious exercise has been burdened in violation” of the statute to sue the government. In such an action, the government may need to show that the burden imposed furthers a “compelling governmental interest” and is “the least restrictive means” of furthering that interest. RFRA’s standard is thus more rigorous than Title VII’s religious accommodation standard, for which the touchstone is reasonableness. (RFRA also provides more robust protections from application of facially neutral laws and policies than the First Amendment’s Free Exercise Clause, which the Supreme Court has construed as not normally providing a basis for noncompliance with generally applicable laws and policies. However, the scope of that Clause’s protections is currently the subject of a pending Supreme Court case.) Many states have adopted their own versions of RFRA.

RFRA could apply in the context of workplace COVID-19 vaccination in two ways. First, if the federal government or a covered entity as a regulator passes a law or adopts a rule mandating vaccination for certain public or private employees, employees with religious objections may have a cause of action Congressional Research Service 6 against the government under RFRA. (RFRA provides that new federal statutes must “explicitly exclude[.]” RFRA’s application if Congress does not want RFRA to apply to that law.) Likewise, if the law or rule imposes vaccination obligations on private employers, employers with religious objections may also have a RFRA claim. Second, if the federal government or a covered entity as an employer adopts its own policy requiring its employees to be

171. RFRA provides that the federal government may not “substantially burden a person’s exercise of religion,” even by “rule[s] of general applicability” except by using “the least restrictive means” to further a “compelling governmental interest.” 42 U.S.C. § 2000bb-1. This statutory provision is intended to reinstate the “Sherbert Test,” overturned in *Smith*, 494 U.S. 872 (1990), as a statutory right. *See* 42 U.S.C. § 2000bb(b) (“The purposes of this Act are [...] to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and [...] to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).

172. RFRA applies to “all [f]ederal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of [RFRA],” except for federal statutes “adopted after [the enactment of RFRA]” which “explicitly exclude[] such

vaccinated, employees with religious objections could bring a RFRA claim against their government employer—although some courts might limit their remedy to Title VII. Federal appellate courts have split on whether Title VII provides the “exclusive” remedy for employees seeking religious accommodations from their government employers, or whether plaintiffs can bring separate claims under RFRA and Title VII. The Supreme Court has not yet opined on RFRA’s relationship with Title VII, but in *Bostock v. Clayton County*, the Court recently posited that “[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”

Assuming that an employee in an RFRA action were to demonstrate a “substantial burden” on the employee’s religious exercise, cases involving other compulsory vaccination programs suggest strong governmental interests behind immunization efforts against infectious diseases. However, applying RFRA in the context of a COVID-19 gathering restriction in the District of Columbia, a federal district court cautioned that a government’s “generalized interests” in “combating the COVID-19 pandemic” may not rise to the level of “compelling” under RFRA unless the government can show a compelling reason to apply its policy to “the particular claimant whose sincere exercise of religion is being substantially burdened.” Moreover, whether a particular law or policy is the “least restrictive means” of furthering public health-related interests likely depends on the particulars of the law or policy and any exemptions or accommodations.

April J. Anderson and Victoria L. Killion, COVID-19 Vaccination Requirements: Potential Constraints on Employer Mandates Under Federal Law, Feb. 10, 2021, <https://crsreports.congress.gov/product/pdf/LSB/LSB10573>.

application by reference to RFRA.” 42 USCS § 2000bb-3.

173. There are no laws enacted that apply here that explicitly exclude their application by reference to RFRA.

174. RFRA relief is available to anyone “whose religious exercise has been burdened in violation of [RFRA].” 42 U.S.C. § 2000bb-1(c).

175. Religious freedom is one of the foundational principles of our nation. The familiar words of the First Amendment to the U.S. Constitution are: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

176. To help safeguard that freedom, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). The RFRA provides a statutory right to challenge burdens that the federal government places on religious liberty. RFRA requires that the federal government provide accommodations including changes to rules to people whose religious practices are unduly burdened by a federal law or policy.

177. Religious exercise includes belief, profession, and “the performance of (or abstention from) physical acts [...] engaged in for religious reasons. *Hobby Lobby*, 573 U.S. at 710 (internal quotations omitted).

178. Plaintiffs’ beliefs about the Covid-19 vaccination and their objections to it set forth in this complaint are religious in nature.

179. Plaintiffs’ beliefs are sincerely held.

180. Plaintiffs were terminated from their lifetime careers because of their religious beliefs.

181. Forcing Plaintiffs to choose between continuation of their employment and a violation of their religious beliefs in order to retain their livelihoods imposes a substantial burden on

Plaintiffs' ability to conduct themselves in accordance with their sincerely held religious beliefs.

182. Accordingly, under RFRA the Plaintiffs seek all relief available under the law.

WHEREFORE, Plaintiffs respectfully pray that this Court grant the following relief against Defendants:

A. Enter judgment on the First Cause of Action declaring that Defendants have violated Title VII of the Civil Rights Act of 1964; declare that Defendants had actual and constructive knowledge that violations of Title VII were occurring; declare that Defendants' violations of Title VII were willful; award Plaintiffs front and back pay; award Plaintiffs compensatory damages, including but not limited to damages for reputational damages and for emotional pain and suffering; award Plaintiffs punitive damages; award Plaintiffs pre- and post-judgment interest; award Plaintiffs reasonable attorneys' fees and costs; and award such other and further relief as the Court deems just and proper.

B. Enter judgment on the Second Cause of Action declaring that Defendants have violated New York State Human Rights Law (NYSHRL); declare that Defendants had actual and constructive knowledge that violations of NYSHRL were occurring; declare that Defendants' violations of NYSHRL were willful; award Plaintiffs front and back pay; award Plaintiffs compensatory damages, including but not limited to damages for reputational damages and for emotional pain and suffering; award Plaintiffs punitive damages; award Plaintiffs pre- and post-judgment interest; award Plaintiffs reasonable attorneys' fees and costs; and award such other and further relief as the Court deems just and proper.

C. Enter judgment on the Third Cause of Action declaring that Defendants have

violated New York City Human Rights Law (NYCHRL); declare that Defendants had actual and constructive knowledge that violations of NYCHRL were occurring; declare that Defendants' violations of NYCHRL were willful; award Plaintiffs front and back pay; award Plaintiffs compensatory damages, including but not limited to damages for reputational damages and for emotional pain and suffering; award Plaintiffs punitive damages; award Plaintiffs pre- and post-judgment interest; award Plaintiffs reasonable attorneys' fees and costs; and award such other and further relief as the Court deems just and proper.

D. Enter judgment on the Fourth Cause of Action declaring that Defendants have violated the U.S. Constitution; declare that Defendants had actual and constructive knowledge that violations of the U.S. Constitution were occurring; declare that Defendants' violations of the U.S. Constitution were willful; and award Plaintiffs all relief available under the law.

E. Enter judgment on the Fifth Cause of Action declaring that Defendants have violated the Religious Freedom and Restoration Act; declare that Defendants had actual and constructive knowledge that violations of the Religious Freedom and Restoration Act were occurring; declare that Defendants' violations of the Religious Freedom and Restoration Act were willful; and award Plaintiffs all relief available under the law.

JURY DEMAND

Plaintiffs demands a trial by jury on all issues so triable.

Dated: March 14, 2023

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