

LIBERTY COUNSEL



DISTRICT OF COLUMBIA
109 Second Street NE
Washington, DC 20002
Tel 202-289-1776
Fax 407-875-0770
LC.org

FLORIDA
PO Box 540774
Orlando, FL 32854
Tel 407-875-1776
Fax 407-875-0770

VIRGINIA
PO Box 11108
Lynchburg, VA 24506
Tel 407-875-1776
Fax 407-875-0770
Liberty@LC.org

REPLY TO FLORIDA

August 18, 2021

VIA EMAIL

Janet T. Mills
Governor
State of Maine
1 State House Station
Augusta, ME 04333
Phone: 207-875-3531
Janet.T.Mills@maine.gov

Nirav D. Shah
Director, Department of Health and Human Services
Maine Center for Disease Control and Prevention
11 State House Station
Augusta, ME 04333
Phone: (207) 287-5177
nirav.shah@maine.gov

Jeanne M. Lambrew
Commissioner
Department of Health and Human Services
11 State House Station
Augusta, ME 04333
Phone: (207) 287-4223
Email: jeanne.m.lambrew@maine.gov

RE: Unlawful Attempt to Remove Religious Exemptions and Accommodations from State's Mandatory COVID-19 Vaccine Policy

THIS IS A LEGAL DEMAND LETTER. YOUR PROMPT RESPONSE IS REQUIRED ON OR BEFORE FRIDAY, AUGUST 20, 2021 AT 5:00 P.M. TO AVOID A LAWSUIT

Dear Governor Mills, Director Shah, and Commissioner Lambrew:

As you know, Liberty Counsel is a national non-profit litigation, education and public policy organization with an emphasis on First Amendment liberties, and a particular focus on religious freedom and the sanctity of human life. Liberty Counsel has engaged in extensive litigation in the last year regarding civil rights violations ostensibly justified by "COVID-19," and has had great success holding both government entities and private actors accountable. *See, e.g., Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (permanent injunction granted and \$1,350,000 in attorney's fees awarded in *Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-06414, C.D. Cal., May 17, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Maryville Baptist*

Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020). In fact, as you are aware, Liberty Counsel is currently representing Calvary Chapel of Bangor in its lawsuit against Governor Mills for her unconstitutional, unconscionable, and discriminatory restrictions on religious worship services.

I write on behalf of numerous doctors, nurses, medical professionals, and other health care workers who have been forced to choose between the exercise of their sincerely held religious beliefs and feeding their families. No individual in Maine should be forced into such an unconscionable decision. On August 12, 2021, Governor Mills announced that Maine will now require health care workers to accept or receive one of the three, currently available COVID-19 vaccines in order to remain employed in the healthcare profession. *See* Office of Governor Janet Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021), <https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october> (last visited Aug. 17, 2021) ((hereinafter “Mandatory COVID-19 Vaccination Policy”). The Mandatory COVID-19 Vaccination Policy defines health care workers to include “any individual employed by a hospital, multi-level health care facility, home health agency, nursing facility, residential care facility, and intermediate care facility for individuals with intellectual disabilities that is licensed by the State of Maine.” *Id.* In addition, the Mandatory COVID-19 Vaccination Policy includes emergency medical service organizations and dentists to accept or receive the mandatory shot.

These health care workers that are now subject to a mandatory vaccine policy were also ostensibly and unlawfully stripped of their rights to request a religious exemption and accommodation from the Mandatory COVID-19 Vaccination Policy. On April 14, 2021, Dr. Shah and the Maine Center for Disease Control and Prevention (“MCDC”) amended 10-144 C.M.R. Ch. 264 to eliminate a religious exemption from the Policy. The only exemptions Maine now lists as available to health care workers are those outlined in 22 M.R.S. §802(4-B), which purports to exempt only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption. Under the prior version of the rule, 10-144 C.M.R. Ch. 264, §3-B provided that a health care worker could be exempt from mandatory immunizations if the “employee states in writing an opposition to immunization because of a sincerely held religious belief.” *Id.* In fact, as acknowledged by MCDC, Maine purported to remove the religious exemption to mandatory immunizations only earlier this month. *See* Division of Disease Surveillance, *Maine Vaccine Exemption Law Change 2021*, <https://www.maine.gov/dhhs/mecdc/infectious-disease/immunization/maine-vaccine-exemption-law-changes.shtml> (last visited Aug. 17, 2021) (“The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization.”).

It has been reported to us that, following the above developments and guidance from Maine, a number of communications have taken place that purport to inform health care workers in Maine that no religious exemptions should be submitted because health care workers are not entitled to such exemptions for their sincerely held religious beliefs. In fact, the health care workers

who have contacted us have been told by their employers, following Maine's guidance, that exemptions and accommodations for sincerely held religious objections to the COVID-19 Vaccination Policy will not be granted, or in some instances, even considered.

As you are undoubtedly aware, while Maine may choose not to provide certain religious exemptions in its state statutory scheme under some circumstances, virtually every employee in Maine – including the health care workers who have been subjected to the Mandatory COVID-19 Vaccination Policy – are protected by Title VII of the Civil Rights Act, which does provide for religious exemptions and accommodations, and mandates that employers provide them.

Maine cannot override federal law, or the federal Constitution. Maine's purported guidance and attempts to remove federal protections and even religious exemptions available under federal law is causing direct and irreparable harm.

We ask that you advise us and the public by close of business on this Friday, August 20, 2021, that Maine will honor all federal protections and entitlements to accommodation for sincerely held religious beliefs. Your failure to timely and positively provide this assurance will indicate to us that Maine is, in fact, continuing in its attempt to nullify and override legal protections afforded to religious objectors under federal law and the United States Constitution. In that event, we will proceed with an emergency legal action against Maine and other entities to protect the fundamental rights of Maine's citizenry.

- A. Maine's Attempt to Nullify, Override, Dissuade, Discourage, or Suppress Requests for Religious Accommodations and Exemptions is Plainly Inconsistent with Title VII; Denying Merited Religious Exemptions and Accommodations Would Violate Title VII; and Maine is Not Permitted to Inquire into Correctness of an Employee's Sincerely Held Religious Beliefs.**

As you are undoubtedly aware, Title VII of the Civil Rights Act prohibits every employer in Maine from discriminating against its employees on the basis of their sincerely held religious beliefs. *See* 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin"). *See also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (same). And, **health care workers who are employed by the State of Maine itself are also afforded the same protection under Title VII.** *See* 42 U.S.C. §2000e(f); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (noting that States are also required to abide by Title VII's mandates in relation to their employees). Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief." 42 U.S.C. §2000e(j). Put simply, an employer violates Title VII if it makes employment decisions related to an employee based solely upon that individual's sincerely held religious beliefs. *Abercrombie &*

Fitch, 575 U.S. at 773 (“An employer may not make an applicant’s religious practices, confirmed or otherwise, a factor in employment decisions.” (emphasis added)).

As you also must know, **federal law and the United States’ Constitution are supreme over any Maine statute or edict, and Maine cannot override, nullify, or violate federal law.** See U.S. Const. Art. VI, cl. 2 (“**This Constitution, and the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (emphasis added)). “**This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures.**” *Haywood v. Drown*, 556 U.S. 729, 734 (2009) (emphasis added). In fact, as the Supreme Court has made clear,

It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law.

Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 712-13 (1985) (emphasis added) (cleaned up). **Thus, as you are undoubtedly aware, Maine’s constant refrain to its health care workers that there is no religious exemption to the Mandatory COVID-19 Vaccination Policy is legally incorrect. Federal law provides protection for every health care worker in Maine with a religious objection, and requires accommodation from such mandates. Maine simply has no authority to override this federal law.**

While there may be some who consider COVID-19 vaccines to be acceptable as a matter of religious doctrine or belief, no employer in Maine – including the State – is permitted to determine which religious adherent has a correct understanding of religious doctrine or whether a health care worker’s sincerely held religious beliefs are shared broadly among members of her faith. As the Supreme Court has recognized, an employee’s “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). See also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (same). Additionally, though membership in or adherence to the tenets of an organized religious is plainly sufficient to provide protection for an individual’s sincerely held religious beliefs, it is not a necessary precondition. See *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829, 834 (1989) (“**Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection [for sincerely held religious beliefs], one must be responding to the commands of a particular religious organization.**” (emphasis added)). See also *Office of Foreign Assets Control v. Voices in the*

Wilderness, 329 F. Supp. 2d 71, 81 (D.D.C. 2004) (noting that the law provides protection for “sincerely held religious beliefs,” “not just tenets of organized religion”).

In fact, the law provides protection for sincerely held religious beliefs even when some members of the same religious organization, sect, or denomination disagree with the beliefs espoused by the individual. That some individuals may have sincerely held religious beliefs that differ from those espoused by health care providers with a sincere religious objection to the three currently available COVID-19 vaccines is irrelevant to whether those sincerely held religious beliefs are entitled to protection under Title VII. Indeed,

[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences . . . and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.”

450 U.S. at 715-16 (emphasis added).

Moreover, the denial of an employee’s request for a religious accommodation and exemption based upon the views of other individuals who do not share their sincere religious beliefs is unlawful. In fact, it is legally irrelevant what other individuals think or religiously believe. Once an employee has articulated her sincerely held religious objections to acceptance or receipt of the currently available COVID-19 vaccines, the proper inquiry is at its end.

Indisputably, 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. There is no question about the accuracy of this determination. The North Dakota Department of Health, in its literature for those considering one of the three, currently available COVID-19 vaccines, notes the following: “[t]he non-replicating viral vector vaccine produced by Johnson & Johnson **did require the use of fetal cell cultures, specifically PER.C6, in order to produce and manufacture the vaccine.**” See North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), available at https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (bold added).

The Louisiana Department of Health likewise confirms that the Johnson & Johnson COVID-19 vaccine, which used PER.C6 fetal cell line, “is a retinal cell line that was **isolated from a terminated fetus in 1985.**” Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 12, 2020), available at

https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf (bold added).

The same is true of the Moderna and Pfizer/BioNTech mRNA vaccines. The Louisiana Department of Health's publications again confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 12, 2020), available at https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf. The North Dakota Department of Health, in its handout literature on COVID-19 vaccines, notes: "[e]arly in the development of mRNA vaccine technology, fetal cells were used for 'proof of concept' (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein) or to characterize the SARS-CoV-2 spike protein." See North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), available at https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (last visited Aug. 10, 2021) (emphasis added).

Because all three of the currently available COVID-19 vaccines are developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, the sincerely held religious beliefs of the employees we represent compel them to abstain from accepting or injecting any of these products into their body, regardless of the perceived benefit or rationale. Thus, while there may be some faith leaders and other adherents whose understanding of Scripture is different, and who may be willing to accept one of the three currently available COVID-19 vaccines despite their connection with aborted fetal cell lines, official recognition of a sincerely held religious objection to acceptance or receipt of a vaccine that is inextricably intertwined with aborted fetal cell lines is unnecessary to warrant protection.

In sum, denying a health care worker's request for a religious accommodation based upon the beliefs of others is unlawful, and refusing to grant a health care worker a religious accommodation at all is plainly a violation of Title VII, regardless of the MCDC rule or any other provision of Maine law.

B. The First Amendment to the United States Constitution Protects Maine Healthcare Workers Employed by the State of Maine.

Further, all healthcare workers in the State of Maine that are employed by the State also have protection for the exercise of their sincerely held religious beliefs under the First Amendment. It is beyond cavil that government employees do not shed their constitutional rights upon entering government employment. See *Martin v. Lauer*, 686 F.2d 24, 31(D.C. Cir. 1982) ("government employees do not shed their first amendment rights on assuming public responsibilities" (emphasis added)). Indeed, "people do not give up their free-exercise or free-speech rights when they become government employees." *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir.

2004) (emphasis added). *See also Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 675 (1996) (“The First Amendment’s guarantee . . . protects government employees.”); *Putnam v. Regional Sch. Unit 50*, No. 1:14-cv-154-JAW, 2015 WL 5440783, *14 (D. Me. Sept. 15, 2015) (“This guarantee applied to government employees as well, who should not ‘suffer reprisal from a government official . . . because of the possible chilling effect against the free exercise of constitutional rights.’” Quoting *Rosaura Bldg. Corp. v. Mun. of Mayaguez*, 778 F.3d 55, 66 (1st Cir. 2015)).

As the Supreme Court made clear last year, “**even in a pandemic, the Constitution cannot be put away and forgotten.**” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (emphasis added). Moreover, the Supreme Court has further noted that it will not “abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty.” *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J.). Indeed, “[e]ven in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution.” *Id.* (emphasis added).

Every healthcare worker employed by the State of Maine has the First Amendment right to the free exercise of their religion, including whether to accept a forcible injection of a vaccine. Neither the flick of the Governor’s pen, nor a purported public health emergency cannot override those cherished constitutional liberties.

C. **Maine Law Prohibits Discrimination on the Basis of An Employee’s Sincerely Held Religious Beliefs.**

The Maine Human Rights Act also provides statutory protection for the health care workers with sincerely held religious objections to the currently available COVID-19 vaccines. Indeed, the Maine Human Rights Act states that “**it is declared to be the policy of this State . . . to prevent discrimination in employment**, housing or access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, **religion**, ancestry or national origin.” 5 M.R.S.A. §4552 (emphasis added). Because of that explicit statement of Maine’s public policy, the Maine Human Rights Act further provides that “[t]he opportunity for an individual to secure employment without discrimination because of race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, age, ancestry, national origin or familial status is recognized as and declared to be a civil right.” 5 M.R.S.A. §4571. And, as with Title VII, “[i]t is **unlawful employment discrimination, in violation of this Act . . . For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . religion.**” 5 M.R.S.A. §4572(1) (emphasis added). The State, too, is subject to the provisions of the Human Rights Act because it applies to any public or private entity. 5 M.R.S.A. §4553(1).

Because the health care workers we represent have a sincerely held religious objections to the currently available COVID-19 vaccines and because they are unable to comply with Maine’s Mandatory COVID-19 Vaccination Policy as it conflicts with their sincerely held religious beliefs,

all employers in Maine – including the State – are mandated to accommodate these religious beliefs under Maine law. As with Title VII (and the First Amendment for state employees) discussed above, an employer’s failure to accommodate a health care worker’s sincerely held religious objections to the COVID-19 vaccines is unlawful and discriminatory.

D. Maine Law Protects Every Individual’s Right to Refuse Unwanted Medical Treatment.

Maine law provides a long-established common law right to all individuals to refuse unwanted medical care. *See In re Gardner*, 534 A.2d 947, 951 (Me. 1987) (“we have continued to recognize the validity of a battery analysis, with its focus on the patient’s right to be free from nonconsensual invasions of his bodily integrity”); *Id.* (“Maine’s law of informed consent supports the right of an individual to decline medical care.”); *Downer v. Veilleux*, 322 A.2d 82, 91 (Me. 1974) (“**every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences**” (emphasis added)).

As the California Supreme Court noted,

Anglo American law starts with the premise of thorough-going self-determination. It follows that **each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment.** A doctor might well believe that an operation or form of treatment is desirable or necessary, but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception.

Thor v. Superior Ct., 855 P.2d 375, 381-82 (Cal. 1993) (emphasis added).

Put simply, “if the patient’s informed consent is to have any meaning at all, **it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole.**” *Thor*, 855 P.2d at 386. By mandating that all Maine health care workers submit to one of the COVID-19 vaccines as a condition of retaining their ability to feed their families and earn a living, Maine runs roughshod over this basic protection. If an employee decides for herself that she desires to abstain from forcible injunction of a COVID-19 vaccine that violates her sincerely held religious beliefs, that is her basic right. Put simply, “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.” *Washington v. Harper*, 494 U.S. 210, 229 (1990) (emphasis added). The Governor’s Mandatory COVID-19 Vaccination Policy blatantly ignores this well-established principle of bodily integrity and personal autonomy.

E. The Emergency Use Authorization Statute Prohibits Mandating the COVID-19 Vaccine.

The United States Code provides that

subject to the provisions of this section, the Secretary (of the Department of Health and Human Services) may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug, device, or biological product intended for use in an actual or potential emergency (referred to in this section as an “emergency use.”)

21 U.S.C. §360bbb-3(a)(1) (emphasis added) (“EUA Statute”). Part of the explicit statutory conditions for an EUA under the EUA Statute, the statute mandates that all individuals to whom the product approved for Emergency Use may be administered be given the option to accept or refuse administration of the product. *See* 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III) (requiring that “individual to whom the product is administered are informed . . . **of the option to accept or refuse administration of the product**” (emphasis added)). The only currently available COVID-19 vaccines (Janssen/Johnson & Johnson, Moderna, and Pfizer/BioNTech) are only authorized for use under the EUA Statute and have no general approval under the United States Code. Thus, the administration of such vaccines cannot be mandatory under the plain text of the EUA Statute.

Even the statutorily required Fact Sheets for each of the EUA-approved COVID-19 vaccines demonstrate that individuals cannot be compelled to accept or receive the vaccine. *See* Modern, FACT SHEET FOR RECIPIENTS AND CAREGIVERS (June 24, 2021), <https://www.fda.gov/media/144638/download> (“**It is your choice to receive or not to receive the Moderna COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care.**” (emphasis added)); Pfizer-BioNTech, FACT SHEET FOR RECIPIENT AND CAREGIVERS (June 25, 2021), <https://www.fda.gov/media/144414/download> (“**It is your choice to receive or not to receive the Pfizer-BioNTech COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care.**” (emphasis added)); Janssen, FACT SHEET FOR RECIPIENTS AND CAREGIVERS (July 8, 2021), <https://www.fda.gov/media/146305/download> (“**It is your choice to receive or not to receive the Janssen COVID-19 Vaccine. Should you decide not to receive it, it will not change your standard medical care.**” (emphasis added)).

Thus, under the EUA Statute and as recognized by the manufacturers of the currently available COVID-19 vaccines, individuals have the option to accept or refuse administration of the product, and it cannot be mandatory. Maine’s current policy ignores this statutory protection and is therefore unlawful.

CONCLUSION

We await your prompt confirmation, on or before close of business on this Friday, August 20, 2021, that Maine will no longer purport to nullify or override the right of Maine citizens to seek religious exemptions from vaccination requirements under federal and state law. Absent this confirmation, we will understand that Maine is continuing in its attempt to nullify and override legal protections afforded to religious objectors, and we will proceed with an emergency legal action against Maine and other entities to protect the fundamental rights of Maine's citizenry. We will seek emergency injunctive relief and all other remedies available under law.

Sincerely,



Daniel J. Schmid[†]

cc:

Christopher C. Taub, Chief Deputy Attorney General, State of Maine

[†] Licensed in Virginia