

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
Fort Myers Division

**Ashley Leigh, Erik Berg,  
and James Griffith,**

Plaintiffs;

v.

**Artis-Naples, Inc.,**

Defendant.

Case No.: 2:22-cv-00606-JLB-KCD  
Judge: Hon. John L. Badalamenti

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION  
AND SUPPORTING MEMORANDUM OF LAW**

**Time Sensitive: Relief Requested Within 14 Days**

Pursuant to Fed. R. Civ. P. 65(a) and L.R. 3.01(e), Plaintiffs Ashley Leigh, Erik Berg, and James Griffith ("Plaintiffs") respectfully move the Court for a preliminary injunction prohibiting Defendant Artis-Naples, Inc., together with its officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with them, from replacing Plaintiffs' unique, lifelong, once-in-a-lifetime positions as tenured musicians of the Naples Philharmonic, or requiring Plaintiffs' immediate reinstatement, pending the outcome of this lawsuit. Plaintiffs' incorporated memorandum of law explains the grounds justifying this relief, as well as the time-sensitive nature of the relief requested.

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## INTRODUCTION AND TIME-SENSITIVE DESIGNATION

In this Title VII religious discrimination action, Defendant Artis-Naples wrongfully terminated Plaintiffs Ashley Leigh, Erik Berg, and James Griffith for refusing on religious grounds to comply with its draconian and unforgiving “no-exemption” COVID-19 vaccine mandate (the “Mandate”). Plaintiffs now move for a preliminary injunction to prohibit Artis-Naples from replacing their positions in the Naples Philharmonic orchestra for the pendency of this litigation, or, in the alternative, to immediately reinstate Plaintiffs.

Even though Artis-Naples failed to accommodate Plaintiffs’ religious objections to the Mandate, retaliated against them for requesting an accommodation, and ultimately terminated them, Plaintiffs seek reinstatement to their unique, once-in-a-lifetime orchestra positions, which they have collectively held for 82 years. But Artis-Naples is swiftly making other plans: It is now planning to permanently replace Plaintiffs’ long-held positions with musicians willing to comply with its discriminatory scheme. For example, Artis-Naples is holding multi-day auditions for Plaintiff Erik Berg’s position as Associate Principal Second Violin **beginning September 22, 2022**, and may extend a permanent contract to a replacement musician within a few days thereafter.<sup>1</sup> Moreover, the filing of this lawsuit is likely to cause Artis-Naples to move swiftly to hold auditions and to also permanently replace Plaintiffs Ashley Leigh and

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<sup>1</sup> Flyer, Artis-Naples, Associate Principal Second Violin (2022), <https://artisnaples.org/uploads/files/resources/documents/naples-philharmonic/2022/Violin.pdf>.

James Griffith. If Artis-Naples is allowed to permanently fill Plaintiffs' positions, then Plaintiffs may effectively be precluded from reinstatement in the likely event that they prevail on their claims. **Relief is therefore respectfully requested on a time-sensitive basis, within the next 14 days.**

Reinstatement is the preferred remedy under Title VII and furthers the statute's remedial policy of making victims whole. *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1526 (11th Cir. 1991). For Plaintiffs, who have committed their entire musical careers to Artis-Naples and who have no other viable options for their careers, reinstatement is the only way to be truly made whole. Plaintiffs thus seek immediate injunctive relief to halt Artis-Naples from replacing their positions; or in the alternative, they seek an injunction ordering reinstatement as this litigation proceeds.

Plaintiffs meet the requirements for injunctive relief. *First*, they are substantially likely to succeed on the merits of their Title VII failure-to-accommodate claim. Plaintiffs hold sincere religious beliefs that conflicted with the Mandate, they informed Artis-Naples of their belief and the conflict, and they were discharged for failing to comply with the Mandate. Artis-Naples cannot meet its burden of showing that it was unable to reasonably accommodate Plaintiffs' religious objections without undue hardship, for a myriad reasons, including chiefly that the accommodations sought by Plaintiffs are actually *required by state law*, and, as a matter of law, *it cannot be an undue hardship for Artis-Naples to comply with the law* and public policy of the State of Florida. *Second*, Plaintiffs will suffer irreparable harm without an injunction. The harm caused

by Artis-Naples's replacing Plaintiffs' unique and long-held positions would impair the court's ability to grant an effective remedy following a decision on the merits. And monetary damages cannot replace Plaintiffs' once-in-a-lifetime career opportunity as full-time salaried musicians in a professional orchestra. Reinstatement is the only equitable remedy, which is why Artis-Naples's discriminatory replacement scheme must be stopped. *Third*, the balance of harms tips sharply Plaintiffs' favor. Artis-Naples would not be harmed by an injunction that would preserve the status quo and ensure that the Court may grant meaningful relief under Title VII. *Fourth*, an injunction is in the public interest, because it is always in the public's interest to vindicate federal civil rights.

## **BACKGROUND**

### **A. Artis-Naples's COVID-19 Vaccination Mandate.**

Defendant Artis-Naples is a nonprofit arts organization that operates the Naples Philharmonic, an ensemble of professional musicians in Naples, Florida. (Pls.' Verified Compl. ["V. Compl."] ¶ 2; Dkt. 1.) In July 2021, Artis-Naples announced that all staff and musicians would have to receive a COVID-19 vaccine and provide proof of vaccination by September 7, 2021. (*Id.* ¶ 51; Declaration of James Dallas ["Dallas Decl."] ¶ 13, attached as **Exhibit 1**) The Mandate came on the heels of a successful performance season in which the Naples Philharmonic safely played a full slate of in-person concerts with the musicians undergoing periodic testing, masking, and socially distanced seating. (V. Compl. ¶ 50; Dallas Decl. ¶ 10.)

When it announced the Mandate, Artis-Naples purported to offer employees

needing a medical or religious exemption the ability to “seek a reasonable accommodation.” (V. Compl. ¶ 57.) To that end, Artis-Naples set up an “Accommodation Review Committee” (the “Committee”). The initial committee was comprised of three Artis-Naples employees, including James Dallas, the orchestra personnel manager. (Dallas Decl. ¶ 14.) To obtain an “accommodation” from the Mandate, Naples Philharmonic musicians were required to complete a “Request for Accommodation form” and submit it to James Dallas by September 1, 2021. (V. Compl. ¶ 59.) As part of the review process, the Committee was supposed to engage in an “interactive process” with each applicant. (*Id.* ¶ 62.)

**B. Plaintiffs’ Religious Objections and Requests for Accommodations.**

Plaintiffs are three former Artis-Naples employees and longstanding musicians for the Naples Philharmonic. (V. Compl. ¶¶ 17–19.) Together, Plaintiffs have served Artis-Naples and the Naples Philharmonic for over 82 years. (*Id.*) Plaintiffs planned to retire from their musical careers as Naples Philharmonic players. (Declaration of Plaintiff Ashley Leigh [“Leigh Decl.”] ¶ 12, attached as **Exhibit 2**; Declaration of Plaintiff Erik Berg [“Berg Decl.”] ¶ 13 attached as **Exhibit 3**; Declaration of Plaintiff James Griffith [“Griffith Decl.”] ¶ 21, attached as **Exhibit 4**.)

As committed Christians, Plaintiffs have sincere religious objections to the COVID-19 vaccines, because each was developed using the cell lines of aborted babies. (V. Compl. ¶ 22.) Consistent with federal and state law, Plaintiffs brought their bona fide religious objections to Artis-Naples’s attention, and in good faith they formally requested a reasonable accommodation to the vaccine mandate. (*Id.* ¶ 82.) As they

made clear to Artis-Naples, *Plaintiffs were willing to comply with alternative safety measures such as regular testing, masking, and symptom monitoring.* (*Id.* ¶ 157.)

In September 2021, the initial three-person Committee reviewed and *granted* Plaintiffs' exemption requests. (Dallas Decl. ¶ 16.) But, unsatisfied with the Committee's decision, Artis-Naples decided that unvaccinated employees should be prohibited from working on campus. To further this illegitimate end, Artis-Naples appointed two new members to the Committee, including David Filner, Executive Vice President of Artistic Operations. (*Id.* ¶¶ 17, 21.) The purpose of these new appointments was to ensure that no on-site employee would receive an exemption to the Mandate, regardless of job, role, or function. (*Id.* ¶ 21.)

Voiding the determinations already made by the original committee, the new Committee led by Filner issued blanket, rubber-stamped denials of each previously approved applicant, including Plaintiffs, except for one. (V. Compl. ¶ 68; Dallas Decl. ¶ 24.)<sup>2</sup> Artis-Naples thus arbitrarily denied Plaintiffs' applications and their proposed accommodations of masking and regular testing without engaging in the required individualized, interactive process.

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<sup>2</sup> James Dallas was only Artis-Naples employee to receive an exemption to the Mandate. (Dallas Decl. ¶ 25.) Dallas sought a *medical* exemption and recused himself from the review process. (*Id.*) The Committee granted his request for a medical exemption but only on the condition that he work remotely. (*Id.*) Dallas initially agreed with the condition but weeks later resigned from Artis-Naples—where he worked for 38 years—out of protest of the Mandate. (*Id.* ¶ 28.)

**C. Artis-Naples’s Failure to Accommodate and Wrongful Termination of Plaintiffs.**

After Artis-Naples refused to accommodate Plaintiffs, it took adverse employment action against them. In October 2021, Artis-Naples placed Plaintiffs on involuntary leave with partial pay for the entire 2021-2022 concert season. (V. Compl. ¶ 93.)

Three weeks after Artis-Naples suspended Plaintiffs, Governor Ron DeSantis signed into law Florida Statute § 381.00317, which prohibits private employers from imposing a COVID-19 vaccination mandate unless they provide *automatic*, individual exemptions, including religious and periodic-testing exemptions, *to all who request them*. (V. Compl. ¶ 97.) Despite the law’s passage, Artis-Naples did not rescind or revise its no-exemption mandate. (*Id.* ¶ 90.) Instead, on December 1, 2021, Artis-Naples informed Plaintiffs that they remained suspended with partial pay indefinitely. (*Id.* ¶ 100.)

After months of silence, Artis-Naples finally gave Plaintiffs each a letter that gave three “options” going forward. (V. Compl. ¶¶ 101, 108.) One, Plaintiffs could receive the COVID-19 vaccine in violation of their religious beliefs and return to work in the 2022-23 season. Two, Plaintiffs could take another year leave of absence, completely unpaid, and then return to work in the 2023-24 season—but only if they accepted a COVID-19 vaccine in violation of their religious beliefs. Or three, Plaintiffs could resign from Artis-Naples effective June 30, 2022, and, so long as they signed a full release of liability, receive severance pay for one year. (*Id.* ¶ 108.) If Plaintiffs did

not accept any of these three options, then Artis-Naples indicated that it would terminate them as of June 30, 2022. (*Id.* ¶ 109.)

Hoping to keep their longtime jobs without sacrificing their religious beliefs, Plaintiffs each submitted two additional exemption requests, this time using the forms prescribed by Florida Statute § 381.00317: one for a religious exemption and one for a periodic testing exemption. (V. Compl. ¶¶ 100–111.) Under Florida law, these completed exemption statements “require[] the employer to allow the employee to opt-out of the employer’s COVID-19 vaccination mandate.” (*Id.* ¶ 112.) Through counsel, Plaintiffs also sent Artis-Naples a demand letter, requesting that it comply with the law. (*Id.* ¶ 115.)

But in reckless disregard of its Title VII obligations and in blatant violation of Section 381.00317, Artis-Naples doubled down on its discriminatory mandate and rejected Plaintiffs’ attempt for an amicable resolution. (V. Compl. ¶ 116.) On June 30, 2022, Artis-Naples unlawfully terminated Plaintiffs’ employment. Meanwhile, the Naples Philharmonic announced auditions for Plaintiff Erik Berg’s position as Associate Principal Second Violin, thus indicating Artis-Naples’s imminent intent to replace Plaintiffs’ positions. (*See* note 1, *supra*).

Plaintiffs then filed discrimination charges with the Equal Employment Opportunity Office (E.E.O.C.), and they received their right-to-sue letters. (V. Compl. ¶ 16.) They then commenced this action.

## LEGAL STANDARD

Title VII authorizes courts to preliminarily enjoin discriminatory employment practices or otherwise fashion equitable injunctive relief. *See* 42 U.S.C. § 2000e-5(g). A party seeking a preliminary injunction “must make four showings: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Otto v. City of Boca Raton*, 981 F.3d 854, 860 (11th Cir. 2020) (cleaned up).

## ARGUMENT

### **I. Injunctive relief is necessary both to ensure that Plaintiffs may be reinstated after prevailing in this litigation and to preserve the status quo.**

Victims of employment discrimination are “entitled to be ‘made whole.’” *E.E.O.C. v. Domino’s Pizza, Inc.*, 909 F. Supp. 1529, 1537 (M.D. Fla. 1995) (quoting *Weaver, supra*, 922 F.2d at 1526). Title VII provides that if the court determines that the employer “is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include ... *reinstatement* or hiring of employees....” 42 U.S.C. § 2000e-5(g)(1) (emphasis added). The Eleventh Circuit has long recognized that reinstatement is the preferred remedy and should be ordered in most circumstances. *E.g.*, *Weaver*, 922 F.2d at 1528; *Allen v. Autauga Cty. Bd. of Educ.*, 685 F.2d 1302, 1305 (11th Cir. 1982). That

is because reinstatement “offers the most likely means of making a plaintiff whole by allowing her to continue her career as if the discrimination had not occurred.” *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999).

Here, Artis-Naples’s imminent effort to replace Plaintiffs—as shown by its plan to hold auditions for Plaintiff Erik Berg’s position—threatens this Court’s ability to order reinstatement as a remedy. A preliminary injunction is therefore warranted to ensure that the Court may grant Plaintiffs full effective relief should they prevail. *Cf. Hicks v. Dothan City Bd. of Educ.*, 814 F. Supp. 1044, 1052 (M.D. Ala. 1993) (plaintiff may seek preliminary relief to preserve the availability of a position).

Conversely, allowing Artis-Naples to replace Plaintiffs’ positions would undermine Title VII’s purpose of providing make-whole relief to victims of employment discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).<sup>3</sup> Given the extraordinarily unique characteristics of the salaried orchestra musician—for example, the rarity of open full-time positions, the extremely competitive auditions, and the rigorous qualifications (which are fully explained in Argument Section III, *infra*, and in the Declarations of Plaintiffs submitted herewith)—only reinstatement would make Plaintiffs truly whole.

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<sup>3</sup> Theoretically, Plaintiffs could potentially be reinstated if they ultimately prevail, even if their positions are filled. But the Eleventh Circuit disfavors “bumping” a newly hired employee to reinstate a wronged Title VII plaintiff. *See Walters v. City of Atlanta*, 803 F.2d 1135, 1149 (11th Cir. 1986). In any event, an innocent third party, having beaten out approximately 200 other applicants for a coveted orchestra position, should not be forced to pay for Artis-Naples’s ongoing discriminatory policy. Instead, it would be more equitable for the Court to provide interim injunctive relief and ensure that Plaintiffs, if they prevail, can and will be made whole through reinstatement.

Indeed, to allow Artis-Naples to replace Plaintiffs would be to reward unlawful discrimination. If front pay were awarded in place of reinstatement, the very well-endowed Artis-Naples would absorb the financial consequences of its unlawful Mandate while its leadership still accomplishes its sinister objective of maintaining a discriminatory, “vaccinated-only” workplace, and purging Plaintiffs on account of their religious beliefs. Consequently, Plaintiffs “would win the battle, but lose the war.” *Smith v. City of New Smyrna Beach*, 2013 WL 12360760, at \*3 (M.D. Fla. June 21, 2013). “Such a result would be inequitable, and reinstatement is therefore necessary.” *Ibid*.

At bottom, the purpose of a preliminary injunction is to preserve the status quo until the court has an opportunity to render a meaningful decision on the merits. *See Haddad v. Arnold*, 784 F. Supp. 1284, 1295–96 (M.D. Fla. 2010). Here, an injunction either prohibiting Artis-Naples from replacing Plaintiffs’ positions pending this litigation or ordering Plaintiffs’ reinstatement would return the parties to “the last uncontested status quo.” *Pharm. Rsch. & Mfrs. of Am. v. Medows*, 184 F. Supp. 2d 1186, 1193 (N.D. Fla. 2001) (quoting *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). An injunction would thus ensure that the merits of Plaintiffs’ claim can be meaningfully adjudicated, or, if the Court finds that Artis-Naples is intentionally discriminating against Plaintiffs, fulfill Title VII’s direction that district courts may award preliminary relief “as may be appropriate” to immediately remedy the discrimination. 42 U.S.C. § 2000e-5(g)(1).

**II. Plaintiffs are substantially likely to succeed on the merits of their Title VII religious discrimination claim.**

**A. Plaintiffs have established a prima facie case that Artis-Naples failed to accommodate their sincerely held religious objections to the COVID-19 vaccines.**

Under Title VII, an employer may not “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 ... religion....” 42 U.S.C. § 2000e-2 (a)(1). Accordingly, “[a]n employer has a ‘statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship.’” *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977)).

To prevail on a failure-to-accommodate claim, Title VII plaintiffs must show that (1) they held a bona fide religious belief that conflicted with an employment requirement; (2) they informed their employer of that belief; and (3) they were discharged for failing to comply with the conflicting employment requirement. *See Dixon v. The Hallmark Companies, Inc.*, 627 F.3d 849, 855 (11th Cir. 2010). Once a plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate that it cannot “reasonably accommodate an employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” *Dixon*, 627 F.3d at 855 (cleaned up) (citing 42 U.S.C. § 2000e(j)).

Plaintiffs have established a prima facie case of religious discrimination under

Title VII. Plaintiffs have a bona fide religious belief: As a matter of conscience and biblical instruction, Plaintiffs cannot receive a pharmaceutical injection developed from aborted fetal cells. (V. Compl. ¶¶ 22.) And Artis-Naples’s employment requirement—namely, that all employees must receive a COVID-19 vaccine—conflicts with that religious belief. (*Id.* ¶ 30.) Plaintiffs informed Artis-Naples of their religious beliefs and the resulting conflict with the Mandate when they submitted their initial accommodation requests in August 2021. (*Id.* ¶¶ 31, 83.)

Artis-Naples failed to offer Plaintiffs a reasonable accommodation. A “reasonable accommodation” “eliminates the conflict between employment requirements and religious practices.” *Bailey v. Metro Ambulance Servs., Inc.*, 992 F.3d 1265, 1276 (11th Cir. 2021) (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986)). In this circuit, courts “evaluate offered accommodations on a case-by-case basis.” 992 F.3d at 1276 (citing *Beadle v. Hillsborough Cty. Sheriff’s Dep’t*, 29 F.3d 589, 592 (11th Cir. 1994)). In their requests, Plaintiffs proposed masking and regular testing as accommodation that would allow them “to perform the essential functions of [their] job.” *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000). After all, the Naples Philharmonic successfully performed the entire 2020-2021 entire concert year with masking, regular testing, and social distancing. (V. Compl. ¶ 50.)

Rather than engaging in an interactive process with Plaintiffs, the Committee led by David Filner denied Plaintiffs’ requests for a religious accommodation. (V. Compl. ¶ 86.) Artis-Naples then placed Plaintiffs on involuntary leave with partial pay for the rest of the 2021-2022 concert season. (*Id.* ¶ 93.) In April 2022, Plaintiffs

reiterated their religious objections to the Mandate and again requested a religious accommodation (along with a periodic testing exemption) using the forms proscribed by Section 381.00317. (*Id.* ¶¶ 110–111.) Under Florida law, Artis-Naples was *required* to grant Plaintiffs their requests. Fla. Stat. § 381.00317(1). But in reckless disregard of state and federal law, Artis-Naples again refused to accommodate Plaintiffs’ religious observances and practices. Instead, Artis-Naples terminated Plaintiffs’ employment effective June 30, 2022. (V. Compl. ¶ 117.) Plaintiffs were discharged for failing to comply with the religiously objectionable Mandate; therefore, they have established a *prima facie* case of Title VII religious discrimination.

**B. Artis-Naples cannot assert an “undue hardship” defense.**

Because Plaintiffs have made a *prima facie* showing of Title VII religious discrimination, the burden shifts to Artis-Naples to show that it would suffer “undue hardship” if it accommodated Plaintiffs’ religious inability to comply with the Mandate. *See Dixon*, 627 F.3d at 855; 42 U.S.C. § 2000e(j). As a matter of law, Artis-Naples cannot establish that granting a religious exemption from its COVID-19 vaccine mandate would cause “undue hardship on the conduct of [its] business.” 42 U.S.C. § 2000e(j). Artis-Naples wholly failed to engage Plaintiffs in a meaningful dialogue about their exemption requests. Indeed, Artis-Naples’s blanket no-exemption policy foreclosed any determination about the reasonableness of an accommodation or whether such an accommodation would cause an undue hardship. Artis-Naples’s failure to perform its “statutory obligation” to consider reasonable accommodations speaks volumes, *Hardison*, 432 U.S. at 75, and its undue hardship defense is nothing by

indefensible pretext for discrimination.

Moreover, Artis-Naples cannot meet its burden for *five* additional reasons.

**1. Complying with a state law that expressly prohibits no-exemption vaccination mandates cannot be an undue hardship.**

An “undue hardship” is “any act that would require an employer to bear greater than a ‘de minimis cost’ in accommodating an employee’s religious beliefs.” *Beadle*, 29 F.3d at 592 (quoting *Hardison*, 432 U.S. at 75). As a matter of law, it can never be an “undue hardship” for an employer to comply with state law.

Florida law expressly prohibits private employers from “impos[ing] a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement on the basis of ... religious reasons.” Fla. Stat. § 381.00317(1). In fact, *Artis-Naples’s own legal counsel* published an article advising that Section 381.00317 “appears to *require* employers to accept and approve any of the five exemption requests *without further consideration* beyond completeness of the required documentation, and the employer *must allow* the employee to opt out of an employer’s vaccine mandate.” Alexis Barkis, *Florida Legislation Restricting Workplace Vaccine Mandates—What Florida Employers Need to Know*, Quarles & Brady LLP (Nov. 19, 2021), <https://perma.cc/8X28-CE33> (emphasis added).<sup>4</sup>

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<sup>4</sup> If, for purposes of this litigation, Artis-Naples’s counsel were to reverse their previous advice that employers “*must allow* the employee to opt out of an employer’s vaccine mandate,” then any such reversal should seriously undermine the credibility of their forthcoming defense of the Mandate. Artis-Naples does not enjoy a special dispensation from complying with state law.

Yet Artis-Naples is doing the precise opposite. It is doggedly and recklessly imposing a universal vaccine mandate without providing for a religious-based opt out. If it is true that an employer need not provide an accommodation that would result in a violation of state law, *see United States v. Bd. of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990) (concluding that it “would be an undue hardship to require a school board to violate an apparently valid criminal statute”),<sup>5</sup> then the converse must also be true: Artis-Naples cannot invoke the “undue hardship” defense under Title VII for an accommodation *that state law already requires it to provide*. That is even more obvious when the law itself proposes reasonable alternatives to compulsive vaccination. *See Fla. Stat. § 381.00317(1)* (listing “periodic testing” and “the use of employer-provided personal protective equipment”).

**2. Artis-Naples’s discriminatory scheme conflicts with scientific evidence and flouts current CDC guidelines.**

Artis-Naples’s pretextual position that unvaccinated employees are vectors of disease, while vaccinated employees are not, contravenes scientific evidence. For example, an October 2021 study published in the prestigious peer-reviewed medical

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<sup>5</sup> *See also, e.g., Lowman v. NVI LLC*, 821 F. App’x 29, 32 (2d Cir. 2020) (“Because NVI’s SSN disclosure policy is mandated by federal law, NVI cannot depart from the policy to accommodate Lowman without suffering an undue hardship.”); *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) (“Requiring defendants to violate the Internal Revenue Code and subject themselves to potential penalties by not providing Seaworth’s SSN on information returns results in undue hardship.”); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830–31 (9th Cir. 1999) (holding employer not liable for refusing to hire person who declined for religious reasons to provide his social security number because accommodating applicant’s religious beliefs would cause employer to violate federal law, which constituted “undue hardship”).

journal *The Lancet* shows that the impact of vaccination on community transmission of circulating variants of SARS-CoV-2 is not significantly different from the impact among unvaccinated people. (V. Compl. ¶ 125.) Another study found no major differences between vaccinated and unvaccinated individuals of SARS-CoV-2 viral loads, even in those with proven asymptomatic infections. (*Id.* ¶ 126.) And in January 2022, an infectious disease expert explained that “the current evidence suggests that current mandatory vaccination policies might need to be reconsidered, and that vaccination status should not replace mitigation practices such as mask wearing, physical distancing, and contact-tracing investigations, even within highly vaccinated populations.” (*Id.* ¶ 129.)

Even more recently, the Centers for Disease Control and Prevention announced on August 11, 2022, that it relaxed its COVID-19 guidelines. The CDC’s new guidelines, among other items, announced that people no longer need to maintain six feet of social distancing and dropped the recommendation of testing asymptomatic people in most community settings. (*Id.* ¶ 132.) According to CDC officials, the changes “are driven by a recognition that an estimated 95% of Americans 16 and older have acquired some level of immunity, either from being vaccinated or infected.” (*Id.*) In short, Artis-Naples’s argument that allowing unvaccinated employees to work would be “an undue hardship” is unsupported by scientific evidence and is at odds with the CDC guidelines.

**3. Artis-Naples allows unvaccinated patrons and visitors on premises.**

Despite placing Plaintiffs on involuntary leave with partial pay in October 2021 for not being vaccinated, Artis-Naples allows unvaccinated patrons to attend Naples Philharmonic concerts and other events. From November 2021 until May 2022, Artis-Naples allowed unvaccinated, unmasked guests to attend Naples Philharmonic concerts if they provided proof of a negative COVID-19 test. (V. Compl. ¶ 135.) On May 20, 2022, four days after Plaintiffs sent their demand letter, Artis-Naples announced that it was “pleased to lift all COVID-19 patron protocols.” (*Id.* ¶ 136.) And as of July 29, 2022, Artis-Naples states that it “does not currently have any COVID-19 patron protocols.” (*Id.*) Thus, Artis-Naples already allows unvaccinated patrons to be in the same concert hall, and breathe the same air, as the Naples Philharmonic musicians. No logical reason exists why Artis-Naples could not provide Plaintiffs with the same accommodation that it already provides for its visitors.

**4. Artis-Naples already allows unvaccinated employees to interact with vaccinated staff on its premises and at sponsored events.**

Artis-Naples’s pretextual “undue hardship” of allowing Plaintiffs to work is further exposed by its COVID-lax workplace culture. For example, at the April 1, 2022, meeting where Artis-Naples issued Plaintiffs its vaccinate-or-be-fired ultimatum, CEO Kathleen van Bergen met in person with Plaintiff Leigh, and separately with Plaintiff Berg and his wife, shook their hands, and stood at a small, six-person table with them. (V. Compl. ¶ 141.) During the meeting, Plaintiff Berg and his wife asked van Bergen whether they needed to put masks on. (*Id.* ¶ 142.) Van Bergen, who was herself

unmasked, responded that masking was unnecessary because Plaintiffs had tested negative for COVID-19 before the meeting. (*Id.*) Plaintiffs' negative COVID-19 tests were sufficient for van Bergen to meet with them on campus, unmasked, and to shake their hands. No legally valid reason exists why Artis-Naples could not also allow the same employees to continue their careers at Artis-Naples with periodic COVID-19 testing, as required by Florida law.

As another example, Artis-Naples invited the unvaccinated Plaintiffs to attend both its Christmas party in December 2021 and its end-of-season party in May 2022, despite their unvaccinated status. (V. Compl. ¶ 144.) After Plaintiffs tested negative for COVID-19, Artis-Naples allowed them to mingle, interact, shake hands with, eat food from the same self-service buffet—and even hug—its vaccinated employees. (*Id.*) Once again, there is no rational reason, nor any legally valid reason, why the same accommodation Artis-Naples provided for the unvaccinated Plaintiffs to attend Artis-Naples-sponsored social events (periodic testing) cannot be provided to allow them to continue their decades-long careers at Artis-Naples.

**5. The Mandate is an extreme outlier in Florida's performing arts industry.**

Artis-Naples's Mandate not only directly violates Florida law; it is a radical outlier among performance arts entities across the State. For example, the Fort Myers-based Southwest Florida Symphony does not mandate vaccination for its employees, job applicants, contractors, and volunteers. (V. Compl. ¶ 149.) Nor does the New World Symphony (NWS) in Miami Beach mandate vaccination for its employees.

Instead, the NWS administers weekly COVID-19 tests of all staff and musicians. (*Id.* ¶ 152.) That other Florida performance arts venues and orchestras follow state law and impose no vaccination requirements on their employees and applicants (and do not have “no exemption” policies) further confirm that Artis-Naples’s Mandate is arbitrary, extreme, and discriminatory.

**III. Plaintiffs will suffer irreparable harm without an injunction.**

**A. Reinstatement, not just monetary damages, is necessary to make Plaintiffs whole from Artis-Naples’s discriminatory mandate.**

Unless Artis-Naples is enjoined from replacing Plaintiffs, or unless they are reinstated to their positions, Plaintiffs will suffer irreparable harm that cannot be remedied by monetary damages alone. At the outset, Plaintiffs acknowledge that employment termination generally does not result in irreparable injury warranting injunctive relief “because, if wrongful, damages will provide adequate compensation for any losses.” Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.). The Supreme Court nevertheless has recognized that “cases may arise in which the circumstances surrounding an employee’s discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found.” *Sampson v. Murray*, 415 U.S. 61, 90 n.68 (1974). This is one such case.

Artis-Naples’s imminent effort to replace Plaintiffs threatens to irreparably harm Plaintiffs because it would impair the Court’s ability to order reinstatement. *See* 11A Fed. Prac. & Proc. Civ. § 2948.1 (“Only when the threatened harm would impair the court’s ability to grant an effective remedy is there really a need for preliminary

relief.”); *cf. Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that school superintendent’s reputation and her ability to procure comparable employment after her termination would be irreparably injured were superintendent denied preliminary injunction reinstating her”). That irreparable harm is magnified by the “extraordinary circumstances” of Plaintiffs’ unique, irreplaceable, lifelong employment with the Naples Philharmonic, and the impossibility of securing comparable employment in a professional orchestra. 11A Fed. Prac. & Proc. Civ. § 2948.1.

Plaintiffs’ chances of obtaining a comparable, full-time position at another orchestra are *virtually zero*. (Leigh Decl. ¶¶ 13, 18; Berg Decl. ¶ 13; Griffith Decl. ¶ 19; Dallas Decl. ¶ 33.) As shown by their 82 years of collective dedication to the Naples Philharmonic, Plaintiffs had no intention of ever leaving Artis-Naples. (Leigh Decl. ¶ 12; Berg Decl. ¶ 13; Griffith Decl. ¶ 16.) That is because securing a full-time salaried position in a professional orchestra is truly a *once-in-a-lifetime opportunity*. (Leigh Decl. ¶ 21; Berg Decl. ¶ 13; Griffith Decl. ¶ 21.)

There are only a handful full-time, orchestra positions available *in the entire country*, and indeed worldwide, in any given year. (Leigh Decl. ¶ 18.) Generally, only the best students from the best music conservatories are considered for a single position. (Griffith Decl. ¶ 17.) Competition is extremely fierce. If a musician secures an audition, she must then compete with up to 200 fellow auditionees over several days. (Leigh Decl. ¶ 6; Berg Decl. ¶¶ 8, 11; Griffith Decl. ¶ 17.) Out of the handful of supremely qualified finalists, any one of them can secure the position—often it comes down to

the luck of the draw. (Leigh Decl. ¶ 9.)

Most orchestras hire young music school graduates, with both the orchestra and the player knowing that such a hire would likely be *a lifetime job*. (Leigh Decl. ¶ 11; Berg Decl. ¶¶ 11, 13; Griffith Decl. ¶ 18.) The competition is so fierce, and the positions are so few, that a young musician who secures a job in a full-time orchestra—as did Plaintiffs Leigh, Berg, and Griffith in 2005, 1990, and 1989, respectively—would plant their roots and play with the orchestra until retirement. (Leigh Decl. ¶ 12; Berg Decl. ¶ 13; Griffith Decl. ¶¶ 18–19.)

All told, monetary damages cannot remedy being terminated from a tenured job that required beating out 200 other young and ambitious musical prodigies during grueling, multi-day auditions. Nor can monetary damages remedy the virtual impossibility of three middle-aged musicians finding once-in-a-lifetime positions that are generally awarded to musicians fresh out of music school. (Leigh Decl. ¶ 13; Berg Decl. ¶ 13; Griffith Decl. ¶ 18.) Thus, this is not a vaccine mandate case where wrongfully discharged employees cannot sufficiently allege irreparable harm because they can move on to another job and later receive monetary damages for their wrongful termination. *E.g.*, *Together Emps. v. Mass Gen. Brigham Inc.*, 32 F.4th 82 (1st Cir. 2022); *Halczenko v. Ascension Health, Inc.*, 37 F.4th 1321, 1322–23 (7th Cir. 2022). Instead, this is a case where the only truly “make whole” remedy for Plaintiffs is reinstatement to their longtime, unique, once-in-a-lifetime positions as Naples Philharmonic musicians.

In sum, Plaintiffs have dedicated their *entire* professional careers to the Naples Philharmonic, and thus to Artis-Naples. And they had every intention to devote the

rest of their careers to Naples Philharmonic but for Artis-Naples's unlawful, no-exemption vaccination Mandate, and their unlawful termination. (Leigh Decl. ¶ 12; Berg Decl. ¶ 13; Griffith Decl. ¶ 21.) In light of the extraordinary requirements and competition to become a tenured orchestra player, and the unavailability of comparable positions, and considering Title VII's remedial objectives, reinstatement is the only remedy that would rightly make Plaintiffs whole.

Thus, Plaintiffs will unquestionably suffer irreparable harm if Artis-Naples is allowed to permanently replace their positions as this case is adjudicated, and injunctive relief is the only way to prevent that irreparable harm.

**B. Under Eleventh Circuit precedent, this Court may presume irreparable harm because Artis-Naples has violated Title VII.**

Even if the extraordinary harms that Plaintiffs face are not *per se* "irreparable," the Eleventh Circuit and its predecessor have long held that, where a statute expressly authorizes injunctive relief, and the relevant statutory conditions have been met, a movant need not show the usual prerequisite of irreparable injury to obtain an injunction. Instead, once the movant makes a substantial showing of the likelihood of success on the merits of her underlying claim, or proves that the statute has been violated, a rebuttable presumption of irreparable harm arises. *See Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) ("[I]n this circuit ... courts are to presume irreparable harm in Title VII cases.").<sup>6</sup>

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<sup>6</sup> *See also, e.g., Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (holding in Fair Housing Act case that, where injunctive relief is provided by statute and the statutory conditions have been satisfied, the usual prerequisite of irreparable injury

Here, Title VII expressly authorizes injunctive relief, *see* 42 U.S.C. § 2000e-5(g), Plaintiffs exhausted their administrative remedies before the E.E.O.C., they have made a substantial showing that they are likely to succeed on the merits of their failure-to-accommodate claim, and they likewise have proved that Artis-Naples is flagrantly and willfully violating Title VII (and Florida law). Thus, the Court may presume irreparable injury to justify injunctive relief. *Cf. Held v. Missouri Pac. R. Co.*, 373 F. Supp. 996, 1004 (S.D. Tex. 1974) (“The Court’s conclusion that plaintiff has made a sufficient showing of succeeding on the merits compels a finding of irreparable injury for purposes of plaintiff’s motion for a preliminary injunction.”).

**IV. The balance of harms tips sharply in favor of enjoining Artis-Naples from replacing Plaintiffs’ positions.**

In deciding whether injunctive relief is proper, the court must balance the hardships to the respective parties. *See Int’l Cosmetics Exch., Inc. v. Gapardis Health & Beauty, Inc.*, 303 F.3d 1242, 1247 (11th Cir. 2002). The threatened injury to Plaintiffs—having their positions replaced and thus their careers erased—outweighs any harm an injunction may cause Artis-Naples. To the extent that Artis-Naples argues that it would

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need not be established because in that instance “irreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes”); *United States v. Hayes Int’l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969) (holding in Title VII racial discrimination case that “[w]here ... an injunction is authorized by statute and the statutory conditions are satisfied ... the usual prerequisite of irreparable injury need not be established.... We take the position that in such a case irreparable injury should be presumed from the very fact that the statute has been violated.”); *accord Middleton-Keirn v. Stone*, 655 F.2d 609, 611 (5th Cir. 1981) (“The Fifth Circuit has ruled that irreparable injury will be presumed in the case of private sector employees seeking a preliminary injunction in Title VII employment discrimination actions.”).

be harmed by being unable to fill vacant employment positions, that argument misses the broader picture. Artis-Naples is enforcing a no-exemption vaccination mandate that directly conflicts with federal and state law. Artis-Naples seeks to cement that discriminatory policy by replacing Plaintiffs' positions with applicants who agree to comply with the Mandate. (V. Compl. ¶ 52; Flyer, *supra* note 1 [stating that "Proof of COVID-19 vaccination is required to be a qualified applicant."].) Artis-Naples cannot seriously argue that it would suffer harm from an injunction that stops it from effectuating its discriminatory scheme.

Nor can Artis-Naples reasonably contend that reinstating Plaintiffs would threaten the health and safety of its employees and patrons. Not only is that argument foreclosed by Florida law and public policy *requiring* religious exemptions to be granted, but, by its own admission, nearly all Artis-Naples employees have been vaccinated. (See Artis-Naples 2021-2022 COVID Protocols, V. Compl. ¶ 47 & note 14.) Further, Artis-Naples has lifted all its COVID-19 protocols and accordingly allows unvaccinated patrons to attend all concerts. (V. Compl. ¶ 136.) Any argument that Plaintiffs would pose a threat to the health and safety of staff and patrons is purely speculative, and not supported by scientific evidence. Even if that speculation has merit, Plaintiffs have agreed to masking and periodic testing as conditions of continued employment, thus ameliorating any perceived risk. (*Id.* ¶ 157.) In light of the expansive healthy and safety upgrades Artis-Naples has made to its facilities (*Id.* ¶ 47), allowing three unvaccinated employees to continue working while masking and testing regularly poses no scientifically identifiable risk to staff and patrons—*especially when patrons are*

*allowed to be in the same spaces unvaccinated, by the thousands.* In short, the balance of harms tips sharply in Plaintiffs' favor.

**V. An injunction barring discriminatory employment practices is in the public interest.**

Enjoining Artis-Naples's discriminatory, no-exemption vaccine Mandate that exists in open defiance of Florida law and public policy is in the public interest. It is always in the public interest for an employer to comply with federal and state law, particularly anti-discrimination legislation. *Cf. League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) ("The vindication or constitutional rights and the enforcement of a federal statute serve the public interest almost by definition."); *Navy Seal 1 v. Austin*, --- F. Supp. 3d ----, 2022 WL 534459, at \*20 (M.D. Fla. Feb. 18, 2022) (noting that "no injury to the public results from recognizing a person's constitutional or statutory right....").

**CONCLUSION**

Plaintiffs meet all the requirements for injunctive relief. Therefore, the Court should grant Plaintiffs' motion and (1) preliminarily enjoin Artis-Naples from replacing Plaintiffs' positions during the pendency of this litigation, and/or (2) order Artis-Naples to immediately reinstate Plaintiffs to their previous positions for the pendency of this litigation, consistent with the Naples Philharmonic's collective bargaining agreement and on equal terms and conditions with all other Naples Philharmonic musicians.

Dated: September 21, 2022

Respectfully submitted,

/s/ Horatio G. Mihet

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
Fort Myers Division

**Ashley Leigh, Erik Berg, and  
James Griffith,**

Plaintiffs;

v.

**Artis-Naples, Inc.,**

Defendant.

**Case No.:** 2:22-cv-00606-JLB-KCD  
**Judge:** Hon. John L. Badalamenti

**DECLARATION OF JAMES DALLAS IN SUPPORT OF PLAINTIFFS'  
MOTION FOR PRELIMINARY INJUNCTION**

I, JAMES DALLAS, declare as follows:

1. I submit this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts stated below unless stated on information and belief; and if called upon to testify to those facts, I could and would do so competently.

2. I was an employee of the Naples Philharmonic at Artis-Naples in Naples, Florida for 38 years. Thirty of those years were as a musician in the orchestra and twelve years in total as the orchestra personnel manager.

3. In my capacity as orchestra personnel manager, I was responsible for the day-to-day management of orchestra activities and related functions in compliance with the musicians' collective bargaining agreement (CBA).

4. My specific responsibilities included being present at orchestral rehearsals and performances, preparing orchestra rosters and seating assignments, maintaining attendance records, preparing orchestra payroll, managing the audition process, hiring substitute and extra musicians, and managing personnel matters with the Vice President of Artistic Operations and Human Resources.

5. I also served as a liaison between the musicians and administration of Artis-Naples and acted as a resource and counsel for orchestra musicians.

6. In October 2021, I voluntarily resigned from Artis-Naples as orchestra personnel manager because I was being made to enforce a COVID-19 vaccine mandate that I disagreed with. As a member of the accommodation review committee, I believe that Artis-Naples's vaccination mandate, including its so-called process for considering accommodations, was unfair and unlawful.

**A. Background of Vaccine Mandate and So-Called Accommodation Process**

7. With this declaration, I hope to deliver a chronology from a manager's point of view as to what transpired at Artis-Naples from the onset of the pandemic.

8. The Naples Philharmonic ceased operation in March of 2020 as the threat of COVID-19 began to spread. The full-time musicians in the orchestra continued to receive their full pay through the end of their season, May 31.

9. When the 2020-2021 season started in September, all full-time musicians returned to work with a 30% pay reduction. This was agreed to by the musicians as there was uncertainty regarding the viability of a concert season. No “per-service” musicians were contracted in advance for this season.

10. For the 2020-2021 season, the Naples Philharmonic successfully produced and presented a season of Masterworks, Pops, Chamber concerts and recorded a series of educational videos for distribution to the schools, all while incorporating weekly testing, social distancing and wearing masks when possible.

11. Full pay was restored for the 2021-2022 season for the orchestra, but not for Plaintiffs, who were placed on involuntary leave with partial pay in October 2021 for not complying with Artis-Naples’s COVID-19 vaccination mandate.

12. In February 2021, David Filner, Executive Vice Presidents of Artistic Operations, first mentioned that touring Broadway shows that may play at Artis-Naples in 2021-2022 may require a fully vaccinated company in order to perform at the hall. It was stated that accommodations would be honored.

13. This requirement became a reality when, in late July 2021, CEO Kathleen van Bergen informed all staff and musicians that Artis-Naples was

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instituting a vaccination requirement. Thankfully, Artis-Naples said it would offer an accommodation process for those with medical and religious needs.

14. A three-person “COVID Committee” was appointed to review accommodation requests, comprising Danielle Daly, Director of Human Resources; Beth Schick, Operations; and myself.

15. We, the committee, initially processed about a dozen requests for medical and religious accommodations.

16. We reviewed and approved all accommodations with the understanding that some of these employees may require frequent testing, masking, etc., to continue in their roles.

17. Shortly after this review, we were informed that two additional people would be added to the review committee: David Filner and Paul Votapek, Principal Clarinet in the orchestra. We were also notified that the previously approved applications were to be reviewed again along with additional requests that had been submitted.

18. During this second review meeting at Artis-Naples, each application was presented, reviewed, and subsequently voted upon by a majority of the committee.

19. This second review process was in marked contrast to our initial three-person review committee, where myself, Danielle Daly and Beth Schick thoroughly reviewed each application per written protocols.

20. The applications were reviewed at a brisk pace with all applications being denied except mine.

21. It is my belief that Filner and Votapek were added to the committee to ensure that zero accommodations would be granted. And the review process was a perfunctory measure to ensure that no unvaccinated employees remained on campus.

22. In protest of the arbitrary handling of the requests, I abstained from voting on most applications. I felt intimidated during the voting process because David Filner was my boss. He knew going into this meeting that I was opposed to a vaccine mandate. Again, with the uncertainty of retaliation and intimidation, I did not voice my objections to what I thought was a sham review process.

23. I believe that Artis-Naples failed to give each applicant a good-faith consideration and did not engage in an interactive process to determine whether an applicant could be reasonably accommodated.

24. When accommodations were reviewed the second time around, upon information and belief, 16 out of 17 accommodations were denied.

25. I was the only staff employee whose accommodation was approved. I had requested a medical exemption, but the committee only approved my request on

the condition that I work remotely. I further believe that the only reason they approved my request was because my position was critical to the efficient operation of the orchestra.

26. As a result of Artis-Naples's summary denial of all the applications (except for mine), many valued employees lost their jobs, including some "per-service" musicians who had been with the Orchestra for over 30 years.

27. When I was appointed to the review committee, I believed that each employee would receive full consideration of their accommodation request. But that is not how it turned out.

#### **B. Consequences of Artis-Naples's Vaccine Mandate**

28. I ultimately resigned from Artis-Naples because I could not in good conscience work for an organization that forced a ruthless vaccination mandate on employees without giving full and fair consideration of those with medical and religious objections to the COVID-19 vaccines.

29. Sadly, at least two dozen wonderful employees of Artis-Naples, including longstanding full-time and per-service musicians completely devoted to the Naples Philharmonic, lost their jobs because of Artis-Naples's needless vaccination mandate.

30. I say "needless" because the Naples Philharmonic successfully held a concert season in 2020-2021 without forced vaccination, instead implementing

health and safety protocols such as frequent testing, masking, social distancing, and air filtration.

31. Based on my experience as an orchestra personnel manager with a deep understanding of how orchestras work and perform, I do not believe that unvaccinated players like Plaintiffs endangered the health and safety of vaccinated musicians and patrons. Further, upon information and belief, many players in the Naples Philharmonic had already contracted COVID-19 and thus had natural immunity.

32. As a longtime orchestra personnel manager, I know that it is extremely difficult to lose an orchestra position and to successfully find a position elsewhere, especially for players who have been part of that orchestra for a long time, as with Plaintiffs.

33. Thus, I believe it would be nearly impossible for any one of the plaintiffs to find a comparable position—*e.g.*, salaried, tenured musician in a professional full-time orchestra—at this point in their careers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2022.

/s/ James Dallas

James Dallas

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
Fort Myers Division

**Ashley Leigh, Erik Berg,  
and James Griffith,**

Plaintiffs;

v.

**Artis-Naples, Inc.,**

Defendant.

Case No.: 2:22-cv-00606-JLB-KCD  
Judge: Hon. John L. Badalamenti

**DECLARATION OF PLAINTIFF ASHLEY LEIGH IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, ASHLEY R. LEIGH, declare as follows:

1. I am a plaintiff in the above-captioned case, and I submit this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts stated below unless stated on information and belief; and if called upon to testify to those facts, I could and would do so competently.

2. Artis-Naples fired me after 17 years because I would not receive one of the three COVID-19 vaccines, each of which is against my sincerely held religious beliefs.

3. Artis-Naples has never imposed a vaccination mandate of any kind before, and it refused to grant me a religious accommodation to allow me to practice

Decl. of Plaintiff Ashley Leigh ISO Mot. Prelim. Inj.

the same health and safety measures that, besides being required by Florida law, the entire orchestra successfully practiced during the 2020-2021 performance season.

**A. My Audition and Beating of Impossible Odds to Earn a Once-in-a-Lifetime Spot on the Naples Philharmonic.**

4. Many professional musicians, including my husband, start their instrument training as early as three years old. I started playing clarinet when I was 12. It has become such a big part of who I am that it is very difficult to imagine doing anything else.

5. Practicing 8 to 10 hours a day is very normal for a serious music performance major, and only a small percentage of serious students actually win an audition. Upon information and belief, there are only about *three* full time orchestra openings for clarinet *in the entire country* in any given year.

6. To illustrate, there were over 200 applicants for my job as assistant principal clarinet at the Naples Philharmonic back in 2005.

7. I had to first make it through a taped round to be invited to the Naples audition. Then, for the surviving applicants, there were two to three days of live auditions. I had to play a long list of orchestral excerpts that took months to prepare.

8. Day one of the audition was all on stage and behind a screen, with a panel of musicians and music directors behind the other side of the screen. For day two, the invited applicants (at this point, between 100 – 150 candidates) were narrowed down to 10 or 20 semi-finalists, which was then narrowed down even

further for next and final round. Day three included playing part of a Beethoven woodwind quintet with the other members of the woodwind section to see who they felt “chemistry” with, as well as playing duet excerpts side by side with the principal clarinet to see if we were “a match.” After this, three candidates were left standing, including me. The final round was behind a screen.

9. Looking back, the position could have gone to any of us on any given day. But thankfully I was chosen, having won the position over 200 other supremely talented musicians.

10. Once I earned a spot on the Naples Philharmonic, there was a year-long process to become “tenured,” which involved the audition committee meeting several times with the conductor to receive updates on my playing performance and personality within the group.

11. There is a lengthy process to remove someone who is not performing well, which includes a probation period, as well as more meetings. There is not a lot of turnover or job openings, because a person usually keeps their spot in the orchestra until retirement.

**B. My Dedication to Artis-Naples and the Naples Philharmonic.**

12. Since securing the position in 2005, I had every intent to keep this job until retirement in my mid-to-late sixties.

13. It is extremely difficult to win a full-time orchestra job. And the older I get, it is more and more unlikely I will be able to win another audition like this again.

14. For example, since being wrongfully terminated by Artis-Naples, I sent my resume to the other area symphony, the Southwest Florida Symphony in Fort Myers. They do not currently have any clarinet openings, and upon information and belief, they might not have any openings for many years to come. I *may* get called to come in and play a concert or two this entire season if someone else gets sick or if someone who is normally on their “first call” list is not available. But doing so would not even remotely match my full-time income as an Artis-Naples employee for the last 17 years.

15. Additionally, the Southwest Florida Symphony currently has 36 total services the entire year. These are not concerts, but simply services. A “per service” orchestra life is completely different from a full-time orchestra job, such as the full time Naples Philharmonic job I have had for the last 17 years.

16. Even if a “full time” clarinet position in the Southwest Florida Symphony were to open up in the next ten years, and I were to beat out all the stiff competition and actually win the position, I would only make a total of about \$5,500 for *the entire year* with no benefits. It simply does not pay very much. (\$142 to \$156 per service). *See Auditions, Southwest Florida Symphony, <https://www.swflso.org/auditions/>.*

17. It is easy to see that this really is not comparable to the \$68,000 annual salary (plus benefits, retirement plan, matching, etc.) that I was earning with the Naples Philharmonic.

18. Finding another comparable clarinet position outside of the Naples area would be nearly impossible, even if I could uproot my family to pursue it. According to the website Musicalchairs—a prominent website that allows orchestras, opera companies, conservatories and schools to advertise vacancies to high-caliber candidates—there are, as of August 12, 2022, *only 11 job openings for clarinet in the entire world*. These include three openings in Italy; one in Canada; three openings in China; one in Sweden; one Air Force band position in Illinois, which I am over the age limit of 39 to enlist in; a section clarinet in McAllen, Texas, with an annual salary of only \$2,240; and one bass clarinet position in the Colorado Symphony for \$50,000 a year, but I neither own nor play a bass clarinet. *See Clarinet Performance Jobs*, Musicalchairs, <https://www.musicalchairs.info/clarinet/jobs>.

19. Having settled with my family in Naples, it would be virtually impossible to relocate to China or Italy to secure a comparable position that I have held with Artis-Naples since 2005.

20. The reality is, there are extremely few full-time orchestra jobs in the country, and only two to four clarinetists have full time jobs in these orchestras. For example, Naples Philharmonic employs two full-time clarinets. People that win

these prestigious positions are often the same people that the local colleges and conservatories hire as clarinet professors.

21. Playing in an orchestra is extremely niche, and once someone wins a good clarinet job, they rarely leave it until retirement age, which for a clarinetist is typically 65 to 67 years old. Hence, there are *very* few clarinet openings in the country that are worth the expense of flying to the audition and paying for transportation and lodging, let alone the cost of moving my entire family to re-start our entire professional lives.

22. Indeed, we established our family in Naples precisely so I could work at, and one day retire from, the Naples Philharmonic. My husband left his full-time tenure track professor of music theory and composition job at Wheaton College in Illinois about 15 years ago so that we could finally build a life together and live in the same place while I pursue my career at Artis-Naples. Because of my job with Artis-Naples, we dated long distance for three years, and were married long distance for another year. (One of us was on an airplane every single week for that first year of marriage.) We made this sacrifice because I had the extraordinarily rare full-time clarinet job in the Naples Philharmonic, and he had his dream job at Wheaton, a private Christian college that his dad attended 50 years ago.

23. It took many years for my husband to build a professional musical life here in Naples. Fifteen years later, he now teaches a studio of about 25 to 30 violin

and piano students, plays at weddings, and also teaches a few days a week at the Southwest Florida Music Education Center. In short, to uproot his professional career in Naples so that I could be employed as a clarinetist elsewhere, even if such a rare opportunity ever arose, would be devastating, if not impossible.

24. Even though Artis-Naples's leadership fired me for refusing to violate my religious beliefs, I want to be reinstated to my position, which I have held for 17 years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2022.

/s/ Ashley Leigh  
Ashley Leigh

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
Fort Myers Division

**Ashley Leigh, Erik Berg, and James  
Griffith,**

Plaintiffs;

v.

**Artis-Naples, Inc.,**

Defendant.

Case No.: 2:22-cv-00606-JLB-KCD  
Judge: Hon. John L. Badalamenti

**DECLARATION OF PLAINTIFF ERIK BERG IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Erik Berg, declare as follows:

1. I am a plaintiff in the above-captioned case, and I submit this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts stated below, unless stated on information and belief; and if called upon to testify to those facts, I could and would do so competently.

2. This past year, Artis-Naples terminated me because I refused on account of my sincerely held religious beliefs to comply with its COVID-19 vaccination mandate, and Artis-Naples refused to provide me with any accommodation.

Decl. of Plaintiff Erik Berg ISO Mot. Prelim. Inj.

3. Prior to my wrongful termination, I worked for Artis-Naples as a musician in the Naples Philharmonic since 1990, largely as Associate Principal Second Violin.

**A. How unique my specific position is in the Naples Philharmonic, and how unique the Naples Philharmonic is in the State of Florida.**

4. In the professional musician line of work, specifically in a symphony orchestra, there are extremely unique factors when auditioning and winning a job. That being so, for many musicians there is not an opportunity to obtain another similar job if your job is taken from you.

5. The Naples Philharmonic is a very special orchestra in the State of Florida, if not in the United States. I believe it is one of only three full-time, salaried orchestras with benefits in the state, the others being in Tampa and Jacksonville. Upon information and belief, the salaries paid in Naples are at least as high if not the highest among those orchestras.

6. There are other orchestras that are not full-time, but pay on a “per service” basis, which means a set amount for each rehearsal or concert. The Southwest Florida Symphony in Fort Myers, Florida, is an example. Upon information and belief, if I were to win an audition to play for all of their concerts, the pay may be only \$5,000 to 6,000 for the entire year.

7. My specific position in the violin section of the orchestra is also just as unique. When I began performing in Naples in 1990, I was in the violin section, just one of many violinists. Several years later, I auditioned again and won my current position as Associate Principal Second Violin. Therefore, I now sit in a “titled chair” and am no longer just a part of the violin section. Instead, I sit in the front of the second violin section. As a leader, I am one of about ten musicians who lead from the front of each string instrument section.

**B. The difficulty of winning an audition at any age, and how that becomes more difficult as musicians get older.**

8. The audition process, especially the competition for jobs in symphony orchestras, is extraordinarily difficult. For background, it is important to understand that musicians cannot just decide when they are in college that they want to play an instrument professionally in an orchestra. They must have started playing at an early age and excelled far beyond their peers in order to even get into a conservatory of music. My training was at the New England Conservatory of Music in Boston, where I received Bachelor and Master of Music degrees with academic honors.

9. The symphony orchestra field is so competitive that, upon information and belief, from my graduating class of all bachelor’s and master’s degree students at a large institution, only five would be moving directly into full-time orchestra jobs following graduation. I was one of those five.

10. Playing a musical instrument is often considered very “athletic” in nature because of the physical motions and fine muscle control and training that go into learning to play on such a high level. Due to the physical exertion necessary for performance, in addition to my daily practicing I find it necessary to include regular strengthening and conditioning. This is important to consider in the audition process, because many of the candidates may be very capable of doing the job, but the orchestra has to choose just one out of all of them, so the youngest candidates will usually have the advantage.

11. At my age (55), it is impossible as an “athlete” to perform on such a high level as other candidates at younger ages who are coming directly out of conservatories with a single-minded focus on their playing. Even when I was the one who was 25 years old, the competition for jobs was extremely fierce, often with several *hundred* candidates applying for *one* or a couple of job openings in a single orchestra.

12. Just because a musician may not be able to win an audition at the age of 55, 65, or 70, does not mean that he or she is not capable of doing their job. There are many violinists in major orchestras who are playing until that later point in their careers, and who have no problem fulfilling their job responsibilities. But winning an audition is different.

13. I had planned to work for the Naples Philharmonic until I retired, but sadly, Artis-Naples's vaccination mandate, and its refusal to grant me a religious exemption, forced me to "choose" between my job and my faith. Because I could not violate my conscience, I am now jobless, with no prospect for finding a remotely comparable job to the one I lost.

14. It is my hope, therefore, to be reinstated to my position with the Naples Philharmonic, which I have faithfully held for *three decades*.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2022.

/s/ Erik Berg  
Erik Berg

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
Fort Myers Division

**Ashley Leigh, Erik Berg, and James  
Griffith,**

Plaintiffs;

v.

**Artis-Naples, Inc.,**

Defendant.

Case No.: 2:22-cv-00606-JLB-KCD  
Judge: Hon. John L. Badalamenti

**DECLARATION OF PLAINTIFF JAMES GRIFFITH IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, James Griffith, declare as follows:

1. I am a plaintiff in the above-captioned case, and I submit this declaration in support of Plaintiffs' motion for preliminary injunction. I have personal knowledge of the facts stated below, unless stated on information and belief; and if called upon to testify to those facts, I could and would do so competently.

2. I make this declaration to tell my story for winning my position with the Naples Philharmonic Orchestra—where I started working part-time in 1989, and where I worked full-time as a tenured musician since 1992 until my wrongful termination in 2022—and how difficult it would be to find a comparable position.

Decl. of Plaintiff James Griffith ISO Mot. Prelim. Inj.

**A. Musical Background**

3. I began my musical career at age 12 here in Southwest Florida. Twelve years old is actually late in life for a string player, but I took to it very well. I was fortunate to have an excellent teacher who inspired me to pursue music in college. So, I auditioned for, and received, a full scholarship to attend the Florida State University School of Music.

4. My first summer at college I was offered a full scholarship to attend the Aspen Music Festival and School. My teacher at Aspen, Ms. Lillian Fuchs, was the viola professor at the world-famous The Juilliard School and Manhattan School of Music.

5. At my first Aspen lesson, Ms. Fuchs inspired me to go to Juilliard. Her encouragement motivated me to work incredibly hard to prepare for my Juilliard audition, which I eventually won. So, I was a very proud Florida native going to Juilliard on scholarship, where I received my Master's degree.

6. Upon graduation, I returned home to Southwest Florida. I started taking national orchestra auditions while playing part-time with various orchestras around the state, including the Naples Philharmonic, which had just completed construction of their new Philharmonic Center. I had success at getting to the final round of several national positions around the county but not landing the final round.

**B. My Audition for the Naples Philharmonic**

7. In 1989, the Naples Philharmonic announced a full-time position audition for a viola musician in their core orchestra in the new Philharmonic Center. I thought it would be a perfect opportunity to end up working where I grew up and where my family was located.

8. It was an extremely tough audition, with *over 200 applicants* trying for *one* job. After months of preparation, on audition day I successfully advanced from the first round of the audition with orchestra excerpts. The audition took place behind a screen on stage so the audition committee could not see who was auditioning. In fact, there was even a carpet placed on the stage so they could not tell whether you were male or female by your footsteps on stage.

9. For round two, the field was reduced to approximately seven players. Once again behind a screen, we played our solo concerto, some solo Bach, and a few of the hardest orchestral excerpts. Three more players were eliminated, leaving four players for the final round.

10. For the final round, held on the next day, the auditioners removed the screen, and we played chamber music with other members of the orchestra on stage while the music director gave us directions and observed us, our playing style, and our ability to adjust and follow instructions on the fly.

11. After beating out approximately 200 applicants, I was chosen as the winner of this audition and was awarded a contract with a probationary status for two years.

12. At the end of those two years, the CEO, music director, and audition committee reviewed my job performance and awarded me a full tenured position with the Naples Philharmonic.

### **C. My Dedication to the Naples Philharmonic**

13. I have dedicated my entire career thus far to the Naples Philharmonic. Since 1989, I have helped build the orchestra into what I believe is one of the most successful ensembles in the country. The Naples Philharmonic is one of only a few orchestras in the country that owns its own performing hall. The community has provided tremendous support over the years to develop a fabulous endowment so that the orchestra, musicians, and the organization are secure and will survive in perpetuity.

14. Upon information and belief, most of the Naples Philharmonic orchestra members have been in the orchestra from the early days of when the Philharmonic Center was originally built.

15. Upon information and belief, many of my colleagues with whom I've been with from the beginning intended to remain in the orchestra for the duration of their careers. Our tenured position allowed for this security.

Decl. of Plaintiff James Griffith ISO Mot. Prelim. Inj.

**D. The Near Impossibility of Securing a Comparable Position Elsewhere**

16. It was my intention to remain in my position with the Naples Philharmonic as long as I was physically able to perform at a professional level. My personal goal was to perform until I was 80 years old.

17. Upon information and belief, a viola position in a major orchestra only becomes available a few times a year. Each position is highly sought after by *hundreds* of professionally ambitious performers, many of whom are recent graduates of the finest conservatories *in the world*.

18. Typically, in auditions, the committee is looking for younger players in general, so that the musician can develop as an orchestra player in the style of that particular orchestra. Older players are usually set in their ways with the style of their previous orchestra, so moving from orchestra to orchestra is very rare.

19. Although I feel my playing now is at its very best, I believe my chances of winning another position in a major orchestra are close to *zero percent*. That is because orchestras look for younger players who are more malleable and adaptable to that specific orchestra's dynamics and style. In other words, youth is often prioritized over experience.

20. In the extremely unlikely event that I did win another position elsewhere, I would have to uproot my family, leave our lifetime friends, and begin

all over again away from my home and family. My wife has her professional career here in Southwest Florida, and she cannot leave.

21. I am currently 59 years old, and it was my intention to remain in my position with the Naples Philharmonic until I was 80 years old. There are many documented stories of orchestra members who have played well into their senior years as examples.<sup>1</sup>

22. Sadly, Artis-Naples fired me after *three decades* of service because I refused to violate my religious beliefs to receive a chemical injection against my conscience.

23. I was willing (and remain willing) and prepared to follow all alternative health and safety protocols, including periodic testing and masking.

24. I would like to be rightfully reinstated to my position because I know that finding a comparable position would be impossible.

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<sup>1</sup> See, e.g., Geoff Edgers et al., 'An Amazing Way to Go': Jane Little, World's Longest-Serving Orchestra Musician, Collapses and Dies Performing 'There's No Business Like Show Business', Wash. Post. (May 16, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/05/16/what-an-amazing-way-to-go-bassist-jane-little-worlds-longest-serving-orchestra-musician-dead-at-87-after-collapsing-while-performing>; The Strad, *Chicago Symphony Orchestra Bassist Retires After 49 Years* (Oct. 4, 2010), <https://www.thestrad.com/chicago-symphony-orchestra-bassist-retires-after-49-years/1522.article>; The Hub, *Chicago Symphony Principal Horn Clevenger to Retire After 47 Years*, League of American Orchestras (Feb. 20, 2013), <https://hub.americanorchestras.org/2013/02/20/chicago-symphony-principal-horn-clevenger-to-retire-after-47-years/>.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2022.

/s/ James Griffith

James Griffith