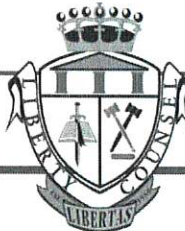


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REPLY TO FLORIDA

September 30, 2021

VIA EMAIL & U.S. MAIL

Martin J. Massiello
President and Chief Executive Officer
[REDACTED]

James L. Reed, Esq.
Senior Vice President and General Counsel
[REDACTED]

Alan Williamson
Vice President Medical Affairs
ACGME Designated Institutional Official (DIO)
[REDACTED]

Eisenhower Medical Center
39000 Bob Hope Drive
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Phone 760-340-3911

**RE: Unlawful Denial of Religious Exemptions from Mandatory COVID-19
Vaccination Policy &**

**NOTICE OF APPEAL Under Eisenhower Health Grievance and Due
Process Policy**

**THIS IS A LEGAL DEMAND LETTER INCLUDING AN EVIDENCE
PRESERVATION DEMAND. EISENHOWER MEDICAL CENTER'S DENIALS
OF RELIGIOUS EXEMPTION FROM ITS MANDATORY COVID-19
VACCINATION POLICY ARE UNLAWFUL. YOUR PROMPT RESPONSE IS
REQUIRED ON OR BEFORE OCTOBER 1, 2021 AT 5:00 P.M. TO AVOID A
LAWSUIT**

Dear Mr. Massiello, Mr. Reed, and Dr. Williamson,

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 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); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); cf. *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (applying reasoning later rejected by the Supreme Court in *Harvest Rock* and other decisions).

We have also sued the States of Maine and New York over their refusals to afford religious accommodations to healthcare workers under forced COVID-19 vaccination mandates. *See Does v. Mills*, No. 1:21-cv-00242-JDL, Doc. 1 (D. Me. Aug. 25, 2021); *Does v. Hochul*, No. 1:21-CV-05067-AMD-TAM, Doc. 1 (E.D.N.Y. Sept. 10, 2021). New York's unconstitutional mandate is now enjoined by a federal court (*see Does v. Hochul, supra*, Doc. 35), and we are expecting a similar outcome in Maine. In addition, we are preparing individual and class action lawsuits against healthcare employers nationwide for their unlawful refusals to provide reasonable accommodations to their employees.

I write on behalf of [REDACTED]

[REDACTED] who are requesting exemption and accommodation from Eisenhower Medical Center's ("EMC") mandatory COVID-19 vaccination policy because of their sincerely held religious beliefs. These Doctors are victims of EMC's unlawful denial of exemptions on the pretext that EMC is "not able to accommodate" them in their "patient facing position[s]" regardless of the merit of their exemption requests. [REDACTED] have engaged Liberty Counsel to bring legal action if EMC continues to deny their religious exemption requests, and **we are actively seeking to represent, pro bono, additional EMC employees who are adversely affected by EMC's illegal mandate and exemption process.**

EMC is administering its vaccine policy in bad faith, and its arbitrary denial of religious exemptions for patient-facing employees is illegal. EMC must cease these practices immediately.

A. EMC's Unlawful Denial of Religious Exemption Requests.

EMC invited its employees to participate in a process through which they could ostensibly request exemption from the mandatory COVID-19 vaccination policy, using EMC's COVID-19 Vaccine Religious Exemption Form.¹ The form allows employees to indicate a religious reason for declining vaccination, conditioned on providing a statement explaining the employee's religious beliefs, and further conditioned on a statement explaining how those "religious belief[s], practice or observance conflict[] with the California vaccination requirement."

¹ See Exhibit 1, attached hereto (COVID-19 Vaccine Religious Exemption Forms of [REDACTED])

The form does not advise employees, however, that patient-facing employees are disqualified from receiving a religious exemption. Importantly, the form purports to base the mandate solely on the State of California's August 5, 2021, mandate. EMC's post hoc decision to deny the religious exemption requests of all patient-facing employees on a supposed inability to accommodate—as if a healthcare system had not considered that patient-facing employees would seek exemption—demonstrates that the denials are arbitrary and pretextual. The denials would be all the more egregious if EMC has granted medical exemptions under the mandatory COVID-19 vaccination policy. Should this matter proceed to litigation, we expect the discovery process to confirm these facts. As explained below, upon these facts, EMC is unlawfully subjecting its patient-facing employees to a sham process and arbitrary denials.

Despite having **conditionally** approved [REDACTED] religious exemption requests on September 10, 2021,² thus demonstrating that EMC could easily provide them the accommodations they requested, EMC denied their requests over two weeks later, verbally on September 24, 2021, and officially on September 28, 2021³ – just two days before California's September 30 deadline to receive the last Pfizer or Moderna injection, or the Johnson & Johnson injection under Section 1 of the State Public Health Officer Order of August 5, 2021 (“CDPH Order”), upon which EMC oddly relies. The CDPH Order itself demonstrates that those workers subject to it, but who qualify for an exemption under Section 2 (either based upon religious beliefs or a qualifying medical reason), can certainly be accommodated under the provisions of Section 3:

3. If an operator of a facility listed above under section (1) deems a worker to have met the requirements of an exemption pursuant to section (2), the unvaccinated exempt worker must meet the following requirements when entering or working in such facility:

a. Test for COVID-19 with **either PCR or antigen test** that either has Emergency Use Authorization by the U.S. Food and Drug Administration or be operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services. **Testing must occur twice weekly for unvaccinated exempt workers in acute health care and long-term care settings, and once weekly for such workers in other health care settings.**

² See **Exhibit 2**, attached hereto [REDACTED] [REDACTED] Notably, with the exception of the Doctors' names and other personal identifying information, the emails to each Doctor are identical.

³ See **Exhibit 3**, attached hereto (EMC 9-28-21 “Interactive Accommodation Assessment Summary” Ltrs. to [REDACTED] [REDACTED] Again, with the exception of each Doctor's name, personal identifying information, and the time of each meeting, the two letters are identical.

b. **Wear a surgical mask or higher-level respirator** approved by the National Institute of Occupational Safety and Health (NIOSH), such as an **N95 filtering facepiece respirator, at all times while in the facility.**

CDPH Order, at ¶ 3.⁴

Notably, neither ██████████ were denied their request for a religious exemption based upon any question or concern over the sincerity of their religious beliefs. In fact, ██████████ HR Relationship Manager, Kimberly Krall, informed both Doctors that EMC believed that they hold sincere religious beliefs. Ms. Krall, in her September 10, 2021, emails respectively informed each of them only that “[t]he condition is to answer the question, ‘can Eisenhower accommodate this request.’”⁵ Further, EMC’s September 28, 2021 letters explicitly admit that EMC failed to offer any accommodation to either ██████████ ██████████ whatsoever,⁶ without mention of any incident occurring during the prior 18 days that would otherwise necessitate a denial. Both letters (nearly identical) generically state,

Accommodation

Based our [sic] detailed discussion⁷] [each Doctor’s] job duties as ██████████ ██████████ a patient facing position, we are not able to accommodate the vaccination exemption request.

There is no discussion, or even the slightest hint, that either Doctor failed to meet the requirements under paragraph 3 of the CDPH Order at any time. Nor do the denial letters indicate that any dangerous incident actually occurred that could be attribute fault to either Doctor during the conditional accommodation period over the prior 18 days.

Litigation discovery, as noted above, would certainly confirm EMC has granted (or will grant) **medical** or **pregnancy** exemptions, keeping those patient-facing employees in their current roles with appropriate precautions. We have reason to believe this is a likely case, considering a public statement made by Dr. Alan Williams, EMC’s Vice President of Medical Affairs:

“So it is important for even, you know, really to push everyone to the point of getting vaccinated as much as we possibly can . . .,” said chief medical officer for

⁴ Cal. Dep’t Public Health, *State Public Health Officer Order of August 5, 2021*, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Health-Care-Worker-Vaccine-Requirement.aspx> (emphasis added).

⁵ See **Exhibit 2**, *supra* n.2.

⁶ See **Exhibit 3**, *supra* n.3, at 2 (of each letter).

⁷ The first meeting with ██████████ (at least) could not have lasted any longer than 20 minutes, and thus, the discussion could not truly have been detailed. ██████████ letter records ██████████ meeting as beginning at 1:20 p.m. on September 24, 2021, and ██████████ letter records ██████████ meeting as beginning just 20 minutes later, on the same date.

Eisenhower Health, Dr. Alan Williamson. “At this point, we're really getting down to sort of one on one communication with individual employees to understand, you know, **how can we get past this barrier to get them vaccinated.**”

The email said 90% of Eisenhower employees have been vaccinated. However, it adds it wants the hospital to reach 100% vaccination of **eligible** employees. **Dr. Williamson said not everyone is eligible to be vaccinated because of medical reasons**, so those employees will get tested weekly.⁸

We note that Dr. Williamson failed to mention any exemptions that would be made for those with religious objections, which he may view as a “barrier” to EMC meeting its 100% vaccination goal. Running roughshod over EMC employees’ religious freedom is not only discriminatory, but it is unlawful. If the foregoing is true, EMC’s unwillingness to extend the same accommodation to employees with **religious** objections will demonstrate EMC’s religious animus to the court and the jury. If an unvaccinated employee poses any increased risk of transmission at all, which is not conceded, an employee unvaccinated for medical reasons or during pregnancy would pose **exactly the same risk** as an employee unvaccinated for religious reasons. Accommodating medical but not religious exemption requests is discrimination.⁹ Moreover, the fact that EMC cannot point to any such increased risk actually occurring from September 10, 2021, to date demonstrates the arbitrary nature of EMC’s policy as well. The interim accommodations also undermine any claim that EMC cannot provide **any** accommodation. Likewise, EMC’s visitor policy further chips away at its own claims here because EMC permits visitors to enter with a mask, upon proof of “a negative COVID-19 test result if unvaccinated or partially vaccinated,” so long as the test was “taken within 72 hours of visiting the hospital.”¹⁰

Additionally, [REDACTED] recently received, on September 28, 2021, two additional documents (EMC’s Counseling Forms and EMC’s Grievance and Due Process Policy (dated June 24, 2019)), indicating that they were being terminated under EMC’s **disciplinary** system, as if exercising their rights under Title VII of the Civil Rights Act of 1964 requires corrective measures for wrongful conduct. On the Counseling Form, the “Explanation of Counseling,” box requires the supervisor to “Provide a summary of **performance issue, behavior, or incident,**” and the “**Corrective Action Plan and/or Consequences**” box requires the

⁸ Bouchot, Marian, *Eisenhower Health to require regular COVID-19 testing for unvaccinated healthcare workers*, News Channel 3 (Aug. 2, 2021, 12:57 p.m.), <https://kesq.com/news/2021/08/02/eisenhower-health-to-require-covid-19-testing-for-all-unvaccinated-healthcare-workers/> (emphasis added).

⁹ The argument on pages 2–13 of the plaintiffs’ brief filed by Liberty Counsel at Doc. 57, *Does v. Mills*, No. 1:21-cv-00242-JDL (D. Me. Sept. 17, 2021), available at <https://lc.org/091721MaineHealthCareWorkerReply.pdf>, addresses a similarly discriminatory policy in the context of a First Amendment claim against a state actor. But the principles apply with equal force on the question of religious discrimination by a private employer under Title VII and cognate California law.

¹⁰ Eisenhower Health, *Visiting Hours and Policies*, <https://eisenhowerhealth.org/patients-visitors/visiting-hours-and-policies/> (last visited Sept. 30, 2021).

supervisor to “State what employee must do to **correct the performance deficiency and/or improve behavior.**”¹¹ Unpaid administrative leave for 30 days, and termination thereafter, is the **punishment** for failure to “receive[] the COVID-19 vaccination by October 30, 2021.” Further, although EMC officials issued a copy of its Grievance and Due Process Policy, those officials failed to follow that policy’s first step under III., which requires the Program Director to advise the employee “of the right to an unbiased appeal by invoking the Appeals Procedure,” and further requiring the “resident/fellow [to] be considered to be on suspension with **continued salary/benefits until the date of the final disposition of the appeal.**”¹² Regardless that EMC did not follow its own procedures, [REDACTED] submit hereby their appeal:

NOTICE OF APPEAL:

Should EMC argue that notice was provided through distribution of the Grievance and Due Process Policy (“Grievance Policy”) via email, accordingly, EMC is hereby notified by this letter that [REDACTED] each appeal, **individually**, EMC’s unlawful denials of their requests for religious exemption and failure to provide any reasonable accommodation under all applicable laws and constitutional rights they may have, including but not limited to all the laws and rights discussed herein. As such, [REDACTED] expect EMC to continue their salary and all benefits previously afforded and currently due until the date of the final disposition of their individual appeals, at a minimum under the Grievance Policy. (*See also* Demand 1), on pg. 17 of this Letter.)

B. EMC Can Reasonably Accommodate Its Patient-Facing Employees’ Sincerely Held Religious Beliefs Without Undue Hardship.

EMC’s pretextual claim that it cannot accommodate [REDACTED] is as implausible as it is illegal. EMC cannot seriously argue it is unable to accommodate its patient-facing employees with sincerely held religious objections to COVID-19 vaccination (especially while EMC is apparently quite able and willing to accommodate its patient-facing employees with medical or pregnancy objections). Large and small healthcare employers in California and across the country are regularly providing religious accommodations to patient-facing employees by allowing them to continue their regular duties and responsibilities while observing enhanced safety protocols—as the entire healthcare system has done for the **better part of two years** prior to EMC’s arbitrary enforcement of its vaccine mandate.

In a federal lawsuit challenging the State of Maine’s prohibition of religious exemptions from the State’s COVID-19 vaccine mandate, the plaintiff employees (represented by Liberty

¹¹ See Exhibit 4, attached hereto (EMC Counseling Forms, dated Sept. 28, 2021, to [REDACTED] and Grievance and Due Process Policy).

¹² See *id.*

Counsel) just filed **32 sworn declarations** of patient-facing healthcare employees from around the country, including four from California (attached as **Exhibits 5–8**), demonstrating the availability and workability of accommodations for patient-facing healthcare workers with sincerely held religious objections to COVID-19 vaccination. (See Docs. 57-6 to 57-9, *Does v. Mills*, No. 1:21-cv-00242-JDL (D. Me. Sept. 17, 2021).) For example, a registered nurse at Saint Agnes Hospital (owned by Trinity Health) in Fresno, California, declared:

Trinity Health granted me a religious exemption and accommodation from its mandatory COVID-19 vaccination policy. . . .

My accommodation permits me to continue all of my previous duties and responsibilities, including working on-site, interacting with colleagues, and providing quality and safe care to my patients. As part of my accommodation, I am required to use PPE, monitor and report symptoms daily, submit to temperature checks upon entering my facility, and undergo COVID-19 testing twice per week. I comply with all of these requirements.

(Ex. 5; see also Ex. 6 (registered nurse at Sutter Health in Roseville, California; granted religious exemption and accommodation, and noting 3 others similarly receiving the same); Ex. 7 (pharmacy technician at Kaiser Permanente, Lincoln, California; granted religious exemption and accommodation, and noting 3 others similarly receiving the same); Ex. 8 (medical social worker at PIH Health Downey Hospital, Downey, California; granted religious exemption and accommodation, and noting approximately 20 others similarly receiving the same).) All of these declarations were obtained on short notice, in a matter of two days. We have since obtained many more. We are confident that, should this matter proceed to litigation, we will have **hundreds** of such declarations available.

In addition to the attached declarations from California healthcare workers, the declarations filed in the Maine litigation demonstrate similar accommodations granted to patient-facing healthcare workers in Maine, Oregon, Illinois, Washington, New Mexico, Missouri, Texas, Wisconsin, Minnesota, Colorado, Michigan, Ohio, Pennsylvania, Delaware, Maryland, and Florida. (See Docs. 57-2 to 57-33, *Does v. Mills*, No. 1:21-cv-00242-JDL (D. Me. Sept. 17, 2021), available at <https://lc.org/091721MaineHealthCareWorkerReply.pdf>.) The healthcare employers granting the accommodations include (a) top education and research hospitals, such as University of Chicago, University of Colorado, University of Maryland, and Temple University, (b) some of the largest healthcare providers in the nation, including Advocate Aurora Health, Veterans Health Administration (VHA), Kaiser Permanente, and Trinity Health, having hundreds of thousands of patient-facing employees and accommodating the subset of those with sincere religious beliefs,

and (c) mid-sized and smaller healthcare providers also readily accommodating patient-facing personnel with sincere religious beliefs.

To be sure, VHA is the largest integrated healthcare system in the United States, employing more than 367,200 full time healthcare professionals and support staff, delivering care to over 9 million veterans at 1,293 facilities throughout the United States (including many in California). (*About VHA*, Veterans Administration, <https://www.va.gov/health/aboutvha.asp> (last visited September 30, 2021).) Obtaining a religious exemption from mandatory COVID-19 vaccination at the VHA only requires an employee to check a box on a form indicating a deeply held religious belief against the vaccination, and exempted employees are able to continue their same job functions with the same duties and responsibilities. (*See Docs. 57-2 to 57-4, Does v. Mills, supra.*) There is no reason why EMC cannot follow the same accommodation policy.

Given that numerous employers similarly situated to EMC have effectively accommodated their patient-facing employees with reasonable safety protocols (e.g., PPE, temperature checks, self-monitoring and reporting of symptoms, testing, etc.), which [REDACTED] have been doing under the CDPH Order (§ 3), and ready and willing to continue to do so, EMC will not be able to carry its burden to show that accommodation of its employees will cause an undue hardship. EMC cannot show that it is so uniquely situated that it cannot possibly provide its patient-facing employees the same accommodations provided by hundreds of healthcare employers to thousands of employees throughout the nation, including in California.¹³

**C. EMC's Bald Assertion that It Cannot Accommodate [REDACTED]
[REDACTED] Transparently Violates Title VII of the Civil Rights Act of 1964.**

As EMC is undoubtedly aware, Title VII of the Civil Rights Act prohibits EMC from discriminating against its employees based on 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). Title VII defines “religion” as “all aspects of religious observance

¹³ Moreover, EMC’s already dubious justification for claiming an inability to accommodate (as stated within the Sept. 28, 2021 Interactive Accommodation Assessment Summar[ies]—“unvaccinated persons are more likely to get infected and spread the virus”) is further weakened by the COVID-19 data constantly being compiled and analyzed. *See, e.g.,* Sanjay Mishra, *Evidence mounts that people with breakthrough infections can spread Delta easily*, National Geographic (Aug. 20, 2021), <https://www.nationalgeographic.com/science/article/evidence-mounts-that-people-with-breakthrough-infections-can-spread-delta-easily>; *see also Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today’s MMWR*, CDC, <https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html> (noting “**the Delta infection resulted in similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people**” (emphasis added)).

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)).

Here, EMC not only had no question about the sincerity of [REDACTED] religious beliefs, but Ms. Krall verbally affirmed that their religious beliefs were sincere. Instead, after a mere 20-minute discussion with each Doctor, EMC swiftly determined there was no accommodation that it was willing to make – despite no prohibition contained in the CDPH Order, and despite the active accommodation that had then been in place at least since September 10, 2021 (and in reality, since about March 2020). Yet, without stating why EMC had to **exceed the measures provided in the CDPH Order**, EMC rejected their requests for a religious accommodation based solely on terms quoted from the CDPH Order (“Per the [CDPH] Order . . .,” as stated in the Sept. 28, 2021 Interactive Accommodation Assessment Summary letters).

An employer’s unsupported, arbitrary denial of a request for a religious exemption and accommodation is unlawful under Title VII. While Title VII defines “‘religion’ [to] include[] all aspects of religious observance and practice, as well as belief, unless an employer **demonstrates** that he is unable to reasonably accommodate to an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business,” 42 U.S.C. § 2000e(j) (emphasis added), employers may not baldly assert “undue hardship.” Federal courts have long held that employers may not shirk their **duty to make good faith efforts** to provide a reasonable accommodation:

“The intent and effect of [the 1972 amendment to Title VII] ... was to make it an unlawful employment practice ... for an employer **not** to make reasonable accommodations, short of undue hardship, for the religious practices of its employees and prospective employees.”

Smith v. Pyro Mining Co., 827 F.2d 1081, 1084–85 (6th Cir. 1987) (quoting *TWA v. Hardison*, 432 U.S. 63, 74 (1977) (1st alteration added) (emphasis added)).

An employee makes a prima facie case of religious discrimination by showing that:

(1) he holds a sincere religious belief that conflicts with an employment requirement; (2) he has informed the employer about the conflicts; and (3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984). Once the employee has established a prima facie case, **the burden shifts**

to the employer to prove that it cannot reasonably accommodate the employee without incurring undue hardship.

Smith v. Pyro Mining Co., 827 F.2d at 1085 (citing *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921, (1979)) (emphasis added).

[REDACTED] have each demonstrated a prima facie case of religious discrimination by notifying EMC of their sincerely held religious beliefs that conflict with EMC's COVID-19 shot mandate, which EMC summarily rejected without a good faith consideration, despite its publicly stated willingness and ability to grant medical exemptions and to provide testing alternatives for hospital visitors. Thus, the burden is now on EMC **"to prove that it cannot reasonably accommodate [these Doctors] without incurring undue hardship."** *Id.* (emphasis added).

The reasonableness of an employer's attempt at accommodation cannot be determined in a vacuum. . . .

...

If the employer's **efforts** fail to eliminate the employee's religious conflict, **the burden remains on the employer** to establish that it is unable to reasonably accommodate the employee's religious beliefs without incurring undue hardship. . . . This court has noted that:

[A]n employer **does not** sustain his burden of proof merely by showing that an accommodation would be **bothersome to administer or disruptive of the operating routine**. In addition, we are somewhat **skeptical of hypothetical hardships** that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted.

Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir.1975).

Smith v. Pyro Mining Co., 827 F.2d at 1085–86 (citations omitted) (third alteration in original) (emphasis added). In this case, the practice **has already been put into place, without any evidence that any hardship actually resulted**. In any event, EMC did not claim "undue hardship." Rather, EMC merely stated "we are not able to accommodate the vaccination exemption request," without providing any justification – other than terminology parroted from the CDPH Order that **itself permits religious accommodations** under Section 3. EMC has not and cannot provide a justification that distinguishes its facilities from the numerous other facilities

in California and across the United States which are currently providing reasonable accommodations for patient-facing employment positions.

As the Ninth Circuit Court of Appeals succinctly explained in *Tooley v. Martin-Marietta Corp.*,

[a] claim of undue hardship **cannot be supported by merely conceivable or hypothetical hardships**; instead, it must be supported by **proof of “actual imposition on co-workers or disruption of the work routine.”** *Id.* at 406-07. The **magnitude** as well as the **fact of hardship** must be determined by the examination of the facts of each case.

Tooley v. Martin-Marietta Corp., 648 F. 2d 1239, 1243 (9th Cir. 1981) (emphasis added). Not only during the last twenty days, but over nearly the last eighteen months, EMC (as well as hospitals and medical facilities across the country) have been demonstrating accommodations can be reasonably made with testing, masks, and similar efforts. Thus, EMC’s sudden claim that it is not able to provide **any accommodation at all** necessarily fails. [REDACTED] are very willing to continue the testing and mask requirements under the CDPH Order. Moreover, if EMC has granted any requests for medical exemptions (which seems likely), the rejection of [REDACTED] requests for a religious exemption and accommodation is all the more suspect and discriminatory, and consequently, unlawful. In sum, EMC’s speculations are doomed to fail where they were put in place for a lengthy period of time without any undue hardship.

D. EMC is Not Permitted to Inquire into Correctness of an Employee’s Sincerely Held Religious Beliefs.

Although EMC did not question the sincerity of [REDACTED] religious beliefs, EMC should be aware that it is not permitted to determine whether a religious adherent has a correct understanding of religious doctrine or whether these Doctors’ or other employees’ sincerely held religious beliefs are shared broadly among members of their faith. As the Supreme Court has recognized, these Doctors’ “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 religion 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 [REDACTED] is irrelevant to whether these Doctors’ 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.**

Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. at 715-16 (emphasis added). Thus, any later attempt to deny [REDACTED] (or other employees’) requests for a religious accommodation and exemption based upon the views of other individuals who do not share their beliefs, would be unlawful.

In fact, 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 handout literature for those considering one of the 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.**” 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 emphasis 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 emphasis 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, [REDACTED] sincerely held religious beliefs compel them to abstain from accepting or injecting any of these products into their bodies, 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.

E. California Law Prohibits Discrimination on the Basis of [REDACTED] Sincerely Held Religious Beliefs.

Under the California Fair Employment and Housing Act, it is the public policy of the State of California that "it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . religious creed." Ca. Govt. Code §12920. Further, "the practice of discriminating because of [religion] is declared to be against public policy," in California. *Id.* In fact, California law declares that "[t]he opportunity to seek, obtain, and hold employment without discrimination because of [religion] is hereby recognized as and declared to be a civil right." Ca. Govt. Code §12921. Because of the unequivocal public policy pronouncements, "[i]t is an unlawful employment practice . . . [f]or an employer, because of [religious creed] to refuse to hire or employ the person [or] to discharge from employment [or] to discriminate against the person in compensation or in terms, conditions, or privileges of employment." Ca. Govt. Code §12940(a)

(emphasis added). *See also Ca. Fair Emp. & Housing Com. v. Gemini Aluminum Corp.*, 144 Cal. App.4th 1004, 1011 (2004).

The only relevant inquiry under California's Fair Employment and Housing Act is whether "the employee has a sincerely held religious belief, the employer was aware of that belief, and the belief conflicted with an employment requirement." *Gemini*, 144 Cal. App. 4th at 1011. In addition, much like claims under Title VII, only [REDACTED] articulation of their own sincerely held religious beliefs are relevant, and not the beliefs of others. *See, e.g., Cook v. Lindsay Olive Growers*, 911 F.2d 233, 240 (9th Cir. 1990) ("Even when an employer acts according to a policy applied reasonably to other individuals with different religious beliefs, it might nevertheless violate §12940(a); **no discriminatory motive is required.**").

Because [REDACTED] articulated a sincerely held religious objection to the currently available COVID-19 vaccines and made EMC aware of their religious beliefs via their request for an exemption and accommodation from the EMC mandatory COVID-19 vaccination policy (Ex. 1), and thus are unable to comply with EMC's Mandatory COVID-19 vaccination policy because it conflicts with their sincerely held religious beliefs, EMC was obligated to accommodate their religious beliefs under California law. As with Title VII discussed above, EMC's blanket refusal to accommodate these Doctors' sincerely held religious objections to the COVID-19 vaccines was unlawful and discriminatory.

F. California Law Protects [REDACTED] Right to Refuse Unwanted Medical Treatment.

California law also dictates that [REDACTED] each have the fundamental right to determine what medical care to accept and refuse. Indeed, "**the right to refuse medical treatment is equally 'basic and fundamental' and integral to the concept of informed consent.**" *Thor v. Superior Ct.*, 5 Cal. 4th 725, 736, 855 P.2d 375, 381 (1993) as modified on denial of reh'g (Aug. 21, 2019)" (1993) (emphasis added). *See also California Advocates for Nursing Home Reform v. Smith*, 38 Cal. App. 5th 838, 862, *modified on denial of reh'g* (Aug. 21, 2019) ("a competent adult" has the "right to refuse medical treatment, even treatment necessary to sustain life."). 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. The premise of this right is long-established and cannot be questioned. "Because health care decisions intrinsically concern one's subjective sense of well-being, this right of personal autonomy does not turn on the wisdom, i.e., medical rationality, of the individual's choice." *Id.* at 381. Instead,

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.

Id. at 381-82 (emphasis added).

By mandating that EMC employees submit to one of the COVID-19 vaccines runs roughshod over this basic protection. If these Doctors decide for themselves that they desire to abstain from forcible injection of a COVID-19 vaccine that violates their sincerely held religious beliefs, that is their 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).

G. The Federal Emergency Use Authorization Statute Prohibits Mandating Any of the Currently Available COVID-19 Vaccines.

The United States Code provides:

[S]ubject 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) [hereinafter EUA Statute]. As an essential part of the explicit statutory conditions for emergency use authorization (EUA), the EUA Statute mandates that all individuals to whom the EUA product 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 federal law. Thus, the administration of such vaccines **cannot be mandatory** under the plain text of the EUA Statute.

The statutorily required Fact Sheets for each of the EUA COVID-19 vaccines acknowledge that individuals cannot be compelled to accept or receive the vaccine. *See* Moderna, *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 Recipients 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)).

The recent FDA biologics license application (BLA) approval of the product COMIRNATY, COVID-19 Vaccine, mRNA, manufactured by BioNTech Manufacturing GmbH,¹⁴ does not change the EUA status of the Pfizer-BioNTech COVID-19 Vaccine that has been available under EUA since December 23, 2020.¹⁵ According to the EUA extension letter issued by the FDA to Pfizer on August 23, 2021, the Pfizer-BioNTech COVID-19 Vaccine and BioNTech’s COMIRNATY, COVID-19 Vaccine, mRNA “are legally distinct” products.¹⁶ Moreover, the now “approved” COMIRNATY vaccine cannot be distributed for use until BioNTech submits “final container samples of the product in final containers together with protocols showing results of all applicable tests” and BioNTech receives “a notification of release from the Director, Center for Biologics Evaluation and Research (CBER).”¹⁷ Thus, it is not clear when (or if) any EMC employee will have access to the “approved” COMIRNATY vaccine, leaving all (or at least the vast majority of) EMC employees who may elect to receive the “Pfizer” vaccine pursuant to EMC’s mandatory vaccine policy to receive a dose of the current stock of Pfizer-BioNTech vaccine still being administered subject to EUA rules. Thus, under the EUA Statute, administration of the **currently available** vaccines cannot be mandatory. At any rate, even without the EUA Statute, [REDACTED] still have legal rights to religious accommodation under federal and state law.

LEGAL DEMAND

As shown above, EMC’s denials of the religious exemption requests of [REDACTED] are unlawful. EMC cannot compel any employee’s compliance with EMC’s mandatory COVID-19 vaccination policy against the employee’s sincerely held religious beliefs, and cannot single out religious exemption requests for disfavored treatment, even as against medical or pregnancy exemption requests.

¹⁴ BLA Approval Letter for COMIRNATY, COVID-19 Vaccine, mRNA (Aug. 23, 2021), <https://www.fda.gov/media/151710/download>.

¹⁵ EUA Extension Letter for Pfizer-BioNTech COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/media/150386/download>.

¹⁶ See EUA Extension Letter, *supra* n.15, at 2 n.8.

¹⁷ See BLA Approval Letter, *supra* n.14, at 2.

Liberty Counsel prefers to avoid the need for further legal action and trusts that the points and authorities presented in this letter demonstrate to EMC that its pretextual and discriminatory denials of its employees' requests for religious accommodation are unlawful. Should EMC continue its unlawful denials, however, Liberty Counsel will be forced to conclude that EMC is disregarding its obligations to provide accommodations to employees with sincerely held religious objections to the COVID-19 vaccines in violation of both federal and state law.

Liberty Counsel is giving EMC the opportunity to grant the religious exemption requests of [REDACTED] without litigation. To avoid litigation, EMC must provide, prior to Friday, October 1, 2021 at 5:00 P.M., EMC's assurances that:

- 1) EMC confirms and accepts this letter sufficiently serves as a NOTICE OF APPEAL under Eisenhower Health's Grievance and Due Process Policy (eff. June 24, 2019), and that [REDACTED] salary and benefits will continue as they had been through the appeal process (including any new benefits due them); and**
- 2) EMC has granted the religious exemption requests of [REDACTED] and notified them of their granted exemptions; and**
- 3) EMC has reinstated the employment of [REDACTED], with the same compensation and benefits as before being placed on unpaid administrative leave or termination, and paid or agreed to pay of [REDACTED] the value of all lost wages and benefits and any out-of-pocket expenses resulting from the period of their unlawful suspension and/or termination; and**
- 4) EMC will not deny (and will reverse any prior denial of) any religious exemption request based solely on any employee's patient-facing position; and**
- 5) EMC will not deny (and will reverse any prior denial of) any religious exemption request based on evaluation criteria less favorable to religious exemption requests than to medical, pregnancy, or any other category of exemption allowed by EMC; and**
- 6) EMC will not deny (and will reverse any prior denial of) any religious exemption request based on the absence of approval or acknowledgement of any employee's religious beliefs by a third party; and**

- 7) **EMC will not deny (and will reverse any prior denial of) any religious exemption request based on any stated or perceived different beliefs by any religious denomination or organization; and**
- 8) **EMC will not deny (and will reverse any prior denial of) any religious exemption request based on any employee's past vaccination or other health decisions or the employee's theological reasons for those decisions; and**
- 9) **EMC will not deny any religious exemption request without providing specific reasons for the denial and will provide specific reasons for denial at the request of any previously denied employee.**

EMC's failure to respond positively or timely, or EMC's taking of any adverse or retaliatory action against [REDACTED], or any other employee who has requested religious accommodation, will indicate to Liberty Counsel that EMC will not comply with its legal obligations against discrimination without judicial intervention. In that event, we will proceed directly with litigation to vindicate the legal rights of [REDACTED] and other EMC employees, without further warning.

Sincerely,



Kristina J. Wenberg[†]
Senior Litigation Counsel
Liberty Counsel

cc: Nic Cocisⁱ
Local Counsel

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Michael D. Landes
President, Eisenhower Medical Center
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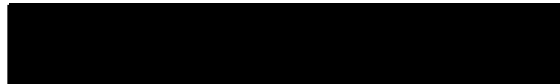
[REDACTED]

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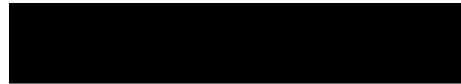
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