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REPLY TO FLORIDA

October 11, 2021

By E-mail

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Oregon Health & Science University
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**Re: Unlawful Denials of Religious Exceptions from
Mandatory COVID-19 Vaccination Policy**

**THIS IS A LEGAL DEMAND LETTER INCLUDING AN EVIDENCE
PRESERVATION DEMAND. OHSU'S PROCESS AND CRITERIA FOR
RELIGIOUS EXCEPTION FROM ITS MANDATORY COVID-19
VACCINATION POLICY ARE UNLAWFUL. YOUR PROMPT
RESPONSE IS REQUIRED ON OR BEFORE OCTOBER 14, 2021 AT
5:00 P.M. TO AVOID A LAWSUIT.**

Dear Mr. Jacobs and Ms. Cuprill-Comas:

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).

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 both a federal district court (see *Does v. Hochul, supra*, Doc. 35), and the Second Circuit Court of Appeals, see *We the Patriots USA, Inc. v. Hochul*, No. 21-2179, Doc. 65 (2nd Cir. Sept. 30, 2021) (granting injunction pending appeal against state policy denying religious exemptions from COVID-19 vaccination requirement for healthcare workers), 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 the Oregon Health & Science University (OHSU) employee ██████ (“**Employee 1**”), and several others, who are requesting exception from OHSU’s mandatory COVID-19 vaccination policy as a reasonable accommodation of their sincerely held religious beliefs, and whose requests have been denied or effectively denied, regardless of merit, under OHSU’s cynical and unlawful “narrow exceptions process.” (Employee 1 request and denial attached as **Exhibit 1**.) Many of these employees have engaged Liberty Counsel to bring legal action if OHSU denies their merited religious exception requests, and **we are actively seeking to represent, pro bono, additional OHSU employees who are adversely affected by OHSU’s illegal mandate and exception process.**

OHSU’s “narrow exceptions process” is not even close to the line of legality and demonstrates the utmost bad faith towards its employees seeking religious exemptions. OHSU must cease its unlawful practices immediately.

A. OHSU’s Unlawful Criteria for Religious Exception.

*All hope abandon, ye who enter in!*¹

OHSU ostensibly offered its employees a process for requesting a medical or religious exception to OHSU’s mandatory COVID-19 vaccination policy, with all requests due by September 20, 2021. (*Sept. 22 update*, attached as **Exhibit 2**.) For religious exception requests, OHSU required submission of its *OHSU Member COVID-19 Vaccine Religious Exception Request Form* (see, e.g., Ex. 1). After the deadline for submission, however, OHSU introduced its Vaccine Exception Review Panel and revealed its post hoc “very narrow criteria for approving medical or religious exemptions.” (Ex. 1.) The previously undisclosed policy promises that, “[i]n accordance with relevant federal and Oregon law, members who can demonstrate a sincerely held religious belief and past behavior consistent with that belief will be approved,” but then smugly declared the beliefs OHSU deems insufficiently religious. (Ex. 2; *OHSU Exceptions Requests and Accommodations Process and FAQs*, attached as **Exhibit 3**; *Narrow exceptions process will help keep OHSU and our community safe*, attached as **Exhibit 4**.)

According to OHSU’s “narrow exceptions process,” the beliefs deemed insufficiently religious include any beliefs leading to “objection to the vaccine on the basis of fetal cell concerns”

¹ Dante Alighieri, *Inferno*, Canto III (1314) (Longfellow Translation, 1867), available at digitaldante.columbia.edu/dante/divine-comedy/inferno/inferno-3/.

and “objection to the vaccine based upon bodily integrity or sanctity.” (Exs. 3, 4.) OHSU declares any such “professed beliefs” to be “personal moral choices and/or conscientious objections rather than a tenet of a religious faith.” (Exs. 3, 4.) OHSU also declares that “[r]eceiving another vaccine in the last five years” is “past behavior that may disqualify an individual from receiving a religious exception.” (Exs. 2–4.)

OHSU’s communications following the revelation of its “narrow exceptions process” make it increasingly clear that OHSU’s Exception Review Panel is actively working against employees seeking religious exceptions, and that the process is designed to intimidate and discourage employees into giving up. OHSU feigns that “each review is requiring a high level of individual assessment by multiple reviewers by representatives from AAEO, Center for Diversity and Inclusion, Human Resources, Legal, Occupational Health and Student Health and Wellness,” and warns that “[i]n preliminary reviews, **OHSU's exception review panel expects that very few of the submitted requests for religious exceptions will be approved.**” (Ex. 4; *An update on vaccine policy exception requests*, attached as **Exhibit 5**.) Moreover, OHSU advised that the Review Panel may not complete its review before the last day that an employee can receive a vaccine in time to be fully vaccinated and compliant with the policy by Oct. 18.” (Exs. 4, 5.) In other words, OHSU unequivocally informed its employees seeking religious exceptions that they likely must choose between receiving a COVID-19 shot that would violate their sincerely held religious beliefs, or getting fired by OHSU, **before OHSU gives them a decision on their exception requests.** Especially when combined with the discouragement that “very few” exceptions will be approved, putting employees to this unconscionable choice constitutes effective denial.

Employee 1 submitted her religious exception request on September 19, 2021, and OHSU denied her request on October 4, 2021—the day OHSU declared to be the last day an employee could receive the Johnson & Johnson vaccine and still be in compliance with OHSU’s vaccination policy as of October 18. (Ex. 1.) Despite Employee 1’s having plainly and completely explained her sincerely held religious beliefs against receiving a COVID-19 vaccine, and providing a verification of the sincerity of her beliefs from her pastor (which OHSU cannot legally require, *see infra* Pt. B), OHSU denied Employee 1’s exception request (and numerous others’) with no opportunity for appeal, and with no explanation other than generic references to OHSU’s “narrow criteria.” (Ex. 1.) As shown below, despite feigning legal compliance, OHSU has unlawfully subjected Employee 1 and others to a sham process for religious exceptions and issued pretextual denials.

B. OHSU’s Denials Violate Title VII Because OHSU Is Not Permitted to Judge the Validity or Reasonableness of Any Employee’s Sincerely Held Religious Beliefs.

OHSU has no legal authority to dictate what any employee’s religion is or ought to be, or to be the arbiter of the validity or reasonableness of any employee’s sincerely held religious beliefs. Nor does OHSU have the authority to demand that a third party validate any employee’s religious beliefs. An employee’s religious beliefs need only be sincere to merit legal protection and require OHSU’s accommodation. And given OHSU’s barely concealed animus towards the religious

beliefs of its employees, any employee who would risk OHSU's retaliation by making a religious exemption request should be presumed sincere, and the law requires it.

Title VII of the Civil Rights Act of 1964 prohibits OHSU from discriminating against its employees on the basis of their sincerely held religious beliefs. *See* 42 U.S.C. §2000e-2(a) (“It shall be an unlawful employment practice for an employer . . . 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 and practice, as well as belief.”** 42 U.S.C. §2000e(j) (emphasis added). Moreover, as the EEOC has made clear, **Title VII’s protections also extend to nonreligious beliefs if related to morality, ultimate ideas about life, purpose, and death.** *See EEOC, Questions and Answers: Religious Discrimination in the Workplace* (July 22, 2008), <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (“Title VII’s protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs. Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic ‘moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.’ Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns ‘ultimate ideas’ about ‘life, purpose, and death.’”).

OHSU is not permitted to determine which religious adherent has a “correct” or “proper” or “valid” understanding of religious doctrine, or whether any employee’s sincerely held religious beliefs are shared by other adherents. As the Supreme Court has recognized, employees’ “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [legal] protection.” *Thomas v. Review Bd. of Ind. Emp’t 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’t 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”). Given this authority, OHSU’s manufactured distinction between “personal moral choices and/or conscientious objections” and “a tenet of a religious faith” is legally unsupported, and any denials of religious exception requests based on this distinction is illegally pretextual.

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 OHSU employees requesting accommodation may have sincerely held religious beliefs that differ from those sincerely held by other individuals and organizations is irrelevant to whether **the employees'** sincerely held religious beliefs are entitled to protection under Title VII. Indeed,

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

450 U.S. at 715–16 (emphasis added). The denial of any employee's request for a religious accommodation based on the views of other individuals who do not share the employee's beliefs is unlawful. In fact, **it is legally irrelevant what other individuals think or believe.**

Many OHSU employees have sincerely held religious beliefs that God forms children in the womb and knows them prior to their birth, and that because of this, life is sacred from the moment of conception to natural death. *See Psalm* 139:13–14 (ESV) (“For you formed my inward parts; you knitted me together in my mother’s womb. I praise you, for I am fearfully and wonderfully made.”); *Psalm* 139:16 (ESV) (“Your eyes saw my unformed substance; in your book were written, every one of them, the days that were formed for me, when as yet there was none of them.”); *Isaiah* 44:2 (KJV) (“the Lord that made thee, and formed thee from the womb”); *Isaiah* 44:24 (KJV) (“Thus saith the Lord, thy redeemer, and he that formed thee from the womb, I am the Lord that maketh all things.”); *Isaiah* 49:1 (KJV) (“The Lord hath called my from the womb; from the bowels of my mother hath he made mention of my name.”); *Isaiah* 49:5 (KJV) (“the Lord that formed me from the womb to be his servant”); *Jeremiah* 1:5 (KJV) (“Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, and I ordained thee.”). These employees also have sincerely held religious beliefs that every child’s life is sacred because each is made in the image of God. *See Genesis* 1:26–27 (KJV) (“Let us make man in our image, after our likeness. . . . So God created man in his own image; in the image of God created he him; male and female created he them.”).

Many OHSU employees also have sincerely held religious beliefs that because life is sacred from the moment of conception, the killing of that innocent life is the murder of an innocent human in violation of Scripture. *See, e.g., Exodus* 20:13 (KJV) (“Though shalt not kill.”); *Exodus* 21:22–23 (setting the penalty as death for even the accidental killing of an unborn child); *Exodus* 23:7 (KJV) (“the innocent and righteous slay thou not, for I will not justify the wicked”); *Genesis* 9:6

(KJV) (“Whoso sheddeth a man’s blood, by man shall his blood be shed: for in the image of God made he man.”); *Deuteronomy* 27:25 (KJV) (“Cursed be he that taketh reward to slay an innocent person.”); *Proverbs* 6:16–17 (KJV) (“These six things doth the Lord hate: yea, seven are an abomination to him . . . hands that shed innocent blood.”). Many OHSU employees also have sincerely held religious beliefs that it would be better to tie millstones around their necks and be drowned in the sea than to bring harm to an innocent child. *See Matthew* 18:6; *Luke* 17:2.

Many OHSU employees also have sincerely held religious beliefs that their bodies are temples of the Holy Spirit, and that to inject medical products that have any connection whatsoever to aborted fetal cell lines would be defiling the temple of the Holy Spirit. (*See I Corinthians* 6:15–20 (KJV) (“Know ye not that your bodies are the members of Christ? shall I then take the members of Christ and make them members of an harlot? God forbid. . . . What? Know ye not that your body is the temple of the Holy Ghost which is in you, which have of God, and ye are not your own? For ye are bought with a price: therefore glorify God in your body, and in your spirit, which are God’s.”).

The Hebrew word for “abomination” in the *Proverbs* 6:16–17 (KJV) text quoted above is תועבה (to`eba). The verbal form is “abhor,” “loath,” “detest,” and “exclude.” Twelve times the Book of Proverbs uses תועבה in reference to an “abomination to the Lord.” (יהוה or Yahweh). The word is also used in conjunction with the Ammonites and the Ashtoreth, the Sidonians, Chemosh, and Moab. Some of these nations sacrificed their children to Baal. Indeed, *Jeremiah* 19:4–9, refers to the shedding of innocent blood by sacrificing children as the reason for judgement against Judah. Abortion is the modern-day sacrifice of children made in the image of God. Many OHSU employees do not want to be a part of such an “abomination.” They do not want to be in any way associated with abortion, directly or indirectly. For them, doing so is abhorrent, loathsome, detestable—abominable—to God.

Thus, while there may be some faith leaders and other religious 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 or other objections, any OHSU employee is entitled to interpret the Scriptural commands against murder and polluting the body differently, which many indisputably do. Once an employee has articulated **the employee’s** sincerely held religious beliefs opposing the currently available COVID-19 vaccines, whether those beliefs are the same as or nothing like any other person’s beliefs, the proper inquiry is at its end. OHSU violates Title VII if it denies a religious exemption request because a third party did not vouch for or agree with the employee’s sincerely held beliefs.

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 (which OHSU knows²), and for other articulated reasons, the sincerely held

² Editorializations notwithstanding, OHSU admits its knowledge of the aborted fetal cell connection as to the available Moderna and Pfizer vaccines. (Exs. 2–4.) OHSU ignores, however,

religious beliefs of Employee 1 and many other OHSU employees compel them to abstain from accepting or injecting any of these products into their bodies, regardless of the perceived benefits or rationales. Employee 1 explained that, because of the undisputed aborted fetal cell connections and biblical injunctions against the taking of innocent life, receiving any COVID-19 vaccine would be a sin and therefore a violation of her sincerely held religious beliefs. Employee 1's (and many other employees') sincerely held beliefs about the sin of abortion and any participation in abortion—no matter how remote—clearly concern “‘ultimate ideas’ about ‘life, purpose, and death.’” *Questions and Answers, supra*. OHSU cannot arbitrarily disqualify these sincerely held beliefs as not “religious” based on any contrary views of its Review Panel or even public religious figures.

OHSU's disqualification criterion of “[r]eceiving another vaccine in the last five years” is also legally unsupportable. All available COVID-19 vaccines are brand new, and are unlike preexisting vaccines in numerous respects involving their technology, development, contents, and administration. For example, OHSU cannot seriously point to an employee's prior receipt of the annual flu vaccine as inconsistent with an employee's current religious objections to the COVID-19 vaccines—the available flu vaccines were not developed, produced, manufactured, or tested using aborted fetal cell lines. Moreover, any employee's knowledge, understanding, and beliefs towards vaccinations and other medications may (and likely do) change over time. The legal premise of OHSU's disqualifier—that an employee's current request for religious accommodation must be consistent with all the employees' prior health decisions or prior religious understandings—is false, and any denial based on this false premise is illegally pretextual.

In sum, it is unlawful for OHSU to condition approval of any employee's request for religious accommodation on agreement with OHSU's or any third party's views on acceptable religious beliefs or on the employee's past health decisions or the theological reasons for those decisions.

C. OHSU's Denials of Religious Exceptions Violate Oregon Employment Discrimination Statutes Which are Patterned after Title VII.

Oregon state law provides employees the same protections from religious discrimination as the federal Title VII. *See, e.g., Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1146 (D. Or. 2017) (“Because Oregon's employment discrimination statute was modeled after Title VII, plaintiff's state and federal discrimination claims are analyzed in the same way.”); *A.L.P. Inc. v. Bureau of Labor & Indus.*, 984 P.2d 883, 885 (Or. Ct. App. 1999) (recognizing state

the even closer connection to the Johnson & Johnson vaccine which uses aborted fetal cell lines in its production and manufacture. *See* N.D. Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf; La. Dep't of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 21, 2020), https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf.

nondiscrimination statute patterned after Title VII). Thus, OHSU's illegal conduct under Title VII also violates Oregon state law.

D. The First Amendment to the United States Constitution Protects Publicly Employed Oregon Healthcare Workers.

In addition to Title VII and cognate state law protections, all healthcare workers in Oregon who are employed by a public entity such as OHSU have protection for the exercise of their sincerely held religious beliefs under the First Amendment to the United States Constitution. It is beyond cavil that government employees do not shed their constitutional rights upon entering government employment. *See Martin v. Lauer*, 686 F.2d 24, 31(D.C. Cir. 1982) (“government employees do not shed their first amendment rights on assuming public responsibilities” (emphasis added)). Indeed, “people do not give up their free-exercise or free-speech rights when they become government employees.” *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (emphasis added). *See also Bd. of Cnty. Comm’rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 675 (1996) (“The First Amendment’s guarantee . . . protects government employees.”); *Putnam v. Regional Sch. Unit 50*, No. 1:14-cv-154-JAW, 2015 WL 5440783, *14 (D. Me. Sept. 15, 2015) (“This guarantee applied to government employees as well, who should not ‘suffer reprisal from a government official . . . because of the possible chilling effect against the free exercise of constitutional rights.’” Quoting *Rosaura Bldg. Corp. v. Mun. of Mayaguez*, 778 F.3d 55, 66 (1st Cir. 2015)).

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

Every publicly employed healthcare worker in Oregon has the First Amendment right to the free exercise of religion, including whether to accept a forcible injection of a vaccine. OHSU's violates this fundamental right of its employees by denying their legitimate requests for religious accommodation because OHSU cannot carry its burden under strict constitutional scrutiny, requiring OHSU to prove universal, mandatory vaccination is the least restrictive means of achieving its health and safety goals. As shown below, OHSU could easily accommodate all of the small percentage of its employees who have submitted religious exception requests.

E. OHSU Can Reasonably Accommodate Its Patient-Facing Employees' Sincerely Held Religious Beliefs Without Undue Hardship.

“Across OHSU's more than 22,000 members” (Ex. 4), only 465 (2%) submitted a request for religious exception. (*Sept. 28 update*, attached as **Exhibit 6.**) OHSU cannot seriously argue it is unable to accommodate these employees' sincerely held religious objections to COVID-19

vaccination, even if patient-facing. Large and small healthcare employers in Oregon 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 OHSU’s arbitrary 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 Counsel) recently filed **32 sworn declarations** of patient-facing healthcare employees from around the country, including two from Oregon (attached as **Exhibits 7 & 8**), demonstrating the availability and workability of accommodations for patient-facing healthcare workers with sincerely held religious objections to COVID-19 vaccination. (*See Docs. 57-2 to 57-33, Does v. Mills*, No. 1:21-cv-00242-JDL (D. Me. Sept. 17, 2021).) For example, a chemotherapy nurse at the Veterans Affairs Medical Center in Portland, Oregon, declared:

2) I am employed as a chemotherapy nurse at the Veterans Affairs (“VA”) Medical Center in Portland, Oregon. My hospital is part of the Veterans Health Administration (“VHA”).

3) The VHA is the largest integrated health care system in the United States, employing more than 367,200 full time health care professionals and support staff, who deliver healthcare services to over 9 million veterans at 1,293 healthcare facilities throughout the United States. (*See* <https://www.va.gov/health/aboutvha.asp>).

4) In Oregon, the VA Portland Healthcare System serves over 95,000 veterans at more than a dozen facilities throughout the state. (*See* <https://www.portland.va.gov/about/index.asp>).

5) The VHA permits and freely grants exemptions and accommodations to healthcare employees with sincerely held religious objections to mandatory vaccinations, including COVID-19 vaccination.

6) The VHA form for requesting and obtaining a religious exemption and accommodation from its mandatory COVID-19 vaccination policy is very simple, and requires employees only to check a box indicating that they have a deeply held religious belief that prevents them from receiving the COVID-19 vaccine, and that they have notified their immediate supervisor in writing of that belief. Employees are not required or expected to explain the nature of their religious beliefs, and supervisors are not required to “approve” those beliefs. . . .

7) Once a VHA employee checks the box and completes the exemption form, he or she is automatically exempted from the mandatory vaccination policy, and permitted to continue in the same job function, with the same duties and responsibilities. The only VHA requirement (or accommodation) for exempt employees is that they must wear a face mask

. . . .

10) My exemption and accommodation permit 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 a mask, as stated in the exemption form. My individual facility is also requiring weekly testing for COVID-19. I comply with all of these requirements.

(Ex. 7; *see also* Ex. 8 (medical professional providing direct support to individuals with disabilities at Shangri-La in Salem, Oregon, who received religious exemption to employer's mandatory COVID-19 vaccination policy along with other employees)). There is no reason why OHSU cannot enact the same policies.

In addition to the attached declarations from Oregon healthcare workers, the declarations filed in the Maine litigation demonstrate similar accommodations granted to patient-facing healthcare workers in Maine, California, Washington, New Mexico, Missouri, Texas, Wisconsin, Minnesota, Illinois, 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 the VHA (*see* Ex. 7), 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. All 32 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.

Given that numerous employers similarly situated to OHSU 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 OHSU's employees are ready and willing to adopt, OHSU will not be able to carry its burden to show that it cannot reasonably accommodate its employees without undue hardship. OHSU 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 Oregon.³

F. 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.

³ Furthermore, to the extent OHSU is willing and able to accommodate its patient-facing employees with **medical** exceptions, OHSU’s unwillingness to extend the same accommodation to employees with **religious** objections will demonstrate OHSU’s religious animus to the court and the jury. If an unvaccinated employee following safety protocols poses any increased risk of transmission at all, which is not conceded, an employee unvaccinated for medical reasons would pose **exactly the same risk** as an employee unvaccinated for religious reasons. Accommodating one and not the other is discrimination. 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. Moreover, such disparate treatment of similar risks undermines OHSU’s already dubious “medical and scientific” justifications (*see* Ex. 3) for universal vaccination, as does the COVID-19 data continually 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))).

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,⁴ does not change the EUA status of the Pfizer-BioNTech COVID-19 Vaccine that has been available under EUA since December 23, 2020.⁵ 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.⁶ 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).”⁷ Thus, it is not clear when (or if) any OHSU employee will have access to the “approved” COMIRNATY vaccine, leaving all (or at least the vast majority of) OHSU employees who may elect to receive the “Pfizer” vaccine pursuant to OHSU’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, these employees still have legal rights to religious accommodation under federal and state law.

LEGAL DEMAND

As shown above, OHSU’s denials of the religious exception requests of Employee 1 and others are unlawful. OHSU cannot compel any employee’s compliance with OHSU’s mandatory COVID-19 vaccination policy against the employee’s sincerely held religious beliefs, and cannot single out religious exception requests for disfavored treatment, even as against medical exception

⁴ BLA Approval Letter for COMIRNATY, COVID-19 Vaccine, mRNA (Aug. 23, 2021), <https://www.fda.gov/media/151710/download>.

⁵ EUA Extension Letter for Pfizer-BioNTech COVID-19 Vaccine (Aug. 23, 2021), <https://www.fda.gov/media/150386/download>.

⁶ *See* EUA Extension Letter, *supra* note 5, at 2 n.8.

⁷ *See* BLA Approval Letter, *supra* note 4, at 2.

requests. Moreover, it is unlawful for OHSU to deny any employee's request for religious accommodation based on OHSU's arbitrary decree or the religious beliefs of any other person or organization, or on the employee's past personal health decisions, whatever the employee's theological reasons for those decisions.

Liberty Counsel prefers to avoid the need for further legal action, and trusts that the points and authorities presented in this letter demonstrate to OHSU that its pretextual and discriminatory denials of its employees' requests for religious accommodation are unlawful. Should OHSU continue its unlawful denials, however, Liberty Counsel will be forced to conclude that OHSU 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 OHSU the opportunity to grant the religious exception request of Employee 1 without litigation. To avoid litigation, OHSU must provide, prior to Thursday, October 14, at 5:00 P.M., OHSU's assurances that:

- 1) OHSU has granted the religious exception request of Employee 1 and halted any HR process which could result in adverse employment action, and notified her of same;**
- 2) OHSU will not deny (and will reverse any prior denial of) any religious exception request where the request is based on an employee's sincere religious objection to receiving the COVID-19 vaccines developed, tested, produced, or otherwise connected to aborted fetal cell lines or from receiving any of the COVID-19 vaccines if such act conflicts with any other sincerely held religious belief, such as belief;**
- 3) OHSU will not deny (and will reverse any prior denial of) any religious exception request where the request is based on an employee's objection to receiving the COVID-19 vaccines based on sincerely held religious beliefs about bodily integrity or sanctity, or any other sincerely held religious belief characterized by OHSU as "personal moral choices and/or conscientious objections;"**
- 4) OHSU will not deny (and will reverse any prior denial of) any religious exception request based on the absence of approval or acknowledgement of the employee's religious beliefs by a third party;**
- 5) OHSU will not deny (and will reverse any prior denial of) any religious exception request based on any stated or perceived different beliefs by any religious denomination, organization, or leader;**
- 6) OHSU will not deny (and will reverse any prior denial of) any religious exception request based on evaluation criteria less favorable to religious exception requests than to medical or any other category of exception allowed by OHSU;**

- 7) **OHSU will not deny (and will reverse any prior denial of) any religious exception request based on an employee's past vaccination or other health decisions or the employee's theological reasons for those decisions; and**
- 8) **OHSU will not deny any religious exception request without providing specific reasons for the denial and an opportunity for appeal or reconsideration, and will provide specific reasons for denial and an opportunity for appeal or reconsideration at the request of any previously denied employee.**

OHSU's failure to respond positively or timely, or OHSU's taking of any adverse or retaliatory action against Employee 1 (or further adverse or retaliatory action against Employee 1), or any other employee who has requested religious accommodation, will indicate to Liberty Counsel that OHSU 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 Employee 1 and other OHSU employees, without further warning.

EVIDENCE PRESERVATION DEMAND

In connection with the foregoing Legal Demand, Liberty Counsel also demands that OHSU preserve all records, data, documents, devices, and things in its possession or the possession of its employees, including private wireless phones and devices and records and data found thereon, from January 1, 2020 to the present (and continuing), constituting, reflecting, or reasonably related to the following:

1. The conception, formation, membership, staff, volunteers, administration, policies, guidelines, communications, analyses, opinions, deliberations, decisions, meetings, and other official or unofficial actions of the OHSU Vaccine Exception Review Panel, including without limitation the "narrow criteria for approving medical or religious exceptions" shared with OHSU employees, students, and other members on September 22, 2021 and any amendments or revisions thereto (*see* Exs. 1, 3, 4);
2. All requests for exception from receiving a COVID-19 vaccine submitted to the Vaccine Exception Review Panel or any other person or persons employed by or under the direction and control of OHSU, from Employee 1 or any other OHSU employee, and all communications, analyses, opinions, deliberations, decisions, meetings, and other official or unofficial actions of the Vaccine Exception Review Panel or such other person or persons concerning such exception or accommodation requests; and
3. Any training received by any Vaccine Exception Review Panel member, consultant, employee, or volunteer, or any other OHSU employee, consultant, volunteer, or board member regarding the conception, enactment, and

administration of OHSU's mandatory COVID 19 vaccination policy, including without limitation the review, consideration, and disposition of requests for religious or medical exception or accommodation from the policy.

The records, data, and documents subject to this demand include all paper and other physical files and all electronically stored information (ESI), including but not limited to e-mail, text, SMS, MMS, social media, and other electronic communications, whether maintained on a personal or business device or account, including on personal wireless devices, personal e-mail accounts, and personal social media accounts; and further including without limitation word processing documents, spreadsheets, databases, calendars, telephone logs, contact information, usage files, and access information from networks, databases, computer systems (including legacy systems, hardware, and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges, and other storage media, laptops, personal computers, tablets, digital assistants, handheld wireless devices, mobile telephones, paging devices, and audio systems (including voicemail).

Liberty Counsel expects OHSU to preserve records, data, documents, devices, and things from January 1, 2020, to the present (and continuing) in OHSU's possession and in the possession of any third party under its control. If OHSU knows or reasonably determines that any older records, data, documents, devices, or things are potentially relevant, however, OHSU should preserve such materials from the relevant earlier period as well.

ESI is an important and irreplaceable source of evidence in connection with this matter. Liberty Counsel cautions OHSU that this preservation demand should be afforded the broadest possible interpretation with respect to ESI, and that responsive ESI can reside not only in areas that are reasonably accessible but also in areas that OHSU may deem not reasonably accessible. Liberty Counsel demands that OHSU preserve all responsive ESI, even if OHSU does not anticipate an obligation to produce such ESI in future litigation.

Preservation of ESI may require more than simply refraining from efforts to destroy or dispose of such evidence. OHSU may have to affirmatively intervene in automatic processes to prevent data loss due to routine operation and overwriting. For instance, sources of ESI can be altered and erased simply through continued use of a computer or other device. Booting a drive, examining its contents, or running any application can irretrievably alter the evidence it contains and may constitute unlawful spoliation of evidence. OHSU should take care to employ proper techniques and protocols, hiring an expert to assist if necessary.

OHSU should be aware that employees or others may seek to hide, destroy, or alter ESI, and OHSU must act to prevent or guard against such actions. Users may seek to delete or destroy information they regard as personal, confidential, or embarrassing and, in so doing, may also delete or destroy responsive ESI. Though Liberty Counsel expects OHSU will act swiftly to preserve data on office workstations and servers, OHSU should also determine whether any home or portable systems contain potentially responsive ESI. OHSU must preserve the contents of the systems, devices, and media used for those purposes as well.

I am available to discuss reasonable preservation steps; however, OHSU should not delay in taking proper precautions to preserve relevant records, data, documents, and things if they may be lost or corrupted as a consequence of delay. Should OHSU's failure to preserve potentially relevant evidence result in the corruption, loss, or delay in production to which Employee 1 or any other employee may later be entitled, such failure would constitute spoliation of evidence, for which sanctions may be imposed.

Please govern yourselves accordingly.

Very truly yours,



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