No. 21-3242

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANE DOE 1, et al.,
Plaintiffs–Appellants,

v.

NORTHSHORE UNIVERSITY HEALTHSYSTEM,
Defendant–Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois
In Case No. 1:21-cv-05683 before The Honorable John F. Kness

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL OR TO EXPEDITE APPEAL

RELIEF REQUESTED BY DECEMBER 16, 2021

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DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and Rule 26.1 of this Court, the undersigned attorney for Plaintiffs–Appellants states:

1. The full name of every party that the attorney represents in the case:

> The undersigned counsel represent Plaintiffs-Appellants **Jane Does 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14**, who are all individual persons. The district court has granted leave for Plaintiffs-Appellants to proceed under pseudonym. (Dkt. 52 at 20–24; A346–350). The true names of Plaintiffs-Appellants will be filed separately, under seal. (Cir. R. 26.1(b)).

2. The names of all law firms whose partners or associates have appeared for Plaintiffs–Appellants in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Liberty Counsel; Leahu Law Group, LLC

3. If the party, amicus or intervenor is a corporation:

   i. Identify all its parent corporations, if any; and

   N/A

   ii. list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

   N/A

4. Provide information required by FRAP 26.1(b)—Organizational Victims in Criminal Cases:

N/A

5. Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

DATED: December 10, 2021.

/s/ Horatio G. Mihet
Horatio G. Mihet

Attorney for Plaintiffs–Appellants

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RELIEF SOUGHT

"*An award of backpay or reinstatement cannot undo a vaccine.*"[1]

Plaintiffs–Appellants, JANE DOES 1-14, on their own behalf and on behalf of all those similarly situated, respectfully request that this Court, *on or before December 16, 2021*:

1. Enter an injunction pending appeal of the district court's November 30, 2021 Memorandum Opinion and Order denying Plaintiffs' a preliminary injunction ("PI Order") (Dkt. 52; A327),[2] restraining and enjoining Defendant–Appellee NorthShore University HealthSystem ("NorthShore"), from enforcing its unlawful "no religious accommodations" policy, and from terminating Plaintiffs' employment or taking other adverse action against Plaintiffs; and/or in the alternative,

2. For an order expediting this appeal, to remedy the irreparable harm being suffered by Plaintiffs.

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[1] *Fraternal Order of Police Chicago Lodge No. 7 v. City of Chicago*, Case No. 2021 CH 5276 (Cook Cty. Nov. 1, 2021) (emphasis added) (attached at dkt. 42-9).

[2] "Dkt. __ at __" refers to the district court's docket and the native pagination of documents. Documents essential to this Motion are provided in a consecutively paginated, composite Appendix, cited as "A__."

JURISDICTION, PROCEDURAL BACKGROUND, AND TIMING

Plaintiffs filed this action on October 25, 2021, to challenge NorthShore's discriminatory and unlawful policy of refusing to grant any accommodation to any on-site employee with sincerely held religious beliefs against NorthShore's COVID-19 vaccination mandate. (Verified Compl, dkt. 1; A002). Plaintiffs brought individual and putative class claims under the Illinois Health Care Right of Conscience Act ("Conscience Act"), 745 ILCS 70 *et seq*., and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e *et seq*. (*Id*.).

Plaintiffs moved for a temporary restraining order ("TRO") and preliminary injunction ("PI"). (Dkts. 3–5). On October 29, 2021 (dkt. 30), the district court concluded that Plaintiffs established a likelihood of success as well as "irreparable harm for which money damages are not adequate," and entered a TRO. (Dkt. 31; A224).

On November 30, 2021, the court issued its PI Order, which re-affirmed the court's determination that Plaintiffs are likely to succeed on the merits of their Title VII claim, but denied preliminary injunctive relief because, when they prevail, Plaintiffs "will be entitled to the full panoply of legal remedies under Title VII—the availability of which

conclusively undermines Plaintiffs' contention of irreparable harm." (Dkt. 52 at 13, 15; A339, A341).

Plaintiffs filed this appeal on December 2, 2021 (dkt. 53; A354), and moved the district court for an injunction pending appeal on December 6, 2021 (dkt. 57; A356), which was denied on December 8, 2021. (Dkt. 58; A365). The instant motion was promptly filed two days later.

To meet NorthShore's December 31, 2021 deadline for "full vaccination" or termination, *the last day on which Plaintiffs can trade their conscience for their livelihood is December 17, 2021*.[3] This Court's intervention is respectfully requested by December 16, 2021.

GROUNDS FOR RELIEF

A. Introduction.

This motion does *not* require this Court to determine the wisdom or legality of employer vaccination mandates, nor the wisdom or legality of requiring workers to take multiple precautions to combat the spread of COVID-19, such as wearing personal protective equipment, monitoring

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[3] "In general, people are considered fully vaccinated … 2 weeks after a single dose vaccine." Ctrs. For Disease Control & Prevention, *When You've Been Fully Vaccinated* (Oct. 15, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html.

and reporting symptoms, testing routinely, or socially distancing. Plaintiffs challenge *none* of these. This motion asks this Court to hold only that an extreme outlier employer who does impose a "no religious accommodation" vaccination requirement: (1) continues to have an obligation to reasonably accommodate sincerely held religious beliefs, (2) cannot adopt a categorical, indiscriminate policy that bans *any* accommodation for *any* on-site employee, without any scientific basis, and (3) imposes irreparable harm when it designs such a policy with the express intent to coerce employees to undergo an irreversible medical procedure against their conscience, and then boasts that its coercive policy is operating as designed and is forcing its employees to irreversibly abandon their religious beliefs "every day."

The COVID-19 pandemic has presented difficult legal issues. NorthShore's extreme, admittedly unscientific, and patently discriminatory "no religious accommodations" policy is not one of them. Plaintiffs have demonstrated a clear entitlement to injunctive relief, and respectfully ask this Court to enter it prior to December 17, 2021—Plaintiffs' last possible day to irreparably violate their conscience.

B. Factual Summary.

1. Plaintiffs and their religious beliefs.

Plaintiffs are employees of NorthShore, who for the last two years of the COVID-19 pandemic have cared for NorthShore's patients. (Dkt. 1, ¶¶4, 13, 16–29, 117–122; A003, A006, A008–014, A034). Donning their protective gear and selfless spirits, Plaintiffs have battled on the front lines to provide critical, life-saving care for their patients, helping NorthShore every day to live up to its mission "to preserve and improve human life." (*Id*.; *see also* Dkt. 41 at 3). Plaintiffs are also people of faith, and they have sincere religious objections to medical treatments that were developed, tested or produced using human cells that originated in abortion, including, indisputably, all three of the COVID-19 vaccines. (Dkt. 1, ¶¶4, 88–116; A003, A027–033).

2. NorthShore's pretextual, unscientific, extreme and indiscriminate "no religious accommodations" policy.

Like many healthcare providers, NorthShore instituted mandatory COVID-19 vaccination for its employees on August 16, 2021. (*Id*. at ¶41; A016). However, unlike its hospital peers in Chicago, Illinois, or the United States (*id*. at ¶51 and Exh. 1; A067, A067), NorthShore categorically decided that its on-site employees with *religious* (but not

medical) objections to vaccination could not be accommodated, regardless of their job function, and would have to be expelled from its facilities as of November 1, 2021 (on unpaid leave), and terminated as of December 31, 2021. (*Id*. at ¶¶76–78, 123–26; A023–024, A035).

NorthShore was not forthcoming about its categorical and indiscriminate rule, and misled employees that NorthShore would accommodate their religious beliefs. (*Id*. at ¶¶56–87; A019–027). NorthShore purported to establish a process for requesting religious (and medical) accommodations. (*Id*. at ¶¶56–58; A019–020). From July 1 through October 1, 2021, NorthShore repeatedly told its employees that NorthShore could and would accommodate those with religious exemptions, including by allowing them to test weekly for COVID-19, consistent with state guidelines. (Dkts. 42 at 2–4, 42-1, 42-3–42-8; A262–264, A293, A306–320). Indeed, NorthShore's religious exemption form, *to this day*, continues to state that "if my exemption is approved, I will be subjected to required weekly COVID-19 testing per the State of Illinois Executive Order." (Dkt. 42 at 4; A264).

NorthShore received approximately 700 exemption requests, from less than 4% of its workforce—544 religious and the others medical. (Dkt.

41 at 4). Notwithstanding its purported exemption process and its repeated indications that employees would be accommodated, in September 2021 NorthShore denied *every single one* of the 544 religious exemption requests—*not* because of "undue burden," but because not a single employee met the unspecified "evidence-based criteria" for substantiating religious beliefs that NorthShore had never disclosed prior to the *en masse* denials. (Dkt. 1, ¶¶60–63; A020–021). NorthShore had even expressly warned its employees that religious views regarding abortion categorically "will result in denials." (*Id*. at ¶68 and Exh. 7; A022, A136).

On October 1, 2021, Plaintiffs' counsel advised NorthShore that the indiscriminate rejection of employees' religious beliefs was unlawful. (*Id*. at ¶84 and Exh. 9; A026, A140). In response, NorthShore retained counsel and suddenly changed course: NorthShore purported to now "approve" the previously-denied religious exemptions, but the result would be exactly the same, because now—for the first time—NorthShore claimed that it could not accommodate a single religiously-exempt employee to remain anywhere on NorthShore's premises, regardless of

that employee's location or job function. (*Id.* at ¶¶85–87 and Exh. 10; A026, A158).

Seven additional indicators confirm that NorthShore's "no religious accommodations" policy is a transparent, litigation-driven pretext:

First, NorthShore readily admits that its policy is unscientific. According to NorthShore's Chief Medical Officer, "*[w]e don't actually know whether you getting the vaccine keeps you from inadvertently transmitting COVID. … Whether you can give it to others [we] don't know yet*." (Dkt. 42 at 1, 4–5; A261, A264–265). NorthShore's written materials also admit that "*[w]e don't have data on whether receiving the vaccine keeps you from spreading the virus*." (*Id.*) NorthShore's admissions echo the federal government, which has also stated in regulatory promulgations, that "'the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing risk of death, and *the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known*.'" *Missouri v. Biden*, --- F. Supp. 3d ---, 2021 WL 5564501 at *10 (E.D. Mo. Nov. 29, 2021) (quoting 86 Fed. Reg. at 61,615) (emphasis added). The Center for Disease Control has likewise acknowledged that "*the Delta infection resulted in similarly high*

SARS-CoV-2 viral loads in vaccinated and unvaccinated people." Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today's MMWR (July 30, 2021), https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html. And, a prospective, longitudinal cohort study published in The Lancet (Oct. 28, 2021) concluded that "*fully vaccinated individuals with breakthrough infections have peak viral load similar to unvaccinated cases and can efficiently transmit infection … including to fully vaccinated contacts*." (Dkts. 29 & 29-1; A208–211 (emphasis added)).[4]

Second, NorthShore's policy is not required by the Illinois Governor, the Illinois Department of Public Health, or the federal government, because all relevant regulations either expressly allow regular testing as an alternative to mandatory vaccination for healthcare

[4] *See also* 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 (study "finds that [Delta] variant *can grow in the noses of vaccinated people as strongly as in unvaccinated people*" (emphasis added)).

employees, or *require* (let alone permit) religious accommodations. (Dkt. 1, ¶¶47–50; A017).

Third, NorthShore is an extreme outlier. As demonstrated by thirty-two sworn declarations, NorthShore's hospital peers in Chicago, Illinois, and throughout the United States—including prestigious healthcare organizations like Advocate Aurora Health, University of Chicago Medical Center and scores of others—have concluded that they *can* accommodate religious employees, and have freely granted accommodations that allow those employees to continue to provide patient care, pursue their passion and earn a living. (*Id*. at ¶51 and Exh. 1; A018, A067).

Fourth, as of October 28, 2021, before it placed any employee on unpaid leave, NorthShore already achieved its goal "to have at least 85% of our team members vaccinated." (Dkt. 42 at 5–6; A265–266). Moreover, as of October 2021, NorthShore's COVID-19 assessment pegged the pandemic at the "GREEN," most relaxed level, allowing the highest number of visitors in its facilities. (*Id*.).

Fifth, NorthShore does not require visitors and patients to be vaccinated. (Dkt. 1, ¶54; A018). Ironically, employees who are terminated

because of their religious convictions, and are no longer allowed to enter NorthShore's facilities as *employees*, are nevertheless allowed to enter those same facilities, and spend hours with the same patients they previously cared for, as *visitors*. (*Id*.)

Sixth, although it purportedly concluded that its religiously-exempt employees are too dangerous to be in its facilities, NorthShore also concluded that its medically-exempt employees *could* be accommodated to remain unvaccinated in their same positions. (*Id*. at ¶55 and Exh. 2; A129). As late as October 21, 2021—four days prior to the filing of this lawsuit—NorthShore was granting medical exemptions and accommodations, allowing employees to remain in their same patient-care roles with alternate safety precautions, such as routine testing. (*Id*.) At the TRO hearing, NorthShore defended this incongruent policy, but when the court expressed skepticism and asked NorthShore to brief the issue for the preliminary injunction hearing, NorthShore again changed tactics, and announced on the eve of the preliminary injunction hearing that it could no longer accommodate the medically-exempt employees it was willing and able to accommodate just days prior. (Dkt. 42 at 23–24; A283–284).

Seventh, NorthShore applied its "no religious accommodations" policy indiscriminately against all religiously-exempt on-site employees, without any individualized, case-by-case determination as to whether a particular employee's job requirements would allow for some accommodation. (Dkt. 1, ¶¶86–87; A026–A027). Every religiously-exempt employee (including those who work in cubicles, without patient contact) was placed on unpaid leave as of November 1, 2021, and will be terminated as of December 31, 2021. (*Id.*)

3. NorthShore's "no religious accommodations" policy was intended and designed to inflict irreparable harm, and, according to NorthShore itself, is successfully inflicting such harm "every day."

NorthShore designed and intended its "no religious accommodations" policy to coerce its employees to violate their conscience to keep their livelihoods. NorthShore boasted to the district court that its policy is operating as designed, to bring the faithful into compliance: "*Every day*, team members who were placed on leave for failing to vaccinate by November 1, 2021, are receiving their vaccine and returning to work." (Dkt. 41-1, ¶10; A252–253 (emphasis added)).

Those "team members" are real people, with real convictions, and real, immediate needs to clothe, feed and shelter their children, and to access life-saving medical care, none of which is possible without their continued employment at NorthShore. (Coerced Employee Declarations, Dkts. 37-1—37-9; A227–246). Numerous putative class members who have already been coerced into compliance have described the circumstances that forced them to violate their conscience, including the need of single parents to feed, shelter and clothe their children; the need of employees to access their NorthShore-provided medical insurance to continue life-saving cancer treatments, the interruption of which would have devastating implications; and the need of parents to continue their children's education. (*Id.*) Plaintiffs themselves have described the same or similar considerations. (Dkt. 1, ¶¶16–29; A008–014).

For these employees, enduring several months without a paycheck is not an option. (*Id.*) Many of them have already "chosen" to accede to NorthShore's demand, and have received vaccination against their core beliefs. (Dkts. 37-1–37-6; A227–240). Invariably, being coerced to undergo an irreversible medical procedure has resulted in lasting feelings of shame, guilt, remorse, and despair. (*Id.*) Other NorthShore

employees who have lasted until now are on the verge of acceding to NorthShore's demand, because that is their only means of keeping their livelihood and avoiding a Christmas-time disaster in their households. (Dkts. 37-7–37-9; A241–246).

LEGAL STANDARD

This Court evaluates a motion for injunction pending appeal using the same factors and "sliding scale" that govern preliminary injunctions. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547–48 (7th Cir. 2007). The moving party must establish that it has "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011). "Once the threshold requirements are met, the court weighs the equities, balancing each party's likelihood of success against the potential harms." *Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013). "Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Religious Discrimination Claims.

A. As the district court found, Plaintiffs are likely to succeed on their Title VII claim.

The district court correctly concluded that Plaintiffs "have demonstrated some likelihood of success on the merits of their Title VII claim." (Dkt. 52 at 3; A329). Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of religion. *See* 42 U.S.C. § 2000e–2; *see also Porter v. City of Chicago*, 700 F.3d 944, 951 (7th Cir. 2012) (setting forth requirements of prima facie case of religious discrimination under Title VII).

The district court found that "it is by no means settled that NorthShore has done all it can to reasonably accommodate Plaintiffs." (Dkt. 52 at 11; A337). The court correctly observed that,

> NorthShore changed its policy in an arguably arbitrary manner, other NorthShore employees who sought an exemption on nonreligious grounds were (at least initially) treated differently, and other hospitals comparable to NorthShore have not categorically foreclosed any accommodation short of vaccination.

(*Id.* at 13; A339). Thus, the court concluded, "a factfinder could conclude that the accommodations Plaintiffs seek are not undue burdens." (*Id.*).

There is ample evidence to support the court's conclusion. In light of the seven indicators detailed above (*supra*, pp.5-12), Plaintiffs should have little difficulty demonstrating that NorthShore's uniquely extreme, unscientific and patently discriminatory "no religious accommodations" policy—belatedly crafted by lawyers in response to a lawsuit demand—is nothing more than a litigation-driven pretext. Plaintiffs' likelihood of success should therefore be considered strong in this Court's "sliding scale" analysis, easing the other requirements. *Roland*, 749 F.2d at 388.

B. Alternatively, Plaintiffs are likely to succeed on the merits of their state law claim.

Plaintiffs are also likely to succeed on the merits of their state law claim. The Conscience Act prohibits discrimination "against *any* person in *any* manner" who refuses to "*obtain*, *receive* or *accept*" "health care services" or "medical care." 745 ILCS 70/2, 70/5, 70/7, 70/8 (emphasis added). The very purpose of the Conscience Act is to give effect to:

> the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse *to obtain, receive or accept*…health care services and medical care…and *to prohibit all forms of discrimination, disqualification, [and] coercion*…by reason of their refusing to act contrary to their conscience or conscientious convictions *in… refusing to obtain, receive, [or] accept…health care services and medical care.*

745 ILCS 70/2 (emphasis added).

NorthShore has violated the Conscience Act by refusing to grant Plaintiffs religious exemptions and accommodations; placing Plaintiffs on unpaid leave with imminent termination; and engaging in the very "forms of coercion" and "disqualification" prohibited by the Act. (*See* V. Compl. ¶¶146–150; A040–041). Notably, "[c]ontrary to Title VII's explicit provision of a reasonable-accommodation defense, *the Right of Conscience Act is devoid of the [undue burden] defense*." *Rojas v. Martell*, 2020 IL App (2d) 190215, ¶43, 161 N.E.3d 336, 348 (emphasis added).

In granting the TRO, the district court correctly concluded that Plaintiffs are likely to prevail on their Conscience Act claim. (Dkt. 31 at 1; A224). This was in line with *all* other Illinois courts that have examined healthcare employee vaccination mandates, and have uniformly enjoined them under the Conscience Act. *See, e.g.*, *Darnell v. Quincy Physicians & Surgeons Clinic, S.C.*, Case No. 2021 MR 193 (Adams Cty., Ill.) (TRO decisions filed at dkts. 5-1, 28-1); *Panozzo v. Riverside Healthcare*, Case No. 2021 L 108 (Kankakee Cty. Ill.) (TRO decision filed at dkt. 28-2).

The district court's reluctance to re-affirm its TRO finding in the PI Order, because "the effect of the Conscience Act is both unclear and

unsettled under state law," (dkt. 52 at 13 n.1; A339), does not change either the clear language of the Act or the uniformity of Illinois courts enjoining conduct like NorthShore's under the Act. Plaintiffs remain likely to prevail.[5]

II. Plaintiffs Will Suffer Irreparable Harm Without an Injunction Pending Appeal.

A. The district court's conclusion that Title VII's monetary remedies negate irreparable harm is wrong as a matter of law.

Because the district court correctly found that Plaintiffs are likely to succeed on the merits, the primary issue for this Court is whether Plaintiffs have demonstrated sufficient irreparable harm under the "sliding scale" to warrant injunctive relief. The district court concluded that the "full panoply of legal remedies" under Title VII "conclusively undermines" Plaintiffs' contention of irreparable harm. (Dkt. 52 at 15; A341). That conclusion is irreconcilable with the statute's plain text and Seventh Circuit precedent.

Title VII expressly provides injunctive relief to private litigants:

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[5] The recent amendment to the Conscience Act, purportedly to remove religious beliefs about COVID-19 vaccines from its protection, is not effective until June 1, 2022, cannot be made retroactive, and violates Equal Protection. (*See, e.g.*, dkt. 42 at 13–16, A273–276).

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court may enjoin the respondent from engaging in such unlawful employment practice*, and order such affirmative action as may be appropriate….

42 U.S.C. § 2000e-5 (emphasis added). By specifically authorizing injunctive relief, Congress essentially incorporated a presumption of irreparable injury into a Title VII violation. *Cf. Illinois Bell Tel. Co. v. Illinois Com. Comm'n*, 740 F.2d 566, 571 (7th Cir. 1984) ("[W]here the plaintiff seeks an injunction to prevent the violation of a statute that specifically provides for injunctive relief, it need not show irreparable harm.")

In any event, the court erred by categorically foreclosing irreparable harm simply because Title VII offers monetary remedies. The Supreme Court, and circuit courts, have repeatedly held that *status quo* preliminary injunctions are available in Title VII cases, particularly where employers make life difficult on account of their employees' protected status. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53, 72 (2006) ("no reason to believe that a court could not have issued an injunction where an employer suspended an employee for retaliatory purposes, even if that employer later provided backpay"); *Sheehan v.*

Purolator Courier Corp., 676 F.2d 877, 885–886 (2d Cir. 1981); *Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944–45 (1st Cir. 1983); *Drew v. Liberty Mut. Ins. Co.*, 480 F.3d 69, 74 (5th Cir. 1973).

B. The district court's finding that coercion to "choose" between an employee's livelihood and an irreversible medical procedure does not inflict irreparable harm is clearly erroneous.

There are some harms that no amount of money can fix. Plaintiffs acknowledge that in the typical employment context, termination of employment by itself is not usually irreparable injury, because damages may rectify what the employee "has presumably lost during unemployment." *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005). But the Supreme Court has recognized that "cases may arise in which the circumstances surrounding an employee's discharge, *together with the resultant effect on the employee*, may *so far depart from the normal situation* that irreparable injury might be found." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974) (emphasis added). This is one of those cases.

Numerous Plaintiffs (lead and putative class) have described how NorthShore's policy has forced them to an impossible choice: They must either violate their conscience and undergo an irreversible medical

procedure, or lose their livelihoods and suffer irreparable damage to their personal and professional lives. The emotional and spiritual consequences of the irreversible medical procedure imposed by NorthShore are neither hypothetical nor conjectural. *See* Decl. of Coerced Employee #1 ¶8 (Dkt. 37-1; A228) (being shamed for her beliefs by coworkers, including being told that she "deserve[d] to die" for being religiously opposed to vaccines); Decl. of Coerced Employee #2 ¶10 (Dkt. 37-2; A232) (detailing the "constant intimidation and harassment" for religious beliefs regarding vaccines); Decl. of Coerced Employee # 3 ¶4 (Dkt. 37-3; A233–234) (forced to receive vaccine against religious beliefs because NorthShore job was "the only way" for her to "to provide shelter, food, medical care, and all basic life necessities" for her children); Decl. of Coerced Employee #2 ¶9 10 (Dkt. 37-2; A232) (feeling "defeated, ashamed, and denigrated" after being forced to receive vaccine); Decl. of Coerced Employee # 4 ¶5 (Dkt. 37-4; A236) ("deeply regret[s]" that she was "forced to choose between [her] livelihood and [her] conscience"); Decl. of Coerced Employee # 8 ¶5 (Dkt. 37-8; A244) ("Because I need my job to support my parents and to provide life-saving medicine for my

father, I am under extreme pressure to give in to NorthShore's demand that I accept a vaccine against my religious beliefs.").

Lead Plaintiffs face the same harms and consequences as these putative class plaintiffs. For example, Jane Doe 3 must care for a husband with severe health issues and a son battling with depression and suicidal ideation. (Dkt. 1 ¶18; A009). NorthShore's policy forces her to choose between violating her religious beliefs and maintaining her family's economic and relational stability. Jane Doe 5 has faced repeated harassment and stigmatization from her manager because of her objection to the vaccine, and her diagnosed anxiety would only be exacerbated by being fired for abiding by her religious beliefs. (Dkt. 1 ¶20; A010). And Jane Doe 7 views her occupation as a surgical prep nurse as more than a job; it is her life's "calling to help patients and co-workers through hard times." (Dkt. 1 ¶22; A011). Losing her job not only means loss of income but also loss of meaning and close relationships with co-workers and patients. *Cf. Sheehan*, *supra*, 676 F.2d at 885–886 (noting that "in many cases the effect on the complainant *of several months without work* or working in humiliating or otherwise intolerable

circumstances *will constitute harm that cannot adequately be remedied by a later award of damages*").

Even if this case is, at bottom, an employment matter, the nature of these harms simply cannot be calculated as monetary damages. *Cf. E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 705–706 (7th Cir. 2005) ("A plaintiff may suffer irreparable harm if the nature of the loss makes monetary damages difficult to calculate."). Indeed, once Plaintiffs accept an irreversible injection that violates the core of their being—their conscience will be forever seared. "*An award of backpay or reinstatement cannot undo a vaccine*." *Fraternal Order of Police Chicago Lodge No. 7 v. City of Chicago*, Case No. 2021 CH 5276 (Cook Cty. Nov. 1, 2021) (emphasis added) (Dkt. 42-9 at 3; A261). "[V]accinations cannot be undone." *N.C. v. Dep't of Children (In the Interest of T.C.)*, 290 So. 3d 580, 583 (Fla. Dist. Ct. App. 2020).

Beyond the irreversibility of the medical procedure they are being coerced to receive, Plaintiffs have demonstrated a likelihood of irreparable harm in the form of emotional abuse, humiliation, stigmatic injury, and violation of conscience. Back pay and other monetary damages will not remedy the stigmatic injury caused by NorthShore's

policy. Nor will it reverse the disruption of trust between the health care employees, coworkers, and their patients. And they will not cure the mental, emotional, and spiritual harms caused by NorthShore.

In sum, Plaintiffs have shown that they "will suffer harm that cannot be prevented or fully rectified by the final judgment after trial." *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 478 (7th Cir. 2001). These injuries "so far depart from the normal situation" that they warrant immediate injunctive relief. *Sampson*, 415 U.S. at 92 n.68.

C. Title VII codifies First Amendment freedoms and prohibits NorthShore's "impossible choice" from irreparably harming Plaintiffs.

The district court rejected Plaintiffs' argument that the coercive effect of NorthShore's policy imposes irreparable harm to their sincerely held religious beliefs, because NorthShore is not a government actor and "the First Amendment is not implicated." (Dkt. 52 at 16.) The district court misconstrues the nature of Title VII protections against religious discrimination.

Title VII's prohibition of disparate treatment on the basis of religion codifies constitutional guarantees, preventing employers from treating religious activity unequally. *See Helland v. S. Bend Cmty. Sch. Corp.*, 93

F.3d 327, 329 (7th Cir. 1996); *see also King v. Bd. of Regents of Univ. of Wisc. Sys.*, 898 F.2d 533, 537 (7th Cir. 1990) (noting that "the applicable law . . . is largely the same"). Similarly, where, as here, an employer has a system for discretionary consideration of exemption requests from general rules, Title VII's duty to accommodate religious beliefs codifies the mandates of the Free Exercise Clause in the context of "individualized exemptions." *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 764 (7th Cir. 2003).

And, although the Free Exercise Clause largely safeguards against government conduct, this Court has held that the Clause is sometimes applicable in private civil suits. *See Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 741 (7th Cir. 2015). After all, the Clause, "at its heart, 'protects religious observers against unequal treatment.'" *Listecki*, 780 F.3d at 743 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542–543 (1993)). So, even though NorthShore "is not a governmental actor," that does not preclude the Court from considering the irreparable harm to Plaintiffs' religious liberty. *Listecki*, 780 F.3d at 742. Irreparable harm is irreparable harm regardless of its source.

Accordingly, denying Plaintiffs injunctive relief would irreparably harm their religious liberty interests codified under Title VII. *Cf. BST Holdings, L.L.C. v. Occupational Safety & Health Admin., United States Dep't of Lab.*, 17 F.4th 604, 618 (5th Cir. 2021) (OSHA's vaccination mandate imposes irreparable harm because it "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)"). For Plaintiffs, the loss of religious-liberty interests "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 346, 373–374 (1976). In the context of the impossible choice facing Plaintiffs, "quantification of injury is difficult and damages are therefore not an adequate remedy." *Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982).

III. Plaintiffs Satisfy the Other Factors for An Injunction Pending Appeal.

The balance of harms tips strongly in Plaintiffs' favor. No doubt an injunction pending appeal would temporarily interfere with NorthShore's extreme and unscientific goal of coerced, 100% vaccination

for employees.[6] And, to be sure, NorthShore has a legitimate interest in preventing the transmission of COVID-19 at its facilities. But NorthShore, the federal government, the CDC and scientific research are all in agreement that vaccination is *not* known to reduce COVID-19 *transmissibility*. (*See* pp.8-9, *supra*). Under these circumstances, neither NorthShore nor the public would be harmed by a *status quo* injunction that prohibits NorthShore from implementing a draconian and unscientific "no religious accommodations" rule. *See Missouri v. Biden*, 2021 WL 5564501 at *14–15 (lack of evidence as to vaccination impact on COVID-19 transmission tips balance of harms in favor of enjoining vaccination mandate). In any event, an employer may not discriminate

[6] Not only do NorthShore's peers freely grant exemptions and accommodations to religious objectors (*supra*, p. 10), but NorthShore's interest in universal compliance is further undercut by the hospitals nationwide that have rescinded their vaccine mandates in recent weeks due to injunctions against the Interim Final Rule of the Centers for Medicare and Medicaid Services ("CMS Rule"). *See Louisiana v. Becerra*, --- F. Supp. 3d ----, 2021 WL 5609846 (W.D. La. Nov. 30, 2021); *Missouri v. Biden*, *supra*, 2021 WL 5564501 (enjoining the CMS Rule's enforcement in ten states); *see also, e.g.,* Kelly Gooch, *15 Healthcare Organizations Suspending COVID-19 Vaccination Mandates*, Becker's Hosp. Rev. (Dec. 8, 2021), https://perma.cc/7J6S-VJ9M.

on the basis of religion "even in pursuit of desirable ends." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

CONCLUSION

For the foregoing reasons, this motion should be granted.

Date: December 10, 2021

Respectfully submitted,

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Dated: December 10, 2021.

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I hereby certify that a true and correct copy of the foregoing was filed via the Court's ECF filing system and therefore service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

Date: December 10, 2021.

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