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QUESTIONING THE ORTHODOXY OF SINCERELY HELD RELIGIOUS BELIEFS OR REQUIRING A CLERGY, PLACE OF WORSHIP, OR A THIRD PARTY TO AGREE WITH OR AFFIRM SUCH RELIGIOUS BELIEFS IS UNLAWFUL

Title VII of the Civil Rights Act of 1964 prohibits employers 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). Moreover, as the EEOC has made clear, **Title VII's protections also extend nonreligious beliefs if related to morality, ultimate ideas about life, purpose, and death**. See EEOC, Questions and Answers: Religious Discrimination in the Workplace (June 7, 2008), ("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'").

Employees may have religious accommodation requests stating their sincerely held religious beliefs injecting any of the three currently available COVID-19 vaccines would be a sin and a violation of their religious beliefs because they are manufactured and produced with, tested on, or otherwise developmentally connected to aborted fetal cell lines. United has responded to many of these submissions with intrusive and irrelevant questions about employees' past personal health decisions and the theological bases for those decisions, or demands that employees vet their religious beliefs about COVID-19 vaccines with a third party to justify their accommodation requests. **The premises of these questions—that an employee's current request for religious accommodation must be consistent with the employees' prior health decisions and religious understandings, or must be acknowledged by a person other than the employee—are legally invalid premises for deciding religious accommodation requests, and any denial based on such premises violates Title VII.**

Employers are 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 broadly among other faithful. 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").

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 which differ from those sincerely held by United employees requesting accommodation 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 upon 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 religiously believe**. Nor does an employee's religious objection to a vaccine need to be unique in order to be personal and sincerely held. (*Cf. supra* "It appears you purchased or downloaded your supporting documentation on the internet.") Once an employee has articulated **the employee's** sincerely held religious objections to the currently available COVID-19 vaccines, whether those objections are the same as or nothing like any other person's objections, the proper inquiry is at its end.

Indisputably, all three of the currently available COVID-19 vaccines are produced by, derived from, manufactured with, tested on, developed with, or otherwise connected to aborted fetal cell lines. There is no question about the accuracy of this determination. The North Dakota

Department of Health, in its handout literature for those considering one of the COVID-19 vaccines, notes the following: "The 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**." 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 (emphasis added) (last visited Aug. 27, 2021).

The Louisiana Department of Health likewise confirms that the Johnson & Johnson COVID-19 vaccine used the PER.C6 fetal cell line, which "is a retinal cell line that was **isolated from a terminated fetus in 1985**." 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 (emphasis added) (last visited Aug. 27, 2021).

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. *See* La. Dep't of Public Health, *supra*. The North Dakota Department of Health likewise confirms: "Early 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**." N.D. Health, *supra* (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, many employees' sincerely held religious beliefs compel them to abstain from accepting or injecting any of these products into their bodies, regardless of the perceived benefits or rationales. 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, any United employee is entitled to interpret the Scriptural command against murder differently, which many indisputably do.

Many 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 ("Thus says the Lord who made you, who formed you from the womb"); *Isaiah* 44:24 ("Thus says the Lord, your Redeemer, who formed you from the womb: 'I am the Lord, who made all things'"); *Isaiah* 49:1 ("The Lord called me from the womb, from the body of my mother he named my name"); *Isaiah* 49:5 ("And now the Lord says, he who formed me from the womb to be his servant,"); *Jeremiah* 1:5 ("Before I formed you in the womb I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations").

Employees may 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 ("Then God said, "Let us make

man in our image, after our likeness…. So God created man in his own image, in the image of God he created him; male and female he created them.").

Many 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 ("You shall not murder"); *Exodus* 21:22–23 (setting the penalty as death for even the accidental killing of an unborn child); *Exodus* 23:7 ("do not kill the innocent and righteous"); *Genesis* 9:6 ("Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image."); *Deuteronomy* 27:25 ("Cursed be anyone that takes a bride to shed innocent blood"); *Proverbs* 6:16–17 ("There are six things that the Lord hates, seven that are an abomination to him:. . . hands that shed innocent blood").

The Hebrew word for "abomination" in the text above is תּוֹעֵבָה (to`eba). The verbal form is "abhor," "loath," "detest," and "exclude." Twelve times the Book of Proverbs uses תּוֹעֵבָה 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, Chemosth, 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 United employees do want to part of such an "abomination." They do not want indirectly or directly be in any way associated with abortion. To do so is abhorrent, loathsome, detestable, abominable to God. In short, to require these employees to inject a substance into their bodies that has any association (no matter how near or remote to abortion) is a sin against their Creator, their Lord, and their Savior.

Employees may 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 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 1 Corinthians* 6:15-20 (KJV) ("Do you not know that your bodies are members of Christ?. . . Or do you not know that your body is a temple of the Holy Spirit within you, whom you have from God? You are not your own, for you were bought with a price. So glorify God in your body.").

Thus, while there may be leaders and other adherents of certain employees' faith traditions whose understanding of Scripture is different, and who may be willing to accept one of the three currently available COVID-19 vaccines despite their association with aborted fetal cell lines, that is irrelevant to the protection of United employees who sincerely believe otherwise. Likewise irrelevant is whether any United employee currently seeking a religious exemption formerly understood or believed any religious doctrine differently. Because all three of the currently available COVID-19 vaccines are developed, produced from, tested with, researched on, or otherwise associated with the aborted fetal cell lines HEK-293 and PER.C6, many United employees' sincerely held religious beliefs compel them to abstain from accepting or injecting any of these products into their body, regardless of the perceived benefits or rationales.

Requiring employees that to obtain a religious exemption they have to be an adherent of a recognized religion with a history of opposition to vaccines. Employees are also being told they need to include a letter from a clergy to support their sincere religious beliefs. This is false ad unlawful. The only issue is whether the employee has a sincere religious belief, not whether a clergy or a "recognized religion" (whatever that is) agrees.

In sum, it is unlawful to condition any employee's request for religious accommodation on a third party's beliefs or acknowledgement of the employee's beliefs, or on the employee's past health decisions or the theological reasons for those decisions.

EMPLOYERS CAN REASONABLY ACCOMMODATE THEIR EMPLOYEES

When boarding an Alaska Air flight, passengers at the boarding gate see a pop-up sign:

IT'S SAFE
TO FLY—AND
EXPERTS AGREE.

Travelers wearing a mask have a .003% or
NEAR-ZERO CHANCE
of being exposed to the virus,
even on a full aircraft
according to a recent Department of Defense study.[1]

Air travel is the safest mode of
Transportation thanks to . . .

HOSPITAL-GRADE AIR FILTRATION . . . .

CLEAN AIR EXCHANGE . . . .
According to researchers at Harvard.[2]

TOP-DOWN AIR FLOW . . . .

The Department of Defense study referenced on the sign was done in conjunction with United Airlines. It is hypocritical for United to feign the need for universal employee vaccination when United participated in the study being touted by airlines as concluding the risk of air traveler exposure to be 0.003%, or "NEAR-ZERO CHANCE."

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[1] David Silcott, *et al.*, *TRANSCOM/AMC Commercial Aircraft Cabin Aerosol Dispersion Tests*, https://www.ustranscom.mil/cmd/docs/TRANSCOM%20Report%20Final.pdf (last visited Aug. 27, 2021).

[2] Harvard T.H. Chan School of Public Health, *Assessment of Risks of SARS-CoV-2 Transmission during Air Travel and Non-Pharmaceutical Interventions to Reduce Risk, Phase One Report: Gate-to-Gate Travel Onboard Aircraft*, https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2443/2020/10/Phase-One-Report-Highlights-1.pdf (last visited Aug. 27, 2021).

The above example applies to airlines, but the same reasoning is true of all employers. Healthcare professionals have worked for months through the pandemic without the shots. Other employees have either worked onsite or remote, and thus employers have demonstrated over many months that they can reasonably accommodate all employees.

The accommodation employees are requesting from any employer no matter the specific job duty is an exemption from the COVID-19 shots. Past history is prologue in this respect, as (1) employers have been providing such accommodation ever since the first COVID-19 shot was available to the public in December 2020, (2) all phases of the employment sectors have been working through the pandemic up to the present, even during the peak of COVID-19, without the shots, even if some of the work was done remotely; (3) the Delta variant has been in the United States for months, and employees continued to work through the present without the COVID-19 shots; (4) many health and safety measures have been implemented to protect the health and safety of employees and customers by requiring PPE and other measures without mandating the COVID-19 shots; (5) nothing has changed except the recent mandate; and (6) therefore months of history during COVID-19, with the Delta variant, during which COVID-19 shots were available, combined with the health and safety measures such as PPE, social distancing, sanitization, air filtration, and implementing and virtual remote work options are reasonable accommodations that permitted employers and employees to operate. The accommodation request is to continue to permit your employees to work in the same manner without diminution as you have done for many months.

In light of this very relevant past history, there are no conceivable circumstances under which employers can now argue that they face an undue hardship to accommodate employees with sincerely held religious objections to the COVID-19 vaccines.

The Emergency Use Authorization Statute Prohibits Mandating 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 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,[3] does not change the EUA status of the Pfizer-BioNTech COVID-19 Vaccine that has been available under EUA since December 23, 2020.[4] 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.[5] 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)."[6] Thus, it is not clear when (or if) any United employee will have access to the "approved" COMIRNATY vaccine, leaving all (or at least the vast majority of) United employees who elect to receive the "Pfizer" vaccine pursuant to United's mandatory vaccine policy to receive a dose of the current stock of Pfizer-BioNTech vaccine still being administered subject to EUA rules.

The following summarizes the current status of the Pfizer-BioNTech shots:

1. All existing Pfizer vials (in the hundreds of millions), remain under the federal Emergency Use Authorization (EUA) (meaning people have the "option to accept or refuse");
2. The third or "booster" Pfizer shot is identical to the above and remains under the EUA with limited use to certain categories of people;
3. BioNTech received FDA approval for people ages 16 and above under the name Comirnaty, but there are no Comirnaty doses available in the United States;

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

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

[5] *See* EUA Extension Letter, *supra* note 4, at 2 n.8.

[6] *See* BLA Approval Letter, *supra* note 3, at 2.

4. In other words, there is currently NO FDA approved COVID-19 injection available anywhere in the United States. Every COVID shot in America remains under the EUA law and thus people have the "option to accept or refuse" them; and
5. Even when an FDA approved COVID shot becomes available, individuals are protected by federal law and many states laws from being forced to get these shots based on their sincere religious beliefs or conscience rights. [7]

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 for religious accommodation under state and federal law.

CONCLUSION

Employers cannot compel compliance with a mandatory COVID-19 vaccination policy against their sincerely held religious beliefs without providing reasonable accommodation. Based on past history, there are no conceivable circumstances under which employers—which for months provided reasonable accommodations to employees—cannot now do the same. It is unlawful for an employer to deny or interfere with any employee's request for religious accommodation because other religious adherents have different beliefs.

[7] https://lc.org/newsroom/details/082721-fda-does-a-bait-and-switch-with-covid-shots-1