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REPLY TO FLORIDA

August 31, 2021

By E-mail

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United Airlines, Inc.
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RE: Unlawful Conditions for Religious Exemptions from Mandatory COVID-19 Vaccination Policy

UNITED AIRLINES' RELIGIOUS EXEMPTION CONDITIONS ARE UNLAWFUL. YOUR IMMEDIATE ATTENTION IS REQUESTED.

Dear Messrs. Kirby and Rivkin:

Liberty Counsel is a national non-profit litigation, education and public policy organization with an emphasis on First Amendment liberties, and a particular focus on religious freedom and the sanctity of human life. Liberty Counsel has engaged in extensive litigation in the last year regarding civil rights violations ostensibly justified by COVID-19, and has had great success holding both government and private actors accountable. *See, e.g., Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (permanent injunction granted and $1,350,000 in attorney's fees awarded in *Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-06414, C.D. Cal., May 17, 2021); *Harvest Rock Church, Inc. v. Newsom,* 141 S. Ct. 889 (2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *cf. Elim Romanian Pentecostal Church v. Pritzker,* 962 F.3d 341 (7th Cir. 2020) (applying reasoning later rejected by the Supreme Court in *Harvest Rock* and other decisions).

I write on behalf of scores of United Airlines (United or UAL) employees in Illinois and elsewhere who are requesting exemption from United's mandatory COVID-19 vaccination policy as a reasonable accommodation of their sincerely held religious beliefs, but have encountered unlawful obstacles and conditions imposed by United in a calculated attempt to dissuade religious exemption requests or manufacture pretexts for denying them. Many of these employees have engaged Liberty Counsel to bring legal action if United denies their religious exemption requests, and we are bringing this matter to your attention for immediate consideration.

United has advised its employees that their deadline to receive vaccination is September 27, 2021, and that "[t]he only exceptions to this policy may be employees who are accommodated pursuant to United's Reasonable Accommodation Process (RAP) for a medical or religious request or work in a state where requiring proof of vaccination is prohibited by law." United also advises its employees that, following a religious exemption request, "United will engage in an interactive process with the employee to determine whether a reasonable accommodation can be provided." United does not inform its employees, however, that United will deploy paralyzing administrative obstacles to religious exemption requests in the form of personal and theological inquisitions that are unlawful in both their premises and their effect.

Not only do these obstacles violate state and federal law, as shown below, but United's inquisitors are also causing undue stress for United's employees who are being forced to choose between keeping their jobs, which they love, and honoring their most deeply held religious beliefs about life, health, and existence. United's obstructive handling of employees' religious exemption requests (we are not advised of a single approval so far) is escalating the stress of United's employees each day. This stress is damaging employees' families, and creating unconscionably dangerous operating conditions for all of United's employees and customers.

Examples abound of impertinent questions and demands interposed by United's inquisitors in response to employees' religious exemption requests:

- Have you ever received a vaccine before, like a flu shot, or others? If the answer is yes, what is the difference of the Covid vaccine?

- [T]he vaccination is preventing you and others from getting the COVID19 virus. It is not, itself, a treatment for the virus. Taking that into account, does the vaccine, vaccination still interfere with your religious belief or practices?

- One reason we are asking employees to get vaccinated is so they don't infect others with COVID19. Do your religious beliefs or practices prevent you from getting vaccination for the sake of helping others avoid COVID19?

- It appears you purchased or downloaded your supporting documentation on the internet.

And, in response to employees' religious accommodation requests based on the connection of the available vaccines to aborted fetal cell lines, United has inquisited:

> a.) Are you aware the COVID vaccines are not prohibited by your religion? That religion views getting the vaccine as an act of charity toward others. Does that change your mind about getting the vaccine?

> b.) Are you aware if any vaccines or medications you have previously received were created, researched, tested or otherwise involved the use of stem cells? Yes __ No __ Don't know __
>
> c.) If your answer is yes, please explain why receiving such vaccines or medications were not a violation of your sincerely held religious belief.
>
> d.) If you answer is don't know, please explain why receiving these vaccines without knowing these conditions was not or is not a violation of your sincerely held religious beliefs.
>
> e.) Please also provide written documentation from a third person, whom you personally know, who is aware of your sincerely held religious belief and can support your request for a religious accommodation?

The impertinence of the final set of questions is particularly self-evident. United is obviously attempting to "expose" some inconsistency between its employees' currently expressed beliefs and their prior religious or medical decisions. At best, United is improperly trying to dissuade its employees from continuing to seek a religious exemption by suggesting their past conduct or understanding is disqualifying. At worst (and more likely), these questions and demands are designed to manufacture illegal pretexts for denying religious exemptions.

Putting aside United's wrong assumption that stem cells are biologically synonymous with aborted fetal cells, United has no legal authority to tell any employee what that employee's religion is, or to be the arbiter of the validity or reasonableness of any employee's religious beliefs. Nor does United 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 United's accommodation. And given United's barely concealed animus towards the religious beliefs of its employees, any employee who would risk United's retaliation by making a religious exemption request should be presumed sincere, and the law requires it.

A. United's Intentional Obstacles to the Religious Accommodation Requests of Its Employees Violate Title VII Because United Is Not Permitted to Inquire Into the Validity or Reasonableness of Any Employee's Sincerely Held Religious Beliefs.

Title VII of the Civil Rights Act of 1964 prohibits United 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'").

Many United employees have submitted religious accommodation requests stating their sincerely held religious beliefs that accepting or receiving 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.**

United 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 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).

Though ostensibly willing to give United employees a religious exemption, 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 United 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 United 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 United 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 by 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.").

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.

Many United 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 United 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) ("Know ye not that your bodies are the members of Christ? shall I then take the members of Chris 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.").

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.

United Airlines is illegally telling its 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 for United 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.

B. United Employees Maintain the Right to Refuse Unwanted Medical Services Under Illinois Law.

Illinois law dictates that United employees have the fundamental right to determine what medical care to accept and refuse. A person's right to refuse or accept medical care is not one to be interfered with lightly. As Justice Cardozo stated, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1095 (1995).

Indeed, the **Illinois Health Care Right of Conscience Act**, 745 ILCS 70/1, *et seq.*, applies to United employees and expressly prohibits public **and private** entities like United from taking adverse employment action against anyone who declines a COVID injection on the basis of conscience or religious belief:

> Findings and policy. The General Assembly finds and declares that **people and organizations hold different beliefs about whether certain health care services are morally acceptable.** It is 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 whether acting individually, corporately, or in association with other persons; and **to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions** in . . . refusing to obtain, receive, accept . . . health care services and medical care.

745 ILCS 70/2 (emphasis added). The General Assembly has accordingly prohibited:

> **Discrimination**. It shall be unlawful for **any person, public or private institution**, or public official to discriminate **against any person in any manner**, including but not limited to, licensing, **hiring, promotion,** transfer, staff appointment, hospital, managed care entity, **or any other privileges, because of such person's conscientious refusal to receive, obtain, accept,** perform, assist, counsel, suggest, recommend, refer or participate in any way in **any particular form of health care services contrary to his or her conscience.**

745 ILCS 70/5 (emphasis added). In addition to this broad non-discrimination provision that expressly applies here, the Illinois General Assembly has also specifically outlawed employment discrimination:

> **Discrimination by employers or institutions.** It shall be **unlawful for any public or private employer**, entity, agency, institution, official or person…to deny admission because of, to place any

> reference in its application form concerning, to orally question about, **to impose any burdens in terms or conditions of employment on, or to otherwise discriminate against**, any applicant, in terms of employment, admission to or participation in any programs for which the applicant is eligible, **or to discriminate in relation thereto, in any other manner, on account of the applicant's refusal to receive, obtain, accept**, perform, counsel, suggest, recommend, refer, assist or participate in any way in **any forms of health care services contrary to his or her conscience.**

745 ILCS 70/7 (emphasis added). Further, Section 3(a) of the Act defines "health care" broadly as:

> **any phase of patient care, including but not limited to**, testing; diagnosis; prognosis; ancillary research; instructions; . . . **medication**; surgery **or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons** . . . .

745 ILCS 70/3(a) (emphasis added). Vaccines are indisputably within the broad coverage of the Act.

Section 3(e) of the Act defines "conscience" as a "sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." 745 ILCS 70/3(e). The Act supersedes "all other Acts or parts of Acts to the extent that any Acts or parts of Acts are inconsistent with the terms or operation of this Act." 745 ILCS 70/14.

Notably, the Act provides a private cause of action against offending entities, such as United. 745 ILCS 70/12. Indeed, demonstrating the reprehensibility of discrimination based on health care decisions, the Act imposes liability for "**threefold the actual damages** . . . the costs of suit and reasonable attorney's fees," *id.* (emphasis added), "**but in no case shall recovery be less than $2,500 for each violation in addition to costs of the suit and reasonable attorney's fees**." *Id.* (emphasis added).

By mandating that United employees submit to one of the COVID-19 vaccines, and by refusing exemptions based on religious opposition to the vaccines, United runs roughshod over this basic protection. If any United employees decides to abstain from forcible injection of a COVID-19 vaccine that violates the employee's sincerely held religious beliefs, that is the employee's basic right. Put simply, "**[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty**." *Washington v. Harper*, 494 U.S. 210, 229 (1990) (emphasis added).

C. United Can Reasonably Accommodate its 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."

Indeed, the accommodation these employees are requesting is an exemption from the COVID-19 shots. Past history is prologue in this respect, as (1) United has been providing such accommodation ever since the first COVID-19 shot was available to the public in December 2020, (2) all phases of the airline and employment sectors have been working through the pandemic up to the present, even during the peak of COVID-19, without the shots; (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) United has implemented measures to protect the health and safety of its employees and passengers by requiring PPE and upgrading air filtration systems without

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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).

mandating the COVID-19 shots (even participating in the above-cited Department of Defense study); (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, and upgraded air filtration, are reasonable accommodations that permitted the company and its 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 circumstances under which United may argue that it faces an undue hardship to accommodate its employees with sincerely held religious objections to the COVID-19 vaccines.

D. 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. 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

As shown above, United cannot compel any employee's compliance with United's mandatory COVID-19 vaccination policy against their sincerely held religious beliefs. Moreover, it is unlawful for United to deny or interfere with any employee's request for religious accommodation, either because other religious adherents have different beliefs from the employee's, or because of 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 United that its ongoing interference with its employees' requests for religious accommodation is based on improper considerations and therefore unlawful. Should United continue its interference or deny any religious accommodation request on such premises, Liberty Counsel will be forced to conclude that United is disregarding its obligations to provide accommodations to employees with sincerely held religious objections to the COVID-19 vaccines.

Liberty Counsel strongly urges United to process and grant its employees' religious exemption requests without litigation. To provide timely advice to our clients, we request a response prior to Friday, September 3, 2021, at 5:00 P.M., with assurances that United:

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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.

1) **in response to any employee's religious exemption request, will limit its inquiry to whether the employee has a sincere religious belief;**

2) **will not deny (and will reverse any prior denial of) any religious accommodation request based on the absence of approval or acknowledgement of the employee's religious beliefs by a third party;**

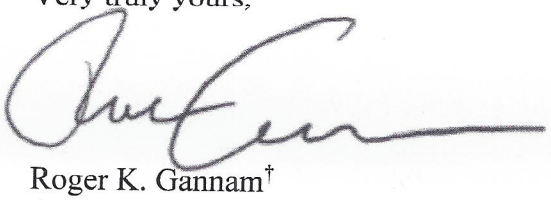
3) **will not deny (and will reverse any prior denial of) any religious accommodation request based on an employee's past health decisions or the employee's theological reasons for those decisions; and**

4) **will not deny (and will reverse any prior denial of) any religious accommodation 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.**

United's failure to respond positively or timely, or United's taking of any adverse or retaliatory action against any employee who has requested religious accommodation, will indicate to Liberty Counsel that United will not comply with its legal obligations without judicial intervention.

Please govern yourselves accordingly.

Very truly yours,



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