IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

PETER CERRETA	:	
Plaintiff,	:	
v.	:	**Jury Trial Demanded**
	:	Case No.: 3:21-cv-982
JOHNSON & JOHNSON	:	
	:	
AND	:	
	:	
JOHNSON & JOHNSON VISION CARE, INC.	:	
	:	
Defendant.	:	
_____	:	

MOTION FOR PRELIMINARY INJUCTIVE RELIEF

Plaintiff, by and through undersigned counsel, and in accordance with Rule 65, Federal Rules of Civil Procedure, requests that this Court enter a preliminary injunction ordering Defendants not terminate Plaintiff from his employment on the basis of his request for religious beliefs exemption from compliance with Defendants required corporate mandate for all employees to be immunized against COVID-19 by October 4th, 2021, and in his case no later than December 8, 2021.

STATEMENT OF THE FACTS

Plaintiff is a senior engineer employed by Defendants since 2018. He is an employee in good standing. On or about August 16th, 2021, Defendants via its

global communication system disseminated a document providing for notice to all employees of a companywide requirement for all employees in the United States to be fully immunized against COVID-19 by October 4th, 2021.

In that communication, Defendants also stated there would be a Flex program that would provide for a hybrid work week that would involve 3 days on-site and 2 days remote per week for those employees that qualified given their job description and role within the company.

On or about August 21, 2021, Plaintiff, after having requested religious belief-based accommodations be provided by Defendants in relationship to the company required immunization against COVID-19, received a written communication from Defendants acknowledging his request.

Following the acknowledgment from Defendants with regard to Plaintiff's request for religious belief-based accommodation, Defendants provided Plaintiff with a series of questions so that Defendants could evaluate if Plaintiff's religious beliefs were legitimate given Defendants views on religious belief legitimacy.

On or about September 2nd, 2021, Defendants provided Plaintiff with an internal case number (10941691). On or about September 9, 2021, Defendants granted a religious belief-based request for accommodation but stated the accommodation would expire in 90 days, or December 8, 2021.

If Plaintiff is terminated for non-compliance with Defendants required employee vaccination against COVID-19 he will experience irreparable harm in that his career within Defendants will be cut short as against his long-term career goals. Plaintiff will also experience irreparable harm if an injunction is not granted prior to December 8, 2021 in that he would have to decide if to violate his religious beliefs and convictions of conscience in order to continue to earn a living if he is to keep his employment with Defendants, and if he chooses not to immunize then his options for parallel employment are highly unlikely if the Court upholds an employer the size of Defendants be capable of demanding employees vaccinate as a condition of employment.

Although Plaintiff has not been terminated, he is under threat of termination if he does not violate his religious beliefs and convictions of conscience. There are arguably millions of individuals in the United States of America who hold deep religious convictions, convictions of conscience who fear gubernatorial and corporate bureaucratic mandates or requirements to vaccinate against COVID-19 as a condition of employment, or even as a condition to live in this free society.

As such, the controversy is not only actual for Plaintiff, but actual in the form of great public interest in obtaining resolution to the question as to whether decisional law may be obtained that provides for religious beliefs and convictions

of conscience the right under federal law be exempt from immunization requirements when mandated by an employer the size of Defendants.

STANDING

Article III of the United Sates Constitution limits the jurisdiction of a federal court to an actual, perceptible, and existing case or controversy. To present a justiciable case or controversy for preliminary injunction, a plaintiff must establish a "clear showing" each element of "standing." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Although confusion about standing is widespread, certain principles of standing appear reasonably clear and permit a federal court, as each court must, to confirm a plaintiff's standing. *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974 (11th Cir. 2005), William Fletcher, *The Structure of Standing,* 98 YALE L.J. 221, 221 (1988) ("The structure of standing law in federal courts has long been criticized as incoherent.").

Article III imposes constitutional standing, an "irreducible… minimum" requiring a plaintiff to show an injury-in-fact that is both fairly traceable to an act of a defendant and redressable by a favorable judicial decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Spokeo, Inc. v. Robins,* 136 S.Ct. 1540, 1547 (2016). Secondly, a plaintiff must seek redress in court to vindicate an interest "protected or regulated by the statute or constitutional guarantee in

question." *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970).

Article III Standing

1. Injury-in-Fact

If requesting an injunction, a plaintiff must establish an immediate danger or sustaining a "concrete" and "particularized" injury. Adducing a "concrete" and "particularized" injury requires the plaintiff to establish a risk of "imminent" future injury, not a "conjectural" or "hypothetical" injury. *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983). A future injury qualifies as "imminent" if the plaintiff faces a "sufficient likelihood" of suffering the alleged injury. *Sierra v. City of Hallandale Beach, Fla.*, 2021 WL 1799848, at *2 (11th Cir. 2021) (quoting *Koziara v. City of Casselberry,* 392 F.3d 1302 (11th Cir. 2004)).

Here, Plaintiff is at risk of "imminent" future injury if he is terminated from his employment as a result of his religious belief and convictions of conscience that results in non-compliance with Defendants corporate mandate for all employees to be immunized by October 4, 2021 and given his preliminary exemption to immunize by December 8, 2021.

2. Causation and Redressability

Plaintiff must also establish that his imminent injury is "fairly traceable" to the conduct of Defendants and that a favorable judicial decision can likely redress the injury. *Lujan,* 504 U.S. at 560; *Carpenters Indus. Council v. Zinke,* 854 F.3d 1, 6 n.1 (D.C. Cir. 2017) ("Causation and redressability typically overlap as two sides of a causation coin").

Here, Plaintiff's imminent injury is "fairly traceable" to responses sought of him under coercive means that required him to provide information about his religious beliefs and convictions of conscience that had he not divulged he would have been terminated on October 4, 2021. The information required of Plaintiff are arguably against corporate arbitrary determination of what religious beliefs and convictions of conscience are valid and which are not. That injury would go against the corporate establishment of religious preference.

Moreover, Plaintiff's imminent injury is "fairly traceable" in that he will either have to immunize or be terminated on December 8, 2021. *Lewis v. Governor of Alabama,* 896 F.3d 1282 (11th Cir. 2018) (holding that an "indirect" injury can qualify as "fairly traceable").

NEED FOR A PRELIMINARY INJUNCTION

A preliminary injunction should issue if the Plaintiff successfully demonstrates that there is a substantial likelihood of success on the merits; the

Plaintiff will suffer irreparable injury if the injunction is not issued; the threat of harm to the Plaintiff outweighs any potential harm to the opposing party; and the injunction, if issued, would not be adverse to the public interest. *Bellsouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC,* 425 F.3d 964, 968 (11th Cir. 2005); *Haitian Refugee Center, Inc. v. Nelson,* 872 F.2d 1555, 1561-62 (11th Cir. 1989), *aff'd* 498 U.S. 479 (1991).

This standard is not to be rigidly applied but is rather flexible and is to balance each consideration so as to arrive at the most equitable result given particular circumstances. *Texas v. Seatrain International, S.A.*, 518 F.2d 175, 180 (5th Cir. 1975). As relates to all factors, it is the "principal and overriding prerequisite is irreparable harm resulting from the absence of an adequate legal remedy." *Sampson v. Murray,* 415 U.S. 61, 88-92 & n.68 (1974). "It is the threat of harm that cannot be undone which authorizes exercise of this equitable power to enjoin before the merits are fully determined." *Parks v. Dunlop,* 517 F.2d 785, 787 (5th Cir. 1975). Plaintiff easily meets all four of the factors.

A. Plaintiff's Substantial Likelihood of Success and Standing under RFRA

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Those

protections have been incorporated against the States. *Everson v. Bd. Of Educ. Of Ewing,* 330 U.S. 1, 15 (1947) (Establishment Clause); *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) (Free Exercise Clause).

The Free Exercise Clause recognizes and guarantees the "right to believe and process whatever religious doctrine [they] desire…" *Empl't Div. v. Smith,* 494 U.S. 872, 877 (1990). The Free Exercise Clause protects beliefs rooted in religion, even if such beliefs are not mandated by a particular religious organization or shared among adherents of a particular religious tradition. *Frazee v. Illinois Dept. of Emp't Sec.,* 489 U.S. 829, 833-34 (1989). "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Church of the Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 531 (1993). Religious beliefs must only be "sincerely held." *Frazee,* 489 U.S. at 834.

Congress enacted the Religious Freedom Restoration Act in 1993 (RFRA) in order to provide very broad protection for religious liberty. *Burwell v. Hobby Lobby Stores, Inc.,* 134 S.Ct. 2751, 189 L.Ed.2d 675, 573 U.S. 682 (2014). Just three (3) years prior to the enactment of the RFRA, the decision in *Employment Div., Dept. of Human Resources of Ore. V. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct.

1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

In those cases, the determination of whether challenged actions violated the Free Exercise Clause of the First Amendment, involved balancing that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. *Hobby Lobby Stores, Inc.l* at 573 U.S. 694. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U.S., at 408-409, 83 S.Ct. 1790. In *Yoder*, the Court held that Amish children could not be required to comply with a state law demanding they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U.S., at 210-211, 234-236, 92 S.Ct. 1526.

However, in *Smith*, the Court rejected the balancing test employed in *Sherbert.* 494 U.S., at 883, 110 S.Ct. 1595. In *Smith*, the issue presented involved members of the Native American Church who were fired for ingesting peyote for sacramental purposes. The State of Oregon rejected their claims for unemployment benefits on the grounds that consumption of peyote was a statutory crime, but the Oregon Supreme Court then applied the *Sherbert* test and held that

denial of benefits violated the Free Exercise Clause. 494 U.S., at 875, 110 S.Ct. 1595. This Court then reversed the Oregon Supreme Court stating that the *Sherbert* test when applied to any objection on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S., at 888, 110 S.Ct. 1595.

Following the decision in *Smith*, the Court supported its decision in *Boerne v. Flores*, 521 U.S. 507, 514, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) when holding under the First Amendment, a "neutral, generally applicable law may be applied to religious practices even when not supported by a compelling government interest. Congress then enacted RFRA; "Laws [that are] 'neutral' toward religion… may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. §2000bb(a)(2); see also §2000bb(a)(4).

Congress enacted RFRA to ensure broad protection for religious liberty by limiting government so it cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." §2000bb-1(a). If there is substantial burden to a person's exercise of religion, then under the RFRA that person is entitled to an exemption from the rule unless the Government can demonstrate that the burden is in furtherance of a compelling government

interest and is applied in the least restrictive means of furthering that compelling interest. §2000bb-1(b).

Congress amended the RFRA to include a definition of "exercise of religion" that includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc-5(7)(A). Congress then expressed its intent by mandating the concept of "exercise of religion" mean to "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." §2000cc-3(g).

RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). The "term 'government' includes a branch, department, agency, *instrumentality*, and official (or otherwise acting under color of law) of the United States…." Id. §2000bb-2(1).

The legal definition of *Instrumentality* given Merriam-Webster is "something through which an end is achieved or occurs." The term *Instrumentality* has been generally defined quite broadly in the legal context. In Black's Law Dictionary, the term is defined as "a thing used to achieve an end or purpose…." [Black's Law Dictionary, 8th Ed. (2004) at p. 814].

The Supreme Court has stated that "a private entity can qualify as a state actor in a few limited circumstances," such as "when… the government compels the private entity to take a particular action; or when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. ____, No. 17-702, slip op. at 6 (2019) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352-54 (1974), *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982).

On August 5, 2020, Johnson & Johnson, a publicly traded company on the New York Stock Exchange under the ticker symbol JNJ announced that its Janssen Pharmaceutical Companies had entered into an agreement with the U.S. Government for the large-scale manufacturing and delivery in the United States of 100 million doses of SARS-CoV-2 investigational vaccines for use in the United States following approval or Emergency use Authorization by the U.S. Food and Drug Administration. The Biomedical Advanced Research and Development Authority, part of the U.S. Department of Health and Human Services' Office of the Assistant Secretary for Preparedness and Response, in collaboration with the U.S. Department of Defense, is committing over $1 billion for this agreement. The U.S. Government may also purchase an additional 200 million doses… under a subsequent agreement.

On or about September 9, 2021 the currently sitting President of the United States Joe Biden announced on national television he would impose vaccination rules on federal workers and on large employers in order to contain a surge of COVID-19. The President stated, "we've been patient, but our patience is wearing thin, your refusal has cost all of us." At the center of President Biden's newly announced plan, the Labor Department is to require businesses with 100 or more employees to ensure their workers are either vaccinated or tested once per week, or face fines for non-compliance.

It is apparent that the government interest is to contain COVID-19, and its means to accomplish that containment is to cause the citizenry to vaccinate. However, the government by employ of financial capacity has engaged in use of corporations such as Defendants in this case to manufacture vaccines and has engaged itself in giving public directive to corporations such as Defendants to implement the governments interest in containing COVID-19 by way of required vaccination. Therefore, corporate entities such as Defendants are nothing less than an *instrumentality of the government* and therefore the standards for religious liberty in this case must be governed under RFRA.

Furthermore, in *Hobby Lobby Stores, Inc.*, a short mention involved the difference between a closely held corporation versus a publicly traded corporation and the unlikelihood of a publicly traded corporation from ever seeking remedy via

RFRA. *Hobby Lobby Stores, Inc.* at 573 U.S. 718. The interesting anecdotal commentary in the opinion is that there is also a dramatic analogous comparison between the nature of the formation and functional nature of a representative government such as the United States Government and that of a publicly traded corporation. This can be apparently recognized in that the publicly traded corporation is one that involves oftentimes tens of thousands if not hundreds of thousands of employees or in analogous language citizens.

Employees are oftentimes given shares or stock options as part of their remuneration package and those shares oftentimes involve voting rights on corporate policies. There are annual shareholder meetings whereby employees/shareholders are given a report and disclosure of the state of affairs. Employees/shareholders as pointed out in the *Hobby Lobby Stores, Inc.* decision may or may not share religious beliefs and therefore a publicly traded corporation is highly unlikely to be able to exercise religious life in itself and because of these dynamics, a publicly traded corporation such as Defendants in this case is more like a secular institution or government than a religious institution or an entity capable of practicing religious beliefs such as *Hobby Lobby Stores, Inc.*

In fact, corporate giants such as Defendants in this case are oftentimes bigger than entire countries. In July of 2018, businessinsider.com published an article that stated annual revenues of 25 companies including Defendants were

larger than certain countries when comparing GDP to earnings (as had been reported by the International Monetary Fund). https://www.imf.org/en/Publications/SPROLLs/world-economic-outlook-databases#sort=%40imfdate%20descending

These corporate giants are in fact more like a country, its board of directors more similar to a representative government of the shareholders interest in having their shareholder value increased. Relationships between corporate giants such as Defendants and the United States government must be seen as relationships of *instrumentality* and therefore subject to the religious liberty test under RFRA.

Further reason to provide RFRA protection to Plaintiff is given cases whereby a private actor's conduct is adopted as state action. A high-water mark case in this area was *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) which challenged the exclusion of blacks from a private restaurant. The restaurant at issue had a lease with a government agency and was within the parking garage of the agency. Having parked his car in the garage, a black man, William Burton, was refused service when he attempted to eat at the restaurant. The issue in that case was whether the restaurant was a state actor for purposes of the Constitution. The Court in that case found that it was given there was a lease relationship between the restaurant and the government agency.

Here, Defendant Johnson & Johnson has operated as an *instrumentality* of the United States government in that it has entered into financial relationships worth hundreds of millions if not billions of dollars to vaccinate the nation (an understandable government interest). When the President of the United States Joe Biden went on air to express not only his frustration with the current state of affairs related to COVID-19, but the President also expressed his frustration with those that have chosen to exercise their religious liberty under the First Amendment. As such, private enterprise within the context of a corporate entity engaged in furthering the interests of the U.S. government is an *instrumentality* of the U.S. government and must submit itself to the RFRA standards for upholding religious liberty of its employees.

Further evidence of likelihood of Plaintiff prevailing in this matter involves the responses he gave to Defendants when being required to provide evidence of a sincerely held belief. He states he is a Presbyterian Church member. A Christian. That his belief that anything not done in faith is sin. That it is sinful to betray the conscience. The belief that he must protect his body because it is the temple of the Holy Spirit. These responses should suffice with respect to the Free Exercise Clause.

Moreover, Plaintiff being a Christian provides for certain passages of Biblical scripture that surpass the capacity for Defendant to demonstrate an undue

economic hardship in accommodating Plaintiff. https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination These scriptural passages include but are not limited to Job 27.6; Ps 16.7; Ps 90.12; Prv 2.9-11.

Further scriptural passages objecting to vaccination can be found in Exodus 20:13, Genesis 4:10, Proverbs 31:8-9, Romans 13:14, 1 Corinthians 6:19-20, etc. (the list being quite large). But finally:

"If you will diligently harken to the voice of the L-rd, your G-d, and will do that which is right in His sight, and will give ear to His commandments, and keep all His statutes, I will put none of these diseases upon you which I put on the Egyptians; for I am the L-rd, your healer". - Exodus 15:26

B. Plaintiff Will Continue to Suffer Irreparable Injury in the Absence of a Preliminary Injunction.

Plaintiff must next demonstrate that he will suffer irreparable injury if the requested injunction is not issued. *Haitian Refugee Center, Inc.*, 872 F.2d at 1561-2. “Irreparable Injury” is distinguishable from mere injury, in that irreparable injury cannot be adequately compensated through the award of money. *United States v. Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983).

The Plaintiff will suffer such irreparable harm here is indisputable. First, he has been required to submit his religious belief to the test of whether they are legitimate enough for the Defendants to establish them as ones they would support. Second, he has been given notice that he has been granted an exemption until the 8th of December, 2021. By implication that means he will be terminated on that date if not sooner. The entire workforce at Defendants has been placed on notice of termination from employment if non-compliant with being fully vaccinated by the 4th of October, 2021. The Defendants can simply decide to terminate Plaintiff as well on the basis they have changed their minds in the analysis of his requested religious beliefs exemption. There is no objective basis that causes Defendants to keep an individual employed or terminate them given the method of evaluation on whether an employees religious beliefs are those the Defendants seeks to establish, support, or qualify as exempt worthy.

C. The Continued and Irreparable Harm Suffered by Plaintiff Far Outweighs Any Potential Harm Which the Injunction May Cause

Plaintiff's irreparable harm of getting fired for upholding his religious beliefs, or the ungodly act of compromising them for the sake of keeping his job is a harm that far outweighs any potential harm which the injunction may cause. In fact, the injunction would not cause Defendants any harm. Plaintiff is a senior engineer who works remotely most of the time. He comes into contact with most

colleagues over electronic communication. Plaintiff does not have any issue testing prior to entry upon Defendants property if required, and he does not object to others around him being vaccinated even though as he understands shedding of the virus may occur.

D. The Public Interest Clearly Supports Injunctive Relief

The broad public interest in providing protection against constitutional violations decidedly tips the balance of equities in favor of the entry of a preliminary injunction. There simply can be no question of any harm to the public by ensuring that Defendants comply with the First Amendment's Establishment Clause and Free Exercise Clause given RFRA's standard. Quite to the contrary, it serves the public interest to know that their religious beliefs do not run afoul when scientist, governmental entities, and large employers decide those religious beliefs no longer matter at large.

The United States of America established the Free Exercise Clause not so that it could be disregarded when inconvenient, or even dangerous as a result of disease or a virus. In fact, there are those who believe that if they follow their religious belief, they will not be contaminated. However, illogical and absurd religious belief may be to some, the First Amendment is a guarantee, not a hoped-for suggestion at this stage in our nation's history.

Because of the stage in our nation's history, it is in the public interest to know that their First Amendment Establishment Clause and Free Exercise Clause are still inalienable rights they can hold to. What is the value of an inalienable right guaranteed by a government for the people and by the people if at a time of concern, it is disregarded or even limited?

With regard to whether the issuance of a preliminary injunction would be contrary to public interest, it must be stated that our nation's technological advancement and use is so vast that it is now a commonality for a large part of the workforce to work from a remote location. Plaintiff is one employee that works from a remote location without economic or productivity sacrifice to the Defendant. As such, the public interest clearly supports injunctive relief.

WHEREFORE Plaintiff, for the foregoing reasons, respectfully requests that this Court:

A. issue a Preliminary Injunction requiring Defendant not terminate Plaintiff until at least this case has received finality; and

B. grant such other relief as the Court may deem just and equitable.

Dated: October 3, 2021

Respectfully Submitted,

/s/*Jack Andreas Krumbein*
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CERTIFICATE OF SERVICE

Plaintiff, Peter Cerreta, by counsel certifies that on October 3 2021, I electronically filed the foregoing with the Clerk by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant:

Johnson & Johnson Vision Care, Inc.
Attn: General Counsel
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Jacksonville, Florida 32256