UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-20311

JENNIFER BRIDGES, BOB NEVENS, MARIA TREVINO, RICARDO ZELANTE, LATRICIA BLANK, ET AL.,

Plaintiffs-Appellants

v.

THE HOUSTON METHODIST HOSPITAL, DOING BUSINESS AS THE METHODIST HOSPITAL SYSTEM, HOUSTON METHODIST THE WOODLANDS HOSPITAL,

Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:21-CV-01774

BRIEF OF APPELLANTS

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

Plaintiffs-Appellants: Jennifer Bridges, Bob Nevens, Maria Trevino, Ricardo Zelante, Latrcia Blank, Bennie Lopez, Tammy Linkenhoker, Madeline Dib, Hunter Ward, Amber Kimich, Alison Antu, Betty Samuel, Victoria Webb, Edna Barrera, Joseph Hoyt, Priscilla Lara, Kara Shepherd, Gilberto Lara, Luz Hernandez, Ashley Heinrich, Katie Yarber, Jennifer Warren, Joann Creamer, Tatyana Lazarenko, Randi Vincent, Ana Escobar, Adriana Galvan, Starla Haugenater, Jade Hernandez, Laura Bowden, Monica Estrella, Alexis Lopez, Katharine Brol, Charles Vargnese, Arlin Cameron, Ashton Hanley, Ashley Leon, Judith Andriko, Mona Wilson, Julie Torre, Stacey Hanzelka, Sara Pika, Latasha Woods, Celina Elvir, Giovanni Savans, Brian Felgere, Nicole Smith, Jonae Powell, Tara Hansen, Terah Trevino, Stephanie Dunlap, Pamela Robins, Brenda Escobar, Pierre Charland, James McCann, II, Michelle Fuentes, Cherri Mosley, Ahmed Montgomery, Amanda Blanton, John Lasseigne, Linda Pickard, Dana Janoch, Dajuana Armstrong, Averi Reed, Amber Baker, James Smiley, Darius Gardner, Karene Tanner, Mckenli Pinkney, Saul Rodriguez, Brooke Lighthall, Lorri Curto, Kimberly Rensi, Mary Apacway, Mathea Volesky, Santana Henderson-Jones, Kim Mikeska, Brandy Mann, Laurica Wooten, Leevetra Seals, Christina Pineros, Brian Clegg, Katherine Sweitzer, Norma Miller, Carmen LaTorre, Freenea Stewart, Teresa Porche, Debra Baugh, Sharon Hollier, Samantha Hanlon, Teryn Essler, Karen Witt, Jeffrey Hinton, Angela Lavespere, Sierra Dockray, Sandra Altamirano, John Brockus, Robert Morin, Oscar Zamudio, Cynthia Strauss, Rogelio Mendez, Savannah Hanson, Jason Jimenez, Alexandra Williams, Stephanie Hilton, Elsa Mejia, Shauna Herin, Paul Herin, Shaylonda

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request this Court afford them the opportunity to present oral argument. This appeal involves important issues of personal liberty and state policy in the midst of the COVID-19 pandemic. Because the appeal involves consideration of evolving state law, Appellants believe oral argument would aid the Court. Accordingly, Appellants respectfully request oral argument.

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I. JURISDICTIONAL STATEMENT

Appellants originally filed this case in state court. Appellees removed the case to federal court pursuant to 28 U.S.C. § 1441(a), (c), and 28 U.S.C. § 1331. ROA.22–25. The district court signed a final judgment on June 12, 2021. ROA.610. Appellants timely filed a notice of appeal on June 14, 2021. ROA.615. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUE

Did the trial court err in granting Appellees' Motion to Dismiss for failure to state a claim?

III. STATEMENT OF CASE

For the first time in the history of the United States, an employer forced an employee to participate in a vaccine trial as a condition for continued employment. On or about March 31, 2021, Appellees The Methodist Hospital and Houston Methodist The Woodlands Hospital became the first major health care system in the country to force its employees to be injected with an experimental/investigational COVID-19 mRNA gen modification injection or be fired. The callous nature of Appellees' experimental vaccine program is exemplified in statements from David

Bernard, CEO of Houston Methodist San Jacinto Hospital, when he informed Appellant nurse Jennifer Bridges:

> "100% vaccination is more important than your individual autonomy. Everyone of you is replaceable. If you don't like what you're doing you can leave and we will replace your spot."

Like many of the Appellants, nurse Bridges contracted COVID-19 while on the front-line treating COVID-19 patients during the height of the pandemic.

Texans have a right to make their own decisions regarding whether to receive experimental vaccines. They have a right to be able to participate in public life – as an employee and citizen – at the same time.

In Executive Order GA-40, issued October 11, 2021, Governor Greg Abbott ordered:

> No entity in Texas can compel receipt of a COVID-19 vaccine by any individual, including an employee or a consumer, who objects to such vaccination for any reason of personal conscience, based on a religious belief, or for medical reasons, including prior recovery from COVID-19. I hereby suspend all relevant statutes to the extent necessary to enforce this prohibition.

Executive Order GA-40. In addition to flatly prohibiting entities, such as Methodist, from mandating vaccines, the political branches of Texas government wrapped citizens in a protective cloak, protecting their liberty interests in deciding whether to receive a EUA-authorized-COVID-19 vaccine.

The Legislature and Executive Branch have articulated Texas's clear public policy protecting Texans' liberty during the COVID-19 pandemic. The Governor

has issued four separate executive orders protecting individual liberty,[1] including bills preventing Texas businesses and agencies from limiting Texans from participating in public life unless they respond to the threat of COVID-19 in a particular way. The Legislature has passed two bills that have similar effects.[2] The political branches have protected an individual's decision to receive the COVID-19 vaccination, to reject the EUA-authorized-COVID-19 vaccine, or to continue to wait.

Methodist's employees have real concerns about their bodies and their health. And if the legal doctrine is as Methodist suggests, and there are no narrow limitations to at-will employment to protect an employee's control of his or her own healthcare decisions, then an employer could require an employee to have any type of medical treatment regardless of whether it is experimental. In this case, Methodist forced Appellants to take a non-FDA-approved medical treatment to continue their employment.

The vaccine manufacturers' Fact Sheets made it clear that "[t]here is no U.S. Food and Drug Administration (FDA) approved vaccine to prevent COVID-19." ROA.60–65. The manufacturers of the COVID-19 vaccine further admitted that the

[1] *See* Executive Orders GA-35, issued April 5, 2021, Executive Order GA-36 issued May 18, 2021, Executive Order GA-38, issued July 29, 2021, Executive Order GA-39, issued August 25, 2021, and Executive Order GA-40, issued October 11, 2021.

[2] *See* TEX. HEALTH & SAFETY CODE § 161.0085; TEX. HEALTH & SAFETY CODE § 81.085.

"[v]accine is an unapproved vaccine that may prevent COVID-19. There is no FDA-approved vaccine to prevent COVID-19." ROA.60–65. After listing seventeen potential side effects from the experimental vaccine, Pfizer and the other manufacturers concluded:

> "These may not be all the possible side effects of the Pfizer-BioNTech COVID-19 Vaccine. Serious and unexpected side effects may occur. Pfizer-BioNTech COVID-19 Vaccine is still being studied in clinical trials."

ROA.60–65.

The doctrine of at-will employment maintains a legal fiction that employees can choose between different employers. But the reality for Appellants is that mandates within their profession force them either to submit to a medical treatment they fear or sacrifice the livelihood on which they and their families depend. Texas law does not require that choice.

Texas public policy is clear: employers cannot mandate COVID-19 vaccines as a condition of employment. Texas state courts are addressing challenges to mandatory COVID-19 vaccine policies. The State of Texas challenged the San Antonio Independent School District's policy requiring its employees to be vaccinated and the Supreme Court of Texas stayed the enforcement of the policy to consider the challenge. *In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Oct. 14, 2021). Because the issue in this case presents an important issue of state law, Appellants respectfully request this Court hold there is a public policy exception to at-will

employment to prevent terminating employees for refusal to take COVID-19 vaccines that are not fully authorized by the FDA or certify to the Supreme Court of Texas.

IV. FACTUAL & PROCEDURAL BACKGROUND

In January 2020 both the United States Department of Health and Human Services ("HHS") and World Health Organization ("WHO") declared public health emergencies. ROA.31. In response to the novel coronavirus, the national government announced a program – Operation Warp Speed – to compress the normal period of time to develop and approve a vaccine. ROA.32. The process normally has several stages of development, including years to test quality control. *See* ROA.32. Pharmaceutical companies rushed to create and mass-produce a vaccine in record time. ROA.33. Less than a year later, the United States Food and Drug Administration ("FDA") issued the first emergency use authorization ("EUA") for an experimental vaccine. ROA.30. As part of granting EUA, the FDA imposed restrictions on dispensing the EUA-authorized-COVID-19 vaccines. ROA.30–31.

A. The EUA requires a healthcare provider to inform a potential EUA-authorized vaccine recipient of the choice to either receive or refuse the vaccine.

Title 21 of the United States Code section 360bbb-3(e)(1)(A) grants the FDA the power to authorize a medical product for emergency use. *See* 21 U.S.C. §

360bbb-3(e)(1)(A). The statute also requires potential EUA-authorized vaccine recipients to be informed they have the option to accept or refuse the EUA-authorized vaccine. *See id.* Section 360bbb-3(e)(1)(A) reflects a fundamental public policy goal of striking a balance between giving people the option of having access to experimental medical products during public emergencies, while also assuring no one is forced to accept administration of the product. *See id.* The FDA required each dose of EUA-authorized vaccine to have a label stating it is "an investigational vaccine not licensed for any indication" and that all "promotional material relating to the Covid-19 Vaccine clearly and conspicuously…state that this product has not been approved or licensed by the FDA but has been authorized for emergency use by the FDA." ROA.30–31. The FDA was clear in its belief that the EUA:

> issued under section 564 preempt state or local law, both legislative requirement and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564… In an emergency, it is critical that the conditions that are part of the EUA or an order or waiver issued pursuant to section 564A – those that FDA has determined to be necessary or appropriate to protect the public health – be strictly followed, and no additional conditions be imposed.

ROA.31.

B. The COVID-19 vaccines authorized for emergency use have unknown long-term effects and can cause serious injury, including death.

The long-term effects of the EUA-authorized COVID-19 vaccines necessarily are unknown. ROA.37. The mRNA enters a host's cells and causes them to produce

the spike protein of the coronavirus, which elicits the development on antibodies.[3] ROA.37. Scientists do not know the long-term consequences of taking the EUA-authorized COVID-19 vaccines and need to continue to study them. ROA.37. But even the short-term known responses justify EUA-authorized vaccine hesitancy and/or refusal to take the EUA-authorized vaccine.

On June 1, 2021, the date of Appellants' Original Petition, the Vaccine Adverse Event Reporting Systems[4] ("VAERS") had reported 4,434 deaths and 12,619 serious injuries, including death, resulting from COVID-19 vaccines. ROA.33. Causes of death include anaphylactic shock, thrombosis with thrombocytopenia syndrome, blood clots, multi-system autoimmune disorder, and organ failure.[5] Since June 1, 2021, the VAERS' numbers have risen substantially. As of

[3] Suzuki YJ, Gychka SG. SARS-CoV-2 Spike Protein Elicits Cell Signaling in Human Host Cells: Implications for Possible Consequences of COVID-19 Vaccines. *Vaccines (Basel)*. 2021;9(1):36. Published 2021 Jan 11. doi:10.3390/vaccines9010036.

[4] VAERS is co-managed by the CDC and FDA. VAERS accepts and analyzes reports of adverse events after a person has received a vaccination. Anyone can report an event to VAERS and healthcare professionals are required to report certain adverse events to VAERS.

[5] Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Pfizer-BioNTech COVID-19 Vaccine-United States, December 14-23, 2020. MMWR Morb Mortal Wkly Rep 2021; 70:46-51. DOI: http://dx.doi.org/10.15585/mmwr.mm7002e1.

September 17, 2021, more than 15,000 deaths and 726,000 total COVID-19 vaccine injuries were reported to VAERS.[6]

Guidance from the FDA and CDC is not completely reassuring because both organizations have issued conflicting and changing advice. For example, the FDA granted EUA status to the Johnson & Johnson vaccine and then paused the administration of the vaccine to investigate risks. ROA.38. Methodist addressed the issue by stating, "the FDA's recent decision to pause the administration of the Johnson & Johnson vaccine proves how carefully the vaccines are being monitored." ROA.52. But it also shows how understanding the EUA-authorized vaccines and their potential effects is an evolving process and underscores the risks associated with taking a EUA-authorized vaccine that has not been granted full FDA approval.

C. Methodist imposes a policy firing employees who do not take a non-FDA-approved COVID-19 vaccine.

Against this backdrop, on April 1, 2021, Appellees Methodist and The Woodlands Hospital issued a policy "requiring mandatory immunization of all covered Houston Methodist (HM) employees." ROA.50, ROA.66–70. Methodist stated it would implement the policy in phases, with the first phase covering management personnel. ROA.50, ROA.66–67. Each phase one employee was required to file a

[6] *More Than 726,000 COVID Vaccine Injuries Report to VAERS*, PRINCIPIA SCIENTIFIC INTERNATIONAL, Oct. 2, 2021, https://principia-scientific.com/more-than-726000-covid-vaccine-injuries-reported-to-vaers/ (last visited Nov. 11, 2021).

request for exemption based on a medical condition or sincerely held religious beliefs by April 7, 2021, or submit to the EUA-authorized vaccine by April 15, 2021. ROA.51, ROA.67. Phase one employees who did not receive the EUA-authorized vaccine or did not have the approved exemption were placed on a two-week, unpaid suspension. ROA.51, ROA.68. Methodist stated if employees did not comply with the policy, Methodist would "immediately initiate the employment termination process." ROA.52, ROA.68.

Next, Methodist CEO, Mark Boom, sent a letter stating that newly hired employees, executives, and managers were 100 percent compliant and "[n]ow it is your turn," indicating that other employees had until June 7 to receive the vaccination. ROA.51–52, ROA.72. Methodist revised its April 1, 2021, policy on April 14, 2021, creating and defining a group of Phase 2 employees. ROA.53, ROA.75. Phase 2 employees include all employees not covered by Phase 1. ROA.53, ROA.77. Methodist required Phase 2 employees to receive any approved one dose vaccine or two doses of any approved two dose vaccine by June 7, 2021. ROA.53, ROA.77. Methodist indicated an employee who was not in compliance would be placed on a 14-day unpaid suspension and then terminated at the end of that time if the employee was not in compliance with the policy. ROA.53, ROA.77. What Boom failed to tell Appellants and other Methodist employees is that the COVID-19 manufacturers' Fact Sheet states, "It is your choice to receive or not receive the Pfizer-BioNTech

COVID-19 Vaccine." ROA.60–65. Boom further failed to communicate to Appellants that the vaccine manufacturers had warned: "The Pfizer-BioNTech COVID-19 Vaccine has not undergone the same type of review as an FDA-approved or cleared product." ROA.60–65.

D. Methodist employees seek legal protection.

Forced with an untenable choice between taking a non-FDA-approved COVID-19 vaccine with uncertain health risks and losing their employment, Appellants filed suit against Methodist. ROA.29–59.

Appellants alleged they are employees of Houston Methodist who were terminated for failing to comply with Houston Methodist's policy. ROA.31. Specifically, Appellants asserted two claims for wrongful discharge. Appellant's pleaded claims for (1) wrongful discharge claim under *Sabine Pilot*, arguing that their discharge violated public policy of Texas, and (2) a violation of the at-will employment doctrine by firing Appellants for the failure to take an EUA-authorized vaccine that federal statutes mandated must be optional. ROA.55–58. Appellants sought both declaratory relief and injunctive relief. ROA 58–59.

Methodist filed a motion to dismiss in which it argued Appellants had not pleaded claims for wrongful termination because the pleadings did not satisfy the *Sabine Pilot* doctrine and because Appellants' claims for violation of the at-will employment doctrine (1) are not cognizable claims under Texas law, and (2) are barred

because an employee advancing a *Sabine Pilot* claim cannot advance additional claims. ROA.236–54. Methodist argued Appellants' request for declaratory relief failed based on standing and because there is no cause of action supporting Appellants' pre-emption claim because section 360bbb-3(e)(1)(A) does not apply to private employers and the federal preemption doctrine does not affect Methodist's policy. ROA.249–53.

V. SUMMARY OF ARGUMENT

Appellants have a viable claim for wrongful discharge because the at-will employment doctrine contains exceptions for discharging individuals for reasons that are against public policy. *See McClendon v. Ingersoll-Rand Co.*, 807 S.W.2d 577, 577 (Tex. 1991) (per curiam) (withdrawing prior opinion in which Supreme Court held plaintiff stated a claim for wrongful discharge under public policy exception because claim was pre-empted by ERISA); *Sabine Pilot*, 687 S.W.2d at 735. Texas has a strong public policy against terminating employees based on their objection to receiving a COVID-19 vaccination. *See, e.g.*, Executive Order GA-40, issued October 11, 2021. Because Texas has a strong public policy against terminating employees based on their objection to receiving a COVID-19 vaccination, the district court erred in dismissing Appellants' claims against Appellee for failure to state a claim upon which relief can be granted.

VI. ARGUMENT

A. A claim survives a motion to dismiss if the facts raise a right to relief.

Appellate courts review dismissal under 12(b)(6) *de novo*. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirit & Wansbrough*, 354 F.3d 348, 351 (5th Cir. 2003). A claim may be dismissed if it fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Under this standard, courts dismiss a pleading only when it fails to plead sufficient factual matters to show a plausible claim for relief on the pleadings. *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). A claim is plausible when a litigant "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When reviewing whether a claim survives dismissal, the allegations in the complaint are liberally construed in favor of the party asserting the claims and all facts pleaded in the complaint must be taken as true. *EPCO Carbon Dioxide Prods., Inc. v. JP Morgan Chase Bank, NA*, 467 F.3d 466, 467 (5th Cir. 2006).

A claim will not be dismissed unless the plaintiff cannot prove any set of facts in support of its claim that would entitle it to relief. *Id.* The facts alleged must "be enough to raise a right to relief above the speculative level," but the complaint may survive a motion to dismiss even if recovery seems "very remote and unlikely." *Innova Hosp. San Antonio, LP v. Blue Cross and Blue Shield of Georga, Inc.*, 892 F.3d

719, 726 (5th Cir. 2018) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The complaint must contain more than conclusions, but it need not contain detailed factual allegations. *Id.*

B. Appellants have stated viable claims for wrongful discharge.

Appellants have stated a viable claim for wrongful discharge because Texas public policy is to protect employees from vaccine mandates. The at-will employment doctrine is a judicially-created doctrine subject to exceptions. *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985). Because Texas public policy is to protect employees from vaccine mandates, Appellants have stated a valid public policy exception under the at-will employment doctrine.

1. Public policy provides exceptions to at-will employment.

Texas is an at-will employment state. *Ritchie v. Rupe*, 443 S.W.3d 856, 885 (Tex. 2014). Because employment is "at will," an employer generally can terminate an employee for any or no reason at all. *See Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 715 (Tex. 2003). Absent a specific agreement to the contrary, employment may be terminated for good cause, bad cause, or no cause at all. *See Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998).

But at-will employment is not absolute. *See Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444. 453 (Tex. 1996). Exceptions exist. *See id.* For example, an employer's termination of an employee may not violate the terms of a statute, an

employment contract, or result from an employee's refusal to commit an illegal act. *Mott v. Montgomery Cnty, Tex.*, 882 S.W.2d 635, 637 (Tex. App.—Beaumont 1994, no pet.). And, because the at-will employment doctrine is judicially created, Texas courts have, over time, shown a willingness to develop various common-law restrains on the doctrine of employment-at-will. *See, e.g., Hillman v. Nueces Cnty*, 579 S.W.3d 354, 358 (Tex. 2019) (noting the freedom to judicially amend a judicially created doctrine, and noting the Court had "no problem" expanding an exception to the at-will employment doctrine); *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 725 (Tex. 1990) (Doggett, J., concurring) (noting the Court would continue to recognize exceptions to the at-will employment doctrine); *Sabine Pilot*, 687 S.W.2d at 733 (noting Texas courts are free to amend a judicially created doctrine).

The Thirteenth Court of Appeals recognized "the absolute employment-at-will doctrine is increasingly seen as 'relic of early industrial times' and a 'harsh anachronism.'" *Johnston v. Del Mar Distributing Co., Inc.*, 776 S.W.2d 768, 770 (Tex. App.—Corpus Christi 1989, no writ). In expanding the at-will employment doctrine in the past, the high court considered "the changes in American society and in the employer/employee relationship." *See Sabine Pilot*, 687 S.W.2d at 735. Although the at-will employment doctrine is robust, Texas courts make exceptions to the doctrine when it conflicts with the state's public policy.

2. The FDA intended vaccines be optional, at least until they are fully approved.

The COVID-19 vaccines Methodist has mandated were authorized pursuant to Section 564 of the Food, Drug, and Cosmetic Act ("FDCA"). 21 U.S.C. § 360bbb-3. Section 360bbb-3(a)(1) allows the Secretary of Health and Human Services to "authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b), of a drug … intended for use in an actual or potential emergency." 21 U.S.C. § 360bbb-3(a)(1). A drug approved under section 360bbb-3 is either (a) not approved or licensed for commercial distribution or (b) is conditionally approved. *Id.* § 360bbb-3(a)(2)(A)–(B).

To authorize a product for emergency use, the FDA must follow certain conditions. *Id.* § 360bbb-3(e)(1). One condition is individuals who are administered the product must be informed of "the significant known and potential benefits and risks" of the EUA-authorized vaccine, "the extent to which risks and benefits are unknown," and "of the option to accept or refuse administration of the product." *Id.* § 360bbb-3(e)(1)(A)(ii)(I)–(III). These requirements form the framework under which the FDA authorizes a product for emergency use.

Relying on the statutory framework, the FDA granted EUAs for three vaccines to prevent COVID-19. *See Authorizations of Emergency Use of Certain Biological Productions During the COVID-19 Pandemic; Availability*, 86 Fed. Reg. 28,608 (May 27, 2021) (Janssen); *Authorizations of Emergency Use of Certain*

Biological Productions During the COVID-19 Pandemic; Availability, 86 Fed. Reg. 5200 (Jan. 19, 2021) (Pfizer and Moderna). In each authorization, the FDA imposed the "option to accept or refuse" condition. The FDA required a dispenser of the EUA-authorized vaccine to distribute to potential vaccine recipients a Fact Sheet that states: "It is your choice to receive or not receive [the vaccine]. Should you decide not to receive it, it will not change your standard medical care." *See, e.g.*, FDA, Fact Sheet for Recipients and Caregivers at 5 (revised June 25, 2021), *https://www.fda.gov/media/144414/download* ("Pfizer Fact Sheet"); ROA.60–65. CDC executives have confirmed their belief that the federal statutes required individuals to consent to vaccines authorized through EUA. It is also worth mentioning that at least a portion of the ingredients of the EUA-authorized vaccines are proprietary. So, it is impossible to have true informed consent when a person does not know what is being injected into their body.

Vaccines authorized through EUA are different than fully FDA-approved vaccines. *See, e.g.*, ROA.405. The clinical trials for EUA were not subjected to the same standards of review that are necessary for FDA-approved vaccines. *See* ROA.405. Further, as Dr. McCullough indicated in his affidavit, many policy considerations were not fully discussed, including whether vaccines are contraindicated for those with natural immunity. ROA.409. Dr. McCullough noted, "based on my 30 years in medicine, and in reviewing thousands of medical studies and abstracts, this is

dangerous and uncharted territory. Never before has any employer required an EUA product under clinical investigation." ROA.409.

EUA products require consent because they have not met the standards for full authorized use. The concept of consent is incompatible with duress. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047–48, 36 L.Ed.2d 854 (1973) (consent to a police search must be free from duress); *Baker v. Morton*, 79 U.S. 150, 157–58, 20 L.Ed. 262 (1870) (consent to contract must be free from duress). In this case, Methodist's action violated public policy because Methodist both mandated the vaccine and then administered it to its employees–even though federal statutes required the vaccine to be optional.[7] *See, e,g.*, Ariz. Op. Atty. Gen. No. I21-007 (Ariz. A.G.), 2021 WL 3836827, at *4 (Aug. 20, 2021) (concluding the federal statutes pre-empt vaccine mandates).

[7] New rules promulgated by Centers for Medicare & Medicaid Services and Occupational Safety and Health Administration requiring certain businesses to implement vaccine mandates or regular testing have no impact on this analysis. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (proposed Nov. 5, 2021) (to be codified at 29 CFR pt. 1910–28) First, these requirements were put in place only after COVID-19 vaccines became approved by the FDA. Second, the requirements have no impact on Texas's public policy or Texas's state law doctrine of at-will employment.

3. Public policy in Texas is to protect employees from termination due to refusal to take a non-FDA-approved vaccine.

Federal statutes and rules, along with Texas's direct response to vaccine mandates, demonstrate the likelihood that state courts in Texas would create a public policy exception to the at-will employment doctrine to prevent employers from terminating employees based on the employee's refusal to take a non-FDA-approved vaccine.

a. Texas has a public policy of freedom to make personal decisions relating to COVID-19 risk.

The Supreme Court of Texas has entertained creating an exception to at-will employment when termination violates public policy. *See McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 70–71 (Tex. 1989) *withdrawn on other grounds* 807 S.W.2d 577 (Tex. 1991) (per curiam); *Sabine Pilot*, 687 S.W.2d at 735. Texas public policy is reflected in its statutes. *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002). The expression of public policy reflected in the state's statutes often are "enlarged to include the administrative practices of the state's officers as part of its public policy." *Dairyland Cnty Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341, 342 (Tex. App.— Fort Worth 1972, writ ref'd n.r.e.). Mandatory vaccination violates Texas's expressed public policy for several reasons.

First, the Texas Legislature and Texas governor have taken exhaustive steps to protect Texans from the any requirement of vaccination or being forced to wear a

face covering. *See* TEX. HEALTH & SAFETY CODE § 161.0085 (prohibiting vaccine passports and prohibiting businesses from requiring a vaccine passport for entry); TEX. HEALTH & SAFETY CODE § 81.085 (prohibiting state agencies or political subdivisions from passing laws requiring an individual to provide the individual's vaccination status for any COVID-19 vaccine administered under an emergency use authorization); Executive Order GA-35, issued April 5, 2021; Executive Order GA-36, issued May 18, 2021 (prohibiting COVID-19 restrictions on activities and prohibiting requirements to wear face masks);Executive Order GA-38, issued July 29, 2021 (preventing governmental entities from compelling vaccines and prohibiting requirements to wear a face mask); Executive Order GA-39, issued August 25, 2021 (barring governmental entities from compelling individuals to receive a COVID-19 vaccine); Executive Order GA-40, issued October 11, 2021 (prohibiting vaccine mandates).

Second, Governor Abbott explicitly prohibited all entities from terminating employees for failure to obtain a COVID-19 vaccine. *See* Executive Order GA 40, issued October 11, 2021. Executive Order 40 followed executive orders prohibiting (1) governmental entities from requiring individuals to receive a COVID-19 vaccine and (2) other governmental agencies and public and private entities receiving public funds from requiring consumers to provide proof of COVID-19 vaccination status to enter any place or obtain any service. Executive Order GA-39, issued August 25,

2021. The executive orders and bills passed by Texas's political branches of government show Texas's strong policy of allowing Texans the freedom of choice when it comes to make risk determinations related to COVID-19. This is particular true in this case, where Methodist fired Appellants for objecting to taking COVID-19 vaccines before the vaccines had FDA approval.

Additionally, Executive Order GA-40 acknowledged the role and importance of natural immunity gained from a prior recovery from COVID-19. This important policy consideration in Texas is also backed by science. In his Declaration, Dr. McCullough, citing to several studies, notes "there are no studies demonstrating clinical benefit of COVID-19 vaccination in COVID-19 survivors . . ." McCullough's opinion is that the immunity gained from a previous infection conveys a "robust, complete, and durable immunity, and is superior to vaccine immunity." ROA.409. In his ultimate opinion, the COVID-19 vaccination is contraindicated for those who have recovered. ROA.409.

b. Because of Texas's strong public policy protecting individual freedoms in the context of COVID-19, Texas courts would likely create a public policy exception to the at-will employment doctrine to protect those freedoms.

The Texas political branches have articulated clear public policy against vaccine mandates. Methodist argued in the district court that its actions are consistent with public policy because the United States Supreme Court recognized that

vaccinations are not oppressive. *See* ROA.243–45. Methodist also noted that the EEOC recognized the propriety of employers requiring a COVID-19 vaccination for all employees entering the workplace.[8] *See* ROA.243.

The holding from the United States Supreme Court regarding whether vaccines are oppressive is irrelevant.[9] *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 12, 25 S.Ct. 358, 49 L.Ed. 643 (1905). *Jacobson* addressed whether a state could require vaccination. *Id.* It did not address the public policy of a state seeking to protect its residents from vaccine mandates. *See id.* The case offers no insight into Texas public policy.

Similarly, federal policies relating to EUA-authorized-COVID-19 vaccines offer no assistance in determining Texas public policy on vaccine mandates. Texas is at odds with federal agencies in its policy surrounding coronavirus. *See* TEX.

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[8] The EEOC guidance is not binding.

[9] *Jacobson* did not hold that deference in public health decisions is limitless. Rather, the opinion concluded with a limitation:

> Before closing this opinion we deem it appropriate, in order to prevent misapprehension [of] our views, to observe-perhaps to repeat a thought already sufficiently expressed, namely-that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression.

197 U.S. at 38, 25 S.Ct. at 366. In the eleven decades since *Jacobson*, the Supreme Court refined its approach for the review of state action that burdens constitutional rights and created tiered levels of scrutiny for constitutional claims. *See Plannned Parenthood v. Casey*, 505 U.S. 833, 857 (1992).

HEALTH & SAFETY CODE § 161.0085; *Id.* § 81.085; Executive Order GA-35, issued April 5, 2021; Executive Order GA-36, issued May 18, 2021; Executive Order GA-38, issued July 29, 2021; Executive Order GA-39, issued August 25, 2021; Executive Order GA-40, issued October 11, 2021. While the federal government recently has implemented vaccination mandates, Texas has steadfastly taken the opposite stance. *Compare* "Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," Presidential Executive Order No. 14043, issued on September 9, 2021, 2021 WL 4099968 (White House) *with* GA-39, issued August 25, 2021.

c. International norms support Texas's public policy of vaccine choice.

Other deep and powerful sources of authority point to the importance of individual freedom in the context of medical decision-making. For example, the judgment by the war crimes tribunal at Nuremberg laid down ten standards to which physicians must conform when conducting medical experiments. The first condition is: "The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent, should be situated as to be able to exercise free power of choice, without intervention of any element of . . . coercion." *Nuremberg Doctor's Trial*, 313 BRITISH MEDICAL JOURNAL 1445, 1448 (Dec. 1996). The Nuremberg Code was adopted in part to protect a human subject's autonomy and to prevent that autonomy from being submerged by

"what the physician-investigator thinks is best for the subject." Evelyne Shuster, *Fifty Years Later: The Significance of the Nuremberg Code*, 337 N. ENGL. J. MED., 1436–1440 (Nov. 1997), *available at*: nejm.org/doi/full/10.1056/nejm199711133372006. The United States code contains same underlying value. For example, 45 C.F.R. section 46.116 requires an investigator to obtain informed consent before involving humans in research. 45 C.F.R. § 46.116.

The principal that undergirds these powerful moral norms is at play in today's case. Allowing employers to mandate non-FDA-approved medical treatment that does not relate to an employee's job submerges the employee's autonomy and freedom of choice. Under duress, an employee cannot truly consent to the medical treatment. *See, e.g., Bustamonte*, 412 U.S. at 227, 93 S.Ct. at 2047–48; *Morton*, 79 U.S. at 157–58.

The response that the employee does have a choice because they can opt for termination is a legal fiction in the context of vaccine mandates. At-will employment is based on a conception of free-market capitalism that does not exist in the healthcare industry. *See, e.g., Federal Government to Expand Vaccination Requirements for Staff in Hospitals, Other Health Care Settings*, AM. HOSP. ASS'N SPECIAL BULLETIN, Sept. 9, 2021, *available at*: https://www.aha.org/system/files/media/file/2021/09/fed-gov-expand-vaccination-requirements-staff-in-hospitals-other-

health-care-settings-receive-medicare-medicaid-funding-9-9-21.pdf. While some employees may have a meaningful choice, many do not. *See Am. Fed'n of State Cnty & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 874 (11th Cir. 2013) (noting threat of termination is coercive); *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 502 (6th Cir. 2004) (noting "in today's economy," the choice to leave a job often amounts to "no choice at all")

d. The Supreme Court of Texas may be best positioned to determine Texas public policy regarding vaccine mandates.

Because Texas public policy is central to Appellant's arguments in this case and the issue is one of intense focus within the state of Texas, the Supreme Court of Texas may be best positioned to determine Texas public policy in this context. The Supreme Court of Texas already is addressing related issues and determining the effect of Executive Order GA-39 on state law. *See In re State*, 2021 WL 4785741, at *1.

The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. TEX. CONST. ART. V., § 3-c(a). Texas appellate rules provide "[t]he Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent." TEX. R. APP. P. 58.1.

Certification is "advisable" where certain state interests are at stake and state courts have not provided clear guidance on how to proceed. *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010), *certified question accepted*, 51 So. 3d 1 (Oct. 29, 2010), *certified question answered*, 63 So. 3d 955 (La. 2011). Certification is "prudent when consequential state-law ground is to be plowed, such as defining and delimiting state causes of action." *McMillan v. Amazon.com, Inc.*, 983 F.3d 194, 202 (5th Cir. 2020).

The factors to consider in deciding whether to certify a question are: (1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are highly relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 332 (5th Cir. 2018), *certified question accepted* (Oct. 26, 2018), *certified question answered*, 579 S.W.3d 53 (Tex. 2019).

1. Texas law does not answer whether a public policy exception exists.

In this case, state law is insufficient. While the at-will employment doctrine is firmly developed, there are no cases that address termination based on an

employee refusing an employer's demand to inject non-FDA-approved medical treatment into the employee's body.

One intermediate court of appeals appears to have shoehorned an employer requiring employees to take potentially dangerous actions under *Sabine Pilot* but did not provide any analysis regarding how it fit squarely under the *Sabine Pilot* doctrine. *See Hawthorne v. Star Enter., Inc.*, 45 S.W.3d 757, 759 (Tex. App.—Texarkana 2001, pet. denied). The public policy behind the *Sabine Pilot* exception is to deter the violation of criminal laws. *See Ran Ken, Inc. v. Schlapper*, 963 S.W.2d 102, 106 (Tex. App.— Austin 1998, pet. denied). In *Safeshred, Inc. v. Martinez*, the Supreme Court stated that the narrow exception to the at-will employment doctrine exists, in part, "because of the public policies expressed in our criminal laws." *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 659 (Tex. 2012). In his concurring opinion in *Sabine Pilot*, Justice Kilgarlin noted a failure to allow for the *Sabine Pilot* exception would "promote a thorough disrespect for the laws and legal institutions of our society.'" *Sabine Pilot*, 687 S.W.2d at 735 (Kilgarlin, J., concurring).

The holding in *Hawthorne* shows Texas courts have held employers cannot terminate their employees for refusing to expose themselves to dangerous health conditions, even conditions that are not prohibited by OSHA. *See Hawthorne*, 45 S.W.3d at 759. The case hints that at least one Texas court has stretched to bar termination resulting from forcing employees to take dangerous risks to their bodies.

But because the intermediate court's holding falls under *Sabine Pilot* (which provides an exception to at-will employment when an employer terminates an employee for refusing to engage in criminal conduct) it does not explicitly address whether there is a public policy exception to the at-will employment doctrine in a context where an employer requires employees to receive medical treatment that is not necessarily related to their performance of their duties.

2. Considerations of comity are paramount in important public policy decisions like the decision regarding vaccine mandates.

This Court previously certified a question to a state supreme court to determine whether the state court would create a new public policy exception to the at-will employment doctrine based on a state statute solidifying an employee's right to bear arms. *See Swindol v. Aurora Fight Sciences Corp.*, 805 F.3d 516, 522 (5th Cir. 2015). The Court held that although the at-will employment doctrine had few exceptions, the Court would benefit from the state court's analysis. In *Swindol*, this Court noted that a state statute solidifying the right to bear arms created a consistency concern that "raises compelling comity interests." *See id.* The same is true in the present appeal. Although Texas has carved few exceptions to at-will employment, Texas has passed statutes and executive orders affirming an individual's right to participate in society and to frequent businesses regardless of vaccine status. Executive Order GA-40 prohibits vaccine mandates as a condition of employment. Executive Order GA-40 issued October 11, 2021.

3. Pragmatic considerations weigh in favor of certifying the question to the Supreme Court of Texas.

Just as the similar public policy question was easily framed to the state supreme Court in *Swindol*, there should be no difficulty framing this question to the court. *See Swindol*, 805 F.3d at 522.

C. Appellants have standing to bring a claim under the Declaratory Judgments Act.

In their motion to dismiss, Appellees contend Appellants have no standing to bring a claim for declaratory relief because they have not pleaded a claim for wrongful termination. ROA.249–53. Because Texas has a public policy exception to at-will employment for termination based on the failure to take a EUA-authorized-COVID-19 vaccine, Appellants have pleaded a claim for wrongful termination and have standing to seek declaratory relief.

VII. CONCLUSION

Texas has a strong public policy against terminating employment based on an employee's objection to receiving a EUA-authorized-COVID-19 vaccine. Because of Texas's strong public policy, Texas courts likely would create an exception to the at-will employment doctrine to bar employers from terminating employees who object to vaccination, especially employees who objected to vaccines that were not

FDA approved. Based on Texas's strong public policy, Appellants have stated a claim for relief against Appellees. *Sabine Pilot*, 687 S.W.2d at 735.

PRAYER

Appellants respectfully request this Court reverse the district court's order dismissing Appellants' claims against Appellees. Appellants pray for any and all further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing with the U.S. Court of Appeals for the Fifth Circuit's ECF/CM system, and counsel for the Defendants-Appellees was served using the court's electronic Notice of Docket Activity pursuant to 5th Cir. R. 25.2.5, as well as by electronic mail to counsel below:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,429 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

The undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the typestyle requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

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