

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

John Doe,

Plaintiff,

vs.

THE BOARD OF EDUCATION OF
MONTGOMERY COUNTY, *et al.*,

Defendants.

Case No.:

**MEMORANDUM IN SUPPORT OF
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTION, OR, IN
THE ALTERNATIVE, TEMPORARY
RESTRAINING ORDER**

Plaintiff John Doe, proceeding under a pseudonym,¹ hereby files this memorandum in support of his emergency motion for a preliminary injunction, or, in the alternative, for a temporary restraining order. By his motion, Doe seeks to stay enforcement of the Board of Education of Montgomery County’s policy requiring employees to be vaccinated against COVID-19 (the “Vaccine Mandate” or “Mandate”), *which has a compliance deadline of September 30, 2021*. For the reasons set forth herein, the Court should grant the motion before that date.

INTRODUCTION

The Vaccine Mandate is patently unconstitutional and in violation of federal statutory law because it lacks a mechanism for employees to request an exemption based on their sincerely held religious beliefs.

Defendant the Board of Education of Montgomery County (the “Board”) operates and oversees Defendant Montgomery County Public Schools (“MCPS”). On September 9, 2021, the Board enacted the Vaccine Mandate, which requires that all MCPS employees must, by September 30, 2021, provide verification that they have received at least the first shot of a COVID-19

¹ Doe will file a separate motion seeking leave to proceed under a pseudonym.

vaccination. The Mandate allows MCPS employees a mechanism to claim an exemption from this requirement based on “medical reason[s],” but it does not contain a similar mechanism based on sincerely held religious beliefs.

Doe, a MCPS employee, is an adherent of the Christian faith. He holds the sincere belief that obtaining a COVID-19 vaccination would conflict with the edicts of his religion. Doe sought an exemption from the Vaccine Mandate on the ground that it compelled him to violate his sincerely held religious beliefs, but the Board denied the request, without evaluating the specific facts involved in his request, taking the position that the Mandate categorically does not permit any religious exemptions.

Doe has filed a Complaint alleging that the Vaccine Mandate is unlawful, and he is likely to succeed on the merits of his claims. Indeed, the Vaccine Mandate’s lack of a religious exemption plainly violates federal law:

First, the Vaccine Mandate violates Title VII, which requires employers to accommodate their employees’ sincerely held religious beliefs. Doe can make a strong prima case that the Board unlawfully failed to accommodate him, and the Board cannot satisfy its burden of demonstrating undue hardship.

Second, the Vaccine Mandate violates the Free Exercise Clause. The Mandate is not “generally applicable” because (a) it contains a mechanism for employees to request medical exemptions but not a mechanism for employees to request religious exemptions and (b) it is underinclusive with regard to its stated aim—preventing the spread of COVID-19—insofar as employees who receive medical exemptions from the Mandate and students (who are not required to be vaccinated) present substantially similar risks as employees who would be exempted from the Mandate on religious grounds. Together, these facts reveal an antipathy toward religion that

renders the Mandate constitutionally suspect. Further, the Board cannot satisfy strict scrutiny because (a) there is no compelling interest in denying Doe a religious exemption and (b) the Vaccine Mandate is not narrowly tailored to serve its aim.

Third, the Vaccine Mandate violates the Equal Protection Clause. Employees who seek medical exemptions are similarly situated to their colleagues who seek religious exemptions. Thus, the Mandate’s differential treatment cannot be justified even under rational basis review, much less strict scrutiny, which applies because the Mandate impairs a fundamental right; namely, the right to the free exercise of religion.

In addition, the remaining factors relevant to consideration of whether to grant preliminary relief—irreparable harm, balance of the harms, and the public interest, weigh strongly in Doe’s favor.

For all of these reasons, which are set forth in more detail below, the Court should enter a preliminary injunction staying enforcement of the Vaccine Mandate on the terms set forth in Doe’s motion.

FACTUAL BACKGROUND

I. DEFENDANTS

The Board was created by Maryland statutory law to operate and oversee the MCPS. (*Id.* ¶ 22.) The MCPS is one of the largest public school districts in the nation. (*Id.* ¶ 24.) It employs approximately 25,000 people. (*Id.*) For the fiscal year 2021, its budget was \$2.756 billion dollars. (*Id.* ¶ 25.)²

² The Board and MCPS are often colloquially referred to as separate entities, with the “Board” referring to the elected body that constitutes the school board itself and “MCPS” referring to the entity that employs the MCPS teachers and staff. It appears, however, that the legal name of Doe’s employer is the “Board of Education of Montgomery County” and that “MCPS” is simply an informal way of referring to the Board. *See* Maryland Code, Education Article § 3-104(a) (“Each

Defendants Brenda Wolff, Karla Silvestre, Judith Docca, Shebra Evans, Lynne Harris, and Rebecca Smondrowski are officers and members of the Board. (*Id.* ¶ 26-31.) Defendant Dr. Monifa B. McKnight is the Interim Superintendent of MCPS. (*Id.* ¶ 32.) John Roe 1-10 are additional MCPS employees charged with implementing the Vaccine Mandate. (*Id.* ¶ 33.) At this time, all of the individual defendants are sued in their official capacities only.

II. DOE

A. Doe’s Employment with MCPS

Doe’s job with MCPS is in administration. (*Id.* ¶ 15.) He is not a schoolteacher. (*Id.*) Doe works in an MCPS administrative building—not a school—and no students attend school in the building where Doe works. (*Id.*) Doe has a private office with a door that can be closed. (*Id.*) Doe’s immediate co-workers, superiors, and subordinates also have private offices with doors that can be closed. (*Id.*)

Doe’s job requires minimal in-person contact with other MCPS employees. (*Id.* ¶ 16.) It is even more rare that Doe interacts with a student. (*Id.* ¶ 17.) Doe has in-person contact with MCPS students approximately one time a month, when his job requires him to visit a MCPS school. (*Id.*) During those visits, Doe does not ordinarily interact with students, and when he does, the interaction is not physically close. (*Id.*) Doe estimates that he could work remotely 60-80% of the time. (*Id.* ¶ 16.)

county board is a body politic and corporate by the name of the Board of Education of County”).

For the sake of clarity, Doe will adopt the convention of referring to the elected body as the “Board” and the employing entity as “MCPS,” but, consistent with the above paragraph, all references to MCPS should be construed to refer to the Board, and vice-versa.

By his Complaint, Doe has made a good faith effort to sue his employer under Title VII and the public officials charged with enforcing the Vaccine Mandate under 42 U.S.C. § 1983, and the Complaint should be construed accordingly. (*See* Compl. ¶ 1 n.2.)

B. Doe's Religious Beliefs

Doe is a devout Christian. (*Id.* ¶ 34.) He is a member of a local church, which he attends twice a week, and has attended for over 20 years. (*Id.*) He teaches Bible study and children's Sunday School, which he has taught for over 10 years. (*Id.*) He has served as an usher and participated in other church ministries for both children and adults. (*Id.*) He is faithful in studying the Bible and teaching it to his own children. (*Id.*)

Doe endeavors to live his life in accordance with God's will for him. (*Id.* ¶ 35.) Doe seeks to determine God's will for his life and family through daily Bible study and prayer. (*Id.* ¶ 36.) Based on his sincere religious beliefs, Doe sincerely believes that it is God's will that he not receive a COVID-19 vaccination. (*Id.* ¶¶ 36, 39)³

III. THE BOARD ENACTS THE VACCINE MANDATE

A. The Board's Response to the Coronavirus Pandemic

On March 16, 2020, in response to the initial wave of the coronavirus pandemic, the Board shut down the Montgomery County public schools to in-person instruction. (*Id.* ¶ 40.) In addition, the Board shut down MCPS administrative offices to in-person attendance. (*Id.*) At that time Doe, like many his administrative co-workers, began performing his job from home. (*Id.*) Doe returned to in-person attendance at his job in June 2020. (*Id.*) He has been attending his job in-person since then. (*Id.*) To the best of his knowledge, despite returning to in-person job attendance over a year ago, Doe has not had COVID-19. (*Id.*)

On March 1, 2021, almost a year after the initial shut-down of the schools, the Board began a phased reopening that involved a small group of students returning to in-person

³ A more full recitation of facts that support Doe's allegations regarding his sincerely held religious beliefs are found in Paragraphs 34-39 of his Verified Complaint.

instruction. (*Id.* ¶ 41.) The phased reopening was completed, and the schools fully reopened, on April 19, 2021. (*Id.*) Various measures were put in place to mitigate the spread of COVID-19, including a mask requirement for students and employees, among other things. (*Id.*) At that time, there was no requirement that MCPS employees be vaccinated. (*Id.*)

B. The Board Reopens Schools for the 2021-22 School Year with no Vaccine Mandate

On or about May 26, 2021, the Board announced that it had decided to keep the schools open to in-person instruction for the 2021-22 school year, again, with various mitigation measures. (*Id.* ¶ 42.) At that time, again, there was no requirement that MCPS employees be vaccinated. Instead, the Board merely “encouraged” employees to receive the vaccine. (*Id.*)

On August 13, 2021, the Board released the 2021-22 MCPS Reopening Guide, which, among other things, explained the measures that would be put in place to mitigate the spread of COVID-19. (*Id.* ¶ 43.) These measures included:

- Requiring that students, staff, and visitors be required to wear face masks in all MCPS school buildings, buses, and facilities;
- Ensuring that school facilities will be regularly sanitized, equipped with cleaning supplies, ventilated, and have their air quality monitored;
- Requiring that pre-kindergarten through 6th grade students be randomly tested for COVID-19 (because these students are not currently eligible to receive a COVID-19 vaccine);
- Requiring and reminding students and staff that they must stay home if they are experiencing symptoms of COVID-19;
- Creating a system of contact tracing for students who test positive for COVID-19; and
- Providing opportunities and encouragement for individuals to engage in proactive preventive measures, such as handwashing.

(*Id.*)

As with the prior reopening plans, under the August 13, 2021 reopening plan, MCPS employees were not required to receive a COVID-19 vaccination. (*Id.* ¶ 44.) Instead, vaccination for employees (and students) was “promoted,” and employees (and students) were required to either “participate in weekly COVID-19 testing” or “submit proof of vaccination.” (*Id.*)

C. The Board Enacts the Vaccine Mandate

On September 9, 2021, however, the Board drastically changed course. On that day, the Board passed a Resolution, by unanimous vote of its officers and members, adopting the Vaccine Mandate. (*Id.* ¶ 45.)

In relevant part, the Vaccine Mandate observes, in prefatory language, that the Board “is committed to providing students with access to . . . educational opportunities while safeguarding the health and safety of our students, staff, and community.” (*Id.* ¶ 46.) Further, it provides that “[t]here are no vaccines currently available for children under 12[,]leaving our youngest learners . . . dependent upon the actions taken by the adult community.” (*Id.*) The operative language of the Mandate provides, in full:

[A]ll staff employed by the [MCPS] [must] provide verification that they have received at least the first COVID-19 vaccination by September 30, 2021, and verification of the second shot be submitted no later than October 29, 2021 (as applicable), unless staff request an exemption based on a medical reason documented by a medical doctor. If a medical exemption is granted, the employee must submit to regular COVID-19 testing as required by MCPS.

(*Id.* ¶ 47.) As is manifest from this text, the Mandate allows employees to apply for an exemption for “medical reason[s].”⁴ (*Id.* ¶ 48.) It does not, however, contain a mechanism for employees to seek an exemption based on their sincerely held religious beliefs. (*Id.*)

⁴ Doe does not have a medical condition that would entitle him to an exemption under the Vaccine Mandate. (*Id.* ¶ 48.)

By its terms, the Mandate does not apply to MCPS students, and the Board does not otherwise require the general student population to receive the COVID-19 vaccine. (*Id.* ¶ 49.) The Board has determined, however, that those students who wish to participate in MCPS sports in the Winter of 2021 and the Fall of 2022—and only those students—must receive a COVID-19 vaccine. (*Id.*)

On or about September 15, 2021, the Board issued a press release regarding the Vaccine Mandate, which stated that employee “vaccination or authorized medical exemption [is] a condition of employment. Failure to comply will result in progressive discipline up to and including termination from MCPS.” (*Id.* ¶ 50.)

IV. THE BOARD DENIES DOE A RELIGIOUS EXEMPTION TO THE VACCINE MANDATE

On September 21, 2021, Doe sent an email to a proper MCPS employee asking for a description of the process for submitting a religious exemption. (*Id.* ¶ 52.) The MCPS employee responded that MCPS categorically does not provide any religious exemptions, only medical. (*Id.*) On September 24, 2021, Doe sent an email to a proper MCPS employee requesting a religious exemption and accommodation from the Vaccine Mandate. (*Id.* ¶ 53.) To date, that employee had not responded. (*Id.* ¶ 54.)

Doe is ready, willing, and able to comply with all reasonable health and safety requirements to facilitate a religious exemption from the Vaccine Mandate. (*Id.* ¶ 55.) Doe has been complying—and will continue to comply—with all of the mitigation measures that are currently required by the Board under the August 13, 2021 MCPS 2021-22 Reopening Guide, including but not limited to weekly testing, wearing a mask, washing his hands, staying home if sick, *etc.* (*Id.* ¶ 56.). In addition, Doe is willing to take reasonable additional mitigation measures, including but

not limiting to working from home, closing his office door when working from his office, and otherwise social distancing from other MCPS employees. (*Id.* ¶ 57.)

Despite all of this, the Board promises to terminate Doe, and others like him, for failing to allow a vaccine to be injected into his body that violates his sincerely held religious beliefs. Doe's loss of his job would cause him severe monetary, emotional, and reputational harm. (*Id.* ¶ 59.)⁵

On information and belief, other MCPS employees have objections to the Vaccine Mandate based on their sincerely held religious beliefs and would seek a religious exemption if the Mandate allowed one. (*Id.* ¶ 58.)

ARGUMENT

A plaintiff is entitled to a preliminary injunction where he can demonstrate that: “(1) [he] is likely to succeed on the merits of [his] claim; (2) [he] is likely to suffer irreparable harm in the absence of an injunction; (3) the balance of hardships weighs in [his] favor; and (4) the injunction serves the public interest. *Hias, Inc. v. Trump*, 985 F.3d 309, 318-19 (4th Cir. 2021). The standard for issuing a temporary restraining order is the same as the standard for a preliminary injunction. *See, e.g., Com. of Va. v. Kelly*, 29 F.3d 145, 147-48 (4th Cir. 1994); *Ass'n of Cmty. Cancer Centers v. Azar*, 509 F. Supp. 3d 482, 493 (D. Md. 2020).

Doe satisfies all four of these factors here.⁶

⁵ A more full recitation of the facts supporting Doe's allegation of monetary, emotional, and reputational harm that would result if he were to lose his job are found in Paragraphs 18-21 and 60-64 of his Verified Complaint.

⁶ Indeed, at least one federal district court has granted temporary relief against enforcement of a vaccine mandate that lacked a mechanism for requesting religious exemptions. *See A. v. Hochul*, No. 1:21-CV-1009, 2021 WL 4189533, at *1 (N.D.N.Y. Sept. 14, 2021).

I. DOE IS LIKELY TO SUCCEED ON THE MERITS

A. The Board’s Failure to Grant Doe a Religious Accommodation from the Vaccine Mandate Violated Title VII.

Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it unlawful for a covered employer to “discharge any individual . . . because of such individual’s . . . religion.” 42 U.S.C. § 2000e-2(a)(1). Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* an employee’s . . . religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j) (emphasis added). Read together, in addition to the standard disparate treatment and disparate impact claims available under Title VII, these provisions create a unique obligation with respect to religion—“a requirement that an employer [must] accommodate an employee’s religious expression.” *Chalmers*, 101 F.3d at 1017-18 (internal quotation marks omitted). This requirement obligates an employer to make exemptions from even facially neutral employment policies that burden religious practice. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773-75 (2015). As the Supreme Court recently stated, “[a]n employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter,” but Title VII “requires otherwise neutral policies to give way to the need for an accommodation.” *Id.* at 775.

1. Doe will be able to prove a prima face case of failure to accommodate.

To make out a prima facie failure-to-accommodate claim, an employee must establish that: “(1) he . . . has a bona fide religious belief that conflicts with an employment requirement; (2) he . . . informed the employer of this belief; [and] (3) he . . . was disciplined for failure to comply with the conflicting employment requirement.” *E.E.O.C. v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017). If the employee can establish these elements, the burden shifts to the employer

to show that “it could not accommodate the plaintiff’s religious needs without undue hardship.” *Chalmers*, 101 F.3d at 1019.

Here, Doe will easily be able to make out a prima case. First, Doe holds sincere religious beliefs that conflict with the requirements of the Vaccine Mandate. (Compl. ¶¶ 34-39.) Second, Doe informed the Board, through its authorized employees and agents, of his sincerely held religious beliefs and request for a religious accommodation. (*Id.* ¶¶ 52-53.) Third, Doe faces termination for failing to comply with the Mandate. (*Id.* ¶¶ 50, 60.) On these facts, Doe will be able to make out a prima facie case.

2. The Board will not be able to rebut Doe’s prima facie case.

Because Doe will be able to satisfy his prima facie showing, the burden will shift to the Board to show that “it could not accommodate the plaintiff’s religious needs without undue hardship.” *Chalmers*, 101 F.3d at 1019. The Board will not be able to make this showing.

For one thing, upon receiving Doe’s request for a religious accommodation, the Board did not give that request the individualized consideration demanded by Title VII. In the EEOC’s recent Technical Assistance, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (the “COVID-19 Technical Assistance”, the EEOC addressed this precise issue. See <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance>, last visited on September 26, 2021. In the COVID-19 Technical Assistance, the EEOC posed the following question: “Under Title VII, how should an employer respond to an employee who communicates that he . . . is unable to be vaccinated . . . because of a sincerely held religious belief.” *Id.* at K.12. The EEOC’s response was as follows:

Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from getting the COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship . . . Under Title VII, ***an employer should thoroughly consider all***

possible reasonable accommodations In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Id. (emphasis added). Elsewhere in that document, the EEOC identified the types of reasonable accommodations employers must consider when they receive requests for religious accommodations, including “masks,” “testing,” “telework,” “social distancing protocols,” “making changes in the work environment (such as [modification] to ventilation systems or limiting contact with other employees and non-employees,” and “regular hand washing.” *Id.* at K.5.⁷

Here, the Board failed to “thoroughly consider all possible reasonable accommodations,” as required by the EEOC. To the contrary, the Board doubled down on its position that, under the Vaccine Mandate, no religious exemptions were permitted. This is a far cry from the “individualized” assessment required by the EEOC. *Id.* at K.5 (noting that the same “individualized assessment” required for employee accommodations based on disability under the Americans with Disabilities Act (the “ADA”) is also required for employee claims of religious accommodations). Under Title VII, “an employer must . . . *actively attempt* to accommodate an employee's religious expression or conduct even if, absent the religious motivation, the employee's conduct would supply a legitimate ground for discharge.” *Chalmers*, 101 F.3d at 1018 (emphasis added); *see also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319 (3d Cir. 1999) (holding, in the context of the ADA, that “an employer, having received adequate notice of an employee's

⁷ Although the COVID-19 Technical Assistance does not have the force of law, the EEOC's interpretation of Title VII is entitled to deference. *Crawford v. Metropolitan Government of Nashville and Davidson Cty.*, 555 U.S. 271, 276 (2009) (observing that EEOC interpretations of statutes it enforces “reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance”); *U.S. Equal Emp. Opportunity Comm'n v. MVM, Inc.*, No. CV-TDC-17-2864, 2018 WL 2197727, at *9 (D. Md. May 14, 2018) (“Courts may appropriately consider and defer to EEOC regulations and guidelines in interpreting Title VII.”).

disability and desire for accommodations, cannot fail to engage the employee in the interactive process of finding accommodations . . .”). The Board utterly failed in that respect here and, for that reason alone, it cannot satisfy its burden of defeating Doe’s prima facie case.

Second, the Board cannot show that affording Doe the types accommodations the EEOC identified in the COVID-19 Technical Assistance as being reasonable in the context of employer vaccination policies—*i.e.*, “masks,” “testing,” “telework,” “social distancing protocols,” “making changes in the work environment,” “hand washing,” *etc.*—would impose an undue hardship on it. Specifically,

- Doe purchases his own masks, (Compl. ¶ 40), the costs of which are negligible in any event, particularly in light of the Board’s \$2.756 billion dollar budget;
- The Board already tests employees exempted from the Vaccine Mandate for medical reasons, and it has recently announced that, due to its receipt of a substantial number of antigen tests, it would begin testing any student who displayed symptoms of COVID-19. (*Id.* ¶ 51.) Thus, the added burden of performing an additional weekly test would be negligible;
- Doe already has a home office set up from the time he worked from home and, thus, the Board would not be burdened in any respect by Doe working from home when he is able;
- When Doe works from his MCPS office, in addition to wearing his own masks, he can simply close his office door, otherwise socially distance himself from his co-workers, and wash his hands regularly, just like other administrative MCPS employees whose medical exemptions have been approved; and
- On the rare occasions when Doe visits a MCPS school, he can, again, wear his own masks, socially distance himself from students and other MCPS employees, and wash his hands regularly, just like MCPS employees who work in school buildings whose medical exemptions have been approved.

On these facts, the Board cannot demonstrate that granting Doe an exemption from the Vaccine Mandate would impose an undue hardship on it.

In short, the Vaccine Mandate, and the Board’s application of it to categorically preclude consideration of religious exemption requests, will not survive review under Title VII. Thus, Doe

has established he is likely to succeed on the merits of his Title VII claim for failure to provide a religious accommodation.⁸

B. The Vaccine Mandate Violates the Free Exercise Clause, Both Facially and As Applied.

The Free Exercise Clause of the First Amendment to the United States Constitution, enforced pursuant to 42 U.S.C. § 1983, provides that “Congress shall make no law . . . prohibiting the free exercise” of religion. U.S. Const. amend. 1. While the government may never regulate religious beliefs, laws that incidentally burden religious practices will generally be upheld so long as they are “neutral and generally applicable.” *Fulton v. City of Philadelphia, Pennsylvania*, ___ U.S. ___, 141 S. Ct. 1868, 1876 (2021) (citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 878-82 (1990)). When a law that incidentally burdens religious practices is either not neutral or not generally applicable, it must satisfy strict scrutiny. *Id.* at 1881.

The requirement that a law must be “generally applicable” to avoid strict scrutiny involves at least two concepts. First, “[a] law is not generally applicable if it . . . [provides] a mechanism for individualized exemptions” but does not allow exemptions on the basis of sincerely held religious beliefs. *Fulton*, 141 S. Ct. at 1877 (cleaned up). In *Fulton*, for example, the City of Philadelphia relied on private foster care agencies to place orphaned children in foster homes. *Id.* at 1875. A religious foster care agency would not place children with same-sex couples because of its religious objection to same-sex marriage. *Id.* The City discontinued placing children through the agency, taking the position that the agency’s actions were causing it to violate a contractual

⁸ In addition to his failure-to-accommodate claim, Doe has also alleged disparate treatment and disparate impact claims. (Compl. ¶¶ 88-108.) For purposes of his motion for preliminary injunction, Doe focuses only on his failure-to-accommodate claim, but he reserves the right to pursue his other claims on the merits.

non-discrimination obligation. *Id.* at 1875-76. The Court concluded that the City’s actions were not “generally applicable” because the non-discrimination obligation allowed the city to make “individual exemptions” from that obligation, yet the City refused to consider the agency’s request for a religious exemption. *Id.* at 1878 (holding that the City “may not refuse to extend [its] exemption system to cases of religious [exemption] without compelling reason” (cleaned up)); *see also Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (holding that law containing mechanism for state to consider individualized exemptions was subject to strict scrutiny where the plaintiff’s request for a religious exemption was denied).

Second, “[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 141 S. Ct. at 1877. In other words, when a law purports to regulate harm caused by religious activity but does not regulate non-religious activity that presents the same harm, the law’s “underinclusiveness” reveals that the law is not generally applicable. *Id.* In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for example, the City of Hialeah prohibited animal sacrifice, which was a practice of the Santeria faith. 580 U.S. 520, 524-28 (1993). The City argued that the prohibition protected public health because of the possibility that sacrificed animals would be disposed of improperly. *Id.* at 544. The City, however, did not purport to regulate non-religious cases of improper animal disposal, such as those occasioned by hunters or restaurants. *Id.* at 544–545. Based on this fact, along with other types of underinclusiveness, the Court held that the prohibition was not generally applicable. *Id.* at 545–546.⁹

⁹ In *Fulton*, one of the questions presented for certiorari was whether *Smith* should be overruled. 141 S. Ct. at 1881. The majority did not answer that question, ruling instead that the City’s policy was invalid even under *Smith*. The concurrence, comprised of Justices Alito, Thomas, and Gorsuch, would have overruled *Smith* and replaced its rule with strict scrutiny. *Id.* at 1924.

1. The Vaccine Mandate substantially burden's Doe's religious exercise.

In considering the constitutionality of the Vaccine Mandate, the Court must recall that, as the Supreme Court held just last year, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 63, 68 (2021).

Here, the Vaccine Mandate, both facially and as applied, violates the rules set forth in *Fulton*, *Church of Lukumi*, and *Smith*. As an initial matter, the Vaccine Mandate plainly burdens Doe's exercise of his religion. Doe's employment will be terminated based on his refusal to violate the tenets of his sincerely held religious beliefs. The loss of a job—and the consequent loss of salary, health insurance, and retirement benefits—constitutes a substantial burden on Doe's religion sufficient to trigger application of the Free Exercise Clause. *See Thomas*, 450 U.S. 717 (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . a burden upon religion exists”); *Sherbert*, 374 U.S. at 403-04 (holding that disqualification from employment benefits imposes a constitutionally significant burden on plaintiff's free exercise of religion).

2. The Vaccine Mandate is not generally applicable.

Moreover, the Vaccine Mandate is not “generally applicable” under both of the tests set forth in *Fulton*. First, the Vaccine Mandate allows employees to seek exemptions for “medical reason[s],” but it does not allow employees to seek exemptions based on their sincerely held religious beliefs. Similar to *Fulton*, the fact that the Vaccine Mandate contains a “system of

While this Court is bound by *Smith*, Doe maintains that *Smith* should be overruled for the reasons stated by Justice Alito in his concurrence in *Fulton*. In any event, even under *Smith*, Doe is likely to prevail here.

individualized exemptions” that excludes claims of religious exemptions renders the Vaccine Mandate not generally applicable. *Fulton*, 141 S. Ct. at 1877; *see also Sherbert*, 374 U.S. at 406.

It does not matter that the Vaccine Mandate’s medical exemptions are arguably required by the ADA. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, then-Judge Alito considered this exact argument in the context of a police department’s “clean shave” policy that burdened Sunni Muslims’ religious practice of growing beards. Judge Alito, writing for the Court, rejected the argument, noting:

It is true that the ADA requires employers to make “reasonable accommodations” for individuals with disabilities. However, [Title VII] imposes an identical obligation on employers with respect to accommodating religion. This parallel requirement undermines the Department’s contention that it provides a medical exception, but not a religious exception, because it believes that “the law may require” a medical exception We cannot accept the Department’s position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not.

170 F.3d 359 (3d Cir. 1999); *see also Tandon v. Newsom*, ___ U.S. ___, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise.” (emphasis in original)). Accordingly, the Vaccine Mandate is not generally applicable under *Fulton*’s first test.

Second, the Vaccine Mandate is also not generally applicable because it is underinclusive to the harms it purports to address in a way that discriminates against religious exercise. As noted, the prefatory language of the Vaccine Mandate states that its purpose is to protect MCPS “students, staff, and community” from COVID-19, with a special emphasis on children under 12 years old. (Compl. ¶ 46.) But the Vaccine Mandate accepts a certain amount of risk of COVID-19 transmission from MCPS employees who are unvaccinated because of “medical reason[s].” Moreover, as noted, the Board does not require the general student body to be vaccinated. For

employees with a medical exemption and students the Board has concluded that other mitigation measures in effect—masks, testing, sanitation, *etc.*—are sufficient to reduce the risk of COVID-19 transmission. While this balancing of risk is an acceptable policy determination, it is undoubtedly underinclusive in light of the stated aims of the Mandate, because no mitigation measure is 100% effective. Accordingly, the Vaccine Mandate is not generally applicable under *Fulton*.¹⁰

When, as here, non-religious activities are “treated more favorably than [religious activities]” despite the fact the non-religious activities either ‘have contributed to the spread of COVID-19’ or ‘could’ have presented similar risks” as religious activities, the Free Exercise Clause is offended. *Tandon*, 141 S. Ct. at 1296 (quoting *Diocese of Brooklyn*, 141 S. Ct. at 67-68 (2020)). On these facts, the Board has drawn an impermissible distinction between employees who are exempted from the Vaccine Mandate for “medical reason[s]” and students, on the one hand, and employees who require a religious exemption, on the other. Accordingly, the Vaccine Mandate is not generally applicable and, thus, strict scrutiny applies.

3. The Vaccine Mandate fails strict scrutiny.

Finally, the Board cannot demonstrate that the Vaccine Mandate satisfies strict scrutiny. To do so, the Board must show that the Vaccine Mandate advances “interests of the highest order” and is “narrowly tailored to achieve those interests.” *Fulton*, 141 S. Ct. at 1877 (internal quotation marks omitted); *see also Tandon*, 141 S. Ct. at 1296 (noting that the government bears the burden of demonstrating strict scrutiny is satisfied). In the context of religious exemptions, the asserted governmental interest cannot be stated at “high level of generality”; instead, it must be stated in

¹⁰ This conclusion is particularly true with respect to employees who receive a medical exemption from the Vaccine Mandate, who are not just *similarly* situated to employees who seek a religious exemption, but *identically* situated.

terms of the “harm of granting specific exemptions to [a] particular religious claimant[.]” *Fulton*, 141 S. Ct. at 1882 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). As for narrow tailoring, “the government [must] show that measures less restrictive of the [religious] activity could not address its interest in reducing the spread of COVID.” *Tandon*, 141 S. Ct. at 1296. “Where the government permits [non-religious] activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.” *Id.* at 1296-97.

Applying these principles here, the Board cannot remotely demonstrate that the Vaccine Mandate satisfies strict scrutiny. For one thing, the Board does not have a compelling interest in denying Doe a religious exemption from the Vaccine Mandate. As noted, the Board has concluded, in connection with employees with medical exemptions from the Vaccinate Mandate and students—both of which groups are unvaccinated—that the risk of spreading COVID-19 can be appropriately mitigated through the use of protective measures. Doe readily admits that, if he were to be granted a religious exemption from the Vaccine Mandate, he would be subject to those same protective measures. For this reason, the Board does not have a compelling interest in denying his “particular” request. *Fulton*, 141 S. Ct. at 1882; *see also Church of the Lukumi*, 508 U.S. at 2234 (“It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest ‘of the highest order’ when it leaves appreciable damage to that supposedly vital interest unprohibited.”).¹¹

¹¹ To be clear, it is undeniable that preventing the spread of COVID-19 among MCPS staff, students, and community is extremely important. For purposes of the Free Exercise Clause, however, the Board must go “beyond broadly formulated interests” and make a “more focused” showing of particularized harm that would be caused by granting the specific religious exemption in order to demonstrate that a “compelling interest” exists. *Gonzales*, 546 U.S. at 431. This the Board cannot do.

For another thing, the Board cannot demonstrate that the Vaccine Mandate is “narrowly tailored.” To make this showing, the Board is required to show that granting Doe a religious exemption from the Vaccine Mandate is “more dangerous” both than granting employees medical exemptions from the Vaccine Mandate and not requiring students to be vaccinated. *Tandon*, 141 S. Ct. at 1297. For reasons already discussed, the Board cannot possibly satisfy that showing.

In sum, Doe is likely to succeed on his claim that the Vaccine Mandate violates the Free Exercise Clause.

While the Vaccine Mandate is thus facially invalid, the Board’s denial of Doe’s specific request for a religious exemption uniquely problematic under the Free Exercise Clause. Doe is an administrative employee, working in an administrative building, whose job involves rare interactions with MCPS students, and even then, never in close proximity. In light of Doe’s limited interaction with students—and especially with students who are under 12 years old—the risk he presents to them is essentially non-existent. And while Doe’s job does require him to interact with other MCPS employees to an extent, the unique facts surrounding his employment, such as the ability to close his office door, the fact that the bulk of his job can be performed from home, *etc.*, reveal that he could be accommodated a way that was uniquely protective of other MCPS employees. Unfortunately, the Board’s categorical denial of his request for an exemption—without evaluating the unique facts surrounding his employment—precluded the Board from making that determination. For these reasons, the Board’s application of the Vaccine Mandate to Doe was also unconstitutional.

C. The Vaccine Mandate Violates the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment, enforced pursuant to 42 U.S.C. § 1983, provides that the government may not “deny any person within its jurisdiction the equal

protection of the laws.” U.S. Const. amend 14. The time-honored principle that underlies this clause is that “all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Hayes v. Missouri*, 120 U.S. 68, 71–72 (1887). To comply with this principle, laws that differentially classify persons must be justified by a “rational basis” for the differential treatment. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Where, however, a governmental classification “interfere[s] with a fundamental right,” the special importance of such rights in our constitutional system demands that the classification be subject to strict scrutiny. *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (citing *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997)). The free exercise of religion is indisputably a “fundamental right.” *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

For reasons explained in Section I.B.2 and 3 above, the Board’s differential classification of employees who receive a medical exemption from the Vaccine Mandate and students, on the one hand, and employees who have a religious objection to the Vaccine Mandate, on the other hand, impermissibly discriminates against the latter’s right to the free exercise of religion. Particularly with respect to employees who receive a medical exemption from the Mandate, there are simply no relevant differences between them and employees who seek a religious exemption. Accordingly, the Board may not, consistent with the principals of equal protection, subject only the latter to the Vaccine Mandate consistent with strict scrutiny.

Moreover, even if the Board’s differential classification did not involve a “fundamental right,” it would still violate equal protection. There simply is no rational basis for denying employees a religious exemption from the Vaccine Mandate while, at the same time, allowing employees a medical exemption. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (“A law declaring

that in general it shall be more difficult for one group of citizens than for all others to seek [protection] from the government is itself a denial of equal protection of the laws in the most literal sense.”). Thus, Doe has shown a likelihood of success on his equal protection claim.

For all of the reasons set forth in Section II above, Doe has demonstrated that he is likely to succeed on the merits of his claims.¹²

II. DOE SATISFIES THE REMAINING FACTORS FOR A PRELIMINARY INJUNCTION

Doe satisfies the remaining three factors for a preliminary injunction: (1) irreparable harm; (2) balance of harms; and (3) public interest.

First, the Vaccine Mandate threatens to irreparably injure, and is actually irreparably injuring, Doe. Under the Mandate, Doe must receive the first shot of a COVID-19 vaccination by September 30, 2021, in contravention of his free exercise rights, or else have his employment terminated. Because the Vaccine Mandate violates Doe’s First Amendment rights, the Hobson’s choice that has been presented to him—violate your religious beliefs or lose your job—gives rise to immediate and actual irreparable harm. *Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 62, 67 (2020) (noting, in case involving free exercise rights, that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes

¹² In addition to his Title VII, free exercise, and equal protections claims, Doe also asserts claims under the Maryland Fair Employment Practices Act (“FEPA”), the Code of Montgomery County Regulations § 27-19, and the Maryland Constitution for violation of his free exercise rights (Article 36) and equal protection rights (Article 24). As relevant here, these state law provisions are interpreted in a substantially similar way as their federal counterparts. *See, e.g., Haas v. Lockheed Martin Corp.*, 914 A.2d 735, 742 (2007) (FEPA and § 27-19); *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 183 A.3d 845, 870 (2018) (Article 36); *Att’y Gen. of Maryland v. Waldron*, 426 A.2d 929, 941 (1981) (Article 24). Thus, these state law provisions also support Doe’s claim for relief.

irreparable injury” (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding irreparable harm existed in the case of public employee who was “threatened with discharge” because of the exercise of First Amendment rights)); *see also Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) (“Violations of first amendment rights constitute per se irreparable injury.” (quoting *Elrod*, 427 U.S. at 373)). Moreover, the reputational and non-economic harm that would accompany Doe’s loss of his job also constitutes irreparable harm. *Roe v. Dep’t of Def.*, 947 F.3d 207, 229 (4th Cir. 2020) (affirming district court’s finding that job loss constituted irreparable harm because of the consequent “stigma”); *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988) (reversing district court finding that job loss did not constitute irreparable harm because of the consequent emotional distress).

Second, as to the balance of harms, the irreparable harm that Doe will suffer if preliminary relief is denied manifestly outweighs the likelihood of any harm to the Board from granting such relief. In light of the fact that Doe will be subject to all of the mitigating measures already put in place by the Board, which are currently being implemented for unvaccinated employees with medical exemptions and unvaccinated students, the Board cannot show that granting Doe, who works in a private administrative office away from students, an exception for religious reasons would impose any cognizable harm. Furthermore, as Doe has demonstrated, he is likely to succeed on the merits of his claims, and the Board suffers no harm by being unable to enforce regulation that “is likely to be found unconstitutional.” *Newsom ex. rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249 (4th Cir. 2003). Thus, the balance of harms weighs heavily in Doe’s favor.

Finally, as to public interest, the Fourth Circuit has made clear that “upholding constitutional rights serves the public interest.” *Id.* Thus, for the reasons already explained, a preliminary injunction is in service of the public interest.

III. THE COURT SHOULD REQUIRE DOE TO PAY ONLY A NOMINAL BOND

If the Court grants Doe's motion (and it should), the bond should be set at a nominal amount. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999) (authorizing district courts to set injunction bonds at a "nominal" amount). Doe has demonstrated a strong likelihood of success on the merits, and the Board will suffer no cognizable harm from being unable to enforce an unconstitutional policy. In this situation, a nominal bond is appropriate. *Id.* (noting that the amount of an injunction bond should approximate the harm suffered by the enjoined party in the event of an improvidently issued injunction); *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 521 (W.D.N.C. 1999) (requiring nominal bond because "Plaintiffs have shown a strong likelihood of success on the merits"). In this case, a bond in the amount of \$1 is appropriate. *See Summers v. Adams*, No. CV03:08-2265-CMC, 2008 WL 11347422, at *2 (D.S.C. Dec. 11, 2008) (requiring bond of \$1 for injunction prohibiting state from issuing license plates in violation of the Establishment Clause.)

IV. IN THE EVENT NO PRELIMINARY INJUNCTION IS ENTERED, DOE SHOULD BE GRANTED AN INJUNCTION PENDING APPEAL

The standard for obtaining an injunction pending appeal under Fed. R. App. P. Rule 8(a) is essentially the same as that for obtaining a preliminary injunction. "A party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

If the Court denies Doe's motion for preliminary injunction order (and it should not), Doe is entitled to an injunction pending appeal for the same reasons set forth in Sections I and II above.

If the Court is inclined to deny this request for an injunction pending appeal, Doe respectfully requests that the Court immediately enter an order denying an injunction pending appeal to avoid unnecessary further motion practice and to facilitate an expeditious appellate ruling.

CONCLUSION

For the foregoing reasons, the Court should grant Doe's motion for preliminary injunction and stay the Vaccine Mandate on the terms set forth in Doe's motion. In the alternative, the Court should enter a temporary restraining order staying the Vaccine Mandate on the terms set forth in Doe's motion. Again in the alternative, if the Court denies Doe's motion, Doe respectfully requests the entry of an injunction pending appeal or, failing that, an expeditious order denying his request for an injunction pending appeal.