THE MILLE LACS BAND OF
OJIBWE INDIANS

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Office of the Solicitor General

Opinion of the Solicitor General
No. 44-22
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Title 4 MLBSA § 18 reads the Solicitor General shall have the following responsibilities, obligations and authority on behalf of the Non-Removable Mille Lacs Bands of Chippewa Indians: (d) To interpret all laws and executive, legislative, secretarial and commissioner's orders and policies on behalf of the Non-Removable Mille Lacs Bands of Chippewa Indians. (1) All said interpretations shall be titled in the form of Opinion of the Solicitor General, be consecutively numbered, dated as to the date of issuance, and contain the official seal of the Band. (2) All said opinions of the Solicitor General shall have the force of law and shall be binding until annulled by the Court of Central Jurisdiction or amended pursuant to legislative order of the Band Assembly. This opinion is issued pursuant to the authority conferred upon the Solicitor General in 4 MLBSA § 18 (d) and shall have the force of law subject to the conditions stated in § 18 (d) (2).

Title 3 MLBSA § 29 states should there be any doubt as to the proper interpretation of any part of this title, or of 2 MLBSA Chapter 1, the Speaker of the Assembly or the Band Assembly as an entity may submit such question to the Solicitor General, who shall give his or her written Opinion thereon, and such Opinion shall be binding unless annulled in whole or in part, by the Court of Central Jurisdiction, or amended by the Band Assembly pursuant to the enactment of the law. On February 9, 2022, the Band Assembly adopted Resolution 20-01-12-22 requesting a Solicitor's Opinion providing thorough legal analysis on eleven questions regarding the legality of Band Executive Orders 2022-03 and 2022-04.

Executive Order 2022-03 requires Ne-la-Shing Clinic, Dental, Public Health and Assisted Living Unit staff who provide any care, treatment or other services for the clinic or its patients to be fully vaccinated against COVID-19, subject to specific exemptions. Persons for whom a vaccine is clinically contraindicated or for who medical necessity requires a delay in vaccination are exempt (hereafter, "medical exemptions"). The Commissioner of Administration may authorize medical exemptions with proper documentation, and religious exemptions if an individual's compliance

with this policy would substantially burden their religious exercise or conflict with their sincerely held religious beliefs, practices, or observances. Staff members who are not fully vaccinated or granted an exemption are subject to progressive discipline under the Band's Personnel Policies and Procedure Manual.

Executive Order 2022-04 requires individuals to wear masks in certain Head Start settings, subject to exceptions, and requires all staff, volunteers and contractors having contact with children and families to be fully vaccinated against COVID-19, subject to certain exceptions. Persons for whom a vaccine is clinically contraindicated or for who medical necessity requires a delay in vaccination are exempt, as are those "legally entitled to an accommodation with regard to the COVID-19 vaccination requirement based on an applicable Federal law." Individuals granted exemptions must provide proof of weekly testing for COVID-19. The Commissioner of Administration may authorize medical exemptions with proper documentation, and religious exemptions if an individual's compliance with this policy would substantially burden their religious exercise or conflict with their sincerely held religious beliefs, practices, or observances. If the Commissioner denies a request for an exemption, the aggrieved individual may appeal to the Nay-Ah-Shing School Board.

Both Orders were issued by Chief Executive Benjamin under 4 MLBS § 6(e).

I. Does Either Executive Order Violate Affected Band Members' Constitutional Rights?

The Band Assembly asked whether Band Executive Orders 2022-03 and 2022-04 violate affected Band members' constitutional rights, as protected by the U.S. Constitution, the Minnesota Chippewa Tribe ("MCT") Constitution, the Indian Civil Rights Act, and Title 1 of Mille Lacs Band Statutes ("MLBS").

Given Band Assembly's request for legal guidance in such a short time, this summary is meant to provide an overview of leading cases but may not be exhaustive. I would also caution that this is an evolving area of law, given the sheer volume of cases challenging vaccine mandates, the ever-changing nature of the COVID-19 virus and its impacts, and resulting changes in the mandates themselves by government bodies. Additionally, most recent caselaw involving COVID-19 vaccine mandates results from decisions on motions for preliminary injunctions or temporary restraining orders, seeking to avoid application of the vaccine rules while the plaintiffs' cases wind their way through the courts. Some plaintiffs may be able to present additional evidence or argument on the merits of their claims that could lead to different outcomes. However, demonstrating likelihood of success on the merits is a key element of any preliminary injunction motion, see Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008), and as shown below, plaintiffs challenging vaccine mandates on constitutional grounds rooted in fundamental rights have rarely succeeded.

Recent challenges in federal courts to vaccine mandates have focused on whether such mandates violate a right to privacy, "medical freedom" or "bodily integrity" under the Fifth and Fourteenth Amendments' Due Process Clauses, or whether vaccine mandates that do not contain a religious exemption violate the First Amendment's guarantee against enactment of laws that prohibit the free exercise of religion.

A. Substantive Due Process Rights

The Supreme Court has held that the Due Process Clause in the Fifth and Fourteenth Amendments includes both a substantive and a procedural component. See Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). The Fifth Amendment applies to action by the Federal government, while the Fourteenth Amendment's Due Process Clause applies to State action. When seeking to establish a new fundamental right not expressly protected by the U.S. Constitution, litigants typically invoke substantive due process, which "forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty." Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009) (internal citations and quotation marks omitted).

Likewise, the MCT Constitution provides that no member of the Minnesota Chippewa Tribe "shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to . . . due process of law." Minn. Chippewa Tribe Const. art. XIII (1964).

1 MLBS § 8 provides a statutory due process right similar to the Due Process Clauses of the U.S. Constitution. Compare 1 MLBS § 8 ("no person shall be deprived of liberty or property without due process of law.") with U.S. Const. amend. V. ("[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.") and U.S. Const. amend. XIV (no state shall "deprive any person of life, liberty, or property, without due process of law.").

Because the Bill of Rights does not apply to restrain the actions of Indian tribes, Congress passed the Indian Civil Rights Act ("ICRA") in 1968, 25 U.S.C. § 1302, to apply most of the U.S. Constitution's Bill of Rights to tribes. 25 U.S.C. § 1302(a)(8) includes a statutory due process right similar to the U.S. Constitution's Due Process Clauses.

However, the scope of substantive due process under 25 U.S.C. § 1302(a)(8), including what constitutes a fundamental right, cannot be solely determined under Federal law. The statute, when applied to action by tribal government, should be interpreted "with due regard for the historical, governmental and cultural values of an Indian tribe." Tom v. Sutton, 533 F.2d 1101, 1104 n. 5 (9th Cir. 1976). Federal courts have "correctly sensed that Congress did not intend that the . . . due process principles of the Constitution disrupt settled tribal customs and traditions." F. Cohen, Handbook of Federal Indian Law 670 (1982 ed.) (footnote omitted). Thus, defining the limits of due process protection under the ICRA "is not an easy process, because . . . [due process] concepts are not readily separated from their attendant cultural baggage." F. Cohen, supra, at 670

(footnote omitted). Because individuals can claim the protections of § 1302 only in a petition for a writ of habeas corpus to a federal court, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978), there is little if any federal caselaw discussing the scope of substantive due process under § 1302. For these reasons, federal courts have left enforcement of most of the guarantees of the Indian Civil Rights Act to the tribal courts. See Santa Clara Pueblo, 436 U.S. at 65-66 ("tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

Therefore, the scope of any substantive due process right under both 25 U.S.C. § 1302(a)(8) and 1 MBLS § 8 should be interpreted in accordance with Band customs and traditions. Accord 2 MLBS § 2; 24 MLBS § 2002 (judicial philosophy); 24 MLBS § 2003 (laws of the Band shall be construed to balance the rights of the individual with the need to co-exist in peace and harmony with one another). But in the absence of written Band law, pertinent laws of the United States may be applied. 24 MLBS § 2007.

Outside counsel and I were unable to locate any decisions from the Band's judicial system interpreting 1 MLBS § 8, 25 U.S.C. § 1302(a)(8) or the due process clause in Article XIII of the MCT Constitution. Thus, for this memo, we rely on federal court opinions interpreting the U.S. Constitution's substantive due process clauses to reach our conclusions.

In its recent decision, Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022), the U.S. Supreme Court did not opine as to the constitutionality of a vaccine mandate promulgated by the Occupational Safety and Health Administration ("OSHA") because the Court struck the rule down on grounds that OSHA lacked statutory authority under its organic act to impose a COVID-19 vaccine mandate by rule, covering virtually all employers with at least 100 employees. The Occupational Safety and Health Act, 29 U.S.C.S. § 651 et seq., did not authorize the mandate because it was limited to regulating hazards that employees faced at work, and the risk of contracting COVID-19 was not a work-related danger, but was a universal risk of daily life. Because the mandate extended beyond the agency's legitimate reach, a stay of the rule was justified.

In Biden v. Missouri, 142 S. Ct. 647 (Jan. 13, 2022), the Court dissolved an injunction against implementation of a U.S. Department of Health and Human Services ("HHS") rule requiring employees of facilities that receive Medicare and Medicaid funds to be vaccinated against COVID-19. The Court held that HHS had delegated authority to issue the rule:

> Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." 42 U.S.C. §1395x(e)(9). COVID-19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID-19 vaccine mandate will substantially

> reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557-61558. He accordingly concluded that a vaccine mandate is "necessary to promote and protect patient health and safety" in the face of the ongoing pandemic. Id., at 61613.
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> The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the "very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19." Florida v. Department of Health and Human Servs., 19 F. 4th 1271, 1288 (CA11 2021).

Id. at 652. Neither case definitively resolves whether Band Executive Orders 2022-03 and 2022-04 violate Band members' fundamental rights.

However, there is longstanding precedent in federal courts upholding vaccine mandates against challenges premised on an individual right to "bodily integrity." In 1905, the U.S. Supreme Court held that U.S. Constitution did not confer an individual liberty or right to "bodily integrity" against Cambridge, Massachusetts's mandate that all Cambridge residents become vaccinated against smallpox. Jacobson v. Massachusetts, 197 U.S. 11, 13-14, 26-27, 38 (1905). The Court's reasoning is no less applicable to the current debate surrounding COVID-19 vaccine mandates:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own . . . regardless of the injury that may be done to others.

Id. at 26. Jacobson and its holding have not been overturned by the Supreme Court, and federal courts at all levels have continued to rely upon it in upholding the constitutionality of COVID-19 vaccine mandates.

In Klaassen v. Trs. of Ind. Univ., 7 F.4th 592, 593 (7th Cir. 2021), the Seventh Circuit upheld a vaccine mandate requiring all students at Indiana University to be vaccinated against COVID-19 unless exempt for medical or religious reasons. "Given Jacobson[,] . . . there can't be a constitutional problem with vaccination against [COVID-19]." Id. (citations omitted). The Klaassen court refused to find "the existence of a fundamental right ingrained in the American

legal tradition" because "vaccination requirements, like other public-health measures, have been common in this nation." Id. The court also found the case before it "easier than Jacobson ..., for two reasons[:] Jacobson sustained a vaccination requirement that lacked exceptions for adults, 197 U.S. at 30" while "Indiana University has exceptions for persons who declare vaccination incompatible with their religious beliefs and persons for whom vaccination is medically contraindicated[;]" and "Indiana does not require every adult member of the public to be vaccinated, as Massachusetts did in Jacobson. Vaccination is instead a condition of attending Indiana University. People who do not want to be vaccinated may go elsewhere." Id.

In a challenge to a New York State emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19, the Second Circuit held that the vaccine mandate did not violate the workers' rights to privacy and bodily integrity under the Fourteenth Amendment, nor did it violate healthcare workers Free Exercise rights under the First Amendment. We the Patriots USA, Inc. v. Hochul, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 32880, at *4-7 (2d Cir. Nov. 4, 2021). The New York rule directed hospitals, nursing homes, hospices, adult care facilities, and other identified healthcare entities to "continuously require" certain of their employees to be fully vaccinated against COVID-19. Id. at *9-*10. The vaccine requirement applied not to all employees, but only to those employees, staff members, and volunteers who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease. Id. at *10. The rule included a medical exemption but not a religious exemption, instead permitting employers to make other accommodations for employees who chose not to be vaccinated based on sincere religious beliefs. Id.

The We the Patriots Plaintiffs claimed that the vaccine rule violated their rights to privacy, "bodily autonomy," and "medical freedom" under the Fourteenth Amendment. Id. at *51. The Court disagreed, holding that "[b]oth this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." Id. (citing Jacobson, 197 U.S. at 25-31, 37); accord Valdez v. Grisham, No. 21-cv-783, 2021 U.S. Dist. LEXIS 173680 at *17 (D.N.M. Sept. 13, 2021) ("the right to work in a hospital . . ., unvaccinated and during a pandemic" is not "deeply rooted in this Nation's history and tradition.").

Additionally, numerous Federal district courts have held that various Federal mandates requiring COVID-19 vaccination do not violate a fundamental right to bodily integrity or to refuse medical treatment. For example, in a challenge to U.S. Executive Order 14042, which requires federal contractors to be vaccinated against COVID-19, the federal district court in Arizona held that a vaccine mandate does not violate a fundamental right under federal law. Brnovich v. Biden, No. CV-21-01568-PHX-MTL, 2022 U.S. Dist. LEXIS 15137 (D. Ariz. Jan. 27, 2022). Plaintiffs in that case had alleged that mandates requiring federal employees and federal contractors to be

vaccinated against COVID-19 "violate the due process rights of federal and contractor employees to bodily integrity and to refuse medical treatment. Id. at *22.

The court held that "[p]roperly construed, this case raises [the] question whether there is a substantive due process right to refuse vaccination while an employee of a federal contractor. That question is easily answered in the negative. There is no such right, at least under prevailing Supreme Court precedent." Id. (citing Jacobson, 197 U.S. 11); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (citing Jacobson and holding that there is no "freedom from compulsory vaccination"); Zucht v. King, 260 U.S. 174, 176 (1922) (similar).

Based on Jacobson, which "has never been overruled and remains binding on this Court," the court determined that the contractor vaccine mandate "must pass only rational basis review." Id. at *81-82. "To do so, the mandate must merely be 'rationally related to a legitimate state interest.'" Id. at *82 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)); accord Heller v. Doe, 509 U.S. 312, 321 (1993) (under rational basis review, "a [measure] is presumed constitutional, and the burden is on the one attacking the [measure] to negative every conceivable basis which might support it." (internal citations and quotation marks omitted)). The court held that the "inhibiting the spread of COVID-19 is a legitimate interest . . . . [a]nd requiring individuals to be vaccinated is rationally related to that interest." Id. at *82 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest.") and Williams v. Brown, 2021 U.S. Dist. LEXIS 201423 at *23-*24 (D. Or. Oct. 19, 2021) ("[T]he Court has no trouble concluding that [Oregon's] vaccine mandates [requiring all employees and workers employed by the executive branch of the Oregon state government to be fully vaccinated] are rationally related to a legitimate state interest.")).[1]

Other Federal district courts have reached the same or similar conclusions: that employee vaccine mandates do not implicate employee's fundamental rights. See Valdez v. Grisham, 2021 U.S. Dist. LEXIS 173680 at *17-*18 ("[F]ederal courts have consistently held that vaccine mandates do not implicate a fundamental right and that rational basis review therefore applies in determining the constitutionality of such mandates."); Johnson v. Brown, No. 3:21-cv-10494, 2021 U.S. Dist. LEXIS 200159 at *39 (D. Or. Oct. 18. 2021) ("[T]he right to refuse vaccination is not a fundamental right.") (citation omitted)); Norris v. Stanley, No. 1:21-cv-00756, 2021 U.S. Dist. LEXIS 198388 at *4-*5 (W.D. Mich. Oct. 8, 2021) (Michigan State University's employee vaccine mandate does not violate fundamental rights); see also Dixon v. De Blasio, No. 21-cv-

[1] However, the Brnovich court ultimately enjoined enforcement of the federal contractor vaccine mandate within the boundaries of the State of Arizona because the mandate "exceeds the scope of the President's authority under the Procurement Act." Id. at * 91. Similarly, a challenge to the Federal Head Start employee vaccine mandate, on which EO 2022-03 is modeled and premised, succeeded in a district court issuing a preliminary stay of the rule's enforcement in 14 states based on the court's conclusion that the federal rule was outside the scope of executive authority, and intruded on the states' police powers. Louisiana v. Becerra, No. 3:21-CV-04370, 2022 U.S. Dist. LEXIS 1333, at *31, *37-*39 (W.D. La. Jan. 1, 2022). As discussed in Section III below, EO 2022-03 and EO 2022-04 do not exceed the scope of the Chief Executive's authority under Band law.

05090, 2021 U.S. Dist. LEXIS 196287 at *18 (E.D.N.Y. Oct. 12, 2021) (NYC Mayor's executive orders requiring proof of vaccination to remain in certain public spaces constitutional because "they do not mandate vaccination. They merely place reasonable restrictions on those who choose not to get vaccinated, given the current dynamics of the global pandemic.").

Like the vaccine mandates upheld in Klaassen, Valdez, Williams v. Brown, and other cases, EO 2022-03 and EO 2022-04 both contain exceptions for medical and religious reasons. Unlike Jacobson, the Executive Orders do not apply to all Band members or all individuals within the Band's territorial jurisdiction. Instead, under the Executive Orders, COVID-19 vaccination is essentially a job qualification for persons employed by the Band's healthcare and daycare facilities. The "right to practice in [one's] chosen profession . . . does not invoke heightened scrutiny." Guttman v. Khalsa, 669 F.3d 1101, 1118 (10th Cir. 2012). "[A]lthough 'the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment,' this right is 'subject to reasonable government regulation.'" Id. (quoting Conn v. Gabbert, 526 U.S. 286, 291-92 (1999)); see also Collins v. Texas, 223 U.S. 288 (1912) (the right to practice medicine is not a fundamental right). Thus, while individuals may "have a right to engage in their chosen professions," governmental infringement on this right will be "presumed to be valid" so long as it is "rationally related to a legitimate state interest." Klaassen v. Trustees of Indiana Univ., No. 21-cv-2382021 U.S. Dist. LEXIS 133300 (N.D. Ind. July 18, 2021), aff'd, 7 F.4th 592 (7th Cir. 2021) (quoting City of Cleburne, 473 U.S. at 440). In fact, vaccine requirements are common job qualifications for healthcare workers:

> [v]accination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella. CDC, State Healthcare Worker and Patient Vaccination Laws (Feb. 28, 2018), https://www.cdc.gov/ phlp/publications/topic/vaccinationlaws.html. As the Secretary explained, these pre-existing state requirements are a major reason the agency has not previously adopted vaccine mandates as a condition of participation. 86 Fed. Reg. 61567-61568.

Biden v. Missouri, 142 S. Ct. 647, 653 (2022); accord We the Patriots USA, Inc. v. Hochul, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 33691 at *4 (2d Cir. Nov. 12, 2021) (COVID-19 vaccine mandate for medically eligible employees "runs closely parallel to the longstanding New York State requirements, subject to no religious exemption, that medically eligible healthcare employees be vaccinated against rubella and measles."). Many states also require workers in daycare facilities to be vaccinated against other diseases such as measles. See, e.g., Rev. Code. Wash. § 43.216.690 (requiring daycare employees and volunteers to be vaccinated against measles, mumps and rubella); Cal. Health and Safety Code § 1596.7995 (requiring daycare employees and volunteers to be vaccinated against pertussis and measles). Thus, there is little indication that requiring an additional vaccination against COVID-19 for healthcare and daycare

workers violates any individual right when other vaccine requirements do not. "If an employee believes his or her individual liberties are more important than legally permissible conditions on his or her employment, that employee can and should choose to exercise another individual liberty, no less significant - the right to seek other employment." Bekerich v. St. Elizabeth Med. Ctr., No. 21-105-DLB-EBA, 2021 U.S. Dist. LEXIS 183757 at *25-*26 (E.D. Ky. Sept. 24, 2021).

The Band has similar legitimate and compelling interests to other sovereigns who instituted vaccine mandates for employees in medical and education fields: "protecting persons who may be extremely vulnerable to the virus and at high risk for poor outcomes, children younger than [5] years who are not eligible for vaccination, and individuals who are not able to get vaccinated due to a contraindication . . . or persons who may be severely immunocompromised and not able to mount an effective immune response to the vaccine." Valdez v. Grisham, 2021 U.S. Dist. LEXIS 173680 at *26. Thus, there is no reason to believe that analysis of EO 2022-03 and EO 2022-04 under current principles articulated in federal law would yield a different conclusion.

B. Free Exercise Rights

The First Amendment forbids the enactment of laws, either state or federal, that "prohibit[] the free exercise" of religion. U.S. Const. amend. I. Band statutes, at 1 MLBS § 1(a), and the Indian Civil Rights Act, at 25 U.S.C. § 1302(a)(1), contain similar guarantees against tribal laws prohibiting the free exercise of religion. The MCT Constitution provides that no member of the Minnesota Chippewa Tribe "shall be denied any of the constitutional rights or guarantees enjoyed by other citizens of the United States, including but not limited to . . . freedom of religion . . . ." Minn. Chippewa Tribe Const. art. XIII (1964).

Outside Counsel and I were unable to locate any decisions from the Band's judicial system interpreting 1 MLBS § 1(a), 25 U.S.C. § 1302(a)(1) or the "freedom of religion" clause in Article XIII of the MCT Constitution. Thus, for this memo, I rely on federal court opinions interpreting the U.S. Constitution's Free Exercise Clause to reach my conclusions.

The Supreme Court has declared the right to exercise religion as fundamental and subject to strict scrutiny. See Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Burdens on one's free exercise may be direct, as where a state criminalizes a particular faith or religious practice. See Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 877-78 (1990). But "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions," also trigger scrutiny under the Free Exercise Clause. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2022 (2017) (citation omitted).

Not every burden on the free exercise of religion is unconstitutional. The U.S. Constitution permits general regulations that incidentally burden religious practices: the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion

prescribes (or proscribes)." Smith, 494 U.S. at 879 (quotations omitted). Neutral and generally applicable regulations need only be supported by a rational basis. Ill. Bible Colleges Ass'n v. Anderson, 870 F.3d 631, 639 (7th Cir. 2017).

Federal courts have upheld employee vaccine mandates that do not contain a religious exemption. In We the Patriots USA, Inc. v. Hochul, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 32880 at *17 (2d Cir. Nov. 4, 2021), the plaintiffs claimed that because cell lines used for testing COVID-19 vaccines may have been derived from fetal cells, receiving the vaccine would conflict with deeply held religious beliefs and violate their First Amendment right to exercise their religion freely unless they were granted an exemption from the rule.[2] The court concluded that the vaccine mandate was a neutral law of general applicability subject to rational basis review because the rule did not single out employees who decline vaccination on religious grounds. The rule is neutral because it applies to all employees defined in the rule except those who qualify for a medical exemption. Id. at *23, *25. As explained by the court:

> [The rule] requires all covered employees who can safely receive the vaccine to be vaccinated. It applies whether an employee is eager to be vaccinated or strongly opposed, and it applies whether an employee's opposition or reluctance is due to philosophical or political objections to vaccine requirements, concerns about the vaccine's efficacy or potential side effects, or religious beliefs. The absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required.

Id. at *27. The court held the rule was generally applicable even though it contained a medical exemption because one of the state's interests in adopting the rule was to protect the health of healthcare employees by preventing COVID-19 infections and thus preventing staffing shortages that could compromise patient safety. Id. at *33. Applying the rule to religious objectors would further the state's interests, whereas applying the rule to those medically unable to be vaccinated would not because "[v]accinating a healthcare employee who is known or expected to be injured by the vaccine would harm her health and make it less likely she could work." Id. at *33-*34.

Band Executive Orders 2022-03 and 2022-04 do contain a religious exemption; thus any argument that the Orders interfere with any Band members' free exercise rights would have to be premised upon the Commissioner of Administration's discretion to grant religious exemptions in specific cases. See Dahl v. Bd. of Trs. of Western Mich. Univ., 15 F.4th 728 (6th Cir. 2021). In Dahl, the university required student-athletes to be vaccinated against COVID-19 as a condition of playing

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[2] Plaintiffs also made a Supremacy Clause claim that the state rule was preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which prohibits discrimination in employment based on religion. Id. at *19. Title VII specifically and expressly exempts tribes from the scope of "employers" governed by the mandates of Title VII: "The term 'employer' . . . does not include (1) the United States, a corporation wholly owned by the Government of the United States, [or] an Indian Tribe . . . ." 42 U.S.C. § 2000e(b) (emphasis added); see also Pink v. Modoc Indian Health Project, 157 F.3d 1185, 1188 (9th Cir. 1998) ("Congress . . . exempted 'Indian tribes' from the scope of the definition of 'employer' as used in Title VII.").

intercollegiate sports but stated that "[m]edical or religious exemptions and accommodations will be considered on an individual basis." Id. at 730. Several student-athletes sought religious exemptions based on "sincerely held Christian beliefs" but none were granted, and those students were barred from competing unless they received the vaccination. Id. at 730, 732.

The Dahl court noted that "a policy that provides a 'mechanism for individualized exemptions' is not generally applicable." Id. at 733 (quoting Fulton, 141 S. Ct. at 1877). "Accordingly, where a state extends discretionary exemptions to a policy, it must grant exemptions for cases of 'religious hardship' or present compelling reasons not to do so." Id. (citation omitted). Because the University provided a mechanism for individualized exemptions where the University retained sole discretion whether to extend an exemption or not, the policy was not generally applicable and decisions not to grant religious exemptions had to pass strict scrutiny. Id. Conversely, a vaccine mandate that provides a non-discretionary religious exemption is neutral and generally applicable. Klaassen, 2021 U.S. Dist. LEXIS 133300 at *65-*67 (determining vaccine mandate was generally applicable where religious exemption was "freely granted to students if they request it, no questions asked.").

The religious exemptions differ between EO 2022-03 and 2022-04. EO 2022-04 provides that Head Start staff members need to complete and submit a religious exemption form to the Commissioner of Administration to receive the exemption. This appears similar to the "no questions asked" policy deemed acceptable in Klaassen.

EO 2022-04 provides that Ne-la-Shing Clinic employees may also request an exemption by completing and submitting a form to the Commissioner of Administration; however, the Commissioner "may grant an exemption ... in his or her sole discretion informed by the guidance issued by the [U.S. EEOC] as of December 14, 2021 ("L. Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates.")." That the Commissioner retains "sole discretion" could mean that the Clinic policy is not generally applicable under Free Exercise Clause caselaw such as Dahl. Even so, the policy should pass strict scrutiny in that it is narrowly tailored to a compelling government interest. See Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 67 ("Stemming the spread of COVID-19 is unquestionably a compelling interest . . . ."); Doe v. Mills, 16 F.4th 20, 33-34 (1st Cir. 2021) (Maine rule requiring vaccination of healthcare workers and providing no religious exemption would pass strict scrutiny even if it contained a discretionary exemption policy like Dahl; the rule "is not underinclusive even under Dahl because it encompasses every employee working in a setting posing a serious risk of COVID-19 exposure and transmission"—i.e., "everyone who works with the medically vulnerable population in healthcare facilities."). Like Maine's vaccine rule upheld in Mills, EO 2022-04 is narrowly tailored in that it applies only to employees working in healthcare settings.

Furthermore, the Commissioner's discretion is to be "informed" by an EEOC policy meant to provide guidance to private employers implementing the non-discrimination requirement of Title VII. This policy allows employers to ask clarifying questions to determine whether an employee's

reasons against vaccination are sincerely held religious beliefs, but generally instructs employers to "assume that a request for religious accommodation is based on sincerely held religious beliefs." EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section L.2, available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L. Thus, as long as the Commissioner limits his or her discretion to determining whether employees seeking exemptions do so based on sincerely held religious beliefs (and not beliefs based on social, political, or economic views, or personal preferences), and freely grants religious exemptions when requested, such discretion does not result in EO 2022-04 violating Free Exercise Clause principles.

Based on the foregoing analysis, I do not believe that EO 2022-03 or EO 2022-04 violate any Band member's rights under the U.S. or MCT Constitutions, Title 1 MLBS or the Indian Civil Rights Act.

II. Does Either Executive Order Violate the Personnel Policy and Procedure Manual or Violate 6 MLBS §1(a) By Amending Those Policies Without Statutory Enactment?

6 MLBS § 1(a) adopts and makes applicable to most employees of the Band and its agencies and subdivisions the Band's Personnel Policy and Procedures Manual ("Manual"). It is the duty of the Employment Law Specialist, Solicitor General's Office and Legislative Counsel to ensure that the Manual is amended as needed to comply with federal and Band law and Band policy. Id. The amended Manual "shall be approved by duly enacted legislation of the Band Assembly prior to implementation." Id.

6 MLBS § 2(a) provides that the Manual "applies to all Mille Lacs Band employees" with certain exceptions." The exceptions are:

(1) The Chief Executive;

(2) Secretary-Treasure/Speaker of the Assembly;

(3) District Representatives;

(4) Elected members of the Nay Ah Shing School Board when acting in the official capacity;

(5) Employees of the Corporate Commission and its subsidiaries;

(6) Employees of the Gaming Regulatory Authority;

(7) Employees of the MLBO Police Department, except the administrative staff working within this department are not exempt;

(8) Department of Natural Resources enforcement staff when she or he is assisting the Mille Lacs Band Police Department; and

(9) Employees hired under contract for a particular purpose.

Id.

The Manual does not purport to prescribe all workplace rules. It states at the outset that it:

> is designed to acquaint you with the Mille Lacs Band of Ojibwe and provide you with information about working conditions, employee benefits and **some** of the policies affecting your employment. You should read, understand and comply with all provisions of the handbook. It describes **many** of your responsibilities as an employee or supervisor and outlines the programs developed by the Mille Lacs Band to benefit employees.

Manual at p. 5 (Introductory Statement) (emphasis added).

In particular, the Manual does not purport to define the health and safety rules that apply to each Band employee. The Manual specifically provides that "[i]t is not possible to list all the forms of behavior that are considered unacceptable in the workplace." Manual at p. 29 (Employee Conduct and Work Rules). It then states that "[e]xamples of infractions of rules and conduct that may result in disciplinary action include, but are not limited to, ... [v]iolation of safety or health rules," but does not specify the substance of those rules. Id.

Similarly, the Manual states that the Band has established a "workplace safety policy to assist in providing a safe and healthy work environment for employees, customers and visitors" but does not set forth the substance of that policy. Manual at 97 (Safety). It further states that the Band "provides information to employees about workplace safety and health issues through workplace safety training and regular internal communication channels such as supervisor-employee meetings, bulletin board postings, memos or **other written communications**") (emphasis added).

This approach, which does not purport to set forth specific health and safety rules in the Manual, makes sense because health and safety rules may vary depending on each employee's particular work environment and the Manual is designed to apply to all Band employees with the limited exceptions noted above.

Because the Manual makes clear that employees must adhere to health and safety rules but does not purport to set forth specific health or safety rules, the adoption of two such rules through the Executive Orders at issue here does not appear to violate either 6 MLBS § 1 or the Manual.

III. Are the Executive Orders on a Subject Matter within the Executive Branch of Government pursuant to the Authority Conferred by Band Statutes, as Required by 4 MLBS § 6?

4 MLBS § 6(e) provides that the Chief Executive has the "authority in exercising the executive powers of Band government ... [t]o issue proclamations and executive orders on any subject matter within the Executive Branch of government pursuant to the authority conferred by Band Statute."

Under Band Statutes, the Executive Branch has "the authority and duty[,]" among other things, to "[a]dminister contracts and grants, cooperative and reciprocity agreements and memoranda of understanding, under the terms and conditions contained therein." 4 MLBS § 3(c). In addition, executive officers have the power "[t]o regulate the performance of their duties by all persons employed within their area of subject matter jurisdiction" and "[t]o take such measures as are deemed necessary to prevent any action which threatens the well-being of programs within their respective jurisdiction, by the issuance of a formal commissioner's order." 4 MLBS §§ 7(d) & (i).

The Executive Orders at issue here are within a "subject matter within the Executive Branch of government pursuant to the authority conferred by Band Statute." By adopting vaccine mandates that implement Interim Final Rules promulgated by the Federal Government governing specific programs and services for which the Band receives federal funds, the rules are part of the Executive Branch's administration of "contracts and grants." Moreover, because the Executive Orders are expressly intended to provide for the health and safety of covered Band employees and the Band members with whom they interact in the performance of their duties, they are part of the Executive Branch's authority to "regulate the performance of their duties by all persons employed" by the Executive Branch and to take measures "deemed necessary to prevent any action which threatens the well-being of programs within" the Executive Branch.

Although the vaccine mandates could have been adopted by the Commissioner of Human Services and the Commissioner of Education under 4 MLBS §§ 7(d) & (i), the broad authority conferred on the Chief Executive by 4 MLBS § 6(e)—to issue "executive orders on any subject matter within the Executive Branch of government pursuant to the authority conferred by Band Statute"—is sufficient to support the Executive Orders at issue here.

IV. Does the Interim Final Rule issued by the United States Centers for Medicare and Medicaid Services on November 5, 2021 apply to the Mille Lacs Band?

On November 5, 2021 the United States Centers for Medicare and Medicaid Services (CMS) issued an Interim Final Rule (IFR) entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination" revising the requirements that most Medicare and Medicaid certified providers and suppliers must meet to participate in the Medicare and Medicaid programs (86 FR 61555).

The CMS IFR governs the operations of 21 types of providers and suppliers, expanding the CMS health and safety standards, known as CMS Conditions of Participation (CoPs), to include a health staff and provider vaccination mandate as a condition of continued participation in Medicare and Medicaid. 86 FR 61556. The CMS IFR uses the terms "provider," "supplier," and "facility" interchangeably. See 86 FR 61556 et seq. Staff and providers in, and suppliers to, certain facilities are covered by the CMS CoPs on which the CMS IFR is based.

The IFR applies to FQHCs under 42 C.F.R. § 405.2401(b), the term "federally qualified health center" means "an entity that has entered into an agreement with CMS to meet Medicare program requirements...and...[i]s an outpatient health program or facility operated by a

tribe…under the Indian Self-Determination Act[.]" After some initial vagueness about which Indian Health Service (IHS) funded tribally administered facilities were covered by the CMS IFR, CMS in January clarified more clearly that all Federally Qualified Health Clinics (FQHCs) are covered by the CMS IFR, including tribally administered FQHCs.

The Band entered into an agreement with CMS for the Ne-Ia-Shing to become a FQHC in 1994. Subsequently in 2009, the Band entered into agreements for the East Lake and Aazhoomog Clinics to become FQHCs. The Band's Ne-Ia-Shing, East Lake, and Aazhoomog (Lake Lena) Clinics are FQHCs with respective CMS Certification Numbers 241819, 241858, and 241859. https://www.cms.gov/files/document/indian-healt-service-cms-all-final.pdf. The clinics' operations are considered by CMS to be subject to the CMS IFR. 42 CFR Part 491.8(d). Because the Band's clinics are FQHCs the CMS IFR is applicable.

Based upon the foregoing analyses I conclude Band Executive Orders 2022-03 and 2022-04 are legal and valid.

Caleb Dogeagle
Solicitor General

March 4, 2022
Date of Issuance