

Chairwoman Erickson and members of the special committee, my name is Brittany Jones. I am an attorney and the Director of Policy and Engagement for Kansas Family Voice, formerly Family Policy Alliance of Kansas. We work on combatting government overreach when it violates religious freedom.

This testimony is written in support of R.S. 2356 which clarifies religious exemptions requirements for employees as related to COVID-19. The scope of our statutory as well as our constitutional framework support granting religious exemptions.

There are a couple guiding principles that have to be understood when discussing any religious exemption. First, under Supreme Court caselaw, the government is not allowed to discuss the validity of a religious belief.¹ By their nature, religious beliefs are personal and something that is difficult to prove. This why courts cannot, and do not, inquire into whether a person's religious are correct. "It is no business of courts to say . . . what is a religious practice or activity."² Further, the fact that a religious belief was only recently acquired does not necessarily make it insincere.³ Court's give adherents a lot of discretion in determining and defining their beliefs as it supports the underlying principle.⁴

Secondly, throughout the federal statutory framework space is consistently made for religious adherents. Title VII prohibits discrimination based on religion or from taking any adverse action against someone because of their religion.⁵ It is unlawful "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." and "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee . . ." on the basis of an employee's religion.⁶ Because of this, the EEOC has instructed employers that they should grant religious accommodations, exempting religiously objecting employees from employer-mandated COVID-19 vaccination programs.⁷ These guidelines have been updated in recent weeks.

¹ *United States v. Seeger*, 380 U.S. 163 (1965).

² *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953).

³ *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997).

⁴ *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993).

⁵ 42 U.S.C. § 2000e-2(a).

⁶ 42 U.S.C. § 2000e *et seq.*

⁷ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L>

EEOC regulations recognize that an employer may not question the validity of an employee's religious beliefs.⁸ The religious institution nor the employee's pastor do not have to affirm their belief or even agree with the believer. An employer has no basis to require an employee to support the employee's asserted religious belief with the statement of any other person or organization, including the employee's clergy. It is inappropriate for the employer to ask for any supporting statement from the employee's clergy or other religious authority.

Other federal statutory schemes support recognizing religious exemptions. When analyzing products authorized by Emergency Use Authorization (EUA), federal regulations require that EUA products give people "the option to accept or refuse administration of the product." They must also ensure that employees have some level of informed consent and are given the option to refuse the vaccine. This option must be real and not mere form. "FDA has an obligation to ensure that recipients of the vaccine under an EUA are informed... that they have the option to accept or refuse the vaccine."⁹

In Kansas, our Kansas Act Against Discrimination has similar protections against adverse actions for employers.¹⁰ Public and private employers must also honor the Religious Freedom Preservation Act which requires courts to analyze religious freedom claims using strict scrutiny.¹¹ Strict scrutiny would require that a:

Government shall not substantially burden a person's civil right to exercise of religion even if the burden results from a rule of general applicability, unless such government demonstrates, by clear and convincing evidence, that application of the burden to the person: 1) Is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling governmental interest.¹²

Any employee who believes they have been discriminated against can invoke this defense. Because there are so many methods of accommodation, under a strict scrutiny, free exercise analysis, a blanket vaccination requirement is not narrowly tailored where an alternative method of protecting against the disease is available and acceptable to the religious objector.

All three federal COVID mandates make reference to federal exemption guidelines and religious exemptions.¹³ However, they give little guidance on how to

⁸ Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1.

⁹ <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained>.

¹⁰ K.S.A. § 44-1009.

¹¹ K.S.A. § 60-5303.

¹² K.S.A. § 60-5303.

¹³ <https://www.federalregister.gov/documents/2021/11/05/2021-23831/medicare-and-medicaid-programs-omnibus-covid-19-health-care-staff-vaccination>; <https://www.federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard#p-1661>; <https://www.cms.gov/files/document/cms-omnibus-staff-vax-requirements-2021.pdf>.

implement these exemptions leaving businesses to sort out the process on their own – leading many to unintentionally violate the religious freedom of their employees.

In light of all this, R.S. 2356 properly recognizes that it is not the place of the government or a business to define a person’s religious beliefs for them. Recognizing a private right of action adds a secondary layer of protection to our existing statutory scheme. Any government or business entity should carefully consider the immense legal and cultural ramifications of imposing this type of broad mandates on employees and families. As Justice Gorsuch said, “Government is not free to disregard the First Amendment in times of crisis.”¹⁴ Religious and conscience rights are foundational to our nation and should not be sidelined.

¹⁴ *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (J. Gorsuch, concurring).