COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT

CIVIL ACTION

NO. 2279CV00339

SHERYL FULLEN
PLAINTIFF
vs.

SPRINGFIELD TECHNICAL COMMUNITY COLLEGE,
AND VANNOCH SIN
DEFENDANTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' PARTIAL MOTION TO DISMISS

Plaintiff Sheryl Fullen, terminated from her position as an Associate Professor in the School of Health and Patient Simulation and Chair of the Medical Imaging and Radiological Technologies Program at Springfield Technical Community College ("STCC"), brings this action against defendants STCC and Vannoch Sin, STCC's Acting Director of Human Resources, alleging, among other things, that STCC and Sin violated her First Amendment right to the free exercise of her religion when Sin fired her after denying Fullen's request for a religious accommodation to STCC's COVID-19 vaccination policy.

Before me is the defendant Sin's motion to dismiss Count V ("Violations of 42 U.S.C. § 1983") against Sin alone[2] on the ground that Fullen's civil rights suit against Sin is barred by qualified immunity.

[2] On December 19, 2022, the defendants filed a partial motion to dismiss Counts I ("Title VII Violation[,] 42 U.S.C. § 2000e, *et seq.*") and II ("Religious Discrimination[,] M.G.L. c. 151B") as to Sin, but not as to STCC; and Counts III ("First Amendment Violations[,] U.S. Constitution"), IV ("Violations of Free Exercise Clause[,] Massachusetts Constitution"), and V in their entirety. On January 26, 2023, the parties filed a joint stipulation of dismissal dismissing Counts I and II as to Sin, but not as to STCC; Counts III and IV in their entirety; and Count V as to STCC, but not as

Following oral argument on January 25, 2023, and for the reasons set forth below, I must deny the Sin's motion.

MOTION TO DISMISS STANDARD

In considering a motion to dismiss under rule 12(b)(6), I must accept as true the facts alleged in the complaint as well as any favorable inferences that reasonably can be drawn from them. See *Lopez* v. *Commonwealth*, 463 Mass. 696, 700 (2012). Factual allegations are sufficient to survive a motion to dismiss under rule 12(b)(6) if they "plausibly suggest [and are] (not merely consistent with)" an entitlement to relief. See *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007).

The factual allegations must "raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)...." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 557. "While a complaint attacked by a ... motion to dismiss does not need detailed factual allegations ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions..." (quotation omitted). *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 545.

PLAINTIFF FULLEN'S COMPLAINT[3]

On September 20, 2021, STCC published a policy stating that its students, faculty, and staff "must be fully vaccinated against COVID-19 and submit verification of their fully vaccinated status to the College absent an approved reasonable accommodation." The employee vaccination policy mandated that, absent an approved

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to Sin. Remaining in the complaint are Counts I and II as to STCC and Count V as to Sin, of which only Count V, against Sin, is the subject of the defendants' motion to dismiss.

[3] These facts, and others cited in this memorandum, are taken from the complaint and exhibits thereto. See *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (court may take into account "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint" in evaluating a rule 12(b)(6) motion).

accommodation, faculty and staff must submit verification of vaccination by January 3, 2022, or face termination.

STCC promised it would provide an "individualized interactive process" to those seeking accommodation and directed employees seeking accommodation to submit their requests on a form provided by STCC.

Fullen, raised a Catholic, and now a born again Christian and a member of the Adam Square Baptist Church, believes, based on biblical teachings, that all life is sacred and that use of a product derived from or connected in any way to abortion is sinful. Fullen's religious belief precludes her from taking any of the three currently available COVID-19 vaccines (Pfizer, Moderna, and Johnson & Johnson) as all three either used aborted fetal cell lines to produce and manufacture the vaccine (Johnson & Johnson) or used aborted fetal cell lines in the early research and testing of the vaccine (Pfizer and Moderna).

On December 6, 2021, Fullen submitted an accommodation request in which she explained her religious belief and how it prevented her from being vaccinated as follows:

> "I object on religious grounds because each vaccine uses fetal stem cells in either their development or testing. The vaccines (BNT182b2 by PfizerBioNTech, mRNA-1273 by Moderna, and Ad26.COV2.S by Janssen) were all manufactured or tested using cell lines derived from an abortion in 1972 (HEK-293) and an abortion in 1985 (PER.C5). I believe that abortion is murder. For me to take a vaccine that utilizes fetal stem cells taken from an abortion would be me participating in the act of murder. The sixth of the Ten Commandments given to us from God states, "You shall not kill". See Exodus 20:13. The Ten Commandments are Gods laws to be followed and disobeying them is a sin. "Ye have heard that it was said by them of old time, Thou shall not kill; and whosoever shall kill shall be in danger of the judgment". See Matthew 5:21. I believe this to be a spiritual death. My eternal salvation is the uttermost importance in my life as a Born Again Christian. To go against God's word places my eternal soul in peril."

Fullen proposed that, instead of taking the vaccine, she wear a mask and check her temperature each day before arriving on campus and stated her willingness to discuss the measures she could take. That discussion never happened.

On December 16, 2021, Fullen participated in a virtual meeting with Sin and a human resources specialist. During the meeting, Sin read through each of Fullen's entries on the reasonable accommodation form submitted by Fullen and asked her if they were true. Although Fullen had stated her inability to take any vaccine that used aborted fetal cell lines in production, development or testing, Sin narrowly asked Fullen if she were willing to take a vaccine that did not "contain" aborted fetal cells—a question far narrower than Fullen's religiously based objection which included stem cell use in the production, development or testing of vaccines. Sin's question was not designed to explore the feasibility of an accommodation for Fullen's religious belief but to "trap" Fullen into stating, in effect, that she did not, in fact, have a religious objection to any of the available vaccines as none of them actually "contain" aborted fetal cells, so that Sin might deny Fullen's request on that unduly narrow basis. Fullen answered that she could not take any of the three available vaccines. In the meeting, Sin did not ask Fullen to describe how she conducted her teaching duties to determine whether the accommodations suggested by Fullen were feasible.[4] Sin engaged in no effective individualized interactive process with Fullen, notwithstanding Fullen's serious proposal.

By letter from Sin dated December 28, 2021 (Exhibit D to her Complaint) Sin, on behalf of STCC, informed Fullen that "[STCC's] view of a religious based accommodation begins with whether an employee has established that they adhere to a religious belief , or practice, and that belief, or practice is sincerely held." While conceding that "[t]he College has determined that while you have established that you have a sincerely held religious belief, the College [could not] grant [her] an accommodation due to the

[4] Although Fullen's courses were described as "labs," approximately 25% of the time was spent discussing theory in a classroom setting that allowed physical distancing. The remainder of the classes involved taking x-rays. During these exercises, Fullen typically divided the class into small groups of three or four. In her teaching, Fullen was almost never physically close to any student or employee for more than a few seconds.

risk it would present to the health and safety of the campus community."[5] (emphasis added).

Fullen then sent an email to Sin requesting to know what specific risk she posed and pointing out that there had not been a single case of COVID-19 traced back to her lab. Sin replied by letter dated January 18, 2022, informing Fullen she had not established "eligibility" for an accommodation because her sincerely held religious belief did not conflict with her being vaccinated and, further, even if she were eligible for an accommodation, granting one "would pose an undue hardship" on STCC, all of which Fullen disputes. Again, Sin never asked Fullen about the manner in which Fullen went about her duties, thus, Sin never meaningfully engaged in an individualized interactive process in order to reach a reasonable accommodation after Fullen proposed that she would do daily temperature checks and wear a mask at all times.

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[5] Sin's January 18, 2022, termination letter (Complaint Exhibit E) included an outdated 2019 Centers of Disease Control link, claiming that Fullen's proposed safety alternatives of daily temperature checks and mask wearing "predated the rise in COVID cases and the highly transmissible Omicron variant." https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-varient.html

On this point, while not in the record before me, but because I find it relevant to the issue of the risk an unvaccinated Fullen may spread COVID-19 to others within the STCC community, I take judicial notice that on August 6, 2121, more than five months before Sin terminated Fullen's employment for refusing on religious grounds to be vaccinated, and determining that an unvaccinated Fullen "will not ensure a safe environment for [STCC] students and employees, media outlets widely reported: "CDC Director Admits Under Oath: *Vaccines Do Not Prevent Transmission, Blames 'Evolution of Science.*"

> "Our vaccines are working exceptionally well," she said. "They continue to work well with 'Delta' with regard to severe illness and death, but what they can't do **anymore** is prevent transmission." (emphasis added) https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html
> https://www.realclearpolitics.com/video/2021/08/06/cdc_director_vaccines_no_longer_prevent_you_from_spreading_covid.html

Neither Sin nor STCC claim to have informed Fullen of the CDC Director Walensky's obviously significant sworn testimony before Congress—revealed in public months before firing Fullen—that a vaccine would not prevent Fullen, nor any STCC employee, from spreading COVID-19 to anyone within the STCC community.

Regarding the subject of Fullen's religious belief not preventing her from being vaccinated, using what Fullen alleges were "amateurish obfuscation techniques," Sin noted that no COVID-19 vaccines contain aborted fetal cells and that some vaccines were developed without using fetal cell lines—*although no such vaccine was available in the United States*. Sin also quoted a publication of the United States Conference of Catholic Bishops (knowing full-well Fullen is not Catholic) concluding that taking the Pfizer or Moderna vaccine "does not involve immoral cooperation in abortion." Tossing such quotes from others offensively suggests that "all Christians think alike."

Sin then further quote, offensively in my view, quoted two Southern Baptist bioethicists who note that there are faith-based arguments for taking the vaccines and that "[w]e must not allow or give support to **mere personal** or **political** preferences **masquerading as religious liberty** claims. . . . Indeed, doing so is **not only morally disingenuous** but also can do long term damage to the **credibility of pastors, churches, and Christian** institutions in our communities."[6] Ex. E, Complaint (emphasis added).

On the subject of the undue hardship to STCC posed by the measures proposed by Fullen, masking and checking her temperature, Sin stated—without supporting explanation or evidence—that those measures "will not ensure a safe environment for our students and employees," but never explored with Fullen how she performed her job duties in order to fairly evaluate whether Fullen's suggested accommodation, measures, and strategies might adequately prevent possible transmission of COVID-19.

Thus, Sin effectively failed to engage in a meaningful individualized interactive process to preserve Fullen's job and civil liberties. *Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 632, 644 (2004), quoting *Russell v. Cooley Dickinson Hosp., Inc.*, 437 Mass. 443, 457 (2002) (employee's initial

[6] Notably, all Sin's quotes fall short of declaring that the taking of COVID-19 vaccines may be done without compromising Fullen's religious belief that abortion is sin.

request for accommodation of disability triggers employer's obligation to participate in process to find possible accommodation). "To hold otherwise would shift the statutory burden entirely to the employee, eviscerating the statutory requirement that an employer provide a reasonable accommodation." *Brown v. F.L. Roberts & Co.*, 452 Mass. 674, 682-83 (2008), citing *Mass. Bay Transp. Auth. V. Mass. Comm'n Against Discrimination*, 450 Mass. 327, (2008) ("If merely looking into an accommodation . . . were to be considered too great an interference with an employer's business conduct, then employers would effectively be relieved of all obligation under [the statute]"). See generally *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied sub nom. *International Ass'n of Machinists & Aerospace Workers v. Anderson*, 442 U.S. 921 (1979) (under Title VII, shortcomings in employee's initial suggestion for accommodation did not relieve union and employer of burden to undertake initial steps to accommodate employee's religious beliefs). "In addition, in purely practical terms, the employer is in as good, if not better, position to determine possible accommodations." *Brown v. F.L. Roberts & Co.*, supra at 683.

Sin's termination letter went on arguably to denigrate if not mock the legitimacy and authenticity of Fullen's own understanding of the tenants of her own faith, claiming:

> The **religious passages** cited in your application **do not prevent you** from complying with the employee vaccination policy. **That is a matter of choice on your part**. period since your **beliefs do not prevent you** from complying with the employee vaccination policy, you are not eligible for a reasonable accommodation based on religion." Ex. E, Complaint (emphasis added)

STCC terminated Fullen's employment on January 25, 2022.[7] Although STCC did not grant any accommodation to Fullen, it has accommodated others – roughly 7,000 students and 1,000 staff, all of whom are allowed to be on campus.

[7] The factfinder may well view STCC's threatened penalty of employment termination as unduly harsh, arbitrary and capricious, for Fullen's refusing, on religious grounds, the COVID-19 vaccine. See, with respect to Massachusetts law mandating the smallpox vaccine, *Jacobson v. Massachusetts*, 197 U.S. 11, 22, 25 S. Ct. 358, 359 (1905) where Jacobsen refused to comply with a

DISCUSSION

In Count V, Fullen claims that Sin's denial of her request for an accommodation to STCC's vaccine mandate violated Fullen's right, under the First Amendment, to the free exercise of her religion. In their motion to dismiss, defendants assert that Count V against Sin should be dismissed because she is entitled to qualified immunity.

"The doctrine of qualified immunity shields government officials, performing discretionary tasks, from liability for civil damages under both Federal and State law . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quotations omitted). *Ahmad* v. *Dep't of Correction*, 446 Mass. 479, 484 (2006). The doctrine "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law" (quotations omitted). *Id.* at 484-485.

Massachusetts statute, claiming abridgment of his Fourteen Amendment substantive due process right of freedom of restraint. After jury verdict in favor of the state, he was sentenced by the court to pay a statutory fine of five dollars. See G.L.c. 75, § 137, providing that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars." (emphasis added). The Supreme Court affirmed the five dollar jury verdict (Justices Brewer and Peckham dissenting.) See also *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) ("In *Jacobson*, the Supreme Court upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and 'did not address the free exercise of religion.'" *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015);

See also *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (enjoining enforcement of the New York Governor's severe restrictions on the applicants' religious services.) (Gorsuch, J., concurring) ("*Government is not free to disregard the First Amendment in times of crisis*. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. . . . Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles. *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.'). Indeed, the *Jacobson* Court itself specifically noted that 'even if based on the acknowledged police powers of a state,' a public-health measure 'must always yield in case of conflict with . . . any right which [the Constitution] gives or secures.'" 141 S.Ct. at 69. (emphasis added).

"The qualified immunity inquiry proceeds with a now-familiar two-part test: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was clearly established at the time of the defendant's alleged violation" (quotations omitted). *Penate* v. *Hanchett*, 944 F.3d 358, 366 (1st Cir. 2019). "Courts need not engage in the first inquiry and may choose, in their discretion, to go directly to the second." *Id.*

Fullen's factual allegations, considered together, permit an inference that the denial of Fullen's accommodation request was not based on the reasons cited in Sin's two letters to Fullen, but was motivated by Sin's opposition to, if not intolerance, or worse, hostility, toward Fullen's religious beliefs. Fullen alleges that Sin attempted to discredit Fullen's objection to the vaccines by recasting it as a different, factually unsupported objection; implied that Fullen could take a vaccine consistent with her asserted religious objection—although no such vaccine was then available in the United States; provided obviously inapplicable rationales for her conclusion that Fullen's religious belief did not prevent her from complying with the vaccine mandate by, for example, relying on guidance from Catholic leaders, knowing Fullen was not Catholic; held Fullen's suggested accommodation measures to the impossibly high standard of "ensuring" the safety of students and employees; and never explored how Fullen performed her job duties in order to fairly evaluate whether her suggested measures, or others, might adequately prevent possible transmission of COVID-19.

These detailed factual allegations plausibly suggest that Sin's purported consideration of Fullen's accommodation request was but a sham.

Worse, as noted, Sin directly questioned Fullen's honesty and integrity in her termination letter, gratuitously tossing offensive, disrespectful and derogatory quotes Fullen's, purportedly from other clergy that "[w]e **must not allow** or give support to **mere personal** or **political** preferences **masquerading** as religious liberty claims. . . . Indeed, doing so is not only **morally disingenuous**." See Exhibit E, complaints.

In December 2021 and January 2022, as now, it was established that government's incidental burdening of an individual's free exercise of religion by a neutral, generally applicable law or policy does not violate the free exercise clause of the First Amendment, as long as the law or policy is rationally related to a legitimate government interest. See *Does 1-6* v. *Mills*, 16 F.4th 20, 29 (1st Cir. October 19, 2021) ("When a religiously neutral and generally applicable law incidentally burdens free exercise rights, we will sustain the law against constitutional challenge if it is rationally related to a legitimate government interest," citing *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 879 (1990) ("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].) "When a law is not neutral or generally applicable, however, we may sustain it only if it is narrowly tailored to achieve a compelling governmental interest." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021).

However, as explained in *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020) Congress undermined *Smith* with passage of *The Religious Freedom Restoration Act of 1993* (RFRA)[8] which prohibits the Federal Government from imposing substantial burdens on religious exercise, absent a compelling interest pursued through the least restrictive means. 107 Stat. 1488, 42 U. S. C. §2000bb et seq. It also gives a person whose religious exercise has been unlawfully burdened the right to seek "appropriate relief." *Tanzin,* 141 S. Ct. 486 at 489.

"The question here is whether 'appropriate relief' includes claims for money

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[8] I cite *Tanzin* for the point that *Employment Div., Dept. of Human Resources of Oregon v. Smith, supra* has been undermined. Of course, Fullen is precluded from bringing a claim here under RFRA because it has been held unconstitutional as applied to the States. See *Abdul-Alazim v. Superintendent, Massachusetts Correctional Inst., Cedar Junction*, 56 Mass. App. Ct. 449, 454 n.8 (2002), citing *Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). *Abdul-Alazim v. Superintendent, Mass. Corr. Inst.*, 56 Mass. App. Ct. 449, 454 n.8 (2002) ("the Supreme Court, on federalism grounds, struck down RFRA as applied to the States.")

damages against Government officials in their individual capacities. We hold that it does." *Tanzin*, supra at 489 (Muslims who sued under RFRA, claiming that federal agents placed them on the No Fly List for their refusal to act as informants against their religious communities, the Court held that RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities.)

> "RFRA secures Congress' view of the right to free exercise under the First Amendment, and it provides a remedy to redress violations of that right. Congress passed the Act in the wake of this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* [] which held that the First Amendment tolerates neutral, generally applicable laws that burden or prohibit religious acts even when the laws are unsupported by a narrowly tailored, compelling governmental interest. See §2000bb(a). RFRA sought to counter the effect of that holding and restore the pre-Smith "compelling interest test" by "provid[ing] a claim . . . to persons whose religious exercise is substantially burdened by government." §§2000bb(b)(1)-(2). That right of action enables a person to "obtain appropriate relief against a government." §2000bb-1(c). A "'government'" is defined to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." §2000bb-2(1).

Tanzin, 141 S. Ct. at 489 (emphasis added). See also *Attorney General v. Desilets*, 418 Mass. 316 (1994) and *Abdul-Alazim v. Superintendent, Mass. Corr. Inst.*, 56 Mass. App. Ct. 449, 454 n.8 (2002).

In respect to the Massachusetts Amendments to the Constitution, art. 46, protection for religious rights of the citizenry at large, *Desilets* rejected the Federal free exercise standard first announced in *Employment Div., Dept. of Human Resources of Or. v. Smith*, supra, "preferring to adhere to the standards of earlier First Amendment jurisprudence," and held that, as a matter of State constitutional jurisprudence, art. 46 was to be analyzed in accord with First Amendment precedent pre-dating the *Smith* case. *Attorney Gen. v. Desilets*, 418 Mass. at 321.

It was also established that the burdening of an individual's exercise of religion

because of animosity to that person's belief is unconstitutional. See *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Com'n*, --- U.S. ---, 138 S.Ct. 1719, 1732 (2018); *Fulton* v. *City of Philadelphia, Pennsylvania*, --- U.S. ---, 141 S.Ct. 1868, 1877 (June 17, 2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature").

In *Masterpiece Cakeshop, Ltd.*, the Supreme Court reversed the decision of the Colorado Court of Appeals enforcing an order of the Colorado Civil Rights Commission with respect to a cakeshop's refusal to sell a wedding cake to a same-sex couple. *Masterpiece Cakeshop, Ltd.*, 138 S.Ct. at 1732. There, the owner of the cakeshop maintained that selling a wedding cake to a same sex couple would be endorsement of and participation in the same-sex wedding ceremony and relationship, which he believed to be forbidden by the teachings of the Bible. *Id.* at 1724. After administrative proceedings in which commissioners expressed hostility to the owner's religious belief, and despite inconsistent decisions in similar matters not involving religious beliefs, the Commission ordered the cakeshop to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes. . . .[,]" which order was upheld by the Colorado Court of Appeals. *Id.* at 1726-1727, 1729-1730. In concluding that the Commission's "hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral to religion[,]" the Supreme Court stated that the cakeshop owner "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which the case was presented, considered and decided." *Id.* at 1732.

Fullen alleges that Sin, like the commission in *Masterpiece Cakeshop, Ltd.*, was not a neutral decisionmaker and she did not give full and fair consideration to Fullen's religious objection.

I am unpersuaded by defendant's argument that Sin is entitled to qualified immunity. "A Government official's conduct violates clearly established law when at the

time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right." *Ashcroft* v. *Al-Kidd*, 563 U.S. 731, 741 (2011), quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. *Id.*[9]

Sin's misconduct, as alleged in Fullen's complaint, egregiously violated Fullen's right to the free exercise of religion not because Sin considered whether Fullen's religious belief conflicted with being vaccinated, but because Sin did not seriously and candidly consider her beliefs, but, instead, wrongfully rejected Fullen's accommodation request based either on Sin's opposition to, hostility toward, or factually unsupported quarrel over Fullen's sincerely held beliefs.

The allegations of this case are much more akin to a 10th Circuit case, *Ashaheed* v. *Currington*, 7 F.4th 1236 (10th Cir. August 10, 2021). In *Asaheed*, the court concluded that a defendant prison official was not entitled to dismissal of the claim against him based on qualified immunity where the allegations of the complaint showed that the official ignored the prison's religious exemption to the prison's beardshaving policy based on apparent animus to the defendant's Muslim religion. ('When Sergeant Currington ignored the Center's religious exemption and forced Mr. Ashaheed to shave his beard, he violated clearly established law.") *Id.* at 1249.

CONCLUSION

Because Fullen has adequately alleged that Sin denied Fullen's request for a

[9] I consider but do not find applicable or persuasive the trial court decision cited by the defendants in *Harris v. University of Massachusetts, Lowell*, 557 F.Supp.3d 304, 314 (D. Mass. August 28, 2021), where a judge denied a student a preliminary injunction, and dismissed her case but not on the grounds asserted here, qualified immunity. There a student claimed the University's vaccine mandate was contrary to her Catholic faith. ("To the extent that [plaintiff] bases her claim on UMass failing to comply with state statutory or constitutional law, . . . the Eleventh Amendment stands in the way. 'While *Ex Parte Young*, 209 U.S. 123 (1908) permits injunctive relief based on federal constitutional claims, it does not allow injunctive relief against state officials for violation of state law, which is the issue here' (citation omitted).")

religious accommodation because of Sin's not so thinly masked opposition, if not overt hostility, toward Fullen's asserted sincerely held religious beliefs, and because the violative nature of Sin's alleged conduct was clearly established, the defendant Sin's motion to dismiss Count V against Sin must be denied.

ORDER

For the foregoing reasons, I **DENY** the defendants' motion to dismiss Count V as to defendant Vannoch Sin.

Edward J. McDonough Jr.
Justice of the Superior Court
Date: 5/24/23

ADDENDUM

In the broad context the impact of the spread of COVID-19 on our civil liberties, I deem it fitting to include—in pertinent part—the cautionary statement of United States Supreme Court Justice Gorsuch in the recent matter of :

SUPREME COURT OF THE UNITED STATES
ARIZONA, ET AL. v. ALEJANDRO MAYORKAS, SECRETARY OF HOMELAND SECURITY, ET AL. [12]

STATEMENT OF GORSUCH, J.
(FOOTNOTE CITATIONS OMITTED)

> . . . Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain

[12] *Arizona v. Mayorkas* (May 18, 2023) is a recent Supreme Court case concerning the "Title 42 orders, " emergency decrees severely restricted immigration to this country for the ostensible purpose of preventing the spread of COVID-19. The federal government began issuing the orders in March 2020 and continued issuing them until April 2022, when officials decided they were no longer necessary.

in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.

Federal executive officials entered the act too. Not just with emergency immigration decrees. They deployed a public-health agency to regulate landlord-tenant relations nationwide. They used a workplace-safety agency to issue a vaccination mandate for most working Americans. They threatened to fire noncompliant employees, and warned that service members who refused to vaccinate might face dishonorable discharge and confinement. Along the way, it seems federal officials may have pressured social-media companies to suppress information about pandemic policies with which they disagreed.

While executive officials issued new emergency decrees at a furious pace, state legislatures and Congress—the bodies normally responsible for adopting our laws—too often fell silent. Courts bound to protect our liberties addressed a few—but hardly all—of the intrusions upon them. In some cases, like this one, courts even allowed themselves to be used to perpetuate emergency public-health decrees for collateral purposes, itself a form of emergency-lawmaking-by-litigation.

Doubtless, many lessons can be learned from this chapter in our history, and hopefully serious efforts will be made to study it. One lesson might be this: Fear and the desire for safety are powerful forces. They can lead to a clamor for action—almost any action—as long as someone does something to address a perceived threat. A leader or an expert who claims he can fix everything, if only we do exactly as he says, can prove an irresistible force. We do not need to confront a bayonet, we need only a nudge, before we willingly abandon the nicety of requiring laws to be adopted by our legislative representatives and accept rule by decree. Along the way, we will accede to the loss of many cherished civil liberties—the right to worship freely, to debate public policy without censorship, to gather with friends and family, or simply to leave our homes. We may even cheer on those who ask us to disregard our normal lawmaking processes and forfeit our personal freedoms. Of course, this is no new story. Even the ancients warned that democracies can degenerate toward autocracy in the face of fear.

But maybe we have learned another lesson too. The concentration of power

in the hands of so few may be efficient and sometimes popular. But it does not tend toward sound government. However wise one person or his advisors may be, that is no substitute for the wisdom of the whole of the American people that can be tapped in the legislative process. Decisions produced by those who indulge no criticism are rarely as good as those produced after robust and uncensored debate.26 Decisions announced on the fly are rarely as wise as those that come after careful deliberation. Decisions made by a few often yield unintended consequences that may be avoided when more are consulted. Autocracies have always suffered these defects. Maybe, hopefully, we have relearned these lessons too.

In the 1970s, Congress studied the use of emergency decrees. It observed that they can allow executive authorities to tap into extraordinary powers. Congress also observed that emergency decrees have a habit of long outliving the crises that generate them; some federal emergency proclamations, Congress noted, had remained in effect for years or decades after the emergency in question had passed. At the same time, Congress recognized that quick unilateral executive action is sometimes necessary and permitted in our constitutional order. In an effort to balance these considerations and ensure a more normal operation of our laws and a firmer protection of our liberties, Congress adopted a number of new guardrails in the National Emergencies Act.

Despite that law, the number of declared emergencies has only grown in the ensuing years. And it is hard not to wonder whether, after nearly a half century and in light of our Nation's recent experience, another look is warranted. It is hard not to wonder, too, whether state legislatures might profitably reexamine the proper scope of emergency executive powers at the state level. At the very least, one can hope that the Judiciary will not soon again allow itself to be part of the problem by permitting litigants to manipulate our docket to perpetuate a decree designed for one emergency to address another. Make no mistake—decisive executive action is sometimes necessary and appropriate. But if emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.