Sixth Annual Notre Dame National Appellate Advocacy Tournament Prompt

Prompt Instructions:

1. Argue only the three issues before SCOTUS.
    i. Do not argue standing.
    ii. Do not argue whether precedent should be overturned unless instructed to do so.
    iii. Do not argue the non-merits-based elements of the preliminary injunction standard. Only argue whether the plaintiff can demonstrate likelihood of success on the merits.
    iv. Do not argue any potential claims of individuals or entities that are not parties to the suit.
    v. Assume that at the time of oral argument before the Supreme Court, the Pfizer, Johnson and Johnson, and Moderna vaccines have received full FDA approval. The prompt is meant to delve into an Establishment Clause claim, not the FDA approval process. .
2. For simplicity, the record is paginated sequentially. You may refer to these pages as "(R. at X.)" / "Page X of the Record," etc. for purposes of your brief and oral argument.
3. You may not cite any cases released after September 1, 2021.
4. Please direct any questions about the prompt to us in accordance with the timetable in the full tournament instructions.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

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Petition for certiorari to the United States Court of Appeals for the Thirteenth Circuit is hereby GRANTED. The United States Supreme Court certifies and limits for argument the following three questions:

1. Does the Vaccine Choice Act violate the Establishment Clause by conditioning state funding for private universities on their providing religious-based exemptions to their vaccination policies?
2. Does a statute "establish" religion by mandating private accommodation of religious practices when it also requires accommodation of similar secular practices?
3. Under what test should the Court assess the constitutionality of statutes mandating accommodation of religious practices by private organizations?

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF HOYNES

MARSHALL UNIVERSITY,	)	CIVIL RIGHTS COURT
	)	LOCATION: ECK
	)	DOCKET NO: EMD-CV-18-71
Plaintiff,	)	
v.	)	
DON SEDANTIS, GOVERNOR OF THE STATE OF HOYNES,	)	
Defendant.	)	

Marshall University is a private institution that has broad powers to set policies to protect the health and safety of its students. The State of Hoynes also has broad powers to protect its citizens from discrimination on account of their race, nationality, gender or—in this case—religion. But by passing a statute that requires private institutions to bend over backward to accommodate a specific religious belief, Hoynes has exceeded its power to protect its citizens from discrimination and threated the fundamental right of all citizens to be free from religious establishment.

On June 22, 2021, Plaintiff Marshall University filed a complaint in the District Court for the Southern District of Hoynes challenging the constitutionality of Hoynes' Vaccine Choice Act under the First Amendment Establishment Clause. Plaintiff filed this Motion for Preliminary Injunction on July 18, 2021, and oral argument was heard on July 28th, 2021.

FACTUAL BACKGROUND

Plaintiff Marshall University is a large private research university located in Eck, Hoynes' capital and largest city. It enrolls approximately 17,000 undergraduate and graduate students and employs 3,500 faculty and 13,000 staff. Like nearly all colleges and universities—public and private—Marshall was deeply affected by the COVID-19 pandemic that resulted in widespread closures and lockdowns across the United States in early 2020. As a result of the nationwide lockdown, Marshall closed its campus and continued all courses remotely. For the fall and spring semesters of 2020 and 2021, however, Marshall pursued a hybrid-model, with most undergraduate students returning to campus and attending classes either remotely or in reduced-capacity classrooms. Following guidance from the Centers for Disease Control, Marshall enforced strict social distancing, masking, and testing protocols. Despite these precautions, over 2,800 students, faculty, and staff contracted COVID-19 during the fall and spring semesters. From these 2,800 infections, there were twelve hospitalizations and one death.

Beyond bringing illness and the tragic loss of life, the COVID-19 pandemic strained Marshall's budget. In the fall and spring of 2020, Marshall spent $11.7 million on its expansive COVID-testing regime and $1.8 million on local hotel rooms for quarantined students. On top of these direct costs, Marshall incurred further consequential losses from the limitations produced by the pandemic. For example, Marshall estimates that it has lost over $15.3 million in auxiliary revenue and another $2.1 million from delays to capital improvement projects. Overall, Marshall's revenue was 19% lower and its operating budget 11% higher than those of the 2018–19 academic year—the last "normal" year before the pandemic.

Starting in December 2020, the Food and Drug Administration issued an Emergency Use Authorization for COVID-19 vaccines produced by Pfizer, Moderna, and Johnson & Johnson. Though priority for vaccination was generally given to those most vulnerable, by April 2021, the State of Hoynes was offering the vaccine to anyone who wished to receive it. Marshall collaborated with state health authorities to set up an on-campus vaccination site and it encouraged—though did not require—all students, faculty, and staff to receive the Pfizer vaccine at no cost. By June 2021, 78% of students, 82% of faculty, and 69% of staff had received one of the three authorized vaccines.

Following guidance from local health officials and private health consultants, Marshall set a target vaccination rate of 95%—a level at which it determined it would be safe to return to full-capacity classrooms, dorms, and dining halls, and eliminate most testing and masking protocols. To reach this target, Marshall planned on requiring all students to receive a COVID-19 vaccination before the fall 2021 semester, with exemptions only for students with documented medical conditions that put them at risk for severe side-effects. Though Marshall contemplated granting exemptions for students with religious or moral objections to vaccination, the administration decided not to adopt a policy of granting any such exemptions as a matter of course. In her letter to students regarding the vaccination requirement, Marshall president Flo Fawcett wrote that the administration would always be "sensitive to the special circumstances" of its students but did "not plan on granting exceptions in circumstances other than medical necessity, supported by documentation from the student's physician."

Vaccination requirements have been common for enrollment in educational institutions—both public and private—for the past century. *See, e.g.*, *Zucht v. King*, 260 U.S. 174 (1922) (upholding city ordinance mandating that child or other person to present a certificate of

vaccination in order to attend public school). These requirements have not been without controversy, but, overall, vaccination rates have remained high, even though most public and private institutions have offered exemptions to those who object to vaccination or religious grounds.[1] The COVID-19 vaccines, however, have been far more controversial than any of their predecessors. According to a survey conducted by the *Eck Register*, only 78% of Hoynes residents plan on receiving one of the COVID-19 vaccines, even assuming they receive full FDA approval. By comparison, 94% and 92% of Hoynes kindergarteners have received the MMR (measles, mumps, and rubella) and chicken pox vaccines, respectively.

The Hoynes State Legislature intensified the COVID vaccine controversy when it passed SB 3007, known as the Vaccine Choice Act (VCA). The Act has two sections. The first section establishes vaccination guidelines for state employees and places limits on the vaccination and masking guidelines that county public health departments are permitted to issue. The second section applies to "nonpublic educational institutions"[2] that are "funded either directly or indirectly by the State." Hoy. Rev. Stat. § 711.28 (2020). It reads, in full:

> No person who objects to receiving any COVID-19 vaccine due to religious faith or conscience can be denied in-person enrollment on account of their vaccination status by a nonpublic educational institution, as defined in § 711.25, that is funded either directly or indirectly by the State. This Act does not prevent nonpublic educational institutions from requiring unvaccinated students to comply with any masking, social distancing, and testing protocols otherwise consistent with this Act. Nor does this Act prevent nonpublic educational institutions that do not receive State funding from requiring COVID-19 vaccination for enrollment.

The VCA was signed into law by Governor Don Sedantis on June 21, 2021—one week after Marshall University had announced to its student body that it would not be instituting a policy of

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[1] *States With Religious and Philosophical Exemptions From School Immunization Requirements*, National Conference of State Legislatures (Apr. 30, 2021), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx.

[2] "'Educational institution' means a school, including a preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic." Hoy. Rev. Stat. § 711.25 (2020).

religious and conscience-based exemptions. Speaking to media after signing the VCA, Governor Sedantis said that the bill was "necessary to protect the freedoms of all Hoynesians from religious discrimination." In an article on the passage of the VCA in the Eck Register, Speaker of the Hoynes House of Representatives—and one of the Act's sponsors—Winnie West was quoted as saying that "religious discrimination in the name of public health is the real pandemic facing this nation."

Marshall University seeks a preliminary injunction to prevent enforcement of the VCA on the ground that the statute is unconstitutional, both facially and as-applied. It claims that it will be irreparably injured by the statute because it will be forced either to change its vaccination policy, thereby putting the health and safety of its community at risk, or keep the policy and forfeit the nearly $2.3 million it receives annually from the State. Most of the funding—approximately $2.1 million—is provided indirectly through the Hoynes Bright Futures Scholarship Program. The program provides funds for certain low-income individuals to use at eligible colleges and universities in the state. Marshall has informed its students that if it forfeits its eligibility due to its vaccine policy, then it will compensate for any lost scholarships with private funds. Marshall claims that if it does not compensate for lost scholarships, many students will not enroll for fall classes.

We GRANT Marshall's request for a preliminary injunction. We ORDER that the State of Hoynes refrain from withholding any state funding from Marshall University on account of its decision not to grant a religious exemption to its mandatory vaccination policy.

JURISDICTION

This Court has subject matter jurisdiction under 28 U.S.C. § 1331 since the case arises under the Constitution of the United States.

STANDARD

A preliminary injunction is "an extraordinary remedy never awarded as of right," but as an exercise of discretion by a court sitting in equity. *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a plaintiff must establish that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "When a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

DISCUSSION

A. Merits

Plaintiff Marshall University makes two arguments challenging the constitutionality of the VCA. First, it argues that the Act violates its First Amendment right to freedom of association because its desire to present a uniform vaccination policy is an "expressive message" that would be undermined by the religious and conscience-based exemptions. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Second, it argues that the Act is an unconstitutional establishment of religion because it requires private entities to make "absolute and unqualified" accommodations to individuals' religious preferences without taking into account the "convenience or interests" of the university. *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985). Because the Court concludes that the plaintiff is likely to succeed in showing that the

VCA is an unconstitutional establishment of religion, it will not address the merits of the freedom of association argument.

The standard governing First Amendment Establishment Clause violations has shifted in recent years. Though the Supreme Court has "frequently relied upon [its] holding in *Lemon*" in evaluating Establishment Clause claims, Caldor, 472 U.S. at 708, recent decisions have narrowed the scope of its applicability. Some Justices have even claimed that *Lemon* is not applicable under any circumstances. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) ("The Court's decision in this case again makes clear that the Lemon test does not apply to Establishment Clause cases . . ."); *id.* at 2102 (Gorsuch, J., concurring) (noting that the *Lemon* test is "now shelved"). Yet, the Court has still not issued a definitive test replacing *Lemon* and has relied on an ad hoc, case-by-case approach. *See, e.g. Marsh v. Chambers*, 463 U.S. 783 (1983) (applying historical approach to legislative prayer); *Van Orden v. Perry*, 545 U.S. 677 (2005) (same application of "historical test" for public display of religious symbols). Since no Supreme Court or binding circuit precedent has provided an alternative to the *Lemon* test in the context of state-mandated religious accommodations in the private sphere, however, it remains the applicable law in this case.

Under the *Lemon* test, a statute respecting religion does not violate the Establishment Clause if (1) it has "a secular legislative purpose;" (2) "its principal or primary effect [is] one that neither advances nor inhibits religion;" and (3) it does "not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (internal citations and quotation marks removed). The core principle of the *Lemon* test is governmental neutrality, both "between religion and religion, and between religion and nonreligion."

McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)).

i. Secular Legislative Purpose

The fact that a statute has the effect of benefitting religion does not mean that it cannot serve a secular purpose—even if the statute explicitly affords a benefit to religious believers or institutions. *See, e.g.*, *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 667–68 (1970) (upholding statute that explicitly exempted religious organizations from state property tax). Statutes that benefit religion only incidentally as part of a broader *secular* objective are generally constitutional. In *Walz*, for example, the Court held that property tax exemptions for religious institutions had a secular legislative purpose, for the state had concluded that such institutions had "beneficial and stabilizing influences in community life." *Id.* at 673. As Justice Brennan noted in his concurrence, "[the] state encourages [religious] activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." *Id.* at 693 (Brennan, J., concurring). Nevertheless, the legitimate secular purposes of accommodation and anti-discrimination can threaten the rights afforded by the Establishment Clause when they impinge on the rights of others.

Because we live in a pluralistic society with a wide range of often-conflicting beliefs, "some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982); *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 764 (2014) (Ginsburg, J., dissenting) ("No tradition . . . allows a religion-based exemption when the accommodation would be harmful to others . . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson,

J., dissenting) ("[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

The State of Hoynes advances only one plausible secular purpose for the VCA: the prevention of discrimination. It claims—boldly—that the VCA's protections are analogous to those of Title VII, which prohibits employers from discriminating against individuals based on race, color, religion, sex and national origin. *See* 42 U.S.C. § 2000e. But this argument does not withstand scrutiny. While preventing discrimination on account of religion is clearly a valid "secular legislative purpose," the VCA accomplishes the opposite. By privileging religious concerns over the concerns of the elderly and the immune-compromised, the Act forces private institutions to discriminate against some of their members in favor of unvaccinated religious individuals. In other words, the religious get the entitlement, and the rest are forced to swallow the externality. This violates the neutrality principle espoused in *Caldor*, which protects individuals from being coerced into the service of religious orthodoxy. 472 U.S. 703 (1985).

The State attempts to sidestep *Caldor* by claiming that the Civil Rights Act already requires employers to "sacrifice" to accommodate the religious practices of their employees. But this comparison belies a crucial difference between the VCA and Title VII. While it is true that Title VII requires limited accommodation of employees' religious practices, its purpose is to prevent discrimination against all identity groups—not to create an "absolute and unqualified" benefit to religious believers. *See* 42 U.S.C. § 2000e (employer must make "reasonable accommodations" to religious practices so long as they do not cause "undue hardship."). Title VII neither prioritizes the concerns of religious individuals over the concerns of people of different races or nationalities nor requires a private organization to fundamentally alter the nature of its operations to accommodate any characteristics of a protected class. *See Corp. of*

Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). By requiring private organizations to provide an "absolute and unqualified" exemption to their health protocols, the VCA does far more than prevent discrimination; it prioritizes the orthodoxy of certain religious believers over the university's own compelling health and safety interests.

The State also argues that the VCA has a secular legislative purpose because it prevents nonpublic educational institutions from requiring vaccinations from those who have conscience-based objections in addition to those who have religious ones. But the fact that the Act accommodates some secular individuals on equal footing as religious ones does not save it from an Establishment Clause challenge. Though this issue has not arisen in the context of public accommodations, the Supreme Court has made clear that public aid programs can violate the Establishment Clause when they directly support religious activity, even when the program also provides aid to comparable secular programs. *See, e.g.*, *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796–98 (1973) (holding that state program providing maintenance funding for religious and nonreligious private schools violated Establishment Clause).

Lastly, the State claims that the Supreme Court has unequivocally held that statutes granting exemptions from generally applicable laws to religious persons are constitutional, regardless of whether they are accompanied by comparable exemptions for secular persons. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding RLUIPA against facial constitutional challenge); *see also Amos*, 483 U.S. at 327 (exempting "religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion."). But *Cutter* and *Amos* are unavailing. Both applied to exemptions to public *laws* not private *policies.* And even then, the constitutionality of such exemptions comes with a caveat: "should . . . requests for

religious accommodations become excessive, impose unjustified burdens on other[s]. . . , or jeopardize the effective functioning of an institution," the Establishment Clause provides grounds for institutions to "to resist the imposition." *Cutter*, 544 U.S. at 726. Here, the VCA's blanket exemption for individuals with religious preferences has jeopardized the functioning of Marshall University by preventing it from providing a safe and healthy environment to its students, faculty, and staff.

ii. Advances or Inhibits Religion

The fact that a law has the effect of incidentally advancing religion does not necessarily mean that it violates the Establishment Clause. *See, e.g., Walz,* 397 U.S. at 673. Rather, for a law to violate the second *Lemon* prong, "the *Government itself* must have advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337. But, as noted above, the VCA is not merely a law exempting religious practitioners from a government mandate—where the religious interest is being weighed against the interests of the state. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015) (applying strict scrutiny to law regulating religious prisoners' beard lengths). Instead, the VCA explicitly places the State's thumb on the scale in favor of religion. Like in *Caldor*, the State "commands [that] … religious concerns automatically control over all secular interests" at the school. 472 U.S. at 709.

The Court's decision in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) is particularly relevant here. In *Larkin*, the Court struck down an ordinance that gave churches the power to veto applications for liquor licenses, concluding that "mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125–26. Like the ordinance in

Larkin, the VCA provides state backing to religious believers who desire to limit the legal prerogatives of secular organizations. This plainly advances religion.

iii. Excessive Government Entanglement

Plaintiffs concede that the VCA does not lead to excessive government entanglement with religion. Therefore, the Court will not address the issue.

B. Irreparable Harm

It is well settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because the Plaintiff has established its likelihood of success on the merits, it has also established that it will likely suffer irreparable harm. But even if irreparable harm did not flow directly from a First Amendment violation, this Court would have no difficulty finding that Marshall has made an adequate showing for injunctive relief. Though the State argues that any harm suffered would be purely financial—in the form of lost revenue and increased cost associated with insurance and heightened safety protocols—it ignores Marshall's argument that a low vaccination rate could lead to significant reputational damage. It plausibly alleges that some students and faculty would refuse to return to campus and seek openings at institutions not subject to the VCA. A high unvaccinated population would also increase the risk of an outbreak, which could not only lead to illness and death, but also irreparable damage to Marshall's image. These harms are "beyond remediation" and are sufficiently certain, actual, and imminent that equitable relief is warranted. *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

C. Balance of Equities and the Public Interest

The balance of equities and the public interest factors merge when the government is the party opposing the preliminary injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, both weigh in favor of granting the injunction. Though the public may have an interest in preventing "religious discrimination," it also has a strong interest in preventing the spread of disease. As the Supreme Court noted in *Jacobson v. Massachusetts*—a case involving mandatory smallpox inoculation— "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to . . . restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." 197 U.S. 11, 29 (1905).

CONCLUSION

In their attempts to curtail the COVID-19 pandemic, governments have occasionally gone too far in limiting Americans' rights to exercise their religious beliefs. In restoring some of those rights, the Supreme Court has emphasized the importance of neutrality. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Secular activities cannot be favored relative to comparable religious activities. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66 (noting that "regulations cannot be viewed as neutral" when they "single out houses of worship for especially harsh treatment"). In this case, the pendulum has swung in the opposite direction. The State of Hoynes has prioritized free exercise of religion over secular concerns by coercing a private university to accommodate a specific kind of religious exercise—vaccine refusal—despite its threat to the health and safety of its students and faculty. Marshall's case on the merits is undoubtedly compelling. And since it has also shown likelihood of irreparable injury and that the balance of equities weighs in its

favor, we GRANT its request for a preliminary injunction preventing enforcement of § 711.25 of the Vaccine Choice Act.

IT IS SO ORDERED.

November 13, 2019 — MATTEO S. STANTON

Date — **DISTRICT COURT JUDGE**

2020 HOYN 71

DON SEDANTIS,
GOVERNOR OF THE STATE OF HOYNES,
Appellant,

v.

MARSHALL UNIVERSITY,
Appellee.

Docket No. Emd-19-213

Supreme Judicial Court of Hoynes.

Argued: June 13, 2020
Decided: November 25, 2020

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Majority Opinion

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ZITRONE, J.

This case involves a constitutional challenge under the Establishment Clause of the First Amendment to a state statute that requires nonpublic educational institutions to accommodate those who object to vaccination for religious or moral reasons as a condition for receiving state funding. Marshall University—a private university in Eck, Hoynes—sought a preliminary injunction to prevent enforcement of the statute, which was granted by the United States District Court for the District of Hoynes. The State of Hoynes filed an interlocutory appeal under 28 U.S.C. § 1292(a)(1) challenging the district court's grant of the preliminary injunction. Because we find the district court applied the wrong legal standard in determining respondent's likelihood of success on the merits, we VACATE and REMAND.

I. BACKGROUND

A. Facts

The facts in this case are largely undisputed. Marshall University—a large private research university in Hoynes—was set to require all its students to receive one of the three emergency-approved COVID-19 vaccinations as a condition for enrollment. This requirement was premised on Marshall's goal of a 95% vaccination rate for students—a rate at which it could be confident that the campus community could return to normal operations without risking an outbreak of COVID-19. The State of Hoynes threw a wrench in these plans when it passed the Vaccine Choice Act (VCA), which mandated that "[n]o person who objects to receiving any COVID-19 vaccine due to religious faith or conscience can be denied in-person enrollment on account of their vaccination status by a nonpublic educational institution . . . that is funded either directly or indirectly by the State." Hoy. Rev. Stat. § 711.28. In other words, the VCA means that if Marshall were to implement its mandatory vaccination policy, it would risk losing the nearly $2.3 million it receives in grants and scholarships from Hoynes each year. Furthermore, since fewer than 95% of its students and staff are currently vaccinated, Marshall claims that it needs to mandate vaccination to safely operate at full capacity during the 2021–22 school year.

B. Procedural History

Marshall University filed its Complaint to the District Court for the

District of Hoynes on June 22, 2021, and filed its Motion for Preliminary Injunction on July 18, 2021. The District Court granted Marshall's request for a preliminary injunction, holding that the Vaccine Choice Act violated the First Amendment Establishment Clause.

II. ANALYSIS

A. Standard of Review

Whether a movant for a preliminary injunction has a strong likelihood of success on the merits is a question of law which we review de novo. *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021). We review the district court's ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting or denying preliminary injunctive relief for abuse of discretion. *Id.* "This standard is deferential, but the court may reverse the district court if it improperly applied the governing law, used an erroneous legal standard, or relied upon clearly erroneous findings of fact." *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014). Lastly, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Id.* (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)).

B. Establishment Clause Violation

a. Lemon *Test*

The State argues that the district court erred by applying the three-pronged standard from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—a standard which it argues was abandoned by the Supreme Court in *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019). We agree with the State that *Lemon* does not provide the appropriate test in this case, though we decline to determine whether the *Lemon* test is no longer applicable to any Establishment Clause challenges in this circuit.

Determining exactly what the Constitution means by "law respecting an establishment of religion" has proven to be a "vexing problem." *Id.* at 2080. Over the past fifty years, courts have attempted—with varying success—to squeeze most Establishment Clause questions into the three-pronged *Lemon* test. Under *Lemon*, a statute (or other state action) was constitutional so long as it had a secular legislative purpose, it did not advance nor inhibit religion, and did not lead to excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). Complications with the *Lemon* test quickly emerged, however. In some cases, the Court sidestepped the *Lemon* test where it would produce results that were overbroad and inconsistent with the clear meaning of the Establishment Clause as it would have been understood by the public at the time of ratification. *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding practice of legislative prayer because it is "deeply embedded in the history and tradition of this country"). Elsewhere, the Court has declined to apply *Lemon* to statutes that have the effect of "advancing religion" where it would result in the exclusion of religious entities from neutral aid programs of private choice. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

There is no doubt that, in recent years, the Supreme Court has indicated that *Lemon* is a dead letter. Indeed, it has declined to apply *Lemon* in an Establishment Clause challenge since 2005, fashioning

alternative tests in all challenges since. *See Town of Greece*, *N.Y. v. Galloway*, 572 U.S. 565 (2014) (legislative prayer); *Van Orden v. Perry*, 545 U.S. 677 (2005) (religious symbols); *see also Freedom From Religion Found., Inc. v. Mack*, 4 F.4th 306 (5th Cir. 2021) (courtroom prayer). In *American Legion*, the Court came close to complete abnegation, with several Justices suggesting that the Court would "no longer appl[y] the old test articulated in *Lemon*." 139 S. Ct. at 2092 (2019) (Kavanaugh, J., concurring); *see id.* at 2081–82 (plurality op.) (similar); *id.* at 2097–98 (Thomas, J., concurring in the judgment) (similar); *id.* at 2101 (Gorsuch, J., concurring in the judgment) (similar). Some Justices have even suggested that, beyond lacking practical applicability, the *Lemon* test has no basis in the Constitution and can even be used as a guise for underlying hostility toward religion. *Id.* at 2097 n.3 (Thomas, J., concurring in the judgment); *see also McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) (noting that *Lemon*'s "seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve" including to "ratchet up the Court's hostility toward religion").

Though the Court has strongly suggested that the *Lemon* test is no longer law, it has equivocated in providing a replacement. In cases involving religious symbols and public rituals, the Court has applied a "more modest approach that focuses on the particular issue at hand and looks to history for guidance." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). And in the context of government aid to religious organizations, the Court has applied a neutrality test, which generally allows indirect aid to religious organizations and direct aid so long as it is for "secular purposes." *Mitchell v. Helms,* 530 U.S. 793 (2000) (plurality opinion). It remains unclear, however, what principles lower courts should derive from Establishment Clause's "history, tradition, and precedent." *Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

Discerning such principles is particularly difficult in this case, which does not fall neatly within any of the typical categories of Establishment Clause claims. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. at 2081 n.16 (identifying the following categories of Establishment Clause cases: "(1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies, (2) religious accommodations and exemptions from generally applicable laws, (3) subsidies and tax exemptions, (4) religious expression in public schools, (5) regulation of private religious speech, (6) state interference with internal church affairs") (internal citations omitted). Since we have limited precedent upon which to evaluate the constitutionality of the VCA, we will base our analysis on the history of the Establishment Clause and the few, scattered cases in which the Court has evaluated laws that require private organizations to accommodate the preferences of religious individuals.

b. Historical Test

Historically, the hallmark of Establishment Clause violations has been "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting). *See also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion,* 44 WM. & MARY L. REV. 2105 (2002–2003) (describing six "hallmarks" that constituted establishment

of religion in the founding era). Incidental support of religion through tax exemption or accommodation of religious expression in the public sphere has consistently fallen short of the historical threshold for coercion. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 668 (1970); *Town of Greece*, *N.Y. v. Galloway*, 572 U.S. 565 (2014). Instead, establishment has meant direct, mandatory support of religious activities, state interference with religious practice, and compulsory church attendance. *See Walz*, 397 U.S. at 668 ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."). Statutes that are deferential to religion and religious believers relative to secular individuals and institutions have generally not been found to violate the Establishment Clause—especially when the principle behind such deference is to prevent discrimination or state interference in religious practice. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987) (the fact that Title VII gives "special consideration to religious groups" does not mean that it is *per se* unconstitutional); *Boyajian v. Gatzunis*, 212 F.3d 1, 5 (1st Cir. 2000) ("Prohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose.").

Marshall argues that laws requiring private entities to accommodate religious individuals or institutions at their own expense are always unconstitutional. Even if *Lemon* doesn't apply, Marshall claims that by conditioning state funding on religious accommodation, the VCA is effectively coercing it to endorse a religious orthodoxy, which would be unconstitutional under the Court's "historical" test.

We agree with Marshall that laws which require private organizations to *endorse* a religious orthodoxy would likely cross the line from neutral public accommodation to establishment. We do not agree, however, that by conditioning receipt of funds on the adoption of a vaccine policy that accommodates individuals with religious or conscience-based objections, the VCA violates the Establishment Clause. There is room for the State to promote tolerance and inclusivity without violating the Constitutional rights of the regulated party. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

Marshall points to two cases which it claims compel us to find in its favor. First, it argues that the district court was correct to follow *Est. of Thornton v. Caldor*, one of the few Establishment Clause cases to involve a law that required private organizations to accommodate religious practices. 472 U.S. 703 (1985). But the district court failed to distinguish *Caldor* in two significant ways. First, the Court in *Caldor* found Connecticut's Sabbath law to violate the Establishment Clause because it involved an "absolute and unqualified" accommodation of religious practices without any consideration of consequences to the regulated employers. *Id.* at 709. The VCA is far from "absolute and unqualified." Unlike the statute in *Caldor*, the VCA provides a choice: accommodate or lose a public benefit. Private educational institutions can still pursue the most stringent vaccination policy they want without being in violation of the law. Moreover, the VCA permits nonpublic educational institutions to require unvaccinated students to comply with testing, social distancing, and other protocols that would mitigate any risk they pose to the student body. The employers in *Caldor*, however, could not mitigate the

costs of accommodating the Sabbath preferences of their employees. Nor did they have any leverage to incentivize their employees to adjust their schedules. They had only two options: accommodate their religious employees or violate the statute.

Marshall's other case, *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982), is similarly unpersuasive. In *Larkin*, the Court struck down an ordinance that gave religious institutions veto power over decisions to grant liquor licenses—essentially elevating the power of a religious institution to that of the state. *Id.* at 117. Respondents claim that the VCA affords religious students a similar form of "veto power," because religious students are essentially permitted to unilaterally override the university's vaccination policy. But by this logic, Title VII of the Civil Rights Act, which requires employers to make reasonable accommodations to employees' religious practices, would also be unconstitutional. 42 U.S.C. § 2000e. A Muslim employee's desire to wear a headscarf would be a "veto" of the employer's dress code, and a Catholic's desire to not work on Good Friday would be a "veto" of the employer's scheduling policies. The problem with the ordinance in Larkin was that it granted religious institutions the power to govern the activities of unaffiliated private businesses—including the power to shut the business down entirely. In other words, the ordinance puts religious institutions in charge of third parties. Despite Marshall's characterizations, that is not the case here. Religious individuals do not have broad command over the school's vaccination policies. They merely have the right to seek accommodations for their religious beliefs—with the same footing as those seeking accommodations for concerns based in conscience. *See Mueller v. Allen*, 463 U.S. 388, 397 (1983) (quoting *Widmar v. Vincent*, 454 U.S. 263 (1981) ("[T]he provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

Lastly, we note that both *Caldor* and *Larkin* were decided using the Court's now-obsolete *Lemon* test. Though we still regard ourselves as bound by these decisions—they have not been explicitly overruled—we are inclined to interpret their scope narrowly since the basis for the decisions has eroded significantly in recent years. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. 2021) (en banc) (Nelson, J., dissenting) (claiming that precedent based on *Lemon* should not be extended, given that *Lemon* has been "effectively killed" by the Supreme Court).

C. Preliminary Injunction

We find that the district court improperly applied governing law and erred in finding that the Respondents carried their burden of showing a likelihood of success on the merits. Because the district court abuses its discretion when it improperly applies governing law, we VACATE and REMAND for further proceedings.

III. CONCLUSION

The Supreme Court has long recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–45 (1987). Here, the State is permitted to pursue a policy of accommodation, even when such accommodation is not required. Such policies do not violate the Establishment Clause in the context of public entities, nor they do not violate the Establishment Clause

in the context of private entities when compliance is not mandated but merely encouraged.

The District Court is *reversed and remanded.*

MANCUSO, J., dissenting

The Majority gives the impression that *American Legion* was the final nail in *Lemon*'s coffin. But this is an overzealous interpretation of the Court's precedent. Though the historical test from *American Legion* has replaced *Lemon* in the context of legislative prayer and public display of religious symbols, the Court has not offered explicit guidance on how lower courts should evaluate the constitutionality of state regulations that mandate private accommodation of religious practices as a form of "anti-discrimination." The precedent most relevant in determining the constitutionality of the Vaccine Choice Act is *Estate of Thornton v. Caldor*—which applies the test from *Lemon*—but the Majority sweeps it aside. 472 U.S. 703 (1985). Because I find this case is governed by the tests in *Caldor* and *Lemon* and that these tests show a strong likelihood that the VCA is a violation of the Establishment Clause, I fully dissent. *Lemon* may be on life support, but it is not up to us to pull the plug.

I.

In its analysis of *American Legion*, the Majority mistakes the Justices' grumblings about *Lemon* as a directive to completely abandon it. True, six Justices appear to be in favor of constraining *Lemon* to some extent—especially for cases involving religious symbols and public prayer. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019). But only four justices have suggested that *Lemon* should be overturned in its entirety. *Id.* at 2092 (Kavanaugh, J., concurring) (noting that *Lemon* does not apply in five "relevant categories" of Establishment Clause cases); *id.* at 2097 (Thomas, J., concurring) ("I would take the logical next step and overrule the *Lemon* test in all contexts."); *id.* at 2101 (Gorsuch, J., concurring) (noting that Lemon was a "misadventure" that "left us only a mess"). *But see id.* at 2090–91 (Breyer, J., concurring) (maintaining that there is "no single formula for resolving Establishment Clause challenges" but declining to state that the *Lemon* test is never appropriate); *id.* at 2094 (Kagan, J., concurring) (approving of the *Lemon* test's "focus on purposes and effects"). If the case before us involved religious symbols, government aid to religious organizations, interference with church affairs, or regulation of religious speech in public forums, then the Majority is correct—*Lemon* would not apply. But this case does not involve one of the common categories of Establishment Cases for which the Supreme Court has adopted an alternative test. In fact, the *only* test that has been applied to cases like the one before us is the *Lemon* test. The Majority thinks that by cobbling together dicta from various concurrences in *American Legion*, it can rewrite our circuit's Establishment Clause jurisprudence. But this is not our charge. We must apply the law as it stands, and—as our sister circuits have recognized—the law as it stands is still *Lemon*. *See, e.g.*, *Janny v. Gamez*, No. 20-1105, 2021 WL 3439009, at *10 (10th Cir. Aug. 6, 2021) (noting that the *Lemon* test remains a "central" though not "exclusive" framework for Establishment Clause challenges).

Only once has the Supreme Court evaluated the constitutionality of mandatory accommodations for religious conduct by

private organizations. *See Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Because *Caldor* has not been explicitly overturned, it provides the appropriate test to apply in this case. This holds regardless of whether *Lemon* is still good law, for the outcome in *Caldor* is not determined solely by *Lemon*, but by anti-establishment principles that date back to the Founding. Though the names for the various Establishment Clause tests may change, the Court has remained constant in its adherence to the fundamental principle of "neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)). The Court's decision in *Caldor* draws from this fundamental principle of neutrality toward religion: if the State passes a law that imposes an "absolute duty" on private organizations to conform their policies and conduct to individuals' religious practices, it tramples upon secular concerns in the name of religion and therefore ceases to be neutral. *Caldor*, 472 U.S. at 709–10.

The Majority errs in holding that because the VCA is not "mandatory"—compliance is merely a condition for receipt of state funds—then it can't be "absolute and unqualified" like the statute in *Caldor*. 472 U.S. at 709. But this is an erroneous interpretation of the Court's holding in *Caldor*, for it sets too high a bar for unconstitutionality. Nowhere in *Caldor* does the court suggest that anything less than "mandatory" compliance is automatically constitutional. If the only criteria for a statute's constitutionality is that it does not grant an "unqualified and absolute" right to religious actors, states will have the power to rewrite their codes to provide highly invasive "protections" against "religious discrimination." Even if not technically mandatory, such protections would undoubtedly coerce private organizations to endorse the privileged religious principles, for otherwise they would be unable to compete with the religious elect. For example, a private secular university could be coerced to refrain from dismissing a student whose religiously-motivated speech or conduct did not conform with its values. We would be loath to require a religious institution to admit atheists into its ranks; so why should the same principle not apply to secular institutions? Though the First Amendment shields religion from intrusions by the state, the state cannot favor some religions by granting them rights that limit the legitimate private choices of others—which is what the VCA accomplishes. This is a clear violation of the Establishment Clause under both *Lemon* and *Caldor*.

II.

The Majority echoes the laments of certain justices that the "seemingly simple" mandates of the Lemon test can be "manipulated" to achieve the nefarious agenda of "ratcheting up hostility toward religion." *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting). But I do not see how a framework based on "history and tradition" provides any greater restraint against judicial meddling—either in favor of religion or in opposition to it. To the cynics, history is nothing more than a set of lies agreed upon. Though I am not such a cynic, I worry about the application of a historical test to events and actions without historical precedent. Doing so would require the court to imagine how the past would react to the present—an exercise of imagination just as fraught with bias and hidden motivations as the criteria from the *Lemon* test. At least *Lemon* requires courts to make explicit

judgments about the purpose and effects of a government's action; the "history and tradition" test loosely followed by the Majority invites courts to make judgments based on pure speculation.

III.

Lastly, I want to reiterate the conclusion of the lower court that the VCA's apparent "neutrality"—giving both religious and "conscience-based" objectors the same rights to refuse vaccination does very little to overcome any constitutional concerns. Lawmakers are clever. Just as they can devise laws that have discriminatory intent against religious groups without explicitly targeting religion, they can devise laws that establish a religion under the guise of protecting conscience. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This is especially the case when some allegedly secular benefit accrues primarily to religious individuals or institutions. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 703 (2002) (Souter, J., dissenting) (questioning constitutionality of school voucher program where 96.6% of voucher recipients went to religious schools). Here, the court should not be fooled by the inclusion of conscience-based protections, especially since the VCA explicitly protects religious individuals. The explicit protection suggests that religious concerns are to be viewed with special regard, while secular concerns regarding long-term health effects, for example, must be proven as a conscience-based objection. If the legislature wanted to avoid Establishment Clause issues, it could have required schools to exempt anyone who refused to receive a vaccine for any reason whatsoever. In other words, it could have outlawed vaccine mandates altogether. But the Court must apply the law as written, and as written it provides special privileges to religion.

I respectfully dissent.

No. 21-1776

IN THE
Supreme Court of the United States

DON SEDANTIS,
GOVERNOR OF THE STATE OF HOYNES,
Appellant,

v.

MARSHALL UNIVERSITY,
Appellee.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

THE PETITION FOR CERTIORARI IS GRANTED AND LIMITED TO THE FOLLOWING QUESTIONS:

(1) Whether the Vaccine Choice Act violates the Establishment Clause by conditioning state funding for private universities on their providing religious-based exemptions to their vaccination policies;

(2) Whether a statute "establishes" religion by mandating private accommodation of religious practices when it also requires accommodation of similar secular practices;

(3) The appropriate test for the Court to assess the constitutionality of statutes mandating accommodation of religious practices by private organizations.

APPENDIX

United States Constitution

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Hoynes State Statutes

HOY. REV. STAT. § 711.25 (2020): Definition of Educational Institution

> "Educational institution" means a school, including a preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic.

HOY. REV. STAT. § 711.28 (2020):

> No person who objects to receiving any COVID-19 vaccine due to religious faith or conscience can be denied in-person enrollment on account of their vaccination status by a nonpublic educational institution, as defined in § 711.25, that is funded either directly or indirectly by the State. This Act does not prevent nonpublic educational institutions from requiring unvaccinated students to comply with any masking, social distancing, and testing protocols otherwise consistent with this Act. Nor does this Act prevent nonpublic educational institutions that do not receive State funding from requiring COVID-19 vaccination for enrollment.