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VIA EMAIL AND FEDEX

Office of President Joseph Biden
1600 Pennsylvania Avenue
Washington, D.C. 20500
president@whitehouse.gov

Rochelle P. Walensky, MD, MPH
Director
Centers for Disease Control
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Chris Magnus
Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, D.C. 20229

Re: *Request to Cease and Desist Implementation and Enforcement of Presidential Proclamation 10294*

Dear President Biden, Director Walensky, and Commissioner Magnus:

On behalf of Informed Consent Action Network and various members located throughout the United States and abroad, we write regarding Presidential Proclamation 10294 (“**Proclamation**”),¹ which places comprehensive travel restrictions on unvaccinated non-citizens and non-residents of the U.S. For the reasons outlined below, any factual and legal foundations upon which the Proclamation purportedly relied have disappeared. Accordingly, we respectfully request that President Biden and the Presidential Administration (“**Administration**”) to immediately rescind the Proclamation in full, and, consistent with all other developed countries worldwide, permit unvaccinated non-citizens and non-residents to enter and move throughout the United States without restriction.

¹ See THE WHITE HOUSE, *A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, Oct. 25, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/>.

I. BACKGROUND

A. General Background

In December 2019, a cluster of patients in the city of Wuhan, China were reported to experience the symptoms of an atypical pneumonia-like illness, subsequently designated as Severe Acute Respiratory Syndrome Coronavirus 2 (“SARS-CoV-2”). The disease that SARS-CoV-2 causes has been commonly referred to as COVID-19. In February and March of 2020, the World Health Organization (“WHO”) and governments across the world made formal emergency declarations regarding COVID-19.

Approximately 20 months later, on October 25, 2021, President Biden issued the Proclamation. Soon thereafter, the Centers for Disease Control and Prevention (the “CDC”) issued Technical Instructions for implementing the Proclamation.² In combination, the Proclamation and the CDC Technical Instructions place comprehensive travel restrictions on unvaccinated non-U.S. citizens and non-U.S. residents who seek to enter the country legally³ – restrictions that remain in place to-date.

The Proclamation permits a number of possible exemptions to the general travel ban for unvaccinated non-citizens and non-residents. Notably, all possible exemptions are based on secular justifications. There is no religious exemption available. The Proclamation and the CDC Technical Instructions also do not permit, unlike developed countries from across the world, proof of natural immunity as qualifying for an exemption or otherwise satisfying the immunization requirements. This is despite the fact that the scientific community has conclusively established through centuries of research that natural immunity is superior to vaccine-elicited immunity.⁴ This should be unsurprising given that vaccine-based immunization is an artificial attempt to emulate the mechanisms of natural immunity. Consistent with this fundamental premise of immunological research, Dr. Anthony Fauci has confirmed that prior infection is the most effective means of

² See CENTERS FOR DISEASE CONTROL, *Technical Instructions for Implementing Presidential Proclamation Advancing Safe Resumption of Global Travel During the COVID-19 Pandemic*, available at <https://www.cdc.gov/quarantine/order-safe-travel/technical-instructions.html>.

³ Notably, undocumented immigrants who seek admission or unlawfully cross the United States’ border and take up residence in the United States are not subject to any restrictions based on their vaccination status. While the estimated number of undocumented immigrants residing in the United States widely varies, the most conservative estimates are that between 10.5 million (See PEW RESEARCH CENTER, *Measuring Illegal Immigration*, available at <https://www.pewresearch.org/fact-tank/2019/07/12/how-pew-research-center-counts-unauthorized-immigrants-in-us/>) and 11.96 million (See DEPARTMENT OF HOMELAND SECURITY, *Population Estimates, Illegal Alien Population Residing in the United States*, available at https://www.dhs.gov/sites/default/files/publications/18_1214_PLCY_pops-est-report.pdf) undocumented immigrants have crossed the border illegally and now reside in the United States. Moreover, there are numerous indications that more undocumented immigrants have been encountered at the border than in any prior year. For example, the number of arrests of illegal migrants at the southwestern border reached a yearly record in August of 2022, according to recently released data from U.S. Customs and Border Protection (“CBP”). See THE HILL, *Migrant Arrests at southwestern border hit yearly record*, available at <https://thehill.com/policy/national-security/3651257-migrant-arrests-at-southwestern-border-hit-yearly-record>. Chris Magnus, CPB Commissioner, further explained that “more individuals encountered at the border without a legal basis to remain will be expelled or removed this year than any prior year.” *Id.*

⁴ See, e.g., Plotkin’s *Vaccines*, 7th Edition, at Section 2.

immunization.⁵ It is simply unreasonable, and unscientific, to disregard hundreds of years of thoroughly vetted research that has established the efficacy of natural immunity. Natural immunity to COVID-19 is no exception to this fundamental immunological principle.

In fact, by the time the Proclamation was issued, the scientific foundation supporting the superiority of natural immunity over vaccine immunity against COVID-19 had solidified. A Cleveland Clinic study published in June 2021 measured the cumulative incidence of SARS-CoV-2 infection among 52,238 vaccinated and unvaccinated health care workers over a five-month period, and found that none of the 1,359 previously infected who remained unvaccinated contracted SARS-CoV-2 over the course of the research, despite a high background rate of COVID-19 in the hospital.⁶ In a May 2021 study from Ireland, researchers conducted a review of 11 cohort studies involving over 600,000 total recovered COVID-19 patients who were followed up with for over 10 months and found that reinfection in all studies was “an uncommon event” and explained that there was “no study reporting an increase in the risk of reinfection over time.”⁷ At the very least, the Proclamation should recognize natural immunity and exempt those with such immunity from the vaccine requirement.

B. Changed Circumstances Since the Proclamation was Issued

Even if the Proclamation was justified at the time of its enactment, changed circumstances and recent data render the vaccine mandate wholly unnecessary.

In fact, even before the Proclamation had been issued, it was already clear that the available vaccines had become ineffective against preventing transmission of COVID-19. On March 29, 2021, the Director of the CDC, Dr. Rochelle Walensky, told the public that the CDC’s own data “suggests...that vaccinated people do not carry the virus, don’t get sick, and that it’s not just in the clinical trials but it’s also in real world data.”⁸ However, because the real-world data had already demonstrated breakthrough infections in those vaccinated just three months after the Pfizer-BioNTech vaccine received FDA approval, the CDC immediately thereafter reversed course and clarified Director Walensky’s statements: “It’s possible that some people who are fully vaccinated could get COVID-19.”⁹

Then, a few months later in July 2021, Director Walensky admitted that the vaccinated had similarly high viral loads of SARS-CoV-2 as the unvaccinated and thus could still contract and

⁵ See https://www.youtube.com/watch?v=s8c_Py1wgGc (regarding immunization from the flu, Dr. Fauci states “the best vaccination is to get infected yourself.”).

⁶ Nabin K. Shrestha, *et al.*, *Necessity of COVID-19 vaccination in previously infected individuals*, medRxiv (Jun. 19, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v3>.

⁷ Eamon Murchu, *et al.*, *Quantifying the risk of SARS - CoV - 2 reinfection over time*, *Reviews of Medical Virology* (May 27, 2021), available at <https://pubmed.ncbi.nlm.nih.gov/34043841/>.

⁸ *Statement from CDC Director Rochelle P. Walensky, MD, MPH on Rachel Maddow Show* (March 29, 2021), transcript available at https://www.msnbc.com/transcripts/transcript-rachel-maddow-show-3-29-21-n1262442?utm_content=.

⁹ See “*CDC Reverses Statement by Director*”, (April 2, 2021), available at <https://thehill.com/changing-america/well-being/546234-cdc-reverses-statement-by-director-that-vaccinated-people-are-no/>.

spread the Delta variant.¹⁰ In August 2021, a joint study by the CDC and the Wisconsin Department of Health services further confirmed Director Walensky’s statement; the study indicated that vaccinated individuals had a 5% higher viral load than the unvaccinated and were not only just as likely to transmit the virus as the unvaccinated, but more likely.¹¹ The above findings are even more concerning in that they demonstrate vaccinated individuals maintain higher viral loads, for longer periods of time, and therefore are more likely to spread the virus due to asymptomatic infection.

For more than 18 months, it has been clear that the vaccines were not stopping infection and it then became increasingly clear that they were not stopping transmission. This remains true today.

Not only were the vaccines not providing adequate protection from infection, but soon after the Proclamation was issued, it became increasingly clear that any vaccine efficacy against COVID-19 had not only waned, but it had also actually turned negative. As early as December of 2021, it was becoming clear that the vaccines were demonstrating *negative efficacy* against the Omicron variant.¹² The demonstrated vaccine inefficacy is explainable by the fact that the available vaccines were engineered from an isolated SARS-CoV-2 sample collected almost two years ago, from an infected patient in Wuhan, China, on December 26, 2020 (Wuhan-Hu-1).¹³ Consequently, the genetic code upon which both the mRNA and viral vector vaccines were developed was that of the parental strain, which has been replaced by the Alpha, Beta, Gamma, Delta, and now the Omicron variant of the virus.¹⁴ Each variant of the virus has become more genetically distinct from the original strain, and, consequently, has substantially weakened vaccine efficacy against each new variant, which explains the demonstrated negligible vaccine efficacy¹⁵

¹⁰ *Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today’s MMWR*, CDC News Room (July 30, 2021) available at <https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html> [<https://perma.cc/VR5V-E67A>] (“Today, some of those data were published in CDC’s Morbidity and Mortality Weekly Report (MMWR), demonstrating that Delta infection resulted in similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people. High viral loads suggest an increased risk of transmission and raised concern that, unlike with other variants, vaccinated people infected with Delta can transmit the virus.”).

¹¹ See Kasen Riemersma, *et. al*, *Shedding of Infectious SARS-CoV-2 Despite Vaccination* medRxiv (August 24, 2021), available at <https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v4.full.pdf>.

¹² See, e.g., Christian Holm, *et. al*, *Vaccine effectiveness against SARS-CoV-2 infection with the Omicron or Delta variants following a two-dose or booster*, medRxiv (Dec. 22, 2021) available at <https://www.medrxiv.org/content/10.1101/2021.12.20.21267966v2> (demonstrating **negative** efficacy for vaccine-based immunity against emerging variants); see also Sara A. Buchan, *et. al.*, *Effectiveness of COVID-19 vaccines against Omicron or Delta symptomatic infection and severe outcomes* medRxiv (January 28, 2022) available at <https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v2> (demonstrating the same).

¹³ Jackson, L. *et al.*, *An mRNA Vaccine against SARS-CoV-2 – Preliminary Report*, N. Engl. J Med (Nov. 12, 2020), available at https://www.nejm.org/doi/10.1056/NEJMoa2022483?url_ver=Z39.88-2003&rft_id=ori:rid:crossref.org&rft_dat=cr_pub%20%200pubmed.

¹⁴ See <https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/> (discussing evolution of COVID variants).

¹⁵ See, e.g., *United Kingdom Health Security Agency Vaccine Surveillance Report*, Week 12, 2022 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063023/Vaccine-surveillance-report-week-12.pdf (demonstrating that vaccine-elicited immunity demonstrates **no** efficacy against the Omicron variant; notably, for the 60-69 age group that have received boosters, the vaccines are demonstrating **negative 369% efficacy**).

and even negative efficacy¹⁶ against the emerging variants. More than 11 variants of concern have emerged since December of 2020 (when the FDA approved the first COVID-19 vaccine). Consequently, the Proclamation’s requirement for vaccines that were developed based on the Alpha variant is comparable to requiring a flu vaccine from a decade ago for the 2022 flu season.

Although the protection of natural immunity has been clear for decades, a recent study from the New England Journal of Medicine confirmed as much in its finding that there is no “discernable differences” in protection against symptomatic infection when comparing immunization acquired through previous infection, vaccination (at least 3 doses), and hybrid immunity.¹⁷ Natural immunity has also demonstrated very strong protection against severe, critical, and fatal reinfection. More importantly, unlike vaccine-induced immunization, the protections of natural immunity show “no evidence for waning.”¹⁸

Further, the Proclamation and the CDC Technical Instructions do not require that noncitizens receive COVID-19 booster injections, despite the fact that the CDC recommended boosters for all adults as early as November 2021.¹⁹ The recommendation for boosters, by definition, establishes that the original COVID-19 vaccines (required under the Proclamation) do not provide durable protection.

Consistent with the above, on August 11, 2022, the CDC released updated guidance indicating: (i) COVID-19 vaccines provide a lesser degree of protection against asymptomatic and mild infection; (ii) receiving only the primary series of the COVID-19 vaccine (which is what the Proclamation and CDC Implementing Guidance requires) provides only minimal protection against infection and transmission in the absence of booster doses; (iii) even receiving all updated COVID-19 vaccines (and boosters) provides only a transient period of protection that will wane over time; and, notably, that (iv) **differentiation between vaccinated and unvaccinated persons for non-pharmaceutical interventions is no longer recommended** due to breakthrough infections among vaccinated persons and natural immunity among unvaccinated persons who have been infected with COVID-19.²⁰ CDC guidance now explicitly states that the measures instituted under the Proclamation are no longer recommended.

¹⁶ See, e.g., *Effectiveness of COVID-19 vaccines against Omicron or Delta symptomatic infection and severe outcomes* available at <https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v2> (demonstrating **negative** efficacy for vaccine-based immunity); see also Danish Cohort Study, available at <https://www.medrxiv.org/content/10.1101/2021.12.20.21267966v2> (demonstrating the same).

¹⁷ Altarawneh, et al., *Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections*, New England Journal of Medicine (June 2022) available at <https://pubmed.ncbi.nlm.nih.gov/35704396/>.

¹⁸ Chemaitelly, et. al, *Duration of immune protection of SARS-CoV-2 natural infection against reinfection in Qatar*, (July 7, 2022) available at <https://www.medrxiv.org/content/10.1101/2022.07.06.22277306v1> (the “effectiveness of primary infection against severe, critical, or fatal COVID-19 reinfection was 97.3% (95% CI: 94.9- 98.6%), irrespective of the variant of primary infection or reinfection, and with no evidence for waning.”).

¹⁹ See CDC Guidance on COVID-19 Boosters, available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html>.

²⁰ See CENTERS FOR DISEASE CONTROL AND PREVENTION, *Summary Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems—United States* (Aug. 2022), available at https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm?s_cid=mm7133e1_x.

Most recently, on September 18, 2022, President Biden announced that “the pandemic is over.”²¹ In harmony with this announcement, Canada, the only other remaining developed country with vaccine-based travel restrictions, announced that it would drop all COVID-19 restrictions for travelers, effective October 1, 2022.²²

Thus, considering these factors, the Proclamation’s underlying rationale – “to prevent further introduction, transmission, and spread of COVID-19 into and throughout the United States”²³ – no longer justifies a vaccine mandate.

C. Impacts on Unvaccinated Non-Citizens/Residents, U.S. Based Family Units, and Worldwide Religious Communities

Without a legitimate justification, the Proclamation is causing disastrous impacts on U.S. citizens and non-citizens alike. Our firm represents non-citizen and non-resident clients from countries across the world on a variety of immigration matters. We also represent U.S. citizens with non-citizen family members, and lawful residents with various immigration matters. Over the past 11 months since the Proclamation was issued, we have observed firsthand the negative and life-long impacts the Proclamation is causing worldwide.

For example, we are aware of numerous instances where unvaccinated non-citizens were unable to attend funerals for close family members in the United States. Unvaccinated non-citizens have been barred from attending their children’s weddings. Unvaccinated non-citizen grandparents have missed births of grandchildren, and, because of the Proclamation, still have not met their grandchildren. Non-citizens who own land in the United States have been banned from stepping foot on their own property, based solely on their vaccination status. Unvaccinated foreign students who have been accepted to universities throughout the United States and who have been issued a visa have been prevented from entering the United States to study and pursue their academic careers. Unvaccinated foreign workers who have been granted employment-based visas to work in the United States for U.S. companies have been unable to enter the United States to take up employment. Unvaccinated foreign workers who were already in the United States working for U.S. employers who need to return to their country to renew their visa at the Consulate are prevented from maintaining their lawful status in the United States because of this policy. They either have to remain in the United States unlawfully after their visa expires, or they have to abandon their employment, not only causing harm to them individually, but also to the U.S. company who employed and sponsored them. Engaged and married couples where one person is a U.S. Citizen and the other is not have either been separated for nearly a year or the U.S. Citizen has essentially been exiled from their own country because they were forced under the Proclamation’s dictates to choose between their country and their spouse/fiancé.

²¹ See 60 MINUTES (September 19, 2022), *President Biden Says “The Pandemic is over”*, available at <https://www.youtube.com/watch?v=MIQz0fsX3U>.

²² See the REUTERS, *Canada to Remove All COVID-19 Travel Restrictions from October 1*, available at <https://www.reuters.com/world/americas/canada-remove-all-covid-border-travel-measures-oct-1-2022-09-26>.

²³ See THE WHITE HOUSE, *A Proclamation on Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic*, Oct. 25, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/>.

Additionally, many of these unvaccinated non-citizens possess religious convictions that prevent them from receiving a COVID-19 vaccine. Among the many other religious objections members from religious communities throughout the world have to compulsory vaccination, the objection to fetal cell entanglement in vaccine development and production is an objection that stands out. A number of religious communities worldwide object to compelled participation in medical procedures, especially where many such procedures (like compelled vaccination) involve forced market participation and support of pharmaceutical companies who profit from the use of these aborted fetal cells. Because the Proclamation permits a variety of secular exemptions to the travel restrictions but openly prohibits any type of religious exemption, it at a minimum appears that the Proclamation targets certain religious adherents worldwide for deliberate exclusion from the United States.

Another example of the negative impacts the Proclamation is causing is seen in the example of the nation of French Polynesia, a country where approximately 40% of the population is unvaccinated. Because of the Proclamation, there are around 100,000 French Polynesian citizens who have been prohibited from traveling to or through the United States. Critically, a large number of these individuals have family and businesses in France (who does not place restrictions on unvaccinated travelers), and the only realistically available route to France is via Los Angeles and San Francisco. This has been foreclosed to these unvaccinated French Polynesians because of the Proclamation. While other routes to France conceivably exist, they are not realistic for logistical and financial reasons. Moreover, many of these unvaccinated French Polynesians have businesses and family in the United States and have been separated from their loved ones for almost a year due to the Proclamation.

II. ANALYSIS

A. The Proclamation Cannot Withstand Rational Basis Review

When challenged, the Proclamation and the CDC's attendant Implementing Guidance will not withstand rational basis review. In order to survive the rational basis test, a "law must bear a rational relationship to a legitimate governmental purpose."²⁴ Arguably, the goal of reducing transmission of COVID-19 may be a legitimate governmental purpose; however, considering that the CDC and that the worldwide scientific community have acknowledged that the available COVID-19 vaccines are ineffective at reducing such transmission, particularly with regard to the emerging variants, the Proclamation has been divorced from that stated interest.

While, in the context of rational basis review, the Constitution generally "does not prohibit [the government] from enacting stupid laws,"²⁵ the judicial deference provided under rational basis scrutiny is not without limitation. For example, the Supreme Court has analyzed numerous laws under rational basis scrutiny but has nonetheless ruled certain regulations do not pass constitutional muster. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking Colorado law that discriminated against same-sex couples after analyzing under rational basis review);

²⁴ *Romer v. Evans*, 517 U.S. 620, 635 (1996).

²⁵ *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (J. Stevens, Concurring).

Plyler v. Doe, 457 U.S. 202 (1981) (under rational basis review, holding Texas regulation prohibiting undocumented immigrant children from attending public school was unconstitutional because undocumented children have no control over their undocumented status); *USDA v. Moreno*, 413 U.S. 528 (1973) (analyzing under rational basis and striking District of Columbia law that separated non-nuclear families, in that the law limited eligibility for food stamps to families who were directly related and living under the same roof).

The legitimacy of the Administration’s goal of reducing transmission through compulsory vaccination is severely undermined – and rendered arbitrary and capricious – for several notable reasons. First, the CDC’s updated guidance now recommends that no distinctions be made between vaccinated and unvaccinated individuals. Consequently, the scientific justifications upon which the Proclamation rests have evaporated. Second, potentially millions of undocumented and unvaccinated immigrants are entering and maintain residence in the United States. These unlawful migrants are categorically exempted from COVID-19 vaccination requirements, while non-citizens attempting to legally enter the United States are subject to the Proclamation’s vaccination requirements. Undocumented and unvaccinated migrants — whose whereabouts, movements throughout the United States, and lengths of stay are generally unknown — somehow are apparently deemed to pose less risk under the Administration’s guidance than do unvaccinated non-citizens who desire to enter the United States legally. Third, and perhaps most importantly, the Proclamation refuses to incorporate consideration of natural immunity, in direct contradiction to centuries of immunological research, and contrary to international standards. For example, the European Union’s digital COVID-19 certificate considers the following as equivalent: (1) a COVID-19 vaccine; (2) a negative COVID-19 test; or (3) having previously recovered from COVID-19.²⁶

Considering these factors, and because the circumstances have changed dramatically since the Proclamation was issued, a rational basis for its continued enforcement and implementation no longer exists. At this point, the Proclamation is punitive, not preventative. Unvaccinated families, students, and workers from across the globe are being punished by the Proclamation’s travel restrictions, without a conceivable justification. These families are being robbed from experiencing some of life’s most intimate and important events with their families who reside in the United States. The Proclamation has deprived the unvaccinated international community – who represent the overwhelming majority of the world’s inhabitants, a group that numbers in the many billions – from entering the United States. Many of these non-citizens have been excluded from attending funerals for family members in the United States. Births have been missed. Lifesaving medical treatment, often available only in the United States, has been foreclosed to unvaccinated non-citizens who desperately need treatment. The United States is on an island as the only developed country enforcing travel restrictions on the unvaccinated international community.

²⁶ See *EU Digital COVID Certificate*, EUROPEAN COMMISSION, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en (“Fully vaccinated persons with the EU Digital COVID Certificate should be exempted from travel-related testing or quarantine 14 days after having received the last dose of a COVID-19 vaccine approved for the entire EU. The same is true for recovered persons with the certificate.”).

B. The Proclamation Cannot Withstand Strict Judicial Scrutiny

The Proclamation also appears to target certain religious family units, including those with members who are United States citizens, for deliberate separation. As a direct and unavoidable consequence of the Proclamation, religious families based in the United States have been separated from portions of their family units who reside abroad, who likewise possess religious convictions that preclude them from compulsory vaccination.

We are aware of family units comprised of U.S. citizens and non-citizens who collectively hold religious beliefs that prevent them from receiving a COVID-19 vaccine. The inevitable effect of the Proclamation is to indefinitely separate these families. Critically, the Proclamation permits similar secular unvaccinated families to be united (the Proclamation permits a series of secular exemptions). This policy violates both the Religious Freedom Restoration Act of 1993²⁷ (“**RFRA**”) and the First Amendment of the United States Constitution.

Regulations implicating rights under the RFRA receive strict scrutiny review.²⁸ Likewise, regulations implicating First Amendment rights that either are not neutral or generally applicable receive strict judicial scrutiny.²⁹

Under RFRA, the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). Pursuant to the 42 U.S.C. § 2000bb-1(b) exception, the “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” By categorically excluding them from associating with non-citizen family members who hold religious beliefs against compulsory vaccination, the Proclamation substantially burdens countless U.S.-based family units. Consequently, the Proclamation will arguably be subject to strict scrutiny review under RFRA. The Proclamation cannot survive strict scrutiny because it is not narrowly tailored to avoid conflict with each individual’s religious beliefs, as required under RFRA. In fact, the Proclamation makes no attempt at tailoring because it also allows for a series of secular-based exemptions and is generally is not being enforced except in the case of air travel.

Similarly, the Proclamation violates the First Amendment because it permits secular exemptions while it prohibits religious exemptions. A government regulation fails the general applicability test “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”³⁰ In *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1878 (2021), the Court – in a 9-0 decision – held that the “creation

²⁷ 42 U.S.C. §§ 2000bb, *et seq.*

²⁸ *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

²⁹ Strict scrutiny review is triggered if the law in question either is not generally applicable, or if it lacks neutrality. *See, e.g., Fulton*, 141 S. Ct. 1868, 1877 (lack of general applicability alone triggered strict scrutiny review); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018) (non-neutrality alone invoked strict scrutiny).

³⁰ *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021).

of a formal mechanism for granting exceptions renders a policy not generally applicable” where that mechanism is unavailable to religious adherents.³¹ In deciding to apply strict scrutiny, the Court observed that the regulation in question had a procedure that was subject to individualized review and approval at the “sole discretion” of a government official.³²

Here, the Proclamation permits secular exemptions to the vaccination requirements that incorporate individualized discretionary review but does not extend that option to religious adherents. Moreover, and in harmony with the *Fulton* holding, the Supreme Court recently ruled that a law is not neutral and generally applicable, and thus invokes strict scrutiny review, if it treats “any comparable secular activity more favorably than religious exercise.”³³ Obviously, with regard to how it applies to religious family units and secular families, the Proclamation fails these tests and therefore violates both RFRA and the First Amendment.

* * *

For the reasons outlined above, we request that the Administration immediately rescind the Proclamation. Absent such action, **we have been authorized to commence litigation.**

Nothing stated or not stated herein shall constitute a waiver of any claims, rights, causes of action, defenses, positions, or remedies possessed by any potential Plaintiff. Govern yourselves accordingly.

Sincerely,



Aaron Siri
Elizabeth A. Brehm
Walker Moller
Christina Xenides

³¹ *Id.* at 1879.

³² *Id.*

³³ *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).