



UNIVERSITY OF CALIFORNIA LAW
SAN FRANCISCO

Legal Developments: Mandates and Misinformation

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Presentation plan

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Mandates:

- Workplace Mandates
 - Jacobson
 - Workplace Mandates
 - Religion...
- School mandates
 - Generally.
 - Challenges.
- Federal mandates.

Misinformation:

- AB2198
- Murthy v. Missouri





Disclosures:

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- The family owns stock (regular) in GSK.
- Served as a volunteer (unpaid) advisor on Moderna's ethics advisory group



Constitutionality of mandates generally:

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- **Argument: freedom not to vaccinate.**
- **Standard: Jacobson v. Mass (1905)**
 - Stands for reasonable limits on individual rights in the public health.
 - Still (again?) High deference.
 - Mandates survived.
 - But...





Jacobson questions:

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- Gorsuch concurrence.
- Ninth Circuit: Health Freedom Defense Fund v. Carvalho.

Ninth Circuit Court appeal regarding mRNA vaccines misinterpreted by Infowars and social media posts

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CLAIM

COVID-19 mRNA vaccines aren't vaccines, according to court ruling

VERDICT[®]

INACCURATE

SOURCE: Alex Jones, Infowars, Instagram, Twitter, 8 Jun. 2024 [↗](#)

DETAILS



Workplace mandates:

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- Employment in the United States is generally at-will.
- Vaccine mandates: a work safety rule.
- Some limits





Justification of workplace mandates:

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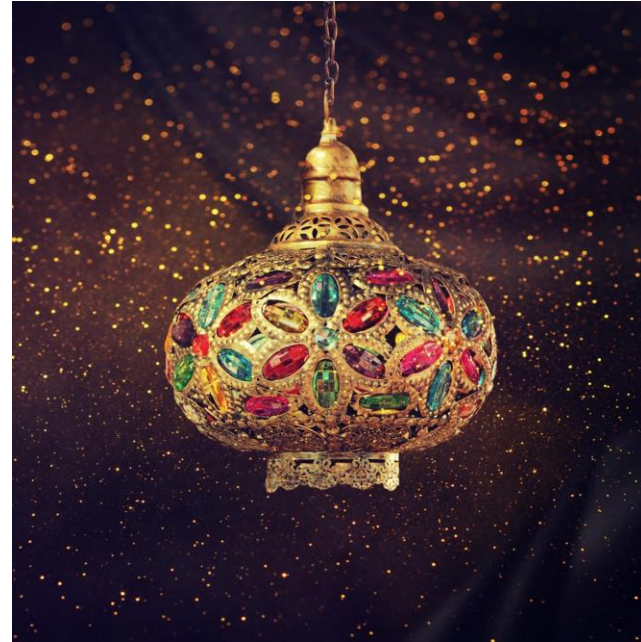
- ❖ Employers owes employees a safe workplace.
- ❖ Employer has personal interest in healthy workforce.
- ❖ Workplace already comes with rules: part of agreement – follow rules.
- ❖ But: workers need protection – power difference.



Civil Rights Act of 1964:

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- Title VII
- Employers with 15 or more employees..
- Cannot “discriminate against, any individual because of his race, color, religion, sex, or national origin...”





Civil Rights Act of 1964 in practice:

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- If an employee has a –
 - Sincere
 - Religious
 - Objection to a workplace rule,
- Need to provide “reasonable accommodation”
- Unless it’s an undue burden.





Civil Rights Act, 1964:

10

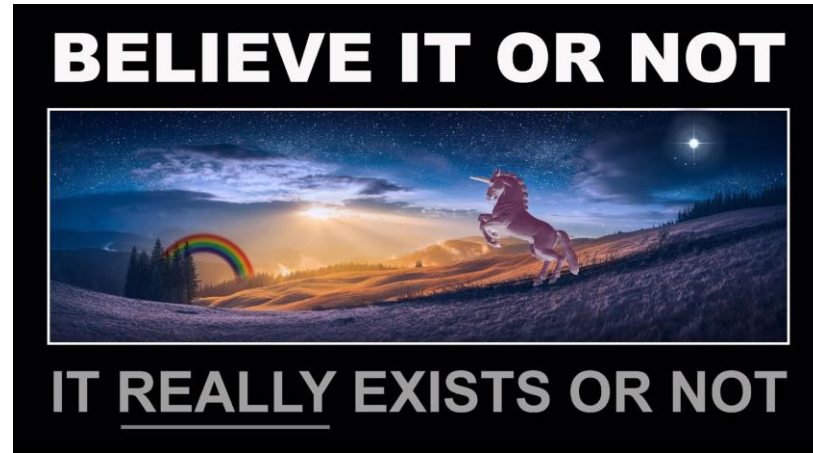
- Sincere religious belief:
 - *Fallon v. Mercy Catholic Center: Three-part test:*
 1. Religion addresses fundamental and ultimate questions.
 2. Religion = comprehensive belief system, not isolated teaching.
 3. Religion is often recognized by formal and external signs.



Avoid pitfalls – you:

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- Cannot require letter from clergy.
- Cannot refuse just because official religion pro-vaccine.
- Should not try to assess rationality.
- Can you reject if also safety arguments?



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Civil Rights Act, 1964:

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- Undue burden?
 - Groff v. Dejoy (2023): Substantial burden.
 - Unclear what that means.

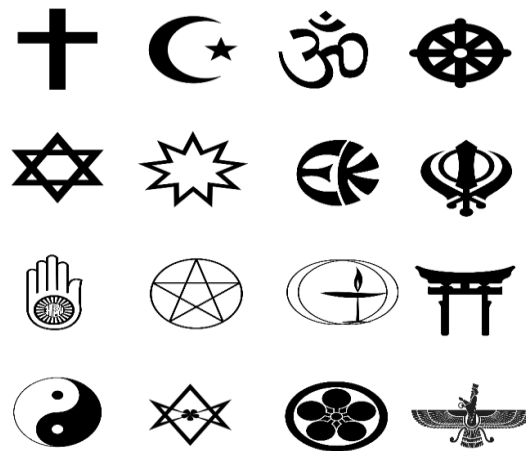




Warning signs:

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- Supreme Court jurisprudence?
- Controversy in lower courts.
- 8th Circuit: allows tricky claims.
- Increasing circuit view: okay to make safety claims and religious claims.
- Can burden religious & secular exemptions similarly.



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American With Disabilities Act

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- Disability?
- Accommodation.
- Undue burden?
- Direct threat?



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Collective bargaining?

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- Is there a union?
- Does collective bargaining agreement require negotiating with union before mandate?



Alpha Stock Images - <http://alphastockimages.com/>

Original Author: Nick Youngson - link to - <http://www.nyphotographic.com/>

Original Image: <http://www.picserver.org/highway-signs2/c/collective-bargaining.html>



FEDERAL MANDATES



September 2021:

17

- Federal workers mandate
- Contractor mandate
- OSHA ETS
 - Also paid leave

**All
stopped
by courts**

CMS rule
stay lifted by
SCOTUS

What's going on?

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Vaccines are caught in a larger battle against the administrative state





School mandates:

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- Still on strong legal grounds.
- Issue: Do they need religious exemptions?
 - Mississippi.
 - But...



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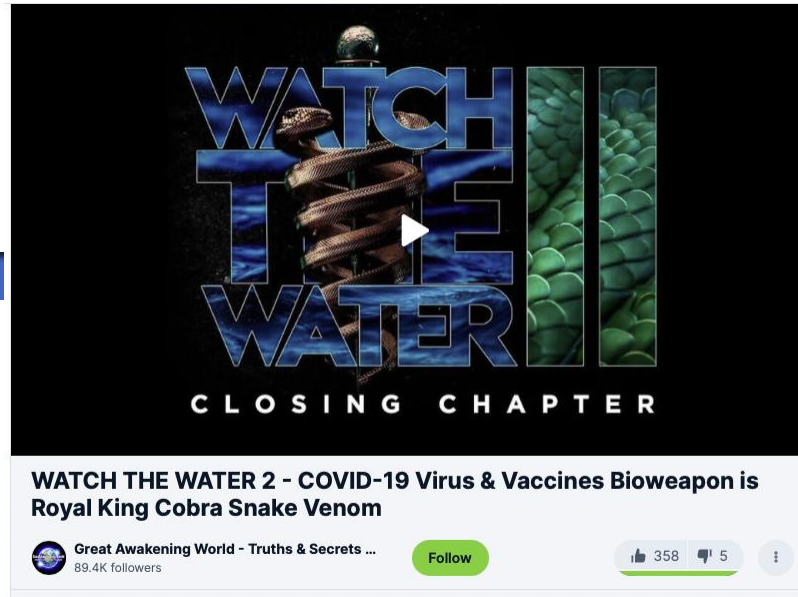
Legislation abounds

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- Multiple states introduced legislation.
- Very little has passed, and that is limited.



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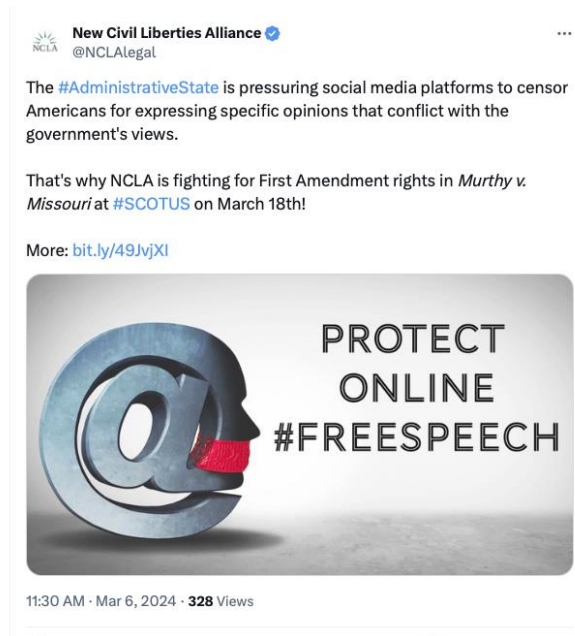


MISINFORMATION AND THE COURTS

Kennedy v. Biden:

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- Murthy v. Missouri:
 - Fifth Circuit
 - Supreme Court.
- What's at stake?





APTER v. DHHS

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- Three doctors prescribing ivermectin challenged FDA statements.
- Fifth Circuit found FDA cannot make recommendations.
- Bad decision.

Case: 22-40802 Document: 65-1 Page: 1 Date Filed: 09/01/2023

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 1, 2023

No. 22-40802

Lyle W. Cayce
Clerk

ROBERT L. APTER; MARY TALLEY BOWDEN; and PAUL E. MARIK,

Plaintiffs—Appellants,

versus

DEPARTMENT OF HEALTH & HUMAN SERVICES; XAVIER
BECERRA, *in his official capacity as Secretary of Health and Human Services*;
FOOD & DRUG ADMINISTRATION; ROBERT M. CALIFF, *in his
official capacity as Commissioner of Food and Drugs,*

Defendants—Appellees.



APTER v. DHHS

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- FDA settled and agreed to remove tweets.
- FDA expressly reserved right to publish other statements.





Judges bring in anti-vaccine claims

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Louisiana v. Becerra

<https://casetext.com/case/state-v-becerra-20>

Additionally, the Plaintiff States provided evidence in the Declaration of Dr. Peter A. McCullough³¹ that the COVID-19 vaccines do not prevent transmission of the disease among the vaccinated or mixed vaccinated/unvaccinated populations, and that mandatory COVID-19 vaccines for hospitals do not increase safety for employees or hospital patients. McCullough declared that additional treatment with other drugs and supplements has resulted in an 85% reduction in hospitalizations and death of high-risk individuals presenting with COVID-19.

Of note, Dr. McCullough declared the Delta variant of SARS-Cov-2 accounts for 98.9% of the present cases in the United States, United Kingdom, and Israel. Dr. McCullough further declared that because of the progressive mutation of the spike protein, the virus has achieved an immune escape from COVID-19 vaccines. He stated the Delta variant is not adequately covered by the vaccines. In other words, even if you are fully vaccinated, you still may become infected

Navy Seal v. Austin

<https://latarea.courtlistener.com/laces/law/accounts filed 005057/>
clusions about “the force” as a whole or aggregated portions of the whole force. The declarations fail, at a minimum, to disaggregate by age, by medical characteristics (for example, BMI, diabetes, high blood pressure, etc.), by assignment, and the like. The declarations evidence mostly historical data from the 2020 and 2021 pre-Omicron, pre-vaccine phase of the pandemic. In sum, the declarations, both bulky and full of numbers, say little or nothing about, for example, the marginal risk, if any, that Navy Commander, who is triumphantly fit and slim and strong, who is robustly healthy, who is young, who has already caught and recovered from COVID-19 with only trivial symptoms, who has commanded the same destroyer “underway” on a 300-day mission with a 320-sailor crew, and who has designed and implemented successfully an anti-COVID protocol customized to the needs of his vessel cannot serve — consistent with his sincerely held religious beliefs — without vaccination as a reasonable accommodation that both preserves the compelling governmental interest and reasonably accommodates the free exercise of religion. That is the question, as to Navy Commander, the defendants scrupulously avoid. But that is the question that RFRA burdens the defendants to answer. They have not.



Thank you!

Questions? Comments?

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