No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DR. DAVID LUXTON,
Applicant,

v.

WASHINGTON STATE DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Application for Extension of Time to File a Petition for
Writ of Certiorari to the Hon. Elena Kagan, Circuit Justice for the
U.S. Court of Appeals for the Ninth Circuit.

APPELLANT'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

DENNIS MCGLOTHIN
COUNSEL FOR APPLICANT
WESTERN WASHINGTON LAW GROUP, PLLC
10485 Northeast Sixth Street, #2620
Bellevue, WA 98004
Telephone: (425) 728-7296
Email: docs@westwalaw.com

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Supreme Court Rule 13.5 and 28 U.S.C. § 2101(c), Applicant Dr. David Luxton requests a 60-day extension of time to file a petition for a writ of certiorari which, given the New Year's Day holiday and ensuing weekend, would permit him to file a petition on or before January 4, 2027. Applicant's petition, when filed, is expected to request the Court grant certiorari and issue a writ of certiorari reversing the court of appeals' June 25, 2026, judgment; August 4, 2026, order denying rehearing en banc; September 21, 2026, order denying motion to recall mandate; and any order denying his still pending motion for reconsideration of the order denying his motion to recall mandate in *Luxton v. Washington State Department of Veterans Affairs*, Case No. 25-3542. *See* Memorandum disposition (ECF No. 44.1) (Appendix A) and Order Denying Petition for Rehearing (ECF No. 46.1) (Appendix B).

Without an extension of time, a petition for writ of certiorari would be due, at the earliest, on Monday, November 2, 2026. Sup. Ct. R. 13.3 (within 90 days of the date the Order Denying Petition for Rehearing was entered). This Application is filed at least 10 days before that date and is timely under Sup. Ct. R. 13(5). Applicant has not previously sought an extension.

The extension of time is sought for a petition that would seek this Court to review a judgment of a circuit court of appeals that was entered on June 25, 2026 (ECF No. 44), based upon the analysis in the unpublished Memorandum disposition of even date. *Luxton v. Washington State Department of Veterans Affairs*, No. 25-3542, 2026 WL 1832333 (9th Cir. June 25, 2026) (Appendix A) ("Memorandum"). The Memorandum affirmed the district court's granting summary judgment in favor of the State of Washington ("State"), which terminated

Applicant's public employment because his sincerely held religious beliefs conflicted with his ability to comply with a newly imposed condition to his continued employment that required him to be injected with the primary series of one of three approved COVID-19 vaccines ("Vaccine Condition"). The decision was not unanimous; rather, one sitting judge dissented in part and would have reversed summary judgment and remanded the case to the district court to determine two issues. Both issues were subsequently decided in Applicant's favor by two different unanimous Ninth Circuit opinions that were published within three weeks of each other and after Applicant filed his Petition for Rehearing and on the same day he filed his Motion to Recall Mandate. See *Cherry v. Washington Dep't of Fish & Wildlife*, 188 F.4th 1170 (9th Cir. August 21, 2026); and *Lewis-Williams v. San Francisco Bay Area Rapid Transit Dist.*, No. 25-618, ___ F.4th ___ (9th Cir. Sept. 11, 2026).

Applicant timely petitioned the court of appeals for reconsideration en banc, but his petition was denied on August 4, 2026 (Appendix B). The circuit court issued its mandate on August 12, 2026.

Nine days after the court of appeals issued its mandate, a different panel of the same circuit court published an opinion that rejected what it deemed to be the State's "attempt to loosen [Title VII's] reasonable-accommodation standard," and it reversed the same district court judge's identical reasonable accommodation decision that he made in this case when he granted the State's summary judgment motion. See *Cherry*, 188 F.4th at 1179-84. *Cherry* also concluded that the State's "[a]ssertions of undue hardship are not enough" even if the undisputed evidence demonstrated that COVID-19 vaccination was the "single best tool" for stemming COVID-19's spread. *Shirley v. Washington State Dep't of Fish & Wildlife,* No. 3:23-cv-05077-DGE, 2025 WL 1374977, at *14 (W.D. Wash. May 9, 2025). Applicant moved with haste and three week after

Cherry was published, he moved to recall the mandate in this case. His motion to recall mandate was denied, however, on September 24, 2026. Absent him filing a motion to reconsider the order denying his motion to recall mandate, Applicant may timely petition this Court for a writ of certiorari regarding the order denying his motion to recall mandate by December 23, 2026. Sup Ct. R. 13.3.

Applicant, however, filed a motion timely for the panel and the en banc court of appeals to reconsider the order denying his motion to recall mandate. On October 5, 2026, Applicant filed his motion (ECF No. 51). His motion has not been denied and is still pending. If his motion for reconsideration is denied, then pursuant to Rule 13.3, Applicant will have 90 days from the date his motion for reconsideration is denied to petition this Court for a writ of certiorari regarding the orders denying his request to recall the mandate, which would be after the 60-day extension requested in this Application expires. Because the arguments that would justify a writ of certiorari regarding the court of appeals' judgment and orders denying Applicant's request to recall the mandate are inextricably intertwined, they should be joined and presented in a single petition to promote judicial efficiency.

There is a valid justification for Applicant seeking the extraordinary relief of reconsideration of the order denying his motion to recall mandate. Coincidentally, the court of appeals published yet another opinion that conflicts with the Memorandum that resulted in the court of appeals' judgment. On the same day Applicant filed his motion to recall mandate, the circuit court of appeals judge who wrote the dissent in this case wrote the unanimous published opinion in *Lewis-Williams v. San Francisco Bay Area Rapid Transit Dist.*, No. 25-618, ___ F.4th ___ (9th Cir. Sept. 11, 2026), in which the other two judges on that panel concurred. *Lewis-Williams* directly conflicts with the Memorandum that resulted in the judgment for which

Applicant seeks an extension of time to file a petition for writ of certiorari because it directly addresses when a district court is permitted to grant an employer a judgment as a matter of law based on the employer's undue hardship affirmative defense in cases where employees have sincere religious beliefs that conflict with their ability to comply with a Vaccine Condition when the unrefuted medical evidence demonstrates that COVID-19 vaccination was the best way to stem COVID-19's spread. In *Lewis-Williams*, the court of appeals upheld a jury verdict and affirmed a district court decision that denied the employer's Fed.R.Civ.P. 50(a) motion for a judgment as a matter of law and 50(b) motion for judgment notwithstanding the verdict in a case where the employer discharged six of its former employees because their sincerely held religious beliefs conflicted with their ability to comply with a Vaccine Condition. __ F.4th at ___, No. 25-618, at *7 (9th Cir. Sept. 11, 2026).

In doing so, it distinguished that case from both *Petersen v. Snohomish Reg'l Fire & Rescue*, 150 F.4th 1211, 1213 (9th Cir. 2025), cert. denied sub nom. *Petersen v. Snohomish Reg'l Fire*, --- S.Ct. ----, No. 25-1210, (U.S. Oct. 5, 2026), which affirmed summary judgment in favor of the employer when the employees were first responder firefighters and *Williams v. Legacy Health*, 174 F.4th 1201, 1203 (9th Cir. 2026), which affirmed summary judgment in favor of the employer when the employees were front line healthcare providers. The court factually distinguished the workers in *Lewis-Williams* because their positions "did not require them to be in close, frequent contact with the public or most coworkers." *Lewis Williams*, at ___, No. 25-618, at *6. It expressly limited the holdings in *Petersen* and *Williams* that affirmed judgments as a matter of law in favor of employers asserting an undue hardship affirmative defense to employment contexts "where the excessiveness of the burden imposed 'is so obvious that reasonable minds could not differ…' " *Id*., at *7. Unlike *Cherry*, the issue squarely addressed in

Lewis-Williams was the employment context which permits a district court to grant an employer asserting an undue hardship affirmative defense a judgment as a matter of law when the unrefuted medical evidence demonstrates that COVID-19 vaccination was the best way to stem COVID-19's spread, which is the identical issue decided by the majority in the Memorandum.

Here, Applicant asserted "he could have performed [his job] completely via telework" and his written position description states his position is "up to 100% telework …" *Memorandum* at *1. Yet, the Memorandum concluded that his assertions that he made under oath and his written position description did "not create a genuine dispute of fact." The judge who wrote the unanimous published opinion in *Lewis-Williams* disagreed with the majority's Memorandum and concluded: "On this record, [the State] did not demonstrate that its hardship would be unjustifiable as it argues that any increase in infection risk was sufficient to satisfy *Groff.* Such a general proposition does not meet the *Groff* legal standard. *Id*. at *2.

Further supporting this Application for Extension of Time, the employers in both *Cherry* and *Lewis-Williams* have filed petitions for rehearing that remain pending. The *Lewis-Williams* employer filed a petition for reconsideration en banc on September 23, 2026, and the circuit court of appeals entered an order on October 1, 2026, requiring the six former employees to file a written response to the petition, which they did on October 21 and 22, 2026 (ECF Nos. 78 and 79). While not an omen that the employer's petition will be granted, the order requiring a response demonstrates that at least one sitting judge voted to have the six former employees file a written response. That, alone, makes it more likely that en banc reconsideration will be granted because the employer's petition is being seriously considered. Second, the State filed a petition for rehearing in *Cherry* on October 5, 2026. The court of appeals has not entered an order on the State's petition.

Based on the holding in *Lewis-Williams*, Applicant filed a motion to reconsider the order denying his motion to recall mandate on October 8, 2026, both from the panel and the en banc court (ECF No. 51). No order has been entered on Applicant's motion for reconsideration.

The district court's order granting summary judgment to the State is reported at 2025 WL 896658 (W.D. Wash. Mar. 24, 2025). Applicant timely moved the district court to reconsider its decision, but his motion was denied, and the order denying reconsideration is reported at 2025 WL 2080575 (W.D. Wash. May 20, 2025).

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367(a) and 42 U.S.C. § 2000-e5(f)(3). The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction over this case, including the court of appeals' decisions regarding recall of the mandate pursuant to 28 U.S.C. § 1254(1); and *Calderon v. Thompson,* 521 U.S. 1136, 118 S. Ct. 14, 138 L. Ed. 2d 1037, amended, 521 U.S. 1140, 118 S. Ct. 16, 138 L. Ed. 2d 1048 (1997)

If filed, Applicant's petition for review is expected to argue that the opinions in both *Cherry* is the correct reasonable accommodation decision based on *Ansonia v. Philbrook*, 479 U.S. 60, 107 S. Ct. 367, 93 L.Ed.2d 305 (1986) and *Lewis-Williams* is the correct undue hardship decision based on *Groff v. DeJoy*, 600 U.S. 447 (2023). This case is the perfect vehicle for this Court to decide both issues because the district court decided the reasonable accommodation issue contrary to *Cherry* and the undue hardship issue contrary to *Lewis-Williams*. These two issues, especially in Vaccine Condition cases, are inconsistent amongst the circuits and, as shown, in some cases within a circuit. . *See, Mason v. Cook Cnty., Illinois*, ___ F.th ___ No. 25-2743, at *3 (7th Cir. Sept. 28, 2026) (summary judgment); and *Bullock v. District of Columbia,* No. CV 25-2167 (JEB), 2026 WL 2905735, at *11 (D.D.C. Sept. 28, 2026) (motion to dismiss).

The request to extend time to file a petition for writ of certiorari, while expressly disfavored by Rule 13.5, should be granted in this case if extensions of time are to be granted at all because of the extraordinary timing involved. The court of appeals published two separate opinions within three weeks of each other, and each published opinion squarely addresses one of the two alternate bases upon which the district court granted the State's summary judgment motion in this case. As if that is not extraordinarily coincidental and unique enough, the first opinion was published only 9 days after the mandate was issued and the second one was published on the day Applicant filed his motion to recall the mandate. Applicant, therefore, could not cite *Cherry* in his petition for rehearing and did not cite *Lewis-Williams* in his motion to recall mandate. Granting this Application would also permit the court of appeals to determine whether it should recall its mandate, vacate the Memorandum and the resulting judgment, and reconsider them in light of **both** *Cherry* and *Lewis-Williams* now that both cases have been properly cited and drawn to the circuit court of appeals' attention. Additionally, if the court of appeals grants reconsideration, it might render the need for Applicant to file a petition for writ of certiorari in this Court moot or, at the very least, it would start anew the 90-day period for him to file his petition. Sup. Ct. R. 13.3; and *FTC v. Minneapolis-Honeywell Regulator Co*., 344 U.S. 206, 211–12 (1952). Finally, granting this Application will also permit this Court to consider both the Memorandum and resulting court of appeals' judgment as well as the order(s) denying Applicant's motion to recall mandate in a single petition. All these reasons promote judicial efficiency.

Granting this Application will not unduly prejudice the State. The State terminated Applicant's employment on October 18, 2021. There is no current injunction or other ongoing relief that has been ordered that depends on this Court determining whether to grant a petition for

writ of certiorari. Finally, a 60-day extension will not unduly delay further proceedings if the Court were to grant Applicant's petition.

Wherefore, Applicant respectfully requests the Court grant this Application and extend the time for him to file a petition for writ of certiorari for 60 days, thereby requiring him to file his petition, if necessary, on or prior to January 4, 2027 due to the New Year's Day holiday and ensuing weekend.

DATED this 23rd day of October 2026.

/s/ *Dennis McGlothin*
Dennis McGlothin
Counsel for Applicant
WESTERN WASHINGTON LAW GROUP, PLLC
10485 Northeast Sixth Street, #2620
Bellevue, WA 98004
(425) 728-7296
Email: docs@westwalaw.com

APPENDIX

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NOT FOR PUBLICATION

FILED

JUN 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID LUXTON, Dr., Plaintiff - Appellant, v. WASHINGTON STATE DEPARTMENT OF VETERANS AFFAIRS, Defendant - Appellee.	No. 25-3542 D.C. No. 3:23-cv-05238-DGE MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
David G. Estudillo, District Judge, Presiding

Argued and Submitted May 22, 2026
Seattle, Washington

Before: HAWKINS, CLIFTON, and R. NELSON, Circuit Judges;
Partial Concurrence and Partial Dissent by Judge R. Nelson.

Appellant Dr. David Luxton's brief tenure as the Director of Counseling & Wellness Programs for the Washington State Department of Veterans Affairs ("WDVA") came to an end when he declined to be vaccinated against COVID-19 due to his religious beliefs and the WDVA determined that it could not

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

accommodate his religious exemption from its vaccine mandate without undue hardship. Dr. Luxton seeks review of the district court's order granting summary judgment in favor of the WDVA on his Title VII failure-to-accommodate claim, 42 U.S.C. § 2000e(j). We review de novo the district court's decision to grant summary judgment. *See Ets-Hokin v. Skyy Spirits, Inc.,* 225 F.3d 1068, 1073 (9th Cir. 2000). We affirm.

1. The district court correctly determined that accommodating Dr. Luxton's exemption from the vaccine mandate would have imposed an undue hardship on the WDVA, because his position required in-person contact with healthcare providers and permitting him to perform that role unvaccinated would expose the providers and their patients to a substantial health and safety risk. Title VII's antidiscrimination mandate requires an employer "to reasonably accommodate" an employee's "religious observance or practice" unless doing so would cause the employer "undue hardship." § 2000e(j). The undue hardship standard "takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating cost of [an] employer." *Groff v. DeJoy*, 600 U.S. 447, 470–71 (2023) (alteration in original). "Health and safety costs" can create an undue hardship in the context of COVID-19 vaccination exemptions. *Petersen v. Snohomish Reg'l Fire & Rescue*, 150 F.4th 1211, 1218 (9th Cir. 2025).

Dr. Luxton asserts that he could have performed the role of Director of Counseling & Wellness Programs completely via telework, but the undisputed evidence shows that he had duties which required him to appear in person. The job description which Dr. Luxton signed upon accepting the position specified that he was responsible for "clinical oversight of 40 plus contract therapists and their subcontractors," and that "[s]ite visits are the primary way in which the performance of the individual clinical contractor is assessed." The "[a]bility to travel throughout the State" was listed as a condition of his employment, as "travel is a frequent part of the management of contracts to providers located in remote areas of the State." Dr. Luxton counters by pointing to a line in the job description which states that the position is "*up to* 100% telework authorized based on WDVA mission requirements." But this caveated statement does not create a genuine dispute of fact as to his job's in-person requirements.

Nor is it disputed that allowing Dr. Luxton to perform his essential in-person functions while unvaccinated would increase the risk of illness or even death faced by other WDVA employees and vulnerable veteran populations. In the context of COVID-19, we have recognized that unvaccinated healthcare employees who work in "close contact with either patients or staff" can pose a "realistic" and "substantial" threat to the employer's operations by heightening the risk of (1) transmission to patients and other staff, and (2) staff shortages due to illness.

Williams v. Legacy Health, 174 F.4th 1201, 1204, 1206–07 (9th Cir. 2026); *see also Petersen*, 150 F.4th at 1220 (holding that "objective, unrebutted medical evidence" showed that unvaccinated firefighters would create "significant health and safety costs" and put at risk the fire department's "own workforce and persons in the public needing emergency, even life-saving, services").

The WDVA submitted an expert report from Dr. John Lynch, in which he opined that vaccination against COVID-19 lowers an individual's risk of infection and transmission and is more effective than alternative measures such as personal protective equipment or social distancing. The record also included a declaration from WDVA Director David Puente Jr., stating that 35 veterans in WDVA facilities died after contracting COVID during the pre-vaccine period when the department was relying instead on masking, testing, and distancing. Dr. Luxton's expert, Dr. Risch, did not contest these points.

Given that Dr. Luxton's job duties would bring him into contact with WDVA healthcare providers and the unrebutted medical evidence shows that this would create a substantial health risk to employees and patients, the undisputed evidence shows that the WDVA would face undue hardship by accommodating Dr. Luxton's request to remain in his role unvaccinated. As this undue hardship determination is sufficient grounds for us to affirm the district court's grant of summary judgment on Dr. Luxton's Title VII claim, we need not reach the

independent question of whether he adequately pursued the WDVA's offer of reassignment.

2. Dr. Luxton also argues that the district court abused its discretion in several respects: by entering a protective order to prevent him from taking a 30(b)(6) deposition of the State; denying his request to amend his complaint; and declining to exercise supplemental jurisdiction over his state law claims. None of these objections have merit.

First, Dr. Luxton failed to challenge the entry of the protective order in a motion to the district court. He had been explicitly instructed by the district court to do so if he wanted to challenge the protective order entered through the court's informal discovery dispute resolution process. His objection is therefore waived on appeal. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007) (holding that a party generally waives an argument by failing to raise it to the district court). Similarly, Dr. Luxton's request for leave to amend his complaint came too late and in an improper form, raised for the first time in his summary judgment briefing rather than in a timely motion. "A need to reopen discovery and therefore delay the proceedings" supports a district court's denial of leave to amend based on prejudice. *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). The district court was justified in concluding that granting Dr. Luxton's request would prejudice the defendants. Finally, the

district court acted within its discretion by choosing not to retain jurisdiction over the remaining state-law claims after it had properly dismissed all of Dr. Luxton's federal claims. *See* 28 U.S.C. § 1367(c)(3).

AFFIRMED.

FILED

JUN 25 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Luxton v. Washington State Department of Veterans Affairs, No. 25-3542

R. NELSON, J., concurring in part and dissenting in part:

Though I am largely in accord with the majority's disposition, I reach a different conclusion on the undue hardship analysis. To successfully demonstrate an undue hardship affirmative defense, the Washington State Department of Veterans Affairs (WDVA) needed to show that in the context of its business, its hardship would be "excessive" or "unjustifiable." *Groff v. DeJoy*, 600 U.S. 447, 469 (2023). On this record, WDVA did not demonstrate that its hardship would be unjustifiable as it argues that any increase in infection risk was sufficient to satisfy *Groff*. Such a general proposition does not meet the *Groff* legal standard.

Still Title VII allows WDVA to assert an affirmative defense either if WDVA faced an undue hardship or if it initiated good faith efforts to accommodate the employee. *Bolden-Hardge v. Office of California State Controller*, 63 F.4th 1215, 1224 (9th Cir. 2023). WDVA offered Dr. Luxton a reassignment process; the undisputed facts are unclear whether he engaged in that process. *Am. Postal Workers Union v. U.S. Postal Serv.*, 781 F.2d 772, 777 (9th Cir. 1986). Accordingly, I would remand to the district court to determine whether WDVA attempted to reasonably accommodate Dr. Luxton.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 4 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DAVID LUXTON, Dr.,

Plaintiff - Appellant,

v.

WASHINGTON STATE DEPARTMENT OF VETERANS AFFAIRS,

Defendant - Appellee.

No. 25-3542

D.C. No.
3:23-cv-05238-DGE
Western District of Washington,
Tacoma

ORDER

Before: HAWKINS, CLIFTON, and R. NELSON, Circuit Judges.

Judge Nelson votes to deny the petition for rehearing en banc, and Judge Hawkins and Judge Clifton so recommend. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 40. The petition for rehearing en banc (Docket Entry No. 45) is therefore DENIED.

Appellant's request for judicial notice made in the petition is also DENIED.