No. 21A90

IN THE SUPREME COURT OF THE UNITED STATES

JANE DOES 1–6, JOHN DOES 1–3, JACK DOES 1–1000, JOAN DOES 1–1000,

Applicants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine, JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, NIRAV D. SHAH, in his official capacity as Director for the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC, NORTHERN LIGHT HEALTH FOUNDATION, MAINEGENERAL HEALTH,

Respondents.

To The Honorable Stephen G. Breyer,
Associate Justice of the United States Supreme Court
and Circuit Justice for the First Circuit

APPLICANTS' REPLY IN SUPPORT OF WRIT OF INJUNCTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Maine's categorical ban on *any* accommodations for religious healthcare workers is an extreme outlier nationwide. Forty-seven other states have rejected this approach for private healthcare facilities, and just two days ago, the EEOC issued detailed guidance confirming that it directly violates federal law. Maine is also extremely selective about which healthcare workers it will force to get vaccinated. At the same time it axed its decades-old religious exemption, it kept an extremely broad medical exemption; at the same time it foreclosed *any* accommodation for religious healthcare workers in hospitals, it chose not to impose *any* mandate on healthcare workers in urgent care centers or private physician's offices. Maine's selective mandate is therefore the antithesis of a neutral, generally applicable law that imposes only "incidental" burdens on religious objectors. And Maine cannot carry its burden under strict scrutiny, because its selective mandate is too porous to justify imposing such a stark and unnecessarily punitive departure from the approach of virtually every other state.

The State Employers' (Respondents') opposition brief does not quarrel with the underlying facts. Instead, it openly admits that Maine revoked the religious exemption in order to increase vaccination rates. (State Opp'n 21 (revoking exemption to "reverse the trend of falling vaccination rates").) Worse, the brief openly admits that Maine thinks religious objections are merely something a believer "chooses," while medical concerns—no matter how minor—render people "unable" to take the vaccine. (*Id.*) As Maine sees it, religious people really "can" take the vaccine but just "choose[]" not to, while medical objectors, for any reason no matter how small, are

"unable" and would be "actually harmed" if required to do so. (*Id.* at 21–22.) Maine likewise assumes that all medical exemptions, no matter how trivial, must be preserved to "ensur[e] healthcare workers remain healthy and able to provide care to patients." (*Id.* at 21.) But it ignores the consequences that religious healthcare workers will no longer be "able to provide care to patients" when they are fired or forced off-site. (*Id.*)

Maine insists this is not a "value judgment," but of course it is. It is precisely the value judgment in favor of secular motivations the Free Exercise Clause prohibits and this Court has previously rejected in many other cases. And Maine has not come close to carrying its heavy burden of justifying that value judgment in court. Since Maine has found a way to accommodate *all* medical objections to the vaccine, it must extend those accommodations to sincere religious objectors like Plaintiffs (Applicants). It cannot be that *only* those with religious objections must be kicked out of their livelihoods, while other unvaccinated employees are welcome to stay on-site. And Maine's patchwork mandate excludes many other healthcare locations entirely—including urgent care centers and private physician offices—and Maine has not justified its exclusion.[1]

Again, Maine is doing all of this in a way that makes it an extreme outlier compared to the rest of the country. Almost every other state has found a way to protect against the same virus without trampling religious liberty—including states

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[1] Maine's response, that its mandate "applies equally to all covered entities" (State Opp'n 19) is circular—of course the law applies to all entities the law applies to. The question is whether the law applies *generally*, and why Maine excludes other healthcare settings entirely.

that have smaller populations and much greater territory than Maine. If Vermont, New Hampshire, Alaska, the Dakotas, Montana, Wyoming, California, and the District of Columbia can all find ways to both protect against COVID-19 and respect individual liberty, Maine can too. And at least on this record, Maine certainly has not shown why it needs a more draconian approach.

Lastly, on Monday the EEOC reaffirmed guidance that Title VII requires an employer to "thoroughly consider all possible reasonable accommodations" for religious objectors to COVID-19 vaccinations, and that "[i]n *many* circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs." *See* EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, at K.12, L.3, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (updated Oct. 25, 2021) (emphasis added). That directly contradicts Maine's complete ban on *any* religious accommodation for healthcare workers in certain facilities. Indeed, as the EEOC Chair said in announcing the technical guidance, "Title VII *requires* employers to accommodate employees' sincerely held religious beliefs . . . ." *See* EEOC, *EEOC Issues Updated COVID-19 Technical Assistance* (Oct. 25, 2021), https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-0. The EEOC's guidance thus confirms that Maine's approach—which bars employers from considering any accommodation other than relegating the employee to remote work or termination—violates federal law.

COVID has presented enormous challenges for everyone concerned with this application—for healthcare workers, for government authorities, and for courts. Plaintiffs do not ask the Court to fully resolve all those challenges at this preliminary stage. But Plaintiffs respectfully ask this Court to preserve the status quo, because Maine should not be permitted to enforce the Vaccine Mandate without first meeting the heavy burdens the law rightfully imposes before allowing this kind of restriction on religious exercise.

ARGUMENT

I. STATE DEFENDANTS' INDIFFERNCE TO JOHN DOE 1'S FIRST AMENDMENT CLAIMS DEMONSTRATES THEIR ESPECIALLY HARSH AND DISCRIMINATORY TREATMENT OF HIS RELIGIOUS EXERCISE.

State Defendants contend that John Doe 1's First Amendment challenge is meritless because the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, does not apply against the States. (State Opp'n 32.) As they know, however, John Doe 1 did not raise a RFRA claim, but challenged the State's COVID-19 vaccine mandate on First Amendment grounds. (V. Compl. ¶¶ 122–139.) The First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). And "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

In *Tandon v. Newsom*, this Court held that the government triggers strict scrutiny under the First Amendment "whenever it treats *any* comparable activity

more favorably than religious exercise." 141 S. Ct. 1294, 1296 (2021). Here, "the regulations cannot be viewed as neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *see also South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (Gorsuch, J.) ("When a State so obviously targets religion for differential treatment, our job becomes that much clearer."). True enough, John Doe 1 referenced this Court's RFRA decision in *Hobby Lobby Stores, Inc. v. Burwell*, 573 U.S. 682 (2014), but the RFRA analysis is functionally identical to the Free Exercise strict scrutiny analysis applicable where—as here—the government singles out religious practice for especially harsh treatment. *Compare Tandon*, 141 S. Ct. at 1296 (requiring application of First Amendment strict scrutiny for laws that single out religious practice for discriminatory treatment), *with Hobby Lobby*, 573 U.S. at 726 (requiring RFRA's strict scrutiny analysis). By permitting some, nonreligious exemptions to the Vaccine Mandate while excluding religious exemptions, State Defendants specifically burden Plaintiffs' First Amendment rights and must satisfy strict scrutiny, which they cannot do.

II. STATE DEFENDANTS' PURPORTED RATIONALE FOR THE VACCINE MANDATE DEMONSTRATES THAT IT SINGLES OUT RELIGIOUS OBJECTORS FOR ESPECIALLY HARSH TREATMENT.

State Defendants contend that the Delta variant is simply too risky to permit any religious exemption or accommodation from the Vaccine Mandate, despite the availability of nonreligious exemptions. (State Opp'n 7–9, 29–30.) But, regardless of State Defendants' purported justifications for granting medical exemptions and rejecting all religious exemptions, it is beyond cavil that those who are exempt for

medical reasons pose the exact same risks to patients and to potential "outbreaks" as anyone exempted for religious reasons. The virus (whether the Delta variant, the original strain, or some future unknown strain) does not know (or care about) the reason why any individual remains unvaccinated. As this Court recognized in *Tandon*, "comparability is concerned with risks various activities pose**,** not the reasons for which they are undertaken." 141 S. Ct. at 1297; *see also Dr. A v. Hochul*, No. 1:21-CV-1009, 2021 WL 4734404, *8 (N.D.N.Y. Oct. 12, 2021) ("[A]s plaintiffs point out, the medical exemption that remains in the current iteration of the State's vaccine mandate expressly accepts this 'unacceptable' risk for a non-zero segment of healthcare workers.").

The First Amendment prohibits State Defendants' discriminatory acceptance of the risk of patient contact with the medically unvaccinated while prohibiting the same risk of contact with the religiously unvaccinated. As the Sixth Circuit reasoned in *Dahl v. Bd. of Trustees of W. Michigan Univ.*,

> the University falters on the narrow tailoring prong. For one, public health measures are not narrowly tailored if they allow similar conduct that creates a more serious health risk. That is the case at the University, which allows non-athletes—the vast majority of its students—to remain unvaccinated. One need not be a public health expert to recognize that the likelihood that a student-athlete contracts COVID-19 from an unvaccinated non-athlete with whom she lives, studies, works, exercises, socializes, or dines may well meet or exceed that of the athlete contracting the virus from a plaintiff who obtains a religious exemption to participate in team activities. For another, narrow tailoring is unlikely if the University's conduct is more severe than that of other institutions. To that point, several other universities grant exemptions from their COVID-19 mandates.

No. 21-2945, 2021 WL 4618519, at *5 (6th Cir. Oct. 7, 2021) (cleaned up). Thus, given the identical risks purportedly posed by the unvaccinated,

> the University's failure to grant religious exemptions to plaintiffs burdened their free exercise rights. The University put plaintiffs to the choice: get vaccinated or stop fully participating in intercollegiate sports. . . . By conditioning the privilege of playing sports on plaintiffs' willingness to abandon their sincere religious beliefs, the University burdened their free exercise rights.

Id. at *3.

III. STATE DEFENDANTS HAVE IMPERMISSIBLY MADE A VALUE JUDGMENT THAT RELIGIOUS OBJECTORS ARE NOT HARMED BY HAVING THEIR SINCERELY HELD RELIGIOUS OBJECTIONS IGNORED.

State Defendants contend that they did not make a value judgment by elevating medical exemptions over religious exemptions, but that allowing medical exemptions advances the State's health policy. (State Opp'n 24–26.) This is a patently circular argument—it is the State's discriminatory policy that Plaintiffs challenge. To be sure, the State's impermissible value judgment is evident in its proffered justification for allowing medical exemptions: "Maine includes a medical exemption to its vaccination requirements because there are certain circumstances when vaccination may cause adverse health consequences, thereby actually harming that individual." (State Opp'n 21.) In other words, Maine thinks forcing vaccination that *may* cause an adverse health consequence is *actual harm*, while forcing vaccination that *will* violate religious conscience is *not actual harm*. And Maine's vaccination statute preserving medical exemptions after removing religious exemptions reflects an even more severe value judgment—a medical exemption is allowed where forcing

vaccination "may" be merely "inadvisable." Me. Rev. Stat. Title 22, § 802.4-B.A. The removal of religious exemptions from the statute indicates Maine views forcing vaccination against conscience to be less harmful than "may[be] inadvisable."

Semantics aside, Maine's value judgment is precisely the kind of non-neutral value judgment that Justice (then Judge) Alito held to trigger strict scrutiny under the First Amendment:

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999). There is no question that forcing religious adherents to violate their sincerely held beliefs inflicts spiritual harm, which under the First Amendment is *actual harm*. As this Court has held time and again, Plaintiffs "are irreparably harmed by the loss of free exercise rights for even minimal periods of time." *Tandon*, 141 S. Ct. at 1297. Indeed, "[t]here can be no question that the challenged [mandate], if enforced, will cause irreparable harm." *Roman Catholic Diocese*, 141 S. Ct. at 67. State Defendants' non-neutral value judgment that medical harm is worse than spiritual harm triggers (and fails) strict scrutiny under the First Amendment.

IV. STATE DEFENDANTS FAIL TO CARRY THEIR BURDEN UNDER STRICT SCRUTINY.

The upshot of Maine's proffered justification for enacting more restrictive policies than 47 other states is that "[t]he size of Maine's workforce is limited as compared to other States." (State Opp'n 31.) But Maine cannot simply say so. As Plaintiffs explain in their Application, it is State Defendants' burden to demonstrate why COVID-19 justifies peculiarly restrictive policies in Maine. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). (Application 29–32.) And Maine must carry its burden with proof—merely saying so is not enough. *See McCullen v. Coakley*, 573 U.S. 464, 496 (2014). Maine fails to carry its burden.

State Defendants provide no facts, figures, or other evidence to back up their claim that Maine's healthcare workforce is too small for any policy less restrictive than universal vaccination with no religious accommodation. They do not explain how, for example, Maine's healthcare workforce and COVID-19 risks are different from Vermont's, New Hampshire's, Alaska's, or South Dakota's—or any other state's—where COVID-19 is present but religious accommodations are still available. With nothing more than unsubstantiated rationalizations, State Defendants fail strict scrutiny.

V. *JACOBSON* IS INAPPOSITE BECAUSE IT DID NOT INVOLVE A FIRST AMENDMENT CHALLENGE, DID NOT INVOLVE A STATE'S ATTEMPTING TO REVOKE PROTECTIONS OF FEDERAL LAW IN VIOLATION OF THE SUPREMACY CLAUSE, AND WAS DECIDED DECADES BEFORE STRICT SCRUTINY BECAME THE GOVERNING STANDARD.

State Defendants also contend that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), provides broad latitude for the State to mandate vaccination. (State Opp'n 26, 36.) But Plaintiffs here do not challenge vaccine mandates in general or even the Governor's authority to issue them. This case is about whether—when a mandate has been issued—the government must still follow federal protections for sincerely held religious beliefs. *Jacobson* has nothing to say on this issue.

Indeed, *Jacobson* has questionable value in any modern case. It can hardly be argued that a 1905 case with minimal progeny and a century of substantial jurisprudential developments since its holding remains the lodestar for current times. Moreover, *Jacobson* did not involve a First Amendment challenge, which in 2021 requires a specific analysis. *Jacobson* was decided twenty years before the First Amendment even applied to the States, and decades before the Supreme Court developed the current tiers of scrutiny in constitutional analysis. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding, under doctrine of incorporation, that Free Speech Clause applicable as against the States); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (applying "exacting judicial scrutiny" in First Amendment case); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating Free Exercise Clause); *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 16 (1947) (incorporating Establishment Clause); *Sweezy v. New Hampshire*, 354 U.S. 234, 65

(1957) (Frankfurter, J., concurring) (considering "compelling interest"); *Sherbert v. Verner*, 374 U.S. 398 (1963) (applying strict scrutiny).

Thus, this Court squarely rejected *Jacobson* as a justification for the government's deprivation of constitutional rights during *this* pandemic. As Justice Gorsuch pointed out in *Roman Catholic Diocese*, "*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis [and] an entirely different right." 141 S. Ct. at 70 (Gorsuch, J., concurring). To be sure,

> *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

Id. Furthermore, "[e]ven if judges may impose emergency restrictions on rights that some have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise." *Id.* at 70–71.

The Governor's Vaccine Mandate purports to repeal the First Amendment's and Title VII's textual protections of religious liberty for healthcare workers in Maine, and then "regulates [and] prohibits conduct because it is undertaken for religious reasons," *Lukumi*, 508 U.S. at 532, while exempting the same conduct undertaken

for nonreligious reasons. *Jacobson* does not protect Maine's discriminatory mandate from strict scrutiny under the First Amendment, which it cannot pass.

VI. EMPLOYER DEFENDANTS ESSENTIALLY CONCEDE THAT STATE DEFENDANTS' COVID-19 VACCINE MANDATE REQUIRES A VIOLATION OF TITLE VII.

Employer Defendants (Respondents) contend they cannot provide reasonable accommodations to Plaintiffs because doing so would cause them to violate State law—*i.e.*, the Governor's COVID-19 Vaccine Mandate. (Provider Opp'n 7.) This contention admits that the State's mandate is inconsistent with and thus preempted by the plain language of Title VII:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. § 2000e-7. Thus, because Maine's revocation of religious exemptions through rulemaking and the Governor's Vaccine Mandate "purport[] to require . . . unlawful employment practice" by abolishing the religious accommodation procedure provided in Title VII, *see* 42 U.S.C. §2000e-2(a), the vaccine mandate is superseded and preempted by Title VII.

First, Employer Defendants can find no refuge in the argument that doing what Title VII requires would be an undue hardship because it would cause a violation of state law. A simple hypothetical demonstrates the absurdity of the argument: Suppose Maine passed a law (or the Governor issued an Executive Order) stating, "Maine no longer permits Christians and Muslims to engage in any

healthcare profession." Title VII would still prohibit Employer Defendants from discriminating against Christians and Muslims in hiring and firing, even if sanctioned by the state law. But this is precisely the kind of religious discrimination Employer Defendants defend, albeit on narrower terms: "Maine no longer permits Christians and Muslims [with religious objections to abortion-connected vaccines] to engage in any healthcare profession at covered facilities." Title VII plainly prohibits any such religious discrimination, and a state's patently unconstitutional policy mandating violation of Title VII does not exempt a private employer from Title VII's requirements. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm.*, 630 F.2d 79, 104–105 (2d Cir. 1980) ("Nor can the City justify the use of rank-ordering by reliance on what it contends are requirements of state law. *Title VII explicitly relieves employers from any duty to observe a state hiring provision which purports to require or permit any discriminatory employment practice*." (emphasis added) (cleaned up)).

Second, the Vaccine Mandate necessarily abolishes the entire "interactive process" of "bilateral cooperation" and "meaningful dialogue" required by Title VII between employers and employees seeking religious accommodation. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *Ansonia Bd. of Educ.* v. *Philbrook,* 479 U.S. 60, 69 (1986); *EEOC* v. *Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009). As illuminated by the EEOC's guidance—updated this week—"the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief," and "should thoroughly consider all possible reasonable accommodations." EEOC, *What You*

Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, at K.12, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (updated Oct. 25, 2021). Reasonable accommodations suggested by the EEOC include masking, distancing, modifying shifts, and periodic testing. *Id.* at K.2. The process also requires an employer "to assess undue hardship by considering the particular facts of each situation and . . . demonstrate how much cost or disruption the employee's proposed accommodation would involve," without "rely[ing] on speculative hardships . . . but, rather . . . on objective information." *Id.* at L.3. The Governor's Vaccine Mandate purports to prohibit the entire process for all religious objectors, precluding any individualized determinations—even for employers that want to provide accommodations. This irresolvable conflict forecloses any argument that the Governor's mandate can coexist with Title VII.

VII. TITLE VII PERMITS INJUNCTIVE RELIEF WHERE, AS HERE, POST-JUDGMENT RELIEF PROVIDES AN INSUFFICIENT REMEDY.

Employer Defendants also contend that post-judgment relief is a sufficient remedy for their decision to terminate all Plaintiffs this coming Friday (*in two days*). (Provider Opp'n 8–9.) Sometimes, however, post-judgment relief is inadequate even in the Title VII context. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981). Specifically, "the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages." *Id.* Here, Employer Defendants, working in tandem with State Defendants, are not only saying

that Plaintiffs will be fired from their current jobs, but they are also telling them that their sincerely held religious objections preclude them from working at large swaths of "covered facilities" in the medical field. This is not a typical employment-related dispute where a fired doctor or nurse can walk across the street to a different hospital and find gainful employment while awaiting distant vindication of her rights. The immediate and irreparable injury to Plaintiffs is the deprivation of any employment in any covered medical facility in the State of Maine. In effect, Defendants have informed Plaintiffs that those with religious objections to COVID-19 vaccines based on sincerely held beliefs are no longer welcome in Maine's healthcare system. Such overt religious exclusion is prohibited by the First Amendment and Title VII, and imposes irreparable harm worthy of preliminary injunctive relief.

CONCLUSION

For the foregoing reasons, and those in the Application, the Court should issue a writ of injunction pending disposition of Plaintiffs' forthcoming petition for writ of certiorari.

Respectfully submitted:

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