No. 21-717

In the Supreme Court of the United States

JOHN DOES, 1-3; JACK DOES, 1-1000; JANE DOES, 1-6; 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 ofHealth and Human Services; NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTH FOUNDATION; MAINEGENERAL HEALTH,

Respondents.

On Motion to Expedite Consideration of the Petition for Writ of Certiorari and Request for Expedited Consideration of Motion

PROVIDER RESPONDENTS' RESPONSE TO MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR EXPEDITED CONSIDERATION OF MOTION

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DISCLOSURE STATEMENT OF DEFENDANT MAINE HEALTH

Defendant MaineHealth ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Maine non-profit corporation, the parent corporation of which is MaineHealth Services, which is also a Maine non-profit corporation.

DISCLOSURE STATEMENT OF DEFENDANT GENESIS HEALTHCARE OF MAINE, LLC

Defendant Genesis HealthCare of Maine, LLC ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Maine limited liability company and that its sole member is GHC Holdings LLC. GHC Holdings LLC is a Delaware limited liability company and its sole member is Genesis HealthCare LLC. Genesis HealthCare LLC is a Delaware limited liability company and its sole member is Gen Operations II, LLC. Gen Operations II, LLC is a limited liability company the sole member of which is GEN Operations I, LLC. GEN Operations I, LLC is a limited liability company of which the sole member is FC-GEN Operations Investment, LLC. FC-GEN Operations Investment, LLC is a limited liability company in which the following have ownership interests:

- Sundance Rehabilitation Holdco, Inc. is a Delaware corporation having a 5.3% membership interest
- Sun Healthcare Group, Inc. is a Delaware corporation having a 64.1% membership interest, and also a 100% interest in Sundance Rehabilitation Holdco, Inc.

- Multiple investors have a 30.6% interest holding rights to income and losses but no rights as to control.

Genesis Healthcare, Inc. is a publicly traded corporation organized in Delaware and the sole shareholder of Sun Healthcare Group, Inc. Genesis Healthcare, Inc., is traded on OTCMKTS under the ticker symbol "GENN". There is no shareholder owning 10% or more of Genesis Healthcare, Inc., shares.

DISCLOSURE STATEMENT OF DEFENDANT GENESIS HEALTHCARE LLC

Defendant Genesis HealthCare LLC ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Delaware limited liability company and that its sole member is GEN Operations II, LLC. GEN Operations II, LLC is a limited liability company the sole member of which is GEN Operations I, LLC. GEN Operations I, LLC is a limited liability company the sole member of which is FC-GEN Operations Investment, LLC. FC-GEN Operations Investment, LLC is a limited liability company in which the following have ownership interests:

- Sundance Rehabilitation Holdco, Inc. is a Delaware corporation having a 5.3% membership interest
- Sun Healthcare Group, Inc. is a Delaware corporation having a 64.1% membership interest, and also a 100% interest in Sundance Rehabilitation Holdco, Inc.
- Multiple investors have a 30.6% interest holding rights to income and losses but no rights as to control.

Genesis Healthcare, Inc. is a publicly traded corporation organized in Delaware and the sole shareholder of Sun Healthcare Group, Inc. Genesis Healthcare, Inc., is traded on OTCMKTS under the ticker symbol "GENN". There is no shareholder owning 10% or more of Genesis Healthcare, Inc., shares.

DISCLOSURE STATEMENT OF DEFENDANT MAINEGENERAL HEALTH

Defendant MaineGeneral Health ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses that it is a Maine non-profit corporation, and that it has no parent corporation.

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INTRODUCTION

Pursuant to Supreme Court Rule 21.4, Respondents MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, Northern Light Health Foundation and MaineGeneral Health (hereafter "Provider Respondents") hereby respond to Petitioners' Motion to Expedite Consideration of the Petition for Certiorari and Request for Expedited Consideration of that Motion (hereafter "Motion"). Provider Respondents intend to file a brief in opposition to the Petition for Certiorari ("Petition") with respect to Petitioner's second and third Questions Presented. Separately, they will request an additional thirty days, until January 14, 2022, to do so.

Provider Respondents believe that expedited consideration of the Petition is not warranted, and could deprive the Court of information and time that would be of value in facilitating a proper assessment of the appropriateness of this case for review.

First, the alleged harm Petitioners sought to prevent through injunctive relief has, with the denial of that relief all five times they have sought it, now occurred. Petitioners' appeal of those requests for injunctive relief is likely moot. There is no exigency requiring expedited consideration of the Petition.

Second, the Court should consider the interlocutory posture of the case, including in particular the underdeveloped record.

Third, the Provider Respondents are private employers, and Petitioners neither allege that they are state actors nor assert any constitutional claims against

them. Hence, even if the Court concludes that the free exercise claims – whether in this case, the two New York cases, or all three – merit review, that review does not require the Court to grant certiorari with respect to the separate claims against the Provider Respondents, as to which the law is well settled and the courts below concluded injunctive relief was not warranted.

STATEMENT OF FACTS[1]

The background set forth in the First Circuit's Opinion (Case 21-1826, Doc. 00117800246, Pages 1, 4-14) and the District Court's Order (Case 1:21-cv-00242-JDL, Doc. 65, ##763, 766-772) provide a complete and accurate recitation of the facts. Nonetheless, for the Court's convenience, the Provider Respondents offer the following brief factual background.

Maine has a long history of requiring healthcare workers at Designated Healthcare Facilities[2] to be vaccinated against infectious diseases subject to limited exemptions. (*See* Case 21-1826, Doc. 00117800246, Pages 4-6; Case 1:21-cv-00242-JDL, Doc. 65, ##770-772.) Petitioners have repeatedly made the erroneous claim that Maine eliminated its religious exemption from mandatory vaccine requirements at the same time it added COVID-19 to its list of mandatory immunizations. (*See* Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ

[1] The Provider Defendants are unable to adopt Petitioners' Statement of Facts.

[2] The term "Designated Healthcare Facility" ("DHCF") is defined in the rules to include "a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities . . ., multi-level healthcare facility, hospital, or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." 10-144 C.M.R. Ch. 264, §1(D).

of Certiorari Relief (Application) at 2, 8-9; *see also* Motion at 2.) In fact, Maine did *not* eliminate the religious exemption to mandatory vaccine requirements for certain healthcare workers in conjunction with its directive that these workers be vaccinated against COVID-19. Rather, in response to declining vaccination rates in the State of Maine, the Maine Legislature amended the State's mandatory immunization laws with respect to both healthcare workers and public school students *in 2019, before the pandemic*, to remove previously recognized religious and philosophical exemptions. (Emphasis added); *see* P.L. 2019, ch. 154, §§ 2, 9-11 (varying effective dates); 22 M.R.S. § 802 (4-B). As a result, the only remaining exemption to all required vaccines is a medical exemption for individuals for whom vaccination would be medically inadvisable and for whose protection the non-medical exemptions were removed. *See id.*

In March 2020, Maine voters rejected a peoples' veto referendum that sought to repeal the 2019 legislative changes, thereby endorsing the Maine Legislature's decision to eliminate non-medical exemptions from vaccination for healthcare workers at DHCFs. On April 14, 2021, following the referendum and consistent with the directive from the Maine Legislature, the Maine Department of Health and Human Services ("DHHS") formally amended its existing Immunization Requirements for Healthcare Workers rule to remove the religious and philosophical exemptions from its text. 10-144 Me. Code R. § 264 (amended Apr. 14, 2021). Then, due to the growing COVID-19 crisis in the United States and Maine, on August 12, 2021, DHHS issued an emergency rule further amending this rule by adding the

COVID-19 vaccine to the list of mandated vaccines for healthcare workers.[3] 10-144 C.M.R. Ch. 264 (amended Aug. 12, 2021) (the "Emergency Rule").[4] *See* Case 1:21-cv-00242-JDL, Doc. 51-1, ##601-608. The Emergency Rule required employees of DHCFs to receive their final dose of the COVID-19 vaccine on or before September 17, 2021. *Id.* at §§ 264(1)(E)-(F), (2), (5), (7). On or about September 2, 2021, Governor Janet Mills announced that DHHS would not begin enforcing the Emergency Rule until October 29, 2021 so healthcare workers would have additional time to come into compliance. *See Mills Administration Provides More Time for Health Care Workers to Meet COVID-19 Vaccination Requirement*, MAINE.GOV (Sept. 2, 2021), https://www.maine.gov/governor/mills/news/mills-administration-provides-more-time-health-care-workers-meet-covid-19-vaccination.

The Provider Respondents each operate one or more DHCFs[5], pursuant to licenses issued and regulations administered by DHHS. Decl. of April Nichols, Case

[3] DHHS has the authority to issue emergency rules as part of its authority to "[e]stablish procedures for the control, detection, prevention . . . of communicable . . . diseases, including public immunization . . . programs." 22 M.R.S. § 802(1)(D), (3) ("[t]he department shall adopt rules to carry out its duties as specified in this chapter"); 18 M.R.S. § 8054(1).

[4] On November 10 of this year, after the First Circuit denied Petitioners' appeal, but before Petitioners filed their Petition, DHHS issued a final amended Immunization Requirements for Healthcare Workers rule ("Final Rule") replacing the Emergency Rule which has been the basis of Petitioners' claims in this case and the target of their efforts to obtain a preliminary injunction. This Final Rule is discussed further below. *See* Case 1:21-cv-00242-JDL, Doc. 81-1, ##1034-1040.

[5] Only a fraction of Maine's healthcare facilities – broadly defined – constitute Designated Healthcare Facilities. In fact, there are many healthcare facilities in the State of Maine which do not meet this definition. *See Health Care Worker Vaccination FAQS,* MAINE.GOV (last updated Nov. 10, 2021) at FAQ 1, https://www.maine.gov/covid19/vaccines/public-faq/health-care-worker-vaccination

1:21-cv-00242-JDL, Doc. 50-2, #576, ¶3; Decl. of Gail Cohen, Case 1:21-cv-00242-JDL, Doc. 50-4, #582, ¶3; Decl. of July West, Case 1:21-cv-00242-JDL, Doc. 50-3, #578, ¶3; Decl. of Paul Bolin, Case 1:21-cv-00242-JDL, Doc. 51-2, #609, ¶3. As a condition of their licensure, the Provider Respondents are required to ensure that employees who are physically present in the workplace are fully vaccinated for COVID-19 subject to the medical exemption. If the Provider Respondents do not follow the Final Rule, they will not be in compliance with state law and could face severe consequences, including being enjoined from continuing to permit employees to work absent proof of vaccination or exemption, civil fines, penalties and loss of licensure. 22 M.R.S. § 804. Accordingly, in compliance with the Emergency Rule imposed by the State agency that licenses and regulates them,[6] each of the Provider Respondents implemented mandatory COVID-19 vaccination policies consistent with the Emergency Rule and the State's deadline for vaccination. Those policies, out of legal necessity, preclude the employment of unvaccinated workers within DCHFs, leading to the termination of those employees who failed to present valid requests for a medical exemption, refused to be vaccinated, and could not be accommodated, such as with remote work.

(listing the types of healthcare facilities that are covered by and excluded from the Emergency and Final Rules).

[6] This observation is not intended to suggest that the Provider Defendants believe the Rule is in any way improper. Rather, it is simply an observation that whether the Rule is constitutionally sound or not, private parties subject to the jurisdiction of the State are bound to comply with state laws unless and until they are rescinded, repealed, or otherwise invalidated.

ARGUMENT

I. There is no exigency requiring expedited review.

Petitioners have failed in their quest for injunctive relief five times since filing their Verified Complaint on August 23, 2021. First, the District Court denied their *ex parte* motion for a temporary restraining order on August 25. Case 1:21-cv-00242-JDL, Doc. 11, #130. Second, the District Court denied their motion for preliminary injunction on October 13. Case 1:21-cv-00242-JDL, Doc. 65, #763. Third, the First Circuit Court of Appeals denied their emergency motion for an injunction pending appeal on October 15. Case 21-1826, Document 00117798575, Entry ID 6452863. Fourth, the First Circuit denied their appeal of the District Court's denial of their motion for preliminary injunction on October 19. Case 21-1826, Document 001177800246, Entry ID 6453714. Fifth, this Court denied their emergency application for writ of injunction on October 29. Doc. 14074119, 595 U.S. __ (2021).

This Court's October 29 denial of the emergency application for writ of injunction occurred on the same day that the State of Maine's Emergency Rule became enforceable. Provider Respondents could no longer employ anyone in their DHCFs who was not so immunized, subject only to medical exemption, without violating the Emergency Rule and risking their licenses to operate. If Petitioners did not get vaccinated, their employment may have soon been terminated.[7] At this point, the alleged harm Petitioners sought to prevent through injunctive relief occurred,

[7] Because Petitioners have remained anonymous, Provider Respondents do not know if the employees they terminated for failure to comply with the COVID-19 immunization requirement actually included any of the Petitioners.

and their request for preliminary injunctive relief became moot. Moreover, when in effect the Emergency Rule applied only to DHCFs, Dental Health Practices, and Emergency Medical Services Organizations, leaving other healthcare jobs (*e.g.,* physicians' offices) available. Now, under the Final Rule (effective November 10; see footnote 4 *supra*) Dental Health Practices and EMS Organizations are no longer subject to the mandate, opening still more employment opportunities to unvaccinated healthcare workers. Because there are other employment opportunities, both in their filed and in Maine, Petitioners do not face the claimed dilemma of choosing between feeding their families and following their religious beliefs.

Finally, Petitioners themselves do not believe there is any emergency with respect to their Petition. In a Motion to Stay Pending Disposition of Petition for Writ of Certiorari filed in the District of Maine on November 19, Petitioners state as follows in reference to emergency applications for writs of injunction now pending in two similar cases in the Second Circuit (*see infra*): "Decisions on those applications are imminent, but even if they were to be denied, they are different procedurally than *the non-emergency, full merits review requested in Plaintiffs' Cert. Petition in this case*, for which at least two justices have expressed a preference." (Emphasis supplied) *See* Case 1:21-cv-002420-JDL, Doc. 81, ##866, 869.

In sum, to the extent any exigency ever existed with respect to the claims against Provider Respondents – a position with which Provider Respondents do not agree, for the reasons set forth in their opposition to Petitioners' emergency application for writ of injunction – that exigency no longer exists.

II. The interlocutory posture of the case renders it a poor choice for review.

The Petition brings forth to the Court a case that has not progressed beyond the resolution of a motion for preliminary injunction. The record is undeveloped, including in ways that raise serious questions about whether the Court can or should accept review.

First, as noted above, Petitioners have remained anonymous to Provider Defendants, the federal courts, and the public throughout the proceedings to date. Their anonymity was not problematic at the preliminary injunction stage, because of the verification of sufficient facts in the Verified Complaint to establish standing and at least the possibility of injunctive relief as an appropriate remedy. However, the facts have changed: the immunization requirement has moved from the future to the present, the Provider Respondents can no longer lawfully employ unvaccinated individuals without medical exemptions in their DCHFs, and employees who failed to become immunized by October 29 as required by the Emergency Rule have been removed from the workplace. The record does not tell us how many, or which, of the 2,009 Petitioners decided to get vaccinated and remain employed, nor how many, or which, have actually lost their employment because of a refusal to become vaccinated. Those in the first group may no longer have viable Title VII claims. Those in the second group may have individual Title VII claims, but any such claims are certainly not ready for resolution at the trial court level, let alone ripe for review by this Court. Indeed all indications are that the majority of Petitioners have not exhausted required administrative remedies for these claims. The Court cannot know, based on

the current record, whether any claims involving the Provider Respondents are currently appropriate for review, or indeed if any are reviewable at all.

Second, the Emergency Rule that is at the core of Petitioners' claims has been replaced by the Final Rule, effective November 10. *See* Case 1:21-cv-00242-JDL, Doc. 81-1, ##1034-1040. The regulation they have sought to enjoin has gone out of existence. The Final Rule is narrower in scope, having eliminated Dental Health Practices and EMS Organizations from its reach. Petitioners have not amended their Verified Complaint nor otherwise taken steps to recast their pleadings in terms of the Final Rule, which depending on how it impacts their individual circumstances may or may not be the cause of their alleged harm.

In light of this uncertainty as to the precise nature and status of Petitioners' claims, a hurried consideration of the Petition could leave the Court without the clarity on these questions needed to determine whether there is still a live controversy, and if so as to which Petitioners.

III. The claims against the Provider Respondents do not merit expedited consideration for review because they are not likely to meet the criteria for review under Supreme Court Rule 10.

Petitioners posit two Questions for Review that pertain to the Provider Respondents. Question 2 asks whether an employer's Title VII-based duty to provide reasonable accommodation for employees' sincerely held religious beliefs preempts the Emergency Rule. Question 3 asks whether the District Court has authority to grant injunctive relief in aid of Title VII remedies in cases involving the accommodation of sincerely held religious beliefs. There are multiple problems with Petitioners' Questions that Provider Respondents will address in their opposition to

the Petition. With regard to the Motion, Provider Respondents make the following points.

First, Provider Respondents are private employers, and Petitioners neither allege that they are state actors nor assert any constitutional claims against them.

Second, the above questions likely do not fall within the parameters of Supreme Court Rule 10. Question 2 asks an entirely unremarkable question about the extent to which Title VII preempts state law. That question is answered by the text of section 708 of Title VII of the Civil Rights Act of 1964 itself:

> Nothing in this title 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 . . . other than such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. 42 U.S.C. § 2000e-7.

And, additionally, in section 1104 of Title XI of the same Act:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field . . . nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof. 42 U.S.C. § 2000h-4.

Title VII limits the duty of employers to accommodate sincerely held religious beliefs by allowing them to show that doing so would constitute an "undue hardship." 42 U.S.C. § 2000e(j). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 83 (1977) this Court resolved any question relevant here as to when a requested accommodation constitutes an undue hardship: "if it would impose more than a *de minimis* cost on the employer." *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004) (citing *Hardison*, 432 U.S. at 83). Costs that will justify denying

a religious accommodation can be economic or non-economic, and it is well settled that accommodations which burden other employees or adversely affect the employer's public image constitute an undue hardship. *E.g. Hardison*, 432 U.S. at 83; *Cloutier*, 390 F.3d at 134-45 (holding employer was not required to permit the plaintiff to wear facial jewelry in contravention of the dress code). More germane to this case, employers are also not required, in order to accommodate employees' religious beliefs, to bear increased "safety risks and the risk of liability for the employer." *E.g., EEOC v. Oak-Rite Mfg. Corp.*, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001) ("Title VII does not require employers to test their safety policies on employees to determine the minimum level of protection needed to avoid injury."); *Kluge v. Brownburg Community Sch. Corp.*, 2021 WL 2915023, at *22 (S.D. Ind. July 12, 2021) ("Title VII does not require employers to provide accommodations that would place them 'on the razor's edge' of liability") (*quoting Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011)); *see also Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 830 (9th Cir. 1999) ("[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law.")

Similarly, Petitioners' Question 3 presents no issues likely to trigger any of the Rule 10 criteria for granting certiorari. The question suggests that there is an unresolved issue with regard to a trial court's authority to grant preliminary injunctive relief. Provider Respondents disagree. As the District Court noted in its decision denying Petitioners' motion for preliminary injunction:

> The Supreme Court has "set a high standard for obtaining preliminary injunctions restraining termination of employment." *Bedrossian v. Nw. Mem'l Hosp.*, 409 F.3d 840, 845 (7th Cir. 2005) (citing *Sampson v. Murray*, 415 U.S. 61 (1974)). The case must present a "genuinely extraordinary situation" to support granting an injunction, *Sampson*, 415 U.S. at 92 n.68; allegations of "humiliation, damage to reputation, and loss of income" are insufficient to meet that standard, *Bedrossian*, 409 F.3d at 845, as are "deterioration in skills" and "inability to find another job," *id.* at 846. Courts generally do not grant preliminary injunctions to prevent termination of employment, because "the termination . . . of employment typically [is] not found to result in irreparable injury." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (3d ed. 2021). Injuries incurred in employment discrimination claims may be addressed through remedies at law, such as reinstatement, back pay, and damages. 42 U.S.C.A. § 2000e-5(g). In addition, in the ordinary course, Title VII violations must be addressed first through the administrative processes available under federal law. *See* 42 U.S.C.A. § 2000e-5(f)(1)), *see also Rodriguez v. United States*, 852 F.3d 67, 78 (1st Cir. 2017) ("It is settled that a federal court will not entertain employment discrimination claims brought under Title VII unless administrative remedies have first been exhausted.").

Case 1:21-cv-00242-JDL, Doc. 65, #798. While Petitioners may disagree with the District Court's decision – one for which the standard of review is a highly deferential abuse of discretion, *see, e.g., Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 158 (1st Cir. 2004) – Provider Respondents do not believe the trial court's exercise of discretion not to grant injunctive relief against them raises any issue that calls for review by this Court.

CONCLUSION

For the foregoing reasons, the Provider Respondents respectfully request that the Court deny Petitioners' Motion.

Dated: November 23, 2021

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