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,

Petitioners,

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 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 Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PROVIDER RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOLAN L. REICHL – *Counsel of Record*
nreichl@pierceatwood.com
JAMES R. ERWIN
jerwin@pierceatwood.com
KATHARINE I. RAND
krand@pierceatwood.com
PIERCE ATWOOD LLP
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorneys for MaineHealth; Genesis Healthcare of Maine, LLC; Genesis Healthcare LLC; MaineGeneral Health

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The questions presented for review relevant to the Provider Respondents are as follows:

1. Whether Petitioners' interlocutory appeal—which challenges denial of temporary relief to prevent an event that has already occurred—is moot with respect to the Provider Respondents.

2. Whether, notwithstanding settled law governing the undue hardship limitation on employers' duty to accommodate sincerely held religious beliefs, Title VII prohibits private employers from implementing conditions of employment that are health-related, required by state law, or both vis-à-vis any individual who cannot meet such conditions because of those beliefs.

3. Whether Article III courts may or should deviate from established principles governing irreparable harm as an element of preliminary injunctive relief, and enjoin termination from employment where employees assert discrimination on the basis of religion, notwithstanding the broad legal and equitable remedies available under Title VII, pursuant to which the employees will be made whole if they successfully adjudicate their claims on the merits.

DISCLOSURE STATEMENT OF RESPONDENT MAINEHEALTH

MaineHealth discloses that it is a Maine nonprofit corporation, the parent corporation of which is MaineHealth Services, which is also a Maine nonprofit corporation.

DISCLOSURE STATEMENT OF RESPONDENTS GENESIS HEALTHCARE OF MAINE, LLC AND GENESIS HEALTHCARE LLC

Genesis HealthCare of Maine, LLC hereby discloses that 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 sold 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. GC-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

DISCLOSURE STATEMENT OF RESPONDENTS GENESIS HEALTHCARE OF MAINE, LLC AND GENESIS HEALTHCARE LLC—Continued

interest, and a 100% interest in Sundance Rehabilitation Holdco, Inc.;

- Multiple investors have a 30.6% interest holding rights to income and losses, but not 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% of more of Genesis Healthcare, Inc. shares.

DISCLOSURE STATEMENT OF RESPONDENT MAINEGENERAL HEALTH

MaineGeneral Health discloses that it is a Maine non-profit corporation, and that it has no parent corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

Petitioners filed their Verified Complaint and Motion for Temporary Restraining Order and Motion for Preliminary Injunction on August 25, 2021. (Case No. 1:21-cv-242 JDL, Doc. 1, 3.) The District Court denied the Motion for TRO on August 26 (Doc. 11), and then denied the Motion for Preliminary Injunction on October 13. (Doc. 65.) The District Court further denied Plaintiffs' Emergency Request for Ruling on Pending Motion for Injunction Pending Appeal on October 13. (Doc. 68.)

Petitioners filed a notice of appeal of the denial of the Motion for Preliminary Injunction on October 13. (Doc. 66.) During the course of Petitioners' appeal, the First Circuit denied their Emergency Motion for Injunction Pending Appeal on October 15 (Case No. 21-1826, Doc. 00117798575), and affirmed the District Court's denial of the preliminary injunction motion on October 19. (Doc. 00117800246.) The First Circuit issued its Mandate on November 9. (Doc. 75.)

Petitioners filed an Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari, which this Court denied on October 29. (No. 21A90, 595 U.S. ___ (2021).) Petitioners filed a Petition for Writ of Certiorari on November 11, 2021, followed by a Motion to Expedite Consideration of Petition for Writ of Certiorari and Request for Expedited Consideration of Motion on November 17. This Court denied that motion on December 6. (Case No. 21-717.)

Since Petitioners filed their Petition for Writ of Certiorari, several motions have been filed in the underlying proceeding at the District Court. Respondents filed a Joint Motion to Modify Protective Order from all Defendants on November 9 (Doc. 74); various media interests filed a Motion to Intervene on November 10 (Doc. 76); and Petitioners filed a Motion to Stay on November 19 (Doc. 81.) The District Court ordered responses to those motions by December 3, and replies by December 8. (Doc. 84.)

JURISDICTION

Petitioners seek review of the First Circuit's judgment on their Motion for Preliminary Injunction, issued on October 19, 2021. They invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). As explained in Section I.A of Reasons for Denying the Petition, Petitioners' appeal is moot because they assert that the event they sought to be enjoined—termination from employment—has already occurred.

SUMMARY OF THE ARGUMENT

Each of Petitioners' six attempts to enjoin the Emergency Rule that is the subject of their Verified Complaint before its October 29, 2021 enforcement date has failed. As a result, the State of Maine's Emergency Rule adding COVID-19 to the list of required immunizations for certain healthcare workers went

into effect and the more than 2,000 alleged employee Petitioners—whose identities remain unknown to the Provider Respondents, the public, and the federal courts—have either accepted the COVID-19 vaccine, requested and received a valid medical exemption, or lost their employment. Petitioners' counsel baldly asserts that all of those who were employed by the Provider Respondents filing this Opposition have since been fired, but there is no evidence in the record indicating which fate has befallen any of the alleged 2,009 Petitioners.

Whether the District Court should have granted Petitioners temporary relief in the form of a reprieve from termination is a purely academic question at this juncture. If Petitioners have in fact been terminated as asserted, they may pursue their Title VII claims against the Provider Defendants in the District Court and, if successful, they will be entitled to damages and equitable relief sufficient to make them whole. Thus, Petitioners' Motion for Preliminary Injunction—the order which is the sole basis for this appeal—is moot.

Even if not moot, this interlocutory appeal would be an unattractive candidate for review given the undeveloped record and questions about whether or how changed circumstances have impacted Petitioners' standing. The Emergency Rule that is the subject of the Verified Complaint expired by its own terms and was replaced by a Final Rule on November 11, 2021 that is narrower in scope. Because the record is devoid of any information concerning Petitioners' identities, where they work, whether they are subject to the Final

Rule, and whether they have received the COVID-19 vaccine or a medical exemption, it is impossible to know whether any of the Petitioners presents an actual and ongoing case or controversy.

These uncertainties counsel against the Court extending certiorari jurisdiction. If the Court grants the Petition and decides the case on this record, it will in effect be rendering an advisory opinion concerning a regulation that no longer exists and relating to Petitioners who may or may not have suffered harm as a result of that defunct regulation. Only after Petitioners' claims are litigated on the merits can the Court assess whether their Title VII claims are both reviewable and worthy of this Court's review.

Procedure aside, the substantive questions Petitioners urge upon this Court relating to the Provider Defendants are not certiorari-worthy. Petitioners contend that Title VII required Provider Respondents—all private employers not alleged to be state actors—to extend religious exemptions to employees unable to be vaccinated against COVID-19 consistent with their religious beliefs, even though such exemptions would place the Provider Defendants in violation of state law mandating the vaccine for employees working in most licensed healthcare facilities. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires employers to provide only *reasonable* accommodations that do not create an undue hardship. *E.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 68 (1977). Research reveals no federal court decision holding that Title VII requires private employers to exempt

employees from any condition of employment that might burden or conflict with their sincerely held religious beliefs.

Whatever the merits of Petitioners' constitutional claims against the State Respondents, their claims against the Provider Respondents are straightforward claims of discrimination. Their resolution hinges on well-settled law, and any Petitioner who successfully establishes a meritorious case can be fully compensated following final judgment. None of the considerations governing review on certiorari set forth in this Court's Rule 10 exists here.

STATEMENT OF THE CASE

Mandatory immunization of healthcare workers has a long history in Maine.[1] Since 2002, the Maine Department of Health and Human Services (DHHS) and Maine Center for Disease Control (Maine CDC) have maintained rules requiring healthcare workers working at Designated Healthcare Facilities[2] to be

[1] Prior to 2002, Maine law required hospitals and other healthcare institutions to mandate employee vaccination against measles, mumps, and rubella. P.L. 1989, ch. 487, § 11 (eff. Sept. 30, 1989). In 2001, the Maine Legislature amended the mandatory vaccination statute, shifting the substantive vaccination requirements from the statute to rules adopted by the Department of Health and Human Services. P.L. 2001, ch. 185, §§ 1-2 (eff. Sept. 21, 2001). Defendants' summary picks up the trail after 2001.

[2] The term "Designated Healthcare Facility" is defined to include "a licensed nursing facility, residential care facility,

vaccinated against certain infectious diseases, subject to limited exemptions. Contrary to Petitioners' refrain, which they repeat in their Petition despite repeated correction by Respondents and the courts, Maine CDC did not eliminate Petitioners' ability to request a religious exemption in connection with its addition of COVID-19 to the list of required vaccinations in August 2021. Rather, in 2019, in response to declining vaccination rates in the State of Maine and prior to the COVID-19 pandemic, the Maine Legislature amended the healthcare vaccination law to remove all non-medical exemptions to the vaccine requirement. *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 immunization for healthcare workers is a medical exemption for individuals for whom vaccination would be medically inadvisable and for whose protection the Legislature removed the non-medical exemptions. *See id.*; *see also* Declaration of Kimberly L. Patwardhan, AAG and attached exhibits (Doc. 48.) Maine voters expressed their overwhelming support for this legislative action when they rejected a peoples' veto referendum in March 2020.[3]

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. Cf. 264, § 1(D).

[3] Question 1 on the March 3, 2020 ballot asked whether voters wished to repeal L.D. 798 and reinstate religious and philosophical exemptions from the vaccine requirements. It was defeated 72% to 27%. Full results of the March 3, 2020, election

On April 14, 2021—not September 1, 2021, as Petitioners contend—the Maine Department of Health and Human Services (DHHS) followed the Maine Legislature's directive and amended its existing Immunization Requirements for Healthcare Workers rule ("Rule") to remove non-medical exemptions. (10-144 C.M.R. Ch. 264 (amended Apr. 14, 2021) (Doc. 49-6).) Approximately four months later, DHHS issued an emergency rule ("Emergency Rule") further amending the Rule by adding the COVID-19 vaccine to the list of mandated vaccines for employees working in Designated Healthcare Facilities. (*Id.* (amended August 12, 2021) (Doc. 49-8).) The Emergency Rule required employees subject to the Rule 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, giving healthcare workers additional time to comply. *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.

MaineHealth, Genesis Healthcare of Maine, LLC, Genesis Healthcare, LLC, and MaineGeneral Health (collectively herein, the Provider Defendants) each operate one or more Designated Healthcare Facilities,

---

are available on the website of the Maine Secretary of State: https://www.maine.gov/sos/cec/elec/results/index.html.

licensed and regulated by DHHS. (*See* Decl. of April Nichols ¶3, Doc. 50-2; Decl. of Gail Cohen ¶3, Doc. 50-4; Decl. of July West ¶3, Doc. 50-3.) As a condition of their licensure, the Provider Defendants are required to ensure that employees physically present in one of their Designated Healthcare Facilities are fully vaccinated for COVID-19, subject to the medical exemption. If the Provider Defendants do not follow the 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. § 803-04. Each of the Provider Defendants implemented mandatory COVID-19 vaccination policies consistent with the Emergency Rule and the State's deadline for vaccination. (Decl. of April Nichols ¶¶7-9, Doc. 50-2; Decl. of Gail Cohen ¶7, Doc. 50-4; Decl. of July West ¶¶7-8, Doc. 50-3.)

Petitioners allege that certain of them are employed by the Provider Defendants in Designated Healthcare Facilities and that they cannot receive the COVID-19 vaccine, consistent with their sincerely held religious beliefs. (Doc. 1, Verified Comp. ¶¶ 10-11, 14, 17, 19-20, 23-26.) Petitioners began their pursuit of injunctive relief on August 24, 2021 with a Verified Complaint and Motions for a Temporary Restraining Order and Preliminary Injunction. (Docs. 1, 3.) Those motions, and their Emergency Request for Ruling on Pending Motion for Injunction Pending Appeal, were all denied by the District Court. (Docs. 11, 65, 68.)

Petitioners appealed to the First Circuit (Doc. 66), which then denied Petitioners' Emergency Motion for Injunction Pending Appeal and affirmed the District Court's denial of the Motion for Preliminary Injunction. (Case No. 21-1826, Doc. 00117798575 & 00117800246.) On October 29, 2021, the enforcement deadline of the Emergency Rule, this Court denied Petitioners' request for an Emergency Writ of Injunction Pending Disposition of Petition for Writ of Certiorari. (No. 21A90, 595 U.S. ___ (2021).)

The October 29, 2021 deadline Petitioners sought six times to enjoin came and went. The record does not reveal what effect the deadline has had on Petitioners. Unless Petitioners received the COVID-19 vaccine or successfully sought a medical exemption, however, their employment with the Provider Defendants was likely terminated on or very soon after October 29, 2021. Shortly thereafter, the Emergency Rule Petitioners challenge expired by its own terms. On November 10, the State adopted a Final Rule that differs from the Emergency Rule in several material respects. (Doc. 82.) Significant among these differences is a narrower definition of "employee" and the removal of Dental Health Practices and EMS Organizations from the coverage of the Rule. (*Compare*, Doc. 50-1, #568 *with* Doc. 82, #1035.)

Petitioners' substantive Title VII claims against the Provider Defendants are being litigated in the District Court, before which several motions are currently pending. Petitioners have taken no action to amend

their Verified Complaint to address the changed circumstances described above, however.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD DECLINE REVIEW BECAUSE PETITIONERS' APPEAL OF AN ORDER DECLINING TO ENJOIN THEIR THREATENED TERMINATIONS IS MOOT, THEY CAN NO LONGER BENEFIT FROM TEMPORARY RELIEF, AND THE MERITS OF THEIR CLAIMS HAVE YET TO BE ADJUDICATED.

A. The Appeal is Moot.

Petitioners appeal the First Circuit's affirmance of the District Court's denial of their preliminary injunction motion, which, relevant to the Provider Defendants, asked the court to order the Provider Defendants to grant them religious exemptions from the vaccine requirement and to enjoin their threatened termination from employment. (Doc. 3, 57.) The sole issue for this Court is whether the Court of Appeals erred in affirming the District Court's denial of Petitioners' request for temporary relief. Where Petitioners have either been vaccinated, granted an exemption, or terminated, the question of temporary relief, and therefore Petitioners' appeal, is now moot.

As this Court explained long ago, "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be

carried into effect." *Mills v. Green*, 159 U.S. 651, 653 (1895). It "necessarily follows" that when "an event occurs which renders it impossible for" the Court to grant Petitioners "any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *Id.*

The Court applied this long-standing and well-grounded principle in *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981). In *Camenisch*, the trial court granted the plaintiffs' motion for preliminary injunction, ordering the University of Texas to provide and pay for a sign-language interpreter. *Id.* By the time the Fifth Circuit affirmed, the University had complied with the injunction and the plaintiff had graduated. *Id.* at 393. Acknowledging that the only issue before the Court of Appeals was whether the District Court had abused its discretion in granting the preliminary injunction, this Court held that these subsequent events mooted the appeal, depriving the Fifth Circuit of jurisdiction. *Id.* at 398 ("[W]hether a preliminary injunction should have been issued here is moot, because the terms of the injunction . . . have been fully and irrevocably carried out.") This Court noted that entire case was not moot, as the merits of the ultimate question—which party should bear the cost of the interpreter—were preserved by an injunction bond. *Id.* at 393. The fact that there remained a case or controversy to be decided on the merits did not rescue the appeal, however, which was focused only on a preliminary injunction order that intervening events and changed circumstances rendered academic. *Id. See also*

Christian Civic League of Maine, Inc. v. FEC, 549 U.S. 801 (2006) (declining to expedite appeal and declaring appeal of denial of preliminary injunction moot where the election to which the sought relief related was over); *Bierman v. Dayton*, 817 F.3d 1070, 1072 (8th Cir. 2016) ("Although the denial of a preliminary injunction is immediately appealable, . . . , 'the appeal of an order denying a preliminary injunction becomes moot if the act sought to be enjoined has occurred.' "), *quoting Bacon v. Neer*, 631 F.3d 875, 877 (8th Cir. 2011).

This appeal is moot for the same reasons. Petitioners sought to enjoin their terminations from employment, and—unless Petitioners received the vaccine or a medical exemption, which would render their appeal moot for other reasons—the event they sought to prevent came to pass on or about October 29, 2021, with enforcement of the Emergency Rule. Petitioners may continue to litigate the merits of their Title VII claims against the Provider Defendants, but "the question whether temporary relief should have been granted by the district court [is] moot." 11A Charles Alan Wright et al., Federal Practice & Procedure § 2962 (3d ed.); 13C Charles Alan Wright et al. Federal Practice & Procedure § 3533.3.1 & n.43 (3d ed.) ("Once the opportunity for a preliminary injunction has passed . . . the preliminary injunction issue may be moot even though the case remains alive on the merits."); *Tropicana Product Sales, Inc. v. Phillips Brokerage Co.*, 874 F.2d 1581, 1583 (8th Cir. 1989) (Plaintiff's "*claim on the merits* is not mooted by the 90-day durational limit set forth in its agreement with [Defendant]. However, they

do not save [Plaintiff's] *appeal* from its motion for a preliminary injunction from being dismissed as moot.") (emphases in original).

The fact that Petitioners' Title VII claims against the Provider Defendants remain live demonstrates that the "capable of repetition yet evading review" exception to the mootness doctrine is inapplicable here. *E.g.*, *Radiant Global Logistics, Inc. v. Furstenau*, 951 F.3d 393, 396 (6th Cir. 2020) (explaining the "capable of repetition, yet evading review," exception does not apply when "a live controversy remains as to the merits of [the plaintiffs'] claims, and so [the parties] would still have the opportunity for [their] day in court—including this court—once the district court enters a final judgment"). The merits of Petitioners' claims against the Provider Defendants will not evade review and are in fact in the process of being litigated in the ordinary course.

Petitioners can no longer benefit from the relief they sought in their motion for preliminary injunction. Accordingly, they must litigate their individual claims in the District Court to final judgment, after which they may proceed with any appeal.

B. Petitioners' Claims Have Yet to be Adjudicated, Facts Have Changed, and the Record is Undeveloped, Making this Case an Exceedingly Poor Candidate for Review.

Petitioners ask the Court to review a case that has not progressed beyond the resolution of a motion for preliminary injunction, concerning an Emergency Rule that is no longer in effect, on a record that does not contain even the most basic information concerning the more than 2,000 alleged Petitioners' identities, where they work, and whether their active employment continues to be threatened such that they could benefit from the injunctive relief they seek.[4] Mootness aside, this lack of information and evidence concerning the Petitioners and whether or how they have been or continue to be harmed strongly militates in favor of this Court's general approach of awaiting final judgment before granting certiorari. *E.g.*, *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967). *Accord Virginia Military Institute v. U.S.*, 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising

[4] In their Reply in Support of Motion to Expedite Petition for Writ of Certiorari, Petitioners baldly assert that "[t]o be sure, all employee Petitioners (Except for Jane Doe 6, who works for John Doe 1 . . .) have now been fired. . . ." (Reply at 4.) Without knowing who more than 2,000 Petitioners are, the Provider Defendants are unable to confirm or deny the accuracy of this assertion. More importantly, the assertion enjoys no evidentiary support in the record.

our certiorari jurisdiction.") (Scalia, J., denying petition for writ of certiorari).

While Petitioners' anonymity was immaterial before October 29, 2021, the landscape is very different today. The immunization requirement Petitioners sought to enjoin went into effect, such that Petitioners have all either received the COVID-19 vaccine, obtained a valid medical exemption, or been terminated. Given the sheer number of alleged Petitioners, it is likely that some fall into each category; however, absent from the record is any information concerning how many, or which, of them received the vaccine or a medical exemption and remain employed, and how many, or which, adhered to their religious beliefs, declined the vaccine, and have since been terminated. Those who lost their jobs may have Title VII claims against the Provider Respondents, but we do not know how many, if any, of them have exhausted their administrative remedies. Thus, these Title VII claims are not even ready for resolution at the trial court level, let alone ripe for review by this Court.

Moreover, the Emergency Rule that Petitioners challenge, and the only regulation to have been reviewed by the trial court and First Circuit, no longer exists. It was replaced by a Final Rule, effective November 10. The Final Rule differs from the Emergency Rule and is narrower in scope. To date, Petitioners have taken no action to amend their Verified Complaint; nor do they acknowledge in their Petition that the Emergency Rule they seek to enjoin is no longer in effect or explain how they were impacted by the

Emergency Rule or how they continue to be impacted by the Final Rule. Depending on where Petitioners work, they may or may not continue to be subject to the vaccine mandate at all. In short, the sparse and muddled record and intervening circumstances makes it impossible to determine which, if any, of the Petitioners have standing.

II. THE QUESTIONS PRESENTED THAT RELATE TO THE PROVIDER RESPONDENTS DO NOT IMPLICATE NOVEL OR UNSETTLED QUESTIONS OF FEDERAL LAW.

Petitioners advance three questions for this Court's review. The first Question Presented by Petitioners inaccurately posits that the Governor of Maine has required the Provider Defendants to deny any worker's request for religious accommodation (or, more accurately, exemption) from the COVID-19 vaccine and asks whether her executive order is constitutional. As explained above, the unavailability of non-medical exemptions is not a result of any executive order, but rather pursuant to a state statute that Petitioners do not discuss in their Petition. At any rate, where Provider Respondents are not state actors, Petitioners have not asserted any constitutional claims against them and the first question presented does not concern them.

Petitioners' second and third Questions Presented *do* concern claims asserted against Provider Respondents; however, neither question implicates any of the considerations set forth in Supreme Court Rule 10.

A. Title VII Does Not Require Provider Respondents to Forgo Public Health-Related Workplace Rules or Violate State Law in Order to Accommodate Petitioners' Religious Beliefs.

Petitioners' second Question Presented asks an entirely unremarkable question about the extent to which Title VII preempts state law, the answer to which can be found in the text of section 708 of Title VII, which provides:

> 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. Thus, while Petitioners purport to couch this question in terms of the Supremacy Clause, the question they would like the Court to review is simpler: Does Title VII require employers to exempt an employee from a condition of employment the employee cannot meet due to their religious beliefs, even when such an exemption will violate health-related workplace rules or place the employer in violation of state law? These are not novel questions; nor have they generated inconsistent opinions among federal courts.

In enacting Title VII, Congress expressly declared that it was not occupying the field.[5]Accordingly, Petitioners' invocation of the Supremacy Clause is premised on their contention that the Immunization Requirements Rule actually conflicts with, and is therefore preempted by, Title VII. *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987). A preemption-generating conflict "occurs either because 'compliance with both federal and state regulations is a physical impossibility,' or because state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id. quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941.) "[P]reemption is not to be lightly presumed." *Id.* Indeed, Petitioners bear a particularly heavy burden here, as state and local regulation "of matters related to health and safety" are presumed to be valid under the Supremacy Clause.

---

[5] The Civil Rights Act of 1964 confirms, in two places, that state laws will be preempted only if they actually conflict with federal law. 42 U.S.C. § 2000e-7 ("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. § 2000h-4 ("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.").

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985).

Title VII's prohibition against discrimination on the basis of religion covers "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that [it] is unable to reasonably accommodate an employee's . . . religious observances or practices without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Since at least 1977, federal courts have interpreted the term "undue hardship" to mean anything more than *de minimis*, consistent with this Court's holding in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 68 (1977).

1. Workplace Health and Safety Rules.

Courts have consistently and repeatedly rejected claims, similar to those advanced by Petitioners, that Title VII is an obstacle to the enforcement of safety-related work rules with which employees cannot comply for religious reasons. *E.g.*, *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (holding it would be an undue hardship for the employer to excuse the plaintiff from the requirement that he shave his facial hair to accommodate the use of a respirator that would protect him from exposure to toxic gases); *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 747-48 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (holding it would be an undue hardship for the employer to excuse employee from requirement that he wear a hard hat as a subway car inspector in order to

accommodate a turban). For these reasons, the United States District Court for the District of Rhode Island recently concluded that the plaintiffs in a case virtually identical to this one, were unlikely to succeed on the merits of their Title VII claims. *T. v. Alexander-Scott*, 2021 WL 4476784, at *3 (D.R.I. Sept. 30, 2021). Invoking the presumption against preemption of state health and safety rules and noting that the challenged rule did not preclude employers from providing reasonable accommodation as and when required by Title VII, the court denied the plaintiffs' request to enjoin a mandatory vaccination rule that, like the Maine Immunization Requirements Rule, contained only a narrow medical exemption. *Id.*

2. Compliance with State Law.

Courts considering whether employers are required to accommodate employees' religious beliefs in ways that would place them in violation of the law have analyzed the question two different ways. Some have concluded such claims fail to state a *prima facie* case, reasoning that the conflict with the plaintiff's religious beliefs stems from a statute or rule, and not a requirement of the employer. *E.g.*, *Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000) 132 F. Supp. 2d 414, 418 (E.D. Va. 2001), *aff'd*, 15 F. App'x 172 (4th Cir. 2001). Others have concluded that an accommodation that places the employer in violation of the law is *per se* an undue hardship. *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826,

830-31 (9th Cir. 1999). At least one Circuit Court of Appeals has declined to endorse or reject either approach, simply concluding that Title VII does not require employers to disregard the law "in the name of reasonably accommodating an employee's religious practices." *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 364 (6th Cir. 2015). "Although they have disagreed on the rationale, courts 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." *Sutton*, 192 F.3d at 830.

Petitioners assume without any analysis, discussion, or even acknowledgement of the foregoing precedent that Title VII confers upon them a right to be exempt from employment conditions they cannot meet because of their religious beliefs. Petitioners implicitly ask the Court to alter this established precedent, which it should decline to consider doing. Moreover, under any plausible framing of the undue hardship threshold, it cannot seriously be questioned that Title VII does not require a healthcare employer to provide reasonable accommodations where those accommodations will jeopardize the safety of other employees, expose members of the public to health related risks, or expose the employer to adverse licensing consequences and potentially jeopardize the employer's ability to operate, especially, though by no means limited to, during a pandemic.

B. The Court Should Decline Petitioners' Invitation to Dispense with the Irreparable Harm Prong of the Preliminary Injunction Inquiry in Cases Alleging Religious Discrimination.

Petitioners' third question presented asks the Court to lower the bar for Article III courts to enjoin termination from employment in cases involving claims of religious discrimination under Title VII. To entice the Court to review this question, Petitioners misrepresent the First Circuit's holding below and rely on inapposite case law predating the Civil Rights Act of 1991, when Title VII plaintiffs could not recover compensatory damages for non-economic harm flowing from unlawful discrimination.

Contrary to Petitioners' assertion in heading V of their Petition, the First Circuit did not hold that preliminary injunctive relief is inappropriate in Title VII cases. Rather, consistent with all authority on this issue, the Court held that, "[w]hen litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy," such that plaintiffs must show a "genuinely extraordinary situation" to establish irreparable harm, *citing Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). (Doc. 00117800246 at 32.)

Petitioners' claim that the First Circuit's holding is contrary to decisions of the Second and Fifth Circuits is clearly incorrect, as the cases Petitioners rely upon do not stand for the proposition Petitioners represent

they do. In *Drew v. Liberty Mutual Ins. Co.*, the Fifth Circuit considered whether the trial court had jurisdiction over a Title VII plaintiff's claim where fewer than 180 days had passed since her submission of a charge to the Equal Employment Opportunity Commission (EEOC). 480 F.2d 69, 72 (5th Cir. 1973.) The question before the court was not whether Ms. Drew had suffered irreparable harm, but rather whether the 1972 amendments to Title VII, which conferred the right to file suit upon the EEOC, was the exclusive means by which a Title VII plaintiff could protect herself from irreparable harm. The trial court and Fifth Circuit each assumed that Ms. Drew—who had been terminated by the time she brought suit—was suffering irreparable harm because, in 1973, the remedies available under Title VII did not include compensatory damages, designed to remedy intangible harm such as emotional distress.

Similarly, in *Sheehan v. Purolator Courier Corp.*, the Second Circuit considered not whether the plaintiff had experienced irreparable harm, but rather whether the trial court had jurisdiction to hear her request for injunctive relief. 676 F.2d 877 (2d Cir. 1981). As in *Drew*, because Title VII did not offer any remedy for "the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances," the court readily found irreparable harm. *Id.* at 885-86.

The Provider Defendants have not argued that the District Court lacked jurisdiction to hear Petitioners' motion for preliminary injunction, and neither

of the courts below so found. *Drew* and *Sheehan* are, therefore, entirely inapposite. If anything, these cases remind us that there was a time when employment discrimination or retaliation routinely gave rise to non-economic harm for which Title VII provided no remedy. Since the Civil Rights Act of 1991, which expanded Title VII's remedies to include compensatory and punitive damages, there is virtually no harm for which a victim of employment discrimination cannot receive adequate redress post-judgment; and Petitioners have yet again failed to identify any such harm in their Petition.

Although the wording of Petitioners' third Question Presented suggests that they will argue injunctive relief is appropriate because the absence of injunctive relief has a "chilling effect" on their religious free exercise and protection from religious discrimination, this is false foreshadowing, as they fail even to reference this alleged "chilling effect" in the body of their Petition. Nowhere do Petitioners assert, let alone submit evidence, that any of them has betrayed their religious beliefs and opted for the vaccine in lieu of termination. Instead, Petitioners assert only that they can show "extraordinary circumstances" here because the breadth of the Rule renders them unable to work anywhere in the State of Maine. (Petition at 39.) This assertion is plainly inaccurate—the Rule applies to only a fraction of Maine's healthcare facilities—and it only serves to highlight the adequacy of Petitioners' remedies at law. If Petitioners can establish that they are victims of unlawful discrimination under Title VII, and if it is truly

impossible for them to mitigate their damages by obtaining comparable employment elsewhere, then they may recover back pay, front pay, and compensatory damages in whatever amount is required to make them whole. In short, Petitioners' alleged un-employability is wholly reparable under Title VII's remedial scheme.

The First Circuit's conclusion that Petitioners failed to establish irreparable harm relating to the threatened termination of their employment is consistent with well-settled law, and Petitioners cite no case to the contrary. Instead, they trumpet their First Amendment rights, which do not exist vis-à-vis the Provider Respondents. The only harm for which Petitioners can seek to hold the Provider Defendants responsible relates to the loss of their employment. For any Petitioner who can prove such a claim, that harm is fully redressable through the broad remedies available under Title VII.

CONCLUSION

Petitioners seek interlocutory review of a moot issue: the trial court's denial of a motion to enjoin their terminations from employment for failure to comply with the State of Maine's COVID-19 vaccine mandate for certain healthcare workers. Since Petitioners initiated this lawsuit, the vaccine mandate they challenge has gone into effect, the terminations they sought to enjoin have occurred, and the rule that underlies their

claims no longer exists. Petitioners' employers, the Provider Respondents, are not state actors, and Petitioners assert no First Amendment claims against them, only claims under Title VII of the Civil Rights Act of 1964, which requires employers to provide reasonable accommodations for employees' sincerely held religious beliefs, where such accommodations are not an undue hardship for the employer. No court has interpreted Title VII to guarantee an employee's exemption from reasonable public health or safety rules, and no court has held that employers must provide an employee with an accommodation that would place the employer squarely in violation of state law. For these reasons, and because Title VII provides broad legal and equitable remedies that will make Petitioners whole if they are able to establish meritorious claims, the trial court's denial of preliminary injunctive relief presents no question appropriate for this Court's review.

Respectfully submitted,

NOLAN L. REICHL – *Counsel of Record*
nreichl@pierceatwood.com
JAMES R. ERWIN
jerwin@pierceatwood.com
KATHARINE I RAND
krand@pierceatwood.com
PIERCE ATWOOD LLP
254 Commercial Street
Portland, ME 04101
207-791-1100

Attorneys for MaineHealth;
Genesis Healthcare of Maine, LLC;
Genesis Healthcare LLC; MaineGeneral Health