

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2566 Caption [use short title]

Motion for: leave to file amici brief in support of Dr. A. v. Hochul

Plaintiffs-Appellees

Set forth below precise, complete statement of relief sought:

Movants seek leave to file a brief as amici curiae

in support of Plaintiffs-Appellees

MOVING PARTY: Former EEOC Employees/Title VII Relic OPPOSING PARTY: N/A

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Rachel N. Morrison OPPOSING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: Second Circuit panel

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
[checked] Yes [] No (explain):

Both parties consented

Opposing counsel's position on motion:
[checked] Unopposed [] Opposed [] Don't Know

Does opposing counsel intend to file a response:
[] Yes [] No [] Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? [] Yes [] No
Has this relief been previously sought in this Court? [] Yes [] No

Requested return date and explanation of emergency:

Is oral argument on motion requested? [] Yes [checked] No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? [] Yes [checked] No If yes, enter date:

Signature of Moving Attorney: /s/ Rachel Morrison Date: Dec. 9, 2021

Service by: [checked] CM/ECF [] Other [Attach proof of service]

21-2566

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J.,
NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S.,
NURSE S., PHYSICIAN LIAISON X,

Plaintiffs-Appellees,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER
OFFICIAL CAPACITY, DR. HOWARD A. ZUCKER, COMMISSIONER OF THE NEW
YORK STATE DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, LETITIA
JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER
OFFICIAL CAPACITY,

Defendants-Appellants.

On Appeal from United States District Court for the
Northern District of New York (Syracuse), No. 21-cv-1009.

**MOTION OF FORMER EEOC EMPLOYEES AND TITLE VII
RELIGIOUS ACCOMMODATION EXPERTS FOR LEAVE TO
FILE ATTACHED *AMICI CURIAE* BRIEF IN SUPPORT OF
PLAINTIFFS-APPELLEES AND IN SUPPORT OF PETITION
FOR PANEL REHEARING OR REHEARING EN BANC**

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Counsel for Movants

Pursuant to Federal Rule of Appellate Procedure 29(b)(2)-(3), Movants respectfully move for leave to file a brief *amici curiae* in support of Plaintiffs-Appellees' Petition for Panel Rehearing or Rehearing En Banc. Both Plaintiffs-Appellees and Defendants-Appellants consent to the filing of the *amici* brief.

Movants are former employees of the U.S. Equal Employment Opportunity Commission (EEOC) and experts in employment discrimination as it relates to religious discrimination and accommodation. Sharon Fast Gustafson is a former General Counsel of the EEOC. During her tenure she established a Religious Discrimination Work Group. Ms. Gustafson has worked to promote religious nondiscrimination and accommodation, as well as litigated these cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Rachel Morrison was an attorney advisor to General Counsel Gustafson at the EEOC, and a member of the General Counsel's Religious Discrimination Work Group, where she advised the General Counsel on religious discrimination matters. Ms. Morrison has written and spoken as an expert on employees' religious rights in the workplace.

Movants offer the proposed brief to explain Title VII's religious

accommodation standard and why New York's vaccine mandate should not and cannot displace religious freedom protections under Title VII. The *amici* brief thus includes relevant material not fully brought to the attention of the Court by the parties.

For the foregoing reasons, Movants respectfully request that the Court grant this unopposed motion to file the attached proposed *amici* brief.

December 9, 2021

Respectfully submitted,

/s/ Rachel Morrison

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because this motion contains 239 words. The motion also complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6), because it has been prepared using Microsoft Word Century Schoolbook font measuring no less than 14 points. Finally, this motion complies with the requirements of Federal Rule of Appellate Procedure 29(b)(3) because it is accompanied by a copy of the proposed brief and sets forth Movants' interest in this appeal and why Movants' participation as *amici curiae* is desirable and would be relevant to the disposition of the case.

Dated: December 9, 2021

/s/ Rachel Morrison
RACHEL N. MORRISON
Counsel for Movants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on December 9, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

Dated: December 9, 2021

/s/ Rachel Morrison

RACHEL N. MORRISON

Counsel for Movants

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**BRIEF *AMICI CURIAE* OF FORMER EEOC EMPLOYEES AND
TITLE VII RELIGIOUS ACCOMMODATION EXPERTS IN
SUPPORT OF PLAINTIFF-APPELLEES AND PETITION FOR
PANEL REHEARING OR REHEARING EN BANC**

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INTEREST OF THE *AMICI CURIAE*¹

Amici are former employees of the Equal Employment Opportunity Commission (EEOC) and experts in employment discrimination as it relates to religious discrimination and accommodation. Sharon Fast Gustafson is a former General Counsel of the EEOC. During her tenure she established a Religious Discrimination Work Group (RDWG). She has worked to promote religious nondiscrimination and accommodation, as well as litigated these cases under Title VII. Rachel Morrison was an attorney advisor to GC Gustafson at the EEOC, and a member of the GC's RDWG, where she advised the GC on religious discrimination matters. She has written and spoken as an expert on employees' religious rights in the workplace.

Amici offer the brief to explain Title VII's religious accommodation standard and why New York's vaccine mandate should not and cannot displace religious freedom protections under Title VII.

¹ No party's counsel has authored this brief in whole or in part, and no person other than *amici*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. Fed. R. App. P. 29(b)(4). This brief has been submitted with an unopposed motion for leave to file it.

SUMMARY OF ARGUMENT

This case raises the question of whether New York can mandate that employers violate Title VII of the Civil Rights Act of 1964.

New York's vaccine mandate allows "any reasonable accommodation" for medically exempt unvaccinated employees. N.Y. Comp. Codes R. & Regs. tit. 10, §2.61(d) (2021). However, the mandate categorically prohibits religious exemptions and allows no reasonable accommodation for employees unvaccinated for religious reasons.

Under Title VII, when a workplace rule violates an employee's sincerely held religious belief, an employer must reasonably accommodate the employee's religious belief if it can do so without undue hardship to the employer's business.

The Equal Employment Opportunity Commission (EEOC)—the federal agency tasked with enforcing Title VII—has set out what is required for a religious accommodation to be deemed "reasonable." An accommodation is *not* reasonable if it transfers an employee from his current position or if it reduces an employee's pay, benefits, or responsibilities of employment, and a reasonable accommodation exists that would not so harm the employee.

Pursuant to the Supremacy Clause of the U.S. Constitution and Title VII, no state can require employers to violate Title VII's reasonable accommodation requirement.

New York's mandate that employers must categorically require employees to be vaccinated against COVID-19, without regard to, or accommodation for, an employee's sincerely held religious beliefs, is facially infirm. This Court should grant the petition.

ARGUMENT

I. Title VII creates a floor of protection against religious discrimination.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, prohibits discrimination in the workplace on the basis of religion. *Id.* §2000e-2(a). By text and design, Congress created a floor of protection against such discrimination that all states are bound to respect. Title VII defines religion to include “all aspects of religious observance and practice, as well as belief.” *Id.* §2000e(j). Beliefs are considered “religious” if they are religious “in the individual’s ‘own scheme of things.’” EEOC, Compliance Manual: Religious Discrimination §12 (2021) [hereinafter “Religion Guidance”] (quoting *Welsh v. United States*, 398 U.S. 333, 339

(1970), and *United States v. Seeger*, 380 U.S. 163, 185 (1965))²; see also EEOC Guidelines on Discrimination Because of Religion [hereinafter “Guidelines”], 29 C.F.R. §1605.1 (EEOC has “consistently applied” *Welsh* and *Seeger* standard to Title VII). Title VII protects an *individual’s* religious beliefs—including about vaccination—regardless of whether those beliefs are common or traditional, whether they seem logical or reasonable to others, and whether they are recognized by an organized religion. Religion Guidance §12-I-A-1 (citing *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)).

Title VII forbids employers to discriminate because of an individual’s religion in hiring, promotion, discharge, “compensation, terms, conditions, or privileges of employment.” 42 U.S.C. §2000e-2(a)(1). Further, employers must not “limit, segregate, or classify” employees based on religion “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.” *Id.* §2000e-2(a)(2). Employers are prohibited

² <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>. EEOC’s religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC’s positions and contains extensive footnotes to caselaw in support.

from discriminating intentionally or through policies that have a disparate impact on religious employees. *See EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768, 771 (2015).

Religious accommodation requirement. In addition to those negative proscriptions, employers are affirmatively required to “reasonably accommodate” an employee’s religious beliefs, observances, and practices unless the accommodation would pose an “undue hardship on the conduct of the employer’s business.” 42 U.S.C. §2000e(j). Absent undue hardship, an employer’s failure to reasonably accommodate religious belief constitutes unlawful discrimination. In *Abercrombie*, the Supreme Court held “Title VII requires otherwise-neutral policies to give way to the need for an accommodation.” 575 U.S. at 775. The Court further explained, “Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment,” creating an affirmative obligation on employers. *Id.*

An employee’s “sincerely held” religious objection to a workplace policy or job duty qualifies for a religious accommodation. Religion Guidance §12-I-A-2 (citing *Seeger*, 380 U.S. at 185); *id.* §12-IV;

Guidelines, 29 C.F.R. §1605.2. An employer is not required to provide an *un*-reasonable accommodation and is not necessarily required to provide the employee's preferred accommodation. Religion Guidance §12-IV-A-3 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986)). For an accommodation to be reasonable, it "must not discriminate against the employee or unnecessarily disadvantage the employee's term's conditions, or privileges of employment." *Id.* (citing *Ansonia*, 479 U.S. at 70). An employer's proposed religious accommodation is not reasonable if the employer provides a more favorable accommodation to other employees for non-religious reasons, including medical reasons. *Id.* (citing *Ansonia*, 479 U.S. at 70-71).

Likewise, a religious accommodation is not reasonable "if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment" and there is another accommodation available that would not require such a harm. *Id.* §12-IV-A-3. When there is more than one reasonable accommodation that does not pose an undue hardship, "the employer ... must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities." Guidelines, 29 C.F.R. §1605.2(c)(2)(ii).

Employees who need religious accommodations should generally be accommodated in their current positions unless there is no accommodation in that position that does not pose an undue hardship. Religion Guidance §12-IV-C-3 (citing Guidelines, 29 C.F.R. §1605.2(d)(iii)). Only when no such accommodation is possible, should the employer consider reassignment or a lateral transfer as an accommodation. *Id.* (citing Guidelines, 29 C.F.R. §1605.2(d)(iii)).

Undue hardship defense. “Undue hardship” is not defined in Title VII. In *TWA v. Hardison* the Supreme Court defined “undue hardship” to mean “more than a *de minimis* cost.” 432 U.S. 63, 84 (1977). Common examples of undue hardship are found when an accommodation would violate a seniority system, infringe on the rights of other employees, require more than a minimal expense, impair workplace safety, or jeopardize security. Religion Guidance §12-IV-B.

To demonstrate undue hardship, employers must rely on “objective information,” not “speculative hardships,” including assumptions that other employees might seek accommodations. EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at L.3, L.4 (last updated Nov. 17, 2021) [hereinafter “COVID-

19 Guidance”].³ Whether a reasonable accommodation exists that does not pose an undue hardship is a fact-specific inquiry appropriate for a case-by-case determination. Religion Guidance §12-IV-B-1.

Reasonable accommodation process. To receive a religious accommodation, an employee should notify the employer of the conflict between a workplace requirement, policy, or practice and the employee’s sincerely held religious belief, observance, or practice. COVID-19 Guidance at L.1.

An employer should assume an employee requesting a religious accommodation is doing so based on a sincerely held religious belief unless the employer “has an objective basis for questioning either the religious nature or the sincerity of a particular belief,” in which case the employer may make a “limited factual inquiry” and seek additional supporting information. *Id.* at L.2.

An employer and an employee should engage in a “flexible, interactive process” to identify workplace accommodations that do not impose an undue hardship on the employer. *Id.* at K.6. An employer

³ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

“should thoroughly consider all possible reasonable accommodations,” which in the COVID-19 vaccine context could include periodic testing, masking, social distancing, modified shifts, telework, and—as a “last resort”—reassignment. *Id.* at K.2, K.6, L.3.

To the extent that an employer grants medical exemptions, but not religious exemptions, the employer must demonstrate that religious exemptions would pose an undue hardship that medical exemptions do not pose. *See* Religion Guidance §12-IV-A-3. Failure to treat like accommodation requests alike would give rise to an inference of pretextual religious discrimination. *Cf. Ansonia*, 479 U.S. at 71 (“unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones ... [because] [s]uch an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness”).

II. New York’s vaccine mandate conflicts with Title VII.

Despite Title VII’s requirement that employers reasonably accommodate employees’ religious beliefs, New York adopted an “emergency” regulation that mandates COVID-19 vaccination for healthcare employees and categorically prohibits religious exemptions.

N.Y. Comp. Codes R. & Regs. tit. 10, §2.61 (2021). That same regulation, however, allows broad medical exemptions whenever “any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of [the employee], based upon a pre-existing health condition.” *Id.* §2.61(d). For such medical exemptions, the mandate provides that employers may grant “any reasonable accommodation.” *Id.* §2.61(d)(1).

Plaintiffs’ sincerely held religious beliefs. In this case, the Plaintiffs hold uncontested sincere religious beliefs against being injected with any of the COVID-19 vaccines approved by the FDA based on their documented connection with aborted fetal cell lines in the vaccines’ testing, development, or production. J.A. A20-A21.

Prior to the mandate, several Plaintiffs had received religious accommodations from their employers, who had determined (a) that the Plaintiffs had sincerely held religious beliefs that prohibited them from receiving the COVID-19 vaccine, (b) that an agreed upon reasonable accommodation existed, and (c) that the accommodation did not pose an undue hardship on the employer. J.A. A25, A29, A40, A46. Yet, because of the mandate, some employers revoked previously granted religious

accommodations and others refused to consider their employees' religious accommodation requests. J.A. A25, A29, A35-36, A40-A41, A46.

New York's mandate prohibits religious accommodations.

New York's vaccine mandate purports to prohibit employers from providing employees the reasonable religious accommodations required by Title VII. As the district court below explained, "The plain terms of [New York's mandate] do not make room for 'covered entities' to consider requests for reasonable religious accommodations." Mem.-Decision and Order at 14, *Dr. A. v. Hochul*, No. 21-cv-1009 (N.D.N.Y. Oct. 12, 2021). New York's mandate effectively nullifies Title VII's religious accommodation requirements for effected employees.

The Second Circuit panel's erroneous reasoning. The Second Circuit panel suggests that under New York's mandate, employers may accommodate their employees' religious beliefs by transferring those employees to different positions not covered by the mandate. Op.37-38. But such an "accommodation" would not be reasonable under Title VII, which permits job transfers as accommodations *only* when other reasonable accommodations do not exist. Even lateral transfers themselves can be adverse employment actions. *See Ortiz-Diaz v. U.S.*

Dep't of Hous. & Urban Dev., 867 F.3d 70, 81 (D.C. Cir. 2016) (Kavanaugh, J., concurring) (“transferring an employee because of the employee’s [protected basis] ... plainly constitutes discrimination with respect to ‘compensation, terms, conditions, or privileges of employment’ in violation of Title VII” (quoting 42 U.S.C. §2000e-2(a))); *see also id.* (Under the plain meaning of the statutory text, “[a]ll discriminatory transfers ... are actionable under Title VII.”).

Here, employers’ ability under New York’s mandate to make “any reasonable accommodation” for medical exemption requests creates an assumption that the same accommodations are available for those with religious exemption requests. Therefore, the proposed transfer accommodations for religious exemption requests are not reasonable because other reasonable accommodations exist. Indeed, prior to the mandate, several Plaintiffs had already received these religious accommodations from their employers.

New York’s mandate cannot nullify Title VII. Whether Title VII requires any particular religious accommodation is not the question in this case. Rather, the immediate question before the Court is whether New York can legally issue a mandate that nullifies the right to Title VII

religious accommodation with respect to COVID-19 vaccination. That answer is “no.”

New York’s mandate requires employers to document and report to the State their compliance with the vaccine mandate, and non-compliant employers are subject to penalties. N.Y. Comp. Codes R. & Regs. tit. 10, §2.61(c)-(f). However, Title VII relieves an employer from “any liability, duty, penalty, or punishment” under any State law “which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII].” 42 U.S.C. §2000e-7.

The U.S. Constitution’s Supremacy Clause establishes that federal laws “shall be the supreme Law of the Land,” U.S. Const. art. VI, para. 2. State laws can provide additional protections for religion but cannot take away rights provided by federal law.

III. Federal vaccine mandates recognize Title VII.

In contrast to New York’s mandate, federal vaccine mandates have rightly recognized Title VII’s religious accommodation provision. President Biden’s executive order mandating vaccination for all Federal employees, recognizes its mandate is “subject to such exceptions as required by law.” Exec. Order No. 14043 §1, 86 Fed. Reg. 50,989, 50,989

(Sept. 9, 2021). One such law is Title VII.

Similarly, two additional federal vaccine mandates—one for healthcare workers funded by the Centers for Medicare and Medicaid Services within the Department of Health and Human Services (HHS) and another for employees of “large” employers covered by the Department of Labor’s Occupational Safety and Health Administration—comply with Title VII’s religious accommodation obligations and direct employers to consult EEOC’s religion guidance and COVID-19 guidance for evaluating and responding to religious accommodation requests. *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555, 61,569, 61,572 (Nov. 5, 2021) (explaining employers must “provide appropriate accommodations, to the extent required by Federal law, for employees who request and receive exemption from vaccination because of a ... sincerely held religious belief, practice, or observance”); *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402, 61,522, 61,532, 61,552 (Nov. 5, 2021) (vaccination requirement does not apply to employees “[w]ho are legally entitled to a reasonable accommodation under federal civil rights laws because they have ... sincerely held religious beliefs, practices, or

observances that conflict with the vaccination requirement”).

The Department of Justice (DOJ) recognizes: “Civil rights protections and responsibilities still apply, even during emergencies. They cannot be waived.”⁴ Likewise, HHS reminded “entities covered by civil rights authorities” that even during the COVID-19 Public Health Emergency they should “keep in mind their obligations under laws and regulations that prohibit discrimination on the basis of ... exercise of conscience and religion in HHS-funded programs.”⁵

CONCLUSION

Without intervention, Plaintiffs will lose Title VII’s vital protections of their religious beliefs. This Court should grant the petition.

⁴ DOJ, *Civil Rights and COVID-19* (last updated May 12, 2021), https://www.justice.gov/crt/Civil_Rights_and_COVID-19.

⁵ HHS Office for Civil Rights in Action, Bulletin: Civil Rights, HIPAA, and the Coronavirus Disease 2019 (COVID-19) 1 (Mar. 28, 2020), <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf>.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the requirements of Fed. R. App. P. 29(b)(4) because it has 2593 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: December 9, 2021

/s/ Rachel Morrison
RACHEL N. MORRISON
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on December 9, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

Dated: December 9, 2021

/s/ Rachel Morrison
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Counsel for Amici Curiae