No. 21-1143

In the Supreme Court of the United States

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., DR. S., NURSE S., PHYSICIAN LIAISON X.,

Petitioners,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. MARY T. BASSETT, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HER OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF FORMER EEOC EMPLOYEES AND TITLE VII RELIGIOUS ACCOMMODATION EXPERTS IN SUPPORT OF PETITIONERS AND PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*[1]

Amici 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. She has written and spoken as an expert on employees' religious rights in the workplace.

Amici offer the proposed brief to explain Title VII's religious accommodation standard and why New York's mandate conflicts with Title VII. Without intervention by the Court, New York's mandate will effectively nullify the vital religious protections guaranteed to Petitioners by Title VII.

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[1] No counsel for a party 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. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF ARGUMENT

This case raises the issue 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 makes no allowance for 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 of a religious accommodation in order for it to be deemed "reasonable." An accommodation is deemed *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 Title VII and the Supremacy Clause of the U.S. Constitution, no state can require employers to violate Title VII's reasonable accommodation requirement. Yet purportedly under New York's mandate, employers must require employees to be vaccinated against COVID-19, without regard to, or

accommodation for, an employee's sincerely held religious beliefs.

Without intervention by this Court, New York's mandate will effectively nullify the vital religious protections guaranteed to Petitioners by Title VII. The 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 by design, Congress created a floor of protection against such discrimination that all states are bound to respect.

Title VII defines religion broadly to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. 2000e(j). Beliefs are considered "religious" if they are "sincerely held" and, "in the individual's 'own scheme of things, religious.'" EEOC, Compliance Manual: Religious Discrimination § 12 (2021) [hereinafter "EEOC Religion Guidance"][2] (quoting *Welsh* v. *United States*, 398 U.S. 333, 339 (1970), and *United States* v. *Seeger*, 380 U.S. 163, 185 (1965)); see also EEOC Guidelines on Discrimination Because of Religion [hereinafter "EEOC Religion Guidelines"], 29 C.F.R. 1605.1 (EEOC has

[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.

"consistently applied" *Welsh* and *Seeger* standard to Title VII). Title VII protects an *individual's* religious beliefs—including religious beliefs 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. EEOC Religion Guidance § 12-I-A-1 (citing *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 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 from discriminating intentionally (disparate treatment) or through policies that have a disparate impact on religious employees. See *Equal Emp't Opportunity Comm'n* v. *Abercrombie & Fitch Stores, Inc.*, 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 Court held that "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. *Ibid.*

An employee's "sincerely held" religious objection to a workplace policy or job duty qualifies for a religious accommodation. EEOC Religion Guidance § 12-I-A-2 (citing *Seeger*, 380 U.S. at 185); *id.* § 12-IV; EEOC Religion 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. EEOC 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 terms, conditions, or privileges of employment." *Ibid.* (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. *Ibid.* (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. EEOC Religion Guidance § 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." EEOC Religion 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. EEOC Religion Guidance § 12-IV-C-3 (citing EEOC Religion 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. *Ibid.* (citing EEOC Religion Guidelines, 29 C.F.R. 1605.2(d)(iii)).

Undue hardship defense. "Undue hardship" is not defined in Title VII. In *Trans World Airlines, Inc.* v. *Hardison* the Supreme Court defined "undue hardship" to mean "more than a *de minimis* cost." 432 U.S. 63, 84 (1977).[3] 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. EEOC Religion Guidance § 12-IV-B.

To demonstrate undue hardship, employers must rely on "objective information," not "speculative or

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[3] Several recent petitions for certiorari have asked the Court to revisit *Hardison*'s undue hardship standard. In one case, *Patterson* v. *Walgreen Co.*, Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch agreed that "in an appropriate case" the Court should "consider whether *Hardison*'s interpretation should be overruled," recognizing that "more than a *de minimis* burden" is not "the most likely interpretation of the statutory term 'undue hardship.'" 140 S. Ct. 685, 685-686 (2020).

hypothetical hardship," including the assumption 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 Mar. 14, 2022) [hereinafter "EEOC COVID-19 Guidance"].[4] Whether a reasonable accommodation exists that does not pose an undue hardship is a fact-specific inquiry appropriate for a case-by-case determination. EEOC 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. EEOC 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." EEOC COVID-19 Guidance 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. EEOC COVID-19 Guidance at K.6. An employer "should thoroughly consider all possible reasonable accommodations," which in the

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[4] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

COVID-19 vaccination 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 EEOC 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, on August 26, 2021, New York adopted an updated "emergency" regulation that mandates COVID-19 vaccination for healthcare employees and eliminated the prior express religious exemption. 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 New York regulation provides that

employers may grant "any reasonable accommodation." *Id.* § 2.61(d)(1). The mandate was updated again in January 2022 to require a "booster or supplemental dose," but the regulation still does not recognize any religious exemptions. N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61 (2022).

Petitioners' sincerely held religious beliefs. In this case, the Petitioners hold uncontested sincere religious beliefs against being injected with any of the COVID-19 vaccines approved by the FDA. App.175a-179a. These religious beliefs relate to the documented connection between the vaccines and the use of aborted fetal cell lines in the vaccines' testing, development, or production. App.175a-179a.

Prior to the August 26 mandate, several Petitioners received religious accommodations from their employers, who had determined (a) that the Petitioners 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. App.181a ¶ 49; App.185a ¶ 77; App.198a ¶ 142; App.204a ¶ 173. Yet, because of the August 26 mandate, some employers revoked previously granted religious accommodations and other employers refused to consider their employees' religious accommodation requests. App.181a ¶ 49; App.185a ¶ 77; App.192a-193a ¶ 112; App.198a-199a ¶¶ 142-143; App.205a ¶ 174.

New York's mandate prohibits religious accommodations. New York's vaccine mandate purportedly prohibits 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." App.84a. While New York's scheme is an outlier, New York is not the only state attempting an end run around Title VII. See, *e.g.*, *Does 1-3* v. *Mills*, No. 21-717 (U.S. Feb. 22, 2022) (denial of petition for certiorari challenging the lack of religious exemptions in Maine's emergency COVID-19 vaccine mandate). If upheld, New York's mandate would effectively nullify Title VII's religious accommodation requirements for effected employees.

The Second Circuit's erroneous reasoning. The Second Circuit suggested that under New York's mandate, an employer may accommodate its employees' religious beliefs by transferring those employees to different positions not covered by the mandate. App.48a-49a. 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] (or denying an employee's requested transfer 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 *ibid.* (Under the plain meaning of the statutory text, "[a]ll

discriminatory transfers (and discriminatory denials of requested transfers) are actionable under Title VII.").

Here, an employer's 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 Petitioners had already received these religious accommodations from their employers. But after the mandate, these Petitioners had their religious accommodations revoked.

New York's mandate cannot nullify Title VII. Whether Title VII requires any *particular* religious accommodation is not the issue in this case. Rather, the issue 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) (2021). 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 state law—including New York's mandate—cannot take away rights duly provided by federal law.

III. Unlike New York's mandate, federal vaccine mandates rightly recognize Title VII.

In contrast to New York's mandate, federal vaccine mandates have rightly recognized Title VII's religious accommodation provision. President Joe Biden's September 9, 2021, 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 of those laws is Title VII's religious accommodation requirement. Consequently, the federal government provides standardized religious accommodation request forms for any federal employees who seek an accommodation with respect to this federal COVID-19 vaccine mandate.[5]

On November 5, 2021, the federal government issued two additional vaccine mandates—one for healthcare workers funded by the Centers for

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[5] See, *e.g.*, EEOC, Religious Accommodation Request Form, https://www.eeoc.gov/sites/default/files/2021-10/EEOC%20Religious%20Accommodation%20Request%20Form%20-%20for%20web.pdf; Safer Federal Workforce Task Force, Template: Request for a Religious Exemption to the COVID-19 Vaccination Requirement (last updated Oct. 29, 2021), https://www.saferfederalworkforce.gov/downloads/RELIGIOUS%20REQUEST%20FORM_FINAL%20REVIEW_20211003%2010.29%2011am.pdf.

Medicare & Medicaid Services (CMS) within the Department of Health and Human Services (HHS) and another for employees of "large" employers covered by the Occupational Safety and Health Administration (OSHA) within the Department of Labor. *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555 (Nov. 5, 2021); *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (Nov. 5, 2021).

CMS's vaccine mandate for healthcare workers—"compelled" by the need "to protect the health and safety" of staff and patients—reiterates that "employers must comply with applicable Federal anti-discrimination laws and civil rights protections," including Title VII. 86 Fed. Reg. 61,555, 61,560, 61,568. The mandate explained that this means 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." 86 Fed. Reg. 61,555, 61,569. In its decision upholding the mandate, this Court reiterated that the mandate "requires providers to offer medical and religious exemptions." *Biden* v. *Missouri*, No. 21A240 (U.S. Jan. 13, 2022), slip op. 2.

Although OSHA's vaccine mandate—premised on the existence of a "grave danger" in workplaces of employers with 100 or more employees—was ultimately struck down by this Court in *National Federation of Independent Business* v. *Department of Labor*, No. 21A244 (U.S. Jan. 13, 2022), it likewise recognized that employees "may be entitled to a reasonable accommodation." 86 Fed. Reg. 61,402, 61,552. As such,

consistent with Title VII, the mandate's vaccination requirement did 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." *Ibid*.

Both CMS's and OSHA's mandates directed employers to consult EEOC's religion guidance and COVID-19 guidance for evaluating and responding to religious accommodation requests. See 86 Fed. Reg. 61,555, 61,572; 86 Fed. Reg. 61,402, 61,522, 61,532, 61,552.

The U.S. Department of Justice recognizes: "Civil rights protections and responsibilities still apply, even during emergencies. They cannot be waived."[6] Likewise, in light of the COVID-19 Public Health Emergency, HHS reminded "entities covered by civil rights authorities" that 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."[7] But New York fails to do just that.

CONCLUSION

Without intervention by this Court, New York's mandate will effectively nullify the vital religious

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[6] U.S. Dep't of Just., *Civil Rights and COVID-19* (last updated May 12, 2021), https://www.justice.gov/crt/Civil_Rights_and_COVID-19.

[7] 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.

protections guaranteed to Petitioners by Title VII. The Court should grant the petition.

Respectfully submitted.

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