No. 21-717

IN THE

Supreme Court of the United States

JANE DOES 1–6, *et al.*,

Petitioners,

V.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MAINE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
Counsel of Record
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org

Counsel for Petitioners

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

As the First Circuit's decision below demonstrates,

> sometimes our promises outrun our actions. Sometimes dissenting religious beliefs can seem strange and bewildering. In times of crisis, this puzzlement can evolve into fear and anger. . . . After all, a large majority of Americans—religious persons included—have taken one of the COVID-19 vaccines. It is also true that some faith leaders, the Pope included, have encouraged vaccination. If so many other religious persons are willing to be vaccinated, it is tempting enough to ask: What can be so wrong with coercing the few who are not?
>
> By now, though, we should know the costs that come when this Court stands silent as majorities invade the constitutional rights of the unpopular and unorthodox.

Dr. A v. Hochul, 142 S. Ct. 552, 558 (2021) (Gorsuch, J., dissenting).

And, the cost of inaction on the instant Petition is clear. It will

> remind us that, in the end, it is always the failure to defend the Constitution's promises that leads to this Court's greatest regrets. [It will] remind us, too, that in America, freedom to differ is not supposed

> to be "limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." . . . The test of this Court's substance lies in its willingness to defend more than the shadow of freedom in the trying times, not just the easy ones.

Id. at 559 (Gorsuch, J., dissenting) (citing *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Though this Court declined to issue emergency injunctive relief—relief that would have prevented the termination of the Petitioners before this Court—as Justice Gorsuch said: "One can only hope today's ruling will not be the final chapter in this grim story." *Dr. A*, 142 S. Ct. at 559 (Gorsuch, J., dissenting). Noting the previous discrimination against religious exercise during the COVID-19 pandemic, "as days gave way to weeks and weeks to months, this Court came to recognize that the Constitution is not to be put away in challenging times, and [it] stopped tolerating discrimination against religious exercises." *Id.* Petitioners pray unto this Court to do so again, and grant the Petition.

LEGAL ARGUMENT

I. STATE RESPONDENTS' ATTEMPT TO REFRAME THE ISSUE TO AVOID THE ACTUAL QUESTION BEFORE THE COURT—WHETHER THE STATE MAY TREAT NONRELIGIOUS EXEMPTIONS MORE FAVORABLY THAN RELIGIOUS EXEMPTIONS—CANNOT SAVE THE FIRST CIRCUIT'S DECISION FROM ITS DIRECT CONFLICT WITH THIS COURT'S PRECEDENT.

A. The First Circuit's Decision Cannot Be Reconciled With This Court's Precedent.

State Respondents assert that the circuit courts have uniformly held that the Free Exercise Clause does not require that religious exemptions be granted to mandatory vaccination policies. (State Br. at 30.) But this misstates the question and ignores the salient issue before the Court. The question is not—as State Respondents contend—whether the First Amendment mandates exemptions to compulsory vaccination. Instead, the question is whether, once the State has created a system of nonreligious exemptions to a vaccine mandate, it is required to treat those requesting religious exemptions equally to those requesting the nonreligious exemptions. Indeed, "the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption." *Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting). Once properly

framed, the answer is clear, and the First Circuit's error below is manifest.

As Justice Gorsuch has already noted in this case, "[t]he State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications." (App. 4a.) In fact, Maine's vaccine mandate explicitly exempts those for whom a COVID-19 vaccine may be medically inadvisable:

> Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement" from a doctor or other care provider indicating that immunization "may be" medically inadvisable. Me. Rev. Stat. Ann., Tit. 22, § 802(4-B) (2021). Nothing in Maine's law requires this note to contain an explanation why vaccination may be medically inadvisable, nor does the law limit what may qualify as a valid "medical" reason to avoid inoculation. So while COVID-19 vaccines have Food and Drug Administration labels describing certain contraindications for their use, individuals in Maine may refuse a vaccine for other reasons too. From all this, it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms.

(App. 4a–5a.)

Such was also the case in *Dr. A*, where Justice Gorsuch again noted in dissent that a vaccine mandate is not neutral or generally applicable when it precludes religious exemptions while permitting the preferred nonreligious, medical exemptions. 142 S. Ct. at 556. Indeed, as here, "New York's mandate fails this test" because "[i]t prohibits exemptions for religious reasons while permitting exemptions for medical reasons." *Id.*

Because Maine's vaccine mandate permits nonreligious medical exemptions for virtually any reason, but prohibits individuals from obtaining an identical exemption based on sincerely held religious beliefs, it is not neutral or generally applicable. Put simply, Maine's vaccine mandate cannot be viewed as neutral because it explicitly discriminates against religious exemptions while permitting the preferred nonreligious, medical exemptions. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("[G]overnment regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."); *id.* ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("[T]he regulations cannot be viewed as neutral because they single out [religious exercise] for especially harsh treatment.").

Despite the unequivocal holdings of the Court that the government may not single out religious exemptions for especially harsh treatment or treat them less favorably than nonreligious exemptions of like kind, the First Circuit below held that Maine's discriminatory treatment of religious exemptions created no neutrality problem under the First Amendment. (App. 30a ("[C]arving out an exception for those people to whom that physical health risk applies furthers Maine's asserted interests in a way that carving out an exemption for religious objectors would not.").) But that holding is plainly in conflict with this Court's precedent. As Justice Gorsuch noted, "The Court of Appeals found Maine's rule neutral and generally applicable *due to an error this Court has long warned against*—restating the Sate's interests on its behalf, and doing so at an artificially high level of generality." (App. 7a (emphasis added).) Contrary to the First Circuit's rationale, under this Court's precedent, "when judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's *actually asserted* interests as applied to the parties before it count—not *post-hoc* reimaginings of those interests expanded to some society-wide level of generality." (*Id.* (citing *Fulton*, 141 S. Ct. at 1877; *Tandon*, 141 S. Ct. at 1296–97; *Lukumi*, 508 U.S. at 544–45)).) State Respondents' asserted interest here is plainly insufficient to justify discrimination against religious exemptions. As Justice Gorsuch explained in *Dr. A*, "allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain

unvaccinated for religious reasons or medical ones." 142 S. Ct. at 556 (Gorsuch, J., dissenting).

The First Circuit's only answer to the unequivocal holdings of this Court was to say that Maine did not single out religious exemptions *alone*, but rather removed exemptions for both religious and philosophical objectors. (App. 27a.) But this too is wholly irreconcilable with the Court's precedents. Indeed, "[i]t is no answer that a State treats some comparable secular . . . activities as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296; *see also Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring). "Rather, [under this Court's precedents,] once a State creates a favored class of [exemptions], as [Maine] has done in this case, the State must justify why [religious exercise is] excluded from that favored class." *Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring).

The First Circuit's failure to recognize the constitutional infirmity of treating nonreligious, medical exemptions more favorably than religious exemptions that pose identical risks to the State's asserted interests places its decision in direct conflict with this Court's precedent. Certiorari is appropriate to correct this "serious error" in a case "present[ing] an important constitutional question." (App. 11a.)

B. The First Circuit's Decision Below Cannot Be Reconciled With the Precedent of the Other Circuits.

State Respondents also contend that certiorari is inappropriate because there is no split among the circuits, and the First Circuit's decision below is consistent with other circuit precedent. (State Br. 31.) As the Petition shows, however, there is a direct conflict between the First Circuit's decision below and the Third, Sixth, and Seventh Circuits. (Pet. 22–31.) And the conflict has intensified since the filing of the Petition.

The Second Circuit has now joined the Third, Sixth, and Seventh Circuits in holding that a law is only neutral and generally applicable if it treats equally religious and nonreligious medical exemptions to mandatory vaccinations. *See Kane v. De Blasio*, 19 F.4th 152, 164 (2d Cir. 2021) (holding that New York City's vaccine mandate for education professionals was neutral and generally applicable but only because "the Mandate does not single out employees who decline vaccination on religious grounds. Its restrictions apply equally to those who choose to remain unvaccinated for any reason."); *id.* at 164 n.12 ("The Vaccine Mandate permits both medical and religious accommodations. In that respect, this case is factually different from recent challenges to other vaccine mandates."). It was because the law was neutral and generally applicable with respect to both religious and nonreligious, medical exemptions that the Second Circuit held it was facially neutral under the First Amendment.

That analysis is in direct conflict with the decision of the First Circuit below. (*Cf.* Pet. 29–31.)

Contrary to the Second, Third, Sixth, and Seventh Circuits, the Ninth Circuit recently joined the First Circuit below in holding that the government was not required to treat religious exemptions to compulsory vaccination equally with nonreligious medical exemptions. *See Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173 (9th Cir. 2021) (holding that vaccine mandate allowing for medical exemptions but prohibiting religious exemptions is facially neutral and generally applicable because the medical exemptions further the government's asserted interest).

Neither the First Circuit's decision below, nor the Ninth Circuit's similar decision in *Doe*, can be reconciled with the clear holding of the Third Circuit in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999). There, Justice (then-Judge) Alito wrote unequivocally for the court that "[b]ecause the Department makes exemptions from its [no beards] policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment." *Id.* at 360. The Third Circuit held that the government is prohibited from making value judgments to legitimize a discriminatory policy:

> [T]he medical exemption raises concern because it indicates that the Department

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

170 F.3d at 366. Indeed, "government 'cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.'" *Dr. A*, 142 S. Ct. at 555 (Gorsuch, J., dissenting) (quoting *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, 138 S. Ct. 1719, 1722 (2018)).

The decisions of the First Circuit below and the Ninth Circuit in *Doe* simply cannot be reconciled with the decisions of the Third Circuit in *Fraternal Order of Police*, the Sixth Circuit in *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021), or the Seventh Circuit in *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592 (7th Cir. 2021). Certiorari is appropriate to align the circuits with this Court's precedents. The Petition should be granted.

II. THE FEDERAL GOVERNMENT'S SUBSEQUENT MANDATE ON HEALTHCARE FACILITIES HAS NO BEARING ON THE QUESTIONS PRESENTED BECAUSE IT IS CURRENTLY ENJOINED NATIONWIDE AND IS PRESENTLY BEFORE THIS COURT.

State Respondents contend that Petitioners' claims are now moot because the federal government issued a mandate of its own for healthcare workers through the Centers for Medicare and Medicaid Services (CMS). (State Br. 15–18.) This contention is incorrect for two reasons. First, the CMS mandate is currently enjoined virtually nationwide. *See Louisiana v. Becerra*, No. 3:21-cv-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021), *aff'd in part*, No. 21-30734, 2021 WL 5913302 (5th Cir. Dec. 15, 2021) (upholding preliminary injunction as to 14 plaintiff states); *Missouri v. Biden*, No. 4:21-cv-01329-MTS, 2021 WL 5564501 (E.D. Mo. Nov. 29, 2021). Second, the Court just heard oral argument on the constitutionality of the CMS mandate on January 7, 2021. A CMS mandate currently enjoined by two separate federal courts, virtually nationwide, because of its legal infirmities cannot moot a claim involving an entirely separate question of whether a state can discriminate against religious exemptions while permitting nonreligious, medical exemptions.

III. MAINE'S ADOPTION OF A FINAL RULE, WHICH MIRRORS THE INTERIM FINAL RULE IN ITS MATERIAL COMPONENTS, DOES NOT MOOT PETITIONERS' CLAIMS NOR ALTER THE NEED FOR THIS COURT'S REVIEW.

Employer Respondents all contend that the Petition should be denied because the Final Rule mooted Petitioners' challenge. (Provider Br. 10–13; Northern Light Br. 13.) This contention is plainly incorrect under this Court precedents. First, as the State Respondents concede, the Final Rule and the Interim Rule are the same in all material respects. (State Br. 18.) Thus, the question of whether Maine's refusal to extend exemptions to religious objectors while permitting nonreligious, medical exemptions remains live in this litigation. And, to the extent the Final Rule removed the requirements for John Doe 1's dental practice, his claims are also not moot because Maine retains the authority to reinstate that restriction at any time.

Faced with similar mootness contentions in past COVID-19 litigation, the Court has made clear that modifications to a challenged restriction or mandate do not moot a First Amendment challenge. Indeed, in *Tandon*, the Court unequivocally declared that "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1296, 1297 (2021). "And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants 'remain under a constant threat' that government

officials will use their power to reinstate the challenged restrictions" *Id.* (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020).

The reason for this is simple: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2020) (Gorsuch, J., statement). Indeed, "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297. The State's retention of authority to reimpose a mandate that otherwise remains in full force and effect to this day negates all Respondents' claims of mootness.

CONCLUSION

Because the First Circuit's decision below is in direct conflict with this Court's precedents and the precedents of the other circuits, and because it involves a question of exceptional importance for First Amendment values, the Petition should be granted.

Respectfully submitted,

Mathew D. Staver (Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org

Counsel for Petitioners