No. 21A145

In the Supreme Court of the United States

DR. A., ET AL.,

Applicants,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit

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INTRODUCTION

This week, New York told hospitals and nursing homes that all employees who were "previously granted religious exemptions" must be vaccinated or receive a medical exemption by **Monday, November 22**. New York allows thousands of unvaccinated private healthcare workers to continue working if they have *medical* reasons for refusing the vaccine, but it is now forcing employers to remove private healthcare workers with *religious* objections from the workplace—even if the employer can provide an exemption without undue hardship and wants to do so. Employers can give medical objectors "any reasonable accommodation," but New York allows only one "accommodation" for religious objectors: banishment from the premises so they no longer count as "personnel" at all. And New York gives no quarter to the banished: they will lose their jobs, their admitting privileges, and even their unemployment benefits.

The application established that this direct attack on religious accommodations violates both the Free Exercise Clause and Title VII. By outlawing religious exemptions, denigrating the religious beliefs of objectors, treating unvaccinated religious workers as "unacceptable" while accepting thousands of other unvaccinated workers, and foreclosing unemployment benefits, New York's mandate is anything but neutral and generally applicable. Both its own behavior and the example of the federal government and 47 states demonstrate that New York fails strict scrutiny. And by precluding employers from doing what Title VII requires—that is, giving

reasonable accommodations for religious exercise in cases with no undue hardship—New York defiantly forbids what federal law commands.

In its opposition, New York does not deny these key facts so much as pretend they are unproblematic and ordinary. But there is nothing ordinary about what Applicants face here: rule by fiat that orders their employers to remove them by a date certain (now **Monday, November 22**), denies them other jobs in their fields, and removes the safety net of unemployment benefits. The fact that New York's response *nowhere* mentions its newly-imposed November 22 deadline shows that it views Applicants' rights to be of little significance. New York seems to believe that the exigencies of the moment allow it to mete out these punishments swiftly and without prior notice while facing judgment for its own actions slowly, or not at all. But the same exigencies that allow New York to wield power expeditiously should also allow Applicants to seek this Court's protection expeditiously, particularly against clear violations of their constitutional and statutory rights.

New York cannot escape scrutiny by complaining that it needs more information about Applicants, their employers, and their discussions about religious exemptions. That criticism is wrong on the facts and mistaken on the law. The sworn evidence in the verified complaint shows that Applicants had their religious exemptions eliminated or foreclosed because of New York's rule. And the challenge here is precisely to the fact that New York's approach globally forbids the kind of employer- and employee-specific consideration of religious accommodations that would allow

personnel to remain on-site. Having taken a poleaxe to religious exemptions across the state, New York's eleventh-hour plea for scalpel-level details is unavailing.

Two Terms ago in *American Legion*, this Court explained that the "Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." But the Religion Clauses can only do that if the courts enforce them and governments respect them. Here, New York aggressively targeted religious conduct *qua* religious conduct, and the Second Circuit wrote off the admittedly "meaningful burdens" on religious exercise as just "not of a constitutional dimension." The result is that New York's egregious behavior threatens to impose severe, immediate, and irreparable harm on Applicants and thousands of healthcare workers like them—all at a time when New York has acknowledged a dire need for more healthcare workers. This Court need not fully flesh out all aspects of Free Exercise doctrine to hold that, under any standard, New York has fallen woefully short of what the Constitution requires. Applicants need and deserve protection now.

I. New York's mandate violates the Free Exercise Clause.

A. Strict scrutiny applies.

New York does not dispute that Applicants have raised religious objections to the COVID vaccine, and that those objections are sincere. Opp.21. Nor does it deny that it removed the religious exemption to its mandate while keeping the medical exemption, and that medically exempt employees can be given "any reasonable accommodation" while religious objectors can only be removed from the worksite so that they no longer qualify as "personnel." App.109 at (d)(1). New York also does not dispute that thousands of medically exempt unvaccinated workers are allowed to

continue working on-site while religious objectors are not. App.109 at (d)(1); Opp.14. Nor does New York deny the substance of Governor Hochul's comments about people with religious objections to the COVID vaccine (though it remarkably attempts to recast her denigration of Applicants' beliefs as "speaking positively about religion"). Opp.26. These undisputed facts establish that Section 2.61 is subject to strict scrutiny. Application at 16-24.

In response, New York makes three main counterarguments. First, it argues that it can treat religious objectors worse than medical objectors because there are (on its telling) many more religious objectors than medical objectors. Opp.14. This argument gets the analysis backwards: the relevant number is the *thousands* of unvaccinated medically exempt workers who are permitted to continue working on-site. That undisputed fact forecloses any claim that the law is generally applicable, because of the entirely "reasonable" truth that the virus doesn't care whether someone is unvaccinated for religious or secular reasons. App.33; Application at 17.

New York offers a series of unsupported and contradictory post-hoc rationalizations for why medically exempt unvaccinated employees might be less dangerous. First, New York claims (without any evidence) that "many" of the medically exempt employees will have suffered an allergic reaction to a first dose of the vaccine and therefore have "at least partial protection." Opp.23. Even aside from the oddity of making this claim at the same time the State aggressively pushes for

people to receive a third shot because the effect of two shots seems to be waning,[1] one could make the exact same argument about Applicants, many of whom have had COVID, App.158, 162, 165, 169, and therefore also have "at least partial protection." New York then turns around and assures the Court (again, without any evidence) that medical exemptions are "predominantly temporary"—which surely would not describe the class of people with allergic reactions. These post-hoc rationalizations cannot elide the simple truth: unvaccinated employees with medical exemptions carry the exact same risks as unvaccinated employees with religious objections. Yet New York deems one risk "unacceptable" and the other perfectly acceptable.

Even when it shifts focus to the number of religious objectors as somehow proving the law generally applicable, New York offers little in the way of verified evidence to support its factual claim, and nothing near what it would need to meet the burden of proof it bears on an injunction application. See *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006) (burdens at preliminary injunction stage track the burdens at trial). It cites to evidence submitted in a different case, in a different court, that does not say what New York claims.[2] Most

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[1] Centers for Disease Control and Prevention, *COVID-19 Vaccine Booster Shots* (Nov. 9, 2021), https://perma.cc/4H5W-DPTW.

[2] Opp.14 n.24 (citing Decl. of Valerie A. Deetz ¶ 3, *Serafin* v. *New York State Dep't of Health*, Index No. 908296-21 (N.Y. Sup. Ct. Oct. 20, 2021), NYSCEF Doc. No. 56; Decl. of Dorothy Persico ¶ 3, *Serafin*, Index No. 908296-21 (N.Y. Sup. Ct. Oct. 21, 2021), NYSCEF Doc. No. 57). Before this Court, New York has rechristened its catch-all category of "other" vaccine exemptions as consisting entirely of "religious" exemptions, without acknowledging that "religious exemptions" is a category that its statistics *do not track*. Compare Opp.14-15 (discussing number of personnel reported as having "'other' (religious) exemptions") with Application at 17 n.16.

fundamentally, though, New York's argument about the number of religious objectors is more properly considered as part of New York's strict scrutiny affirmative defense—where it bears the burden of proof. It could present competent evidence about this on remand, but if past is prologue, it is unlikely to do so. See *infra* Section I.B. (New York abandoned COVID worship restrictions on remand from this Court).

Second, New York asserts that it has not used its unemployment insurance program to target and punish religious objectors. Opp.39. Before this Court, New York asserts that it "does *not* categorically deny unemployment insurance benefits" to religious objectors who lose their jobs, as long as they submit "a valid *request* for accommodation"—even if they were not, in the end, accommodated. Opp.39 (emphasis in original). But that is the opposite of what New York has told its own citizens. On Saturday, September 25, two days before the first vaccination deadline, Gov. Hochul announced that "workers who are terminated because of refusal to be vaccinated are not eligible for unemployment insurance absent a valid doctor-approved request *for medical accommodation*."[3] Having publicly announced that the only valid request for accommodation is a medical one, and having told this Court and two others that no

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[3] N.Y. State Governor's Office, *In Preparation for Monday Vaccination Deadline, Governor Hochul Releases Comprehensive Plan to Address Preventable Health Care Staffing Shortage* (Sept. 25, 2021), https://perma.cc/2GJV-TLQW (emphasis added).

New York makes much of the fact that unemployment insurance is administered by the Department of Labor, which is not a party to this case. Opp.37. But the Governor is the head of all 20 of New York's state agencies, Labor included. She is a party to this case, and she is responsible for publicizing the policy that only those with a valid medical accommodation request will receive benefits.

religious exemptions are allowed, New York should not be heard to suddenly claim that it will be magnanimous to religious objectors forced to the unemployment lines.

Third, New York argues that Applicants have waived any argument that strict scrutiny is triggered by Section 2.61's denial of unemployment benefits to religious objectors. Opp.38. As New York is aware, this particular argument could not have been raised in the complaint, because Governor Hochul did not announce the categorical denial of unemployment benefits to religious objectors until September 25, well after the lawsuit was filed. But more fundamentally, New York is confusing arguments for claims. From the very beginning of this lawsuit, Applicants raised a Free Exercise Clause claim and argued that as a result of that claim, New York's mandate was subject to strict scrutiny. App.172-175 (verified complaint). And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Applicants' discussion of New York's late-breaking stripping of unemployment benefits is "not a new claim * * * but a new argument to support what has been [their] consistent claim: that [New York] did not accord [them] the rights it was obliged to provide by the First Amendment." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

For all these reasons, strict scrutiny applies.

B. New York's mandate fails strict scrutiny.

In the application, the Applicants also explained that New York cannot hope to meet its burden on strict scrutiny. Application at 25-29. New York has failed to

provide persuasive reasons as to why it needs greater restrictions than 47 other states and the federal government. It has not demonstrated why it cannot extend to religious objectors the same precautions it provides to medically exempt employees, despite that the risks posed by individuals in both groups remain the same. And New York's punitive methods are the opposite of the least restrictive means of meeting its interests. *Ibid.*

In response, New York advances two counterarguments. Opp.22-29. First, the state argues that "significant uncertainty" surrounding COVID gives it license to regulate with "the greatest latitude." Opp.28. It even claims the right to take "a truly unique approach" if it wants to. Opp.29. Despite these grandiose claims to judicial deference, New York fails the basics of the strict scrutiny standard as repeatedly explained by this Court. Application at 25. Indeed, New York doesn't once mention *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015), much less apply it.

But as this Court explained in *Holt*, courts may not "assume a plausible, less restrictive alternative would be ineffective" but must justify its decision with "persuasive reasons." 574 U.S. at 369 (cleaned up); see also *Mast* v. *Fillmore County*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring) (noting that because "Montana, Wyoming, and other States" provide an accommodation, "the County * * * bore the burden of presenting a compelling reason why it cannot offer the Amish this same alternative" (cleaned up)). New York fails to offer any persuasive reasons why it needs to banish religious objectors when 47 other states and the federal government respect

religious objectors. And without more, New York has not shown that it is using the least restrictive means available, and thus fails strict scrutiny.

New York's reaction to the *Diocese of Brooklyn* and *Agudath* decisions last year is particularly instructive. There, as here, New York argued that its far more restrictive approach was justified, claiming that the public health sky would fall should the Court grant relief. See Opp. at 36, *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (No. 20A87) (contending that permitting large religious gatherings could place "the entire City and State at risk" (internal quotation marks omitted)). But when this Court's remand gave New York the opportunity to actually *demonstrate* that it could pass strict scrutiny, New York made a telling choice: it quit. More specifically, after the remand, New York simply agreed to permanent injunctions in both cases, conceding that it actually could not prove the apocalyptic claims it had made to this Court just weeks earlier. See, *e.g.*, Permanent Inj. Order at 4, *Agudath Israel of Am.* v. *Cuomo*, No. 20-cv-4834 (N.D.N.Y. Feb. 9, 2021) ("Defendant has agreed to an injunction * * * and has not presented additional evidence"). Perhaps on remand here, New York would be able to present some evidence demonstrating that its vindictive approach to religious objectors passes strict scrutiny, despite the fact that most of the country has figured out how to make religious objections work while facing the exact same pandemic. But New York has not done so yet, and its plea to be allowed to shoot now and provide proof later should be rejected.

Second, New York contends that medical exemptions and religious exemptions warrant different treatment because medical ineligibility is "predominantly temporary," and the overall number of religious accommodation requests is higher than non-religious requests. Opp.23. But what New York calls "temporary" means temporary *until the risk is eliminated—i.e.*, indefinitely. There is no deadline for the end of any medical exemption, so New York's assertion that "a medically ineligible" worker's risk is "correspondingly limited" rings hollow. Opp.23.

For these reasons, and the reasons in the Application, New York has failed to meet strict scrutiny here.

II. New York's mandate conflicts with Title VII.

Title VII requires employers to engage in a good faith process to provide religious accommodations to employees and prohibits taking "an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775-776 (2015) (Alito, J., concurring). The EEOC instructs that a broad range of accommodations ought to be available to employees with religious objections, such as PPE, testing, and social distancing—accommodations that have worked well for medically exempt employees in New York.[4]

[4] See K.2., K.12., and L.3. at EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Oct. 28, 2021), https://perma.cc/E3WH-WH7Q.

Despite this traditional accommodation regime, New York is forcing employers to violate Title VII by firing or banishing employees with religious objections—even where employers had already granted them religious exemptions. Just this week, the Department of Health directed healthcare administrators to ensure that by November 22, 2021, all employees "who were previously granted religious exemptions" must show proof of vaccination or a valid medical exemption—or be removed as "personnel." Addendum 6. New York's suggestion that employers "consider reasonable accommodation requests" is mere posturing, because as its guidance makes clear, the only "accommodation" that Section 2.61 allows for *religious* objectors is removal from the category of "personnel" entirely—either by termination or by relegation to remote work.[5] Meanwhile, employers may grant "any reasonable accommodation" to medically exempt employees.[6] App.109 at (d)(1).

New York offers little in response, mainly arguing that there is not enough of a factual record to determine whether Title VII is implicated or not. This is wrong on several levels. First, and in accordance with Fed. R. Civ. P. 65, Applicants put in ample evidence by means of the verified complaint, which is therefore "deemed

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[5] N.Y. State Dep't of Health, *Frequently Asked Questions (FAQs) Regarding the August 26, 2021 – Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation* at ¶ 20, https://perma.cc/XZ45-T3TS, ("there are no religious exemptions[.] * * * [C]overed entities cannot permit unvaccinated individuals to continue in 'personnel' positions such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients, or residents to the disease").

[6] *Id.* at ¶¶ 17, 18 ("personnel with medical exemptions [may] continue normal job responsibilities * * * provided that they comply with all applicable requirements for personal protective equipment, including masking"; "[t]his regulation does not require personnel with medical exemptions to undergo COVID-19 testing").

admitted for preliminary injunction purposes." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (citations omitted). New York wrongly describes the statements in the verified complaint as mere "allegations" when they are in fact sworn testimony that New York has not bothered to contest. Opp.21.

Second, that sworn testimony provides a significant foundation for Applicants' claim regarding Title VII. Four plaintiffs received religious exemptions only to have them revoked when New York removed religious exemptions on August 26. App.148 ¶¶ 49-50 (Nurse A's employer informed her that "employees who do not comply with the vaccination program by the deadlines above will be placed off duty for seven days without pay * * * Employees who choose not to meet the program requirements after seven days will be deemed to have opted to resign."); App.152 ¶ 77 (Dr. F's employer told him that "his hospital privileges will be suspended" unless he shows proof of vaccination); App.163-164 ¶¶ 142-143 (Dr. O); App.169 ¶ 174 (Dr. S). Several employers wanted to grant religious exemptions or accommodations but told employees, "my hands are tied" by New York's mandate. App.158-159 ¶ 112 (Nurse J). Nurse D's employer told her that her employment will end, and that "the separation will be 'deemed' to be voluntary, meaning no unemployment benefits, and all health and other benefits will terminate." App.151 ¶ 68. Applicants are being excluded from the workplace too; Dr. G's employer told him "he will not be allowed to enter any of the buildings of the health service, including the hospitals in which he works and teaches." App.154 ¶ 85; see also App.167 ¶ 165 (Technologist P's employer

told her that "if she fails to be vaccinated against her religious belief, her security badge will be deactivated, she will not be able to access her place of employment and will essentially be regarded as a trespasser.")

New York also argues that Title VII does not preempt its mandate. Opp.29-30. But Title VII does preempt state law "where a state law 'require[s] or permit[s] the doing of any act which would be an unlawful employment practice,' and thus results in an actual conflict with Title VII." Opp.30 (quoting 42 U.S.C. 2000e-7). By allowing only banishment for religious objectors, New York is violating the text of Title VII, which makes it an "unlawful employment practice" "to limit, segregate, or classify" employees in any way that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(2); see also *Ortiz-Diaz* v. *United States Dep't of Hous. & Urban Dev.*, 867 F.3d 70, 81 (D.C. Cir. 2017) (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 Former EEOC Employees Amicus Br. at 3, 9-10.[7]

[7] Placing religious objectors on unpaid leave also violates Title VII. See Application at 34. Other unvaccinated employees are accommodated without being placed on unpaid leave, and accommodations "may not be doled out in a discriminatory fashion." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 71 (1986). And 15 of 17 of Applicants' employers found that unnecessary when they were allowed to offer religious exemptions.

New York argues that accommodating Applicants with anything beyond remote work is, in the State's "expert judgment," categorically an undue hardship. Opp.35-36. But Title VII makes it each "employer['s]" burden to "demonstrate[]" that on-site work is an "undue hardship," 42 U.S.C. 2000e(j)—a determination which New York categorically prohibits. Practically speaking, New York has prevented most Applicants from working at all. See, *e.g.*, App.149-150 (ophthalmologist with surgical practice); App.152-153, 168-169 (oral surgeons); App.155 (rehabilitation therapist); App.163-164 (general surgeon); App.156-158, 165-166 (OB/GYNs). Of the 15,844 healthcare workers who received religious exemptions under the district court's preliminary injunction, those who still have their jobs will be banished from their workplace by November 22—unless this Court intervenes.[8] The message is clear: get vaccinated or go find work in a different state with a different license. Yet Americans are not supposed to have their liberty "in appropriate places abridged on the plea that it may be exercised in some other place." *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1938)).

If any *employers* dare to violate New York's mandate by providing religious exemptions, the Department of Health is "conduct[ing] surveillance * * * to monitor compliance", App.118, and can impose "civil penalties" and "order the facility to comply with the mandate under Section 16 of the Public Health Law."[9] That

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[8] Rob Frehse, *New York State Health Care Workers Will No Longer Have Religious Exemption to COVID-19 Vaccine Mandate, Court Rules*, CNN (Oct. 29, 2021, 10:29 PM), https://perma.cc/DJ5N-P7SV.

[9] Amanda Hull, *How Enforceable is the Healthcare Vaccine Mandate in New York?,* CNY Central (Sept. 29, 2021) https://perma.cc/JH62-FZQA.

enforcement mechanism triggers fines of $2,000, increasing to $5,000 and $10,000 for repeat violations—and these fines can be reimposed daily as New York's masking and testing requirements have shown.[10]

The Second Circuit's latest opinion—issued on Friday after the application was filed in this Court—confirms that most Title VII accommodations have been outlawed. Addendum 2-6. After the Second Circuit struck down Judge Hurd's preliminary injunction, App.4-50, 61-88, Judge Hurd issued a clarifying order that emphasized New York's obligation to provide reasonable accommodations under federal law. App.89. Yet in a supplemental opinion on November 12, the Second Circuit called his order "erroneous[]" because it implied that "employers may grant religious accommodations that allow employees to continue working" as "personnel," that is, interacting with patients and coworkers. Addendum 4-5. The panel asserted that, on the contrary, the panel asserted that the only "reasonable accommodation" that Section 2.61 allows is to "*remove[] the individual from the scope of the Rule*," by removing them from the workplace altogether. Addendum 4 (emphasis in original). As long as an employee qualifies as "personnel," "her employer must 'continuously require' that she is vaccinated against COVID-19." Addendum 5 (citing Section 2.61). Thus, not only has New York abandoned the protections that Title VII guarantees to religious employees, but the panel gave this approach its stamp of approval twice—

[10] 2 N.Y.C.R.R. § 12; see also Section 2.60 and Section 2.62 (imposing penalties for violating mask and testing mandates; "each day that an entity operates in a manner inconsistent with the Section shall constitute a separate violation under this Section").

and has now directed that "any further proceedings" remain under its control. Addendum 6.

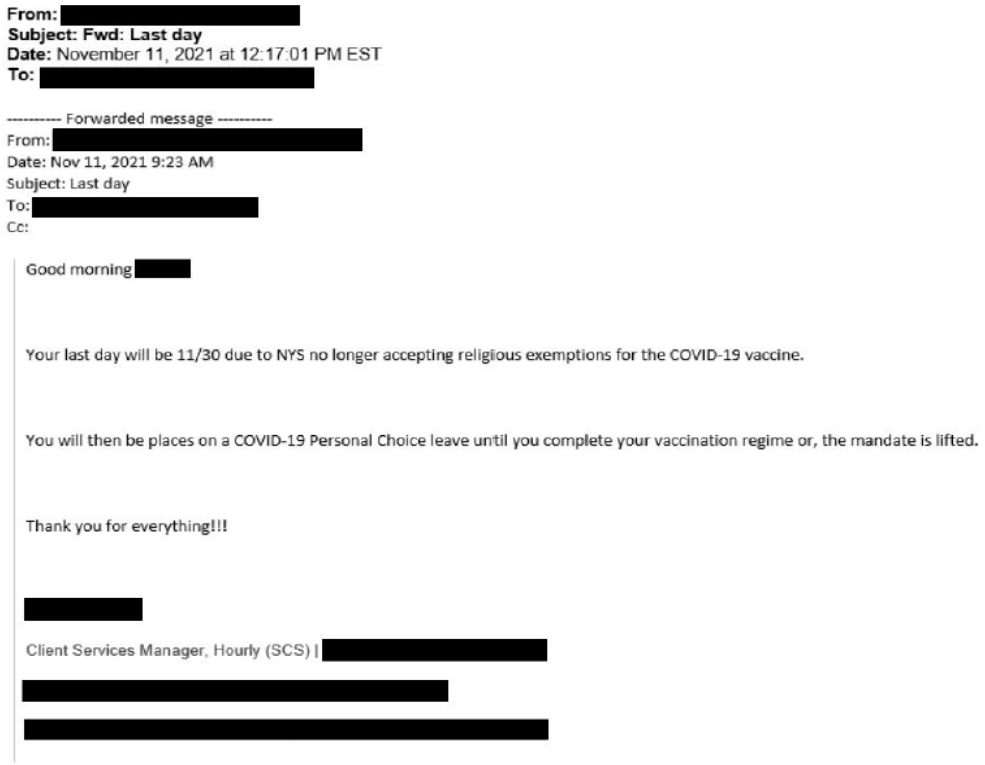
III. Emergency relief is warranted.

New York's response and its actions since the application was filed serve only as further demonstrations of the need for emergency relief. New York has failed to justify Section 2.61 under the Free Exercise Clause or Title VII. Instead of ameliorating its draconian policy, it has made it worse by issuing a directive on Monday to employers to eliminate all "previously granted religious exemptions" and setting a deadline of November 22 for employers to comply by firing or removing religious objectors.

New York argues that the Applicants will suffer *no* burden because they have not shown that Section 2.61 "directly compels them to act in violation of their religious beliefs." Opp.40. But on its face, Section 2.61 requires the Applicants to violate their sincere religious belief or face penalties that will cost them the loss of their jobs, careers, and livelihoods, including unemployment benefits. Such a choice constitutes irreparable harm. See *supra* Section II (Title VII); *Holt,* 574 U.S. at 361 (facing "serious disciplinary action" for "contraven[ing]" prison's policy was a substantial burden on free exercise); *Diocese of Brooklyn*, 141 S. Ct. at 67 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

New York offers no response to the argument that Applicants may be barred from recovering damages from any harm they do incur because of Section 2.61. Application at 32 n.31. That harm has already begun. See Application at 34. Some employers who

have threatened to terminate religious objectors' employment will have to move up their firing date because of New York's late-breaking announcement, including the employer that sent an Applicant this notice:



From: [redacted]
Subject: Fwd: Last day
Date: November 11, 2021 at 12:17:01 PM EST
To: [redacted]

---------- Forwarded message ----------
From: [redacted]
Date: Nov 11, 2021 9:23 AM
Subject: Last day
To: [redacted]
Cc:

Good morning [redacted]

Your last day will be 11/30 due to NYS no longer accepting religious exemptions for the COVID-19 vaccine.

You will then be places on a COVID-19 Personal Choice leave until you complete your vaccination regime or, the mandate is lifted.

Thank you for everything!!!

[redacted]
Client Services Manager, Hourly (SCS) | [redacted]
[redacted]
[redacted]

Two other Applicants have been notified in the last twenty-four hours:

Per the NYS DOH notice released November 15, 2021, previously granted religious exemptions to the mandatory Covid-19 vaccination are rescinded effective Monday, November 22nd. At this time, the DOH medical exemptions remain in place.

and:

Please remember that all staff must comply with this vaccination mandate as a condition of continued employment with the NYS DOH deadline of Monday November 22, 2021.

All this is of a piece with New York's other moves to intimidate religious objectors during this lawsuit, including its September 25 announcement that religious objectors are not eligible for unemployment benefits. These ongoing efforts to change

the regulatory facts are far worse than New York's previous last-minute maneuvers in the *Diocese of Brooklyn/Agudath Israel* litigation. See Opp. at 19, *Agudath Israel of Am*. v. *Cuomo*, No. 20A90 (Nov. 25, 2020) (citing recent changes to various color "clusters"). There at least New York claimed to be reducing the burden on the Applicants—a claim this Court rejected as too little, too late. See *Diocese of Brooklyn*, 141 S. Ct. at 68 (Governor's frequent reclassifications without notice created "constant threat" necessitating injunctive relief). Here, New York is making the burden both worse and irreversible as to a large class of religious objectors who will—by Thanksgiving—find themselves out of a job and without the unemployment protection almost every other New Yorker enjoys, exacerbating any feared staffing shortages. Opp.41. Emergency relief is thus needed.

New York's actions also warrant a grant of certiorari on the merits. This is not a "merits preview," Opp.21, it is an opportunity for this Court to resolve a matter of nationwide scope with full briefing and argument. Consideration on the merits would provide much-needed guidance on matters pending around the country. See, *e.g.*, *Sambrano* v. *United Airlines, Inc.*, No. 21-1074 (N.D. Tex. filed Sept. 21, 2021). Three other circuits have already resolved vaccine mandate cases with differing approaches. *Dahl* v. *Board of Trustees of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021); *Does* v. *Mills*, 16 F.4th 20 (1st Cir. 2021); *Klaassen* v. *Trustees of Ind. Univ.*, 7 F.4th 592 (7th Cir. 2021), application denied, No. 21A15 (Aug. 12, 2021) (upholding mandate that allowed for religious exemptions).

New York's claim that the record is "sparse" is not a vehicle problem with the Applicants' case but goes to the State's burden of proof on strict scrutiny. Opp.20-21. The Applicants' case—and the cert-worthiness of this vehicle—depends not on evidence of specific back-and-forth conversations with their employers, but on New York's global rule that exempts medical objectors and requires religious objectors to be banished from the premises or fired *regardless* of what accommodations their employers may be willing to make. Applicants presented sworn testimony confirming the impact of New York's ban on religious exemptions, and it is *New York*'s burden to provide evidence that the ban is constitutionally permissible. It has not done so, and it has ignored the dire consequences of its actions since the Second Circuit's order. See Application at 34; *supra* Section II.

CONCLUSION

The application should be granted.

Respectfully submitted.

/s/ Thomas Brejcha
Counsel of Record

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NOVEMBER 2021

No. 21A125

In the Supreme Court of the United States

DR. A., ET AL.,

Applicants,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, ET AL.,

Respondents.

ADDENDUM TO REPLY BRIEF

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EXHIBIT 1

In the
United States Court of Appeals
For the Second Circuit

August Term, 2021

(Argued: October 27, 2021 Decided: November 12, 2021)

Docket No. 21-2179

WE THE PATRIOTS USA, INC., DIANE BONO, MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI,

Plaintiffs-Appellants,

–v.–

KATHLEEN HOCHUL, HOWARD A. ZUCKER, M.D.,

Defendants-Appellees.

Docket No. 21-2566

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.

B e f o r e :

WALKER, SACK, and CARNEY, *Circuit Judges*.

CAMERON L. ATKINSON (Norman A. Pattis, Earl A. Voss, *on the brief*), Pattis & Smith, LLC, New Haven, CT, *for Plaintiffs-Appellants We The Patriots USA, Inc. et al. (in No. 21-2179).*

STEVEN C. WU, Deputy Solicitor General (Barbara D. Underwood, Mark S. Grube, *on the brief*) *for* Letitia James, Attorney General for the State of New York, New York, NY, *for Defendants-Appellants (in No. 21-2566) and Defendants-Appellees (in No. 21-2179) Kathleen Hochul et al.*

CHRISTOPHER A. FERRARA (Michael McHale, Stephen M. Crampton, *on the brief*), Thomas More Society, Chicago, IL, *for Plaintiffs-Appellees Dr. A. et al. (in No. 21-2566).*

Alex J. Luchenister, Richard B. Katskee, Americans United for Separation of Church and State, Washington, D.C.; Daniel Mach, Heather L. Weaver, Lindsey Kaley, American Civil Liberties Union Foundation, Washington, D.C. & New York, NY; Christopher Dunn, Beth Haroules, Arthur Eisenberg, Amy Belsher, New York Civil Liberties Union Foundation, New York, NY, *for Amici Curiae* (*in No. 21-2179*) *Americans United for Separation of Church and State, American Civil Liberties Union, New York Civil Liberties Union, Central Conference of American Rabbis, Global Justice Institute,*

Metropolitan Community Churches, Men of Reform Judaism, Methodist Federation for Social Action, Muslim Advocates, National Council of Jewish Women, Reconstructionist Rabbinical Association, Union for Reform Judaism, and Women of Reform Judaism.

Mark D. Harris, Shiloh Rainwater, Proskauer Rose LLP, New York, NY, *for Amicus Curiae (in No. 21-2179) Greater New York Hospital Association.*

PER CURIAM:

We write to clarify our opinion in *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, and *Dr. A. v. Hochul*, No. 21-2566, which we heard and decided in tandem. 2021 WL 5121983 (2d Cir. Nov. 4, 2021). We do so in light of the text of the recent order of the district court in *Dr. A. v. Hochul*, vacating the preliminary injunction at issue. No. 1:21-CV-1009 (N.D.N.Y. Nov. 5, 2021). The district court there wrote that the *Dr. A*. Plaintiffs "no longer need" a preliminary injunction because Section 2.61 "does not prevent employees from seeking a religious accommodation allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." *Id*. (quoting *We the Patriots USA, Inc.*, 2021 WL 5121983, at *17).

A reader might erroneously conclude from this text that, consistent with our opinion, employers may grant religious accommodations that allow employees to continue working, unvaccinated, at positions in which they "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61 (definition of "personnel"). In our opinion, however, we stated that "Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation *that removes the individual from the scope of the Rule*." 2021 WL 5121983, at *17 (emphasis added). In other words, it may be *possible* under the Rule for an employer to

accommodate—not *exempt*—employees with religious objections, by employing them in a manner that removes them from the Rule's definition of "personnel." *Id.* Such an accommodation would have the effect under the Rule of permitting such employees to remain unvaccinated while employed.

Of course, Title VII does not obligate an employer to grant an accommodation that would cause "undue hardship on the conduct of the employer's business." *See* 42 U.S.C. § 2000e(j). And, as we also observed in our opinion, "Contrary to the *Dr. A.* Plaintiffs' interpretation of the statute, Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated." 2021 WL 5121983, at *17. To repeat: if a medically eligible employee's work assignments mean that she qualifies as "personnel," she is covered by the Rule and her employer must "continuously require" that she is vaccinated against COVID-19. 10 N.Y.C.R.R. § 2.61. As we observed, this requirement runs closely parallel to the longstanding New York State requirements, subject to no religious exemption, that medically eligible healthcare employees be vaccinated against rubella and measles. 2021 WL 5121983, at *13.

The preliminary injunction entered by the district court in *Dr. A. v. Hochul* on October 12, 2021, has been vacated. *See We The Patriots USA, Inc. v. Hochul*, No. 21-2179, and *Dr. A. v. Hochul*, No. 21-2566, 2021 WL 5103443, at *1 (2d Cir. Oct. 29, 2021). New York State's emergency rule requiring that healthcare facilities "continuously require" that certain medically eligible employees—those covered by the Rule's definition of "personnel"—are vaccinated against COVID-19, is currently in effect. 10 N.Y.C.R.R. § 2.61. We caution further that our opinion addressed only the likelihood of success on the merits of Plaintiffs' claims; it did not provide our court's definitive determination of the merits of those claims.

In the interest of judicial economy, we direct the Clerk of Court to refer any further proceedings in these two matters to this panel.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT 2

NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

November 15, 2021

DHDTC 21-11
NH 21-25
DHCBS 21-13
DAL 21-32

Dear Chief Executive Officers, Nursing Home Operators and Administrators, Adult Care Facility Administrators, and Home Care and Hospice Administrators:

The purpose of this letter is to inform covered entities that beginning **November 22, 2021**, all covered entities must ensure that covered "personnel" under the Department's August 26, 2021 – Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation who were previously granted religious exemptions have documentation of either a first dose COVID-19 vaccination or a valid medical exemption. Facilities should have a process in place to consider reasonable accommodation requests from covered personnel based on sincerely held religious beliefs consistent with applicable Federal and State laws, including Equal Employment Opportunity (EEO) laws such as Title VII of the Civil Rights Act and NYS Human Rights Law, and their applicable guidance.

https://coronavirus.health.ny.gov/system/files/documents/2021/11/faqs-for-10-nycrr-section-2.61-11-08-21.pdf

Questions or concerns concerning this DAL can be addressed to hospinfo@health.ny.gov, covidnursinghomeinfo@health.ny.gov, covidadultcareinfo@health.ny.gov, or covidhomecareinfo@health.ny.gov.based on the specific covered entity.

Sincerely,

Jennifer L. Treacy
Deputy Director
Office of Primary Care and Health Systems Management

Add.8