No. 21A90

In the Supreme Court of the United States

JOHN DOES, 1-3; JACK DOES, 1-1000; JANE DOES, 1-6; JOAN DOES, 1-1000,

Applicants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine; JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services; NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTHFOUNDATION; MAINEGENERAL HEALTH,

Respondents.

To the Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit

MOTION BY THE BECKET FUND FOR RELIGIOUS LIBERTY, WITH ATTACHED PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANTS AND IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, FOR LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON 8 ½ BY 11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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The Becket Fund for Religious Liberty respectfully moves for leave to file a brief *amicus curiae* in support of Applicants' Emergency Application For Writ of Injunction, without 10 days' advance notice to the parties of *Amicus*'s intent to file as ordinarily required.

In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice, but *Amicus* was nevertheless able to obtain a position on the motion from the parties. Applicants and State Respondents consent to the filing of the *amicus* brief. Private Respondents take no position on the filing of this brief.

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, nationwide. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021).

Becket has also litigated cases before this and other courts concerning the intersection of COVID-related restrictions and the free exercise of religion. See, *e.g.*, *Agudath Israel of Am.* v. *Cuomo*, 141 S. Ct. 889 (2020); *Lebovits* v. *Cuomo*, 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020) (challenge to restrictions on Jewish girls' school);

Roman Catholic Archbishop of Washington v. *Bowser*, No. 20-cv-03625, 2021 WL 1146399 (D.D.C. Mar. 25, 2021) (enjoining restrictions on worship attendance).

Amicus offers the proposed brief to address how vaccine mandate conflicts, while difficult, can be resolved by courts holding parties on all sides—plaintiffs, governments, and employers—to their respective burdens. Doing so will provide much-needed guidance to the lower courts, and much-needed assurance to the public, that ours is a "government of laws, not of men." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646 (Jackson, J., concurring). The *amicus* brief thus includes relevant material not fully brought to the attention of the Court by the parties. See Sup. Ct. R. 37.1.

For the foregoing reasons, *Amicus* respectfully requests that the Court grant this unopposed motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted.

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No. 20A90

In the Supreme Court of the United States

JOHN DOES 1-3, ET AL.,

Applicants,

v.

JANET T. MILLS, IN HER OFFICIAL CAPACITY AS GOVERNOR OF MAINE, ET AL.,

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To the Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPLICANTS AND EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country. Becket has also represented numerous prevailing religious parties in this Court. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367 (2020); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021).

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Amicus offers the proposed brief to address how vaccine mandate conflicts, while difficult, can be resolved by courts holding parties on all sides—plaintiffs,

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

governments, and employers—to their respective burdens. Doing so will provide much-needed guidance to the lower courts, and much-needed assurance to the public, that even in emergencies ours is a "government of laws, not of men." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646 (Jackson, J., concurring). Here, Maine has failed to carry its burden to justify the relevant vaccine mandate, and therefore an injunction should issue pending disposition of the forthcoming petition for certiorari. This is not to say that another government could not satisfy strict scrutiny, or that Maine itself could not do so in the future. But it is important for this Court to acknowledge that Maine has not yet done so in this case and, until it does, cannot categorically deprive a discrete subset of employees of accommodation for their religious objections to accepting a vaccination in violation of their religious beliefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The difficult question of vaccine mandates—with which governments, employers, and millions of Americans are currently struggling—involves important interests on all sides. On one hand, governments seek to prevent the spread of a deadly disease and protect public health during a pandemic. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020). On the other, there is a long legal tradition protecting the decision to refuse unwanted medication, sometimes made for religious reasons. *Cruzan* v. *Director*, *Mo. Dep't. of Health*, 497 U.S. 261, 270, 278 (1990).

Where such powerful interests collide, it is critically important for this Court to hold the parties—*all* of the parties—to their respective burdens under the law. For plaintiffs, that means courts must insist that religious liberty claims can only be

advanced by those whose claims are both sincere and religious. For governments, it means that they must be required to carry their constitutional burdens by proving, with evidence, that a mandate is actually in furtherance of a compelling government interest, and that denying an exemption is the least restrictive means of achieving that interest. For employers, it means that they must accommodate sincere religious objectors unless they demonstrate that doing so would impose an undue hardship under Title VII.

Here, straightforward application of those burdens requires an injunction for the plaintiffs. Sincerity and religiosity have been conceded. Maine's categorical withdrawal of its previous religious exemption, coupled with a mandate that both burdens a specific subset of the population *and* includes secular exemptions for anytime vaccination "may" be medically "inadvisable," would only be permissible if Maine could pass strict scrutiny.

On this record, Maine has failed to pass that test. First, Maine is an outlier. Forty-seven other states either do not have vaccine mandates on private healthcare facilities, allow testing as an alternative, or allow for religious exemptions. Maine has not proven that it cannot follow those alternative approaches, including those of rural states with small populations. Second, Maine has not demonstrated that it cannot allow religious objectors to work on the same terms as those subject to its secular exemptions. Maine may one day be able to justify some version of a mandate, but has failed to do so here.

Finally, Maine's categorical ban on religious exemptions cannot override Title VII,

particularly for employers who can (and therefore must) reasonably accommodate their employees without undue hardship.

Accordingly, this Court should grant the application and enjoin operation of Maine's mandate as to plaintiffs. At a minimum it should remand to the lower courts to hold Maine to the appropriate legal burdens before allowing it to impose its mandate. Doing so will confirm that ours is a "government of laws, not of men," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 646 (Jackson, J., concurring)—even in emergencies.

ARGUMENT

I. Religious liberty plaintiffs must show their claims are sincere and religious.

Religious liberty claims are available only for exercises that are both sincere and religious. Free exercise guarantees are the product of a "struggle for religious liberty * * * through the centuries," one where "men have suffered death rather than subordinate their allegiance to God to the authority of the State." *Girouard* v. *United States*, 328 U.S. 61, 68 (1946). Courts can and should ensure that parties do not insincerely invoke this hard-won right, see*, e.g.*, *United States* v. *Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010), including raising the issue *sua sponte* at the trial level where appropriate. That is because defendant governments sometimes have a strong incentive not to contest sincerity even when it is an obvious issue, including in *pro se* prisoner cases. In such cases, winning on the factual issue of sincerity—which by its nature is limited to particular plaintiffs—may in government officials' view be inferior to the categorical and precedential rules they can obtain if the courts reach the

merits of their claims. Cf. *United States* v. *Secretary*, 828 F.3d 1341, 1349 (11th Cir. 2016) ("The United States produced evidence that the Department is not screening out insincere applicants").

Indeed, "the ability of the federal courts to weed out insincere claims" is widely recognized; Congress passed both RFRA and RLUIPA "confident" "that the federal courts were up to the job." *Burwell* v. *Hobby Lobby Stores, Inc.* 573 U.S. 682, 718 (2014). That was true even for the category of prisoner claims, where "the propensity of some prisoners to assert claims of dubious sincerity was well documented." *Ibid.* Excluding insincere claims is thus beneficial both for religious liberty and the law more broadly, because it reduces the number of religious liberty conflicts and allows non-religious disputes to be resolved under other, more applicable legal doctrines.

Similarly, sincere beliefs that are philosophical or political rather than religious, however strongly held, cannot serve as the basis for Free Exercise claims. Non-religious beliefs or ways of life, "however virtuous and admirable," do not come within the ambit of the Free Exercise Clause. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). To enjoy such protections, "the claims must be rooted in religious belief." *Ibid.*

Before this Court, however, there is no dispute as to sincerity or religiosity. Plaintiffs here made detailed and sworn factual pleadings about their religious beliefs and motivations, including 24 scriptural references. Verified Compl. ¶¶ 50-74. In light of this thorough demonstration, defendants did not dispute sincerity or religiosity, prompting the district court to "treat these facts as established for purposes of deciding the Preliminary Injunction Motion." Pet. App. Ex. 5, at 8.

II. Mandates that selectively burden religious exercise must satisfy strict scrutiny.

The courts below upheld Maine's mandate under *Smith*. But Maine's regulation is not subject to *Smith*'s rule for at least three reasons: Maine allows for secular exemptions, revoked its religious exemption, and excludes most of the population from its mandate (including many healthcare workers). Me. Rev. Stat. Title 22, § 802(4-B)(A) (2021). The mandate thus falls well outside of *Smith*'s rule for neutral and generally applicable "across-the-board" statutes. *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990). It is therefore subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-32 (1993).

Secular exemptions. Maine allows exemptions for any healthcare employee for whom vaccination even "may" be medically "inadvisable." Me. Rev. Stat. Title 22, § 802(4-B)(A). This is an extraordinarily broad exemption: it applies no matter how small the alleged harm or how trivial the likelihood of its occurrence, and regardless of the effect on the spread of COVID, so long as the employee produces a "written statement from a licensed physician, nurse practitioner or physician assistant" opining that vaccination "may" be inadvisable. *Ibid.* "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom,* 141 S. Ct. 1294, 1296 (2021). Because Maine broadly allows medical exemptions while categorically forbidding any religious accommodations, strict scrutiny applies.

The court of appeals disagreed on the grounds that the exemption "support[s]

Maine's public health interests" by "protecting its residents" from "accept[ing] medically contraindicated treatments." Pet. App. Ex. 1, at 27. But people who are unvaccinated because of "medical inadvisability" and those who are unvaccinated because of a religious objection undermine Maine's primary asserted interest in exactly the same way: Maine says unvaccinated workers contribute to the risk of spreading COVID. *Tandon*, 141 S. Ct. at 1296 (finding that it was "clear" that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," and that "[c]omparability is concerned with the risks various activities pose, not the reasons why people" engage in those activities). Thus, where the government grants accommodations for secular interests, as here, it "may not refuse to extend" those accommodations "to cases 'of religious hardship' without compelling reason." *Fulton* v. *Philadelphia*, 141 S. Ct. 1868, 1878 (2021) (quoting *Smith*, 494 U.S. at 884).

The court of appeals attempted to avoid this issue by citing public health justifications for the medical exemption. Pet. App. Ex. 1, at 19. But Dr. Shah's declaration identifies the government's "four public health reasons" for the vaccine mandate—all of which relate to stopping the spread of COVID. Shah Decl. ¶ 56(a)-(d). Thus, judged from the relevant vantage point—namely "the asserted government interest that justifies the regulation at issue," Pet. App. Ex. 1, at 19 (quoting *Tandon*, 141 S. Ct. at 1296)—the medical exemption undermines general applicability because it undermines that interest "in a similar way." *Ibid.* (citing *Fulton*). An unvaccinated employee is an unvaccinated employee, regardless of the reason for being unvaccinated.

In any event, even accepting the court of appeals' level-of-generality shift, this particular medical exemption would *still* trigger strict scrutiny because of how broadly it sweeps. Maine's policy directs employers to grant medical exemptions no matter the reason or factual circumstances, and regardless of its effect on the spread of COVID. Thus even a very minor medical reason would qualify, even if it would not result in significant medical problems or missed work. The court reasoned that in light of Maine's broader interest in "protecting the health and safety of all Mainers," the medical exemption and a religious exemption weren't "comparable," because denying a medical exemption could make it difficult for Maine to "keep its healthcare facilities staffed in order to treat patients," since some healthcare workers might become sick from "medically contraindicated vaccines." Pet. App. Ex. 1, at 19-22. But this reasoning makes sense only if one thinks that objecting healthcare workers who are denied a religious exemption will simply deny their conscience and accept the vaccine. If, by contrast, such objectors would abide by their conscience and be fired, then denying a religious exemption could *also* present staffing problems at Maine healthcare facilities, and the two exemptions would be fully "comparable" for *Tandon* purposes. 141 S. Ct. at 1296.

Of course, other medical exemptions—ones that furthered the government's underlying interest—might not trigger strict scrutiny. But where the exemption is so broad that it undermines the interest the government claims justifies its rule, strict scrutiny is required. And that is the only kind of medical exemption Maine employs.

The court can't conduct a comparability analysis by "assum[ing] the worst" about

religious objectors—*i.e.*, that even though they say they *cannot* get the vaccine, they don't really mean it—while "assum[ing] the best" about medical objectors—*i.e.*, that the medical consequences of getting a vaccine that *may* be *inadvisable* are typically going to be significant enough to seriously threaten a provider's health and cause missed work. *Tandon*, 141 S. Ct. at 1297. Indeed, such an analysis runs squarely contrary to this Court's many religious-unemployment cases, the upshot of which is that an employee forced to leave a job because of his "religious convictions" *can't* be treated as having "quit voluntarily," *Thomas* v. *Review Bd.*, 450 U.S. 707, 712-713 (1981), but instead has just as much "cause" for not working as one who faces "health" and "safety" risks, *Sherbert* v. *Verner*, 374 U.S. 398, 400 n.3 (1963) (quoting South Carolina benefits statute); see also *id.* at 407 n.7. On this record, the exemptions are comparable, meaning the mandate must pass strict scrutiny.

Selective treatment of religious objectors. While Maine retained its broad medical exemption, it revoked its 30-year-old religious one. In 2019, Maine passed a law expressly eliminating "religious and philosophical" exemptions from its vaccine requirements, while preserving the medical exemption. See Me. Rev. Stat. Title 22, § 802(4-B)(B) (2021) (noting repeal). In so doing, Maine acted contrary to the centuries-old tradition of allowing competent adults to refuse unwanted medical treatment, *Cruzan*, 497 U.S. at 270, which reflects that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); see *Washington* v. *Glucksberg*, 521 U.S. 702, 725 (1997) ("The right assumed in *Cruzan*" was based

on "the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment" and was therefore "entirely consistent with this Nation's history and constitutional traditions."). Maine also acted counter to both its own tradition of allowing religious exemptions from vaccine requirements, 2001 Me. Legis. Serv. Ch. 185 (H.P. 1044) (L.D. 1401) (West), and that of most states and the federal government that continue to allow religious exemptions from vaccine requirements. See *infra* at Section III(1).

Maine's selective elimination of religious exemptions thus took a religious practice that was lawful (refusing vaccines for religious reasons) and made it unlawful, contrary to long tradition and widespread practice, all while leaving in place a broad secular exemption. A law like this may ultimately turn out to be constitutional. But it is not the sort of "across-the-board" prohibition only "incidental[ly]" affecting religious exercise that the Court had in mind in *Smith*. 494 U.S. at 878, 884.

The court of appeals rejected this analysis on two grounds, both meritless. First, it reasoned that the law was neutral because the plaintiffs hadn't shown that the law prohibited the exemptions "*because of* their religious nature." Pet. App. Ex. 1, at 18 (quoting *Fulton*, 141 S. Ct. at 1877). But a deliberate choice to burden religious conduct *qua* religious conduct, while continuing to exempt parallel secular conduct, is on its face not neutral as to religion. An employee whose religious objection had been protected under prior law, and then lost that exemption in 2019 *precisely because her objection was religious*, has not been subject to a "neutral" law. Laws that fail to operate "without regard to religion" or that otherwise "single out the religious" for

disadvantages "clear[ly] * * * impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran Church of Columbia* v. *Comer*, 137 S. Ct. 2012, 2020-2021 (2017).

Moreover, "even slight suspicion" that state action against religious conduct "stem[s] from animosity to religion or distrust of its practices" is enough to require government officials to reconsider. *Masterpiece Cakeshop Ltd.* v. *Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). And that's particularly true here because the government's broad accommodations for secular medical interests signal that "the State" is "assum[ing] the worst" about religious motivations for accommodation "but assum[ing] the best" about secular ones. *Tandon*, 141 S. Ct. at 1297 (quoting *Roberts* v. *Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (*per curiam*)).

Second, the First Circuit found that the law was not a "religious gerrymander" because the religious exemption had been removed before COVID. Pet. App. Ex. 1, at 29-30. But at most that timing shows that the law is not a *COVID* gerrymander. The timing does nothing to change the fact that the removal of an exemption for a longstanding, traditional, and widespread religious exercise, on its face, is not the kind of religion-neutral prohibition that falls within *Smith*, but rather one that fails to operate "without regard to religion" and thus triggers scrutiny. *Trinity Lutheran*, 137 S. Ct. at 2020-2021. There may be valid reasons to remove a religious exemption; but the government must be required to actually justify its conduct.

Finally, Maine's rule is subject to strict scrutiny because, as a regulation that applies only to "health care facility employees," it is not the kind of generally applicable,

across-the-board statute contemplated in *Smith*. In fact, even within the healthcare field, the law is not across-the-board: as Maine explained to the First Circuit, its mandate "does not apply to private physician practices, urgent care clinics, or any other facility not identified in the rule." 10/18/21 Me. C.A. Br. 49. There may be good reasons that Maine has focused on only certain healthcare facility employees, left out many other healthcare employees, and imposed no vaccine mandate at all on other large swaths of its population—reasons that go to tailoring and fit. But a mandate that only applies to a small segment of the state's population is, by definition, not "generally applicable." Maine therefore must meet its burden to demonstrate that this selectivity passes strict scrutiny.

III. Maine hasn't carried its burden on strict scrutiny.

Maine bears the burden of satisfying strict scrutiny. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-430 (2006). Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997); see also *Thomas*, 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). Even when the government has identified a problem in need of solving, the restriction "must be actually necessary to the solution." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). "That is a demanding standard." *Ibid*. And "because [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Id*. at 799-800 (internal citations omitted). And "so long as the government can achieve its interests in a manner that does not burden religion, it

must do so." *Fulton*, 141 S. Ct. at 1881.

Maine has failed to carry this burden in two ways:

1. ***No proof that Maine needs greater restrictions than 47 other states and the federal government.*** Maine is an outlier. Forty-seven other states have either not imposed any COVID vaccination mandate on private-sector healthcare workers, have allowed religious exemptions, or have allowed accommodations like weekly testing. The federal government also allows religious exemptions for agency employees. "[W]hen so many" other jurisdictions "offer an accommodation, [Maine] must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015).

According to data from the National Academy for State Health Policy (NASHP), only 15 states require private-sector healthcare workers to be vaccinated against COVID.[2] Of these, all but three states either provide for religious exemptions or allow employees to undergo testing in lieu of vaccination.[3] Only New York, Rhode Island,

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[2] National Academy for State Health Policy, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, updated Oct. 8, 2021, https://perma.cc/ME38-JX5T. NASHP identifies 15 states that have imposed COVID vaccine mandates on healthcare employees working in the private sector (California, Colorado, Connecticut, the District of Columbia, Delaware, Illinois, Maine, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington). NASHP identifies an additional eight states that impose vaccine mandates on healthcare workers employed by the state, but do not require private-sector healthcare employees to be vaccinated (Hawaii, Kentucky, Minnesota, Nevada, North Carolina, Pennsylvania, Vermont, and Virginia).

[3] California, Colorado, Connecticut, the District of Columbia, Illinois, Massachusetts, Maryland, New Mexico, Oregon, and Washington allow for religious exemptions to their healthcare employee vaccination mandates. California Department of Public Health, *Order of the State Public Health Office Adult Care Facilities and Direct Care Worker Vaccine Requirement* (Sept. 28, 2021), https://perma.cc/2KWE-JLBK; Colorado Department of Public Health and Environment, *Standards for Hospitals and Health Facilities*, 6 CCR 1011-1(12) (Aug. 30, 2021), https://perma.cc/E3BY-48PV; State of Connecticut, *Executive Order No. 13F* (Sept. 3, 2021), https://perma.cc/YDC5-G8KF; Government of the District of Columbia, *Mayor's Order 2021-099* (Aug. 10, 2021), https://perma.cc/3T3F-U2T3 (mandate for District employees), https://perma.cc/9MND-GWGX (adding healthcare workers on Aug.

and Maine require private-sector healthcare workers to receive COVID vaccines with no religious accommodation or testing alternative.[4] And the federal government recognizes that its agencies can be "required to provide a reasonable accommodation to employees * * * because of a sincerely held religious belief, practice, or observance." Safer Federal Workforce, *Vaccinations*, https://perma.cc/EWU4-N3E9. Where, as here, Maine "has available to it a variety of approaches that appear capable of serving its interests," it must explain why it cannot take the more common path. *McCullen* v. *Coakley*, 573 U.S. 464, 493-494 (2014) (considering policies of other states); *Holt*, 574 U.S. at 368-369 (same).

Maine's response boils down to its claim that it is unique because it is a rural state with a small healthcare provider population. Shah Decl. ¶ 66. But Maine nowhere explains why this problem is more acute in Maine than in many other similar states that have less population density and fewer providers. For example, Maine does not explain why the approach taken in neighboring Vermont, which is also

16, 2021); State of Illinois, *Executive Order 2021-22* (Sept. 3, 2021), https://perma.cc/33YF-5ZJN; Maryland Department of Health, *Amended Directive and Order Regarding Vaccination Matters, MDH No. 2021-08-18-01* (Aug. 18, 2021), https://perma.cc/5MEB-S3E4; The Commonwealth of Massachusetts, *Order of the Commissioner of Public Health No. 2021-4* (Aug. 4, 2021), https://perma.cc/YNY5-UXW6; Oregon Health Authority Public Health Division 333-019-1010 (Sept. 1, 2021), https://perma.cc/8UHK-SJZU; State of Washington, *Proclamation by the Governor 21-14, COVID-19 Vaccination Requirement* (Aug. 9, 2021), https://perma.cc/9KKV-GP97.

Delaware and New Jersey allow for weekly or twice weekly testing as an alternative to vaccination: Delaware Health and Social Services, *Emergency Secretary's Order* (Sept. 10, 2021), https://perma.cc/Z7CL-CK7R; Governor of New Jersey, *Executive Order No. 252* (Aug. 6, 2021), https://perma.cc/J6J9-WULD.

[4] New York's mandate, which removed a religious exemption, was enjoined by the Northern District of New York because it was not neutral or generally applicable, and likely to fail strict scrutiny because the government failed to explain why reasonable accommodations that worked for medically exempted employees could not be extended to employees exempted for religious reasons. *Dr. A.* v. *Hochul*, No. 1:21-cv-1009, 2021 WL 4734404, at *5 (N.D.N.Y. Oct. 12, 2021).

small and rural, but imposes no mandate on private sector healthcare workers and allows even state workers to test and mask if they do not want the vaccine,[5] would not work in Maine. Nor does Maine explain how states with even smaller populations and even greater size than Maine—states like Alaska, the Dakotas, Montana, and Wyoming—can protect their health systems against the same disease with much less restrictive approaches.[6] To constitutionally impose its mandate, Maine must explain why the less restrictive approaches used in these other states wouldn't work for Maine. Having failed to do so, Maine has failed strict scrutiny.

2. ***No proof that religious objectors cannot be treated like those who are exempt for other reasons.*** Maine also fails strict scrutiny because it has not demonstrated why it cannot treat employees with religious objections like those who are exempt from the mandate, including those who are medically exempt and those who work at "private physician practices" and "urgent care centers."

First, Maine has continued to broadly allow medical exemptions for any reason that even "may" make the vaccine medically "inadvisable," as determined by "the physician's, nurse practitioner's or physician assistant's professional judgment." Me. Rev. Stat. Title 22, § 802(4-B)(A). But the concerns that Maine raises to allowing *any*

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[5] See Transcript: Weekly COVID-19 Briefing (Sept. 8, 2021), https://perma.cc/CK8E-DLL5 (executive branch employees required to be "vaccinated or be subject to at least weekly testing and mandatory masking at work").

[6] The First Circuit fared no better when it tried to make up for Maine's evidentiary shortfall by noting the percentage of Maine's population that is above 65. Pet. App. Ex. 1, at 6 (citing United States Census Bureau, *65 and Older Population Grows Rapidly as Baby Boomers Age, Release No. CB20-99*, June 25, 2020, https://perma.cc/UY4E-GZJ2. But neighboring Vermont has essentially the same percentage elderly population, as do Florida and West Virginia. *Ibid.* None has imposed a mandate like Maine's, so Maine needs to explain why the less restrictive approaches taken by these comparable states would not work in Maine.

kind of religious accommodation would fully apply to medically exempt healthcare workers. For instance, Maine says that religious healthcare workers can't be accommodated in dentists' offices because dental patients have their mouths open for lengthy periods, nor in EMS because of the close proximity to potentially unmasked patients. Shah Decl. ¶¶ 57-58. But that's all just as true for a *medically* exempt dental worker or EMS provider.

Likewise, Maine emphasized to the First Circuit that its mandate does *not* include "private physician practices" and "urgent care centers." But Maine never explains why whatever precautions apply in *those* healthcare facilities cannot be used for religious objectors in facilities subject to the mandate.

Maine's broad medical exemption and its patchwork approach to healthcare providers thus show the mandate "hardly counts as [the] no-more-than-necessary lawmaking" required to pass the least-restrictive-means test, *Roberts*, 958 F.3d at 415, and suggests the government's "interests could be achieved by narrower [policies] that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546. That is, whatever means Maine is using to ensure the medically exempt don't increase COVID risks must be applied to sincere religious objectors who work in the exact same facilities. *Holt*, 574 U.S. at 365 ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it."). Like the Ninth Circuit in *Tandon*, the First Circuit erred because it failed to "requir[e] the State to explain why it could not safely permit" religious objectors to exercise the same "precautions used

[for] secular" objectors. 141 S. Ct. at 1297. Maine must meet its "exceptionally demanding" burden of proof. *Hobby Lobby*, 573 U.S. at 728.

All this is not to say that Maine can *never* make a showing that it has reasons specific to it that differentiate it from 47 other states, or that it could not have good reasons for allowing certain medical exemptions but not religious exemptions, even when they have the same effect on the spread of COVID. But Maine must at least try to make that evidentiary showing, and thus far in this litigation it has not.[7]

IV. Maine cannot exempt employers from their burdens under Title VII.

Maine also cannot replace Title VII's requirement that employers provide reasonable accommodations to religious employees with a categorical ban on *any* such accommodations. Title VII prohibits, and gives courts equitable authority to enjoin, adverse employment actions on the basis of "all aspects of religious observance and practice, as well belief," including religious beliefs about vaccines. 42 U.S.C. 2000e(j); 42 U.S.C. 2000e-5(g); *Dr. A* v. *Hochul*, No. 1:21-cv-1009, 2021 WL 4734404, at *5 (N.D.N.Y. Oct. 12, 2021) (enjoining vaccine mandate because, *inter alia*, it prevented employers from reasonably accommodating employees with religious objections in accordance with Title VII).

Employers accordingly have multiple duties under Title VII. First, they must engage in a good faith "interactive process" involving "bilateral cooperation" and "meaningful dialogue" with their employees who request religious accommodations. *Thomas*

[7] New York and California also made unsupported claims to this Court about the interests they sought to further in restricting religious worship. Since then those claims about the spread of COVID have proven to be inaccurate; no government continues to make them now.

v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000); *Ansonia Bd. of Educ.* v. *Philbrook,* 479 U.S. 60, 69 (1986); *EEOC* v. *Chevron Phillips Chem. Co.*, 570 F.3d 606, 621 (5th Cir. 2009). Second, employers must provide reasonable accommodations to employees who do not get vaccinated because of a sincerely held religious belief, practice, or observance, unless they can show that doing so would be an "undue hardship." 42 U.S.C. 2000e(j); 29 C.F.R. 1605.2. These duties are closely linked; without engaging in the required interactive process with its employees, an employer does not know whether an acceptable accommodation would pose an undue hardship. *Chevron*, 570 F.3d at 621. But, while acknowledging that Title VII controlled, the First Circuit simply asserted, without putting the defendant hospitals to their proof, that *any* accommodation would cause undue hardship. Not so.

For instance, if employers can accommodate *medical* objectors, it's not clear why they cannot do the same for religious ones. And, as spelled out in recent EEOC guidance, before terminating a religious employee, employers must "thoroughly consider all possible reasonable accommodations" such as masking, social distancing, modified shifts, periodic testing, telework, or reassignment, and then "*demonstrate*"—not just assert—that *each* of those alternatives would create an undue hardship. See K.2., K.12., and L.3. at EEOC, *What you should know about COVID-19* (updated Oct. 25, 2021), https://perma.cc/CC2W-CQR8 ("An employer cannot rely on speculative hardships when faced with an employee's religious objection but, rather, should rely on objective information" and "will need to demonstrate how much cost or disruption the employee's proposed accommodation will involve"). Yet Maine's mandate violates

Title VII by preventing employers from *even considering* such accommodations. Which leads to the most obvious Title VII violation: the mandate forces an employer which either *wants to* or *can* accommodate its employees' religious beliefs to nonetheless exclude them from the worksite. Indeed, no matter how easy it might be to accommodate employees—and thus *not* lose valuable healthcare workers when even Maine acknowledges the sector is "fragile due to understaffing" (Shah Decl. ¶ 56(c))—the mandate requires exclusion.

* * *

Vaccine mandates raise difficult questions, involve weighty societal interests, and generate heated political and social debates. Our Constitution and court system can handle such conflict—indeed, they can help the country work through the conflict—but only if courts hold all parties to their respective burdens to determine when and whether such mandates would be constitutionally permissible.

CONCLUSION

This Court should issue the requested injunction pending disposition of the forthcoming petition for certiorari. In the alternative, the Court should grant the application and remand to the lower courts to hold the parties to their appropriate burdens.

Respectfully submitted.

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