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 ofHealth 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 HEALTH FOUNDATION; MAINEGENERAL HEALTH,

Respondents.

On Emergency Application for Writ of Injunction to the Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit

PROVIDER RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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DISCLOSURE STATEMENT OF DEFENDANT MAINE HEALTH

Defendant MaineHealth ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Maine non-profit corporation, the parent corporation of which is MaineHealth Services, which is also a Maine non-profit corporation.

DISCLOSURE STATEMENT OF DEFENDANT GENESIS HEALTHCARE OF MAINE, LLC

Defendant Genesis HealthCare of Maine, LLC ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Maine limited liability company and that its sole member is GHC Holdings LLC. GHC Holdings LLC is a Delaware limited liability company and its sole member is Genesis HealthCare LLC. Genesis HealthCare LLC is a Delaware limited liability company and its sole member is Gen Operations II, LLC. Gen Operations II, LLC is a limited liability company the sole member of which is GEN Operations I, LLC. GEN Operations I, LLC is a limited liability company of which the sole member is FC-GEN Operations Investment, LLC. FC-GEN Operations Investment, LLC is a limited liability company in which the following have ownership interests:

- Sundance Rehabilitation Holdco, Inc. is a Delaware corporation having a 5.3% membership interest
- Sun Healthcare Group, Inc. is a Delaware corporation having a 64.1% membership interest, and also a 100% interest in Sundance Rehabilitation Holdco, Inc.

- Multiple investors have a 30.6% interest holding rights to income and losses but no rights as to control.

Genesis Healthcare, Inc. is a publicly traded corporation organized in Delaware and the sole shareholder of Sun Healthcare Group, Inc. Genesis Healthcare, Inc., is traded on OTCMKTS under the ticker symbol "GENN". There is no shareholder owning 10% or more of Genesis Healthcare, Inc., shares.

DISCLOSURE STATEMENT OF
DEFENDANT GENESIS HEALTHCARE LLC

Defendant Genesis HealthCare LLC ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses it is a Delaware limited liability company and that its sole member is GEN Operations II, LLC. GEN Operations II, LLC is a limited liability company the sole member of which is GEN Operations I, LLC. GEN Operations I, LLC is a limited liability company the sole member of which is FC-GEN Operations Investment, LLC. FC-GEN Operations Investment, LLC is a limited liability company in which the following have ownership interests:

- Sundance Rehabilitation Holdco, Inc. is a Delaware corporation having a 5.3% membership interest
- Sun Healthcare Group, Inc. is a Delaware corporation having a 64.1% membership interest, and also a 100% interest in Sundance Rehabilitation Holdco, Inc.
- Multiple investors have a 30.6% interest holding rights to income and losses but no rights as to control.

Genesis Healthcare, Inc. is a publicly traded corporation organized in Delaware and the sole shareholder of Sun Healthcare Group, Inc. Genesis Healthcare, Inc., is traded on OTCMKTS under the ticker symbol "GENN". There is no shareholder owning 10% or more of Genesis Healthcare, Inc., shares.

DISCLOSURE STATEMENT OF
DEFENDANT MAINEGENERAL HEALTH

Defendant MaineGeneral Health ("Defendant"), through counsel and in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, hereby discloses that it is a Maine non-profit corporation, and that it has no parent corporation.

DISCLOSURE STATEMENT OF
NORTHERN LIGHT HEALTH FOUNDATION

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant Northern Light Health Foundation makes the following disclosures regarding its corporate status: Northern Light Health Foundation is a T13-B non-profit corporation. It has no parent corporation. As a non-profit, it has no owners or shareholders, but has one corporate member, Eastern Maine Healthcare Systems d/b/a Northern Light Health, which is also a T13-B non-profit corporation.

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STATEMENT OF THE CASE

Eighteen months after the start of the COVID-19 pandemic that had taken the lives of more than 600,000 people in the United States and six months after the three highly effective COVID-19 vaccines became readily available in Maine, the State of Maine added COVID-19 to the list of immunizations required of employees working in licensed healthcare facilities. Claiming that taking any of the vaccines would violate their sincerely held religious beliefs, Plaintiffs unsuccessfully petitioned the United States District Court for the District of Maine and then the First Circuit Court of Appeals for injunctive relief to enjoin enforcement of this requirement. (Plaintiffs' Emergency Application for Writ of Injunction Pending Disposition of Petition for Writ of Certiorari ("Application") Ex. 5, Order on Pls.' Mot. for Prelim. Inj., ECF No. 65 (the "Order"); Application Ex. 1, Opinion on Appeal (the "Opinion").) As the courts correctly observed in denying their motion and affirming that denial, respectively, this case is not about whether the plaintiff healthcare workers can be forced to accept the COVID-19 vaccine against their will and in contravention of their religious beliefs. Plaintiffs have sworn in their Verified Complaint that they cannot and will not receive the COVID-19 vaccine. Thus, the issue is whether they can continue to work unvaccinated in licensed healthcare facilities after the State's deadline of October 29, 2021. What is at stake for Plaintiffs, then, is the loss of their employment, a harm for which they can be made whole under Title VII of the Civil Rights Act of 1964 (Title VII) after exhausting their administrative remedies and litigating the merits of their individual discrimination claims against the Provider Defendants.

The likelihood of Plaintiffs prevailing with respect to those individual discrimination claims is exceedingly low. Plaintiffs urge upon this Court a novel theory that the Provider Defendants are required to violate state law, disregard a condition of their licenses, and jeopardize the health and safety of their patients and workers in order to accommodate their religious beliefs under Title VII. This position defies common sense and is contrary to well settled law. Doing what the law requires the Provider Defendants to do does not give rise to any cause of action by Plaintiffs. As the State Defendants explain, it does not violate the first amendment rights of any of the plaintiffs; nor would it violate Title VII.

In sum, regardless of the fate of the immunization rule, which the Provider Defendants[1] believe to be constitutional, Plaintiffs are extraordinarily unlikely to succeed on the merits of their Title VII claims against the Provider Defendants, and they have failed to articulate any reason why the established framework for the litigation of employment discrimination claims—which includes administrative exhaustion and pursuant to which a successful plaintiff may recover damages and post-trial injunctive relief—is inadequate. The Court should deny the Application.

STATEMENT OF FACTS

The background set forth in the First Circuit's Opinion (Opinion at 4-14) and the District Court's Order (Order at 1-10) provide a complete and accurate recitation of the facts. Nonetheless, for the Court's convenience, the Provider Defendants offer the following brief factual background.

[1] Whenever referenced herein, "Provider Defendants" refers collectively to MaineHealth, Genesis HealthCare of Maine LLC, Genesis HealthCare LLC, MaineGeneral Health, and Northern Light Health Foundation.

Maine has a long history of requiring healthcare workers at Designated Health Facilities[2] to be vaccinated against infectious diseases subject to limited exemptions. (*See* Opinion at 4-6; Order at 8-10.) Contrary to Plaintiffs' repeated and knowingly false refrain, Maine did not eliminate the religious exemption to mandatory vaccine requirements for certain healthcare workers in conjunction with its directive that these workers be vaccinated against COVID-19. (*See* Application at 2, 8-9.) Rather, in response to declining vaccination rates in the State of Maine, the Maine Legislature amended the healthcare vaccination law in 2019, before the pandemic, to remove previously recognized religious and philosophical exemptions. *See* P.L. 2019, ch. 154, §§ 2, 9-11 (varying effective dates); 22 M.R.S. § 802(4-B). As a result, the only remaining exemption to immunization for healthcare workers is a medical exemption for individuals for whom vaccination would be medically inadvisable and for whose protection the non-medical exemptions were removed. *See id.*.

In March 2020, Maine voters rejected a peoples' veto referendum, thereby endorsing the Maine Legislature's decision to eliminate non-medical exemptions from vaccination for healthcare workers at Designated Healthcare Facilities. On April 14, 2021, following the referendum and consistent with the directive from the Maine Legislature, the Maine Department of Health and Human Services ("DHHS") formally amended its existing Immunization Requirements for Healthcare Workers

[2] The term "Designated Healthcare Facility" is defined in the rules to include "a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities . . ., multi-level healthcare facility, hospital, or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." 10-144 C.M.R. Ch. 264, §1(D).

rule to remove the religious and philosophical exemptions from its text. (Respondents' Appendix (R.A.) at 61-67, 10-144 Me. Code R. § 264 (amended Apr. 14, 2021).) Then, due to the growing COVID-19 crisis in the United States and Maine, on August 12, 2021, DHHS issued an emergency rule further amending the Rule by adding the COVID-19 vaccine to the list of mandated vaccines for healthcare workers.[3] (R.A. at 74-82, 10-144 C.M.R. Ch. 264 (amended Aug. 12, 2021).[4] The Rule requires employees of Designated Healthcare Facilities to receive their final dose of the COVID-19 vaccine on or before September 17, 2021. *Id.* at §§ 264(1)(E)-(F), (2), (5), (7). On or about September 2, 2021, Governor Janet Mills announced that DHHS would not begin enforcing the Rule until October 29, 2021 so healthcare workers would have additional time to come into compliance. *See Mills Administration Provides More Time for Health Care Workers to Meet COVID-19 Vaccination Requirement*, MAINE.GOV (Sept. 2, 2021), https://www.maine.gov/governor/mills/news/mills-administration-provides-more-time-health-care-workers-meet-covid-19-vaccination.

The Provider Defendants each operate one or more Designated Healthcare Facilities[5], licensed and regulated by DHHS. (*See* Decl. of April Nichols ¶3, (R.A.

[3] DHHS has the authority to issue emergency rules as part of its authority to "[e]stablish procedures for the control, detection, prevention . . . of communicable . . . diseases, including public immunization . . . programs." 22 M.R.S. § 802(1)(D), (3) ("[t]he department shall adopt rules to carry out its duties as specified in this chapter"); 18 M.R.S. § 8054(1).

[4] *See* Opposition to Motion for Preliminary Injunction by MaineGeneral et al. at ECF No. 50-1 for a red-lined copy of the Rule.

[5] Only a fraction of Maine's healthcare facilities – broadly defined – constitute Designated Healthcare Facilities. In fact, there are many healthcare facilities in the State of Maine which do not meet this definition. *See Health Care Worker Vaccination FAQS, MAINE.GOV (last updated Oct. 13, 2021)* at FAQ 1, https://www.maine.gov/covid19/vaccines/public-faq/health-care-worker-vaccination (listing the types of healthcare facilities that are covered by and excluded from the Rule).

91-93); Decl. of Gail Cohen ¶3 (R.A. 97-99); Decl. of July West ¶3 (R.A. 94-96); Decl. of Paul Bolin ¶3 (R.A. 100-102).) As a condition of their licensure, the Provider Defendants are required to ensure that employees who are physically present in the workplace are fully vaccinated for COVID-19 subject to the medical exemption. If the Provider Defendants do not follow the Rule, they would not be in compliance with state law and could face severe consequences, including being enjoined from continuing to permit employees to work absent proof of vaccination or exemption, civil fines, penalties and loss of licensure. 22 M.R.S. § 803-04. Stated otherwise, Providers Defendants have no discretion with respect to compliance with the Rule.[6] Accordingly, each of the Provider Defendants implemented mandatory COVID-19 vaccination policies consistent with the Rule and the State's deadline for vaccination.

ARGUMENT

I. STANDARD OF REVIEW

Plaintiffs' request to enjoin a presumptively valid state regulation invokes this Court's authority under the All Writs Act, 28 U.S.C. § 1651(a). It is well settled "that injunctive relief under the All Writs Act is to be used 'sparingly and only in the most critical and exigent of circumstances.'" *Brown v. Gilmore*, 533 U.S. 1301, 122 S.Ct. 1 (2001) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC.*, 479 U.S. 1312, 1313, 107 S.Ct. 682 (1986).) Injunctive relief is appropriate only where

[6] This observation is not intended to suggest that the Provider Defendants believe the Rule is in any way improper. Rather, it is simply an observation that whether the Rule is constitutionally sound or not, private persons subject to the jurisdiction of the State are bound to comply with state laws unless and until they are rescinded, repealed, or otherwise invalidated

"the legal rights at issue are indisputably clear" and where an injunction is "[n]ecessary or appropriate in aid of [this Court's] jurisdiction." *Id.* (internal quotation omitted.); *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S. 1306, 1306, 125 S.Ct. 2 (2004).

II. PLAINTIFFS' ENTITLEMENT TO RELIEF AGAINST THE PROVIDER DEFENDANTS IS FAR FROM INDISPUTABLY CLEAR

Plaintiffs' constitutional claims are brought against only the State Defendants, and Plaintiffs do not assert or develop any argument that the Provider Defendants are state actors.[7] Plaintiffs' claims against the Provider Defendants arise under Title VII and they rest on the overly simplified and inaccurate premise that Title VII requires employers to accommodate employees' religious beliefs, regardless of the effect that the proposed accommodation would have on the employer or others. In fact, courts have employed a two-part framework to evaluate whether a failure to accommodate an employee's religious beliefs amounts to unlawful discrimination under Title VII. First, the plaintiff must make a "*prima facie* case that a bona fide religious [belief or] practice conflicts with an employment requirement and was the basis for adverse action." *Sanchez-Rodriguez v. AT&T Mobility Puerto Rico, Inc.*, 673 F.3d 1, 2 (1st Cir. 2012). If the plaintiff does so, the burden moves to the defendants to show that "it offered a reasonable

[7] The Verified Complaint included a claim of conspiracy under 42 U.S.C. § 1985 (Count V), but Plaintiffs have failed to discuss or develop arguments in support of that claim in their Application. For the reasons set forth in the opinions of the District Court and First Circuit, this claim is wholly unsupported by the record and does not warrant this Court's consideration. (*See* Opinion at 34; Order at 37-38.)

accommodation *or* that a reasonable accommodation would be an undue burden." *Id.*

This two-part framework exists because Title VII does not require employers to provide reasonable accommodations for an employee's religious beliefs where doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). It has long been the rule that a religious accommodation constitutes an undue hardship if it imposes on the employer "more than a *de minimis* cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

Courts considering whether employers are required to accommodate employees' religious beliefs in ways that would place them in violation of the law have analyzed the question two different ways. Some have concluded such claims fail to state a *prima facie* case, reasoning that the conflict with the plaintiff's religious beliefs stems from a statute or rule, and not a requirement of the employer. *E.g. Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000); *Baltgalvis v. Newport News Shipbuilding Inc.*, 132 F.Supp.2d 414, 418 (E.D. Va. 2001) *aff'd* 15 F. App'x. 172 (4th Cir. 2001). Others have concluded that an accommodation that places the employer in violation of the law is *per se* an undue hardship. *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 830-31 (9th Cir. 1999). At least one Circuit Court of Appeals has declined to endorse or reject either approach, simply concluding that Title VII does not require employers to disregard the law "in

the name of reasonably accommodating an employee's religious practices." *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362, 364 (6th Cir. 2015). "Although they have disagreed on the rationale, courts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law." *Sutton*, 192 F.3d at 830.

Plaintiffs' Title VII claims against the Provider Defendants conflate the terms "reasonable accommodation" and "exemption." The record shows only that Plaintiffs requested a single form of accommodation—exemption—which the Provider Defendants denied, citing their inability to grant the requested accommodation without placing themselves in violation of state law. Whether the undue hardship threshold is *de minimis* or consistent with the higher standard applicable to claims arising under the Americans with Disabilities Act, it cannot seriously be questioned that Title VII does not require a healthcare employer to provide reasonable accommodations where those accommodations will expose the employer to adverse licensing consequences and potentially jeopardize the employer's ability to operate during a pandemic. The First Circuit therefore appropriately held that Plaintiffs did not show a likelihood of success on the merits of their Title VII claims and were not entitled to injunctive relief. (*See* Opinion at 33.)

III. CRITICAL AND EXIGENT CIRCUMSTANCES DO NOT EXIST, AS PLAINTIFFS HAVE ADEQUATE REMEDIES AT LAW SHOULD THEY PREVAIL ON THEIR TITLE VII CLAIMS

Plaintiffs do not allege that, absent an injunction, they will be required to accept the COVID-19 vaccine and thereby violate their sincerely held religious

beliefs; only that they will likely lose their jobs. Thus, as both the trial court and Court of Appeals observed (Order at 18-19; Opinion at 20-21), their claims are dissimilar to those raised in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) and other recent decisions of this Court, where the plaintiffs complained that governmental regulation prevented them from worship or otherwise made it impossible for them to adhere to their sincerely held religious beliefs. Plaintiffs affirmatively plead that their "sincerely held religious beliefs compel them to abstain from obtaining or injecting [a COVID-19 vaccine] into their body, regardless of the perceived benefit or rationale."[8] (Ver. Compl. ¶68, ECF No. 1.) (emphasis supplied.) Hence their ability to adhere to their beliefs is not at issue. The harm they complain of is the loss of employment.

Moreover, Plaintiffs have not brought any constitutional claims against the Provider Defendants, only claims for violation of statutory rights relating to discrimination. Plaintiffs therefore have shown no basis for injunctive relief against these private employers to protect their First Amendment rights.

One of the central purposes behind Congress' enactment of Title VII is "to make persons whole for *injuries suffered* on account of unlawful employment discrimination." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added). Any Plaintiff who can demonstrate a meritorious Title VII claim

[8] In Paragraph 68 of the Verified Complaint, Plaintiffs allege that they are compelled to abstain "regardless of the perceived benefit or rationale." (Ver. Compl. ¶ 68, ECF No. 1.) Given their religious beliefs, remaining employed is the only possible rationale Plaintiffs could advance for receiving the vaccine. Paragraph 68 of their Verified Complaint therefore amounts to an unambiguous assertion that they do not intend to be vaccinated and therefore expect to be terminated. In other words they have very clearly sworn that if put to the choice between losing their jobs and violating their religious beliefs, they will pick the former. (*Id.*)

will have an adequate remedy at law in the form of back pay, front pay or reinstatement, compensatory and punitive damages, and attorneys' fees—*i.e.* post-trial money damages and equitable relief. 42 U.S.C. § 1981a. Thus, each and every plausible harm Plaintiffs might experience as a result of alleged discrimination by the Provider Defendants can be remedied through post-trial relief, after Plaintiffs have exhausted their administrative remedies and thereby taken advantage of Title VII's elaborate dispute-resolution scheme, the purpose of which is to resolve discrimination claims before they ever reach litigation. The administrative process is itself a critical component of Title VII's remedial scheme, 42 U.S.C. § 2000e-5(f)(1)), of which the trial court correctly concluded Plaintiffs have failed to avail themselves. (Order at 36-37.)

If and when the Plaintiffs lose their employment, it will be because they allowed the deadline for them to obtain the mandatory healthcare worker COVID-19 vaccine to pass. That they will have done so for religious reasons does not establish irreparable harm necessary for injunctive relief, let alone transform their claims into something "critical and exigent" that would justify the Court's departure from well-settled precedent. On this record, the Court can conclude only that, if the Plaintiffs are or have been terminated, their damages will be the same as in virtually every employment discrimination case heard by the courts: lost wages and benefits, other economic harm, and non-economic harm such as emotional distress. The broad remedies available under Title VII are such that, if Plaintiffs prevail, they will be made whole.

CONCLUSION

Plaintiffs are asking this Court to enjoin private employers from terminating their employment based on Title VII claims, before any court has adjudicated the merits of those claims. Regardless of the fate of the Rule, if the Provider Defendants terminate Plaintiffs' employment, Plaintiffs may pursue their Title VII claims on the merits. Should they prevail, they will be made whole. Should they lose, they may appeal. Under the circumstances, injunctive relief is neither necessary nor appropriate to preserve or aid this Court's jurisdiction, and Plaintiffs' Application should therefore be denied.

Dated: October 25, 2021

/s/ Nolan L. Reichl

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