No. 24-1015

IN THE
Supreme Court of the United States

JOHN DOES 1-2, JANE DOES 1-3, JACK DOES 1-750, JOAN DOES 1-750,

Petitioners,

v.

KATHY HOCHUL, in her official capacity as Governor of the State of New York, JAMES MCDONALD, in his official capacity as Commissioner of the New York State Department of Health, TRINITY HEALTH, INC., NEW-YORK PRESBYTERIAN HEALTHCARE SYSTEM, INC., WESTCHESTER MEDICAL CENTER ADVANCED PHYSICIAN SERVICES, P.C.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONER

Petitioners submit this Supplemental Brief under Rule 15.8 to address a significant development that emphasizes the importance of the questions presented and the need for this Court's review.

Petitioners likewise submit this Supplemental Brief to address fundamental errors submitted by the United States as *amicus curiae*.

INTRODUCTION

The United States, as *amicus curiae*, contends that this matter is merely of "isolated significance." United States Br. 23. That is incorrect. Petitioners' lives were destroyed and their long-tenured employment stripped from them by their Respondent employers who refused to engage in any interactive process with their employees required by Title VII. And the reason they would not even "consider" their requests for exemption from the COVID-19 shots and a reasonable religious accommodation is because the Mandate forbade them under penalty of fines and loss of their business licenses. Even a remote worker who had an exemption and accommodation from all vaccines and an exemption from the COVID-19 vaccine had his exemption and accommodation rescinded because religious exemptions could not be "considered."

The United States recognizes, as did the lower courts, that Petitioners claims for damages remain

live and justiciable—rendering the United States' focus on the repeal of the offending rule inapposite.

The case against the Respondent Employers, all of which interpreted and applied the Mandate to prohibit any and all requests for an exemption and a reasonable religious accommodation, despite the commands of Title VII, is worthy of this Court's review.

As discussed more fully *infra*, the United States is incorrect that Petitioners merely failed to use the correct terminology for their requests—as if that matters in the context of Title VII. The record confirms that Petitioners requested both an exemption *and accommodation*, and their employers failed to provide one on the basis of a State law that prohibited it. The United States claims that Petitioners' complaint does not reflect that they sought accommodations, and that they may well have prevailed below if the complaint has alleged differently. United States Br. 22. *This is plainly incorrect and dispelled by the sworn testimony presented below*.

At minimum, this Court should grant the Petition, vacate the lower court's decision, and remand for further determination of Petitioners' claims. Even the United States has now suggested that Petitioners would have prevailed if the proper scope of the rule was as Petitioners alleged. *It is*. And Petitioners' plight is worthy of this Court's review.

SUPPLEMENTAL ARGUMENT

1. The United States commits the same error as the lower courts by contending that religious accommodations were available, just not exemptions, which is directly contradicted by the record below. United States Br. 2 (contending, in error, that Respondents' application of the state law "left room for religious accommodations short of complete exemptions" and thus does not conflict with Title VII). This is incorrect and directly contradicted by the sworn record. The United States suggests that the decision below "left open the possibility that the opportunities for a reasonable accommodation under Title VII for religious objectors are so few as to be illusory," but that "the record on that question [is] lacking." United States Br. 16. This is plainly incorrect.

The record is clear: The State never corrected at any stage of these proceedings that accommodations might be available, just not exemptions. The contention that there is no conflict between Title VII and the Final Rule is wordplay.

Take the record as to John Doe 1. In the Verified Complaint, John Doe 1's sworn testimony shows that he operated a religious senior healthcare facility and wanted to be able to provide his religious employees with religious accommodations. Pet. App. 142a. After the State issued the requirement that he mandate his employees receive the COVID-19 vaccine as a condition of continued employment, he contacted the State to determine whether he could provide religious

accommodations to his employees. He was told that *no exemptions or accommodations could be made*. Pet. App. 143a ("John Doe 1 has spoken with state officials that are responsible for regulating his facility, and he has been informed that offering religious exemptions and accommodation to his employees will result in daily fines and a potential closure of his facility."). Thus, contrary to the contentions of the United States, there was no dispute that no exemptions or accommodations were available for religious objectors. *Period*.

Respondents understood, interpreted, and applied that wholesale prohibition the same way as the State officials who spoke directly to John Doe 1. All Respondents informed Petitioners that the State's Final Rule prohibited even considering requests for religious exemptions *and accommodations*.

John Doe 2's sworn allegations in the Verified Complaint noted that he inquired whether his previously granted religious accommodation would be honored. Pet. App. 143a. John Doe 2 was told by his employer that "[r]eligious exemptions are no longer accepted." Pet. App. 143a–144a.

Jane Doe 1, too, requested a religious exemption and accommodation. Pet. App. 144a. She was told by her employer that "[a]s a health care institution in NYS, NYP must follow the NYS DOH requirements as they evolve. This means that NYP can no longer consider any religious exemptions to the COVID vaccination even those previously approved." Pet. App. 144a–145a.

Jane Doe 2 was likewise told by her employer: "WMC Health, in order to comply with DOH Regulations, will no longer accept applications for a religious exemption and those applications already received will be not be considered." Pet. App. 145a–146a.

Jane Doe 3 was also told that her religious accommodation could not even be considered because the employer was "required to comply with state law." Pet. App. 146a.

2. Contrary to the United States' contention (at 22), *Petitioners' Verified Complaint demonstrates that there were no accommodations—not merely that they were so remote as to prove illusory*. Assuming *arguendo* that the Final Rule permitted remote work, which assumption requires the suspension of reality as no court in the Second Circuit ever found any employee was entitled to or qualified for any accommodation throughout the State of New York (in this or any other case), consider the case of John Doe 2. He worked remotely for 10 years as an IT specialist, during which time he had been exempted from all vaccines and was also exempted from COVID-19. But pursuant to the Final Rule, John Doe 2's employer, New York-Presbyterian, stated: *"Religious exemptions are no longer accepted."* Pet. Cert. 5. Any religious exemption request was automatically and categorially denied even to a remote worker that would have, in the eyes of the United States, "removed them from the [mandate's] scope." United States Br. 22. Neither the Second Circuit nor the

State of New York distinguished this remote worker from any other employee. The United States ignores his existence entirely, and its conclusions based upon that glaring omission taint its entire conclusion. The Second Circuit could have carved out John Doe 2 from the other Plaintiffs and did not. New York could have said that the employer interpreted the mandate as to John Doe 2 incorrectly. *It did not*. Simply put: the theoretical accommodation under the Final Rule for remote work is fiction, solely designed as a post hoc litigation tactic to avoid the obvious conflict with Title VII and preemption under the Supremacy Clause. The Final Rule was never applied to exempt remote work. It was never understood that way. No one disavowed the application and understanding of the Final Rule. And no one was provided the theoretical accommodation. Not a single employee throughout the entire state of New York. The record is neither murky nor unclear. The rule prohibited religious accommodations of any employee, and Petitioners were all fired because of that rule.

3. The text of the Final Rule uses the precise language that Petitioners used in their requests, yet both the United States and the lower courts faulted them for applying for accommodation under the language of the Rule.

New York, itself, referred to the Final Rule as a prohibition on religious exemptions and accommodations. The text of the Final Rule makes that clear. It referred to an individual's need for accommodation as "an exemption." *See* R.68, Ex. B to Verified Compl., dkt.1–8 ("Limited *Exemptions* to

vaccination . . . If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to a specific member of a covered entity's personnel, based upon a specific pre-existing health condition, the requirements of this section relating to COVID-19 immunization *shall be subject to a reasonable accommodation* of such health condition only until such immunization is found no longer to be detrimental to the health of such member. (emphasis added).) The Final Rule itself refers to accommodations as exemptions. *See* R. 75–77, Exhibit C to Verified Compl., dkt. 1-9 ("If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel . . . *any reasonable accommodation may be granted* (emphasis added).)

In other words, both the United States as *amicus curiae* and the lower court below faulted Petitioners for using both "exemption and accommodation" in their request—**but that is precisely the language of the State's rule**. Petitioners were all fired for this fictional error, and both the United States and the lower courts ignored the record below to suggest that this Court should perceive no error or need for review. This is incorrect.

Put simply, no one doubted the proper understanding of the Final Rule. The State saw it as a total prohibition on religious exemptions and accommodations. The employers interpreted and enforced it as a total prohibition on religious exemptions and accommodations. Both the State and

Respondents' interpretation confirm the obvious—the Final Rule conflicts with Title VII in a manner federal law and the Supremacy Clause do not permit.

Petitioners were all healthcare workers in New York that were subjected to a state-law mandate that all healthcare workers accept and receive a COVID-19 vaccine as a condition of continued employment in the healthcare industry. Petitioners harbored sincere religious objections to the vaccine, and each sought a religious accommodation from their employers under Title VII. Many of the employers had previously granted Petitioners an accommodation for their religious beliefs, but revoked those accommodations when New York changed the rule and prohibited any religious accommodation solely to the COVID-19 vaccine. All Petitioners were fired for refusing to violate their sincerely held religious convictions, and Petitioner John Doe 1 was forced to shutter the doors of a 50-year-old senior facility because the accommodations were plainly prohibited.

Notwithstanding the United States' incorrect view of the record and glaring omissions in its brief, Petitioners' plight is worthy of this Court's review. The Petition should be granted.

Respectfully submitted,

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