No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JANE DOES 1–6, JOHN DOES 1–3, JACK DOES 1–1000, 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 for the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC, NORTHERN LIGHT HEALTH FOUNDATION, MAINEGENERAL HEALTH,

Respondents.

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

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI
RELIEF REQUESTED BY OCTOBER 26, 2021

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PARTIES AND DISCLOSURE STATEMENT

Applicants are JANE DOES 1–6, JOHN DOES 1–3, JACK DOES 1–1000, and JOAN DOES 1–1000, none of which has any parent corporation or publicly held shareholder. Respondents are 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 for the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, GENESIS HEALTHCARE, LLC, NORTHERN LIGHT HEALTH FOUNDATION, MAINEGENERAL HEALTH.

DIRECTLY RELATED PROCEEDINGS

Does v. Mills, No. 21-1826, Opinion affirming denial of preliminary injunction (1st Cir. Oct. 19, 2021), appended hereto as **EXHIBIT 1**.

Does v. Mills, No. 21A83, Order denying application for writ of injunction pending appeal without prejudice (U.S. Oct. 19, 2021), appended hereto as **EXHIBIT 2**.

Does v. Mills, No. 21-1826, Order denying emergency motion for injunction pending appeal (1st Cir. Oct. 15, 2021), appended hereto as **EXHIBIT 3**.

Does v. Mills, No. 1:21-cv-242-JDL, Order denying motion for injunction pending appeal (D. Me. October 13, 2021), appended hereto as **EXHIBIT 4**.

Does v. Mills, No. 1:21-cv-242-JDL, Order denying motion for preliminary injunction (D. Me. October 13, 2021), appended hereto as **EXHIBIT 5**.

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INTRODUCTION

Pursuant to Sup. Ct. Rules 20, 22 and 23, and 28 U.S.C. §§ 1651 and 2101, Applicants, JANE DOES 1–6, JOHN DOES 1–3, JACK DOES 1–1000, and JOAN DOES 1–1000, hereby move the Court for an emergency writ of injunction in aid and pending disposition of their forthcoming petition for writ of certiorari.

In compliance with the First Amendment, Title VII of the Civil Rights Act of 1964, and other laws, forty-seven states in our Union freely allow people of faith to request and receive reasonable accommodations for their sincerely held beliefs against mandatory vaccination requirements, thereby allowing countless Americans – including healthcare workers – to live out their faith, serve their communities and provide shelter, food and education for their families without violating their core, sincerely held religious beliefs. A forty-eighth state, New York, recently attempted to ban religious exemptions (but not medical exemptions) for healthcare workers through a law that is virtually indistinguishable from the one under review here, and that law was promptly preliminarily enjoined by the district court, *Dr. A v. Hochul*, No. 1:21-CV-1009, 2021 WL 4734404, *9 (N.D.N.Y. Oct. 12, 2021), and by the Second Circuit, *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, dkt. 65 (2d Cir. Sept. 30, 2021), pending its legal challenge, on the grounds that the law is likely unconstitutional and in violation of Title VII.

That leaves only two states, Rhode Island and Maine, both in the First Circuit, that have, by legislative and executive action, written over the clear protections of Title VII, and have banned private employers from **providing even the process** required by Title VII for considering reasonable accommodations for people of faith

who are religiously opposed to mandatory vaccines. If this Court does not intervene promptly, as New York's courts have done, and if Maine's contrivance to abolish religious exemptions—now with the blessing of the First Circuit—is allowed to stand, untold numbers of employees in Maine will have to decide, in a matter of days, what is more important to them—their deeply held religious beliefs, or their ability to work anywhere in their state so that they can feed their families. And, without this Court's immediate intervention, Maine's judicially approved deprivation of religious exemptions will serve as a model for other states, localities and employers to follow, endangering the right of people of faith across the Nation not to be subjected to the same impossible and unconscionable "choice."

Maine's deadline for private healthcare employers to purge themselves of all employees that have sought religious exemptions is October 29, 2021. However, Plaintiffs and other healthcare workers in Maine are already being told **this week** not to report to work absent Court-ordered relief or violation of their sincerely held religious beliefs. Accordingly, **relief from this Court cannot wait until October 29, and is needed as soon as possible**.

For many years prior to the instant action and in compliance with federal law, Defendants permitted healthcare workers in the State of Maine to apply for and receive religious exemptions to mandatory vaccine requirements. Yet, on August 14, 2021, Maine stripped all protections for religious objectors to any vaccination requirement in conjunction with its emergency declaration that all healthcare workers in Maine receive a COVID-19 vaccination. (**EXHIBIT 6**, Verified Complaint,

¶ 41–49.) Defendants now threaten all Applicants with the immediate termination of their ability to feed their families and the loss of their license so that they can never work again within their chosen profession anywhere within the State of Maine. To protect Applicants' fundamental right to free exercise of their religious convictions, relief from this Court cannot wait.

Our Nation is at a seminal crossroad whereby only this Court can provide the necessary relief to prevent an onslaught of religious discrimination throughout the Republic. As Justice Gorsuch stated earlier this year, **"[e]ven in times of crisis—perhaps *especially* in times of crises—we have a duty to hold governments to the Constitution**." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., statement) (bold emphasis added; italics original). Over the last 20 months, churches were discriminatorily shuttered and religious congregants were unconstitutionally told they must refrain from worship, even on the most sacred holidays of their faith. It took several interventions from this Court to align the States' COVID-19 restrictions with the demands of the First Amendment. After this Court's decisions in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), *South Bay*, and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), people of faith across the nation could once again enjoy the promises and protection of their Constitution.

Now, the Court is faced with a new "variant" of open and overt religious discrimination, namely the abolition of a previously recognized, Title VII-mandated process for accommodating the sincerely held religious convictions that countless

individuals across the Nation hold. In a land born on the will to be free, "take the jab or take a hike and never work again" has no place in our constitutional jurisprudence. This Court should step in to protect the faithful from becoming First Amendment orphans. Relief is needed today.

RELIEF SOUGHT

Faced with summary termination from their employment on October 29, 2021, and with the inability to work within their profession anywhere in the entire State of Maine, Applicants request a temporary stay of Maine's enforcement of its rules abolishing religious exemptions for healthcare workers, until Applicants can file a Petition for Writ of Certiorari and this Court has the opportunity to consider it. The limited relief sought would maintain the status quo in Maine, and would place Maine on par with 48 of its sister States where Title VII still provides a process for healthcare workers to request and receive accommodations for their sincerely held religious beliefs.[1] As detailed in this Application, even before it enacted its unforgiving mandate banning religious exemption, **Maine enjoyed (and continues to enjoy) some of the most successful COVID-19 statistics in the nation**. (*See* page 10, *infra*). Maine waited many months after COVID-19 vaccination became available to mandate it and to ban religious exemptions for its healthcare heroes. Staying Maine's heavy hand for a little while longer will not be detrimental to Maine,

[1] This includes New York, where Title VII protections have been restored via preliminary injunctive relief, but excludes Rhode Island, where legal challenges to the abolition of religious exemptions are still pending, without preliminary injunctive relief in place.

but will prevent countless Mainers from becoming permanently unemployed **and unemployable** on the basis of their religious beliefs, to the irreparable detriment of their families.

Applicants therefore respectfully move this Court for an injunction pending disposition of their forthcoming Petition for Writ of Certiorari, restraining and enjoining Defendants–Appellees, all of their officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the Governor's COVID-19 Vaccine Mandate such that—

i. Defendant Governor Mills will not enforce her mandate that John Doe 1 require his employees to receive a COVID-19 vaccine and refuse to provide a religious exemption or accommodation for such employees in violation of John Doe 1's and his employees' sincerely held religious beliefs;

ii. Defendants will immediately cease in their revocation of previously granted religious exemptions, or in their refusal to consider, review, and grant Plaintiffs' requests for religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, provided that Plaintiffs agree to abide by reasonable accommodation provisions such as masking, testing, symptom monitoring, and reporting; and

iii. Defendants will immediately cease threatening to discharge and terminate Plaintiffs from their employment for failure to accept a COVID-19 vaccine that violates their sincerely held religious beliefs.

JURISDICTION AND TIMING

Plaintiffs filed this action on August 25, 2021 (Exhibit 6), and immediately moved for preliminary injunctive relief. (**EXHIBIT 7**, Motion for Temporary Restraining Order and Preliminary Injunction, "PI Motion"). Over Plaintiffs' objections, the district court delayed a hearing until September 20, 2021. (Dkt. 44). The court then held Plaintiffs' motion under advisement for more than three weeks, waiting until two days before Plaintiffs' October 15, 2021 deadline for accepting the last available vaccine to become fully vaccinated by the State's October 29, 2021 deadline. On October 13, 2021, the district court denied Plaintiffs' Motion for Preliminary Injunction, holding that Plaintiffs were unlikely to succeed on the merits of their challenge to the Governor's COVID-19 Vaccine Mandate (Exhibit 5, PI Order at 14). Plaintiffs noticed their appeal to the First Circuit on the same day, within one hour of the PI Order.

In conjunction with Plaintiffs' Motion for Preliminary Injunction and pursuant to Fed. R. App. P. 8(a)(1)(C), Plaintiffs also requested from the district court alternative relief in the form of an injunction pending appeal should the court deny the preliminary injunction. (Exhibit 7.) The district court also denied Plaintiffs'. Motion for Injunction Pending Appeal. (Exhibit 4.) Within one hour of the First Circuit docketing Plaintiffs' appeal on October 14, Applicants filed an Emergency

Motion for Injunction Pending Appeal with the First Circuit. The First Circuit summarily denied that Motion on October 15. (Exhibit 3.) On the same day, Applicants sought an emergency writ of injunction from this Court, and Justice Breyer denied that motion on October 19, without prejudice to Applicants refiling in the event the First Circuit denied or delayed relief. (Exhibit 2.)

On the same day as Justice Breyer's Order (October 19), the First Circuit issued its Opinion affirming the district court's denial of preliminary injunctive relief. (Exhibit 1). Applicants bring the instant Application within a day of the First Circuit Opinion. Applicants have therefore moved diligently and with extreme urgency throughout these proceedings. This Court has jurisdiction under 28 U.S.C. §§ 1651 and 2101.

FACTUAL BACKGROUND AND URGENCIES JUSTIFYING EMERGENCY RELIEF

Plaintiffs-Applicants are healthcare workers in Maine who have sincerely held religious beliefs that preclude them from accepting any of the COVID-19 vaccines because of the vaccines' connection to aborted fetal cell lines, and for other religious reasons that have been articulated in detail to Defendants. (V. Compl. ¶¶ 8–26, 50–74.) Plaintiffs' sincere religious beliefs regarding the sanctity of every human life, from the moment of conception, are articulated in great detail in the Verified Complaint (¶¶ 50–75). The Verified Complaint also details the undeniable and generally accepted fact that all three of the available COVID-19 vaccines were either developed, researched, tested, produced or otherwise developmentally associated with fetal cell lines that originated in elective abortions. (*Id*. at ¶¶ 60–68). Defendants

have not disputed either the vaccines' connection to aborted fetal cells, or the sincerity of Plaintiffs' religious beliefs. Accordingly, although Plaintiffs' religious beliefs and the bases therefore are critical to their claims, Plaintiffs rely on their undisputed sworn allegations in the Verified Complaint, and do not detail them here again.

One Plaintiff, John Doe 1, is a licensed healthcare provider in Maine, operating his own private practice with employees who have sincerely held religious objections to the Governor's COVID-19 Vaccine Mandate. (*Id*. at ¶ 16). John Doe 1 has sincerely held religious objections to accepting or receiving the COVID-19 vaccines, and has sincerely held religious beliefs that he is to honor the religious beliefs of his employees who object to the COVID-19 vaccines. (*Id*.)

Since COVID-19 first arrived in Maine, Plaintiffs have risen every morning, donned their personal protective equipment, and fearlessly marched into hospitals, doctor's offices, emergency rooms, operating rooms, and examination rooms with one goal: to provide quality healthcare to those suffering from COVID-19 and every other illness or medical need that confronted them. (*Id*. at ¶8). They did it bravely and with honor, and they answered the call of duty to provide healthcare to the people who needed it the most, working tirelessly to ensure that those ravaged by the pandemic were given appropriate care. (*Id*.)

On August 12, 2021, Governor Mills announced that Maine would require health care workers to accept or receive one of the three COVID-19 vaccines in order to remain employed in the healthcare profession (the "**COVID-19 Vaccine Mandate**"). (*Id*. at ¶ 41). On August 14, 2021, the Maine Center for Disease Control

and Prevention ("MCDC") amended 10-144 C.M.R. Ch. 264 to eliminate the ability of health care workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 Vaccine Mandate. (*Id.* at ¶ 46). **Critically, however, Maine has retained the previously available exemptions for medical reasons**. (*Id.* at ¶¶ 47–49).

As a result of the Governor's and Maine's abolishing of religious exemptions, Plaintiffs were uniformly and summarily denied their requests for religious exemptions and accommodations, specifically under the guise that Title VII's protections no longer apply in Maine. (*Id.* at ¶¶ 10–26). When presented with requests from Plaintiffs for exemption and accommodation for their sincerely held religious beliefs, Defendants have responded in the following ways:

- "I can share MaineHealth's view that **federal law does not supersede state law in this instance**." (*Id.* at ¶ 87 (emphasis added).)
- "**[W]e are no longer able to consider religious exemptions for those who work in the state of Maine**." (*Id.* at ¶ 84.)
- "All MaineGeneral employees will have to be vaccinated against COVID-19 by Oct. 1 unless they have a medical exemption. The mandate also states that only medical exemptions are allowed, **no religious exemptions are allowed**." (*Id.* at ¶ 93 (emphasis added).)
- "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So, unfortunately, that is not an option for us." (*Id.* at ¶ 94.)

And, similarly, Plaintiff John Doe 1 is now facing the imminent revocation of his facility license, and the shuttering of his private healthcare practice, because his religious beliefs prohibit him from accepting a vaccine and from forcing his employees to accept a vaccine against their religious convictions. (*Id.* at ¶¶ 16, 43–45).

Notably, as of August 2021, even before it abolished religious exemptions for its healthcare workers, Maine had some of the best COVID-19 success statistics in the nation, according to Governor Mills' own statements:

> **Despite having the oldest median age population in the country, Maine, adjusted for population, ranks third lowest in total number of cases and fourth lowest in number of deaths from COVID-19 from the start of the pandemic, according to the U.S. CDC.**

(**EXHIBIT 8**, *Mills Administration Provides More Time for Health Care Workers to Meet COVID-19 Vaccination Requirement*, at 3 (emphasis added).)

* * *

The seminal issue before this Court can be boiled down to a simple question: Does federal law apply in Maine? Though the question borders on the absurd, so does Defendants' answer to it. Defendants have explicitly claimed to healthcare workers in Maine, including Plaintiffs, that federal law does not apply, and neither should they. Defendants have informed Plaintiffs, who have sincerely held religious objections to the Governor's COVID-19 Vaccine Mandate that no protections or considerations are given to religious beliefs in Maine. Indeed, Defendants' answer has been an explicit claim that federal law does not provide protections to Maine's healthcare workers.

The answer to the question before this Court is clear: federal law and the United States Constitution are supreme over any Maine statute or edict, and Maine cannot override, nullify, or violate federal law. *See* U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). "This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 729, 734 (2009). Indeed, "[i]t is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (cleaned up).

Thus, there can be no dispute that Maine is required to abide by federal law and provide protections to employees who have sincerely held religious objections to the COVID-19 vaccines. And, here, the federal law is clear: There can be no dispute that Title VII of the Civil Rights Act prohibits Defendants from discriminating against Plaintiffs on the basis of their sincerely held religious beliefs. 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion."). And, Defendants have a duty under Title VII to consider and provide religious exemptions and accommodations to those with sincerely held religious objections to the COVID-19 Vaccine Mandate. 42 U.S.C. § 2000e(j).

In direct contrast to this unquestionable principle of black letter law, however, every Defendant in this suit has seen fit to claim to its healthcare workers that the converse is true, and that Maine law is supreme over federal law; has informed Plaintiffs that their requests for an exemption and accommodation from the mandate cannot even be evaluated or considered; and has flatly denied all requests for religious exemption and accommodation from the mandate that all healthcare workers receive a COVID-19 vaccine. Employers bent on discrimination "usually don't post help wanted signs reading 'blacks need not apply.'" *Lewis v. City of Unity City*, 918 F.3d 1213, 1261 (11th Cir. 2019) (Rosenbaum, J., concurring in part). But Maine and its healthcare employers have no problem being direct: "**religious misbelievers need not apply**."

The dispute in this case is **not** about what accommodations are available to Plaintiffs or whether accommodation of Plaintiffs' sincerely held religious objections can be conditioned on compliance with certain reasonable requirements. Plaintiffs have already acknowledged to Defendants that they are willing to comply with reasonable health and safety requirements that were deemed sufficient for the last 20 months. The dispute is about whether Defendants are required to even consider a request for reasonable accommodation of Plaintiffs' sincerely held religious beliefs. The answer is clear: **yes**. And this Court should require Defendants to acknowledge and accept that federal law mandates accommodation for Plaintiffs' sincerely held religious beliefs, and order that Defendants extend such protections.

As the Northern District of New York has just held when it enjoined New York's very similar, legally indistinguishable scheme that purported to abolish religious exemptions but maintain secular, medical exemptions: "'**Title VII does not demand mere neutrality with regard to religious practices . . . rather, it gives them favored treatment.' Thus, under certain circumstances, Title VII 'requires otherwise-neutral policies to give way to the need for an accommodation**.'" *Dr. A v. Hochul*, No. 1:21-CV-1009, 2021 WL 4734404, *9 (N.D.N.Y. Oct. 12, 2021) (quoting *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775–776 (2015)) (emphasis added). Indeed, the court in *Dr. A* plainly held that plaintiffs were likely to succeed on the merits of their claims because – as here – the Governor's mandate "has effectively foreclosed the pathway to seeking a religious accommodation that is guaranteed under Title VII." *Id.* at *6.

On September 30, 2021, the Second Circuit gave its imprimatur to the *Dr. A.* TRO against State Defendants in *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, dkt. 65 (2d Cir. Sept. 30, 2021). There, the Second Circuit issued an injunction pending appeal against the New York Governor's COVID-19 Vaccine Mandate purporting to abolish religious exemptions, and enjoined New York from enforcing its mandate to the extent it terminated religious exemptions in the State. *Id.*

On October 7, 2021, the Sixth Circuit issued an order affirming a preliminary injunction against Western Michigan University for its similar refusal to grant religious accommodations from a mandatory COVID-19 vaccine policy. *See Dahl v. Bd. of Trustees of W. Mich. Univ.*, No. 21-2945, 2021 WL 4618519 (6th Cir. Oct. 7,

2021). In denying the university's request for a stay, the Sixth Circuit concluded that the student athletes' "free exercise challenge will likely succeed on appeal." *Id. at* *1. Specifically,

> the University's failure to grant religious exemptions to plaintiffs burdened their free exercise rights. The University **put plaintiffs to the choice: get vaccinated or stop fully participating in intercollegiate sports**. . . . **By conditioning the privilege of playing sports on plaintiffs' willingness to abandon their sincere religious beliefs, the University burdened their free exercise rights**.

Id. at *3 (emphasis added).

The court continued,

> But the mandate does penalize a student otherwise qualified for intercollegiate sports by withholding the benefit of playing on the team should she refuse to violate her sincerely held religious beliefs. **As a result, plaintiffs have established that the University's vaccination policy for student-athletes burdens their free exercise of religion.**

Id. (emphasis added).

As here, the university offered medical exemptions and, theoretically, religious exemptions to its student-athletes, but refused to provide religious accommodations. *Id.* at *1. The Sixth Circuit found that such a discriminatory scheme of individualized exemptions made the vaccine mandate not neutral or generally applicable. *Id.* at *4. That alone was sufficient to mandate the application of strict scrutiny under *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Earlier this year, Governor Mills rightfully declared that Maine's healthcare workers were "Superheroes" and requested that "all Maine people join me in thanking

all of our healthcare workers who have heeded the call of duty and worked long hours, days, and weeks, often at great sacrifice to themselves and their families, to protect Maine people during this extraordinary crisis." Office of Governor Janet T. Mills, *Governor Mills Announces Four Maine Healthcare Superheroes to Attend Super Bowl LV Thanks to Generosity of New England Patriots' Kraft Family* (Feb. 2, 2021), https://www.maine.gov/governor/mills/news/governor-mills-announces-four-maine-healthcare-superheroes-attend-super-bowl-lv-thanks. Yet, on August 12, 2021, those same superheroes were cast as evil villains for requesting exemption and accommodation from the Governor's edict for their sincerely held religious beliefs.

All Plaintiffs seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months, or even increased, reasonable protective measures. Regardless of whether Maine sees fit to extend protections to religious objectors under its own statutory framework, federal law demands that Plaintiffs and all employees in Maine receive protections for their sincerely held religious beliefs.

This Court should hold Maine to the bargain it made with its citizens when it joined the Union and ensure that Maine respects the required protections that federal law demands. As this Court has recently held, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese*, 141 S. Ct. at 68 (emphasis added). When we have demanded so much of our healthcare heroes, we owe them nothing less than the full measure of our own commitment to

constitutional principles. Anything less would be desecrating the sacrifice these medical heroes made for untold numbers of people—including Defendants—when the call of duty demanded it of them.

LEGAL ARGUMENT

I. APPLICANTS HAVE A CLEAR AND INDISPUTABLE RIGHT TO RELIEF BECAUSE DEFENDANTS' INTENTIONAL REMOVAL OF RELIGIOUS EXEMPTIONS FROM THE VACCINE MANDATE WHILE ALLOWING MEDICAL EXEMPTIONS VIOLATES THE FIRST AMENDMENT.

A. Maine's Mandate on John Doe 1's Private Practice Violates the First Amendment.

As already noted, one Plaintiff, John Doe 1, is a licensed healthcare provider in Maine, operating his own private practice with employees who have sincerely held religious objections to the Governor's COVID-19 Vaccine Mandate. (*Supra*, page 8). John Doe 1 has sincerely held religious objections to accepting or receiving the COVID-19 vaccines, and has sincerely held religious beliefs that he is to honor the religious beliefs of his employees who object to the COVID-19 vaccines. (*Id*.)

The Governor's mandate and threat of revocation of John Doe 1's ability to operate his facility for failure to comply is almost identical to the mandate struck down by this Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). There, the federal government mandated that Hobby Lobby (a privately held corporation with sincerely held religious beliefs against abortion) provide insurance coverage for its employees to receive abortion-inducing drugs and contraceptives. 573 U.S. at 690–91. There, the Court noted that the plaintiffs—as here—

> have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing

> health insurance that covers methods of birth control that, as HHS acknowledges . . . may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, **the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs**.

Id. at 720 (emphasis added).

Here too, the Governor's mandate imposes a substantial burden on John Doe 1's religious beliefs. In fact, John Doe 1 must either mandate that his employees receive an abortion-connected vaccine they find objectionable under their sincerely held religious beliefs, or deprive his employees of their abilities to feed their families. Such an unconscionable choice is clearly a substantial burden. Indeed, the First Amendment can hardly be thought to countenance as "a tolerable result to put a family-run business to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing [employment]." *Id.* at 722. In *Hobby Lobby*, as here, the Court was faced with a government mandate that conflicted with the sincerely held religious beliefs of the plaintiffs. There, as here, compliance with the government's mandate imposed a substantial burden on the plaintiffs' sincerely held religious beliefs. There, as here, the government's restrictions on the plaintiffs' sincerely held religious beliefs were subject to (and failed) strict scrutiny. Because, as shown *infra*, the Governor's COVID-19 Vaccine Mandate is not neutral or generally applicable, and provides for individualized medical exemptions but not religious exemptions, the mandate is subject to strict scrutiny, and Defendants utterly fail to carry their burden under that standard.

B. Maine's Singling Out of Religious Employees Who Decline Vaccination for Especially Harsh Treatment Is Not Religiously Neutral.

"[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). In fact, "the regulations cannot be viewed as neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese*, 141 S. Ct. at 66. "When a state so obviously targets religion for differential treatment, our job becomes much clearer." *South Bay*, 141 S. Ct. at 717 (Gorsuch, J.).

The First Circuit's decision below runs roughshod over this precedent and ignores that the pertinent analysis is whether **two activities carry the same risk**, not what the underlying intentions are for treating religion and nonreligion alike. (Exhibit 1, at 19.) As this Court said in *Tandon*, under the First Amendment, "comparability is concerned with **risks various activities pose not the reasons for which they are undertaken**." 141 S. Ct. at 1297 (emphasis added). The First Circuit flips this test on its head and concludes that the underlying justification for the alleged dichotomous treatment is what matters. (Exhibit 1, at 19.)

Here, Maine has plainly singled out religious employees who decline vaccination for religious reasons for especially harsh treatment (*i.e.*, depriving them from earning a living anywhere in the State), while favoring and accommodating employees declining vaccination for secular, medical reasons. Under the *Tandon*,

South Bay, and *Roman Catholic Diocese* triumvirate, Maine's discriminatory treatment of unvaccinated religious employees violates the First Amendment.

Under the prior version of Maine's immunization exemption requirements, Maine allowed for (a) medical exemptions, and (b) exemptions for any employee who "states in writing an opposition to immunization because of a sincerely held religious belief." (V. Compl. ¶ 48.) On August 14, 2021, however, Maine removed **only the religious exemption from the rule**. (V. Compl. ¶ 46.) Indeed, as the district court in New York has just held when it enjoined New York's nearly identical medical-but-not-religious exemption scheme, where – as here – the government has removed a previously available religious exemption, that "intentional change in language is the kind of 'religious gerrymander' that triggers heightened scrutiny." *Dr. A v. Hochul*, 2021 WL 4734404, at *8.

C. The Vaccine Mandate's More Favorable Treatment of Employees Declining Vaccination for Secular, Medical Reasons as Compared to Employees Declining Vaccination for Religious Reasons Is Not Generally Applicable, Because the Risk to "Outbreaks" is Exactly the Same.

Maine's continuing recognition of only medical exemptions also removes the Vaccine Mandate from neutrality and general applicability. As *Dr. A* held last week, where the government permits medical exemptions from the mandate, but excludes religious exemptions, the law is not neutral. 2021 WL 4734404, at *8. *See also Dahl*, 2021 WL 4618519, at *3 ("The University's vaccine mandate likewise provides a mechanism for individualized exemptions. . . . As a result, the University must prove that its decision not to grant religious exemptions to plaintiffs survives strict scrutiny."). *Cf. Klaassen v. Trs. of Ind. Univ.*, No. 1:21-CV-238 DRL, 2021 WL

3073926, at *5 (N.D. Ind. July 18, 2021), *aff'd* 7 F.4th 592 (7th Cir. 2021) (holding that a university's vaccine mandate was neutral and generally applicable where it provided a mechanism for students to request and receive religious exemptions to the vaccine mandate).

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Justice (then-Judge) Alito wrote unequivocally for the court that "**[b]ecause the Department makes exemptions from its [no beards] policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment**." 170 F.3d 359, 360 (3d Cir. 1999) (emphasis added). There, like Maine here, the city argued that it was required to provide medical accommodations under federal law but that religious exemptions were not required. *Id.* at 365. The court squarely rejected that rationale: "It is true that the ADA requires employers to make reasonable accommodations for individuals with disabilities. However, **Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion.**" *Id.* (emphasis added) (cleaned up). Thus, the court held, "**we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not**." *Id.* (emphasis added).

Here, the district court and the First Circuit found that the availability of medical exemptions, while religious exemptions were specifically targeted and excluded, does not violate the First Amendment because the two are not comparable. (PI Order at 19; First Circuit Op. at 20.) Justice Alito squarely rejected that contention:

> We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith* /*Lukumi* rule does not apply. While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi,* **it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection**.

Fraternal Order of Police, 170 F.3d at 365 (emphasis added) (cleaned up). The same is true here. Maine maintained a policy that permitted religious exemptions and medical exemptions to mandatory vaccinations. (V. Compl. ¶ 48.) Then, Maine specifically removed religious exemptions while maintaining medical exemptions. (V. Compl. ¶¶ 46–47.) And, that discriminatory removal of a religious exemption while maintaining a medical exemption violates the First Amendment. 170 F.3d at 365 ("Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

Here, Maine claims secular, medical reasons for declining vaccination are important enough to overcome its purported interest but that religious reasons for declining vaccination are not. And the district court and First Circuit have concluded that such a value judgment was perfectly permissible under the First Amendment, because it was motivated by the laudable goal of promoting public health. **But the asserted goal of the Government here is to stop "outbreaks" and the spread of COVID-19 at healthcare facilities**. (*See* dkt. 49-4, Declaration of Nirav Shah, ¶ 53 ("Maine CDC determined that requiring vaccinations for healthcare workers in certain high-risk settings was necessary to protect public health, healthcare workers and Maine's health care system from the further spread of COVID-19.").) Since the COVID-19 virus does not know whether a healthcare worker has declined vaccination based on medical or religious grounds, to the extent unvaccinated workers pose any increased risk of viral spread and "outbreaks," **that risk is equal (indeed, exactly the same)** whether they are unvaccinated because of medical or religious reasons. Therefore, the risks to the spread of COVID-19 and "outbreaks" at healthcare facilities posed by unvaccinated healthcare workers who decline vaccination because of medical reasons is not merely **comparable, but actually identical,** to the risks posed by unvaccinated healthcare workers who decline vaccination because of religious reasons. And the Government has made a value judgment that one risk (the secular) is acceptable and can be mitigated, while the other risk (the religious) is unacceptable and cannot be mitigated.

Such a value judgment does not legitimize a discriminatory policy:

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

Fraternal Order of Police, 170 F.3d at 366 (emphasis added). Essentially, as here, "[w]e thus conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained." *Id.* at 367 (emphasis added).

The Northern District of New York's decision in *Dr. A*, and Justice Alito's opinion for the court in *Fraternal Order of Police* hardly represent a novel proposition. As the Sixth Circuit explained, "a double standard is not a neutral standard." *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). As many courts have recognized, allowing medical exemptions while prohibiting religious exemptions is unconstitutional. *See, e.g.*, *Litzman v. N.Y. City Police Dep't*, No. 12 Civ. 4681(HB), 2013 WL 6049066, at *3 (S.D.N.Y. Nov. 15, 2013) (holding that a policy that permits medical exemptions but not religious exemptions is neither neutral nor generally applicable and must be subject to strict scrutiny); *Singh v. McHugh*, 185 F. Supp. 3d 201, 225 (D.D.C. 2016) ("In sum, it is difficult to see how accommodating plaintiff's religious exercise would do greater damage to the Army's compelling interests in uniformity, discipline, credibility, unit cohesion, and training than the tens of thousands of medical shaving profiles the Army has already granted."); *Cunningham v. City of Shreveport*, 407 F. Supp. 3d 595, 607 (W.D. La. 2019) (allowing medical exemptions while precluding

religious exemptions removes law from neutrality and general applicability). Maine's discriminatory retention of medical exemptions while excluding religious exemptions must be subjected to, and cannot withstand, strict scrutiny. Put simply, "restrictions inexplicably applied to one group and exempted from another do little to further [the government's] goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d at 615 (6th Cir. 2020).

D. Maine's Discriminatory Treatment of Religious Exemptions Is Subject to and Cannot Withstand Strict Scrutiny

1. Maine's favorable treatment of exemptions posing equal risks of "outbreaks," and Maine's questionable risk assumptions undermine its claim of a compelling interest.

Where, as here, First Amendment rights are at issue, "the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). Here, because Maine's Vaccine Mandate and its exclusion of religious exemptions implicate Plaintiffs' First Amendment rights, Maine "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993). This is so because "[d]eference to [the government] cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Maine*, 435 U.S. 829, 843 (1978).

To be sure, efforts to contain the spread of a deadly disease are "compelling interests of the highest order." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 910 (W.D. Ky. 2020). But Maine's permitting unvaccinated employees with medical exemptions to continue in their same healthcare positions while claiming unvaccinated employees with religious exemptions would put the entire healthcare system at risk of "outbreaks" undermines any claim that Maine's interest is compelling. **If any unvaccinated employees pose a risk to Maine's healthcare system because they are unvaccinated, then all unvaccinated employees pose the same risk**. Put simply, Maine's Vaccine Mandate "cannot be regarded as protecting an interest of the highest order . . . **when it leaves appreciable damage to that supposedly vital interest unprohibited**." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (emphasis added) (cleaned up). Where, as here (V. Compl. ¶¶ 46–49), the government permits exceptions, this Court has recognized that such exceptions "can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015) (cleaned up). Indeed, "[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law . . . furthers a compelling interest." *McAllen Grave Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014).

Maine also asserts that vaccines are the only way to prevent the spread of COVID-19 and "outbreaks" at healthcare facilities, because unvaccinated individuals

are at greater risk of infection and transmission. (Dkt. 49-4, Shah Decl., ¶ 23.) But, as demonstrated in the Verified Complaint,

> A preliminary study has shown that in the case of a breakthrough infection, the Delta variant is able to grow in the noses of vaccinated people **to the same degree as if they were not vaccinated at all**. The virus that grows is just as infectious as that in unvaccinated people, meaning vaccinated people can transmit the virus and infect others.

(V. Compl. ¶ 79 (quoting Sanjay Mishra, *Evidence mounts that people with breakthrough infections can spread Delta easily*, National Geographic (Aug. 20, 2021), https://www.nationalgeographic.com/science/article/evidence-mounts-that-people-with-breakthrough-infections-can-spread-delta-easily (emphasis added)).) *See also* Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today's MMWR, https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html (noting that "**the Delta infection resulted in similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people**" (emphasis added)). Thus, Maine's assumptions of the relative risks of transmission by vaccinated and unvaccinated employees are scientifically questionable, further undermining Maine's claimed compelling interest in mandating vaccination. And, critically, it is **the Government's** (not Plaintiffs') burden to demonstrate the compelling interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) (""the burdens at the preliminary injunction stage track the burdens at trial."). Maine has not met that burden here.

2. Maine Stands Virtually Alone In Its Blanket Refusal to Extend Religious Accommodations and Its Mandate is Not the Least Restrictive Means.

Even assuming *arguendo* that imposing a mandatory COVID-19 vaccination requirement on healthcare workers in Maine, and excluding religious but not secular exemptions is supported by a compelling interest, the Vaccine Mandate still fails strict scrutiny because it is not the least restrictive means of achieving that interest. As this Court held in *Tandon*,

> narrow tailoring requires the government to **show** that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. **Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied.** Otherwise, precautions that suffice for other activities suffice for religious exercise too.

141 S. Ct. at 1296–97 (emphasis added). Now that New York's unconstitutional exemption regime has been judicially enjoined, 48 other states have demonstrated that preventing the spread of COVID-19 and encouraging vaccination of healthcare workers can still be achieved while protecting the sincerely held religious beliefs of conscientious objectors. These states have found a way to accommodate religion under the same alternative protective measures Plaintiffs request here. Maine stands virtually alone in its refusal to recognize this truth.

In *Dr. A*, the court held that Defendants' failure to explain "why they chose to depart from similar healthcare vaccination mandate issued in other jurisdictions that include the kind of religious exemption that was originally included" demonstrates a lack of narrow tailoring. 2021 WL 4734404, at *9.

In *Dahl*, as is true here, the court found that the university failed strict scrutiny under the narrow tailoring prong:

> the University falters on the narrow tailoring prong. For one, public health measures are not narrowly tailored if they allow similar conduct that creates a more serious health risk. That is the case at the University, which allows non-athletes—the vast majority of its students—to remain unvaccinated. One need not be a public health expert to recognize that the likelihood that a student-athlete contracts COVID-19 from an unvaccinated non-athlete with whom she lives, studies, works, exercises, socializes, or dines may well meet or exceed that of the athlete contracting the virus from a plaintiff who obtains a religious exemption to participate in team activities. For another, narrow tailoring is unlikely if the University's conduct is "more severe" than that of other institutions. **To that point, several other universities grant exemptions from their COVID-19 mandates.**

2021 WL 4618519, at *5 (emphasis added) (cleaned up).

In fact, despite Maine's contentions that there are no alternatives to a vaccine mandate that prohibits religious exemptions, healthcare providers in Maine (and across the country) are regularly and freely providing religious accommodations to healthcare workers. An employee of the Department of Veterans Affairs at the VA Maine Healthcare System in Augusta was merely required to check a box requesting a religious exemption, and received that exemption and accommodation. (Dkt. 57-2 ¶¶ 5, 10.).

Another VA employee was likewise given an accommodation in Maine. (Dkt. 57-2, ¶¶ 2–6.) That employee's experience highlights the dichotomous treatment of healthcare workers in Maine. Her VA exemption allowed her to "continue all of [her] previous duties and responsibilities, including working on-site, interacting with

colleagues, and providing quality and safe care to [her] patients," and her accommodation only requires that she wear a mask and submit to testing twice weekly. (*Id.* ¶ 10.) This same employee, however, was also a per diem employee at Eastport Memorial Nursing Home in Maine, where she requested a religious accommodation similar to her VA accommodation but was informed that such accommodations were not available under Maine law, and her employment was discriminatorily terminated. (*Id.* ¶ 11.)

Indeed, the availability and workability of accommodations for healthcare workers with sincerely held religious objections to COVID-19 vaccination is evident not only in Maine, but from sea to shining sea, at large employers and small. (Dkts. 57-3 to 57-33 (**32 employee declarations** demonstrating accommodations granted to healthcare employees in Maine, Oregon, California, Washington, New Mexico, Missouri, Texas, Wisconsin, Minnesota, Illinois, Colorado, Michigan, Ohio, Pennsylvania, Delaware, Maryland, and Florida).) Maine has never provided a reasonable explanation as to why it cannot do what 48 other states are successfully doing. As such, Maine badly flunks its strict scrutiny burden of demonstrating narrow tailoring.

3. The Lower Courts Impermissibly Placed the Burden on Applicants to Demonstrate that Less Restrictive Alternatives Employed by Forty-Eight Other States Are Sufficient to Protect Maine's Interest.

Maine's contention that it simply cannot provide any reasonable accommodation to the sincerely held religious beliefs of its healthcare workers because Maine's healthcare workforce is "smaller" than those of other jurisdictions

lacks any reason or factual proof, and yet was accepted by the courts below. How much smaller is Maine's healthcare force from Vermont's or New Hampshire's, both of which allow religious exemptions? Maine never explained or provided any proof to show that its situation is singularly unique and justifies is lonesome, draconian approach.

The district court improperly placed the burden on Plaintiffs to demonstrate that alternatives are available and sufficient to protect Maine's asserted interest, rather than requiring Maine to demonstrate that other alternatives that work everywhere else are not sufficient in Maine. (PI Order at 34 ("the Plaintiffs have not provided any scientific or expert evidence demonstrating the efficacy of the approaches adopted in other states.") The First Circuit, too, impermissibly ignored the burden placed on the Government by accepting – without anything more than the Government's *ipse dixit* that other alternatives are not sufficient. (Exhibit 1 at 24–25.)

But, the lower courts' analysis fails to recognize the fundamental principle that strict scrutiny "requires **the Government** to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (emphasis added). And it is the Governor's burden to make this showing even at this stage of litigation, because "the burdens at the preliminary injunction stage track the burdens at trial." *Gonzales*, 546 U.S. at 429. "As the Government bears the burden of proof on the ultimate question of . . . constitutionality, **[Plaintiffs] must be deemed likely to prevail unless the**

Government has shown that [their] proposed less restrictive alternatives are less effective than [the mandate]." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added).

And, this point is critical because the government must show it "**seriously** undertook to address the problem with less intrusive tools readily available to it," meaning that it "**considered different methods that other jurisdictions have found effective**." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014) (emphasis added). *See also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (same). And the Governor must "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495).

Not only has Maine failed to factually support its "small workforce" justification, but Maine has brought forth no record facts to even suggest, let alone prove, that the COVID-19 situation in Maine is so much worse than the rest of the country, to justify its lonesome, draconian approach. In fact, the Governor has admitted quite the opposite, when she recently noted that "**[d]espite having the oldest median age population in the country, Maine, adjusted for population, ranks third lowest in total number of cases and fourth lowest in**

number of deaths from COVID-19 from the start of the pandemic, according to the U.S. CDC." (*Supra* page 10).

At bottom, Maine has merely **said** that other approaches that work in 48 other states would not work in Maine, but, "[g]iven the vital First Amendment interests at stake, **it is not enough for [Maine] simply to say that other approaches have not worked**." *McCullen*, 573 U.S. at 496 (emphasis added).

II. APPLICANTS HAVE A CLEAR AND INDISPUTABLE RIGHT TO RELIEF BECAUSE DEFENDANTS' WHOLESALE REJECTION OF RELIGIOUS ACCOMMODATIONS IS PLAINLY INCONSISTENT WITH TITLE VII AND IS THEREFORE NULLIFIED AND SUPERSEDED BY FEDERAL LAW.

A. Title VII Supersedes Maine's Rule Because Even the Employer Defendants Have Admitted That Title VII's Requirement of Religious Accommodation and Maine's Revocation of Religious Exemptions Are in Conflict.

Employer Defendants' primary contention concerning their utter refusal to comply with the demands of Title VII is that Maine's revocation of religious exemptions from the COVID-19 Vaccine Mandate are not inconsistent with Title VII, and thus they need not comply. (V. Compl. ¶1.) Employer Defendants are wrong. Title VII plainly requires that every employer with over 15 employees (which includes all Employer Defendants (V. Compl. ¶ 171)) **must provide religious accommodations** "unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship." 42 U.S.C. § 2000e(j). *See also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977) ("the employer's statutory obligation to make reasonable accommodation for the religious observance of its employees,

short of incurring an undue hardship, **is clear**" (emphasis added)). Despite that mandate of federal law, Maine has issued a wholesale revocation of religious exemptions and accommodations for healthcare workers and has abolished the entire exemption and accommodation process under Title VII for religious objectors. (V. Compl. ¶ 46 (noting that Maine "eliminate[d] the ability of health care workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 Vaccine Mandate").)

Thus, Title VII's requirement that employers provide at least a process for seeking an accommodation for an employee's sincerely held religious beliefs, and Maine's refusal to provide such a process, are in direct conflict. Under such a scheme, the Supremacy Clause demands that Defendants comply with Title VII. Where—as here—federal law "imposes restrictions [and] confers rights on private actors," and Maine law "imposes restrictions that conflict with the federal law," "**the federal law takes precedence** and the state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1480 (2018) (emphasis added). And, *Dr. A* held that refusing to given plaintiffs a process in which to seek accommodation for their sincerely held religious beliefs is plainly a Title VII violation. 2021 WL 4734404, at *6 ("What matters is that plaintiffs' current showing establishes that §2.61 has effectively foreclosed the pathway to seeking a religious accommodation that is guaranteed by Title VII.").

Employer Defendants take great pains to suggest that Maine's refusal to extend religious protections is not preempted by Title VII's demand that employers provide a reasonable accommodation for religious beliefs. This is incorrect. Title VII

supersedes state laws where—as here—"compliance with both federal and state regulations is a physical impossibility." *California Fed. Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 281 (1987) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

Employer Defendants have made it clear that they could not comply with Title VII because it would violate state law. (*See, e.g.*, V. Compl. ¶ 86 ("I can share MaineHealth's view that federal law does not supersede state law in this instance. . . Requiring MaineHealth to violate state law by granting unrecognized exemptions would impose such a hardship. As such, we are not able to grant a request for a religious exemption from the state mandated vaccine.").) Employer Defendants' admission is fatal. "**[T]he Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law**." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (emphasis added) (cleaned up). Indeed, "[this] Court has long recognized that, 'if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.'" *Dr. A*, 2021 WL 4734404, at *5 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015)).

B. Title VII Explicitly Preempts State Laws, Like Maine's, That Require the Doing of an Act That Is Prohibited by Title VII.

Under the plain language of Title VII, Maine's refusal to recognize and accommodate Plaintiffs' sincerely held religious beliefs is preempted and overridden by Title VII**.** Indeed,

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, **other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter**.

42 U.S.C. § 2000e-7 (emphasis added). Thus, because Maine's rule revoking religious exemptions and accommodations "purports to require" discrimination on the basis of religion, and purports to abolish the exemption and accommodation procedure explicitly provided in Title VII, each of which are "an unlawful employment practice" under Title VII, *see* 42 U.S.C. §2000e-2(a), Maine's rules are superseded and preempted by Title VII.

In addition to the explicit textual preemption of Title VII, abundant precedent demonstrates that Maine cannot require employers to engage in a practice that is unlawful under Title VII. *See, e.g.*, *Coalition for Economic Equality v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997) (noting that Title VII preempts state laws that "purport to require the doing of any act which would be an unlawful employment practice under Title VII"); *Brown v. City of Chicago*, 8 F. Supp. 2d 1095, 1112 (N.D. Ill. 1998) (noting that Congress "'intended to supercede [*sic*] all provisions of State law which require or permit the performance of an act which can be determined to constitute an

unlawful employment practice under the terms of Title VII of the Act or are inconsistent with any of its purposes'" (quoting *Rinehart v. Westinghouse Elec. Corp.*, No. C 70-537, 1971 WL 174, at *2 (N.D. Ohio Aug. 20, 1971)); *LeBlanc v. S. Bell Tel. & Tel. Co.*, 333 F. Supp. 602, 608 (E.D. La. 1971) (noting that Louisiana's employment law provisions that conflict with Title VII "are invalid under the Supremacy Clause").

Moreover, Employer Defendants are not permitted to rely upon Maine's revocation of protections for religious objectors as a defense to refusing to do what Title VII requires. *See, e.g.*, *Guardians Ass'n v. Civil Serv. Comm.*, 630 F.2d 79, 104–105 (2d Cir. 1980) ("Nor can the City justify the use of rank-ordering by reliance on what it contends are requirements of state law. Title VII explicitly relieves employers from any duty to observe a state hiring provision "which purports to require or permit" any discriminatory employment practice." (citation omitted))

III. APPLICANTS ARE SUFFERING IRREPARABLE HARM.

A. Applicants Are Suffering Irreparable First Amendment Injury.

While it is generally true that a loss of employment does not constitute irreparable harm, **that ignores the seminal First Amendment questions before the Court**. And there can be no dispute that State Defendants' substantial burden on Plaintiffs' religious exercise constitutes irreparable harm as a matter of law. As this Court has held time and again, Plaintiffs "are irreparably harmed by the loss of free exercise rights for even minimal periods of time." *Tandon*, 141 S. Ct. at 1297. Indeed, "**[t]here can be no question that the challenged [mandate], if enforced, will cause irreparable harm**." *Roman Catholic Diocese*, 141 S. Ct. at 67 (emphasis added). Plaintiffs' constitutional injuries in the instant matter are

presumed irreparable harm. *See, e.g.*, *Sindicator Puertorriqueno de Trabajaddores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012) ("irreparable injury is presumed" in First Amendment cases). Put simply, "a violation of plaintiffs' constitutional right, and in particular, a violation of First Amendment rights, constitutes irreparable harm, *per se*." *Westchester Legal Servs., Inc. v. Westchester Cnty.*, 607 F. Supp. 1379, 1385 (S.D.N.Y. 1985).

Defendants' collective false reduction, that Plaintiffs face only the loss of a job rather than the unconscionable loss of First Amendment rights at the hand of State Defendants, must be rejected. The impact of Maine's far-reaching mandate cannot be understated. Plaintiffs cannot simply go from one employer who unlawfully discriminates, and get a job at a different employer to feed their families while their legal claims are pending. Maine has essentially ensured the Plaintiffs **cannot work anywhere in the entire State**. If that's not irreparable harm, the word has no meaning. Indeed, "**[t]he harm [Plaintiffs] would suffer is not only, as [Defendants] argue[], the loss of [their] job[s] *per se,* but also the penalty for exercising [their First Amendment] rights. The chilling effect of that penalty cannot be adequately redressed after the fact**." *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987) (emphasis added).

Indeed, where the Governor's mandate "conflicts with plaintiffs' and other individuals' federally protected right to seek a religious accommodation from their individual employers," injunctive relief is appropriate. *Dr. A*, 2021 WL 4734404, at *10. As the Sixth Circuit held, "[e]nforcement of the [government's COVID-19 vaccine

mandate] would deprive plaintiffs of their First Amendment rights, an irreparable injury." *Dahl*, 2021 WL 4618519, at *6.

B. Injunctive Relief Is Available and Needed to Preserve The Status Quo.

Even in the Title VII context, injunctive relief is available to preserve the status quo. *See Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 884 (2d Cir. 1981). Specifically, the Second Circuit held that "if the court eventually will have jurisdiction of the substantive claim and an administrative tribunal has preliminary jurisdiction, **the court has incidental equity jurisdiction to grant temporary relief to preserve the status quo pending ripening of the claim for judicial action on the merits**." *Id.* (emphasis added). It continued, "within the framework of Title VII, we are persuaded that Congress intended the federal courts to have resort to all of their traditional equity powers, direct and incidental, in aid of the enforcement of the Title." *Id.* at 885. Indeed,

> It is noteworthy that the court is the only arbiter of the merits of a discrimination claim, and **we think it plain that for the court to renounce its incidental equity jurisdiction to stay such employer retaliation pending the EEOC's consideration would frustrate Congress's purposes**. Unimpeded retaliation during the now-lengthy (180-day) conciliation period is likely to diminish the EEOC's ability to achieve conciliation. It is likely to have a chilling effect on the complainant's fellow employees who might otherwise desire to assert their equal rights, or to protest the employer's discriminatory acts, or to cooperate with the investigation of a discrimination charge. **And in many cases the effect on the complainant of several months without work or working in humiliating or otherwise intolerable circumstances will constitute harm that cannot adequately be remedied by a later award of damages**. Given the singular role in 1964 of the individual

> private action as the only method of enforcing Title VII, and the continued view in 1972 of that right of action as "paramount," **we cannot conclude that Congress intended to preclude the courts' use of their incidental equity power in these circumstances to prevent frustration of Congress's goals**.

Id. at 885–86 (emphasis added).

Put simply, "**where a person has filed a Title VII charge with the EEOC, the court has jurisdiction to entertain a motion for temporary injunctive relief against employer retaliation while the charge is pending before the EEOC and before the EEOC has issued a right to sue letter**." *Id.* at 887 (emphasis added). *See also Holt v. Continental Grp., Inc.*, 708 F.2d 87, 89–90 (2d Cir. 1983) (same); *Bermand v. New York City Ballet, Inc.*, 616 F. Supp. 555, 556 (S.D.N.Y. 1985) ("Decisions by our Court of Appeals, however, **firmly establish** . . . this Court has jurisdiction to entertain applications for preliminary injunctive relief for the purpose of preserving the status quo pending EEOC's investigative and conciliatory process." (emphasis added)). Plaintiffs awarded immediate injunctive relief to remedy their present and ongoing loss of First Amendment rights.

IV. PLAINTIFFS SATISFY THE OTHER IPA REQUIREMENTS.

As *Dr. A* recognized when it enjoined New York's similar scheme, "the public interest lies with enforcing the guarantees enshrined in the Constitution and federal anti-discrimination laws." *Dr. A*, 2021 WL 4734404, at *10. Indeed, "**[p]roper application of the Constitution . . . serves the public interest [because] it is always in the public interest to prevent a violation of a party's constitutional rights**." *Dahl*, 2021 WL 4618519, at *6 (emphasis added).

Additionally, "**the balance of the hardships clearly favors plaintiffs**." *Id.* (emphasis added). Indeed, as there, "defendants have not shown that granting the same benefit to religious practitioners that was originally included in the August 18 Order would impose any more harm—especially when Plaintiffs have been on the front lines of stopping COVID for the past 18 months while donning PPE and exercising other proper protocols in effectively slowing the spread of the disease." *Id.* Maintaining the status quo, and keeping Maine on par with its forty-eight sister states will impose no hardships on Maine. The writ of injunction should issue today.

CONCLUSION

Because the Governor's COVID-19 Vaccine Mandate completely removes any protections for Plaintiffs' sincerely held religious beliefs and subjects them to especially harsh treatment, it violates the First Amendment and should be immediately enjoined to avoid irreparable harm, pending the disposition of Plaintiffs' forthcoming petition for writ of certiorari.

Respectfully submitted:

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