No. 21A145

In the Supreme Court of the United States

DR. A., et al.,

Applicants,

v.

KATHY HOCHUL, Governor of New York, et al.,

Respondents.

BRIEF IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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INTRODUCTION

The COVID-19 pandemic has imposed a deadly toll on New York. COVID-19's impact has been particularly devastating in the healthcare sector, where already vulnerable patients and residents are at greater risk of severe harm from any infection, and where the spread of the virus among healthcare workers can lead to a vicious cycle of staff shortages and deterioration of patient care. Concerns about COVID-19 have also risen in recent months because of the alarming spread of the highly contagious SARS-CoV-2 Delta variant.

In light of these concerns, the New York Department of Health (DOH) issued an emergency rule requiring COVID-19 vaccinations for certain healthcare workers: namely, any worker whose activities could potentially expose patients, residents, or other personnel to COVID-19 if he or she were infected. 10 N.Y.C.R.R. § 2.61. Like preexisting vaccination requirements for measles and rubella that have been in effect for decades, DOH's emergency COVID-19 rule contains only a narrow medical exemption. Plaintiffs here sued to challenge the absence of a religious exemption on Free Exercise and Title VII preemption grounds. The district court granted a preliminary injunction, but the Second Circuit reversed.

Plaintiffs now ask this Court for the extraordinary relief of a stay of DOH's emergency rule. This Court should deny the application. Under comparable circumstances, this Court recently denied a request to enjoin a Maine regulation that also requires healthcare workers to receive a COVID-19 vaccination without providing a religious exemption. *See Does v. Mills*, No. 21A90, 2021 WL 5027177 (U.S. Oct. 29,

2021). The court is also considering a similar emergency stay application in *We The Patriots USA, Inc. v. Hochul*, No. 21A125, which arises from the same Second Circuit proceeding as this case.

For the reasons given in defendants' opposition in *We The Patriots*, plaintiffs here fail to show an indisputably clear entitlement to relief on the merits of their Free Exercise claim. As the Second Circuit found, nothing in this record indicates any hostility to or singling out of religious beliefs that would render the emergency rule nonneutral. Nor does the availability of a medical exemption undercut the rule's general applicability. The rule's medical exemption is tightly constrained in both scope and duration (far more so than the medical exemption at issue in *Mills*), and it serves rather than undermines the rule's objective of protecting the health of healthcare workers. For these reasons, the medical exemption is not comparable to the religious exemption that plaintiffs seek, and thus does not support any inference that otherwise similarly situated religious interests are being disfavored. *See* Br. in Opp. to Emergency Appl. for Writ of Inj., No. 21A125 (filed Nov. 10, 2021).

Plaintiffs' claim of Title VII preemption also fails to support their request for an emergency stay. As the Second Circuit correctly recognized, DOH's emergency rule does not prohibit employers from providing a reasonable accommodation under Title VII. Plaintiffs' arguments to the contrary assume that Title VII requires employers to offer plaintiffs their preferred accommodation—an outright exemption from vaccination. But well-settled case law makes clear that Title VII does not entitle employees to the accommodation that they prefer; nor does the statute compel

employers to provide accommodations that would be unreasonable or impose an undue hardship, as an outright exemption would here.

Finally, the extraordinary relief of an interim stay is not warranted because this Court is unlikely to grant certiorari. There is no circuit split over the constitutionality of COVID-19 vaccination rules for healthcare workers. And the record here is sparse, especially when it comes to concrete evidence about the anonymous plaintiffs, their unidentified employers, and those employers' actual implementation of DOH's emergency rule. These factors make this case a poor vehicle for reviewing the issues that plaintiffs have raised.

STATEMENT

A. New York's Long History of Vaccination Requirements

New York has long been a national leader in mandating vaccinations to protect against the spread of communicable disease. The State required school-age children to be vaccinated against smallpox in the 1860s. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002). And New York has also regularly imposed vaccination requirements on healthcare workers. For example, DOH regulations require hospital employees who pose a risk of transmission to patients to be immunized against measles and rubella; like the emergency rule at issue here, this requirement does not contain a religious exemption. *See* 10 N.Y.C.R.R. § 405.3(b)(10)(i)-(iii). Similar rules

apply to healthcare workers in long-term care facilities and other institutions.[1] These regulations have been in place in similar form since 1980 for rubella and 1991 for measles.[2]

B. The COVID-19 Pandemic and the Development of Safe Vaccines

COVID-19 is a highly infectious and potentially deadly respiratory illness that spreads easily from person to person. In the United States alone, COVID-19 has infected more than 45 million people and claimed more than 750,000 lives,[3] including almost 725,000 infections and over 2,400 deaths among healthcare workers,[4] who have been disproportionately harmed by the disease.

In light of the harms caused by the COVID-19 pandemic, the U.S. Food and Drug Administration (FDA) issued emergency use authorizations for the Pfizer-BioNTech, Moderna, and Janssen COVID-19 vaccines, and the FDA granted full

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[1] *See* 10 N.Y.C.R.R. §§ 415.26(c)(1)(v)(a)(2)-(4) (nursing home personnel), 751.6(d)(1)-(3) (employees of diagnostic and treatment centers), 763.13(c)(1)-(3) (personnel of home health agencies, long term home health care programs, and AIDS home care programs), 766.11(d)(1)-(3) (personnel of licensed home care services agencies), 794.3(d)(1)-(3) (hospice personnel), 1001.11(q)(1)-(3) (assisted living residences personnel).

[2] *See* Health and Immunization of Employees of Medical Facilities and Certified Home Health Agencies, 3 N.Y. Reg. 6, 6 (Jan. 14, 1981) (rubella); Immunization of Health Care Workers, 13 N.Y. Reg. 16, 16 (Dec. 24, 1991) (measles).

[3] Centers for Disease Control & Prevention, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*. All websites last visited November 16, 2021.

[4] Centers for Disease Control & Prevention, *COVID Data Tracker: Cases & Deaths Among Healthcare Personnel*.

regulatory approval for the Pfizer vaccine on August 23, 2021.[5] Studies show that the vaccines are both safe and highly effective, particularly for preventing hospitalizations in vulnerable populations. For example, among adults 65 to 74 years old, one recent study showed the vaccines' efficacy for preventing hospitalizations ranged from 84% to 96%, and concluded that increasing vaccination coverage is "critical to reducing the risk for COVID-19–related hospitalization, particularly in older adults."[6]

The COVID-19 vaccines do not contain aborted fetal cells. HEK-293 cells—which are currently grown in a laboratory and are thousands of generations removed from cells collected from a fetus in 1973—were used in testing during the research and development phase of the Pfizer and Moderna vaccines.[7] But the use of fetal cell lines for testing is common, including for the rubella vaccination, which New York's healthcare workers are already required to take.[8] A diverse range of religious leaders has strongly encouraged adherents to receive a COVID-19 vaccination. For example,

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[5] Press Release, Food & Drug Admin., *FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020); Press Release, Food & Drug Admin., *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine* (Dec. 18, 2020); Press Release, Food & Drug Admin., *FDA Issues Emergency Use Authorization for Third COVID-19 Vaccine* (Feb. 27, 2021); Press Release, Food & Drug Admin., *FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021).

[6] *See, e.g.*, Heidi L. Moline et al., *Effectiveness of COVID-19 Vaccines in Preventing Hospitalization Among Adults Aged ≥ 65 Years – COVID-NET, 13 States, February-April 2021*, 70 Morbidity & Mortality Wkly. Rep. 1088, 1092 (2021).

[7] Los Angeles Cnty. Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines* 1-2 (Apr. 20, 2021).

[8] Carina Storrs, *How Exactly Fetal Tissue Is Used for Medicine*, CNN (Dec. 8, 2017).

Pope Francis, the leader of the Roman Catholic Church (with which all but one of the plaintiffs are affiliated), has recognized that taking an approved COVID-19 vaccine is "an act of love" and "a simple yet profound way to care for one another, especially the most vulnerable."[9] The U.S. Conference of Catholic Bishops has explained that receiving the Pfizer and Moderna vaccines is consistent with the Catholic faith because those vaccines did not use fetal cell lines for their "design, development, or production," and the connection between those vaccines and abortion "is very remote."[10] More broadly, a coalition of 145 global faith leaders, representing a variety of faiths, issued a statement that the "only way to end the pandemic" is to ensure that COVID-19 vaccines "are made available to all people as a global common good."[11]

C. New York's Response to Transmission of the Delta Variant in the Healthcare Sector

DOH is charged with protecting the public health and supervising and regulating "the sanitary aspects of . . . businesses and activities affecting public health." N.Y. Public Health Law § 201(1)(m). Pursuant to this broad mandate, DOH

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[9] Devin Watkins, *Pope Francis Urges People to Get Vaccinated Against Covid-19*, Vatican News (Aug. 18, 2021) (quotation marks omitted).

[10] Chairmen of the Comm. on Doctrine and the Comm. on Pro-Life Activities, U.S. Conf. of Catholic Bishops, *Moral Considerations Regarding the New COVID-19 Vaccines* 4-5 (Dec. 11, 2020).

[11] Press Release, ReliefWeb, *World Religious Leaders Call for Massive Increases in Production of Covid Vaccines and End to Vaccine Nationalism* (Apr. 27, 2021) (quotation marks omitted).

has acted swiftly to respond to the risks posed by the Delta variant in New York's healthcare sector.

On August 18, 2021—prior to full FDA approval of the Pfizer vaccine—the DOH Commissioner issued an Order for Summary Action under Public Health Law § 16, which allows him to "take certain action immediately" to remedy "a condition or activity which in his opinion constitutes danger to the health of the people," for a period not to exceed fifteen days. Public Health Law § 16. The Order required limited categories of healthcare entities—hospitals and nursing homes—to ensure that covered personnel were fully vaccinated against COVID-19. (App. 99-105.) The Order also included both a medical exemption and an exemption for individuals who hold a "religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer." (App. 103-104.) The Order was not intended to be a permanent solution, but rather served as an immediate "stop-gap measure pending action by the Public Health and Health Planning Council," a council within DOH that consists of the Commissioner and 24 other members drawn from the public health system, healthcare providers, and elsewhere.[12]

As a result, the Order was superseded when, eight days later on August 26, 2021—three days after the FDA gave full approval to the Pfizer vaccine—the Council approved the emergency rule that is at issue in this proceeding with the benefit of fuller consideration and input by its members. Under New York law, an emergency

[12] Decl. of Vanessa Murphy, J.D., M.P.H. ("Murphy Decl.") ¶ 6, *Does v. Hochul*, No. 21-cv-5067 (E.D.N.Y. Oct. 5, 2021), ECF No. 48.

rule may go into effect immediately and remain in effect for up to ninety days. N.Y. State Administrative Procedure Act § 202(6)(b). The emergency rule requires covered healthcare entities to "continuously require" employees to be fully vaccinated against COVID-19 if they "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61(a)(2), (c). In contrast to the Commissioner's Order, the emergency rule covers a broader range of healthcare entities—specifically, extending to certified home health agencies, long term home health care programs, hospices, and adult care facilities, among others. § 2.61(a)(1)(ii)-(iv). Also, unlike the Order, the emergency rule was formally published in the *New York Register* and was accompanied by a full set of required documentation, including a Regulatory Impact Statement and findings to support the need for emergency action. *See* Prevention of COVID-19 Transmission by Covered Entities, 43 N.Y. Reg. 6, 6-9 (Sept. 15, 2021).

The rule contains only a single exception to its requirements: a narrow medical exemption that is strictly limited in duration and scope. The rule exempts employees for whom a "COVID-19 vaccine [would be] detrimental to [their] health . . . based upon a pre-existing health condition." § 2.61(d)(1). As to duration, the exemption applies "only until such immunization is found no longer to be detrimental to such personnel member's health," and that duration "must be stated in the personnel employment medical record." *Id.* As to scope, the exemption must be "in accordance with generally accepted medical standards," such as the "recommendations of the

Advisory Committee on Immunization Practices" (ACIP), a committee that operates under the auspices of the CDC. *Id.*

DOH guidance on the emergency rule makes clear that the available grounds for a medical exemption are narrow and largely temporary. As explained by DOH's Frequently Asked Questions document regarding the emergency rule,[13] the only "contraindications" recognized by the CDC as a ground for a medical exemption from COVID-19 vaccination are severe or immediate allergic reactions "after a previous dose" of the vaccine or "to a component of the COVID-19 vaccine."[14] Even then, the CDC advises that "the majority of contraindications are temporary," such that "vaccinations often can be administered later when the condition leading to a contraindication no longer exists."[15] The CDC also recognizes certain "precautions"—i.e., conditions that increase the risk of a serious reaction or that interfere with the effectiveness of a vaccine—that could warrant deferring administration of the COVID-19 vaccine (such as a recent acute illness), or administering a different version of the vaccine (such as a reaction to one of the three available vaccines).[16] By contrast,

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[13] N.Y. Dep't of Health, *Frequently Asked Questions (FAQs) Regarding the August 26, 2021 – Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation* 4 ("Dep't of Health, *FAQs*").

[14] Centers for Disease Control & Prevention, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States* (Nov. 5, 2021).

[15] Centers for Disease Control & Prevention, *Vaccine Recommendations and Guidelines of the ACIP: Contraindications and Precautions* (Aug. 5, 2021).

[16] *Id.* For example, the CDC notes that a small fraction—about seven per million—of women between eighteen and forty-nine years old experience thrombosis

(*continued on the next page*)

less serious conditions are not a basis for a medical exemption, including common side effects to the COVID-19 vaccine like fever, headache, or fatigue; allergic reactions to other substances; or immunosuppression due to a health condition or use of another medication. Dep't of Health, *FAQs*, *supra*, at 4-5.

Public health experts have uniformly concurred that the number of individuals who are medically ineligible to receive a COVID-19 vaccine is very small. Data show that the vaccines do not present "immediate health issues or side effects for most people with pre-existing medication conditions," and, apart from age, "there are no major exemptions that cover large groups of people."[17] The vaccines are safe for immunocompromised people, pregnant women, and people with underlying conditions. The primary group of people who face serious medical risk from a COVID-19 vaccine are people who experience anaphylactic shock, but that "severe allergy is rare, and less than one in 1 million people experience it."[18]

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with thrombocytopenia syndrome after receiving the Janssen vaccine. Centers for Disease Control & Prevention, *Safety of COVID-19 Vaccines* (Nov. 1, 2021). Any concerns about this unlikely risk, however, can be assuaged by receiving the Pfizer or Moderna vaccine.

[17] Decl. of Elizabeth Rausch-Phung, M.D., M.P.H. (Rausch-Phung Decl.) ¶ 66, *Dr. A. v. Hochul*, No. 21-cv-1009 (N.D.N.Y. Sept. 22, 2021), ECF No. 16; Ivan Pereira, *Few People Medically Exempt from Getting COVID-19 Vaccine: Experts*, ABC News (Sept. 15, 2021) (quotation marks omitted).

[18] Rausch-Phung Decl. ¶ 66; Pereira, *Few People Medically Exempt*, *supra*; *see also* Kimberly G. Blumenthal et al., *Acute Allergic Reactions to mRNA COVID-19 Vaccines*, 325 JAMA 1562, 1562 (2021) (rate of anaphylaxis to Pfizer and Moderna vaccinations is 2.5 to 11.1 per 1 million doses).

The emergency rule does not contain an exemption for those who oppose vaccination on religious or any other grounds. The availability of a medical but not religious exemption is also a feature of the requirement that healthcare workers be vaccinated against measles and rubella. DOH has explained that the emergency rule is consistent with these preexisting obligations and that allowing a religious exemption for the COVID-19 vaccine, but not for measles and rubella, would undermine a consistent approach to preventing the transmission of these particularly infectious and harmful diseases in the healthcare sector.[19] The decision to omit a religious exemption is consistent with statements by the American Medical Association that nonmedical exemptions "endanger the health of the unvaccinated individual and those whom the individual comes in contact with," and that healthcare workers in particular "have a fundamental obligation to patients [to get] vaccinated for preventable diseases."[20]

In accompanying administrative materials, DOH further explained the basis for the emergency rule. It noted that the rule responded to the increasing circulation of the Delta variant, which had led to a tenfold increase in COVID-19 infections since early July 2021. DOH found that COVID-19 vaccines are safe and effective, and that the presence of unvaccinated personnel in healthcare settings poses "an unacceptably

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[19] *See* Rausch-Phung Decl. ¶¶ 46-52.

[20] American Med. Ass'n, *Audiey Kao, MD, PhD, on Mandating Vaccines for Health Care Workers* (July 20, 2021) (quotation marks omitted); *see* Jennifer Lubell, *Why COVID-19 Vaccination Should Be Required for Health Professionals* (Am. Med. Ass'n July 27, 2021).

high risk" that employees may acquire COVID-19 and transmit it both (a) to colleagues, thereby "exacerbating staffing shortages"; and (b) to "vulnerable patients or residents," thereby "causing [an] unacceptably high risk of complications." 43 N.Y. Reg. at 8. DOH emphasized that unvaccinated individuals have *eleven times* the risk as vaccinated individuals of being hospitalized with COVID-19.

The Council also conducted a meeting on August 26, 2021, at which it considered further information concerning the need for the emergency rule and the scope of the obligations it imposed. DOH's Commissioner explained that the emergency rule was necessary because the State was at a crucial inflection point with the increasing prevalence of the Delta variant and the heightened risk for the spread of other respiratory viruses (such as the flu) in the fall season.[21] DOH counsel further explained that the scope of the emergency rule largely tracked preexisting vaccine requirements, including those for measles and rubella, in order to facilitate the rule's implementation and enforcement. For example, the definition of "covered personnel" aligns with the scope of DOH's regulation requiring seasonal influenza vaccination or masking for certain healthcare workers. Comm. Meeting at 10:40-11:12; *see* 10 N.Y.C.R.R. § 2.59(a)(1). Counsel similarly noted that the medical exemption is consistent with the existing standards governing immunizations for students. Comm. Meeting at 30:42-31:00; *see* 10 N.Y.C.R.R. §§ 66-1.1(*l*), 66-1.3(c). DOH's Director of Epidemiology confirmed that the medical exemption in the emergency rule is

[21] Video, Special Meeting of the N.Y. Pub. Health & Health Planning Council, Comm. on Codes, Reguls. & Legis., at 2:48-4:06 (Aug. 26, 2021) ("Comm. Meeting").

consistent with medical exemptions in other regulations and is based on generally accepted medical standards such as the recommendations of CDC's ACIP. Comm. Meeting at 14:33-15:03. And DOH counsel also explained that the lack of a religious exemption is consistent with a variety of regulatory provisions requiring measles and rubella vaccinations for certain healthcare workers. *Id.* at 37:20-37:38.

DOH's findings about the immediate necessity for the emergency rule are supported by the CDC's conclusions that the Delta variant is more than twice as contagious as prior variants and may cause more severe illness in unvaccinated people. Although vaccinated people may transmit the Delta variant to others, they do so at much lower rates than unvaccinated people.[22] The CDC has also recognized the importance of achieving high vaccination rates in settings where residents are at high risk of COVID-19-associated mortality, including long-term care facilities. Deaths at such facilities account for almost one third of COVID-19 related deaths in the United States, and the CDC has observed outbreaks that occurred in facilities where the "residents were highly vaccinated, but transmission occurred through unvaccinated staff members."[23]

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[22] *See* Rausch-Phung Decl. ¶¶ 8-12; Centers for Disease Control & Prevention, *Delta Variant: What We Know About the Science* (Aug. 26, 2021); Centers for Disease Control & Prevention, *Science Brief: COVID-19 Vaccines and Vaccination* (Sept. 15, 2021).

[23] *See* Rausch-Phung Decl. ¶ 62; James T. Lee et al., *Disparities in COVID-19 Vaccination Coverage Among Health Care Personnel Working in Long-Term Care Facilities, by Job Category, National Healthcare Safety Network – United States, March 2021*, 70 Morbidity & Mortality Wkly. Rep. 1036, 1036-37 (2021).

Since the emergency rule went into effect on September 27, 2021, DOH has collected preliminary data concerning the rate of vaccinations and exemptions among New York's healthcare workforce as of October 19, 2021. Because the rule has been subject to limited temporary restraining orders (TROs) preventing DOH from interfering with employers' grants of religious exemptions, this data includes some information about religious exemptions.

In the nursing home sector, 127,822 of 144,183 workers were fully vaccinated (88.7%), 12,569 had received one dose of a two-dose vaccine (8.7%), 538 were reported as currently medically ineligible for a COVID-19 vaccine (0.4%), and 2,680 were reported as "other" exemptions (1.9%), which DOH understands to refer to the religious exemption preserved by the various TROs (since no other nonmedical exemptions are permitted).[24] In the adult care facility sector, 26,449 of 29,583 workers were fully vaccinated (89.4%), 2,166 had received one dose of a two-dose vaccine (7.3%), 155 were reported as currently medically ineligible for a COVID-19 vaccine (0.5%), and 567 were reported as "other" (religious) exemptions (1.9%).[25] In the hospital sector, 91.4% of workers were fully vaccinated, 4.8% had received one dose of a two-dose vaccine, 0.5% were medically ineligible for a COVID-19 vaccine, and 1.3% were reported as "other" (religious) exemptions.[26]

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[24] *See* Decl. of Valerie A. Deetz ¶ 3, *Serafin v. New York State Dep't of Health*, Index No. 908296-21 (Sup. Ct. Albany County Oct. 20, 2021), NYSCEF Doc. No. 56.

[25] *See id.* ¶ 4.

[26] *See* Decl. of Dorothy Persico ¶ 3, *Serafin*, Index No. 908296-21 (Sup. Ct. Albany County Oct. 21, 2021), NYSCEF Doc. No. 57.

The disparity between medical and religious exemptions is not uniform across the State. *Cf. Does v. Mills*, 16 F.4th 20, 26 (1st Cir. 2021) (noting disparities in "geographic distribution of vaccination" within Maine). In Erie County, only 41 hospital workers (0.2%) were currently medically ineligible, while 740 (4%) reported "other" (religious) exemptions. And in Monroe County, only 42 (0.1%) hospital workers were currently medically ineligible, while 977 (3.2%) reported "other" (religious) exemptions.[27]

D. Procedural History

On September 13, 2021, plaintiffs filed this lawsuit, challenging the omission of a religious exemption from DOH's emergency rule. The plaintiffs are seventeen anonymous healthcare workers allegedly subject to the emergency rule. (App. 135, 146-172.)

Plaintiffs, all but one of whom identify as Catholics,[28] allege that they have religious objections to receiving vaccines that use "aborted fetus cell lines in their testing, development, or production" (App. 135; *see* App. 143-146). Plaintiffs allege that if they do not take the COVID-19 vaccine they will face various employment consequences, risk disciplinary charges, or lose their licenses.[29] (*See, e.g.*, App. 138-

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[27] *See* Persico Decl. ¶¶ 4-5.

[28] One plaintiff identifies as a Baptist. (App. 158.)

[29] Plaintiffs allege a diverse range of potential employment consequences. Some allege direct loss of employment. Others allege that they will be unable to continue their practices if their "hospital privileges [are] suspended." (*See* App. 152-

(*continued on the next page*)

143, 155, 159, 163, 168, 171-172.) Plaintiffs do not identify themselves or their employers. They claim that the DOH emergency rule violates their right to free exercise of religion and is preempted by Title VII. (*See* App. 172-180.) They seek declaratory and injunctive relief. (*See* App. 180.)

Plaintiffs moved for a temporary restraining order (TRO) and a preliminary injunction that same day. Plaintiffs did not submit any evidence with that motion. The district court granted a TRO without hearing from defendants. (App. 56-60.) On October 12, 2021, the district court granted plaintiffs' motion for a preliminary injunction. (*See* App. 62-88)

On October 29, 2021, the Second Circuit issued an order that vacated the preliminary injunction and reversed the trial court's order granting a preliminary injunction, with an opinion to follow. (App. 2-3.) On November 4, 2021, the Second Circuit issued its written decision. (*See* App. 4-54; *We The Patriots USA, Inc. v. Hochul*, No. 21-2179, 2021 WL 5121983 (2d Cir. Nov. 4, 2021) ("*WTP*, at *__").)[30]

On plaintiffs' Free Exercise claim, the court held that plaintiffs had failed to show that DOH's emergency rule was "likely not neutral or generally applicable." (App. 24; *WTP*, at *8.) The court explained that the rule "is facially neutral because it does not single out employees who decline vaccination on religious grounds." (*Id.*) And the court rejected plaintiffs' contention that the rule should be deemed

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154, 157, 164, 169.) Others allege that they were told that their employment would be at risk if they do not receive a COVID-19 vaccination. (*See* App. 160, 166.)

[30] The order and written decision also resolved the companion *We The Patriots* appeal.

nonneutral because it "eliminated" a religious exemption contained in the Commissioner's separate August 18 Order issued just eight days earlier, explaining that the rule was issued by different decision-makers, following a distinct procedure that "provided more process, public input, and support for a measure that would be effective" for a different duration. (App. 26; *WTP*, at *9.) As for public statements made by Governor Hochul that plaintiffs assert reflected animus, the court noted that many of those comments "did not relate to Section 2.61 or workplace vaccine requirements at all," and that the Governor's "expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers." (App. 27-28; *WTP*, at *10.) Otherwise, "politicians' frequent use of religious rhetoric to support their positions" would trigger heightened scrutiny for many government actions. (App. 27-28; *WTP*, at *10.)

The Second Circuit also concluded that the rule is likely generally applicable. The medical exemption did not render the rule underinclusive because "applying the vaccination requirement to individuals with medical contraindications and precautions would not effectively advance" the State's interest in promoting the health of healthcare workers to reduce the risk of staffing shortages. (App. 31; *WTP*, at *12.) The court also held that the evidence before it showed that the risks of a medical exemption and a religious exemption are not comparable. The "medical exemption is defined to be limited in duration," and "[t]he statistics provided by the State further indicate that medical exemptions are likely to be more limited in number than

religious exemptions, and that high numbers of religious exemptions appear to be clustered in particular geographic areas." (App. 31-32; *WTP*, at *12.) The court also concluded that the medical exemption does not create a mechanism for individualized exemptions because it applies to "an objectively defined category of people" and "affords no meaningful discretion to the State or employers." (App. 37-38; *WTP*, at *14.)

As a neutral law of general applicability, the Second Circuit assessed the rule under rational-basis review, and it concluded that the rule was a rational response to the spread of "an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of over 750,000 in the United States and some 55,000 in New York." (App. 39; *WTP*, at *15.)

The Second Circuit also rejected plaintiffs' claim based on Title VII preemption. The court explained that "Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." (App. 42; *WTP*, at *17.) The court also recognized that "Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated." (*Id.*) And the court further held that the sparse record precluded any inference that the anonymous plaintiffs' unidentified employers would be unable to provide *any*

reasonable accommodation consistent with the emergency rule.[31] (App. 43; *WTP*, at *17.)

Finally, the Second Circuit concluded that plaintiffs had also failed to show irreparable injury or a balance of the equities supporting a preliminary injunction, but noted that factual developments on remand might affect both of these factors. (App. 45-50; *WTP,* at *19-21.)

ARGUMENT

THE COURT SHOULD DENY PLAINTIFFS' REQUEST FOR THE EXTRAORDINARY RELIEF OF AN INTERIM STAY

Plaintiffs ask this Court to enjoin the enforcement of a duly issued emergency state health regulation—"extraordinary relief" that "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Me. PAC v. McKee*, 562 U.S. 996, 996 (2010) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Such drastic relief is issued "sparingly and only in the most critical and exigent circumstances," such as when "the legal rights at issue are indisputably clear." *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (quotation marks omitted). Plaintiffs do not come close to satisfying this stringent standard here.

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[31] The Second Circuit also rejected a substantive due process claim brought by plaintiffs in the *We The Patriots* action. (*See* App. 44-45; *WTP*, at *18.) Plaintiffs here did not bring such a claim.

A. This Court Is Unlikely to Grant Certiorari.

This Court's assessment of plaintiffs' likelihood of success on the merits encompasses "a discretionary judgment about whether the Court should grant review in this case." *Does v. Mills*, No. 21A90, 2021 WL 5027177, at *1 (U.S. Oct. 29, 2021) (Barrett, J., concurring); *see Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Plaintiffs have failed to establish that this lawsuit is an appropriate vehicle to resolve the issues for which they seek review.

For one thing, there is no circuit split over the constitutionality of COVID-19 vaccination requirements for healthcare workers. The only other court of appeals to have addressed such a rule upheld it on grounds similar to those given by the Second Circuit below. *See Mills*, 16 F.4th 20. And plaintiffs are wrong to identify a conflict (*see* Emergency Appl. for Writ of Inj. at 37 ("Br. at")) with the Sixth Circuit's decision upholding a preliminary injunction against a university's COVID-19 vaccination requirement for student-athletes. *See Dahl v. Board of Trs. of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021) (per curiam). That case involved "a factual setting significantly different from that presented here": namely, a scheme under which the university's grant of exemptions was subject to no meaningful standards. (App. 38-39, *WTP*, at *15 n.29.) No similar discretionary exemption scheme is at issue here. See *infra* at 24.

This case also provides a poor vehicle because, as the Second Circuit repeatedly noted, the "record before the district court[] was sparse." (App. 35; *WTP*, at *14.) In particular, for purposes of plaintiffs' Title VII preemption claim, there was little to no

concrete evidence "in support of their broad allegations about the effect of Section 2.61" on their employment. (App. 43; *WTP*, at *17.) For example, plaintiffs provided no documentation below about whether they have sought or been offered accommodations that would be consistent with the emergency rule—facts that would be especially important for evaluating their claim that the emergency rule wholly prohibits accommodations required by Title VII. Plaintiffs object that their factual allegations "must be accepted as true." (Br. at 32 n.32 (quotation marks omitted).) But the problem here is not that plaintiffs' factual claims are *disputed*—it is that they are *incomplete*. There are thus important factual questions material to plaintiffs' Title VII claim that are addressed neither by plaintiffs' allegations nor by the record below, such as "the substance of Plaintiffs' interactions with their employers," "the opportunities for a reasonable accommodation under Title VII for religious objectors," and the availability of "accommodations for the medically ineligible." (App. 43; *WTP*, at *17.)

For these reasons, this Court should reject plaintiffs' invitation to "use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument." *Mills*, 2021 WL 5027177, at *1 (Barrett, J., concurring).

B. Plaintiffs Have Not Shown an Indisputably Clear Right to Relief.

Plaintiffs' request for relief should also be denied because they have failed to make a "strong showing" of likely success on the merits of their appeal, *see Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation marks omitted), let alone an "indisputably

clear" constitutional violation, *Wisconsin Right to Life*, 542 U.S. at 1306 (Rehnquist, C.J., in chambers) (quotation marks omitted).

1. Plaintiffs are unlikely to succeed on their Free Exercise claim.

Under this Court's precedents, "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). This Court has specifically identified "compulsory vaccination laws" as among the neutral, generally applicable laws that do not require religious exemptions under the First Amendment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 889 (1990). Here, as the Second Circuit correctly held, plaintiffs' Free Exercise claim fails because DOH's emergency rule is a neutral law of general applicability that is subject to rational-basis review—a bar that it readily clears.

Plaintiffs' arguments to the contrary here largely parallel those made by the plaintiffs in *We The Patriots* and should be rejected for the reasons already given by defendants in their opposition to the *We The Patriots* stay application. See Br. in Opp. to Emergency Appl. for Writ of Inj. 21-34, No. 21A125 ("WTP Opp."). Rather than rehash those arguments, defendants here respond to certain specific points raised by plaintiffs.

First, plaintiffs assert that DOH's emergency rule is not generally applicable because its "medical exemption treats comparable secular conduct better than religious conduct." (Br. at 16.) As defendants have previously explained, however, the

medical exemption is not comparable to the religious exemption requested by plaintiffs. The medical exemption advances rather than undermines one of the core purposes of the emergency rule (to protect healthcare workers themselves); it is extremely limited in both scope and duration (and narrower than the medical exemption in the Maine regulation considered in *Mills*); and preliminary data shows that it allows significantly fewer unvaccinated individuals than a religious exemption would, thus limiting the medical exemption's impact. See WTP Opp. at 28-31.

Plaintiffs counter that "an unvaccinated employee carries the same risk of COVID spread regardless of their reasons for remaining unvaccinated" (Br. at 17), but they are incorrect. As defendants have explained (WTP Opp. at 29-30), because the most significant contraindication that would warrant a medical exemption is an adverse reaction to a prior dose of the COVID-19 vaccine, many of the workers who receive medical exemptions will already have received at least partial protection from that first vaccine dose. Moreover, because medical exemptions are predominantly temporary (WTP Opp. at 30-31), the amount of time that a medically ineligible individual poses a risk of spreading COVID-19 is also correspondingly limited. And finally, plaintiffs are wrong to dismiss the relevance (Br. at 17-18) of the significantly higher numbers of exemptions that will be offered on religious rather than medical grounds—three to four times more statewide (WTP Opp. at 13-14), and up to twenty-three times more in certain jurisdictions (*see* App. 32; *WTP*, at *12). There is thus no basis to find that the tightly constrained medical exemption "undermines the purposes of the [emergency rule] to at least the same degree as the covered conduct

that is religiously motivated." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004).

Second, plaintiffs contend that the medical exemption renders the emergency rule the type of discretionary exemption scheme that this Court has found not to be generally applicable. (Br. at 18-19.) But as defendants previously explained (WTP Opp. at 25-26), and the Second Circuit correctly concluded, the "medical exemption here does not 'invite the government to decide which reasons for not complying with the policy are worthy of solicitude.'" (App. 37; *WTP*, at *14 (quoting *Fulton*, 141 S. Ct. at 1879).) "Instead, the Rule provides for an objectively defined category of people to whom the vaccine requirement does not apply." (*Id.*) Thus, "[o]n its face, the Rule affords no meaningful discretion to the State or employers, and Plaintiffs have not put forth any evidence suggesting otherwise." (App. 38; *WTP*, at *14.) In sharp contrast, the scheme at issue in *Fulton* authorized a state official to issue exemptions at his or her "sole discretion." 141 S. Ct. at 1878. And, as *Smith* explained, the program at issue in *Sherbert v. Verner*, 374 U.S. 398 (1963), allowed exceptions for "good cause," which was an undefined standard under that scheme. 494 U.S. at 884.

Third, plaintiffs contend that DOH's emergency rule "targeted religion"—and thus was not neutral—because it "removed an existing religious exemption while broadening the medical exemption." (Br. at 19.) But both aspects of plaintiffs' characterization of the rule are wrong. The emergency rule did not "remove[] an existing religious exemption," an apparent reference to the religious exemption contained in the Commissioner's earlier August 18 Order for Summary Action. (App.

99-105.) As defendants have explained (WTP Opp. at 22-23), the emergency rule was not an amendment to the Commissioner's Order at all, but rather the product of an independent rulemaking process. It is also simply not true that the emergency rule "broaden[ed] the medical exemption." To support this characterization, plaintiffs point (Br. at 7) to immaterial wording changes between the Commissioner's August 18 Order and the emergency rule.[32] But those changes did not (and were not intended to) alter the scope of the medical exemption, whose operative language parallels that in the similar exemption for the longstanding measles/rubella vaccination requirements. *See* 10 N.Y.C.R.R. § 405.3(b)(10)(iii).

Plaintiffs further argue that the emergency rule is nonneutral because, after the Second Circuit's decision below, some of their employers revoked religious exemptions that they had previously granted. (Br. at 20.) As an initial matter, plaintiffs' assertion that their *employers* targeted religion in making employee-specific decisions does not mean that *DOH* did so as well in issuing a statewide emergency rule. More fundamentally, even as alleged, the employers' actions did not "single out the religious for disfavored treatment," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020 (2017), but rather treated claims for religious exemptions *the same* as any other type of claim for an exemption—with the

[32] For example, plaintiffs point out (Br. at 7) that the August 18 Order provided that the COVID-19 vaccination requirement "shall be subject to a reasonable accommodation" for medically ineligible staff (App. 103), while the emergency rule says that the requirement "shall be inapplicable," § 2.61(d)(1). But plaintiffs fail to note that the emergency rule goes on to talk specifically about providing and documenting "any reasonable accommodation."

sole exception of the narrow medical exemption, which is unique for reasons previously explained (WTP Opp. at 28-31).

Fourth, plaintiffs assert that various statements by Governor Hochul "reflected antipathy toward religious objectors." (Br. at 21.) But as defendants have explained (WTP Opp. at 24), plaintiffs have failed to establish any nexus between these statements and DOH's issuance of this emergency rule. The quoted statements were all made weeks after the emergency rule was adopted, and none of them came from the actual decision-makers who actually considered and issued the rule (the DOH Commissioner and twenty-four members of the Public Health and Health Planning Council). Many of the Governor's statements were also not about the emergency rule or healthcare workers at all, but instead were broader calls for the public to become vaccinated. (App. 27-28; *WTP*, at *10.) And despite plaintiffs' attempt to argue otherwise, the full context of the Governor's statements reveals that she was speaking positively about religion, rather than disparaging religious beliefs: that is, she was "express[ing] general support for religious principles that she believes guide community members to care for one another by receiving the COVID-19 vaccine." (App. 28-29; *WTP*, at *10.) This Court's concerns about state officials' declarations of religious hostility are simply not triggered when, as here, a state official invokes her own personal religious beliefs to support public policy; "otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions non-neutral." (App. 28; *WTP*, at *10. (quotation marks omitted).)

Finally, plaintiffs claim that DOH's emergency rule does not satisfy strict scrutiny. (Br. at 25.) At the outset, that argument fails because strict scrutiny does not apply, and the rule easily satisfies rational-basis review, as plaintiffs do not contest. (WTP Opp. at 32-34.) But plaintiffs' arguments under strict scrutiny also fail on their own terms.

Plaintiffs principally argue that DOH has failed to show narrow tailoring because New York is "a national outlier" (Br. at 25) in not allowing religious exemptions. That claim is an overstatement. Both Maine and Rhode Island have similarly required healthcare workers to receive a COVID-19 vaccination without providing a religious exemption. *See Mills*, 16 F.4th at 24; *Dr. T. v. Alexander-Scott*, No. 21-cv-387, 2021 WL 4476784, at *1 (D.R.I. Sept. 30, 2021). And in the context of mandatory vaccination requirements for schoolchildren, many States in addition to New York no longer allow for religious exemptions, including California, Connecticut, Maine, Mississippi, and West Virginia.[33] Indeed, the Fourth Circuit rejected a Free Exercise challenge to West Virginia's mandatory childhood vaccination statute, which, like DOH's emergency rule, recognized only medical but not religious exemptions. *See Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir. 2011); *see also F.F. v. State*, 194 A.D.3d 80, 88 (3d Dep't) (rejecting Free Exercise challenge to

[33] *See* Cal. Health & Safety Code § 120325 et seq. (Westlaw 2021); Conn. Gen. Stat. Ann. § 10-204a (Westlaw 2021); Me. Rev. Stat. Ann. tit. 20-A, § 6355 (Westlaw 2021); Miss. Code Ann. § 41-23-37 (Westlaw 2021); W. Va. Code Ann. § 16-3-4 (Westlaw 2021).

removal of religious exemption for schoolchildren), *appeal dismissed & lv. denied*, 37 N.Y.3d 1040 (2021).

More fundamentally, DOH was not obligated to follow the choices of other States that have allowed religious exemptions from COVID-19 vaccination requirements. "It is one of the happy incidents of the federal system that a single courageous state may" chart its own course and depart from the policies of other States. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And state public health officials have the greatest latitude when, as here, there remains significant uncertainty about the best manner of responding to a devastating infectious disease. As plaintiffs acknowledge (Br. at 26-27), States have taken a wide variety of approaches to COVID-19, with some requiring vaccinations (among healthcare workers or other populations), and others going in the opposite direction and *prohibiting* vaccination requirements. *See In re State*, No. 21-873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021). Strict scrutiny does not constrain States to adopt the lowest-common-denominator policy of their fellow States. *Cf. Bell v. Wolfish*, 441 U.S. 520, 554 (1979) ("the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions"). And when, as here, policymakers "undertake[] to act in areas fraught with medical and scientific uncertainties . . . courts should be cautious" not to override those expert judgments based on their own litigation-driven view of the facts. *Marshall v. United States*, 414 U.S. 417, 427 (1974).

In any event, New York's unique experience with COVID-19 would justify even a truly unique approach to protecting the healthcare sector here. New York bore the brunt of the initial wave of COVID-19, which tore through New York City in March and April 2020. As an amicus observed below, "[d]uring the first wave, healthcare workers were much more likely to contract the virus than the general population," and "[r]ates of infection and death were highest among frontline staff, such as nurses and physicians." Br. for Amicus Curiae Greater N.Y. Hosp. Ass'n in Supp. of Defs.-Appellees at 3, CA2 No. 21-2179, ECF No. 124. Given New York's experience at the forefront of responding to the COVID-19 pandemic in the United States, it is entirely unsurprising that New York would be a leader in mandating COVID-19 vaccinations for all healthcare workers medically eligible to receive one.

2. Plaintiffs are unlikely to succeed on their Title VII preemption claim.

a. Plaintiffs are also unlikely to succeed on their claim invoking Title VII because they have failed to show the type of irreconcilable conflict between Title VII and DOH's emergency rule that would be necessary to establish federal preemption. Beyond the ordinary presumption against preemption, *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), in enacting Title VII, Congress included two provisions explicitly disclaiming "any intent categorically to pre-empt state law"; those provisions "severely limit Title VII's pre-emptive effect." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 282 (1987) (op. of Marshall, J.). Congress provided that the Civil Rights Act as a whole should not be construed "as indicating an intent

on the part of Congress to occupy the field" in which any title operates. 42 U.S.C. § 2000h-4. And Title VII specifically does not "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State"—except in the limited circumstance where a state law "require[s] or permit[s] the doing of any act which would be an unlawful employment practice," and thus results in an actual conflict with Title VII. *Id.* § 2000e-7. Plaintiffs have failed to show that the DOH emergency rule conflicts with federal law under these standards.

First, plaintiffs' Title VII claim rests on the erroneous factual premise that the emergency rule implements a "categorical ban on religious accommodations." (Br. at 29.) The Second Circuit correctly rejected this premise, explaining that the rule "does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." (App. 42; *WTP*, at *17; *cf. Mills*, 16 F.4th at 28 (reaching similar conclusion regarding Maine's rule).) Specifically, because the rule applies only to personnel "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease," 10 N.Y.C.R.R. § 2.61(a)(2), nothing in the rule bars employees from being reassigned to activities that would not be covered by this language, such as remote work.

Plaintiffs argue that the emergency rule precludes employers from offering the particular accommodation that they would prefer—namely, continuing "physical contact with patients or other employees" despite being unvaccinated. (Br. at 31.) But

Title VII does not require that employees receive their preferred accommodation; rather, "any reasonable accommodation by the employer is sufficient to meet its accommodation obligation." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986); *see also Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). And on this threadbare record, plaintiffs have not established whether they have requested (or whether their employers can make available) reassignments or other adjustments that would remove them from the scope of the emergency rule and allow them to continue working without exposing other personnel, patients, or residents to COVID-19. Although plaintiffs sometimes assume that any such accommodation is categorically unavailable (see, e.g., Br. at 32 n.30), their own allegations suggest otherwise: for example, at least one plaintiff "has been 100% remote for the past 18 months" (App. 171), work that would appear to be outside the scope of the emergency rule. "[W]ithout any data in the record," the court below properly "decline[d] to draw any conclusion about the availability of reasonable accommodation based solely on surmise and speculation." (App. 43; *WTP*, at *17.)

The record is equally devoid of any evidence to support plaintiffs' assertion (Br. at 31-32) that their employers are offering accommodations to employees with medical exemptions while denying comparable accommodations to employees with religious objections to the COVID-19 vaccines. As this Court has recognized, such claims of discriminatory accommodation policies "turn[] on factual inquiry into past and present administration" of accommodations by particular employers. *Ansonia Bd. of Educ*, 479 U.S. at 70. But here, no employers are identified; there is no evidence of

"Plaintiffs' interactions with their employers" or their employers' accommodations for medically ineligible employees (App. 43; *WTP*, at *17); and the emergency rule itself does not dictate any particular accommodations, *see* § 2.61(d)(1). As the Second Circuit correctly noted, "the Rule does not prevent healthcare entities from taking additional precautions to minimize the transmission risk posed by medically exempt employees" beyond simply requiring personal protective equipment (App. 43; *WTP*, at *17 n.33), and plaintiffs can point to no evidence that employers have uniformly declined to adopt such additional precautions for medically ineligible staff. This barren factual record thus does not support plaintiffs' unsupported assertion that their employers are administering accommodations in an impermissibly discriminatory way.

Second, plaintiffs have not shown an irreconcilable conflict between the emergency rule and Title VII because the accommodation they prefer—working directly with patients, residents, and other personnel while remaining unvaccinated—is not *required* by Title VII, even assuming that other accommodations were not available. Title VII requires employers only to make reasonable accommodations that do not impose more than "a de minimis cost." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). And this Court has expressly recognized that such costs can justify an employer's rejection of a requested religious accommodation. For example, this Court concluded in *Hardison* that Title VII did not prohibit the termination of an employee whose religious beliefs prohibited him from working on Saturdays where the proposed scheduling accommodations would involve

costs in the form of "lost efficiency in other jobs or higher wages." *Id.* at 84; *see also Mills*, 16 F.4th at 36.

In weighing whether a proposed accommodation is unreasonable or would impose an undue hardship, courts give heavy weight to workplace safety. "Title VII does not require that safety be subordinated to the religious beliefs of an employee." *Draper v. United States Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975). Thus, courts have upheld employers' rejection of accommodations that would compromise safety in the workplace, such as a subway worker's request not to wear a hard hat,[34] or a firefighter's request to grow a beard that would interfere with his ability to wear a respirator.[35] These decisions reflect the critical understanding that workplace safety standards protect others besides just the employee requesting the accommodation, and further ensure that employers can effectively provide goods and services. Title VII thus does not require accommodations that could be provided "only at the expense of others," or that would undermine the employer's operations. *Hardison*, 432 U.S. at 81; *see also Knight v. Connecticut Dep't of Public Health*, 275 F.3d 156, 168 (2d Cir. 2001) (state agency not required to allow employees "to evangelize while

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[34] *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 758 (E.D.N.Y. 1998), *aff'd on op. below,* 189 F.3d 461 (2d Cir. 1999).

[35] *Hamilton v. City of New York*, No. 18-cv-4657, 2021 WL 4439974, at *6 (E.D.N.Y. Sept. 28, 2021); *see also Sides v. NYS Div. of State Police*, No. 03-cv-153, 2005 WL 1523557, at *2, 6 (N.D.N.Y. 2005) (refusal of New York State Police to hire applicant who could not work on the Sabbath did not violate Title VII because proposed accommodation "could conceivably threaten to compromise public safety").

providing services to clients" given that such an accommodation "would jeopardize the state's ability to provide services in a religion-neutral" manner).

Here, plaintiffs' requested religious accommodation would both risk workplace safety and undermine DOH's policy of promoting public health. See *supra* at 11-13. Because these consequences impose more than a de minimis cost, plaintiffs' proffered accommodation is not required under Title VII. Accordingly, even if plaintiffs cannot be reassigned, Title VII does not obligate plaintiffs' employers to subordinate the health and safety of their patients, residents, and workers to plaintiffs' religious beliefs.

b. Plaintiffs respond (e.g., Br. at 34) that some employers may *want* to allow an unvaccinated healthcare worker to continue coming into contact with other people, and that the emergency rule conflicts with Title VII by forbidding such voluntary arrangements. This argument for preemption rests on two fundamentally mistaken premises.

First, plaintiffs mistakenly assume that the religious exemptions they have previously been granted necessarily reflected a judgment by their employers that they faced no "undue hardship" under Title VII from having unvaccinated workers interact with others. That assumption is unfounded. Many employers may simply have been responding to the temporary restraining orders issued by lower courts against the emergency rule—including orders that did not involve a Title VII claim at all. *See, e.g.*, *We The Patriots USA, Inc. v. Hochul*, No. 21-2179 (2d Cir. Sept. 30, 2021), ECF No. 65. Other employers may have been motivated by fear of litigation

from employees like these plaintiffs, or other factors unrelated to Title VII. Plaintiffs thus have no basis beyond conjecture to surmise that the religious exemptions they have received necessarily reflected their employers' views of undue hardship under Title VII.

Second, even if a particular employer were willing to accept the risk of an unvaccinated healthcare worker, that willingness would not make the employer's accommodation one that is *required* by Title VII. Because Title VII imposes a floor but not a ceiling, employers are free to offer accommodations beyond what the federal statute would require—and States are not barred from regulating such employer decisions outside the scope of Title VII. *See California Fed. Sav.*, 479 U.S. at 284-87 (rejecting preemption claim against California statute that provided pregnancy disability benefits beyond what Title VII required). Indeed, Title VII respects rather than undermines the States' traditional prerogative to regulate health and safety: as discussed (see *supra* at 33), "safety considerations are highly relevant" to the question of which accommodations may "reasonably" be offered without imposing an "undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j). *See Draper*, 527 F.2d at 521; *cf. Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 78-79 (2002) (Americans with Disabilities Act allows "employer[s] to screen out a potential worker . . . not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety").

Here, the emergency rule reflects DOH's expert judgment that COVID-19 vaccination is essential to protect healthcare workers, the vulnerable populations

they serve, and the healthcare system as a whole. And this point would be true even if a particular employer were willing to overlook such risks to retain a particular employee—just as an employer's willingness to excuse a surgeon's refusal to wash her hands would not eliminate the harms caused by that decision. Nothing in Title VII supports plaintiffs' view that the statute respects only *employers'* safety concerns, while disregarding *the States'* judgments about the minimum requirements to protect health and safety in the workplace—judgments that ordinarily receive heavy weight in any preemption analysis. *See Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 715 (1985). Put simply, the statute does not allow an employer to ignore important state health and safety regulations under the guise of complying with Title VII.

c. Finally, plaintiffs assert (Br. at 30) that an interim final rule recently promulgated by the Centers for Medicare and Medicaid Services (CMS) and guidance issued by the Equal Employment Opportunity Commission (EEOC) support their Title VII claim. *See* Medicare and Medicaid Programs – Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555 (Nov. 5, 2021); EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Oct. 28, 2021). The courts below did not consider the effect of these documents, and this Court should decline to do so for the first time on this emergency stay application. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, neither the CMS interim final rule nor the EEOC guidance supports plaintiffs' claim. The CMS rule merely advises covered facilities that Title VII continues to apply—an undisputed proposition. 86 Fed. Reg. at 61,572. Nothing in the CMS rule dictates that particular accommodations be provided. And nothing in the CMS rule requires employers to disregard the risk of COVID-19 spread by unvaccinated individuals; to the contrary, the rule expressly acknowledges that "[i]n granting such exemptions or accommodations, employers must ensure that they minimize the risk of transmission of COVID-19 to at-risk individuals, in keeping with their obligation to protect the health and safety of patients." *Id.*

The EEOC guidance likewise does not support plaintiffs' claim that they are entitled to their preferred accommodation. Indeed, the EEOC guidance recognizes that permissible Title VII accommodations would include "a modified shift," "telework," or "reassignment"—all of which are permitted by DOH's emergency rule. EEOC, *What You Should Know*, *supra*. EEOC's guidance thus confirms that the emergency rule does not categorically prohibit accommodations that would be allowed under Title VII.

3. Plaintiffs' objection to a nonparty state agency's administration of unemployment benefits was never presented below, is unrelated to the emergency rule at issue here, and cannot support a stay of the rule.

Plaintiffs argue—for the first time in this litigation—that DOH's emergency rule triggers strict scrutiny in light of subsequent guidance issued by a nonparty state agency, the New York State Department of Labor (DOL), which says that healthcare

workers may be ineligible for unemployment insurance benefits if they "voluntarily quit or are terminated for refusing an employer-mandated vaccination . . . absent a valid request for accommodation."[36] According to plaintiffs, because only medical exemptions are available under DOH's emergency rule, DOL's new guidance categorically denies unemployment insurance benefits to healthcare workers with religious objections to COVID-19 vaccination and thus "target[s] religious objectors." (Br. at 23.)

As an initial matter, this Court should decline to consider this new argument, which plaintiffs raised for the first time in their stay application. Plaintiffs failed to raise this argument below—including in their merits brief to the Second Circuit, which they filed nearly one month after the DOL guidance was issued.[37] Plaintiffs have also never directly challenged DOL's guidance or sued DOL itself. As a result, no court below addressed this argument. *See Cutter*, 544 U.S. at 718 n.7. And DOL's guidance has no direct nexus to plaintiffs' claims here: it was issued by an agency that is not a party to this case; it addresses eligibility requirements for unemployment benefits that are not at issue here; and it does not affect the implementation of the DOH emergency rule that is actually under review.

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[36] *See* DOL, *Unemployment Insurance: Top Frequently Asked Questions*. In their application, plaintiffs erroneously assert that the website is maintained by DOH. (Br. at 9, 23.) It is maintained by DOL.

[37] *See* Br. for Pls.-Appellees, *Dr. A. v. Hochul*, No. 21-2566 (2d Cir. Oct. 22, 2021), ECF No. 38.

In any event, plaintiffs simply misinterpret the guidance. DOL does *not* categorically deny unemployment insurance benefits to healthcare workers who quit or are terminated because they refuse to take the COVID-19 vaccination on religious grounds. As the guidance makes clear, benefits are available so long as there was "a valid *request* for accommodation." And, for purposes of determining eligibility for unemployment insurance benefits, a valid request may exist even if an employer was unable or unwilling to provide the accommodation, thereby leading to the employee's resignation or termination. There is thus no basis on this record to presume that healthcare workers will in fact be denied unemployment insurance benefits if they lose their jobs based on their religious objections to receiving the COVID-19 vaccines.

C. The Absence of Irreparable Injury and the Balance of the Equities Weigh Heavily Against an Injunction.

The extraordinary relief of an emergency stay is also unwarranted here for the additional reason that these plaintiffs have failed to establish either irreparable injury or a balance of the equities in their favor.

1. Plaintiffs have failed to establish that they will suffer any harms that are either imminent or irreparable. *First*, plaintiffs' threadbare evidence fails to establish that they face any imminent threat of adverse employment actions. (The district court notably did not rely on any such harm in issuing its preliminary injunction. (App. 71-72, 84-85.)) Nothing in the emergency rule requires employers to terminate or otherwise take adverse employment actions against unvaccinated healthcare workers. Rather, employers can comply with the emergency rule by

reassigning unvaccinated workers to activities where, if they were infected, they would not pose a risk of transmitting COVID-19 to patients, residents, or other workers. *See* § 2.61(a)(2). Plaintiffs have not proffered any evidence that they have sought (or been denied) such a reassignment.

Second, even if plaintiffs did face the imminent harms they allege, it is well-established that loss of employment, and the resulting financial loss, do not constitute "irreparable harm" because plaintiffs can be fully compensated by reinstatement or money damages, including in claims against their employers. *See Sampson v. Murray*, 415 U.S. 61, 90-92 (1974). Plaintiffs also assert irreparable injury from an imminent deprivation of their First Amendment right to free exercise. *See Roman Catholic Diocese*, 141 S. Ct. at 67. But plaintiffs have not established that DOH's emergency rule directly compels them to act in violation of their religious beliefs. They remain free to refuse a COVID-19 vaccine, subject to potential employment consequences. This purported harm bears no resemblance to the harm in *Roman Catholic Diocese*, where this Court found that the executive orders under review directly interfered with religious exercise by barring "the great majority of those who wish[ed] to attend" religious services from doing so. *Id.* at 67-68.

In contrast to plaintiffs' failure to show imminent irreparable harm, the public faces the risk of imminent irreparable harm if DOH's emergency rule were stayed. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Achieving high vaccination rates in particularly vulnerable settings is of the utmost importance. Those vulnerable populations include immunocompromised patients especially

susceptible to viral infections and people who cannot receive the COVID-19 vaccine because they are too young or have contraindications. The COVID-19 vaccines have been proven to be extremely safe and effective at protecting healthcare workers themselves and the populations they serve from suffering severe complications from COVID-19. See *supra* at 4-5. And the vaccination requirement will also protect others who need emergency medical treatment from the consequences of staffing shortages and overstrained emergency rooms that could follow a COVID-19 outbreak among healthcare workers.

These concerns are especially urgent now in light of the uncertainty surrounding the scope of future COVID-19 outbreaks. The emergence and prevalence of the Delta variant have led experts to predict that there will be a fall surge in COVID-19 infections. And limited healthcare resources will soon face additional strains due to seasonal influenza and other diseases that accompany the onset of fall and winter. Vaccination of healthcare workers will help to prevent additional burdens from being inflicted on the healthcare sector at the precise moment when it is at risk of becoming overtaxed. Accordingly, the balance of the equities tips decidedly in favor of defendants.

CONCLUSION

The emergency application for a writ of injunction should be denied.

Dated: New York, NY
November 16, 2021

Respectfully submitted,

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