No. 22-2858

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

John Does 1-2, Jane Does 1-3, Jack Does 1-750, Joan Does 1-750,

Plaintiffs-Appellants,

v.

Kathy Hochul, in her official capacity as Governor of the State of New York, Howard A. Zucker, in his official capacity as Commissioner of the New York State Department of Health, Trinity Health, Inc., New York-Presbyterian Healthcare System, Inc., Westchester Medical Center Advanced Physician Services, P.C., as assignee of WMC Health,

Defendants-Appellees.

On Appeal from United States District Court for the Eastern District of New York, No. 1:21-cv-05067-AMD-TAM, Hon. Ann M. Donnelly

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@lc.org – hmihet@lc.org
rgannam@lc.org – dschmid@lc.org
Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST STATE DEFENDANTS ARE NOT MOOT.

State Defendants contend the "case is moot" as to them. (Doc. 102, Brief for Appellees Governor Kathy Hochul and Commissioner James V. McDonald ("State Brief"), 23.) State Defendants' sole justification for the contention is that they "have **proposed** repeal" of the Vaccine Mandate. (State Br. 23–24 (emphasis added).) But proposed repeals are not sufficient to moot a case because they have not happened yet. Indeed, the Court is "not required to dismiss a live controversy as moot merely because it may become moot in the near future." *Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1142 (9th Cir. 2009). Nevertheless, even if the Court did consider a proposed repeal that may happen sometime in the future to warrant a finding of mootness—which it should not—Plaintiffs' challenge to the Vaccine Mandate survives a mootness determination under the exceptions to mootness.

A. State Defendants' Voluntary Cessation of the Challenged Mandate Does Not Moot Plaintiffs' Claims.

1. State Defendants bear a formidable burden in demonstrating mootness.

State Defendants bear a "heavy burden" in making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.*, 528 U.S. 167, 189

(2000)); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 653 (1953) (same); *Los Angeles Cnty. v. Lyons*, 440 U.S. 625, 631 (1979) ("The burden of demonstrating mootness is a heavy one." (cleaned up)). The government's burden to demonstrate Plaintiffs' claims are moot is "formidable" and requires absolute clarity that a return to prior unlawful ways will not occur. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). State Defendants have not made and cannot make that showing.

2. State Defendants' retention of authority to reinstate the mandate negates mootness.

As the Supreme Court unequivocally declared in *Tandon v. Newsom*, "even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case." 141 S. Ct. 1294, 1297 (2021). "And so long as a case is not moot, litigants otherwise entitled to . . . relief remain entitled to such relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020)). This is true where "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon*, 141 S. Ct. at 1297. Thus, "the rescission of the policy does not render this case moot." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1637 n.* (2018).

State Defendants have not asserted that they have repealed the Vaccine Mandate and will not reinstate one like it in the future, but only that they have "issued

a proposed rulemaking that will repeal the rule" at some point in the future. (State Br. 28.) They even concede the case is not moot *now*, arguing instead that the case "will certainly be moot when the repeal process is complete." (State Br. at 30.) Even when (or if) the repeal occurs, however, neither the proposed repealing rule nor State Defendants' brief makes it absolutely clear that the challenged conduct is not likely to recur. The absence of absolute clarity and retention of authority are fatal to any contention of mootness. *See, e.g.*, *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018) ("[W]e have held a defendant does not meet its burden of demonstrating mootness when it retains authority to 'reassess' the challenged policy 'at any time.'" (quoting *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013))).

Put simply, given the ever-changing nature of COVID-19 infringements on religious exercise, "there is no reason why [plaintiffs] should bear the risk of suffering further irreparable harm in the event of another [mandate]." *Roman Catholic Diocese*, 141 S. Ct. at 68–69. Thus, the Court should reject State Defendants' proposition to "send the plaintiffs home with an invitation to return later if need be." *Id.* at 71 (Gorsuch, J., concurring).

> [I]f [the Court] dismissed this case, nothing would prevent the Governor from reinstating the challenged [mandate] tomorrow. And by the time a new challenge might work its way to [the Court, she] could just change [it] again. The Governor has fought this case at every step of the way. To turn away religious [plaintiffs] bringing meritorious claims just because the Governor decided to hit the "off" switch in the

> shadow of [the Court's] review would be . . . just another sacrifice of fundamental rights in the name of judicial modesty.

Id. at 72 (Gorsuch, J., concurring).

3. State Defendants' continued defense of the mandate negates mootness.

A case is not moot where, as here, State Defendants "did not voluntarily cease the challenged activity because [they] felt [it] was improper," and have "at all times continued to argue vigorously that [their] actions were lawful." *Olagues v. Russoniello*, 770 F.2d 791, 795 (9th Cir. 1985); *see also Pierce v. Ducey*, No. CV-16-01538-PHX-NVW, 2019 WL 4750138, at *1 (D. Ariz. Sept. 30, 2019) ("A voluntary cessation joined with a threat to do it again is the paradigm of unsuccessful blunting of power to adjudicate . . . ."), *vacated on other grounds*, 965 F.3d 1085 (9th Cir. 2020).

"[W]hen the government ceases a challenged policy without renouncing it, the voluntary cessation is less likely to moot the case." *Pierc*e, 2019 WL 4750138, at *5. Here, far from renouncing the Vaccine Mandate, State Defendants devote the majority of substantive argument in their brief to defending the constitutionality of the mandate. (State Br. 37–57.) At no point do State Defendants admit that the Vaccine Mandate was erroneous, that it violates the constitutional rights of religious objectors, or that it was in any way unlawful. In fact, State Defendants note that their Vaccine Mandate's treatment of religious objections "readily cleared" the relevant

constitutional inquiry (State Br. 37) and continue to insist that their unconstitutional treatment of religious objectors "protected the health of the workers themselves and prevented them from being vectors of transmission to their colleagues and the vulnerable populations they serve." (State Br. 53.)

"Far from being a Damascene conversion," *Frisby v. Larsen*, 330 F. Supp. 545, 549 n.17 (N.D. Cal. 1971), State Defendants' proposed rescission of the Vaccine Mandate reflects no considered judgment as to its constitutional infirmity. State Defendants imposed the Vaccine Mandate on all Plaintiffs, causing their injury by termination of employment. (Addendum 2 n.4.) After imposing this constitutional injury, and without retreating from its defense, State Defendants assert that Plaintiffs' claims are moot—or, more precisely, "will certainly be moot when the repeal process is complete." (State Br. 30.) This is not the law.

"[A] defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." *Sheely v. MRI Radiology Net., P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007). In such a case, State Defendants' constant refrain that their refusal to follow the commands of the First Amendment was never unlawful negates mootness. *See, e.g., id.* (collecting cases showing mootness defeated by failure to admit unlawful conduct and provide assurances of not returning to it); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833–34 (11th Cir.

1989) (holding matter not moot when defendant "never promised not to resume the prior practice" and continually pressed "that the voluntarily ceased conduct should be declared constitutional"); *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 127 (5th Cir. 1973) ("[I]n the face of appellant's own inability to recognize his transgressions of the Act, we decline to assume he will not violate the Act in the future."); *Pierce*, 2019 WL 4750138, at *6 ("There is nothing in the parties' submissions or the record to demonstrate the Governor changed his mind about the merits of Plaintiff's claim.").

4. State Defendants' proposed repeal sounds of litigation tactics rather than genuine retreat from unlawful conduct.

Despite having the Vaccine Mandate in place since August 16, 2021 (JA 032, V. Compl., ¶ 33), only now—almost two years after imposition of the mandate and on the eve of a briefing deadline—do State Defendants **propose** repealing it. This seemingly litigation-induced timing, combined with the expressed hostility towards religious objectors in New York, betrays an intent to go back. *Cf. Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such [post-litigation] maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 871 (2005) (rejecting counties' mere "litigating position" as evidence of actual intent of county policies). "The defendant[s are] free to return to [their] old ways. This, together with a public interest in having the legality of the practices settled, militates against a

mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (cleaned up).

B. Plaintiffs' Claims Are Not Moot Because They Are Capable of Repetition Yet Evading Review.

1. Plaintiffs have had insufficient time to complete their legal challenge prior to State Defendants' proposed repeal of the Vaccine Mandate, and the mandate is reasonably likely to return in the future.

Not only can State Defendants not carry their burden under the voluntary cessation doctrine, but this case also "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). "The exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* Both circumstances are present.

There is no question that the duration of the Vaccine Mandate was always going to be "too short to be fully litigated prior to cessation or expiration." Here, State Defendants imposed the Vaccine Mandate on healthcare workers on August 16, 2021. (JA 032, V. Compl., ¶ 33.) Plaintiffs commenced this action on September 10, 2021. (JA 005.) The district court denied injunctive relief on August 2, 2022 (Addendum 13) and dismissed Plaintiffs' claims on September 30, 2022 (Addendum

1–38). Plaintiffs commenced this appeal on October 28, 2022. (JA 259.) State Defendants formally proposed rescinding the mandate on May 24, 2023 (State Br. 14), while the appeal still pends. Even if the proposed repeal of the mandate could otherwise moot Plaintiffs' claims, the duration of the mandate was too short to be fully litigated. *See Kingdomware Tech., Inc. v. United States*, 579 U.S. 162, 169–170 (2016) (two years is too short); *Turner v. Rogers*, 564 U.S. 431, 440 (2011) (12 months is too short); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) (18 months is too short); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (two years is too short).

Kingdomware Technologies involved the claims of a veteran-owned business against the Department of Veterans Affairs (VA) for failing to follow procurement rules that would have given the business a competitive advantage in bidding for VA procurement contracts. *See* 579 U.S. at 164. Because the case reached the Court four years after it was commenced, and the work the business desired to perform for the VA was already complete, the Court found that "no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks." *Id.* at 169–170. The Court concluded that the "capable of repetition, yet evading review" exception applied because the short-term procurement contracts at issue "were fully performed in less than two years after they were awarded," and "a period of two years is too short to complete judicial review of the lawfulness of the

procurement." *Id.* at 170 (internal quotation marks omitted) (citing, *inter alia*, *Southern Pac. Terminal Co.*, 219 U.S. at 514–16). Thus, the case was not moot "because the same legal issue in [the] case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete." *Id.*

In *First National Bank*, two banks that wanted to spend money to influence the vote on state referendum proposals were restricted in their advocacy by state criminal statutes. *See* 435 U.S. at 767–68. In determining whether the banks' claims were moot, because the vote on the most recent referendum was already concluded, the Court found that "[u]nder no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment" because in each of the four previous referendum attempts by the state legislature "the period of time between legislative authorization of the proposal and its submission to the voters was approximately 18 months," which "proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long." *Id.* at 774–75. The Court also found that, given the legislature's track record with referenda and the banks' continuing desire to influence referendum votes, there could be no serious doubt that the banks would

be subject to the criminal statute's restrictions in the future. *Id.* Thus, the Court held the case was not moot. *Id.* at 775.

Moreover, a court is "more likely to find that the challenge behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly." *Sheely v. MRI Radiology Net., P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007). Here, the opposite is true. State Defendants imposed the Vaccine Mandate and manifested their hostility towards religious beliefs with explicit intentionality. As the record reveals, Governor Hochul showed no hesitation or reluctance in chastising religious objectors. (*See* JA 232 (noting Governor Hochul's speech criticizing Plaintiffs and other religious objectors for their sincerely held religious beliefs: "there's people out there who aren't listening to God and what God wants. **You know who you are**." (emphasis added)).) State Defendants appointed themselves arbiters of appropriate religious beliefs in New York and imposed the Vaccine Mandate intentionally. Such intentionality, and State Defendants' persistent defense of the mandate throughout this litigation (*see* pt. I.A.3, *supra*), create **at least** a reasonable likelihood that such a mandate will return in the future.

2. State Defendants' contrary arguments ignore binding precedent.

State Defendants contend the duration of the Vaccine Mandate was not too short to be fully litigated. (State Br. 33–34.) The sole basis for their contention,

however, is that the preliminary injunction phases of certain other litigation were fully litigated. (State Br. 33–34.) This contention ignores the law. Under binding Supreme Court precedent, a matter is not "fully litigated" unless concluded on the merits in the trial court and submitted to appellate review, including up to the Supreme Court. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011). As the Ninth Circuit has recognized, "[a]n action is 'fully litigated' if it is reviewed by this Court and the Supreme Court." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013); *see also Video Tutorial Servs., Inc. v. MCI Tele. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (matter too short in duration if it cannot be "effectively appealed before it expired"). Plaintiffs' claims are not moot because State Defendants' conduct is capable of repetition yet evading review.

C. Plaintiffs' Claims for Permanent Injunction and Declaratory Relief Are Not Moot.

Plaintiffs' claims for declaratory relief and a permanent injunction preventing State Defendants from reinstating the Vaccine Mandate are not moot. "The court may consider how easily former practices might be resumed at any time in determining the appropriateness of injunctive relief." *United Air Lines, Inc. v. Air Line Pilots Ass'n Int'l.*, 563 F.3d 257, 275 (7th Cir. 2009); *see also Scotch Whisky Ass'n v. Barton Distilling Co*., 489 F.2d 809, 813 (7th Cir. 1973) (holding district court did not abuse its discretion when entering injunction against unlawful conduct that "ceased before the trial has taken place"). Indeed,

> While the preliminary injunction diminished the *immediate* threat of prosecution, it is important not to confuse the threat of enforcement that existed relative to [the plaintiff's] immediate advocacy, with the broader threat of enforcement that must be considered by this Court with respect to his requests for declaratory and permanent injunctive relief.

Hatchett v. Barland, 816 F. Supp. 2d 583, 593 (E.D. Wis. 2011). Thus, even in a case where preliminary relief was moot, "[t]he case itself was not moot, because a request for a permanent injunction was pending," and the plaintiff's rights were subject to similar deprivation in the future. *Certified Grocers of Ill., Inc. v. Produce, Fresh & Frozen Fruits & Vegetables, Fish, Butter, Eggs, Cheese, Poultry, Florist, Nursery, Landscape & Allied Emps., Drivers, Chauffeurs, Warehousemen & Helpers Union, Chicago and Vicinity, Ill., Local 703*, 816 F.2d 329, 331 (7th Cir. 1987) (emphasis added). Claims for a permanent injunction are not moot where—as here—a "prior pattern of contradictory behavior [leaves] the Court with no assurance that the alleged constitutional violations [will] not recur." *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 48 (1st Cir. 2010) (cleaned up). Accordingly, in *Harvest Rock Church, Inc. v. Newsom*, No. 2:20-cv-6414, Doc. 95 (C.D. Cal. May 14, 2021), the district court issued a permanent injunction against restrictions that had been rescinded but could be reinstated at any time.

D. Plaintiffs' As-Applied Claims Are Not Moot.

Importantly, in "an as-applied challenge, [a court] examine[s] the facts of the case before [it] exclusively, and not any set of hypothetical facts under which the

statute might be unconstitutional." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012); *see also Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008) ("The amendments to the picketing ordinances here do not moot Green's as-applied challenges to the original ordinances."); *Nextel W. Corp. v. Unity Twp.*, 282 F.3d 257, 263 (3d Cir. 2002) ("[A]lthough facial challenges were mooted by the amendment, the as-applied challenges were not moot because relief was still available for these claims, which the amendment had not redressed."); *id.* at 263 n.5 (noting that declaratory and injunctive relief still available for as-applied challenges even after amendment to the challenged regulation); *Parker v. Judicial Inquiry Comm'n of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958, at *8 (M.D. Ala. Aug. 31, 2017) (holding government actions cannot moot as-applied challenge where plaintiff remains subject to the authority under which allegedly offending government action was instituted); *D'Acquisto v. Washington*, 750 F. Supp. 342, 346 (N.D. Ill. 1990) ("To hold that the claims of plaintiffs and those similarly situated were mooted by completion of the procedures they challenge would effectively eliminate the possibility of any 'as applied' challenge to those procedures. Dismissal of this action on grounds of mootness would be inappropriate under the circumstances.").

Here, Plaintiffs challenge the Vaccine Mandate both facially and as-applied. (JA 051–52, V. Compl., ¶¶ 120–136.) And, as the district court acknowledged

below, the mandate was already applied against Plaintiffs, causing their termination from employment. (Addendum 2 ("All of the plaintiffs have since been fired from their jobs.").) Despite any proposed repeal—an event not certain to occur—Plaintiffs have already suffered the constitutional injury imposed on them by the mandate. An as-applied challenge raising the Free Exercise violation imposed by the mandate is not moot.

II. PLAINTIFFS STATED A PLAUSIBLE FREE EXERCISE CLAIM.

A. State Defendants' Vaccine Mandate Was neither Neutral nor Generally Applicable.

State Defendants contend that the Vaccine Mandate was neutral and generally applicable and that it did not target religious practices because of religious motivation. (State Br. 37.) The district court largely agreed with this contention and dismissed Plaintiffs' Free Exercise claims. (Addendum 18–26.) Both are incorrect.

In a virtually identical challenge to a state vaccination mandate on healthcare workers in Maine, the First Circuit reversed the district court's dismissal of the Free Exercise claims of the plaintiffs. *See Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023). Notably, the district court's dismissal here relied on the now-reversed district court dismissal in *Lowe*. (*See* Addendum 22, 25.) In *Lowe*, as here, the plaintiffs challenged Maine's vaccination mandate on healthcare workers as a condition of maintaining their employment because the mandate did not provide any religious exemption but permitted nonreligious, medical exemptions. *Lowe*, 68 F.4th at 709.

There, as here, the district court concluded that the mandate was neutral and generally applicable. *Id.* The First Circuit disagreed, holding that the allowance of nonmedical religious exemptions while prohibiting religious exemptions of like kind was sufficient to support a Free Exercise claim. *Id.* ("[W]e conclude that the plaintiffs' complaint states claims for relief under the Free Exercise and Equal Protection Clauses, as it is plausible . . . that the Mandate treats comparable secular and religious activity dissimilarly without adequate justification."). The same is true here.

As New York does here (JA 032–034, V. Compl., ¶¶ 33–41), Maine permitted medical exemptions from the COVID-19 vaccine mandate for healthcare workers, but eliminated the previously available religious exemptions. *Lowe*, 68 F.4th at 710–11. The district court held, in its dismissal order, that the vaccine mandate was neutral and generally applicable. *Id.* at 713. The First Circuit reversed:

> [W]e conclude that it is plausible . . . that the Mandate falls in this category, based on the complaint's allegations that the Mandate allows some number of unvaccinated individuals to continue working in healthcare facilities based on medical exemptions while refusing to allow individuals to continue working while unvaccinated for religious reasons.

Id. at 714.

1. The district court erred in its finding that religious and medical exemptions did not pose comparable risks.

In *Lowe*, as here, the state argued that healthcare workers seeking an accommodation for religious reasons were not similarly situated to those seeking accommodation for nonreligious, medical reasons. *Id.* at 714–15. This is what the State argues here. (State Br. 45.) The district court below also held that the two unvaccinated individuals were not comparable for purposes of neutrality and general applicability. (Addendum 22–26.) The First Circuit rejected this conclusion in *Lowe*, and so, too, should this Court. Relying on the Supreme Court's decision in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), the First Circuit held that a mandate permitting an exemption for nonreligious, medical reasons is not neutral or generally applicable when it singles out religious reasons for remaining unvaccinated.

> Drawing all reasonable inferences in the plaintiffs' favor, it is plausible based on the plaintiffs' allegations that the medical exemption undermines these interests in a similar way to a hypothetical religious exemption. The availability of a medical exemption, like a religious exemption, could reduce vaccination rates among healthcare workers and increase the risk of disease spread in healthcare facilities, compared to a counterfactual in which the Mandate contains no exceptions, all workers must be vaccinated, and neither religious objectors nor the medically ineligible can continue working in healthcare facilities.

Lowe, 68 F.4th at 715.

2. The district court erred in accepting State Defendants' overgeneralized asserted interests.

The district court below accepted State Defendants' assertion that the two exemptions were not comparable because the justification for prohibiting religious exemptions was based on keeping vaccination rates high and medically exempt people cannot be vaccinated. (Addendum 22–26.) This is identical to what the district court concluded in *Lowe*. *See* 68 F.4th at 715. But again, the First Circuit rejected that analysis: "[T]he State has not asserted an independent interest in maximizing vaccination rates apart from the public health benefits of doing so, and the Supreme Court has instructed us to assess comparability in the public health context based on 'the risks various activities pose.'" *Id.* (quoting *Tandon*, 141 S. Ct. at 1296.). "Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. **Comparability is concerned with risks various activities pose, not the reasons why people [undertake them]**." *Tandon*, 141 S. Ct. at 1296 (cleaned up) (emphasis added). Plaintiffs' Complaint plainly alleges that an unvaccinated, religiously exempt healthcare worker would pose risk identical to that of an unvaccinated, medically exempt healthcare worker. (JA 056, ¶¶ 155–56, 158.) Justice Gorsuch agreed with that conclusion when discussing New York's similar vaccine mandate:

> At this point in the proceedings, the only question is whether the challenged law contains an exemption for a secular objector that undermines the government's asserted interests in a similar way an exemption for a religious objector might. Laws operate on individuals; rights belong to individuals. And **the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption**.

Dr. A. v. Hochul, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (cleaned up) (emphasis added).

The First Circuit reached the same conclusion when reversing the dismissal of the Maine healthcare worker's complaint: "it remains plausible that the Mandate's medical exemption creates comparable risks to those that would be created by a religious exemption, warranting strict scrutiny." *Lowe*, 68 F.4th at 717. This Court should likewise hold that New York's Vaccine Mandate fails neutrality and general applicability, and subject the mandate to strict scrutiny. The district court's contrary conclusion was in error.

B. The District Court Erred in Finding that the Vaccine Mandate Was Subject Only to Rational Basis Review.

Because Plaintiffs have adequately alleged that the Vaccine Mandate is neither neutral nor generally applicable, it is subject to strict scrutiny. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021). "That standard is not watered down; it really means what it says." *Tandon*, 141 S. Ct. at 1298. Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*,

521 US. 507, 534 (1997), which is rarely passed. *See Burson v. Freeman*, 504 U.S. 191, 200 (1992). Indeed, as the First Circuit held in *Lowe*,

> [b]ecause it is plausible, based on the complaint and without the benefit of factual development, that the Mandate is subject to strict scrutiny, dismissal would be appropriate only if the materials we may consider on a motion to dismiss establish that the Mandate survives that standard of review even when applying the Rule 12(b)(6) plausibility standard.

68 F.4th at 717. The district court below did not even consider strict scrutiny, much less apply it to the Vaccine Mandate. (Addendum 27–28.) For that reason alone, its order must be reversed—it is beyond cavil that applying the wrong standard of review requires reversal. *See Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620, 627 (2d Cir. 2018).

In a rare dissimilarity between the proceedings here and those in *Lowe*, State Defendants here do not even attempt to show that the Mandate survives strict scrutiny. (*Compare* State Br. 37–55 *with Lowe*, 68 F.4th at 718.) And, as *Lowe* notes, at the motion to dismiss stage the government must "show that the Mandate is narrowly tailored to advance a compelling government interest. 'Put another way, so long as the government can achieve its interest in a manner that does not burden religion, it must do so.'" 68 F.4th at 717 (quoting *Fulton*, 141 S. Ct. at 1881). As the First Circuit also noted, to survive such scrutiny, the government must "address the likely effects of including a religious exemption in the Mandate or give reasons why doing so would prevent the state from achieving its public health goals." *Id.* at 718.

Given State Defendants' and the district court's failure to even address the appropriate standard, the dismissal was in error. *See id.*

The district court erred in finding that Plaintiffs had not pleaded a plausible claim under the First Amendment, erred in subjecting Plaintiffs' Free Exercise claims to rational basis review, and erred in dismissing the complaint. This Court should reverse.

III. PLAINTIFFS STATED A PLAUSIBLE EQUAL PROTECTION CLAIM.

State Defendants also contend that Plaintiffs have failed to state an Equal Protection claim under the Fourteenth Amendment. (State Br. 55-57.) Their sole basis for doing so was reliance on the contention that Plaintiffs' Free Exercise claims fail. (State Br.55-57.) The district court likewise dismissed Plaintiffs' Equal Protection claims solely on the basis of its conclusion that Plaintiffs were not similarly situated to those who received nonreligious, medical exemptions. (Addendum 29 ("Employees with medical conditions cannot be vaccinated because it endangers their health; the plaintiffs have no medical condition, and thus can be vaccinated safely.").) Because of that erroneous finding, the district court held that "the equal protection claim fails because the free exercise challenge fails." (Addendum 29.) The district court provided no other justification for its dismissal of the Equal Protection claim, and State Defendants advance no other justification on appeal here. (Addendum 29; State Br. 55-57.)

Here, again, the First Circuit decision in *Lowe* is instructive. There, as here, "[t]he district court reasoned that, because it had concluded that the free exercise claim warranted only rational basis review, an equal protection claim resting on the assertion that the Mandate burdens the plaintiffs' free exercise rights must also receive rational basis review." *Lowe*, 68 F.4th at 718. And, like here, the government "endorses this reasoning [and] does not develop any argument that, if we reverse the dismissal of the free exercise claim, we can nonetheless affirm the dismissal of the equal protection claim." *Id.* (*See also* State Br. 55–57.) This Court should follow the First Circuit: "because we reverse the dismissal of the free exercise claim, we also reverse the dismissal of the equal protection claim." *Lowe,* 68 F.4th at 718.

State Defendants attempt to assert one additional reason—aside from reliance on the Free Exercise analysis—that Plaintiffs' Equal Protection claim fails. (State Br. 56 n.25 (contending that Plaintiffs' reliance on *Romer v. Evans*, 517 U.S. 620 (1996) is misplaced).) But State Defendants only raise that additional contention in a footnote and only in passing. It is therefore waived. *See United States v. Quinones*, 317 F.3d 86, 90 (2d Cir. 2003) ("we do not consider an argument mentioned only in a footnote to be adequately raised"). Even if it was not waived, it is still an erroneous contention. (*See* Plaintiffs-Appellants' Opening Br. 38–44.)

IV. PLAINTIFFS STATED A PLAUSIBLE TITLE VII CLAIM.

A. Provider Defendants' Reliance on the *Hardison de Minimis* Test Is in Error Because the Supreme Court Now Requires Significant Hardship.

Provider Defendants contend that the district court's decision should be affirmed because requiring them to provide the accommodation requested by Plaintiffs would impose an undue hardship on them. In so contending, Provider Defendants argue that the accommodation would result in more than *de minimis* costs to them. (Doc. 98, Brief for Defendant–Appellee Trinity Health, Inc. ("Trinity Brief"), 20 (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), for *de minimis* standard); Doc. 100, Brief for Defendant–Appellee Westchester Medical Center Advanced Physician Services ("WMC Brief"), 26 (noting that an undue hardship occurs whenever it results in "more than de minimis cost to the employer").)

On June 29, 2023, however, the Supreme Court released its decision in *Groff v. DeJoy*, No. 22-174, 2023 WL 4239256 (U.S. June 29, 2023), in which it clarified "that the *de minimis* reading of *Hardison* is a mistake." 2023 WL 4239256, at *4. Specifically, the Court stated: "We hold that showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII." *Id.* at *10. Instead, to be excused from providing a religious accommodation otherwise required under Title VII, an employer must

demonstrate that the "burden is substantial in the overall context of [the] employer's business." *Id.* Put simply, "[w]hat is most important is that 'undue hardship' in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test." *Id.* at *11.

Provider Defendants' reliance on the incorrect standard fatally undermines their contention that they have not violated Title VII. As the Supreme Court clarified in *Groff*, "**Title VII requires that an employer reasonably accommodate an employee's practice of religion**, not merely that it assess the reasonableness of a particular possible accommodation or accommodations." *Id.* at *12 (emphasis added). Provider Defendants failed to reasonably accommodate Plaintiffs, in violation of Title VII. The district court should be reversed.

B. The District Court Erred in Finding that a Violation of State Law Constitutes an Undue Hardship Under Title VII.

Provider Defendants all contend that, regardless of the appropriate standard under Title VII, forcing Provider Defendants to violate state law to comply with Title VII is an undue hardship. (Trinity Br. 23–29; WMC Br. 31–37; Doc. 101, Brief of Appellee New York-Presbyterian Healthcare System, Inc. ("NYP Brief"), 19–28.) The district court likewise held that Provider Defendants would suffer undue hardship if they were required to violate state law in order to comply with Title VII. (Addendum 33.) This Court should reject their erroneous view of the law.

The Eleventh Circuit's new decision in *Campbell v. Universal City Dev. Partners, Ltd.*, No. 22-10646, 2023 WL 4381000 (11th Cir. July 7, 2023), is particularly instructive on this point. There, the defendant claimed it could not comply with the requirements of the Americans with Disabilities Act because doing so would require it to violate state law. 2023 WL 4381000, at *1 ("Universal argues that 'compliance with state law' necessitates Universal's discriminatory eligibility requirement."). This is precisely what Provider Defendants argue here in relation to Title VII accommodation requirements. (NYP Br. 20–28; Trinity Br. 23–29; WMC Br. 31–37.) The Eleventh Circuit, however, explicitly and unequivocally rejected the defendant's argument:

> [T]o the extent that state law conflicts with the ADA and requires disability discrimination, we hold that "compliance with state law," in and of itself, cannot qualify as "necessary" under the ADA, or it would impermissibly preempt and effectively eviscerate the ADA. **So "compliance with state law" does not relieve Universal of its obligation to follow the ADA.**

Campbell, 2023 WL 4381000, at *1 (emphasis added).

The district court below held that Provider Defendants need not follow Title VII's commands where doing so "would require them to violate state law." (Addendum 32.) This is precisely what the Eleventh Circuit rejected: "The first reason Universal gives for why it must exclude Campbell is because state law requires it. We are not persuaded." 2023 WL 4381000, at *8. Both the district court below and the defendant in *Campbell* posited that defendants "can impose

discriminatory eligibility criteria when state law requires it to do so" and that "no conflict arises between state law and federal law, even if state law requires discrimination without any legitimate reasons for doing so." 2023 WL 4381000, at *8. (*See also* Addendum 32–36.)

The Eleventh Circuit rejected that rationale because it ignores the plain text of federal law: "[W]e must conclude that the text of the ADA precludes us from finding that it is 'necessary' to comply with state law when state law otherwise requires a public accommodation to violate the ADA." 2023 WL 4381000, at *8. Much like under Title VII, "a state law that provides *less* protection than the ADA to those with a disability is preempted." *Id.* at *9. The Eleventh Circuit's reasoning is plainly relevant here:

> For instance, if a state passed a law that required public accommodations to discriminate against those with a disability—say, to get a business license—that law would be preempted by the ADA. But if the state passed a law requiring businesses to provide *all* accommodations (not just *reasonable* ones) to those with a disability, that law would not be preempted by the ADA because it would provide greater protection to those with disabilities.

Id. The same is true under Title VII. Under the plain language of Title VII, New York'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 New York'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 is "an unlawful employment practice" under Title VII, *see* 42 U.S.C. §2000e-2(a), New York's rules are superseded and preempted by the plain language of Title VII.

Simply put, "if compliance with state law qualified as 'necessary' when it required discrimination that violates the ADA, it would conflict with the ADA's preemption provision." *Campbell*, 2023 WL 4381000, at *9. Indeed, "'a state law at odds with a valid Act of Congress is no law at all.'" *Id.* (quoting *Barber ex rel. Barber v. Colo. Dep't of Rev.*, 562 F.3d 1222, 1234 (10th Cir. 2009) (Gorsuch, J., concurring in the judgment)). "To paraphrase then-Judge Gorsuch, 'the demands of the federal [ADA] do not yield to state laws that discriminate against the disabled, it works the other way around.'" *Id.* (modification in original).

The reason for this is simple: "if compliance with state law" excused a defendant from complying with federal law, "then any state could unilaterally nullify [federal law] by enacting a state law requiring discrimination. That can't be right." *Id.*

> If the ADA requires allowing Campbell to ride, then Universal doesn't face criminal and civil penalties from Florida. The Supremacy Clause requires "a different order of priority." If federal law requires Universal to allow Campbell to ride, and state law forbids it, then Universal must let Campbell ride. Instead, Universal can assert the ADA as a defense to an enforcement action by Florida or seek a declaratory judgment ahead of time.

Id. at *10 (cleaned up). This Court, too, has recognized the faulty logic of Provider Defendants and the district court below. In *Mary Jo C. v. New York State and Local Retirement System*, the Court explained, "Congress clearly meant Title II to sweep broadly. If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws, state law would serve as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Title II." 707 F.3d 144, 163 (2d Cir. 2013) (cleaned up). The same is true for Title VII.

"Reliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause." *Barber*, 562 F.3d at 1233. Provider Defendants are not permitted to rely on State Defendants' revocation of protections for religious objectors as a defense for failure 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." (cleaned up)). The district court's conclusion that state law requirements excuse Provider Defendants from compliance with Title VII's requirements was plainly in error.

CONCLUSION

For the foregoing reasons, the district court should be reversed.

Respectfully submitted,

/s/ Daniel J. Schmid
Mathew D. Staver
Horatio G. Mihet
Roger K. Gannam
Daniel J. Schmid
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org | hmihet@LC.org
rgannam@LC.org | dschmid@LC.org
Counsel for Plaintiffs–Appellants

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/s/ Daniel J. Schmid
Daniel J. Schmid
Attorney for Plaintiff-Appellant

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Daniel J. Schmid
Attorney for Plaintiff-Appellant