

No. 21-717

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IN THE  
**Supreme Court of the United States**

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JOHN DOES 1–3, ET AL.,

*Petitioners,*

V.

JANET T. MILLS, GOVERNOR OF MAINE, ET AL.,

*Respondents.*

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

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**MOTION TO EXPEDITE CONSIDERATION OF THE  
PETITION FOR WRIT OF CERTIORARI AND REQUEST  
FOR EXPEDITED CONSIDERATION OF THIS MOTION**

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November 17, 2021

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Pursuant to Supreme Court Rule 21, Petitioners move for expedited consideration of their Petition for Writ of Certiorari filed November 11, 2021 and, if the Petition is granted, expedited merits briefing and oral argument. Petitioners show the Court their pressing need for swift resolution of the questions presented as follows:

### STATEMENT OF FACTS

On August 12, 2021, Governor Mills announced that Maine would require healthcare workers to accept or receive one of the three, currently available COVID-19 vaccines as a condition to continued employment in the healthcare profession. (Pet. 7 (citing Office of Governor Janet T. Mills, *Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1* (Aug. 12, 2021), <https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october> (hereinafter “COVID-19 Vaccine Mandate”)).) Pursuant to the Mandate, Dr. Shah and the Maine Center for Disease Control and Prevention (“MCDC”) amended 10-144 C.M.R. Ch. 264 to strip healthcare workers in Maine of their pre-existing right to request and obtain a religious exemption and accommodation from the Mandate. (Pet. 8 (citing V. Compl. ¶ 46).) In fact, as acknowledged by MCDC, Maine specifically and intentionally removed the religious exemption from mandatory immunizations effective September 1, 2021. (*Id.* (citing V. Compl. ¶ 49 (“The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization.”)).) The only exemptions Maine now allows for healthcare workers are for those individuals for

whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption. (*Id.* (citing V. Compl. ¶ 47).)

As detailed in the Petition, Petitioners have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines because of their connection to cell lines of aborted fetuses, whether in the vaccines' origination, production, development, testing, or other inputs. (Pet. 8–9 (citing V. Compl. ¶ 50).) Maine does not dispute that its new rule burdens the exercise of sincerely held religious beliefs. *Does 1-3 v. Mills*, No. 21A90, 2021 WL 5027177 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting). Rather, Respondents maintain they have no obligation to provide accommodations for sincerely held religious beliefs despite granting individualized medical exemptions. As a result, some Petitioners have already been fired for refusing to violate their religious beliefs, and others are facing imminent termination.

### **PROCEDURAL BACKGROUND**

Petitioners filed this action in the district court on August 25, 2021, and immediately moved for preliminary injunctive relief. (Pet. 17.) Over Petitioners' objections, the district court delayed a hearing until September 20. (*Id.*) The court then kept Petitioners' emergency motion under advisement for more than three weeks, waiting to rule until two days before Petitioners' vaccine compliance deadline. (Pet. 18.) On October 13, the district court finally denied Petitioners' preliminary injunction motion, holding that Petitioners were unlikely to succeed on the merits of their challenge to the Governor's COVID-19 Vaccine Mandate. (Pet. 18; App. 51a.)

Petitioners noticed their appeal to the First Circuit on the same day, within one hour of the district court's denial. (Pet. 1.)

In Petitioners' preliminary injunction motion to the district court, pursuant to Fed. R. App. P. 8(a)(1)(C), Petitioners also requested the alternative relief of an injunction pending appeal (IPA) if the court denied the preliminary injunction, which the district court also denied. (Pet. 18; App. 49a.) Within one hour of the First Circuit's docketing Petitioners' appeal on October 14, Petitioners filed an emergency IPA motion to the court. (Pet. 18.) The First Circuit Court denied the IPA motion without explanation on October 15. (App. 47a.) Petitioners applied to this Court for an emergency writ of injunction on the same day, October 15, and Justice Breyer denied that application without prejudice on October 19. (App. 45a.) Also on October 19 the First Circuit issued its decision affirming the district court's denial of a preliminary injunction. (Pet. 18; App. 12a.) The next day, October 20, Petitioners submitted to this Court a new emergency application for a writ of injunction, pending disposition of their forthcoming petition for writ of certiorari. (Pet. 18.) The Court denied the application on October 29. (App. 1a.) Petitioners filed their certiorari petition on November 11, 2021.

## **ARGUMENT**

“If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency.” *Does 1-3 v. Mills*, No. 21A90, 2021 WL 5027177, at \*8 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting). In this case, every day that the Court allows Maine to flagrantly disregard the First Amendment, Title VII, and Supremacy Clause is another day that Maine's citizens

are stripped of their right to free exercise of religion and the Title VII guarantees against religious discrimination. As a result of the First Circuit's decision to uphold Maine's COVID-19 Vaccine Mandate, hundreds of healthcare workers in Maine are losing their jobs and the financial means to provide for themselves and their families—they are jobless because Maine showed preferential treatment to those with secular reasons for refusing the vaccine over those with sincerely-held religious reasons.

The First Circuit decision sets dangerous precedent that states can nullify federal constitutional rights, Title VII, and the Supremacy Clause. Indeed, Maine is not alone in its frontal attack on the Supremacy Clause: New York's COVID-19 vaccine mandate also removed any right of healthcare workers to seek a religious exemption. Justice Sotomayor currently has before her two emergency applications for writs of injunction against the New York mandate pending disposition of forthcoming petitions for writs of certiorari, *see We The Patriots USA, Inc. v. Hochul*, No. 21A125, *and Dr. A v. Hochul*, No. 21A145, seeking review of the Second Circuit's decision in *We The Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 WL 5276624 (2d Cir. Nov. 12, 2021), *clarifying* 2021 WL 5121983 (2d Cir. Nov. 4, 2021) (consolidated for decision with *Dr. A*). Justice Sotomayor has requested and received responses to both applications. Furthermore, private employers around the nation are similarly denying religious exemptions, resulting in lawsuits. *See, e.g., Jane Does 1-14 v. NorthShore University Health System*, No. 1:21-cv-05683 (N.D. Ill. Oct. 29, 2021) (granting emergency injunctive relief against health system's vaccine mandate,

to fourteen plaintiffs and putative class representatives who faced termination after health system refused to consider exemption requests based on sincerely held religious beliefs). This Court should swiftly and clearly assert federal law's supremacy under these circumstances and preserve the cherished First Amendment liberties and critical Title VII rights being eroded each day.

Any argument that Maine should be permitted wide deference as it addresses COVID-19 must be tempered by the principle that “[g]overnment is not free to disregard the First Amendment in times of crisis.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). Nor should judicial deference to states in a time of emergency or crisis “mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.” *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring). Nearly a year ago, the Court taught that no temporary restriction of constitutional rights purportedly based on emergency COVID-19 measures could ever be justified as long-term restrictions on constitutionally guaranteed rights. As Justice Gorsuch explained in his concurring opinion in *Roman Catholic Diocese*, “[e]ven if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. . . . [C]ourts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.” *Id.* at 70 (Gorsuch, J., concurring). Only the Court’s immediate intervention will ensure that Mainers’ federal rights are protected from Maine’s blatant effort to subvert federal law.

The Court has previously expedited review when faced with watershed constitutional matters that call for urgent intervention. For example, in reviewing the military’s power to try foreign saboteurs captured on U.S. soil, the Court held that expedited review was required—

In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, *to preserve unimpaired the constitutional safeguards of civil liberty*, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay . . . .

*Ex parte Quirin*, 317 U.S. 1, 19 (1942) (emphasis added); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) (“Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review.”). The Court also granted expedited review of a challenge to the constitutionality of an executive agency. *See, e.g., Hannah v. Larche*, 361 U.S. 910 (1959) & 363 U.S. 420 (1960) (expediting briefing and oral argument to review authorization and constitutionality of Civil Rights Commission).

Questions concerning the scope of executive branch power have also triggered expedited review. *See, e.g., Dames & Moore v. Regan*, 452 U.S. 932, 933 (1981) (challenging President’s authority to extinguish property rights of private individuals to comply with Iranian Hostage settlement); *United States v. Nixon*, 417 U.S. 927 (1974) (granting certiorari before judgment and scheduling oral argument five-and-a-half weeks later); *New York Times Co. v. United States*, 403 U.S. 713, 753 (1971) (reviewing Executive Branch’s effort to prevent the publication of classified information); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (granting

certiorari before judgment to review President Truman’s nationalization of steel mills).

Maine’s refusal to follow federal law and the United State Constitution is a similarly unprecedented action that merits expedited review. The Governor, through her COVID-19 Vaccine Mandate, is violating the First Amendment’s Free Exercise Clause by expressly prohibiting religious exemptions to mandatory vaccination for healthcare workers while endorsing broad medical exemptions for the same healthcare workers. The Mandate’s prohibition of religious exemptions also requires private employers to disregard Title VII’s religious accommodation requirements by denying employees a process for seeking and obtaining reasonable accommodation of their sincerely held religious beliefs against COVID-19 vaccination, even where such accommodation is possible without imposing an undue hardship on employers. Thus, Maine’s actions violate the First Amendment, essentially mandate religious discrimination under Title VII, and are preempted by the Supremacy Clause.

All Petitioners seek in this lawsuit the ability to continue providing the healthcare they have provided to patients throughout the pandemic—throughout their careers—and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months. As Petitioners have advised their employers, Petitioners remain ready, willing, and able to comply with all reasonable health and safety protocols necessary to accommodating their religious objections to COVID-19 vaccination. (V. Compl. ¶¶ 75, 76.) Essentially, Petitioners



seek to have their religious objections accommodated on the same terms as workers whose medical exemptions from vaccination have been accommodated.

Because the deadline imposed by Respondents' unconstitutional mandate demands that Petitioners choose between violating their sincerely held religious beliefs or losing their livelihoods, relief cannot wait. Petitioners and other healthcare workers in Maine are already being told not to report to work, are being terminated, and are facing the irreparable loss of cherished free exercise rights each day. No American should be faced with this unconscionable choice, especially the healthcare heroes who have served us admirably for the entire duration of COVID-19. As Justice Gorsuch noted,

Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of the pandemic for the last 18 months are now being fired and their practice shuttered. All for adhering to their constitutionally protected religious beliefs. *Their plight is worthy of our attention.*

(App. 11a (emphasis added).)

Only the Court can provide the necessary relief to stop this latest incursion of religious discrimination throughout the Nation. As Justice Gorsuch stated earlier this year, “[e]ven in times of crisis—perhaps *especially* in times of crises—we have a duty to hold governments to the Constitution.” *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021) (Gorsuch, J., statement). Here, the Court is faced with a new “variant” of religious discrimination—a refusal to recognize the religious objections to COVID-19 vaccines sincerely held by countless individuals across the Nation. In a land born on the will to be free, “take the jab or take a hike”

has no place under our laws, and this Court should step in to aid the faithful from becoming constitutional orphans. Expedited relief to halt the grave constitutional crisis occurring in Maine (and elsewhere) is their only hope.

### CONCLUSION

For the reasons set forth in this motion and the Petition, Petitioners respectfully request the Court's expedited consideration of this motion, and that the Court expedite its consideration of the Petition and, if granted, briefing and oral argument on the merits.

Respectfully submitted:

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