No. 21-1143

# In The Supreme Court of the United States

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., DR. S., NURSE S., PHYSICIAN LIAISON X.,

*Petitioners,*

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. MARY T. BASSETT, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HER OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF UNITED STATES SENATORS MARCO RUBIO, JOHN BARRASSO, MIKE BRAUN, KEVIN CRAMER, TED CRUZ, JOHN HOEVEN, CINDY HYDE-SMITH, JAMES LANKFORD, MIKE LEE, CYNTHIA LUMMIS, AND RICK SCOTT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTERESTS OF THE *AMICI*[1]

*Amici* are United States Senators:

Senator Marco Rubio of Florida

Senator John Barrasso, M.D., of Wyoming

Senator Mike Braun of Indiana

Senator Kevin Cramer of North Dakota

Senator Ted Cruz of Texas

Senator John Hoeven of North Dakota

Senator Cindy Hyde-Smith of Mississippi

Senator James Lankford of Oklahoma

Senator Mike Lee of Utah

Senator Cynthia M. Lummis of Wyoming

Senator Rick Scott of Florida

*Amici* are devoted to maintaining Congress's centuries-old tradition of protecting religious liberty. Congress enacted the Civil Rights Act of 1964, including its protections for religious faith. *Amici* rely on the Civil Rights Act's protections and legislate against its backdrop. *Amici* are thus uniquely obligated and positioned to raise concerns about the

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation. All parties received timely notice and consented in writing to the filing of this brief.

effect of the decision below on the protection of religious liberty.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Public officials have a duty to safeguard religious liberty. "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

New York officials are derelict in their duty.

On August 18, 2021, New York imposed a COVID-19 vaccine mandate for healthcare workers. In its original form, the vaccine mandate contained both a medical exemption and a religious exemption. When New York officials revealed an updated version on August 26, 2021, however, the religious exemption had disappeared.

In disregarding their independent obligation to safeguard religious liberty, New York officials "erred in the most fundamental of things." *Dr. A. v. Hochul*, 142 S. Ct. 552, 558 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief) (discussing *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

The officials "took the view that the collective [is] more important than the individual—and that the demands of an impending emergency [are] more pressing than holding fast to the timeless promises of our Constitution." *Id.*

This Court should grant *certiorari* and reverse the decision below. New York's mandate cannot stand. The mandate represents a calculated effort to prevent the religious accommodation process that the Constitution and Congress have long required.

## ARGUMENT

### I. Congress has robustly and repeatedly sought to defend religious liberty under the authority of the First Amendment.

Religious liberty has been one of our nation's bedrock principles since the Founding. "Of the motives which influenced the first settlers to a voluntary exile . . . and to seek an asylum in this then unexplored wilderness, the first and principal, no doubt, were connected with religion." Daniel Webster, Oration Before the Pilgrim Society at Plymouth, Massachusetts (Dec. 22, 1820), *reprinted in* The Speeches of Daniel Webster, and His Master-Pieces (B.F. Tefft ed., 1854). Indeed, when forming our government, the American people gave religious liberty special prominence; it is the first right protected in what they identified as the Bill of Rights. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof. . . .").

For many years, this Court interpreted the First Amendment to require religious exemptions from laws that burdened the free exercise of religion unless the burdens were "justified by a 'compelling state interest.'" *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Court, however, changed course in *Employment Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, for free exercise challenges involving a neutral, generally applicable law, this Court abandoned the compelling interest test in favor of one akin to rational basis review. *See id.* at 882-89.

> On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, and the Religious Land Use and Institutionalized Persons Act of 2000, Congress tried to restore the constitutional rule in place before *Smith* was handed down.

*Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1889 (2021) (Alito, J., concurring in judgment) (citations omitted).

"Values that are protected against government interference through enshrinement in the Bill of Rights," however, "are not thereby banished from the political process." *Smith*, 494 U.S. at 890. Decades

before *Smith*, for example, Congress protected religious liberty in Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.*

Through Title VII, Congress has forbidden employers from discriminating against employees because of their religion. 42 U.S.C. § 2000e–2(a)(1). Nor can employers limit, segregate, or classify employees "in any way" that adversely affects the employees' status because of their religion. *Id.* § 2000e–2(a)(2).

Congress has demanded more than "mere neutrality with regard to religious practices," *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). "[O]therwise-neutral policies [must] give way to the need for an accommodation" of an employee's religious observance or practice, *id.*, unless the employer "is unable to reasonably accommodate . . . without undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j).

Title VII protects "all aspects of religious observance and practice, as well as belief." *Abercrombie*, 575 U.S. at 774-75. The shelter of federal law is not limited to specific acts of religious worship. No covered employer, in New York or anywhere else, may take an action in which a "motivating factor," 42 U.S.C. § 2000e–2(m), is "avoiding the need for accommodating a religious practice," *Abercrombie*, 575 U.S. at 774.

## II. New York's vaccine mandate reflects an intentional effort to undermine Congress's protection of religious observance and practice in the workplace.

In response to the COVID-19 pandemic, governments and private entities have imposed various restrictions and requirements, including vaccine mandates. However, unlike the vaccine mandates imposed by the federal government, *Biden v. Missouri*, 142 S. Ct. 647, 651 (2022), and numerous other states, Pet.Addendum at 1-22, New York's vaccine mandate does not permit employers to accommodate employees' religious faith.

New York's vaccine mandate reflects an intentional effort to undermine the protections for religious liberty supplied by Congress. The first mandate was an "Order for Summary Action" promulgated by the New York State Commissioner of Health on August 18, 2021. Pet.App.13a-14a. The subsequent mandate was issued on August 26, 2021 as an emergency rule "by the State's Public Health and Health Planning Council, a group of 25 healthcare professionals, including the Commissioner of Health." Pet.App.10a. This second mandate deleted the religious exemption contained in the original order.

The Governor of New York has said this deletion was intentional, further stating that she was not aware of a "sanctioned religious exemption from any organized religion" and that "everybody from the Pope on down is encouraging people to get vaccinated."

*Governor Hochul Holds Q&A Following COVID-19 Briefing*, N.Y. State Governor's Office (Sept. 15, 2021), https://perma.cc/5DY6-S7KM.

The Governor's explanation itself reflects a misunderstanding of religious liberty. Title VII's protection has never depended on "sanction" from an "organized religion." Federal law prohibits employers from discriminating based on an improper motive; this can include "avoiding the need for accommodating a religious practice," *Abercrombie*, 575 U.S. at 774, whether or not the accommodation would actually be required by the employee's faith.

When they deleted the religious exemption, New York officials took square aim at Title VII. The original mandate exempted "covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer." Pet.App.131a. The phrase "reasonable accommodation" unambiguously refers to Title VII's requirement that employers "reasonably accommodate" religious observances and practices by employees. *See* 42 U.S.C. § 2000e(j). Thus, under New York's original order, employees entitled to a religious exemption were simultaneously entitled to an accommodation under Title VII. Yet rather than allowing employers and employees to work through Title VII's accommodation process, New York removed religious accommodation from the mandate entirely. Not only does New York mistrust individual faith and conscience, it apparently mistrusts Title VII too.

To be sure, Petitioners are not seeking *certiorari* to review the Second Circuit's holdings on Title VII. But New York's rejection of Title VII's religious protections has independent significance.

New York banished unvaccinated religious objectors from the workplace, but it exempted employees who remained unvaccinated for medical reasons. Like other states, New York appears to trust that employers will take appropriate precautions to avoid COVID-19 transmission by and among unvaccinated employees with health concerns. Unlike the federal government and 47 other states, however, New York does not permit employers to accommodate religious faith in the same way. New York has ordered healthcare employers to decline religious accommodations *even when identical precautions are acceptable for other employees who present the same workplace risk*.

Petitioners have been forced to choose between their faith and their employment. This is precisely the injury that Congress sought to remedy with Title VII. But as the court below acknowledged—unfortunately without providing needed injunctive relief—New York's mandate works in a manner that raises "difficult, apparently unusual questions" about Petitioners' remedies under Title VII. Pet.App.54a. Adverse employment consequences are "not the type of harm that usually warrants injunctive relief," because employees can receive money damages after the fact. *Id.* But as the Second Circuit explained (and then

inexplicably disregarded), New York's mandate may make this Title VII remedy impossible:

> Perhaps, if they prevail at the conclusion of this litigation, Plaintiffs would seek lost wages, but it is not at all clear who would pay them. To the extent Plaintiffs allege that they will suffer adverse employment consequences or loss of professional standing if not provided accommodations under Title VII, Plaintiffs might seek money damages from their employers. Private medical-provider employers might make a persuasive argument that they should not have to pay because they were in effect compelled by [New York] law to terminate the employment. Absent a waiver, however, sovereign immunity would likely prevent Plaintiffs from obtaining money damages from the State.

Pet.App.54a-55a. With its order, New York shut the door on individualized religious accommodations under Title VII. Should these employees invoke Title VII to challenge their loss of employment, however, the New York order interposes the State (and its sovereign immunity) between the Petitioners and their employers as a defense.

"The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 534). Government officials "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that

passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* Even a "slight suspicion" of "animosity to religion or distrust of its practices" triggers First Amendment scrutiny. *See Lukumi*, 508 U.S. at 547.

In this case, there is more than "slight suspicion." By intentionally circumscribing Title VII and its individualized accommodation process, New York officials did more than evade federal law. They trespassed on ground protected by the First Amendment.

## III. New York has established a roadmap for undermining religious liberty in the workplace. If unchecked, it would set a dangerous precedent for future state and local officials who might be tempted to circumvent Congressional protections of faith.

Federalism is central to the American constitutional system. *Arizona v. United States*, 567 U.S. 387, 398 (2012). "The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v.*

*Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Nevertheless, a state may not trespass on the freedoms enshrined in the Bill of Rights or undermine the civil liberties guaranteed by federal law. "The Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land,'" and "[u]nder this principle, Congress has the power to preempt state law." *Arizona*, 567 U.S. at 399. "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Id.*

In Title VII, Congress respected state sovereignty while simultaneously safeguarding civil liberties. "Congress . . . explicitly disclaimed any intent . . . to 'occupy the field' of employment discrimination law." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (citing 42 U.S.C. §§ 2000e–7, 2000h–4). Title VII therefore does not excuse employers from complying with state law unless "any such law . . . purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e–7.

In the context of religious liberty, Title VII requires more than mere neutrality to religion. "Title VII requires otherwise-neutral policies to give way to the need for an accommodation." *Abercrombie*, 575 U.S. at 775. Under New York's vaccine mandate, however, employers cannot perform this federally-required

analysis. In New York, if a healthcare worker has a sincere religious objection to receiving a COVID-19 vaccine, the employer must remove that worker from the workplace.

According to New York, this is consistent with Title VII. New York argues that, although an employer must reasonably accommodate an employee's religion, the employer need not offer the employee's preferred accommodation. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986). New York suggests that employers can accommodate religious objections by consigning employees to telework. Therefore, it argues, Title VII does not preempt the vaccine mandate. According to New York, if an employer has a way to satisfy both statutes, *i.e.*, removing a religious objector from his normal workplace, then there is no preemption. *See* Br. for Appellants at 62-64, *Dr. A. v. Hochul*, No. 21-2566 (2d Cir. Oct. 18, 2021).

There are two problems with New York's theory. *First*, as the district court held below, the New York vaccine mandate "do[es] not make room for [employers] to consider requests for reasonable religious accommodations." Pet.App.84a. More precisely, the mandate precludes employers from considering any accommodation other than relegating religious objectors to remote work. While this might be a reasonable accommodation for certain employees, many healthcare workers—surgeons, physicians, nurses, and others—cannot perform their jobs remotely. For these workers, the vaccine mandate eliminates reasonable religious accommodation

because the state-authorized accommodation is unfeasible.

*Second*, even if employers feasibly could relegate all religious objectors to telework, this is not reasonable **accommodation**. This is illegal **discrimination**. Recall that Title VII prohibits employers from discriminating against employees because of their religion or segregating them to their professional detriment because of their religion. 42 U.S.C. § 2000e–2(a). Here, the only suggested "accommodation" available under New York's vaccine mandate is for an employer to segregate its religious objectors from the rest of its workforce. In other words, the only "accommodation" under New York's mandate is itself an unlawful employment practice. Title VII should therefore preempt the mandate. *See* 42 U.S.C. § 2000e–7.

Although Petitioners are not seeking *certiorari* to consider the lower court's incorrect understanding of Title VII, New York's justifications for its behavior raise parallel First Amendment concerns. As discussed above, New York's mandate essentially requires a class of healthcare workers to be fired or segregated for observing their sincerely-held religious beliefs. Yet it permits another class of healthcare workers—those with medical exemptions—to remain in the regular workforce. Stated differently, it "prohibits religious conduct" in the workplace "while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (majority opinion).

If allowed to stand, New York's mandate risks becoming a roadmap for other state and local officials to circumvent people's religious freedoms. Under New York's formula, a state or local authority with sufficient justification (real or imaginary) could mandate a desired practice—vaccination or something else. The authority could then eliminate all feasible means of accommodating religious objectors except by segregating them. Simultaneously, the authority could excuse similarly situated people from compliance with the mandate for preferred reasons—medical or otherwise. The result: certain people of faith (or people of a certain faith) are excluded from the marketplace.

That cannot be what the First Congress intended when it sent the Bill of Rights to the states for ratification. And it cannot be what the Eighty-Eighth Congress intended when it passed the Civil Rights Act.

## CONCLUSION

New York's vaccine mandate violates the Free Exercise Clause of the First Amendment. *Amici* respectfully request this Court to grant *certiorari* and require New York to justify its mandate (if it can) under the demanding strict-scrutiny standard. Allowing New York's mandate to remain as-is would serve as a dangerous precedent that may invite other authorities, motivated by their zeal to implement the latest public health guidance—or something else in the

future—to disregard the fundamental rights of their citizens.

Respectfully submitted,

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