No. 21-717

IN THE

Supreme Court of the United States

JOHN DOES 1–3, ET AL.,

Petitioners,

V.

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

Respondents.

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

REPLY IN SUPPORT OF MOTION TO EXPEDITE CONSIDERATION OF THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The State and Provider Respondents not only oppose the Court's expedited review of the Petition, but they also seek to delay it.[1] (State Resp'ts' Resp. to Pet'rs' Mot. to Expedite; State Resp'ts' Mot. for Extension; Provider Resp'ts' Resp. to Pet'rs' Mot. to Expedite; Provider Resp'ts' Mot. for Extension.) Although the Court has denied their motions for extension of time to respond to the Petition, Respondents still oppose the Court's expedited review. Contrary to the Court's holdings, Respondents essentially contend that Petitioners' months-long suffering of irreparable First Amendment injury represents no urgency. As Justice Gorsuch explained, however, "[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." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). While there may be no place like home for the holidays, Respondents go back to work when they are over, while most Petitioners likely cannot—without violating their consciences or obtaining expedited relief from this Court. "Their plight is [still] worthy of [the Court's] attention." (Pet. App. 11a.)

[1] Respondent Northern Light Health Foundation has not responded to Petitioners' Motion to Expedite or moved for an extension of time to file it response to the Petition. Thus, as used herein, and unless otherwise indicated, the term "Respondents" refers only to the "State Respondents" and "Provider Respondents" as they identify themselves in their respective motions for extension of time and responses to Petitioners' Motion to Expedite.

ARGUMENT

I. PETITIONERS' CONTINUING IRREPARABLE FIRST AMENDMENT INJURIES MAKE THEIR PETITION URGENT AS A MATTER OF LAW.

The Governor contends expedited review should be denied because "there is no current exigency" and because "circumstances today are less urgent than when this Court denied their emergency application for a writ of injunction." (State Resp. 4–5.) Provider Respondents similarly protest that there is no rush. (Provider Resp. 6–7.) But the Court has instructed time and again that claimants "are irreparably harmed by the loss of free exercise rights *for even minimal periods of time." Tandon v. Newsom*, 141 S. Ct.1294, 1297 (2021) (emphasis added). Indeed, "[t]here can be no question that the challenged [mandate], if enforced, will cause irreparable harm." *Roman Catholic Diocese*, 141 S. Ct. at 67. The Governor's unconstitutional vaccine mandate and the employer Respondents' complicit denial of Title VII accommodations are worse than mere threats to happy holidays. As Justice Gorsuch already observed, "[t]his case presents an important constitutional question, a serious error, *and an irreparable injury*." (Pet. App. 11a (emphasis added).) Petitioners suffer irreparable injury each day the Governor's vaccine mandate remains in place. The Court should reject Respondents' rationalizations for Petitioners' continuing irreparable harm and grant expedited review of the Petition.

II. THE GOVERNOR'S FINAL RULE DOES NOT MOOT PETITIONERS' CHALLENGES.

The Court should reject Respondents' contentions that Petitioners' challenges are moot. (State Resp. 1, 6–7; Provider Resp. 1, 6–7.) Respondents previously, in response to Petitioners' application for an emergency writ of injunction, contended

that Petitioners suffered no irreparable harm and could not yet bring their claims because no adverse action had been taken against them. (State Resp'ts' Opp'n, No. 21A90, at 34–35; Provider Resp'ts' Opp'n, No. 21A90, at 8–11.) So, according to Respondents, Petitioners were then too early and are now too late. The law does not countenance Respondents' attempts to evade review of their unconstitutional scheme.

A. Employee Petitioners are suffering the same injuries under the modified rule as they did under the original rule.

State Respondents contend Petitioners' claims are moot because the emergency rule that imposed the COVID-19 vaccine mandate on healthcare workers in Maine, including Petitioners, is no longer in effect and has been replaced by a final rule. (State Resp. 3.) But, as State Respondents concede, the Final Rule imposes precisely the same vaccine mandate on almost all Petitioners, requiring "employees, licensed practitioners, students, trainees, volunteers, and persons providing patient care or other services" at a "designated healthcare facility" to accept and receive a COVID-19 vaccine. (State Resp. 3 n.4.) To be sure, all employee Petitioners (except for Jane Doe 6, who works for John Doe 1; *see* Part II.B, *infra*) have now been fired for exercising their sincerely held religious beliefs. It began with Jane Doe 2, who was fired on August 23—two months prior to the Governor's October 29 deadline. (Pet. 14–15.) The other employee Petitioners (except Jane Doe 6) were fired after the October 29 deadline. As to them, the mandate they challenge merely lost its "emergency" label.

Maine's modification of the emergency rule—which changed nothing for the employee Petitioners who worked for Provider Respondents and provides no remedy

for their terminations—matters not to the justiciability of Petitioners' claims. The changed rule is already being enforced against them, and their as-applied First Amendment challenges to the vaccine mandate remain alive and well. (*See* Dist. Ct. Doc. 1, V. Compl., ¶¶ 122–139.) Courts "confronted with an as-applied challenge . . . examine 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). And, "amendments to the [challenged regulation] do not moot . . . as-applied challenges to the original." *Green v. City of Raleigh*, 523 F.3d 293, 300 (4th Cir. 2008); *see also Nextel West 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 declaratory and injunctive relief still available for as-applied challenges even after amendment to challenged regulation). Petitioners' claims before this Court—which involve important First Amendment questions and irreparable injury continuing each day—are not moot and are worthy of expedited consideration.

B. The claims of Petitioners John Doe 1 and Jane Doe 6 are not moot because the Governor retains the authority to reinstate the vaccine mandate on John Doe 1's practice at any time.

It is true that the modified vaccine mandate rule does not cover dental practices, including John Doe 1's practice, where Jane Doe 6 works. (V. Compl., ¶¶ 15–16.) So, while John Doe 1 was originally faced with the shuttering of his practice for his commitment to operating it in accordance with his sincerely held religious beliefs, which includes honoring the sincerely held religious beliefs of his

employees like Jane Doe 6, the modified rule gives them some reprieve. But the modification does nothing to the justiciability of their claims.

As the Court made clear in *Tandon*, "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. at 1297. The reason is simple: "litigants otherwise entitled to emergency injunctive 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*, 141 S. Ct. at 68). Where—as here—the Governor has regularly modified her COVID-19 restrictions, and the changes occurred "before judicial relief can be obtained," "[i]t is clear the matter is not moot." *Roman Catholic Diocese*, 141 S. Ct. at 68. Put simply, given the ever-changing nature of Maine's COVID-19 restrictions, "there is no reason why [Petitioners] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68–69.

CONCLUSION

Because Petitioners are suffering irreparable constitutional injury each day the Governor's vaccine mandate remains in place, and because the matter still involves "an important constitutional question, a serious error, and an irreparable injury" (Pet. App. 11a), the Court should grant expedited review of the Petition and quickly reach the merits of Petitioners' claims.

Respectfully submitted:

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