No. _____

IN THE

Supreme Court of the United States

TOGETHER EMPLOYEES, ET AL.,

Applicants,

V.

MASS GENERAL BRIGHAM INCORPORATED,

Respondent.

To the Honorable Stephen Breyer,
Associate Justice of the United States Supreme Court
and Circuit Justice for the First Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING APPEAL

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November 23, 2021

PARTIES

Applicants are TOGETHER EMPLOYEES, ROBERTA LANCIONE, JOYCE MILLER, MARIA DIFRONZO, MICHAEL SACCOCCIO, ELIZABETH BIGGER, NATASHA DICICCO, NICHOLAS ARNO, and RUBEN ALMEIDA. Respondent is MASS GENERAL BRIGHAM INCORPORATED.

DIRECTLY RELATED PROCEEDINGS

TOGETHER EMPLOYEES, et al. v. MASS GENERAL BRIGHAM INCORPORATED, 1st Cir. No. 21-1909, opinion and order denying emergency motion for injunction pending appeal (Nov. 18, 2021), reprinted at App. Ex. 1.

TOGETHER EMPLOYEES, et al. v. MASS GENERAL BRIGHAM INCORPORATED, D. Mass. No. 1:21-cv-11686-FDS, order denying emergency motion for injunction pending appeal (Nov. 8, 2021), reprinted at App. Ex. 2.

TOGETHER EMPLOYEES, et al. v. MASS GENERAL BRIGHAM INCORPORATED, D. Mass. No. 1:21-cv-11686-FDS, opinion and order denying motion for preliminary injunction (Nov. 10, 2021), reprinted at App. Ex. 3.

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INTRODUCTION

Pursuant to Sup. Ct. Rule 21, 28 U.S.C. §1651, and 28 U.S.C. §2101, Applicants seek an emergency writ of injunction pending resolution of their appeal to the First Circuit from a district court order denying their motion for a preliminary injunction prohibiting Respondent, their employer, from enforcing its mandatory COVID-19 vaccination policy against them.[1] Respondent gave Applicants until November 5, 2021, to take a vaccine that either violates their sincerely held religious beliefs or places them in significant physical or mental danger, and Respondent has now terminated all non-compliant Applicants.[2] (App. Ex. 1 at 12.) The relief sought in this application is needed immediately to protect Applicants' ability to practice their religion unburdened and to prevent irreparable harm. Far more is at stake in this matter than simply the "loss of a job." Respondent's position, that it cannot accommodate the religious or medical objections of its employees, is not only factually false—because Respondent is doing exactly that for *other* employees—but also a violation of Title VII and the ADA. (See Exs. L, M, O, & Q to Compl., App. Ex. 4.) After putting Applicants under constant pressure to forsake their religious beliefs and physical wellbeing, Respondent has enforced its deadline for Applicants to violate

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[1] Applicant Together Employees is an unincorporated association of over 200 employees of Respondent. (App. Ex. 4 ¶ 6.)

[2] Subsequent to the November 5 deadline, one named Applicant resigned to avoid the inevitable termination, another named Applicant capitulated to Respondent's pressure and became vaccinated in violation of the Applicant's sincerely held religious beliefs, and Respondent terminated the remaining named Applicants. (App. Ex. 1 at 12; App. Ex. 6 at 4 n.3.) The capitulation of one named Applicant highlights the urgency of the relief requested by the other Applicants and the irreparable nature of the harm they face. The remaining Applicants all continuously suffer under the same pressure to capitulate to regain their employment, and there is no legal remedy that can reverse a vaccination for any Applicant coerced to give in.

their sincerely held religious beliefs or place themselves in physical danger by taking a vaccine, and relief cannot wait. By choosing not to violate their sincerely held beliefs or place themselves in physical danger, and losing their jobs as a result, Applicants face the continuing inability to feed their children, the continuing loss of any practical ability to work in their professions, constant potential homelessness, and continuing significant emotional and psychological harm.

This Court is presented now with a different shade of religious and disability discrimination under the guise of "undue hardship," namely a refusal to recognize and accommodate sincerely held religious beliefs and real disabilities contra the COVID-19 vaccines. This case presents the issue of an employer's claiming undue hardship in accommodating Applicants while at the very same time accommodating *other* employees. The Court should step in to prevent these blatant Title VII and ADA violations. Failure to do so would result in the de facto removal of an employer's burden of showing actual undue hardship, leaving only a lip-service approach to religious and disability accommodation. Allowing the First Circuit's decision below to stand will remove federally guaranteed protections in the workplace for those with disabilities and sincerely held religious beliefs. Relief is needed immediately.

RELIEF SOUGHT

Applicants seek an emergency writ of injunction, pending disposition of their appeal to the First Circuit, restraining and enjoining Respondent and its officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing Respondent's vaccine policy against Applicants without accommodating their sincerely held religious beliefs and

disabilities, and requiring Respondent to reinstate Applicants' employment and positions under the same accommodations that Respondent has given to other similarly situated employees (whose religious beliefs and disabilities have been accommodated).

JURISDICTION AND TIMING

Applicants filed this action on October 17, 2021 (Compl., App. Ex. 4), and immediately moved for a preliminary injunction under *Bailey* v. *Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1983). On October 20, the district court denied the preliminary injunction without prejudice, but set a status conference and subsequent hearing on the preliminary injunction motion following record development. (Dist. Ct. Doc. 11.) At the status conference on October 25, the court denied Applicants' request to take an expedited deposition and put on a full evidentiary hearing in support of the preliminary injunction. (Dist. Ct. Doc. 17.) At the preliminary injunction hearing on November 4, the district court again denied Applicants' preliminary injunction motion. (Dist. Ct. Doc. 35 (The district court issued a written opinion and order of denial on November 10 (Doc. 44) which it corrected on November 12 (App. Ex. 3)).) On November 5, Applicants appealed the preliminary injunction denial to the First Circuit (Dist. Ct. Doc. 36) and requested an immediate decision on their request for an injunction pending appeal (IPA) which they had included as alternative relief in their preliminary injunction motion (Dist. Ct. Docs. 2, 37). On November 8, the district court denied the IPA motion (App. Ex. 2), and Applicants filed an emergency IPA motion to the First Circuit (App. Ex. 5). After Respondent filed its opposition to the First Circuit IPA motion, Applicants filed their reply in support of the motion

(App. Ex. 6). The First Circuit denied the IPA motion on November 18 (App. Ex. 1). Applicants now seek a writ of injunction from this Court on an emergency basis.

URGENCIES JUSTIFYING EMERGENCY RELIEF

As shown above, Applicants have moved with extreme urgency throughout the proceedings below. Nevertheless, Applicants are *already out of time*—Respondent has terminated Applicants' employment, depriving them of the ability to feed their families. Worse, many named Applicants are the sole breadwinners for their families, and are currently suffering significant psychological harm from their inabilities to provide, even as they lose their health insurance and other employee benefits. They continuously face the very real choice between continuing to honor their consciences and feeding their families by forsaking their sincerely held religious beliefs or physically harming themselves. Applicants' need for relief is urgent, and their desire is to be accommodated on the same terms as other similarly situated employees while continuing to fight on the front lines against the spread of COVID-19**.**

Respondent has both asserted that accommodating Applicants would be an undue hardship and actually accommodated other similarly situated employees (including patient-facing employees, see App. Ex. 6 at 2–3). The district court went through three phases of reasoning in an attempt to justify Respondent's actions: first, rejecting that any accommodation could be made at all; second, justifying Respondents' accommodations of other employees as likely available only to "back office" employees; and third, concluding that it would be a hardship for "substantial numbers" of employees to be unvaccinated. (App. Ex. 6 at 3–4.)

Next the First Circuit adopted the district court's burden-shifting approach, stating that the district court's opinion was "well-reasoned," and agreeing with the finding that Applicants "could likely not show that they could defeat [Respondent]'s assertion of undue hardship." (App. Ex. 1 at 12–13). But it is not a plaintiff's burden to "defeat" an employer's "assertion." Rather, it is an employer's burden to show that a reasonable accommodation would be a burden. *See Sanchez-Rodriguez* v. *AT&T Mobility Puerto Rico, Inc.,* 673 F.3d 1, 8 (1st Cir. 2012). "Once an employee has made out a *prima facie* case of discrimination, the employer must show that it offered a reasonable accommodation *or* that a reasonable accommodation would be an undue burden" *Id.* The issue is thus whether Respondent must follow the law and meet its burden of demonstrating that it would, in fact, be an undue hardship to accommodate its employees. The district court adopted, and the First Circuit endorsed, a reverse burden-shifting approach by accepting *Respondent's* lack of evidence of hardship on the preliminary injunction record as *Applicants'* failure. In other words, the district court held it against Applicants that more evidence was not on the record supporting Respondent's burden of showing of undue hardship. Respondent was thus absolved of its burden of showing that accommodating Applicants' religious beliefs would be an undue hardship, even after Applicants established a prima facie case under Title VII and the ADA. Respondent's termination of Applicants was therefore unjustified and in violation of Title VII and the ADA.

And Respondent's actions were not inconspicuous—they were brazen. Respondent itself provided as exhibits for the second preliminary injunction hearing

Respondent's exchange with one of the Applicants who sought a religious accommodation:

1. Exhibit 29: Dr. Bigger clearly and sincerely stated that she has refused any vaccines with a connection to aborted fetal tissue, provided a scriptural basis for her belief, and clearly identified, using scientific sources, the role that aborted fetal tissue plays in the current vaccines and her religious opposition to taking them (never stating that the vaccines *contained* aborted fetal tissue).
2. Exhibit 30: An anonymous individual from [Respondent's] vaccination committee misconstrued Dr. Bigger's accommodation request, stating falsely that Dr. Bigger claimed the vaccines contained aborted fetal tissue.
3. Exhibit 31: Dr. Bigger stated that she was disappointed that her request was denied and corrected the reviewer as to what Dr. Bigger actually stated in her request, providing further information as to aborted fetal tissue's role in the production, manufacture and testing of the vaccines.
4. Exhibit 32: The anonymous reviewer responded to Dr. Bigger, simply stating that her request has been denied and that she should get vaccinated.

(App. Ex. 1 at 6–7; Dist. Ct. Docs. 31-29 to 31-32.) Examples like this abound, even in the limited record before the district court.

But the main issue was never addressed: why was it only a hardship for Respondent to accommodate Applicants, but not other employees, even those that

interacted with patients? Despite Applicants' raising the issue in their Complaint (App. Ex. 4, ¶ 58), in their memorandum in support of a preliminary injunction (Dist. Ct. Doc. 3 at 18), in their reply in support of a preliminary injunction (Dist. Ct. Doc. 34 at 7, 9–10), at the October 20, 2021 preliminary injunction hearing (Dist. Ct. Doc. 13 at 13:18–25, 14:1–2), and again at the November 4 preliminary injuncting hearing, Respondent never answered the question. Thus, Respondent has not sufficiently shown that accommodating Applicants will, in fact, cause an undue hardship on Respondent.

With respect to the ADA claims, Respondent simply copied a list of vaccine contraindications from the CDC, and whoever applied for a "medical exemption" having one of the listed contraindicators was approved. Those who's medical reasons did not fit the checklist were denied. (App. Ex. 4, Compl., Ex. D; Dist. Ct. Doc. 29, Hashimoto Decl., ¶ 29.) Respondent's instructed doctors within its network not to sign their patients' medical exemption forms even in the case of anaphylaxis. (App. Ex. 4, Compl., Ex. D.) This begs the question: what about other physical and mental disabilities within the definition of "disability" under 42 U.S.C. § 12102(1)? Unfortunately, Respondent's non-acceptance of mental disabilities, and lack of explanation regarding anything outside of the CDC's checklist were not considered to be relevant, despite numerous Applicants' suffering from physical and mental disabilities such that receiving a COVID-19 vaccine would have a significant negative impact on their major life activities.

This case is not about what accommodations are available to Applicants or whether accommodation of Applicants' sincerely held religious beliefs and disabilities can be conditioned on compliance with certain reasonable requirements—Respondent is already providing such accommodations to other employees. Nor is the sincerity of Applicants' religious beliefs at issue—the district court assumed their sincerity, and the First Circuit did not disagree. (App. Ex. 1 at 13; App. Ex. 3 at 31.) Rather, this dispute is about whether Respondent can accommodate Applicants *at all*, and the answer is *yes*—Respondent has not shown otherwise. "Title VII does not demand mere neutrality with regard to religious practices . . . . Rather, it gives them favored treatment . . . ." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015). The Court should require Respondent to accommodate Applicants' sincerely held religious beliefs and disabilities.

ARGUMENT

I. Respondent has not met its burden of showing that accommodating Applicants would be an undue hardship.

Given the lower courts' assumption that Applicants' religious objections to receiving a COVID-19 vaccine are sincere (App. Ex. 1 at 13; App. Ex. 3 at 31), Applicants unquestionably established a prima facie case under Title VII: "'(1) a bona fide religious practice conflicts with an employment requirement, (2) [Applicants] brought the practice to [Respondent's] attention, and (3) the religious practice was the basis for the adverse employment decision.'" *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 55 (1st Cir. 2002). Applicants have established a prima facie case on disability discrimination as

well: they "(1) [have] a disability within the meaning of the ADA; (2) [are] qualified to perform the essential functions of the job, with or without reasonable accommodations; and (3) [were] subject to an adverse employment action based in whole or part on his disability." *Ramos-Echevarria v. Pichis, Inc.*, 659 F.3d 182, 186 (1st Cir. 2011). For all Applicants' claims, then, the issue is whether Respondent can demonstrate accommodating Applicants would be an undue hardship.

During the district court's questioning of Applicants' counsel below, the court asked, "In other words, isn't there a difference between let's say an emergency triage nurse who's dealing with people on a daily basis with no opportunity to screen and somebody who is an assistant accountant, you know, who can more easily work remotely, let's put it that way?[3]" (Dist. Ct. Doc. 42, Tr., at 12:22–13:2.) But this question sought facts within *Respondent's* burden to show that it would be an undue hardship on Respondent to accommodate Applicants. *See Sanchez-Rodriguez* v. *AT&T Mobility Puerto Rico, Inc.,* 673 F.3d 1, 8 (1st Cir. 2012). This reverse burden-shifting was the essence of the preliminary injunction hearings. At the earlier October 20 preliminary injunction hearing, the district court pondered, "It is not at all clear what, if any, accommodation can be made here or what would be reasonable. Again, it is a hospital that at least some of the plaintiffs are providing direct patient care. This is a highly infectious disease in which testing and masks and PPE do provide

[3] The district court fixated on this "back office" concept, apparently assuming that unvaccinated "back office" employees pose less of a threat. In its written order denying injunctive relief, however, the district court accepted Respondent's representation that "all MGB employees are expected to be deployable to the hospitals as needed" in an attempt to justify not only Respondent's policy, but also the proposition that these same "back office" employees pose a risk. (App. Ex. 3 at 16 (cleaned up).)

limited protections, and it's unclear to me whether or not reasonable accommodations can be made here, and that's one of the things that I want to explore at the later hearing." (Dist. Ct. Doc. 13, Tr., 70:4–13). At the "later hearing," however, Respondent stated to the district court that 234 out of over 2,400 total accommodation requests were granted (just under 10%). (*See* App. Ex. 1 at 2.) Respondents have necessarily accommodated these 234 employees' religious beliefs and disabilities. Moreover, Applicants' preliminary injunction Exhibit 18 (Dist. Ct. Doc. 32-18) provided an example of one such employee's accepted religious accommodation request, including her "personal statement" indicating her patient-facing position.

The district court made its preliminary decision based upon assurances that Respondents' "process for evaluating reasonable accommodation requests was thorough, thoughtful, and robust." (Dist. Ct. Doc. 13, Tr., 49:23–25.) But Respondent's assurance is undermined by the disparate treatment of Applicants, whose accommodations have been denied despite the sincerity of their objections (*see, e.g.,* Dist. Ct. Doc. 13, 11:17–20 (Applicant Almeida has been granted religious accommodations for eight years, only to be denied this year)), as compared to Respondent's other employees whose accommodations have been granted. The fact that Respondent is already accommodating hundreds of other employees conclusively refutes Respondent's mere assertions that it would cause an undue hardship to accommodate "*further* exemptions" or "*additional* unvaccinated employees" because it needs to "*minimize* the number of unvaccinated staff" and not "allow[] *large numbers* of employees to remain unvaccinated." (Dist. Ct. Doc. 27 at 2, 19–20.)

Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion," 42 U.S.C. § 2000e-2(a)(1), "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Respondent did not meet its burden of demonstrating that it was "unable to reasonably accommodate" Applicants' religious beliefs (or their disabilities). Moreover, Applicants have demonstrated that they can perform the essential functions of their jobs with respect to the accommodations requested. See *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 142 (1st Cir. 1997). On materially identical facts, the Northern District of Illinois issued a temporary restraining order against a large healthcare employer despite similar claims of undue hardship. *See Does 1–14* v. *Northshore Univ. Healthsystem,* No. 1:21-cv-05683, Doc. 31 (Nov. 1, 2021), *extended by* Doc. 48 (Nov. 16, 2021). Thus, Applicants have established a likelihood of success on the merits.

II. Applicants are suffering irreparable harm.

Applicants' harms are not limited to "external factors common to most discharged employees." *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974). There is nothing "common" about Respondent's process or the impact it is having on Applicants. First, while it is generally true that a loss of employment does not constitute irreparable harm, this case involves exercise of religion and several other hardships that were demonstrated in the record, including the "impossible choice"

that Applicants face—honoring their religious beliefs or putting food on the table.[4] *See On Fire Christian Center, Inc.* v. *Fischer*, 453 F. Supp. 3d. 901, 914 (W.D.K.Y. 2020). "If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel." *Ross-Simons of Warwick, Inc.* v. *Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996). Additionally, Applicants' terminations are not likely to be mere short term losses of income. Many Massachusetts hospitals have similar vaccination policies. Applicants' having to seek new healthcare employment while explaining their prior terminations and ongoing litigation could effectively prevent them from working in health care in the Commonwealth. Granting Applicants' requested injunction will enable them to return to work for Respondent, or at least communicate to other healthcare employers that Respondent's policy is likely unlawful. Furthermore, Applicants have variously provided record evidence of mental health treatment necessitated by the "choice" imposed by Respondent, the loss of employment benefits in addition to lost income, and the inability to pay for housing, or care for children or elderly relatives, without employment. (App. Ex. 1, Compl., Exs. L, O, Q.)

[4] That one named Applicant has already capitulated and taken the vaccine (*see* note 2, *supra*) is itself evidence of irreparable harm. He has now committed an act that violates his conscience, that he cannot undo—he cannot "untake" the vaccine. Thus, his harm is irreparable. But the other Applicants, who could return to work if they likewise capitulate (Dist. Ct. Doc. 27 at 34), face the continuing irreparable harm of the constant pressure to forsake their beliefs. The First Circuit's conclusion that Applicants "have already made their choices" (App. Ex. 1 at 16) is, therefore, not entirely accurate. Applicants face the choice every day that they suffer the consequences of their terminations, and the intensity of the coercion to forsake their religious beliefs to put food on the table continuously increases.

"The harm [Applicants] would suffer is not only, as [Respondent] argues, the loss of [their] job[s] *per se,* but also the penalty for exercising [their religious free exercise] rights. The chilling effect of that penalty cannot be adequately redressed after the fact." *Romero Feliciano v. Torres Gaztambide*, 836 F.2d 1, 4 (1st Cir. 1987) (referring to loss of First Amendment freedoms); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The same irreparable chilling effect on Applicants' religious free exercise rights is present here, though in the Title VII context. Applicants face continuous pressure to forsake their religious beliefs to avoid homelessness or the inability to provide for their families, and are even treating for ongoing psychological harm from Respondent's coercive pressure. Applicants are entitled to injunctive relief because they face a "genuinely extraordinary situation." *Sampson*, 415 U.S. at 92 n.68.

III. Applicants satisfy the remaining requirements for injunctive relief pending appeal.

Both the district court and the First Circuit imputed a constitutional argument to Applicants' search for injunctive relief, but Applicants do not assert that state action is involved in this matter. Rather, Applicants have cited numerous cases that highlight the significant public interest in preserving the free exercise of religion in the injunctive relief context. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Dahl v. Bd. of Trustees of W. Mich. Univ.*, No. 1:21-cv-757, 2021 WL 3891620 (W.D. Mich. Aug. 31, 2021) (granting TRO against university's preventing plaintiffs from playing sports after having been denied religious exemption from vaccine policy); *Magliulo v. Edward Via College of Osteopathic*

Medicine, No. 3:21-CV-2304, 2021 WL 36799227 (W.D. La. Aug. 17, 2021) (granting TRO where "threat to religious freedom was imminent"); *On Fire Christian Center, Inc.* v. *Fischer*, 453 F. Supp. 3d. 901 914 (W.D.K.Y. 2020). Moreover, keeping Applicants employed serves the public because Applicants are in the unique position of actually helping fight the spread of COVID-19 on the front lines. Furthermore, the balance of the hardships favors Applicants. Respondent is already accommodating hundreds of other employees, undermining any argument that increased risk or cost outweighs the burden of Applicants' having to forsake their religious beliefs to avoid destitution and homelessness.

CONCLUSION

For the foregoing reasons, the Court should grant Applicants an emergency writ of injunction against Respondent's COVID-19 vaccine policy pending disposition of their First Circuit appeal.

Respectfully submitted,

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