No. 23-152

IN THE

Supreme Court of the United States

ALICIA LOWE, *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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF PROVIDER RESPONDENTS

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QUESTION PRESENTED

The question presented for review relevant to the Provider Respondents is as follows:

Whether Title VII prohibits private employers from implementing conditions of employment that are required by state law vis-à-vis employees who cannot meet such conditions because of their sincerely held religious beliefs, notwithstanding the undue hardship limitation on employers' duty to accommodate those beliefs?

DISCLOSURE STATEMENT OF RESPONDENT MAINEHEALTH

MaineHealth discloses that it is a Maine non-profit corporation, the parent corporation of which is MaineHealth Services, which is also a Maine non-profit corporation.

DISCLOSURE STATEMENT OF RESPONDENTS GENESIS HEALTHCARE OF MAINE, LLC AND GENESIS HEALTHCARE LLC

Genesis HealthCare of Maine, LLC hereby discloses that it is a Maine limited liability company and that its sole member is GHC Holdings LLC. GHC Holdings LLC is a Delaware limited liability company and its sole member is Genesis HealthCare LLC. Genesis HealthCare LLC is a Delaware limited liability company and its sole member is Gen Operations II, LLC. GEN Operations II, LLC is a limited liability company the sole member of which is GEN Operations I, LLC. GEN Operations I, LLC is a limited liability company of which the sole member is FC-GEN Operations Investment, LLC. GC-GEN Operations Investment, LLC is a limited liability company in which the following have ownership interests:

- Sundance Rehabilitation Holdco, Inc. is a Delaware corporation having a 5.2% membership interest;

- Sun Healthcare Group, Inc. is a Delaware corporation having a 65.3% membership interest, and a 100% interest in Sundance Rehabilitation Holdco, Inc.;

- Multiple investors have a 29.5% interest holding rights to income and losses, but not rights as to control.

Genesis Healthcare, Inc. is a publicly traded corporation organized in Delaware and the sole shareholder of Sun Healthcare Group, Inc. Genesis Healthcare, Inc. is traded on OTCMKTS under the ticker symbol "GENN." There is no shareholder owning 10% or more of Genesis Healthcare, Inc. shares.

DISCLOSURE STATEMENT OF RESPONDENT MAINEGENERAL HEALTH

MaineGeneral Health discloses that it is a Maine non-profit corporation, and that it has no parent corporation.

DISCLOSURE STATEMENT OF RESPONDENT NORTHERN LIGHT EASTERN MAINE MEDICAL CENTER

Northern Light Eastern Maine Medical Center discloses that it is a Maine non-profit corporation. Its sole member is Eastern Maine Healthcare Systems, doing business as Northern Light Health. As a non-profit public benefit corporation, Northern Light Eastern Maine Medical Center has no shareholders.

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STATEMENT OF THE CASE

I. Factual Background

Accurate and comprehensive factual summaries of the legislative and regulatory actions relevant to Petitioners' claims have been set forth in decisions by the First Circuit, and the facts underlying those summaries exist in the public record. *See Lowe v. Mills*, 68 F.4th 706, 709-713 (1st Cir. 2023); *Does 1-6 v. Mills*, 16 F.4th 20, 20-24 (1st Cir. 2021). Petitioners ignore these summaries and continue to present a factually inaccurate legislative and regulatory history that better suits their narrative of religious hostility on the part of the State Respondents and Providers.[1] Contrary to Petitioners' claim, Maine did *not* eliminate only the religious exemption to the statute and regulation requiring healthcare workers to receive certain immunizations, and it did *not* eliminate the religious exemption in connection with the pandemic or the addition of the COVID-19 vaccine to the list of mandated

1. Throughout Petitioners' petition they misrepresent facts to the Court. For example, they write: "Employer Respondents all explicitly informed Petitioners that their religious convictions must be overridden by state law, with no exception and no accommodation whatsoever" (Pet. for Writ of Cert. (hereinafter the "Petition") at 4); "[a]ll Petitioners were refused any consideration for religious accommodation under Title VII" (*Id.* at 5); and "Petitioners and all healthcare workers in Maine were also stripped of their pre-existing federal right to request a religious accommodation from the COVID-19 Mandate" (*Id.* at 8). As explained below, the Vaccine Mandate permits reasonable accommodations for employees' religious beliefs other than exemptions to vaccination. The only accommodation that the Petitioners ever requested from Providers was an exemption – the exact accommodation that Providers could not provide them. Thus, Petitioners' hyperbolic allegations that they were stripped of their rights to accommodations and not provided "any consideration for religious accommodation" are simply not true.

immunizations. *See Mills*, 16 F.4th at 30. As the First Circuit found and as described below, the legislative and regulatory history does not bear out Petitioners' version of the legislative and regulatory history or their claim that the challenged rule evinces animus toward religion. *Id*. at 30-37.

For years, the Maine Department of Health and Human Services ("DHHS") has had the statutory responsibility to "[e]stablish procedures for the control, detection, prevention, and treatment of communicable . . . diseases, including [through] public immunization and contact notification programs." 22 M.R.S. § 802. Exercising its authority under Section 802, DHHS and the Maine Center for Disease Control ("Maine CDC") enacted rules in 2002, requiring all Designated Healthcare Facilities[2] ("DHCF") to obtain and maintain their employees' proof of immunization or documented immunity against a variety of communicable diseases, including but not limited to measles, mumps, chicken pox, and—more recently—influenza ("the Vaccine Mandate"). 10-144 C.M.R. Ch. 264, §2(A). Until 2019, Section 802 recognized religious and philosophical exemptions for employees whose sincere religious or philosophical beliefs were contrary to immunization. 22 M.R.S. § 802(4-B)(B). The Vaccine Mandate similarly permitted DHCFs to recognize religious and philosophical exemptions. In 2019, however, the Legislature passed L.D. 798, which removed these non-medical exemptions from Section

2. The term Designated Healthcare Facility (hereafter "DHCF") is defined in the rules to include "a licensed nursing facility, residential care facility, Intermediate Care Facility for Individuals with Intellectual Disabilities . . ., multi-level healthcare facility, hospital, or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." 10-144 C.M.R. Ch. 264, §1(D).

802, and further directed DHHS to amend its rules and to eliminate non-medical exemptions by September 1, 2021. P.L. 2019, Ch. 154, § 11. In March 2020, Maine voters soundly rejected a peoples' veto referendum, thereby endorsing the Legislature's decision to eliminate non-medical exemptions from vaccination for employees working in DHCFs.[3]

On April 14, 2021, consistent with the Legislature's directive and several months before COVID-19 was added to the list of required vaccines, DHHS amended the Vaccine Mandate by eliminating the two non-medical exemptions from the vaccine requirement. On August 12, 2021, DHHS and Maine CDC issued an Emergency Routine Technical Rule ("ERTR"), further amending the Vaccine Mandate to add COVID-19 to the list of mandatory vaccines for employees of DHCFs, and also requiring employees to have received their final dose by September 17, 2021.[4] On September 2, 2021, the Governor announced that DHHS would not enforce the Vaccine Mandate's COVID-19 vaccine requirement until October 29, 2021.[5]

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3. Question 1 on the March 3, 2020 ballot asked whether voters wished to repeal L.D. 798 and reinstate religious and philosophical exemptions from the vaccine requirements. It was defeated 72% to 27%. Full results of the March 3, 2020, election are available on the website of the Maine Secretary of State: https://www.maine.gov/sos/cec/elec/results/index.html.

4. A red-lined copy of the State of Maine Immunization Requirements for Healthcare Workers, 10-144 C.M.R. Ch. 264, can be found at Case No. 1:21-cv-00242 (D. Me.), ECF No. 50-1.

5. *See Mills Administration Provides More Time for Health Care Workers to Meet COVID-19 Vaccination Mandate*, *available at:* https://www.maine.gov/governor/mills/news/mills-administration-provides-more-time-health-care-workers-meet-covid-19-vaccination.

The consequences to a DHCF of failing to require and maintain proof of employee vaccination or medical exemption were substantial. DHCFs that did not comply with the Vaccine Mandate could be enjoined from continuing to permit employees to work absent proof of vaccination or medical exemption and were subject to civil fines, penalties, and loss of licensure. 22 M.R.S. §§ 803-804. Section 804 of the Vaccine Mandate specifically stated:

> Any person who neglects, violates or refuses to obey the rules . . . may be ordered by the department, in writing, to cease and desist . . . . In the case of any person who refuses to obey a cease and desist order . . . the department may impose a fine, which may not be less than $250 or greater than $1,000 for each violation. Each day that the violation remains uncorrected may be counted as a separate offense . . . .
>
> A licensing agency under the department may immediately suspend a license[6]. . . for a violation under this section.

Id. § 804.

Only a fraction of Maine's healthcare facilities—broadly defined—constitute DHCFs; but each of the

6. Pursuant to 22 M.R.S. § 1817, DHHS may "amend, modify, or refuse to renew a license in conformity with the Maine Administrative Procedure Act, or file a complaint with the District Court requesting suspension or revocation of any license on any of the following grounds: violation of this chapter or the rules pursuant to this chapter, permitting, aiding or abetting the commission of any illegal act in that institution, or conduct or practices detrimental to the welfare of a patient."

Providers operates one or more DHCFs, licensed and regulated by DHHS.[7] As noted above, the Providers were required as a condition of their licensure to assure that all non-exempt employees who were physically present in any of their DHCFs were fully vaccinated for COVID-19. To comply with the Vaccine Mandate, as amended by the ERTR on August 12, 2021, each of the Providers implemented an employment requirement that employees become fully vaccinated by the date established in the Vaccine Mandate or by the Governor, unless they presented a valid medical exemption; and they communicated this requirement to their workforces. (App. 207a-212a, Am. Compl. ¶¶ 72-74, 79, 83-86.)

Petitioners Alicia Lowe, Debra Chalmers, Nicole Giroux and Garth Berenyi were originally part of a group of Plaintiffs who filed suit on August 25, 2021, in the U.S. District Court for the District of Maine against Governor Janet Mills, Department Commissioner Jeanne Lambrew, and then-Maine Center for Disease Control and Prevention ("Maine CDC") Director Nirav Shah and the Providers.[8]

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7. All of the Providers on this Brief are licensed healthcare providers with facilities in Maine that qualify as DHCFs. MaineHealth, MaineGeneral Health and Northern Light Eastern Maine Medical Center operate hospitals and other DHCF and non-DHCF facilities; Genesis operates long-term care facilities.

8. The Complaint was filed using pseudonyms for Petitioners, listed as Petitioners six "Jane Does" and three "John Does" who allegedly worked in healthcare settings and objected to the Mandate on religious grounds. Seven of Petitioners alleged that they were employees or former employees of the Providers, one alleged that he was an employer who objected to requiring his employees to comply with the Mandate, and one alleged that she was employed by this employer Petitioner.

The Plaintiffs alleged that they were healthcare workers employed at one of Providers' "healthcare facilities," that they requested a religious exemption from the vaccine requirement, and their Provider-employer denied their request as inconsistent with the Vaccine Mandate. (App. 189a-192a, 207a-212a, Am. Compl. at ¶¶ 10-11, 14-15, 72-74, 79, 83-86.) Petitioners no longer work for the Providers.[9] (App. 189a-193a, 207a-211a, 214a-216a, Am. Compl. at ¶¶ 10-16, 78-79, 82, 95-101.)

II. PROCEDURAL HISTORY

The Petitioners' Complaint included five counts. Against the State, it challenged the Mandate under the First Amendment's Free Exercise Clause and the Fourteenth Amendment's Equal Protection Clause. Against Providers, it raised Title VII claims for failure to accommodate Petitioners' religious beliefs. It also alleged that all defendants had both violated the Supremacy Clause by purportedly claiming that the Vaccine Mandate superseded Title VII's requirements and conspired to violate the Petitioners' civil rights in violation of 42 U.S.C.

9. Following the First Circuit's decision on Petitioners' appeal, which dismissed all claims against Providers but remanded the constitutional claims against the State back to the District Court for further litigation, the State informed Petitioners and Providers that it planned to rescind the Vaccine Mandate's COVID-19 vaccine requirement and would no longer enforce that requirement. (Case No. 1:21-cv-00242 (D. Me.), ECF No. 167.) The Vaccine Mandate was amended on August 31, 2023 to remove the COVID-19 vaccination requirements for healthcare workers in DHCFs effective as of September 5, 2023. (*Id.* at ECF No. 187.) This change does not impact the Petition or First Circuit's decision in Providers' favor as the Vaccine Mandate's COVID-19 vaccination requirement was in effect and enforceable against Providers when the alleged harms to Petitioners at issue in this case occurred.

§ 1985. The Petitioners sought declaratory and injunctive relief, as well as damages.

The same day the complaint was filed, the Petitioners moved for a temporary restraining order and preliminary injunction, seeking to bar the State from enforcing the Vaccine Mandate and requiring Providers to grant the Petitioners religious exemptions from COVID-19 vaccination. The District Court denied the motion. *See Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 39 (D. Me. 2021). The First Circuit court affirmed, concluding that the Petitioners had not shown a likelihood of success on the merits, that they would likely suffer irreparable harm absent preliminary relief, or that the balance of the equities or the public interest favored an injunction.[10] *See Does 1-6 v. Mills,* 16 F.4th 20, 29-37 (1st Cir. 2021), *cert. denied sub nom.*, *Does 1- 3 v. Mills*, 142 S. Ct. 1112 (2022). This Court denied the Petitioners' application for injunctive relief, *see Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (mem.), and their petition for certiorari, *see Does 1-3*, 142 S. Ct. at 1112.

Petitioners filed their First Amended Complaint on July 11, 2022.[10] This amended pleading removed some of the original plaintiffs (leaving only the seven plaintiffs

10. After remand to the District Court, two Maine newspapers intervened in the case to challenge the plaintiffs' use of pseudonyms. The District Court granted the newspapers' motion to unseal the plaintiffs' identities and ordered the plaintiffs to file an amended complaint identifying themselves by name, *see Does 1-6 v. Mills*, No. 21-cv-00242, 2022 WL 1747648, at *7 (D. Me. May 31, 2022), and the First Circuit denied a stay of the order pending appeal, *see Does 1-3 v. Mills,* 39 F.4th 20, 22 (1st Cir. 2022). Following the First Circuit's decision, the plaintiffs voluntarily dismissed their appeal. *See Does 1-3*, 142 S. Ct. at 1112.

(the Petitioners) who allege they were employed by the Providers), identified the Petitioners by name, and updated some factual allegations to reflect developments since the original complaint's filing (such as Petitioners' termination from their employment with Providers), but includes the same claims as the original complaint.[11] All Defendants moved to dismiss.

The District Court granted the Providers' and the State Defendants' motions and dismissed the amended complaint. *See Lowe v. Mills*, No. 1:21-cv-00242-JDL, 2022 WL 3542197, at *1 (D. Me. Aug. 18, 2022). It first dismissed the claims against Governor Mills and the damages claims against the State because Petitioners had failed to respond to the State's Rule 12(b)(1) arguments. *See id.* at *6 . Turning to the Rule 12(b)(6) motions, the District Court concluded that the Vaccine Mandate is a religiously neutral law of general applicability that is rationally related to Maine's legitimate public health interests, and so does not violate the Free Exercise or Equal Protection Clauses. *See id.* at *10-15. And it reasoned that Petitioners' factual allegations establish that the Providers could not have offered Petitioners their requested accommodation without violating state law and risking onerous penalties, creating an undue hardship that precluded liability under Title VII. *See id.* at *6-10. Finally, it concluded that the Supremacy Clause does not provide a distinct cause of action and that the complaint's allegations with respect to the conspiracy count were too vague and conclusory to support a plausible claim, and so dismissed the Supremacy Clause and conspiracy claims. *See id.* at *15.

11. Importantly, the allegations of the First Amended Verified Complaint adhered to Petitioners' assertion in their original complaint that exemption from the State-imposed Vaccine Mandate was the only accommodation they would accept. (App. 290, Am. Compl. ¶ 8).

Petitioners appealed the District Court's dismissal to the First Circuit. The First Circuit upheld the District Court's dismissal of the Title VII claims against the Providers but vacated the District Court's dismissal of the Free Exercise and Equal Protection claims.[12] Petitioners now seek a writ of certiorari asking this Court to take up the Title VII claims.

SUMMARY OF THE ARGUMENT

In August of 2021, the State of Maine added COVID-19 to its list of diseases for which immunization is a requirement for certain health care employees (the Vaccine Mandate). In order to comply with the Vaccine Mandate, Respondents here, a group of health care providers that employed Petitioners (hereafter "Providers"), had no choice but to require their on-site employees to receive COVID-19 vaccinations, subject to exemption only for medical reasons. Petitioners claim that by complying with applicable state law, Providers violated Title VII because they "refused any consideration for religious accommodation under Title VII" and did not accommodate Petitioners' sincerely held religious objections to the various available COVID-19 vaccinations. (Petition at 5.) However, from this case's very inception

12. Providers note for the Court's information that they have filed a Motion for Entry of Final Judgment Pursuant to Fed. R. Civ. P. 54(b) with the District Court (the "Rule 54(b) Motion") (Doc. 172), which Petitioners have characterized as moot because they have filed the instant Petition to the Court. (Doc. 180) Providers filed the 54(b) Motion given the bifurcated nature of the case – namely, that the First Circuit's decision dismissed all claims against the Providers but have allowed the constitutional claims against the State Respondents to continue to be litigated before the District Court. The District Court has not yet ruled on the Rule 54(b) Motion.

and continuing to this day, Petitioners have consistently stated – and expressly pled in their Verified Complaint, Amended Verified Complaint and Petition – that the *only* acceptable accommodation from any of the Providers would have been an outright non-medical exemption from the Vaccine Mandate. This, despite the fact that an exemption was the one accommodation that Providers could not lawfully offer to their Designated Healthcare Facility employees. (Case No., 1:21-cv-00242-JDL (D. Me.), ECF No. 1 at ¶¶ 5, 8; App. 186a-188a, ECF. No. 152 (hereinafter "Am. Compl." at ¶¶ 5, 8) As noted below, Providers risked severe penalties, including loss of their licenses to operate, if they provided Petitioners their requested accommodation.

Providers thus asserted, as an affirmative defense, that accommodating Petitioners with a non-medical exemption from receiving COVID-19 vaccinations would have constituted an undue hardship under Title VII. The dispositive issue before the First Circuit was whether the allegations in the Amended Complaint required dismissal of Petitioners' Title VII claims in light of Providers' undue hardship affirmative defense. While Title VII requires employers to provide reasonable accommodations to employees on account of their sincerely held religious beliefs, that duty is limited to accommodations that do not create an undue hardship. Even under the undue hardship standard applicable to Title VII religious accommodation cases as clarified by this Court in *Groff v. DeJoy*, 143 S.Ct. 2279 (2023), an accommodation that would put an employer in violation of state law and which would imperil its license to operate, plainly clears that threshold and is *per se* an undue hardship. This was especially true in this

case where the consequence of violating the law included possible loss of a license and the ability for Providers to operate their healthcare facilities during a pandemic. The First Circuit appropriately considered Providers' undue hardship affirmative defense, and, applying well-settled law to the particular facts alleged by Petitioners, determined that Petitioners' Title VII claims were properly dismissed. None of the considerations governing review on certiorari set forth in this Court's Rule 10 exists here. This Court should decline to grant certiorari.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' QUESTIONS PRESENTED DO NOT IMPLICATE NOVEL OR UNSETTLED QUESTIONS OF FEDERAL LAW

Petitioners advance two questions for this Court's review. The first Question inaccurately posits that the Vaccine Mandate is "directly contrary" to Title VII. (Petition at i.) As explained below, when applicable well-settled law regarding Title VII is applied to the facts as alleged by Petitioners, the undeniable conclusion is that Petitioners' requested accommodation – an exemption from the Vaccine Mandate – would impose an undue hardship on Providers. Petitioners inaccurately frame their second Question by asserting that the Vaccine Mandate "requires employers to deny without any consideration all requests by employees for a religious accommodation" and therefore Title VII should preempt the conflicting state law under the Supremacy Clause. (*Id.* at ii.) As discussed below, this attempt to frame their case as concerning religious accommodations in general is misleading: Petitioners have consistently requested

only one specific accommodation from Providers – a total exemption from the Vaccine Mandate – which the Vaccine Mandate prohibited Providers from providing. Further, Petitioners have waived any claims concerning the Supremacy Clause as they did not pursue those claims before the First Circuit on appeal.

Accordingly, neither question implicates any of the considerations set forth in Supreme Court Rule 10 and the Petitioners' Petition for a Writ of Certiorari should be denied.

A. The only accommodation alleged or at issue is an exemption that would have allowed Petitioners to continue working in DHCFs without receiving the required COVID-19 vaccine.

Petitioners do not allege that they requested or were entitled to an accommodation that would remove them from the purview of the Vaccine Mandate, such as a leave of absence, remote work, or reassignment to a position outside of any DHCF.[13] To the contrary, Petitioners

13. To the extent the Petition could be construed to assert Providers violated Title VII by not providing an interactive process through which Petitioners could have sought accommodations, they waived that argument by not explicitly asserting it below. Petitioners have hung their hats entirely on their claim that the Providers were obligated to exempt them from the vaccine requirement, and it is too late now for them to try out another hook. *See Melendez v. Otero*, 964 F.2d 1225, 1226 n.1 (1st Cir. 1992); *In Re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 152-53 (1st Cir. 1990). Moreover, liability for failure to engage in an interactive process only arises when "the parties could have discovered and implemented a reasonable accommodation through

emphatically assert that: **"All [they] seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months"** without getting vaccinated. (App. 188a-189a, Am. Comp. ¶ 8) (emphasis in original.) Petitioners also specifically allege that:

> The Governor's COVID-19 Vaccine Mandate also says that '[t]he organizations to which this requirement applies must ensure that each employee is vaccinated, with this requirement being enforced as a condition of the facilities' licensure.'
>
> **Thus the Governor has threatened to revoke the licenses of all health care employers who fail to mandate that all employees receive the COVID-19 vaccine.**

(App. 196a-197a, Am. Compl. at ¶¶ 33-34.) (emphasis in original.)

Thus, Petitioners *agree with Providers* on two critical – and ultimately dispositive – points. First, that to accommodate Petitioners' religious beliefs the only way they found acceptable Providers would have to violate state law. Second, that by doing so Providers faced substantial penalties, up to and including revocation of their licenses

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good faith efforts." *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 67 (1st Cir. 2020). Here, Petitioners foreclosed that possibility from the start by declaring what the one and only accommodation must be.

to operate. This acknowledgment leaves no room for any factual dispute about either the nature of accommodation sought or the extent of hardship to Providers were they to provide it. As explained below, the accommodation Petitioners sought would constitute an undue hardship, as a matter of law.

B. Title VII does not require employers to expose themselves to legal risks in order to accommodate employees' religious beliefs.

The First Circuit concluded below that "[t]he risk of license suspension for violating the [Vaccine] Mandate would have constituted an 'undue hardship on the conduct of the [Providers'] business' under any plausible interpretation of that phrase." *Mills*, 68 F.4th at 721. This conclusion is supported by an extensive body of case law rejecting claims that employers must excuse employees from work rules designed to protect their and others' safety. *E.g. Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (holding it would be an undue hardship for the employer to excuse the plaintiff from the requirement that he shave his facial hair to accommodate the use of a respirator that would protect him from exposure to toxic gases); *Kalsi v. New York City Transit Auth.*, 62 F. Supp. 2d 745, 747-48 (E.D.N.Y. 1998), *aff'd* 189 F.3d 461 (2d Cir. 1999) (holding it would be an undue hardship for the employer to excuse an employee from the requirement that he wear a hard hat as a subway car inspector in order to accommodate a turban).

Here, however, Providers' ability to offer an exemption was constrained not only by health and safety considerations, but also by law. Courts considering

whether employers are required to accommodate employees' religious beliefs in ways that would place them in violation of the law have analyzed the question two different ways. Some have concluded such claims fail to state a *prima facie* case, reasoning that the conflict with the plaintiff's religious beliefs stems from a statute or rule, and not a requirement of the employer. *E.g., Seaworth v. Pearson*, 203 F.3d 1056, 1057 (8th Cir. 2000); *Baltgalvis v. Newport News Shipbuilding, Inc.*, 132 F. Supp. 2d 414, 418 (E.D. Va. 2001), *aff'd* 15 F. App'x. 172 (4th Cir. 2001). Applying the rationale set forth in these cases, for Petitioners to state a claim for failure to provide reasonable accommodation under Title VII, they must identify an employment policy or requirement that conflicts with their religious beliefs, which the employer has the ability or discretion to modify. However, when Petitioners were employed by Providers, applicable state law made COVID-19 vaccination a requirement for every employee working in a DHCF unless they were eligible for a medical exemption. Providers could no more waive the requirement that Petitioners be vaccinated against COVID-19 than they could waive the requirement that their physicians be licensed to practice medicine.

Other courts have concluded that an accommodation that places the employer in violation of the law is *per se* an undue hardship. *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830-31 (9th Cir. 1999). At least one Circuit Court of Appeals has declined to endorse or reject either approach, simply concluding that Title VII does not require employers to disregard the law "in the name of reasonably accommodating an employee's religious practices." *Yeager v. FirstEnergy*

Generation Corp., 777 F.3d 362, 364 (6th Cir. 2015). "Although they have disagreed on the rationale, courts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law." *Sutton*, 192 F.3d at 830.

Because there is no dispute that Providers would have had to violate the Vaccine Mandate – that is, state law – to provide Petitioners the only accommodation they say was acceptable to them, Petitioners are left with the contention that their Title VII claims would be viable *if* the Vaccine Mandate were ultimately found to be unconstitutional. However, the law does not support this contention, either. Title VII cannot be construed to require employers to provide accommodations that would place them "on the 'razor's edge' of liability." *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011) (internal citation omitted). Whether or not Petitioners ultimately persuade a court that the Vaccine Mandate was unconstitutional is irrelevant because it is undisputed that "the state of the law during [Petitioners' employment] created a risk" of substantial penalties and loss of licensure. *See EEOC v. Oak-Rite Mfg. Corp.*, No. IP99–1962–C–H/G, 2001 WL 1168156, at *14 (S.D. Ind. Aug. 27, 2001) (holding that "[t]he risk of being fined" by OSHA was "sufficient to establish undue hardship"). In sum, it is plain from the face of the Amended Complaint that Providers could not have extended Petitioners the only accommodation they sought without running afoul of a presumptively valid state law, and assuming all of the risks attendant to doing so, including, absurdly, the risk that the healthcare facilities most needed during the pandemic would have been unable to offer the very healthcare Petitioners claim to have

wanted so ardently to provide. Thus, the First Circuit correctly affirmed the District Court's conclusion that the Petitioners therefore failed to state plausible Title VII claims against Providers.

C. There is no conflict between Title VII and the Vaccine Mandate given that Petitioners' requested accommodation would have resulted in undue hardship to Providers.

Although Petitioners abandoned their standalone Supremacy Clause claim in the District Court,[14] they continue to baldly assert that Title VII preempts the Vaccine Mandate because it was contrary to Title VII's requirements. This statement is legally and factually incorrect. In dismissing Petitioners' preemption argument below, the First Circuit stated that this Court "has explained that Title VII preempts state laws 'only if they actually conflict with federal law.'" *Mills*, 68 F.4th at 724 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)). The First Circuit further observed that Title VII's definition of religion incorporates the undue hardship defense such that an employment action cannot be discriminatory on the basis of religion if the

14. Petitioners did not separately appeal the Supremacy Clause claim asserted in the Amended Complaint, which was abandoned below in the District Court. Given Petitioners' waiver, the First Circuit dismissed this claim. *Mills*, 68 F.4th at 714 ("The plaintiffs have thus waived any arguments on those [Supremacy Clause and § 1985 conspiracy claims] points, and we affirm those aspects of the district court's decision"). Further, as this Court held in *Armstrong v. Exceptional Child Ctr., Inc.*, "the Supremacy Clause is not the source of federal rights, and certainly does not create a cause of action." 575 U.S. 320, 324-25 (2015).

undue hardship defense applies. *Id*. Here, because the undue hardship defense has been established, "there is no 'actual[ ] conflict' in this case." *Id*.; *see also We the Patriots USA v. Hochul*, 17 F.4th 266, 292 (2d Cir. 2021) (concluding that a similar COVID-19 vaccination state rule did not conflict with Title VII). As discussed above, it was entirely possible for Providers to comply with both federal law (Title VII) and state law (the Vaccine Mandate). Yet, because Petitioners insisted on only one accommodation – an exemption from the Vaccine Mandate – which under applicable law constitutes a *per se* undue hardship, Providers cannot accommodate them and there is no conflict between the two laws. Also, by alleging that a total exemption from the Vaccine Mandate was the only acceptable accommodation for their sincerely held religious beliefs, Petitioners have eschewed all other possible accommodations which might have been available to them under Title VII. As Petitioners themselves recognized at oral argument before the First Circuit, Providers were in a "damned if you do, damned if you don't situation." *Mills*, 68 F.4th at 720.

Petitioners also contend that the following Title VII language would have exempted Providers from liability for violating the Vaccine Mandate:

> Nothing in [Title VII] 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 . . . , other than such law which 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. Providers read this language – in conjunction with the undue hardship provision – to have the opposite effect; that is, to have authorized them to *comply* with the Vaccine Mandate, because they could do so without violating Title VII. The Vaccine Mandate did not contain any reference to religion; it simply required employers to ensure that employees entering DHCFs were vaccinated unless eligible for a medical exemption. While the Vaccine Mandate limited the accommodations a healthcare employer could lawfully offer to an employee working in a DHCF who declined the vaccine for religious reasons, it did not preclude all reasonable accommodations and therefore did not purport to require or permit healthcare employers to discriminate in violation of Title VII. *E.g. Hochul,* 17 F.4th at 292 (concluding that there was no conflict between Title VII and state law "because, although it bars an employer from granting a religious exemption from the vaccination requirement, it does not prevent employees from seeking a religious accommodation allowing them to continue working consistent with the Rule") (emphasis in original); *Dr. T. v. Alexander-Scott*, No. 1:21-cv-00387-MSM-LDA, 2022 WL 79819, at *9-10 (D.R.I. Jan. 7, 2022) (holding that Rhode Island regulation virtually identical to Maine's Vaccine Mandate did not preclude reasonable accommodation and that the Petitioners were therefore unlikely to establish preemption); *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172, 1201 (W.D. Wash. 2012) (holding that Board of Pharmacy rules did not "require or permit" discrimination on the basis of religion and therefore were not preempted by Title VII, even if they were unconstitutional under the Free Exercise clause of the United States Constitution). Further, as the First Circuit observed, "the Providers do not have enforcement authority with respect to the

[Vaccine] Mandate, and they have no power to determine for the State that the [Vaccine] Mandate is invalid under Title VII." *Mills*, 68 F.4th at 724. Instead, had Providers disregarded the Vaccine Mandate and its prohibition on vaccination exemptions other than for medical reasons, such reckless behavior could have resulted in severe penalties for Providers and the populations that they serve.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS

Although Petitioners do not raise this Court's decision in *DeJoy* in their Petition – and therefore have waived such an argument – to the extent that decision could be viewed as a basis to review the decision below, this Court's clarification of the "undue hardship" standard in *DeJoy* does not affect the First Circuit's analysis or holding in Providers' favor. In *DeJoy*, this Court clarified that undue hardship "is shown when a burden is substantial in the overall context of an employer's business" and declined to adopt wholesale the Americans with Disabilities Act ("ADA") standard and guidance for the undue hardship defense applicable to Title VII religious discrimination claims. *DeJoy*, 143 S. Ct. at 2294. Notably, in the First Circuit's decision below, it stated that "[Petitioners'] requested accommodation would have constituted an undue hardship under any plausible interpretation of the statutory text" regarding undue hardship and, and further that granting their required exemption certainly would be considered an undue hardship under the "significant costs on the [employer]" ADA standard. *Mills,* 68 F.4th at 721 (concluding "it is difficult to imagine a penalty that would

cause a healthcare provider more significant difficulty '[i]n the conduct of [its] business'" than loss of its license to operate). Thus, Providers' circumstances easily satisfy the undue hardship standard clarified in *DeJoy*.

In a final attempt to salvage their doomed position, Petitioners attempt to conjure a split between the First Circuit's decision in this case and decisions in other Circuit Courts. There is no such split. The cases cited by Petitioners are factually and legally distinguishable and therefore shed no light on the Title VII undue hardship question presented here.

In the following cases, the Circuit Courts concluded that the challenged employment policies which the defendant-employers justified as complying with applicable state laws were preempted by Title VII because they could arguably be viewed as requiring or permitting discriminatory employment practices. *See Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civ. Serv. Comm'n*, 630 F.2d 79, 104-05 (2d Cir. 1980) (race discrimination case); *Palmer v. Gen. Mills Inc.,* 513 F.2d 1040, 1042-44 (6th Cir. 1975) (sex discrimination) *Williams v. Gen. Foods Corp.*, 492 F.2d 399, 404-05 (7th Cir. 1974) (sex discrimination); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219,1225-26 (9th Cir. 1971) (sex discrimination). However, *none* of the cited cases involved religious discrimination and Title VII's undue hardship defense. *See Mills*, 68 F.4th at 724-25 ("[t]he applicability of the undue hardship defense distinguishes this case from those the plaintiffs cite applying § 2000e-7 in the context of alleged racial discrimination – where Title VII offers no undue hardship defense").

Other cases cited by Petitioners do not relate to Title VII at all and therefore have no bearing on the questions presented in this case. *See Campbell v. Universal City Dev. Partners,* 72 F.4th 1245, 1257-58 (11th Cir. 2023) (a public accommodation case where state law provided less discrimination protection for individuals with disabilities than under Title II of the ADA); *Nat. Fed. of the Blind v. Lamone*, 813 F.3d 494, 503-04, 508-09 (4th Cir. 2016) (a public services accommodations case under Title II of the ADA); *Mary Jo C. v. New York State and Local Ret. Sys.*, 707 F.3d 144, 161-63 (2d Cir. 2013) (same); *Barber v. Colorado Dept. of Rev.*, 562 F.3d 1222, 1228, 1232-33 (10th Cir. 2009) (Section 504 of the Rehabilitation Act); *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (age discrimination case under the Age Discrimination in Employment Act).

Petitioners disregard these fundamental distinctions between the cases they cite to support an alleged circuit split and the Title VII undue hardship legal standard applicable here. Indeed, the circuit split they claim to have found is imaginary and affords no occasion for review under Rule 10.

CONCLUSION

Petitioners dealt themselves a losing hand at the beginning of the case when they expressly alleged that only an outright exemption from a legally required immunization would comport with their religious beliefs. They have doggedly insisted on going all in on the claim that Providers had a duty to provide that exemption in violation of state law at the risk of substantial penalties, notwithstanding the well-established limitation of the employer's duty to accommodate religious beliefs to circumstances where doing so does not create an undue hardship. Nothing about Petitioners' case justifies this Court's time and attention, and their petition should be denied.

Dated: September 15, 2023.

Respectfully submitted,

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