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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT, NORTHERN LIGHT HEALTH FOUNDATION

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of The Supreme Court of the United States, Defendant Northern Light Health Foundation makes the following disclosures regarding its corporate status: Northern Light Health Foundation is a non-profit corporation organized under Title 13-B of the Maine Revised Statutes. It has no parent corporation. As a non-profit, it has no owners or shareholders, but has one corporate member, Eastern Maine Healthcare Systems d/b/a Northern Light Health, which is also a Title 13-B non-profit corporation.

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CONSTITUTIONAL, STATUTORY AND OTHER LEGAL PROVISIONS INVOLVED

In addition to the laws set forth in Petitioners' Petition for Writ of Certiorari (the "Petition") at pages 1-2, the following statutes and state laws are implicated by the Petition:

Title VII, Section 708: "Nothing in this title 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 or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e–7.

Title XI, Section 1104: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

Maine Statute Regarding Public Health and Control of Notifiable Diseases and Conditions: "**Exemptions to immunization.** Employees are exempt from immunization otherwise required by this subchapter or by rules adopted by the department pursuant to this section under the following circumstances.

A. A medical exemption is available to an employee who provides a written statement from a licensed

physician, nurse practitioner or physician assistant that, in the physician's, nurse practitioner's or physician assistant's professional judgment, immunization against one or more diseases may be medically inadvisable.

B. (PL 2019, c. 154, §9 (RP.)

C. An exemption is available to an individual who declines hepatitis B vaccine, as provided for by the relevant law and regulations of the federal Department of Labor, Occupational Health and Safety Administration." ME. REV. STAT. ANN. TIT. 22, § 802(4-B) (Supp. 2021).

Maine's Emergency Rule: Please see the State Defendants' Appendix to their Brief in Opposition to Petitioners' Petition at 2a-15a.

Maine's Final Rule: Please see the State Defendants' Appendix to their Brief in Opposition to Petitioners' Petition at 16a-28a.

STATEMENT OF THE CASE

I. INTRODUCTION

When faced with the global pandemic of the novel coronavirus of 2019 ("COVID-19"), which has infected at least 48,000,000 people, resulted in over 776,000 deaths in the United States and continues to mutate and produce dangerous new variants, the Maine Department of Health and Human Services ("DHHS") took steps to safeguard public health and updated its existing rule on Immunization Requirements for Healthcare Workers in August 2021 to add the COVID-19 vaccine to the list of required vaccines

for such workers. DHHS added the COVID-19 vaccine to the rule **after** previously recognized exemptions to immunization for religious **and** philosophical beliefs were removed from the rule as a consequence of the enactment of a related statute in 2019. *See* ME. REV. STAT. ANN. tit. 22 § 802(4-B) (Supp. 2021). Accordingly, the only exemption from immunization for all required vaccines, including COVID-19, available to healthcare workers is a medical exemption. Petitioners – all employee healthcare workers except for one dental provider – object to receiving the COVID-19 vaccine based on their alleged religious beliefs against abortion and concerns about the use of fetal cell line material in the vaccine and/or its development. Petitioners allege causes of action under the Free Exercise Clause and the Equal Protection Clause against the State Defendants, violations of Title VII against the Provider Defendants and causes of action under the Supremacy Clause and 42 U.S.C. § 1985 against all Defendants.

Because the COVID-19 immunization rule has been upheld by the First Circuit Court of Appeals (the "First Circuit") and the District Court of Maine (the "District Court") and the deadline for immunization passed effective October 29, 2021, the Provider Defendants, including Northern Light Health Foundation ("Northern Light"), have implemented the immunization rule's requirements. Recently, in a filing before the District Court, Petitioners confirmed that all employee Petitioners have been terminated by the Provider Defendants and that the one employer Petitioner – John Doe 1 – is no longer covered by the immunization rule. Even though the immunization law has taken effect and the alleged damage Petitioners sought to prevent through a preliminary injunction – loss of the employee Petitioners' employment – has occurred,

Petitioners continue to seek a preliminary injunction to enjoin the law. Petitioners' request for such relief is now moot. Given this new information and for the reasons set forth in the First Circuit's decision summarized below, Northern Light urges the Court to deny the Petition.

On October 19, 2021, the First Circuit affirmed the District Court's decision denying Petitioners' request for a preliminary injunction. (Pet. App. B, Opinion on Appeal (the "Opinion"); *see* Pet. App. C, Order on Pls.' Mot. for Prelim. Inj. (the "Order").) Noting that "health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often requires close contact between providers and patients (who often are medically vulnerable)," the First Circuit confirmed there was no likelihood of success on the merits of Petitioners' claims because: (1) the immunization rule is facially neutral, was not designed to and does not single out religious objections to immunization, and does not permit secular conduct that undermines the State's asserted interest in protecting health and safety thereby survived rational basis review; (2) even if strict scrutiny applied, the immunization rule was narrowly tailored to promote the State's interest in "protecting public health against a deadly virus" and is the least restrictive means of doing so; (3) there was no Supremacy Clause violation where the Provider Defendants "merely dispute that Title VII requires them to offer [Petitioners] the religious exemptions they seek;" (4) "hospitals need not provide the exemption [Petitioners] request [under Title VII] because doing so would cause them to suffer undue hardship;" and (5) Petitioners did not plead adequate facts to establish the alleged Section 1985 conspiracy. (Pet. App. at 19a, 25a-42a (internal citations omitted).)

The First Circuit further concluded that there was no irreparable injury justifying a preliminary injunction or any pre-termination relief because "loss of employment 'does not usually constitute irreparable injury'" except in very extreme circumstances not present in this case. (*Id.* at 40a-41a.) Finally, the First Circuit affirmed that the balancing of the equities tipped in the State Defendants' favor as "Maine's interest in safeguarding its citizens is paramount." (*Id.* at 42a-43a.) Notably, the First Circuit distinguished each of the cases Petitioners continue to rely on to support their position. (*Id.* at 34a-38a.) For all of the reasons articulated in the Opinion, this Court should deny the Petition.

II. STATEMENT OF FACTS

The background set forth in the First Circuit's Opinion and the District Court's Order (Pet. App. at 14a-24a, 54a-63a) provides an accurate recitation of the facts. The only new developments since the Opinion are that the challenged rule has been finalized and is now permanent, all employee Petitioners have been terminated from the Provider Defendants employ (other than Jane Doe 6 as explained below), and John Doe 1 – the sole employer Petitioner – is no longer subject to the challenged law. For the Court's convenience, Northern Light offers the following brief factual background.

Maine has a long history of requiring healthcare workers at Designated Healthcare Facilities[1] to be

1. The term "Designated Healthcare Facility" 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,

vaccinated against infectious diseases subject to limited exemptions. (*See* Pet. App. at 14a-16a, 60a-63a.) Contrary to Petitioners' repeated and knowingly false refrain, Maine did **not** eliminate the religious exemption to mandatory vaccine requirements for certain healthcare workers in conjunction with its directive that these workers be vaccinated against COVID-19. (*See* Pet. at 2, 8-9; Pet. App. at 15a (correcting Petitioners' inaccurate statements).) Rather, in response to declining vaccination rates in the State of Maine, the Maine Legislature amended the healthcare immunization law in 2019, before the pandemic, to remove previously recognized religious **and** philosophical exemptions.[2] *See* P.L. 2019, ch. 154, §§ 2, 9-11 (varying effective dates); Me. Rev. Stat. Ann. tit. 22 § 802(4-B).[3] As a result, the only remaining exemption to immunization for healthcare workers is a medical

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or home health agency subject to licensure by the State of Maine, Department of Health and Human Services Division of Licensing and Certification." 10-144-264 Me. Code R. §1(D) (eff. Nov. 10, 2021).

2. The sponsor for the bill amending the healthcare immunization rule stated it was being implemented to protect the immunocompromised "who will never achieve the immunities needed to protect them and [who] rely on their neighbors' vaccinations." *Hearing on LD 798, An Act to Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization requirements Before the J. Standing Comm. on Educ. & Cultural Affs.*, 129th Legis., 1st Reg. Sess. (Me. 2019) (statement of Rep. Tipping).

3. The other vaccines covered by the Final Rule and related statute required of healthcare workers subject only to a medical exemption include: rubeola (measles), mumps, rubella (German measles), varicella (chicken pox), hepatitis B and influenza.

exemption for individuals for whom immunization would be medically inadvisable and for whose protection the non-medical exemptions were removed. Me. Rev. Stat. Ann. tit. 22 § 802(4-B).

In March 2020, Maine voters rejected a peoples' veto referendum, thereby endorsing the Maine Legislature's decision to eliminate non-medical exemptions from immunization for healthcare workers at Designated Healthcare Facilities. On April 14, 2021, following the referendum and consistent with the directive from the Maine Legislature, DHHS formally amended its existing Immunization Requirements for Healthcare Workers rule to remove the religious and philosophical exemptions from its text. (*See* 10-144-264 Me. Code R. (eff. Apr. 14, 2021).) Then, due to the growing COVID-19 crisis in the United States and Maine, on August 12, 2021, DHHS issued an emergency rule further amending the Immunization Requirements for Healthcare Workers rule to add the COVID-19 vaccine to the list of mandated vaccines for healthcare workers (the "Emergency Rule").[4] (10-144-264 Me. Code R. (eff. Aug. 12, 2021).) The Emergency Rule required employees of Designated Healthcare Facilities to receive their final dose of the COVID-19 vaccine on or before September 17, 2021. *Id.* at §§ 1(E)-(F), 2, 5, 7. On or about September 2, 2021, Governor Janet Mills announced that DHHS would not begin enforcing the Emergency

4. DHHS has the authority to issue emergency rules as part of its authority to "[e]stablish procedures for the control, detection, prevention . . . of communicable . . . diseases, including public immunization . . . programs." Me. Rev. Stat. Ann. tit. 22 § 802(1)(D), (3) ("[t]he department shall adopt rules to carry out its duties as specified in this chapter"); Me. Rev. Stat. Ann., tit. 5 § 8054(1) (2011).

Rule until October 29, 2021 so healthcare workers would have additional time to come into compliance. *See Mills Administration Provides More Time for Health Care Workers to Meet COVID-19 Vaccination Requirement*, MAINE.GOV (Sept. 2, 2021), https://www.maine.gov/governor/mills/news/mills-administration-provides-more-time-health-care-workers-meet-covid-19-vaccination.

Because the Emergency Rule could only be in effect for ninety (90) days, DHHS proposed certain permanent amendments to the Immunization Requirements for Healthcare Workers rule subject to a routine notice and comment period. On November 10, 2021, DHHS issued a final revised Immunization Requirements for Healthcare Workers rule (the "Final Rule"), which superseded the Emergency Rule. 10-144-264 ME. CODE R. (eff. Nov. 10, 2021). The Final Rule mirrors the Emergency Rule except that it includes a narrower definition of "employee" and removes the COVID-19 vaccination requirement for Emergency Medical Services and dental practices.[5] *See Health Care Worker Vaccination FAQS,* MAINE.GOV (last updated Nov. 10, 2021) at FAQs 1, 3 and 4, https://www.maine.gov/covid19/vaccines/public-faq/health-care-worker-vaccination.

Northern Light operates one or more Designated Healthcare Facilities, licensed and regulated by DHHS.[6]

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5. Emergency Medical Services are covered by the Bureau of Emergency Medical Services' COVID-19 vaccination rule and dental practices may be subject to other federal COVID-19 vaccination rules depending on their size.

6. Only a fraction of Maine's healthcare facilities – broadly defined – constitute Designated Healthcare Facilities. In fact,

(*See* Decl. of Paul Bolin ¶3, ECF No. 51-2.) As a condition of its licensure, Northern Light is required to ensure that employees who are physically present in the workplace are fully vaccinated for COVID-19 subject to the medical exemption. If Northern Light does not follow the Final Rule, it would not be in compliance with state law and subject to severe consequences, including being enjoined from continuing to permit employees to work absent proof of vaccination or exemption, civil fines, penalties and loss of licensure. Me. Rev. Stat. Ann. tit. 22 §§ 803-04. Stated otherwise, Northern Light has no discretion with respect to compliance with the Final Rule, no power to abrogate such rule and must comply with it.[7] Accordingly, Northern Light implemented mandatory COVID-19 vaccination policies consistent with the Final Rule and the State's deadline for vaccination. Petitioners' counsel has represented that all employee Petitioners have been terminated due to the Final Rule.[8] (Pet'rs' Reply in Supp. of Mot. to Expedite Consideration of the Pet. for Writ of Cert. at 4 (Nov. 24, 2021).)

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there are many healthcare facilities in the State of Maine which do not meet this definition. *See Health Care Worker Vaccination FAQS* at FAQ 1 (listing the types of healthcare facilities that are covered by and excluded from the Final Rule).

7. This observation is not intended to suggest that Northern Light believes the Final Rule (or the Emergency Rule) is in any way improper. Rather, it is simply an observation that whether the Final Rule is constitutionally sound or not, private persons subject to the jurisdiction of the State are bound to comply with state laws unless and until they are rescinded, repealed, or otherwise invalidated.

8. Because Petitioners have remained anonymous, Northern Light does not know if the employees it terminated for failure to comply with the COVID-19 immunization requirement actually included any of the Petitioners.

SUMMARY OF THE ARGUMENT

Standard of Review

Petitioners request the Court's review of this case asserting that it presents "an important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). As set forth below, the Questions are not novel but rather legal issues that have been settled by decisions in various federal courts relying on this Court's precedent. Notably, shortly after the Opinion issued, the Second Circuit echoed the First Circuit's analysis – again citing to this Court's precedent – when faced with similar constitutional and Title VII claims by healthcare workers in New York.[9] *See We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). Accordingly, the Petition does not present "important question[s] of federal law" worthy of the Court's review and should be denied.

Further, consistent with Northern Light's obligation under Rule 15(2) of this Court's rules to address "any perceived misstatement of fact or law in the petition," it hereby brings to the Court's attention certain inaccuracies in the Questions.

In both the first and second Questions, Petitioners assert that the state law at issue is the "governor's order" when in fact the state law is a Final Rule –

9. Notably, Petitioners continue to cite to the decision in the Northern District of New York to support their arguments but that decision is superseded by a Second Circuit decision that is not in their favor – something that Petitioners relegate to a footnote in the Petition. (Pet. at 28-29, n.2.)

previously an Emergency Rule – that was subject to a routine rulemaking process. In addition, in the first Question, Petitioners characterize the challenged state law as "mandating that private healthcare employers . . . terminate their healthcare workers who are not fully vaccinated for COVID-19 and deny any worker's request for religious accommodation from the mandate" which is an ultimatum and directive that the challenged law did not and does not contain. Petitioners make a similar mischaracterization in the second Question. As noted below, rather than mandate that covered employers terminate workers for noncompliance with the vaccine mandate or instruct covered employers to deny religious exceptions, the Final Rule and Emergency Rule simply do not provide for religious exemptions and threaten significant penalties for covered employers who do not follow the law.

Questions One and Two Do Not Merit the Court's Review

As to Question one, Petitioners' Free Exercise and Equal Protection claims are brought against only the State Defendants, and Petitioners do not assert or develop any argument that the Provider Defendants, including Northern Light, are state actors.[10] Nevertheless, Northern Light concurs with the First Circuit's analysis of those constitutional issues (summarized above,

10. The Verified Complaint included a claim of conspiracy under 42 U.S.C. § 1985 (Count V), but Petitioners have failed to include that claim in the Questions or develop arguments in support of that claim in their Petition. Such a claim is wholly unsupported by the record and does not warrant this Court's consideration. (*See* Pet. App. at 34a, 94a.)

supra 4) and urges the Court to deny the Petition given the completeness and sound basis of that analysis. Given that Question one does not implicate the Provider Defendants, Northern Light does not address it further in the Argument below.

Regarding Question two, Petitioners assert a vague Supremacy Clause claim against all Defendants. The Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015). Accordingly, the Supremacy Clause cannot independently supply any basis for Petitioners' requested injunctive relief against Defendants. In any event, Petitioners have not articulated an actual Supremacy Clause challenge because, as the First Circuit observed in the Opinion, "[t]he parties agree that Title VII is the supreme law of the land; the hospitals merely dispute that Title VII requires them to offer the appellants the religious exemptions they seek." (Pet. App. at 39a.) To the extent Petitioners' Supremacy Clause claim is simply an assertion that the provisions of Title VII preempt the Final Rule, that assertion fails as addressed at length below.

Question Three Has Never Been Raised, Is Moot, and No Preliminary Injunctive Relief Would Have Been Appropriate Under the Applicable Analysis

At no point in this litigation has any party raised the scope of an Article III courts' authority to grant preliminary injunctive relief, nor has that issue formed the basis of any decision below. Accordingly, Question three is not before this Court. Moreover, based on Petitioners'

representation that all employee Petitioners have been terminated by the Provider Defendants because they refused to comply with the Final Rule, Petitioners' claims for preliminary injunctive, pre-termination relief are moot. *See Together Employees v. Mass General Brigham Inc.*, No. 21-1909, 2021 WL 5368216, at *5 (1st Cir. Nov. 18, 2021).

Finally, Petitioners were not, and are not eligible for injunctive relief because "the deadline for being vaccinated has passed, the appellants cannot point to an 'impossible choice' as a special factor here; they have already made their choice." *Id.* Any Title VII claims Petitioners allegedly have against Northern Light and the other Provider Defendants should proceed in the District Court or elsewhere in the normal course because regular Title VII remedies such as money damages and reinstatement are available to Petitioners in the unlikely event that they prevail on their Title VII claims. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984) (preliminary injunctive relief is only appropriate where Petitioners show they have inadequate remedies at law); *Together Employees,* 2021 WL 5368216 at *5, n.5 ("[m]oney damages would adequately resolve all of the alleged harms"); (Pet. App. at 40a ("[w]hen litigants seek to enjoin termination of employment, money damages ordinarily provide an appropriate remedy").). Accordingly, the third Question is not presented by the facts of this case. The Court should deny the Petition.

ARGUMENT

I. TITLE VII DOES NOT PREEMPT THE IMMUNIZATION REQUIREMENT AND PETITIONERS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

Both Questions two and three presented by Petitioners must be considered in the procedural context in which they have traveled to this Court; the appeal of the District Court's order denying Petitioners' Motion for Preliminary Injunctive Relief.

In its Opinion, the First Circuit affirmed that Petitioners (a) did not establish a likelihood of success on the merits of their Free Exercise Clause, Equal Protection Clause, Supremacy Clause preemption, substantive Title VII and 42 U.S.C. § 1985 claims; (b) did not establish irreparable harm because they would be entitled to seek money damages among other relief if they prevailed on their Title VII claims; and (c) the balance of the equities did not weigh in Petitioners' favor or merit a preliminary injunction given the context of the case and the public interest. (*See supra* at 4-5.) The ruling related to Question two – Supremacy Clause preemption – was interlocutory and a finding on the "likelihood of the success" of such claim, not a final ruling on the issue of preemption. On that basis, Question two should not be reviewed at this time.

Further, as noted above, Question three was not raised in the papers or decisions below and therefore is not properly presented. The novel aspect of Question three; the scope of an Article III court's power to issue such relief, need not be confronted because Petitioners simply

are not entitled to that relief even assuming its theoretical availability. To the extent that Question three requests review of the irreparable harm finding, the Question is moot because employee Petitioners are no longer employed by Provider Defendants and now able to seek Title VII remedies that may be available to them. Notwithstanding the mootness of Question three and Petitioners' request for injunctive relief, Northern Light and the other Provider Defendants prevail on the merits of Petitioners' Title VII claim along with all other preliminary injunction factors.

When assessing whether to issue a preliminary injunction, a federal court must find the following four elements satisfied: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in the plaintiff's favor, and (4) service of the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015). Petitioners bear the burden of establishing that the aforementioned factors "weigh in [their] favor." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 120 (1st Cir. 2003).

"Likelihood of success is the main bearing wall of the four-factor framework." *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir. 1996). "If the movant fails to demonstrate a likelihood of success on the merits, the remaining elements are of little consequence." *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020). Petitioners cannot prevail on this threshold inquiry because Title VII yields the same result as application of the Final Rule; i.e., no accommodation in the form of a religious exemption from the vaccine mandate may be granted in the circumstances presented.

Moreover, the following analysis of the likelihood of success on the Title VII claims presented demonstrates that the second Question Petitioners pose to the Court can only be answered in the negative and disposes fully of that inquiry. The following analysis also substantially undercuts the implicit assertion at the heart of the third Question; i.e., their asserted entitlement to preliminary injunctive relief.

A. There Is No Likelihood of Success on the Merits of the Title VII Claims

Neither the Final Rule, nor Northern Light's conduct in abiding by it, are at odds with Title VII. Petitioners' contention that Northern Light's compliance with the Final Rule is violative of Title VII is grounded on the incorrect assertion that in the circumstances of this case Title VII provides an absolute right to a religious accommodation in the form of an exemption to the government's mandatory COVID-19 vaccination for healthcare workers.

Title VII addresses preemption issues in only two areas. First, Section 708 of Title VII states "[n]othing in this title 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 or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e–7. Second, Section 1104 of Title XI (applicable to all titles of the Civil Rights Act, including Title VII), states "[n]othing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any

such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

As explained further below, the Final Rule – specifically, the absence of a religious exemption in such rule – does not require or permit Northern Light to engage in an unlawful employment practice in violation of Title VII. Moreover, contrary to Petitioners' implicit assertion, Title VII **never** requires an employer to make a religious accommodation (or any other accommodation for that matter), when doing so would constitute an undue hardship as is the case here.

In *California Federal Savings And Loan Association v. Guerra*, this Court analyzed Sections 708 and 1104 and concluded "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII; these two sections provide a 'reliable indicium of congressional intent with respect to state authority' to regulate employment practice." 479 U.S. 272, 282 (1987) (internal citations omitted). Because Congress did not intend for Title VII to occupy the field, the preemption inquiry centers on whether there is conflict between the Final Rule and Title VII such that "compliance with both federal and state regulations is a physical impossibility." *Id.* at 281 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)). Here, application of the Final Rule and Title VII to Petitioners yields the same result. Therefore, there is no conflict preemption.

By its terms, Title VII constrains the conduct of employers.[11] It does not purport to govern the State's ability to set forth the regulations healthcare providers must abide by. Title VII expressly states that "[i]t shall be an unlawful employment practice for employers – (1) 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 . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . . ." 42 U.S.C. § 2000e-2.

Title VII further provides that the duty to accommodate an employee's religious beliefs, practices and observances

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11. As a procedural matter, Petitioners have not exhausted their administrative remedies with respect to their Title VII claim. (*See* Bolin Decl. at ¶ 9.) Accordingly, that claim was not even properly before the District Court. *See* 42 U.S.C. § 2000e–5(f)(1); *Frederique-Alexandre v. Dep't of Natural and Envtl. Resources Puerto Rico*, 478 F.3d 433, 440 (1st Cir. 2007) ("A plaintiff must exhaust his administrative remedies, including EEOC procedures, before proceeding under Title VII in federal court"). The District Court so held. (Pet. App. at 92a-93a.) Petitioners make much of their failure to exhaust administrative remedies in the Petition citing to cases in the Second and Fifth Circuits that allegedly excuse them from doing so. (*See* Pet. at 36-38.) Petitioners' argument does not move the needle because the First Circuit concluded that despite having failed to exhaust, "[t]he [Petitioners] have failed to demonstrate why they are entitled to pre-termination relief . . . given that loss of employment 'does not usually constitute irreparable injury'"). (Pet. App. at 41a (citations omitted).)

is built into the definition of "religion," which "includes all aspects of religious observance and practice, as well as belief, *unless* an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice *without undue hardship on the conduct of the employer's business*." *Id.* at § 2000e-2(j) (emphasis added).

Importantly, in the context of Title VII religious discrimination cases, "undue hardship" means more than a *de minimis* cost on the employer. *See Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977); *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134-35 (1st Cir. 2004). Indeed, the undue hardship "calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system." *Cloutier,* 390 F.3d at 134-35; *see also EEOC v. Oak-Rite Mfg. Corp.*, No. IP99-1962-C-H/G, 2001 WL 1168156, at *10 (S.D. Ind. Aug. 27, 2001) ("questions of undue hardship have been resolved as a matter of law, especially where the employer showed that the proposed accommodation would either cause or increase safety risks or the risk of legal liability for the employer"). Courts have also routinely held that employees' religious beliefs and related accommodation requests must yield to workplace health and safety rules where, as here, the requested accommodation would circumvent such rules and create an undue hardship for the employer. *See Bhatia v. Chevron U.S.A., Inc.,* 734 F.2d 1382, 1383 (9th Cir. 1984); *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).

As the First Circuit properly concluded, Northern Light and the other Provider Defendants are not obliged to provide Petitioners the requested exemption "because doing so would cause them to suffer an undue hardship." (Pet. App. at 41a) (citing *Cloutier*, 390 F.3d at 134 and *Trahan v. Wayfair Maine, LLC*, 957 F.3d 54, 67 (1st Cir. 2020).) In *Cloutier*, the First Circuit affirmed the district court's grant of summary judgment to the employer (Costco) on the grounds that plaintiff-employee's insistence on an exemption from the employer's prohibition of facial jewelry would result in undue hardship on the employer. *Id*. at 136. The plaintiff was a member of the Church of Body Modification and wore facial jewelry, including an eyebrow ring, as part of her religion. *Id.* at 129-30. The First Circuit concluded that the employer was not required to grant plaintiff's request for an exemption to the dress code as "[g]ranting such an exemption would be an undue hardship because it would adversely affect the employer's public image" and undermine its dress code designed to appeal to customer preference and promote a professional public image. *Id.* at 135-36.

The potential burden on Northern Light in this case is much more significant than the burden on the employer in *Cloutier*. To mitigate the spread of COVID-19 in the State of Maine, especially in Designated Healthcare Facilities where many patients are essentially captive and likely more vulnerable to serious complications associated with COVID-19, including death, the government issued the Emergency and Final Rules. Under the Final Rule, healthcare workers, including employees of Northern Light, must become fully vaccinated against COVID-19 on or before October 15, 2021 (enforcement was delayed until October 29, 2021). DHHS has made clear that Designated

Healthcare Facilities that do not comply with the Final Rule, which expressly prohibits religious exemptions for workers, could face substantial monetary and other enforcement penalties, including loss of their license to operate, from the Maine Division of Licensing and Certification. *See* ME. REV. STAT. ANN. tit. 22 §§ 803-804; *Health Care Worker Vaccination FAQS*, at FAQs 24-25, 30. That is a very serious consequence for the Provider Defendants and the Maine public to bear during a global pandemic.

Given these circumstances, there can be no argument that Title VII **requires** Northern Light to disregard the Final Rule and the important public health interests underpinning it by granting Petitioners the religious exemptions they seek.[12] *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999) ("[C]ourts 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.") Were Title VII to be read as Petitioners propose, Northern Light would suffer an undue hardship far exceeding the burden placed on the employer of the unsuccessful plaintiff in *Cloutier*, who arrived at work adorned with facial piercings in violation of company dress policy. There is truly no comparison.[13]

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12. In addition, Petitioners' requested alternative accommodations – masking in the workplace, testing and symptom monitoring – would also violate the Final Rule and would impose an undue hardship on Northern Light. *See Health Care Worker Vaccination FAQs* at FAQ 24.

13. The relief Petitioners seek against the Provider Defendants cannot be granted even in the event the Final Rule

Accordingly, because Petitioners seek religious exemptions from the government's mandatory COVID-19 vaccine requirement for healthcare workers which are not available to them as accommodations under Title VII, there is no conflict between Title VII and the Final Rule and no "important question of federal law that has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 10(c). The Petition should be denied.

B. Petitioners Have Not Been Irreparably Harmed by Northern Light's Compliance with the Final Rule

In addition to the absence of any likelihood of success on the merits of their Title VII claims, Petitioners are not entitled to preliminary injunctive relief, the assertion at the heart of the third Question they present to the Court, because they have not suffered, and do not stand to suffer, an irreparable harm.

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is enjoined. Simply put, the requested relief would have the effect of granting to 1,000 unidentified employees the particular accommodation they seek. Given that the Provider Defendants do not know the identities of the employees in question, they are unable, at this juncture, to assess whether granting the requested accommodation; i.e., exemption from vaccination, would nonetheless constitute an "undue hardship" within the meaning of Title VII, even in the event the Final Rule were not in place. In such a circumstance, the undue hardship analysis required of the Provider Defendants would require case by case assessment of the requesting employee's job functions in order to determine whether the accommodation could be made without incurring an undue hardship.

This Court has held, as a matter of law, that loss of employment—as Petitioners have admitted occurred here—does not constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90-91 (1974). "[I]nsufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury . . . ." *Id.* at 91, n.68. This is so because the loss of a job is something that can be addressed by "a later-issued damages remedy." *Rio Grande Cmty. Health Ctr., Inc. v. Rullan,* 397 F.3d 56, 76 (1st Cir. 2005); *Together Employees*, 2021 WL 5368216, at *5 ("[m]oney damages would adequately resolve all of the alleged harms"); *see also Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) ("[s]ince reinstatement and money damages could make [employees] whole for any loss suffered during this period, their injury is plainly reparable").

Here, injunctive relief is not appropriate because Petitioners will have the opportunity to have their Title VII claims heard in the District Court and the menu of potential damages associated with such claims will be available to them. *See Sampson*, 415 U.S. 61, 90-91 ("[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"). Accordingly, Petitioners have not established irreparable harm and the Petition should be denied.[14]

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14. Petitioners' assertion that if they do not obtain the relief they seek they will not be able to obtain employment anywhere in the healthcare field within the State of Maine is not accurate. The

C. The Balance of the Hardships and the Public Interest Warrant Denying Injunctive Relief

Finally, the implicit assertion that they are entitled to preliminary injunctive relief animating Petitioner's third Question fails also because Petitioners cannot show that their objection to the COVID-19 vaccine and its impact on their ability to work at Northern Light outweighs the danger of the unvaccinated Petitioners working at Northern Light during the pandemic and potentially infecting patients and their co-workers with COVID-19. *See Bayley's Campground, Inc. v. Mills*, 463 F. Supp. 3d 22, 38 (D. Me. 2020), *aff'd*, 985 F.3d 153 (1st Cir. 2021) ("[t]he public interest in this case is enormous . . . [t]he types of injunctive relief Plaintiffs seek would upset the bedrock of the state's public health response to COVID-19 . . . ."); (Pet. App. at 42a-43a.).

The Governor made clear that the Final Rule is part of the State's plan to mitigate COVID-19, especially as more contagious and virulent strains of COVID-19 such as the Delta and Omicron variants are on the rise. *See Mills Administration Requires Health Care Workers To Be Fully Vaccinated Against COVID-19 By October 1,* MAINE.

Final Rule applies to "Designated Healthcare facilities" a term defined by statute. There are many healthcare jobs in the State of Maine that do not meet this definition. *See Health Care Worker Vaccination FAQS* at FAQ 1 (listing the types of healthcare facilities that are and are not covered by the Final Rule). In fact, the Petitioners acknowledge that there are other healthcare jobs in Maine that are not subject to the Final Rule. (Pet. at 20-21 (criticizing the challenged law for targeting healthcare workers in hospitals but "chos[ing] not to impose *any* mandate on healthcare workers in urgent care centers or private physician's offices.").)

GOV (Aug. 12, 2021), https://www.maine.gov/governor/mills/news/mills-administration-requires-health-care-workers-be-fully-vaccinated-against-covid-19-october. Further, as the Seventh Circuit noted when affirming the district court's denial of a challenge to a university's COVID-19 vaccine mandate for students, "[v]accination protects not only the vaccinated persons but also those who come in contact with them, and at a university close contact is inevitable." *Klassan v. Trustees of Indiana University*, No. 21-2326, 2021 WL 3281209, at *1 (7th Cir. Aug. 2, 2021). As the First Circuit observed, this is even more true in the context of a network of hospitals and patient care facilities like those of Northern Light:

> Maine faced a severe crisis in its healthcare facilities when the delta variant hit the state. According to Maine CDC, the delta variant is more than twice as contagious as previous variants and may cause more severe illness than previous variants. An individual infected with the delta variant may transmit it to others within twenty-four to thirty-six hours of exposure. Those conditions threaten the entire population of the state. But health care facilities are uniquely susceptible to outbreaks of infectious diseases like COVID-19 because medical diagnosis and treatment often require close contact between providers and patients (who often are medically vulnerable). And outbreaks at healthcare facilities hamper the state's ability to care for its residents suffering both from COVID-19 and from other conditions. That problem is particularly acute in Maine because, as Maine CDC's director stated, "the

> size of Maine's healthcare workforce is limited, such that the impact of any outbreaks among personnel is far greater than it would be in a state with more extensive healthcare delivery systems." . . . On August 11, four of fourteen known COVID-19 outbreaks in Maine were occurring at health care facilities with "strong infection control programs." Those outbreaks were mostly caused by healthcare workers bringing COVID-19 into the facilities.

(Pet. App. at 19a-20a (internal citations omitted).)

Accordingly, the public interest in preventing COVID-19 and its associated danger and destructive consequences outweighs the Petitioners' interest in retaining their employment at Northern Light while remaining unvaccinated.

CONCLUSION

For the reasons set forth above and articulated in the First Circuit's Opinion, the Petition does not present unresolved and "important question[s] of federal law" and therefore should be denied.

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Respectfully submitted,

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