No. 23-152

IN THE
Supreme Court of the United States

ALICIA LOWE, *et al.*,
Petitioners,
v.
JANET T. MILLS, in her official capacity as Governor of the State of Maine, *et al.*,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent Providers ("Respondents") incorrectly contend that Petitioners provided this Court with a "factually inaccurate" history. (Brief in Opposition, "Opposition," 1.) But, as John Adams famously opined, "[f]acts are stubborn things."[1] The evidence of religious discrimination is evident in the record. The Court need only look at Respondents' own words.

Respondents inappropriately circumscribe the relevant Questions Presented to suggest that no conflict exists among the circuits. Yet, the First Circuit's decision permitted compliance with state law to justify noncompliance with federal antidiscrimination law. Numerous circuits, in conflict with the First Circuit, require employers and entities subject to federal antidiscrimination law to follow the commands of federal law even in the face of contrary state law, and the Supremacy Clause demands that result. Respondents knowingly and intentionally violated Title VII's nondiscrimination provision respecting religion by categorically refusing to consider *any* religious accommodation. Their defense is that under state law, *all* religious discrimination requests must categorically be denied. Title VII expressly provides protection against religious discrimination. While not all religious discrimination claims must be accommodated, all such claims must at least be adequately considered. Choosing to

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[1] John Bartlett, *Familiar Quotations* 380 (15th ed. 1980).

disregard Title VII, Respondents based their categorical refusal to consider any such requests on a conflicting state law. And the First Circuit wrongly upheld that choice even though state law must be subservient to federal law when the two conflict. The Constitution demands that result, and so should this Court. The Petition should be granted.

ARGUMENT

I. RESPONDENTS' FACTUAL NARRATIVE OBFUSCATES THE IRREFUTABLE FACT THAT THE FIRST CIRCUIT PERMITTED RESPONDENTS TO VIOLATE TITLE VII'S DEMANDS ON THE BASIS OF CONTRARY STATE LAW.

A. Respondents' Categorical Denials of All Religious Accommodation Requests Violate Title VII, Notwithstanding Contrary State Law.

Despite their opening salvo (Opposition 1), Respondents admit that they deliberately and consciously chose to ignore the demands of Title VII on the basis of contrary state law. (Opposition 9 ("In order to comply with the Vaccine Mandate, Petitioners had no choice but to require their on-site employees to receive COVID-19 vaccinations, subject to exemption *only for medical reasons*.") (emphasis added).)

When responding to Petitioner Lowe's request for a religious accommodation, Respondent MaineHealth stated: "You submitted a religious exemption, your request is *unable to be evaluated* due to a change in the law. Your options are to receive vaccination or provide documentation for a medical exemption to meet current requirements for continued employment." (Pet. 13 (quoting App. 208a, Compl. ¶74) (emphasis added).) Respondent MaineHealth's thus admittedly refused to even consider or "evaluate" a religious accommodation request.

Petitioner Giroux's interactions with Respondent MaineGeneral likewise demonstrate the same religious discrimination. In response to her request for a religious accommodation, Respondent MaineGeneral stated: "All MaineGeneral employees will have to be vaccinated against COVID-19 by Oct. 1 unless they have a medical exemption. The mandate also states that only medical exemptions are allowed, *no religious exemptions are allowed*." (Pet. 16 (quoting App. 212a, Compl. ¶84) (emphasis added).)

Respondents' own words demonstrate the open religious discrimination towards Petitioners. Respondents' only justification for ignoring Title VII's commands was that doing so would violate contrary state law. The First Circuit's decision below approving Respondents' categorical exclusion of religion as a basis for an accommodation conflicts with the decisions of this Court and other circuits.

B. Respondents' Suggestion That Petitioners Failed to Request the Right Accommodation Ignores the Fact that Any Accommodation is Necessarily Predicated on Obtaining an Exemption.

Respondents contend that they could not offer an accommodation to Petitioners because the only accommodation sought was an exemption, which they categorically refused to consider. (Opposition 12.) To reach the accommodation consideration, there must be an option for an exemption. Without an exemption, there would never be an accommodation. Respondents slammed the door shut without ever considering any *accommodation*, because they argue there can be no religious *exemption*.

Petitioners indisputably informed Respondents that they had sincere religious objections to an employment requirement regarding the Mandate, *which is all that Title VII requires*. (App. 189a-193a, Compl. ¶¶10-16.) Once Petitioners put Respondents on notice regarding their religious conflict with the work rule, Title VII placed the burden on *Respondents* to consider and offer reasonable accommodations. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773-74 (2015). Petitioners were not required to employ "magic words" to request a religious accommodation. *Broderick v. Donaldson*, 437 F.3d 1226, 1232 (D.C. Cir. 2006). The "exemption" versus "accommodation" magic language required by

Respondents and the First Circuit is wholly foreign to established Title VII law.

Nevertheless, Petitioners here did substantially more than was required under Title VII – they informed Respondents that they were willing to abide by other measures to permit them to continue working, as they had done since the beginning of COVID-19, while still comporting their lives to their sincere religious convictions. (App. 205a, Compl. ¶¶65-71.) Thus, it is factually incorrect to state that Petitioners sought only one accommodation—which was an exemption.

Even assuming *arguendo* that Petitioners only requested an exemption from the Mandate, that fact would not negate Title VII's requirement that employers consider whether the request is based on sincere religious beliefs, and, if so, whether the employer can make reasonable accommodations. Respondents instead categorically refused to consider any request based on religion. Their defense was (paraphrasing) "the state made us do it." If upheld, the First Circuit's opinion below allows a state to gut any provision of Title VII that outlaws discrimination – as to race, color, religion, sex, and national origin. That cannot be the law.

Sometimes the only available accommodation for religion is a wholesale exemption. In *Abercrombie & Fitch*, Abercrombie admitted that it "imposes a Look Policy that governs its employees' dress," and that its Look Policy prohibited any employee from wearing "headgear." 575 U.S. at 770. The prospective

employee was a practicing Muslim who was required by her religious convictions to wear a headscarf. *Id.* There were only two available options (*i.e.*, accommodations) in that scenario: (a) permitting an employee to practice her religion while being exempted from the "no headgear" policy, a result mandated by Title VII; or (b) enforcing a total prohibition on "headgear" and refusing to hire a prospective employee because her religion requires her to wear a headscarf. It was an "all or nothing" scenario. This Court held that Title VII gives religious practices "favored treatment, affirmatively obligating employers not to . . . discharge any individual because of such individual's religious observance and practice." *Id.* at 775 (cleaned up).

This Court held that Abercrombie violated Title VII by refusing to hire the prospective employee on the basis of her Muslim faith. *Id.* The necessary corollary of this Court's discussion concerning the accommodations for the "no headgear" policy is that the prospective employee must have been first exempted from the prohibition on wearing headgear and then accommodated by being permitted to wear her religious headgear during work hours. If the prospective employee was not exempted from the prohibition on wearing headgear during work hours, then she would have no need for any accommodation. The exemption and accommodation were inextricably intertwined. Title VII does not permit categorical denials of otherwise protected nondiscrimination characteristics.

Other times, the accommodation is not all or nothing, but rather requires an exemption from the employment requirement first and then a discussion of some compromise accommodation. Take, for example, the "no-beard" policy at issue in the Fifth Circuit's decision in *Hebrew v. Texas Dep't of Crim. Justice*, No. 22-20517, 2023 WL 5989580 (5th Cir. Sept. 15, 2023). There, a member of the Hebrew Nation religion was terminated from his position for failure to shave his beard and cut his hair. *Id.* at *1. To shave his beard would have been a "violation of his religious vow." *Id.* The employee submitted a request for a religious accommodation, but he was ultimately terminated because of his refusal to comply with the "no-beard" policy. *Id.* The employee's request for an accommodation was predicated on an exemption to the requirement that he shave his beard entirely because he would need no accommodation unless he was exempted from the absolute "no beard" policy. *Id.* The Fifth Circuit held that a refusal to extend an "exception for Hebrew" violated Title VII because this Court's "decision in *Groff* enables Americans of all faiths to earn a living without checking their religious beliefs and practices at the door." *Id.* at *6.

A proper consideration of Petitioners' sincere religious beliefs necessarily means that they be exempted from the Mandate, and once exempted, Respondents were required to then consider reasonable accommodation options. What Respondents cannot do is what they did here – categorically deny all requests that were based on religion. *See, e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 790-792 (5th Cir. 2020) (noting that the employee

was first granted an exemption to the flu vaccine requirement and then the accommodation offered was a transfer to a different position); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 945, 501 (5th Cir. 2001) (same); *Blackwell v. Lehigh Valley Health Network*, No. 5:22-cv-3360-JMG, 2023 WL 362392, *7 (E.D. Penn. Jan. 23, 2023) (noting that the employee was first given the exemption from a requirement to accept a Covid-19 vaccination, and the accommodation offered was that she submit "to regular COVID-19 screening tests *in lieu of vaccination*." (emphasis added)).

Respondents' impermissibly narrow reading of Title VII's requirements, and the First Circuit's improper conflation of the exemption-accommodation requirements of Title VII, ignore this Court's precedent and that of the other circuits. The Petition should be granted to resolve the conflict.

II. RESPONDENTS IGNORE TITLE VII'S LIABILITY SHIELD WHEN FACED WITH INCONSISTENT STATE LAWS, AND THE DECISION BELOW HIGHLIGHTS THE CONFLICT AMONG THE CIRCUITS.

Respondents suggest that, contrary to the decisions of this Court and the plain language of the statute, Title VII does not require employers to expose themselves to legal risks to accommodate an employee's religion. (Opposition 14.) To defend their refusal to comply with Title VII, Respondents ignore the plain import of the Supremacy Clause. Respondents' only basis for suggesting that their

termination of Petitioners was justified is a contrary state law. (Opposition 16.) Respondents' contention is unequivocal: "there is no dispute that Providers would have had to violate the vaccine mandate – that is, *state law* – to provide Petitioners" with consideration of their accommodation requests, which Title VII demands. (*Id.*) The First Circuit accepted this rationale below. (App. 26a-28a.)

The problem for both Respondents and the First Circuit below is that Title VII, not to mention the Supremacy Clause itself, demands compliance with federal law. Title VII takes precedence over conflicting state laws. Contrary to Respondents' suggestion that "Title VII cannot be construed to require employers to provide accommodations that would place them 'on the razor's edge of liability'" (Opposition 16 (quoting *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 554 (7th Cir. 2011)), Title VII compels compliance with its nondiscrimination provision, and shields employers who have to violate contrary state law to meet their nondiscrimination obligations. Indeed, "[a] discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Quionones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995). This is why Justice Gorsuch has previously opined that those "who rely on their compliance with discriminatory state laws as evidence of their reasonableness will normally find themselves proving their own liability, not shielding themselves from it." *Barber ex rel. Barber v. Colorado Dep't of Rev.*, 562 F.3d 1222, 1234 (10th Cir. 2009) (Gorsuch, J., concurring).

Indeed, for those who may find that difficult position unfair, Congress provided an explicit, textual remedy.

> Nothing in this subchapter 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 subchapter*.

42 U.S.C. §2000e-7 (emphasis added).

Thus, contrary to Respondents' suggestion that Maine's discriminatory treatment of religious accommodations placed them on some "razor's edge of liability" (Opposition 16), there was never any *lawful* threat of liability. Title VII provided Respondents with a potent shield from any liability under state law. Indeed, "Title VII provides that employers are exempted from liability under state laws which require the doing of acts which constitute unlawful employment practices." *Williams v. Gen. Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974). "Instead, [Respondents] can assert [Title VII] as a defense to an enforcement action by [the state] or seek a declaratory judgment ahead of time." *Campbell v. Universal City Dev. Partners, Ltd.*, 72 F.4th 1245, 1258 (11th Cir. 2023) ("compliance with state law" does not justify a

discriminatory eligibility requirement in volitation of federal law).

Ironically, in their efforts to avoid this Court's review, Respondents highlight the need for it. Respondents rely on *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999); and *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223 (10th Cir. 1999), for the contention that compliance with state laws excuses noncompliance with Title VII. (Opposition 15.)

In *Sutton*, the Ninth Circuit stated that "an employer is not liable under Title VII when accommodating an employee's religious belief would require the employer to violate federal or state law." 192 F.3d at 830. In *Weber*, the Tenth Circuit noted that "requiring a defendant to violate a state statute to accommodate plaintiff resulted in undue hardship." 166 F.3d at 1223. Those decisions, like the First Circuit's decision below, cannot be reconciled with the decisions of the Second, Third, Sixth, and Ninth Circuits that compliance with state law does not excuse noncompliance with Title VII (*see* Pet. 23-27), or the decisions of the Second, Fourth, Seventh, Tenth, and Eleventh Circuits that compliance with state law does not excuse noncompliance with federal antidiscrimination statutes in general. (Pet. 27-33.) Simply put, as the Sixth Circuit noted, "an employer's compliance, even in good faith, with the requirement of a state law . . . does not render the company's actions any less a violation of Title VII." *Palmer v. General Mills Inc.*, 513 F.2d 1040, 1042 (6th Cir. 1975).

Respondents' reliance (Opposition 15) on *Yeager v. FirstEnergy Generation Corp.*, 777 F.3d 362 (6th Cir. 2015) is similarly misplaced. There, the Sixth Circuit stated that "Title VII does not require an employer to reasonably accommodate an employee's religious beliefs if such accommodation would violate a *federal* statute." *Id.* at 363 (emphasis added). *Yeager* and the First Circuit decision below are not in conflict because they address wholly separate issues. The Supremacy Clause question at issue here is whether compliance with a contrary *state* law excuses noncompliance with a federal statute, (Petition 19-33), and not how to resolve the interplay of two competing *federal* statutes.

III. RESPONDENTS ADMIT CIRCUIT CONFLICTS EXIST INVOLVING TITLE VII AND CONTRARY STATE LAW RESPECTING RACE AND SEX, BUT THEY PROVIDE NO JUSTIFICATION FOR ALLOWING STATE LAW TO PREVAIL OVER TITLE VII RESPECTING RELIGION.

Respondents attempt to evade this Court's review of an obvious conflict among the circuits by narrowing the scope of the relevant inquiry, to suggest that no conflict exists among the circuits concerning the interplay of federal antidiscrimination law and conflicting state laws on the same subject. In so doing, Respondents admit that a conflict exists between the First Circuit's decision below regarding religion, and the decisions of other Circuits regarding

race and sex. Respondents provide no justification for treating religion under Title VII different than any other nondiscrimination category. Just last Term, this Court rejected such differential treatment involving "undue hardship." *See Groff v. DeJoy*, 600 U.S. 447 (2023).

Respondents contend that *Guardians Ass'n of the N.Y.C. Police Dep't, Inc. v. Civil Service Comm'n* 630 F.2d 79 (2d Cir. 1980) is inapposite because it deals solely with Title VII's prohibition on race discrimination (Opposition 21), and that *Williams v. Gen. Foods Corp.*, 42 F.2d 399 (7th Cir. 1974); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); and *Palmer v. General Mills Inc.*, 513 F.2d 1040 (6th Cir. 1975) cannot create a conflict because they deal with Title VII's prohibition on sex discrimination. (Opposition 21.) This argument ignores that all these cases held that discrimination prohibited by Title VII cannot be justified on the basis of contrary state law, not that the individual protected class at issue in those cases provided unique considerations. Such a narrow reading of these conflicting circuit decisions ignores the fact that Title VII prohibits discrimination on the basis of race, sex, *and religion* in the same statute, 42 U.S.C. §2000e-2. It makes no sense that a contrary state law overrides Title VII on matters of religion, but not for discrimination based on race, sex, color or national origin. Religion is not an orphan to Title VII protections. *See Groff v. DeJoy*, 600 U.S. 447 (2023).

Respondents' final contention is that certain circuit decisions not dealing with Title VII provide no

basis for a conflict. (Opposition 22.) But that ignores the cases cited by Petitioners (Pet. 27-33) that compliance with state law cannot excuse noncompliance with federal antidiscrimination law. As the Eleventh Circuit held, "that can't be right." *Campbell v. Universal City Dev. Partners, Ltd.*, 72 F.4th 1245, 1258 (11th Cir. 2023). The reason for this is simple: "the Supremacy Clause of the Constitution requires a different order of priority." *Barber ex rel Barber v. Colorado Dep't of Rev.*, 562 F.3d 1222, 1233 (10th Cir. 2009).

CONCLUSION

Because the First Circuit's decision below permitted compliance with state law to serve as a justification for noncompliance with Title VII, and because that decision is in direct conflict with the decisions of this Court and numerous other circuits, the Petition should be granted, and the conflicts resolved. As Justice Gorsuch noted, federal law does "not yield to state laws that discriminate against [religion]; *it works the other way around*." *Barber*, 562 F.3d at 1234 (Gorsuch, J., concurring) (emphasis added).

Respectfully submitted,

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