No. _____

IN THE
Supreme Court of the United States

ALICIA LOWE, JENNIFER BARBALIAS, GARTH BERENYI, DEBRA CHALMERS, NICOLE GIROUX, ADAM JONES, NATALIE SALAVARIA,

Petitioners,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine, JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services, NANCY BEARDSLEY, in her official capacity as Acting Director of the Maine Center for Disease Control and Prevention, MAINEHEALTH, GENESIS HEALTHCARE OF MAINE, LLC, MAINEGENERAL HEALTH, NORTHERN LIGHT EASTERN MAINE MEDICAL CENTER,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Mathew D. Staver
Counsel of Record
Anita L. Staver
Liberty Counsel
109 Second St., NE
Washington, D.C. 20002
(202) 289-1776

Horatio G. Mihet
Daniel J. Schmid
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

Counsel for Petitioners

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

"Reliance on state statutes to excuse non-compliance with federal law is simply unacceptable under the Supremacy Clause." *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009). As Justice Gorsuch noted during his tenure on the Tenth Circuit, "a state law at odds with a valid Act of Congress is no law at all. Accordingly, the demands of the federal [antidiscrimination law] do not yield to state laws that discriminate against the [protected class]; *it works the other way around*." *Id.* at 1234 (Gorsuch, J., concurring) (emphasis added). Simply put, "the Supremacy Clause of the Constitution requires a different order of priority. A discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Id.* (quoting *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995)).

The First Circuit's decision below constitutionally inverted this analysis. The First Circuit held that following Title VII's demands to provide reasonable accommodations for sincerely held religious beliefs is an undue hardship when following Title VII "would have exposed the Providers to penalties for violating [state law]." (App. 37a). The First Circuit's decision below reverses the supremacy of federal over state law. The questions presented are:

(1) Whether compliance with state laws directly contrary to Title VII's requirement to provide a reasonable accommodation may serve as an undue

hardship justifying an employer's noncompliance with Title VII of the Civil Rights Act of 1964.

(2) Whether a state law that requires employers to deny without any consideration all requests by employees for a religious accommodation, contrary to Title VII's religious nondiscrimination provision, is preempted by Title VII and the Supremacy Clause.

PARTIES

Petitioners are Alicia Lowe, Jennifer Barbalias, Garth Berenyi, Debra Chalmers, Nicole Giroux, Adam Jones, and Natalie Salavaria. Respondents are MaineHealth, Genesis Healthcare of Maine, LLC, MaineGeneral Health, and Northern Light Eastern Maine Medical Center. Additional Parties to the proceedings below are Janet T. Mills, in her official capacity as Governor of the State of Maine, Jeanne M. Lambrew, in her official capacity as Commissioner of the Maine Department of Health and Human Services, Nancy Beardsley, in her official capacity as Acting Director of the Maine Center for Disease Control and Prevention.[1]

DIRECTLY RELATED PROCEEDINGS

ALICIA LOWE, et al. v. MILLS, et al., No. 22-1710, (1st Cir. May 25, 2023), Opinion Affirming District Court's Dismissal of First Amended Verified Complaint is reprinted in the Appendix at 1a-30a.

ALICIA LOWE, et al. v. MILLS, et al., No. 22-1710, (1st Cir. May 25, 2023), Judgment is reprinted in the Appendix at 41a-42a.

ALICIA LOWE, et al. v. MILLS, et al., No. 1:21-cv-242-JDL, (D. Me. Aug. 18, 2022), Opinion and Order

[1] Plaintiffs did not assert Title VII claims against the Maine government officials, and thus the Additional Parties are not subject to the claims asserted in this Petition.

Dismissing First Amended Verified Complaint is reprinted in the Appendix at 43a-84a.

JOHN DOES 1-3, et al. v. MILLS, et al., No. 21-717, (U.S. Feb. 22, 2022), Order Denying Petition for Writ of Certiorari is reprinted in the Appendix at 85a.

JOHN DOES 1–3, et al. v. MILLS, et al., No. 21A90, (U.S. Oct. 29, 2021), Order Denying Emergency Application for Writ of Injunction is reprinted in the Appendix at 86a-97a.

JANE DOES 1–6, et al. v. MILLS, et al., No. 21-1826 (1st Cir. Oct. 19, 2021), Opinion and Order Affirming Denial of Motion for Preliminary Injunction is reprinted in the Appendix at 98a-130a.

JANE DOES 1–6, et al. v. MILLS, et al.. No. 1:21-cv-242-JDL (D. Me. October 13, 2021), Order Denying Motion for Preliminary Injunction is reprinted in the Appendix at 131a-180a.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

OPINIONS AND ORDERS BELOW

The First Circuit's opinion and order affirming the dismissal of Petitioners' complaint is reported at 68 F.4th 706 (1st Cir. 2023) and reprinted in the Appendix at 1a-30a. The district court's order dismissing Petitioners' complaint is not yet published, but is available at 2022 WL 3542187 (D. Me. Aug. 18, 2022) and reprinted in the Appendix at 43a-84a.

JURISDICTION

The First Circuit entered its opinion and judgment, affirming the district court's final judgment dismissing Petitioners' Title VII claims, on May 25, 2023. (App. 1a-42a.) Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Supremacy Clause of the United States Constitution provides,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of

> the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl.2.

Title VII of the Civil Rights Act of 1964 provides, in relevant part, "It shall be an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion," 42 U.S.C. § 2000e-2(a), and, "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Also relevant to the instant Petition is 42 U.S.C. §2000e-7, which states,

> 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.

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioners are all former healthcare workers in the State of Maine who submitted, under Title VII of the Civil Rights Act of 1964, a request for a religious accommodation from the State's mandate that all healthcare workers in Maine receive a COVID-19 vaccination as a condition of continued employment in the healthcare industry. (App. 188a, First Amended Verified Complaint ("Compl.") ¶8.) Justice Gorsuch described Petitioners' fight nearly two years ago,

> This case presents an important constitutional question, a serious error, and an irreparable injury. Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All for adhering to their constitutionally protected religious beliefs. *Their plight is worthy of our attention.*

(App. 96a-97a (Gorsuch, J., dissenting from denial of injunctive relief pending appeal) (emphasis added).)

Though circumstances and the seminal question have changed from Petitioners' original plea to this Court, Petitioners' plight has not and is still worthy of this Court's attention today. In August

2021, the Governor of Maine instituted a vaccine mandate for healthcare workers in the State of Maine. (App. 196a-197a, Compl. ¶¶31-39.) Prior to their termination, Petitioners worked for healthcare facilities in Maine that were subject to the Governor's vaccination mandate, including MaineHealth, Genesis Healthcare of Maine, LLC, MaineGeneral Health, and Northern Light Eastern Maine Medical Center (collectively the "Employer Respondents"). Petitioners all sought accommodations under Title VII for their sincerely held religious objections to the COVID-19 vaccines, and were automatically refused such accommodations solely on the basis that the State's mandate prohibited any and all such accommodations. (App. 207a-212a, Compl. ¶¶72-86.) Petitioners filed a federal complaint against the State Defendants for instituting a COVID-19 vaccination requirement that prohibited religious accommodations in violation of the First and Fourteenth Amendments to the United States Constitution, and against the Employer Respondents for refusing to provide the religious accommodations demanded by Title VII.

Despite the plain import of Title VII's requirement that employers provide accommodation for Petitioners' sincerely held religious convictions, *see* 42 U.S.C. §2000e-2(a), Employer Respondents all explicitly informed Petitioners that their religious convictions must be overridden by state law, with no exception and no accommodation whatsoever. When rejecting Petitioners' request for religious accommodation, Employer Respondents informed Petitioners that Title VII did not apply. Even a

cursory review of Employer Respondents' positions with respect to accommodating religious beliefs under Title VII reveals the grave error committed by the First Circuit below.

Petitioner Lowe was informed by her employer that, under its view, "federal law did not supersede state law in this instance." (App. 209a, Compl. ¶77.) Petitioner Lowe's employer stated, based on the newly implemented state mandate, "we are no longer able to consider religious exemptions for those who work in the state of Maine." (App. 208, Compl. ¶74.) Petitioner Lowe was further informed that her employer believed providing a religious accommodation required by Title VII would cause it "to violate state law by granting unrecognized exemptions." (App. 210a, Compl. ¶77.) It stated, "we are not able to grant a request for a religious exemption from the state mandate vaccine." (*Id.*)

Petitioner Giroux was informed by her employer that, notwithstanding Title VII: "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So, unfortunately, that is not an option for us." (App. 212a, Compl. ¶85.)

All Petitioners were refused *any* consideration for religious accommodation under Title VII, were terminated from their employment, and the sole basis given by Employer Respondents was that compliance with Title VII would require violation of a contrary state law. (App. 207a-212a, Compl. ¶¶72-86.)

Though one would search in vain for a merited justification for such a constitutionally inverted analysis, the First Circuit's decision below supplied it. As the First Circuit saw the matter, "granting the accommodation would have exposed the Providers to penalties for violating the [state] Mandate." (App. 37a.) But "[r]eliance on state statutes to excuse noncompliance with federal laws is simply unacceptable under the Supremacy Clause." *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222, 1233 (10th Cir. 2009). And the reason for this is simple: "the demands of [federal antidiscrimination laws] do not yield to contrary state laws that discriminate against [protected classes]; *it works the other way around*." *Id.* at 1234 (Gorsuch, J., concurring) (emphasis added).

What should have been obvious to Petitioners' employers, and to the First Circuit below, is that federal law is supreme over any contrary state law. *See* U.S. Const. Art. VI, cl. 2. "This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 729, 734 (2009). Indeed, "it is a familiar and well-established principle that the Supremacy Clause invalidates state laws that interfere with, or are contrary to, federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (cleaned up). Thus, "state law is nullified to the extent that it actually conflicts with federal law." *Id.* at 713.

The First Circuit charted a different course. It permitted compliance with contrary state laws to

excuse noncompliance with Title VII. This cannot be the law, and the Supremacy Clause demands a different outcome. This Court should grant the Petition.

II. FACTUAL BACKGROUND

A. The Governor's COVID-19 Vaccine Mandate.

On August 12, 2021, Governor Mills announced that Maine will require healthcare workers to accept one of the three then-available COVID-19 vaccines to remain employed in the healthcare profession (the "Vaccine Mandate"). (App. 196a, Compl. ¶31.) The Vaccine Mandate defined healthcare worker as "any individual employed by a hospital, multi-level health care facility, home health agency, nursing facility, residential care facility, and intermediate care facility for individuals with intellectual disabilities that is licensed by the State of Maine" as well as "those employed by emergency medical service organizations or dental practices." (App. 196a, Compl. ¶32.) The Vaccine Mandate also provided 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." (*Id.*, ¶33.) The Governor threatened to revoke the licenses of all covered healthcare employers failing to mandate that their employees receive a COVID-19 vaccine. (App. 197a, Compl. ¶34.)

In addition to the Governor's mandate, 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 Vaccine Mandate. Effective on September 1, 2021, Dr. Shah and the Maine Center for Disease Control and Prevention ("MCDC") amended 10-144 C.M.R. Ch. 264 to eliminate the ability of healthcare workers in Maine to request and obtain a religious accommodation from the COVID-19 Vaccine Mandate. (App. 197a, Compl. ¶36.) The only source of mandatory immunization exemption Maine recognized for healthcare workers is 22 M.R.S. § 802.4-B, which purports to exempt only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor documenting the need for an exemption. (*Id.*, Compl. ¶37.) Under the prior version of Maine's regulation, 10-144 C.M.R. Ch. 264, § 3-B, a healthcare worker could be exempted from mandatory immunizations if the "employee states in writing an opposition to immunization because of a sincerely held religious belief." (*Id.*, Compl. ¶38.) In fact, as acknowledged by MCDC below, Maine removed the religious exemption to mandatory immunizations effective September 1, 2021. (App. 197a-198a, Compl. ¶39 ("The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization.").)

B. Petitioners' Sincerely Held Religious Beliefs Against Receiving the COVID-19 Vaccines.

Petitioners have sincerely held religious beliefs that precluded them from accepting or receiving any of the three then-available COVID-19 vaccines because of their connection to aborted fetal cell lines, whether in the vaccines' origination, production, development, or testing. (App. 198a, Compl. ¶40.) A fundamental component of Petitioners' sincerely held religious beliefs is that all life is sacred, from the moment of conception to natural death, and that abortion is a grave sin against God and the taking of an innocent life. (*Id.*, Compl. ¶41.) Petitioners' sincerely held religious beliefs are rooted in Scripture's teachings that "[a]ll Scripture is given by inspiration of God, and is profitable for doctrine, for reproof, for correction, [and] for instruction in righteousness." (*Id.*, Compl. ¶42. (quoting *2 Timothy* 3:16 (KJV)).) Because of their sincerely held religious beliefs, Petitioners must conform their lives, including their decisions relating to medical care, to the commands and teaching of Scripture. (*Id.*, Compl. ¶43.)

Petitioners have sincerely held religious beliefs that God forms children in the womb and knows them prior to their births, and that life is sacred from the moment of conception. (App. 199a, Compl. ¶44 (quoting, *inter alia*, *Psalm* 139:13–14 (ESV); *Psalm* 139:16 (ESV); *Isaiah* 44:2 (KJV)).)

Petitioners have sincerely held religious beliefs that every child's life is sacred because each child is made in the image of God. (*Id.*, Compl. ¶45 (quoting *Genesis* 1:26–27 (KJV)).) And, because life is sacred from the moment of conception, the killing of that innocent life is the murder of an innocent human in violation of Scripture. (*Id.*, Compl. ¶46 (quoting, *inter alia*, *Exodus* 20:13 (KJV); *Exodus* 21:22–23 (KJV); *Exodus* 23:7 (KJV)).)

Petitioners also have the sincerely held religious belief that it would be better to tie millstones around their necks and be drowned in the sea than bring harm to an innocent child. (App. 200a, Compl. ¶47 (quoting *Matthew* 18:6; *Luke* 17:2).) Petitioners have sincerely held religious beliefs, rooted in the Scriptures, that anything that condones, supports, justifies, or benefits from the taking of innocent human life via abortion is sinful, and contrary to the Scriptures. (*Id.*, Compl. ¶48.) Petitioners believe that it is an affront to Scripture's teaching for them to use a product derived from or connected in any way with abortion. (*Id.*, Compl. ¶49.) Petitioners' sincerely held religious beliefs therefore precluded them from accepting any one of the three available COVID-19 vaccines because of their connections to aborted fetal cell lines. (*Id.*, Compl. ¶50.)

Petitioners have sincerely held religious objections to the Johnson & Johnson (Janssen Pharmaceuticals) vaccine because it unquestionably used aborted fetal cells lines to produce and manufacture the vaccine. (App. 201a, Compl. ¶50.) As reported by the North Dakota Department of Health,

"[t]he non-replicating viral vector vaccine produced by Johnson & Johnson did require the use of fetal cell cultures, specifically PER.C6, in order to produce and manufacture the vaccine." (*Id.*, Compl. ¶52.) Petitioners have sincerely held religious objections to the Moderna and Pfizer/BioNTech COVID-19 vaccines because both of these vaccines, too, have their origins in research using aborted fetal cell lines. (App. 202a, Compl. ¶55.) In fact, "[e]arly in the development of mRNA vaccine technology, fetal cells were used for 'proof of concept' (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein) or to characterize the SARS-CoV-2 spike protein." (*Id.*, Compl. ¶56.) The Louisiana Department of Health's publications also confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. (*Id.*, Compl. ¶57.)

Because all three of the COVID-19 vaccines available to Petitioners were developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, Petitioners' sincerely held religious beliefs compelled them to abstain from injecting any of these products into their bodies. And, because Petitioners' sincerely held religious convictions precluded them from accepting a COVID-19 vaccine, they were terminated from their employment. (App. 186a-187a, Compl. ¶5.)

Respondents have not contested the sincerity of Petitioners' religious beliefs. (*See* App. 60a ("the Hospital Defendants do not challenge the sincerity of

the Plaintiffs' asserted religious beliefs or that those beliefs are the reason for the Plaintiffs' refusal to be vaccinated"); App. 26a (concluding that Employer Respondents did not contest the sincerity of Petitioners' religious beliefs).)

C. Employer Respondents Rely On Contrary State Law to Excuse Their Noncompliance with Title VII and Deny Without Any Consideration The Religious Accommodation Requests of the Petitioners.

Consistent with her sincerely held religious beliefs, Petitioner Alicia Lowe submitted to her employer, Respondent MaineHealth, a request for a religious exemption from the Vaccine Mandate. (App. 207a, Compl. ¶72.)

On August 17, 2021, MaineHealth denied Petitioner Lowe's request for a religious accommodation (App. 208a, Compl. ¶73), stating:

> Please be advised that due to the addition of the COVID-19 vaccine to Maine's Healthcare Worker Immunization law announced by the governor in a press conference on 8/12/21, **we are no longer able to consider religious exemptions for those who work in the state of Maine. This also includes those of you who submitting [sic] influenza exemptions as well**. . . .

> 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.

(App. 208a, Compl. ¶74.)

On August 20, 2021, after receiving her first denial from MaineHealth, Petitioner Lowe responded to MaineHealth, stating:

> My request for an exemption was made under federal law, including Title VII of the Civil Rights [Act] of 1964. The Constitution provides that federal law is supreme over state law, and Maine cannot abolish the protections of federal law. You may be interested in this press release from Liberty Counsel, and the demand letter they have sent to Governor Mills on this issue (which is linked in the press release):https://lc.org/newsroom/details/081821-maine-governor-must-honor-religious-exemptions-for-shot-mandate.
>
> Regardless of what the Governor chooses to do, Franklin Memorial has a legal obligation under federal law to consider and grant my proper request for a religious exemption. Please let me know promptly if you will do so.

(App. 209a, Compl. ¶75.)

That same day, MaineHealth responded to Petitioner Lowe stating that federal law does not supersede state law or the Vaccine Mandate. (*Id.*, Compl. ¶76.) Specifically, MaineHealth stated:

> Although I cannot give legal guidance to employees, **I can share MaineHealth's view that federal law does not supersede state law in this instance**. The EEOC is clear in its guidance that employers need only provide religious accommodations when doing so does not impose an undue hardship on operations. Requiring MaineHealth to violate state law by granting unrecognized exemptions would impose such a hardship. As such, we are not able to grant a request for a religious exemption from the state mandated vaccine.

(App. 209a-210a, Compl. ¶77.) Petitioner Lowe was thus terminated from her employment because she could not accept a COVID-19 vaccination in violation of her sincerely held religious convictions. (App. 210a, Compl. ¶78.)

Petitioner Chalmers submitted to her employer, Genesis Healthcare, a request for a religious exemption and accommodation from the Vaccine Mandate. (App. 210a, Compl. ¶79.) After reviewing Petitioner Chalmers's submission, which

articulated her sincerely held religious beliefs, Genesis Healthcare sent her a cursory response stating that her religious beliefs did not qualify for an exemption from the Vaccine Mandate. (*Id.*) Petitioner Chalmers was given until August 23, 2021, to become vaccinated, and when her request for a religious objection and accommodation was cursorily denied, Petitioner Chalmers was terminated from her employment. (*Id.*)

Petitioner Barbalias submitted a request to her employer, Respondent Northern Light, seeking an exemption and accommodation from the Vaccine Mandate. (App. 210a-211a, Compl. ¶80.) Northern Light responded to Petitioner Barbalias, denying her request and stating that the Vaccine Mandate does not permit exemptions or accommodations for sincerely held religious beliefs. (*Id.*) Specifically, Northern Light informed Petitioner Barbalias that her request for a religious exemption could not be granted because Maine law and the Governor do not permit "non-medical exemptions," and stated, "the only exemptions that may be made to this requirement are medical exemptions supported by a licensed physician, nurse practitioner, or physician assistant." (App. 211a, Compl. ¶81.) Petitioner Barbalias was terminated from her employment because Respondent Northern Light stated that compliance with state requirements excused its noncompliance with Title VII. (*Id.*, Compl. ¶82.)

On August 19, 2021, Petitioner Giroux submitted a request to her employer, Respondent MaineGeneral, stating that she has sincerely held

religious objections to the COVID-19 vaccines and requesting an exemption and accommodation from the Vaccine Mandate. (App. 211a, Compl. ¶83.) MaineGeneral told Petitioner Giroux that no religious exemptions were permitted under the Governor's mandate and that her request for a religious exemption and accommodation was denied. (*Id.*) Specifically, MaineGeneral stated:

> MaineGeneral Health must comply with Governor Mill's [sic] COVID-19 vaccination mandate for all health care employees. 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.

(App. 212a, Compl. ¶84.) Maine General further stated, "Allowing for a religious exemption would be a violation of the state mandate issued by Governor Mills. So unfortunately, it is not an option for us." (*Id.*, Compl. ¶85.)

III. PROCEDURAL HISTORY.

Petitioners initiated this action on August 25, 2021, with the filing of a Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction. On August 26, the district court held a temporary restraining order (TRO) hearing and denied the TRO the same day. (*See* App.

9a-10a.) The district court initially scheduled a preliminary injunction hearing for September 10 but granted Respondents' request to continue the hearing to September 20, over Petitioners' objection. (*See* App. 134a.) After the preliminary injunction hearing on September 20, the court took the matter under advisement and informed the parties that a decision would issue expeditiously. Twenty-three days later (two days before Petitioners' deadline to become vaccinated), the district court denied the preliminary injunction. (App. 131a-180a.)

Within an hour of the district court's order denying a preliminary injunction, Petitioners appealed the denial to the First Circuit and moved for an emergency injunction pending appeal. (App. 110a.) The First Circuit denied that emergency motion (*id.*), and Petitioners applied to this Court for an emergency writ of injunction pending disposition of Petitioners' forthcoming certiorari petition. Justice Breyer denied that motion without prejudice to refiling the application should the First Circuit not grant the necessary relief. (*See* App. 11a.) On October 19, 2021, the First Circuit issued its opinion affirming the denial of a preliminary injunction (App. 98a-130a), and Petitioners immediately reapplied to this Court for a writ of injunction. On October 29, the Court, over the dissent of Justice Gorsuch with whom Justices Thomas and Alito joined, denied the application. (App. 86a-97a.)

On August 18, 2022, after conducting a hearing on Respondents' motions to dismiss, the district court entered its opinion and order dismissing Plaintiffs'

complaint in its entirety and entered final judgment dismissing all claims. (App. 43a-84a.) Petitioners timely appealed that dismissal to the First Circuit. (App. 13a.) On May 25, 2023, the First Circuit entered its order and judgment affirming the dismissal of Petitioners' Title VII and other claims, but reversing the dismissal of Petitioners' constitutional claims. (App. 1a-42a.)

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT'S HOLDING THAT AN EMPLOYER MAY DISREGARD TITLE VII'S PROHIBITION ON RELIGIOUS DISCRIMINATION ON THE BASIS OF CONTRARY STATE LAW DIRECTLY CONFLICTS WITH DECISIONS FROM THE SECOND, FOURTH, SIXTH, SEVENTH, NINTH, TENTH, AND ELEVENTH CIRCUITS.

A. The First Circuit Held that Employers May Disregard Title VII's Requirements to Provide Religious Accommodations Solely on the Basis of Contrary State Law.

As a threshold matter, no one disputes that Petitioners adequately raised a *prima facie* case of religious discrimination under Title VII in their complaint, as the First Circuit noted below. (App. 26a.) Thus, Petitioners' appeal below "turn[ed] on [the employers'] undue hardship defense." (*Id.*) The sole defense raised by Employer Respondents below was

that providing a religious accommodation to Petitioners would have required them to violate state law and thus constitute an undue hardship. (App. 27a ("Maine law makes clear that, by providing the plaintiffs their requested accommodation as described in the complaint, the Providers would have risked onerous penalties, including license suspension. The Mandate requires the Providers to 'require for all employees who do not exclusively work remotely and who are not medically exempted a certificate of immunization against COVID-19." (cleaned up)).) As to Petitioners' requested religious accommodation, the First Circuit held that granting such an accommodation "would thus have placed the Providers in violation of the Mandate." (App. 27a-28a.)

The First Circuit's decision below unequivocally held that a violation of a state law directly contrary to Title VII excused noncompliance with Title VII's nondiscrimination requirements. The dismissal of Petitioners' Title VII claims was based on nothing more, and the decision below elevated Maine's state law above the requirements of Title VII.

> The only reasonable inference from [Petitioners' complaint] and from the *relevant Maine law*, both of which we may properly consider in reviewing the dismissal of Title VII claims . . . is that granting the requested accommodation would have exposed the Providers to a substantial risk of license suspension, as

> well as monetary penalties [for violating the state mandate.]

(App. 28a-29a (emphasis added).)

The First Circuit held that a violation of state law that prohibited an accommodation explicitly required by Title VII was a justifiable excuse from compliance with Title VII. "[P]otential penalties for violating [state] laws can render a proposed accommodation an undue hardship." (App. 33a.) Put another way, the First Circuit held that employers may ignore the requirements of Title VII if their justification for doing so is a risk of punishment under state laws that directly conflict with Title VII. (App. 34a ("we conclude that the complaint's allegations and *the relevant Maine law* permit no reasonable inference but that granting the plaintiffs their requested accommodation would have exposed the Providers to a substantial risk of license suspension and other penalties, creating an undue hardship") (emphasis added).) And, the First Circuit's rationale was plain: it is an undue hardship to comply with Title VII when such compliance requires an employer to violate a contrary state law. (App. 37a ("[G]ranting that accommodation would have exposed Providers to penalties for violating the Mandate, and thus constituted an undue hardship not required by Title VII.").)

The First Circuit's decision below relied upon the decisions of two other circuits that have likewise held that state laws directly contrary to Title VII serve as a justification for ignoring the

nondiscrimination requirements in Title VII. (App. 31a-33a (citing *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882 (3d Cir. 1990) and *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984)).) The Third Circuit's decision in *United States v. Bd. of Educ.* held that an employer need not provide an accommodation unquestionably required by Title VII when doing so would allegedly violate state law. 911 F.2d at 891. The Ninth Circuit's decision in *Bhatia* reached the same conclusion. 734 F.2d at 1384 (holding that an employer is excused from compliance with Title VII's nondiscrimination requirements to avoid the risk of "liability for violating the California Occupational Safety and Health Administration standards").

The First Circuit's decision below also relied upon the Second Circuit's decision in *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). There, the Second Circuit likewise held that employers are permitted to follow state law to excuse their noncompliance with Title VII's requirements to provide a religious accommodation to their employees. *Id.* at 291-92. In *We The Patriots*, the Second Circuit reversed the district court's conclusion that "Plaintiffs' adequately demonstrated that [New York's vaccine mandate] effectively forecloses the pathway to seeking a religious exemption that is guaranteed by Title VII." *Id.* at 261. The essence of the Second Circuit's decision, like that of the First Circuit below (App. 33a), was that state law excused noncompliance with Title VII's requirements to provide a religious accommodation. 17 F.4th at 292-93.

The decision of the First Circuit below, along with the decisions of the Second, Third, and Ninth Circuits discussed above, are in direct conflict with the decisions of other circuits. The holding that compliance with state law excuses noncompliance with Title VII and federal antidiscrimination law simply cannot be reconciled with the decisions of several other circuits.

B. The Second, Sixth, Seventh, and Ninth Circuits Have Held that Contrary State Laws Must Yield to Title VII's Antidiscrimination Requirements.

The First Circuit's decision below, along with the decisions of the Second, Third, and Ninth Circuits discussed *supra*, directly conflict with other decisions of the Second, Sixth, Seventh, and Ninth Circuits that contrary state laws must yield to Title VII's commands. *See, e.g.*, *Guardians Ass'n of N.Y.C. Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971); *Palmer v. General Mills Inc.*, 513 F.2d 1040 (6th Cir. 1975); *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974).

In *Guardians Ass'n*, the Second Circuit rejected an employer's reliance on conflicting state laws to justify its use of a practice prohibited by Title VII. 630 F.2d at 104-05. "[T]he City cannot use rank-ordering not shown to be job-related when test scores produce a disparate racial impact. Nor can the City justify the

use of rank-ordering by reliance on what it contends are the requirements of state law." *Id.* at 104. Indeed, "Title VII explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice." *Id.* at 105 (quoting 42 U.S.C. §2000e-7). The First Circuit explicitly recognized the Second Circuit's holding but concluded that it was inapposite to Petitioners' claims because it only pertained to racial discrimination. (App. 39a.) But Title VII equally prohibits both religious and racial discrimination, 42 U.S.C. §2000e-2, and the purported distinction between the two provides no basis for a contrary holding on preemption. It cannot be countenanced that compliance with state law excuses noncompliance with Title VII when the claim involves religious discrimination, but that compliance with state law does not excuse noncompliance with Title VII when the claims arise from discrimination on account of race. The First Circuit's decision directly conflicts, and cannot be reconciled, with the Second Circuit's *Guardians Association* decision.

The First Circuit's decision is also in direct conflict with the Ninth Circuit's decision in *Rosenfeld*. In *Rosenfeld*, a female employee was "refused assignments" to certain employment positions because "she could not perform the task of such a position without placing the company in violation of California laws." 444 F.2d at 1225. Indeed, for the employer to employ her in certain positions would have run afoul of California's Industrial Welfare Order No. 9-63 and certain California labor code provisions. *Id.* The female employee brought suit,

alleging that such practices violated Title VII's prohibition on discrimination on the basis of sex. *Id.* The employer's sole defense for its discriminatory employment practices was that "its policy is compelled by California labor laws." *Id.*

The Ninth Circuit rejected the employer's defense, holding that Title VII's nondiscrimination requirements could not be overridden by contrary state law. *Id.* "It would appear that these state law limitations imposed upon female labor run contrary to the general objectives of Title VII [and] are therefore, by virtue of the Supremacy Clause, supplanted by Title VII." *Id.* Contrary to the First Circuit's decision below, the Ninth Circuit correctly noted that recognizing such a defense would ignore the purpose of Title VII's broad remedial scheme. *Id.* The employer's "argument assumes that Congress, having established by Title VII the policy that individuals must be judged as individuals, and not on the basis of characteristics generally attributed to racial, religious, or sex groups, was willing for this policy to be thwarted by state legislation to the contrary." *Id.* Such is not the law.

As the Ninth Circuit pointed out, the preemption sections of Title VII were "added to the Act to save state laws aimed at preventing or punishing discrimination . . . *not to save inconsistent state laws*." *Id.* at 1226 (emphasis added). Simply put, the Ninth Circuit held that "state labor laws inconsistent with the general objectives of the Act must be disregarded." *Id. Rosenfeld* cannot be reconciled with the First Circuit's decision below.

The Seventh Circuit's decision in *Williams* is also in direct conflict with the First Circuit's decision below. *Williams*, 492 F.2d at 403-04. There, much like in *Rosenfeld*, the employer distributed overtime opportunities and benefits primarily to men and discriminated against women in such decisions because it believed Illinois law required it to do so. *Id.* at 404 (noting "the Corporation's reliance on the Illinois Female Employment Act in the structuring of employment opportunities"). Citing 42 U.S.C. §2000e-7, the Seventh Circuit held that an employer was not excused from liability for a violation of Title VII merely because state law required such a discriminatory employment practice. *Williams*, 492 F.2d at 404 ("[T]he scheme of Title VII provides that employers are exempted from liability under state laws which require the doing of acts which constitute unlawful employment practices, *not that reliance on state statutes resulting in discriminatory practices bars Title VII liability*." (emphasis added) (cleaned up)). "It would have been incongruous for Congress to have intended a defense resulting in the perpetuation of discriminatory employment practices (even if based on state law) in a federal law designed to achieve equality of educational opportunity." *Id.*

The Sixth Circuit's *Palmer* decision is also in direct conflict with the First Circuit's decision below. The Sixth Circuit held that "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." 513 F.2d at 1042. *See also Ash v. Hobart Mfg. Co.*,483 F.2d 289,

292 (6th Cir. 1973) ("even good faith reliance by an employer upon a conflicting state female employment statute . . . would not render that employer's actions any less a violation of the Federal Civil Rights Act").

Guardians Association, *Rosenfeld*, *Williams*, *Palmer*, and *Ash* cannot be reconciled with the First Circuit's decision below. The decisions of the Second, Sixth, Seventh, and Ninth Circuits directly conflict with the First Circuit's decision below. This Court should grant the Petition and resolve the conflict.

C. The Second, Fourth, Seventh, Tenth, and Eleventh Circuits Have Held that Contrary State Laws Must Yield to Federal Nondiscrimination Requirements.

The First Circuit's decision below also exacerbated a larger conflict among the circuits concerning whether contrary state law creates a reasonable justification for ignoring federal nondiscrimination requirements. *See, e.g.*, *Campbell v. Universal City Dev. Partners, Ltd.*, 72 F.4th 1245 (11th Cir. 2023); *Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144 (2d Cir. 2013); *Barber ex rel. Barber v. Colorado Dep't of Revenue*, 562 F.3d 1222 (10th Cir. 2009); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016); *Quinones v. City of Evanston*, 58 F.3d 275 (7th Cir. 1995). In each of these conflicting circuit decisions, the court held that—regardless of the nature of the federal antidiscrimination statute at issue—reliance on contrary state laws was no excuse from liability.

In *Campbell*, an employer refused to provide an accommodation under the Americans with Disabilities Act because it claimed doing so would require it to violate state law. 72 F.4th at 1256. The Eleventh Circuit noted: "The first reason Universal gives for why it must exclude Campbell is because state law requires it. *We are not persuaded*." *Id.* (emphasis added). "In other words, Universal says, it can impose discriminatory eligibility criteria when state law requires it to do so." *Id.* at 1257.

Much like Title VII does here—*see* 42 U.S.C. §2000e-7—"the ADA explicitly provides that the ADA does not preempt state laws that provide greater protection to those with a disability." 72 F.4th at 1257 (citing 42 U.S.C. §12201(b)). "So by implication, a state law that provides *less* protection than the ADA to those with a disability is preempted." *Id.*

To illustrate the preemption point, the Eleventh Circuit used an example strikingly similar to the issue here: "For instance, if a state passed a law that required public accommodations to discriminate against those with a disability—say, to get a business license—that law would be preempted by the ADA." *Id.* (*Cf.* App. 29a (noting that the State's Vaccine Mandate required as a condition of business licensure that Employer Respondents refuse to provide religious accommodation to COVID-19 vaccination).)

Universal's defense was premised on the notion that state law demanded it discriminate against the plaintiff. 72 F.4th at 1257. The Eleventh Circuit

disagreed. "[W]e must conclude that the text of the ADA precludes us from finding that it is [excusable] to comply with state law when state law otherwise requires a public accommodation to violate the ADA." *Id.* "If compliance with state law were 'necessary,' then any state could unilaterally nullify the ADA by enacting a state law requiring discrimination. *That can't be right*." *Id.* (emphasis added). Simply put, the Eleventh Circuit held that compliance with contrary state laws cannot excuse noncompliance with federal antidiscrimination requirements. *Id.* ("We hold the compliance with state law does not qualify as 'necessary' . . . Therefore, it does not excuse from ADA liability a public accommodation that imposes discriminatory eligibility criteria because of state law.").

To make the conflict with the First Circuit's decision below even more clear, the Eleventh Circuit noted that federal law demands a finding that a covered entity is excused from compliance with contrary state laws. "Universal also resists the conclusion that compliance with state law does not qualify as necessary on the ground that if Universal fails to follow Florida law, Florida will subject Universal to closure or criminal or civil penalties, or all those things." *Id.* This is virtually identical to the defenses accepted by the First Circuit below. (App. 29a-34a (noting that "granting the plaintiffs' desired accommodation would require violating the Mandate, and that noncompliant employers would face fines and loss of licensure" (cleaned up)).) The Eleventh Circuit noted the constitutionally inverted nature of this reasoning: "We don't agree. If the ADA requires

allowing Campbell to ride, then Universal doesn't face criminal and civil penalties in Florida. The Supremacy Clause requires 'a different order of priority.'" 72 F.4th at 1258. "If federal law requires Universal to allow Campbell to ride, and state law forbids it, then Universal must let Campbell ride." *Id.* This is in direct conflict with the First Circuit's decision below. (App. 37a.)

The Second Circuit's decision in *Mary Jo* likewise directly conflicts with the First Circuit's decision below. 707 F.3d 144. There, plaintiffs brought a claim arguing that defendants had violated Title II of the Americans with Disabilities Act by failing to grant a reasonable accommodation concerning state-imposed deadlines for applying for disability benefits. 707 F.3d at 149. The district court dismissed plaintiff's complaint, holding that requiring defendant to grant a reasonable accommodation that would otherwise violate state law is not required by federal law. *Id.* at 161. The Second Circuit held that state laws which are inconsistent with federal nondiscrimination statutes must yield to the federal command. *Id.* at 163.

The Second Circuit noted that Title II "requires preemption of inconsistent state law when necessary to effectuate a required 'reasonable modification.'" *Id.* Its rationale was directly contrary to the First Circuit's decision below: "If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws, state law would serve as an obstacle to the accomplishment and execution of the full purposes

and objective on Congress in enacting Title II." *Id.* "We conclude that the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws when necessary to effectuate Title II's reasonable modification provision." *Id.* Were it otherwise, federal law "would be powerless" to accomplish its antidiscrimination requirements when contrary to state law. *Id.*

The Seventh Circuit's decision in *Quinones* likewise conflicts with the First Circuit's decision below. 58 F.3d 275. There, Illinois state law prohibited the provision of certain employment and pension benefits to a class of individuals because of their age. *Id.* at 277. The city claimed that providing the benefits sought by the plaintiff under federal law would require it to violate state law. *Id.* The Seventh Circuit rejected that rationale: "Evanston believes that it is compelled to follow the directives from the state, but the Supremacy Clause of the Constitution requires a different order of priority." *Id.* Indeed, "[a] discriminatory state law is not a *defense* to liability under federal law; it is a *source* of liability under federal law." *Id.* The Seventh Circuit rejected the City's attempt to excuse its noncompliance with federal law on the basis of compliance with contrary state law.

The Fourth Circuit, too, has rejected the First Circuit's conclusion below. *Lamone*, 813 F.3d at 508. There, Maryland state law imposed certain requirements on the conduct of elections and prevented certain accommodations for individuals

with disabilities. *Id.* The Fourth Circuit noted that "the strong form of defendants' argument [was] the mere fact of a state statutory requirement insulates public entities from making otherwise reasonable modifications to prevent disability discrimination." *Id.* As the Fourth Circuit held, that "cannot be correct." *Id.* The reason was simple: "The Constitution's Supremacy Clause establishes that valid federal legislation can preempt state laws," and Title II of the ADA "trumps state regulations that conflict with its requirements." *Id.* As such, the defendants could not rely on contrary state requirements as an excuse for failure to follow federal antidiscrimination laws. *Id.* at 508-09.

The Tenth Circuit's decision in *Barber* also directly conflicts with the First Circuit. 562 F.3d at 1233. There, the Tenth Circuit noted that the only reason a defendant was excused from compliance with federal antidiscrimination requirements was that the state law at issue was *not* in direct conflict. *Id.* But, had there been an actual conflict between the state and federal schemes, the state law would not have excused compliance with federal law. *Id.* "Reliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause." *Id.*

Then-Judge Gorsuch highlighted the conflict in his concurrence. "If Colorado law *had* discriminated on the basis of disability, in violation of the Rehabilitation Act, the State defendants argue they still shouldn't be held liable, in part because they were bound to follow state law." *Id.* at 1234 (Gorsuch,

J., concurring). But, as Justice Gorsuch concluded, "a state law at odds with a valid Act of Congress is no law at all." *Id.* "Accordingly, the demands of the Rehabilitation Act do not yield to state laws that discriminate against the disabled; *it works the other way around*." *Id.* (emphasis added). "State officials 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." *Id.*

The decisions of the Second, Fourth, Seventh, Tenth, and Eleventh Circuits cannot be reconciled with the First Circuit's decision below. State laws that are contrary to federal nondiscrimination laws must yield to the demands of federal law. This Court should grant the Petition to resolve the conflict among the circuits.

II. THE FIRST CIRCUIT'S DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND THE SECOND AND ELEVENTH CIRCUITS CONCERNING WHETHER THE PLAIN TEXT OF TITLE VII PREEMPTS CONTRARY STATE LAWS.

The plaint text of Title VII explicitly provides that employers are not excused from compliance with Title VII's accommodation requirements on the basis of a conflicting state law:

> Nothing in this subchapter shall be deemed to exempt or relieve any person

> from 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 that 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).

Congress also made plain that it intended to preempt any state law that conflicts with its nondiscrimination objectives in Title VII.

> 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 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 (emphasis added).

The First Circuit below held that Title VII does not always preempt state laws requiring employment practices in direct conflict with Title VII's nondiscrimination requirements. That decision is in direct conflict with the plain language of Title VII and

the decisions of this Court and the Second and Eleventh Circuits.

A. The First Circuit Held that Title VII Does Not Always Preempt Contrary State Laws.

Despite Title VII's unequivocal pronouncement that employers are not excused from liability for compliance with a state law "that 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, the First Circuit held that employers are excused from compliance with Title VII when such compliance would violate contrary state law. (App. 37a-38a.) Specifically, the First Circuit held that Section 2000e-7 does not demonstrate that Maine's refusal to allow religious accommodations from the Vaccine Mandate is preempted because Title VII does not require such an accommodation. (App. 37a.) "Title VII could preempt the Mandate only if it required the Providers to grant the plaintiffs' requested accommodation. But granting that accommodation would have exposed the Providers to penalties for violating the Mandate." (*Id.*) This reasoning is entirely circular. Title VII plainly *does* require reasonable accommodation of sincerely held religious beliefs. Maine law, however, purported to outlaw all accommodations. Concluding that Title VII does not require employers to provide reasonable accommodations because Maine law prohibits all accommodations circularly guts the intended protection of federal law and nullifies both Title VII and the Supremacy Clause.

The First Circuit noted Petitioners' position that Section 2000e-7 preempts the State's COVID-19 Vaccine Mandate. (App. 38a (noting Petitioners' contention that 42 U.S.C. §2000e-7 "exempts the Providers from liability for violating the Mandate, which, they assert, purports to require the Providers to violate Title VII by denying them their preferred accommodation.").) The court rejected that contention stating that it was "an extremely broad view of Title VII's requirements" (*id.*), and that a violation of state law excused compliance with Title VII. (App. 39a.) The First Circuit's only basis for so holding was that "[t]he plaintiffs cite no case holding that Title VII preempted a state law in analogous circumstances involving religion." *Id.* (emphasis original). As discussed *supra*, however, the First Circuit noted that there is precedent for the proposition that Title VII preempts contrary state laws in the race discrimination context. (App. 39a (citing *Guardians Ass'n of N.Y.C. Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980)).) The First Circuit ignored that 42 U.S.C. §2000h-4, in addition to 42 U.S.C. §2000e-7, explicitly invalidates and preempts state law directly contrary to Title VII's purposes and prohibited employment practices.

Despite the fact that simultaneous compliance with the State's COVID-19 Vaccine Mandate and Title VII is not possible, the First Circuit held that the contrary state law was not preempted. Specifically, the First Circuit acknowledged that while the state law creates a scenario where "the need to comply with the Mandate, on the one hand, and with Title VII, on

the other hand, placed the Providers in a 'damned-if-you-do, damned-if-you-don't situation," the contrary state law was nevertheless not preempted by Title VII. (App. 37a-38a.)

The First Circuit's analysis flips the Supremacy Clause on its head, excuses employers from compliance with Title VII solely on the basis of contrary state law, criticizes Petitioners for relying on analogous and directly on-point racial discrimination precedent, and directly conflicts with precedent from this Court and the Second and Eleventh Circuits. This Court should grant the Petition to resolve the conflict.

B. This Court and the Second and Eleventh Circuits Have Held that the Plain Language of Title VII Explicitly Preempts Contrary State Laws.

In addition to the plain text of Section 2000e-7, the First Circuit's decision below conflicts with the decisions from this Court and the Second and Eleventh Circuits.

1. The First Circuit's holding below directly conflicts with this Court's precedents.

As this Court recognized in a different context, federal nondiscrimination laws are intended to be "a floor beneath which [protections] may not drop—not a ceiling above which they may not rise." *California Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272,

285 (1987) (cleaned up). In *Guerra*, the Court was faced with a California law that required employment protections and benefits *in excess* of those required by Pregnancy Discrimination Act, not—as here—requiring diminished protection for protected categories. *Id.* at 290. Contrary to Maine's discriminatory COVID-19 Vaccine Mandate at issue here, the law in *Guerra* did not "prevent employers from complying with both federal law (as petitioners construe it) and the state law." *Id.* Indeed, the California law, which provided greater protections for protected classes, did not stand as an obstacle to compliance with federal law—it supplemented it to provide enhanced protection. *Id.* at 291 ("This is not a case where compliance with both federal and state regulations is a physical impossibility or where there is an inevitable collision between the two schemes of regulation."). As the Court noted, the Pregnancy Disability Act "does not compel California employers to treat pregnant workers *better* than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers." *Id.* (emphasis original). And, because California provided *greater* protection than required by federal law, the statutory scheme was "not inconsistent with the purposes of the federal statute, nor does it require the doing of an act which is unlawful under Title VII." *Id.* at 292.

Contrary to what the First Circuit held below, this Court noted that Title VII explicitly preempts state laws that permit or require the doing of an act—here, denying all religious accommodation requests from the COVID-19 Vaccine Mandate—that cannot

be reconciled with the requirements of Title VII. *See id.* at 290 n.29. In fact, the arguments of the petitioners in *Guerra* largely mirror the conclusion reached by the First Circuit below. "Petitioners assert that even if [the Pregnancy Disability Act] does not *require* employers to treat pregnant employees differently than other disabled employees, it *permits* employers do so because it does not specifically prohibit different treatment." *Id.* (emphasis original). The logical conclusion of the *Guerra* petitioners' argument was that it required a finding that federal law "permits any employer action that it did not expressly prohibit." *Id.* This is largely what the First Circuit held below. (App. 38a.) This Court explicitly and unequivocally rejected that conclusion: "We conclude that 'permit' in [Section 2000e-7] must be interpreted to pre-empt only those state laws that expressly *sanction* a practice unlawful under Title VII; the term does not pre-empt state laws that are silent on the issue." *Id.* (emphasis original).

Here, the State's COVID-19 Vaccine Mandate explicitly sanctioned—indeed, *required*—a practice of blanket rejection of all religious accommodation request under Title VII in relation to the COVID-19 Vaccine Mandate, irrespective of whether such accommodations were reasonable, and irrespective of whether such accommodations could be provided without undue hardship. (App. 36a (noting that employers "could <u>not</u> offer religious exemptions to workers covered by the Mandate (since doing so would not comply with the Mandate)" (emphasis original)).) The First Circuit's holding that such a mandate requiring—or, at minimum, permitting—the doing of

an act prohibited by Title VII is not preempted is in direct conflict with this Court's precedent.

The direct conflict between the First Circuit's preemption holding below and this Court's precedent is further demonstrated by the Court's corollary holding concerning Section 2000e-7 in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Shaw*, this Court noted that "Title VII expressly preserves *nonconflicting* state laws." *Id.* at 101 (emphasis added). "Insofar as state laws prohibit employment practices that are lawful under Title VII, however, preemption would not impair Title VII." *Id.* at 103. This is so because "Title VII does not itself prevent States from extending their nondiscrimination laws to areas not covered by Title VII." *Id.* Citing Section 2000e-7, this Court held that Title VII's preemption analysis is concerned with state laws—such as Maine's mandate here—that permit or require employment practices that Title VII explicitly prohibits. *Id.* ("Quite simply, Title VII is neutral on the subject of all employment practices it does not prohibit."). The reason for the distinction is plain: "Title VII would prohibit precisely the same employment practices, and be enforced in precisely the same manner, even if no State made additional employment practices unlawful." *Id.*

As this Court stated in *Albermarle Paper Co. v. Moody*, Section 2000e-7 explicitly preempts "state statutes inconsistent with it." 423 U.S. 405, 423 n.18 (1975). The First Circuit holding below that a state law directly conflicting with Title VII is not

preempted cannot be reconciled with this Court's precedents.

2. The First Circuit's holding below directly conflicts with decisions of the Second and Eleventh Circuits.

The First Circuit's holding also conflicts with decisions of the Second and Eleventh Circuits. In *Bradshaw v. Sch. Bd. of Broward Cnty.*, 486 F.3d 1205 (11th Cir. 2007), the Eleventh Circuit held that state laws that directly conflict with Title VII are preempted as a matter of the plain language of the statute. *Id.* at 1211. There, Florida imposed various compensatory damages caps on employment discrimination cases that did not conflict with Title VII's damages caps. *Id.* ("In the present case, Florida does not want to impose liability for compensatory damages beyond Title VII's cap."). Because the Florida statutory scheme did not permit or require a damages award that was inconsistent with or contrary to Title VII, it was not preempted. *See id.* ("Title VII will not be 'deemed' (that is, construed) to prevent states from imposing liability in any way they see fit, *so long as the states do not interfere with Title VII by requiring or permitting acts that Title VII would forbid*." (emphasis added)).

The Second Circuit's decision in *Bridgeport Guardians, Inc. v. Delmonte*, 248 F.3d 66 (2d Cir. 2001) likewise recognized that Title VII preempts contrary state laws. There, the Second Circuit held that "Title VII explicitly relieves employers from any

duty to observe state law 'which purports to require or permit' any discriminatory employment practice." *Id.* at 74 (quoting 42 U.S.C. §2000e-7). *See also id.* at 72 (noting that it is "axiomatic" that Title VII "would preempt any contrary state law").

CONCLUSION

The First Circuit's decision below conflicts with the precedent of this Court and the precedent of numerous circuit courts concerning whether compliance with a state law directly contrary to Title VII can excuse noncompliance with Title VII. The First Circuit's decision below also conflicts with this Court's precedent and the precedent of other circuits on the question of whether the plain language of Title VII explicitly requires the preemption of contrary state laws. This Court should grant the Petition and resolve the conflicts on these questions of national importance.

Respectfully submitted,

Mathew D. Staver
Counsel of Record
Anita L. Staver
Liberty Counsel
109 Second St., NE
Washington, D.C. 20002
(202) 289-1776

Horatio G. Mihet
Daniel J. Schmid
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776

Counsel for Petitioners