No. 24-1015

IN THE

Supreme Court of the United States

JOHN DOES 1-2, et al.,
Petitioners,
v.
KATHY HOCHUL, Governor of New York, et al.,
Respondents.

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

BRIEF IN OPPOSITION FOR STATE RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

During the COVID-19 pandemic, New York required certain healthcare entities to ensure that employees be fully vaccinated against COVID-19 if the employees could potentially expose other personnel, patients, or residents to COVID-19 if the workers were infected. Following expiration of the federal COVID-19 public health emergency, the rule was repealed. While it was in effect, the rule did not include a religious exemption, but it also did not dictate the actions that employers could take in response to unvaccinated employees. As a result, employers retained flexibility to provide reasonable accommodations to religious objectors, including reassigning unvaccinated employees to activities where they would not expose others to COVID-19. The questions presented are:

1. Whether employees' request for permission to violate a now-repealed state public health regulation imposed an undue hardship on the employers under Title VII of the Civil Rights Act of 1964, when the employees could have sought other reasonable accommodations consistent with both Title VII and state law.

2. Whether a now-repealed state regulation that permitted employers to provide reasonable accommodations to religious objectors, while prohibiting a blanket religious exemption that would have jeopardized public health, was preempted by Title VII and the Supremacy Clause.

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INTRODUCTION

Petitioners here—four healthcare workers—challenged a now-repealed New York State Department of Health (DOH) emergency rule that required certain healthcare entities to ensure that employees be fully vaccinated against COVID-19 if their activities could have potentially exposed other personnel, patients, or residents to COVID-19 if the workers were infected. Petitioners asserted claims against the Governor of the State of New York and the DOH Commissioner. Petitioners separately asserted religious discrimination claims against their private employers under Title VII of the Civil Rights Act of 1964.

The U.S. District Court for the Eastern District of New York dismissed petitioners' complaint. While petitioners' appeal from that dismissal was pending, DOH repealed the rule based on the end of the declared federal COVID-19 public health emergency, the changed trajectory of COVID-19, and new federal guidance regarding mandatory vaccination in healthcare settings. In an unpublished and nonprecedential summary order, the U.S. Court of Appeals for the Second Circuit dismissed petitioners' appeal regarding their claims against the state respondents as moot. The court of appeals affirmed the dismissal of petitioners' claims against the employer respondents on the merits.

In their petition for certiorari, petitioners expressly abandon their moot claims against the state respondents (*see* Pet. iii, n.1) and seek review of only the dismissal of their Title VII claims against the employer respondents. Although no claims against the state respondents remain, state respondents have strong interests in opposing the petition because it is based on the incorrect premise that the DOH rule presented an

irreconcilable conflict with Title VII and was unconstitutional for that reason while it was in effect. Accordingly, in support of the employer respondents' opposition to the petition for a writ of certiorari, state respondents submit this brief to address "misstatement[s] of . . . [state] law in the petition that bear[] on what issues properly would be before the Court if certiorari were granted," Sup. Ct. Rule 15.2, and to defend the constitutionality of the (repealed) state rule, *cf.* 28 U.S.C. § 2403(b); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277-78 (2022).

The Court should deny the petition for two independent reasons. First, although petitioners' Title VII claims against the employer respondents are not moot, the petition nonetheless revolves around a state rule that was repealed almost two years ago—after the trajectory of COVID-19 changed. Petitioners indisputably have no reasonable expectation of the rule's vaccination requirement recurring, and sensibly do not seek review of the Second Circuit's determination that their claims against the state respondents are moot. But granting certiorari to address petitioners' claims against the employer respondents would require the Court to wade into questions concerning the meaning and validity of the same repealed state rule. And doing so would be a largely hypothetical exercise in which the Court would be deprived of the benefit of further consideration of the rule's scope by state courts and of further practical experience with the rule's implementation.

Second, this case does not actually present the questions that petitioners seek to raise. Petitioners contend that this case presents the questions of whether a state rule that prohibits *all* religious accommodations (i) can be used by employers to establish an undue hardship that would make religious accommodation

unreasonable and thus avoid Title VII liability; and (ii) is preempted by Title VII. But this case does not present either of those questions because the DOH rule, while it was in effect, did not prohibit all religious accommodations. Rather, the rule allowed employers to offer religious accommodations that placed unvaccinated employees in roles that would not expose other personnel, patients, or residents to COVID-19 if the employees were infected. The rule thus allowed religious accommodations, albeit not petitioners' preferred accommodation, in accordance with Title VII. When the rule's scope is properly understood, this case does not present any question about the validity of a state law that, unlike the rule here, prohibits employers from providing any religious accommodations whatsoever. Accordingly, the petition should be denied.

STATEMENT

A. New York's Response to COVID-19 Transmission in the Healthcare Sector

1. COVID-19 is a potentially deadly respiratory illness that spreads easily from person to person. In the United States, the virus has claimed more than 1.2 million lives, and healthcare workers have been disproportionately harmed by the disease.[1]

When the COVID-19 pandemic began in early 2020, there was no vaccine available to help prevent the

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[1] Centers for Disease Control & Prevention, *COVID Data Tracker: Trends in United States COVID-19 Deaths, Emergency Department (ED) Visits, and Test Positivity by Geographic Area* (as of July 12, 2025); Shao Lin et al., *COVID-19 Symptoms and Deaths among Healthcare Workers, United States*, 28 Emerg. Infect. Dis. 1624 (2022). (For sources available on the internet, URLs appear in the Table of Authorities.)

spread of the disease. In December 2020, the U.S. Food and Drug Administration (FDA) issued emergency use authorizations for the Pfizer-BioNTech and Moderna vaccines,[2] and it subsequently granted full regulatory approval for those vaccines in August 2021 and January 2022, respectively.[3] Studies have shown that these vaccines are both safe and highly effective, particularly for preventing COVID-19-related hospitalizations in vulnerable populations.[4]

2. Pursuant to DOH's broad mandate to supervise and regulate "the sanitary aspects of . . . businesses and activities affecting public health," N.Y. Pub. Health Law § 201(1)(m), DOH acted swiftly to respond to the increasing risks posed by the Delta variant of the SARS-CoV-2 virus in New York's healthcare sector in August 2021.

As relevant here, on August 18, 2021—prior to full FDA approval of the Pfizer vaccine—the DOH Commissioner issued an interim order requiring limited categories of healthcare entities (hospitals and nursing homes) to ensure that covered personnel were fully vaccinated

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[2] Food & Drug Admin., Press Release, *FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020); Food & Drug Admin., Press Release, *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine* (Dec. 18, 2020).

[3] Food & Drug Admin., Press Release, *FDA Approves First COVID-19 Vaccine* (Aug. 23, 2021); Food & Drug Admin., Press Release, *Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine* (Jan. 31, 2022).

[4] *See, e.g.*, Heidi L. Moline et al., *Effectiveness of COVID-19 Vaccines in Preventing Hospitalization Among Adults Aged ≥ 65 Years – COVID-NET, 13 States, February-April 2021*, 70 MMWR Morb. Mortal. Wkly. Rep. 1088, 1092 (2021) (finding vaccines' efficacy for preventing hospitalizations ranged from 84% to 96% among adults 65 to 74 years old).

against COVID-19. (CA2 J.A. 77-83.) The interim order, which could remain in force for only fifteen days, *see* N.Y. Pub. Health Law § 16, served as an immediate stop-gap measure pending anticipated separate action by DOH's Public Health and Health Planning Council. The interim order included both a medical and religious exemption. (CA2 J.A. 81-82.)

The interim order was superseded when, eight days later—and three days after the FDA gave full approval to the Pfizer vaccine—the Council approved an emergency rule requiring that certain healthcare workers receive a COVID-19 vaccine. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 274 (2d Cir.) ("*WTP*"), *clarified by* 17 F.4th 368 (2d Cir. 2021), *cert. denied sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022); *see also* N.Y. Pub. Health Law § 225. The Council did not amend the Commissioner's interim order: "rather, it independently promulgated a new Rule," based on more extensive consideration of a longer-term and more broadly applicable vaccination requirement, input from the Council's members, and preexisting vaccination requirements for other, similarly infectious and harmful diseases. *See WTP*, 17 F.4th at 282-83.

The emergency rule required covered healthcare entities to "continuously require" employees to be fully vaccinated against COVID-19 if they "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." (CA2 J.A. 85-86 (§ 2.61(a)(2), (c)).) The rule covered a broader range of healthcare entities than the Commissioner's interim order (CA2 J.A. 84 (§ 2.61(a)(1)(ii)-(iv))), and was published in the *New York State Register* with supporting documentation, *see* Prevention of COVID-19 Trans-

mission by Covered Entities, 43 N.Y. Reg. 6, 6-9 (Sept. 15, 2021).

The rule contained only a single, narrow exception to its requirements: a medical exemption limited in duration and scope. (CA2 J.A. 86-87 (§ 2.61(d)).) The rule did not contain an exemption for those who oppose vaccination on religious or any other grounds. The availability of a medical but not religious exemption paralleled New York's preexisting and longstanding rules requiring that healthcare workers be vaccinated against the highly infectious diseases of measles and rubella. *See* 10 N.Y.C.R.R. §§ 66-1.1(l), 66-1.3(c).

In accompanying administrative materials, DOH further explained the basis for the rule. DOH noted that the rule responded to the increasing circulation of the Delta variant at that time. It found that COVID-19 vaccines are safe and effective, and that the presence of unvaccinated personnel in healthcare settings posed "an unacceptably high risk" that employees may acquire COVID-19 and transmit it both to (a) colleagues, thereby exacerbating staffing shortages; and (b) vulnerable patients or residents, thereby causing an unacceptably high risk of medical complications. (CA2 J.A. 93.)

On June 22, 2022, a permanent rule went into effect. For purposes of this appeal, the permanent rule was substantively the same as the emergency rule. *See* Prevention of COVID-19 Transmission by Covered Entities, 44 N.Y. Reg. 10 (June 22, 2022).

3. On May 1, 2023, the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) announced that it intended to end its federal regulatory requirement that covered providers and suppliers establish policies and proce-

dures for staff vaccination for COVID-19.[5] Following expiration of the federal COVID-19 public health emergency, CMS published its repeal of its regulation in the *Federal Register* in early June 2023.[6]

Shortly after CMS's announcement, and given the changing trajectory of COVID-19, DOH reevaluated the rule and announced that a repeal was being recommended for consideration by the Council. In guidance materials dated May 24, 2023, DOH announced that it would "cease citing providers for failing to comply with the requirements of" the rule while the repeal was under consideration.[7]

DOH then issued a proposed rulemaking to implement the repeal. *See* Removal of the COVID-19 Vaccine Requirement for Personnel in Covered Entities, 45 N.Y. Reg. 28 (June 28, 2023). In support of the repeal, DOH explained that "there are now effective treatments for COVID-19, case rates appear to have steadily declined, and hospitalizations due to COVID-19 have substantially decreased." *Id.* at 29. The repeal became effective on October 4, 2023. *See* Removal of the COVID-19 Vaccine Requirement for Personnel in Covered Entities, 45 N.Y. Reg. 22 (Oct. 4, 2023).

4. Multiple lawsuits challenging DOH's rule were filed after its implementation. In one proceeding in the U.S. District Court for the Eastern District of New York,

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[5] Memorandum from Dirs., Quality, Safety & Oversight Grp. & Survey & Operations Grp., to State Survey Agency Dirs. 2 (May 1, 2023).

[6] Medicare and Medicaid Programs; Policy and Regulatory Changes to the Omnibus COVID-19 Health Care Staff Vaccination Requirements, 88 Fed. Reg. 36485 (June 5, 2023).

[7] *See* Eugene P. Heslin, First Deputy Comm'r & Chief Med. Officer, No. 23-09, Dear Administrator Letter 1 (May 24, 2023).

a district court denied a motion for a preliminary injunction enjoining enforcement of the rule. *See* Order, *We The Patriots USA, Inc. v. Hochul*, No. 21-cv-4954 (E.D.N.Y. Sept. 12, 2021). In another proceeding in the U.S. District Court for the Northern District of New York, a district court preliminarily enjoined enforcement of the rule. *See Dr. A. v. Hochul*, 567 F. Supp. 3d 362, 377-78 (N.D.N.Y. 2021), *vacated & remanded sub nom. WTP*, 17 F.4th 266, *and clarified by* 17 F.4th 368, *cert. denied*, 142 S. Ct. 2569. In October 2021, the Second Circuit issued an order that vacated the preliminary injunction in the Northern District case (*Dr. A.*) and affirmed the order denying a preliminary injunction in the Eastern District case (*We The Patriots*). *We The Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 WL 5103443 (2d Cir. Oct. 29, 2021).

A few days later, the Second Circuit issued its written opinion explaining the basis for its order. As relevant here, the court concluded that the plaintiffs were unlikely to succeed on their claims that Title VII preempted the rule. The plaintiffs had argued that the rule was preempted because it categorically precluded covered entities from providing any religious accommodation to healthcare workers whose sincerely held religious beliefs prevented them from taking the vaccine. *See WTP*, 17 F.4th at 277-78, 291. The Second Circuit rejected that argument, explaining that the rule did "not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the rule, while avoiding the vaccination requirement." *Id.* at 292. For example, the court noted, the rule did not prevent employees from seeking, or prevent employers from granting, religious accommodations that allowed employees to conduct telemedicine. *See id.* The court further explained that "Title VII does not

require covered entities to provide the accommodation" that the plaintiff employees preferred—which in *WTP* was "a blanket religious exemption allowing them to continue working at their current positions unvaccinated." *Id.*

The Second Circuit subsequently issued a clarifying order confirming its ruling that the rule allowed "an employer to *accommodate*—not *exempt*—employees with religious objections, by employing them in a manner that removes them from the Rule's definition of 'personnel.' Such an accommodation would have the effect under the Rule of permitting such employees to remain unvaccinated while employed." *WTP*, 17 F.4th 368, 370 (2d Cir. 2021) (per curiam) (citation omitted). This Court denied emergency applications from the *Dr. A.* and *WTP* plaintiffs for injunctive relief enjoining enforcement of the rule pending the filing and adjudication of a petition for a writ of certiorari from the Second Circuit's *WTP* order. *See Dr. A. v. Hochul*, 142 S. Ct. 552 (2021) (mem.). The Court subsequently denied the *Dr. A.* plaintiffs' petition for a writ of certiorari. *See Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022). The *WTP* plaintiffs did not seek certiorari.

B. Procedural History

1. In September 2021, four anonymous healthcare workers filed the action at issue here in the U.S. District Court for the Eastern District of New York.[8] (Pet. App. 63a-117a.) The complaint named as defendants two state officers: Kathy Hochul, as Governor of the State of New York; and Howard A. Zucker, as DOH Commis-

[8] A fifth plaintiff, an anonymous board president of a senior care facility, asserted claims against only the state respondents (*see* Pet. App. 71a), which the petition has abandoned (*see* Pet. iii, n.1).

sioner.[9] The complaint also named as defendants petitioners' private sector employers: Trinity Health, Inc.; New York-Presbyterian Healthcare System, Inc.; and Westchester Medical Center Advanced Physician Services, P.C. (Pet. App. 75a-76a.)

Petitioners alleged that they have religious beliefs that precluded them from receiving any of the then-available COVID-19 vaccines. (Pet. App. 80a.) Petitioners further alleged that the employer respondents denied their requests for blanket exemptions from the DOH rule, i.e., their requests to remain unvaccinated while continuing activities that could expose other covered personnel, patients or residents to COVID-19 if petitioners were infected. Petitioners did *not* allege that they sought (or would have accepted) a religious accommodation that would have allowed them to remain unvaccinated *and* in compliance with the rule, such as telework or other roles that would not have potentially exposed others to COVID-19. The petitioners claimed that their employment would be terminated if they were not vaccinated for COVID-19. (Pet. App. 89a-94a.)

As relevant here, petitioners brought a claim against both state and employer respondents alleging that DOH's rule conflicted with Title VII and was preempted by the Supremacy Clause. (Pet. App. 102a-104a.) Petitioners also brought claims against only the employer respondents alleging that they had violated Title VII. (Pet. App. 108a-110a.) Petitioners sought declaratory relief and injunctive relief barring state respondents from enforcing the rule. Petitioners also sought monetary relief and attorney's fees from unspecified respondents. (Pet. App. 113a-117a.)

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[9] The current DOH Commissioner is James V. McDonald M.D., M.P.H.

The state and employer respondents each moved to dismiss the complaint following the Second Circuit's *WTP* decision. The district court afforded petitioners an opportunity to amend their complaint to account for the Second Circuit's analysis in *WTP* (*see* CA2 J.A. 15 (Minute Entry & Order (Nov. 3, 2021))), but petitioners did not do so.

2. In September 2022, the U.S. District Court for the Eastern District of New York (Donnelly, J.) granted the motions to dismiss. As relevant here, the court dismissed petitioners' claim that Title VII preempted the rule. Applying the Second Circuit's analysis in *WTP*, the court rejected petitioners' argument that the rule prohibited any religious accommodations. The court concluded that while the rule barred blanket exemptions, it did "'not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement.'" (Pet. App. 60a (quoting *WTP*, 17 F.4th at 292).) The court explained that petitioners alleged that they sought only a complete exemption. (Pet. App. 59a.) And the court further explained that Title VII did not require employers to provide employees with their *preferred* accommodation, but rather a *reasonable* accommodation that does not cause undue hardship. (Pet. App. 59a-60a.)

The district court also dismissed petitioners' Title VII claims against the employer respondents. It concluded that petitioners had failed to exhaust their administrative remedies by obtaining right-to-sue letters from the U.S. Equal Employment Opportunity Commission, a precondition to filing Title VII claims in federal court. And the court concluded that, in any event, the only accommodation sought by petitioners (a blanket exemption) would pose an undue hardship by

requiring their employers to endanger patients, nursing home residents, and other healthcare workers in violation of the rule—a valid state public health regulation. (*See* Pet. App. 52a-56a.)

3. Petitioners appealed. By the time the Second Circuit decided their appeal in December 2024, DOH had repealed the rule more than a year earlier. See *supra* at 6-7.

In an unpublished and nonprecedential summary order, the U.S. Court of Appeals for the Second Circuit (Cabranes, Sullivan, Pérez, JJ.) dismissed petitioners' appeal of the dismissal of their claims against the state respondents as moot. (Pet. App. 5a-9a.) The court explained that the rule's repeal meant that petitioners could not obtain prospective injunctive relief against the state respondents, and that petitioners' request for declaratory relief could not avoid mootness. (Pet. App. 6a.) The court also concluded that petitioners failed to state a Title VII claim against the employer respondents because "their sole request" for a blanket religious exemption from the DOH vaccination requirement would have violated then-existing state law, and thereby inflicted on the employer an undue hardship. (*See* Pet. App. 11a.)

REASONS FOR DENYING THE PETITION

A. Certiorari Is Not Warranted to Review Issues Regarding a State Rule That Was Repealed Almost Two Years Ago.

The Court should deny the petition because DOH repealed the state rule challenged in petitioners' complaint almost two years ago.

1. As the court of appeals correctly held and as petitioners do not dispute, the rule's repeal mooted all of petitioners' claims against the state respondents—including their claim that the rule was preempted by Title VII. (Pet. App. 5a-6a; *see* Pet. iii, n.1.) No exception to the mootness doctrine applied because petitioners failed to show any reasonable expectation that the rule would be reinstated. (Pet. App. 7a-8a.) Indeed, petitioners do not seek certiorari to review the court's mootness ruling. (*See* Pet. iii, n.1.)

Although petitioners' Title VII claims seeking money damages against the employer respondents are not moot, resolving petitioners' questions presented about those claims would require the Court to wade into interpreting the scope, and deciding the validity, of the repealed DOH rule. The premise of the petition is that DOH's rule, when it was in effect, could not have been validly relied on by petitioners' employers to avoid Title VII liability because the rule purportedly prohibited *any* religious accommodations whatsoever. (*See, e.g.*, Pet. i-ii, 4-5.) But as explained *infra* (at 15-17), that premise misunderstands the rule—which allowed religious accommodations though not the blanket exemption that petitioners sought. Accordingly, the Court would need to opine on the correct interpretation of the repealed rule if it were to grant certiorari.

The Court should not do so. Because the rule is repealed, this Court would have to consider whether the rule conflicted with Title VII between August 2021 and October 2023—without the benefit of further consideration by state courts or further practical experience with the rule's implementation. The Court should not grant certiorari to wade into stale issues about a bygone rule.

Further counseling against certiorari is the fact that the stale dispute at the center of the petition is the proper interpretation of a *state* rather than a *federal* law. As this Court has explained, a federal court "risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). That federalism concern warrants denying certiorari review here, when New York's highest court never addressed whether DOH's rule precluded all religious accommodations, as petitioners claim, or allowed certain religious accommodations, as DOH maintained. *See, e.g.*, *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988). Nor is the New York Court of Appeals remotely likely to do so when the rule has been repealed.

This appeal also presents an exceedingly poor record upon which to resolve a disputed (and essentially academic) question of state law. The Court would need to rely solely on the conclusory allegations in petitioners' complaint, asserting that they were denied blanket exemptions to the rule in 2021. Petitioners chose not to amend their complaint after the Second Circuit emphasized that the plaintiff employees in *WTP* had failed to establish that the opportunities for religious accommodations, such as telemedicine positions, were "so few as to be illusory," *WTP*, 17 F.4th at 292. Despite an opportunity to assert additional factual allegations to support

their claim that the DOH rule precluded *any* accommodations, plaintiffs relied on their initial complaint, which did "not allege that they have sought anything other than a complete exemption." (Pet. App. 59a.) This case thus presents a poor vehicle for review because petitioners failed to include factual allegations relevant to the practical effect of the (now repealed) state rule that bear on the viability of their Title VII arguments.

B. The Petition Seeks Review on Questions Not Presented by the State Rule at Issue.

The Court should deny certiorari for the independent reason that this case does not actually present the questions identified by petitioners as warranting this Court's review. Petitioners ask this Court to grant certiorari in order to decide (1) whether "compliance with state laws directly contrary to Title VII's requirement to provide a religious accommodation for religious beliefs may serve as an undue hardship" under Title VII, and (2) whether "a state law that requires employers to deny without any consideration all requests by employees for a religious accommodation" is preempted by Title VII. (Pet. i-ii.) But these questions are predicated on petitioners' fundamentally mistaken view that DOH's rule eliminated *any* opportunity for employees to secure a reasonable accommodation under Title VII. (*See, e.g.*, Pet. 38-39.) When the rule is properly understood as allowing religious accommodations—just not the blanket exemption that petitioners preferred—this case does not present the questions raised in the petition.

1. The petition rests on the erroneous premise that "no healthcare worker in New York was permitted to seek or receive any accommodation for their sincerely held religious beliefs." (Pet. 4 (emphasis omitted).) The

Second Circuit correctly rejected this premise. As the court explained, the DOH rule, while in effect, did "not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." *WTP*, 17 F.4th at 292; *cf. Does 1-6 v. Mills*, 16 F.4th 20, 28 (1st Cir. 2021) (discussing availability of accommodations under Maine's vaccination requirement). Specifically, because the rule applied only to personnel "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease" (CA2 J.A. 85 (§ 2.61(a)(2)), the rule allowed employees to engage in activities that would not potentially expose others to COVID-19. For example, the court noted, the rule did not prevent employees from seeking, or prevent employers from granting, religious accommodations that allowed employees to conduct telemedicine. *See WTP*, 17 F.4th at 292. That interpretation is consistent with DOH's position while the rule was in effect.[10]

2. When the scope of the repealed state rule is properly understood, this case plainly does not implicate the questions presented in the petition or any supposed circuit split on Title VII preemption.

Because the rule permitted employees to seek, and employers to grant, religious accommodations that

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[10] *See, e.g.*, Br. for Appellees Governor Kathy Hochul and Commissioner James V. McDonald at 58-59 (June 22, 2023), *Does v. Hochul*, No. 22-2858, 2024 WL 5182675 (2d Cir. 2024), ECF No. 102; Br. in Opp'n to Emergency Application for Writ of Injunction at 30-31 (Nov. 16, 2021), *Dr. A. v. Hochul*, No. 21A145, 142 S. Ct. 552 (2021); Reply Br. for Appellants at 22-23 (Oct. 25, 2021), *Dr. A. v. Hochul*, No. 21-2566, *WTP*, 17 F.4th 266, ECF No. 42; Br. for Appellants at 62-63 (Oct. 18, 2021), *Dr. A. v. Hochul*, No. 21-2566, *WTP*, 17 F.4th 266, ECF No. 23.

would not pose a risk of exposing others to COVID-19, *see WTP*, 17 F.4th at 292, this case does not concern whether Title VII preempts a state law that requires employers to deny *all* requests for a religious accommodation. Nor does this case concern whether employers can establish undue hardship arising from a state law that, unlike the DOH rule, precludes *all* religious accommodations. Simply put, the questions that petitioners ask this Court to review—concerning the preemptive effect of Title VII on a state law that forecloses *all* possible religious accommodations—did not arise in this case even when the DOH rule was in effect.

The cases petitioners invoke are not in conflict with the Second Circuit's conclusion here, which properly recognized that the rule allowed religious accommodations and thus did not directly conflict with Title VII. For example, in *Barber ex rel. Barber v. Colorado, Department of Revenue*, a decision on which petitioners rely heavily (*see* Pet. 30-31), the Tenth Circuit held that plaintiff was not entitled to her preferred accommodation where "another objectively reasonable alternative was available." 562 F.3d 1222, 1230-31 (10th Cir. 2009). So too here. The district court below observed that petitioners did "not allege that they have sought anything other than a complete exemption" from the rule (Pet. App. 59a), despite the Second Circuit having ruled in *WTP* that religious objectors to COVID-19 vaccination could seek *accommodations* that would "remove[] them from the Rule's definition of 'personnel,'" 17 F.4th at 370. Indeed, petitioners had the opportunity to amend their complaint to allege additional facts concerning whether they had sought any religious accommodations other than a blanket exemption and whether such opportunities were available, *see WTP*, 17 F.4th at 292, but they declined to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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