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.

SARAH GAGNÉ-HOLMES, in her official capacity as Acting Commissioner of the Maine Department of Health and Human Services, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As Justice Gorsuch noted nearly four 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.

Does 1-3 v. Mills, 142 S. Ct. 17, 22 (2021) (Gorsuch, J., dissenting). Since its inception, this case has come to this Court three times and in the court of appeals four times. In the *third* appeal, the First Circuit permitted Petitioners to probe their claims in discovery. Upon returning to the district court, the State immediately claimed that its vaccine mandate was no longer necessary, rescinded it (after maintaining it for three years), and moved to dismiss Petitioners' claims to evade scrutiny of its discriminatory mandate. Petitioners' constitutional claims were worthy of this Court's attention four years ago and still are today. Though the pandemic has ended, the ruinous constitutional injury thrust upon Petitioners has not.

The questions presented for review are:

(1) Whether a State may avoid judicial review of an authorizing statute that categorically prohibits

religious accommodations to compulsory vaccination—contrary to Title VII of the Civil Rights Act of 1964—by rescinding an emergency rule applying the statute to a specific disease, while continuing to enforce the statute in all other respects.

(2) Whether a State's decision to maintain an unconstitutionally discriminatory system of compulsory vaccination through three years of litigation and only rescinds its vaccination mandate immediately after an appellate court requires it to submit to merits discovery concerning the constitutionality of that system engages in a litigation-driven sham to escape review of its unconstitutional policies.

PARTIES

Petitioners are Alicia Lowe, Jennifer Barbalias, Garth Berenyi, Debra Chalmers, Nicole Giroux, Adam Jones, and Natalie Salavaria. Respondents Sarah Gagné-Holmes, in her official capacity as Acting Commissioner of the Maine Department of Health and Human Services and Dr. Puthiery Va, Director of the Maine Center for Disease Control and Prevention. Additional Parties are Janet T. Mills, in her official capacity as Governor of the State of Maine, MaineHealth, Genesis Healthcare of Maine, LLC, MaineGeneral Health, and Northern Light Eastern Maine Medical Center.

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 Appendix A at 1a-26a.

ALICIA LOWE, et al. v. MILLS, et al., No. 22-1710, (1st Cir. May 25, 2023), Judgment is reprinted in Appendix B at 27a-28a.

ALICIA LOWE, et al. v. MILLS, et al., No. 1:21-cv-242-JDL, (D. Me. Aug. 18, 2022), Opinion and Order Dismissing First Amended Verified Complaint is reprinted in Appendix C at 29a-52a.

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 reported at 142 S. Ct. 1112 (2022).

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 reported at 142 S. Ct. 17 (2021)

JOHN DOES 1–3, et al. v. MILLS, et al., No. 21A83, (U.S. Oct. 19, 2021), Order Denying Emergency Application for Writ of Injunction is available electronically at 2021 WL 1170854.

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 reported at 16 F.4th 20 (1st Cir. 2021).

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 reported at 566 F. Supp. 3d 34 (D. Me. 2021).

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The First Circuit's opinion affirming the dismissal of Petitioners' complaint is reported at 126 F.4th 747 (1st Cir. 2025) and reprinted in Appendix A at 1a-26a. The district court's dismissal of Petitioners' complaint is reported at 718 F. Supp. 3d 69 (D. Me. 2024) and reprinted in Appendix C at 29a-52a.

JURISDICTION

The First Circuit entered its opinion and judgment, affirming the district court's dismissal of Petitioners' complaint on January 17, 2025. (App. 1a-26a, 27a-28a.) 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 Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

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. (App. 60a.) Justice Gorsuch described Petitioners' fight 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*.

Does 1-3 v. Mills, 142 S. Ct. 17, 22 (2021) (Gorsuch, J., dissenting). (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 instituted a vaccine mandate for healthcare workers in the State of Maine. (App. 68a.) 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 ("Employers"). 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 because the State's mandate prohibited any and all such *religious* accommodations. (App. 59a.) While the State's statutory system prohibited religious accommodations from compulsory vaccination, it permitted the more favored non-religious medical exemption to the same compulsory vaccine. Petitioners filed a federal complaint against the State and several private employers 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 Employers 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), Employers 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, Employers informed Petitioners that Title VII did not apply, and the State's position was that neither did the First Amendment.

Petitioner Lowe was informed by her employer that, under its view, "federal law did not supersede state law in this instance." (App. 80a, 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. 79a, 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. 80a, 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,: "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. 83a, Compl. ¶85.)

All Petitioners were refused *any* consideration for religious accommodation under Title VII and were terminated from their employment solely because Employers thought compliance with Title VII would require violation of a contrary state law. (App. 79a-83a, 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." *Lowe v.*

Mills, 65 F.4th 706, 724 (1st Cir. 2023). The upshot of all this: Petitioners were all fired from their occupations solely because their employers thought they were compelled to comply with an unconstitutionally discriminatory statute that prohibited religious accommodation while permitting non-religious medical accommodations.

Respondents maintained their mandate for two years *after* every unvaccinated healthcare worker had been terminated for seeking a religious accommodation. In other words, despite eliminating the alleged "danger" of having religious healthcare workers continue in the field for which they had served admirably for nearly two years, the State nevertheless continued to enforce the specific mandate as to COVID-19 vaccination long after any purported risks remained in the healthcare setting. Once the First Circuit issued its decision in the third appeal, which permitted Petitioners to begin probing their constitutional claims against the unconstitutionally discriminatory statute in discovery, Respondents charted a different course.

At that point, on the eve of discovery, Respondents suggested that "new evidence" required a reconsideration of the mandate altogether, and Respondents repealed the rule requiring COVID-19 vaccination. What Respondents did not repeal at that time, *and what remains alive and well today*, is the Statute, 22 M.R.S.A. §802, which prohibits *any religious accommodation for any compulsory vaccination under any circumstances.* At the same time, the Statute permits the State's preferred non-

religious medical exemption. Thus, on its face, Respondents' statutory scheme and the system of compulsory vaccination treated Petitioners' religious objections less favorably than Respondents' preferred nonreligious medical exemptions.

Petitioners' challenged the entire system. Though Respondents repealed a small portion of that system (the COVID-19 vaccination requirement), they have not repealed the Statute that prohibits any religious accommodation. Respondents' unconstitutional scheme remaining in place to this day. Despite that fact, the First Circuit below held that Respondents' partial repeal of the unconstitutional system was sufficient to moot Petitioners' challenge to the entire constitutionally injurious scheme. That decision conflicts with this Court's precedents and the precedent of the Fifth, Ninth, and Tenth Circuits. This Court should grant review and resolve the conflicts.

II. FACTUAL BACKGROUND

A. The State's Vaccine Mandate.

On August 12, 2021, the Governor announced that Maine would require healthcare workers to receive one of the three, then-available COVID-19 vaccines to remain employed in the healthcare profession. (App. 67a, Compl. ¶31.) The Governor's announcement defined healthcare workers 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." (App. 68a, Compl. ¶32.) Respondents threatened to enforce the vaccination mandate by revoking the licenses of all healthcare employers who failed to mandate that all employees receive the COVID-19 vaccine. (*Id.*, ¶34.) As the First Circuit previously recognized, the vaccine mandate challenged by Petitioners "is the product of th[e] rule and the related state statute." *Lowe v. Mills*, 68 F.4th 706, 711 (1st Cir. 2023). The district court, in its first dismissal of Petitioners' Complaint, likewise recognized that the emergency rule and the statute both operated "in tandem" to effectuate the injury Petitioners alleged. *Lowe v. Mills*, 2022 WL 3542187, *5 (D. Me. Aug. 18, 2022) ("DHHS's removal of the religious and philosophical exemptions in April 2021 served to conform the Rule to the requirements of the statute, 22 M.R.S.A. §802(4-B), *which operate in tandem*. (emphasis added).

1. Respondents' emergency then permanent then temporary rule.

In general, Maine law has long required certain licensed healthcare facilities to require certain vaccines for healthcare workers. *Lowe*, 68 F.4th at 709-10. Since 2001, the Maine Department of Health and Human Services ("MDHHS") has been delegated authority to designate the diseases against which a healthcare worker is required to be vaccinated. *Id.* at 710. In August 2021, the Maine Center for Disease Control and Prevention ("MCDC") issued an emergency rule that added COVID-19 to the list of diseases against which healthcare workers must be

vaccinated. (App. 68a, Compl. ¶36.) Effective on September 1, 2021, MCDC amended 10-144 C.M.R. Ch. 264 to eliminate the ability of healthcare workers in Maine to request and obtain a religious exemption and accommodation from the COVID-19 vaccination mandate. (*Id.*, ¶36.) The only exemptions Maine now lists as available to healthcare workers are those outlined in 22 M.R.S. § 802.4-B, which exempts only those individuals for whom an immunization is medically inadvisable and who provide a written statement from a doctor. (App. 69a, Compl. ¶37.)

Under the prior version of the rule, 10-144 C.M.R. Ch. 264, § 3-B, a healthcare worker could be exempt from mandatory immunizations if the "employee states in writing an opposition to immunization because of a sincerely held religious belief." (*Id.*, ¶38.) Maine removed the religious exemption to mandatory immunizations effective September 1, 2021. (*Id.*, ¶39 ("The health care immunization law has removed the allowance for philosophical and religious exemptions and has included influenza as a required immunization."). MDHHS made the Emergency Rule *permanent* in November 2021. *Lowe*, 68 F.4th at 711.

Permanent, that is, only until the First Circuit reversed the earlier dismissal of Petitioners' Complaint, the effect of which was to require Respondents to submit to discovery concerning the constitutionality of their discriminatory system of exemptions to compulsory vaccination, at which point Respondents promptly and suspiciously repealed the "permanent" rule to evade constitutional scrutiny.

2. Respondents' discriminatory statute.

Much like the emergency-turned-permanent-turned-rescinded rule requiring healthcare workers in Maine to receive COVID-19 vaccination as a condition of employment, Maine's statutory scheme prohibits religious exemptions from compulsory vaccination. Prior to 2019, Maine permitted healthcare workers to request and receive three potential accommodations from compulsory vaccination: (1) a medical exemption, (2) a religious exemption, and (3) a philosophical exemption. *See Lowe*, 2022 WL 3542187, *4 (citing the previous version of 22 M.R.S.A. §802(4-B)(A), (B) (2019)). (App. 69a, Compl. ¶38.) The medical exemption was available for anyone "who provided a physician's written statement that immunization . . . *may be* medically inadvisable." *Lowe*, 2022 WL 3542187, *4. The religious and philosophical exemptions were available to those "who stated in writing a sincere religious or philosophical belief that is contrary to the immunization requirement." *Id.*

Respondents revoked the religious and philosophical exemptions in 2019, but retained a medical exemption. *Lowe*, 68 F.4th at 710 (noting that the medical exemption was now available if a licensed physician, nurse practitioner or physician assistant stated that the immunization "may be medically inadvisable"). MDHHS made the removal of the religious and philosophical exemptions applicable to healthcare workers in September 2021. (App. 69a, Compl. ¶39.)

B. Petitioners' Sincere Religious Beliefs.

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. 69a, 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. (App. 70a, 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.*, ¶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.*, ¶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. (*Id.*, ¶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. (App. 71a, Compl. ¶45 (quoting *Genesis* 1:26–27 (KJV)).) 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.*, ¶46 (quoting, *inter alia*, *Exodus* 20:13 (KJV); *Exodus* 21:22–23 (KJV); *Exodus* 23:7 (KJV)).)

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.*, ¶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. (App. 72a, Compl. ¶49.)

Petitioners' sincerely held religious beliefs compelled them to abstain from accepting or receiving any of the three then-available COVID-19 vaccines because of the unquestioned connection to aborted fetal cells. (App. 72a-73a, Compl. ¶¶50, 52, 55, 56, 57.) Because all three of the COVID-19 vaccines then 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. 58a, Compl. ¶5.)

C. Respondents' Discriminatory Preference For Non-Religious Medical Exemptions.

Respondents' compulsory vaccination system requiring Petitioners to receive a COVID-19 vaccine contained only one potential exemption: a nonreligious medical exemption. (*See also* App. 68a-69a, Compl., ¶¶36-39.) The option to obtain an exemption and accommodation for Petitioners' sincerely held religious beliefs was revoked by Respondents, and precluded Petitioners from obtaining that which the First Amendment and federal law required. It was not merely theoretical that Petitioners' religious beliefs were relegated to subservient status—they were explicitly told by their employers that Maine prohibited the employers from offering or providing any respect for their religious beliefs.

In its response to Petitioner Lowe, MaineHealth indicated it was perfectly willing to accept and grant medical exemptions but not religious exemptions. (App. 84a, Compl. ¶88). Specifically, MaineHealth stated to Petitioner Lowe: "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." (*Id.*) To add clarity to Petitioner Lowe's disfavored status, MaineHealth stated: "If you seek an accommodation other than a religious exemption from state mandated vaccine, please let us know." (*Id.*, ¶90.)

Petitioner Barbalias's employer, Northern Light Eastern Maine Medical Center, indicated her request for a religious accommodation was impermissible and that only medical exemptions would be considered or approved. (*Id.*, ¶ 91.) Specifically, Northern Light stated that "the only exemptions that may be made to this requirement are medical exemptions" and that all Northern Light employees must comply with the Vaccine Mandate "except in the case of an approved medical exemption." (*Id.*)

Petitioner Giroux's employer, MaineGeneral, stated that all healthcare workers must comply with the Vaccine Mandate "unless they have a medical exemption," and that the "mandate states that only medical exemptions are allowed, no religious exemptions are allowed." (App. 85a, Compl. ¶92.)

It was by force of Respondents' COVID-19 vaccination mandate and the discriminatory statutory system that prohibited Petitioners from obtaining any consideration for their sincere religious objections that Petitioners' employers prohibited them from receiving accommodations for their sincere religious convictions and terminated them.

Respondents created a two-tiered system of exemptions and placed religious beliefs and those who hold them in a class less favorable than other exemptions that Respondents were perfectly willing to accept. Under Respondents' statutory and regulatory system creating a disfavored class of religious exemptions, employers were not even permitted to *consider* religious exemptions, much less

grant them to those who have sincerely held religious objections to the COVID-19 vaccines.

III. PROCEDURAL HISTORY

A. Procedural history prior to litigation-driven efforts to evade review.

Petitioners commenced this action on August 25, 2021, with the filing of a Verified Complaint (District Court Docket Entry ("dkt.") No. 1) and a Motion for Temporary Restraining Order and Preliminary Injunction (dkt. 3). On August 26, the district court held a hearing on Petitioenrs' Motion for Temporary Restraining Order and issued an order denying Petitioners' motion the same day. (Dkt. 11.) The district court initially scheduled a hearing on Petitioners' Motion for Preliminary Injunction for September 10, 2021, but granted Defendants' request, over Petitioners' objection, to continue that hearing to September 20. (*See* dkt. 44.) The court held a hearing on Petitioners' Motion for Preliminary Injunction on September 20, took the matter under advisement, and informed the parties that a decision would issue expeditiously. Twenty-three days later, and two days before Petitioners' deadline to become vaccinated or face termination, the district court issued its decision denying injunctive relief. (Dkt. 65.)

Petitioners timely noticed their appeal to the First Circuit within an hour of the district court's decision. (Dkt. 66.) Immediately thereafter, Petitioners moved for an injunction pending appeal in the district court (dkt. 67), which the district court denied on October 13, 2021. (Dkt. 68.) Petitioners promptly moved for an

emergency injunction pending appeal under Fed. R. App. P. 8 in the First Circuit on October 14, 2021. The court of appeals denied the injunction pending appeal without comment the next day, October 15, 2021. *See Does 1-3 v. Mills*, 2021 WL 4845812 (1st Cir. Oct. 15, 2021).

Immediately after the court of appeals denied Petitioners' motion for injunction pending appeal, Petitioners sought emergency relief in this Court, filing an emergency application for injunctive relief. On October 19, 2021, Justice Breyer denied Petitioners' emergency application for injunctive relief. *Does 1-3 v. Mills*, 2021 WL 1170854 (U.S. Oct. 19, 2021). Justice Breyer's denial of Petitioners' emergency application "without prejudice to [Petitioners] filing a new application after the Court of Appeals issues a decision on the merits of the appeal, or if the Court of Appeals does not issue a decision by October 29, 2021." *Id.* at *1.

That same day, October 19, 2021, the court of appeals issued its decision in Petitioners' preliminary injunction appeal, affirming the district court's denial of preliminary injunction. *Does 1-6 v. Mills*, 16 F.4th 20 (1st Cir. 2021). Petitioners again sought emergency injunctive relief against Respondents' discriminatory compulsory vaccination system in this Court on October 21, 2021. That application was referred by Justice Breyer to the full Court, which denied the application on October 29, 2021. *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021).

Three Justices dissented from the denial of injunctive relief. *See id.* at 18. As Justice Gorsuch wrote: "Maine has adopted a new regulation requiring certain healthcare workers to receive COVID–19 vaccines if they wish to keep their jobs. Unlike comparable rules in most other States, Maine's rule contains no exemption for those whose sincerely held religious beliefs preclude them from accepting the vaccination." *Id.* (Gorsuch, J., dissenting). But, "[t]he State's vaccine mandate is not absolute; individualized exemptions are available, but only if they invoke certain preferred (nonreligious) justifications. Under Maine law, employees can avoid the vaccine mandate if they produce a "written statement from a doctor or other care provider indicating that immunization may be medically inadvisable." *Id.* at 19 (cleaned up). "From all this, it seems Maine will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms. That kind of double standard is enough to trigger at least a more searching (strict scrutiny) review." *Id.* (emphasis original).

Justice Gorsuch noted that "Maine's decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, *it borders on the irrational*." *Id.* at 22 (emphasis added). "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," and

"[a]ll for adhering to their constitutionally protected religious beliefs." *Id.*

On January 27, 2022, news media organizations intervened for the sole purpose of challenging Petitioners previously granted pseudonymity (dkt. 105)—to which no party had objected—and on February 14, the defendants filed motions to dismiss Petitioners' claims (dkts. 107, 108, 109). On May 31, 2022, the district court granted the intervenors' motion and ordered Petitioners to file an amended complaint disclosing their identities by July 11, 2022. (Dkt. 131.) Petitioners appealed the pseudonymity order to the court of appeals on June 1, 2022 (dkt. 132) and sought an emergency stay preventing the disclosure of their identities. On June 24, 2022, the district court held a hearing on Defendants' motions to dismiss. (Dkt. 146.)

On July 7, 2022, four days before Petitioners were required to reveal their identities in an amended complaint, the First Circuit denied Petitioners' requested stay of the pseudonymity order, *Does 1-3 v. Mills*, 39 F.4th 20 (1st Cir. 2022), effectively foreclosing any relief that could be obtained through full briefing and argument. Petitioners voluntarily dismissed the appeal. *See Does 1-3 v. Mills*, 2022 WL 1736742 (1st Cir. July 14, 2022).

Petitioners filed their First Amended Verified Complaint on July 11, 2022. (App. 053a-115a.) Prior to filing the amended complaint, defendants had moved to dismiss the Complaint for failure to state a claim and lack of jurisdiction on February 14, 2022.

(Dkt. 107, 108, 109.) The district court originally set a hearing on those motions for June 2, 2022 (dkt. 123), which was cancelled pending Petitioners' appeal of the order to disclose their identities. (Dkt. 135.) After returning to the district court on the First Amended Verified Complaint, the district court set another hearing on the motions to dismiss for June 24, 2022. (Dkt. 137.) On August 18, 2022, the district court entered an order dismissing Petitioners' amended complaint for failure to state a claim and lack of jurisdiction (dkt. 156) and entered judgment of dismissal the same day. (Dkt. 157.)

Petitioners timely noticed their appeal to the First Circuit on September 15, 2022. (Dkt. 158.) The Court of Appeals heard oral arguments on that appeal on May 4, 2023, and entered its Opinion reversing in part the district court's dismissal on May 25, 2023, *Lowe*, 68 F.4th 706, permitting Petitioners to probe their constitutional claims in discovery.

B. The First Circuit's revival of Petitioners' claims.

In Petitioners' appeal of the original dismissal of their claims, the court of appeals concluded:

> Applying the Rule 12(b)(6) standard and drawing all reasonable inferences in the plaintiffs' favor, we conclude that it is plausible, in the absence of any factual development, that the Mandate falls in this category, based on the complaint's allegations that the Mandate allows some number of unvaccinated individuals to continue working in healthcare

> facilities based on medical exemptions while refusing to allow individuals to continue working while unvaccinated for religious reasons.

Lowe, 68 F.4th at 714. The court of appeals further held that "it is plausible based on the plaintiffs' allegations that the medical exemption undermines these interests in a similar way to a hypothetical religious exemption." *Id.* at 715. Simply put, the First Circuit concluded that it had "reason to be skeptical that dismissal is appropriate absent further factual development." *Id.* It held that "applying the plausibility standard applicable to Rule 12(b)(6) motions and drawing all reasonable inferences from the complaint's factual allegations in the plaintiffs' favor, the complaint states a claim under the Free Exercise Clause." *Id.* at 718. The court of appeals concluded the same as to Petitioners' Equal Protection claims. *Id.* The First Circuit then remanded the matter back to the district court for Petitioners to probe their claims in discovery and have a trial on the merits. *Id.* at 725.

C. Respondents' litigation-drive efforts to evade review of unconstitutionally discriminatory statutory scheme for compulsory vaccination.

Upon returning to the district court, Petitioners attempted to begin probing their claims in discovery only to be met with Respondents' new strategy—this time to evade review. On July 11, 2023, MDHHS announced that it was proposing to revoke the

COVID-19 vaccination requirement for healthcare workers in Maine. (App. 127a, Declaration of Nancy Beardsley, ("Beardsley Decl."), ¶38.) MDHHS announced that "[a]round the end of May 2023 and beginning of June 2023," corresponding perfectly with the timing of the First Circuit's remand of Petitioners' claims against the State for discovery and trial on the merits, Respondents began "reviewing" available science on the continued need for its COVID-19 vaccination mandate for healthcare workers. (App. 120a, Bearsley Decl. ¶16.) Respondents claimed that some of their decision was based upon the Center for Medicare and Medicaid Services' removal of its healthcare worker mandates, but *under its own admissions*, it was aware of that revocation *prior to this Court even holding oral arguments on the previous appeal*. (*See* App. 119a, Beardsley Decl. ¶9 (noting that CMS had announced its intent to revoke the rule on May 1, 2023—*three days before the First Circuit held oral argument* and a full three weeks before the court of appeals entered its opinion sending Plaintiffs' claims back to the district court).)

In addition to the suspicious timing that perfectly coincided with the court of appeals' revival of Petitioners' constitutional challenges to the discriminatory system, Respondents timing for the revocation of the COVID-19 vaccination requirement for healthcare workers was also suspiciously coincidental for another independent reason. Though Respondents contended that their decision to revoke the COVID-19 vaccination requirement for healthcare workers was purportedly triggered—in part—by the CMS revocation of its rule, they also

claimed that they were revoking the requirement based on the "science and research," "changed circumstances regarding COVID-19 variants, vaccination rates, and disease prevalence," and the "evidence base for the rule requiring COVID-19 vaccination for healthcare workers." (App. 120a, Beardsley Decl. ¶¶16-18.) But, as Respondents' sworn testimony demonstrated below—the number of hospitalizations and deaths were *increasing dramatically at the exact time of the repeal*. (App. 129a-130a, Beardsley Decl. ¶¶45, 47.) From July 2023—when the State proposed repealing the Rule—to August 2023—when the repeal became effective, Maine saw an over *40 percent increase in COVID-19 hospitalizations* (*id.*, ¶45), and a *167 percent increase in deaths* over the same period. (*Id.*, ¶47.) Yet, Respondents still averred that the State's decision to revoke the Rule was based on the science and "declining hospitalization and death rates." (App. 131a, Beardsley Decl. ¶51.) *That was not true.*

The First Circuit held below that, despite the significant evidence against the merits of Respondents' rescission and the suspicious timing of that decision, Petitioners' claims were nevertheless moot because the mandate had been rescinded. (App. 28a.) This Petition follows.

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Holding That A State May Maintain An Discriminatory Operative Statute That Directly Conflicts with Title VII of the 1964 Civil Rights Act And That Facially Violates The First Amendment May Evade Review By Rescinding A Regulation Implementing Compulsory Vaccination Over Every Religious Objection Conflicts With This Court's Precedents.

A. The First Circuit wrongly held that a facial challenge involving both the authorizing statute and the implementing regulation was moot when the emergency regulation is rescinded.

As the district court previously (and correctly) stated, Petitioners' Complaint included a challenge to both the Statute prohibiting religious accommodations from compulsory vaccination *and* the Rule which made that Statute applicable to COVID-19 vaccination. *Lowe v. Mills*, 2022 WL 3542187, *5 (D. Me. Aug. 18, 2022) ("the COVID-19 vaccine mandate refer[s] to *both* the current version of the Rule *and* the statute, 22 M.R.S.A. §802(4-B), which operate in tandem" to prohibit Plaintiffs from obtaining a religious exemption to compulsory vaccination.). *See also Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 43 (D. Me. 2021) ("when I refer in this decision to the COVID-19 vaccine mandate, I am referring to the Rule as it operates in conjunction with the statute, 22 M.R.S.A. §802(4-B), which authorizes it."). Prior to

its decision below, the First Circuit had likewise referred to Petitioners' challenge as to both the Rule *and* the Statute. *Lowe v. Mills*, 68 F.4th 706, 709 (1st Cir. 2023) ("Since 2021, Maine has required certain healthcare facilities to ensure that their non-remote workers are vaccinated against COVID-19. See 10-144-264 Me. Code R. § 2(A)(7); see also Me. Rev. Stat. Ann. tit. 22, § 802. We refer to this requirement as the "Mandate."). In other words, up until the last decision below, all courts treated Petitioners' challenge as to the entirety of the discriminatory system of accommodations.

That only changed when Respondents revoked a part of that system—the Rule. Despite its prior holdings to the contrary, the First Circuit went to great lengths in the latest appeal to suggest that Petitioners' challenge to the system of discriminatory vaccination exemptions did not include a challenge to the Statute at all, but was merely a challenge to the Rule applying the Statute to COVID-19. (App. 11a ("The district court correctly concluded that the appellants' complaint did not present a facial challenge to the statute. . . Appellants' challenge was only to that portion of the regulation concerning COVID-19 vaccinations which was in existence from August 12, 2021 to September 5, 2023." (cleaned up)).) The First Circuit, contrary to the district court's decision below and its own decision before, *see Lowe*, 68 F.4th at 709, held that Petitioners had nevertheless only challenged the "emergency rule – but not the enabling statute." (App. 12a.)

The First Circuit below held that Respondents' rescission of the Rule requiring COVID-19 vaccination mooted Petitioners' claims against the system that treated religious accommodation requests differently and less favorably than nonreligious, medical accommodation requests. (App. 13a ("Because the COVID-19 vaccine mandate has been repealed by way of COVID-19's removal from Chapter 264, and it has not been reinstated, there is simply no ongoing conduct to enjoin.").) It therefore rejected Petitioners' contentions that their claims were not moot because the Statute remains alive and well. The First Circuit's decision below directly conflicts with this Court's precedents.

B. This Court has held that a facial challenge to statute is not mooted merely because the state rescinds an implementing regulation.

The First Circuit's decision below conflicts with this Court's precedents on the issue of whether a constitutional challenge to a discriminatory system of compulsory vaccination is mooted by a partial repeal of the State's statutory system imposing the constitutional injury. *E.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Ne. Fla. Chapter of Assoc. Gen. Contr. Of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979).

Contrary to the decision below, this Court has held that a State's efforts to evade constitutional review of

an allegedly discriminatory statutory system is not mooted unless interim events "have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631. At best, what Respondents did was effectuate a partial repeal of the constitutional violations that Petitioners challenged below. Under this Court's precedents, a partial repeal of the challenged conduct is insufficient to moot the case. *See, e.g.*, *Aladdin's Castle, Inc.*, 455 U.S. at 288-89 (holding that defendant's partial repeal of a challenged ordinance did not moot the case). The decision below conflicts with this Court's precedents.

In *Aladdin's Castle*, petitioners challenged the government's ordinance prohibiting it from operating its coin-operated amusements in the city. 455 U.S. at 285-86. After securing a lease arrangement to operate it establishment, the police chief denied petitioner's application for a business license because he found that petitioner's parent corporation was connected with criminal elements—a term in the statute authorizing him to withhold business licenses. *Id.* at 287. Petitioner sought relief in the state court system, contending that the statute was unconstitutionally vague, secured an injunction, and obtained the business license. *Id.* Immediately after providing petitioner with a business license, the City enacted a new ordinance which effectively repealed petitioner's license. *Id.* at 288. Petitioner challenged the amended ordinance in federal court, obtained an injunction against the amended ordinance, and that injunction was affirmed on appeal. *Id.*

In the interim between the Court of Appeals' decision and this Court's adjudication of the appeal, the City *again* amended the operative ordinance and repealed the portion of the offending language altogether. *Id.* This Court held that a partial repeal of an allegedly unconstitutional ordinance was not sufficient to moot an otherwise well-pleaded claim. "A question of mootness is raised by the revision of the ordinance that became effective while the case was pending in the Court of Appeals. When that court decided that the term "connections with criminal elements" was unconstitutionally vague, that language was no longer a part of the ordinance." *Id.* But the fact that the government has enacted a partial repeal or total revision of the allegedly offending ordinance is not alone sufficient to moot a claim. "Such abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." *Id.* at 289.

> In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated. The city followed that course with respect to the age restriction, which was first reduced for Aladdin from 17 to 7 and then, in obvious response to the state court's judgment, the exemption was eliminated. There is no certainty that a similar course would not be pursued if its most recent

> amendment were effective to defeat federal jurisdiction.

Id.

Because the partial repeal of the operative language of the ordinance did not completely eradicate its unconstitutional effects, this Court held that it was required to review the merits of the claim. That holding is in direct conflict with the First Circuit's decision below that the State's repeal of the offending regulation is sufficient to moot Petitioners' claims against the operative statute that created the unconstitutionally discriminatory system.

In *Northeastern Florida*, this Court likewise held that the government's partial repeal of the challenged ordinance does not moot a plaintiff's claims. 508 U.S. at 660-61. After the City repealed the ordinance that had been found unconstitutional by the district court (and after successful appeal in the Eleventh Circuit), it repealed the offending ordinance before this Court could reach the merits. *Id.* After repealing the allegedly offending language, the City moved to dismiss the appeal in this Court, claiming "that there was no longer a live controversy with respect to the constitutionality of the repealed ordinance." *Id.* at 661. The City claimed (as did Respondents below) that "the repeal of the challenged ordinance renders the case moot." *Id.* This Court disagreed.

Instead, this Court held that "repeal of the objectionable language" does not render a case moot if

circumstances demonstrate that the unconstitutional effect is not eradicated. *Id.* at 662.

> This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. *The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way*.

Id. (second emphasis added).

The same is true of Respondents' decision to keep the Statute prohibiting religious accommodations to compulsory vaccination while repealing the Rule applying it to COVID-19. The State's discriminatory statute prohibits religious accommodations for any compulsory vaccination, yet permits nonreligious

accommodations to the same compulsory vaccination, and the Rule made that applicable to COVID-19. While the Rule was rescinded to evade review may disadvantage Petitioners "to a lesser degree," the unconstitutional discrimination against religious beliefs "disadvantages them in the same fundamental way" under the Statute. The First Circuit's decision below was in direct conflict with this Court's precedents.

In *Lyons*, the petitioner challenged the City of Los Angeles's police "department-authorized chokeholds" in certain police encounters. 461 U.S. at 99. Petitioner had been stopped by officers of the Los Angeles police department and, during that stop, had been placed in a "bar arm control" or "carotid-artery control" chokehold. *Id.* at 97-98. Through its official and unofficial policies, the police department "authorize[d] the use of the holds in situations where no one is threatened by death or grievous bodily harm." *Id.* at 99. The district court enjoined the police department's policy of permitting chokeholds in certain situations, the court of appeals affirmed the injunction, and this Court granted certiorari. *Id.* at 100.

During the interim period between this Court's grant of certiorari and the parties' briefing, the City of Los Angeles "imposed a six-month moratorium on the use of the carotid-artery chokehold except under circumstance where deadly force is authorized." *Id.* The petitioner contended that the moratorium mooted plaintiff's claims because he was no longer threatened with injury from the allegedly

unconstitutional policy authorizing the use of the offending chokeholds. *Id.* This Court disagreed, holding that a repeal of a policy or regulation that does not—by its own operation—permanently repeal the allegedly unconstitutional government action is not sufficient to moot a plaintiff's claims. *Id.* at 101. "[W]hile acknowledging that subsequent event have significantly changed the posture of this case," the Court nevertheless noted that "the case is not moot because the moratorium is not permanent and may be lifted at any time." *Id.* "[S]ince the moratorium by its terms is not permanent," [i]ntervening evens have not 'completely eradicated the effects of the alleged violation." *Id.* (quoting *Davis*, 440 U.S. at 631). The same is true here because the Statute remains alive and well. The First Circuit's decision cannot be reconciled with *Lyons*.

II. The First Circuit's Holding That The State's Decision To Maintain Its Discriminatory Compulsory Covid-19 Vaccination Scheme For Three Years In Direct Conflict With Title VII of the 1964 Civil Rights Act And Rescind It Only When The State Will Be Subjected To Merits Discovery By Order Of the Court Of Appeals Does Not Moot The Case According To The Precedent Of This Court And The Fifth, Ninth, and Tenth Circuits.

Respondents admitted below that it was not until "around the end of May 2023 and the beginning of June 2023," that they purportedly "reviewed the available science and research on the then current risks of COVID-19 in healthcare settings." (App. 120a,

Beardsley Decl. ¶16.) Respondents announced that "[a]round the end of May 2023 and beginning of June 2023," (App. 120a, Beardsley Decl. ¶16), corresponding perfectly with the timing of the court of appeals' remand of Plaintiffs' claims for discovery and trial on the merits.

Respondents claimed that some of their decision was based upon the Center for Medicare and Medicaid Services' removal of its healthcare worker mandates, but *under their own admissions*, they were aware of that revocation *prior to the court of appeals even holding oral arguments on the previous appeal*. (*See* App. 119a, Beardsley Decl. ¶9 (noting that the CMS had announced its intent to revoke the rule on May 1, 2023—*three days before the First Circuit held oral argument* and a full three weeks before the court of appeals entered its opinion sending Plaintiffs' claims back to the district court).)

Both the First Circuit and the district court attributed little weight to this unquestionably suspicious timing, calling Petitioners' recitation of the sequence of events "misleading." (App. 10a.) But the timing is critical. After Petitioners fought for two years to have their day in Court, and despite Respondents admitting that they were aware of changed circumstances concerning the risk of COVID-19 beginning "*in January 2022*" (App. 47a), Respondents did nothing to alter the challenged Vaccine Mandate until the eve of discovery commencing in the district court, and *after the First Circuit had required they submit to Plaintiffs'*

discovery. That is litigation-based timing, but the First Circuit's decision below disagreed.

A. The First Circuit below, and the Second, Ninth, Eleventh, and D.C. Circuits, have held that the State may evade constitutional review of its compulsory vaccination scheme by rescinding it on the eve of discovery.

The First Circuit held that "the defendant state officials have independently demonstrated that the 'voluntary' repeal of the COVID-19 regulatory vaccine mandate was not done in order to moot the case." (App. 19a.)

The First Circuit noted that Respondents "continued to monitor the COVID-19 public health situation in Maine," and that the May 2023 timeframe for Respondents' rescission of the challenged rule did not have anything to do with its own previous decision—which also came down (coincidentally) in May 2023. (App. 20a ("In early 2023, when the federal government announced that the public health emergency would end on May 11, MDHHS began planning for the end of Maine's public health emergency, which was set to terminate on the same date. In early May, CMS announced that it planned to rescind the federal vaccine requirement, which it did on June 5, 2023. Following these events, and in recognition of changed circumstances regarding COVID-19 variants, vaccination rates and disease prevalence, around the end of May and the beginning of June, MDHHS began a review of the available

science and research undergirding its vaccine requirement. It concluded, based on the changed COVID-19 risk in Maine, that the mandate was no longer necessary.").

The First Circuit rejected Petitioners' demonstration that Respondents' rescission was litigation-driven and effectuated to evade the courts' review of the unconstitutional scheme. (App. 21a (noting that Petitioners claimed that "the timing shows that it was this court's reinstatement of their claims and remand which motivated the Maine health officials to revoke the regulation."). The First Circuit cited to the evidence showing that "the number of hospitalizations and deaths were increasing dramatically at the exact time of Defendants' repeal." (App. 21a) Nevertheless, despite noting the timing concerns and the questionable scientific basis for Respondents' rescission, the First Circuit held that the data was insufficient to suggest that it was done to moot Petitioners' claims. (App. 21a ("The appellants point only to two months of data, but the complete set of data that the state reviewed showed an overall decline in hospitalizations and deaths since the vaccine mandate was issued. The increases that appellants point to also represent small numeric shifts, not 'dramatic' increases: three deaths in July 2023 relative to eight deaths in August 2023, and thirty-one hospitalized COVID-19 patients per day in July 2023 relative to forty-four in August 2023.").)

The First Circuit then held that the evidence was insufficient to demonstrate that Respondents' decision was litigation driven to evade constitutional

scrutiny. (App. 22a.) The First Circuit then criticized Petitioners for not engaging in discovery on the mootness questions (App. 9a)—although Petitioners were never given that opportunity and the burden indisputably rests on Respondents to demonstrate that it was not litigation driven—not the other way around.

The Second, Ninth, Eleventh, and D.C. Circuits have reached similar conclusions to the First Circuit below that a government entity may evade constitutional review of its challenged COVID-19 vaccination mandate by rescinding it after it effects had already been felt by the plaintiffs. *E.g.*, *Does 1-2 v. Hochul*, 2024 WL 5182675 (2d Cir. Dec. 20, 2024) (holding that New York's rescission of the discriminatory scheme permitting medical exemptions from compulsory COVID-19 vaccination while prohibiting religious accommodations mooted plaintiffs' claims); *Donovan v. Vance*, 70 F.4th 1167 (9th Cir. 2023) (holding that the government's rescission of a COVID-19 vaccine mandate mooted plaintiff's claims despite the discriminatory *process* still existing and not being rescinded); *Navy Seal 1 v. Austin*, 2023 WL 2482927 (D.C. Cir. Mr. 10, 2023) (holding that the Secretary of Defense's rescission of the COVID-19 vaccination mandate mooted the servicemember plaintiffs' claims, despite the fact that the discriminatory process remained in place); *Regaldo v. Director, Ctr. For Disease Control*, 2023 WL 239989 (11th Cir. Jan 18, 2023) (same).

B. The Fifth, Ninth, and Tenth Circuits have held that the government's rescission of a Covid-19 vaccination mandate to escape judicial scrutiny does not moot a plaintiff's constitutional claims.

The Ninth Circuit confronted a virtually identical scenario in *Health Freedom Defense Fund, Inc. v. Carvalho*, 104 F.4th 715 (9th Cir. 2024), but reached a result directly contrary to the First Circuit below. There, the government similarly engaged in litigation-based revocation of a challenged COVID-19 vaccine mandate. As the Ninth Circuit noted, "For over two years—until twelve days after argument—Los Angeles Unified School District (LAUSD) required employees to get the COVID-19 vaccination or lose their jobs. LAUSD has not carried its "formidable burden" to show that it did not abandon this policy because of litigation." *Id.* at 719. The Ninth Circuit "held oral argument . . . where LAUSD's counsel was vigorously questioned. The same day LAUSD submitted a report recommending rescission of the Policy. Twelve days later, LAUSD withdrew the policy." *Id.* at 723.

Respondents here likewise faced vigorous questioning at the First Circuit's oral argument in the previous appeal and ultimately faced a reversal of the dismissal. *Lowe*, 68 F.4th 706. And, just like Respondents here, "LAUSD's about-face occurred only after vigorous questioning at argument in this court, which suggests that it was motivated, at least in part, by litigation tactics." *Health Freedom*, 104

F.4th at 723. The Ninth Circuit held, "LAUSD's timing is suspect," and that alone precludes a finding of mootness. *Id.* The reason was simple: the government's suspicious timing for rescinding a mandate that was kept in place up until the point it would be scrutinized "can be interpreted as acting at least partially in bad faith to avoid litigation risk." *Id.* at 724 (cleaned up). The same is true of Respondents' suspicious and scientifically unsupported timing of rescission here, but the First Circuit reached a result directly in conflict with the Ninth Circuit's decision in *Health Freedom Defense Fund*.

Similarly, in *Bacon v. Woodward*, the Ninth Circuit reached a conclusion that is also in direct conflict with the First Circuit's decision below. *See* 104 F.4th 744 (9th Cir. 2024). There, the Washington Governor, similar to Maine's Governor below, issued a mandate that all state agency employees be vaccinated against COVID-19. *Id.* at 747. Contrary to the facially discriminatory mandate below, Washington at least pretended to permit religious accommodations, *id.*, though they were not available in practice. *Id.* A group of state firefighters and EMTs sued, challenging the denial of their request for religious accommodation. The district court denied the request for injunctive relief, and the plaintiffs appealed. *Id.* at 749. While the appeal was pending but before the Ninth Circuit could adjudicate the appeal, the Governor rescinded the mandate. *Id.* at 750. The Ninth Circuit held that such rescission was not sufficient to moot the plaintiff's claims.

> Here, the firefighters filed the Complaint before the Proclamation required them to get vaccinated and thereby violate their religious beliefs. Since then, some firefighters lost their jobs because of the Proclamation. These factual developments are relevant to our mootness analysis, as the request for prospective relief requires a return to the pre-termination status quo between the firefighters and Spokane. Thus, the last legally relevant relationship between the parties is the firefighters' gainful employment for Spokane. The district court could require Spokane to reinstate terminated firefighters, and the claim for injunctive relief thus remains live as well.

Id. (emphasis added). The same relief was available to and requested by Petitioners below, but the First Circuit held that it did not matter for justiciability purposes. (App. 10a.) The First Circuit's decision below and the Ninth Circuit's decision in *Bacon* cannot be reconciled.

The Fifth Circuit's decision in *Crocker v. Austin*, 115 F.4th 660 (5th Cir. 2024) is also directly contrary to the First Circuit's decision below. There, as Petitioners did here (App. 91a, Compl. ¶120), the plaintiffs' complaint challenged the system of compulsory vaccination and the failure of the system to appropriately recognize requests for religious accommodation. 115 F.4th at 667. During the pendency of the plaintiffs' claims, the Department of Defense and the Air Force rescinded the mandate compelling service members to receive the COVID-19

vaccine. *Id.* ("The Air Force has at least partially redressed the harm Appellants suffered by rescinding the vaccine mandate and correcting Appellants' service records.") After doing so, the government contended that plaintiff's claims were moot because they were no longer subject to a mandate to receive the COVID-19 vaccine. *Id.* The Fifth Circuit disagreed.

The primary reason the Fifth Circuit held that the plaintiffs' claims were not moot was because the allegedly unconstitutional accommodation process remained in place—*even though the mandate for the COVID-19 vaccine had been rescinded*. "[T]he district court failed to consider Appellants' broader, ongoing claims concerning the Air Force's alleged 'sham' religious exemption process and policies." *Id.* at 668. "We also hold that the claims of the six Appellants still serving in the Air Force are not moot because they plausibly allege an ongoing harm—*that they remain subject to an allegedly unlawful accommodations process*." *Id.* (emphasis added).

This is precisely what Petitioners' alleged below, which is that the *system* remains in place because the Statute remains operative, despite the rescission of Rule applying it to the COVID-19 vaccine. The First Circuit's decision below cannot be reconciled with the Firth Circuit's decision in *Crocker*.

The Fifth Circuit's decision in *Jackson v. Noem*, 2025 WL 868167 (5th Cir. Mar. 20, 2025), is also in direct conflict with the First Circuit's decision below. There, despite the United States rescinding the

mandate that Coast Guard members receive the COVID-19 vaccine, the Fifth Circuit held that relief could still be effectuated against the plaintiff's injuries. *Id.* at *2. The Fifth Circuit discussed the fact that the plaintiffs were still subject to a discriminatory *process* that had never been rescinded. *Id.* In other words, the mandate was rescinded but the discriminatory process that produced the denial of religious accommodations under the vaccination mandate remained alive and well. *Id.* (citing *Crocker*, 115 F.4th at 667-68). Because the *process* (or, as here, the *system*) that resulted in the alleged injuries was not rescinded, the Fifth Circuit held that the plaintiffs' claims were not moot. *Id. Jackson* is in direct conflict with the First Circuit's decision below.

The Tenth Circuit's decision in *Does 1-11 v. Board of Regents of University of Colorado*, 100 F.4th 1251 (10th Cir. 2024), is likewise in direct conflict with the First Circuit's decision below. There, the Tenth Circuit noted that government claimed mootness because it had rescinded its prior vaccination mandate. *Id.* at 1263 ("The Administration contends that the September 1 Policy is dead letter because it was 'rescinded and replaced' with the September 24 Policy.") Much like Respondents here, the government contended that "there is no threat the September 1 Policy will ever be enforced against any plaintiff in the future." *Id.* at 1264. The Tenth Circuit rejected that contention because

> the Administration's denial of that exemption has never been reconsidered under any subsequent policy, a preliminary injunction

> would require the Administration to revoke and to re-examine its application of the September 1 Policy to Jane Doe 2. That relief would necessarily entail revocation of the Administration's decision unlawfully to terminate Jane Doe 2's employment under the September 1 Policy. Therefore, this Court "could ... cause a real-world effect through a favorable decision" for Jane Doe 2.

Id. In other words, despite the rescission of the original mandate, the Tenth Circuit found that it could still provide effectual relief to the plaintiffs. The same is true here, but the First Circuit said that was not enough to keep Petitioners' claims justiciable. The First Circuit's decision below cannot be reconciled with the Tenth Circuit's decision in *Does*.

C. This Court's precedents hold that a State is not permitted to engage in litigation-based timing to avoid review of challenged laws.

The First Circuit's decision below is also in direct conflict with this Court's precedents. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) ("Such [post-litigation] maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye."); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 871 (2005). These decisions cannot be reconciled.

CONCLUSION

Because the First Circuit's decision below directly conflicts with this Court's precedents and multiple decisions of the Fifth, Ninth, and Tenth Circuits on a question of exceptional importance, this Court should grant the petition and resolve the conflicts.

Respectfully submitted,

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