

No. 24-1015

In the Supreme Court of the United States

JOHN DOE, ET AL., PETITIONERS

v.

KATHY HOCHUL, GOVERNOR OF NEW YORK, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a state law that allows for reasonable accommodations short of complete religious exemption is consistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and therefore can form the basis of an employer's undue-hardship defense.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

INTRODUCTION

Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, state law must yield to federal law when the two conflict. Here, the relevant federal law is Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination based on religion and requires employers to reasonably accommodate religious practice unless the employers show that the accommodation imposes an undue hardship on their business operations. See *Groff v. DeJoy*, 600 U.S. 447, 453-454, 468 (2023). State law that conflicts with Title VII is preempted and has no effect. Employers thus cannot

point to compliance with preempted state laws as a basis for claiming that a reasonable accommodation would impose undue hardship under Title VII.

However, those black-letter preemption and Title VII principles are not implicated here. Rather, the principal dispute in this case involves state law, making this case an unsuitable vehicle for this Court’s review. Petitioners are former healthcare workers who contend that New York’s now-repealed COVID-19 vaccine mandate for healthcare workers—known as Section 2.61—conflicted with Title VII because it foreclosed employers from granting any reasonable accommodations for religious practice. Petitioners are correct that, if New York law foreclosed any consideration of religious accommodations, it would be preempted by Title VII, which requires consideration of such accommodations. Petitioners are also correct that an employer could not rely on such a state law to skirt compliance with federal antidiscrimination requirements.

But New York law, as interpreted by the Second Circuit in a published decision, leaves room for religious accommodations short of complete exemptions. See *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2021) (per curiam), opinion clarified, 17 F.4th 368 (2021), cert. denied, 142 S. Ct. 2569 (2022). The Second Circuit also suggested that New York law would conflict with Title VII if New York law, in practice, did not actually allow any religious accommodations. See *id.* at 292-293. And that court has held in a line of published decisions that an employer’s attempt to rely on state laws that conflict with federal law cannot excuse compliance with federal antidiscrimination requirements. Consistent with that circuit precedent, the unpublished decision below held only that granting the “sole” accommodation that

petitioners sought—a complete “religious exemption” from Section 2.61 while continuing to work in their roles—would have imposed an undue hardship on petitioners’ employers in the form of penalties resulting from their noncompliance with Section 2.61. Pet. App. 11a. It did not hold that Section 2.61 “trump[ed] Title VII’s requirements to provide a religious accommodation” of all types. Pet. 17.

The petition also does not present a conflict among the courts of appeals that warrants this Court’s review. Nor is there any conflict regarding broader Title VII principles. Like the Second Circuit below, the courts of appeals have generally held that employers cannot rely on state laws that conflict with Title VII to excuse the need to comply with Title VII. At most, petitioners point to potential tension between the decision below and prior Second Circuit precedent, but that intra-circuit conflict does not warrant further review. Any lack of clarity regarding how New York’s now-repealed law operated would make this case an even poorer vehicle. Petitioners did not allege that they sought and were denied other accommodations aside from a complete exemption; it is thus an open question whether petitioners could have shown that, in practice, Section 2.61 did not allow any religious accommodations. Further, New York’s repeal of Section 2.61 diminishes the prospective importance of this case and would require this Court to interpret a state regulation without the benefit of input from New York courts.

The petition should be denied.

STATEMENT

A. Statutory Background

Title VII makes it an “unlawful employment practice for an employer” “to fail or refuse to hire or to discharge

any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). The statute defines "'religion'" to "include[] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

Title VII thus "requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'" *Groff v. DeJoy*, 600 U.S. 447, 453-454 (2023) (citation omitted); see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). But employees are not automatically entitled to the accommodation of their choice. See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). Rather, an employer may "meet its accommodation obligation" through "any reasonable accommodation" of the employee's religious practices, even if it is not the accommodation the employee prefers. *Ibid.* That accommodation must actually "eliminate[] the conflict between employment requirements and religious practices," *id.* at 70, unless the employer "show[s] that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business," *Groff*, 600 U.S. at 470.

Congress expressly addressed the relationship between employers' obligations under Title VII and state laws. "Nothing" in Title VII "relieve[s] any person from any liability, duty, penalty, or punishment provided by"

state law “other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under” Title VII. 42 U.S.C. 2000e-7. That section “expressly preserves nonconflicting state laws.” *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983). But under that section, Title VII “supersede[s]” conflicting state laws, including laws that would “require[] the employer to act in a manner that constitutes an unlawful employment practice under Title VII.” EEOC Dec. No. 85-13, 1985 WL 32782, at *2 (Aug. 23, 1985).

Separately, a provision in Title XI applicable to all titles of the Civil Rights Act provides that “[n]othing” in that Act “shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter,” and that no provision “shall * * * be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.” 42 U.S.C. 2000h-4. Together, 42 U.S.C. 2000e-7 and 2000h-4 indicate that “state laws will be pre-empted only if they actually conflict with federal law.” *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987); see *id.* at 295 (Scalia, J., concurring in the judgment) (referring to those sections as “*antipre-emption* provisions”).

B. The Present Controversy

1. On August 18, 2021, the Commissioner of the New York State Department of Health issued a short-term, emergency order obligating certain healthcare entities to require specified employees to be vaccinated against COVID-19. Pet. App. 18a; see D. Ct. Doc. 1-8 (Sept. 10, 2021). That order permitted medical and religious exemptions. Pet. App. 19a.

Eight days later, New York’s Public Health and Health Planning Council superseded that order by issuing a regulation known as Section 2.61. Pet. App. 21a; see N.Y. Comp. Codes R. & Regs., tit. 10, § 2.61 (Supp. 2021) (§ 2.61). Like the short-term order, Section 2.61 required covered healthcare entities to mandate COVID-19 vaccination for covered “[p]ersonnel” who “engage[d] in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.” § 2.61(a)(2); see Pet. App. 22a-23a. Unlike the short-term order, Section 2.61 permitted only a medical exemption and did not include a religious exemption. See Pet. App. 23a. Section 2.61 was silent, however, as to whether employers could grant religious accommodations, short of complete exemptions, to remove employees from Section 2.61’s definition of covered personnel. See D. Ct. Doc. 82, at 20 (Feb. 17, 2022).

Effective October 2023, New York repealed Section 2.61, “correspond[ing] with the changed conditions surrounding the COVID-19 pandemic.” Pet. App. 6a-7a.

2. Petitioners are four healthcare workers who asserted religious objections to receiving the COVID-19 vaccine. Pet. App. 3a-4a; see Pet. 5-7. Three petitioners initially obtained religious exemptions from their employers under New York’s short-term order. Pet. App. 19a. But after Section 2.61 was promulgated, the employers “amended their vaccination policies to comply with state requirements” and revoked the religious exemptions. *Id.* at 23a-25a. One petitioner sought a religious exemption for the first time after Section 2.61 was promulgated; that request was denied. *Id.* at 19a n.12, 24a-25a.

On September 10, 2021, petitioners sued their employers—New York Presbyterian Healthcare System, Inc., Trinity Health, Inc., and Westchester Medical Center Advanced Physician Services, P.C. (employer respondents)—as well as New York’s Governor and State Department of Health Commissioner (state respondents) in the United States District Court for the Eastern District of New York. Pet. App. 25a, 63a. Petitioners alleged that they were willing to comply with “[m]asking and testing protocols” while continuing in their roles as “a reasonable alternative to vaccination” and “an accommodation of sincerely held religious beliefs,” *id.* at 89a, but that employer respondents denied those requests based on Section 2.61, see *id.* at 89a-94a. As relevant here, petitioners asserted that employer respondents’ failure to accommodate their religious beliefs violated Title VII, *id.* at 107a-110a, and that Title VII preempted Section 2.61 because Title VII requires religious accommodations that Section 2.61 disallows, see *id.* at 102a-104a; see also *id.* at 57a-58a.¹

3. Shortly after petitioners filed their complaint, two other federal district courts in New York issued orders in similar lawsuits. One district court denied a request for preliminary relief similar to petitioners’. See Pet. App. 27a; *We The Patriots USA, Inc. v. Hochul*, No. 21-cv-4954 (E.D.N.Y. Sept. 12, 2021). Another district court granted preliminary relief to a group of healthcare workers and enjoined enforcement of Section 2.61. See Pet. App. 27a-28a; *Dr. A. v. Hochul*, No.

¹ Petitioners also brought free-exercise and equal-protection claims against the state respondents, as well as a claim that all respondents engaged in an unlawful conspiracy under 42 U.S.C. 1985. See Pet. App. 25a, 99a-102a, 104a-107a, 110a-113a. Those claims are not at issue in the petition. See Pet. i-ii.

21-cv-1009, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021) (temporary restraining order); *Dr. A. v. Hochul*, 567 F. Supp. 3d 362 (N.D.N.Y. 2021) (preliminary injunction).

The Second Circuit affirmed the denial of relief in *We The Patriots* and vacated the preliminary injunction in *Dr. A.* See *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2021) (per curiam), opinion clarified, 17 F.4th 368 (2021). The court of appeals held, *inter alia*, that Title VII did not preempt Section 2.61. *Id.* at 290-293. The court reasoned that “Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule.” *Id.* at 292. The court further explained that “Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement.” *Ibid.* This Court denied further review. See *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021) (denying application for injunctive relief); *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (denying certiorari).

4. The district court subsequently granted respondents’ motions to dismiss. Pet. App. 13a-62a.

The district court reasoned that “[t]he sole ‘accommodation’” that petitioners sought was “a religious exemption from the vaccine requirement.” Pet. App. 55a. The court found that granting that exemption would impose an undue hardship on employer respondents because it “would require them to violate” Section 2.61, and it “would expose vulnerable patients and nursing

home residents, as well as other healthcare workers, to the COVID-19 virus.” *Id.* at 55a-56a.

The district court further rejected petitioners’ argument that Title VII preempted Section 2.61 based on the Second Circuit’s decision in *We The Patriots*. Pet. App. 56a-60a. While recognizing that Title VII “requires an employer to offer a reasonable accommodation” absent proof of undue hardship, the court explained that it does not require an employer “to ‘offer the accommodation the employee prefers.’” *Id.* at 59a-60a (quoting *We The Patriots*, 17 F.4th at 292). Although Section 2.61 prohibited petitioners’ preferred exemption, the district court concluded that, “[a]s the Second Circuit” had construed Section 2.61, that provision did not “‘foreclose all opportunity’” for petitioners to secure a different accommodation. *Id.* at 60a (quoting *We The Patriots*, 17 F.4th at 292).

5. The court of appeals affirmed in part and vacated in part in an unpublished summary order. Pet. App. 1a-12a.

With respect to petitioners’ Title VII claims against employer respondents, the court of appeals affirmed. Pet. App. 9a-11a. The court reasoned that “[e]ven if [petitioners] plausibly alleged a *prima facie* case of Title VII religious discrimination,” *id.* at 10a, employer respondents had demonstrated an undue hardship, *id.* at 10a-11a. Specifically, because petitioners were “covered personnel under Section 2.61,” “granting their sole request for a religious exemption would have required the [employer respondents] to violate” Section 2.61. *Ibid.* That, “in turn,” would have subjected employer respondents “to financial penalties or a suspension or revocation of their operating licenses,” which the court found sufficed to satisfy “the heightened standard for

undue hardship recently set forth in *Groff*.” *Id.* at 11a. For support, the court cited another case involving Section 2.61, in which the Second Circuit reiterated that Section 2.61 did not conflict with federal law because “Title VII does not require covered entities to provide the accommodation that [employees] prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated.” *D’Cunha v. Northwell Health Sys.*, No. 23-476, 2023 WL 7986441, at *3 (2d Cir. Nov. 17, 2023) (quoting *We The Patriots*, 17 F.4th at 292); see Pet. App. 11a.²

Petitioners did not seek panel or en banc rehearing.

DISCUSSION

This petition reduces to a dispute over how to interpret a now-repealed state law. Petitioners portray the Second Circuit’s unpublished summary order below as erroneously allowing employers to claim an undue hardship—and to sidestep their Title VII nondiscrimination obligations—by relying on a New York law, Section 2.61, that purportedly conflicted with Title VII. But petitioners’ view of New York law is at odds with how the Second Circuit previously construed Section 2.61. A prior, published Second Circuit decision interpreted that provision to leave room for reasonable accommodations for religious practice and thus to not conflict with Title VII. The unpublished decision below—though difficult to parse—did not clearly depart from published Second Circuit precedent and could not have

² The court of appeals separately held that petitioners’ free-exercise and equal-protection claims against the state respondents were moot because the State repealed Section 2.61. Pet. App. 5a-9a. Petitioners do not challenge that holding at this stage. See Pet. iii n.1.

overturned that precedent in all events. The petition also does not present a circuit conflict that would warrant this Court's review and suffers from other vehicle problems. The petition should be denied.

A. The Decision Below Is Consistent With Title VII Principles

The petition purports to raise questions about whether a state law that conflicts with Title VII—in particular, a state law that prohibits employers from considering religious-accommodation requests—can provide a basis for an employer's undue-hardship defense, or whether such a state law is instead preempted by Title VII. Pet. i-ii. The answer is straightforward: Title VII preempts state laws that are incompatible with it, and such laws therefore cannot support an undue-hardship defense. Thus, Title VII would preempt state laws that prohibit consideration of religious-accommodation requests. The decision below, however, does not contravene that basic principle and does not implicate the questions presented.

1. As no party appears to dispute, state laws that conflict with Title VII are preempted by Title VII and therefore cannot serve as the basis for an undue-hardship defense. See, *e.g.*, Employer Br. in Opp. 10-11; State Br. in Opp. 15-17. Under the Supremacy Clause, “[w]here state and federal law ‘directly conflict,’ state law must give way.” *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citation omitted); see U.S. Const. Art. VI, Cl. 2. In the Title VII context, Section 708 of Title VII and Section 1104 of Title XI expressly address the interaction between federal and state law. See *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987). Section 708 of Title VII provides:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

42 U.S.C. 2000e-7. Section 1104 of Title XI, which applies to Title VII, provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. 2000h-4.

Through those sections, Congress permitted state legislatures to provide broader protection than federal law. See *California Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 394 (9th Cir. 1985), cert. granted, 474 U.S. 1049 (1986), aff'd, 479 U.S. 272 (1987). At the same time, Congress recognized that federal law preempts state laws (1) that require or permit an unlawful employment practice under Title VII, 42 U.S.C. 2000e-7, or (2) that conflict with any provision of the Civil Rights Act or the Act's purposes, 42 U.S.C. 2000h-4.

When a state law conflicts with, and is thus preempted by, Title VII, it follows *a fortiori* that an employer cannot rely on the need to comply with that state law to excuse noncompliance with Title VII. Because

Title VII “exempt[s] or relieve[s]” an employer “from any liability, duty, penalty, or punishment provided” by a conflicting state law, 42 U.S.C. 2000e-7, any penalties flowing from noncompliance with that state law could not form the basis of an undue-hardship defense. Cf. *Williams v. General Foods Corp.*, 492 F.2d 399, 404 (7th Cir. 1974). As far as Title VII is concerned, the state law is without effect. See *Barber ex rel. Barber v. Colorado Dep’t of Revenue*, 562 F.3d 1222, 1234 (10th Cir. 2009) (Gorsuch, J., concurring in the judgment) (“[A] state law at odds with a valid Act of Congress is no law at all.”). Complying with “[a] discriminatory state law” is thus “not a *defense* to liability under federal law; it is a *source* of liability under federal law.” *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (Age Discrimination in Employment Act (ADEA)).

Under those principles, Title VII would preempt a state law that precludes an employer from attempting to reasonably accommodate an employee’s religious practice. The state law would prohibit what Title VII requires. See *Guerra*, 479 U.S. at 281. Thus, an employer could not rely on that conflicting state law to excuse compliance with Title VII’s religious-accommodation obligation—as the Equal Employment Opportunity Commission (EEOC) has long maintained.³ Conversely, Title VII would relieve employers of penalties flowing

³ See EEOC Dec. No. 85-13, 1985 WL 32782, at *2-*3 (Aug. 23, 1985) (state law that “requires the employer to” violate Title VII cannot “relieve [the employer] of its Title VII duty to reasonably accommodate [the employee’s] religious beliefs”); cf., e.g., 29 C.F.R. 1604.2(b)(1) (similar, addressing “sex-oriented State employment legislation”); EEOC Amicus Br., *Rosenfeld v. South Pacific Co.*, Nos. 23,983 and 23,984 (9th Cir. Sep. 29, 1969) (Title VII sex discrimination); EEOC Amicus Br., *Quinones v. City of Evanston*, No. 94-3060 (7th Cir. Dec. 21, 1994) (ADEA).

from noncompliance with that preempted state law. See 42 U.S.C. 2000e-7; cf. *Campbell v. Universal City Dev. Partners, Ltd.*, 72 F.4th 1245, 1258 (11th Cir. 2023) (Americans with Disabilities Act (ADA)).

By contrast, so long as a state law does not conflict with Title VII, if providing an accommodation would require the employer to violate state law, the penalties flowing from noncompliance with that state law could support an undue-hardship defense. While “[r]eliance on state statutes to excuse non-compliance with federal laws is simply unacceptable under the Supremacy Clause,” that issue is not implicated when “there [i]s no conflict.” *Barber*, 562 F.3d at 1232-1233 (Rehabilitation Act). Any costs of noncompliance could be considered just as any other costs of providing an accommodation (*e.g.*, hiring other employees to cover missed shifts) could be. The question would be whether the employer has shown that “a burden is substantial in the overall context of [its] business.” *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

2. Though the decision below is no model of clarity, the better reading is that it does not contravene those basic principles.

a. The petition’s central premise is that Section 2.61 required healthcare entities, including employer respondents, to deny without consideration all religious-accommodation requests. See, *e.g.*, Pet. 4, 38. The petition’s second question presented expressly incorporates that assertion by asking “[w]hether a state law that requires employers to deny without consideration all requests by employees for a religious accommodation * * * is preempted.” Pet ii. The first question presented is also framed in terms of whether “compliance with state laws directly contrary to Title VII’s

requirement to provide a reasonable accommodation for religious beliefs may serve as an undue hardship.” Pet. i. Petitioners thus argue that the Second Circuit erroneously allowed a state law that violates Title VII to excuse compliance with Title VII.

Petitioners repeatedly point to one passage of the decision below to support their reading. See Pet. 7, 17-18, 28, 33. The court of appeals explained that, because petitioners were “covered personnel” under Section 2.61, “granting [petitioners’] sole request for a religious exemption would have required [employer respondents] to violate the state regulation” and the resulting “financial penalties or a suspension or revocation of their operating licenses” sufficed to prove undue hardship. Pet. App. 10a-11a. In petitioner’s view, that supports reading the decision below as holding that state law could “trump Title VII’s requirements to provide a religious accommodation,” Pet. 17, and as “flipp[ing]” the required preemption analysis, Pet. 28.

If the court of appeals had so held, that would be plainly incorrect for the reasons explained: a state law that forecloses any consideration of religious accommodations would conflict with Title VII and therefore be preempted. See pp. 11-14, *supra*.

b. However, the best reading of the decision below—especially against the backdrop of earlier circuit precedent—is contrary to petitioners’ reading.

The Second Circuit interpreted Section 2.61 in a previous, published opinion addressing a Title VII challenge similar to petitioners’. In *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) (per curiam), the court of appeals observed that Section 2.61 was “silent” on “the employment-related actions that employers may take in response to employees who refuse to be

vaccinated for religious reasons.” *Id.* at 292. The court accepted the State’s argument that Section 2.61 thus did not “bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule,” *e.g.*, by “giving them . . . assignments—such as telemedicine—where they would not pose a risk of infection to other personnel, patients, or residents.” *Ibid.* (quoting Br. for Appellants 62, *Dr. A. v. Hochul*, No. 21-2566 (2d Cir. Oct. 18, 2021)); accord *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 368, 370 (2d Cir. 2021) (per curiam) (clarified opinion reaffirming that proposition). Under the Second Circuit’s interpretation, “Section 2.61’s text does not foreclose all opportunity for [employees] to secure a reasonable accommodation under Title VII,” and thus “does not conflict with federal law.” *We The Patriots*, 17 F.4th at 292. The decision left open the possibility that “the opportunities for a reasonable accommodation under Title VII for religious objectors * * * are so few as to be illusory,” but found the record on that question lacking. *Ibid.*; see *id.* at 292-293.

The unpublished summary order below—while murky—thus appears to build upon the court of appeals’ previous understanding in *We The Patriots* that Section 2.61 allows for employer consideration of religious accommodations, consistent with Title VII. The court addressed only the possibility of a religious exemption because that was petitioners’ “sole request.” Pet. App. 11a. While petitioners claim that employer respondents “categorically prohibited any and all religious accommodations,” Cert. Reply Br. 5, petitioners do not allege that they sought (or that employer respondents denied) accommodations that would have removed them from Section 2.61’s scope. As the district court explained,

petitioners alleged that they sought only “a complete exemption—which they characterize as an accommodation—while continuing to work directly with patients, elderly people and co-workers.” Pet App. 59a.

Given *We The Patriots*, and without “a definitive interpretation from the state courts,” it would be “inappropriate to assume” that Section 2.61 would have been “construed in a way that creates a conflict with federal law.” *Arizona v. United States*, 567 U.S. 387, 415 (2012); see State Br. in Opp. 14.

c. Petitioners’ reading of the decision below would also make it inconsistent with other published Second Circuit precedent. As petitioners acknowledge, see, *e.g.*, Pet. 21-22, 28-29, those earlier precedents correctly hold that state laws that conflict with federal law cannot provide a defense to an otherwise actionable federal claim.

Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981), for instance, held that an employer could not rely on state law to justify rank-ordering applicants because that practice produced a disparate racial impact in violation of Title VII. See *id.* at 104-105. The Second Circuit reasoned that “Title VII explicitly relieves employers from any duty to observe a state hiring provision ‘which purports to require or permit’ any discriminatory employment practice.” *Id.* at 105 (quoting 42 U.S.C. 2000e-7); cf. *Bridgeport Guardians, Inc. v. Delmonte*, 248 F.3d 66, 74 (2d Cir.) (“We have consistently recognized that, in some circumstances, state law requirements may be displaced in order to effectuate Title VII remedies.”), cert. denied, 534 U.S. 950 (2001).

Similarly, *Mary Jo C. v. New York State & Local Retirement System*, 707 F.3d 144 (2d Cir.), cert. dismissed, 569 U.S. 1040 (2013), held that the ADA’s reasonable-modification requirement “contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate [ADA] Title II’s reasonable modification provision.” *Id.* at 163. The Second Circuit reasoned that “[i]f all state laws were insulated from Title II’s reasonable modification requirement solely because they were state laws, ‘state law [would serve as] an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ in enacting Title II.” *Ibid.* (citation omitted; brackets in original).

Petitioners’ interpretation of the decision below cannot be squared with *We The Patriots, Guardians*, or *Mary Jo C.* The unpublished decision below could not overrule those decisions, see, e.g., *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014), and did not address them.

Petitioners cite (Pet. 19) the Second Circuit’s unpublished decision in *D’Cunha v. Northwell Health Systems*, No. 23-476, 2023 WL 7986441 (Nov. 17, 2023), but it is distinguishable for the same reasons as the decision below. The plaintiff there sought only “an exemption from the COVID-19 vaccination requirement while continuing to provide direct patient care as a resident,” which the court determined would have been an undue hardship on the employer. *Id.* at *2; see *id.* at *2-*3. Other unpublished Second Circuit decisions are to the same effect. See *Braccia v. Northwell Health Systems*, No. 24-2665, 2025 WL 2610704, at *2 (Sept. 10, 2025) (“The amended complaint does not allege that any plaintiff sought accommodation in the form of a

reassignment that would remove her from Section 2.61’s definition of ‘personnel’ so that Section 2.61 would not apply.”), petition for cert. pending, No. 25-963 (filed Feb. 9, 2026); *Wright v. The Brooklyn Hosp. Ctr.*, No. 24-2632, 2026 WL 1141057, at *2 (Apr. 27, 2026) (plaintiff “did not allege that he ever requested” certain accommodations).

At bottom, petitioners ultimately assert that the decision below conflicts with prior Second Circuit precedent and press intra-circuit conflicts. See Pet. 21-22, 28-29, 40-41. But, even if such inconsistency existed, this Court does not ordinarily review such intra-circuit conflicts. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). Further, to the extent confusion exists within the Second Circuit about what the now-repealed Section 2.61 meant, the preferable course would have been for petitioners to seek panel or en banc rehearing. Without further clarification, the better reading of circuit precedent is that the court, in published opinions, has recognized that Title VII and other federal nondiscrimination laws displace conflicting state laws. That sound principle would obviate any need to review either question presented, which assume that Section 2.61 was “directly contrary to Title VII’s” reasonable-accommodation requirement, Pet. i, and “require[d] employers to deny without any consideration” religious-accommodation requests, Pet. ii.

B. The Questions Presented Do Not Warrant Review

1. Further undercutting the case for review, the petition does not present a conflict among the courts of appeals.

Petitioners contend the decision below conflicts with decisions from other circuits reasoning that state laws incompatible with Title VII must yield to Title VII’s

antidiscrimination requirements, see Pet. 22-25 (citing, e.g., *Palmer v. General Mills Inc.*, 513 F.2d 1040 (6th Cir. 1975), *Williams*, 492 F.2d 399, and *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971)); that state laws incompatible with other federal laws do not excuse liability for violating those federal laws, see Pet. 25-31 (discussing cases); and that Title VII preempts contrary state laws, see Pet. 40-41 (citing *Bradshaw v. School Bd. of Broward County*, 486 F.3d 1205 (11th Cir. 2007)). But as explained, the court of appeals’ decision does not contravene those principles. See pp. 14-19, *supra*.

To the extent that petitioners identify other circuits as supposedly endorsing the view that compliance with state laws that conflict with federal laws can still constitute an undue hardship for employers, see Pet. 18-20, 34-36, this Court should await cases from those circuits because the decision below is a poor vehicle. Regardless, petitioners are incorrect that a clear split exists.

Petitioners contend that the First Circuit’s decision in *Lowe v. Mills*, 68 F.4th 706, cert. denied, 144 S. Ct. 345 (2023), held that a “state law was not preempted” even though “simultaneous compliance” with that law and Title VII was “not possible.” Pet. 35. Some language in *Lowe* could be read to endorse that principle; for example, the First Circuit reasoned that “the undue hardship analysis precedes any conclusion about preemption of state law,” 68 F.4th at 724, suggesting that even a law that precluded consideration of any religious accommodation could support an undue-hardship defense. Such a broad holding would be incorrect. See pp. 11-14, *supra*.

But *Lowe* mainly rested on the narrower propositions that Title VII does not require that an employer

grant an employee’s “preferred accommodation” (a blanket religious exemption) and that a state law that forbids only that particular exemption does not necessarily conflict with Title VII. 68 F.4th at 724; see *id.* at 723 (“The plaintiffs have never alleged or argued that they would have accepted any accommodations that would have placed them outside the [state law’s] scope.”). Moreover, the First Circuit expressly declined to “decide whether every accommodation that would require an employer to violate state or federal law would necessarily constitute an undue hardship under Title VII.” *Id.* at 722.

Petitioners’ reliance on *United States v. Board of Education*, 911 F.2d 882 (3d Cir. 1990), is similarly flawed. That case concerned a Pennsylvania statute that prohibited teachers from wearing religious attire in public schools. See *id.* at 884-885. The court of appeals explained “that it would be an undue hardship to require a school board to violate an apparently valid criminal statute.” *Id.* at 891. But that statement cannot be read as endorsing the broad proposition that a state law that conflicts with Title VII (or any other federal law) can provide a basis for an undue-hardship defense because the court assumed that the criminal statute was facially valid. Indeed, the court separately explained that Pennsylvania’s law “pass[ed] Title VII muster.” *Id.* at 893.

Nor does *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382 (9th Cir. 1984) (per curiam), implicate a circuit conflict. That case involved an employer’s requirement (designed to comply with state law) that employees whose duties included potential exposure to toxic gases shave facial hair in order to wear a respirator. *Id.* at 1383. An employee objected to the requirement on

religious grounds and sued the employer under Title VII. *Id.* at 1382-1383. The Ninth Circuit held that the employer successfully established undue hardship, in part because if the employer “were to retain [the employee] as a machinist and assign him to duties involving exposure to toxic gas, it would risk liability for violating California Occupational Safety and Health Administration standards.” *Id.* at 1384. But the court of appeals also explained that if the employer had “retained [the employee] as a machinist” and assigned him only duties that did not involve exposure to toxic gas, that too would have imposed undue hardships on the employer, including requiring the employee’s coworkers to “assume his share of potentially hazardous work.” *Ibid.*

2. This case is also a poor vehicle for other reasons.

First, there is an open question whether petitioners could have shown that “the opportunities for a reasonable accommodation under Title VII for religious objectors” are “so few as to be illusory.” *We The Patriots*, 17 F.4th at 292. Petitioners’ complaint does not reflect whether they sought, or whether employer respondents refused to consider, any other accommodations besides a complete exemption from Section 2.61. See pp. 16-17, *supra*. Nor did petitioners seek to amend their complaint after *We The Patriots* held that Section 2.61 allowed for reasonable accommodations besides complete exemption. Had petitioners alleged that they sought reasonable accommodations that would have removed them from Section 2.61’s scope and that those accommodations were illusory, the outcome might well have been different under Second Circuit precedent.

Second, Section 2.61 was repealed. While petitioners’ claims for damages against employer respondents

present a live controversy, that repeal renders the dispute in this case of more “isolated significance.” *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955). Section 2.61’s repeal also means that this Court would have to interpret the scope of a New York regulation without the benefit of consideration by New York’s “highest court,” which could “risk[] friction-generating error.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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