21-2179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WE THE PATRIOTS USA, INC., DIANE BONO,
MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI,
Plaintiffs-Appellants,

v.

KATHLEEN HOCHUL, HOWARD A. ZUCKER, M.D.,
Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the Eastern District of New York
Case No. 1:21-cv-04954, Hon. William F. Kuntz, II

BRIEF, IN SUPPORT OF APPELLEES AND IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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RULE 26.1 DISCLOSURE STATEMENT

All the *amici* are nonprofit organizations that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of religious freedom and the separation of religion and government. They believe that the right to exercise religion freely is precious, but that it was never intended to override protections for people's safety and health. *Amici* therefore oppose Plaintiffs' attempt to use the First Amendment's Free Exercise Clause to mandate a religious exemption from New York's vaccination requirements for healthcare workers.

The *amici* are:

- Americans United for Separation of Church and State.
- Central Conference of American Rabbis.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Men of Reform Judaism.
- Methodist Federation for Social Action.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. A motion for leave to file accompanies this brief.

- National Council of Jewish Women.
- National Council of the Churches of Christ in the USA.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a year and a half, healthcare workers have served on the front lines of the Covid-19 pandemic, enduring grueling hours and making great sacrifices to save as many people as they can. To protect the health and lives of those workers and of the vulnerable patients they serve, New York State has enacted a regulation requiring that healthcare personnel in the state be vaccinated against Covid-19. (App. 13–15.) For vaccination reduces the risk of dying or being hospitalized from Covid-19 more than tenfold. *See, e.g.*, *Monitoring Incidence of COVID-19 Cases, Hospitalizations, and Deaths, by Vaccination Status — 13 U.S. Jurisdictions, April 4–July 17, 2021*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 10, 2021), https://bit.ly/2XjTGLE. And it greatly reduces both the risk of being infected and the risk of transmitting the disease to others as well. *See, e.g.*, Lianna Matt McLernon, *COVID vaccines very effective, hinder spread, studies say*, CIDRAP (Sept. 9, 2021), https://bit.ly/3nKKmuW.

Plaintiffs nevertheless challenge New York's vaccination mandate, principally contending that the Free Exercise Clause entitles them to religious exemptions. That is not so.

The Supreme Court and lower courts have long upheld vaccination requirements in the face of constitutional challenges, including arguments

based on the freedom of religion. And under Supreme Court precedent, neutral, generally applicable laws enacted without discriminatory intent toward religion do not violate the Free Exercise Clause. New York's vaccination mandate for healthcare workers complies with this standard because it applies to all healthcare employees who can be vaccinated safely.

The vaccination requirement is not rendered unconstitutional by its allowance of a medical exemption. Nonreligious exemptions to a law do not require a religious exemption when the nonreligious exemptions advance the governmental interests served by the law, or at least do not undermine those interests to the same extent that a religious exemption would. Here, far from undermining the governmental interest underlying the vaccination mandate—protecting people's health—the medical exemption supports it. A religious exemption would not.

The Court should deny Plaintiffs' motion for an injunction.

ARGUMENT

I. The courts have long rejected religion-based requests for exemptions from vaccination requirements.

Religious freedom is a value of the highest order. But as the Supreme Court recently reaffirmed, the constitutional guarantee of religious freedom does not confer on religious objectors "a general

immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The Supreme Court and lower courts thus have repeatedly rejected religion-based challenges to vaccination requirements.

More than a century ago, in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. The Court "[did] not perceive that this legislation ha[d] invaded *any* right secured by the Federal Constitution." *Id.* at 38 (emphasis added). And the Court explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others." *Id.* at 26. The Court thus straightforwardly rejected the view that the Constitution bars compulsory measures to protect the public health, affirming instead the "fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state.'" *Id.* (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)). For "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27.

Likewise, in *Zucht v. King*, 260 U.S. 174, 175 (1922), the Court rejected a Fourteenth Amendment challenge to a San Antonio ordinance

prohibiting children from attending public or private schools without proof of vaccination. The Court explained that "[l]ong before this suit was instituted" *Jacobson* had upheld the state's power to require vaccinations. *Id.* at 176. The Court therefore concluded that "the constitutional question presented . . . was not . . . substantial in character." *Id.*

Although *Jacobson* and *Zucht* did not specifically consider a Free Exercise Clause argument, several of the Court's subsequent decisions have recognized that the principles set forth in those two cases apply in the free-exercise context as in all others. In *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), for example, the Court noted that one "cannot claim freedom from compulsory vaccination . . . on religious grounds." For the "right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Id.* at 166–67.

In *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963), the Court, citing *Jacobson* and *Prince*, emphasized that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." In *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972), the Court underscored that free-exercise claims are denied when "harm to the physical or mental health . . . or to the public safety, peace, order, or

welfare has been demonstrated or may be properly inferred." In explaining that foundational principle, the Court specifically pointed (*id.* at 230 & n.20) not just to *Jacobson* but also to *Wright v. DeWitt School District No. 1*, 385 S.W.2d 644 (Ark. 1965), a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law. And in *Employment Division v. Smith*, the Court reaffirmed that the Free Exercise Clause does not "require[] religious exemptions from . . . health and safety regulation such as . . . compulsory vaccination laws." 494 U.S. 872, 888–89 (1990) (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

Smith also altered the legal standard for free-exercise claims in a manner that makes religion-based challenges to vaccination mandates like New York's even more difficult. In pre-*Smith* cases, such as *Sherbert*, 374 U.S. at 403–09, and *Yoder*, 406 U.S. at 215–19, the Supreme Court had been of the view that a law that substantially burdens religious exercise must serve a compelling governmental interest through narrowly tailored means. But *Smith* changed the legal landscape by holding that laws do not trigger heightened scrutiny under the Free Exercise Clause when they are neutral toward religion and apply generally, even if they substantially burden religion. *See* 494 U.S. at 878–79. As Justice Scalia explained for the Court, to "h[o]ld that an individual's religious beliefs excuse him from compliance with an otherwise valid law" would make "'professed doctrines

of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.'" *Id.* (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)).

In accordance with both *Smith* and the Supreme Court's pre-*Smith* precedents, this Court and many others have ruled that the Free Exercise Clause does not require religious exemptions from vaccination requirements. In *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), this Court held that a school district did not violate the Free Exercise Clause by temporarily excluding from school, as a result of a chicken-pox outbreak, children who had religious exemptions from New York State's vaccine requirements. The court explained that "New York could constitutionally require that all children be vaccinated in order to attend public school," and that the state had "go[ne] beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs." *Id.* at 543. Likewise, in *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017), rejecting a free-exercise challenge to Michigan's procedures for obtaining a religious exemption from vaccination requirements for schoolchildren, the Sixth Circuit observed that "[c]onstitutionally, [the plaintiff] has no right to an exemption." Similarly, in *Workman v. Mingo County Board of Education*, 419 F. App'x 348, 353 (4th Cir. 2011), the Fourth Circuit denied a free-exercise

challenge to West Virginia's vaccination requirements for school attendance, noting that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." And in *F.F. v. New York*, 143 N.Y.S.3d 734, 741–42 (N.Y. App. Div. 2021), a New York appellate court held that New York State did not violate the Free Exercise Clause by repealing the religious exemption from its vaccination requirements for schoolchildren. Numerous federal district courts and other state courts have resolved free-exercise claims in vaccination cases the same way.[2]

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[2] *See, e.g.*, *Klaassen v. Trustees of Ind. Univ.*, __ F. Supp. 3d __, No. 1:21-cv-238, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021), *motion for injunction pending appeal denied*, 7 F.4th 592 (7th Cir. 2021), *emergency application for writ of injunction denied*, No. 21A15 (U.S. Aug. 12, 2021); *W.D. v. Rockland County*, __ F. Supp. 3d __, No. 7:19-cv-2066, 2021 WL 707065, at *22–31 (S.D.N.Y. Feb. 22, 2021), *appeal docketed*, No. 21-551 (2d Cir. Mar. 9, 2021); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085–87 (S.D. Cal. 2016); *Boone v. Boozman*, 217 F. Supp. 2d 938, 953–55 (E.D. Ark. 2002); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987); *C.F. v. N.Y.C. Dep't of Health & Mental Hygiene*, 139 N.Y.S.3d 273, 287–92 (N.Y. App. Div. 2020); *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 224–25 (Cal. Ct. App. 2018); *Davis v. State*, 451 A.2d 107, 112 & n.8 (Md. 1982); *Wright*, 385 S.W.2d at 646–48; *Cude*, 377 S.W.2d at 819; *Bd. of Educ. v. Maas*, 152 A.2d 394, 405–08 (N.J. Super. Ct. App. Div. 1959), *aff'd mem.*, 158 A.2d 330 (N.J. 1960); *State ex rel. Dunham v. Bd. of Educ.*, 96 N.E.2d 413, 413 (Ohio 1951); *Sadlock v. Bd. of Educ.*, 58 A.2d 218, 222 (N.J. 1948); *Harris v. Univ. of Mass.*, No. 21-cv-11244, 2021 WL 3848012, at *7 (D. Mass. Aug. 27, 2021); *Middleton v. Pan*, No. 2:16-cv-5224, 2016 WL 11518596, at *2, 7 (C.D. Cal. Dec. 15, 2016), *report and*

Application of *Smith*'s rule that neutral, generally applicable laws do not trigger heightened scrutiny under the Free Exercise Clause confirms that there is no basis to deviate from these precedents with respect to New York's vaccination requirement for healthcare workers. *Smith*'s neutrality requirement means that a law must not "infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). General applicability is the closely related concept that government, "in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 531, 543. The touchstone in both inquiries is whether government has discriminated against religious conduct. *See id.* at 533–34, 542–43.

New York's vaccination mandate easily satisfies these standards. Plaintiffs do not contend that the mandate is motivated by any anti-religious animus. And the requirement applies equally to all healthcare

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recommendation adopted, 2017 WL 10543984 (C.D. Cal. July 13, 2017); *Schenker v. County of Tuscarawas*, No. 5:12-cv-1020, 2012 WL 4061223, at *12 (N.D. Ohio Sept. 14, 2012); *Brock v. Boozman*, No. 4:01-cv-760, 2002 WL 1972086, at *5–8 (E.D. Ark. Aug. 12, 2002); *cf. Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding not only that religious exemption to Mississippi student-vaccination statute was not required by Free Exercise Clause but also that it violated Equal Protection Clause because it "would discriminate against the great majority of children whose parents have no such religious convictions").

workers who can safely be vaccinated, regardless of whether they object to vaccination on religious or nonreligious grounds. (App. 13–14.)

The vaccination mandate is therefore subject only to rational-basis review. *See Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014). And it survives that review easily, because it is rationally related to the state's legitimate—indeed, compelling—interests in protecting healthcare personnel and their patients from illness and death.

II. The vaccination mandate's medical exemption does not render the lack of a religious exemption unconstitutional.

A. The medical exemption does not trigger strict scrutiny.

Plaintiffs argue (Mot. 12–16) that the inclusion of a medical exemption in the vaccination mandate (App. 14) triggers strict scrutiny and renders the lack of a religious exemption unconstitutional. But in most of the cases cited above rejecting challenges to vaccination mandates, the opinions noted that a medical exemption was available and nevertheless did not hold that strict scrutiny applied. *See Jacobson*, 197 U.S. at 12, 31, 38–39; *Phillips*, 775 F.3d at 540, 543; *Nikolao*, 875 F.3d at 313, 316; *Workman*, 419 F. App'x at 351, 353; *F.F.*, 143 N.Y.S.3d at 742.[3]

[3] *See also Klaassen*, __ F. Supp. 3d __, 2021 WL 3073926, at *6, 25–26; *W.D.*, __ F. Supp. 3d __, 2021 WL 707065, at *22–23; *Whitlow*, 203 F.

Nor do the Supreme Court's recent decisions in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam), call for a different result. Plaintiffs point to (Mot. 12–13, 15) the statement in *Fulton* that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). But *Fulton* held only that individualized secular exemptions that are granted at the *discretion* of governmental officials may result in strict scrutiny of a denial of a religious exemption. *See id.* at 1877–79. The principle that strict scrutiny may arise out of individualized exemptions "is limited . . . to systems that are designed to make case-by-case determinations" and "does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004); *accord Ungar v. N.Y.C. Hous. Auth.*, 363 F. App'x 53, 56 (2nd Cir. 2010) (summary order). Far from being dependent on discretionary decisions of state officials, the medical exemption here is objective and categorical:

Supp. 3d at 1083, 1086; *Boone*, 217 F. Supp. 2d at 942 n.6, 953; *C.F.*, 139 N.Y.S.3d at 276, 292; *Sadlock*, 58 A.2d at 219, 222; *Harris*, 2021 WL 3848012, at *4, 7; *Middleton*, 2016 WL 11518596, at *2, 7; *Brock*, 2002 WL 1972086, at *5–8.

healthcare workers are automatically entitled to it if they receive an appropriate certification from a medical professional. (App. 14.)

Plaintiffs also point (Mot. 13–14) to *Fulton*'s statement that "[a] law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877; *accord Tandon*, 141 S. Ct. at 1296; *Cent. Rabbinical Cong.*, 763 F.3d at 197. This argument likewise fails, as illustrated by two influential Third Circuit opinions by then-Judge Alito—*Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359 (3d Cir. 1999), and *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004)—that apply the same rule and provide detailed guidance for distinguishing exemptions that undermine the governmental interests at stake from those that do not.

In *Fraternal Order*, the court ruled that a police department's refusal to grant its officers a religious exemption from a prohibition on beards triggered heightened scrutiny under the Free Exercise Clause, because the department had exempted officers from that prohibition for medical reasons, and the medical exemption undermined the governmental interest supporting the prohibition—"fostering a uniform appearance"—just as much as a religious exemption would have. *See* 170 F.3d at 366. In *Blackhawk*, the court concluded that a state's denial of a

religious exemption from a fee requirement for keeping exotic wildlife was subject to strict scrutiny because exemptions provided to zoos and circuses undermined the state interests at issue—raising money and discouraging the keeping of wild animals in captivity—to the same extent as would a religious exemption. *See* 381 F.3d at 211.

By contrast, explained Justice Alito in *Fraternal Order* and *Blackhawk*, the denial of a religious exemption in *Smith* from a law banning possession of controlled substances did not trigger strict scrutiny even though the law contained an exemption for medical uses: "The purpose of drug laws is to protect public health and welfare," but "when a doctor prescribes a drug, the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served." *Blackhawk*, 281 F.3d at 211; *accord Fraternal Ord.*, 170 F.3d at 366. "Therefore, the prescription exception in *Smith* did not undermine the purpose of the state's drug laws." *Blackhawk*, 281 F.3d at 211; *accord Fraternal Ord.*, 170 F.3d at 366. Likewise, Justice Alito noted that an exemption from the no-beard policy in *Fraternal Order* for undercover officers did not "undermine the [police] Department's interest in uniformity because undercover officers 'obviously are not held out to the public as law enforcement person[nel].'" 170 F.3d at 366 (citing a brief; alterations in original); *accord Blackhawk*, 281 F.3d at 211.

Justice Alito summed up the differences between exemptions that trigger strict scrutiny and those that do not: "The prescription exception [in *Smith*] and the undercover exception [in *Fraternal Order*] do not trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." *Fraternal Ord.*, 170 F.3d at 366. "However, the medical exemption [in *Fraternal Order*] raises concern because it indicates that the [police] Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.*

The medical exemption in New York's vaccination mandate is like the medical exemption in *Smith* and the undercover exemption in *Fraternal Order*: Far from undermining the interests behind New York's vaccination mandate, the medical exemption advances them. Like the drug law upheld in *Smith*, the purpose of vaccination laws "is to protect public health and welfare" (*Blackhawk*, 281 F.3d at 211). Just as is the case "when a doctor prescribes a drug," when a doctor certifies that vaccination is medically contraindicated for a particular healthcare worker (as required to obtain the medical exemption, s*ee* App. 14), "the doctor presumably does so to serve the patient's health and in the belief that the

overall public welfare will be served" (*Blackhawk*, 281 F.3d at 211). As recently explained by Douglas Laycock—a scholar whose writings have heavily influenced opinions of Supreme Court Justices expressing an expansive view of the Free Exercise Clause[4]—"medical exceptions don't undermine the government's interest in saving lives, preventing serious illness or preserving hospital capacity. By avoiding medical complications, those exceptions actually serve the government's interests." Douglas Laycock, *What's the law on vaccine exemptions? A religious liberty expert explains*, THE CONVERSATION (Sept. 15, 2021), https://bit.ly/3lsSGg4.

Moreover, forcing vaccinations on those who cannot safely be vaccinated is obviously something that "the government . . . does not have an interest in" (*Fraternal Ord.*, 170 F.3d at 366). The Supreme Court explained in *Jacobson* that it "would be cruel and inhuman in the last degree"—and likely unconstitutional—to require vaccination of a person "if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his

[4] *See, e.g.*, *Fulton*, 141 S. Ct. at 1889, 1899 n.34, 1912, 1915, 1923 n.81 (Alito, J., concurring in the judgment); *Danville Christian Acad. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612–13 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).

then condition, would seriously impair his health, or probably cause his death." 197 U.S. at 39.

In addition, even if the medical exemption could be construed as undermining the state interests at stake, it certainly does not do so "to at least the same degree as the covered conduct that is religiously motivated." *Cf. Blackhawk*, 381 F.3d at 209. That's because requests for religious exemptions from vaccination requirements are far more common than requests for medical exemptions.

For instance, San Diego's largest healthcare system recently reported that the number of requests it received for religious exemptions from its Covid-19 vaccination mandate for employees was seven times higher than the number of requests for medical exemptions. *See* Paul Sisson, *Thousands of San Diego County healthcare workers seek vaccine exemptions, citing religion*, L.A. TIMES (Sept. 12, 2021), https://lat.ms/2XpkxWy. A Kentucky hospital granted more than six religious exemptions for every medical exemption from its Covid-19 vaccination requirement. *See* Defs.' Resp. Pls.' Mot. Restraining Order at 7, *Beckerich v. St. Elizabeth Med. Ctr.*, No. 2:21-cv-105 (E.D. Ky. Sept. 14, 2021), ECF No. 15. And at a Newark hospital, five percent of the staff obtained religious exemptions from mandatory Covid-19 vaccination, while only 1.2 percent obtained medical exemptions. *See* Elizabeth Llorente, *Will*

N.J. hospitals face a nursing shortage under vaccine mandates? They already are, NJ.COM (Sept. 20, 2021), https://bit.ly/3CtjDqI.

Similar data has been reported outside the healthcare context. Approximately 3,000 employees of the Los Angeles police department—one quarter of the department's workforce—recently made requests for exemptions from a Covid-19 vaccination requirement; and more than 2,600 of these requests were for religious exemptions, while only about 360 were for medical ones. *See* Emily Alpert Reyes et al., *Thousands of LAPD employees plan to seek exemptions to COVID-19 vaccine mandate*, L.A. TIMES (updated Sept. 14, 2021), https://lat.ms/39cyGJ2. Washington State agencies received 3,891 employee requests for religious exemptions from Covid-19 vaccination, compared to 829 requests for medical ones. *See* Joseph O'Sullivan, *Washington state workers are getting exemptions to avoid the COVID-19 vaccine — but will they keep their jobs?*, SEATTLE TIMES (Sept. 18, 2021), https://bit.ly/3AuHDt9. The number of New York students who claimed religious exemptions from vaccination requirements for schoolchildren during the 2018–19 schoolyear (before the religious exemption from those requirements was repealed) was nearly six times higher than the number who claimed medical exemptions. *See* Merri Rosenberg, *School districts can be fined for unvaccinated students*, N.Y. STATE SCH. BDS. ASS'N (Sept. 23, 2019), https://bit.ly/3lWzgCe. And other

states have reported greater or similar disparities in the school context. *See* Casey M. Zipfel et al., *The Landscape of Childhood Vaccine Exemptions in the United States*, 7 SCI. DATA 401 (2020), at 5, https://go.nature.com/2XdYUYO.

Thus, permitting a religious exemption poses a much greater threat to New York's interest in preventing the spread of Covid-19 among healthcare workers and to vulnerable patients than does allowing a medical exemption. What's more, that threat is magnified by the tendency of religious objectors to vaccination to cluster in particular communities. *See* Thomas May & Ross D. Silverman, *'Clustering of exemptions' as a collective action threat to herd immunity*, 21 VACCINE 1048, 1050 (2003), https://bit.ly/2TJONcX. Such clustering can lead to outbreaks of vaccine-preventable diseases, by causing the percentage of people who are vaccinated in a community to fall below the "herd immunity" level—the level necessary to prevent a disease from circulating. *See id.* at 1048–50. The percentage of a community that needs to be vaccinated to achieve herd immunity against the currently prevalent Delta variant of Covid-19 is estimated to be between 90 and 97 percent. *See* Hilary Brueck, *Getting to herd immunity will require 90% of people to be vaccinated against COVID-19, experts say*, BUSINESS INSIDER (Aug. 27, 2021), https://bit.ly/3kstOFR; Nicholas Steyn et al., *A COVID-19 Vaccination*

Model for Aotearoa New Zealand, TE PUNAHA MATATINI (June 30, 2021), at 2, https://bit.ly/39oonS6. Therefore, at many healthcare providers, whether religious exemptions are allowed may well be determinative of whether the provider experiences outbreaks of Covid-19 among staff—which, in turn, can greatly increase the risks to patients. *See* Llorente, *supra* (religious-exemption requests granted to five percent of hospital's employees); Sisson, *supra* (religious-exemption requests received from three percent of healthcare system's employees); Reyes, *supra* (religious-exemption requests received from more than a fifth of police department's employees).

In sum, medical exemptions serve New York's interest in protecting the health of people who cannot safely be vaccinated, New York has no real choice other than to allow those exemptions, and religious exemptions pose a much greater threat than do medical ones to the state's efforts to prevent spread of Covid-19. Hence, the state's decision to allow medical exemptions but not religious exemptions in no way reflects "a value judgment in favor of secular motivations, but not religious motivations." *Cf. Fraternal Ord.*, 170 F.3d at 366. The medical exemption therefore does not trigger strict scrutiny under the Free Exercise Clause.

B. Even if the medical exemption triggered strict scrutiny, New York's vaccination requirement would pass muster.

Even if strict scrutiny were to apply, New York's vaccination mandate would satisfy the test. "A government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (quoting *Lukumi*, 508 U.S. at 546). Just as secular exemptions may sometimes trigger strict scrutiny, so too they may sometimes prevent laws from surviving that review, whether by signifying that the government's interest is not truly compelling or by showing that the government's means are not adequately tailored. *See, e.g.*, *Fulton*, 141 S. Ct. at 1881–82; *Tandon*, 141 S. Ct. at 1296–97. And just as Justice Alito's opinions for the Third Circuit illuminate how to distinguish exemptions that trigger strict scrutiny from those that do not, a circuit-court opinion by then-Judge Gorsuch—*Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014)—illuminates how to distinguish exemptions that fail strict scrutiny from those that pass it.

In *Yellowbear*, Justice Gorsuch considered a prisoner's claim under the Religious Land Use and Institutionalized Persons Act, a statute that mandates strict-scrutiny review of governmental conduct that substantially burdens incarcerated individuals' religious exercise. *See id.*

at 56 (citing 42 U.S.C. § 2000cc–1(a)). Justice Gorsuch recognized that "[a] law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all." *Id.* at 60.

But, cautioned Justice Gorsuch, "it is important to acknowledge that inferences like these are not inevitable or irrebuttable." *Id.* at 61. "We know that few statutes pursue a single purpose at any cost, without reference to competing interests," he explained. *Id.* "Given this, it would be odd if the mere fact that a law contains some secular exceptions always sufficed to prove the government lacked a compelling interest in avoiding another exception to accommodate a claimant's religious exercise." *Id.* "If that were the case, the compelling interest test would seem nearly impossible to satisfy." *Id.*

Instead, noted Justice Gorsuch, "[a] government can rebut an argument from underinclusion by showing that it hasn't acted in a logically inconsistent way—by (say) identifying a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explaining how such differential treatment furthers some distinct compelling governmental concern." *Id.* As an example, he cited a case

holding that the governmental interest "in preventing eagle deaths isn't undermined simply because the government has restricted intentional eagle killings more than accidental ones," for "surely the government has a compelling interest in not subjecting citizens to laws they can't realistically avoid breaking." *Id.* (citing *United States v. Friday*, 525 F.3d 938, 958–59 (10th Cir. 2008)).

Here, there is no question that the governmental interest served by New York's vaccination mandate—preventing spread of a deadly disease—is compelling. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). And New York "hasn't acted in a logically inconsistent way" (*Yellowbear*, 741 F.3d at 61) by allowing medical exemptions but not religious exemptions. For there is both "a qualitative" and a "quantitative difference between the particular religious exemption requested and [the] secular exception[] already tolerated." *Id.* Qualitatively, unlike a religious exemption, a medical exemption advances public health by protecting those who cannot safely be vaccinated from the physical harm that vaccination would inflict on them. Quantitatively, because religious exemptions are claimed so much more often than medical ones, allowing religious exemptions poses a much greater threat to New York's efforts to protect staff and patients at medical-care facilities.

Moreover, New York's "differential treatment" of medical and religious exemptions "furthers [a] distinct compelling governmental concern" (*Yellowbear*, 741 F.3d at 61): Permitting a medical exemption and disallowing a religious exemption each advance the state's interest in protecting from harm healthcare workers whose medical conditions preclude them from being safely vaccinated. These particularly vulnerable people include those who have allergic reactions to vaccine components. *See, e.g.*, *Vaccines Protect Your Community*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://bit.ly/3nCZavx (last visited Sept. 14, 2021). Just as "the government has a compelling interest in not subjecting citizens to laws they can't realistically avoid breaking" (*Yellowbear*, 741 F.3d at 61), so too it has a compelling interest in not attempting to vaccinate healthcare workers whose medical condition precludes immunization—as well as in safeguarding those vulnerable people's health by disallowing nonmedical exemptions that could cause colleagues to infect them.

CONCLUSION

For the foregoing reasons, the motion for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5,149 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared using Microsoft Word in Century Schoolbook font, in a size measuring no less than 14 points.

s/ *Alex J. Luchenitser*