No. 21-1826

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOHN DOES, 1-3; JACK DOES, 1-1000; JANE DOES, 1-6; JOAN DOES, 1-1000,
Plaintiffs-Appellants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine; JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services; NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTH FOUNDATION; MAINEGENERAL HEALTH,
Defendants-Appellees.

On Appeal from an Order of the
United States District Court for the District of Maine
Case No. 1:21-cv-00242-JDL, Hon. Jon David Levy

BRIEF, IN SUPPORT OF APPELLEES AND AFFIRMANCE, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MAINE; DISCIPLES CENTER FOR PUBLIC WITNESS; DISCIPLES JUSTICE ACTION NETWORK; EQUAL PARTNERS IN FAITH; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; INTERFAITH ALLIANCE FOUNDATION; METHODIST FEDERATION FOR SOCIAL ACTION; MUSLIM ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN; AND RECONSTRUCTIONIST RABBINICAL ASSOCIATION

(Additional counsel affiliated with American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maine are listed on the signature page.)

October 18, 2021

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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' contention that the First Amendment's Free Exercise Clause requires a religious exemption from Maine's vaccination mandate for healthcare workers.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Maine.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.

[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.

- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- Muslim Advocates.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.

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 immense sacrifices to save as many people as they can. To protect the health and lives of those workers and the vulnerable patients they serve, Maine has enacted a regulation requiring that healthcare personnel in the state be vaccinated against Covid-19. (PI Order 10.) Vaccination greatly reduces both the risk of being infected and the risk of transmitting the disease to others. *See, e.g.*, Lianna Matt McLernon, *COVID vaccines very effective, hinder spread, studies say*, CIDRAP (Sept. 9, 2021), https://bit.ly/3nKKmuW.[2] And it 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.

[2] *See also, e.g.*, Darius Mostaghimi et al., *Prevention of host-to-host transmission by SARS-CoV-2 vaccines*, THE LANCET (Sept. 14, 2021), https://bit.ly/3lBOL0E; Ashley Fowlkes, et al., *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance — Eight U.S. Locations, December 2020–August 2021*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 27, 2021), https://bit.ly/3zeKepC.

Plaintiffs nevertheless challenge Maine'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. Maine's vaccination mandate for healthcare workers complies with this standard because it applies to all healthcare employees who can be vaccinated safely.

That the vaccination requirement allows a medical exemption but not a religious exemption does not render the requirement unconstitutional. When a nonreligious exemption to a law advances the governmental interests served by the law, or at least does not undermine those interests as much as a religious exemption would, the nonreligious exemption does not trigger a constitutional obligation to provide a religious exemption. Here, the medical exemption supports and advances the governmental interest underlying the vaccination mandate—protecting people's health. A religious exemption would not.

The Court should affirm the district court's denial of a preliminary 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 have thus repeatedly rejected religion-based challenges to vaccination requirements.

As an initial matter, vaccine mandates are plainly permissible under the Supreme Court's precedent. 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. Noting that "'persons and property are subjected to all kinds of restraints and burdens in order to secure the . . . health . . . of the state,'" the Court concluded that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," and that the vaccination law had not "invaded *any* right secured by the Federal Constitution." *Id.* at

26–27, 38 (quoting *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877)) (emphasis added). Subsequently, in *Zucht v. King*, 260 U.S. 174, 175 (1922), ruling that "the constitutional question presented" was not "substantial in character," the Court relied on *Jacobson* in rejecting a Fourteenth Amendment challenge to a San Antonio ordinance that prohibited children from attending public or private schools without proof of vaccination.

Although neither *Jacobson* nor *Zucht* specifically considered a religious-freedom claim, the cases recognized a fundamental limitation on individual liberties: They must not be used to harm others or threaten public health or safety. As the Court explained in *Jacobson*, "[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 has affirmed that general principle time and again, including in discussions relating to mandatory vaccination. In *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), the Court noted that one "cannot claim freedom from compulsory vaccination . . . on religious grounds" because 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." And 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 so doing, 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.

Subsequently, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court made religion-based challenges to mandatory vaccination laws even less viable than they already were. Before *Smith*, the Court generally applied strict scrutiny to laws that substantially burdened religious exercise. *See Sherbert*, 374 U.S. at 403–09; *Yoder*, 406 U.S. at 215–19. But *Smith* held that laws do not trigger heightened scrutiny under the Free Exercise Clause when they are neutral toward religion and generally applicable, even if they substantially burden religion. *See* 494 U.S. at 878–79. Justice Scalia wrote for the Court that 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)). Thus, the Court reaffirmed in *Smith* that the Free Exercise Clause does not "require[ ] religious exemptions from . . . health and safety regulations such as . . . compulsory vaccination laws." *Id.* at 888–89 (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

Many federal appellate and other courts have followed suit, confirming that religious objections do not entitle individuals to exemptions from vaccination requirements. In *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), the Second Circuit held that a school district did not violate the Free Exercise Clause by temporarily excluding from school, during a chicken-pox outbreak, children who had religious exemptions from New York State's chicken-pox vaccination 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 school vaccination requirements, the Sixth Circuit observed that "[c]onstitutionally, [the plaintiff] has no right to an exemption." 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 school vaccination requirements, noting that "the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest." In *F.F. v. New York*, No. 2021-443, 2021 WL 4735375, at *1 (N.Y. Oct. 12, 2021), after a New York appellate court held that the state did not violate the Free Exercise Clause by repealing the religious exemption from its vaccination requirements for schoolchildren (143 N.Y.S.3d 734, 741–42 (N.Y. App. 2021)), New York's highest court concluded "that no substantial constitutional question is directly involved" and dismissed an appeal from that decision. And in *Dr. T. v. Alexander-Scott*, No. 1:21-cv-387, 2021 WL 4476784, at *2 (D.R.I. Sept. 30, 2021), a Rhode Island district court rejected a free-exercise challenge to a vaccination mandate for healthcare workers substantially similar to the one here. Numerous other federal district courts and state

courts have resolved free-exercise claims in vaccination cases the same way.[3]

[3] *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*, 521 F. Supp. 3d 358, 396–407 (S.D.N.Y. 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); *Dixon v. de Blasio*, No. 1:21-cv-5090, 2021 WL 4750187, at *7–8 (E.D.N.Y. Oct. 12, 2021); *Harris v. Univ. of Mass.*, No. 21-cv-11244, 2021 WL 3848012, at *7 (D. Mass. Aug. 27, 2021), *appeal docketed*, No. 21-1770 (1st Cir. Sept. 28, 2021); *Middleton v. Pan*, No. 2:16-cv-5224, 2016 WL 11518596, at *2, 7 (C.D. Cal. Dec. 15, 2016), *report and 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); *Acebedo v. Commonwealth*, No. 21-0187-cv, slip op. at 25 n.26 (N. Mar. I. Commw. Super. Ct. Sept. 13, 2021), https://bit.ly/3FhBG5D; *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").

There is no basis to deviate from these precedents with respect to Maine's vaccination requirement for healthcare workers. Application of *Smith*'s rule that neutral, generally applicable laws do not trigger heightened scrutiny under the Free Exercise Clause confirms this. *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 activity. *See id.* at 533–34, 542–43.

Maine's vaccination mandate satisfies these standards. The requirement applies equally to all healthcare workers who can safely be vaccinated, regardless of whether they object to vaccination on religious or nonreligious grounds. *See* 10-144-264 Me. Code R. (Aug. 12, 2021).

Plaintiffs nevertheless have argued (Pls.' Mot. Inj. Pending Appeal 10) that the vaccination mandate is not neutral toward religion because, two years before adding the Covid-19 vaccine to the list of immunizations required for healthcare workers, Maine repealed a previously existing religious exemption from its vaccination rules (PI Order 9–10). But, as

then-Judge Gorsuch wrote for the Tenth Circuit in *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014), "[s]urely the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future, especially if experience teaches the accommodation brings with it genuine safety problems that can't be addressed at a reasonable price." That was exactly the case here: Maine removed its religious exemption because of decreases in vaccination rates that increased the risk of disease outbreaks. (PI Order 22–23.) Moreover, a rule that the repeal of a religious exemption triggers strict scrutiny would have a perverse effect by "discouraging . . . officials from granting the accommodation in the first place." *See Yellowbear*, 741 F.3d at 58. And such a rule would make no logical sense: Why should strict scrutiny arise from the repeal of a religious exemption when rational-basis scrutiny would apply if there had never been a religious exemption in the first place? New York and California appellate courts have accordingly rejected arguments that the repeal of a religious exemption to a vaccination requirement triggers strict scrutiny. *See F.F.*, 143 N.Y.S.3d at 739–42; *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 220–21, 224–25 (Cal. Ct. App. 2018).[4]

[4] *See also Whitlow*, 203 F. Supp. 3d at 1084–86; *Middleton*, 2016 WL 11518596, at *2, 7.

The vaccination mandate is therefore subject only to rational-basis review. *See, e.g.*, *Parker v. Hurley*, 514 F.3d 87, 95–96 (1st Cir. 2008). 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 have argued (Pls.' Mot. Inj. Pending Appeal 10–14) that the inclusion of a medical exemption in the vaccination mandate (PI Order 9–10) triggers strict scrutiny and renders the regulation unconstitutional insofar as it lacks a religious exemption. But in most of the cases rejecting free-exercise challenges to vaccination mandates, the courts noted that a medical exemption *was* available yet did not hold that strict scrutiny applied. *See 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; *Dr. T.*, 2021 WL 4476784, at *1–2.[5]

[5] *See also Klaassen*, __ F. Supp. 3d __, 2021 WL 3073926, at *6, 25–26; *W.D.*, 521 F. Supp. 3d at 406; *Whitlow*, 203 F. 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; *Acebedo*, No. 21-0187-cv, slip op. at 6, 25 n.26.

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), require strict scrutiny here. In *Fulton*, the Supreme Court stated 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). Plaintiffs have relied heavily (Pls.' Mot. Inj. Pending Appeal 6–7) on a case based on that principle—*Dahl v. Board of Trustees of Western Michigan University*, __ F.4th __, No. 21-2945, 2021 WL 4618519 (6th Cir. Oct. 7, 2021). There the Sixth Circuit concluded that a university's vaccination mandate was likely subject to strict scrutiny because it permitted individualized religious and medical exemptions on a discretionary basis. 2021 WL 4618519, at *3–4. But 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); *see also Fulton*, 141 S. Ct. at 1877. Far from being dependent on discretionary decisions of state officials, the medical exemption here is objective and categorical: healthcare workers are automatically entitled to

it if they receive an appropriate certification from a medical professional. *See* Me. Stat. tit. 22 § 802(4-B)(A).

Plaintiffs also have relied heavily (Pls.' Mot. Inj. Pending Appeal 9) on *Tandon*, where the Court stated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise" and that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." 141 S. Ct. at 1296. Similarly, in *Fulton*, the Court noted 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. But these cases do not carry the day for Plaintiffs, 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 a religious exemption would have. *See* 381 F.3d at 211.

Justice Alito contrasted the facts of *Fraternal Order* and *Blackhawk* with the denial in *Smith* of a religious exemption from a law banning possession of controlled substances. He explained that strict scrutiny did not apply in *Smith* 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*, 381 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*, 381 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*, 381 F.3d at 211. He concluded that "[t]he 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.

The medical exemption in Maine's vaccination mandate is like the medical exemption in *Smith* and the undercover exemption in *Fraternal Order*: It advances the purposes of the vaccination mandate—to protect the public health. When a doctor certifies that vaccination is medically contraindicated for a particular healthcare worker (as required to obtain the medical exemption, *see* Me. Stat. tit. 22 § 802(4-B)(A)), "the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served" (*Blackhawk*, 381 F.3d at 211).

As recently explained by Douglas Laycock—a scholar whose writings have heavily influenced recent separate Supreme Court opinions expressing an expansive view of the Free Exercise Clause[6]—"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. On the other hand, a religious exemption does not advance a vaccination mandate's purpose of protecting the public health and welfare in any way.

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[6] *See, e.g.*, *Fulton*, 141 S. Ct. at 1889, 1899 n.34, 1912, 1915, 1923 n.81 (Alito, J., concurring in the judgment, joined by Thomas, J., and Gorsuch, J.) (citing Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed*, 8 J. L. & RELIGION 99 (1990); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996)); *Danville Christian Acad. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting from denial of application to vacate stay, joined by Alito, J.) (citing Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 5–6 (2016)); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612–13 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50; Laycock & Collis, *Generally Applicable Law*, *supra*).

Moreover, forcing vaccinations on those who cannot safely be vaccinated is something that "the government . . . does not have an interest in" (*Fraternal Ord.*, 170 F.3d at 366). As the Supreme Court explained in *Jacobson*, it "would be cruel and inhuman in the last degree" 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 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" (*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 thirteen

religious exemptions for every medical exemption from its Covid-19 vaccination requirement. *See Beckerich v. St. Elizabeth Med. Ctr.*, __ F. Supp. 3d __, No. 2:21-cv-105, 2021 WL 4398027, at *4–5 (E.D. Ky. Sept. 24, 2021). A Minnesota healthcare provider approved approximately eight religious exemptions for every medical exemption from its Covid-19 vaccination mandate. *See* Def. Univ. of Minn. Physicians' Mem. Supp. Dismissal at 3, *Roe 1 v. Allina Health Sys.*, No. 0:21-cv-2127 (D. Minn. Oct. 8, 2021), ECF No. 73. Grants of religious exemptions from a Connecticut hospital's Covid-19 vaccination requirement outnumbered grants of medical exemptions by more than six to one. *See* Kasturi Pananjady & Jenna Carlesso, *CT hospitals see spike in religious exemptions for mandated COVID vaccines*, CT MIRROR (Oct. 1, 2021), https://bit.ly/2ZQlp7n. 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. And three quarters of the licensed health-care workers in the District of Columbia who have not been vaccinated against Covid-19 are requesting religious exemptions. *See* Michael Brice-Saddler & Jasmine Hilton, *Thousands of*

D.C. health care workers remain unvaccinated amid flurry of religious exemption requests, WASH. POST (Oct. 2, 2021), wapo.st/3mtJF7c.

Similar data has been reported outside of the healthcare context. Approximately 3,000 employees of the Los Angeles police department—one quarter of the department's workforce—recently requested 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 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 Maine'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. In such communities, requiring religious exemptions to Maine's vaccination mandate would pose an especially high risk of triggering Covid-19 outbreaks in healthcare settings.

In sum, medical exemptions—but not religious exemptions—serve Maine's interest in protecting the health of people who cannot safely be vaccinated; Maine has no real choice other than to allow medical 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 is not "prohibit[ing] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar

way" (*Fulton*, 141 S. Ct. at 1877). The medical exemption therefore does not trigger strict scrutiny under the Free Exercise Clause.

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

Even if strict scrutiny were to apply, Maine'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." *Id.* at 1881 (quoting *Lukumi*, 508 U.S. at 546). Under strict scrutiny, secular exemptions may prevent a law from passing muster if they signify that the government's interest is not truly compelling or demonstrate that the government's means are not adequately tailored. *See, e.g.*, *id.* at 1881–82; *Tandon*, 141 S. Ct. at 1296–97. But secular exemptions are not always fatal under strict scrutiny. Just as Justice Alito's opinions for the Third Circuit illuminate how to distinguish exemptions that trigger strict scrutiny from those that do not, Justice Gorsuch's Tenth Circuit opinion in *Yellowbear*, 741 F.3d 48, 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 Justice Gorsuch cautioned that "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, Justice Gorsuch noted, "[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 Maine's vaccination mandate—protecting staff and patients at medical-care facilities from a highly transmissible and 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 Maine "hasn't acted in a logically inconsistent way" (*Yellowbear*, 741 F.3d at 61) by allowing medical exemptions but not religious exemptions. As discussed above, 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 much more often than medical

ones, allowing religious exemptions poses a much greater threat to Maine's efforts to protect staff and patients at medical-care facilities.

Moreover, Maine's "differential treatment" of medical and religious exemptions "furthers [a] distinct compelling governmental concern" (*Yellowbear*, 741 F.3d at 61): Permitting a medical exemption while disallowing a religious exemption advances 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

The right to freely exercise religion should never be misused to harm others. But that is exactly what the religious exemptions sought by Plaintiffs would do, putting their colleagues and the patients they serve at

increased risk of death or suffering from the most dangerous pandemic virus the world has confronted in more than a century. This Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Rule 32(f), it contains 5,651 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*

CERTIFICATE OF SERVICE

I certify that on October 18, 2021, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

s/ *Alex J. Luchenitser*