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 AFFIRMANCE, OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; NEW YORK CIVIL LIBERTIES UNION; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE, METROPOLITAN COMMUNITY CHURCHES; MEN OF REFORM JUDAISM; METHODIST FEDERATION FOR SOCIAL ACTION; MUSLIM ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN; RECONSTRUCTIONIST RABBINICAL ASSOCIATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM

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

October 7, 2021

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
luchenitser@au.org

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

Statutes

Other Authorities

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

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 New York's vaccination mandate for healthcare workers.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- New York Civil Liberties Union.
- Central Conference of American Rabbis.
- Global Justice Institute, Metropolitan Community Churches.
- 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. All parties have consented to the filing of this brief.

- Muslim Advocates.
- National Council of Jewish Women.
- 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 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, New York State has enacted a regulation requiring that healthcare personnel in the state be vaccinated against Covid-19. (App. 16–18.) 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 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.

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)).

This Court and many others have followed suit when presented with free-exercise challenges to vaccination requirements, confirming that religious objections do not entitle individuals to exemptions from them. 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, 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*, 143 N.Y.S.3d 734, 741–42 (N.Y. App. Div. 2021), 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. 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*

There is no basis to deviate from these precedents with respect to New York'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

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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), *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").

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.

New York'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. (App. 16–17.)

Plaintiffs nevertheless argue that the vaccination mandate was motivated by hostility toward religious belief, citing statements made by Governor Hochul weeks after the mandate was enacted. (Appellants' Br. 21–24.) But the cited statements demonstrate just the opposite—that the reasons for the vaccination mandate are secular:

> I want you to live, I want our kids to be safe when they're in schools, I want to be safe when you go to a doctor's office or to a hospital and are treated by somebody, you don't want to get the virus from them. You're already sick or you wouldn't be there.

Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center, N.Y. STATE (Sept. 26, 2021), https://on.ny.gov/3FnHryw.

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 (Appellants' Br. 25–26) that the inclusion of a medical exemption in the vaccination mandate (App. 17) 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.[4]

[4] *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. 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

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. Plaintiffs point to (Appellants' Br. 24) 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. This principle "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: Healthcare workers are automatically entitled to it if they receive an appropriate certification from a medical professional. (App. 17.)

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.

Plaintiffs also rely (Appellants' Br. 25) on *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 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 New York's vaccination mandate is like the medical exemption in *Smith* and the undercover exemption in *Fraternal Order*: It advances the purposes of New York's 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* App. 17), "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[5]—"medical

[5] *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

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.

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

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for injunctive relief) (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50; Laycock & Collis, *Generally Applicable Law*, *supra*).

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). Grants of religious exemptions from a Connecticut hospital's Covid-19 vaccination mandate 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 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. In such communities, requiring religious exemptions to New York's vaccination mandate would pose an especially high risk of triggering Covid-19 outbreaks in healthcare settings.

Plaintiffs contend that it does not matter that requests for religious exemptions vastly outnumber ones for medical exemptions. They argue that New York has "achieved herd immunity against COVID-19 among healthcare workers," pointing out that "87% of New York healthcare workers"[6] have been immunized against Covid-19. (Appellants' Br. 33.) That argument fails for multiple reasons.

First, 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. This range is far higher than estimates given earlier in the pandemic—on which Plaintiffs mistakenly rely (*see* Appellants' Br. 32)—because the Delta variant is much more contagious than earlier variants were. *See* Brueck, *supra*.

[6] This number rose to 89 percent as of October 6, 2021. *See Hospital Worker Vaccinations*, N.Y. STATE, https://on.ny.gov/3aaEJhF (last visited Oct. 6, 2021).

Second, Plaintiffs ignore the clustering phenomenon discussed above. Indeed, the data Plaintiffs cite shows that the percentage of healthcare workers who are vaccinated against Covid-19 varies widely in New York by county, from a high of 97 percent in Albany County to a low of 61 percent in Steuben County (as of October 6, 2021). *See Hospital Worker Vaccinations*, N.Y. STATE, https://on.ny.gov/3aaEJhF (last visited Oct. 6, 2021).

Third, the concept of "herd immunity" refers to the percentage of a population in a *community* that needs to be vaccinated to prevent a disease from circulating. *See* May, *supra*, at 1048. Plaintiffs cite no studies explaining whether or how that concept applies in a particular workplace when the surrounding community has not attained the same goal.

All that said, to the extent that the concept of herd immunity may be meaningful with respect to individual workplaces, there are a good number of examples indicating that allowing religious exemptions would substantially increase the likelihood that employers would fall below the needed vaccination level. *See* Llorente, *supra* (religious exemptions granted to five percent of hospital's employees); *Beckerich*, __ F. Supp. 3d __, 2021 WL 4398027, at *4 n.3, 5 (religious exemptions granted to approximately four 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); John Woolfolk, *Bay Area and California public workers finding religion to avoid COVID-19 shots*, MERCURY NEWS (updated Oct. 5, 2021), bayareane.ws/3iQco59 (religious-exemption requests granted to six percent of Contra Costa County employees).

In sum, medical exemptions—but not religious 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 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." *Cf. 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, 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." *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, 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 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 New York'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 New York "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 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 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,

s/ *Alex J. Luchenitser*

DANIEL MACH
HEATHER L. WEAVER
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
(202) 675-2330
dmach@aclu.org
hweaver@aclu.org

LINDSEY KALEY
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
lkaley@aclu.org

RICHARD B. KATSKEE
ALEX J. LUCHENITSER*
**Counsel of Record*
Americans United for Separation of Church and State
1310 L Street NW, Suite 200
Washington, DC 20005
(202) 466-7306
katskee@au.org
luchenitser@au.org

New York Civil Liberties Union Foundation
CHRISTOPHER DUNN
BETH HAROULES
ARTHUR EISENBERG
AMY BELSHER
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
cdunn@nyclu.org

Counsel for Amici Curiae

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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 5,773 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*