No. 21A125

In the Supreme Court of the United States

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

Applicants,

v.

KATHLEEN HOCHUL, HOWARD A. ZUCKER,

Respondents.

On Emergency Application for Writ of Injunction to the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTERESTS OF THE *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. The Free Exercise Clause was neither intended nor originally understood to require exemptions from laws that protect the health and safety of the public 4
A. The intent and writings of the Founders 4
B. Early state constitutions and court decisions 6
II. This Court has repeatedly recognized that the Free Exercise Clause does not create a general entitlement to religious exemptions from vaccination laws 9
III. The vaccination mandate's medical exemption does not render the lack of a religious exemption unconstitutional 13
CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

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2021 WL 4398027 (E.D. Ky. Sept. 24, 2021) 16

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508 U.S. 520 (1993) 15, 16, 20

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521 U.S. 507 (1997) 4, 5

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168 N.E. 101 (Mass. 1929) 9, 13

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22 U.S. 1 (1824) 6

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of free religious exercise and the separation of religion and government. They believe that the right to practice one's faith is precious, but that it was never intended to override protections for people's safety and health. *Amici* therefore oppose applicants' 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.
- Central Conference of American Rabbis.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.
- Interfaith Alliance Foundation.
- 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 to fund the brief's preparation or submission. This brief has been submitted with a motion for leave to file it.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Historical analysis, a long line of precedent, and this Court's recent decisions all point to the same conclusion: The Free Exercise Clause does not require a religious exemption from New York's vaccination mandate for healthcare workers.

The Clause was never intended or originally understood to require religious exemptions from laws that protect public health or safety. That is evident from the writings of leading Founders and early state constitutions and judicial decisions.

A long line of decisions by this Court is in accord. The Court has repeatedly recognized that the Free Exercise Clause does not mandate exemptions from nondiscriminatory measures that protect public safety and health, such as vaccination requirements.

And the medical exemption in New York's vaccination mandate does not require a religious exemption under the principle, emphasized in this Court's recent decisions, that a law is suspect if it contains secular exemptions that undermine the relevant governmental interests to the same extent that a religious exemption would. The medical exemption advances the governmental interest underlying New York's mandate—protecting people's health—while a religious exemption would not. Moreover, experience in both the employment and the school contexts demonstrates that religious exemptions from vaccination requirements are granted much more frequently than medical exemptions and thus pose a far greater threat to states' efforts to prevent disease outbreaks.

The application should be denied.

ARGUMENT

I. The Free Exercise Clause was neither intended nor originally understood to require exemptions from laws that protect the health and safety of the public.

A. The intent and writings of the Founders.

This Court has looked to the writings of our country's Founders in interpreting the original intent and understanding of the First Amendment's Religion Clauses. James Madison and Thomas Jefferson in particular played "leading roles" "in the drafting and adoption of" the First Amendment. *Everson* v. *Board of Educ.*, 330 U.S. 1, 13 (1947). Thus, the Court has noted, "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 214 (1963) (footnote omitted).

Madison, Jefferson, Williams, and other leading contributors to our constitutional order did not understand the right of religious freedom to mandate exemptions from laws that protect public safety or health. For example, though Madison believed that the right to practice one's religion freely was of utmost importance, he cautioned that it should not be construed to "trespass on private rights or the public peace."[2]

So too, it is "quite clear that Jefferson did not" endorse a "broad principle of affirmative accommodation" for religious objections against laws that secure public safety. See *City of Boerne* v. *Flores*, 521 U.S. 507, 542 (1997) (Scalia, J., concurring in

[2] Letter from James Madison to Edward Livingston (July 10, 1822), https://bit.ly/34wu2n5.

part). While Jefferson warned against the dangers of allowing government to "restrain the profession or propagation of [religious] principles," he believed that government might validly "interfere when [those] principles break out into overt acts against peace and good order."[3]

Williams, the Baptist theologian and founder of Rhode Island, likewise opposed the idea of an entitlement to religious exemptions from general laws protecting public safety.[4] Other prominent religious thinkers whose teachings influenced the Framers' understanding of religious freedom, including Isaac Backus and John Leland, also shared as a theological commitment the understanding that religious objectors do not have a right to exemptions from public-safety laws.[5]

Similarly, George Washington expressed the "wish and desire that the Laws may always be as extensively accommodated to [freedom of conscience], as a due regard to the Protection and essential Interests of the Nation may Justify, and permit."[6] In other words, Washington believed that religion should be accommodated willingly and enthusiastically, but not at the expense of public safety.

Moreover, it was broadly accepted in colonial and founding-era America that public-health laws were essential to public safety. "At the time of the framing of the Constitution, state governments and * * * major cities had a long history of public

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[3] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), https://bit.ly/2JShvmT.

[4] See Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 630–632 (1990), https://bit.ly/3BMyZG9.

[5] See *id.* at 623 & n.143, 630–632.

[6] Letter from George Washington to the Society of Quakers (Oct. 13, 1789), https://bit.ly/3lQjkxG.

health statutes and regulations passed in response to waves of deadly epidemic disease dating back to the earliest colonial days."[7] For example, to fight diseases such as smallpox, yellow fever, plague, and cholera, colonies and states regularly imposed quarantine measures.[8] And during the Revolutionary War, the Continental Congress authorized then-General Washington to order compulsory inoculations against smallpox for his troops.[9] These kinds of measures were "widely regarded as a central tenet of state police powers."[10] So our Constitution's Framers would not have thought that measures to safeguard the public health must be legally subordinated to religious practices.

B. Early state constitutions and court decisions.

Most founding-era state constitutional analogues to the Free Exercise Clause contained caveats reflecting this basic understanding that the right to free exercise did not override public-safety concerns.[11] For example, the free-exercise guarantee of Delaware's Declaration of Rights of 1776 included the qualifier "unless, under colour of religion, any man disturb the * * * safety of society." Del. Decl. of Rights of 1776, § 3, https://bit.ly/3CSaetn. The free-exercise guarantee of the Maryland Constitution of

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[7] Edward P. Richards, *A Historical Review of the State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020*, 11 J. Nat'l Sec. L. & Pol'y 83, 87 (2020), https://bit.ly/3CMcxOJ.

[8] Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 93–126 (2014), https://bit.ly/3q4STtR.

[9] Philip J. Smith, et al., *Highlights of Historical Events Leading to National Surveillance of Vaccination Coverage in the United States*, 126 Pub. Health Reps. (Supp. 2) 3, 4 (2011), https://bit.ly/3ENPW4R.

[10] Donohue, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. at 90; accord Richards, 11 J. Nat'l Sec. L. & Pol'y at 89; see also *Gibbons* v. *Ogden*, 22 U.S. 1, 203, 205 (1824).

[11] See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1461–1462 (1990).

1776 contained the limitation "unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights." Md. Const., art. XXXIII (1776), https://bit.ly/3nfDio6. The free-exercise clause of New York's 1777 Constitution provided that "the liberty of conscience, hereby granted, shall not be so construed as to * * * justify practices inconsistent with the peace or safety of this State." N.Y. Const., art. XXXVIII (1777), https://bit.ly/2Z4zHRt. The Georgia Constitution of 1777 recognized that "[a]ll persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State." Ga. Const., art. LVI (1777), https://bit.ly/3jlyOLs. And the New Hampshire Constitution of 1784 stated that although everyone has "a natural and unalienable right to worship GOD according to the dictates of his own conscience," none have the right to "disturb the public peace, or disturb others, in their religious worship." N.H. Const., art. I, § 5 (1784), https://bit.ly/3vwRPQ5. Accord Mass. Const., part I, art. II (1780), https://bit.ly/3E2U6FP; R.I. Charter, para. 2 (1663), https://bit.ly/3pldfi9; S.C. Const., art. VIII, § 1 (1790), https://bit.ly/3ETe9a0.

As Professor Michael McConnell has explained, "[t]he wording of the state provisions * * * casts light on the meaning of the first amendment," "for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states."[12] And that original meaning, according to Professor McConnell, was that "the free exercise

[12] McConnell, 103 Harv. L. Rev. at 1456.

right should prevail" "[w]here the rights of others are not involved" but should not override "peace and safety limitations" "necessary for the protection of others."[13]

Early state-court decisions point in the same direction. Professor Vincent Phillip Muñoz has determined that "no antebellum state court interpreted constitutional protections of religious free exercise to grant exemptions" from public-safety laws.[14]

Indeed, the few early court decisions to address the issue demonstrate precisely the opposite. For instance, the Pennsylvania Supreme Court held in 1831 that while "religious scruples of persons concerned with the administration of justice[ ] will receive all the indulgence that is compatible with the business of government," respect for religious obligations "must not be suffered to interfere with the operations of that organ of the government which has more immediately to do with the protection of person[s]." *Phillips* v. *Gratz*, 2 Pen. & W. 412, 416–417 (Pa. 1831). Similarly, the Supreme Judicial Court of Maine noted in 1854 that it "is not disputed" that "society['s] * * * right to interfere on the principle of self-preservation" prevails over the right to freely exercise religion. *Donahoe* v. *Richards*, 38 Me. 379, 412 (Me. 1854).

[13] *Id.* at 1462, 1464–1466.

[14] Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 Harv. J.L. & Pub. Pol'y 1083, 1099 (2008) (citing Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 276–295 (1991)).

II. This Court has repeatedly recognized that the Free Exercise Clause does not create a general entitlement to religious exemptions from vaccination laws.

Vaccination requirements date back to the founding of our nation. The Continental Congress authorized compulsory immunization of Revolutionary War soldiers, as noted above,[15] and American military personnel were thereafter regularly subjected to vaccination mandates.[16] Massachusetts adopted a law requiring smallpox vaccination in 1809,[17] and most other states and many localities followed suit during the course of the nineteenth century.[18] Exemptions from these requirements for medical reasons were permitted during that era.[19] But statutory religious exemptions from vaccination laws were uncommon until the second half of the twentieth century.[20]

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[15] Smith, 126 Pub. Health Rep. (Supp. 2) at 4.

[16] Lindsay Chervinsky, *The Long History of Mandated Vaccines in the United States*, Governing (Aug. 5, 2021), https://bit.ly/3q5w4q4.

[17] Smith, 126 Pub. Health Rep. (Supp. 2) at 4.

[18] See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002); Douglas S. Diekema, *Personal Belief Exemptions From School Vaccination Requirements*, 35 Ann. Rev. Pub. Health 275, 278 (2014), https://bit.ly/3qiahvc; *Morris* v. *City of Columbus*, 30 S.E. 850, 853 (Ga. 1898).

[19] See Lawrence O. Gostin, Jacobson v Massachusetts *at 100 Years: Police Power and Civil Liberties in Tension*, 95 Am. J. Pub. Health 576, 577 (2005), https://bit.ly/3GY8GRl; *Morris*, 30 S.E. at 851; *Blue* v. *Beach*, 56 N.E. 89, 96 (Ind. 1900); *State* v. *Hay*, 35 S.E. 459, 461 (N.C. 1900); *State* v. *Martin*, 204 S.W. 622, 625 (Ark. 1918); *Commonwealth* v. *Green*, 168 N.E. 101, 101 (Mass. 1929); *Allen* v. *Ingalls*, 33 S.W.2d 1099, 1100 (Ark. 1930); *Vonnegut* v. *Baun*, 188 N.E. 677, 679 (Ind. 1934); *State* v. *Drew*, 192 A. 629, 630 (N.H. 1937).

[20] See Andrew Meriwether, *The Complicated History Of Religious Exemptions To Vaccines*, WBEZChicago: Curious City (Sept. 16, 2021), https://bit.ly/3qjneoP; Elena Conis, *The History of the Personal Belief Exemption*, 145 Pediatrics, no. 4, Apr. 2020, at 1–2, https://bit.ly/30c60yH; Diekema, 35 Ann. Rev. Pub. Health at 279.

Throughout this evolution of vaccination mandates, this Court and the lower courts have repeatedly recognized—consistent with the original intent and understanding of the right to free religious exercise—that the right does not render vaccination requirements inapplicable to religious objectors. More than a century ago, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905), this 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 therefore had not "invaded *any* right secured by the Federal Constitution." *Id.* at 26–27, 38 (emphasis added) (quoting *Hannibal & St. Joseph R.R. Co.* v. *Husen*, 95 U.S. 465, 471 (1877)). Subsequently, in *Zucht* v. *King*, 260 U.S. 174, 175–176 (1922), 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. The Court ruled that "the constitutional question presented" was not "substantial in character." *Id.* at 176.

Although neither *Jacobson* nor *Zucht* specifically considered a free-exercise 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." 197 U.S. at 26.

The Court has affirmed that general principle time and again, including with reference to vaccination requirements. In *Prince* v. *Massachusetts,* 321 U.S. 158, 166–167 (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." Citing *Jacobson* and *Prince*, the Court emphasized in *Sherbert* v. *Verner*, 374 U.S. 398, 402–403 (1963), 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 again explained that free-exercise claims may be denied when "harm to * * * 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. And in *Employment Division* v. *Smith*, the Court reaffirmed that the Free Exercise Clause does not "require[ ] religious exemptions from * * * health and safety regulation[s] such as * * * compulsory vaccination laws." 494 U.S. 872, 888–889 (1990) (citing *Cude* v. *State*, 377 S.W.2d 816 (Ark. 1964)).

State supreme courts have long viewed religion-based challenges to vaccination requirements the same way. For instance, in *City of New Braunfels* v.

Waldschmidt, the Texas Supreme Court ruled that the state constitution's religious-freedom guarantee did not relieve religious objectors of the duty to comply with a vaccination requirement for schoolchildren, explaining that to "permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 207 S.W. 303, 305 (Tex. 1918) (quoting *Reynolds* v. *United States*, 98 U.S. 145, 167 (1878)). In *Mosier* v. *Barren County Board of Health*, 215 S.W.2d 967, 969 (Ky. 1948), Kentucky's highest court rejected a religious-freedom argument against mandatory vaccination of schoolchildren, noting that "one may have any religious belief desired, but one's conduct remains subject to regulation for the protection of society." In *Sadlock* v. *Board of Education*, 58 A.2d 218, 219, 222 (N.J. 1948), New Jersey's Supreme Court held that a schoolchild-vaccination requirement that contained a medical exemption but not a religious exemption did not violate "the constitutional guaranty of religious freedom," because that right "was not intended to prohibit legislation with respect to the general public welfare." And in *Cude*, 377 S.W.2d at 819, the Supreme Court of Arkansas concluded that the state constitution's free-exercise clause did not override a school vaccination mandate, for "a person's right to exhibit religious freedom ceases where it overlaps and transgresses the rights of others." Federal appellate courts and other state courts have issued similar decisions.[21]

[21] See, e.g., *Does 1–6* v. *Mills*, __ F.4th __, No. 21-1826, 2021 WL 4860328, at *4–9 (1st Cir. Oct. 19, 2021), application for injunctive relief denied, __ S. Ct. __, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021); *Phillips* v. *City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *Nikolao* v. *Lyon*, 875 F.3d 310, 316 (6th Cir. 2017); *Workman* v. *Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353–354 (4th Cir. 2011); *F.F.* v. *State*, 143 N.Y.S.3d 734, 741–742 (N.Y. App. Div.), appeal dismissed for lack of a substantial

Under this Court's precedents, New York's vaccination requirement for healthcare workers does not violate the Free Exercise Clause. There is simply no general right to a religious exemption from a public-safety law such as a vaccination mandate. And because New York's vaccination requirement is neutral and generally applicable—it applies equally to all healthcare workers who can safely be vaccinated, regardless of whether they object to vaccination on religious or nonreligious grounds (see Applicants' Appendix 21–22)—the requirement does not trigger heightened scrutiny. See *Smith*, 494 U.S. at 878–879. The vaccination mandate is thus subject to rational-basis review at most (see *id.* at 882–889), which it easily survives because it is rationally related to the state's legitimate—indeed, compelling—interests in protecting healthcare personnel and their patients from illness and death.

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

Applicants' main argument (Application 2, 10, 23–28) is that the inclusion of a medical exemption in the vaccination mandate triggers strict scrutiny and renders the regulation unconstitutional insofar as it lacks a religious exemption. But medical exemptions to vaccination mandates are ubiquitous. For example, all fifty states

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constitutional question and motion for leave to appeal denied, 37 N.Y.3d 1040 (N.Y. 2021); *C.F.* v. *N.Y.C. Dep't of Health & Mental Hygiene*, 139 N.Y.S.3d 273, 287–292 (N.Y. App. Div. 2020); *Brown* v. *Smith*, 235 Cal. Rptr. 3d 218, 224–225 (Cal. Ct. App. 2018); *Davis* v. *State*, 451 A.2d 107, 112 & n.8 (Md. 1982); *Brown* v. *Stone*, 378 So. 2d 218, 223 (Miss. 1979); *Wright*, 385 S.W.2d at 646–648; *Bd. of Educ.* v. *Maas*, 152 A.2d 394, 405–408 (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); *Anderson* v. *State*, 65 S.E.2d 848, 851–852 (Ga. Ct. App. 1951); *In re Whitmore*, 47 N.Y.S.2d 143, 146–147 (N.Y. Dom. Rel. Ct. 1944); *Drew*, 192 A. at 630–632; *Vonnegut*, 188 N.E. at 680; *Green*, 168 N.E. at 101.

grant medical exemptions from their school immunization requirements.[22] That is because, as this Court explained in *Jacobson*, 197 U.S. at 39, 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."

Thus, were the Court to accept applicants' argument that religious exemptions must accompany medical exceptions, the effect would be that religious exemptions from vaccination mandates would be generally required. Indeed, applicants acknowledged during oral argument before the Second Circuit that they "essentially contend that *all* existing vaccination mandates without a religious exemption necessarily fail the general applicability test because they likely all contain medical exemptions." C.A. Op. 30. Adopting this view would be contrary to the original understanding of the Free Exercise Clause and to the long line of precedents rejecting free-exercise challenges to vaccination requirements.

Applicants err in contending (Application 23–24, 28) that the Court's recent decisions in *Tandon* v. *Newsom*, 141 S. Ct. 1294 (2021), and *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868 (2021), require the radical departure from history and precedent that applicants advocate. In *Tandon*, 141 S. Ct. at 1296, after stating that "government regulations are not neutral and generally applicable, and therefore

[22] *States With Religious and Philosophical Exemptions From School Immunization Requirements*, Nat'l Conf. of State Legislatures (Apr. 30, 2021), https://bit.ly/3CSZpY2.

trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," the Court emphasized 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." Similarly, in *Fulton*, 141 S. Ct. at 1877, 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." Accord *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 543 (1993) (ordinances were not generally applicable because they were substantially underinclusive and "fail[ed] to prohibit nonreligious conduct that endanger[ed] [applicable state] interests in a similar or greater degree than" prohibited religious conduct).

As the Second Circuit explained in detail (C.A. Op. 25–31), the medical exemption in New York's vaccination requirement does not trigger strict scrutiny under this standard, for two principal reasons. First, the medical exemption *advances* the purpose of the vaccination mandate—to protect the public health—by safeguarding from harm healthcare workers whose medical conditions preclude them from being safely vaccinated. As recently stated by Professor Douglas Laycock, "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."[23] On the other hand, a religious exemption does not advance a vaccination mandate's purpose of protecting the public health in any way.

Second, even if the medical exemption could be construed as undermining the state interests at stake, it certainly does not do so to "a similar or greater degree than" (*Lukumi*, 508 U.S. at 543) a religious exemption would. That is because requests for religious exemptions from vaccination requirements are far more common than requests for medical exemptions.

For instance, a Des Moines hospital system reported that 115 out of its 1900 employees applied for religious exemptions from its Covid-19 vaccination mandate, while only five employees applied for medical exemptions.[24] A Kentucky hospital granted more than thirteen religious exemptions for every medical exemption from its Covid-19 vaccination requirement.[25] A Minnesota healthcare provider approved approximately eight religious exemptions for every medical exemption from its Covid-19 vaccination mandate.[26] San Diego's largest healthcare system reported that the number of requests it received for religious exemptions from its Covid-19 vaccination requirement for employees was seven times higher than the number of requests for

[23] Douglas Laycock, *What's the law on vaccine exemptions? A religious liberty expert explains*, Conversation (Sept. 15, 2021), https://bit.ly/3lsSGg4.

[24] Tony Leys, *Most Des Moines hospital staff comply with vaccine mandates by getting shots or exemptions*, Des Moines Reg. (Nov. 1, 2021), bit.ly/3mIoqj6.

[25] *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).

[26] 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.

medical exemptions.[27] Grants of religious exemptions from a Connecticut health system's Covid-19 vaccination order outnumbered grants of medical exemptions by more than five to one.[28] 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.[29] In Colorado, 4.2 percent of healthcare workers received a religious exemption from the state's Covid-19 vaccination requirement, but only 1.3 percent received medical exemptions.[30] And three quarters of the licensed healthcare workers in the District of Columbia who reported not being vaccinated against Covid-19 requested religious exemptions.[31]

Similar data has been reported outside the healthcare context. Out of 10,873 City of Denver employees, 553 received religious exemptions from a Covid-19 vaccination requirement, while only 58 received medical exemptions.[32] In Nevada, 227 of the state's 2,372 correctional staff requested religious exemptions from a Covid-19 vaccination mandate, 26 requested medical exemptions, and 29 requested

[27] Paul Sisson, *Thousands of San Diego County healthcare workers seek vaccine exemptions, citing religion*, L.A. Times (Sept. 12, 2021), https://lat.ms/2XpkxWy.

[28] Kasturi Pananjady & Jenna Carlesso, *CT hospitals see spike in religious exemptions for mandated COVID vaccines*, CT Mirror (Oct. 1, 2021), https://bit.ly/2ZQlp7n.

[29] 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.

[30] Meg Wingerter, *97% of Colorado health care workers got COVID shots or received exemptions by state deadline*, Denver Post (Nov. 3, 2021), https://dpo.st/3nSNTWu.

[31] 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.

[32] Jeremy Jojola & Nicole Vap, *City of Denver grants vast majority of vaccine exemption requests; hundreds avoid shot*, 9news (Nov. 1, 2021), bit.ly/3q7M1fq.

"medical-religious" exemptions.[33] Approximately 3,000 employees of the Los Angeles police department—one quarter of the department's workforce—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.[34] Washington State agencies received 3,891 employee requests for religious exemptions from Covid-19 vaccination, compared to 892 requests for medical ones.[35] Requests by federal-government employees for religious exemptions from a Covid-19 vaccination mandate dwarf requests for medical exemptions.[36] 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.[37] And other states have reported similar or greater disparities in the school context.[38]

[33] Michael Lyle, *Hundreds of prison staff submitted religious exemptions ahead of vaccination deadline*, Nev. Current (Nov. 4, 2021), bit.ly/3ELrGk8.

[34] Emily Alpert Reyes & Kevin Rector, *Thousands of LAPD employees plan to seek exemptions to COVID-19 vaccine mandate*, L.A. Times (updated Sept. 14, 2021), https://lat.ms/39cyGJ2.

[35] 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.

[36] Lisa Rein et al., *Nearing Monday coronavirus vaccine deadline, thousands of federal workers seek religious exemptions to avoid shots*, Wash. Post (Nov. 7, 2021), https://wapo.st/3mSrp8M.

[37] Merri Rosenberg, *School districts can be fined for unvaccinated students*, N.Y. State Sch. Bds. Ass'n (Sept. 23, 2019), https://bit.ly/3lWzgCe.

[38] 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. In addition, that threat is magnified by the tendency of religious objectors to cluster in particular communities.[39] In such communities, requiring religious exemptions from New York's vaccination mandate would pose an especially high risk of triggering Covid-19 outbreaks in healthcare settings. Indeed, in recent years, the clustering phenomenon has led to outbreaks of dangerous diseases such as measles, mumps, and pertussis in New York and around the country—primarily among children, because of in-school transmission.[40]

Applicants contend that it does not matter that requests for religious exemptions vastly outnumber ones for medical exemptions. They argue that "93% of New York healthcare workers [have] received a COVID-19 vaccine series" and that therefore "New York has achieved herd immunity against COVID-19 among healthcare workers." (Application 31.) But the concept of "herd immunity" refers to the percentage of a population in a *community* that needs to be vaccinated to prevent

[39] 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; Diekema, 35 Ann. Rev. Pub. Health at 283; C.A. Op. 28.

[40] See, *e.g.*, Olivia Benecke & Sarah E. DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 Glob. Pediatric Health 1, 1, 4 (2019), https://bit.ly/3pilaup; Diekema, 35 Ann. Rev. Pub. Health at 283–284; *F.F. ex rel. Y.F.* v. *State*, 114 N.Y.S.3d 852, 863–864 (N.Y. Sup. Ct. 2019), aff'd, 143 N.Y.S.3d 734 (N.Y. App. Div.), appeal dismissed for lack of a substantial constitutional question and motion for leave to appeal denied, 37 N.Y.3d 1040 (N.Y. 2021); *Does 1–6* v. *Mills*, __ F. Supp. 3d __, No. 1:21-cv-242, 2021 WL 4783626, at *10 (D. Me. Oct. 13, 2021), aff'd, __ F.4th __, No. 21-1826, 2021 WL 4860328 (1st Cir. Oct. 19, 2021), application for injunctive relief denied, __ S. Ct. __, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021).

a disease from circulating; attempting to apply the concept to healthcare workers as a group is improper because they can be infected by, and infect, other community members.[41] 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 98 percent.[42] And only two thirds of New York's population has been fully vaccinated thus far.[43]

In sum, medical exemptions—but not religious exemptions—serve New York's interest in protecting the health of people who cannot safely be vaccinated, and religious exemptions pose a much greater threat to the state's efforts to prevent the 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.

But 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). Here, there

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[41] See May, 21 Vaccine at 1049–1050; Diekema, 35 Ann. Rev. Pub. Health at 276.

[42] See Trung Nguyen et al., *COVID-19 vaccine strategies for Aotearoa New Zealand: a mathematical modelling study*, Lancet (Aug. 19, 2021), https://bit.ly/2ZUQtn4; Hengcong Liu et al., *Herd immunity induced by COVID-19 vaccination programs to suppress epidemics caused by SARS-COV-2 wild type and variants in China*, medRxiv (July 23, 2021), bit.ly/3bFTr0G; Hilary Brueck, *Getting to herd immunity will require 90% of people to be vaccinated against COVID-19, experts say*, Bus. Insider (Aug. 27, 2021), https://bit.ly/3kstOFR.

[43] *Vaccination Progress to Date*, N.Y. State, https://on.ny.gov/3bKUVH4 (last updated Nov. 8, 2021).

is no question that the governmental interest served by New York's vaccination mandate—protecting people from the spread of a deadly disease in medical institutions—is compelling. See, *e.g.*, *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020). Moreover, allowing medical exemptions but not religious exemptions satisfies the narrow-tailoring requirement because religious exemptions "create[] a categorically different and more severe risk" (*Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 449 (2015)): Religious exemptions threaten the health of workers who cannot safely be vaccinated, whereas medical exemptions protect their health. And 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 safeguard the health of staff and patients at medical facilities.

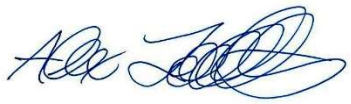
CONCLUSION

The right to exercise one's religion freely should never be misused to harm others. But that is exactly what a decision requiring the religious exemptions sought by applicants would do, putting their colleagues and the patients they serve at increased risk of death or suffering from the most dangerous pandemic the world has confronted in more than a century. And though this case concerns Covid-19 vaccines, a ruling that requires religious exemptions in this context could jeopardize other efforts to fight vaccine-preventable diseases—including diseases like measles that are particularly dangerous to children.[44] The Court should stay true to the original intent

[44] See Matt Wood, *Measles is still a very dangerous disease*, UChicago Medicine: The Forefront (Feb. 10, 2019), https://bit.ly/2Z3BXbx.

of the Free Exercise Clause and more than a century of precedent by denying the application.

Respectfully submitted.



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