24-681-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MILLER, et al.,
Plaintiffs-Appellants,

v.

JAMES V. MCDONALD, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of New York

BRIEF OF ALABAMA AND 19 OTHER STATES AS *AMICI* CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI* CURIAE

The States of Alabama, Arkansas, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, New Hampshire, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia respectfully submit this brief as *amici curiae* in support of Plaintiffs-Appellants.

Ten years ago, 48 States provided religious exemptions from school vaccination requirements. California eliminated its religious exemption in 2016. Connecticut, Maine, and New York soon followed. *Amici* States are concerned about a growing trend to curtail longstanding religious liberties protected by the First Amendment. It is precisely when democratic majorities do not share the religious views of a minority that the minority's rights most need protection. Such concerns are reflected in the history and tradition of the Free Exercise Clause, which the Supreme Court has understood to require religious exemptions in cases like this one. And a decision today allowing New York to disregard these freedoms could pave the way for the federal government to threaten the rights of citizens of *Amici* States.

Moreover, virtually all of *Amici* States offer some form of religious exemption to school vaccination requirements. Most exemptions are protected by statute, some by a state constitution, and others were judicially imposed. *Amici* States have significant interests in resisting acceptance of New York's view that refusal to accommodate religion is somehow necessary for public health. Nothing in the

experience of *Amici* States (or New York itself for sixty years) suggests that a State must violate fundamental religious freedoms in order to protect its citizens.

SUMMARY OF ARGUMENT

If Appellants do not violate their sincerely held religious objections to vaccines, New York will impose ruinous penalties, effectively shut down their schools, and interfere with the religious education and upbringing of their children. The burdens on their religious practice are enormous, and they represent exactly the kind of evil that the First Amendment is designed to thwart. New York's school vaccine requirements offend the Free Exercise Clause, but the district court here erroneously dismissed the claims under rational basis review.

This Court should apply strict scrutiny for two primary reasons. First, the law provides a mechanism for students to opt out—but only when immunization "may be detrimental to a child's health." N.Y. Pub. Health L. § 2164(8). This is the kind of "individualized exemption[]" that a State "may not refuse to extend" to religious objectors unless it satisfies strict scrutiny. *Emp. Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 874, 884 (1990). New York's stance that only some "reasons … are worthy of solicitude" is not neutral and generally applicable. *Id.* Second, a State may not "treat *any* comparable secular activity more favorably than religious exercise," *Tandon v. Newsom*, 593 U.S. 61, 62 (2021), but that is just what New York has done. The law "prohibits religious conduct while permitting secular conduct that

undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). A student who objects to vaccination on religious grounds poses no more risk to public health than a student who objects on medical grounds, yet New York subjects the two to different rules. Separately, by singling out schoolchildren despite its broad aims to vaccinate the entire population, New York's law is not neutral and generally applicable. For similar reasons, New York's law cannot survive strict scrutiny.

Amici States provide religious accommodations from school vaccine requirements. Many have done so for decades. Indeed, New York is one of very few States to eliminate religious exemptions altogether. The experience of *Amici* States suggests that it is possible to accommodate minority religious beliefs and practices without compromising public health or undermining the rule of law.

ARGUMENT

I. This Case Implicates Bedrock Free Exercise Principles.

Appellants are religious minorities who seek to vindicate their right not "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). In this case, the challenged law does not threaten them with criminal sanctions, but the price may be just as steep Not only are New York's penalties so "financially ruinous" that Appellants "are unable to pay the[m]," DE33 at 23, but the threat of ongoing liability for their schools also upends

the traditional "parental control over the religious upbringing and education of their minor children," *Yoder*, 406 U.S. at 231. New York thus seeks to inflict "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 218. Indeed, it is difficult to imagine a more compelling claim than the religious rights of Amish parents whose Amish children "attend private Amish-only schools in rural Amish communities removed from the modern world." Blue Br. 1. Their claim sits at the intersection of several important principles in Free Exercise jurisprudence that should guide this Court's analysis.

A. The history and tradition underlying the Free Exercise Clause reveal the founding generation's deep concern for the rights of religious minorities. "Indeed, it was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) (cleaned up).

Our Nation's early leaders were deeply familiar with the history of religious hostility in England, which had persisted in the Colonies. "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). Unfortunately, the "practices of the old world were transplanted to and began to thrive in the soil of the new America." *Id.* at 9. But eventually, "freedom-loving colonials … reached the conviction that individual

religious liberty could be achieved best" if government had no power "to interfere with the beliefs of any religious individual or group." *Id.* at 11.

"In assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities … had visited deviation in the matter of conscience." *McGowan v. Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J., separate op.). The "sword of justice which had been bloodied in aid of religious oppression in Europe was sheathed by the First Amendment." *Zummo v. Zummo*, 574 A.2d 1130, 1135 (Pa. 1990).

In developing modern doctrine, the Supreme Court has interpreted the "meaning and scope of the First Amendment … in the light of its history and the evils it was designed forever to suppress." *Everson*, 330 U.S. at 15-16; *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) ("[T]his Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." (cleaned up)). Today, "it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs" with which we disagree or even "that we find offensive." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 649 (2018) (Gorsuch, J., concurring). Indeed, it is precisely by protecting the most "*unpopular* religious beliefs that we

prove this country's commitment to serving as a refuge for religious freedom." *Id.*; *see also Yoder*, 406 U.S. at 218 & n.9, 223-24.

B. The history of the Nation's commitment to religious freedom is also intertwined with the right to religious education and the parental right to raise children with a religious upbringing. "Education was inseparable from religion" at the time of the Founding. Michael W. McConnell, *Multiculturalism, Majoritarianism and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. Chi. Legal F. 123, 134 (1991). "Until well into the nineteenth century, most schools … were connected with churches or religious orders, most teachers were clergy, and the curriculum was a mixture of classicism and Christianity." *Id.*; *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2173-74 (2003). At that time, "private schools, including denominational ones," received myriad forms of public financial support. *See Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 480 (2020).

Consistent with the founding generation's reverence and support for religious schooling, the Supreme Court continues to protect the religious rights and interests of religious educational institutions. *Id.* at 485-86; *see also, e.g.*, *Carson v. Makin*, 596 U.S. 767, 778-80 (2022); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Zelman v. Simmons-Harris*, 536 U.S. 639, 649-53 (2002).

The Supreme Court has also "recognized that parents' decisions about the education of their children … can constitute protected religious activity." *Espinoza*, 591 U.S. at 511 (Gorsuch, J., concurring). Indeed, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Yoder*, 406 U.S. at 205. Fundamental to that tradition is the parents' right "to guide the religious future and education of their children." *Id.* When "the interests of parenthood are combined with a free exercise claim"—as here—"the central values underlying the Religion Clauses in our constitutional scheme of government" demand heightened scrutiny. *Id.* at 233-34; *see also City of Boerne v. Flores*, 521 U.S. 507, 514 (1997); *Smith*, 494 U.S. at 881-82.

II. New York's School Vaccine Mandate Violates the Free Exercise Clause.

For over sixty years, New York embraced the religious rights of parents to decline certain vaccinations for their children on religious grounds. Today, New York compels parents to choose between their children's education or their religious upbringing. At the same time, thousands of children attend New York schools without the statutorily mandated immunizations. But their reasons are favored by the State while religious reasons are demeaned as "fake" and "garbage." Blue Br. 14-20.[1] On its face and in effect, New York's law selectively bans conduct based on its

[1] *See also* Pet. 10-14, *FF. v. New York*, No. 21-1003 (U.S. filed Jan. 10, 2022), *cert. denied*, 142 S. Ct. 2738 (May 23, 2022).

religious character. Such an enactment is anathema to the Free Exercise Clause and subject to strict scrutiny. The Court should find the refusal to grant religious exemptions unconstitutional and reverse.

A. New York's provision for individualized health exemptions requires this Court to apply strict scrutiny.

When a State creates a "system of individual exemptions, it may not refuse to extend that system" to religious objectors without satisfying strict scrutiny. *Smith*, 494 U.S. at 884. This rule predated *Smith*, was reaffirmed in *Smith*, and remains good law today. *See Fulton*, 593 U.S. at 533-34. Indeed, the "essential point" of *Smith* was that the drug laws at issue had "no medical exception for peyote." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 22 (2016). There was no secular analogue—nothing resembling an individual exemption to the drug laws—so the claim failed. But in cases where a State makes "exemptions from its policy for secular reasons," religion is entitled to "similar treatment." *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2612 (2020) (Kavanaugh, J., dissenting) (quoting *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359, 360 (3d Cir. 1999)).

The Supreme Court has applied the exemption rule in a variety of contexts. For example, in *Thomas v. Review Board of the Indiana Employment Security Division*, the State required applicants for unemployment benefits who had voluntarily left their jobs to show "good cause" for doing so. 450 U.S. 707, 717

(1981). The State did not consider religious reasons for leaving work to be "good cause." But because the "'good cause' standard created a mechanism for individualized exemptions," the State could not deny a religious exemption without "a compelling reason." *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality op.) (discussing *Thomas*).

In *Lukumi Babalu Aye*, a local ordinance incorporated Florida law penalizing "whoever unnecessarily kills any animal." 508 U.S. at 537 (alterations accepted). The law was not neutral because it exempted "necessary" killings while "deem[ing] unnecessary" any killing for religious reasons. *Id.* The Supreme Court relied upon the same rule from its unemployment cases. Because the law "require[d] an evaluation of the particular justification for the killing," the law made available "individualized exemptions," which must extend to religious conduct. *Id.* at 537-38.

More recently in *Fulton*, the Supreme Court held that a city's contract with a foster care agency was not generally applicable because it prohibited certain kinds of discrimination by the agency "unless an exception is granted." 593 U.S. at 535. Even though the city had never granted an exception, the "creation of a formal mechanism" for doing so "render[ed] [the] policy not generally applicable." *Id.* at 537. When the government "decide[s] which reasons for not complying with [its] policy are worthy of solicitude," its law faces heightened scrutiny. *Id.* (quoting *Smith*, 494 U.S. at 884).

1. New York's catch-all "health" exemption is the same kind of mechanism for individualized exemptions that warrants heightened scrutiny. New York has "established a mandatory 'program of immunization … to raise to the highest reasonable level the immunity of the children of the state against communicable diseases.'" *Kerri W.S. v. Zucker*, 202 A.D.3d 143, 146 (4th Dep't 2021) (quoting N.Y. Pub. Health L. § 613(1)(a)). But the program exempts a child when "such immunization may be detrimental to [the] child's health." N.Y. Pub. Health L. § 2164(8) ("PHL § 2164"). Like those laws the Supreme Court has found to be not generally applicable, New York's statute is a general mandate with individual exemptions. As such, its burdens on religious practice "must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

The district court did not faithfully apply the doctrine. DE33 at 24-27. On its view, a law does not fail to be generally applicable if any exemptions are "phrased in mandatory terms and appl[y] to an objectively defined group of people." *Id.* at 25. For starters, those criteria are not grounded in Supreme Court precedent, and they are plainly under-protective. A State could not, for example, grant exemptions to practitioners of a single religion so long as it does so in a "mandatory" and "objective" way. "If anything," the constitutional problems are *greater* "when the government does not merely create a mechanism for individualized exemptions," but a "categorical exemption" too. *See Fraternal Order of Police*, 170 F.3d at 365;

Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 197 (2d Cir. 2014) ("While all laws are selective to some extent, categories of selection are of paramount concern…." (cleaned up)).

Again, *Lukumi* is instructive. The challenged ordinance did not escape strict scrutiny even though its exclusions were objectively defined. On "a *per se* basis," the city exempted categories like the "slaughter of animals for food" and the "eradication of insects and pests." 508 U.S. at 537. It was not their nature but the mere *existence* of these secular exceptions that "devalue[d] religious reasons" for similar conduct. *Id.*; *see also Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 2024 WL 2012317, at *19 (10th Cir. May 7, 2024); *Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting).

According to the court below, "an objectively defined" exception affords the State "no meaningful discretion," so its law cannot be "an individualized exemption triggering strict scrutiny." DE33 at 25. This too was doctrinal error. While the State's exercise of discretion may be *sufficient* to "render the law not generally applicable," *id.*, there are many other ways to flunk *Smith*'s test. *See, e.g.*, *Tandon*, 595 U.S. at 64 (applying strict scrutiny to a law with "myriad exceptions and accommodations" without reference to discretion); *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., concurring); *Lukumi*, 508 U.S. at 537-38; *Fraternal Order of Police*, 170 F.3d at

365.[2] Under binding precedent, New York's system of exemptions is subject to strict scrutiny regardless of how it allocates discretion to enforce it.

2. Even by its own lights, the district court reached the wrong conclusion: New York's PHL § 2164 does not exempt "an objectively defined category of people," and it does not eliminate official discretion. DE33 at 25. Instead, the law's operative phrase delegates significant discretion to regulators, physicians, and school officials. Plus, the State retains discretion over any individual exemption through a mechanism for administrative or judicial review.

The group of exempted children is undefined because the law is "silent with regard to the parameters of what 'may be detrimental to a child's health.'" *Kerri W.S.*, 202 A.D.2d at 159 (alterations accepted). On its face, the law fails to delimit the detriments to health that qualify, making it just as subjective as the "good cause" standards examined in the Supreme Court's unemployment cases. In *Thomas*, the State insisted that it had adopted a "[n]eutral" and "objective" requirement. 450 U.S. at 717. Under that State's reading of its law, "every personal subjective reason for leaving a job [was] a basis for disqualification." *Id.* at 723 n.1 (Rehnquist, J.,

[2] To the extent that circuit precedent has used language like that of the court below, the Court did not purport to establish *an exhaustive test* for when a law contains "a mechanism for individualized exemptions." *Cf. We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 289 (2d Cir. 2021). If this Court held there that a law exempting "an objectively defined category of people" is generally applicable, *id.*, it should not extend that reasoning here.

dissenting). The Court nonetheless found criteria such as "good cause" and "no fault" to be "individualized," not generally applicable. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 n.7 (1987); *accord City of Boerne v. Flores*, 521 U.S. 507, 514 (1997); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 830 (1989). This Court should reach the same conclusion.

Additionally, the law exempts a child whenever there *may be* a health risk. As this Court has explained, an exemption is less "certain" if it turns on whether "immunization simply 'may be' inapposite." *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 150 n.19 (2d Cir. 2023) (quoting *Does 1-3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting)). Thus, New York "will respect even mere *trepidation* over vaccination as sufficient, but only so long as it is phrased in medical and not religious terms." *Does 1-3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting). That "double standard" demands "a more searching (strict scrutiny) review." *Id.*

Perhaps the best evidence of the text's vagueness is the fact that the New York Department of Health had to adopt a regulation defining it. *See* 10 N.Y. Comp. Codes R. & Regs. § 66-1.1(l). Subsequent litigation over the agency's definition has confirmed the text's inherent imprecision. In a challenge to Section 66-1.1(l), a New York appellate court decided that because the text was "silent," the agency could engage in "interstitial rule making." *Kerri W.S.*, 202 A.D.2d at 159-61. The sole constraint on the agency's interpretive power is that its definition work to "decrease

the number of unvaccinated children." *Id.* at 159. Of course, the text is so broad that almost *any* definition would narrow the scope of exemption. The agency's free rein suggests that the statute did not "objectively define" the children to whom it applies.

Even after the regulation, the law's meaning is left to the judgments of individual physicians in individual cases. The agency's instruction to apply some "nationally recognized evidence-based standard of care" is hardly informative. 10 N.Y. Comp. Codes R. & Regs. § 66-1.1(l). Standards of care may vary widely in what they deem health risks. Changes to standards may expand or shrink the number of qualifying children. Even if physicians apply the same standards, their opinions may differ, and "certain conditions are commonly misperceived as contraindications."[3] The regulations themselves offer conflicting guidance—in one place, New York tells physicians "to identify a medical contraindication," *id.* § 66-1.3(c), and in another, a "contraindication *or precaution*," *id.* § 66-1.1(l) (emphasis added), which is a completely different type of condition, *see Goe v. Zucker*, 43 F.4th 19, 26 (2d Cir. 2022). The law is so subjective that New York City felt the need to list ten non-qualifying conditions in its instructions *for physicians*.[4]

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[3] U.S. Ctrs. for Disease Control & Prevention, *Contraindications and Precautions* (Aug. 1, 2023), www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html.

[4] N.Y.C. Dep't of Ed. & N.Y.C. Health, *Medical Request for Immunization Exemption*, www.schools.nyc.gov/docs/default-source/default-document-library/medical-request-for-immunization-exemption-english.pdf.

All told, the scope of New York's health exemption remains indeterminate, which may explain why some schools grant 17% of health exemptions while others grant 50%. *See* Blue Br. 20; *see also Lukumi*, 508 U.S. at 535 (considering "the effect of a law in its real operation"). And the district court's contrary reasoning amounts to an *ipse dixit* in a footnote. *See* DE33 at 25 n.6. The statute may be "mandatory," but it is far from "clear." *Contra id.* at 26.

The district court was also wrong to conclude that PHL § 2164 "affords no meaningful discretion to the State." *Id.* As discussed, "the definition of the term 'may be detrimental to a child's health' was left to [agency] discretion." *Kerri W.S.*, 202 A.D.3d at 160 (alterations accepted). While the health department undertook the task of promulgating a (loose) definition, it may change its view at any time. The agency also may interpret the law through case-by-case enforcement against individuals, schools, or physicians. Here, the agency and its administrative law judge initially disagreed about whether penalties should be imposed. *See* DE33 at 8-9. Another case may come out differently.

The law further "delegates" the authority to grant exemptions to school officials, who have "broad" and "long-standing discretion." *Goe*, 43 F.4th at 33-34. The law does not help them in the exercise of their discretion. Particularly obscure is the provision that a "person in charge … may require additional information supporting the exemption." 10 N.Y. Comp. Codes R. & Regs. § 66-1.3(c). The

regulation does not specify what kind of information may be required, nor how it should affect the decision whether to grant an exemption. Because a school's decisions are subject to agency or judicial review, *Goe*, 43 F.4th at 34, New York ultimately "retains discretion," and its "policy is not generally applicable," *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021).

The law is no less individualized because it tasks schools (including private ones) with the initial decision. The district court flatly denied that school officials "approve or deny exemptions on a case-by-case basis," DE33 at 27, but that's exactly what they do, *Goe*, 43 F.4th at 33-34. Officials must review exemption forms and try their best to apply the law—*i.e.*, decide when vaccination may be detrimental. True, school officials are not completely "free," DE33 at 26, but neither were officials in the unemployment cases who had to identify "good cause" and the like. This discretion would also help explain the stark divergence in exemption rates.

* * *

New York's PHL § 2164 is not neutral and generally applicable because it contains a mechanism for individualized exemptions. Even if the district court were right that mandatory phrasing, objective categories, or official discretion are prerequisites to strict scrutiny, those factors are met here.

B. New York's more favorable treatment for comparable secular activity requires this Court to apply strict scrutiny.

In *Tandon v. Newsom*, the Supreme Court reiterated that a law is not neutrally and generally applicable if it "treat[s] *any* comparable secular activity more favorably than religious exercise." 593 U.S. at 62 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)). The Court must consider whether a challenged law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. If it does, the law's "underinclusiveness" means it must be subjected to strict scrutiny. *Id. Accord Cent. Rabbinical Cong.*, 763 F.3d at 197 (examining whether unregulated secular conduct "is at least as harmful" as regulated religious conduct).

New York's PHL § 2164 is underinclusive because it (1) grants secular exemptions while denying religious exemptions and (2) requires vaccination only for children and only in the school setting.

1. New York denies any exemption for religious reasons but grants the same exemption for secular reasons. The type of conduct prohibited and exempted is exactly the same—school attendance without certain vaccinations. Whether the conduct is undertaken for religious reasons or secular reasons, it affects New York's interests in precisely the same way. The government must treat the same risks the same way or show that its burdens on religious exercise satisfy strict scrutiny.

The court below rejected this straightforward application of precedent, reasoning that

> the general applicability analysis does not turn on whether the secular activity identified by Plaintiffs is comparable in terms of risk to allowing *only them* to be exempt from PHL § 2164 for religious reasons. It turns on whether it is comparable in terms of risk to allowing a religious exemption *for all who would potentially claim it*.

DE33 at 30 (emphasis added). In other words, the district court seemed to compare the aggregate risk of *all* religious exemptions against the risk of *all* medical exemptions. But in the following paragraphs, the analysis amounted to a recitation of New York's generic interests and a citation to *We the Patriots*, 76 F.4th at 152-53. *See* DE33 at 30-32. The district never actually compared the aggregate risks. Nor could it—on motion to dismiss—where the parties plausibly dispute the facts.

The Supreme Court's Free Exercise jurisprudence does not support the aggregated approach. For example, in *Roman Catholic Diocese*, the Court considered whether certain regulations treated "houses of worship [] more harshly than comparable secular facilities." 592 U.S. at 16. Its analysis proceeded to compare the disease-related risks of attending "a worship service" versus shopping in "a large store." *Id.* at 17. Because the law permitted "hundreds of people" to shop while restricting "more than 10 or 25 people" in a church, the law was not neutral and generally applicable. *Id.* at 17-18. The Court did not go on to compare the total number of churches to the total number of stores or the total number of churchgoers

to the total number of shoppers. *Accord Tandon*, 593 U.S. at 63; *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting); *Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (comparing groups without regard to their size). This more granular approach makes sense; a State has no more license to discriminate against a popular religion than a less popular one.

Here, New York's interests in its school vaccination requirement are set forth by statute. Its goal is "to raise to the highest reasonable level the immunity of the children of the state against communicable diseases." N.Y. Pub. Health L. § 613(1)(a). And the district court found that the state legislature chose to abolish the religious exemption to protect more effectively against vaccine-preventable illnesses. DE33 at 20; *see also* DE33 at 27 n.8; Blue Br. 33-34. As New York averred in this case, "it aims to protect the health of the public in general against disease outbreaks … [by] ensur[ing] that, the vast majority of children … are vaccinated." *Id.* at 30.[5]

However described, New York's primary interest in increasing vaccination rates militates equally against all exemptions—regardless of their motivation. New York "does not suggest a [student] who is unvaccinated for medical reasons is less

[5] In a challenge to a different mandate, this Court described New York's interest in eschewing exemptions as "an intent to more fully ensure that employees at healthcare facilities receive the vaccine." *Hochul*, 17 F.4th at 283.

likely to spread or contract [a] virus than someone who is unvaccinated for religious reasons." *See Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting).

The only real ground the district court offered for distinguishing religious from secular exemptions was this: "[T]he medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict on them." DE33 at 32 (quoting *We the Patriots*, 76 F.4th at 153). Although the district court did not elaborate, its rationale may be premised upon New York's more generic interest—as asserted in litigation—in "protect[ing] the health of children … in the school environment." *Id.* at 30. Presumably, offering a health exemption premised on a medical contraindication would indeed protect the health of children.

But New York's argument answers the wrong question. The Court must ask whether the State "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. The way in which the government says that religious objections undermine its interests is by reducing immunity against communicable diseases. The potential complications of taking a vaccine has nothing to do with the prohibition on religious conduct. *See Tandon*, 593 U.S. at 62 ("Comparability is concerned with the risks various activities pose, not the reasons" for them."). Such complications may be

reasons uniquely "worthy of solicitude," but the government may not so decide without subjecting its reasoning to strict scrutiny. *Fulton*, 593 U.S. at 537.

Under *Fulton* and *Tandon*, the critical fact is that children "medically exempted from the mandate … pose[] identical risks to the public as children seeking a religious exemption." *See M.A. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 41 (2d Cir. 2022) (Park, J., concurring). If New York must take other steps to combat the risks of unvaccinated students with religious objections, it can do so the same way it combats the risks of unvaccinated students with health objections. The State must "explain why it could not safely permit" religious conduct "using precautions used in secular activities." *Tandon*, 593 U.S. at 64.

2. The law is also substantially underinclusive because it applies only to children in the school setting. New York's mandate is highly selective despite its stated goal "to raise to the highest reasonable level" the immunity of children and adults in the State. *See* N.Y. Pub. Health L. § 613(1)(a). Consequently, there are a variety of comparable secular activities that undermine the State's interests in the same way as a religious exemption. The district court whistled past the graveyard with a citation to *We the Patriots*. *See* DE33 at 32. But in that case, the Court focused on Connecticut's medical exemption and did not squarely address and resolve other potential underinclusiveness problems. *Cf.* 76 F.4th at 162 (Bianco, J., concurring in part and dissenting in part).

The most glaring problem with the scope of the mandate is that it does not reach unvaccinated adults, the subset of those who work with children, or the subset of those who work in schools. If New York has a special interest in preventing the spread of disease *in the school environment*, then presumably it would impose the same vaccination requirements for everyone in the school environment. New York's stated interest in providing health exemptions is tied to risks "in the school environment," yet it does not legislate to eliminate other obvious risks of the same kind. DE33 at 30. And if New York has a special interest in preventing the spread of disease *among children*, then one would expect it to mandate vaccination in other places where children congregate. "One need not be a public health expert to recognize that the likelihood" of contracting a virus in other public places or from an adult at school "may well meet or exceed" the risks of contracting a virus from a student with a religious exemption. *Dahl*, 15 F.4th at 735.

The district court offered no neutral explanation for the State's decision to regulate religious conduct but not these comparable (or greater) risks to its interests. Under *Tandon*, if "*any*" one of these secular activities is treated more favorably than religious exercise in light of the governmental interest, the law is subject to strict scrutiny. *See also Fulton*, 593 U.S. at 534. New York ultimately may be able to show that the mandate's restriction to children in school is well founded. But it was not

required to do so in the court below because the Court erroneously applied rational basis review.

C. New York's mandate fails strict scrutiny.

If the Court applies strict scrutiny, it should rule that PHL § 2164 is not "narrowly tailored to serve a compelling state interest." *Roman Catholic Diocese*, 592 U.S. at 18. New York's primary interest is the generic desire to increase vaccination rates, which would justify rejecting *any* exemption, not only religiously motivated objections. *See Espinoza*, 591 U.S. at 486. Instead, "it must do more than assert that certain risk factors are always present [with vaccine exemptions], or always absent from the other secular activities the government may allow." *Tandon*, 593 U.S. at 63. New York has not shown that its individualized system for health exemptions and its categorical ban on religious exemptions is narrowly tailored for every one of the mandated vaccines and for every public and private school in the State. It certainly has not shown that comparable secular "activities pose a lesser risk of transmission than [*Appellants*'] proposed religious exercise." *Id.* New York's public-health interest thus "cannot justify a [] provision that requires only religious [objectors] to 'bear [its] weight.'" *Espinoza*, 591 U.S. at 486 (quoting *Lukumi*, 508 U.S. at 547).

Furthermore, where New York does not mandate vaccines for adults in school settings, its child mandate is "fatally underinclusive because its 'proffered objectives

are not pursued with respect to analogous nonreligious conduct.'" *Id.* (quoting *Lukumi*, 508 U.S. at 546). New York also has not shown the absence of "other less restrictive rules that could be adopted to minimize the risk." *Roman Catholic Diocese*, 592 U.S. at 18.

The Supreme Court summarily granted relief in *Tandon* based on a similar mismatch between the purported government interests and the overly restrictive means it used to promote them. This is not the "rare case[]" in which religious discrimination could survive strict scrutiny. *Lukumi*, 508 U.S. at 546.

III. States Can Protect Public Health While Respecting Religious Rights.

By deciding to repeal the religious exemption, New York made itself an "extreme outlier" among the States. *See Rockland*, 53 F.4th at 41 (Park, J., concurring). As Appellants observe, 45 States respect the religious freedom to decline school vaccination requirements. *See* Blue Br. 13 n.4 (collecting state laws).[6] In Alabama, for example, a parent can simply object in writing that an otherwise required immunization "conflicts with his religious tenets and practices." Ala. Code § 16-30-3(1). The vast majority of States have not found it necessary to discriminate

[6] Some States go even further and accommodate moral or philosophical beliefs as well. *See, e.g.*, 28 Pa. Code § 23.84 (granting exemptions "on the basis of a strong moral or ethical conviction"); *see also* Nat'l Conf. State Legs., *States With Religious and Philosophical Exemptions From School Immunization Requirements* (Updated Aug. 3, 2023), www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements (citing 15 States with "philosophical exemptions").

against religion in order to protect the health of schoolchildren and the broader public. Nor did New York for over sixty years.

In light of the national consensus, the Court should take with a grain of salt any grand representations about threats to public health. Respectfully, it should do so anyway in the context of individual religious freedoms. After all, "measuring a highly particularized and individual interest in the exercise of a civil right directly against … rarified values" like "public health and safety" "inevitably makes the individual interest appear less significant." *Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting) (cleaned up). To Appellants, the stakes could not be more significant: New York demands that they violate their religious beliefs or stop operating Amish-only schools in Amish-only communities. The refusal to accommodate them "borders on irrational." *Id.* at 22.

Many citizens of *Amici* States have beliefs and practices that are not shared by a majority of the population. Some may prefer to live "separated from the outside world and 'worldly' influences." *Yoder*, 406 U.S. at 217. *Amici* States have endeavored to protect their rights under the Free Exercise Clause, and many *Amici* States have also enacted state analogues to the Religious Freedom Restoration Act (RFRA). Under their state laws, dozens of States offer even stronger protections than the First Amendment without suffering public health emergencies. *See, e.g.*, Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego

L. Rev. 163, 175-77 (2016). These "state RFRAs" have been extremely "valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations." *Id.* at 165. In many cases, the courts decide that religious rights must be "zealously protected, … even at the expense of other interests of admittedly high social importance." *Yoder,* 406 U.S. at 214.

The experience of *Amici* States has not borne out the fear that accommodating religion might "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879. *Amici* States have not been flooded with frivolous or insincere claims as a result of accommodating religious objections. *Contra* DE33 at 19-20 (citing worries of the New York legislature); Blue Br. 14-20 (similar). *Amici* States frequently litigate against religion claims too, including in prisoner cases where the stakes are high and the "propensity" for insincerity is "well documented." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718 (2014). Enduring state and federal legislation protecting religious liberties reflect the continuing view that courts are "up to the job" of policing abuses of religious accommodations. *Id.*

While there are many reasons to be optimistic about the future of religious protections under state and federal law, courts still must guard vigilantly against encroachments. New York is not the only State to rescind a religious accommodation, nor are its legislators the only government officials to exhibit open hostility to religion. *Amici* States are concerned that if governments succeed in cases

like this one, they will be emboldened to remove other accommodations. Already, New York's Public Health and Health Planning Council declined to provide religious exemptions from one mandate on the ground that the State's prior mandate was "highly effective" without them. *Hochul*, 17 F.4th at 282. If the Court deems it neutral every time New York rescinds longstanding religious exemptions, the result will be an enormous erosion of fundamental freedoms—and countless more tragic cases like this one.

CONCLUSION

The Court should reverse.

May 20, 2024

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CERTIFICATE OF SERVICE

I certify that on May 20, 2024, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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