No. 21-1003

IN THE

Supreme Court of the United States

F.F., as Parent of Y.F., et al.,
Petitioners,

v.

State of NEW YORK,
KATHY HOCHUL, Governor of New York, and
LETITIA JAMES, Attorney General of New York,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

New York law generally requires that children must be vaccinated against certain serious diseases, including measles, in order to enroll in or attend school. In 2018, New York became the epicenter of the Nation's worst measles outbreak in a quarter-century. The State legislature responded by amending the law to repeal the only non-medical-related exemption to the school vaccination requirement—an exemption for those children whose parents or guardians object to vaccination on religious grounds. Medical and public health organizations uniformly supported the amendment, and the legislature marshalled data and scientific evidence demonstrating that the amendment would increase vaccination rates and prevent future outbreaks. The questions presented are:

1. Whether petitioners failed plausibly to allege that New York's repeal of the non-medical exemption to its mandatory school vaccination law was motivated by religious bias and thus constitutes a non-neutral law that triggers strict scrutiny under the Free Exercise Clause.

2. Whether petitioners' challenges based on alleged under- and overinclusiveness and secular exemptions are not properly before the Court because they were neither presented to, nor decided by, the state courts below.

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INTRODUCTION

New York law has long required schoolchildren to be vaccinated against several serious diseases, including measles. In 2018, the State became the epicenter of the Nation's worst measles outbreak in a quarter-century, with the virus spreading primarily among children in places with low vaccination rates. New York's legislature responded by eliminating the only non-medical-related exemption to the school vaccination requirement, an exemption for children whose parents or guardians had religious objections to vaccination.

Petitioners are parents of schoolchildren who allegedly qualified or would have qualified for this religious exemption. They brought this putative class action in state court, alleging that New York's school vaccination law, as amended, violated their rights under the Free Exercise Clause. The state trial court dismissed the claim, holding that the law was neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and, thus, subject to rational basis review, which it easily satisfied. The intermediate appellate court (Appellate Division) unanimously affirmed that decision, and New York's court of last resort declined to review the matter.

Petitioners do not contend that the Appellate Division's decision implicates any split in authority. Nor do they contend that their claim can survive if the school vaccination law is neutral and generally applicable under *Smith*. Rather, they assert that intervention is warranted because the Appellate Division misapplied this Court's precedent in holding that the law is neutral and generally applicable.

Preliminarily, this case does not merit this Court's review because such review is unlikely to be outcome determinative. The state trial court held that if the law were not neutral or generally applicable and therefore subject to strict scrutiny, the law would satisfy such scrutiny. And petitioners failed to preserve a challenge to that ruling on appeal in state court.

In any event, none of petitioners' fundamentally case-specific contentions regarding the law's purported lack of neutrality or general applicability warrants review. Although petitioners argue that the Appellate Division erred in rejecting their claim that the repeal of the religious exemption was the product of religious hostility, that argument presents nothing more than a challenge to the Appellate Division's application of settled law to the particular facts of this case. The Appellate Division also did not misapply that law. The events leading to the amendment at issue and the amendment's legislative history firmly demonstrate that the legislature was motivated by a singular purpose: to protect the public health by increasing vaccination rates.

Nor is certiorari warranted to review petitioners' remaining contentions, none of which were adequately developed below. To the extent petitioners now contend that the school vaccination law is not neutral, even if not the product of religious hostility, that contention was neither pressed nor passed upon below and lacks merit in any event. Petitioners also failed to assert that the law is not generally applicable when seeking review in New York's court of last resort and failed to make that assertion in a non-conclusory manner in the State's lower courts, which accordingly did not address it. Regardless, petitioners cite no facts—alleged or established—to support the assertion.

STATEMENT

A. Factual Background

1. In 1860, New York became the second State, following close behind Massachusetts, to enact vaccination requirements for schoolchildren. Ch. 438, § 1, 1860 N.Y. Laws 761, 761.[1] That law "directed and empowered" local school boards to refuse to admit any child who was not vaccinated against smallpox. *Id.* Over time, more States adopted mandatory school vaccination laws, which, by 1981, were universal throughout the United States.[2]

Today, New York's school vaccination law, like that of every other State, mandates vaccinations against several contagious diseases, including measles, polio, varicella (chicken pox), and pertussis (whooping cough).[3] New York's law provides that any child who is not immune to any of the enumerated diseases based on past exposure must be vaccinated against that disease to enter or attend any public or non-public childcare center, nursery school, or elementary, intermediate, or secondary school. N.Y. Public Health Law (P.H.L.) § 2164(1), (7); N.Y. Comp. Codes R. & Regs. tit. 10 (10 N.Y.C.R.R.), §§ 66-1.1(f)-(g), 66-1.3(a).

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[1] See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002).

[2] James Colgrove, *State of Immunity: The Politics of Vaccination in Twentieth-Century America* 177 (2006).

[3] U.S. Centers for Disease Control and Prevention, Center for State, Tribal, Local, and Territorial Support, *State School Immunization Requirements and Vaccine Exemption Laws* 8 (Feb. 2022) (internet). (For sources available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on April 15, 2022.)

The law contains only a single, narrow exception to its vaccination requirements: a medical exemption that is limited in duration and scope. P.H.L. § 2164(8); 10 N.Y.C.R.R. § 66-1.3(c). As to scope, the exemption applies only to the specific immunization that is medically contraindicated, 10 N.Y.C.R.R. § 66-1.3(c), and only when consistent with a "nationally recognized evidence-based standard of care," such as the guidance issued by the Centers for Disease Control and Prevention's Advisory Committee on Immunization Practices, *id* § 66-1.1(*l*).[4] As to duration, the exemption applies only until the "immunization is found no longer to be detrimental to the child's health," P.H.L. § 2164(8), and that duration must be specified in the child's medical records, 10 N.Y.C.R.R. § 66-1.3(c).

Starting in 1966, New York included a non-medical, religious exemption, Ch. 994, § 2, 1966 N.Y. Laws 3331, 3333, which, as later clarified, exempted children whose parents or guardians objected to vaccination on religious grounds, Ch. 538, § 3, 1989 N.Y. Laws 2785, 2787 (codified at P.H.L. former § 2164(9)). In early 2019, a bill was introduced in both houses of the legislature to amend the school vaccination law by repealing its only non-medical exemption. *See* N.Y. Senate Bill S2994A, 242d Sess. (2019); N.Y. Assembly Bill A2371A, 242d Sess. (2019). In June 2019, the legislature enacted that

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[4] Although § 66-1.1(*l*) has been subject to state law and federal constitutional challenges, none has succeeded to date. *See Doe v. Zucker*, 141 S. Ct. 1512 (2021) (denying injunction pending appeal in federal constitutional challenge); *Doe v. Zucker*, 520 F. Supp. 3d 217 (N.D.N.Y. 2021) (dismissing complaint in federal constitutional challenge), *appeal docketed*, No. 21-537 (2d Cir. 2021); *Kerri W.S. v. Zucker*, 202 A.D.3d 143 (4th Dep't 2021) (rejecting state law challenge), *mot. for lv. filed*, Mot. No. 2022-162 (N.Y. 2022).

bill into law. Ch. 35, §§ 1-4, 2019 McKinney's Sess. Laws of N.Y. 153, 153-54.

2. The repeal bill was prompted by the Nation's worst measles outbreak in a quarter-century. As the legislature was aware, New York was the epicenter of the outbreak, with the virus primarily spreading in areas "with precipitously low immunization rates." N.Y. Senate Introducer's Memorandum in Support of Bill S2994A, 242d Sess. (May 21, 2019) ("Senate Mem.") (internet).[5] The outbreak was so severe that the Nation was at risk of losing its status as a country that had eradicated measles. *See id.*; N.Y. Senate, Tr. of Floor Proceedings, 242d Sess., at 5387 (June 13, 2019) ("Senate Tr.") (internet).

In considering the bill, the legislature marshalled extensive data and scientific evidence. That data showed that, over the last several years, the rate of religious exemptions had increased statewide by 65 percent. *See* Senate Tr. at 5388-89. At least five times as many children had religious exemptions as had medical ones. *See* N.Y. Assembly, Tr. of Floor Proceedings, 242d Sess., at 70-71 (June 13, 2019) ("Assembly Tr.") (internet). Religious exemptions also tended to cluster geographically. Some schools had granted religious exemptions to over 20 percent of their students. *See id.* at 58-59; Senate Tr. at 5384-85, 5389, 5399. Indeed, in the jurisdictions hardest hit by the measles outbreak, the vast majority of those infected were unvaccinated

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[5] Petitioners have never disputed that judicial notice can be taken of the repeal's legislative history, including the accompanying legislative memoranda and floor debate in the New York State Assembly and Senate. *See Territory of Alaska v. American Can Co.*, 358 U.S. 224, 226-27 (1959); *State v. Green*, 96 N.Y.2d 403, 408, n.2 (2001).

children. *See* Assembly Tr. at 58-59, 106; N.Y. State Bar Ass'n, Memorandum in Support of S2994A/A2371, at 2-3 (May 20, 2019) ("NYSBA Mem.") (internet) (cited in 2019 *New York State Legislative Annual* 40, n.38). One local health department reported that one child with a religious exemption who had contracted measles had caused 44 new cases, 26 of which were schoolchildren with religious exemptions. Senate Tr. at 5385. Thus, as the legislative record made clear, the repeal bill would increase vaccination rates and thereby "protect the health of all New Yorkers, particularly our children." Senate Mem., *supra*; *see also* N.Y. Assembly Sponsor's Memorandum in Support of Bill A2371A ("Assembly Mem."), *in* Bill Jacket to N.Y. Sess. Laws 2019, Ch. 35, at 4a (2019) (emphasizing importance of "high vaccination rate" among schoolchildren to prevent outbreaks) (internet).

Medical and public health organizations, including the American Medical Association and the American Academy of Pediatrics, uniformly supported the bill as an important public health measure. *See* Senate Tr. at 5445-46; Assembly Tr. at 64-65, 101. So too did numerous educational organizations, including the New York State PTA and the New York State School Boards Association. *See* Senate Tr. at 5435.

The legislature modeled the bill after legislation that other States had adopted in response to the outbreaks of vaccine-preventable disease. California had removed the non-medical exemptions from its school vaccination law after a 2014 measles outbreak. *See* Senate Mem., *supra*. Thereafter, its vaccination rates "improved demonstrably, particularly in schools with the lowest rates of compliance." *Id.*; *see also* Senate Tr. at 5385 ("California showed us the way"); Assembly Tr. at 47 ("The vaccination rate in California, once they

eliminated nonmedical exemptions, went from 90 percent, approximately, to 95 percent"). Maine had likewise repealed its school vaccination law's non-medical exemption in response to an outbreak of pertussis, another vaccine-preventable disease. *See* Senate Tr. at 5404.

When considering the bill, the State made clear its respect for religious practices while also finding that public health concerns necessitated the measure. One legislative memorandum accompanying the bill noted that "freedom of religious expression is a founding tenet of this nation" while also observing that, under "long-standing" legal precedent, the legislature could pass laws to protect the public health, including through compulsory vaccination. *See* Senate Mem., *supra* (citing, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944)). The Governor of New York stated upon signing the bill: "While I understand and respect freedom of religion, our first job is to protect the public health and by signing this measure into law, we will help prevent further transmissions." Pet.App. 34a.

Similar sentiments animated the floor debate over the repeal bill. One senator quoted a letter from the New York State Council of School Superintendents submitted in support of the bill that she said "get[s] the tone right":

> We do not take this stance with ease or with any lack of respect for individuals with a sincerely held religious belief against vaccinations. Nor have we arrived at this conclusion lightly or without debate. However, school districts are now struggling to deal with an illness that was effectively eliminated from

> the country two decades ago. This is unacceptable.

Senate Tr. at 5436; *see also, e.g.*, *id.* at 5448-49. Other legislators who supported the bill likewise admitted that it was "a difficult vote." Assembly Tr. at 61; *see also id.* at 112 ("This has not been an easy task."); *id.* at 118 ("I've been torn, and I think many of us are torn."). Still other legislators applauded the respect the legislature had shown to religious practices when considering the bill. *See* Senate Tr. at 5432, 5451-53. One senator who *opposed* the bill nonetheless acknowledged, "I do appreciate the debate and the respectfulness with which this issue was approached." *Id.* at 5451. He continued: "I'm proud of this body. We balanced everybody's interest." *Id.* at 5452.

B. State Court Proceedings

1. Petitioners are parents of schoolchildren who allegedly qualified or would have qualified for the religious exemption to New York's school vaccination law. Pet.App. 20a. They filed this putative class action in state court on behalf of similarly situated parents and guardians, claiming that the school vaccination law, as amended, violates their rights under the Free Exercise Clause of the U.S. Constitution's First Amendment. Pet.App. 22a-26a. In support, petitioners cited the remarks of a handful of legislators that allegedly evidenced that the repeal was motivated by religious hostility. Pet.App. 23a. Petitioners also asserted other constitutional claims, none of which they pursue here, including the claim that the repeal violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. Pet.App. 43a-48a; *see* Pet. 15.

Petitioners unsuccessfully sought interim injunctive relief in the state trial court and intermediate appellate court (Appellate Division). Pet.App. 24a. The state trial court then granted respondents' motion to dismiss the complaint for failure to state a claim. Pet. App. 18a-50a. As that court held, "the overall history and context of New York's vaccination law, the series of events leading up to the repeal of the religious exemption, and the legislative history of the repeal, all lead to the inexorable conclusion that the repeal was driven by public health concerns, not religious animus." Pet.App. 31a; *see also* Pet.App. 32a-40a. The court further held that petitioners' free-exercise claim would fail even if strict scrutiny applied. Pet.App. 41a-43a. It explained that the state "unquestionably" had a compelling interest in "[p]rotecting public health, and children's health in particular, through attainment of threshold inoculation levels for community immunity from vaccine-preventable, highly contagious diseases that pose the risk of health consequences" and that the school vaccination law, as amended, was the least restrictive means to further that interest effectively. Pet.App. 42a-43a.

2. The Appellate Division unanimously affirmed. Pet.App. 2a-17a. Quoting this Court's precedent, the court observed that the Free Exercise Clause "bars even subtle departures from neutrality on matters of religion." Pet.App. 6a-7a (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018)). Thus, the court explained, even a "suggestion of animosity toward religion" suffices to state a free-exercise claim. Pet.App. 10a. The court further recognized that, under this Court's precedent, factors relevant to assessing governmental neutrality include the series of events leading to the enactment and any legislative history, such as "contemporaneous state-

ments made by members of the decisionmaking body." Pet.App. 7a (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1731).

Examining those factors here, the Appellate Division held that petitioners failed plausibly to allege that the legislature was motivated by religious hostility when, in the wake of the measles outbreak, it repealed the school vaccination law's only non-medical exemption. The court reasoned that the legislative history, including the "spirited floor debate," established that that the legislature "was motivated by a prescient public health concern"—namely, insufficient vaccination rates that enabled the outbreak of a vaccine-preventable illness. Pet.App. 7a-10a. The court noted that organizations with "expertise in medicine and public health" supported the measure as a "sound, evidence-based decision in the interest of public health." Pet.App. 7a-9a.

The Appellate Division held that the remarks of "only five of the over 200 legislators in office" did not, "under these circumstances, taint the actions of the whole." Pet.App. 10a. The court noted that many of the statements did not necessarily evince religious hostility but instead expressed concern that "there were individuals who abused the religious exemption to evade the vaccination requirement based upon non-religious beliefs." Pet.App. 10a. While the court recognized that petitioners had identified "certain insensitive comments that could be construed as demonstrating religious animus," it reasoned that "by and large, these comments highlight the tension between public health and socio-religious beliefs—a unique intersection of compelling personal liberties that was to be balanced against the backdrop of a measles outbreak that could be repeated." Pet.App. 11a.

The Appellate Division further held that although the amendment repealed a statutory exemption for religious practices, this fact did not necessarily defeat the school vaccination law's general applicability. Pet. App. 11a. As the court observed, the amendment did not impose any special burden on religious practices. Pet.App. 11a-12a. Rather, the religious exemption had provided a benefit to those in a covered class and its removal merely subjected "those in the previously covered class to vaccine rules that are generally applicable to the public." Pet.App. 12a.

Finally, the Appellate Division held that because the school vaccination law, as amended, was neutral and generally applicable, the law was subject to rational basis review, which it easily satisfies. Pet.12a, 15a-16a. The court explained that targeting schoolchildren is a "rational approach to stemming the spread of communicable diseases." Pet.App. 15a. Schoolchildren, "by their very environment and nature, spend significant portions of their time in close contact with another." Pet.App. 15a. Moreover, by applying to schoolchildren, the law "ensures that the vast majority of children—who will quickly grow into the vast majority of adults—are vaccinated." Pet.App. 15a.

3. Petitioners sought to appeal as of right to New York's court of last resort (the Court of Appeals) and also moved for discretionary leave to appeal in that court. Petitioners made only one affirmative argument in support of that appeal: They contended that the Appellate Division had erred in rejecting their claim that the amendment "was infected by religious animus." Mem. of Law in Supp. of Subject Matter Jurisdiction at 5, *F.F. v. State of New York*, 37 N.Y.3d 1040 (2021) (Mot. No. 2021-443), 2021 WL 7279054; *see also* Mem.

of Law in Support of Mot. for Leave to Appeal to the Ct. of Appeals at 6-12, *F.F.*, 37 N.Y.3d 1040.

Petitioners did not argue that the Court of Appeals must or should hear the appeal to address whether the school vaccination law, as amended, provides a mechanism for individualized exemptions or treats comparable secular activity more favorably. Nor did petitioners cite the decisions of this Court that they now assert (Pet. 19, 34) clarified the importance of those considerations when assessing whether a law is generally applicable, namely this Court's decisions in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam).

On October 12, 2021, the Court of Appeals dismissed, on its own motion, petitioners' appeal as of right, finding no substantial constitutional question directly involved and, in the same order, denied petitioners' motion for leave to appeal. Pet.App. 1a.

REASONS FOR DENYING THE PETITION

Petitioners do not contend that this case implicates a split in authority. Indeed, this Court observed long ago that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." *Prince*, 321 U.S. at 166. In *Smith*, this Court re-affirmed that "compulsory vaccination laws" are among the neutral, generally applicable laws that do not require religious exemptions under the First Amendment. 494 U.S. at 889. And federal and state courts have uniformly recognized that the Free Exercise Clause does not bar States from adopting mandatory school vaccination laws that, like the law at issue here, have only medical exemptions. *See, e.g.*, *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017);

Phillips v. City of New York, 775 F.3d 538, 543-44 (2d Cir.), *cert. denied*, 577 U.S. 822 (2015); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 351-54 (4th Cir.), *cert. denied*, 565 U.S. 1036 (2011); *Brock v. Boozman*, No. 4:01-cv-760, 2002 WL 1972086, at *5-8 (E.D. Ark. Aug. 12, 2002); *Brown v. Stone*, 378 So. 2d 218, 219-22 (Miss. 1979).

Nor do petitioners contend that their claim can survive if the school vaccination law, as amended, is a neutral one of general applicability under this Court's precedent and, thus, subject to rational basis review. Rather, they argue that this Court should grant certiorari because the Appellate Division erred in holding that the law was neutral and generally applicable.

Preliminarily, certiorari is not warranted to review that holding because any such review is unlikely to be outcome determinative. The state trial court held that even if the law were subject to strict scrutiny, the law would satisfy such scrutiny—as other courts have held when addressing mandatory school vaccination laws that, as here, provide only medical exemptions. Pet. App. 41a-43a (citing, e.g., *Workman*, 419 F. App'x at 353-54; *Brown v. Smith*, 235 Cal. Rptr. 3d 218, 224-25 (Ct. App. 2018)). Petitioners thereafter failed to preserve a challenge to that holding by raising it on appeal in state court. Indeed, petitioners have never disputed that preventing "the spread of communicable diseases clearly constitutes a compelling interest." *Workman*, 419 F. App'x at 353. And, on appeal in state court, petitioners failed to challenge the trial court's holding that the law was the least restrictive means to further that interest effectively. Pet.App. 42a-43a. Petitioners' abandonment of any challenge to that finding therefore provides an independent basis to affirm the dismissal of their free-exercise claim and renders academic their

challenge here to the law's neutrality and general applicability.

In any event, petitioners' case-specific contentions as to why the school vaccination law, as amended, is not neutral or generally applicable—most of which have vehicle problems—do not warrant this Court's intervention.

I. Certiorari Is Not Warranted to Review the Lower Court's Holding That Petitioners Failed to State a Plausible Claim Based on Alleged Religious Hostility.

1. Certiorari is not warranted to address petitioners' claim that the repeal of the religious exemption was motivated by religious hostility and is, thus, not neutral. Pet. 24-29. The framework governing petitioners' claim is well established. When assessing governmental motive, including for free-exercise claims, courts look to several familiar factors, such as the events leading to the challenged measure and any relevant legislative history. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (op. of Kennedy, J.) (citing *Village of Arlington Hgts. v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). The Appellate Division here correctly articulated and closely considered these factors. Pet.App. 7a-11a. It then unanimously held that petitioners' complaint failed plausibly to allege that New York's legislature as a whole was motivated by religious hostility when, in the wake of the measles outbreak, it amended the school vaccination law to repeal the religious exemption. Pet.App. 12a.

Petitioners now challenge the Appellate Division's application of a properly stated legal framework to the

particular circumstances of this case. Pet. 24-29. Petitioners' challenge thus presents at most a classic example of alleged error correction that is unworthy of this Court's review. *See* Sup. Ct. R. 10.

2. There is also no error to correct. As the Appellate Division properly recognized, the Free Exercise Clause "'bars even subtle departures from neutrality on matters of religion'" and therefore a "suggestion of animosity toward religion" is sufficient to state a free-exercise claim. Pet.App. 10a (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1731). After reviewing petitioners' allegations and canvassing the legislative history, the court held that the repeal was the product of legitimate public health concerns, not religious animosity. Pet.App. 7a-13a.

This conclusion is well founded. The legislative memoranda accompanying the repeal bill—which New York courts deem highly probative of legislative intent, *see, e.g.*, *Expressions Hair Design v. Schneiderman*, 32 N.Y.3d 382, 391-92 (2018)—focused exclusively on the importance of increasing vaccination rates to protect the public health. *See* Senate Mem. *supra*; Assembly Mem., *supra*. Medical and public health organizations uniformly advocated for the bill as an "evidence-based decision in the interest of public health." Pet.App. 7a-8a; *see, e.g.*, Assembly Tr. at 101; Senate Tr. at 5445.

The legislature also gathered extensive data and scientific evidence in support of the bill. That evidence demonstrated that the rate of religious exemptions was rising statewide—a trend that was compounded by the fact that the exemptions tended to cluster geographically. *See* Senate Tr. at 5388-89. Some schools were reporting that over 20 percent of their students had religious exemptions. *Id.* at 5384-85, 5389, 5399;

Assembly Tr. at 58-59. The overwhelming majority of cases in the hardest hit jurisdictions was comprised of unvaccinated children. *See* Assembly Tr. at 58-59, 106; NYSBA Mem., *supra*. Indeed, one local health department reported that one child with a religious exemption had spread measles to 44 people, including 26 children who also had religious exemptions. Senate Tr. at 5385.

The legislature also considered the responses of other States to recent disease outbreaks. After California repealed its law's non-medical exemption in response to a 2014 measles outbreak, its "vaccination rates improved demonstrably, particularly in schools with the lowest rates of compliance." Senate Mem., *supra*; *see also* Senate Tr. at 5385, 5394-95 (similarly noting success of California's repeal); Assembly Tr. at 47 (same). Maine too had repealed its non-medical exemption in response to a whooping-cough outbreak, another vaccine-preventable disease. Senate Tr. at 5404.

The legislative history thus establishes that the legislature, guided by scientific data, crafted a sensible measure to confront a pressing public health threat: insufficient vaccination rates driven in large part by increased reliance on the religious exemption.

3. In arguing that the amendment was the product of religious hostility, petitioners rest exclusively on statements of five legislators, some of whom sponsored the bill. Pet. 10-14, 26-29. This argument squarely contravenes this Court's warning against invalidating a statute based solely on "what fewer than a handful" of legislators have said about it. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [this Court] to

eschew guesswork." *Id.* This principle applies equally when evaluating remarks made by a bill's sponsor. As this Court confirmed last term, "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government, legislators have a duty to exercise their judgment and to represent their constituents." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021); *see also, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

In this case, comments by five legislators that the Appellate Division found to be, at most, "insensitive," Pet.App. 11a, fail plausibly to suggest that the legislature as a whole was motivated by religious hostility.[6] Not only were those statements made by less than three percent of the over 200 legislators in office,

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[6] Many of the comments fail to even suggest insensitivity toward religious practices. For instance, petitioners rely upon the Senate majority leader's statement, "We have chosen science over rhetoric." Pet. 10. But petitioners cite nothing to suggest that the subject statement referred to the repeal bill at all. It was made during a speech at the end of the legislative session—a week after the bill was passed. *See* Senate Tr. at 7092, 7321 (June 20, 2019) (internet). And upon making the statement, the Senate majority leader identified numerous laws that the legislature had recently passed, covering a wide range of topics, with no mention of the school vaccination law or any amendment thereto. *See id*. at 7321-25.

Other comments cited by petitioners merely express concern that the religious exemption was being misused by parents who did not hold a sincere religious objection to vaccinations but nonetheless used the exemption to evade the vaccination requirements. *See, e.g.*, Pet. 12. Such concern does not evince any kind of hostility to those parents who, in fact, held sincere religious objections.

Pet.App. 10a, but they also were made to members of the public, rather than other legislators during the floor debate accompanying the repeal bill. *See In re Delmar Box Co.*, 309 N.Y. 60, 67 (1955) (legislator's statements that were not made "in the course of debate on the floor of the legislature" do not "serve as a reliable index to the intention of the legislators who passed the bill").

Petitioners also ignore a key indicator of the legislature's collective intent—the legislative memoranda accompanying the bill. *See, e.g.*, *Expressions Hair Design*, 32 N.Y.3d at 391-92. As the Senate Sponsor's Memorandum explained, although "freedom of religious expression is a founding tenet of this nation," "long-standing precedent" allowed the legislature to pass laws to protect the public health, including through compulsory vaccination. Senate Mem., *supra* (citing, e.g., *Prince*, 321 U.S. 158).

The floor debate, which petitioners also ignore, similarly reflects a sincere effort to balance two incommensurable values: protecting the public health and respecting religious practice. One senator, quoting a letter sent in support of the repeal bill, stated that her decision to support the bill was not taken "with ease or with any lack of respect for individuals with a sincerely held religious belief against vaccinations." Senate Tr. at 5436. Other legislators likewise admitted that, although they would support the bill, it was nonetheless a "difficult vote." Assembly Tr. at 61; *see also id.* at 112, 118. Still other legislators applauded the respect the legislature had shown to religious practices when considering the bill. *See* Senate Tr. at 5432, 5451-53. Even a senator who *opposed* the bill nonetheless emphasized that he "appreciate[d] the debate and the respectfulness with which this issue was approached."

Id. at 5452. He continued: "I'm proud of this body. We balanced everybody's interest." *Id.* at 5452.

Contrary to petitioners' argument, Pet. 27-28, the Appellate Division's decision does not conflict with this Court's decision in *Masterpiece Cakeshop*. In that case, a devout Christian baker refused to bake a wedding cake for a same-sex couple because doing so would violate his "most deeply held" religious beliefs. 138 S. Ct. at 1724. The state court upheld the Colorado Civil Rights Commission's determination that the baker had violated the state's antidiscrimination law, but this Court reversed. *Id.* at 1726-27, 1729-32. It held that the Commission's determination was the product of "impermissible hostility" toward sincere religious beliefs as established by (i) its disparate treatment of the baker's case compared to other bakers and (ii) the "official expressions of hostility to religion" made by members of the Commission during its formal, public hearings for the case. *Id.* at 1729, 1732.

Masterpiece Cakeshop is readily distinguishable. It involved the decision of a seven-member commission, *id.* at 1729, whereas this case involves a decision made by a legislative body of over 200 members, Pet.App. 10a. As this Court has recognized, when a larger body is at issue, the "difficulties in determining the actual motivations of the various legislators that produced a given decision increase." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *see also, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 233 (5th Cir. 2016) (en banc) (plurality op.) (making same point).

Further, the comments in *Masterpiece Cakeshop* were made in the "very different context" of an "adjudicatory body deciding a particular case." 138 S. Ct. at 1730. Those comments were of concern given that

parties appearing before an adjudicatory body are entitled to "fairness and impartiality," regardless of the personal views of the body's individual members. *Id.* By contrast, legislatures have a different role. They debate and make statewide or nationwide policy, including on difficult or sensitive issues. That debate could be chilled if impermissible motives were imputed to the legislature based *solely* on a few remarks that were not even made during legislative debate, especially where, as here, legitimate motives are manifest on the face of the legislative record. *See O'Brien*, 391 U.S. at 383-84.

II. Certiorari Is Not Warranted to Review Petitioners' Remaining Contentions.

A. This Case Provides a Poor Vehicle to Address Petitioners' New Argument Regarding Neutrality.

Petitioners raise a separate argument relating to neutrality: They claim that the school vaccination law, even if not the product of religious hostility, is nonetheless not neutral because it is over- and underinclusive.[7] Pet. 29-31. This case provides a poor vehicle to address this contention. Petitioners' sole argument below regarding neutrality was premised on allegations of religious hostility. Any separate argument they now raise regarding the law's alleged lack of neutrality was neither pressed nor passed upon below. This Court's "longstanding rule" counsels against considering such an argument now. *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *see also Timbs v. Indiana*, 139 S. Ct. 682, 690

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[7] Petitioners separately contend that the law's underinclusiveness shows that it is not generally applicable. That contention is addressed *infra* at 27-30.

(2019) (declining to review reformulated question that was not argued or addressed in the state courts).

Petitioners' argument fails to warrant this Court's intervention for the additional reason that it does not implicate a split in authority and entails only an application of this Court's precedent to the circumstances of this case. In making the argument, petitioners rely entirely on this Court's decision in *Lukumi*. Pet. 29-31. There, this Court held that a series of city ordinances that banned ritual animal sacrifices was not neutral because those ordinances impermissibly targeted religious conduct for disfavored treatment. *Lukumi*, 508 U.S. at 532-540. In so holding, the Court noted that the ordinances' over- and underinclusiveness established that the city was not genuinely pursuing its asserted interests in animal welfare. *See id.* at 535, 538; *see also id.* at 580 (Blackmun, J., concurring) (distinguishing the case from one that involves a law that "sincerely pursued the goal of protecting animals from cruel treatment"). Indeed, this Court has noted that *Lukumi* is a "textbook illustration" of the principle that a law's underinclusiveness can reveal pretext. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015). By contrast, petitioners' assertions fail to raise doubts about whether the State is in fact pursuing the interest it invokes.

As for the law's purported overinclusiveness, petitioners claim that if the legislature were genuinely concerned that individuals who lacked sincerely held religious beliefs were misusing religious exemption, it would not have repealed the exemption and would instead have focused on punishing misuse, including through criminal prosecutions. Pet. 30-31. The fact that the legislature chose a different approach fails to suggest any insincerity in its public health objectives. While petitioners' preferred approach might have

deterred some misuse of the religious exemption, it would not have eliminated such misuse. Indeed, it likely would not have substantially reduced misuse, because school officials would have been hard pressed to question the sincerity of the stated religious beliefs of their students' parents and guardians. *Cf. Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714-16 (1981) (holding that religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others"). Moreover, misuse of the exemption was only part of a larger concern—declining vaccination rates attributable to increased reliance on the religious exemption.

The law's purported underinclusiveness similarly fails to suggest pretext. Petitioners argue that if the State's goal were to reduce the "spread of communicable diseases in the school community," then the law is underinclusive because it (i) allows for medical exemptions and (ii) does not apply to adults in the school environment, such as students over 18 and teachers. Pet. 29. As elaborated below, petitioners fail to cite any allegation suggesting that these features undermine the State's interests in protecting the public health in the same or similar way as the religious exemption. Nor do they cite any other allegation suggesting that the legislature was not sincerely seeking to protect the public health when—following the lead of other States and guidance of medical and public health organizations—it strengthened the school vaccination law in the wake of a measles outbreak that had largely infected unvaccinated children.

B. This Case Provides a Poor Vehicle to Address Petitioners' Contentions Regarding General Applicability That Were Neither Presented to nor Decided by the State Courts Below.

1. This case provides a poor vehicle to address petitioners' contention that the school vaccination law, as amended, is not generally applicable. As this Court has explained, "due regard for the appropriate relationship of this Court to state courts" requires it to refuse to address issues affecting the validity of state laws that were "not urged or considered there." *Wilson v. Cook*, 327 U.S. 474, 484 (1946) (quotation marks omitted). This principle of comity militates against reviewing issues that litigants in this Court failed to press when seeking review in a state court of last resort. After all, state high courts play an important role in interpreting and enforcing federal rights. Litigants could subvert that role if, notwithstanding their failure to ask those courts to address a federal issue, they could obtain this Court's review on that very issue.

Yet that is what petitioners seek to do here. Their only argument in the New York Court of Appeals as to why that court should either hear their appeal as of right or grant discretionary review was that the Appellate Division had erroneously rejected their claim of religious hostility. At no point did petitioners contend that the school vaccination law was not generally applicable under this Court's precedent, let alone contend that such a claim merited that court's attention. See *supra* at 11-12.

Nor do petitioners offer a valid excuse for their failure even to mention this claim. Petitioners assert that the claim is premised on this Court's recent deci-

sions in *Fulton* and *Tandon*. *See* Pet. 19-21. But they cited neither decision to the Court of Appeals despite having the opportunity to do so. *Tandon* was issued on April 9, 2021. 141 S. Ct. 1294. Contrary to petitioners' assertion, Pet. 35, this was weeks before petitioners filed their memoranda in support of their motion for leave in the Court of Appeals, on April 29, 2021, and nearly two months before they filed their memoranda in support of their appeal as of right, on June 4, 2021. While *Fulton* was issued in late June 2021—i.e., after petitioners filed their memoranda—they could and should have apprised the Court of Appeals of that decision if they thought that it affected their case. That court's rules provide that counsel "shall timely inform" the court of "all developments" affecting appeals and motions, including "pertinent developments in applicable case law." N.Y. Comp. Codes R. & Regs. tit. 22, § 500.6. Roughly four months passed between *Fulton* and the Court of Appeals' ruling on their appeal. Pet.App. 1a. During that time, petitioners never brought *Fulton* to that court's attention.

Indeed, petitioners failed adequately to press the contentions they raise now, purportedly based on *Fulton* and *Tandon*, in either the state trial court or intermediate appellate court. Petitioners argue here that the school vaccination law is not generally applicable because it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." Pet. 21 (quoting *Fulton*, 141 S. Ct. at 1877). Yet petitioners did not make this argument in any form below, even though that argument was available well before *Fulton*, as *Smith* addressed the effect of individualized exemptions on a law's general applicability. *See Smith* 494 U.S. at 884; *see, e.g.*, *Axson-Flynn v. Johnson*, 356 F.3d 1277,

1297-98 (10th Cir. 2004) (addressing "*Smith*'s 'individualized exemption' exception"). Accordingly, no state court passed upon that argument, and this Court should reject petitioners' belated attempt to rely on it now. *See, e.g.*, *Heath*, 474 U.S. at 87.

Petitioners also failed to raise in a non-conclusory manner their other contention purportedly based on *Fulton* and *Tandon*. They argue that the school vaccination law is not generally applicable because it permits secular conduct that undermines the State's asserted interests in the "same way" as the religious exemption. Pet. 21 (citing *Fulton*, 141 S. Ct. at 1877*; Tandon*, 141 S. Ct at 1296). In support, they cite two features of the law that they allege defeat its general applicability: (i) the existence of a medical exemption for children and (ii) the fact that the law does not extend to adults, such as students who are older than 18 years of age or teachers. Pet. 21. Although petitioners argued in the state trial court and intermediate appellate court that these aspects of the law rendered it "suspiciously underinclusive," they did so to support their claim under the Equal Protection Clause, Pet.App. 13a-15a, 43a-45a, and seemingly to provide circumstantial evidence for their claim of religious hostility, Pet.App. 35a.[8] As a

[8] While petitioners stated, with no legal development, in briefs to both the state trial court and intermediate appellate court that the law is "not one of general applicability" and that its "underinclusiveness undermines the state defendants' claims," they made those statements in service of their religious hostility claim. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 12-13, *F.F. v. State of New York*, 66 Misc. 3d 467 (N.Y. Sup. Ct. 2019) (No. 4108-19); *see also* Appellants' Opening Brief at 41-42, *F.F. v. State*, 194 A.D.3d 80 (3d Dep't 2021) (No. 530783). Indeed, in the very next paragraph, petitioners reiterated that "the issue before the Court" was whether the law could be found constitutional if motivated by religious hostility.

result, no state court below decided whether the law's alleged underinclusiveness renders it not generally applicable under this Court's precedent. This Court does not ordinarily review issues that have not been considered below, and it should not do so here. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view").

This case provides a particularly poor vehicle to address the law's general applicability for the additional reason that petitioners failed to present factual allegations that would allow this Court to conduct a meaningful review of whether the law is sufficiently underinderinclusive to render it not generally applicable. Petitioners have not proffered facts—alleged or established—that the law's medical exemption or its inapplicability to adults threatens the State's interests underlying the school vaccination law to the same or similar degree as the religious exemption did. *See Fulton*, 141 S. Ct. at 1877. Petitioners simply assume that they do. But they allege no facts to support this proposition. *Cf. Lukumi*, 508 U.S. at 544-45 (analyzing law's underinclusiveness based on "substantial testimony at trial" that secular conduct at issue poses "same public health hazards" as regulated religious conduct).

It is no answer for petitioners to argue that they were deprived of an opportunity to seek discovery on the issue. Unlike its federal counterpart, New York's rules of civil procedure allow parties to oppose motions to dismiss for failure to state a claim on the ground that "facts essential to justify opposition may exist but cannot then be stated." N.Y. Civil Practice Law and Rules 3211(d); *see, e.g.*, *Koeppel v. Volkswagen Grp. of Am., Inc.*, 128 A.D.3d 441, 441 (1st Dep't 2015). Petitioners did not invoke this provision in state court. This Court should therefore refuse to grant certiorari based

on the issue when, as here, petitioners fail to even try to build a factual record that would allow for meaningful judicial review of that issue.

2. In all events, petitioners' contentions regarding general applicability are unsound. The school vaccination law does not provide a mechanism for individualized exemptions. In *Fulton*, this Court determined that a scheme for granting foster care contracts was not generally applicable because it allowed a state official to grant exceptions to an antidiscrimination provision in that official's "sole discretion." 141 S. Ct. at 1878 (quotation marks omitted). Here, New York's law does not provide a broad discretionary scheme under which officials may consider claims of religious hardship alongside other requests for individualized exemptions. Instead, it contains only a single medical exemption that is narrow and clearly defined. The exemption applies only if a specific immunization is medically contraindicated, 10 N.Y.C.R.R. § 66-1.3(c), and only when consistent with a nationally recognized evidence-based standard of care, *id.* § 66-1.1(*l*). A child is thus entitled to an exemption if and only if these objectively defined criteria are met. *See, e.g.*, *Doe v. San Diego Unified School Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021) (medical exemption to student COVID-19 vaccination mandate did not provide a "mechanism for 'individualized exemptions'" given "rigidity of the medical exemption"); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288-90 (2d Cir. 2021) (per curiam), *petition for cert. pending*, No. 21-1143 (filed Feb. 14, 2022); *Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022).

Petitioners' contentions as to the law's purported underinclusiveness fare no better. The school vaccination law serves two related goals. First, it aims to

protect the health of children while they are physically present in the school environment. Second, it aims to protect the health of the public in general against disease outbreaks both in and outside of school; it does this by serving as the apparatus that ensures that, as the Appellate Division noted, "the vast majority of children—who will quickly grow into the vast majority of adults—are vaccinated." Pet.App. 15a. *See, e.g.*, *Viemeister v. White*, 179 N.Y. 235, 241 (1904) (New York's school vaccination law operates "impartially upon all children in the public schools, and is designed, not only for their protection, but for the protection of all the people of the state").

As compared to the religious exemption, the medical exemption does not pose a comparable threat to the State's interests, for two reasons. First, the medical exemption *advances*—rather than endangers—the State's interest in protecting the health of schoolchildren. It makes clear that a child need not receive a vaccine that would threaten that child's health. *See, e.g.*, *Doe*, 19 F.4th at 1178; *We the Patriots USA*, 17 F.4th at 284-88; *Does 1-6*, 16 F.4th at 30-31.

Second, although the medical exemption may raise the risk of an exempted child transmitting a vaccine-preventable disease, that exemption does not endanger the State's interests to at least the same degree as the religious exemption. As petitioners acknowledge, Pet. 5, the number of religious exemptions far exceed medical exemptions. In the school year before the repeal, the number of religious exemptions was over five times greater than the number of medical exemptions. *See* Pet. 5; Assembly Tr. at 70-71. The health risks associated with religious exemptions—both to the exempt individuals and their communities—were further exacerbated by the facts that (i) such exemptions

tended to cluster geographically[9] and (ii) the rate of such exemptions had been increasing. *See* Senate Tr. at 5384-85, 5388-89, 5399; Assembly Tr. at 58-59.

The medical exemption's narrow scope and limited duration also differentiate it from the religious exemption. A medical exemption does not apply across the board but rather is limited to the *specific* vaccination that is medically contraindicated. 10 N.Y.C.R.R. § 66-1.3(c). Children with medical exemptions therefore often receive some, if not most, of the vaccines required by New York law. Religious exemptions do not face any similar constraint. Indeed, petitioners cite nothing to suggest they have religious objections to only some of the required vaccines. *See* Pet. 4. Further, the medical exemption is only valid until a vaccine "is found no longer to be detrimental to the child's health," P.H.L. § 2164(8), with the duration specified in the child's medical records, 10 N.Y.C.R.R. § 66-1.3(c). Religious exemptions are not similarly time limited or periodically reassessed, and petitioners likewise cite nothing to suggest their religious objections are temporary.

Petitioners also fail to allege any facts to substantiate their contention that unvaccinated adults undermine the State's interest in the same or similar way as religious exemptions for children. They cite no allega-

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[9] Multiple studies have documented the phenomenon of geographic clustering of non-medical exemptions, which are associated with an increase in the risk of outbreaks of vaccine-preventable diseases. *See, e.g.*, Amer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000-2011*, 132 Pediatrics 37, 38-40 (2013); Saad B. Omer et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations With Geographic Clustering of Pertussis*, 168 Am. J. Epidemiology 1389, 1394-95 (2008).

tions that suggest that the law's inapplicability to adults contributed, as the religious exemption did, to declining vaccination rates that rendered areas susceptible to outbreaks. Indeed, they fail to allege any facts to suggest that there is even an appreciable number of unvaccinated adults in schools, much less an appreciable number who are unvaccinated for non-medical secular reasons rather than religious ones. *See Tandon*, 141 S. Ct. at 1296 (general applicability looks to whether the law treats "comparable secular activity more favorably than religious exercise"). Nor could they likely do so, given the ubiquity of established vaccination mandates. Nearly every adult present in a New York school who grew up in the United States lived somewhere with a mandatory school vaccination law. See *supra* at 3. And, for over two decades, any adult who has immigrated to the United States has been subject to the federal law that generally requires that adults be vaccinated against several diseases, including measles, to be deemed admissible to the United States. *See* 8 U.S.C. § 1182(a)(1)(A); U.S. Citizenship & Immigr. Servs., *Vaccination Requirements* (last updated Oct. 1, 2021) (internet).

Moreover, petitioners overlook a crucial difference between adults and children. Children "by their very environment and nature," Pet.App. 15a, pose a higher transmission risk. In contrast to teachers or other staff, they tend to spend more time commingling in close proximity, whether in the hallways, in the cafeteria, or on the playground.

3. Finally, petitioners separately claim that, in assessing whether a statutory amendment is generally applicable, a court must only look to the amendment, rather than how the law as a whole operates after the amendment. Pet. 20. According to petitioners, because

the amendment at issue applied only to the religious exemption, it is not generally applicable. But review is not warranted to address this narrow claim, which is based on a misapprehension of the Free Exercise Clause. That clause protects religious observers against "unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation marks omitted). The mere elimination of a statutory exemption, or some other benefit or accommodation for religious practices, does not necessarily show that those practices are subject to unequal treatment. After all, governments may grant exemptions, accommodations, or benefits to religious conduct that are not legally required. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting). Removing such preferential treatment is not sufficient by itself to show that government is now favoring comparable secular conduct over religious conduct or otherwise imposing "special disabilities" on religious conduct. *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (quotation marks omitted). Rather, removing preferential treatment can be a means of providing *equal treatment*. Indeed, taken to its logical conclusion, petitioners' argument could inhibit government accommodations of religious practices. If governments know that strict scrutiny applies *any* time a religious accommodation is removed, even if no comparable secular activity is treated more favorably as a result, then they may decline to offer accommodations in the first place out of fear that they will be unable to scale back or get rid of such accommodations in the future.

CONCLUSION

The petition for a writ of certiorari should be denied.

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