No. 21-1003

IN THE
Supreme Court of the United States

F.F., AS PARENT OF Y.F., *et al.*,

Petitioners,

v

NEW YORK, *et al.*,

Respondents.

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

REPLY BRIEF

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PRELIMINARY STATEMENT

After more than fifty years of providing a religious exemption from its childhood vaccination requirement, New York State repealed this accommodation of religious freedom. Though several members of the legislature introduced the repeal bill in January 2019, neither its Assembly or Senate held committee hearings or engaged in any formal fact-finding before passing the legislation on June 13, 2019. This, even though it purported to act in response to a measles outbreak, which reached its apex in late 2018/early 2019, and where the law requires vaccination against numerous conditions *other* than measles. In lobbying for its passage, numerous legislators publicly mocked and ridiculed those seeking religious exemptions for their children, and the legislature left intact a medical exemption. And there is no dispute the repeal has put tens of thousands of students to the Hobson's choice of violating their sincerely-held religious beliefs or being denied the right to attend any manner of in-person schooling.

Whether this repeal, enacted under these circumstances, offends the First Amendment's fundamental guarantee of religious liberty is an issue of grave national import. This Court should grant certiorari to determine whether the State Court, which upheld the repeal, acted consistent with this Court's precedents.

In opposition, Respondents contend that certiorari should be denied because the State Court properly applied settled law and because this case presents a poor vehicle to address the question presented. Respectfully, Respondents are wrong. For the reasons set forth below and in the Petition, certiorari should be granted.

ARGUMENT

I. The repeal of the religious exemption was not neutral and was motivated by active hostility toward religion.

"The Constitution commits government itself to religious tolerance, and *upon even the slightest suspicion* that proposals for state intervention stem from animosity or distrust of its practices, all officials must pause to remember their high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colo. Civil. Rights Comm'n.*, ___ U.S. ___, ___, 138 S.Ct. 1719, 1731 (2018) (emphasis added). Thus, "where 'official expressions of hostility to religion' accompany laws or policies burdening free exercise, [the Court has] simply 'set aside' such polices without further inquiry." *Dr. A. v. Hochul*, ___ U.S. ___ (2021) (slip op. at 6) (Gorsuch, J., dissenting) (quoting *Masterpiece Cakeshop*, *supra*).

Respondents contend that the State Court recited and applied the appropriate legal standards and, thus, Petitioners' request for review is nothing more than "a classic example of error correction." *See* Resp. Opp. Br. at 14-15. But this Court grants certiorari to review whether "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10. Thus, even if the State Court cited relevant precedent, including *Masterpiece Cakeshop* and *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), it misapplied them, and this Court should grant certiorari to correct this error and maintain the uniformity and supremacy of its precedents.

Respondents next argue that the State Court did not err because it reviewed the legislative history of the repeal and concluded that a sincere concern for public health, not religious animus, motivated the legislature. *See* Resp. Opp. Br. at 15-16. But even if it was proper, at the motion to dismiss stage, for the Court to take judicial notice of, and consider, legislative debates and related materials when reviewing the sufficiency of Petitioners' Complaint, such sources do not resolve the question as a matter of law. To the contrary, they raise factual questions about the legislature's underlying motivation, and Petitioners should have been permitted to conduct discovery to develop the record relevant to answering these questions.

Indeed, even if the public health concerns truly motivated the repeal (which Petitioners do not concede, and their Verified Complaint explicitly disputes), such a conclusion does not exclude the possibility that it also acted because of other impermissible motives, such as religious hostility. As this Court has explained in the equal protection context, a plaintiff seeking to challenge legislative action as unconstitutionally discriminatory need not demonstrate that discrimination was its sole purpose. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *see also Lukumi*, 508 U.S. at 540-42 (drawing on equal protection jurisprudence, including *Arlington Heights*, to guide Free Exercise neutrality inquiry). "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 529 U.S. at 265-66. Thus, a plaintiff need only show that that the impermissible classification was one motivating factor,

potentially of many, influencing the challenged action. *See Id.*

Respondents counter that the State Court properly found that the pleading failed amply to raise an inference of religious animus because it cites comments by only five of about 200 legislators, which is insufficient to impute religious animus to the entire body. They contend further that, even if the cited remarks evince religious hostility of the same extent as those at issue in *Masterpiece Cakeshop*, that case is distinguishable because it involved a seven-member adjudicative body, which must be impartial as it decides individual cases, as opposed to a 200-member legislature, which must weigh and balance competing policy interests. Respondents' arguments are unpersuasive.

Addressing their second argument first, whatever the practical differences between an adjudicatory and legislative body, both are bound by the First Amendment. Indeed, this Court has repeatedly recognized that legislative bodies may not transgress constitutional mandates and that inquiry into their motivations is not only permissible, but necessary to determine the constitutionality of their actions. *See, e.g., Arlington Heights, supra*. In *Lukumi*, the Court struck down a city ordinance, enacted by a legislative body, as intentionally directed at the challengers' religious practice. Some of the key evidence supporting the Court's conclusion included religiously hostile comments by city council members. *See Lukumi*, 508 U.S. at 541-42.

Respondents also cite *Hunter v. Underwood*, 471 U.S. 222, 228 (1985), for the proposition that, the larger

the legislative body, the more difficult it is to determine the motivations of the individual legislators. *See* Resp. Opp. Br. at 19. But that does not mean that a legislature's motives can never be judicially determined. Indeed, in *Hunter*, the Court concluded that a provision of Alabama's constitution, was motivated at least in part by an intent to discriminate on the basis of race. *Hunter* also reaffirms that, to warrant invalidation, the improper motive need not be the sole purpose, but rather only a substantial motivating factor, underlying the enactment. 471 U.S. at 231-32.

As for the sufficiency of the pleading, under *Arlington Heights*, at the motion to dismiss stage, Petitioners' allegations of religious animus and non-neutrality raised an inference that religious hostility was a motivating factor underlying the repeal. Not only does it cite specific comments by various legislators, the Complaint also notes that that the Legislature, though claiming to have acted solely for public health reasons in response to a measles outbreak that started in late 2018, waited six months after introducing the bill in January 2019, conducted no committee hearings on the matter, and then enacted the repeal after the measles outbreak had effectively abated. Moreover, while the Legislature purported to act in response to a recent outbreak, similar legislation had been introduced in at least three prior legislative sessions, when there was no such outbreak and, notably, the law requires vaccination against numerous conditions *other* than measles. This historical background, timing of events and departure from the normal legislative process (*e.g.*, failure to conduct committee hearings), when viewed together as part of the totality of circumstances, including the various legislators' comments, raises the inference

that the repeal was not neutral but motivated at least in part by religious hostility.

Also illustrating the repeal's non-neutrality is its over- and under-inclusiveness. *See* Pet. at 29-31. Respondents counter that this argument was "neither pressed nor passed upon below." Resp. Opp. Br. at 20. But that is not entirely accurate. For starters, Petitioners' Complaint points out the repeal's under-inclusivity resulting from the maintenance of a medical exemption and inapplicability of the vaccination requirement to college students and adult staff. *See* Complaint ¶ 134 ("No compelling state interest exists to selectively eliminate the religious exemption where, as here, the State maintains both the medical exemption from vaccinations, has allowed college students to retain their religious exemptions . . . and has allowed adult staff and personnel at the same public and private schools to remain un- or under-vaccinated by its standards."). Before the Appellate Division, Petitioners also argued that the repeal's over- and under-inclusiveness demonstrate non-neutrality. *See* App. Br. at 31-32 ("The Verified Complaint plausibly alleges that this course of conduct had little to do with public health. Indeed, the action was both over-inclusive and under-inclusive – it lacked any studied consideration and there was no public process, hearings or ratiocination matching a matter of this import."); *Id.* at 41 ("The medical affidavit Supreme Court cites does not show that those with a religious exemption pose any, and certainly not a greater, threat to the public than adults in schools who are unvaccinated or those children with medical exemptions who are unvaccinated. Similarly, Supreme Court has not justified this 'nuclear option' – throwing thousands of healthy children out of all schools, public and private – was necessary without having

examined less restrictive means to maintain public health available to State health authorities. Nor does the Court justify how excluding these students from schools, yet not from museums, parks, shops, libraries, or any other public place, protects the public health.").[1]

Respondents also contend that this Court's intervention is unwarranted because Petitioner's non-neutrality argument does not implicate a split in authority and relies entirely on *Lukumi*, which is settled law. *See* Resp. Opp. Br. at 21. But this argument misses the point – whether or not there is a split of authority amongst the lower courts, the State Court decided the issue of neutrality in a manner that conflicts with this Court's precedents, and this presents an appropriate basis for this Court's intervention. *See* Sup. Ct. R. 10.

II. The repeal of the religious exemption was not generally applicable.

"A law is not generally applicable if it invites the government to consider the particular reasons

1. *See also* App. Br. at 42, arguing under-inclusivity as demonstrating lack of general applicability, an argument that also demonstrates non-neutrality. Petitioners argued: "Moreover, Supreme Court erred in holding that the law here is one of general applicability – indeed, its under-inclusiveness entirely undermines this conclusion. New York State does not require that adults working in its schools – whether as teachers, cafeteria workers, bus drivers, coaches, and custodians – demonstrate that they have current immunity or up to date vaccinations. Students 18 years of age or older need not be vaccinated, thus permitting students aged 18-21 with religious exemptions to continue education in all high schools." *Id.*

for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, ___ U.S. ___, 141 S.Ct. 1868, 1877 (2021). A "law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*

By its very terms, the repeal legislation applies only to the religious exemption. Furthermore, the resulting vaccination scheme continues to allow for a medical exemption and does not otherwise apply to students over age 18 or to adult faculty, staff or visitors.

Respondents argue that Petitioners neither advanced this argument in the trial or appellate courts nor pressed it when seeking leave to appeal to the Court of Appeals. *See* Resp. Opp. Br. at 23-25. But this argument parses the record below too finely. Throughout this proceeding, Petitioners' primary claim was under the First Amendment and, throughout, they argued that the repeal was not a neutral law of general applicability under *Smith*. Indeed, in their brief to the Appellate Division, Petitioners argued that the repeal is not generally applicable because, *inter alia*, it allows students with medical exemptions to attend school. *See* App. Br. at 41-42. To be sure, Petitioners stressed and prioritized certain arguments more than others, but their First Amendment attack was a unified one. Moreover, irrespective of the level of emphasis Petitioners attributed to the issue of general applicability, it is clear that, in upholding the constitutional validity of the repeal, the Appellate Division held the law was generally applicable. *See* Pet. App. B at 11a-12a. As such, the issue was plainly passed upon below, and Petitioners are permitted to re-prioritize and hone their arguments

as they seek review of that decision. This is not a case where Petitioners are advancing a wholly new claim or argument divorced entirely from the issues pressed and passed upon below.

Respondents also argue that Petitioners inexcusably failed to cite this Court's decisions in *Fulton* and *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) below, and they highlight Petitioners' error in Point III of their Petition, arguing for the alternative remedy of a GVR disposition, where they asserted that *Tandon* was decided *after* they sought leave to appeal to the Court of Appeals. *See* Resp. Br. at 23-24. To be sure, we concede that *Tandon* was decided *before* Petitioners sought leave to appeal to the Court of Appeals, and we regret the unintentional error in stating otherwise. *See* Pet. at 35. But there is no dispute that both *Fulton* and *Tandon* were decided *after* the Appellate Division entered its March 18, 2021 Opinion and Order and, thus, were not available for Petitioners to argue to that Court, whose decision is the subject of their Petition. Respondents acknowledge that *Fulton* was decided after Petitioners sought leave to appeal, but they contend that Petitioners were obligated to notify the Court of this decision while their motion was *sub judice*. *See* Resp. Opp. Br. at 24. But while *Fulton* and *Tandon* clarified and elucidated the general applicability inquiry, as Respondents themselves point out, the argument was available prior to these cases. Indeed, Petitioners acknowledged this in their Petition, when they noted, in arguing for a GVR disposition in light of *Fulton* and *Tandon*, that "substantive review by this Court is warranted based upon the State court's departure even from the pre-*Fulton* and *Tandon* line of cases." Pet. at 35. In other words, while *Fulton* and *Tandon* aide in the analysis, failure to bring them to the Court of Appeals' attention should not preclude certiorari.

Respondents next contend that Petitioners failed to plead or otherwise present sufficient facts demonstrating "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." Resp. Br. at 26. In support of this proposition, they cite and contrast *Lukumi* on the ground that, there, "substantial trial testimony" supported the conclusion; of course, here, there was no trial, and the Complaint was dismissed before Petitioners could even develop the record through discovery.

But even more to the point, as demonstrated by Justice Gorsuch's dissent in *Hochul*, the issue of whether the medical exemption undermines the State's asserted interest in a manner similar to the religious exemption must be examined on an individual basis. *See Hochul, supra* (slip op at 11-13). "Laws operate on individuals; rights belong to individuals. And the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption." *Id.* at 12. There can be no question that a student under 18 who is unvaccinated for medical reasons is just as capable as transmitting a communicable disease as a similarly aged student unvaccinated for religious reasons. *See Doe v. Mills*, ___ U.S. ___, 142 S.Ct. 17, 20 (2021) (Gorsuch, J., dissenting) ("But Maine does not suggest a worker who is unvaccinated for medical reasons is less likely to spread or contract the virus than someone who is unvaccinated for religious reasons."). To the extent Respondents contend that there are a greater number of religious exemptions, or that they cluster in certain areas, that argument should be assessed under the strict scrutiny analysis. *Hochul*, *supra* (slip op at 13).

Petitioners amply alleged, on an individualized basis, that eliminating the religious exemption while maintaining the medical exemption and not expanding the vaccination requirement to everyone, renders the repeal and resulting statutory scheme not generally applicable. *See* Complaint ¶ 134.

Respondents next contend that the vaccination scheme does not provide for individualized exemptions because the medical exemption is objectively defined and its issuance not left to any official's "sole discretion." *See* Resp. Opp. Br. at 27. This argument is misplaced. First, while regulations define the outer contours of what qualifies for a medical exemption, *see* 10 N.Y.C.R.R. § 66-1.1(l), the same regulations leave it to local school officials to decide whether the applicant has met this standard and whether to issue the exemption, *see* 10 N.Y.C.R.R. § 66-1.3; *Doe v. Zucker*, 520 F.Supp.3d 218, 256-57 (N.D.N.Y. 2021) ("Thus, Plaintiffs have failed to allege 'that there is no rational connection' between the delegation of authority to the local school districts, where the Plaintiff children reside, to decide requests for medical exemptions and 'the promotion of public health, safety or welfare.'"). Thus, the medical exemption is subject to a level of individualized discretion. But, more critically, by codifying a secular medical exemption to the exclusion of religious exemptions, the vaccination scheme treats a secular objection more favorably than a religious one and, thus, is not generally applicable. *See Tandon*, 141 S.Ct. at 1296; *Mills*, 142 S.Ct. at 19. Whether such differential treatment is justified is a question to be addressed under the strict scrutiny analysis. The same is true with respect to Respondents' arguments that the repeal is neither over- nor under-inclusive. *See* Resp. Opp. Br. at 27-30.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should enter.

Respectfully submitted,

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