No. 21-1143

IN THE
Supreme Court of the United States

DR. A., et al.,
Petitioners,
v.
KATHY HOCHUL, Governor of New York, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Free Exercise Clause permits a State to require certain medically eligible healthcare personnel to receive a COVID-19 vaccination when any infected personnel are likely to expose patients or other personnel to COVID-19, without a blanket exemption allowing unvaccinated religious objectors to work in public-facing roles.

2. Whether the Court should revisit *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in the context of the interlocutory order below and the sparse evidentiary record that petitioners presented on their motion for a preliminary injunction.

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INTRODUCTION

The COVID-19 pandemic has imposed a deadly toll on New York. COVID-19's public-health harms have been particularly devastating in the healthcare sector, where vulnerable patients and residents face heightened risks of both becoming infected with the virus and experiencing severe health consequences from any such infection. Additionally, the spread of the virus among healthcare workers can lead to a dangerous cycle of staff shortages and deterioration of patient care.

Given these substantial public-health concerns, the New York State Department of Health (DOH) issued an emergency rule requiring COVID-19 vaccinations for certain healthcare workers, i.e., staff members who, if infected, are likely by reason of their work activities to expose patients, residents, or other personnel to COVID-19. Pet. App. 133a-156a. Like longstanding similar state vaccination requirements for measles and rubella, DOH's rule at issue here contains a single, limited medical exemption. That medical exemption is limited in scope and duration, exempting solely those employees for whom the COVID-19 vaccine would be detrimental to their health based on a preexisting health condition, and lasting only until immunization is no longer detrimental to that worker's health.

Petitioners here—sixteen healthcare workers—sued to challenge DOH's emergency rule, alleging that the Free Exercise Clause required DOH to also exempt all healthcare workers who object to the COVID-19 vaccination on religious grounds. The U.S. District Court for the Northern District of New York granted a preliminary injunction. The U.S. Court of Appeals for the Second Circuit reversed, concluding that petitioners were not likely to succeed on the merits of their

claims and that the balance of equities and public interest did not warrant preliminary relief. This Court then denied petitioners' emergency application for injunctive relief pending the filing and disposition of their petition for certiorari.

The petition does not warrant this Court's review. Under circumstances like those presented here, this Court recently denied a petition seeking review of a First Circuit decision upholding a Maine regulation that requires COVID-19 vaccination of healthcare workers without providing a religious exemption. *See Does 1-3 v. Mills*, 16 F.4th 20 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022). The Court should likewise deny certiorari here for three reasons.

First, this petition presents a poor vehicle to review the questions presented. The interlocutory posture of the case, which arises from a request for a preliminary injunction based on a complaint that has since been amended, strongly counsels against certiorari. In reversing the preliminary injunction, the court of appeals emphasized the sparse factual record about key issues. The court of appeals further emphasized that its conclusions were preliminary and might change at later stages of the proceedings. Moreover, the petition seeks to raise several arguments that were not raised below. The Court should not precipitously review the case without a comprehensive factual record and full consideration of the issues by the courts below.

Second, contrary to petitioners' assertions, the decision below does not implicate a circuit split. The court of appeals applied the same standard that other courts apply in analyzing the neutrality of a rule challenged under the Free Exercise Clause. Like other courts, the court of appeals considered whether the

challenged rule is neutral on its face and whether its history or administration reveals any departures from neutrality. And like other courts, the court of appeals here did not require petitioners to show religious animus in order to show non-neutrality. Instead, it correctly recognized that a showing of animus is one method of defeating neutrality. There is also no circuit split regarding whether a secular exemption to a challenged rule is a proper comparator for the requested religious exemption. The purported split identified by petitioners merely reflects the courts' application of the same standard to different factual circumstances.

Finally, the decision below is correct. Under well-established Free Exercise principles, the presence of a single, limited medical exemption to a vaccine requirement does not require the State to provide a blanket religious exemption from vaccination. DOH's COVID-19 vaccination rule is not comparable to rules to which this Court has previously applied strict scrutiny because DOH's rule does not allow for broad nonreligious exemptions. Moreover, the only recognized exemption furthers rather than undermines the rule's fundamental public-health objectives.

STATEMENT

A. New York's History of Vaccination Requirements

New York has long been a national leader in mandating vaccinations to protect against the spread of communicable disease. The State required school-age children to be vaccinated against smallpox in the 1860s. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002).

New York has also regularly imposed vaccination requirements on healthcare workers. For example, DOH regulations require hospital employees whose work activities pose a risk of transmission to patients to be immunized against measles and rubella; like the rule at issue here, this requirement contains a limited medical exemption, but does not contain a religious exemption. *See* 10 N.Y.C.R.R. § 405.3(b)(10)(i)-(iii). Similar rules apply to healthcare workers in long-term care facilities and other institutions.[1]

B. The COVID-19 Pandemic and the Development of Safe Vaccines

COVID-19 is a potentially deadly respiratory illness that spreads easily from person to person. In the United States, COVID-19 has infected almost 80 million people and claimed more than 950,000 lives.[2] Healthcare workers have been disproportionately harmed by the disease, experiencing over 1,000,000 infections and over 4,000 deaths.[3]

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[1] *See* 10 N.Y.C.R.R. §§ 415.26(c)(1)(v)(a)(2)-(4) (nursing homes), 751.6(d)(1)-(3) (diagnostic and treatment centers), 763.13(c)(1)-(3) (home health agencies, long-term home health care programs, AIDS home-care programs), 766.11(d)(1)-(3) (licensed home-care services agencies), 794.3(d)(1)-(3) (hospice), 1001.11(q)(1)-(3) (assisted living residences).

[2] Centers for Disease Control & Prevention, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory* (internet). (For sources available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on April 1, 2022.)

[3] Centers for Disease Control & Prevention, *COVID Data Tracker: Cases & Deaths Among Healthcare Personnel* (internet). *See also* CA2 J.A. 227, 397-402.

When the COVID-19 pandemic began, there was no known vaccine available to help prevent the spread of the disease. In December 2020, the U.S. Food and Drug Administration (FDA) issued an emergency use authorization for the Pfizer-BioNTech COVID-19 vaccine. It subsequently issued emergency use authorizations for the Moderna, and Janssen vaccines, and then granted full regulatory approval for the Pfizer and Moderna vaccines.[4] Studies show that the vaccines are both safe and highly effective, particularly for preventing hospitalizations in vulnerable populations.[5]

The COVID-19 vaccines do not contain aborted fetal cells. HEK-293 cells—which are currently grown in a laboratory and are thousands of generations removed from cells collected from a fetus in 1973—were used in testing during the research and development phase of the Pfizer and Moderna vaccines. *See* CA2 J.A. 223, 371-378, 383-384. The use of such cell lines for testing is common, including for the rubella vaccination, which New York's healthcare workers are already required to take. *See* CA2 J.A. 386-390. A diverse range of religious leaders has strongly encouraged COVID-19 vaccination. For example, the U.S. Conference of Catholic Bishops has explained that receiving the Pfizer and Moderna vaccines is consistent with the Catholic faith

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[4] CA2 J.A. 221-222, 335-351, 358; Press Release, Food & Drug Admin., *Coronavirus (COVID-19) Update: FDA Takes Key Action by Approving Second COVID-19 Vaccine* (Jan. 31, 2022) (internet).

[5] *See, e.g.*, Heidi L. Moline et al., *Effectiveness of COVID-19 Vaccines in Preventing Hospitalization Among Adults Aged ≥ 65 Years – COVID-NET, 13 States, February-April 2021*, 70 Morbidity & Mortality Wkly. Rep. 1088, 1092 (2021) (finding vaccines' efficacy for preventing hospitalizations ranged from 84% to 96% among adults 65 to 74 years old).

because those vaccines did not use fetal cell lines for their design, development, or production.[6]

C. New York's Response to COVID-19 Transmission in the Healthcare Sector

DOH is charged with protecting the public health and supervising and regulating "the sanitary aspects of . . . businesses and activities affecting public health." N.Y. Pub. Health Law § 201(1)(m). Pursuant to this broad mandate, DOH acted swiftly to respond to the increasing risks posed by the Delta variant of the SARS-CoV-2 virus in New York's healthcare sector in August 2021.

On August 18, 2021—prior to full FDA approval of the Pfizer vaccine—the DOH Commissioner issued an Order for Summary Action under Public Health Law § 16 (Pet. App. 126a-132a), which allows him to take immediate action to remedy a condition or activity that constitutes a danger to public health, for a period not to exceed fifteen days, *see* N.Y. Pub. Health Law § 16. The August 18 Order required limited categories of health-care entities—i.e., hospitals and nursing homes—to ensure that covered personnel were vaccinated against COVID-19. Pet. App. 128a-130a. The Order included both a medical exemption and an exemption for individuals who hold a religious belief "contrary to the practice of immunization, subject to a reasonable accommodation by the employer." Pet. App. 130a-131a. The Order was not intended to be a permanent solution, but rather served as an immediate "stop-gap measure" pending

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[6] Chairmen of the Comm. on Doctrine & the Comm. on Pro-Life Activities, U.S. Conf. of Cath. Bishops, *Moral Considerations Regarding the New COVID-19 Vaccines* 4-5 (Dec. 11, 2020) (internet).

further action by the Department and the Public Health and Health Planning Council, a council within DOH that consists of the Commissioner and 24 other members drawn from the public-health system, healthcare providers, and elsewhere.[7]

The Order was superseded when on August 26, 2021—three days after the FDA gave full approval to the Pfizer vaccine—the full Council engaged in a separate process to approve the emergency rule at issue here, based on full consideration and input by its members. The rule requires covered healthcare entities to "continuously require" employees to be fully vaccinated against COVID-19 if they "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." Pet. App. 134a-135a (10 N.Y.C.R.R. § 2.61(a)(2), (c)). Unlike the Commissioner's August 18 Order, the rule covers a broader range of healthcare entities, extending to certified home health agencies, long-term home health care programs, hospices, and adult-care facilities, among others. Pet. App. 133a-134a (§ 2.61(a)(1)(ii)-(iv)). Also, unlike the Order, the rule was published in the *New York State Register* with required supporting documentation. *See* Pet. App. 133a-156a (Prevention of COVID-19 Transmission by Covered Entities, 43 N.Y. Reg. 6, 6-9 (Sept. 15, 2021)).

The rule contains only a single, narrow exception to its requirements: a medical exemption limited in duration and scope. The rule exempts employees for whom a COVID-19 vaccine would be detrimental to their health based upon a preexisting health condition. Pet.

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[7] Decl. of Vanessa Murphy, J.D., M.P.H. ¶ 6, *Does v. Hochul*, No. 21-cv-5067 (E.D.N.Y. Oct. 5, 2021), ECF No. 48.

App. 135a-136a (§ 2.61(d)(1)). The exemption applies only until immunization is found no longer to be "detrimental to such personnel member's health," and that duration must be written in the employment medical record. Pet. App. 135a (§ 2.61(d)(1)). And the exemption must be "in accordance with generally accepted medical standards," such as the "recommendations of the Advisory Committee on Immunization Practices" (ACIP), a committee under the auspices of the Centers for Disease Control and Prevention (CDC). Pet. App. 135a (§ 2.61(d)(1)).

DOH guidance on the emergency rule makes clear that the available grounds for a medical exemption are narrow and largely temporary. For example, the only "contraindications" recognized by the CDC as grounds for a medical exemption from COVID-19 vaccination are severe or immediate allergic reactions "after a previous dose" of the vaccine or "to a component of the COVID-19 vaccine."[8] The CDC also recognizes certain "precautions"—i.e., conditions that increase the risk of a serious reaction to the vaccine or that interfere with its effectiveness—that could warrant deferring COVID-19 vaccination (such as a recent acute illness), or administering a different version of the vaccine (such as a reaction to one of the three available vaccines).[9] Less serious conditions are not a basis for a medical exemption,

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[8] Centers for Disease Control & Prevention, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States* (updated Mar. 30, 2022) (internet); *see* N.Y. State Dep't of Health, *Frequently Asked Questions (FAQs) Regarding the Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation* 4 ("Dep't of Health, *FAQs*") (internet).

[9] *See* Centers for Disease Control & Prevention, *Interim Clinical Considerations*, *supra*.

including common side effects of the COVID-19 vaccine like fever, headache, or fatigue; or immunosuppression due to a health condition. Dep't of Health, *FAQs*, *supra*, at 4-5.

The rule does not contain an exemption for healthcare personnel who oppose vaccination on religious or any other grounds. The availability of a medical but not a religious exemption parallels New York's preexisting rules requiring that healthcare workers be vaccinated against measles and rubella. As DOH has explained, allowing a religious exemption for the COVID-19 vaccine, but not for the measles and rubella vaccines, would undermine the State's consistent approach to preventing the transmission of these particularly infectious and harmful diseases in the healthcare sector.[10] CA2 J.A. 225-226.

In accompanying administrative materials, DOH further explained the basis for the rule. DOH noted that the rule responded to the increasing circulation of the Delta variant, which had led to a tenfold increase in COVID-19 infections in less than two months. It found that COVID-19 vaccines are safe and effective, and that the presence of unvaccinated personnel in healthcare settings poses an unacceptably high risk that employees may acquire COVID-19 and transmit it both (a) to colleagues, thereby exacerbating staffing shortages; and (b) to vulnerable patients or residents, thereby causing an unacceptably high risk of medical complications. DOH also emphasized that unvaccinated individuals have *eleven times* the risk as

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[10] *See also* Video, Special Meeting of the N.Y. Pub. Health & Health Plan. Council, Comm. on Codes, Reguls. & Legis., at 30:42-31:00, 37:20-37:38 (Aug. 26, 2021) (internet); *see also* 10 N.Y.C.R.R. §§ 66-1.1(l), 66-1.3(c).

vaccinated individuals of being hospitalized with COVID-19. Pet. App. 142a.

DOH's findings about the immediate necessity for the emergency rule are supported by the conclusions of the CDC. For example, the CDC has recognized the importance of achieving high vaccination rates in settings where residents are at high risk of COVID-19 associated mortality, including in long-term care facilities. Deaths at such facilities account for almost one-third of COVID-19 related deaths in the United States. The CDC had observed outbreaks that occurred in facilities where the "residents were highly vaccinated, but transmission occurred through unvaccinated staff members." CA2 J.A. 230-231, 454-455. And although vaccinated people may transmit the Delta variant to others as well, it was found that they did so at much lower rates than unvaccinated people. *See* CA2 J.A. 217, 267-268, 296.

D. Procedural History

In September 2021, petitioners—sixteen anonymous healthcare workers allegedly subject to DOH's emergency rule—filed this lawsuit, challenging the lack of a religious exemption in the rule.[11] *See* Pet. App. 163a, 179a-208a.

Petitioners alleged that they have religious objections to receiving vaccines that use aborted fetal cell lines in their testing, development, or production. Pet. App. 175a-179a. Petitioners alleged that if they do not take the COVID-19 vaccine they will face various employment consequences, risk disciplinary charges, or

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[11] Technologist P. moved away from New York and has withdrawn as a plaintiff in the underlying lawsuit. Pet. 14 n.11.

lose their licenses.[12] *See, e.g.*, Pet. App. 189a, 193a, 197a-198a, 208a. Petitioners did not identify themselves or their employers. They claimed that the DOH emergency rule violates their right to Free Exercise of religion and is preempted by Title VII of the Civil Rights Act of 1964. *See* Pet. App. 208a-214a. They sought declaratory and injunctive relief. Pet. App. 218a-219a.

Petitioners moved for a temporary restraining order (TRO) and a preliminary injunction, without submitting further evidence. The district court granted a TRO without hearing from defendants. *See* Pet. App. 97a-100a. In October 2021, the district court granted a preliminary injunction. Pet. App. 72a-96a.

On appeal, the Second Circuit issued an order vacating and reversing the preliminary injunction (Pet. App. 63a-65a), and then issued a written opinion explaining the basis for the order (Pet. App. 1a-62a).[13]

On petitioners' Free Exercise claim, the court concluded that petitioners were unlikely to prevail on the merits because they were unlikely to show that DOH's emergency rule was not neutral or generally applicable. Pet. App. 25a. The court emphasized that its decision was preliminary and did not reflect a final determination on the merits. Pet. App. 9a-10a. The

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[12] Plaintiffs alleged a range of potential employment consequences. Some alleged loss of employment. Others allege that they will be unable to continue their medical practices if their hospital privileges are suspended. *See* Pet. App. 185a, 187a, 199a, 205a. Others alleged that they were told that their employment would be at risk if they do not receive a COVID-19 vaccination. Pet. App. 194a-195a, 202a-203a.

[13] The order and written decision also resolved another appeal that concerned a similar Free Exercise challenge to the DOH rule. That case is not the subject of this petition and is not at issue here.

court observed that based on the limited record, it appeared that DOH had not "eliminated" a religious exemption contained in the Commissioner's August 18 Order because DOH did not modify the earlier order. Instead, it issued a new rule with a different scope and duration, which applied to a broader group of health-care entities. And the emergency rule was promulgated by different decision-makers than the August 18 Order, and was the product of a different process that included fuller consideration and input by the Council's members. Pet. App. 28a-29a. As for public statements made by Governor Hochul relied on by petitioners, the court noted that many of those comments did not relate to the emergency rule, and that the Governor's expression of her own religious belief to encourage vaccination did not imply an intent on the part of the State to target those with religious beliefs contrary to hers. Pet. App. 30a.

The court of appeals also concluded that the rule is likely generally applicable. Emphasizing the undeveloped nature of the factual record (Pet. App. 36a-39a), the court noted that the medical exemption did not appear to render the rule underinclusive. As the court explained, the medical exemption furthers the public-health interests underlying the rule, i.e., protecting the health of vulnerable patient populations and health-care workers, and reducing the risk of staffing shortages, while a religious exemption would not (Pet. App. 34a-35a). The court also observed that, based on the limited evidence before it, the risks of COVID-19 transmission from the rule's medical exemption are lower than the risks from a religious exemption. Pet. App. 35a-36a. As the court explained, the medical exemption is limited in scope and duration, while a religious exemption would not be limited. And "the medical exemptions are likely to be more limited in number

than religious exemptions." Pet. App. 35a. As a neutral rule of general applicability, the court assessed DOH's rule under rational-basis review. The court concluded that the rule is a rational response to the spread of an especially contagious variant of the virus during a pandemic.[14] Pet. App. 45a.

Finally, the court of appeals concluded that petitioners had failed to show irreparable injury or a balance of equities supporting a preliminary injunction. The court noted that factual developments on remand might affect the district court's analysis of these factors in assessing petitioners' request for a permanent injunction. Pet. App. 52a-57a.

This Court then denied petitioners' subsequent emergency application for injunctive relief enjoining the rule's enforcement during the pendency of their petition for certiorari. *See* Pet. App. 105a. The court of appeals also denied a petition for rehearing en banc, without any noted dissents. Pet. App. 122a-123a.

Proceedings have continued in the courts below following the decision challenged by petitioners. Petitioners filed an amended complaint and renewed their motion for a preliminary injunction based on new claims not at issue here. For example, plaintiffs newly alleged that DOH's rule is preempted by a federal regulation and that guidance issued by the New York State Department of Labor (DOL) regarding unemployment benefits violates their Free Exercise rights. The district court denied the renewed motion for a preliminary injunction, concluding that petitioners were

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[14] The Second Circuit also rejected petitioners' claim that Title VII preempts the rule. Pet. App. 45a-50a. The petition does not raise this claim.

unlikely to succeed on the merits of their new claims. Petitioners have appealed. *See Dr. A. v. Hochul*, No. 21-cv-1009, 2022 WL 548260, at *3-7 (N.D.N.Y. Feb. 23, 2022), *appeal docketed*, No. 22-650 (2d Cir. Mar. 28, 2022).

REASONS FOR DENYING THE PETITION

A. This Interlocutory Dispute Is Not an Appropriate Vehicle for Considering the Questions Presented.

1. This Court has frequently noted that the interlocutory posture of a case is sufficient to warrant denying certiorari. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635-36 (2019) (statement of Alito, J., respecting the denial of certiorari); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

Denying certiorari review of an interlocutory decision promotes judicial efficiency and allows the Court to consider claims based on a full factual record and comprehensive presentation of the legal issues. For example, ongoing district court proceedings may result in an evidentiary record that was not available when a preliminary injunction motion was decided. As litigation progresses, the lower courts may also engage in different legal analyses and reach different legal conclusions—which should inform this Court's consideration of the issues. And denying certiorari of an interlocutory decision enables additional arguments asserted at different stages of the proceeding to be consolidated into a single petition. *See Major League Baseball Players*

Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. Here, the Court should adhere to its practice of denying review of interlocutory decisions given that ongoing proceedings may result in further factual development. The decision below rested on the limited evidence presented on the preliminary injunction motion. As the court of appeals acknowledged, subsequent factual developments may affect its analysis. *See* Pet. App. 9a-10a. For example, the court observed that additional information about the events leading to DOH's rule may be relevant to the neutrality inquiry. Pet. App. 27a; *see* Pet. App. 29a-30a & n.20. And the court explained that factual development may shed light on the comparability of the COVID-19 transmission risks posed by the rule's medical exemption and petitioners' requested religious exemption. *See* Pet. App. 36a, 38a-39a.

Indeed, new factual developments have already undermined the Court's ability to provide effective relief on review of this denial of a preliminary injunction. As petitioners acknowledge, several petitioners lost their employment or admitting privileges after the decision below issued. Pet. 13-14. Those petitioners' past injuries do not support the preliminary injunction they seek to have reinstated here because no relief that the Court could issue against DOH would compel petitioners' unnamed former employers to rehire them or require unnamed hospitals to restore their admitting privileges. *See* Pet App. 45a n.30; *cf. City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) ("past wrongs" insufficient to warrant prospective injunctive relief). And one petitioner has received a medical exemption (Pet. 14), so it is unclear what further relief he seeks. These changed circumstances warrant denying certiorari.

3. At this interlocutory stage of the litigation, not only the facts but also the legal claims are in flux. Petitioners improperly assert several arguments that were not considered below, including arguments about new claims that were raised in their amended complaint and not yet considered by the court of appeals. Because this Court is "a court of review, not of first view," *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (quotation marks omitted), certiorari should be denied, *see Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019).

For example, several petitioners have been vaccinated for COVID-19, a development that renders their claims moot. Attempting to avoid this threshold defect, petitioners now purport to challenge a new DOH emergency regulation effective January 21, 2022, that required covered entities to ensure that personnel receive any booster shot recommended by the CDC. Pet. App. 158a; *see* Pet. App. 157a-160a. But that rule was not considered by the courts below, and DOH subsequently issued a new emergency regulation, on March 22, 2022, removing the booster requirement. *See* Prevention of COVID-19 Transmission by Covered Entities (Mar. 22, 2022) (codified at § 2.61) (internet).

Moreover, petitioners' amended complaint contains new claims that may affect the litigation's course. The amended complaint adds a claim that a regulation issued by the Centers for Medicare and Medicaid Services preempts DOH's rule. And the amended complaint challenges guidance issued by the DOL concerning unemployment benefits. Petitioners improperly attempt to challenge that guidance here (*see* Pet. 6-7), despite failing to raise this argument below—including in their merits brief to the Second Circuit, which they filed

nearly one month after the DOL guidance was issued.[15] The district court has already denied petitioners' renewed preliminary injunction motion, which was based on both the DOL guidance and the preemption claim, and plaintiffs have appealed. *See Dr. A.*, 2022 WL 548260, at *6. Because that appeal is still pending, the Court should deny certiorari and allow the court of appeals to review these issues first.

B. The Decision Below Does Not Implicate a Circuit Split and Is Consistent with This Court's Precedents.

The court of appeals' decision does not implicate any split in authority and correctly applies this Court's precedents in finding that DOH's rule is a neutral law of general applicability. Indeed, this Court has specifically identified "compulsory vaccination laws" as among the neutral, generally applicable laws that do not require religious exemptions under the First Amendment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 889 (1990).

1. The court of appeals did not require a showing of animus to defeat neutrality, and there is no split in authority on that issue.

Petitioners argue that the ruling below deepens a purported split in authority on whether a showing of religious animus is necessary to establish that a challenged rule is not neutral. *See* Pet. 21-26. But petitioners' argument misapprehends the decisions on which it relies. The Second Circuit, like all other circuits that

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[15] *See* Br. for Pls.-Appellees, *Dr. A. v. Hochul*, No. 21-2566 (2d Cir. Oct. 22, 2021), ECF No. 38.

have addressed the issue, considered several methods by which litigants might show a lack of neutrality, including but not limited to alleged religious animus. Indeed, the Second Circuit considered potential animus because petitioners raised that argument—not because the court was requiring animus to establish any Free Exercise claim.

As this Court has observed, there are many ways of demonstrating that "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). When a challenged rule is facially neutral, courts look to its history and administration for subtle departures from neutrality that restrict practices based on their religious nature or intolerance of religious beliefs. *See Lukumi*, 508 U.S. at 533-34.

The authorities relied on by petitioners in the Third, Sixth, Tenth, and Eleventh Circuits (Pet. 21-23) apply the established rule that there are alternative means of showing a lack of neutrality without showing animus. For example, in *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit found that a zoning ordinance was not neutral on its face because it expressly excluded religious assemblies from a business district. 366 F.3d 1214, 1232-34 & n.16 (11th Cir. 2004); *cf. Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1257-60 (10th Cir. 2008) (statute facially discriminated by providing scholarships to some religious institutions but not others deemed too sectarian). And in *Roberts v. Neace*, the Sixth Circuit found a lack of neutrality in an executive order mandating closures to prevent transmission of COVID-19 because the order had broad exemptions for certain businesses but lacked comparable exemp-

tions for religious entities. 958 F.3d 409, 413-14 (6th Cir. 2020); *see also Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (lack of neutrality where officials granted exemptions for secular and religious purposes but not for Orthodox Jewish community).

The decisions which petitioners claim are in conflict (*see* Pet. 23-25) are simply fact-bound applications of the same uniform standard—i.e., that in addition to facial neutrality, courts also look to whether a challenged rule has been applied to restrict practices based on their religious nature or objections to religious beliefs. Thus, the Seventh Circuit decisions on which petitioners rely looked to whether government actions restricted religious practices *because of* their religious nature.[16] Similarly, the Ninth Circuit considered multiple arguments concerning neutrality in *Stormans, Inc. v. Wiesman*, and found on the facts that the rule at issue was facially neutral and operated neutrally. 794 F.3d 1064, 1076-79 (9th Cir. 2015); *see also Archdiocese of Wash. v. Washington Metro. Area Trans. Auth.*, 897 F.3d 314, 322 (D.C. Cir. 2018) (rejecting multiple arguments concerning neutrality).

The Second Circuit correctly applied the same settled standard here. First, it concluded that DOH's rule is facially neutral. The court then considered and rejected petitioners' fact-bound arguments that the rule nonetheless "'targets religious conduct for distinctive treatment.'" Pet. App. 26a (quoting *Lukumi*, 508 U.S. at 533-54). For example, the court rejected petitioners'

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[16] *See* Pet. 23-24 (citing *Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021); *Illinois Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017); *St. Johns United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006)).

contention that the rule targeted religious practice by supposedly reversing the Commissioner's earlier Order containing a religious exemption.[17] *See* Pet. 30. As the court explained, the DOH rule did not reverse the Order or reflect suppression of religious beliefs but rather represented a comprehensive and longer-term solution issued after the Council's more extended consideration of public-health policy. *See* Pet. App. 27a-30a & n.20.

Finally, like other circuits, the Second Circuit considered whether alleged religious animus might provide a separate avenue for finding a lack of neutrality. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). The court rejected petitioners' case-specific assertions of animus (*see* Pet. 28-29), concluding that petitioners had failed to establish any nexus between Governor Hochul's statements and DOH's issuance of the emergency rule. Pet. App. 30a-31a. Animus was thus simply one neutrality-related argument, among several, that petitioners raised and that the Second Circuit correctly considered and rejected.

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[17] Petitioners also claim that a lack of neutrality can be inferred from the purported denial of unemployment benefits. But that argument was never raised to the Second Circuit. And the district court rejected that argument when petitioners raised it in their renewed preliminary injunction motion. *See Dr. A.*, 2022 WL 548260, at *6.

2. There is no split in authority on the standard for when a secular exemption defeats general applicability, and the court of appeals correctly applied that standard to the facts here.

Petitioners are also incorrect in arguing that the ruling below deepens a purported split in authority on whether the presence of categorical exemptions renders a rule not generally applicable. *See* Pet. 15-21. A policy is substantially underinclusive and not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. As this Court has explained, the Free Exercise Clause bars disparate treatment of otherwise *comparable* exemptions to a challenged rule, where the exemptions differ only in their religious or nonreligious motivation. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). None of the decisions relied on by petitioners ruled that an exemption for nonreligious conduct automatically requires strict scrutiny. Rather, consistent with *Tandon* and *Roman Catholic Diocese*, they conducted a comparative analysis to determine if the secular exemptions undermined the challenged rule's purpose to the same degree as would the sought-after religious exemptions. The courts merely reached different results based on the application of the same fact-bound comparative analysis to different circumstances.

The Third Circuit decisions on which petitioners rely illustrate the point. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit applied strict scrutiny to a rule prohibiting police officers from wearing beards because an available

medical exemption directly undercut the policy's purpose in maintaining a uniform appearance for law enforcement personnel in the same manner that a religious exemption would undercut the policy. 170 F.3d 359, 360, 365-66 (3d Cir. 1999). On the other hand, the court found that an exception for undercover officers did not impact general applicability because that exemption did not undermine the rule's purposes. *See id.*; *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (exempted nonreligious conduct undermined law's purposes "*to at least to the same degree* as the covered conduct that is religiously motivated" (emphasis added)).

The decisions from other courts to which petitioners point (*see* Pet. 16-17) are in accord. For example, the Sixth Circuit has evaluated whether secular conduct allowed under a challenged rule endangered state interests "'in a similar or greater degree than' religious conduct" did. *Monclova Christian Acad. v. Toledo-Lucas County Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543)); *see also Kentucky v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020). And the Eleventh Circuit evaluated whether secular exemptions to a zoning ordinance endangered the government's interest "as much or more" than a religious exemption would endanger that interest. *See Midrash*, 366 F.3d at 1235; *see also Mitchell County v. Zimmerman*, 810 N.W.2d 1, 12-13 (Iowa 2012) (considering whether exempted secular conduct threatened statutory purposes to equal or greater degree than would religious exemption).

The First Circuit applied the same standard in *Mills*, a decision this Court recently declined to

review.[18] The First Circuit analyzed Maine's COVID-19 vaccination requirement for healthcare workers and concluded, based on the record before it, that the medical exemption did not undermine the purposes of the rule: i.e., keeping healthcare workers healthy to provide care in an overburdened healthcare system and keeping vulnerable patients safe. An exemption for religious objectors would not advance these interests.[19] *See Mills*, 16 F.4th at 30-32.

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[18] No conflict arises from a Sixth Circuit decision upholding a preliminary injunction against a university's COVID-19 vaccination requirement for student-athletes. *See* Pet. 31 (relying on *Dahl v. Board of Trs. of W. Mich. Univ.*, 15 F.4th 728 (6th Cir. 2021) (per curiam)). As the court of appeals observed here, *Dahl* involved a significantly different factual setting, i.e., a scheme under which the university's grant of exemptions was subject to no meaningful standards. Pet. App. 44a n.29. As explained (*infra* at 25-26), no similar discretionary exemption scheme exists here.

The Fifth Circuit's recent decision denying a stay pending appeal of a preliminary injunction enjoining the enforcement of COVID-19 vaccination requirements against certain military members, including U.S. Navy SEALs, is also inapposite. The Fifth Circuit there considered claims under the heightened standard of the Religious Freedom Restoration Act, not the Free Exercise Clause. In any event, that decision was superceded when this Court granted a partial stay of the district court's preliminary injunction pending appeal. *See U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022), *application for stay granted sub nom. Austin v. U.S. Navy SEALs 1-26*, No. 21A477 (U.S. Mar. 25, 2022).

[19] The Ninth Circuit also found that a medical exemption to a COVID-19 vaccination requirement did not defeat general applicability under the circumstances presented in that case, noting that the medical exemption was limited in scope and duration. *See Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (2021), *reh'g en banc denied*, 22 F.4th 1099 (9th Cir. 2022). Petitioners rely heavily on dissenting opinions in *Doe* (Pet. 19-20), but those opinions largely questioned whether other secular exemptions not at issue here were comparable to a religious exemption.

Here, contrary to petitioners' argument (Pet. 26-27), the Second Circuit applied the same comparative analysis to the limited factual record before it, and correctly found that petitioners failed to establish that the rule's medical exemption is comparable to their requested religious exemptions. *First*, far from undermining the interests served by the rule, the medical exemption *advances* the rule's objective of protecting the health of healthcare employees and reducing the risk of staffing shortages that can compromise patient safety. Pet. App. 34a.[20]

Second, although the medical exemption may raise the risk of exempted staff members transmitting COVID-19, the medical exemption's narrow scope and limited duration mean that it does not risk such harm to at least the same degree as would petitioners' requested religious exemption. Because the medical exemption is available only when a worker can demonstrate a need based on CDC and DOH guidance, the number of exemptions is limited based on objective criteria. And the medical exemption's duration is limited to until vaccination "is found no longer to be detrimental to such personnel member's health." Pet. App. 135a-136a (§ 2.61(d)(1)). Accordingly, most medical exemptions will simply defer the administration of the COVID-19 vaccine for a short time-period rather than permanently excuse a worker from being vaccinated. Indeed, the medical exemption in DOH's rule is narrower than the exemption in the Maine statute considered in *Mills*, under which healthcare workers could obtain an exemption with a care provider's state-

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[20] Petitioners claim that the Second Circuit failed to consider the impact of religious objectors on staffing shortages (Pet. 27), but petitioners did not present any evidence on that question.

ment "indicating that immunization *may be* medically inadvisable," or that an employee has "mere *trepidation* over vaccination" for medical reasons. *Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting). *See* Pet. App. 42a n.28.

Petitioners' sought-after religious exemption is quite broad in scope compared to the medical exemption. A religious exemption would not be limited by any objective criteria. *See Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714-16 (1981) (holding that religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others" to merit protection). And any religious exemption would not be limited in time or periodically reassessed. *See* Pet. App. 35a. Indeed, data show that medical exemptions are likely to be more limited in number than religious exemptions, and that high numbers of religious exemptions are likely to be clustered in particular geographic areas. For instance, the ratios of religious exemptions to medical exemptions for hospital workers in Erie County and Monroe County were approximately 18 to 1 and 23 to 1, respectively. Pet. App. 35a-37a; *see Roman Cath. Diocese*, 141 S. Ct. at 66-67 (comparing risk in large store with potentially hundreds of shoppers and nearby church limited to ten to twenty-five congregants). Based on these distinctions, the court of appeals correctly concluded that petitioners failed to show that the exemptions are likely comparable.

3. Petitioners' remaining arguments are meritless.

The court of appeals also correctly determined that petitioners failed to demonstrate that the emergency rule provides a mechanism for individualized exemptions. *See Fulton*, 141 S. Ct. at 1877. Petitioners do not

purport to identify a circuit split on this question, but rather assert that the court of appeals misapplied *Fulton*. Pet. 27-29. But the court of appeals' application of established legal standards to the particular facts presented does not warrant certiorari.

In any event, the court of appeals correctly applied *Fulton*. In *Fulton*, this Court determined that a scheme for granting foster care contracts was not generally applicable because it allowed a government official to grant exceptions to an antidiscrimination provision in that official's "sole discretion." 141 S. Ct. at 1878 (quotation marks omitted). Here, DOH's rule does not provide a broad discretionary scheme under which officials may consider claims of religious hardship alongside other requests for individualized exemptions. Pet. App. 43a. Instead, the rule contains a single, limited medical exemption that is tightly constrained by healthbased criteria.[21] See *supra*, at 7-9.

Finally, contrary to petitioners' contentions, the rule satisfies even strict scrutiny. DOH's compelling interest in combatting COVID-19 in healthcare settings is not plausibly disputed. *See Roman Cath. Diocese*, 141 S. Ct. at 67. Petitioners argue that the rule is not narrowly tailored because New York is supposedly an outlier in declining to provide religious exemptions for healthcare

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[21] Petitioners criticize the Second Circuit's citation to *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021). *See* Pet. 20-21. Although the Court has granted certiorari in part in that case, it need not defer resolution of the current petition pending the resolution of *303 Creative*. This Court limited its review in *303 Creative* to petitioners' Free Speech Clause claim, declining to review their Free Exercise Clause claim. *See 303 Creative LLC v. Elenis*, No. 21-476, 2022 WL 515867 (U.S. Feb. 22, 2022). The resolution of *303 Creative* thus has no bearing on petitioners' Free Exercise claims here.

vaccination requirements. *See* Pet. 35, 37. But both Maine and Rhode Island have similarly required healthcare workers to receive a COVID-19 vaccination, without providing a religious exemption. *See Mills*, 16 F.4th at 24; *Dr. T. v. Alexander-Scott*, No. 21-cv-387, 2022 WL 79819, at *6-8 (D.R.I. Jan. 7, 2022), *appeal docketed*, No. 22-1073 (1st Cir. Jan. 27, 2022). And outside the COVID-19 context, many States in addition to New York, including California, Connecticut, Maine, Mississippi, and West Virginia, do not allow religious exemptions from vaccination requirements for schoolchildren.[22] Indeed, the Fourth Circuit rejected a Free Exercise challenge to West Virginia's mandatory childhood vaccination statute, which, like DOH's rule, recognized only medical but not religious exemptions. *See Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 353-54 (4th Cir.), *cert. denied*, 565 U.S. 1036 (2011).

In any event, DOH was not obligated to follow the policy choices of other States that have allowed religious exemptions from COVID-19 vaccination requirements. State public-health officials have the greatest latitude when, as here, there remains significant uncertainty about the best manner of responding to a devastating infectious disease. *See Marshall v. United States*, 414 U.S. 417, 427 (1974).

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The reasons for denying certiorari on the question presented regarding the court of appeals' analysis under the existing *Smith* framework also counsel in favor of denying certiorari on the question presented

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[22] *See* Cal. Health & Safety Code § 120325 et seq.; Conn. Gen. Stat. Ann. § 10-204a; Me. Rev. Stat. Ann. tit. 20-A, § 6355; Miss. Code Ann. § 41-23-37; W. Va. Code Ann. § 16-3-4.

regarding reconsideration of *Smith*. *See* Pet. 31-33. Any reconsideration of *Smith* would best be performed in a case with a fully developed factual record so that new approaches to the Free Exercise analysis can properly be considered in context rather than in the abstract. Here, the sparse factual record does not provide such context. For example, petitioners failed to present evidence about the availability of alternatives to accommodate their religious objections. Pet. App. 39a, 49a. This Court should not upend its established Free Exercise precedent without an evidentiary record that allows it to consider, inter alia, how any new approach might balance the State's public-health interests, petitioners' religious beliefs, and healthcare providers' interests in workplace safety and cost-efficient provision of medical services.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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