No. 21-1143

In the Supreme Court of the United States

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., DR. S., NURSE S., PHYSICIAN LIAISON X.,

Petitioners,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. MARY T. BASSETT, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HER OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Lower courts are deeply divided over how to apply the Free Exercise Clause. These divisions tempt governments toward gamesmanship. Unclear and malleable standards for neutrality and general applicability mean that governments can often avoid liability for imposing "meaningful burdens" on religious exercise by tweaking the regulatory regime or quibbling about the relevant baseline. Recent conflicts over COVID worship restrictions and clergy access to the condemned have shown how far governments will go to deny accommodations to the religious, and to shield those denials from judicial review.

New York's brief in opposition is an instant classic of the governmental gamesman genre. First, it simply denies the existence of obvious, well-known, and certworthy splits. New York can do this only by ignoring prior grants by this Court and contradicting its own briefs below and in *Diocese of Brooklyn* and *Agudath*.

Second, rather than address the glaring inconsistency of allowing both the unvaccinated-but-medically-exempt and the vaccinated-but-actively-infected to work in hospitals while excluding healthy religious objectors, New York attempts to brief around the problem by describing its mandate as only for "certain" workers. Medical exemptions are variously treated as either quite rare (so New York can suggest less risk of COVID transmission) or quite common (so New York can claim a greater risk of staffing shortages). Vaccinated workers walking around the hospital with active COVID infections get ignored entirely.

Third, New York asks this Court to treat its frequent goalpost-moving as a virtue rather than a vice.

Of course governments that keep changing the rules often cite their own changes as reasons to escape this Court's review. But the need for burdened parties to respond to this gamesmanship to protect their rights is hardly a reason for this Court to deny review.

New York may think that if it can dodge review for another year or two it can later come back and tell this Court that the whole dispute is moot because everyone has either been fired, forced to receive the vaccine, or forced to leave the state. But the First Amendment exists to protect citizens from such burdens, particularly where the harms are "spiritual rather than pecuniary." *Ramirez* v. *Collier*, No. 21-5592, 2022 WL 867311, at *12 (2022). The Court should grant the petition.

I. The circuit splits are deep and intractable.

New York's opposition rests on its implausible claim that the circuit splits over neutrality and general applicability are illusory. To New York, divisions in the lower courts over free exercise are "simply fact-bound applications of the same uniform standard." BIO.19. That claim flies in the face of this Court's recent cert grant to address such splits. Philadelphia BIO at 18-19, *Fulton* v. *City of Philadelphia*, 140 S.Ct. 1104 (2020) (No. 19-123) (granting cert over similarly unfounded claim by Philadelphia, that "the rule of law applied by the Third Circuit * * * [was] in keeping with the rule in every other circuit"); see also *Stormans* v. *Wiesman*, 136 S.Ct. 2433 (2016) (Alito, J., dissenting). This Court has not been wrestling with whether and how to replace *Smith* because it is a well-functioning, uniformly-understood standard.

A. The Second Circuit's decision deepens the 4-4 split over general applicability.

As we explained in the petition, there is a 4-4 circuit split over whether the existence of a secular exemption—like the exemption for medical objectors in New York's rule—makes a law not "generally applicable" under *Smith*. Pet.15-21.

In response, New York argues first that the split is illusory and second that its actions are justified on the merits. BIO.21-25.

1. To hear New York tell it, there's no disagreement on general applicability among the circuits. But leading scholars have long recognized a well-entrenched circuit split over how to define general applicability and analogous comparators, placing cases like *Stormans* on one side of the split and cases like *Fraternal Order* and *Midrash Sephardi* on the other. See, *e.g.*, Douglas Laycock & Steven Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 5-6, 11 (2016) ("There is a circuit split" on when "analogous secular conduct" confirms that "a law ceases to be generally applicable").

That conflict was not resolved in *Fulton* and is clearly presented here. New York claims that a "single, limited medical exemption" cannot show a lack of general applicability, BIO.26, and four circuits agree. Pet.17-21; see also *e.g.*, *Does 1-6* v. *Mills*, 16 F.4th 20, 30 (1st Cir. 2021) (considering a medical exemption and concluding that "no case in this circuit and no case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable"). But the Third and Eleventh Circuits and the Iowa Supreme Court have recognized that a single exemption

can be sufficient where it undermines the state's asserted interest justifying the burden on religion exercise. Pet.16-17; accord Laycock & Collis at 21-23, *supra*.

Indeed, the split is so clear that it has already generated a sharp 3-1 split over the general applicability of vaccine mandates. See Pet.2-3, 30-31. And while New York tries to paint this split as merely different applications of the same rule, federal district courts have repeatedly disagreed. The First, Second and Ninth Circuits have treated vaccine mandates with secular exemptions as generally applicable. Pet.2-3. But on the other side of the split, district courts in the Sixth and Eleventh Circuits have followed the Sixth Circuit's contrary decision in *Dahl*, along with Justice Gorsuch's dissent from the denial of an injunction pending appeal in this case, to find that medical exemptions can show a vaccination mandate is not generally applicable. See *Doster* v. *Kendall*, 2022 WL 982299, at *14 (S.D. Ohio 2022) (relying on *Dahl*); *Poffenbarger* v. *Kendall*, 2022 WL 594810, at *16 (S.D. Ohio 2022) (same); *Air Force Officer* v. *Austin*, 2022 WL 468799, at *11 (M.D. Ga. 2022) ("This scenario was exactly what Justice Gorsuch discussed in *Dr. A v. Hochul*, where exemptions for religious reasons went unrecognized while exemptions for medical reasons were permitted"). These courts were not applying the same rule as the First, Second, and Ninth Circuits.

2. Next, New York tries to justify its mandate under the strict scrutiny it would have faced in the Third, Sixth, and Eleventh Circuits. BIO.21-22. But this does nothing to resolve the split. In any case, its own actions have undermined its asserted interests and fail strict scrutiny. See Part I.C, *infra*.

B. The Second Circuit's decision deepens the 4-5 split over neutrality.

New York removed the religious exemption to its mandate "intentionally." App.26a-27a. But circuits have split 4-5 over the neutrality standard. Pet.21-26. In the Third, Sixth, Tenth, and Eleventh Circuits, New York's mandate would trigger strict scrutiny, because a rule that is intended to treat religion differently is by definition not "neutral" towards religion. Pet.21-23. The Second Circuit's decision to bless New York's rule deepens the already intractable split.

In response, New York does not deny that the religious exemption was removed intentionally. Instead, it offers three merits arguments to defend the removal: that the rule (without the religious exemption) is "facially neutral," that it did not "reflect suppression of religious beliefs" but rather "more extended consideration of public-health policy," and that there is no "nexus" between Gov. Hochul and the agency she runs. BIO.19-20.

These arguments all fail: facial neutrality is not determinative under *Lukumi*; the second rule copied key parts of the first rule nearly word-for-word (compare App.128a-132a with 133a-136a); and Gov. Hochul appoints the head of DOH and takes its "nation-leading health care worker vaccine mandate" as her most important early accomplishment in office.[1] But regardless of these merits disputes, the important point for certiorari purposes is that in the Third, Sixth, Tenth, and Eleventh Circuits, all of this would have been more than enough to establish that New York has

[1] N.Y. State Governor's Office, *Governor Kathy Hochul's First 45 Days* (Oct. 7, 2021), https://perma.cc/3Q5P-GDVS.

failed to treat religion neutrally. But in the First, Seventh, Ninth, D.C., and now Second Circuits, a law admittedly intended to prevent a specific religious exercise is still neutral absent some additional showing of hostility or animus. Pet.23-26.

New York now remarkably claims that *zero* circuits take the view that animus is a necessary element of proving a lack of neutrality. BIO.19-20. Instead, according to New York, animus is merely a *sufficient* element, not a necessary one. BIO.19-20.

That characterization blinks reality. For example, *Mills* held that the religious objectors had to show that "the state *singled out* religious objections * * * '*because of* their religious nature.'" 16 F.4th at 30 (first emphasis added). The other circuits on that side of the split did the same. Pet.23-26. And New York itself has taken this position repeatedly, both in the Second Circuit below and before this Court.

In the Second Circuit, New York responded to Petitioners' argument that New York "specifically excised the prior religious exemption" by asserting that Petitioners "identif[ed] no evidence whatsoever" that the change "reflected any hostility toward certain religious beliefs." Reply C.A. Br.5 (cleaned up).

In *Diocese of Brooklyn* v. *Cuomo*, the applicants argued that the Free Exercise Clause requires "government *neutrality*,' not 'governmental avoidance of bigotry.'" Application at 36 (No.20A87). New York responded by claiming that the standard for neutrality is whether a law's object is "to infringe upon or restrict practices because of their religious motivation." Opp.20, 32, *Diocese of Brooklyn*, (No.20A87). Indeed,

New York chided the Diocese for offering "no precedent of this Court or any other court suggesting that a law is not neutral" where it singles out religion for positive, rather than animus-based, reasons. *Id.* at 34. And in the companion case *Agudath Israel of America* v. *Cuomo*, No.20A90, New York went even further, asserting that, because "the Governor's public statements fall far short of showing that Executive Order 202.68 was motivated by religious animus," those statements could not render the Order non-neutral. Opp.26.

New York's new position thus contradicts both precedent and New York itself seventeen months ago.

C. The Second Circuit's decision conflicts with this Court's recent Free Exercise Clause decisions.

The Second Circuit's decision also flouted *Tandon*, *Fulton*, and *Masterpiece* by upholding a rule that (a) permits actions taken for secular reasons but prohibits the same actions taken for religious reasons; (b) creates an individualized exemption procedure for medical accommodations but not religious accommodations; and (c) intentionally targets religion by removing an existing religious exemption while its chief decisionmaker announces that she disapproves of religious objectors. Pet.5-6, 26-30.

New York does not dispute any of this. Instead, it doubles down on its argument that its mandate does not violate *Fulton* and *Tandon* because the medical exemption scheme "advances" its interests in employees' health and in "reducing the risk of staffing shortages" while a religious exemption would not. BIO.24. And it asserts that its medical exemption is nothing like the

exemption in *Fulton* because it is "single, limited[,]" and "constrained by healthbased criteria." BIO.26. Finally, despite *Masterpiece*, it asks this Court to set aside all of Gov. Hochul's statements singling out religious objectors as having no "nexus" with the rules issued by the agency she directs. BIO.20. Each argument fails.

First, New York's gerrymandered rule "prohibits religious conduct while permitting secular conduct that undermines" its "interests in a similar way." *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021). New York asserts interests in preventing the spread of COVID among health care workers and avoiding staffing shortages, but admits that its medical exemptions "may raise the risk of exempted staff members transmitting COVID-19." BIO.24; see also App.37a (noting "reasonable" proposition that each unvaccinated employee carries comparable risks "irrespective of the reason that the employee is unvaccinated"). And forcing the firing of religious objectors—whom New York claims are more numerous than those with medical exemptions, BIO.25—created precisely the kind of staffing shortages the rule was supposed to prevent. CMA Br.17-18. The staffing crisis in turn led New York to permit vaccinated employees who are sick with COVID to return to work (App.222a-223a)—shredding whatever remained of its interest in excluding the religious to stem the spread of COVID among healthcare workers. In short, New York's own response to its self-created crisis has fatally undermined the interests it asserts. Under *Tandon* and *Fulton*, this defeats general applicability. Pet.26-27.

Second, New York's medical exemption makes the mandate "inapplicable" if "any licensed physician or

certified nurse practitioner certifies" that a vaccine would be "detrimental" based on a "pre-existing health condition." App.135a. This is no less a "formal mechanism" for granting exemptions than the single exemption at issue in *Fulton*. 141 S.Ct. at 1879. The criteria for the medical exemption don't change the government's underlying interest in the mandate; they simply reveal the government's decision about "which reasons for not complying with the policy are worthy of solicitude." *Ibid.* Under *Fulton*, New York's individualized medical exemptions defeat general applicability as well. Pet.27-28.

Third, *contra* New York, the nexus between Gov. Hochul's remarks and the rule is clear. On September 25 she announced that health care workers fired for being unvaccinated were categorically ineligible for unemployment benefits, and on September 26 she preached a sermon saying that vaccine objectors "aren't listening to God and what God wants." App.109a (Gorsuch, J., dissenting). Her statements criticizing religious vaccine objectors were not made in a vacuum; she had the power to punish them, and she did so. Pet. 5-8, 28-29. The Second Circuit's willingness to excuse her behavior defies *Masterpiece*.

II. The petition provides an exceptional vehicle for resolving disputed questions of nationwide importance.

Forty-seven states and the federal government have found a way to protect religious conscience while combatting COVID. Pet.2. New York, Maine, and Rhode Island are outliers, but they are also home to 22 million people. The impact of failing to accommodate religious health care workers in New York has been

devastating. *Amicus* Catholic Medical Association estimates that 34,000 health workers lost their job or were placed on leave as a result of New York's mandate. CMA Br.17. And "immediately after the Second Circuit dissolved the preliminary injunction in this case, 32 hospitals—including six in Western New York—met the State's criteria for suspending nonessential procedures" because of staffing shortages. *Ibid.*

Governments at all levels are continuing to impose COVID vaccine mandates. See, *e.g.*, *Doe* v. *San Diego Unified Sch. Dist.*, 22 F.4th 1099, 1103 (9th Cir. 2022) (Bumatay, J., dissenting). New York aspires to be a "national leader in mandating vaccinations." BIO.3. If New York's rule is allowed to stand, other governments will follow suit. Only this Court can resolve the division in the Circuits and reaffirm that here, too, the Constitution still applies.

New York's BIO confirms this is an excellent vehicle in which to do so. The decision below acknowledged—and New York now apparently concedes—that Petitioners face "meaningful burdens" on their religious exercise. App.53a. New York also concedes many other key facts: that it "intentionally" removed the religious exemption; that it exempts other unvaccinated workers for secular reasons; that those workers carry the same risk of spreading COVID as the banned religious objectors; that New York allows COVID-positive workers to continue working while religious objectors are barred; that New York is out of step with almost every jurisdiction in the nation. Under any interpretation of the Free Exercise Clause, these undisputed facts make for an easy case in which to find that New York's rule is subject to, and fails, strict scrutiny.

Petitioners lost below only because the Second Circuit thought their religious burdens were "not of a constitutional dimension." App.53a. That stark error confirms that *Smith* is a poor match for the text, structure, history, and tradition of the Free Exercise Clause. This case offers a particularly good vehicle for reconsidering *Smith*, as it involves the intersection of two longstanding free exercise interests: conscientious objection and bodily autonomy. See, *e.g.*, *Welsh* v. *United States*, 398 U.S. 333, 365 (1970) (Harlan, J., concurring) ("The policy of exempting religious conscientious objectors is one of longstanding tradition in this country"); *Cruzan* v. *Director, Mo. Dep't of Health*, 497 U.S. 261, 269-270 (1990) (long common law history allowing refusal of unwanted medical treatments, often for religious reasons). The petition thus offers the Court the opportunity to overrule or limit *Smith* in a defined subset of cases without necessarily adopting a categorical rule applicable to every free exercise dispute.

New York's vehicle arguments are standard fare and easily dispatched. This Court commonly grants review of cases in similar postures concerning the free exercise of religion, and sometimes hears them "on an expedited basis." *Ramirez*, 2022 WL 867311, at *6. See also *Fulton*, 141 S.Ct. 1868; *Roman Catholic Archdiocese* v. *Feliciano*, 140 S.Ct. 696 (2020); *Trinity Lutheran* v. *Comer*, 137 S.Ct. 2012 (2017); *Zubik* v. *Burwell*, 578 U.S. 403 (2016); *Gonzales* v. *O Centro*, 546 U.S. 418 (2006).

Nor can New York evade review by emphasizing its own repeated tweaks to the rules and Petitioners' responses to the newly moved goalposts. This is a time-

honored approach by governments. See, *e.g.*, Philadelphia BIO at 21, *Fulton* (No.19-123) (citing new "multiple rounds of contract negotiations," "a new standard contract," "an updated and more detailed nondiscrimination provision," and the City's new "creation of a Waiver/Exemption Committee"—"there are no facts about any of these important developments in the record as CSS presents it to the Court.").

None of New York's recent legal changes—adding a booster mandate, removing a booster mandate, stripping unemployment benefits from religious objectors, allowing COVID-positive vaccinated workers on-site—can save New York's obviously unconstitutional mandate. This Court can easily deal with New York's tweaks.

* * *

New York asks this Court to wait years for "further factual development." But that wait will only mean that more people will lose their jobs (BIO.15), accept forced vaccination (BIO.16), or be forced to move out of state (BIO.10 n.11). Delay makes no sense when Petitioners could be treating patients today and can't be made whole with money tomorrow. *Ramirez*, 2022 WL 867311, at *12.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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