No. 21A145

IN THE

# Supreme Court of the United States

DR. A, ET AL.,

*Applicants*,

V.

KATHY HOCHUL, GOVERNOR OF NEW YORK, ET AL.,

*Respondents*.

**To the Honorable Sonia Sotomayor,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Second Circuit**

**MOTION BY JOHN DOE 1, PRESIDENT OF THE BOARD OF FAITH-BASED SENIOR LIVING CENTER IN NEW YORK, WITH ATTACHED PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF APPLICANTS, FOR LEAVE TO FILE BRIEF, IN AN UNBOUND FORMAT ON 8 ½- BY 11-INCH PAPER, AND WITHOUT TEN DAYS ADVANCE NOTICE TO PARTIES**

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November 18, 2021

*Amicus Curiae*, John Doe 1, President of the Board of a faith-based senior living facility in the State of New York, respectfully moves this Court for leave to file a brief of amicus curiae in support of Applicants' Emergency Application for Writ of Injunction, in an unbound format on 8 ½- by 11-inch paper, and without ten days advance notice to the parties of Amicus Curiae's intent to file as ordinarily required.

Given the emergency nature of the Application, and given the irreversible and irreparable injury Doe will suffer absent relief from this Court, it was not feasible to give ten day notice to the Parties, but Doe nevertheless obtained the position of the Parties with respect to the filing of the instant Motion. All Parties consent to the filing of the proposed amicus brief.

Amicus Curiae is John Doe 1, President of the Board of Directors of a faith-based senior living facility in New York. Doe's facility is a small, faith-based senior living facility currently providing religious-based care to fifteen residents. Doe's facility has a small number of employees, all of whom share the faith-based mission of the facility, and Doe and the employees want religious accommodations and exemptions from the Governor's COVID-19 vaccine mandate on healthcare workers. Because of the mandate, Doe and the employees are unable to receive religious accommodations, and Doe faces the threat of penalties for his failure to require its employees to accept or receive a COVID-19 vaccine in direct conflict with their sincerely held religious beliefs.

Doe has been put to the unconscionable and unconstitutional choice of closing a facility that has existed for nearly 50 years and sending the residents under its care

to other facilities and uprooting their lives, or facing crippling sanctions for failure to abide by the Governor's COVID-19 vaccine mandate on healthcare workers. **The harm suffered by Doe is not a speculative or future injury. Doe has been given until Monday, November 22, 2021 to comply with the mandate or face penalties for operating a senior living facility with unvaccinated employees**. The New York mandate requires Doe to close on Monday, since his employees cannot violate their sincere religious beliefs. Yet, other laws also prevent Doe from abruptly closing on Monday because he is required to find other suitable locations for the residents. Doe has no choice but to continue to operate in a noncompliant status while he attempts to secure other placement for the residents.

For the foregoing reasons, Doe respectfully requests that the Court grant this unopposed motion to file the attached proposed amicus brief and accept it in the format and at the time submitted.

Respectfully submitted,

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**To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit**

## BRIEF OF AMICUS CURIAE JOHN DOE 1, PRESIDENT OF THE BOARD OF FAITH-BASED SENIOR LIVING CENTER IN NEW YORK IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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November 18, 2021

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## INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is John Doe 1, President of the Board of Directors of a faith-based senior living facility in New York. Doe's facility is a small, faith-based senior living facility currently providing religious-based care to fifteen residents. Doe's facility has a small number of employees, all of whom share the faith-based mission of the facility, and Doe and the employees would like to request and receive religious accommodations and exemptions from the Governor's COVID-19 vaccine mandate on healthcare workers. Because of the mandate, Doe's employees are unable to receive religious accommodations, and Doe faces the threat of penalties for his failure to require his employees to accept or receive a COVID-19 vaccine in direct conflict with their sincerely held religious beliefs. Doe is also one of many Plaintiffs in a separate litigation, *Does v. Hochul*, No. 1:21-cv-5067 (E.D.N.Y.), similar to Applicants', challenging the Governor's unconstitutional COVID-19 vaccine mandate.

Doe has been put to the unconscionable and unconstitutional choice of closing a facility that has existed for nearly 50 years and sending the residents under his care to other facilities and uprooting their lives, or facing crippling sanctions for failure to abide by the Governor's COVID-19 vaccine mandate on healthcare workers. **The harm suffered by Doe is not a speculative or future injury. Doe has been given until Monday, November 22, 2021 to comply with the mandate or face**

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief has been submitted with an unopposed motion for leave to file it.

**penalties for operating a senior living facility with unvaccinated employees.** The New York mandate requires Doe to close on Monday, since his employees cannot violate their sincere religious beliefs. Yet, other laws also prevent Doe from abruptly closing on Monday because he is required to find other suitable locations for the residents. Doe has no choice but to continue to operate in a noncompliant status while he attempts to secure other placement for the residents. And the only reason Doe faces this unconscionable choice is because of the Governor's COVID-19 vaccine mandate.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In Doe's separate challenge to the Governor's mandate, despite his requesting emergency relief in the form of a temporary restraining order and preliminary injunction, the Eastern District has stayed its hand multiple times. The court initially stayed its hand pending the resolution of the temporary restraining order and preliminary injunction issued by the Northern District in Applicants' case. And the Eastern District again stayed its hand during the pendency of the Second Circuit's consideration of the appeal below in Applicants' case. In addition to Applicants and Doe, numerous other individuals face similar irreparable harm from similar mandates. *See, e.g.*, *Does v. Mills*, No. 21A90, 2021 WL 5027177 (U.S. Oct. 29, 2021).

Like Applicants, Doe currently faces immediate, irreparable, and unconstitutional injury to his cherished First Amendment liberties and those of his employees. Doe faces an imminent deadline of November 22 to bring his staff into compliance with the Governor's mandate or face crippling fines and the closure of his

facility. And, the reason for this unconscionable choice is simply his desire to provide exemptions and accommodations to his employees with sincerely held religious objections to the COVID-19 vaccines. Additionally, forcing Doe and Applicants to choose between their sincerely held religious beliefs and compliance with a government mandate is per se irreparable harm.

Doe desires to respect the sincerely held religious beliefs of his employees at the faith-based senior living facility in New York. The Governor's mandate prohibits him from doing so and forces him to choose between his and his employees' religious beliefs and compliance with an unconstitutional mandate. This substantial burden, and the singling out of Doe's and Applicants' sincerely held religious beliefs for especially harsh treatment, runs roughshod over the First Amendment. The Governor's mandate is neither neutral nor generally applicable, it cannot survive strict scrutiny, and it imposes grave, immediate, and irreparable harm on Doe and Applicants. The Application should be granted, and the Governor enjoined from enforcing her unconstitutional mandate.

## ARGUMENT

### I. AMICUS CURIAE FACES IMMEDIATE, IRREPARABLE, AND UNCONSTITUTIONAL INJURY ABSENT INJUNCTIVE RELIEF FROM THIS COURT BEFORE MONDAY, NOVEMBER 22.

As Justice Gorsuch recently pointed out in a challenge to Maine's similarly unconstitutional vaccine mandate on healthcare workers,

> *This case presents an important constitutional question, a serious error, and an irreparable injury*. Where many other States have adopted religious exemptions, Maine has charted a different course. There, healthcare workers who have served on the front line of a pandemic for the last 18 months are now being fired and their practices shuttered. All

> for adhering to their constitutionally protected religious beliefs. Their plight is worthy of our attention. I would grant relief.

*Does 1–3 v. Mills*, No. 21A90, 2021 WL 5027177, at *4 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting) (emphasis added).

The First Amendment injury befalling Doe and Applicants, and others like them in New York, is unquestionably irreparable harm as a matter of settled law. As this Court has held time and again, litigants "are irreparably harmed by the loss of free exercise rights for even minimal periods of time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Indeed, "[t]here can be no question that the challenged [mandate], if enforced, will cause irreparable harm," *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Nowhere is the irreparable injury more pronounced than the immediate harm facing Doe. On Monday, November 15, 2021, the government of the State of New York sent Doe' facility a letter informing him that no healthcare workers at Doe's facility could continue to work around residents and patients if they remained unvaccinated. **The deadline given to Doe's facility for compliance is Monday, November 22, 2021**.

Doe has one employee who received a COVID-19 vaccine, and the remainder of Doe's employees all requested religious exemptions and accommodations to from mandatory COVID-19 vaccination. While Doe desired to grant the religious accommodation requests, the State informed Doe that doing so would be a violation

of state law and would subject Doe to crippling fines for noncompliance with the Governor's mandate. It is impossible for Doe to both comply with the Governor's mandate, which requires all healthcare personnel at Doe's facility to be vaccinated against COVID-19, and to comply with the obligations New York law imposes upon the facility for providing quality care for residents at its facility. *See* 10 N.Y.C.R.R. §401.3(g)–(i). *See also* N.Y. Dep't of Health, *New York State Department of Health Office of Primary Care and Health Systems Management Nursing Home Facility Closure Plan Guidelines* (Dec. 31, 2017), https://www.health.ny.gov/professionals/nursing_home_administrator/docs/dal_nh_17-06_revised_nh_closure_guidelines_att.pdf. Thus, Doe faces the unconscionable and unconstitutional choice of closing his facility and sending its cherished elderly residents packing, or suffering crippling monetary fines for his inability to staff his facility with vaccinated healthcare personnel.

And even if Doe chooses to close his facility rather than operate in violation of the Governor's vaccine mandate, he will still have to violate the mandate for as long as it takes to find other beds and facilities for all his residents—he must keep his employees who object to vaccination on religious grounds to provide quality care to his residents until they are relocated. Thus, under any scenario, absent an injunction from this Court, Doe will be forced to violate the law (potentially multiple laws) because he cannot fully comply with both the Governor's mandate and the other regulations applicable to senior living facility at the same time.

## II. AMICUS CURIAE'S IMMEDIATE AND IRREPARABLE INJURY IS A DIRECT RESULT OF THE GOVERNOR'S UNCONSTITUTIONAL COVID-19 VACCINE MANDATE WHICH INFRINGES ON FIRST AMENDMENT LIBERTIES.

### A. Requiring Doe to Comply With the Governor's COVID-19 Vaccine Mandate While Refusing Exemptions for Religious Objectors Violates the First Amendment.

Doe runs a senior care facility in New York with employees who have sincerely held religious objections to the Governor's COVID-19 Vaccine Mandate. (*See Does v. Hochul*, No. 1:21-cv-5067 (E.D.N.Y.), Doc. 1, V. Compl., ¶ 78.) Doe has sincerely held religious beliefs that he and his faith-based facility are to honor the sincerely held religious beliefs of their employees who object to the COVID-19 vaccines. (*Id.*) Doe has been threatened with closure of his facility and loss of his business license for considering and granting religious accommodations and exemptions for his employees. (*Id.* ¶¶ 79–80.)

The Governor's mandate and its threat of revocation of Doe's ability to operate his facility for failure to comply is analogous to the mandates struck down by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). There, the federal government mandated that Hobby Lobby (a privately held corporation with owners having sincerely held religious beliefs against abortion) provide insurance coverage for its employees to receive abortion-inducing drugs and contraceptives. 573 U.S. at 690–91. There, the Court noted that the plaintiffs—as here—

> have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges . . . may result in the destruction of an embryo. By requiring the Hahns and

> Greens and their companies to arrange for such coverage, *the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs*.

*Id.* at 720 (emphasis added). Here, too, the Governor's mandate imposes a substantial burden on Doe's religious beliefs. In fact, Doe must either mandate that his employees receive a vaccine they find objectionable according to their sincerely held religious beliefs, or fire them. Moreover, Doe faces the choice of suffering crippling fines for failure to disdain his employees' sincerely held religious beliefs (which he shares) or shutting his doors and sending his cherished residents packing. Such an unconscionable choice is a substantial burden on Doe's free exercise of his religious beliefs. Indeed, the First Amendment can hardly be thought to countenance as "a tolerable result to put a family-run business to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing [employment]." *Id.* at 722.

In *Hobby Lobby*, as here, the Court was faced with a government mandate that conflicted with the sincerely held religious beliefs of the plaintiff business owners. There, as here, compliance with the government's mandate imposed a substantial burden on the plaintiffs' sincerely held religious beliefs. There, as here, the government's restrictions on the plaintiffs' sincerely held religious beliefs were subject to (and failed) strict scrutiny. Because the New York Governor's COVID-19 Vaccine Mandate is not neutral or generally applicable, and provides for individualized medical exemptions but not religious, the mandate is subject to strict scrutiny, and the Governor cannot satisfy that burden.

### B. The Governor's Favorable Treatment of Nonreligious Exemptions While Discriminating Against Religious Exemptions Violates the First Amendment.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In fact, "the regulations cannot be viewed as neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "When a state so obviously targets religion for differential treatment, our job becomes much clearer." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (statement of Gorsuch, J.).

In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, Justice (then-Judge) Alito wrote unequivocally for the court that "[b]ecause the Department makes exemptions from its [no beards] policy for secular reasons and has not offered any substantial justification for refusing to provide similar treatment for officers who are required to wear beards for religious reasons, we conclude that the Department's policy violates the First Amendment." 170 F.3d 359, 360 (3d Cir. 1999). There, like New York here, the city argued that it was required to provide medical accommodations under federal law but that religious exemptions were not required. *Id.* at 365. The court squarely rejected that rationale: "It is true that the ADA requires employers to make reasonable accommodations for individuals with disabilities. However, Title VII of the Civil Rights Act of 1964 imposes an identical obligation on employers with respect to accommodating religion." *Id.* (cleaned up). Thus, the court

held, "we cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not." *Id.* (*See also Does v. Mills*, No. 21A90, Application for Writ of Injunction 16–29.)

As Justice Gorsuch noted in *Does v. Mills*, "Slice it how you will, medical exemptions and religious exemptions are on comparable footing when it comes to the State's asserted interests." 2021 WL 5027177, at *3 (Gorsuch, J., dissenting). That sentiment was shared equally by Justice Alito in *Fraternal Order of Police*:

> We also reject the argument that, because the medical exemption is not an "individualized exemption," the *Smith* /*Lukumi* rule does not apply. While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi,* it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.

*Fraternal Order of Police*, 170 F.3d at 365 (cleaned up). The same is true here. New York maintained a policy that permitted religious exemptions and medical exemptions to mandatory vaccinations, but New York specifically removed religious exemptions while maintaining medical exemptions. (*See* Application 6–8.) And that discriminatory removal of a religious exemption while maintaining a medical exemption violates the First Amendment. *See Fraternal Order of Police*, 170 F.3d at 365 ("Therefore, we conclude that the Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of

discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*.").

Here, New York contends (and the Second Circuit agreed) that secular, medical reasons for declining vaccination are important enough to overcome the State's purported interest in universal mandatory vaccination, but that religious reasons for declining vaccination are not. Such a value judgment does not legitimize a discriminatory policy:

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, *when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny*.

170 F.3d at 366 (emphasis added). Essentially, as here, "[w]e thus conclude that the Department's policy cannot survive any degree of heightened scrutiny and thus cannot be sustained." *Id.* at 367.

### C. New York's Discriminatory Treatment of Religious Exemptions Cannot Survive Strict Scrutiny.

Even assuming that imposing a mandatory COVID-19 vaccination requirement on healthcare workers in New York without religious exemptions is supported by a compelling government interest,[2] the Vaccine Mandate still fails strict

[2] John Doe 1 agrees with Justice Gorsuch's statement in *Does v. Mills*, that "stemming the spread of COVID-19 qualified as a compelling interest [but] that this interest cannot qualify as such forever." 2021 WL 5027177, at *3 (Gorsuch, J., dissenting).

scrutiny because it is not the least restrictive means of achieving the government's interest. As the Supreme Court said in *Tandon*,

> narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied**.** Otherwise, precautions that suffice for other activities suffice for religious exercise too.

141 S. Ct. at 1296–97. Unfortunately for New York, nearly every other state has found a way to accommodate religion under the same alternative protective measures Applicants and Doe request here. New York cannot support its position that the same alternative measures approved and effective in other states simply do not work in New York.

And the reason New York's contention fails is simple: To satisfy its burden under strict scrutiny, the government must show it "seriously undertook to address the problem with less intrusive tools readily available to it," meaning that it "considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (same). And the Governor must "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the

chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 134 S. Ct. at 495).

"Many other States have made do with a religious exemption in comparable vaccine mandates . . . [New York's] decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, *it borders on the irrational*." *Does*, 2021 WL 5027177, at *4 (Gorsuch, J., dissenting) (emphasis added). This is so because "restrictions inexplicably applied to one group and exempted from another do little to further [the government's] goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020). The government cannot meet its burden under strict scrutiny.

## CONCLUSION

Because the Governor's mandate is imposing irreparable, immeasurable, and unconscionable injury on Applicants and Doe, the Application should be granted.

Respectfully submitted,

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