No. 21A217

In the Supreme Court of the United States

JOHN DOE, ET AL.,

Applicants,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

MARK L. RIENZI
DANIEL H. BLOMBERG
DIANA VERM THOMSON
ADÈLE KEIM
KAYLA A. TONEY
JAMES J. KIM
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1919 Penn. Ave. NW, Suite 400
Washington, D.C. 20006

PAUL M. JONNA
Counsel of Record
CHARLES S. LIMANDRI
JEFFREY M. TRISSELL
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9930
pjonna@limandri.com

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
309 West Washington Street, Suite 1250
Chicago, IL 60606

CHRISTOPHER A. FERRARA
THOMAS MORE SOCIETY
148-29 Cross Island Pkwy
Whitestone, NY 11357

Counsel for Applicants

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INTRODUCTION

Respondents' COVID vaccine mandate is a national outlier. Virtually every school district in the country allows students with religious objections to attend school without COVID vaccination. Application at 8-9 ("99.962% of school districts"). And Respondents' mandate is nowhere close to generally applicable: it does not reach 85% of the students in the District, including 60% of Applicant Jill Doe's fellow high schoolers. Application at 6-7. Students can remain on campus unvaccinated for a wide variety of reasons—some medical, some logistical, some based on parental concerns about vaccine safety, some for sports. But not religion. So Respondents will soon banish Jill from her classes, ban her from her sports teams, and consign her to her room for online school, all because of her religious exercise.

Respondents do not deny any of these facts. There is no dispute that Respondents' approach is an extreme outlier, both nationally and within California—and indeed has only become more so in the last week, since the Los Angeles Unified School District has halted its vaccine mandate. Nor is there any question about the religiosity or sincerity of Jill's claims—Respondents did not dispute those well-documented facts below and do not dispute them here. There is also no dispute about whether the government has carried its burden under strict scrutiny. Respondents do not even assert they meet that standard, and with good reason given the gaping holes in the mandate and the behavior of most school districts in the Nation.

What remains, then, is a narrow legal dispute about whether strict scrutiny applies. And on that point, Respondents' brief confirms that Jill is not being excluded pursuant to a general ban on unvaccinated students in its schools. Respondents now

concede their mandate allows *most* people in their schools to remain unvaccinated. They do not deny that students are allowed to remain unvaccinated for certain logistical reasons (Opp.7), for medical reasons (Opp.5-6), because of parental concerns about vaccine safety that the District chooses to respect (Opp.23), or because the District is inexplicably content to just wait until next fall (Application at 7, citing App.122) (no response in Opp.). This is why the District concedes that its approach is only "incremental" and "does not apply to all students immediately." Opp.7, 25.

Respondents quibble with Applicants' description of these gaping holes and try out a variety of different labels of their own, including "exemption," "conditional enrollments," "procedural protections," or a "phased approach" that is "consistent with the health and safety concerns of some parents." Opp.7, 10, 23. And of course Respondents say these gaps are all justified. But what matters is that Respondents do not deny that the gaps exist.

As Judge Ikuta correctly recognized, blackletter Free Exercise law requires strict scrutiny where the government allows exemptions that undermine its asserted interest. That is manifestly the case here, when so many are allowed to remain unvaccinated and carry the same or greater risk of contracting and spreading COVID as Jill Doe. Under that standard, strict scrutiny is required. Cases like *Diocese of Brooklyn* and *Tandon* (which barely get a mention and receive no real analysis in Respondents' brief) may require grappling with thorny questions about which activities present comparable transmission risks to religious worship. But no such comparator question plagues this case because unvaccinated students are

unvaccinated students, regardless of the reason. Having chosen to defer to so many other interests, and to allow so many other unvaccinated individuals into the very classrooms from which Jill Doe is about to be excluded, Respondents need to satisfy strict scrutiny. And since they have abandoned any pretense that their exemption-riddled rule can survive strict scrutiny, relief is warranted.

That leaves Respondents with only one way to win: convince this Court not to act. But that plea for inaction misunderstands both the important role of this Court and the power granted by Congress to deal with emergencies under the All Writs Act. Governments should not be permitted to use the exigencies of COVID to impose swift and harsh mandates—mandates that restrict constitutional rights, including for children—and then plead for regular order when those violations are laid bare.

Jill Doe would certainly prefer a different schedule for this case. And if Respondents would simply allow her to attend classes until the fall, the way the District allows hundreds of other students her age to wait, there would be ample time for a more traditional litigation timeline. But Respondents' unyielding January 4 deadline forecloses that pace, leaving Applicants no choice but to seek this Court's emergency aid. Applicants therefore respectfully request that this Court act now, either to grant the application or grant certiorari.

ARGUMENT

I. The District's mandate violates the Free Exercise Clause.

An injunction pending disposition of a petition for certiorari is warranted here because Applicants are "likely to succeed on the merits of their free exercise claim;

they are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time'; and the [government] has not shown that 'public health would be imperiled' by employing less restrictive measures." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (quoting *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 66, 68 (2020)). And "discretionary consideration[s]" that counseled against granting relief in the first case of its kind, *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring), do not apply to the fourth such case, particularly where likelihood of success is so strong and the "short fuse," *ibid.*, so clearly of Respondents' own creation.

A. The mandate is subject to strict scrutiny.

1. The District confirms the mandate is not generally applicable.

The District does not have a generally applicable rule barring unvaccinated students from in-person school. To the contrary, Applicants identified at least *six* general categories of unvaccinated individuals that the District allows on campus: (1) students under 16, (2) students who turned 16 after November 1, 2021, (3) students with conditional admissions, (4) students and staff with medical exemptions, (5) staff with religious exemptions, and (6) other exceptions. Application at 6-8. Altogether, these exemptions leave over 80,000 District students free to choose not to be vaccinated, so only 15% of the District's students and 40% of its high schoolers are subjected to the mandate. Application at 6.

In response, the District does not dispute the exceptions' existence or unusually large magnitude, only their legal significance. The District begins by fighting about nomenclature, insisting that an "exemption" is just what the District decides it is,

Opp.14, "neither more nor less." See Lewis Carroll, *Through the Looking Glass*, ch. 6 (1872). But while the District wants to gerrymander its interests to define away the gaping exemptions, that's not how Free Exercise analysis works. Rather, the law is "clear" that governmental regulations "trigger strict scrutiny * * * whenever they treat *any* comparable secular activity more favorably than religious exercise," and equally clear that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296. Here, that interest is "protecting student 'health and safety'" from COVID. App.11. And each of the secular reasons the District allows unvaccinated individuals on campus are *at least* comparable to allowing Jill, since they all equally "contribute[] to the spread of COVID-19." *Diocese of Brooklyn*, 141 S. Ct. at 67. "Comparability is concerned with the risks various activities pose, not the reasons why people gather." *Tandon*, 141 S. Ct. at 1296. "Risks of contagion turn on social interaction in close quarters; the virus does not care why they are there." *Roberts* v. *Neace*, 958 F.3d 409, 416 (6th Cir. 2020).

The District eventually identifies the correct legal rule, agreeing that the exceptions that count are the exceptions that undermine its interest. Opp.13-14. But the District never explains why the unvaccinated people allowed on campus do not threaten its interests. Nor does it explain its selective invocation of "iHigh," or charter schools, or homeschool, all which it says are reasonable alternatives to continuing in-person instruction halfway through the school year at one's own high school. Opp.1,

24 & n.10.[1] If this is so, then those options should be sufficient for all the other unvaccinated students and staff. But the District does not consign those students and staff to iHigh. It lets them on campus. And then it lets visitors on campus regardless of their vaccination status. App.324. All those individuals undermine the District's goal of protecting health at least as much as a sincere religious objector like Jill Doe, but the District treats them differently. That triggers strict scrutiny.

As to the District's more specific defenses of the gaps:

Students under 16. The District claims that it is advancing its "interest in protecting the health and safety of individual students by * * * imposing the vaccination requirement only after full FDA approval for an age group," Opp.13, and that vaccinations that pose "increased risk to health and safety undermine[] the District's interests." Opp.13. The problem with this argument is two-fold. First, the District nowhere explains why these unvaccinated students can be tolerated attending school in-person, and do not need to be consigned to iHigh. Second, this position is the exact opposite of what the District tells parents. In a district-wide letter explaining its vaccine mandate, the District emphasized that "[s]tudents ages 5 to 15 are recommended to receive a COVID-19 vaccine by the FDA and the CDC" and that "*San Diego Unified supports this recommendation.*" App.157 (emphasis added); see also App.62. Having affirmatively recommended that students under 16 get vaccinated, the District should not be heard now to tell this Court that their

[1] Immediate enrollment in a charter school is neither easy nor guaranteed. Cal. Educ. Code § 47605(e)(2)(B) (determining student enrollment "by a public random drawing"). And a district may not require a student to attend one. *Id.* at § 47605(g).

exclusion from the mandate is necessary for "health and safety." Opp.13.

The District eventually acknowledges the true reason for this exception: the District's deference to "the health and safety concerns of some parents regarding emergency use authorization." Opp.23. In other words, the District will let students under 16 be unvaccinated—and continue attending in-person school—in order to respect parental concerns about emergency use authorization. That is not unreasonable. But it means the District lacks a generally applicable rule that could justify ignoring similar parental *religious* concerns about the vaccines, or relegating unvaccinated *religious* students to iHigh.

Students who turn 16 after November 1. The District fails to defend this glaring omission from its mandate. Application at 7, 17. It would be hard pressed to do so: even if the Court agreed with its formulation of health and safety for vaccines with only an emergency use authorization, that would not apply to students over 16 who have not yet been vaccinated. Hundreds of such students are in *exactly the same* position as Jill Doe vis-à-vis the District's interests, but unlike Jill are allowed to complete their school year. The only conceivable reason for this omission is administrative convenience, which is not a reason that should take pride of place over religious accommodation. And, once again, the mere presence of the exemption means that the District is tolerating threats to its claimed interest from comparable activity for secular reasons, while refusing to tolerate Jill Doe's religious exercise. There is no generally applicable rule excluding unvaccinated students.

Students with conditional admissions. The District acknowledges this

exemption, but argues that it is required by state law and limited to 30 days. But, as explained below, this 30-day limit is discretionary, and raises the question of why the District cannot exercise its discretion to accommodate Jill. See Section I.A.2, *infra*. Moreover, while the District's concern for students in difficult circumstances is understandable, it still undermines the District's interest at least as much as permitting a COVID-recovered student with a religious objection on campus.

Students and staff with medical exemptions. The District incorrectly claims that Applicants have abandoned reliance on this exemption, but see Application at 7, 12, 16, 17, and 32, and then argues at length why the exemption is permissible. Opp.13-18. But the District nowhere explains why someone who is unvaccinated for medical reasons is less likely to spread COVID than one who is unvaccinated for religious reasons. If the medically exempt are not consigned to iHigh, why is Jill Doe?

The District invokes state law to defend its medical exemption, claiming that "[s]tate law does not recognize religious or personal belief exemptions for student immunizations" and instead only permits a medical exemption. App.75. But that invocation is misleadingly incomplete. While California's statute is itself an outlier in denying religious exemptions to some childhood vaccinations,[2] it nonetheless specifically requires that new, non-statutory vaccine mandates must include personal belief exemptions. Cal. Health & Safety Code § 120338 (allowing new vaccines to "be

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[2] See *States With Religious and Philosophical Exemptions From School Immunization Requirements*, NCSL (Nov. 22, 2021), https://perma.cc/ZSA7-3K4Q (44 states permit religious or personal belief exemptions for childhood vaccinations, and California is one of just six that recently began denying them in some instances).

mandated * * * ***only if*** exemptions are allowed for both medical reasons and ***personal beliefs***" (emphases added)). Such requirements also apply "before a pupil's first admission," so that parents have time to make decisions and students are not unexpectedly banished from school mid-year. *Id.* Thus, in sharp contrast to the District, Governor Newsom has recognized his statutory obligation to include a personal beliefs exemption for his proposed mandate. App.337 ("Requirements established by regulation, not legislation, must be subject to exemptions 'for both medical reasons and personal beliefs.'" (citing § 120338)).

Staff with religious exemptions. The District does not dispute that this exception exists, but entirely fails to address it. Nor does the District explain why staff who are more at risk for COVID than Jill due to age and lack of natural immunity can request religious accommodations while Jill cannot.

Other exceptions. The District argues at length about IEPs, but fails to explain why statutory "due process protections" warrant greater deference than constitutional free exercise protections. Opp.16. Even more tellingly, it never once addresses why its students can compete unmasked and up-close against visiting unvaccinated athletes when it cannot allow those same students to attend math class—masked and socially distanced—with Jill.[3]

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[3] The District allows its sports teams to compete against schools without a vaccine mandate. Application at 25. That apparently includes unmasked, face-to-face wrestling. *Girls Wrestling @ Mira Mesa*, Scripps Ranch Falcons (Dec. 10, 2021), https://perma.cc/7QP6-YDAZ (pictures of unmasked wrestlers). Today, the wrestlers are at the El Cajon Invitational, in a school district without a vaccine mandate, where they will presumably wrestle unvaccinated opponents. *El Cajon Invitational*, Scripps

2. The District confirms it has discretion over its mandate.

The application established the District's discretion to change its own mandate—exempting some people, creating extensions or deferrals for others. Application at 18-20. Under *Lukumi* and *Fulton*, that discretion alone triggers strict scrutiny.

The District struggles mightily to deny that it has discretion over its own mandate. As to its here-today-gone-tomorrow pregnancy exception, the District emphasizes that the removal of that provision was simply a reversion to the terms that were actually "approved by the Board." Opp.17. Since the pregnancy exception was not in the Roadmap document approved by the Board, the District says the Interim Superintendent was authorized to remove it. Opp.17.

The problem with this argument is that many of the *other* limitations the Board clings to were not "approved by the Board" either. For example, nothing in the Roadmap document the Board adopted limits conditional enrollments to 30 days. App.283-299. And nothing approved by the Board indicates how long IEP conditional enrollments last. Yet the District insists to this Court that those exceptions all come with firm limits. Either those representations are false (because the limits do not really exist) or they are true and they demonstrate the District's discretion (because, as with pregnancy, the District can add to, subtract from, or modify its own mandate).

Nor can the District rescue itself from this problem by citing state statutes as the source of the claimed 30-day limit. Opp.7. The statutory sections related to homeless,

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Ranch Falcons (Dec. 17, 2021), https://perma.cc/4U29-32PS. Excluding Jill Doe from masked, socially distanced math class is not even rational.

foster, and migrant children do not include any reference to 30 days at all. Opp.7 (citing Cal. Educ. Code § 48853.5(f)(8)(B)); Cal. Health & Safety Code § 120341(a); Cal. Educ. Code § 48852.7(c); 42 U.S.C. 11432(g)(3)(C); Cal. Educ. Code §§ 54440 and 48204.7(c)(3)). And the cited section covering military families likewise offers more flexibility than Respondents suggest. Opp.7 (citing Cal. Educ. Code §§ 49700 and 49701); Cal. Educ. Code § 49701 Art. IV(C) ("[I]initial vaccinations must be obtained within thirty (30) days or within such time as is reasonably determined under the rules promulgated by the Interstate Commission."). None of these sources impose a firm 30-day limit; none would constrain the Board's discretion over a mandate created by the Board rather than the State; and nothing in the Board's approved Roadmap imposed a 30-day limit or deprives the Board of discretion going forward.

The District's defense of its discretion thus dooms its case one way or the other: either the exceptions are open-ended categorical exceptions (in which case they violate general applicability under *Tandon* and *Smith*) or they are malleable exceptions which the District is free to limit (in which case they violate general applicability under *Lukumi* and *Fulton*).

3. The District confirms it has not treated religion neutrally.

The mandate is not neutral because it purposely and explicitly treats religious requests more harshly than any number of secular requests. Application at 21-22. For instance, as noted above, the District admits it was willing to accede to "health and safety concerns of some parents," Opp.23, just not the *religious* concerns of some parents. The District does not deny that it decided to exclude religious exemptions

before implementing the mandate while at the same time crafting other, secular exemptions. Indeed, it admits that it twice made statements rejecting the possibility of religious exemptions. Opp.21-22. To deny religious requests in advance without considering them, while stating that other requests will be granted, is to deny "neutral and respectful consideration" of Jill Doe's religious claim. *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

In response, the District bafflingly suggests it did not necessarily realize that religious rights would be affected by imposing the mandate, and thus that it was not lacking in neutrality when it chose to foreclose any accommodation for religion. Opp.21. To even make the argument betrays remarkable insensitivity to religious interests. And the argument is disingenuous. Why else would the District include religious exemptions in a "Frequently Asked Questions" document, App.322, other than that questions about religious exemptions were frequently asked?

Further, following the Ninth Circuit's injunction, the District had a choice to offer Jill Doe an exemption during the pendency of the appeal or remove its pregnancy exemption. App.38; Application at 22. Rather than offer a single religious student a single religious exemption, the District removed the entire category of pregnancy exemptions—and did it overnight. Cutting off pregnant girls to spite religious ones is not the action of a neutral arbiter and raises more than the "slight suspicion" of "animosity to religion" that triggers scrutiny. *Masterpiece*, 138 S. Ct. at 1731 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993)).

Finally, the District points to a statement by the Board president that personal belief exemptions "create[] kind of a loophole that means [a] large number [of] people don't, in the end, get vaccinated." Opp.22 (quoting App.259). The District admits that within this "loophole," religious exemptions are "an obvious subset." Opp.22. The District's only explanation is that this statement was made after the Board adopted the mandate, but the statement was describing the Board's reasoning for excluding the exemption, published the day after the Board adopted the mandate. This is a contemporaneous statement that the Board considered and rejected religious objections on a wholesale basis without "full and fair consideration" of any specific religious objection, tarring religious belief as a "loophole" to be plugged instead of a constitutional right to be respected. *Masterpiece*, 138 S. Ct. at 1732.

4. The District confirms its mandate violates parental rights.

Strict scrutiny is also triggered because Applicants' religious objection involves the Does' parental rights with respect to Jill. Application at 20-21. The District says this argument was waived, Opp.18, but it is confusing arguments for claims. Applicants raised a Free Exercise Clause claim in their complaint, App.274-279, and argued that as a result of that claim, the mandate was subject to strict scrutiny. Application at 20-21. And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). In any event, Applicants clearly invoked their parental rights to direct Jill's education in both the district court and the court of appeals—indeed, the Does' role *as Jill's parents* who share her religious beliefs is the sole basis for their next-friend claims.

On the merits, the District gets this Court's decisions regarding parental rights and religion flatly wrong. First, the District wrongly conflates the plaintiff's case (*i.e.*, whether strict scrutiny is triggered) with the defendant's affirmative defense (*i.e.*, whether strict scrutiny is passed). Concerns about health and safety are properly accounted for as part of the strict scrutiny analysis, not the logically prior question of whether religious rights are implicated in the first place. Courts have repeatedly ruled as much in the public health context. See, *e.g.*, *Central Rabbinical Cong. of U.S.* v. *New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 198 (2d Cir. 2014) (noting that City's "asserted interests" in preventing spread of disease to children "are substantial and may prove, on analysis, to be compelling" but remanding for those interests to be considered as part of strict scrutiny). That is the opposite of the District's understanding of the *Yoder* parental rights standard, which in its view can never be invoked "when the act or omission sought may arguably impact safety." Opp.20. A "may arguably impact" standard would be no standard at all.

Second, the District also says that child vaccination rules can never trigger strict scrutiny, relying on *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), and *Employment Division* v. *Smith*, 494 U.S. 872 (1990). In the case of *Prince*, the District admits that it is citing dicta. Opp.20. And the passage of *Smith* they rely on is expressly stated as a hypothetical. 494 U.S. at 888-889 ("would open the prospect" of Free Exercise challenges to vaccination). Given the Court's reliance on the *Meyer*/*Pierce*/*Yoder* line of parental rights precedent both before and after *Smith*, Application at 20-21, these dicta do not create a legal standard. In fact, that the vast majority of school districts

provide religious exemptions to vaccination requirements is a tell that the premises of the *Prince* and *Smith* dicta are not true today. See Application at 8-9; see also Cal. Health & Safety Code § 120338. Religious accommodation is the national norm, and interference with parental control of religious upbringing is not.

B. The District concedes that the mandate fails strict scrutiny.

The District only argues that its treatment of Jill Doe survives rational basis. Opp.23-24. But it does not argue that it could pass strict scrutiny. This concession is hardly surprising, given the mandate's gaping holes and the District's status as an extreme national (and state) outlier. Application at 8-9. And it means that the District must lose, because its mandate is clearly not a neutral and generally applicable law.

Even the District's rational basis arguments fail to explain why *all* of the other unvaccinated students and staff can be tolerated at in-person school, but Jill Doe must be consigned to iHigh in the name of protecting health. That is particularly irrational in light of the known negative mental health outcomes from online schooling, especially for teenage girls like Jill. Application at 30 n.12. This is not a rational basis case, but even if it were, there simply is no rational reason to allow so many of Jill's unvaccinated classmates to remain while she (who has already recovered from COVID) is banished.

II. The other injunctive relief factors support granting an injunction.

Applicants demonstrated that the balance of harms and public interest favor an injunction allowing Jill to continue attending in-person school. Application at 28-30. The District asserts that Jill has not been "prevented from exercising [her] religion"

and complains that, since she is proceeding anonymously, it has not been able to test her claims about harm to her athletic career and academic options. Opp.24 n.10.

These arguments fail for three reasons. First, as discussed in the application and not rebutted by the District, this Court's precedents provide that the deprivation of Jill's First Amendment rights is alone sufficient to establish irreparable harm. Second, the District obviously knows that consigning students to online school is harmful. That is presumably why it does not consign all the other unvaccinated students—medical exemptees, conditional enrollees, recent 16-year-olds, 15-year-olds whose parents have health and safety concerns about emergency use authorization—to online school. There is no reason to think that the public interest is served by allowing all of those students to attend in-person school and participate in sports, but would somehow be harmed by allowing Jill Doe, a healthy athlete who has already recovered from COVID, to join them. Indeed, that is precisely the choice made by virtually every school district in the nation, and recently reinforced by the Los Angeles Unified School District's decision to halt its own mandate.[4]

Finally, the District's own results suggest that its other policies like masking, social distancing, and testing, have been working remarkably well. Application at 24. When case counts have consistently been below one quarter of one percent all year long with Jill Doe in the building, there is simply no reason to expect that either

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[4] See Board of Educ. of the City of L.A., *Special Meeting Stamped Order of Business* (Dec. 14, 2021), https://perma.cc/HAX6-QVV4; see also Mike Ives, *Los Angeles schools put off a student vaccine mandate until Fall 2022*, *New York Times*, Dec. 15, 2021, https://perma.cc/2ZGV-V3DV.

excluding her from campus or forcing her to take the vaccine will make any meaningful difference. Cf. *Missouri* v. *Biden*, No. 4:21-cv-1329, 2021 WL 5564501, at *8 (E.D. Mo. Nov. 29. 2021) (noting federal government's admission that "the effectiveness of the vaccine[s] to prevent disease transmission by those vaccinated [is] not currently known" (quoting 86 Fed. Reg. 61,555, 61,615 (Nov. 5, 2021)).

III. In the alternative, the Court should grant certiorari.

In the application, we explained that if the Court is not inclined to grant emergency relief pending the filing and disposition of a petition for certiorari, it should treat the application as a petition for certiorari and grant that petition now. Application at 30-33. Given the nationwide importance of vaccine mandate litigation, the cases already headed to this Court, and the specific problems posed by the intersection of vaccine mandates and the Free Exercise Clause, granting certiorari in this case would allow the Court to decide the Free Exercise issue narrowly, in a case where none of the relevant factual issues is in question. Application at 30.

In response, the District admits that challenges to vaccine mandates are a "current nationwide issue[]." Opp.26. Indeed, it could hardly argue otherwise, as evidenced by the Solicitor General's emergency applications filed yesterday in this Court that seek to suspend lower court injunctions against the federal CMS vaccination mandate. See *Biden* v. *Missouri*, No. 21A240 (application filed Dec. 16, 2021); *Becerra* v. *Louisiana*, No. 21A241 (application filed Dec. 16, 2021).

Despite this obvious nationwide importance, the District offers a grab bag of reasons to deny certiorari, none availing. First, the District says that this case is a

bad vehicle for addressing the intersection of the Free Exercise Clause and vaccination mandates because the school setting is unique. Opp.27. But that alleged uniqueness at most impacts the District's strict scrutiny claim, which it has already waived, not whether strict scrutiny is triggered. The setting would not change the general applicability analysis, which should be the same question, whether the setting is a community hospital, a local doctor's office, or a public high school. And as we pointed out in the application, the Ninth Circuit's standard for deciding whether strict scrutiny is triggered diverges from both this Court's decisions in cases like *Lukumi* and from the decisions of other lower courts. See Section I.A.1, *supra*. Proclaiming "schools are different" is thus irrelevant to the Free Exercise questions.

Second, the District contends that the facts in this case are disputed. Opp.28. Some facts—for example, the motivations of individual District officials—are still in dispute and will likely be the subject of extensive discovery as the litigation progresses.[5] But the key facts governing *this* equitable proceeding are undisputed: the Applicants are sincere and their objection is religious; the District exempts wide swaths of students from its vaccination mandate for a host of non-religious reasons; the District is forcing the Does to consent to their daughter's vaccination; and strict scrutiny is conceded. See Sections I.A.-I.B, *supra*. It is of no moment that other fact issues will be explored before the case reaches final judgment, perhaps years hence.

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[5] Cf. Testimony of State Entity Employee #2 at 134:18-135:9, *In the Matter of the Independent Investigation Under Executive Law 63(8)* (May 24, 2021) (deposition testimony of former Medical Director in the Division of Epidemiology of the New York Department of Health that the cluster zones at issue in *Diocese of Brooklyn* and *Agudath Israel* were made up by Governor Cuomo's office, not public health officials).

Third, the District claims there is no split of authority. Opp.31-33. But as we pointed out in the application, there is a split among the lower courts over whether strict scrutiny is triggered by allowing a medical exemption while denying a religious one. Application at 32-33. The District says the Court ought to restrict its gaze to public school cases, but never explains why. Opp.32. Nor could it. General applicability goes to the nature of legal rules, not the particular factual context.[6]

The need for this Court's intervention has become only more pressing since the application was filed. The Solicitor General's two applications filed yesterday and the likelihood that other federal mandates will reach this Court before year's end only serve to emphasize the urgency. As of this writing, there are three broad categories of vaccine mandate cases that have already reached the Court:

(1) Federal government mandates (*e.g.*, *Biden* v. *Missouri*, *Becerra* v. *Louisiana*, *Georgia* v. *President of the U.S.*, No. 21-14269 (11th Cir. docketed Dec. 10, 2021), which have turned on the nature of federal power.

(2) State and local government mandates (*e.g.*, *Does 1-3* v. *Mills*, *Dr. A* v. *Hochul*, and this case), which have concerned the Free Exercise Clause.

(3) Private employer mandates, both non-profit (*e.g.*, *Together Employees* v. *Mass General Brigham Inc.*) and for-profit (*e.g.*, *Sambrano* v. *United Airlines*, No. 21-11159 (5th Cir., order denying injunction pending appeal, Dec. 10, 2021), which have turned on the ADA and Title VII.

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[6] The District also contends that Judge Ikuta wrongly thought she was disagreeing with the panel majority over the proper legal rule to be applied, claiming that she was actually disagreeing with them over a factual issue. Opp.29-31. But the District misunderstands the general applicability test, which is an objective test. See *Tandon*, 141 S. Ct. at 1296. The District does not get to dial up its interest to the level of general "health and safety" or dial it down to "stopping the spread of COVID" at will.

This case provides the Court with an apt vehicle to provide much needed guidance to lower courts and state and local governments with respect to the second group of disputes. Like this case—and like many of last year's COVID worship restriction cases—many of the disputes in the second category are time-sensitive because they involve irreversible changes to individual lives. Because critical years of schooling, sports, or professional careers lost to state and local vaccine mandates cannot be replaced, the Court should move with dispatch to resolve the issue.

* * *

The pandemic has stretched government, including the courts, in ways unknown to recent memory. But other crises in our Nation's history have put far more stress on our constitutional structure than this one, and the Constitution has proven equal to the task. Even in the throes of World War II, this Court recognized that there will rarely be a national crisis that justifies kicking children out of school: "It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school." *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 636 (1943). The challenges of the pandemic are great, but they do not justify deviating from the Constitution.

CONCLUSION

The application should be granted.

Respectfully submitted.

MARK L. RIENZI
DANIEL H. BLOMBERG
DIANA VERM THOMSON
ADÈLE A. KEIM
KAYLA A. TONEY
JAMES J. KIM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Penn. Ave. NW, Suite 400
Washington, D.C. 20006

PAUL M. JONNA
Counsel of Record
CHARLES S. LIMANDRI
JEFFREY M. TRISSELL
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
(858) 759-9930
pjonna@limandri.com

THOMAS BREJCHA
PETER BREEN
THOMAS MORE SOCIETY
309 West Washington Street, Suite 1250
Chicago, IL 60606

CHRISTOPHER A. FERRARA
THOMAS MORE SOCIETY
148-29 Cross Island Pkwy
Whitestone, NY 11357

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