No. 21A90

In the Supreme Court of the United States

JOHN DOES, 1-3; JACK DOES, 1-1000; JANE DOES, 1-6; JOAN DOES, 1-1000,
Applicants,

v.

JANET T. MILLS, in her official capacity as Governor of the State of Maine; JEANNE M. LAMBREW, in her official capacity as Commissioner of the Maine Department of Health and Human Services; NIRAV D. SHAH, in his official capacity as Director of the Maine Center for Disease Control and Prevention; MAINEHEALTH; GENESIS HEALTHCARE OF MAINE, LLC; GENESIS HEALTHCARE, LLC; NORTHERN LIGHT HEALTH FOUNDATION; MAINEGENERAL HEALTH,
Respondents.

On Emergency Application for Writ of Injunction to the Honorable Stephen G. Breyer, Associate Justice of the United States Supreme Court and Circuit Justice for the First Circuit

MOTION BY RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS, WITH ATTACHED PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, FOR LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES

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MOTION FOR LEAVE (1) TO FILE *AMICUS CURIAE* BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, (2) TO DO SO IN AN UNBOUND FORMAT ON 8½-BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES[1]

Movants, religious and civil-rights organizations, respectfully request leave of the Court to (1) file the attached *amicus curiae* brief in support of respondents and in opposition to applicants' emergency application for a writ of injunction, (2) file the brief in an unbound format on 8½-by-11-inch paper, and (3) file the brief without ten days' advance notice to the parties.

Positions of the Parties

Applicants do not oppose this motion. The state-official respondents consent to this motion. The private-party respondents take no position on this motion.

Identities of *Amici*; Rule 29.6 Statement

All the proposed *amici* are nonprofit organizations that have no parent corporations and that are not owned, in whole or in part, by any publicly held corporation. The proposed *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Maine.
- Disciples Center for Public Witness.
- Disciples Justice Action Network.

[1] No counsel for a party authored this motion or the proposed *amicus* brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the motion's or brief's preparation or submission.

- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.
- National Council of the Churches of Christ in the USA.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.

Interests of *Amici*

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of free religious exercise and the separation of religion and government. They believe that the right to practice one's faith is precious, but that it was never intended to override protections for people's safety and health. *Amici* therefore oppose applicants' contention that the First Amendment's Free Exercise Clause requires a religious exemption from Maine's vaccination mandate for healthcare workers.

Format and Timing of Filing

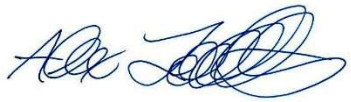
Applicants' emergency application was docketed on October 20, 2021. In light of the October 25, 2021 deadline that has been set for responding to the application, there was insufficient time for the proposed *amici* to prepare their brief for printing and filing in booklet form, as ordinarily required by Supreme Court Rule 33.1. Nor, for the same reason, were the proposed *amici* able to provide the parties with ten days' notice of their intent to file the attached brief, as ordinarily required by Rule

37.2(a). But the proposed *amici* did provide notice of their intent to file the brief to the parties on the same day that the application was docketed.

* * * * *

For the foregoing reasons, the proposed *amici* respectfully request that the Court grant this 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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OCTOBER 2021

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that share a commitment to preserving the constitutional principles of free religious exercise and the separation of religion and government. They believe that the right to practice one's faith is precious, but that it was never intended to override protections for people's safety and health. *Amici* therefore oppose applicants' contention that the First Amendment's Free Exercise Clause requires a religious exemption from Maine's vaccination mandate for healthcare workers.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
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- Disciples Center for Public Witness.
- Disciples Justice Action Network.
- Equal Partners in Faith.
- Global Justice Institute, Metropolitan Community Churches.
- Interfaith Alliance Foundation.
- Methodist Federation for Social Action.

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

- National Council of the Churches of Christ in the USA.
- National Council of Jewish Women.
- Reconstructionist Rabbinical Association.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a year and a half, healthcare workers have served on the front lines of the Covid-19 pandemic, enduring grueling hours and making immense sacrifices to save as many people as they can. To protect the health and lives of those workers and the vulnerable patients they serve, Maine has enacted a regulation requiring that healthcare personnel in the state be vaccinated against Covid-19. Vaccination greatly reduces both the risk of being infected and the risk of transmitting the disease to others.[2] And it reduces more than tenfold the risk of dying or being hospitalized from Covid-19.[3]

Applicants nevertheless challenge Maine's vaccination mandate, principally contending that the Free Exercise Clause entitles them to religious exemptions because the mandate has a medical exemption. But this Court has long recognized

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[2] See, *e.g.*, Lianna Matt McLernon, *COVID vaccines very effective, hinder spread, studies say*, CIDRAP (Sept. 9, 2021), https://bit.ly/3nKKmuW; Akshay Syal, *Vaccinated people are less likely to spread Covid, new research finds*, NBC News (Oct. 1, 2021), https://nbcnews.to/3CeqmFD; *Link between COVID vaccination and reduced household transmission, Swedish study finds*, ScienceDaily (Oct. 11, 2021), https://bit.ly/2Z6zihi; Darius Mostaghimi et al., *Prevention of host-to-host transmission by SARS-CoV-2 vaccines*, The Lancet (Sept. 14, 2021), https://bit.ly/3lBOL0E; Ashley Fowlkes et al., *Effectiveness of COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Frontline Workers Before and During B.1.617.2 (Delta) Variant Predominance — Eight U.S. Locations, December 2020–August 2021*, Ctrs. for Disease Control & Prevention (Aug. 27, 2021), https://bit.ly/3zeKepC.

[3] See, *e.g.*, Deidre McPhillips, *New CDC data shows the risk of dying from Covid-19 is 11 times higher for unvaccinated adults than for fully vaccinated adults*, CNN (Oct. 15, 2021), https://cnn.it/3vwvQJ9; *Monitoring Incidence of COVID-19 Cases, Hospitalizations, and Deaths, by Vaccination Status — 13 U.S. Jurisdictions, April 4–July 17, 2021*, Ctrs. for Disease Control & Prevention (Sept. 10, 2021), https://bit.ly/2XjTGLE.

that the Free Exercise Clause does not mandate exemptions from nondiscriminatory measures that protect public safety and health, such as vaccination requirements. Maine's vaccination mandate meets this standard: It applies to all healthcare employees who can be vaccinated safely. And the mandate's medical exemption advances the governmental interest underlying the mandate—protecting people's health—while a religious exemption would not. Moreover, experience in both the employment and the school contexts demonstrates that religious exemptions from vaccination requirements are granted much more frequently than medical exemptions and thus pose a far greater threat to state efforts to prevent disease outbreaks.

Maine's vaccination requirement is constitutional. The Court should deny the application.

ARGUMENT

I. The Free Exercise Clause does not entitle people to religious exemptions from a nondiscriminatory vaccination mandate.

Religious freedom is a value of the highest order. But as this Court recently reaffirmed, the constitutional guarantee of religious liberty does not confer on religious objectors "a general immunity from secular laws." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). This Court has thus repeatedly recognized that the Free Exercise Clause does not create a general entitlement to religious exemptions from vaccination laws.

As an initial matter, vaccine mandates are permissible under this Court's precedent. More than a century ago, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25

(1905), the Court upheld a mandatory-vaccination law aimed at stopping the spread of smallpox. Noting that "'persons and property are subjected to all kinds of restraints and burdens in order to secure the * * * health * * * of the state,'" the Court concluded that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," and that the vaccination law had not "invaded *any* right secured by the Federal Constitution." *Id.* at 26–27, 38 (quoting *Hannibal & St. Joseph R.R. Co.* v. *Husen*, 95 U.S. 465, 471 (1877)) (emphasis added). Subsequently, in *Zucht* v. *King*, 260 U.S. 174, 175–176 (1922), the Court relied on *Jacobson* in rejecting a Fourteenth Amendment challenge to a San Antonio ordinance that prohibited children from attending public or private schools without proof of vaccination. The Court ruled that "the constitutional question presented" was not "substantial in character." *Id.* at 176.

Although neither *Jacobson* nor *Zucht* specifically considered a free-exercise claim, the cases recognized a fundamental limitation on individual liberties: They must not be used to harm others or threaten public health or safety. As the Court explained in *Jacobson*, "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] * * * regardless of the injury that may be done to others." 197 U.S. at 26.

The Court has affirmed that general principle time and again, including with reference to vaccination requirements. In *Prince* v. *Massachusetts,* 321 U.S. 158, 166–167 (1944), the Court noted that one "cannot claim freedom from compulsory vaccination * * * on religious grounds" because the "right to practice religion freely

does not include liberty to expose the community * * * to communicable disease." Citing *Jacobson* and *Prince*, the Court emphasized in *Sherbert* v. *Verner*, 374 U.S. 398, 402–403 (1963), that it "has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles" when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 230 (1972), the Court again explained that free-exercise claims may be denied when "harm to * * * physical or mental health * * * or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." In so doing, the Court specifically pointed (*id.* at 230 & n.20) not just to *Jacobson* but also to *Wright* v. *DeWitt School District No. 1*, 385 S.W.2d 644 (Ark. 1965), a case expressly rejecting a free-exercise challenge to a mandatory-vaccination law. And in *Employment Division* v. *Smith*, the Court reaffirmed that the Free Exercise Clause does not "require[ ] religious exemptions from * * * health and safety regulation[s] such as * * * compulsory vaccination laws." 494 U.S. 872, 888–889 (1990) (citing *Cude* v. *State*, 377 S.W.2d 816 (Ark. 1964)). Many federal and state appellate courts have followed suit, rejecting free-exercise challenges to vaccination requirements.[4]

[4] See *Phillips* v. *City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *Nikolao* v. *Lyon*, 875 F.3d 310, 316 (6th Cir. 2017); *Workman* v. *Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353–354 (4th Cir. 2011); *F.F.* v. *State*, 143 N.Y.S.3d 734, 741–742 (N.Y. App. Div.), appeal dismissed for lack of a substantial constitutional question and motion for leave to appeal denied, No. 2021-443, 2021 WL 4735375 (N.Y. Oct. 12, 2021); *C.F.* v. *N.Y.C. Dep't of Health & Mental Hygiene*, 139 N.Y.S.3d 273, 287–292 (N.Y. App. Div. 2020); *Brown* v. *Smith*, 235 Cal. Rptr. 3d 218, 224–225 (Cal. Ct. App. 2018); *Davis* v. *State*, 451 A.2d 107, 112 & n.8 (Md. 1982); *Brown* v. *Stone*, 378 So. 2d 218, 223 (Miss. 1979); *Wright*, 385 S.W.2d at 646–648; *Cude*, 377 S.W.2d at 819–820; *Bd.*

Under these precedents, Maine's vaccination requirement for healthcare workers does not violate the Free Exercise Clause. There is simply no general right to a religious exemption from a public-safety law such as a vaccination mandate. And because Maine's vaccination requirement is neutral and generally applicable—it applies equally to all healthcare workers who can safely be vaccinated, regardless of whether they object to vaccination on religious or nonreligious grounds (see 10-144-264 Me. Code R. (Aug. 12, 2021))—the requirement does not trigger heightened scrutiny (see *Smith*, 494 U.S. at 878–879).

Applicants nevertheless argue (Application 18–19) that the vaccination mandate is not neutral toward religion because, two years before adding the Covid-19 vaccine to the list of immunizations required for healthcare workers, Maine repealed previously existing religious and philosophical exemptions from its vaccination rules (Applicants' Appendix Ex. 5 at 9–10). But as then-Judge Gorsuch wrote for the Tenth Circuit in *Yellowbear* v. *Lampert*, 741 F.3d 48, 58 (10th Cir. 2014), "[s]urely the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future, especially if experience teaches the accommodation brings with it genuine safety problems that can't be addressed at a reasonable price." That was exactly the case here: Maine removed its religious exemption because of decreases in vaccination rates that

of Educ. v. *Maas*, 152 A.2d 394, 405–408 (N.J. Super. Ct. App. Div. 1959), aff'd mem., 158 A.2d 330 (N.J. 1960); *State ex rel. Dunham* v. *Bd. of Educ.*, 96 N.E.2d 413, 413 (Ohio 1951); *Mosier* v. *Barren Cnty. Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948); *Sadlock* v. *Bd. of Educ.*, 58 A.2d 218, 222 (N.J. 1948); *City of New Braunfels* v. *Waldschmidt*, 207 S.W. 303, 305 (Tex. 1918).

increased the risk of disease outbreaks and endangered the public health. (Applicants' Appendix Ex. 3 at 22–23.) Moreover, a rule that the repeal of a religious exemption triggers strict scrutiny would have a perverse effect by "discouraging * * * officials from granting the accommodation in the first place." See *Yellowbear*, 741 F.3d at 58. And such a rule would make no logical sense: Why should strict scrutiny arise from the repeal of a religious exemption when rational-basis scrutiny would apply if there had never been a religious exemption in the first place?

Maine's vaccination mandate is thus subject to rational-basis review at most. See *Smith*, 494 U.S. at 882–889. It survives that review easily, because it is rationally related to the state's legitimate—indeed, compelling—interests in protecting healthcare personnel and their patients from illness and death.

II. The vaccination mandate's medical exemption does not render the lack of a religious exemption unconstitutional.

A. The medical exemption does not trigger strict scrutiny.

Applicants argue (Application 19–24) that the inclusion of a medical exemption in the vaccination mandate (Applicants' Appendix Ex. 5 at 9–10) triggers strict scrutiny and renders the regulation unconstitutional insofar as it lacks a religious exemption. They rely heavily (Application 13–14, 19, 28, 37–38) on *Dahl* v. *Board of Trustees of Western Michigan University*, __ F.4th __, No. 21-2945, 2021 WL 4618519 (6th Cir. Oct. 7, 2021)—which, to *amici*'s knowledge, is the only appellate opinion that has sustained a free-exercise challenge to a vaccination requirement. There, the Sixth Circuit concluded on a preliminary-injunction appeal that a university's vaccination mandate, which applied only to student-athletes, was likely subject to

strict scrutiny because it permitted individualized religious and medical exemptions on a discretionary basis. *Id*. at *3–4. *Dahl* was based on this Court's ruling in *Fulton* v. *City of Philadelphia* that "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" 141 S. Ct. 1868, 1877 (2021) (second alteration in original) (quoting *Smith*, 494 U.S. at 884).

But *Fulton* held only that individualized secular exemptions that are granted *at the sole discretion* of governmental officials may result in strict scrutiny of a denial of a religious exemption. See 141 S. Ct. at 1877–1879. This type of discretionary mechanism raises particular free-exercise concerns because a state's refusal under such a system "to extend an exemption to an instance of religious hardship suggests a discriminatory intent." See *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (plurality opinion). Here, far from being dependent on discretionary decisions of state officials, the medical exemption is objective and categorical—healthcare workers are automatically entitled to it if they receive an appropriate certification from a medical professional. See Me. Stat. tit. 22, § 802(4-B)(A).

Applicants also rely heavily (Application 18–19, 27, 36) on *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021), in which the Court stated that "government 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" and 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." Similarly, in *Fulton*, 141 S. Ct. at 1877, the Court noted that "[a] law * * * lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." But these cases do not require strict scrutiny of Maine's vaccination mandate, as illustrated by two Third Circuit opinions by then-Judge Alito—*Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), and *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004)—that apply the same rule and provide detailed guidance for distinguishing nonreligious exemptions that undermine the governmental interests at stake from those that do not.

In *Fraternal Order*, the court ruled that a police department's refusal to grant its officers a religious exemption from a prohibition on beards triggered heightened scrutiny under the Free Exercise Clause, because the department had exempted officers from that prohibition for medical reasons, and the medical exemption undermined the governmental interest supporting the prohibition—"fostering a uniform appearance"—just as much as a religious exemption would have. See 170 F.3d at 366. Similarly, in *Blackhawk*, the court concluded that a state's denial of a religious exemption from a fee requirement for keeping exotic wildlife was subject to strict scrutiny because exemptions provided to zoos and circuses undermined the state interests at issue—raising money and discouraging the keeping of wild animals in captivity—to the same extent as a religious exemption would have. See 381 F.3d at 211.

Justice Alito contrasted the facts of *Fraternal Order* and *Blackhawk* with the denial in *Smith* of a religious exemption from a law banning possession of controlled substances. He explained that strict scrutiny did not apply in *Smith* even though the law contained an exemption for medical uses: "The purpose of drug laws is to protect public health and welfare," but "when a doctor prescribes a drug, the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served." *Blackhawk*, 381 F.3d at 211; accord *Fraternal Ord.*, 170 F.3d at 366. "Therefore, the prescription exception in *Smith* did not undermine the purpose of the state's drug laws." *Blackhawk*, 381 F.3d at 211; accord *Fraternal Ord.*, 170 F.3d at 366. Likewise, Justice Alito noted that an exemption from the no-beard policy in *Fraternal Order* for undercover officers did not "undermine the [police] Department's interest in uniformity because undercover officers 'obviously are not held out to the public as law enforcement person[nel].'" 170 F.3d at 366 (citing a party's brief; alterations in original); accord *Blackhawk*, 381 F.3d at 211. He concluded that "[t]he prescription exception [in *Smith*] and the undercover exception [in *Fraternal Order*] do not trigger heightened scrutiny because the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing." *Fraternal Ord.*, 170 F.3d at 366.

Likewise, Maine's medical exemption does not trigger strict scrutiny because the state does not have an interest in forcing vaccinations on those who cannot safely be vaccinated. As this Court explained in *Jacobson*, it "would be cruel and inhuman in the last degree" to require vaccination of a person "if it be apparent or can be shown

with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death." 197 U.S. at 39.

Moreover, like the medical exemption in *Smith* and the undercover exemption in *Fraternal Order*, Maine's medical exemption advances the purpose of the vaccination mandate—to protect the public health. When a doctor certifies that vaccination is medically contraindicated for a particular healthcare worker (as required to obtain the medical exemption, see Me. Stat. tit. 22, § 802(4-B)(A)), "the doctor presumably does so to serve the patient's health and in the belief that the overall public welfare will be served" (*Blackhawk*, 381 F.3d at 211).

As recently explained by Professor Douglas Laycock, "medical exceptions don't undermine the government's interest in saving lives, preventing serious illness or preserving hospital capacity. By avoiding medical complications, those exceptions actually serve the government's interests." Douglas Laycock, *What's the law on vaccine exemptions? A religious liberty expert explains*, Conversation (Sept. 15, 2021), https://bit.ly/3lsSGg4. On the other hand, a religious exemption does not advance a vaccination mandate's purpose of protecting the public health and welfare in any way.

What is more, even if the medical exemption could be construed as undermining the state interests at stake, it certainly does not do so "to at least the same degree as the covered conduct that is religiously motivated" (*Blackhawk*, 381 F.3d at 209). That is because requests for religious exemptions from vaccination requirements are far more common than requests for medical exemptions.

For instance, San Diego's largest healthcare system recently reported that the number of requests it received for religious exemptions from its Covid-19 vaccination mandate for employees was seven times higher than the number of requests for medical exemptions.[5] A Kentucky hospital granted more than thirteen religious exemptions for every medical exemption from its Covid-19 vaccination requirement.[6] A Minnesota healthcare provider approved approximately eight religious exemptions for every medical exemption from its Covid-19 vaccination mandate.[7] Grants of religious exemptions from a Connecticut health system's Covid-19 vaccination requirement outnumbered grants of medical exemptions by more than five to one.[8] At a Newark hospital, five percent of the staff obtained religious exemptions from mandatory Covid-19 vaccination, while only 1.2 percent obtained medical exemptions.[9] And three quarters of the licensed healthcare workers in the District of Columbia who have reported not being vaccinated against Covid-19 are requesting religious exemptions.[10]

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[5] See Paul Sisson, *Thousands of San Diego County healthcare workers seek vaccine exemptions, citing religion*, L.A. Times (Sept. 12, 2021), https://lat.ms/2XpkxWy.

[6] See *Beckerich* v. *St. Elizabeth Med. Ctr.*, __ F. Supp. 3d __, No. 2:21-cv-105, 2021 WL 4398027, at *4–5 (E.D. Ky. Sept. 24, 2021).

[7] See Def. Univ. of Minn. Physicians' Mem. Supp. Dismissal at 3, *Roe 1* v. *Allina Health Sys.*, No. 0:21-cv-2127 (D. Minn. Oct. 8, 2021), ECF No. 73.

[8] See Kasturi Pananjady & Jenna Carlesso, *CT hospitals see spike in religious exemptions for mandated COVID vaccines*, CT Mirror (Oct. 1, 2021), https://bit.ly/2ZQlp7n.

[9] See Elizabeth Llorente, *Will N.J. hospitals face a nursing shortage under vaccine mandates? They already are.*, NJ.com (Sept. 20, 2021), https://bit.ly/3CtjDqI.

[10] See Michael Brice-Saddler & Jasmine Hilton, *Thousands of D.C. health care workers remain unvaccinated amid flurry of religious exemption requests*, Wash. Post (Oct. 2, 2021), wapo.st/3mtJF7c.

Similar data has been reported outside the healthcare context. Approximately 3,000 employees of the Los Angeles police department—one quarter of the department's workforce—recently requested exemptions from a Covid-19 vaccination requirement; and more than 2,600 of these requests were for religious exemptions, while only about 360 were for medical ones.[11] Washington State agencies received 3,891 employee requests for religious exemptions from Covid-19 vaccination, compared to 829 requests for medical ones.[12] The number of New York students who claimed religious exemptions from vaccination requirements for schoolchildren during the 2018–19 schoolyear (before the religious exemption from those requirements was repealed) was nearly six times the number who claimed medical exemptions.[13] And other states have reported similar or greater disparities in the school context.[14]

Thus, permitting a religious exemption poses a much greater threat to Maine's interest in preventing the spread of Covid-19 among healthcare workers and to vulnerable patients than does allowing a medical exemption. In addition, that threat is magnified by the tendency of religious objectors to cluster in particular

[11] See Emily Alpert Reyes & Kevin Rector, *Thousands of LAPD employees plan to seek exemptions to COVID-19 vaccine mandate*, L.A. Times (updated Sept. 14, 2021), https://lat.ms/39cyGJ2.

[12] See Joseph O'Sullivan, *Washington state workers are getting exemptions to avoid the COVID-19 vaccine — but will they keep their jobs?*, Seattle Times (Sept. 18, 2021), https://bit.ly/3AuHDt9.

[13] See Merri Rosenberg, *School districts can be fined for unvaccinated students*, N.Y. State Sch. Bds. Ass'n (Sept. 23, 2019), https://bit.ly/3lWzgCe.

[14] See Casey M. Zipfel et al., *The landscape of childhood vaccine exemptions in the United States*, 7 Sci. Data 401 (2020), at 5, https://go.nature.com/2XdYUYO.

communities.[15] In such communities, requiring religious exemptions from Maine's vaccination mandate would pose an especially high risk of triggering Covid-19 outbreaks in healthcare settings. Indeed, in recent years, the clustering phenomenon has led to outbreaks of dangerous diseases such as measles, mumps, and pertussis in Maine and around the country—primarily among children, due to in-school transmission.[16]

In sum, medical exemptions—but not religious exemptions—serve Maine's interest in protecting the health of people who cannot safely be vaccinated; Maine has no real choice other than to allow medical exemptions; and religious exemptions pose a much greater threat to the state's efforts to prevent the spread of Covid-19. Hence, the state is not "prohibit[ing] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" (*Fulton*, 141 S. Ct. at 1877). The medical exemption therefore does not trigger strict scrutiny under the Free Exercise Clause.

B. Even if the medical exemption triggered strict scrutiny, Maine's vaccination requirement would pass muster.

Even if strict scrutiny were to apply, Maine's vaccination mandate would satisfy the test. "A government policy can survive strict scrutiny only if it advances

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[15] See Thomas May & Ross D. Silverman, *'Clustering of exemptions' as a collective action threat to herd immunity*, 21 Vaccine 1048, 1050 (2003), https://bit.ly/2TJONcX.

[16] See Applicants' Appendix Ex. 5 at 22–23 (pertussis outbreaks in Maine); *F.F. ex rel. Y.F.* v. *State*, 114 N.Y.S.3d 852, 863–864 (N.Y. Sup. Ct. 2019) (measles outbreaks in New York), aff'd, 143 N.Y.S.3d 734 (N.Y. App. Div.), appeal dismissed for lack of a substantial constitutional question and motion for leave to appeal denied, No. 2021-443, 2021 WL 4735375 (N.Y. Oct. 12, 2021); Olivia Benecke & Sarah E. DeYoung, *Anti-Vaccine Decision-Making and Measles Resurgence in the United States*, 6 Glob. Pediatric Health 1, 1, 4 (2019), https://bit.ly/3pilaup (measles outbreaks in Washington State and elsewhere in United States).

'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881 (quoting *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993)). Under strict scrutiny, secular exemptions may prevent a law from passing muster if they signify that the government's interest is not truly compelling or demonstrate that the government's means are not adequately tailored. See*, e.g.*, *id.* at 1881–1882; *Tandon*, 141 S. Ct. at 1296–1297. But secular exemptions are not always fatal under strict scrutiny. Just as Justice Alito's opinions for the Third Circuit illuminate how to distinguish exemptions that trigger strict scrutiny from those that do not, Justice Gorsuch's Tenth Circuit opinion in *Yellowbear*, 741 F.3d 48, illuminates how to distinguish nonreligious exemptions that cause a law to fail strict scrutiny from those that do not.

In *Yellowbear*, Justice Gorsuch considered a prisoner's claim under the Religious Land Use and Institutionalized Persons Act, a statute that mandates strict judicial scrutiny of governmental conduct that substantially burdens incarcerated individuals' religious exercise. See 741 F.3d at 56 (citing 42 U.S.C. § 2000cc-1(a)). Justice Gorsuch recognized that "[a] law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all." *Id.* at 60.

But, Justice Gorsuch cautioned, "it is important to acknowledge that inferences like these are not inevitable or irrebuttable." *Yellowbear*, 741 F.3d at 61. "We know that few statutes pursue a single purpose at any cost, without reference to competing

interests." *Id.* "Given this, it would be odd if the mere fact that a law contains some secular exceptions always sufficed to prove the government lacked a compelling interest in avoiding another exception to accommodate a claimant's religious exercise." *Id.* "If that were the case, the compelling interest test would seem nearly impossible to satisfy." *Id.*

Instead, Justice Gorsuch noted, "[a] government can rebut an argument from underinclusion by showing that it hasn't acted in a logically inconsistent way—by (say) identifying a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explaining how such differential treatment furthers some distinct compelling governmental concern." *Yellowbear*, 741 F.3d at 61. As an example, he cited a case holding that the governmental interest "in preventing eagle deaths isn't undermined simply because the government has restricted intentional eagle killings more than accidental ones," for "surely the government has a compelling interest in not subjecting citizens to laws they can't realistically avoid breaking." *Id.* (citing *United States* v. *Friday*, 525 F.3d 938, 958–959 (10th Cir. 2008)).

Here, there is no question that the governmental interest served by Maine's vaccination mandate—preventing the spread of a deadly disease—is compelling. See, *e.g.*, *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020). The medical context renders it especially so, given the vulnerability of patients.

And Maine "hasn't acted in a logically inconsistent way" (*Yellowbear*, 741 F.3d at 61) in allowing medical exemptions but not religious exemptions. As explained

above, there is both "a qualitative" and a "quantitative difference between the particular religious exemption requested and [the] secular exception[ ] already tolerated." *Id.* Qualitatively, a medical exemption, unlike a religious exemption, advances public health by protecting those who cannot safely be vaccinated from the physical harm that vaccination would inflict on them. Quantitatively, because religious exemptions are claimed much more often than medical ones, allowing religious exemptions poses a much greater threat to Maine's efforts to protect staff and patients at medical facilities.

Moreover, Maine's "differential treatment" of medical and religious exemptions "furthers [a] distinct compelling governmental concern" (*Yellowbear*, 741 F.3d at 61): Permitting a medical exemption while disallowing a religious exemption advances the state's interest in protecting from harm those healthcare workers whose medical conditions preclude them from being safely vaccinated. These particularly vulnerable people include those who have allergic reactions to vaccine components.[17] Just as "the government has a compelling interest in not subjecting citizens to laws they can't realistically avoid breaking" (*Yellowbear*, 741 F.3d at 61), so too does it have a compelling interest in not attempting to vaccinate healthcare workers whose medical conditions preclude immunization—as well as in safeguarding those vulnerable people's health by disallowing nonmedical exemptions that could cause colleagues to infect them.

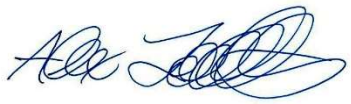
[17] See, *e.g.*, *Vaccines Protect Your Community*, U.S. Dep't of Health & Hum. Servs., https://bit.ly/3nCZavx (last visited Oct. 20, 2021).

CONCLUSION

The right to freely exercise religion should never be misused to harm others. But that is exactly what a decision requiring the religious exemptions sought by applicants would do, putting their colleagues and the patients they serve at increased risk of death or suffering from the most dangerous pandemic virus the world has confronted in more than a century. And though this case concerns Covid-19 vaccines, a ruling that requires religious exemptions in this context could jeopardize other efforts to fight vaccine-preventable diseases—including diseases like measles that are particularly dangerous to children.[18] The application should be denied.

[18] See Matt Wood, *Measles is still a very dangerous disease*, UChicago Medicine: The Forefront (Feb. 10, 2019), https://bit.ly/2Z3BXbx.

Respectfully submitted.



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OCTOBER 2021