No. 21-1143

In the Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans. Through pro bono legal representation of both individuals and institutions, First Liberty's clients include people of diverse religious beliefs, including individuals and institutions of the Catholic, Protestant, Islamic, Jewish, Falun Gong, and Native American faiths.

Throughout the COVID-19 pandemic, First Liberty has advised and successfully sought relief for those seeking to practice their faith safely and without discrimination. *See, e.g.*, *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. Apr. 11, 2020) (granting temporary relief against discriminatory restrictions on drive-in worship services); *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020) (granting temporary relief against discriminatory restrictions on outdoor worship services). First Liberty is also currently representing 35 Navy SEALs and other Navy Special Warfare personnel challenging the Navy's refusal to grant any religious exemptions to its COVID-19 vaccine mandate. *U.S. Navy Seals 1-26 v. Biden*, No. 22-10077, 2022 WL 594375 (5th Cir. Feb.

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[1] All parties were timely notified and consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

28, 2022). Even during a pandemic, federal courts have a continuing duty to protect constitutional rights.

As an amicus, First Liberty maintains an interest in preserving religious liberty in New York for our many New York clients of various faiths who seek to navigate the challenges of COVID-19 while adhering to their deepest convictions.

SUMMARY OF THE ARGUMENT

The Free Exercise Clause commits all government officials, high or petty, to religious tolerance. Such tolerance extends not only to popular religious beliefs that align with the government's agenda, but also to unpopular ones that may run directly counter to the government's viewpoint. By mandating a COVID-19 vaccination orthodoxy that provides no exemptions for those with contrary religious beliefs, Governor Hochul and the state of New York abandoned their duty to the Constitution and the rights it secures. New York's vaccine mandate unconstitutionally prohibits the free exercise of religion, and the Second Circuit erred in holding otherwise.

The vaccine mandate is not a neutral law. When analyzing neutrality, this Court's precedent requires a meticulous examination of the law and the circumstances surrounding the law's creation to ensure that the law does not unlawfully suppress religious beliefs or practices. This analysis does not defer to government assurances that a law is neutral, nor does it require substantial, overt religious animus. Here, the removal of religious exemptions from New York's vaccine mandate mere days after such exemptions were

being granted, combined with Governor Hochul's hostile statements and the mandate's harsh treatment of those with religious objections to the COVID-19 vaccine, raise much more than a slight suspicion that the mandate is not neutral. The Second Circuit failed to properly apply this Court's precedents in favor of an overly deferential analysis that is skeptical not of government intrusion into matters of conscience, but rather the attempt by sixteen healthcare workers ("Petitioners") to live according to the tenets of their faith. The Second Circuit's analysis is the latest in a troubling trend of confusion among courts regarding the proper test for neutrality, and this case presents an opportunity for the Court to provide clarification.

The vaccine mandate is also not generally applicable. This Court's precedents forbid religious observers from being subject to unequal treatment. Thus, if a law treats *any* secular activity more favorable than a religious one, it is subject to the exacting standards imposed by strict scrutiny. Here, New York's vaccine mandate provides medical exemptions without providing a similar religious exemption. This fact alone is sufficient to establish that the mandate is not generally applicable. However, the Second Circuit again misapplied this Court's precedent by considering factors only relevant to the Court's strict scrutiny analysis to determine general applicability. To correct the error made by the Second Circuit, this Court should grant certiorari.

ARGUMENT

I. The Free Exercise Clause protects religious beliefs regarding vaccinations.

"The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). The Free Exercise Clause guarantees to all Americans the "right to believe and profess whatever religious doctrine [they] desire[ ]," even doctrines out of favor with a majority of fellow citizens. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Indeed, if the First Amendment's protection only extended to popular religious beliefs, it would be no protection at all. *See Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch J., concurring) ("Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom."). These beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit . . . protection." *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981). Nor is it the role of government to determine whether an adherent has "correctly perceived" the commandments of his religion. *Id.* at 716.

The First Amendment's protections are not only limited to beliefs. Instead, religious liberty extends to the right to live out those beliefs publicly in "the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877. Thus, "[t]he Constitution

commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Consistent with this mandate of religious tolerance, no government "official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Here, the religious beliefs at issue are Petitioners' religious objections to New York's vaccine mandate. While some New York officials might consider these beliefs heterodox, as indicated by the officials' assertions that the beliefs are wrong because of the pronouncements of certain religious leaders, their controversial nature makes their protection under the First Amendment especially vital. *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (stating "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate"); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (warning against the "grave risk" of "state-created orthodoxy" and stating the "sphere of inviolable conscience and belief . . . is the mark of a free people"). But instead of remembering their "high duty" to the Constitution and its rights, New York instead declares the orthodoxy of vaccination on all people and seeks to make everyone apostles of this orthodoxy, regardless of their religious beliefs. This mandate puts Petitioners in an impossible position, they can either compromise

their beliefs or lose their jobs without even having the safety net of unemployment benefits available to anyone else.

II. The Second Circuit erred in holding that New York's vaccine mandate was neutral.

A. The Free Exercise Clause demands a meticulous examination of a law and the circumstances surrounding its creation to determine whether a law is neutral.

Laws that burden religious exercise are presumptively unconstitutional unless they are both neutral and generally applicable. *Smith*, 494 U.S. at 877–78. Regarding neutrality, states are forbidden from acting "in a manner intolerant of religious beliefs or restrict[ing] practices because of their religious nature." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021). Additionally, states "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. When analyzing whether a law is neutral, courts must "meticulously" scrutinize both the law itself and the circumstances surrounding its creation to ensure the law does not unlawfully suppress religious exercise. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

Examining a law to determine whether it facially discriminates against religion is only the starting point of this analysis. *See id.* ("Facial neutrality is not determinative."). The Free Exercise Clause also "forbids subtle departures from neutrality" and "covert

suppression of particular religious beliefs." *Id.*; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1731. Thus, to protect against "governmental hostility which is masked" courts must closely scrutinize "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 534. Courts must also carefully consider "the effect of a law in its real operation," which "is strong evidence of its object." *Id.* at 535.

Significantly, this inquiry is not deferential to the government. This Court has repeatedly refused to defer to lawmakers to displace its own independent judgment on issues related to First Amendment rights. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994) ("[I]n First Amendment cases . . . the deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law."); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843(1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). Indeed, such deference is entirely inconsistent with the Court's obligation to meticulously examine the circumstances surrounding government action to uncover masked hostility. *Lukumi*, 508 U.S. at 534.

Nor is evidence of overt religious animus required to prove that a law is not neutral. Proof of hostility or discriminatory motivation is certainly sufficient to prove that a challenged governmental action is not

neutral. *See Lukumi,* 508 U.S. at 533. The Constitution requires neutrality, not merely the governmental avoidance of bigotry. *See Smith,* 494 U.S. at 881. Limiting First Amendment protections to "animus" would allow the government to favor religions whose beliefs are compatible with those of the State, so long as it does not act out of overt hostility to the others, which is "plainly not what the framers of the First Amendment had in mind." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008). It also does not matter whether the government treats comparable secular beliefs "as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). This Court's precedent is clear: a law that creates "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" must be "set aside." *Lukumi*, 508 U.S. at 547.

B. The Second Circuit failed to properly apply this Court's precedents on neutrality.

Instead of applying the rigorous neutrality analysis required by *Lukumi* and its progeny, the Second Circuit applied a watered-down analysis that was both overly deferential to New York and required substantial, overt animus. The Second Circuit gave no weight to the fact that, in a matter of days, New York's vaccine mandate overrode Commissioner Zucker's previous order, issued just days earlier, that allowed for religious exemptions. In doing so, the court erroneously limited its judicial inquiry into neutrality, opting instead to defer to the determinations of New

York's Public Health and Health Planning Council without questioning why New York removed the religious exemption or why it is denying unemployment to those fired for failing to get the vaccine, while offering those benefits to everyone else. *Contra Lukumi*, 508 U.S. at 534; *Landmark,* 435 U.S. at 843.

The Second Circuit also erroneously discounted Governor's Hochul's statements as merely being personal opinions that did not demonstrate any governmental animus towards Petitioners' religious beliefs. But under this Court's precedent, these statements did demonstrate animus. The Governor accused Petitioners of not "listening to God and what God wants" and stated that only those who are vaccinated are "true believers." The Governor also demonstrated hostility by admitting the removal of the religious exemptions was "intentional" and implied Petitioners' religious views were invalid because there was no "sanctioned religious exemption from any organized religion."

Such statements from the highest government official in New York are tantamount to improperly prescribing "what shall be orthodox" on matters related to vaccination, especially when combined with the sweeping mandate and harsh penalties for noncompliance. *See Barnette*, 319 U.S. at 642. They also unlawfully invalidated Petitioners' religious beliefs as not being "correctly perceived." *See Thomas*, 450 U.S. at 714. Further, these statements cannot merely be discounted as personal views because the same could have been said in *Masterpiece*. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729 (quoting a commission

member's statement that "*to me* [asserting freedom of religion] is one of the most despicable pieces of rhetoric that people can use" (emphasis added)). The mere fact that multiple meanings could be ascribed to the statements is sufficient to raise a "slight suspicion that [the vaccine mandate] stem[s] from animosity to religion or distrust of its practices." *Id.* at 1731; *see also id.* at 1729 (recognizing that many statements demonstrating hostility "are susceptible of different interpretations"). The Second Circuit also ignored this Court's holding that poor treatment of comparable secular activities does not indicate neutrality. *Tandon*, 141 S. Ct. at 1296. Thus, the fact that the vaccine mandate also targets certain philosophical or political views is irrelevant to the court's neutrality analysis.

In sum, the Second Circuit's holding is inconsistent with this Court's neutrality requirements. While the Second Circuit's misapplication is reason enough to grant certiorari in this case, its error is compounded by the fact that other circuits have similarly misapplied this Court's precedent. *See Does 1-6 v. Mills*, 16 F.4th 20, 34 (1st Cir. 2021) (upholding the removal of a religious exemption from a vaccine mandate because Maine did not have a "improper motive"); *Illinois Bible Colleges Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2017) (requiring a showing of "religious animus" or targeting religion); *Archdiocese of Washington v. Washington Metro. Area Transit* Auth., 897 F.3d 314, 335 (D.C. Cir. 2018) (requiring evidence of animus). Indeed, the Court has already corrected Ninth Circuit for a similar misapplication of its neutrality test. *See Tandon v. Newsom*, 992 F.3d 916, 922 (9th Cir. 2021), disapproved in later proceedings, 141 S. Ct. 1294 (2021)

(upholding restrictions on in-home worship in part because there was no "animus toward religious gatherings"). This Court should therefore grant certiorari to clarify the proper standard for determining a law's neutrality.

III. The Second Circuit erred in holding that New York's vaccine mandate was generally applicable.

This Court should also grant certiorari to correct widespread errors lower courts are making regarding this Court's test for general applicability. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice" to ensure that religious observers are not subject to "unequal treatment." *Lukumi*, 508 U.S. at 542. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884. A law is therefore not generally applicable "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. A law also lacks general applicability "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* Indeed, this Court recently emphasized that a law triggers strict scrutiny if it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (emphasis in original). "[W]hether 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." *Id.* "Comparability is concerned with the risks various activities pose." *Id.*

As this Court recently emphasized, the most important consideration for determining general applicability is whether the law creates "a formal mechanism for granting exceptions." *Fulton*, 141 S. Ct. at 1879. If the law has *any* secular exemption but fails to do the same for religious exercise, it is not generally applicable. *Tandon*, 141 S. Ct. at 1296. This rule is categorical and is not based upon "whether any exceptions have been given" or might be given in the future. *See Fulton*, 141 S. Ct. at 1879.

Here, the Second Circuit put the cart before the horse by failing to apply a categorical approach and in favor of considering factors only relevant to the Court's strict scrutiny analysis. While considerations such as the number of exemptions, length of exemptions, and which exemptions best advance the government's interest are relevant to a court's strict scrutiny analysis, they have no bearing on general applicability. *See Fulton*, 141 S. Ct. at 1881 (stating strict scrutiny requires courts to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants"); *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (considering sizes of different groups seeking exemptions while applying strict scrutiny); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 727 (2014) (requiring courts to "look to the marginal interest in enforcing" a law as part of their strict scrutiny analysis). Indeed, the reason for why a secular

exemption exists is irrelevant to a court's general applicability analysis. *See Tandon*, 141 S. Ct. at 1296.

The analysis for this case simply required the Second Circuit to determine if New York's vaccine mandate offered a secular exemption without offering a religious one. The answer here is yes: the mandate offers a medical exemption with no comparable religious exemption. Such differential treatment is sufficient to trigger strict scrutiny. *Tandon*, 141 S. Ct. at 1296. The Second Circuit erred in overly complicating this analysis in the name of analyzing the comparability of medical exemptions to religious exemptions. But comparability is only concerned with whether both exemptions present similar risks. This determination should be made based on a one-to-one comparison between someone seeking a religious exemption and someone seeking a medical exemption to determine whether the risk of granting an exemption to each is comparable. After all, the court's focus should have been not on New York's general asserted interest, but rather its interest in denying an exception to the Petitioners in particular. *Cf. Fulton*, 141 S. Ct. at 1881. The Second Circuit's discussion of exemptions collectively, therefore, misapplied the Court's precedent. Like neutrality, other courts have made similar errors in their general applicability analysis. *See Does 1–6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1182 (9th Cir. 2021). This Court should grant certiorari to clarify that it "really means what it says" when it stated a law triggers strict scrutiny if it "treat[s] *any* comparable secular activity more

favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296, 1298.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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