

No. 21-1143

IN THE
Supreme Court of the United States

DR. A., ET AL.,

Petitioners,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW
YORK, IN HER OFFICIAL CAPACITY, ET AL.,

Respondents.

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

**BRIEF OF CATHOLIC MEDICAL
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Catholic Medical Association is the largest association of Catholic individuals in healthcare. CMA helps its members to grow in their faith, maintain ethical integrity, and provide excellent healthcare in line with Catholic teachings. To accomplish these goals, CMA represents Catholic healthcare workers, creates and curates educational resources, engages in public advocacy, and advises Church leaders on healthcare ethics and policy. CMA is committed to equipping Catholics in medicine to promote the highest quality healthcare, consistent with both their Church's teachings and the Hippocratic oath.

As part of its work, CMA advocates for the right of its members to obey their conscience and Catholic teaching in their medical work. While CMA members share diverse views on the COVID-19 vaccine and its ethical application, CMA believes that members should decide this issue for themselves. So, CMA opposes discriminatory laws—like New York's healthcare worker mandate—that coerce its members to make healthcare decisions over their sincere religious objections. This brief shows the religious discrimination that CMA members have faced in New York, the human cost of this discrimination, and how it has severely weakened New York's healthcare system.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2, and all parties consented to its filing.

SUMMARY OF THE ARGUMENT

New York has over 500,000 healthcare workers. At great risk to themselves, these heroes have bravely served their communities throughout the COVID-19 pandemic. The solidarity these workers achieved was inspiring. They were celebrated with a ticker-tape parade, showered in service awards, and saluted nightly with a chorus of cookware. But last year, this solidarity began to splinter. New York issued a mandate requiring its healthcare workers to receive a COVID-19 vaccine. In its original form, this mandate had both medical and religious exemptions. But a week later, the State erased the religious one. And it did so with spite. According to Respondents, no organized religion backs an exemption, and everyone “from the Pope on down” supports the vaccine. The Governor even recruited “apostles” to proselytize this message.

New York’s about-face on the religious exemption—and the hostility behind that move—shows the mandate lacks neutrality toward religion. This alone violates free exercise. But the mandate also lacks general applicability. By forbidding religious exemptions while allowing medical ones, the mandate bans religious conduct while allowing secular conduct that undermines public interests in a similar way. Allowing a healthcare worker to remain unvaccinated undermines New York’s health goals equally whether that worker is unvaccinated for religious or medical reasons. And worse, to ease a worker shortage that this mandate helped fuel, New York now allows vaccinated workers with an active infection and not fully vaccinated workers to remain on the job, yet it will not mobilize healthy workers fired for their faith. Such discrimination triggers strict scrutiny.

What's more, New York's law fails strict scrutiny because it is not narrowly tailored to serve a compelling state interest. Because New York allows secular exemptions—which undermine its interest no less than a religious one—it cannot discriminate against people of faith. That violates free exercise.

New York's religious discrimination has imposed severe human costs. Immediately after New York launched its mandate, 3.5% of the State's healthcare workers vanished. The stories of those fired for their faith are troubling. Many report losing their jobs, their clients, and their legacies. And because New York barred them from unemployment benefits, their families are scrambling to make ends meet.

The costs to New York's healthcare system are equally substantial: a severe worker shortage. After New York issued its mandate, many hospitals could not accept new patients due to short staffing. Remaining workers felt pressure to fill in the gaps. And patients faced long wait times, lost their provider, and were forced to delay medical procedures. This could've been avoided. To address this crisis—and the constitutional infringement—this Court should stop New York from engaging in religious discrimination and allow fired religious workers to return to work.

ARGUMENT

I. The Second Circuit’s decision conflicts with this Court’s free-exercise precedents.

The First Amendment protects the free exercise of religion. *Emp. Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). This fundamental right protects against coerced “physical acts” that violate a person’s faith. *Ibid.* And laws that burden this right must satisfy strict scrutiny when they are not neutral toward religion or generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). To satisfy this burden, the government must show that its law is narrowly tailored to serve a compelling state interest. *Id.* at 531-32. Under this Court’s free-exercise precedents, New York’s COVID-19 vaccine mandate for healthcare workers invokes and fails to satisfy this test.

A. New York’s mandate is not neutral toward religion.

Under the First Amendment, New York may not pass judgment on or presuppose “the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018). Indeed, officials must avoid even a “slight suspicion” that their actions “stem from animosity to religion or distrust of its practices.” *Ibid.* (quoting *Lukumi*, 508 U.S. at 547). Here, New York spoke the quiet part—that, in its view, religious objections to the State’s healthcare-worker mandate are illegitimate, and that it *intentionally* erased a religious exemption. That violates free exercise.

Last summer, former New York Governor Andrew Cuomo announced a COVID-19 vaccine mandate for healthcare workers to help stop “the spread of the Delta variant.” Pet.App.127a. This mandate originally had express religious and medical exemptions. The religious exemption protected those who “hold a ... sincere religious belief” that prevents them from receiving the vaccine. Pet.App.131a. The medical exemption applied if a designated professional certified that receiving the vaccine would be “detrimental” based on a “specific pre-existing health condition,” but “only until” the vaccine no longer posed this risk. Pet.App.130a. But only one week later, New York announced a new mandate—erasing the religious exemption and expanding the medical one. Compare Pet.App.130a-131a with Pet.App.135a-136a; Pet.5.

This was a deliberate erasure. Governor Kathy Hochul explained at a news conference that the religious exemption was “left off” the new mandate “intentionally.” Pet.5. She justified this by declaring she was unaware of a “sanctioned religious exemption from any organized religion” and that “everybody from the Pope on down is encouraging people to get vaccinated.” Pet.5–6. Governor Hochul even rallied congregants from two churches’ pulpits, preaching that the vaccine “is from God,” and suggesting that good-faith religious objectors “aren’t listening to God and what God wants.” Pet.6. She told one church:

How can you believe that God would give a vaccine that would cause you harm? ... [A]ll of you, have to be not just the true believers, but our apostles to go out there and spread the word that we can get out of this once and for all, if everybody gets vaccinated. [Pet.6.]

As these comments show, New York’s mandate divides healthcare workers into two camps—“orthodox” heroes and unorthodox expendables. *Masterpiece*, 138 S. Ct. at 1731. It then sets a high cost for dissent. New York said that while it would allow healthcare workers terminated for secular objections to receive unemployment benefits on a case-by-case basis, it would categorically deny benefits to those fired for their faith. Pet.6-7. This record “practically exudes suspicion” of those who hold disfavored religious beliefs, *Dr. A v. Hochul*, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., dissenting from application denial). Because New York may not declare all religious objections to COVID-19 vaccines “illegitimate,” this Court should “set aside” this mandate as applied to Petitioners. *Masterpiece*, 138 S. Ct. at 1724, 1731.

B. New York’s mandate is not generally applicable.

New York’s mandate is also not generally applicable. By forbidding religious exemptions while allowing medical ones, the mandate “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Allowing a healthcare worker to remain unvaccinated undermines New York’s “public health goals equally whether that worker” is unvaccinated for religious or medical reasons. *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting from application denial); see *Lukumi*, 508 U.S. at 542-46; *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

While New York says allowing religious exemptions could more significantly undermine its aims if more people were to seek a religious exemption than a medical one, that possibility does not make the mandate “generally applicable.” *Fulton*, 141 S. Ct. at 1879. Indeed, New York’s mandate lacks general applicability no matter “whether any [medical] exceptions” are actually given. *Ibid.* Petitioners need only show that, based on a one-to-one comparison, a person seeking a medical exemption “undermines” New York’s “asserted interest in a similar way” that a person seeking a religion exemption might. *Id.* at 1877; see *Tandon*, 141 S. Ct. at 1296 (comparing secular exemptions to “the religious exercise at issue”); *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (comparing sizes of groups seeking exemptions as part of strict scrutiny).

New York’s mandate treats people seeking a religious exemption worse than those performing a “comparable secular activity.” *Tandon*, 141 S. Ct. at 1296. That triggers strict scrutiny. *Id.* at 1298.

C. New York’s mandate does not satisfy strict scrutiny.

While New York’s religious hostility is *per se* unconstitutional, *Masterpiece*, 138 S. Ct. at 1731, its mandate must at least satisfy “strict scrutiny” because it lacks general applicability, *Fulton*, 141 S. Ct. at 1881. To pass this “most rigorous” test, New York must prove its mandate is “narrowly tailored” to serve a compelling interest. *Ibid.* It has not done so.

As for interests, New York says its mandate is designed to “prevent the spread of COVID-19 in healthcare facilities.” Pet.App.34a. But allowing *any*

healthcare worker to remain unvaccinated undermines this goal equally—whether that worker is unvaccinated for religious *or* medical reasons. Section I.B, *supra*. While New York answers that it would “likely” see fewer requests for “medical exemptions” than religious ones, Pet.App.35a, that kind of “predictive judgment”—based on “ambiguous” or no evidence—cannot “suffice” to prove a compelling interest. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 799–800 (2011). New York “bears the risk of uncertainty”—not Petitioners. *Ibid*.

For backup, New York says providing a medical exemption “furthers” its “interest in protecting the health of covered personnel,” whereas allowing a religious one does not. Pet.App.34a. Not so. While that pivot rewrites the interest, it does not reboot the analysis. New York issued its mandate for one purpose—to stop the spread of COVID-19 in healthcare settings. Pet.App.89a. Allowing any medical exemption undermines this interest, no matter whether it serves *another* state interest. So too with religious exemptions. New York cannot tolerate secular carve-outs while tossing equivalent religious ones. *E.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (Controlled Substance Act exemptions to promote “public health and safety” not “determinative” in strict scrutiny analysis).

Finally, New York says its mandate serves to “reduce the risk of staffing shortages that can compromise” patient safety. Pet.App.34a. But that logic only amplifies the mandate’s poor tailoring. To address the “severe staffing shortages” that this mandate helped create, New York said it would “allow” vaccinated healthcare workers infected with COVID-19 to return

to work after five days even if they were still showing symptoms. Pet.App.222a-223a. And it has now stalled the booster requirement. Section II.B, *infra*. So while the State allows infected workers, not fully vaccinated workers, and those unvaccinated for medical reasons to remain on the job, it forbids even healthy religious objectors from serving in a crisis. That rampant “underinclusiveness” shows the State’s “interests are insufficient” to tolerate its religious discrimination. *Fulton*, 141 S. Ct. at 1877, 1881.

Adding to these flaws, New York’s mandate is an outlier among many better options. Forty-seven other states have satisfied their public health goals without crushing religious freedom. Pet.Add. And while this alone shows New York’s law is not narrowly tailored, Maine recently argued that it needed only a 90% vaccination rate to protect its healthcare workers from a COVID-19 outbreak. *Does 1-3 v. Mills*, 142 S. Ct. 17, 21 (2021) (Gorsuch, J., dissenting from application denial). In contrast, New York has not identified a safe vaccination target here. And even if the State repurposed Maine’s logic, current data suggests that 98% of New York hospital workers,² and between 94% and 99% of New York long-term care workers,³ are already vaccinated. On this evidence, New York has not justified a need to discriminate against religious objectors to further its asserted interests.

² N.Y. State Dep’t of Health, *Hospital Staff Vaccinations*, <https://on.ny.gov/3BZ4H1a> (last accessed Feb. 28, 2022).

³ N.Y. State Dep’t of Health, *Long Term Care Vaccinations*, <https://on.ny.gov/3hvKuKg> (last accessed Feb. 28, 2022).

II. The human cost of this error is immense.

The Second Circuit's error imposes severe human costs. Lost freedom is one. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Stigma is another. When government appeases "the collective" at the expense of "the individual," minorities suffer. *Dr. A*, 142 S. Ct. at 558 (Gorsuch, J., dissenting from application denial) (citing S. Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* 72-95 (2000)). But as shown below, denying fundamental rights can impose other severe costs—lost careers, lost clients, and lost legacies.

A. New York's mandate has crushed workers fired for their faith.

The stories below show only some of the harms already suffered by healthcare workers because of New York's discriminatory mandate. They represent the stories of thousands of other medical professionals who have not publicly shared their plight.

Tom

Take Tom’s story first.⁴ Tom is an Ivy League trained neurosurgeon. He and his family have lived in New York over 10 years. Tom has committed his career to serving the people of New York. And he has done so with excellence, developing specialized experience in two surgeries that few other surgeons in his area can provide. Like many healthcare workers, Tom faithfully served his community throughout the pandemic—loving his neighbors at great risk to himself. When his hospital issued a COVID-19 vaccine mandate last summer, it gladly offered Tom a reasonable accommodation due to his sincere religious objection to receiving currently available versions. Tom worked under this accommodation for months, diligently obeying all safety and testing rules.

Last fall, Tom’s world turned upside-down. Around Thanksgiving, after the Second Circuit dissolved the preliminary injunction in this case, Tom’s hospital withdrew his religious accommodation and suspended him without pay. When Tom pled for alternatives, he was told he could continue working only if he switched to remote work. But Tom cannot do neurosurgery remotely. Still, Tom pressed for the 50 patients he had already scheduled for surgery: “Can I at least finish caring for these?” The hospital refused.

⁴ In this brief, pseudonyms are used in place of real names to protect the identities of CMA members or friends—Tom, Kate, Jill, and Jenna—who are non-plaintiff healthcare workers suffering from New York’s mandate. CMA collected and verified the stories of these people. Krista is not a CMA member, but her story is publicly available online. Except where otherwise indicated, quotes are taken from their stories on file with CMA.

This abrupt turn left Tom and his patients in a bind. Tom's practice "crumbled" and his patients were left "stranded and desperate for care." Tom's hospital also canceled his credentials and kept him from cleaning out his locker—calling him a "danger" to the community because he is an unvaccinated person.

Tom is now trying to recover. While he has sought solutions at the state and local levels, he's "hit roadblock after roadblock." He has lost "tens of thousands of dollars." Frustrated patients have vilified Tom online. Tom is heartbroken for them. And Tom fears he will never rehabilitate his professional "reputation." He also says this experience has been "severely stigmatizing." And Tom's now seeking new work in another state. New York's mandate has left Tom's patients without care, Tom's career on hold, and Tom's family looking to move. It should not be so.

Kate

Kate is another frontline worker reeling from New York's religious disapprobation. She has served as a nurse for over 30 years. When the pandemic started, Kate remembers that little was known about its dangers. So nurses took extra precautions. Among other things, Kate began caring for patients alone, dressing in awkward protective gear and learning new protocols. While these were difficult adjustments, Kate and her co-workers acclimated to them over time. It was a unifying season for healthcare professionals. But this solidarity soon began to splinter.

Last year, Kate’s hospital issued a COVID-19 vaccine mandate. Kate applied for a religious exemption, but it was denied. In fact, Kate’s hospital initially denied *all* requests for religious exemptions. Then it backtracked, allowing them on a temporary basis—including one for Kate.

Kate kept her job. She obeyed all the rules, taking weekly tests and serving her patients well. But she soon felt singled out. The hospital began awarding special ribbons to vaccinated workers, which set apart the orthodox nurses from the unorthodox. Kate felt shamed by this segregation. And this segregation soon grew into separation. After the Second Circuit dissolved the preliminary injunction in this case, Kate faced a terrible choice: get the vaccine, change her faith, or lose her job. Kate kept her faith but lost her job. Worse, she could not get unemployment benefits because New York considers her religious exercise illegitimate. Kate was still out of work one month later. And she learned that her daughter—a nurse elsewhere in New York—was also fired for her faith.

Reflecting on these losses, Kate says she “miss[es] taking care of people” the most. That’s her calling. Because of New York’s law, Kate lost a career, and her neighbors lost a faithful caretaker and friend.

Jill

Jill can empathize with Kate’s plight. She’s been a pediatrician serving New York children for over 25 years. Like other frontline doctors, Jill showed up for work every day, risking her own health, to serve sick friends and neighbors during the pandemic.

Last year, her hospital issued a COVID-19 vaccine mandate. Jill has sincere religious beliefs that prevent her from receiving currently available vaccines. So she applied for and received an accommodation. Jill obeyed all the rules and faced regular testing. But like Tom and Kate, that soon became not good enough. Around Thanksgiving, after the Second Circuit dissolved the preliminary injunction in this case, New York's mandate erased Jill's religious exemption. And it was devastating.

Jill lost her livelihood, which rocked her family because Jill was "the[ir] major source of income." Now, her family lacks "financial ... stability." The condition has deteriorated so much that Jill's teenage children, who work part-time jobs, are offering to chip in to cover the family's financial needs. Worse, New York considers Jill categorically ineligible to receive unemployment benefits, and Jill has had difficulty finding new work. She's running into the same roadblock at every New York provider. But Jill is just as concerned about the children in the community she has faithfully served for decades. Jill says New York's discriminatory mandate has left "thousands of [her former] patients" looking elsewhere for help.

Jenna

Jenna is another hero, turned expendable. She landed her first nursing job a few years ago, right after college. Jenna loved her work, even during the height of the pandemic. But in late 2020, a COVID-19 vaccine was released, and for the first time, she felt isolated from co-workers. Jenna is a devout Catholic and passionately pro-life. Because she believes all COVID-19 vaccines have "some link" to abortion, she

cannot in good conscience receive them. But she kept this decision to herself. And for good reason. She overheard one co-worker say he was glad some people refused the vaccine because that meant “the idiots could die off quicker.” For months, Jenna would “walk into work anxious”—worried that she would be outed for her faith. “The mental turmoil” of this hiding “was exhausting.” But the worst was yet to come.

Last summer, Jenna signed a 12-month lease for a new apartment. She was settling in. But it was a “bittersweet” moment because her parents and some of her siblings “were moving to Texas.” A few weeks later, her hospital issued a COVID-19 vaccine mandate. That worried Jenna, but she was given a religious exemption and could keep her job. Then came New York’s mandate, which erased her religious exemption. Jenna was “devastated.” She had a new “lease and bills to pay.” As the deadline loomed, Jenna struggled to “hold[] [everything] together” at work. She was told that her vaccination status would be reported to the state licensing board. And she felt like she “was dealing with the stress ... of this situation alone.” Around Thanksgiving, after the Second Circuit dissolved the preliminary injunction in this case, Jenna was fired. With a hefty lease, and no unemployment benefits, Jenna felt “kicked to the curb.”

“How quickly” things change, Jenna thought. One year before, she felt “appreciated” for her work; now she felt abandoned. Jenna “had no ... choice but to move” away from her only home. She had “lived [in New York] all [her] life.” But she felt “no longer welcomed” there. Jenna broke her lease, costing her almost \$4,000, and then spent another \$4,000 to move to Texas. She had no paycheck or health insurance for

two months. In the news, Jenna saw that Governor Hochul declared an emergency because New York had lost many healthcare workers. She couldn't help but think of her "old job and co-workers." She wanted to help, but New York says people like her can't. "Time has yet to heal the wounds" she has suffered.

Krista

Finally, there is Krista Michael. She's a nurse who lives in upstate New York, where she served her community for over 30 years. Wendy Wright, *Rochester nurse refuses to quit; awaits final ruling on religious exemptions to vaccine mandate*, Spectrum News (Oct. 12, 2021), <https://perma.cc/D8ZG-AQRD>. In 2020, at the peak of the pandemic, Krista was serving the "sickest of the [sick]." *Ibid.* Like so many others, she "took risks" and "made sacrifices" in "a time of critical need." *Ibid.* Last year, her hospital issued a COVID-19 vaccine mandate. While Krista is "not anti-vax," she firmly believed this vaccine went against her faith. *Ibid.* So Krista requested and received a "religious exemption," allowing her to stay on the job. *Ibid.* And she promised to do her "level best every day" while she could still hold onto her career. *Ibid.* Then came New York's mandate, which erased her exemption.

The mandate made Krista feel "dispensable." Eriketa Cost, *I'll go to work until they escort me out: Local nurse says no to vaccine as mandate takes effect*, Rochester First (Oct. 4, 2021), <https://perma.cc/THZ5-HSHL>. She eventually lost her job. Eriketa Cost, *Walked out with my head held high: Religious exemptions end for health care vaccine mandate*, Rochester First (Nov. 24, 2021), <https://perma.cc/BAH2-MF2S>.

But Krista worked her final week just as she promised—“with all [her] heart” until her “time was up.” *Ibid.* While Krista mourns a career lost, she’s thankful to have kept her faith. *Ibid.* She “made a decision,” knew what she couldn’t do, and stood by it. *Ibid.* But Krista often thinks about her friends. One had found her niche, loved caring for others, but is now working “at the post office.” *Ibid.* And she’s not alone. New York’s mandate has left many people of faith with “few options,” *ibid.*—none are good.

B. New York’s mandate has crippled the State’s healthcare system.

New York’s mandate has also damaged the State’s healthcare system. About “34,000 health workers” have lost their jobs or been “placed on leave”—reducing the workforce by 3.5%. David Robinson, *NY COVID-19 vaccine mandate reduced health care workforce by 3%. Here’s the biggest impact*, Lohud (Oct. 14, 2021), <https://perma.cc/DN4F-SSMZ>. This reduction has severely affected public health, leaving some facilities unable to curb long “wait times” and struggling to sustain suitable “levels of care.” *Ibid.*

Take the situation in Western New York. Immediately after the Second Circuit dissolved the preliminary injunction in this case, 32 hospitals—including six in Western New York—met the State’s criteria for suspending nonessential procedures. Jon Harris, *Several hundred WNY health care workers lose jobs as religious vaccine exemptions expire*, The Buffalo News (Dec. 7, 2021), <https://perma.cc/Y92G-JDCK>. In fact, the six hospitals in Western New York had insufficient staff to accept new patients for *anything*:

WNY hospitals at staffed bed capacity

These six hospitals are among 32 across the state where the Health Department will soon begin limiting elective procedures due to strained capacity. Data below is for Sunday, Dec. 5:

Hospital name	County	Total staffed acute care beds	Beds occupied	Occupancy rate
Brooks-TLC Hospital	Chautauqua	35	35	100%
Erie County Medical Center	Erie	342	342	100%
Mercy Hospital of Buffalo	Erie	225	225	100%
Mount St. Mary's Hospital	Niagara	59	59	100%
Sisters of Charity Hospital	Erie	150	150	100%
UPMC Chautauqua at WCA	Chautauqua	94	94	100%

Ibid. By forbidding religious exemptions, New York’s mandate abruptly sidelined many healthcare workers, “worsening a staffing crunch that [was] already pressuring [the state’s] hospital capacity.” *Ibid.*

Hospitals began telling people to “be patient” as wait times ballooned. *Health systems lose workers with no religious exemption to vaccine rule*, WNYT (Nov. 23, 2021), <https://perma.cc/SC7F-C9J8>. Some doctors suggested that the mandate could not have come at a worse time. At St. Peter’s Health Partners, for example, Dr. Steven Hanks explained that while he cares that “workers are vaccinated,” his network could not “afford to lose more workers.” *Ibid.* He understood officials’ concern, but he said the mandate is a “speed bump that [health providers] could’ve done without.” *Ibid.* Losing “176 people” makes serving patients “more challenging.” *Ibid.*

Dr. Hanks warned that patients will no longer have “the same experience.” *Ibid.* They will wait

longer “in the emergency department,” face delayed discharges, and have fewer “rehabilitation” options on release. *Ibid.*

Dr. Hanks is not alone in second-guessing the mandate. James Mulder, *More CNY health care workers will lose jobs if they don't get Covid shots by Monday*, Syracuse.com (Nov. 19, 2021), <https://perma.cc/WYJ7-A7HQ>. Gary Fitzgerald works for Iroquois Healthcare Association. He agrees that the mandate “couldn't [have] come at a worse time.” *Ibid.* Many New York hospitals and nursing homes were already short-staffed. *Ibid.* Upstate University Hospital, for example, had recently closed 20% of its staffed beds because it was down “400” registered nurses. *Ibid.* That shortfall is a crisis. Even “losing a half dozen” registered nurses can cripple smaller hospitals. *Ibid.* And Gary said that “further job losses” due to New York scrapping “the religious exemption” would make this “shortage” even worse. *Ibid.* It need not be so.

This staffing shortage has led New York to sabotage its mandate's goals—in its view, jeopardizing worker and patient safety. Aside from allowing vaccinated workers with active infections to return to work, New York now says it will not “enforce [its scheduled] booster-shot requirement.” *Covid News: New York Backs Off Booster Mandate for Health Care Workers*, N.Y. Times (Feb. 28, 2022), <https://perma.cc/9KDB-5RH3>. “Th[is] decision [is] an acknowledgment that too many workers were refusing boosters for the state's health care system to continue functioning normally with the mandate in place.” *Ibid.* New York ditched this requirement despite believing it's “critical ... to keep[ing] both health care workers and their

patients safe.” *Ibid.* (quoting New York health commissioner, Dr. Mary T. Bassett).

New York’s about-face on the booster shot allows up to hundreds of thousands of healthcare workers to remain on the job while, according to New York, risking patient and worker safety. As of early February, over 230,000 New York healthcare workers (out of about 515,000 such workers) reported “not having a booster shot.” Brendan Lyons, *New York backs off booster-shot mandate for health care workers*, Times Union (Feb. 18, 2022), <https://perma.cc/J5EH-JLDJ>. Even if 80% of New York’s workers have now received the booster, that still leaves over 100,000 workers jeopardizing the State’s health interests. This number dwarfs that of healthcare workers originally asserting religious objections—even assuming (unrealistically) that the 3.5% workforce reduction last fall accounts for only those denied religious exemptions.

New York can’t have it both ways. Because the State allows exemptions for secular reasons, it must allow them for religious ones. See Section I. And doing this will help stem the staffing crisis—advancing an important health interest. It’s a win-win for everyone, because the State needs all hands on deck.

C. New York’s mandate has demoralized workers still on the job.

New York’s mandate has also sapped healthcare workers already overtaxed from high demands. Serving during a pandemic is stressful. To cope with early setbacks, some hospitals organized care groups. At one hospital, for example, nurses banded together to form “hope huddles.” Am. Hosp. Ass’n, *Hope Huddles*

Focus on Positive, Inspiring Stories During Pandemic, <https://perma.cc/N5A7-XEN7> (last accessed Mar. 7, 2022); see Northwell Health, *Front line nurses in COVID-19 pandemic find solace in 'Hope Huddles'*, YouTube (Mar. 27, 2020), <https://perma.cc/6WMQ-L4NF>. These huddles allowed workers to celebrate recovering patients, share funny stories, and encourage each other. *Ibid.* They were catalysts for “hope.” *Ibid.* But hope is sometimes hard to find now.

While the pandemic has ebbed and flowed, New York’s mandate sparked fresh “concerns” about “an already beleaguered healthcare workforce.” Mike Murphy, *Ontario County wants NY to reconsider COVID-19 booster mandate for healthcare workers*, Daily Messenger (Jan. 13, 2022), <https://perma.cc/34LK-WLK6>. The “pandemic has driven burnout among” healthcare “workers to crisis levels.” David Levine *U.S. Faces Crisis of Burned-Out Health Care Workers*, U.S. News (Nov. 15, 2021), <https://bit.ly/3vMXdku>. Even before the pandemic, “physicians were at twice the risk for burnout compared to the general population, and about 40% of those surveyed reported depression and suicidal ideation.” *Ibid.* Now, some “60% to 75%” of clinicians report “symptoms of exhaustion, depression, sleep disorders, and PTSD.” *Ibid.* And about 80% of those who have remained on the job “say that staff shortages have [negatively] affected their ability to work safely and to satisfy patient needs.” *Ibid.*

This burnout is no surprise. During the pandemic, physicians have worked “longer hours and in different capacities” from before—“forcing them to spend more time away from their families.” *Ibid.* Nurses have also “faced extended shifts,” working in “uncomfortable ...

equipment” up to “24 hours a day.” *Ibid.* They face these pressures while constantly battling fears of “being exposed to COVID-19, themselves.” *Ibid.* No one can flourish in these conditions. And the data is starting to prove it. Medical workers increasingly report “feeling isolated, lonely[,] and disconnected to their” work. *Ibid.* And 20% of them have quit for these or similar reasons. *Ibid.* This human cost triggers alarm, but it also zaps the industry’s bottom line. “Research estimates that burnout cost the health care system about \$4.6 billion a year before the” pandemic. *Ibid.* That number has likely skyrocketed since.

Relief is nowhere in sight. A recent “survey of nearly 10,000 nurses” showed that “25% of respondents said they plan to leave their job in six months.” *Ibid.* Another “30% said they were” weighing a change “because of work stress.” *Ibid.* Dr. Ernest Grant, president of American Nurses Association, warns that there won’t “be any ... health care system if this continues.” *Ibid.* The system will “implode.” *Ibid.* Indeed, estimates show the “nation will need ... 1.2 million [more] nurses by next year” to reverse this trend. *Ibid.* But many “barriers” have sidelined qualified workers, *ibid.*—the worst of which is New York’s discriminatory mandate. Some officials want more flexible (and constitutional) solutions. Murphy, *supra*. As one lawmaker has said, New York must “help” its workers, “not crush them with ... mandates.” *Ibid.*

New York has addressed one health crisis by creating another. If New York needs healthcare workers, the solution is simple: stop the religious discrimination and recall people of faith ready and waiting to help.

CONCLUSION

The Court should grant Petitioners' petition.

Respectfully submitted,

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MARCH 2022