No. 21-1143

In the Supreme Court of the United States

DR. A., ET AL., *Petitioners,*

v.

KATHY HOCHUL, GOVERNOR OF NEW YORK, ET AL.

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

BRIEF OF PROTECT THE FIRST FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION, SUMMARY AND INTEREST OF *AMICUS*[1]

As the Petition highlights, lower courts are divided over whether (and when) categorical secular exemptions trigger strict scrutiny under the Free Exercise Clause. Some courts hold that secular exemptions are comparable—and thus trigger strict scrutiny—if they pose similar risks to those that would be posed by a religious exemption. Other courts hold the opposite. This Court should grant review to clarify the effect of secular exemptions in Free Exercise analysis and to resolve a deepening division in the lower courts on the pressing question of vaccine mandates that deny religious exemptions while allowing comparable secular ones.

Despite that division, the question of how to deal with secular exemptions is nothing new. *Amicus* Protect the First Foundation, a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas, writes separately to highlight how the lower courts' disagreement can be traced to an oft-overlooked nuance that plagues not only the cases cited in the Petition, but Free Exercise cases going back decades in state and federal courts across the country. On the one hand are the easy cases—secular exemptions that undermine the government's asserted interests with no offsetting benefit to those interests. All agree that those types of exemptions trigger strict

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the brief's preparation. All parties were given 10 days' notice and consented in writing to the brief's filing.

scrutiny. But what do this Court's Free Exercise precedents require when a secular exemption *both* promotes and at the same time harms the government's interests? Those are the cases on which lower courts often divide.

Vaccine mandates like New York's are a case in point. Although New York now denies any religious exemption for healthcare workers, it provides a secular exemption to workers for whom vaccination would be "detrimental … based upon a pre-existing health condition." N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61(d)(1) (2022). If New York's interest is broadly framed as protecting health and well-being, then the medical exemption can be said to both help and hurt that goal—by preventing health complications while at the same time allowing workers to catch and spread the COVID-19 virus.

When examining secular exemptions that have such mixed effects, some lower courts focus on the ways the exemption promotes the state's interests. On that basis, they conclude that the exemption is not comparable to a religious exemption, so the law remains generally applicable. But that reasoning is flawed: By focusing on the government's *purpose*, such reasoning transplants the weighing of interests that should occur in the strict scrutiny analysis into the general applicability test, where it does not belong.

Here, for example, New York has argued that the medical exemption is "not comparable to the religious exemption requested by plaintiffs" because it "advances rather than undermines" the state's interest in "protect[ing] healthcare workers themselves." Resp't's Br. in Opp'n to Emergency Appl. for Writ of Inj. at 23.

So too the Second Circuit, in upholding New York's refusal to allow a religious exemption, held that the medical exemption did not trigger strict scrutiny because "[v]accinating a healthcare employee who is known or expected to be injured by the vaccine would harm her health and make it less likely she could work." *We The Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 285 (2d Cir. 2021). But that reasoning overlooks the fact that terminating religious objectors also harms the state's interest in preventing staffing shortages and keeping healthcare workers on the front lines. More fundamentally, it ignores that the medical exemption undermines the government's core asserted interest in "prevent[ing] the spread of COVID-19 in healthcare facilities among staff, patients, and residents." *Id.*

Although lower courts are divided over how to treat such secular exemptions, this Court's precedents consistently show the correct approach. As far back as *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993), this Court recognized that laws discriminate against religious practice when they "fail to prohibit nonreligious conduct that endangers [the government's asserted] interests in a similar or greater degree" to religious conduct. That such nonreligious exemptions might in other ways further the government's interests does not make the law generally applicable. Indeed, when this Court has found a law to fail the general applicability test because of secular exemptions, those secular exemptions *did* further government interests. See, *e.g.*, *id.* at 521–522 (finding an ordinance "substantially underinclusive with regard to the city's public health interests" even though secular exemptions promoted public health and safety in other ways); *accord Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam); *Roman Cath. Diocese*

of Brooklyn v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam).

Correctly understood, this Court's precedents thus confirm that New York's mandate does "precise[ly] … what the requirement of general applicability [wa]s designed to prevent." *Lukumi*, 508 U.S. at 546. Whatever other interests the mandate might promote, those interests can and should be considered in the compelling-interest analysis. But on the threshold general applicability question, it is enough to say that the mandate's medical exemption counters the state's main asserted purpose—preventing the spread of COVID-19—in a similar way and to a similar extent as a religious exemption.

This Court should grant review to clarify that such exemptions discriminate against religion and trigger strict scrutiny.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. Lower courts are divided on how to address secular exemptions that both promote and harm a state's asserted interests.

The issue presented in this case traces its root to this Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). Under that decision, and later cases, laws that incidentally burden religion must undergo strict scrutiny unless they are both neutral toward religion and generally applicable. See, *e.g., id.* at 879; *Lukumi*, 508 U.S. at 531. Although this Court's decisions in *Smith* and *Lukumi* did not "define with precision" what it means for a law to be "of general application,"

Lukumi, 508 U.S. at 543, more recent cases like *Tandon* and *Fulton* have provided much-needed clarity. Yet lower courts still regularly treat the "general applicability" issue as an open question and continue to "wrestle with its definition in specific cases." *Mitchell Cnty.* v. *Zimmerman*, 810 N.W.2d 1, 11 (Iowa 2012). Confusion has arisen especially over how to interpret the Free Exercise Clause when a secular exemption benefits the government's interests in some ways yet harms those interests in other ways. And the recent spate of COVID-19-related litigation has only deepened the confusion.

Pre-COVID cases

Even before COVID-19 vaccine mandates raised these questions, lower courts divided over how to treat secular exemptions that both support and undermine the government's asserted interests. Some courts correctly recognized that such exemptions trigger strict scrutiny so long as they substantially undermine the government's stated interests.

For example, in *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999), the Third Circuit, in an opinion by then-Judge Alito, addressed Muslim police officers' challenge to a police department's grooming policy. The policy allowed for two exceptions: one for officers with medical reasons for growing a beard and another for undercover officers. *Id.* at 360–361. Considering both exceptions in view of the department's stated interest in maintaining a uniform appearance, the court explained that the undercover exception did not undermine the department's interest because undercover

cops were not held out to the public as law enforcement officers. *Id.* at 366. The medical exception, by contrast, "undoubtedly undermine[d] the Department's interest in fostering a uniform appearance." *Id.* That exemption thus suggested that the department had "made a value judgment that secular (i.e., medical) motivations for wearing a beard [were] important enough to overcome its general interest in uniformity but that religious motivations [were] not." *Id.*

Likewise, in *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3rd Cir. 2004), the Third Circuit (in another opinion by then-Judge Alito) considered state rules imposing a fee to keep exotic animals in captivity. In keeping with his Lakota religious beliefs, the plaintiff kept a bear for ceremonial purposes, but he was denied an exemption even though the state waived the fee for zoos and some circuses. *Id.* at 205. The fee's stated goal was to "discourag[e] the keeping of wild animals in captivity except where doing so provide[d] a 'tangible' benefit for Pennsylvania's wildlife." *Id.* at 211. But while zoos might provide some tangible benefits to wildlife—such as "conducting research on animals that are indigenous to Pennsylvania or … raising animals to be released into the wild"—the exemptions still failed the general applicability test because they "work[ed] against [the state's asserted] interests to at least the same degree as the type of exemption that Blackhawk" sought. *Id.*

Another example is *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). That decision held that a town's zoning ordinance "improperly targeted religious assemblies" by excluding Jewish

synagogues from its retail district while allowing private clubs and lodges. *Id.* at 1222. Although the town claimed that private clubs and lodges supported its general interest in encouraging a social atmosphere and promoting retail "synergy" by encouraging consumer traffic, *id.* at 1233 & n.15, private clubs and lodges were still "incompatible with [the town's] asserted goals of achieving maximum economic benefit," *id.* at 1235. That was because private clubs and lodges, unlike retail shops, "operate for 'social, educational, or recreational purposes'" rather than for revenue-generating services of the kind "'customarily carried on as a business.'" *Id.* at 1234–1235. In short, the town "violate[d] the principles of neutrality and general applicability because private clubs and lodges endanger[ed] [the town's] interest in retail synergy as much or more than churches and synagogues" would have. *Id.*

Many state courts have taken a similar tack. For example, in *Horen* v. *Commonwealth*, 479 S.E.2d 553, 557 (Va. Ct. App. 1997), the Virginia Court of Appeals held that a law that banned a Native American medicine woman from keeping ceremonial owl feathers was not generally applicable because the law allowed researchers, educational institutions, and others to use feathers. Although those secular uses were "legitimate" and presumably furthered the state's broad interest in "the protection of fowl," allowing those uses while "inexplicably den[ying] an exception for bona fide religious uses" triggered strict scrutiny. *Id.* at 556–557; *accord Mitchell Cnty.*, 810 N.W.2d at 15–16 (law forbidding Mennonite practice of using steel-wheeled tractors on roads was not generally applicable

because the law allowed school buses to use ice grips and tire studs).

Other courts in pre-COVID-19 cases (wrongly) focused the general applicability inquiry on the ways secular exemptions *furthered* government interests. In *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109 (9th Cir. 2009), for example, the Ninth Circuit considered a religious objection to a state's requirement that pharmacies stock and deliver prescription drugs. The rules had numerous exceptions, and the court recognized that pharmacies could not all be expected "to stock every single medication that might possibly be prescribed, or to maintain specialized equipment that might be necessary to prepare and dispense every one of the most recently developed drugs." *Id.* at 1134–1135. Even so, the Ninth Circuit held the law was still generally applicable because "the absence of these exemptions would likely drive pharmacies out of business," thus undermining the state's interest in maximizing access to prescription drugs. *Id.* at 1135.

In short, even before the COVID-19 pandemic, lower courts often reached starkly opposing conclusions on the relevance of facts showing that a secular exemption undermines the state's interest to the same or greater extent as a religious exemption.

Vaccine mandate cases

With the onset of COVID-19 vaccine mandate cases, the preexisting split of authority on how to treat secular exemptions has only deepened. Most vaccine mandates provide exemptions for those with a medical contraindication. A few mandates, like New York's, offer no corresponding religious exemption. Several circuits have now accepted the argument advanced by governments that, because medical exemptions further a broad government interest in health and safety, those exemptions are not comparable to a religious exemption. But that gets the analysis backward. Courts should weigh such governmental interests at the strict scrutiny stage. On the threshold general applicability question, however, courts need only ask whether a secular exemption "undermines the government's asserted interests in a similar way." *Fulton* v. *City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

The Ninth Circuit's decision in *Doe* v. *San Diego Unified School District*, 19 F.4th 1173 (9th Cir. 2021), and the subsequent denial of en banc rehearing, highlight the divide. San Diego's school district required vaccination for all students participating in on-site learning and extracurricular activities. *Id.* at 1175–1176. The district exempted students with medical contraindications but not religious objectors. *Id.* at 1176. A Ninth Circuit panel held that the medical exemption "serves the primary interest for imposing the mandate—protecting student 'health and safety'—and so does not undermine the District's interests as a religious exemption would." *Id.* at 1178. Even though the students with medical exemptions were just as likely

to spread the virus as those with religious exemptions, the panel held the risks were not comparable. *Id.*

Several judges dissented from the failure to rehear the case en banc, exposing deep divisions within the circuit. Judge Bumatay, joined by six colleagues, highlighted how the panel opinion improperly shifted the general applicability test from "assessing the comparability of risks to asking whether the District had a good reason for a secular exemption." *Doe* v. *San Diego Unified Sch. Dist.*, 22 F.4th 1099, 1107 (9th Cir. 2022) (Bumatay, J., dissenting from denial of reh'g). Under the correct framework, he explained, students with medical and religious objections both "present the exact same risk of infecting their fellow students." *Id.* at 1105. Accordingly, he concluded that "the District's failure to provide a religious exemption must be subject to strict scrutiny under *Tandon*." *Id.* at 1106; *accord id.* at 1114 (Bress, J., dissenting from denial of reh'g) (noting that the panel's analysis was "inconsistent with the analytical approach for Free Exercise Clause claims that the Supreme Court set forth in *Tandon*"); *id.* at 1115 (Forrest, J., dissenting from denial of reh'g) (agreeing that strict scrutiny should apply because the mandate discriminated between secular and religious reasons for remaining unvaccinated).

The First Circuit made the same error in upholding Maine's refusal to allow a religious exemption to its vaccine mandate. In so holding, the panel wrongly weighed at the threshold whether the mandate would further Maine's interests in protecting health and safety. *Does 1-6* v. *Mills*, 16 F.4th 20, 30–31 (1st Cir. 2021), cert. denied, No. 21-717, 2022 WL 515892 (U.S.

Feb. 22, 2022). Reasoning that promoting those interests offset the risk posed by unvaccinated workers, the panel held that "the comparability concerns the Supreme Court flagged in the *Tandon* line of cases" were not present there. *Id.* at 32. The panel thus held that strict scrutiny did not apply. *Id.*

Similarly, in this case the Second Circuit focused its general applicability inquiry on how a medical exemption would promote New York's interests. Despite crediting as "reasonable" the "proposition that any individual unvaccinated employee is likely to present statistically comparable risks of both contracting and spreading COVID-19 at any given healthcare facility, irrespective of the reason that the employee is unvaccinated," the court declined "to confine [its] analysis to evaluating the *risk* of COVID-19 transmission posed by each unvaccinated individual." *We The Patriots USA*, 17 F.4th at 286 (emphasis added). Instead, the court weighed the medical exemption's *benefit*—how it furthers "the government's asserted interest in protecting the health of workers and maintaining staffing levels"—and found that benefit adequately distinguished the medical exemption from a religious one. *Id.* at 287.

The Fifth Circuit, by contrast, recently concluded that medical and religious exemptions are comparable. The court held (in the context of applying strict scrutiny under RFRA) that the Navy's vaccine mandate was underinclusive because the Navy granted temporary medical exemptions to some service members, "yet no reason is given for differentiating those service members from" those with religious objections. *U.S. Navy SEALs 1-26* v. *Biden*, No. 22-10077, 2022

WL 594375, at *12 (5th Cir. Feb. 28, 2022) (per curiam).

The disarray is even more pronounced in the district courts. Many of them struggle to determine the impact of religious exemptions, or the lack thereof, when analyzing whether vaccine mandates are generally applicable and neutral. Several district courts have thus held that the lack of a religious exemption triggers strict scrutiny.[2] Yet others have held that the lack of a religious exemption still leads to rational basis review.[3]

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[2] See, *e.g.*, *Poffenbarger* v. *Kendall*, No. 3:22-cv-1, 2022 WL 594810, at *16 (S.D. Ohio Feb. 28, 2022) (mandate not generally applicable because "it distinguishe[d] between religious and non-religious exemptions"); *U.S. Navy SEALs 1-26* v. *Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, at *11 (N.D. Tex. Jan. 3, 2022) (finding medical exemption to be comparable); *Thoms* v. *Maricopa Cnty. Cmty. Coll. Dist.*, No. CV-21-01781-PHX-SPL, 2021 WL 5162538, at *9 (D. Ariz. Nov. 5, 2021) (school's policy requiring nursing students to be vaccinated to participate in clinical placements not generally applicable because school granted secular exemptions); *Dr. A.* v. *Hochul*, No. 1:21-CV-1009, 2021 WL 4734404, at *7 (N.D.N.Y. Oct. 12, 2021) (mandate not generally applicable because its medical exception accepted a risk that it deemed unacceptable for religious objectors), *vacated*, *We The Patriots USA, Inc.* v. *Hochul*, Nos. 21-2179, 21-2556, 2021 WL 5103443 (2d Cir. Oct. 29, 2021).

[3] See, *e.g.*, *Does 1-11* v. *Bd. of Regents of the Univ. of Colo.*, No. 21-cv-02637-RM-KMT, 2022 WL 252320, at *5–6 (D. Colo. Jan. 27, 2022); *Dr. T.* v. *Alexander-Scott*, No. 1:21-cv-00387-MSM-LDA, 2022 WL 79819, at *8 (D.R.I. Jan. 7, 2022); *Doe* v. *San Diego Unified Sch. Dist.*, No. 21-CV-1809-CAB-LL, 2021 WL 5396136, at *4 (S.D. Cal. Nov. 18, 2021); *Does 1-6* v. *Mills*, No. 1:21-cv-00242-JDL, 2021 WL 4783626, at *12 (D. Me. Oct. 13, 2021), *aff'd*, 16 F.4th 20 (1st Cir. 2021).

These stark differences in decisions throughout the lower courts highlight the need for the Court to provide clarity and uniformity on the question of when secular exemptions trigger strict scrutiny.

II. This Court's decisions make clear that laws are not generally applicable when they forbid religious conduct while allowing secular conduct that undermines the government's interests in a similar way.

Despite this widespread confusion, this Court has provided a consistent answer to the secular exemptions question: a law is *not* generally applicable if it prohibits religious conduct while allowing secular conduct that harms a legitimate government interest in a similar way. *Fulton*, 141 S. Ct. at 1877. Certiorari is thus warranted to remind the lower courts, many of which seem to have forgotten that consistent guidance.

The Court's consistency on that point goes back at least as far as *Lukumi*. There, a city responded to news that a Santeria church was opening in the community by passing three ordinances restricting the practice of animal sacrifice, a ritual in the Santeria faith. *Lukumi*, 508 U.S. at 527. The ordinances provided several secular exemptions, including slaughtering animals for food, fishing, extermination of mice and rats within a home, and euthanasia of stray animals. *Id*. at 528, 543–544. To justify its restrictions, the city relied on two main interests: protecting the "public health, safety, welfare and morals of the community" and preventing animals from being killed "unnecessarily" or "cruelly." *Id*. at 526, 528 (citations omitted).

Just as New York argues here that the medical exemptions promote worker health and safety, the city in *Lukumi* argued that the exempted secular conduct promoted the government's interest in protecting public health. It argued that eradicating pests, for example, enhanced public health and safety by protecting the food chain and controlling the spread of disease. Br. of Resp't, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1992) (No. 91-948), 1992 WL 541282, at *22. Similarly, the city argued that euthanasia was justified because it "protect[ed] the community from the health and safety problems inherent in large numbers of animals on the loose." *Id*.

Without disputing those claims, this Court still found the challenged regulation underinclusive as to the city's interest in public health. The Court noted that, while the "health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it," the city let hunters bring their kill to their houses and did nothing to regulate disposal after their activity." *Lukumi*, 508 U.S. at 544. Likewise, the city failed to explain how exempting anyone who slaughters a small number of hogs or cattle for food "d[id] not implicate [the city's] professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 545.

In other words, the secular exemptions in *Lukumi* both helped and harmed the city's interest in preventing public health risks. But, at the general applicability stage, the Court focused on the harm and concluded that the ordinances failed "to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree than Santeria sacrifice

does." *Id.* at 543. The Court thus held that the ordinances fell "well below the minimum standard" for general applicability and thus triggered strict scrutiny. *Id.*

This Court's subsequent decisions reaffirm that, if a law restricts religious exercise while failing to restrict secular conduct that is at least as harmful to the government's interests, the law is not generally applicable.

In *Roman Catholic Diocese*, New York's governor restricted attendance at businesses and gatherings in areas with high levels of COVID-19. The restrictions applied to "non-essential businesses" and to "houses of worship," but "essential" businesses were exempt and could admit as many people as they wished, even in "red zones." *Roman Cath. Diocese*, 141 S. Ct. at 66. The list of "essential" businesses included not only places like acupuncture facilities and chiropractors' offices, but also hospitals, grocery stores, and medical supply manufacturers.[4]

Keeping hospitals, medical providers, and grocery stores open no doubt promoted New York's interests in protecting public health and general welfare. And keeping other essential businesses open promoted the government's asserted interest in revitalizing and "reopening New York's economy in a slow, measured way." Mem. of Law in Opp. to Pl.'s Mot. for Prelim. Inj., *Roman Cath. Diocese of Brooklyn v. Cuomo*, 495

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[4] See New York State, Empire State Development, *Guidance for Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Recent Executive Orders* (Oct. 23, 2020, 10:10 AM), https://perma.cc/NY2Y-FHYS.

F.Supp.3d 118 (E.D.N.Y. 2020) (No. 20-cv-04844-NGG-CLP), 2020 WL 8618139. Under the Second Circuit's logic, then, this Court should have upheld the governor's order because the secular exemptions served the state's interests in several ways.

But this Court did not rule that way because balancing the government's interests at the general applicability stage would put the cart before the horse. Instead, the Court reasoned that the exempted secular businesses on the list were doing similar harm, if not more harm, to New York's asserted interest in stemming the spread of the virus. See *Roman Cath. Diocese*, 141 S. Ct. at 67 (the governor had "stated that factories and schools have contributed to the spread of COVID-19, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records" (citation omitted)). Unlike the lower courts here, the Court did not balance those risks against the ways each essential business promoted public health or other government interests.

Tandon elaborated even further. Among the several points the Court said were made "clear" by its prior decisions, the Court reiterated that laws "are not neutral and generally applicable, and therefore trigger strict scrutiny," when they treat a "comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. And, the Court explained, comparability is "judged against the asserted interest," and the analysis should focus on "the *risks* various activities pose." *Id.* (emphasis added). In the context of COVID-19 worship restrictions, the question was thus whether exempted secular conduct "'contributed to the

spread of COVID-19' or 'could' have presented similar risks" as worshipping would. *Id.* (citation omitted). Like *Roman Catholic Diocese*, *Tandon* focused on the risks posed by exempted secular activities without weighing those risks against how the exempted secular activities might have benefited California's objectives in other ways. See *id.* at 1296–1297.

Most recently, the Court in *Fulton* reaffirmed 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." *Fulton*, 141 S. Ct. at 1877. Pointing to *Lukumi* as an example, the Court reiterated that the ordinances there were not generally applicable because secular exemptions "posed a similar hazard." *Id.*

Lukumi, *Roman Catholic Diocese*, *Tandon*, and *Fulton* all make clear that the Second Circuit's approach here is misguided. To begin, it is unlikely that a secular exemption would ever be included in a law or policy unless that exemption benefited the government's objectives in some way. And, as cases like *Lukumi* show, governments can often widen the goalposts by framing their interests at a high level of generality like "public health" or "safety" and then argue on that basis that secular exemptions promoting such broad interests aren't comparable. But this Court has cautioned against framing government interests "at a high level of generality" because "the First Amendment demands a more precise analysis." *Fulton*, 141 S. Ct. at 1881; cf. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (even in strict scrutiny analysis, courts must "look[] beyond broadly formulated interests justifying the general applicability

of government mandates" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants").

That is why the comparability analysis under the Free Exercise Clause requires the court to evaluate the harm done to the government's interests and, in particular, whether the permitted secular conduct and the prohibited religious conduct "*undermine* the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (emphasis added). As the Second Circuit itself has stated elsewhere, a law fails the general applicability test "if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is *at least as harmful* to the legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong. of U.S. & Can.* v. *N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (emphasis added).

Applying these principles here confirms that New York's vaccine mandate is not generally applicable. It may be true, as New York has asserted, that the medical exemption furthers the state's separate interest in protecting the health of covered personnel in the sense that it might be harmful to force a medically contraindicated worker to get the vaccine. But, at the general applicability stage of the analysis, that is beside the point. What matters at this stage is whether the medical exemption *harms* the government's asserted interest to a similar degree as the religious exemption.

And here, it clearly does. As the Second Circuit recognized, allowing unvaccinated workers invoking the

medical exemption to remain on the front lines presents "comparable risks of both contracting and spreading COVID-19," regardless of "the reason that the employee is unvaccinated," *We The Patriots USA*, 17 F.4th at 286. The medical exemption thus undermines, to the same degree, the mandate's main goal of preventing the spread of COVID-19 in healthcare facilities among staff, patients, and the public. What's more, firing healthcare workers with religious objections undercuts the state's asserted interest in preventing staffing shortages. In short, the mandate prohibits religious objections "while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

None of this means that the ways a secular exemption might promote a state's interests are irrelevant. Those interests can and should be weighed at the strict scrutiny stage of the analysis. See, *e.g.*, *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2260–2261 (2020) (considering, in its strict scrutiny analysis, the ways Montana's policy advanced state interests). But that kind of consideration has no place at the general applicability stage.

CONCLUSION

Despite clear guidance from this Court, the lower courts are hopelessly split on how to determine whether a law is generally applicable. To provide (again) the guidance they desperately need, the Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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