

No. 21-1143

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In the **Supreme Court of the United States**

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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.*

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

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**BRIEF OF *AMICUS CURIAE* THOMAS MORE  
LAW CENTER IN SUPPORT OF PETITIONERS**

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## QUESTIONS PRESENTED

Using its emergency regulatory powers, New York has imposed a COVID vaccine mandate on healthcare workers, but provided no religious exemption. Workers who are unvaccinated for religious reasons are excluded from the workplace. By contrast, healthcare workers remaining unvaccinated for medical reasons are permitted to continue in-person healthcare work—often in the same facilities, doing the same jobs, and carrying the same claimed risk as the terminated religious objectors. New York even allows vaccinated workers with active and symptomatic infections to continue working, but not healthy religious objectors.

New York’s approach deviates from virtually every other state and the federal government, which continue to allow unvaccinated religious objectors to provide in-person healthcare.

1. Whether an administrative rule that targets and forbids religious conduct, while permitting otherwise identical secular conduct, is permissible under the Free Exercise Clause.

2. Whether *Employment Division v. Smith* should be overruled.

*Amicus Curiae* addresses the first question.

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**STATEMENT OF IDENTITY  
AND INTERESTS OF *AMICUS CURIAE***

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing New York’s Unconstitutional Vaccine Mandate, submits this brief.<sup>1</sup> *Amicus Curiae* is an organization devoted to medical decisions only being made within the bounds of the Constitution and based upon reliable scientific and medical principles. *Amicus Curiae* cares deeply about preserving an individual’s sincerely held religious and moral convictions. Presently, forty-seven states and the federal government allow religious accommodations from COVID-19 vaccination. *Amicus Curiae* seeks to prevent more states from following New York’s example which devalues the important role religion plays in the lives of many healthcare workers and the real implications of such policies. *Amicus Curiae* faced the loss of their careers and unpaid suspensions due to the categorical denial of religious exemptions. Many support their families with their paychecks and fear if they will be able to earn a living due to being publicly ostracized by their government and their employers for following their sincerely held religious convictions. Many have experienced their employers sharing confidential medical information with their co-workers. Many have faced rigorous and inappropriate

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<sup>1</sup> On March 7, 2022, *Amicus Curiae* sought consent from the parties and provided notice of this filing in accordance with Supreme Court Rule 37(2)(a). Both parties granted consent to *Amicus Curiae* for this filing. *Amicus Curiae* further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

questioning and insults from their employers regarding their religious beliefs. All have faced unjust persecution.

The Over 400 Physicians, Surgeons, Nurses, and Medical Professionals Opposing New York's Unconstitutional Vaccine Mandate worked on the front lines during the beginning of the COVID-19 pandemic, frequently working overtime in unsafe conditions. They willingly sacrificed their own health to serve others; the majority have already contracted COVID-19 and presently have the antibodies against the illness.

*Amicus Curiae* has worked from the beginning of the pandemic, almost two years ago, without vaccination and without placing others in danger. *Amicus Curiae* willingly follows health and safety protocol to avoid transmission of COVID-19. They just cannot do so when such a protocol, like forced vaccination, violates their sincerely held religious beliefs.

*Amicus Curiae* has personally felt the backlash of draconian vaccination mandates, such as the one forwarded by New York, and its political theater. The President even villainized individuals holding religious objections to vaccination by proclaiming that the purpose of vaccine mandates is “to protect vaccinated workers from unvaccinated coworkers.” <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-COVID-19-pandemic-3/>, *last visited* Mar. 16, 2022. The polarization, on a national level, of *Amicus Curiae's* sincerely held religious beliefs has exacerbated the discrimination and hardship they have

faced and continue to face. Ironically, it is *Amicus Curiae*'s religious beliefs that drew them to careers of service in the medical field and inspire them to care for sick individuals despite the potential risk doing so could pose to themselves and their families. *Amicus Curiae* is concerned by the irreparable harm New York's mandate has caused to the 37,000 healthcare workers who either lost their jobs to maintain their sincerely held religious beliefs or were forced to undergo medical treatment that violated their religious conscience. Pet. at. 2. *Amicus Curiae* believes that religious decisions regarding medical treatment should not be defined by the demands of the State of New York, but should be informed by the bounds of one's religious conscience.

*Amicus Curiae* has undergone rigorous schooling, boards, residencies, and have significant debt to pay for their schooling. Yet, due to forced vaccination mandates, face the inability to earn an income. *Amicus Curiae* oppose the villainization of unvaccinated individuals. First, doing so minimizes the importance of religious liberty and welcomes religious discrimination. Indeed, *Amicus* has experienced this firsthand and is living it presently. Second, the concepts upon which these mandates are based, such as "protecting vaccinated workers from unvaccinated coworkers" forwards a serious falsehood about what the presently available COVID-19 vaccinations do and what the effect of vaccination is.<sup>2</sup>

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<sup>2</sup> See, e.g., Anika Singanayagam, PhD, *et al.*, *Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective, longitudinal, cohort study*, *The Lancet*, Oct.



*Amicus Curiae* files this brief to encourage this Honorable Court to not justify New York’s mandate—which on its face provides a secular exemption and thus accommodations for a non-religious purpose but decidedly fails to extend the same protections to religious individuals. New York’s vaccine mandate is unconstitutional and, undoubtedly, catalyzes religious discrimination.

### INTRODUCTION

Petitioners succinctly outline the constitutional problem New York has created by its vaccine mandate: “New York intentionally removed its religious exemption (but not its medical exemption), outlawed reasonable accommodations for religion (but not for other purposes), and declared the terminated workers ineligible for the safety net of unemployment benefits.” Pet. at 30. The severity with which New York’s vaccine mandate treats religious objectors is so extreme that it almost seems implausible. The undisputed record, however, presents statement after statement from Respondents establishing that no cause for such denial exists—it really is as bad as it seems.

New York intentionally and categorically decided to refuse any sincerely held religious objections to its vaccine mandate. *Dr. A. v. Hochul*, 142 S. Ct. 552, 553 (2021) (Gorsuch, J., dissenting). New York’s Governor then decided that she was the arbiter of religious faith and head theologian for the entire State of New York.

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29, 2021, available at [https://www.thelancet.com/journals/laninf/article/PIIS1473-3099\(21\)00648-4/fulltext](https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext), last visited Mar. 17, 2022 (discussing that COVID-19, especially newer variants, can be transmitted by vaccinated individuals as well).

The Governor publicly stated that no religious faith actually held an objection to the available COVID-19 vaccinations, telling audiences that “God wants” everyone to be vaccinated, that “everybody from the Pope on down is encouraging people to get vaccinated,” and “[h]ow can you believe that God would give a vaccine that would cause you harm? That is not truth.” *Id.* at 553-54. Then, the Governor changed the State’s protocols for unemployment benefits to ensure that not only would religious objectors lose their jobs if they remained faithful to their beliefs, but they would also be ineligible to collect unemployment after they were fired. *Id.* at 54. The Governor’s words and actions form a jarring antithesis to the pluralism that lives at the heart of our nation’s Free Exercise jurisprudence. This Court should grant the petition.

### SUMMARY OF THE ARGUMENT

This *Amicus Curiae* brief addresses three constitutional problems New York created with its vaccine mandate.

First, when issuing the mandate, New York intentionally disregarded Petitioners’ sincerely held religious beliefs by withholding a religious exemption. It did so because the State unilaterally—and incorrectly—determined that the mandate did not run contrary to anyone’s religious beliefs. In making this assessment, the State determined “what shall be orthodox” in matters of religious faith. *W. Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). This is not the proper role of the State.

Second, New York’s vaccine mandate does provide an exemption for individuals for secular reasons. This creates a double standard where a secular purpose may qualify for an exemption but a religious purpose may not, thus treating secular behavior more favorably. Such treatment conflicts with this Court’s holdings in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) that focus on the risk of providing a religious exemption and whether the secular exemptions that the State already allows pose a similar risk.

Third, New York’s decision to disallow unemployment benefits to individuals who cannot undergo vaccination for religious reasons conflicts with this Court’s holding in *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713-14 (1981). A State cannot substantially burden religious faith by withholding public benefits to religious individuals who lose their job for carrying out their faith.

## ARGUMENT

### **I. The Free Exercise Clause Protects Individuals From State-Imposed Orthodoxy and Preserves Religious Pluralism.**

The United States was founded on the ideal that the government cannot control every aspect of a person’s life—especially regarding matters of religious exercise and livelihood. As this Court famously opined, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. Thus, this Court has been hesitant to determine “what shall be orthodox” when adjudicating matters involving an individual’s sincerely held religious beliefs.

This Court has consistently adopted a “narrow function” in free exercise cases when addressing a claimant’s “particular belief or practice in question.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 713-14 (1981). Recognizing that an individual’s freedom to religious exercise involves a very personal matter, one that speaks to our nation’s core principles, “[t]he determination of what is a ‘religious’ belief or practice is more often than not a difficult and delicate task” that does not turn on “judicial perception.” *Id.* In this area, much discretion is given to the religious observer. “[R]eligious beliefs need not” even “be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Id.*

This is where New York’s vaccine mandate first fails. The mandate is premised on the false presupposition that the Governor can use the powers of the State to answer theological questions pertaining to religious conscience.

On September 26, 2021, the Governor delivered a speech to the Christian Cultural Center and promptly published a transcript of the speech on the State of New York’s official website. *See* Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center, available at <https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service->

christian-cultural-center, *last visited* Mar. 16, 2022. In the speech, the Governor declares that the available COVID-19 vaccines are “from God.” *Id.* Then the Governor states that individuals who have decided not to undergo COVID-19 vaccination “aren’t listening to God and what God wants.” *Id.* The Governor then calls upon the congregation to be her “apostles.” *Id.* The Governor in a contemporaneous speech proclaims that no one holds a religious objection because her understanding is that all Roman Catholics support the use of these vaccines and opposing religious beliefs are “not truth.” *Hochul*, 142 S. Ct. at 553-54 (Gorsuch, J., dissenting).

Reading the Governor’s statements provides insight into why New York eliminated its religious exemption, but kept its secular exemptions—the State believes it can make these important religious determinations for the people it governs. This is a profoundly disturbing manner in which to use the imprimatur and authority of the State. And one that lacks “sensitivity to and respect for this Nation’s pluralism, and the values of neutrality and inclusion that the First Amendment demands.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

Contrary to the bold assertions of New York’s Governor, “[t]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.” *Thomas*, 450 U.S. at 709. It is not the role of the State to determine what all

Roman Catholics must believe or what constitutes orthodox truth on matters of religious faith.<sup>3</sup>

Unfortunately, it is from this constitutionally infirm perspective that New York built its exemption scheme, which leads us to the mandate's second major failure: New York determined that it should allow exemptions for non-religious reasons but refused to offer a similar accommodation for religious purposes.

## **II. The Free Exercise Clause Prohibits the Double Standard Forwarded by New York's Vaccine Mandate.**

New York's intentional decision to exempt individuals from its vaccine mandate for a secular purpose, but not a religious purpose creates an unconstitutional double standard and results in an escapable conflict with this Court's holdings in *Tandon*, 141 S. Ct. 1294 and *Fulton*, 141 S. Ct. 1868.

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<sup>3</sup> New York's Governor seems unaware that many Catholic Bishops, Archbishops, Diocese, and Archdiocese have approved religious exemptions for the available COVID-19 vaccinations based on their interpretations of the Catechism of the Catholic Church and these vaccines' relationship to the use of fetal cells from voluntarily aborted children. *See, e.g.*, Meghann Meyers, *Archbishop: Catholics can refuse COVID-19 vaccine*, Military Times, Oct. 12, 2021, available at <https://www.militarytimes.com/news/yourmilitary/2021/10/12/archbishop-catholic-troops-can-refuse-covid-19-vaccine/>, *last visited* Mar. 16, 2022; Catholic News Service, *Colorado bishops oppose vaccine mandate, welcome Denver's religious exemption*, National Catholic Reporter, Aug. 10, 2021, available at <https://www.ncronline.org/news/coronavirus/colorado-bishops-oppose-vaccine-mandates-welcome-denvers-religious-exemption>, *last visited* Mar. 16, 2022.

In *Tandon*, this Court warned against applying less favorable conditions to religious exercise on private property than secular activities such as “hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants.” *Id.* at 1297. And when COVID restrictions contain “myriad exceptions and accommodations for comparable activities,” strict scrutiny must be applied. This Court further warned that this “standard is not watered down; it really means what it says.” *Id.* at 1298 (internal quotations and citations omitted).

While New York’s vaccine mandate may at first appear factually not analogous to California’s restrictions on gatherings in *Tandon*, the State’s asserted interest in curtailing the spread of COVID-19 is quite similar. Therefore, the imposition on religious exercise should still be weighed against the risk that offering a religious accommodation would pose to the government’s stated interest. When addressing its secular comparators, New York’s vaccine mandate poses an even closer analysis of risk because it offers an exemption not just for a comparable, secular risk, but it offers an exemption for an *identical*, secular risk. New York offers a secular medical exemption in the same hospital rooms, for the same positions, and for the very same people to which it refuses to extend a religious exemption. Such uneven handling of, not just comparable risks but identical risks requires a finding that the mandate is not neutral or generally applicable.

Justice Gorsuch’s dissent in *Does 1-3 v. Mills* is instructive here. 142 S. Ct. 17, 19 (2021) (J., Gorsuch,

dissenting). In *Does 1-3*, Justice Gorsuch asks whether Maine, by permitting a medical exemption from its state-wide COVID regulation, has established a scheme of individualized exemptions. *Id.* As here, Maine’s law did not limit who could obtain a medical exemption or what might qualify as a medical basis worthy of exemption. *Id.* The law only required that the exemption be “phrased in medical and not religious terms.” *Id.* Justice Gorsuch’s dissent concludes that the mere existence of an exemption for medical purposes, but not for the protection of religious exercise, presented the “kind of double standard . . . enough to trigger . . . strict scrutiny.” *Id.* The controlling inquiry is whether the government has provided a “mechanism for individualized exemptions.” *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). If so, “it must grant exemptions for cases of ‘religious hardship.’” *Id.* (quoting *Fulton*, 141 S. Ct. at 1877). Here, as in *Does 1-3* and *Fulton*, the critical point is that once the government creates a mechanism for individualized exemptions, the law is no longer generally applicable.

Moreover, New York’s vaccine mandate also fails under *Fulton* because “[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.*” 141 S. Ct. at 1877 (emphasis added). New York’s vaccine mandate plainly prohibits an exemption for Petitioner’s religious exercise while permitting a secular exemption “that undermines the government’s asserted interests in a similar way.” *Id.* at 1877. Again, the inquiry is not based in why the exemption exists, but the *risk* that



the exemptions poses to the government's state interest. Given that New York exempts identical secular comparators that pose the same risk, the State cannot avoid the application of strict scrutiny. The Second Circuit's decision misapprehends the essential holding of *Tandon* and *Fulton* and creates an unconstitutional double standard.

**III. New York's Denial of Unemployment Benefits to Religious Observers Who Cannot Comply With Its Vaccine Mandate Squarely Violates *Thomas v. Review Bd.***

Last, we turn to New York's decision to withhold unemployment benefits to healthcare workers who are religiously opposed to obtaining the currently available COVID-19 vaccines. The question of whether unemployment benefits may be withheld under these circumstances has been answered by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and then echoed in *Thomas v. Review Bd.*, 450 U.S. 707.

In *Thomas*, this Court held that when an individual loses his job because his religious beliefs disallowed participation in a required aspect of his work, the State violates his First Amendment right to free exercise of religion by denying him unemployment benefits. *Id.* at 709. Thomas worked for his employer without issue until circumstances led to a position transfer that required Thomas to fabricate turrets for military tanks. *Id.* at 710. Due to Thomas' sincerely held religious beliefs, he objected to working in the production of weapons. *Id.* Thomas' employer could not provide a religious accommodation because all departments of the company were now focused on the production of

weaponry. *Id.* Thomas faced a choice: continue working and violate his sincerely held religious beliefs or quit his job to avoid violating the principles of his faith. *Id.* Thomas chose the latter. *Id.* The Circuit Court held that Thomas did not qualify for benefits because he quit voluntarily and for personal reasons. *Id.* at 713.

This Court found that the guarantees of the Free Exercise Clause extend to minority religions and to minority interpretations of religion and acknowledged that “[c]ourts are not arbiters of scriptural interpretation.” *Id.* at 716. The Court held that the State must not compel a person “to choose between the exercise of a First Amendment right and participation in an otherwise available public program.” *Id.* (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)). This is the choice New York has forced upon Petitioners here.

Petitioners are correct to characterize New York’s vaccine mandate as “extraordinarily punitive.” Pet. at 1. Indeed, New York has taken the remarkable position that it will deny unemployment benefits to religious individuals who must abstain from vaccination due to their sincerely held beliefs. Pet. at 6, 7. It matters not that the State defines withholding unemployment benefits to anyone who fails to obtain the vaccine, and not just for claimants who oppose vaccination on religious grounds. The same argument was made and rejected in *Thomas*. 450 U.S. at 717 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)) (“A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”). The central holding of *Thomas* directly

applies to New York's denial of unemployment benefits for Petitioners here:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

*Thomas*, 450 U.S. at 717-18. Petitioners' religious faith prohibits them from undergoing vaccination with the presently available COVID-19 vaccines. New York's updated policy disallows Petitioners from obtaining the public benefit of unemployment. This punishment puts substantial pressure on the Petitioners who now face the loss of their livelihoods and the added inability to obtain unemployment benefits.

The Second Circuit's opinion undercuts the longstanding precedent of *Thomas* and *Sherbert*. The petition should be granted to clarify the proper application of these precedents, particularly in light of the wavering status of *Emp't Div. v. Smith*, 494 U.S. 872, 874 (1990).

## CONCLUSION

New York's vaccine mandate violates the Free Exercise Clause and openly treats religious exercise worse than secular conduct because the State allows exemptions from its mandate for purely secular

purposes. New York and its Department of Labor then prohibit anyone who has lost his/her job due to non-compliance with the State's vaccine mandate from receiving unemployment benefits. New York's position conflicts with this Court's holdings in *Tandon*, *Fulton*, and *Thomas*. If not reviewed by this Court, this flagrant and State-imposed discrimination of minority religious beliefs will be repeated and copied by other states.

Members of this Court have opined that its role is analogous to an umpire in a baseball game, calling balls and strikes. New York's treatment of Petitioners in this case is more obvious than that—it is the equivalent to intentionally hitting the batter with the pitch. *Amicus Curiae* urges this Court to grant the petition at its first conference.

Respectfully submitted,

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