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.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

This brief addresses only the first of the two questions presented by the petitioners:

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 revisited.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as free exercise of religion, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because the State of New York and its administrative agencies such as the Department of Health—and even the courts—have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

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[1] Petitioners and respondents consented to the filing of this brief after being timely notified more than 10 days before filing. No counsel for a party authored any part of this brief. No one other than the *amicus curiae*, its members, or its counsel financed the preparation or submission of this brief.

In this instance, NCLA is particularly disturbed by New York's intentional refusal to provide for a religious exemption to its healthcare workers' vaccine mandate. As the State provides for medical exemptions, the policy is inherently unequal and even prejudiced, thus violating the Free Exercise Clause of the First Amendment. Administrative policymaking is institutionally slanted against orthodox or traditional religion, and thus even when administrative rules or other decisions appear facially equal, one must worry that on account of the underlying process, they in fact discriminate.

SUMMARY OF THE ARGUMENT

In a shocking reversal, New York's public health agency first promised a religious exemption to its COVID-19 healthcare worker vaccine mandate and then intentionally withdrew that exemption while maintaining a different exemption for non-religious, medical reasons. Governor Kathy Hochul explained that a religious exemption is not needed because true believers would get vaccinated.

This case turns on the discriminatory attitudes inherent in all administrative policymaking and grossly displayed in New York. Legislative and administrative lawmaking are different in kind, and the differences reveal systematic discrimination against religious Americans. Administrative rules are made by persons who are not directly accountable to ordinary Americans in elections, and because administrative policymaking is devoted to rationalism and scientism, it is indifferent and even hostile to orthodox and traditional religion.

This inequality, even prejudice, is painfully evident in New York's administrative process for crafting its COVID-19 vaccine policy and evidenced by its Governor's overtly hostile statements toward minority religious beliefs. It therefore should be especially easy for this Court to hold that this process denies the free exercise of religion.

This is not to say that the petitioners have a free exercise right to a religious exemption. The First Amendment—both textually and historically—precludes a constitutional right of religious exemption. The problem here, however, is inequality rather than exemption.

This Court needs to recognize the inequality of the administrative process for many religious Americans. And at least where, as here, the inequality and even prejudice are overt, the Court should grant certiorari to review the unequal policy and restore the free exercise of religion.

REASONS FOR GRANTING THE PETITION

I. IF THIS COURT IS UNWILLING TO REVISIT *SMITH*, IT SHOULD STILL GRANT THE PETITION TO REVIEW NEW YORK'S POLICY UNDER *SMITH*

Although this Court is being asked to revisit *Employment Division v. Smith*, 494 U.S. 872 (1990), such a reconsideration is not the only possible basis for reviewing the constitutionality of New York's policy. In *Smith*, this Court largely repudiated a free-exercise right of religious exemption and recognized, instead, a free-exercise right to religious equality—in other words, a right to neutral laws of general applicability. That holding about equality is

significant here because New York is engaged in prejudiced and discriminatory treatment of religious Americans.

Even if the First Amendment guarantees a right of religious exemption, it also, more fundamentally, secures Americans in religious equality. At least, that is, it protects them from unequal constraints—those that discriminate against them on account of their religion. (*See infra* Part III.) Thus, whatever one thinks of *Smith*'s rejection of a right of exemption, that opinion was surely correct in recognizing that religious Americans at least enjoy religious equality under the Free Exercise Clause.

In elevating this equality-based vision and discarding the exemption vision, *Smith* rests on "the political logic that religious Americans can protect themselves from oppression under equal laws by engaging in politics." Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1926 (2015). But this expectation that religious Americans can engage with their lawmakers does not reflect the current realities of American lawmaking. Law comes nowadays not so much in statutes enacted by representative legislatures but by "policies" dictated by unelected bureaucrats, and this profusion of administrative policy generates a profound inequality.

Whereas ordinary Americans can directly elect, petition, and lobby their representative lawmakers, they are excluded from choosing administrative policymakers and therefore can rarely meet them, let alone bargain with them. And unlike elected lawmakers, who tend to be solicitous of their religious

constituents, administrative policymakers pursue ideals of rationalism and scientism that are indifferent and even antagonistic to religion, especially religious views perceived to be outside the mainstream. (*See infra*, Part II. A.)

This Court therefore needs to recognize the inequality inherent in the administrative process by which New York instituted its healthcare-workers vaccine mandate.

II. NEW YORK'S ADMINISTRATIVE POLICYMAKING PROCESS IS UNEQUAL AND PREJUDICED AGAINST RELIGION

New York left its policy decision regarding vaccination requirements and exemptions for healthcare workers in the hands of the Public Health and Health Planning Council—an administrative agency—instead of the elected legislators. This administrative avenue for policymaking raises questions about institutionalized inequality and even prejudice. When administrative policymaking displaces lawmaking by an elected representative body, the process of making policy becomes a tilted game against religion or at least some types of religion. Here, the policy's intentional elimination of religious accommodations and simultaneous accommodations for non-religious objectors, combined with New York Governor Hochul's openly expressed hostility towards Americans whose religious beliefs militate against vaccination, make this conclusion inescapable.

A. The Inequality of Administrative Policymaking

The inequality of administrative policymaking—what really is administrative lawmaking—occurs in at least two layers. First, the unconstitutional expansion of administrative authority leaves ordinary Americans, including religious Americans, with no opportunity to vote for or against their administrative lawmakers. It prevents them from exercising their constitutionally guaranteed right to elect those who make the laws that bind them. *See* Hamburger, *Exclusion and Equality*, *supra*. Second, this exclusion from the policymaking process is especially consequential for religious Americans because administrative power and its authority based in expertise are expressions of rationalism and scientism—not necessarily reason and science, but the institutional elevation of such things. Administrative power thus is institutionally predisposed, even prejudiced, against religion, especially minority religious views that are perceived to be irrational or at odds with administrative policy. *See id.*

The overall result is that administrative governance is much less responsive to the religious needs of many Americans than elective legislative governance. Although the administrative exclusion of Americans from the rule- and exemption-making process affects Americans of all sorts, it particularly shifts such power to administrative bodies, with not necessarily personal but certainly institutional commitments, that are distinctly indifferent and even hostile to much religion. Administrative governance thus leaves many religious Americans in a

disadvantageous position when attempting to persuade their administrative lawmakers to avoid burdening their religious beliefs.

The difference between representative and administrative policymaking is painfully clear. When a legislature makes laws, the policies that bear down on religion are made by persons who feel responsive to religious constituents and who are therefore usually open to considering exemptions or generally less severe laws. In contrast, when policies come from administrative agencies, they are made by persons who are chosen or removed by the executive, not the public, and so are less responsive than legislators to the distinctive needs of a diverse people. Agencies are expected, moreover, to maintain an ethos of scientism and rationality, which however valuable for some purposes, is indifferent and sometimes even antagonistic to a wide range of religious views.

The danger for religious Americans from the shift of policymaking out of representative legislatures is evident from the recent COVID-19-related restrictions that specifically and unlawfully targeted churches and religious gatherings. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). These restrictions have almost always been imposed through administrative power, whether exercised by state or local agencies or by state governors advised by administrative experts, who then interpreted and applied the restrictions.

Although this case also concerns a policy response to COVID-19, the unequal treatment of religious minorities under administrative power is by no means confined to pandemic-driven policies. Just last year, in *Fulton v. City of Philadelphia*, 141 S.Ct.

1868 (2021), this Court held that the city's refusal to contract with a Catholic adoption agency, because it did not certify same-sex couples, violated the Free Exercise Clause. The Court explained that the policy was not generally applicable and neutral because the Commission had discretion to grant exceptions. As the city showed no compelling interest in denying an exception to the petitioner for religious reasons, while making exceptions available to others for non-religious reasons, the policy was unconstitutional and reflected hostility toward religion. Here too, New York's administrative decision to prohibit accommodations to healthcare workers who object to vaccination on religious grounds while mandating identical accommodations for healthcare workers with non-religious objections reflects a hostility toward religiously motivated behavior. That hostility is further evinced by various statements made by Governor Hochul, discussed below. (*See infra*, Part II. B.)

This indifference or hostility to (at least) non-mainstream religious views partly reflects a class distinction—between the rulemaking class and those to whom they dictate policy. Individuals who set the policies of administrative agencies tend to enjoy a higher level of education than those governed by their decisions. Although progress through educational institutions can be valuable, it may be accompanied by disdain and sometimes even antipathy toward religious views outside of what the knowledge class—those persons who have or identify with an elevated degree of education—considers reasonable or mainstream. Accordingly, when members of the knowledge class are given policy making authority over their fellow citizens, it should be no surprise that

the policies they implement often embody those attitudes

In other words, the tendency of administrative decision-making to discriminate against minority religious views is the natural and predictable result of shifting power from elected representatives in a legislature to relatively more educated but unelected administrators. This observation is not to disparage education, but merely to point out that the unfavorable attitudes of many administrative rule-makers toward religion is hardly surprising.

That religious and class antagonisms are embedded in administrative power should come as no surprise, as such animosities did much to spur its establishment and growth. Fearing that the bulk of Americans would not support progressive policies, Woodrow Wilson in 1887 urged shifting legislative power from democratically elected officials to administrative bodies. He explained that "the reformer is bewildered" by the need to persuade "a voting majority of several million heads." Philip Hamburger, *Is Administrative Law Unlawful?* 371 (U. Chicago Press 2014). He was particularly worried about the nation's diversity, which meant that the reformer needed to influence "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, of Negroes." *Id.* It was a point he elaborated at length.[2] Although Wilson was

[2] Wilson also wrote: "The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes." And "where is this unphilosophical bulk of mankind more multifarious in its composition than in the United States?" Accordingly, "[i]n order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the histories of

distinctively racist, he gave expression to a widely felt disdain among the knowledge class for the unwashed masses that increasingly formed the electorate. And his concern about persuading "Irishmen" (in contrast to Americans of the "older stocks") remains a potent reminder that an elevated disgust for Catholicism was a motivating factor in the development of administrative power in the United States. In other words, the disempowering of religious minorities was not a bug, but a feature.

None of this is to say that government should disregard the input of the knowledge class, for agency expertise can be beneficial if shared with elected representatives and not used to justify an "off-road" mode of legislating. Nor is it to say that reason and religion should be considered at war with one another, for that is far from the truth and all too often invoked as an unreasonable "rationalist" canard against religion. Above all, it should not be supposed that the rationalism and scientism of administrative policymaking assures that the resulting policy is rational or scientific.[3]

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a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe." *Id.* at 372.

[3] *See*, *e.g.*, Marty Makary, *The High Host of Disparaging Natural Immunity to Covid*, WALL ST. J. (Jan. 26, 2021), https://www.wsj.com/articles/the-high-cost-of-disparaging-natural-immunity-to-covid-vaccine-mandates-protests-fire-rehire-employment-11643214336 ("Public-health officials ruined many lives by insisting that workers with natural immunity to Covid-19 be fired if they weren't fully vaccinated. But after two years of accruing data, the superiority of natural immunity over vaccinated immunity is clear. By firing staff with natural immunity, employers got rid of those least likely to infect others.") (last visited Mar. 18, 2022); Sheri Fink & Mike Baker,

Rather, the point is that administrators are not representative of the people nor accountable to them at elections, and administrative power comes with a vision of rationality and scientism that, whatever its merits, is indifferent if not antagonistic to non-mainstream religious beliefs. The resulting policymaking process disadvantages many religious minorities.

Again, a simple comparison reveals the prejudice embedded in the administrative perversion of the political process. Under a republican form of government, in which laws are made by an elected representative legislature, religious Americans, even those with unpopular beliefs, can almost always get a respectful and even sympathetic hearing about their needs as minorities, and very often can persuade lawmakers to defeat a harsh law or at least secure an accommodation. But under the administrative version of government, religious Americans must struggle to be heard by administrative policymakers, can expect contemptuous treatment, and face institutional indifference and even outright hostility. *See* Hamburger, *Exclusion and Equality*, *supra*, at 1939-42.

'It's Just Everywhere Already': How Delays in Testing Set Back the U.S. Coronavirus Response, N.Y. TIMES (Mar. 10, 2020), https://bit.ly/FinkNYT03102020 (discussing administrative policy on new drugs and devices which delayed the availability of COVID-19 tests) (last visited Mar. 18, 2022); Anahad O'Connor, *How the Government Supports Your Junk Food Habit*, N.Y. TIMES (July 19, 2016), https://bit.ly/OConnorNYT07192016 (discussing administrative food and agricultural policies which for decades encouraged Americans to eat unhealthy foods) (last visited Mar. 18, 2022).

Religious liberty thus comes with an unexpected slant. Courts blithely assume that America offers a flat or even legal landscape—a broad and equitable surface on which all Americans can enjoy rights equally, regardless of their religion. But the underlying inequality of the administrative rule, exemption, and other policymaking process tilts the entire game, so that many apparently equal policies actually lean against religion.

This unequal process hollows out the religious equality guaranteed by the Free Exercise Clause. Even where the courts protect against facially unequal laws, the underlying inequality of the lawmaking process is apt to render laws unequal and oppressive. Put another way, the inequality built into the administrative version of the political process renders many apparently equal administrative policies unequal as to religious minorities. Thus, even when an administrative policy seems equal on its surface, it remains necessary to ask whether it disadvantages some religious Americans because of the relative indifference or even hostility of administrative policymakers to orthodox or traditional religion.

B. New York's Unequal Administrative Policy

New York's administrative process in this case is deeply discriminatory and illustrates the inherent capriciousness of administrative policymaking.

On August 18, 2021, the New York Department of Health proposed an emergency COVID-19 vaccination mandate for healthcare workers to protect patients and fellow workers in healthcare facilities. The original proposal included mandatory

exemptions for those with either religious or medical reasons for not taking the vaccine. Three days later, the State's Public Health and Health Planning Council—an advisory committee headed by the Commissioner of the Department of Health—proposed a revised mandate, this time with no religious exemption. *See* 10 N.Y. Admin. Code § 2.61 (2021). The removal of the religious exemption was not accompanied by any contemporaneous explanation, scientific or otherwise, reflecting precisely the sort of indifference and prejudice toward religion one might expect from an administrative process. New York is thus an abject but not unusual example of the religious inequality inherent in administrative policymaking. *See, e.g., Fulton*, 141 S.Ct. 1868; *Tandon*, 141 S. Ct. 1294, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

An essential element of republican government and of religious liberty is to have policies adopted in laws made by a representative legislature that is elected by, and thus responsive to, the people, including religious minorities. Instead, New York imposed its healthcare worker vaccine policy through an administrative body that is unelected and thus unresponsive, and even institutionally prejudiced against orthodox or traditional religion—in this case, expressly prejudiced against petitioners' religious views.

Several weeks before § 2.61 took effect, the then-new Governor acknowledged that "we left off [the religious exemption] in our regulations

intentionally."[4] She provided no scientific or legal basis for this intentional omission, asserting instead that there was no "sanctioned religious exemption from any organized religion" and that organized religions are "encouraging the opposite."[5] Explicitly addressing Catholics who might object to receiving a vaccine, she added that "everybody from the Pope on down is encouraging people to get vaccinated."[6] Governor Hochul later rhetorically asked worshipers at the Abyssinian Baptist Church in Harlem: "How can you believe that God would give a vaccine that would cause you harm? That is not truth. Those are just lies out there on social media."[7]

It hardly needs to be observed that it is not the role of government to decide which religious beliefs constitute "truth" or to condemn religious views that deviate from what a public official says is God-given. But far more serious than the Governor's personal bias against religious views that fail to conform to official policy is the systemic indifference and even prejudice built into administrative policymaking. This danger—that administrative

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[4] Governor Hochul Holds Q&A Following COVID–19 Briefing (Sept. 15, 2021), https://www.governor.ny.gov/news/video-rough-transcript-governor-hochul-holds-qa-following-covid-19-briefing (last visited Mar. 18, 2022).

[5] *Ibid.*

[6] *Ibid.*

[7] Governor Hochul Attends Services at Abyssinian Baptist Church in Harlem (Sept. 12, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-attends-services-abyssinian-baptist-church (last visited Mar. 18, 2022).

policymaking is systemically tilted against orthodox or traditional religion—needs to be recognized regardless of whether it comes, as here, with nakedly prejudiced expressions.

Thus, even if one were to ignore the Governor's comments, Section 2.61's unequal treatment of religion remains indefensible. It goes so far as to force healthcare employers to violate their obligations under Title VII of the Civil Rights Act of 1964, which requires that they reasonably accommodate their employees' religious beliefs. 42 U.S.C. § 2000e(j). The Second Circuit correctly recognized that "an employer must offer a reasonable accommodation that does not cause the employer an undue hardship." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 292 (2d Cir. 2021). But the Second Circuit was incorrect in concluding that it was sufficient to give religious objectors "assignments—such as telemedicine—where they would not pose a risk of infection," *id.*, because the same "no risk" standard does not limit accommodations available to non-religious objectors.

Equal treatment under the Free Exercise Clause requires accommodations to be offered to religious and non-religious objectors on an equal basis, absent compelling justification based on relative risk. "Comparability is concerned with the risks various [accommodations] pose, not the reasons why." *Tandon*, 141 S. Ct. at 1296. Here, New York's health bureaucrats have already deemed it reasonable and risk-justified to allow unvaccinated healthcare workers with non-religious, medical objections to the vaccine to work in person and treat patients, provided such workers follow test-and-mask requirements. Indeed, § 2.61 requires such

accommodations. But the same test-and-mask accommodation is forbidden for healthcare workers with religious objections to the vaccine. There is no compelling reason for this unequal treatment, because tested and masked unvaccinated workers present the same (low) risk of carrying and transmitting COVID-19 regardless of why they are unvaccinated.

New York's Department of Health even allows healthcare workers who are infected with COVID-19 and actively experiencing symptoms to return to work in person and treat patients, provided such infected workers are vaccinated and wear N95 or KN95 masks. Petitioners' App.222a-223a.

New York has thus determined that N95 and KN95 masks reduce risks to a level low enough to permit in-person work for both unvaccinated workers and vaccinated-but-infected workers. There is no justification for thinking that the same masks when worn by an unvaccinated worker with religious objections will not reduce risks to the same low level. This rejection of the efficacy of masks only for religious workers is mere discrimination on the basis of religion in violation of the First Amendment. In letting medically exempt workers retain their livelihoods while barring religious objectors from practicing their professions, New York violates the Free Exercise Clause.

III. A PROPER REMEDY WOULD BE TO HOLD THE POLICY UNEQUAL AND THUS UNCONSTITUTIONAL

Notwithstanding that this Court is being asked to revisit *Smith*, it could strike down New York's

policy without disturbing *Smith* by holding that the administrative process under which New York made its decision is discriminatory, unequal, and therefore unconstitutional. This case, put simply, could be decided on the basis of inequality rather than exemption.

A. Taking Equality Seriously

It is important not to let the dispute about religious exception distract from the constitutional right to religious equality. It should be indisputable that unequal religious constraints—whether against a particular type of religion or against religion as a whole—deny the free exercise of religion.

Smith's critics suggest that if the First Amendment does not protect a right of exemption, it means nothing. But if it does not protect at least against inequality, then the First Amendment really will have been eviscerated. The Free Exercise Clause was adopted in response to a long history of inequality, and there is no more pervasive inequality than to have policymaking power turned over to unelected administrators with institutional commitments at odds with one's religion.

Tellingly, Justice Scalia concluded his opinion in *Smith* by noting that, even without a right of religious exemption, religious Americans can always pursue a political remedy—prototypically by appealing to their elected representatives to include exemptions or other relief when they enact potentially burdensome laws.[8] That may be true where the laws

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[8] *Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just

are made by the elected legislature. But here, the policy comes from unelected administrators who, quite apart from serving a governor with personal prejudices, are selected from a class that tends to be indifferent and even adverse to religious beliefs outside of what it perceives to be mainstream.

Unequal constraints are most clearly and emphatically barred by the Free Exercise Clause, and this problem is evident in New York's administrative process. A candid recognition of the inequality would have the salutary effect of limiting the stakes in a bruising controversy over a right of exemption. Though (as will be seen below) a constitutional right of exemption has no foundation in the Constitution, the demands for such a right have increased in past decades—and not by accident. There has been a massive shift of policymaking power from representatives to administrators during recent decades, and this transfer has left traditional and orthodox religious Americans subject to ever less sympathetic responses from those who exercise authority over them. Whereas they once could persuade their elected servants to accommodate their beliefs, they now must deal with unaccommodating administrative masters.

This expansion of administrative lawmaking explains much of the rising demand for a constitutional right of exemption. Lawmaking

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as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

nowadays is more administrative than representative. And unlike representatives, who tend to be sympathetic to—if not adhere to—the religions of their constituents, the new sort of lawmakers tend to begin the conversation (as in New York) by "intentionally" omitting religious accommodations. It is therefore unsurprising that the call for exemption or other accommodation tends to come in response to administrative lawmaking.

Accordingly, before this Court moves toward a right of exemption that is unjustified by constitutional text or history, the Court should first stand up for the free exercise right to equality. This Court has a duty to recognize the religious discrimination inherent in administrative lawmaking, and in so doing, it will alleviate the growing pressure for a right of exemption.

B. The First Amendment's Text, Drafting, and Underlying History Preclude a General Right of Religious Exemption

Far from authorizing a constitutional right of religious exemption, the First Amendment expressly precludes it. Starting with the text, the First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. So, if a statute prohibits the free exercise of religion, the legislature had no power in the first place to make the law. Such a statute (or if severable, the relevant section) is simply unlawful and void. There is thus no

room under the First Amendment for a right of exemption.

This conclusion is also clear from the drafting debates, where no one is recorded as even having discussed a general right of exemption. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 927-28.

Nor should any of this be a surprise, as the vast majority of minority religious groups in the late eighteenth century were devoted to seeking equal rights, not exemptions. Religious minorities at the time of the Revolution were often worried about the imposition of targeted constraints on account of their religion. As late as the 1770s, Baptists in Virginia were imprisoned merely for meeting and preaching. John Leland, *The Writings of the Late Elder John Leland* 106-07 (L.F. Greene ed., New York, 1845); Charles F. James, *Documentary History of the Struggle for Religious Liberty in Virginia* 29, 212-14 (J.P. Bell Co., Lynchburg, Va., 1900). This seemed especially outrageous at a time when Americans were demanding equal rights in their struggle against Britain. Religious minorities in America therefore tended to demand equal rights, both against establishment privileges and more fundamentally against discriminatory constraints. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 942; Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 Sup. Ct. Rev. 295, 336-67 (1992).

Their opponents often suggested that in pursuing religious liberty, religious minorities in actuality sought a general right of exemption—this

being an effective way to smear the minorities. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 941. Tellingly, the leaders of religious minorities repeatedly disclaimed any ambition for a general right of exemption, instead insisting upon equality. *See id.* at 942; *see also* Hamburger, *Equality and Diversity*, *supra*, at 336-67.

Some suggest that the conditions recited in state constitutional guarantees of religious freedom reveal a general right of exemption—at least where there was no threat to the public peace. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990). But this perspective, which would allow Americans to claim a religious liberty from equal laws, gets the history backward. *See* Hamburger, *A Constitutional Right of Religious Exemption*, *supra*, at 918-26. The conditions in some state guarantees cut off constitutional claims of exemption from law by reducing religious liberty to a conditional toleration—a freedom that was available only on the condition that one did not breach the peace or hold views that tended toward a breach of the peace. *Id.* If one violated the underlying condition, one forfeited one's religious liberty. *Id.* at 922-23. In contrast, the First Amendment included no conditions. Rather than adopt the merely conditional toleration so common in state constitutions, the First Amendment embraced the inalienable character of religious liberty by stating it unconditionally. It is thus utterly anti-textual and ahistorical to discern the meaning of the unconditional federal right from the conditional state protections.

In addition to these observations about the text, drafting, and underlying history, there are obvious practical impediments to a free exercise right of exemption. For one, such a right would create moral hazard (something the Founders understood) and would leave judges with dangerous discretion to define its boundaries. But it should be enough here to notice that the text, by its very words, precludes any such right, that the debates did not even discuss any general right of exemption, and that all of this makes sense in light of what religious minorities sought in the 1770s and 1780s.

C. Discriminatory Statements Against Religious Minorities Confirm the Resulting Policy Is Unequal and Unconstitutional

This Court should recognize the inequality ingrained in administrative power by providing a remedy for religious Americans whose religious beliefs are burdened—not because they have a free exercise right of exemption, but because of the inequality of the administrative policymaking process.

It should be particularly easy to reach this conclusion when, as here, an administrator or agency answers to a governor whose statements confirm the hostile or otherwise discriminatory character of the policymaking process. Of course, when a member of a legislature expresses religious prejudice, it is not obvious that her invidious attitudes should be attributed to the legislature as a whole. But this case involves an administrative agency headed by a single administrator, who in turn serves a single governor. In such circumstances, the Governor's verbalized

prejudice must be taken as the prejudice of the agency and its policymaking process.

The point is not that a facially equal policy is unconstitutionally discriminatory solely on account of bad motive, but rather that the Governor's discriminatory expressions confirm the underlying inequality inherent in administrative policymaking. This slanted process by itself should be enough to render the policy unequal—to require that it be held void at the behest of any person adversely affected in his religion. Where, as here, there is evidence corroborating that New York's administrative policymaking is indifferent, hostile, or otherwise discriminatory, this Court should recognize the inequality inherent to the administrative policymaking process and take this opportunity to hold the policy unequal and void.

D. There Are Advantages to Holding the Policy Void Rather Than Carving out an Exemption

Holding New York's administrative policy unequal and thus void will have substantially the same effect as a holding that petitioners are exempt from New York's vaccination requirement. But over the long term, there is an advantage in this approach—beyond that of following the text of the First Amendment.

When the judicial response to free-exercise violations focuses on exemption, administrators can pursue regulatory projects that burden religion without fear of more than an exemption—that is, without fear for their larger projects. Such administrators thus have every reason to regulate as harshly as they wish, reckoning that they will

sometimes get away with it and that they will never suffer more than a carve-out for some adversely affected plaintiffs. The judiciary's exemption response thus invites administrative severity and increases the volume of litigation making demands for exemptions.

In contrast, if the judges were to recognize the inequality of administrative policymaking and hold the resulting policies void when challenged by affected plaintiffs, administrators would have some skin in the game. They would think twice ahead of time about the policies they impose through their discriminatory processes, thereby reducing the tensions with religious Americans.

IV. THIS COURT NEEDS TO CONFRONT THE RELIGIOUS INEQUALITY OF ADMINISTRATIVE POLICYMAKING

This Court must address the discriminatory tendencies of administrative policymaking, or else it will face a growing (if constitutionally insupportable) demand for exemption that will be unmanageable and divisive. In addition, the Court must consider the seriousness of the burgeoning administrative inequality problem and the Court's role in creating it.

Systematic discrimination against religious Americans or against those who hold non-mainstream beliefs has no place in America—regardless of whether in the substance of a policy or in the process by which it is made. In *Smith*, this Court recognized the importance of legislative lawmaking for religious Americans, but failed to address the reality that nowadays most "law" is made by administrative fiat, which is unresponsive and often hostile to religious Americans. This produces a fundamental inequality,

which is so deeply ingrained in a pervasive mode of power that this Court may hesitate to confront the problem. But the ubiquity of administrative policymaking, and the magnitude of the resulting discrimination, compel this Court to act.

The problem is not confined to New York. Across the nation, relatively orthodox or traditional Americans again and again confront the indifference and even hostility of administrative policymaking, in violation of their free exercise rights not to be subjected to discriminatory constraints. New York's unequal policy, which exempts healthcare workers for medical but not religious reasons is just the tip of the iceberg.

Judges have a special duty to address administrative discrimination because, having legitimized administrative governance, the judiciary is partly responsible for its inherent inequality. The judiciary therefore bears responsibility for the current situation, in which religious Americans cry out for exemptions from their administrative rulers—from the rulemaking class—but have little hope because these rule-makers tend to be rigidly indifferent and even biased against them. This discriminatory process is a disgrace, and the Court needs to address it.

CONCLUSION

Administrative policymaking is incompatible with religious liberty and places many religious Americans at a systemic disadvantage. Recognizing that something is deeply awry, but not fully understanding the depth of the constitutional distortions arrayed against them, religious Americans increasingly turns to the courts for a

general right of exemption—a right that the First Amendment never authorized and, in fact, textually precludes. Thus, one constitutional distortion has provoked demands for another. Having legitimized an illicit mode of power that undercuts the equality of religious Americans, judges are being asked to cure the problem with an illicit general right of exemption.

Being partly responsible for permitting the initial administrative unconstitutionality, this Court has a special duty—if only on account of its own reputation—to clean up the mess. It needs to recognize the profound inequality that runs through all administrative lawmaking—an inequality that bears down on many religious Americans in ways that leave them stunned and struggling, wondering what happened to their freedom and equality.

The Court should therefore grant the petition for certiorari.

Respectfully submitted,

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