No. 21-A_____

In the Supreme Court of the United States

WE THE PATRIOTS USA, INC., DIANE BONO, MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI,

Applicants,

v.

KATHLEEN HOCHUL, HOWARD ZUCKER,

Respondents.

To The Honorable Sonia M. Sotomayor
Associate Justice of the United States Supreme Court
And Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
RELIEF REQUESTED BY AS SOON AS POSSIBLE

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QUESTION PRESENTED

New York State Health Regulation § 2.61 requires all New York healthcare workers to receive a COVID-19 vaccination unless they qualify for the only exemption recognized by § 2.61 – a medical exemption. § 2.61 does not require employers to alter any medically exempted employee's employment conditions, leaving it to their discretion on whether to alter those conditions at all. It compels the termination of those with religious objections. Applicant Diane Bono and many of Applicant We The Patriots USA, Inc.'s members lost their jobs because their sincerely held religious beliefs will not allow them to receive a COVID-19 vaccination. Applicants Michelle Melendez and Michelle Synakowski face the imminent loss of their employment for the same reasons. The district court denied the Applicants' petition for emergency relief and for a preliminary injunction, and the United States Court of Appeals for the Second Circuit granted an injunction pending appeal based on the Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020). It then affirmed the district court's denial of the Applicants' request for a preliminary injunction.

The question presented is:

1. Whether New York State Health Regulation § 2.61 violates the Free Exercise Clause of the First Amendment by requiring employers to terminate healthcare workers who refuse a vaccine because of their religious beliefs but allows employers the unfettered ability to keep healthcare workers who refuse a vaccine because of a medical condition.

PARTIES TO THE PROCEEDING

The Applicants are We The Patriots USA, Inc., Diane Bono, Michelle Melendez, and Michelle Synakowski. They are the Plaintiffs in the United States District Court for the Eastern District of New York and the appellants before the United States Court of Appeals for the Second Circuit.

The Respondents are Kathleen Hochul – the governor of New York – and Howard Zucker – New York State's health commissioner at the time of the underlying action being brought. They are the Defendants in the United States District Court for the Eastern District of New York and the appellees before the United States Court of Appeals for the Second Circuit.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Applicant, We The Patriots USA, Inc., is not owned by any parent or publicly held company. No parent or publicly held company owns 10% or more of its stock.

DECISIONS BELOW

All decisions in this case in the lower courts are styled *We The Patriots USA, Inc., et al. v. Hochul, et al.* The United States Court of Appeals for the Second Circuit's order, dated October 29, 2021, affirming the district court's ruling and vacating its prior order granting an injunction pending appeal is reproduced at App.1-3. It indicates that a formal opinion will follow expeditiously. App.3. The current docket sheet of the United States District Court for the Eastern District of New York containing the district court's orders is reproduced at App.4-8. The district court's text order denying the Applicants' motion for a preliminary injunction, dated

September 12, 2021, is located between docket entries 7 and 8. App.6. The district court's text order denying the Applicants' emergency motion to stay pending appeal, dated September 13, 2021, is located between docket entries 9 and 10. App.7.

JURISDICTION & TIMING

The United States District Court for the Eastern District of New York had federal question jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The United States Court of Appeals for the Second Circuit had appellate jurisdiction over the district court's denial of the Applicant's motion for a preliminary injunction under 28 U.S.C. § 1292(a)(1). This Court has jurisdiction over the Applicants' forthcoming petition for a writ of certiorari under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651.

The Applicants have moved with unmatched diligence and urgency to protect their rights. Ten days after they filed their complaint and immediately after they located means to notify the Respondents as the Federal Rules of Civil Procedure require, they filed an emergency motion for a temporary restraining order and a preliminary injunction with the district court on September 12, 2021. App.30. The district court denied it within two hours of being filed. App.6. The Applicants appealed within an hour of the district court's order. App.6. The next day, they filed an emergency motion to stay enforcement of New York State Health Regulation § 2.61 pending appeal. App.6-7. The district court denied this motion within half an hour of it being filed. App.7. That same day, the Applicants filed a motion for an injunction pending appeal with the Second Circuit. They have now petitioned the Court for relief within 72 hours after receiving the Second Circuit's decision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

EMERGENCY APPLICATION FOR A STAY PENDING THE DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

To the HONORABLE SONIA M. SOTOMAYOR, Associate Justice of the Supreme Court of the United States:

Pursuant to Supreme Court Rules 20, 21, 22, and 23, and 28 U.S.C. §§ 1651 and 2101, Applicants – We The Patriots, USA, Inc., Diane Bono, Michelle Melendez, and Michelle Synakowski – hereby move the Court for an emergency writ of injunction pending the Court's disposition of their forthcoming petition for a writ of certiorari.

The Constitution does not contain a public health emergency exception to the Bill of Rights. Despite popular opinion, this Court's precedents have never created one, and, over the past year, the Court has rejected such an exception. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020); *High Plains Harvest Church v. Polis*, 141 S.Ct. 527(Mem) (2020) (converting an application for injunctive relief into a petition for a writ of certiorari before judgment, granting the petition, and adopting *Cuomo* as its decision). Lower courts, however, have struggled to reconcile *Polis*'s adoption of *Cuomo* as a merits decision and the Court's precedent in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

Lower courts have particularly struggled with this reconciliation in vaccination mandate cases. State and national policymakers have determined that vaccination represents the best way to bring an end to the COVID-19 pandemic. Thus, President Biden has directed federal agencies to create a national COVID-19 vaccination mandate for federal workers and contractors through administrative

rulemaking,[1] and state and local policymakers have also mandated COVID-19 vaccinations as prerequisites to work in certain industries or enjoy certain activities.[2] These mandates carry a common constitutional infirmity. They allow medical exemptions to the mandates with or without accommodations while completely prohibiting religious exemptions.

The Respondents have adopted a similar COVID-19 vaccination mandate for New York's healthcare workers: New York State Health Regulation § 2.61. **§ 2.61 specifically prohibits any exemptions except the medical exemption it provides. It also gives employers complete discretion over what additional precautions, if any, medically exempt healthcare workers must adhere to.**

The individual applicants – Diane Bono, Michelle Melendez, and Michelle Synakowski – are New York nurses who have worked throughout the pandemic. They are devout Christians who object to deriving any benefit – no matter how remote – from a process involving abortion, which they believe is morally wrong. App.30, App.45, App.51. Since all three currently available COVID-19 vaccinations use cell lines artificially developed from aborted fetal cells in their testing, development, or production, they cannot receive COVID-19 vaccination without violating their consciences. App.31, App.46, App.51-52.

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[1] https://www.whitehouse.gov/covidplan/

[2] For example, New York City requires proof of COVID-19 vaccination for a person to dine indoors, go to an indoor gym, or attend indoor entertainment events. *See* https://www1.nyc.gov/site/doh/covid/covid-19-vaccines-keytonyc.page

Thus, Bono saw her 39-year career as an outstanding nurse end under § 2.61's mandate while awaiting emergency relief after her employer, Northwell Health, revoked her prior religious exemption as required by § 2.61. She has since been unable to find employment in the healthcare field in New York because of § 2.61. Melendez has been on leave for an unrelated health issue and will return to work shortly. When she does, her employer – Northwell Health – will likely terminate her because of § 2.61. Synakowski has endured a rollercoaster. Her employer first granted her a religious exemption before § 2.61. It then revoked that exemption, but it reinstated it after the United States District Court for Northern District of New York issued a preliminary injunction enjoining the Respondents' enforcement of § 2.61.

They are not alone. Bono and Melendez's employer – Northwell Health – terminated 1,400 employees for refusing the COVID-19 vaccination.[3] Other healthcare facilities in New York have taken similar action. The message is clear. The New York healthcare system will not work to accommodate faith when it conflicts with the state's public health measures.

This decision – given the force of law by § 2.61 – violates the Court's clearly established First Amendment precedents on the neutrality and general applicability standards that state laws must meet. It imposes an unconscionable choice on New York healthcare workers: abandon their faith or lose their careers and their best means to provide for their families. Thus, § 2.61 causes incalculable and irreparable

[3] https://apnews.com/article/coronavirus-pandemic-business-new-york-health-72287faf1ccbe739df8826e51378d96a

damage to the Applicants and every other similarly situated New York healthcare worker in violation of clearly established First Amendment law. **For the reasons stated herein, the Applicants respectfully ask the Court to issue an emergency stay against the enforcement of New York State Health Regulation § 2.61 as soon as possible pending the filing and disposition of a petition for a writ of certiorari**.

The Applicants will not abuse the Court's grant of a stay to create the functional equivalent of a preliminary injunction. If the Court does not set a briefing schedule for the petition,[4] the undersigned represent to the Court that they will file a petition for a writ of certiorari within 14 days of the Court's grant of their requested stay.

STATEMENT OF THE CASE

On August 16, 2021, then New York Governor Andrew Cuomo promised New York health care workers that the state's coming COVID-19 vaccine mandate for healthcare workers would allow for "limited exceptions for those with religious or medical reasons." App.25-27. On August 26, 2021, the Respondents promulgated New York State Health Regulation § 2.61 without any public notice and comment period. App.21. The regulation departed drastically from Governor Cuomo's promises by eliminating religious exemptions for healthcare workers when it comes to the Respondents' COVID-19 vaccination mandate. App.21-23.

[4] The undersigned completed their opening merits brief to the Second Circuit in accordance with its order on four days' notice. They can meet an equivalent schedule with respect to their petition for a writ of certiorari if the Court so directs.

§ 2.61 covers "any facility or institution included in the definition of 'hospital' … including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers…." App.21. It applies to

> all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.

App.22. The regulation requires "[c]overed entities … [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed…." App.22.

The only exemption that § 2.61 provides is a "medical exemption." App.22. § 2.61, however, does not require employers to change anything about the employment conditions of the healthcare workers who receive a medical exemption – i.e., assigning them to work with low-risk patients or just in telemedicine.

I. COVID-19 Vaccines – Ingredients.

The three major COVID-19 vaccines – Johnson & Johnson (Janssen), Pfizer, and Moderna – use cells artificially developed using fetal cells taken from aborted fetuses in the 1970s and the 1980s in their testing and/or manufacture. *See COVID-19 Vaccines & Fetal Cells*, Michigan Department of Health & Human Services.[5]

[5] https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf

Johnson & Johnson used an aborted fetal cell line to produce and manufacture its vaccine. *Id.* Pfizer and Moderna did not use an aborted fetal cell line to produce and manufacture their vaccines, but they did use an aborted fetal cell line to confirm its efficacy prior to producing and manufacturing it. *Id.*

II. Northwell Health & Applicants Diane Bono & Michelle Melendez.

Applicant Diane Bono is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. App.30, ¶ 3. She is a practicing Christian and believes in "the sanctity of life, born and unborn." App.30, ¶ 5. She believes that abortion is morally evil and that its fruits are as well. App.30, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. App.30, ¶ 6. On August 23, 2021, she submitted a request for a religious exemption from New York's COVID-19 vaccination mandate to Northwell Health. App.42-43. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

> We have received your request dated August 23, 2021 for an accommodation in the form of a religious exemption from New York State's mandate that requires all health care personnel receive their first dose of the COVID-19 vaccine by September 27, 2021. On August 18, 2021, the New York State Department of Health ("DOH") issued this mandate under Section 16 of the Public Health Law. However, on August 26, 2021 the DOH announced that religious exemptions are not permitted under the State mandate. It is for this reason that we are unable to grant your request for a religious exemption.

App42.

It then delivered her an ultimatum: "If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk." App.42.

Bono elected not to comply with the Respondents' mandate because it would violate her religious beliefs. App.31, ¶ 7. Northwell Health terminated her on September 30, 2021 in reliance on § 2.61 – hours before the Second Circuit granted the injunctive relief that she sought. She has been unable to find work in the healthcare field since.

Applicant Michelle Melendez is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. App.45, ¶¶ 2-3. She is a practicing Catholic and believes in "the sanctity of life, born and unborn." App.45, ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. App.45, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. App.45, ¶ 6. On August 22, 2021, she submitted a request for a religious exemption from New York's COVID-19 vaccination mandate to Northwell Health. App.48. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

> We have received your request dated August 22, 2021 for an accommodation in the form of a religious exemption from New York State's mandate that requires all health care personnel receive their first dose of the COVID-19 vaccine by September 27, 2021. On August 18, 2021, the New York State Department of Health ("DOH") issued this mandate under Section 16 of the Public Health Law. However, on August 26, 2021 the DOH announced that religious exemptions are not permitted under the State mandate. It is for this reason that we are unable to grant your request for a religious exemption.

App.48.

Northwell Health, however, did not issue the same direct ultimatum to Melendez as it did to Diane Bono because Melendez currently is out on medical leave. Melendez, however, believes that, like Bono, she will be terminated as soon as she returns to work if she refuses to get a COVID-19 vaccine. App.46, ¶ 8.

Melendez has elected not to comply with the Respondents' mandate because it would violate her religious beliefs. App.46, ¶ 9. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. App.46, ¶ 9.

III. Applicant Michelle Synakowski.

Michelle Synakowski is a registered nurse employed at St. Joseph's Hospital in New York. App.51, ¶¶ 2-3. She is a practicing Catholic and believes in "the sanctity of life, born and unborn." App.51, ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. App.51, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. App.51, ¶ 6. She will not comply with New York's vaccination mandate, and her employer informed her that it would terminate her employment on September 21, 2021 if she did not receive the vaccine because it is required to do so by New York State Health Regulation § 2.61. App.51, ¶¶ 7-8. It subsequently allowed her to keep her religious exemption in accordance with the Second Circuit's grant of an injunction pending appeal and the United States District Court for the Northern

District of New York's grant of a preliminary injunction in a different case.[6] Given her employer's past actions, Synakowski's choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. App.52, ¶ 9.

REASONS FOR GRANTING A STAY

Applicants who seek injunctive relief pending the filing and disposition of a petition for a writ of certiorari must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (considering the same three factors as well as a fourth factor – "the balancing of the equities").

I. The Merits So Strongly Favor The Applicants That There Is A Reasonable Probability That At Least Four Justices Will Consider The Issues Sufficiently Meritorious To Grant Certiorari And A Fair Prospect Majority Will Vote To Reverse The Second Circuit's Judgment.

The Applicants will raise two issues in their petition for a writ of certiorari, but they only apply for injunctive relief on one here.[7] The question that they seek

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[6] The Second Circuit reviewed the Northern District of New York case – *Dr A., et al. v. Hochul*, *et al.*, 2d Cir. Dkt. No. 21-2566 – simultaneously with this case. It vacated the Northern District's grant of a preliminary injunction in the same order as it affirmed the Eastern District's ruling in this case.

[7] The Applicants claim that § 2.61 violates their fundamental unenumerated right to privacy, medical freedom, and bodily autonomy under the Fourteenth Amendment and the Court's decisions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990); and *Roe v. Wade*,

relief on here is whether New York State Health Regulation § 2.61 violates the Free Exercise Clause of the First Amendment by requiring employers to terminate healthcare workers who refuse a vaccine because of their religious beliefs but allows employers the unfettered ability to keep healthcare workers who refuse a vaccine because of a medical condition.

Three members of the Court – Justices Thomas, Alito, and Gorsuch – have indicated their willingness to grant relief on this issue under this test. *See John Does 1-3, et al. v. Mills*, No. 21A90 (October 29, 2021) (Gorsuch, J., dissenting). Two other members of the Court – Justices Kavanaugh and Barrett – based their declination of review in *Mills* because it constituted the first circuit case to address the question. *Mills*, No. 21A90 (Barrett, J., concurring).

The Applicants respectfully submit that another justice will join Justices Thomas, Alito, and Gorsuch because the Second Circuit has become the third circuit to opine on a vaccination mandate that permits a medical exemption, but not a religious one, and the second circuit court to do so in the healthcare worker context. *See Does 1-6 v. Mills*, 2021 WL 4860328 (1st Cir. Oct. 19, 2021); *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728 (6th Cir., Oct. 7, 2021) (affirming a preliminary injunction against a public university's COVID-19 vaccination mandate for student-

410 U.S. 113 (1973). That claim, however, does not enjoy the crystal clear support among the Court's precedents that their First Amendment claim does, thus rendering it an unsuitable ground for granting extraordinary relief in this context under the Court's precedents.

athletes under this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020)).

Adding to the greater likelihood of another justice joining Justices Thomas, Alito, and Gorsuch's view in this case is that the Applicants present a different factual context than the *Doe* applicants presented. As the First Circuit recognized and the Northern District of New York held, the evidence shows that the Respondents orchestrated a religious gerrymander to single out religious believers – precisely the type of special hostility that this Court forbade in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018). *Mills*, 2021 WL 4860328 at *9; *Dr. A. v. Hochul*, 2021 WL 4734404 at *8 (N.D.N.Y Oct. 12, 2021) (holding that § 2.61's elimination of the religious exemption merely 8 days after the Respondents initially issued a preliminary regulation allowing for religious exemptions was an intentional change in language reflective of a "religious gerrymander"). The Applicants supply evidence below that the change has its roots in the Respondents' hostility toward the particular religious beliefs that the Applicants hold, and this key difference between this application and the *Mills* application makes it likely that another justice will join Justices Thomas, Alito, and Gorsuch in granting relief here.

§ 2.61 also is very likely to fail a First Amendment analysis before this Court. The Court has converted its *Cuomo* decision into controlling precedent in *High Plains Harvest Church v. Polis*, 141 S.Ct. 527(Mem) (2020) (granting certiorari and adopting *Cuomo* as its decision). *Cuomo* implicitly rejects *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) as a "plenary override" to fundamental constitutional rights in public health

emergencies and establishes that traditional First Amendment analysis applies to free exercise claims by not mention it at all. *Cuomo*, 141 S.Ct. 63; *see also Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (citing *Jacobson* and stating that the Court's "cases since Roe accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims"). § 2.61 on its face likely will not survive a First Amendment analysis under this Court's precedent as explained below.

For the reasons discussed below, these questions raise issues of sufficient importance that there is a reasonable probability that at least four Justices will consider the Applicants' First Amendment claim to be sufficiently meritorious to grant certiorari and a majority of the Court will vote to reverse the Second Circuit's judgment.

A. The Court has expressly overruled *Jacobson v. Massachusetts* and its progeny in two lines of decisions, and it has also implicitly overruled it in the last 70 years of its substantive due process jurisprudence.

The Respondents have relied heavily on *Jacobson v. Massachusetts* and its progeny as a constitutional safe harbor to defend § 2.61 throughout this litigation. They will reasonably seek to do so again. Their defense, however, fails under the Court's most recent precedents, its decision in *Planned Parenthood v. Casey*, and its past century of substantive due process jurisprudence.

First, as mentioned in passing above, the Court has drastically reshaped the constitutional limitations on state police power in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020). *Cuomo* now operates as binding precedent

and clearly establishes that states' public health regulations meet the same constitutional requirements as any other exercise of the police power, eliminating the "safe harbor" that its prior precedents established. *High Plains Harvest Church v. Polis*, 141 S.Ct. 527(Mem) (2020) (converting an application for injunctive relief into a petition for a writ of certiorari before judgment, granting the petition, and adopting *Cuomo* as its decision).

Before the Court's *Cuomo* decision, *Jacobson* and its progeny controlled a state's exercise of its police power in a public health emergency. As recently as May 2020, the Court denied an application for injunctive relief against a California executive order that limited attendance at churches. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613(Mem) (2020). Even though the Court did not formally explain its denial, Chief Justice Roberts penned a brief concurrence explaining that the Court's precedent in *Jacobson* required the Court to defer to policymakers even when First Amendment claims were at stake during a public health emergency. *Id.* at 1613 (Roberts, C.J., concurring).

These precedents established a constitutional "safe harbor" for state public health regulations. To successfully dock in the "safe harbor," state governments would assert that a public health emergency compelled stringent regulations, which they often supported by data rehearsing death tolls and hospitalizations. *See, e.g.*, *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 224 (2d Cir. 2020).

These precedents lost their controlling weight in *Cuomo*. There, the Court considered an executive order imposed by then-New York governor Andrew Cuomo

that allowed health officials in New York to establish red zones to contain outbreaks of COVID-19. *Cuomo*, 141 S.Ct. at 65-66. Governor Cuomo's order limited religious assemblies at churches and synagogues to fewer than ten people while allowing "essential" businesses to admit as many people as they wished. *Id.* at 66. The Court applied its well-established First Amendment precedents on "neutrality" and "general applicability" and concluded that Governor Cuomo's executive order violated the First Amendment because it singled religious establishments out for far harsher treatment than secular establishments, thus requiring the application of the Court's strict scrutiny test which compelled the conclusion that the restrictions were unconstitutional. *Id.* at 67. The Cuomo order did not mention *Jacobson v. Massachusetts* or its progeny, implicitly overruling them by eliminating them from the analysis.

Justice Gorsuch, however, reprised Chief Justice Roberts' *South Bay* concurrence by offering more insight into how the Court treated *Jacobson* via a concurrence. Justice Gorsuch explained that *Jacobson* predated modern tiers of scrutiny, but did not "depart from normal legal rules during a pandemic…." *Id.* at 70 (Gorsuch, J. concurring). He also pointed out that Henning Jacobson did not raise a First Amendment challenge or even a challenge claiming a fundamental unenumerated right. *Id.* at 70-71 (Gorsuch, J. concurring). Thus, like Chief Justice Roberts' *South Bay* concurrence, Justice Gorsuch's *Cuomo* concurrence offered critical insight into how the Court treated *Jacobson* and its progeny in *Cuomo*.

Second, the Court specifically rejected *Jacobson* and its progeny as a "plenary override" in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) in the face of a state regulation that defined fetal life as human and prohibited the termination of that human life through abortion. In affirming a woman's right to choose to have an abortion, the Court rejected the suggestion that *Jacobson* supplied a per se constitutional safe harbor, stating that its "cases since Roe accord with Roe's view that a State's interest in the protection life falls short of justifying any plenary override of individual liberty claims."[8] *Casey*, 505 U.S. at 857 (citing *Jacobson*, 197 U.S. at 24-30). *Casey* gave no indication that the Court confined its overruling of *Jacobson* as a "plenary override" just to Fourteenth Amendment unenumerated rights claims.

Moreover, if *Casey*'s plain language did not establish at a sufficient level of clarity the rule that *Jacobson* no longer functions as a "plenary override," the Court implicitly put any doubt to rest in *Lawrence v. Texas*, 539 U.S. 558 (2003). The CDC described HIV/AIDS as a global pandemic in 2006,[9] and it was treated as a global pandemic since the 1980s.[10] According the CDC's statistics in 2018, gay and bisexual men accounted for 69% of new HIV diagnoses.[11] Despite HIV/AIDS being declared a

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[8] *See also* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, forthcoming in Buffalo L.R., Vol. 70, pp. 59-66 (Sept. 24, 2021) (discussing *Roe*'s inconsistency with *Jacobson*). Professor Blackman's article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906452

[9] https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm

[10] Michael H. Merson, *The HIV-AIDS Pandemic at 25 – The Global Response*, N. Engl. J. Med. (2006). https://www.nejm.org/doi/full/10.1056/nejmp068074

[11] https://www.cdc.gov/hiv/statistics/overview/ataglance.html

global pandemic and the increased risk of the spread of HIV/AIDS among gays and bisexuals, the Court clearly established that states' police power does not permit them to criminalize homosexual intimacy, which is protected as a fundamental unenumerated right under the Fourteenth Amendment.[12] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Neither *Jacobson* nor its progeny made an appearance in *Lawrence*, and the Court did not discuss any public health concerns that state officials might have in its opinion at all, let alone with the "plenary override" principle found in *Jacobson* or its progeny. It had already rendered *Jacobson* a nullity in *Casey*.

Finally, the Court's substantive due process precedents over the last century provide ample support to conclude that Jacobson has been overruled without an express opinion from the Court saying so. The Fourteenth Amendment represented a drastic shift in American constitutional law. Before its ratification, the Court had clearly established that the Founders did not intend for the Bill of Rights to apply to state governments. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Thus, the states enjoyed a greater measure of sovereignty than they did after the ratification of the Fourteenth Amendment. In the thirty years before the ratification of the Fourteenth Amendment, there were strong political movements – mainly the abolition movement – that sought to subject state sovereignty to the individual rights protections guaranteed by the Bill of Rights. *See* Michael Kent Curtis, *The Bill of Rights As A Limitation On State Authority: A Reply To Professor Berger*, 16 Wake Forest L. Rev.

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[12] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

45 (1980). The framers of Fourteenth Amendment were abolitionists, and they intended to achieve the subjugation of state sovereignty to individual rights protections through the Fourteenth Amendment. *Id.*

The main author of the Fourteenth Amendment, Representative John Bingham, elaborated on the Fourteenth Amendment after its ratification, referencing *Barron v. Baltimore* by name:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizensof the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the UnitedStates.

Id. at 85 (quoting Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871)). Furthermore, another author of the Fourteenth Amendment, Senator Jacob Howard, explained that its Privileges or Immunities Clause guaranteed unenumerated rights like the Art. IV, Sec. 2 Privileges and Immunities Clause did. *See* Randy E. Barnett & Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L.R. 499, 500 (2019). Senator Howard explained that the Fourteenth Amendment was intended to protect unenumerated rights of the kind defined in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 123). *Id.* at 500 (citing Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard)).

The Court declined to adopt an interpretation of the Fourteenth Amendment's Privileges or Immunities Clause as a vehicle for incorporation of the Bill ofRights or the development of unenumerated constitutional rights in *The*

Slaughter-House Cases, 83 U.S. 36 (1873). Throughout the late 1800s, the Court repeatedly rejected arguments aimed at achieving the Fourteenth Amendment's original purpose of incorporating the Bill of Rights against the states. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876). The Court did not recognize incorporation as a constitutional doctrine until 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925), and it did not recognize unenumerated rights as protected by the Fourteenth Amendment until *Lochner v. New York*, 198 U.S. 45 (1905). Nor did the Court even discuss modern constitutional scrutiny doctrines until 1938 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), and it did not apply a form of scrutiny other than rational basis review until *Korematsu v. United States*, 323 U.S. 214 (1944).

Thus, when the Court decided *Jacobson*, it had not given full force and meaning to the precise nature of the Fourteenth Amendment. The controlling jurisprudence at the time meant that the Court did not examine unenumerated rights or enumerated rights guaranteed by the Fourteenth Amendment because it did not interpret the Fourteenth Amendment as protecting either form of individual rights. Henning Jacobson, therefore, did not even attempt to assert claims under the Bill of Rights or some sort of unenumerated rights theory within the Fourteenth Amendment, relying wholly on the argument that the Fourteenth Amendment protected a form of generalized liberty. The Court itself then concluded that Boston's vaccination mandate did not violate any right given or secured by the Constitution without a specific analysis of any enumerated right or a specific

unenumerated right as it undoubtedly would have done if its jurisprudence had raised the possibility. *Jacobson*, 197 U.S. at 26-27.

The Court's incorporation of the Bill of Rights against the states and the development of the Court's unenumerated rights doctrine have established a more specific analysis for a state to meet rather than merely invoking a "plenary override." Thus, for these reasons, the Applicants ask the Court to consider their application for a writ of an injunction through strict scrutiny rather than the pre-incorporation scrutiny that *Jacobson* promulgated.

B. New York State Health Regulation § 2.61 draws strict scrutiny under the Court's free exercise jurisprudence because it targets certain religious beliefs with special disabilities in violation of the First Amendment, and it cannot survive strict scrutiny.

§ 2.61 triggers strict scrutiny under the First Amendment's Free Exercise Clause in two ways. First, it fails "the minimum requirement of neutrality" to religion required by *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) and the "generally applicable" requirement of *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith,* 494 U.S. 872, 884 (1990). Second, the Respondents cannot meet their burden to show that § 2.61 satisfies strict scrutiny. *Cuomo*, 141 S.Ct. at 67.

Addressing the "minimum requirement of neutrality" first, the First Amendment's Free Exercise Clause "forbids subtle departures from neutrality and covert suppression of particular beliefs." *Hialeah*, 508 U.S. at 534 (internal citations and quotation marks omitted). In other words, the Free Exercise Clause prohibits masked government hostility toward religion as well as overt hostility. *Id.* at 534. The Court enumerated a non-exhaustive list of factors relevant to assessing government

neutrality in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018). These factors included "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 1731 (internal citations and quotation marks omitted).

While little historical background or legislative or administrative history is publicly available at this point in this case, the specific series of events leading to the enactment of § 2.61 and Respondent Hochul's subsequent public comments raise serious questions on the merits of whether New York acted with hostility toward religious beliefs such as those held by the Respondents.

Before the enactment of § 2.61, New York state authorities led by then-Governor Andrew Cuomo promised healthcare workers that they would be allowed to keep their religious exemptions under any vaccine mandate, saying on August 16, 2021 that "[t]he State Department of Health will issue Section 16 Orders requiring all hospital, LTCF, and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with religious or medical reasons." App.26. Governor Cuomo resigned shortly after making that promise, and Respondent Hochul replaced him as New York's governor on August 24, 2021.[13] On August 26, 2021 – a mere 8 days after the original announcement of New York

[13] https://apnews.com/article/cuomo-last-day-governor-660e489dbb90037fd0d44d79efc1e6a8

COVID-19 vaccination mandate with religious and medical exemptions, New York's Public Health and Planning Council issued an emergency regulation mandating COVID-19 vaccinations for healthcare workers while eliminating the religious exemption that then-Governor Cuomo had promised healthcare workers that they would keep.[14] App.21-23.

New York officials remained silent on why the abrupt change occurred under Respondent Hochul's administration. Weeks later, Respondent Hochul offered explanations, including "I'm not aware of a sanctioned religious exemption from any organized religion. In fact, they're encouraging the opposite. They're encouraging their members – everybody from the pope on down is encouraging people to get vaccinated"[15] and, in a political speech[16] at a Sunday morning church service, stated

> We are not through this pandemic. I wished we were but I prayed a lot to God during this time and you know what - God did answer our prayers. He made the smartest men and women, the scientists, the doctors, the researchers - he made them come up with a vaccine. That is from God to us and we must say, thank you, God. Thank you. And I wear my "vaccinated" necklace all the time to say I'm vaccinated. All of you, yes, I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are.

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[14] https://www.natlawreview.com/article/new-york-issues-emergency-regulation-mandating-covid-19-vaccination-health-care

[15] https://www.wxxinews.org/post/hochul-says-religious-exemption-not-legitimate-excuse-avoid-covid-19-vaccine. The article's quoted portion differs slightly from the audio version of Hochul's actual remarks. Applicants' counsel quote the audio version of Hochul's actual remarks found in this article.

[16] The Respondents have consistently disputed whether Respondent Hochul spoke as a private citizen or in an official capacity as governor of New York. The transcript prepared by Respondent Hochul's own office indicates that she delivered a political speech as governor of New York. *See* https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center

> I need you to be my apostles. I need you to go out and talk about it and say, we owe this to each other. We love each other. Jesus taught us to love one another and how do you show that love but to care about each other enough to say, please get the vaccine because I love you and I want you to live, I want our kids to be safe when they're in schools, I want to be safe when you go to a doctor's office or to a hospital and are treated by somebody, you don't want to get the virus from them. You're already sick or you wouldn't be there.[17]

Respondent Hochul's public comments stand as the only explanation from a New York official as to the policy reasons for the sudden reversal in New York's COVID-19 vaccination mandate policy. Her remarks doom § 2.61 as a constitutional matter. The Court has established that what the pope or any other religious leader says is irrelevant when it comes to the religious beliefs that government must respect: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981). Nor are the Applicants required to make their religious beliefs "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. In other words, Respondent Hochul's disagreement with their religious beliefs and her actions in targeting them through § 2.61 is precisely the type of conduct that the First Amendment prohibits.

The only publicly available evidence on why New York's policy on whether healthcare workers could keep their religious exemptions changed is Respondent Hochul's replacement of former Governor Cuomo and her public comments. Those

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[17] https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center

public comments clearly establish the complete lack of neutrality in the enactment of § 2.61, and they merit the grant of a stay from this Court.

Turning to the "generally applicable" requirement, "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (Jun. 17, 2021). "A law also lacks general applicability if it permits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* While it is true that all laws are somewhat selective, the Court has held that specific "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993). Thus, if § 2.61 treats any comparable secular activity more favorably than religious exercise, it must satisfy strict scrutiny. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (Apr. 9, 2021) (citing *Cuomo*, 141 S.Ct. at 67-68).

In the context of the COVID-19 pandemic, *Cuomo* and *Tandon* both establish that "comparability" examines whether secular and religious activities pose the same risks to spreading COVID-19. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. No question exists that an unvaccinated person poses a risk of contracting and spreading COVID-19. COVID-19 will not walk up to unvaccinated healthcare workers, tap them on the shoulders, and ask them why they are not vaccinated before infecting them. It will not ask them why they are not vaccinated before it turns them into pollinators. In other words, unvaccinated healthcare workers who assert a religious exemption

pose the same risks that unvaccinated healthcare workers who assert a medical exemption do.

§ 2.61 draws a bright line between two categories of unvaccinated healthcare workers. The first group consists of healthcare workers who seek medical exemptions. § 2.61 allows their employers to grant those exemptions after considering the reasons underlying their requests and imposes no requirements on whether they need to be removed from the workplace or comply with additional precautions such as limiting the types of patients that they can work with. App.22. The second group consists of healthcare workers who seek religious exemptions. § 2.61 requires their employers to terminate them, and it bars them from obtaining employment as healthcare professionals within the state of New York until they receive a COVID-19 vaccination.

§ 2.61 establishes a state mandated system of individualized exemptions that excludes religious exemptions while allowing medical ones. In other words, the Respondents have made a value judgment that medical exemptions – secular exemptions – are more important than religious exemptions. This system violates First Amendment requirement of "general applicability" and automatically triggers strict scrutiny under the Court's precedents in *Cuomo*, *Tandon*, and *Fulton*.[18]

[18] At least one circuit court has concluded that allowing medical exemptions, but not religious exemptions, violates the Free Exercise Clause in a non-emergency context. *See Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999).

§ 2.61 cannot survive strict scrutiny. Under a strict scrutiny analysis, the Respondents must show that § 2.61 is narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). It fails on both elements.

First, the Respondents likely will claim a compelling interest in preventing the spread of COVID-19 and its variants in the healthcare community. They, however, undermine the compelling nature of their interest by allowing healthcare workers to claim medical exemptions from their COVID-19 vaccination mandate. *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (adopting Justice Scalia's reasoning in a prior concurring opinion to state "[a] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citations omitted). Once again, COVID-19, and the spread of COVID-19, will not inquire as to a healthcare worker's reasons for being exempt from the Respondents' COVID-19 vaccination requirement. By allowing medical exemptions with no limitations on those who claim them, the Respondents have failed to state a compelling interest strong enough to infringe on the Applicants' First Amendment rights.

Second, § 2.61 fails the narrow tailoring prong, which requires it to show in this context that "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions

that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S.Ct. at 1297 (citing *Cuomo*, 141 S.Ct. at 69-70).

The Respondents willingly provide accommodations to healthcare workers claiming medical exemptions and do not impose any limitations on their ability to work with at risk patients, but they mandate the termination of healthcare workers claiming religious exemptions and then bar them from working in healthcare until they bow to the COVID-19 vaccination mandate. Even if the Respondents could constitutionally impose stricter requirements on healthcare workers who receive religious exemptions, the Respondents had many ways to limit their risk to public health. The Respondents could have required all exempt healthcare workers to work only with low-risk populations in the healthcare system. It could have required them to submit to regular COVID-19 testing, masking, and other restrictions.

They chose to do none of these things and completely ignored the fact that healthcare workers such as the Applicants delivered quality and safe healthcare throughout the COVID-19 pandemic without being vaccinated. Last year, the Respondents categorically lauded the Respondents as heroes. This year, they are trying to fire them with no consideration of how they can accommodate them. The First Amendment requires narrow tailoring, and the Respondents have not made any good-faith efforts to narrowly tailor § 2.61.

§ 2.61 does not comply with the First Amendment, and it remains hopelessly incompatible with the Court's precedents in *Cuomo*, *Tandon*, and *Fulton*. Additionally, Respondent Hochul's public comments have established that § 2.61

bears the hallmarks of the special hostility to certain religious beliefs that the Court expressly forbade in *Masterpiece Cakeshop*. Thus, the Applicants have shown a strong likelihood of success on the merits and present a case where the Respondents' actions have so defied the Court's precedents as to require extraordinary relief from this Court.

C. The Court's precedents do not permit the Respondents to justify § 2.61's individualized exemption process with a comparative, collective impact analysis. In the alternative, the Respondents must show that religious exemptions undermine herd immunity.

The Respondents have attempted to justify § 2.61's failure to make room for healthcare workers with certain religious beliefs within its individualized exemption process through a comparative, collective impact analysis. In other words, they have urged courts to compare the collective risks posed by the number of healthcare workers seeking medical exemptions versus the number of healthcare workers seeking religious exemptions. The Court's precedents foreclose such an argument.

Systems of individualized exemptions are just that: systems of individualized exemptions. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. As discussed above, the inquiry into comparability for purposes of "general applicability" examines the risks posed by an individual secular exemption compared to another individual religious exemption, not by comparing the collective impact of religious exemptions to the collective impact of secular exemptions. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. To compare collective impact is to depart from the Court's established precedents on "general applicability." Thus, the Court should not accept an invitation to engage in such a departure.

Nor should the Court accept an invitation to engage in the same departure in the "narrow tailoring" prong of the strict scrutiny analysis. Both *Tandon* and *Cuomo* establish that the proper "narrow tailoring" analysis is to look at the nature of the individual activity at issue and determine whether it is more dangerous than a comparable secular activity. *Tandon*, 141 S.Ct. at 1297; *Cuomo*, 141 S.Ct. at 69-70. These precedents do not permit the comparison of the collective impact of religious and medical exemptions, and the Court should reject any invitation by the Respondents to contort strict scrutiny into something that it is not.

As discussed above, individuals who do not receive a vaccination for religious or medical reasons pose the same risks and undermine the Respondents' interest in the same way. The same reasonable precautions and accommodations have worked for unvaccinated healthcare workers throughout the COVID-19 pandemic. They will continue to work in the hands of capable professionals. The law does not permit the faithful to be singled out because they are more numerous than those suffering from medical conditions.

In the alternative and without conceding their argument that the Court's precedents preclude a comparative, collective impact analysis, the Applicants submit that the "narrow tailoring" prong of the strict scrutiny analysis governs any comparison of collective impacts. The "narrow tailoring" prong is the only part of the *Tandon* framework that permits a "dangerousness" analysis and would be remotely consonant with the arguments that the Respondents have submitted throughout this litigation.

Because their arguments would be subject to a strict scrutiny analysis, the Respondents bear the burden of proof to establish a sufficient factual justification for why the collective impact of religious exemptions would be more dangerous than the collective impact of medical exemptions. *Reed*, 576 U.S. at 172. They cannot carry this burden simply by citing statistics that show religious exemptions would far outnumber medical exemptions because such a simplistic comparison says nothing about the dangerousness of allowing the former.

Instead, the Respondents must carry their burden under the concept that they, the Center for Disease Control and Prevention (CDC), and the World Health Organization (WHO) have bandied about for the last year and half with ambiguity: herd immunity. The WHO defines herd immunity as "the indirect protection from an infectious disease that happens when a population is immune either through vaccination or immunity developed through previous infection."[19]

The WHO's latest prognostication on herd immunity came almost a year ago, and it stated that no studies have effectively established what percentage of a population must become immune to reach herd immunity.[20] It, however, pointed to herd immunity against measles requiring 95% of a population to be vaccinated and polio requiring 80%.[21]

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[19] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

[20] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

[21] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

United States officials, including Dr. Anthony Fauci, have attempted to pin down a number for herd immunity, but they have consistently moved the goalposts, increasing that number when it has become politically convenient for them to do so.[22] When the pandemic began, Dr. Fauci consistently told the United States that it needed to achieve a 60-70% herd immunity threshold.[23] At the end of 2020, he gradually increased his prognostication until he reached 85%.[24] At the same that he moved these prognostications up, Dr. Fauci practically staked his fortune on the fact that COVID-19 would not require the same herd immunity threshold as measles: "I'd bet my house that Covid isn't as contagious as measles."[25]

The Respondents have made many of their public health decisions during the COVID-19 pandemic based on their collaborations with the CDC. They obviously do not believe that herd immunity for COVID-19 needs to be 100% or they would not allow for medical exemptions in New York's healthcare system. They, however, have not even tried to publicly define where the herd immunity threshold lies before

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[22] Dr. Fauci acknowledged that he deliberately moved the goalposts for political reasons in comments to the media: "When polls said only about half of all Americans would take a vaccine, I was saying herd immunity would take 70 to 75 percent.… Then, when newer surveys said 60 percent or more would take it, I thought, 'I can nudge this up a bit,' so I went to 80, 85." *See* https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[23] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[24] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[25] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

imposing a religiously hostile regulation on the Applicants on the basis that their collective exercise of religion will endanger public health.

As of October 30, 2021, the CDC's data shows that 74.1% of New York's population has received at least one COVID-19 vaccination and that 66.5% have been fully vaccinated.[26] The numbers become even greater when just the 18+ year old population is considered. As of October 30, 2021, the CDC's data shows that 87.4% of New York's 18+ year old population has received at least one COVID-19 vaccination and that 78.6% have been fully vaccinated.[27]Thus, by Dr. Fauci's most inflated and politicized numbers, New York has achieved some version of herd immunity in its population at large.

The numbers become more fatal to the Respondents' case when just healthcare workers are considered. As of October 27, 2021, the Respondents' own data showed that 93% of New York healthcare workers received a COVID-19 vaccine series, meaning that they took more than one vaccination.[28] This number exceeds Dr. Fauci's highest and most political prognostication by 8 percentage points, and is within 2 percentage points of the highest herd immunity threshold for any disease (95% for measles). In other words, New York has achieved herd immunity against COVID-19 among healthcare workers, thus obviating the need for it to deny religious exemptions to healthcare workers.

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[26] https://coronavirus.health.ny.gov/vaccination-progress-date
[27] https://coronavirus.health.ny.gov/vaccination-progress-date
[28] https://covid19vaccine.health.ny.gov/hospital-worker-vaccinations

Percentages on religious exemptions versus medical exemptions in the employment context and their relation to herd immunity are hard to find because the Respondents do not require private employers to report such data to them.[29] From what the Applicants can glean from publicly reported data, numbers can vary wildly. For example, in Washington state, about 6% of its public employees requested religious exemptions in response to its COVID-19 vaccination mandate.[30] To the contrary, the Los Angeles Police Department saw about 21% of its employees request a religious exemption in response to its COVID-19 vaccination mandate.[31] At a private regional health system in Arkansas, about 5% of its staff requested religious and medical exemptions.[32]

The data that the Applicants can locate plainly indicates a level of herd immunity to COVID-19 among New York's healthcare workers. Even if religious exemptions greatly exceed medical exemptions as reflected in some examples above, New York has not articulated a policy position on herd immunity that is different than Dr. Fauci's unless it invents one for litigation. Thus, it cannot carry its burden under strict scrutiny to show that religious exemptions collectively pose a far more dangerous threat to its public health policies than medical exemptions.

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[29] If they do, the Respondents do not make that data public to the best of the undersigned's knowledge.

[30] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d

[31] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d

[32] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d

II. It Is Absolutely Certain That Irreparable Harm Will Result To The Applicants If A Stay Is Denied.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Cuomo*, 141 S.Ct. at 67-68. The Applicants stand to lose their careers and the means of support by which they provide for their families simply because they will not compromise their religious beliefs. App.30-31, App.45-46, App.51-52. They have dedicated a substantial portion of their lives to building careers in healthcare. They depend on their careers in healthcare to support their families. App.30-31, App.45-46, App.51-52. § 2.61 upends decades of work and achievement for the Applicants and destroys their best chance to support their families simply because they will not violate their religious beliefs. Their plight is no abstract hardship. § 2.61 has caused them incalculable harm, and it will continue to do so unless this Court issues a stay.

Monetary damages cannot compensate them for being outlawed from their professions because of their religious beliefs. Even relief is ultimately granted in this litigation, the Applicants will still struggle for a year or more to find ways to support their families in other career fields as the courts weigh these issues. App.30-31, App.45-46, App.51-52. Their plight constitutes precisely the type of irreparable harm that merits a stay from the Court.

III. Granting A Stay Would Advance The Public Interest, Not Hamper It.

The right to religious freedom are enshrined in the U.S. Constitution. The right to be free from religious discrimination is enshrined in Title VII of the Civil Rights

Act and New York state law. The repeated efforts that society has made to articulate the public's supreme interest in protecting religious freedom cannot be clearer.

While protecting the public health is undoubtedly an important public interest, it can only go so far. As the Court specified in *Roman Catholic Diocese of Brooklyn v. Cuomo*, "even in a pandemic, the Constitution cannot be put away and forgotten." 141 S.Ct. 63, 68 (2020). This principle has held especially true in the context of the Court's First Amendment cases concerning religion where it has required states to show that "public health would be imperiled" by less restrictive measures. *Id.* at 68.

Here, the Applicants have proposed less restrictive measures. For more than a year and a half, they along with their colleagues in New York's healthcare system have safely delivered critical health care to patients during the COVID-19 pandemic. They did so by professionally complying with the precautions that the Respondents and medical experts around the world recommend: masking, frequent testing, and contact tracing. They propose the same reasonable measures that worked throughout the COVID-19 pandemic, and they have even proposed additional measures in an effort to help further the Respondents' interests by expressing their willingness to work with lower-risk patient categories. The Respondents could not rebut these proposals in good faith so they ignored them in a headlong rush to bar healthcare workers of certain faiths from working in healthcare in New York.

The Respondents' disregard for common sense and insistence on the most drastic action possible stands contradicted by the discretion that they have vested in private employers for individuals with medical exemptions. They have entirely

trusted hospitals to make smart operational decisions with respect to maximizing patient protection by failing to mandate accommodations for those with medical exemptions. This vesting of discretion implicitly acknowledges that the Applicants' proposals carry far more weight than the Respondents have acknowledged during this litigation, and it drives home the point that a COVID-19 vaccination is no magic antidote. In other words, the Respondents have not carried their burden to show how the Applicants' religious beliefs or proposals would frustrate their interests any more than the medical exemptions that they have provided for. Rather than create a system of reasonable accommodation, they have created a system of unreasonable termination.

A stay serves the public interest by allowing for "a serious examination of the need for such a drastic measure" as the one that the Respondents have imposed on New York healthcare workers without subjecting the Applicants to the burdens of religious discrimination while that examination is conducted. *Id.* at 68.

CONCLUSION

As the Court's precedents clearly establish, there is no "plenary override" to constitutional liberties even in a public health emergency. When a state's public health regulations burden fundamental constitutional rights, they must pass muster under a strict scrutiny analysis. New York State Health Regulation § 2.61 violates multiple fundamental constitutional rights, and it cannot pass muster under strict scrutiny. The Court should reject the Respondents' invitation to create a public health exception or a "plenary override" to the liberties guaranteed by the United States

Constitution and should issue a writ of injunction staying the enforcement of § 2.61 until the disposition of the Applicants' petition for a writ of certiorari is filed and disposed of.

For the reasons stated herein, the Applicants respectfully ask the Court to issue an emergency stay against the enforcement of New York State Health Regulation § 2.61 as soon as possible pending the filing and disposition of a petition for a writ of certiorari.

The Applicants will not abuse the Court's grant of a stay to create the functional equivalent of a preliminary injunction. If the Court does not set a briefing schedule for the petition, the undersigned represent to the Court that they will file a petition for a writ of certiorari within 14 days of the Court's grant of their requested stay.

Respectfully submitted

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APPENDIX