No. 23-643

In the Supreme Court of the United States

WE THE PATRIOTS USA, INC., CT FREEDOM ALLIANCE, LLC, CONSTANTINA LORA, MIRIAM HIDALGO AND ASMA ELIDRISSI,
Petitioners,
v.
CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, BETHEL BOARD OF EDUCATION, GLASTONBURY BOARD OF EDUCATION AND STAMFORD BOARD OF EDUCATION,
Respondents.

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

RESPONDENT, GLASTONBURY BOARD OF EDUCATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a mandate is neutral and generally applicable if it provides for a medical exemption but not a religious one.

2. Whether a legacy exemption is required in order to prevent the creation of an ex-post facto law, prohibited by the United States Constitution, when eliminating a prior existing exemption.

3. Whether *Employment Division v. Smith* need to be considered in the instant case.

4. Whether a newly decided Tenth Circuit Court of Appeals is meritorious in analyzing the instant case.

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STATEMENT OF THE CASE

The Petitioners, two associations and three parents (on behalf of their children) (collectively referred to as "WTP"), move this Court to address the Constitutionality of Conn. Gen. Stat. § 20-204a which codifies the vaccination laws in Connecticut public and private schools. As is more fully set forth herein, Petitioners' arguments are unsound and undermine a state's, and thus a municipalities, rights to manage public health crises. To support their arguments Petitioners rely on concepts so far removed from the issues at bar that they provide no meaningful comparison.

NATURE OF THE CASE

This action stems from a change in Conn. Gen. Stat. § 20-204a which occurred on April 28, 2021. Conn. Gen. Stat. § 20-204a codifies vaccination laws in Connecticut public and private schools. Specifically, it requires all school children to be vaccinated against a list of communicable diseases before they may attend school.

Prior to April, 2021, §10-204(a) permitted students to receive exemptions from the vaccination requirements for medical reasons, if a medical provider issued a certificate that in their medical opinion a certain required vaccine was "medically contraindicated because of [that student's] physical condition[;]" a student also could obtain a religious exemption provided they could provide a statement that the vaccine is "contrary to [their] religious beliefs"

(or the child's parent or guardian's beliefs). Conn. Gen. Stat. § 10-204a(a) (Rev. 2, 2019) (a)(2) and (3).

The Connecticut General Assembly passed No. 21-6 of the 2021 Public Acts ("P.A. 21-6") in April, 2021. The P.A. 21-6 phased out the religious exemption by amending § 10-204a(a). Accordingly, children enrolled in kindergarten through twelfth grade who previously sought and received religious exemptions were grandfathered in and were permitted to continue utilizing their religious exemption. Preschool children who previously sought and received a religious exemption were provided a one-year grace period in which to become vaccinated and complaint with the new § 10-204a(a). Pre-school children, however, were required to become compliant with § 10-204a(c) by September 1, 2022, or within 14 days of transferring to a school program. Conn. Gen. Stat. § 10-204a(c).

P.A. 21-6 § 1 was passed in response to a significant decrease in school vaccination rates across Connecticut over the years immediately preceding the new legislation. A review of the pleadings in this case and the legislative history demonstrate that the pre-existing religious exemption had an impact on the decline in vaccination rates. For the school years 2012 to 2020 there was an increase in kindergarten students claiming a religious exemption each year. The overall school vaccination rates declined over the same time period.

PROCEDURAL HISTORY OF THE SUBJECT FEDERAL ACTION

On or about April 30, 2021, Plaintiffs commenced an action in the United States District Court for the District of Connecticut against the Connecticut Office of Early Childhood Development, Connecticut Department of Public Health, Bethel Board of Education, Glastonbury Board of Education, and Stamford Board of Education. Plaintiffs are comprised of two organizations, We the Patriots USA, Inc. ("Patriots") and CT Freedom Alliance, LLC ("CT Freedom") and three parents.[1]

WTP allege that the amended § 10-204a violates (1) the free exercise clause of the First Amendment; (2) their rights to privacy and medical freedom; (3) the equal protection clause of the Fourteenth Amendment; (4) their Fourth Amendment right to control their children's upbringing; and (5) the Individuals with Disabilities Education Act ("IDEA").

The State Defendants moved to dismiss the Complaint on July 21, 2021, arguing counts one through four and all claims by the association plaintiffs had to be dismissed under Rule 12(b)(1) for

[1] Plaintiffs, Patriots and CT Freedom allege that they are organizations that advocate for the protection of constitutional rights and freedoms and that many of their members are Connecticut parent who are "affected by" P.A. 21-6 § 1. The three parent Plaintiffs allege that their children attend kindergarten or prekindergarten programs and specifically allege that vaccinating their children would be contrary to their personal religious beliefs.

lack of subject matter jurisdiction because they are barred by the Eleventh Amendment and the association plaintiffs failed to allege sufficient facts to establish associational standing. The State Defendants further argued all five counts had to be dismissed under Rule 12(b)(6) for failure to allege sufficient facts upon which relief may be granted.

The District Court issued an order on January 12, 2022, granting Defendants' motions to dismiss. The District Court specifically ruled that (1) counts one through four were barred by the Eleventh Amendment, (2) the two association Plaintiffs lacked associational standing, and (3) all five counts failed to allege sufficient facts upon which relief may be granted.

Plaintiffs thereafter filed their notice of appeal from the Order Granting Defendants' Motion to Dismiss Ruling of the District of Connecticut (Janet B. Arterton) entered on January 11, 2022.

The United States Court of Appeals for the Second Circuit affirmed the District Court's dismissal of the first four counts of the complaint and vacated and remanded the dismissal of the fifth count of the complaint for further proceedings.

The Second Circuit Court of Appeals in the Certified Order stated:

> Only one court -- state or federal, trial or appellate -- has ever found plausible a claim of a constitutional defect in a

> state's school vaccination mandate on account of the absence or repeal of a religious exemption….
> We decline to disturb this nearly unanimous consensus. (Internal citations omitted).

App.3a.

Ultimately the Second Circuit issued an order affirming the District Court's dismissal of the first four counts of the complaint and remanding the fifth count for further proceedings.

On August 17, 2023, Petitioners filed a petition for *en banc* review. The Second Circuit denied Petitioners' petition for *en banc* review on September 11, 2023. App.128a-129a.

Petitioners then filed for the instant writ of certiorari on December 11, 2023.

REASONS FOR DENYING THE PETITION

Petitioners fail to present a novel or compelling issue warranting the granting of certiorari. The Second Circuit properly concluded that the first four counts of the complaint should be dismissed.

More specifically, the Second Circuit correctly reasoned that public health concerns, in light of declining vaccination rates, leaves the state, and thus the country, at risk of disease outbreaks. The Second Circuit further correctly reasoned that § 10-204a is

neutral under *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, generally applicable, is subject to rational basis review, and does not offend the Free Exercise Clause.

Petitioners have failed to put forth compelling reasons for the invocation of this Court's judicial discretion. The subject Petition is an inappropriate case upon which to grant certiorari.

I. THE SECOND CIRCUIT'S DECISION DOES NOT EXACERBATE A PRE-EXISTING CIRCUIT SPLIT OVER WHICH CATEGORICAL SECULAR EXEMPTIONS DEPRIVE A LAW OF NEUTRALITY AND GENERAL APPLICABILITY UNDER *SMITH*

Petitioners, banking on the confusion that emergency orders and rules that the Covid-19 pandemic sparked, are over ambitious in their assertion that there is a widespread circuit split over whether or not a religious exemption may be denied, in the context of vaccination, when a medical exemption is provided. In doing so, Petitioners rely on the dissenting opinion of Justices Thomas, Alito, and Gorsuch in *Dr. A., et al. v. Hochul*, 142 S.Ct. 2569, 2570(Mem) (2022). Petitioners, however, are misguided in their reliance on *Dr. A* as that case exclusively involved emergency vaccination mandates during the height of COVID-19. This is an important distinction which must not be overlooked as the law at issue in *Dr. A* did not undergo several iterations of drafting, following lengthy legislative debate as occurred prior to the passing of § 10-204a.

A. Mandatory Vaccination Laws With Medical But Not Religious Exemptions Is Generally Applicable Here.

A law that "incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review. If the law it not neutral or not generally applicable, it is subject to strict scrutiny…." *App. 22a. See Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1296-97, 209 L.Ed.2d 355 (2021) (per curiam); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

While the Free Exercise Clause aims to protect "the right to believe and profess whatever religious doctrine one desires," *Smith*, 494 U.S. 872, 877 (1990), the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id*. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)(Stevens, J., concurring in judgment)). A neutral law of general applicability is constitutional if it is rationally related to a legitimate state interest, even if there are incidental burdens on religious traditions. *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522, 141 S.Ct. at 1876; *see also, Smith*, 494 U.S. at 878-82.

Here, 10-204a applies universally, and does not make individual exemptions for certain individuals or groups of individuals unlike the rule at issue in *Lukumi*, 508 U.S. 520, 543 (1993) (laws prohibiting

the slaughter of animals was clearly motivated by religion and abhorrence of animal sacrifice).

This Court, although addressing vaccination mandates during the height of COVID-19, in *Does 1-3 v. Mills*, confirmed that "a law fails to qualify as generally applicable, and thus triggers strict scrutiny, if it creates a mechanism for 'individualized exemptions.'" 142 S. Ct. 17, 19 (2021) (Gorsuch, joined by Thomas and Alito dissenting from denial of certiorari) *citing Lukumi*, 508 U.S., at 537, 113 S.Ct. 2217; *see also Fulton v. Philadelphia*, 593 U.S. ——, —— – ——, 141 S.Ct. 1868, 1876-1877, 210 L.Ed.2d 137 (2021).

Defendants do not have a discriminatory scheme of individualized exemptions to the vaccination requirement. Rather, the Statute provides authority, only to medical providers, to indicate that a vaccination is inappropriate, "medically contraindicated", for an individual: "in the opinion of such physician, physician assistant or advanced practice registered nurse such immunization is medically contraindicated because of the physical condition of such child…." Conn. Gen. Stat. Ann. § 10-204a. Defendants have not prescribed 'a list' of conditions that constitute contraindications for vaccination, rather, that decision is left to the sound discretion of a child's medical provider.

The medical exemption contained within § 10-204a is not a "mechanism for individualized exemptions" which would render the Statute not generally applicable. *Fulton*, 141 S.Ct at 1977 (2021). The instant case is unlike *Dahl v. Board of Trustees of Western Michigan University*, 15 F.4th 728, 395 Ed. Law Rep. 484

(2021), where the university retained full discretion to grant or deny religious and medical exemptions to its vaccine mandate. Here, the State and municipality Defendants have forgone the ability to determine which medical conditions may be deemed a contraindication of vaccination and instead placed that "power" upon medical providers. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 fn.29 (2d Cir. 2021), opinion clarified, 17 F.4th 368 (2d Cir. 2021).

The vaccination mandate at issue here is generally applicable. "'[A] law can be generally applicable when, as here, it applies to an entire class of people.' The Vaccine Mandate applies to the class of people who work in the New York City public schools." *Kane v. de Blasio*, 623 F. Supp. 3d 339, 356 (S.D.N.Y. 2022). The mandate in § 10-204a is generally applicable as it applies to all school aged children and the mechanism for exemptions is completely removed from the hands of the state and municipalities.

Petitioners out right decry the Second Circuit's determination the § 10-204a is a law of general applicability "by invoking the state's asserted interest in the medical exemption, rather than focusing on that exemption's impact on the purpose of the vaccination mandate itself." Petition at p. 14. Petitioners, however, never once make a claim that the vaccination mandate was passed for a different purpose than to protect the health and safety of school age children, except that because religion is mentioned the statute must be religiously motivated. They put forth no alternative purpose for the statute because no alternative purpose exists.

The United States District Court for the Southern District of New York provides sound guidance that vaccination requirements, especially in a school setting, "will potentially save lives, protect public health, and promote public safety." *Kane*, 623 F. Supp. 3d 339, 358 (S.D.N.Y. 2022) (internal quotations omitted). The *Kane* court further stated that "it is obvious that New Yorkers may choose whether to attend a sporting event with unvaccinated athletes and accept whatever risk those athletes pose. In contrast, school attendance is not a similar choice, and the risk posed by unvaccinated teachers is obvious." *Kane*, 623 F.Supp.3d 339, 356 (S.D.N.Y. 2022). (The court here was analyzing a New York vaccination mandate requiring teachers to be vaccinated while not having the same requirement of professional athletes.) Unvaccinated students, much like unvaccinated teachers, pose an obvious risk of infection to students and teachers alike; it is of paramount importance to protect the Nation's youth which can be done, in part, by ensuring a vaccination compliant student is not put at unnecessary risk of infectious disease by their non-complying peers.

Ultimately and contrary to Petitioners' assertion, § 10-204a is generally applicable.[2]

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[2] It is also important to note that West Virginia's analogous provision for compulsory vaccination, W. Va. Code Ann. § 16-3-4, provides for no religious exemption to vaccination while providing an exemption for medical necessity. Proposed legislation, House Bill 5105, in West Virginia was most recently vetoed by West Virginia Governor, Jim Justice on March 27, 2024. West Virginia Governor stated the opposition to the

B. Resolution Of The Legal Question: Regulatory Objective v. Exemption Objective.

Section I.B. of the Petition purports to raise the issue of whether the courts must analyze a law's regulatory objective or if it must analyze the law's exemption objectives. Petitioners are creating an "either or scenario" when in fact both objectives *should* be analyzed in tandem in order to get the complete picture. Just because Petitioners believe there is a dispute among the circuits, does not in fact mean there is such a circuit split. Petitioners do not rely on any circuit opinions which address the questions at issue, rather they rely on law review articles to advance an unmeritorious argument.[3]

At most, Petitioners have demonstrated persuasive arguments at a policy level, however, they have provided nothing within the circuits to indicate a circuit split warranting the granting of certiorari.

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religious exemption believes the exemption "will do irreparable harm by crippling childhood immunity to diseases such as mumps and measles." Jim Justice, Letter re: Enrolled Committee Substitute for House Bill 5105 (2024). https://www.wvlegislature.gov/Bill_Text_HTML/2024_SESSIONS/RS/veto_messages/HB5105.pdf

[3] Petitioners rely on *William T. Sharon, Religious and Secular Comparators*, 30 Geo. Mason L. Rev. 763, 801 (2023). *See Petition* at p.16.

In addition to the law review articles, Petitioners exclusively rely on the analysis in *Tandon v. Newsom*, 593 U.S. 61, 64 (2021), however, *Tandon* is not nearly as relevant and/or on point as they contend. Additionally, Petitioners have a gross misinterpretation of *Tandon*.

This Court's majority opinion in *Tandon* stated "[w]ether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justified the regulation at issue…. Comparability is concerned with the risks various activities pose, not the reasons why people gather. *Id*., at 62, *citing Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ——, —— – ——, 141 S.Ct. 63, 67-68, 208 L.Ed.2d 206 (2020) (per curiam) – ——, 141 S.Ct., at 66.

Accordingly, this Court has already determined that it is the law's regulatory objective that must be analyzed. Here, the regulatory objective in enacting §10-204a was to protect the health of our Nation's youth by preventing them from being unnecessarily exposed to a growing number of unvaccinated peers.

C. Strict Scrutiny is Not Necessary Because the Vaccination Mandate id Neutral and Generally Applicable.

§ 10-204a is neutral and generally applicable, therefor the Second Circuit correctly utilized rational basis review. The Second Circuit was *not* required to use strict scrutiny.

1. The Medical Exemption.

The medical exemption contained within §10-204a is neutral and generally applicable. Further, the power to dictate which students have contraindications for vaccination, thus medically exempting them from vaccination, is retained by each student's medical provider. There is no "list" of medical conditions prescribed by that state or municipalities which indicate which medical conditions are a contraindication for vaccination. Accordingly, there is no scheme of individualized exemptions.

A thorough review of vaccination trends over the years prior to passing §10-204a demonstrated a clear decline in vaccination rates of Connecticut school children. A further analysis demonstrated that the increase in unvaccinated children from 2012 through 2020 was not due to an increased in medical exemptions, "the percentage of Connecticut kindergartners claiming a medical exemption from vaccination remained roughly constant, at 0.2-0.3%, over the same period." App. 7a-8a.

In the context of healthcare providers during COVID-19 a note to paragraph (a)(2) of federal legislation, 29 C.F.R. § 1910.502, provides a medical exemption to vaccination: "OSHA does not intend to preclude the employers of employees who are unable to be vaccinated from the scope exemption in paragraphs (a)(2)(iv) and (v) of this section. Under various anti-discrimination laws, workers who cannot be vaccinated because of medical conditions… may ask for a reasonable accommodation from their employer." 29

C.F.R. § 1910.502. There is no comparable provision providing a religious exemption.

2. The Legacy Exemption

Prior to passing § 10-204a vaccination trends showed a clear decline in vaccination rates of Connecticut school children. A further analysis demonstrated that the increase in unvaccinated children was due to an increased in religious exemptions:

> As the rate of vaccination against MMR and other vaccine-preventable diseases was declining, the percentage of Connecticut kindergartners whose families claimed exemption from vaccination on religious grounds was on the rise. In school year 2012-2013, 1.4% of kindergartners were exempt from one or more vaccinations on account of religious objections; in school year 2018-2019, the percentage rose to a high of 2.5%, before dropping slightly, to 2.3%, in school year 2019-2020. The overall trend was toward an increase in religious exemptions.

App. 7a.

Petitioners contend that §10-204a is, in effect, the State creating "a preference for certain religious conduct over other identical religious conduct…." Petition at p. 24. This argument lacks merit.

The legislation here provides no different treatment for the most popular religious affiliations than it

provides for the least popular. Rather, all religious denominations are accorded the same treatment; that is, a school-aged child with a pre-existing religious exemption may retain that exemption whereas a school aged child who does not have a pre-existing religious exemption may no longer obtain one. Therefore, Free Exercise is protected because "legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Larson v. Valente*, 456 U.S. 228, 245 (1982).

Had § 10-204a failed to include the legacy exemption for previously religiously exempted students it would have had the effect of being an ex post facto law. As this Court knows, Article I of the United States Constitution states "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9, cl. 3. If this carve-out was not included it could have been seen as a taking of school children's First Amendment protection of religious freedom.

The legacy exemption in §10-204a provides the vehicle to prevent both ex post facto effect as well as prevent a taking of First Amendment Rights already afforded to those children with a pre-existing religious exemption. The legacy exemption does not require the application of strict scrutiny as it is a law of neutral general applicability in that it does not favor any one religion over any other.

3. Rational Basis Review Applies to Conn. Gen. Stat. §10-204a.

This Court has repeatedly affirmed "that a law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review. If the law is not neutral or not generally applicable, it is subject to strict scrutiny…." App. 22a. *See,* ___ *U.S.* ____, 141 S. Ct. 1294, 1296-97, 209 L.Ed.2d 355 (2021) *(per curiam); see also Lukumi*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

As stated above, §10-204a is a law that is neutral and generally applicable, therefore rational basis review applies, not strict scrutiny.

Contrary to Petitioners' belief, the statute leaves open alternative means for religious objectors to educate their children. Homeschooling is a meaningful alternative to in person learning and has become and even better alternative since COVID-19, which sent many of us to continue education and work from home.

Petitioners' argument on page 31 of the Petition undermines the rest of their argument. They argue that the blanket application of the statute, to protect students in areas of higher prevalence of unvaccinated students is not narrowly tailored. If, the legislation did as Petitioners propose, require each school district to maintain a certain percentage of vaccination compliant students, that would undoubtedly lead to actual

religious discrimination for the same reason that voting districts are heavily scrutinized when they are redrawn.

It is often the case, although not always, that individuals, with similar religious beliefs live in close proximity with one another, often to foster a sense of community. If this measure had been taken instead, it is likely that certain religious groups would be more significantly affected than others. Doing so would remove the statute from being a law that is neutral and generally applicable, as it is currently.

Rational basis review is the appropriate, and only, method of reviewing the issues presented in the instant case.

II. *SMITH'S* HYBRID RIGHTS EXCEPTION IS INAPPLICABLE HERE

Contrary to Petitioners' claim, this Court cannot find in favor of Petitioners and hold §10-204a's exemptions deprive it of general applicability under *Smith*.

This Court in *Smith* instructed us that a "hybrid-rights" claim arises when there is a Free Exercise Clause claim in tandem with an alleged violation of a fundamental right.

Petitioners rely heavily on *Yoder* where this Court held that compulsory education of Amish children "would gravely endanger if not destroy the free exercise of their religious beliefs." *Wisconsin v. Yoder*,

406 U.S. 205, 205 (1972). *Yoder*, however, is not on point and is not as instructive as Petitioners hope.

In *Yoder* the State, as parents patriae, argued that children must attend school through age 16. The State was unsuccessful, however, because the Amish parents were able to put forth persuasive evidence to disprove the State's position.

> [A]n additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

Yoder, 406 U.S. 205, 222 (1972). See *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923).

Accordingly, by taking their children out of "traditional schools" Amish parents were not foreclosing the education of their children. Rather,

education of Amish children continues outside of the formal classroom and is geared towards educating the children on life in Amish society. The present case is much different.

Further, the cases (including *Yoder*) which Petitioners rely address the Free Exercise Clause and the requirement for parents to keep their children in formal education until a certain age. The instant case poses the opposite. Here, parents are seeking to have their children remain in school, while they are excluded by the State for failure to be compliant with the requirements of in person education and § 10-204a.

Smith stands for the proposition that a hybrid rights approach should be utilized when a fundamental right is being challenged along with a Free Exercise claim. The Second Circuit properly rejected the hybrid rights approach here as education, although of extreme importance, has yet to be dubbed a fundamental right.

Petitioners are free to argue that a hybrid-rights approach is warranted. But they are misguided. Hybrid-rights approach applies only when a fundamental right is being impinged upon at the same time as a Free Exercise Clause violation.

The only fundamental right at issue in the present case is a parent's right to raise their child the way he or she sees fit. Here that means the parent's right to prohibit their child from being vaccinated. The State, and thus the City of Glastonbury, is not requiring

parents to forego their religious objections and vaccinate their child. The City, following State law and guidance is prohibiting those who are unvaccinated from attending in person learning in the district, as required by the statute and following State rule.

In order to garner attention to their claims Petitioners use terms such as "bar" and "forbid" when referencing what §10-204a requires of them. Petition at p. 35. §10-204a, however, neither bars nor forbids them from obtaining childcare or educating their children. This is unfounded. §10-204a merely requires that children be vaccinated for certain, enumerated, communicable diseases prior to attending an in person learning environment.

Therefore, the hybrid-rights approach called for by the Petitioners is inappropriate in the context of the present case.

III. RECENT CASE LAW DEVELOPMENTS IN THE UNITED STATES DISTRICT COURT FOR THE TENTH CICUIRT HAVE NO EFFECT ON THE PRESENT CASE

Petitioners alerted Respondents to the fact that on May 7th, 2024, the United States Court of Appeals for the Tenth Circuit issued its decision in *Jane Does 1-11; John Does 1, 3-7 v. The Board of Regents of the University of Colorado, et. al.*, No. 21-1414 (10th Cir. May 7, 2024). Respectfully, the recent decision by the Tenth Circuit has no effect on the issues at place in the instant matter.

In reference to two policies regarding vaccination against COVID-10, the Tenth Circuit held:

> that a government policy may not grant exemptions for some religions, but not others, because of differences in their religious doctrines, which the Administration's first policy did. We further hold that the government may not use its view about the legitimacy of a religious belief as a proxy for whether such belief is sincerely-held, which the Administration did in implementing the first policy. Nor may the government grant secular exemptions on more favorable terms than religious exemptions, which the Administration's second policy does. Finally, we hold that the policies at issues in this appeal were motivated by religious animus and therefore subject to strict scrutiny….

Appendix for Respondents Glastonbury Board of Education (herein after "*App*.") at *App*. 4. The most relevant part of the history of the policies at issue in that case is as follows.

In April 2021 the University of Colorado (hereinafter referred to as the "University") announced that students and employees returning for the fall semester would be required to be vaccinated against COVID-19, with exceptions. The University did not establish an exemption policy. Instead, the University allowed each campus to prescribe its own exemption policy and process for obtaining an exemption. *App*. at 4.

One campus, the Anschutz Campus (hereinafter referred to as "Anschutz") implemented a policy which would allow students and employees to obtain an exemption on religious grounds using a form. *Id*. at 4-5. Anschutz enacted two policies: the first policy took effect on September 1, 2021 (hereinafter referred to as the "First Policy") and the second policy, created in response to the First Policy, took effect on September 24 (hereinafter referred to as the "Second Policy").

The First Policy "declared that '[a] religious exemption may be submitted based on a person's religious belief whose teachings are opposed to all immunizations.' [but it] would 'only accept requests for religious exemption that cite to the official doctrine of an organized religion . . . as announced by the leaders of that religion.'" *Id*. at 5 *citing* the First Policy.

In response to input received by students and staff, and threats of litigation, Anschutz enacted the Second Policy. The Second Policy provided that a religious exemption would be granted unless granting the exemption would unduly burden members of the campus. *Id*. at 7. The Second Policy only provided a religious exemption to employees; students were unable to obtain any religious exemption under the Second Policy.

The two policies in the Colorado case, and § 10-204a are vastly different. Further, the approach to the Colorado policies and § 10-204a are also vastly different.

A. Anschutz's First Policy Clearly Violates The Safeguards For Religion Provided For in the US Constitution.

The First Policy enacted by Anschutz is dissimilar from § 10-204a. For starters, the First Policy "is permeated with animus against *certain* religions, and because it involves an intrusive inquiry into the Does' religious beliefs, the Does are likely to prevail on their Free Exercise Clause and Establishment Clause Claims." *Id*. at 30. The First Policy was clearly motivated by religious animus, even if not apparent on the face of the policy, the system of granting and denying exemptions makes the motivation clear. "If a government policy is motivated by religious animus, the policy is categorically unconstitutional under the Free Exercise Clause." *Id*. *See Ashaheed v. Currington*, 7 F.4th 1236, 1244 (10th Cir. 2021).

§ 10-204a, however, has no such similar motivation nor does it have a similar exemption system. Rather, §10-204a does not provide for a system of religious exemptions. And it especially does not provide for a system of individualized exemptions which would run afoul of a law of general applicability. See Section **I.A.**, supra.

In enacting their First Policy Anschutz "implemented a policy of granting exemptions for some religions, but not others." *Id*. at 31. Their policy "resulted in real-world discrimination among religions[,]" a clear violation of Constitutional safeguards. *Id*. at 32.

B. Anschutz's Second Policy Clearly Violates The Safeguards For Religion Provided For in the US Constitution.

Anschutz's Second Policy is likewise dissimilar from § 10-204a. The Second Policy was "tailored to reach precisely the same results as the unlawful September 1 Policy, the Does are likely to prevail in showing that the September 24 Policy is a product of discriminatory religious animus, not neutral motivations." *Id*. at 44.

As with the First Policy, the Second Policy also fails to comply with the requirements of general applicability because it permits exemptions on an individualized basis. In determining that the Second Policy, like the first, was a result of religious animus, the Tenth Circuit reasoned "[i]t is manifestly unreasonable to think that the September 24 Policy would reach precisely the same results as the September 1 Policy by accident." *Id*. at 48.

Again, it is clear from the application of the Anshutz policies religious exemptions that religious animus was a motivating factor in granting or denying a religious exemption. The policy allowing for exemptions there was not neutral or generally applicable and thus requires review under strict scrutiny.

§ 10-204a, however, has no similar motivation based on religious animus nor does it have any individualized exemption policy. The religious

exemption in the Second Policy cannot be viewed in a similar manner to § 10-204a.

C. Anschutz Is An Employer Subject To Title VII Of The Civil Rights Act of 1964 Thus Requiring Them to Provide A Religious Exemption To Employees; Further Removing The Tenth Circuit's Decision From The Realm Of Applicability.

In addition to the preceding, the Colorado case is further removed from being appliable in that Anschutz is an employer and subject to Title VII of the Civil Rights Act of 1964. Accordingly, Anschutz was *required* to provide a religious exemption to their policies. *Id.* at 54-55. *See Groff v. DeJoy*, 600 U.S. at 447, 454 (2023).

The Tenth Circuit said it best: "[t]hus, although "the First Amendment likely does not require any religious accommodations whatsoever to neutral and generally applicable laws," a government employer such as the Administration must still provide religious accommodations under Title VII, and "must abide by the First Amendment" in doing so." *Id.* at 55 *citing Kane v. de Blasio*, 19 F.4th 152, 168-9 (2d Cir. 2021) (per curiam). § 10-204a is not applicable to employees whereas the two policies in the Colorado case directly concerns employees.

Not only does this point further remove the Colorado case from the realm of applicability to the instant case, but it also provides additional support for

Respondents. § 10-204a is not only neutral and generally applicable, but it is in fact not required to provide any sort of religious exemption. § 10-204a does not run afoul of any Constitutional requirements.

D. The Two Anschutz's Policies Are Vastly Different from § 10-204a; The Colorado Case and the Instant Case Should Not be Viewed In Tandem.

The only similarity between the case at bar and the Colorado case is that they each involve vaccination requirements in a school setting. Petitioners, however, are anticipated to rely on this recent Colorado case because the religious exemption there was found by the Tenth Circuit Court of Appeals to be violative of the Constitution. As explained above, however, the two cases are so dissimilar that they should not be considered in tandem.

Respectfully, this Court should not consider the Colorado case meritorious while resolving the claims at issue in the case at bar.

CONCLUSION

For the foregoing reasons, the Respondent, Glastonbury Board of Education, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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