

No. 25-126

IN THE
Supreme Court of the United States

MICHAEL KANE, *et al.*,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, *et al.*,

Respondents.

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

**BRIEF OF *AMICUS CURIAE* LORICA INSTITUTE
FOR FREEDOM OF EXPRESSION AND RELIGION
IN SUPPORT OF PETITIONERS**

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I. Identity and Interest of the *Amicus*, Prior Notice to Counsel of Record of Intent to File

Amicus curiae Lorica Institute for Freedom of Expression and Religion is a not-for-profit corporation incorporated under the laws of Missouri. Its principal mission is to vindicate—by education, legal advocacy, and respectful participation in public debate—the rights of free expression and free exercise of religion guaranteed by the Constitution of the United States and other constitutional and positive law of the United States and her several federated states.¹

On August 8, 2025, undersigned counsel by email informed counsel of record for both petitioners and respondents that Lorica intended to file this brief in support of the petition to grant a writ of *certiorari*.

II. Introduction and Necessary Background

In designing to terminate professing believers who objected to receiving the COVID shots with as little risk, effort, and cost as possible, the decision makers at New York City’s Department of Education, the collective respondents here, caught themselves in the switches of the First Amendment and Title VII. The only way out was to define “religion”—a term used in both the First Amendment and Title VII, of course—so narrowly that the issue largely disappeared. That any public actor should

1. This brief has been authorized by Lorica’s governing agents. No counsel for any of the parties, nor any person or entity outside of Lorica and its corporate agents, has participated in the preparation or funding of this brief. Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received timely notice of this filing.

be in the business of defining down “religion,” at all, is strange, but the Second Circuit has now not only OK’d the exercise for respondents, it has effectively adopted a definition itself—without ever worrying about what the public understanding of the word is at *any* point in the nation’s history. That is not permissible.

Initially attempting to blink the Free Exercise clause completely, and make their vaccine mandate plainly “generally applicable” and “neutral” to religion (and so escape strict scrutiny risk) under *Employment Division v Smith*, 494 U.S. 872 (1990), respondents allowed for no religious exemptions, at all. But that necessarily put their workplace mandate firmly in the teeth of Title VII (42 U.S.C. 2000e(j)), which imposes a religious accommodation duty independent of the Constitution on all employers—as the unions representing most New York City teachers promptly pointed out. (All of this is amply detailed in the Second Circuit opinions that Petitioners have placed in their Appendix, *Kane v. DiBlasio*, 19 F.4th 152 (2021), Petition Appendix at pp. 95a to 140a; *New Yorkers for Religious Liberty v. City of New York*, 125 F.4th 319 (2025), Petition Appendix at pp.1a to 30a.

The agreement that respondents reached with the union to resolve this, though, opened neither of the switches they had steered themselves between. The fundamental problem was that negotiated, modified mandate procedures gave respondents discretion not merely to decide who got exempted, but even to decide what the word “religion” means in the Constitution and Title VII.

The procedure required that accommodation requests to be processed “for recognized [*sic* –no explanation of

who supplies the “recognition”] and established religious organizations (e.g., Christian Scientists²).” *Kane*, 19 F.4th at 160; and *cf. New Yorkers for Religious Liberty*, 125 F.4th at 330-331. But it required first-pass, final denial “where the objection is personal, political, or philosophical in nature” or if a “leader of the religious organization has spoken publicly in favor of the vaccine.” *Kane*, 19 F.4th at 160. Any otherwise qualifying objectors also were required to get a “religious leader” to vouch for them in writing. *Ibid.*

The two-tiered standard for automatic processing—“recognized” and “established” religions get the pass,

2. This choice to favor Christian Scientists especially is almost comically ironic, but also illustrative of respondents’ blind ignorance of things religious in devising the mandate procedures. It is the doctrine of Christian Science, now widely publicized, that its adherents’ moral decision making must be made by consulting their *personal* consciences, not by dictates from authorities within the Church of Christ Scientist:

Most of our church members normally rely on prayer for healing. It’s a deeply considered spiritual practice and way of life that has meant a lot to us over the years. So we’ve appreciated vaccination exemptions and sought to use them conscientiously and responsibly, when they have been granted.

On the other hand, our practice isn’t a dogmatic thing. Church members are free to make their own choices on all life-decisions, in obedience to the law, including whether or not to vaccinate. These aren’t decisions imposed by their church.

“A Christian Science Perspective on Vaccination and Public Health,” published online at <https://www.christianscience.com/press-room/a-christian-science-perspective-on-vaccination-and-public-health> (last visited August 25, 2005).

others get scrutinized—obviously vitiated any claim of general applicability for First Amendment purposes. And the definitional exclusions for things “personal, political, or philosophical” as non-“religious” is grounded in no textual provision of either the First Amendment or Title VII (and contrary to the history of “religion” in the United States, as shown briefly below). That the provision gave *respondents* discretion to determine what is “religious” what not likewise vitiates any claim of general applicability.

As the Petition details, the Second Circuit in *Kane* recognized some of these constitutional problems, applied strict scrutiny to the mandate, but only to the procedures *as applied* to the plaintiffs (*Kane*, F.4th at 168-170), and ordered a “fresh [re-]consideration” of the plaintiffs’ denied exemptions. *Id.* at 177. But it had no real criticism of the personal-is-not-religious definitional element of the mandate, at all. And so respondents continued to apply their personal-is-not-religious definitional doctrine in the “fresh [re-]considerations” to deny all of the plaintiffs requests for exemptions, backing up those denials for classroom personnel by claiming “undue burden” under Title VII, too.³ The district courts dismissed all of the

3. This is shown best by the synopses of “reconsideration” decisions that respondents put on record in the Southern District *Kane* matter, no. 21-Civil-7863, ECF no. 122-2, which was relied on explicitly by the District Court in its order of dismissal, too. App. at p. 65a. The following excerpt is illustrative of those boilerplate denials:

APPEAL NO. 00004831, Margaret Chu

After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE’s determination to deny Appellant Chu’s reasonable accommodation. The record before the Panel demonstrated that the employee’s sincerely held religious beliefs, which the panel does not question,

claims, with prejudice, after these fresh reconsiderations, which the Second Circuit largely affirmed. In that opinion, the Second Circuit held that the fresh reconsideration process did not “prefer[] certain religions over others [n]or was infected with religious animus,” and so declined to deploy strict scrutiny to the process on its face or as-applied to individuals whose requests were denied. *New Yorkers for Religious Liberty*, 125 F.4th at 331-332.

But the Second Circuit’s holding as to one of the two plaintiffs (Heather Clark) whose dismissed claim it revived flatly contradicts its holding that the fresh reconsideration process did not give respondents discretion to prefer certain religions to others:

[T]he district court dismissed Clark’s claim because “the [Citywide] panel found that her decision to not receive a vaccin[e] was not based on her religious belief, but rather, on nonreligious sources,” a conclusion the district

are not preventing the employee from vaccination. Indeed, *the religious doctrine articulated provides, ultimately, for appellant to choose to take or abstain from vaccination based on her view of the facts and circumstances. The appellant is not entitled, under the law, to a reasonable accommodation concerning her personal, fact-based decision not to take the vaccine.*

Even assuming the appellant had established a valid basis for a reasonable accommodation, the panel believes the DOE has satisfied what is necessary under the law to demonstrate undue hardship. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated...

Kane v. DiBlasio, S.D.N.Y. No. 21-cv-07863, ECF Document no. 122-2 at p. 6 (emphasis supplied).

court deemed “entirely proper ... under Title VII.” *Kane II*, 623 F. Supp. 3d at 362 n.30. *While such a conclusion could indeed be proper and constitutional* if the Citywide Panel had a basis for reaching it, Clark’s allegations support the plausible inference that the Panel denied her request solely on the basis of its characterization of her religious objection as too idiosyncratic rather than as not sincerely held or non-religious in nature.

125 F.4th at 335 (emphasis supplied).

Moral decision making under this holding thus becomes a “non-religious” exercise, regulation of which may be “proper” under the First Amendment and Title VII, if the exercise includes consultation of non-religious sources. That necessarily implies that a process of applying personal religious *principle*—based not on “sources” but on cultivated personal moral discernment—to facts and data that is supplied by non-religious source material is not “religious” under the Free Exercise clause or Title VII.

But that very process of applying internal, personal moral discernment (not based on outside “sources”) to information supplied by “non-religious sources” is precisely what many (probably most) strains of Christian moral theology and philosophy simply calls “conscience.”

III. Summary of Argument

The doctrine of primacy of conscience, in substance if not by that name, has always been understood to be part of “religious” systems protected by the First Amendment

and Title VII. The definitions of “religion” glossed onto those laws by respondents and the courts below, however, (as well as several other courts throughout the country) defy that historical and widely held understanding, and define all “primacy of conscience” religions out of the protections of American law.

IV. Argument

Mainstream Christian religions from before the time of the adoption of the Constitution have demanded of adherents a process of moral decision making that requires application of a personal, internal faculty (unique to each human) to the facts and circumstances that confront him or her when a moral judgment is required. They also require that the facts and circumstances to which that personal, internal faculty applies itself be gathered assiduously, from personal perception as well as from available other sources, *especially* factual, non-religious sources that the person regards as trustworthy. Failure to follow this process, and the judgment of the personal, internal faculty—conscience—is always sinful.

The line of demarcation between “religious” and “non-religious” moral decision making that respondents adopted, and the Second Circuit approved as “proper” under the Constitution and Title VII, utterly blinks this command of the primacy of conscience, and so also defies the public understanding of “religion” as that term is used in the First Amendment and Title VII.

- a. **Religions that accord primacy of conscience demand that a believer's personal, individual conscience consult "non-religious" sources for the evidence, information and data to which moral analysis must be applied, and that the believer must act according to conscience, not doctrine.**

Since at least the time that Thomas Aquinas lectured in Paris in the thirteenth century, Roman Catholic moral theology (or at least the Thomistic strain of it that has now triumphed its way into the Catechism of the Catholic Church) has taught that an individual's informed, personal moral conscience *must* be consulted and obeyed even if it seems to contravene a consensus of moral judgment, even a consensus within the church. *See, e.g.,* John Kavanaugh, S.J., Ph.D., "Uninformed Conscience," *America, The Jesuit Review*, June 10, 2010, ("Conscience is a particular kind of judgment by which we [each] apply our knowledge of good and evil...Aquinas points out that when I make such a judgment, I should follow it...[but] we base our moral judgments not only on principles but on evidence, data and information" that we must consult when any moral judgment is confronted. And that doctrine, commonly now called "the primacy of conscience" is codified in the Catechism of the Catholic Church: "A human being must always obey the certain judgment of his conscience. If he were to deliberately act against it, he would condemn himself." English Translation of Catechism of the Catholic Church, U.S. Catholic Conference, Inc. (1997), §§1790 and 1800.

The substance of that doctrine is likewise a part of Methodist moral theology, too, articulated most famously in John Wesley's Sermon 105:

Conscience, then, is that faculty whereby we are at once conscious of our own thoughts, words, and actions; and of their merit or demerit, of their being good or bad ... be sure to obey it at all events; continually listen to its admonitions, and steadily follow them. Whatever it directs you to do, according to the word of God, do.

John Wesley, “Sermon 105 – On Conscience,” *The Sermons of John Wesley, 1872 Edition*, ¶¶3 and 18 (electronic reprint at wesley.nnu.edu/john-wesley/the-sermons-of-john-wesley-1872-edition/sermon-105-on-conscience).⁴ It is even a part of the moral theology of the Church of Christ Scientist, respondents’ crude misunderstanding notwithstanding. See footnote 2 above.

Primacy of conscience doctrine, if not by that name but in substance, at least, was part of Catholic moral doctrine from at least five centuries before the adoption of the First Amendment in 1791, and was preached by Wesley himself in the 18th century roughly contemporaneously with adoption of the First Amendment (Wesley in fact died in 1791, the very same year that the First Amendment was ratified. Editors of Encyclopedia Britannica, “John Wesley,” August 6, 2025, <https://www.britannica.com/biography/John-Wesley>). And Wesley’s sermons were

4. Methodism became perhaps the dominant denomination professed by African Americans, both slaves and freedman, by late in the 18th century and persisting through the 19th. See Albert Raboteau, *Slave Religion: The “Invisible Institution,”* Oxford U. Press (2004 ed.), p. 131 (“the Separate Baptists and the Methodists reaped a revival of harvest of black and white members ... By the end of the [18th] century these two denominations were in the ascendancy ... Slaves and free blacks were among those swelling the ... Methodist ranks”).

widely disseminated in that 1872 edition of his Sermons quoted above, published only four years after the Fourteenth Amendment was ratified.

Thus, when the religion clauses of the First Amendment first could be applied to actions of state actors through the Due Process clause of the Fourteenth Amendment, believing Freedmen who were the special objects of that provision “were swelling the ... Methodist ranks” Raboteau, note 4 *supra*, whose doctrine included the admonition as to personal conscience “Whatever it directs you to do, according to the word of God, do”! Wesley Sermon 105, *supra*. And the Catholic moral doctrine of Irish-American, Catholic volunteers and conscripts to the Union Army who fought and died in service to a victory that was precondition to the adoption of the Fourteenth Amendment included the command that a person must always obey the certain command of his conscience. Catechism of the Catholic Church, *supra*, §1800.

- b. The authorities presuming to rule as a matter of law what is or isn’t a “religious” objection to the COVID shots wrongly define “conscience” out of American religion and so contradict the public understanding of the word “religion” in the First Amendment “religion” clauses both at its adoption, at its incorporation against the States at the Fourteenth Amendment’s adoption, and also at the adoption of Title VII.**

Petitioners quite correctly argue that the discretion respondents arrogated to themselves to determine what are the necessary, and the forbidden, ingredients of a “religious” request for accommodation vitiates their claim

of general applicability, and so also vitiates the Second Circuit’s holding that rational basis review applies under *Employment Division v. Smith*.

But the premise of the whole exercise—that there is a determinate line of demarcation between “religious” and “non-religious” so obvious that analysis is not even necessary—is erroneous, and threatens mischief beyond Free Exercise jurisprudence. The Second Circuit here simply blessed without pause the proposition that consulting “non-religious” sources in the process of moral decision renders the whole process “non-religious” automatically. Such judicial incuriosity about whether that was understood to be true when the Free Exercise Clause and Title VII became effective threatens to infect the jurisprudence of any positive law—constitutions, statutes, and regulations, all—where the word “religion” is used. (As this case illustrates, it has already thoroughly infected the jurisprudence of Title VII.)

That a federal court just assumes a meaning for a word used in the Constitution or federal statute is obviously improper. “If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.” *Bostock v. Clayton County*, 590 U.S. 644, 140 S.Ct. 1731, 1738 (2020).

As this brief has tried to quickly demonstrate, the word “religion” in the First Amendment’s religion clauses has *always* comprehended belief systems that include, and many that require, a personal calculus that applies personal, internal moral discernment to all data—

observed factual evidence, and data and information from outside sources—in moral decision making. That is a doctrine of mainstream Christian belief and has been for centuries. Any public authority that reads a demarcation between the “personal” and the “religious” into American positive law, or forbids consultation of “non-religious” sources in the process of religious moral decision making, violates the religion clauses and Title VII. Inescapably “that conclusion emerges from the Clause[s]’ text, and the history against which that text was enacted.” *Consumer Financial Credit Bureau v. Community Financial Services Association*, 601 U.S. 416, 441 (2024) (Kagan, J., concurring). The failure of the Second Circuit even to inquire what the historical understanding of the word “religion” is in the text of the religion clauses and Title VII was error. And it is an error that has been common among Circuit and District courts throughout the country.

c. The conflict among the circuits is even more pervasive than petitioners describe.

In addition to petitioners’ canvass of circuit decisions that analyze whether employers’ exclusion of personal, conscience-grounded objections to the COVID vaccine as “non-religious” vitiates the employers’ claim of neutrality and general applicability in Free Exercise analysis (almost all of which include Title VII analysis, too), there are several district court decisions analyzing the same issues which are awaiting disposition in the Ninth Circuit. And the Fifth Circuit issued an opinion on these subjects after the petition here was filed.

The Fifth Circuit decision, a Title VII case that deploys Free Exercise analysis as an analog, joined the

majority of circuits that have declined to allow employers and district courts to apply their own limiting definitions of “religion” to exclude classes of believers from qualifying for workplace exemptions from COVID vaccines. *Wright v Honeywell*, No. 24-30667, 2025 WL 2218131 (5th Cir., August 5, 2025).

In the Ninth Circuit there are at least four appeals currently pending involving employer-made, judge-blessed definitions of “religion” separating the ingredients of the “personal,” and so “non-religious,” from the “religious” in workplace COVID vaccine cases.

In *Chavez v. San Francisco Bay Area Rapid Transit*, 723 F. Supp. 3d 805 (N.D. Cal. 2004) the court entered a defense summary judgment on plaintiff’s Free Exercise claims using rational basis review, but allowed a jury to decide if the requests for accommodation were “religious” under Title VII. The court’s post-trial affirmance of a \$7.8 million verdict for one subset of plaintiffs’ claims was entered last December under the caption *Lewis-William v. San Francisco Bay Area Rapid Transit*, No. 22-cv-6119-WHA (N.D. Cal., December 30, 2024). Both claims are now pending on cross-appeal in the Ninth Circuit, appeal numbers 25-619 and 25-740.

In *Moli v. King County, Washington*, No. 23-cv-823-RSL, 2024 WL 1860184 (W.D. Wash., April 29, 2004), *Detwiler v. Mid-Columbia Med. Ctr.*, No. 23-cv-1306-JR, 2023 WL 7221458 (D. Or., Sept. 13, 2023), and *Bowerman v. St. Charles Health System*, No. 23-cv-1720-AA, 2024 WL 3276131 (D. Or., June 6, 2024), the district courts entered defense judgments in Title VII cases, holding in each that plaintiffs’ requests for workplace exemptions

from the COVID vaccine were personal and non-religious, and so not properly invoked under Title VII. All three decisions are pending on appeal in the Ninth Circuit, appeal numbers 24-3155 (*Moli*), 23-3710 (*Detwiler*), and 24-5002 (*Bowerman*).

Granting the petition here will allow this Court to correct, or preempt, the methodological errors of these cases, and aid uniformity in the jurisprudence of the religion clauses and Title VII.

CONCLUSION

For all of these reasons, *amicus*, the Lorica Institute agrees with petitioners that the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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