No. 25-133

Supreme Court of the United States

JOSEPH MILLER; EZRA WENGERD; JONAS SMUCKER; DYGERT ROAD SCHOOL; PLEASANT VIEW SCHOOL; SHADY LANE SCHOOL,
Petitioners,

v.

JAMES V. MCDONALD, ET AL.,
Respondents.

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

BRIEF OF ALABAMA AND 20 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici are the States of Alabama, Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia.

Forty-six States provide religious exemptions to school vaccine requirements. Since 2016, California, Connecticut, New York, and Maine no longer do. *Amici* worry that the trend reflects a growing hostility toward religious views. If it is "neutral and generally applicable" for New York legislators to eliminate religious accommodations with such open disdain for the beliefs they protect, then it is not just New York's Amish community under threat.

To be sure, States are generally free to try more stringent public-health regimes, but not by burdening *only* religiously motivated conduct, and especially not by interfering with the religious education and upbringing of children. *Amici* States have a strong interest in protecting their citizens from the erosion of free-exercise rights, and even more protective States must be vigilant against federal incursions.

Amici States also write to resist the false dilemma that States must choose either religious freedom or the physical health of their citizens. Collectively, *Amici* States have allowed religious exemptions from school vaccine requirements for centuries. For States "to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational." *Does 1-3 v. Mills*, 142 S. Ct. 17, 22 (2021) (Gorsuch, J., dissenting).

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[1] *Amici* gave notice of their intent to file this brief under Rule 37.

SUMMARY OF ARGUMENT

What could be a better exemplar of a majority directly coercing a religious minority than this: Old Order Amish communities in rural New York, who run private schools on private land, who are bound by faith to live apart from the modern world, were at once mocked, vilified, and threatened if they refuse to "put [their] trust in vaccines." DE1-3 at 2. The price of schooling their children cannot be subjecting them to medical treatments that their religion commands them to reject. Such a compelled choice would be repugnant to the founding generation, and it is forbidden by this Court's doctrine.

The judgment below must be reversed. *First*, petitioners have more than plausibly alleged that New York's vaccine mandate is directly coercive and substantially interferes with the religious development of their children. *See Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943). Indeed, the court below deemed "[t]rue" the claim that petitioners face "two impossible options: inject their children with vaccines … against their religious beliefs, or forego educating their children in a [school], requiring them to sacrifice a central religious practice." App.22a.

But citing the Fourth Circuit's reversed opinion in *Mahmoud*, App.21a n.16, the panel held that *Yoder* claims are just "not … viable in [the Second] Circuit." App.20a. That error must be corrected in light of *Mahmoud*, which reaffirmed *Yoder*, *Barnette*, and the basic principle that government cannot substantially interfere with a child's religious upbringing unless it satisfies strict scrutiny. *See* 145 S. Ct. at 2351-53,

2361. To say that the spiritual threat the Amish face today is "not equivalent" to that of *Yoder*, App.22a, the court below misunderstood "the character of the burden," *Mahmoud*, 145 S. Ct. at 2361, and effectively told petitioners that they have overstated "the commands of [their] religion," which courts have "no license" to do. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 585 U.S. 617, 651 (2018) (Gorsuch, J., concurring).

Second, New York's vaccine program is not neutral and generally applicable. The law provides an opt-out mechanism, but only if a doctor says there could be a health problem. Such "individualized exemptions" must "extend" to religious objectors unless the State can satisfy strict scrutiny. *Employment Division v. Smith*, 494 U.S. 874, 884 (1990). Deciding which objections are "worthy of solicitude," *id.*, the State cannot "treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Yet New York "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). A student who objects to vaccination on religious grounds poses no greater risk to state interests than one who objects on medical grounds.

The Court should grant the petition and reverse. Petitioners have plausible free-exercise claims, and New York's school vaccine mandate should be reviewed under strict scrutiny. At a minimum, the Court should grant the petition, vacate the judgment, and remand for reconsideration in light of *Mahmoud*.

ARGUMENT

I. The decision below must be reversed under *Mahmoud*, *Yoder*, *and Barnette*.

"The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 8 (1947). But despite their religious differences, "freedom-loving colonials … reached the conviction that individual religious liberty could be achieved best" if government had no power "to interfere with [religious] beliefs." *Id.* at 11. Thus, the "Framers intended" for the free exercise of religion not just to be tolerated but "to flourish." *Mahmoud*, 145 S. Ct. at 2381 (2025) (Thomas, J., concurring) (quoting *Espinoza v. Montana Dept. of Revenue*, 591 U.S. 464, 497 (2020)); *see also McGowan v. Maryland*, 366 U.S. 420, 464 (1961) (opinion of Frankfurter, J.)

First Amendment doctrine allows religion to flourish by recognizing that "parents' decisions about the education of their children … can constitute protected religious activity." *Espinoza*, 591 U.S. at 511 (Gorsuch, J., concurring). The right "to guide the religious future and education of [one's] children" is an "enduring American tradition" and in fact embedded in the very "history and culture of Western civilization." *Yoder*, 406 U.S. at 205, 232. Thus, not only are religious rights not "shed … at the schoolhouse gate," *Tinker v. Des Moines*, 393 U.S. 503, 506-507 (1969); when "the interests of parenthood are combined with a free exercise claim," the stakes are nothing less than "the central values underlying the Religion Clauses," *Yoder*, 406 U.S. at 233-34.

Mahmoud, *Yoder*, and *Barnette* illustrate several ways that a law can infringe on free exercise in this context. First, the government cannot demand of students "a particular 'affirmation of a belief and an attitude of mind'" through "direct coercion." *Mahmoud*, 145 S. Ct. at 2352 (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943)). To require students "to participate" in an act "in contravention of their beliefs and those of their parents" cannot "be squared with the First Amendment." *Id.* at 2351-52. Second, even "more subtle forms of interference with the religious upbringing of children" can violate the Free Exercise Clause. *Id.* at 2352. "The question" is whether such laws "'substantially interfer[e] with the religious development' of the child or pose 'a very real threat of undermining' the religious beliefs and practices that parents wish to instill." *Id.* at 2356 (quoting *Yoder*, 406 U.S. at 218); *see also id.* at 2377 (Thomas, J., concurring); *Pierce v. Society of Sisters*, 268 U.S. 510, 532-535 (1925).

Petitioners have plausibly alleged both direct coercion and substantial interference, so New York's vaccine mandate must be subjected to strict scrutiny. At an administrative hearing, one of the petitioners testified that "our Almighty God wants us to fully put our faith [and] trust in Him," which "conflict[s] [with] put[ting] our trust in vaccines. We are commanded to not be conformed to this world …, even in the way we try to remain healthy." DE1-3 at 2. (citing Proverbs 3:5; Mark 8:35; Romans 12:1-2). When New York targeted petitioners and other religious minorities with the recent revision to its school immunization laws, they had no choice but to "obey God rather than man." App.39a. New York's vaccine mandate orders

Amish students to participate in an act their religion forbids, and it poses an objective danger of substantially interfering with the right of parents to raise children in the faith tradition of their choosing.

The government cannot compel children to act in ways contradicted by the religious beliefs of their parents without satisfying strict scrutiny. *Mahmoud*, 145 S. Ct. at 2352. In *Barnette*, students were instructed to salute the American flag. Plaintiffs were Jehovah's Witnesses who believed the flag to be a graven image and the salute akin to "bow[ing] down" before it. 319 U.S. 624, 639 (citing Exodus 20:3-5). Here, a government is again demanding that students perform an act—the injection of one to two dozen doses of vaccines and other immunizing agents—which their religion deems sinful. DE1-3 at 2-3. This case is on all fours with *Barnette* because under New York law, these "children would be compelled to commit some specific practice forbidden by their religion." *Mahmoud*, 145 S. Ct. at 2352.

New York's penalties for noncompliance may be even more draconian than those challenged in past cases. Instead of an individual student faced with expulsion, *Barnette*, 319 U.S. at 630, or a family forced to pay for private schooling, *Mahmoud*, 145 S. Ct. at 2349, 2359-60, here the State has issued exorbitant fines on the schools, which threaten their very existence, App.50a-51a, 65a-69a.[2] These are private

[2] New York assessed five-figure penalties on the "modest assumption that each of th[e] students was out of compliance for one day." App.6a n.9. Multiply the fines by the number of school days in a year, and the law seems to authorize annual penalties in *the millions* for each of these schools "with total enrollment far below 100 students." App.91a.

schools, so even if the Constitution could tolerate the Hobson's choice between public and private schooling, *but see Mahmoud*, 145 S. Ct. at 2359-60; *Espinoza*, 591 U.S. at 475-76, *Morse v. Frederick*, 551 U.S. 393, 424 (2007) (Alito, J. concurring), petitioners are out of options. Given that schooling is not only required by law, *see* N.Y. Educ. Law §3205, but a "vital part" of Amish spiritual development, App.6a, the pressure New York exerts on petitioners is more than "subtle." *Cf. Mahmoud*, 145 S. Ct. at 2352, 2355; *id.* at 2381 (Sotomayor, J., dissenting); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 753-756 (2020) (discussing "the close connection that religious institutions draw between their central purpose and educating the young in the faith"); *Society of Sisters*, 268 U.S. at 534.

New York's vaccine mandate poses the same kind of "substantial interfere[nce]" and "objective danger" to the right to direct children's religious upbringing the Court confronted in *Yoder* and again in *Mahmoud*. 145 S. Ct. at 2349 (quoting *Yoder*, 406 U.S. at 218). The right is "not merely a right to teach religion in the confines of one's own home. Rather, it extends to the choices that parents wish to make for their children outside the home." *Id.* at 2351. Petitioners choose for their children to live "separately from the modern world," App.31a, which means eschewing many modern technologies. *See Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2430-31 (2021) (Gorsuch, J., concurring). The Amish lead "lives of faith and self-reliance that have not altered in fundamentals for centuries." *Id.* at 2432. Petitioners here "educate their children 'in the Amish way, with Amish teachers, in Amish schools, on Amish owned property.'" App.32a.

Just as instruction in "objectionable ideas" and reprimanding children who disagree with the favored viewpoint can substantially interfere with a parent's efforts to inculcate religion, *Mahmoud*, 145 S. Ct. at 2353-56, so can the State's compulsion to use modern technology that the Amish religion forbids. New York mandates that schoolchildren do "the exact opposite," *id.* at 2354, of what they learn at home. It makes no difference that the Maryland schools in *Mahmoud* interfered with religion using words, whereas New York uses modern medicine. After all, *Barnette* did not distinguish between the pledge of allegiance and "the compulsory flag salute." 319 U.S. at 633-34. Neither "word" nor "act" could be compelled without proof of a "grave and immediate danger" to state interests. *Id.* at 639, 642.

In *Mahmoud*, every Member of the Court agreed that *Yoder* stands *at least* for the proposition that the law cannot "affirmatively compel[] the parents to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 145 S. Ct. at 2389 n.6 (Sotomayor, J., dissenting) (cleaned up). That rule requires reversal here. New York law "directly compel[s] the Amish to [vaccinate] their children" or shut down their schools, either one of which would be "contrary to the Amish religion and way of life." *Id.* at 2389-90 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988)). All agree that a statute so "coercive in nature" with a serious "'impact' on the Amish religion" is "constitutionally problematic." *Id.* (quoting *Lyng*, 485 U.S. at 457). Thus, even if *Yoder* were somehow "special," *id.* at 2357, it should have applied in full force here. *Contra* App.20a-21a & n.16 (citing *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *rev'd*, 145 S. Ct. 2332).

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Making a beeline for *Employment Division v. Smith*, the Second Circuit simply failed to apply governing law. "*Yoder* is an important precedent of this Court." *Mahmoud*, 145 S. Ct. at 2357. Dismissing "so-called 'hybrid rights claims,'" App.20a, the lower court missed that "the burden imposed here is of the exact same character as that in *Yoder*." *Mahmoud*, 145 S. Ct. at 2361 n.14. When there is a burden of the "same character," strict scrutiny applies without the "need [to] ask whether the law at issue is neutral or generally applicable." *Id.* at 2361.

The court below seemed to realize that petitioners face "two impossible options: inject their children with vaccines, forcing conduct against their religious beliefs, or forego educating their children in a group setting, requiring them to sacrifice a central religious practice." App.22a. Yet the court waved away the concern based on *its* view that "compliance with §2164" will not be an "existential threat" for the Amish. *Id.*

But that judgment was not the court's to make. Petitioners do see an existential threat, for their stance on vaccines is inherent in their traditional way of life. And their dilemma, the court acknowledged, is theological: either vaccinate (violating a tenet of their faith), or close their schools (the way their faith is propagated). These are "fundamentally theological choices driven by the content of different religious doctrine." *Catholic Charities Bureau v. Wisc. Labor & Indus. Rev. Comm'n*, 605 U.S. 238, 252 (2025). By insisting that "the Amish faith or the Amish way of life" can be consistent with vaccination, App.22a, the court waded into religious matters on which it had "no

license" to opine, *Masterpiece Cakeshop*, 585 U.S. at 651 (Gorsuch, J., concurring); *accord Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714, 716 (1981).

II. The decision below must be reversed under *Fulton*, *Tandon*, and *Lukumi*.

Separately, the Court has declined to apply strict scrutiny to neutral and generally applicable laws that incidentally burden religious exercise. *Smith*, 494 U.S. at 879. New York's school vaccination regime flunks the test. Thousands of children attend New York schools without all the mandated vaccines. But their reasons are favored by the State while religious reasons, which were accommodated for over sixty years, are now demeaned as "fake" and "made up."[3] On its face and in effect, New York's law selectively banned conduct based on its religious character and motivation. Such an enactment is anathema to the Free Exercise Clause and subject to strict scrutiny.

A. When a State creates a "system of individual exemptions, it may not refuse to extend that system" to religious objectors without satisfying strict scrutiny. *Smith*, 494 U.S. at 884. This rule predated *Smith*, was reaffirmed in *Smith*, and remains good law today. *See Fulton*, 593 U.S. at 533-34, 536. Indeed, the "essential point" of *Smith* was that the drug laws at issue had "no medical exception for peyote." Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 22 (2016); *see also See Calvary Chapel*

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[3] N.Y. State Senate, Stenographic Record, Reg. Sess., at 5443 (June 13, 2019) (statement of Sen. James Skoufis), legislation.nysenate.gov/pdf/transcripts/2019-06-13T14:43; *see* Pet.10-14, *F.F. v. New York*, No. 21-1003 (U.S. Jan. 10, 2022).

Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting). There was no secular analogue—nothing like an individual exemption to the drug laws—so Smith's claim failed.

One way that a law can fail under *Smith* is if it permits exemptions based on "the particular reasons for a person's conduct." *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). In *Thomas*, for instance, the State's unemployment scheme denied that religious reasons could be "good cause" for leaving a job. 450 U.S. at 717; *accord Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality). In *Lukumi*, the government distinguished between "necessary" animal slaughter (*e.g.*, for food) and "unnecessary" animal slaughter (*e.g.*, for ritual). *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993). Once the law called for "an evaluation of the particular justification for the killing," it allowed "individualized exemptions" that must extend to religious conduct. *Id.* at 537-38.

Put simply, where there are religious "reasons for not complying with [a] policy," the government cannot decide "which reasons are worthy of solicitude" without satisfying strict scrutiny. *Fulton*, 593 U.S. at 537. In effect, "exemptions … for secular reasons" should beget "similar treatment" for religious reasons. *See Calvary Chapel*, 140 S. Ct. at 2612 (2020) (Kavanaugh, J., dissenting) (quoting *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359, 360 (3d Cir. 1999)).

New York's catch-all "health" exemption is precisely the kind of individualized exemption that warrants heightened scrutiny. On a case-by-case basis, physicians can exempt children by certifying

that a vaccine "may be detrimental to a child's health." N.Y. Pub. Health Law §2164(8). The mere existence of these exemptions "devalues religious reasons" by "judging them to be of lesser import." *Lukumi*, 508 U.S. at 537; *see also Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1277 (10th Cir. 2024); *Does 1-3*, 142 S. Ct. at 19 (Gorsuch, J., dissenting).

In just a few sentences, the court below disagreed, reasoning that New York's medical exemptions are "not discretionary" but "mandatory" and "objectively defined." App.18a. This is just the move the State tried and this Court rejected in *Thomas*, 450 U.S. at 717; *see also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 142 n.7 (1987); *accord City of Boerne v. Flores*, 521 U.S. 507, 514 (1997); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 830 (1989). Under *Smith*, an exemption does not evade strict scrutiny just because it is mandatory or "categorical." *See Fraternal Order of Police*, 170 F.3d at 365; *Cent. Rabbinical Cong. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014); *see, e.g.*, *Tandon*, 595 U.S. at 64 (applying strict scrutiny to a law with "myriad exceptions and accommodations" without reference to discretion).

The lower court's premise was wrong too. The law is not objective and mandatory. In fact, it is utterly "silent" about what medical conditions qualify. *Kerri W.S. v. Zucker*, 202 A.D.3d 143, 146 (N.Y. App. Div. 2021). Even with the aid of agency regulations (which may change at any time), the child's physician still has considerable discretion,[4] and a school official can

[4] The agency's instruction to apply some "nationally recognized evidence-based standard of care" is hardly informative. 10 N.Y.

then demand additional support for an exemption, *see* 10 N.Y. Comp. Codes R. & Regs. §66-1.3; *Goe*, 43 F.4th at 33-34. "Practically speaking," the law does not seem to be enforced in a predictable and uniform way: some New York schools report that "up to 50% of students had medical exemptions" while others "in the same community" have "zero students" exempted. App.19a. That fact makes it more than plausible that New York's vaccination regime is not neutral and generally applicable. *Cf. Lukumi*, 508 U.S. at 535 (considering "the effect of a law in its real operation"); *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021).

B. In *Tandon v. Newsom*, the Court reiterated that a law is not neutrally and generally applicable if it "treat[s] *any* comparable secular activity more favorably than religious exercise." 593 U.S. at 62 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17-19 (2020) ("*Brooklyn Diocese*")). Whether two acts are "comparable" is "judged against

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Comp. Codes R. & Regs. §66-1.1(l). Even if physicians apply the same standards, their opinions may differ, and they may "misperceive[]" some conditions "as contraindications." U.S. Ctrs. for Disease Control & Prevention, *Contraindications and Precautions* (July 25, 2024), perma.cc/H7MP-FZAB. The agency also offers conflicting guidance—in one place, New York tells physicians they must "identify a medical contraindication," *id.* §66-1.3(c), and in another, a "contraindication *or precaution*," *id.* §66-1.1(l) (emphasis added), which is completely different, *see, e.g.*, *Goe v. Zucker*, 43 F.4th 19, 26 (2d Cir. 2022). The law is so indeterminate that New York City had to list ten non-qualifying conditions in its instructions *for physicians*. N.Y.C. Dep't of Ed. & N.Y.C. Health, *Medical Request for Immunization Exemption*, www.schools.nyc.gov/docs/default-source/default-document-library/medical-request-for-immunization-exemption-english.pdf.

the asserted government interest." *Id.*; *see Brooklyn Diocese,* 592 U.S. at 16-17 (Gorsuch, J., concurring). A law is suspect if it "prohibits religious conduct" but "permit[s] secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. If it does, then the law's "underinclusiveness" merits strict scrutiny. *Id.* New York's school vaccine program is underinclusive for at least two reasons.

1. The law plainly discriminates by permitting the same act to be taken for secular reasons but not religious ones. In the context of public health, if the government requires "dangerous" acts "to proceed with precautions," it must allow religious exercise to proceed with the same precautions unless shown to be more "dangerous." *Tandon*, 593 U.S. at 63. But of course, vaccine avoidance presents the same dangers regardless of the parent's or child's reasons. *Cf. Does* 1-3, 142 S. Ct. at 20 (Gorsuch, J., dissenting); *M.A. v. Rockland Cnty. Dep't of Health*, 53 F. 4th 29, 41 (2d Cir 2022) (Park, J., concurring). Because New York's stated interest is just the "immunity of the children of the state against communicable diseases," N.Y. Pub. Health Law §613(1)(a); App.59a, it cannot discriminate among identical risks to its interest without satisfying strict scrutiny.

The court below sidestepped a straightforward application of *Tandon* by "analyzing risk in the aggregate." App.15a. On this view, because an Amish school is a "clustered population of almost 100% unvaccinated students," there is no "comparable secular conduct." App.17a. But that reasoning would make the Free Exercise Clause turn on how many people practice a given religion in close proximity. There's no support for that move in this Court's cases.

It did not matter whether "hundreds of people" actually went shopping in "a large store" while New York was restricting church attendance; it was enough that the law would permit a greater risk than the burdened religious exercise. *Brooklyn Diocese*, 592 U.S. at 17-18; *accord Tandon*, 593 U.S. at 63; *Calvary Chapel*, 140 S. Ct. at 2607 (Alito, J., dissenting). Here, the State will allow a school to operate with 100% of the students unvaccinated for medical reasons (apparently almost 50% in practice) but not a single student can be unvaccinated for religious reasons. The law does not treat like things alike, so it is not neutral and generally applicable.

2. New York's mandate applies only to children—exempting all adults, including those who work with children and those who work in schools—and it applies only in the school setting. That degree of selectivity makes the law underinclusive. "One need not be a public health expert to recognize that the likelihood" of contracting a virus from an adult or anywhere other than school "may well meet or exceed" the risks of contracting a virus from a student with a religious exemption. *Dahl*, 15 F.4th at 735.

New York may well be able to show that restricting the mandate to children who wish to go to school is well founded. Perhaps the State has a reason for treating the risks presented by religious objections differently than other risks. But it was not required to show any kind of fit between means and ends because the courts reviewed only for a rational basis. That error should be reversed.

* * *

If *Smith* saves New York's termination of religious exemptions, then *Smith* must be reconsidered. Drastic and novel burdens on a religious practice do not become more tolerable just because they burden non-believers too. Just a few years ago, *Smith*'s illogic is what led many courts to bless governmental restrictions and even *prohibitions* on worship services and church attendance, which might have continued indefinitely had this Court not intervened. *See Tandon*, 593 U.S. at 64 ("This is the fifth time…"). Whether those governments also burdened "hair salons" or "movie theaters," *Tandon*, 593 U.S. at 63, was no solace to Christians in Louisville when the "mayor criminalized the communal celebration of Easter." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 905 (W.D. Ky. 2020). Or when California banned "worship on Christmas Day." *Harvest Rock Church, Inc. v. Newsom*, 982 F.3d 1240 (9th Cir. 2020) (O'Scannlain, J., dissenting in part).

Likewise, Petitioners are committed to living apart from the world, App.6a, and it does not answer their plea to insist that the law is generally applied—*i.e.*, that it burdens *other* parents who have no religious qualms about the vaccine schedule. Indeed, it is in "protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop*, 584 U.S. at 649 (Gorsuch, J., concurring). Where the polity does not understand or credit the beliefs of a minority, the uncompromising breadth of the majority's enactment should earn more scrutiny, not less. *Employment Division v. Smith* teaches just the opposite and should be reconsidered.

III. New York's law fails strict scrutiny.

Strict scrutiny requires that the government prove "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022); *see Brooklyn Diocese*, 592 U.S. at 18. Here, New York's interests in "public health and safety" are the kind of "rarified values [that] inevitably make[] the individual interest appear less significant." *Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting). But this "general interest" in the public health must be "compelling" as "to the *specific* application of [the challenged] rules to *this* community." *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring). On the facts of this case, New York has not shown a qualifying interest and that its vaccine mandate is narrowly tailored.

Despite its professed interest in achieving "the highest reasonable level" of vaccination, *Kerri W.S.*, 202 A.D.3d at 146 (quoting N.Y. Pub. Health Law §613(1)(a)), New York still provides exemptions for which thousands of schoolchildren qualify each year. Evidently, the public health would not be jeopardized by exempting schools with "far below 100 students" in total. App.91a. Although the court below emphasized (in bold text) that "Amish isolation does not protect their communities from disease," App.16a, it offered no citation or explanation for its opinion.

A State "must do more than assert" that every additional exemption is "always" a risk. *Cf. Tandon*, 593 U.S. at 63. It must defend its tailoring, *id.*, including the fact that its mandate applies *only* to children and *only* to those who attend school. There are many adults in the State of New York, many who did not receive every vaccine on the list, and many

who work with children or in schools. New York has thus left "appreciable damage to [its] supposedly vital interest unprohibited." *Espinoza*, 591 U.S. at 486; *accord Dahl*, 15 F.4th at 735.

Because New York's "objectives are not pursued with respect to analogous nonreligious conduct" to the same degree as they are with religious conduct, the school vaccine mandate is "fatally underinclusive" and therefore unconstitutional. *Espinoza*, 591 U.S. at 486 (quoting *Lukumi*, 508 U.S. at 546). The Court granted emergency relief in *Tandon* based on a very similar mismatch between the purported state interests and the overly restrictive means it used to promote them. This is not the "rare case[]" in which religious discrimination could survive strict scrutiny. *Lukumi*, 508 U.S. at 546.

IV. Public health can be protected without sacrificing religious rights.

Recognizing the utility of a school vaccine program, forty-six States still respect the religious freedom of parents and their children to opt out. *See* Pet.8-9 & n.4. In Alabama, for example, a parent can simply write to object that a required immunization "conflicts with his religious tenets and practices." Ala. Code §16-30-1. Some States go further and grant exemptions "on the basis of a strong moral or ethical conviction." 28 Pa. Code §23.84. Accordingly, the Court should take with a grain of salt any representations about threats to public health. The vast majority of States have not found it necessary to discriminate against religion in order to protect schoolchildren. Nor did New York for over sixty years.

Religious rights must be "zealously protected … even at the expense of other interests of admittedly

high social importance." *Yoder*, 406 U.S. at 214. Notwithstanding their strong interests in public health and safety, *Amici* States have endeavored to protect minority religious rights to the fullest. Many have enacted state analogues to the Religious Freedom Restoration Act (RFRA), offering even stronger protections than the First Amendment. *See, e.g.*, Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 San Diego L. Rev. 163, 175-77 (2016). State RFRAs have been extremely "valuable for religious minorities, who often have no other recourse when the law conflicts with their most basic religious obligations." *Id.* at 165. States have not suffered dire public health emergencies as a result.

Nor has the experience of *Amici* States borne out the fear that exemptions "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879. States have not been flooded with frivolous or insincere religious objections. *Contra* App.46a-47a (citing worries of the New York legislature). While accommodating religion in many contexts, *Amici* States do still litigate against religion claims, especially where the stakes are high and the "propensity" for insincerity is "well documented." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718 (2014). Restricting religious freedom might be more convenient, but enduring protections have proven that courts are "up to the job" of policing abuses. *Id.*

New York is not the only State to rescind a religious accommodation, nor are its legislators the only government officials to exhibit open hostility to religion. *Amici* States are concerned that if governments succeed in cases like this one, they will be emboldened to remove other important religious accommodations. Already, New York's Public Health

and Health Planning Council declined to provide religious exemptions from another mandate on the ground that this one was "highly effective" without them. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 282 (2d Cir. 2021). If the courts deem it neutral every time a State rescinds longstanding religious exemptions, the result will be an enormous erosion of fundamental freedoms—and countless more tragic cases like this one.

CONCLUSION

The Court should grant certiorari and reverse.

Respectfully submitted,

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