NO. 25-133

IN THE

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, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK; BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF ADVOCATES FOR FAITH & FREEDOM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, *Amicus curiae* Advocates for Faith & Freedom submits this brief. Advocates for Faith & Freedom is a religious, nonprofit legal organization dedicated to protecting the fundamental constitutional liberties that have long defined the United States as a beacon of freedom. These include the rights to the free exercise of religion, freedom of speech, and the fundamental right of parents to direct the upbringing, education, and care of their children. See (https://faith-freedom.com, last visited Sept. 2, 2025).

INTRODUCTION

New York's intolerant vaccine laws have been before this Court before. *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (Thomas, J., dissenting joined by Gorsuch, J. and Alito, J.). Indeed, when this Court denied the petition in *Dr. A.* on June 30, 2022, the New York Commissioner of Health had already begun seeking $118,000 in fines against the Amish Petitioners in this case. App.68a-69a. And one thing is certain: unless this Court hears the petition before it, New York will continue to issue crippling fines and to illegitimize religious persons from earning a

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37(a)(2). *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

livelihood (*Dr. A*) and obtaining an education (this petition).

Yet again, New York has created vaccine regulations that intentionally remove a religious exemption while allowing a medical exemption. N.Y. Pub. Health Law § 2164 (2019). But worse here, unlike in *Dr. A.*, New York's regulations require children in schools to be vaccinated, but do not require the same of adults in schools. New York regulates schools but does not regulate similar locations that could similarly be affected by communicable disease. However, instead of making its regulations more effective by design, New York has chosen to penalize people with sincerely held religious beliefs with civil penalties. New York's law is punishable by a civil penalty of up to $2,000 for each day and for each student who attends school not fully vaccinated, in accordance with New York's regulations. *See id.* §§ 12(1), 206(4)(c). The severity with which New York's vaccine law treats religious objectors is extreme, especially since New York has no cause for its law or its decision to remove its religious exemption.

The Amish population has historically had low vaccination rates (significantly lower than the rest of the population), but uniquely has not posed a danger to the health and safety of others. Instead, Amish communities live in isolation and adhere to quarantining protocols. Anderson C, Potts L. Physical Health Conditions of the Amish and Intervening Social Mechanisms: An Exhaustive Narrative Review, available at (https://pmc.ncbi.nlm.nih.gov/articles/PMC8857275/,

last visited Sept. 2, 2025). The Amish population has proven successful containment efforts during outbreaks and has exhibited stronger immunity from disease and better health than the American population at large. *Id.*; see also (https://time.com/5159857/amish-people-stay-healthy-in-old-age-heres-their-secret/#:~:text=Including%20other%20forms%20of%20manual,of%20the%20overall%20U.S.%20population, last visited Sept. 2, 2025).

Still, New York intentionally and categorically decided (yet again) to refuse any sincerely held religious objections to its vaccine law. *Dr. A. v. Hochul*, 142 S. Ct. 552, 553 (2021) (Gorsuch, J., dissenting). New York legislators discounted sincere religious objections to vaccination as "fake" when passing N.Y. Pub. Health Law § 2164. Pet. at 12-13. The sponsor of the law, Senator James Skoufis, said from the floor that any religious objection to vaccination was "made up." *Id.* New York Senator David Carlucci claimed that people with religious objections to vaccines were "selfish and misguided." *Id.* New York Assemblyman Jeffrey Dinowitz, the primary sponsor of the bill and apparent theologian testified that no religion would allow for a person to avoid vaccination. "It is just utter garbage." *Id.* He then stated that a person with a religious objection to a vaccine is "a heretic." *Id.*

Such religious opinions from those in power in the government are common in New York. New York's Governor has likewise proclaimed herself the arbiter of religious faith. The Governor publicly stated that

no religious faith held an objection to vaccinations, telling audiences that "God wants" everyone to be vaccinated, that "everybody from the Pope on down is encouraging people to get vaccinated," and "[h]ow can you believe that God would give a vaccine that would cause you harm? That is not truth." *Dr. A.*, 142 S. Ct. at 553-54. Then, the Governor changed the State's protocols for unemployment benefits to ensure that not only would religious objectors lose their jobs if they remained faithful to their beliefs, but they would also be ineligible to collect unemployment after they were fired. *Id*. at 554.

New York's treatment of sincerely held religious beliefs is antithetical to the pluralism that lives at the heart of our nation's Free Exercise jurisprudence. This Court should grant the petition.

SUMMARY OF THE ARGUMENT

This *Amicus Curiae* brief addresses two constitutional problems New York created by eliminating its exemption to protect sincerely held religious objections to vaccination.

First, when passing its compelled vaccination law, New York intentionally disregarded Petitioners' sincerely held religious beliefs by eliminating its long-recognized religious exemption. It did so because the State unilaterally—and incorrectly— determined that vaccination did not run contrary to anyone's religious beliefs. In making this assessment, the State determined "what shall be orthodox" in matters of religious faith. *W. Virginia State Bd. of Ed. v.*

Barnette, 319 U.S. 624, 642 (1943). This is not the proper role of the State.

Second, New York's vaccine mandate does provide an exemption for individuals for secular reasons. This creates a double standard where a secular purpose may qualify for an exemption but a religious purpose may not, thus treating secular behavior more favorably. Such treatment conflicts with this Court's holdings in *Tandon v. Newsom,* 141 S. Ct. 1294 (2021) and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) that focus on the risk of providing a religious exemption and whether the secular exemptions that the State already allows pose a similar risk.

ARGUMENT

I. THE FREE EXERCISE CLAUSE PROTECTS INDIVIDUALS FROM STATE-IMPOSED ORTHODOXY AND PRESERVES RELIGIOUS PLURALISM.

The United States was founded on the ideal that the government cannot control every aspect of a person's life—especially regarding matters of religious exercise. As this Court famously opined, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. Thus, this Court has been hesitant to determine "what shall be orthodox" when adjudicating matters involving an individual's sincerely held religious beliefs.

This Court has consistently adopted a "narrow function" in free exercise cases when addressing a claimant's "particular belief or practice in question." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713-14 (1981). Recognizing that an individual's freedom to religious exercise involves a very personal matter, one that speaks to our nation's core principles, "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task" that does not turn on "judicial perception." *Id.* In this area, much discretion is given to the religious observer. "[R]eligious beliefs need not" even "be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

This is where New York's vaccine law first fails. The mandate is premised on the false presupposition that New York can use the powers of the State to answer theological questions pertaining to religious conscience.

New York government officials from the sponsors of N.Y. Pub. Health Law § 2164 in the Senate and in the Assembly to the current governor of the State believe that sincerely held religious beliefs opposing vaccines is "fake". See e.g., Pet. at 12-13. On September 26, 2021, the Governor delivered a speech to the Christian Cultural Center and promptly published a transcript of the speech on the State of New York's official website. *See* Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center , available at (https://www.governor.ny.gov/news/rush-transcript-

governor-hochul-attends-service-christian-cultural-center, last visited Sept. 2, 2025). In the speech, the Governor declares that vaccines are "from God." *Id*. Then the Governor stated that individuals who have decided not to undergo vaccination "aren't listening to God and what God wants." *Id*. The Governor then called upon the congregation to be her "apostles." *Id*. The Governor in a contemporaneous speech proclaimed that no one holds a religious objection because her understanding is that opposing religious beliefs are "not truth." *Hochul*, 142 S. Ct. at 553-54 (Gorsuch, J., dissenting).

Reading the Governor's statements in tandem with the New York legislators statements calling religious beliefs "utter garbage" and "fake" provides insight into why New York eliminated its religious exemption, but kept its secular medical exemptions—the State believes it can make these important religious determinations for the people it governs. This is a profoundly disturbing manner in which to use the imprimatur and authority of the State. And one that lacks "sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

Contrary to the bold assertions of New York's Senators, Assemblymen, and Governor, "[t]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas,* 450 U.S. at 709. It is not the role of the State to determine what all people of faith must

believe or what constitutes orthodox truth on matters of religious faith.

Unfortunately, it is from this constitutionally infirm perspective that New York built its exemption scheme, which leads us to the law's second major failure: New York determined that it should allow exemptions for non-religious reasons but refused to offer a similar accommodation for religious purposes.

II. THE FREE EXERCISE CLAUSE PROHIBITS THE DOUBLE STANDARD FORWARDED BY NEW YORK'S VACCINE LAW.

New York's intentional decision to exempt individuals from its vaccine mandate for a secular purpose, but not a religious purpose creates an unconstitutional double standard and results in an escapable conflict with this Court's holdings in *Tandon,* 141 S. Ct. 1294 and *Fulton*, 141 S. Ct. 1868.

In *Tandon*, this Court warned against applying less favorable conditions to religious exercise on private property than secular activities such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants." *Id.* at 1298. And when health restrictions contain "myriad exceptions and accommodations for comparable activities," strict scrutiny must be applied. This Court further warned that this "standard is not watered down; it really means what it says." *Id.* (internal quotations and citations omitted).

While New York's vaccine law may at first appear factually not analogous to California's restrictions on gatherings in *Tandon*, the State's asserted interest in curtailing the spread of infectious disease is quite similar. Therefore, the imposition on religious exercise should still be weighed against the risk that offering a religious accommodation would pose to the government's stated interest. When addressing its secular comparators, New York's vaccine law poses an even closer analysis of risk because it offers an exemption not just for a comparable, secular risk, but it offers an exemption for an *identical*, secular risk. New York offers a secular medical exemption in the same classrooms and for the very same students to which it refuses to extend a religious exemption. Such uneven handling of not just comparable risks but identical risks requires a finding that the mandate is not neutral or generally applicable.

Justice Gorsuch's dissent in *Does 1-3 v. Mills* is instructive here. 142 S. Ct. 17, 19 (2021) (J., Gorsuch, dissenting). In *Does 1-3*, Justice Gorsuch asks whether Maine, by permitting a medical exemption from its state-wide COVID regulation, has established a scheme of individualized exemptions. *Id*. As here, Maine's law did not limit who could obtain a medical exemption or what might qualify as a medical basis worthy of exemption. *Id*. The law only required that the exemption be "phrased in medical and not religious terms." *Id*. Justice Gorsuch's dissent concludes that the mere existence of an exemption for medical purposes, but not for the protection of religious exercise, presented the "kind of double standard . . . enough to trigger . . . strict scrutiny."

Id. The controlling inquiry is whether the government has provided a "mechanism for individualized exemptions." *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 733 (6th Cir. 2021). If so, "it must grant exemptions for cases of 'religious hardship.'" *Id*. (quoting *Fulton,* 141 S. Ct. at 1877). Here, as in *Does 1-3* and *Fulton*, the critical point is that once the government creates a mechanism for individualized exemptions, the law is no longer generally applicable.

Moreover, New York's vaccine law also fails under *Fulton* because "[a] law also lacks general applicability *if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way*." 141 S. Ct. at 1877 (emphasis added). New York's vaccine law plainly prohibits an exemption for Petitioners' religious exercise while permitting a secular exemption "that undermines the government's asserted interests in a similar way." *Id*. at 1877. Again, the inquiry is not based in why the exemption exists, but the *risk* that the exemptions poses to the government's state interest. Given that New York exempts identical secular comparators that pose the same risk, the State cannot avoid the application of strict scrutiny. The Second Circuit's decision misapprehends the essential holding of *Tandon* and *Fulton* and creates an unconstitutional double standard.

CONCLUSION

New York's vaccine law violates the Free Exercise Clause and openly treats religious exercise worse than

secular conduct because the State allows exemptions from its mandate for purely secular purposes. New York's position conflicts with this Court's holdings in *Tandon* and *Fulton*. If not reviewed by this Court, this flagrant and State-imposed discrimination of minority religious beliefs will be repeated by New York yet again and will be copied by other states. This Court should grant the petition.

Respectfully submitted,

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