

No. 25-133

In the Supreme Court of the United States

JOSEPH MILLER, et al.,

Petitioners,

v.

JAMES V. McDONALD, Commissioner,
New York State Department of Health, et al.,

Respondents.

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

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INTRODUCTION

New York does not even try to contest that this is a case of the utmost importance. *See* Pet.33-34. As New York does not deny, the Second Circuit’s decision essentially allows New York to outlaw the practice of the Amish faith within its borders. New York asks this Court to countenance that direct affront to “the ability of those who hold religious beliefs of all kinds to live out their faiths.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). But each reason it offers for the Court to stay its hand falls flat.

New York disingenuously asserts that there is no split. But New York does not acknowledge—let alone address—that multiple Justices of this Court have *already recognized* a “split [that] is widespread, entrenched, and worth addressing,” regarding “whether a mandate ... that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves.” *Dr. A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari). That split is real and persistent.

New York’s defense of the Second Circuit’s opinion on the merits gets this Court’s precedents wrong. The relevant interest for purposes of the comparability analysis is the “interest that justifies the regulation,” not any sort of *post hoc* interest. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). A “mechanism for individualized exemptions” need not be discretionary to trigger strict scrutiny. *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citation omitted). And *Wisconsin v. Yoder*, 406 U.S. 205 (1972),

cannot be “confined ... to its facts,” *Mahmoud v. Taylor*, 606 U.S. 522, 558 (2025). For these reasons and others, the Second Circuit was wrong.

Finally, New York’s purported vehicle problems are anything but. New York suggests that there is no use in resolving the confusion regarding *Employment Division v. Smith*, 494 U.S. 872 (1990), here because New York’s categorical disregard for free exercise satisfies strict scrutiny in any event. That is wrong, and no court in this case has held as much. New York also suggests that this Court should not reconsider *Smith* in a case involving “public health, safety, and child welfare.” BIO.32. But “the Constitution cannot be put away and forgotten” simply because the government invokes public health. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (per curiam).

The petition for a writ of certiorari should be granted, and the Second Circuit should be reversed. At minimum, this Court should grant, vacate, and remand in light of *Mahmoud*.

ARGUMENT

I. The Court Should Grant Certiorari to Resolve Acknowledged Confusion Over *Employment Division v. Smith*.**A. The split is real.**

As multiple Justices have already recognized, “there remains considerable confusion over whether a mandate ... that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves.” *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari). New York fails to even cite this opinion, and it is no mystery why. The acknowledged “split is widespread, entrenched, and worth addressing.” *Id.* That split is real, and it is implicated here.

The Second Circuit applied rational basis review despite the fact that PHL 2164 permits secular medical exemptions while categorically disallowing religious exemptions. Pet.App.13a-19a. This approach aligns with that of the Third and Ninth Circuits. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 172-73 (3d Cir. 2024) (secular medical exemption did not trigger strict scrutiny); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (9th Cir. 2021) (same).¹

¹ The tension in the Third Circuit’s case law is plain. *Contra* BIO.14-15. Writing for the Third Circuit, then-Judge Alito recognized that general applicability is undermined “when the government does not merely create a mechanism for

But this case would have come out differently in the First, Sixth, and Eleventh Circuits, as well as in the Supreme Court of Iowa. Each of those courts has recognized, contrary to the Second Circuit, that permitting secular exemptions while categorically prohibiting religious exemptions renders a law not generally applicable and thus subject to strict scrutiny. *See Lowe v. Mills*, 68 F.4th 706, 715-17 (1st Cir. 2023) (secular medical exemption triggered strict scrutiny); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 482 (6th Cir. 2020) (secular exemptions for gyms, tanning salons, office buildings, and casinos triggered strict scrutiny); *Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1232-35 (11th Cir. 2004) (secular exemption for clubs triggered strict scrutiny); *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 15-16 (Iowa 2012) (secular exemptions for school buses, tire chains, and certain tires triggered strict scrutiny).²

individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.” *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). *Spivack* ignored this precedent when it suggested that “a ‘single objective exemption’ did not undermine general applicability.” 109 F.4th at 173 (citation omitted).

² New York tries to distinguish Maine’s medical exemption in *Lowe* on the basis of its language. But the language of New York’s medical exemption is similar. *Compare* BIO.16 (noting that Maine’s medical exemption applies when “vaccination *may* be medically inadvisable” (citation omitted)), *with* N.Y. Pub. Health Law § 2164(8) (allowing medical exemption when “immunization *may* be detrimental to a child’s health” (emphasis added)).

New York incorrectly tries to paper over this split by suggesting that the cases simply “reached different results based on the application of the same comparative analysis to different circumstances.” BIO.13. But the cases on both sides of the split involved “secular conduct that similarly frustrates the specific interest that the mandate serves.” *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari). That includes the decisions of the Second, Third, and Ninth Circuits, as “allowing a [person] to remain unvaccinated undermines the State’s asserted public health goals equally whether that [person] happens to remain unvaccinated for religious reasons or medical ones.” *Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting from denial of application for injunctive relief).

As Justice Alito recently observed, “[t]here is confusion about the meaning of *Smith*’s holding on exemptions from generally applicable laws.” *Fulton*, 593 U.S. at 609 (Alito, J., concurring in judgment). That confusion has grown in the four years since. The Court should resolve it.

B. The decision below is wrong.

New York offers three primary merits defenses of the Second Circuit’s decision to apply rational basis review to New York’s categorical disregard for free exercise. None holds up.

First, New York argues that the medical exemption is not comparable to Petitioners’ requested religious exemption because it “promotes New York’s public-health objectives” in a way the religious

exemption would not. BIO.18. But New York cannot keep its purported public-health objectives straight.

At the time of the repeal, the Legislature identified the State’s interest as “the prevention of disease outbreaks.” Bill Jacket at 4A, N.Y. A.B. 2371 (2019), <https://perma.cc/L7SR-EQPD> (“Bill Jacket”). Similarly, elsewhere in its brief, New York identifies its interest as “preventing the spread of communicable diseases.” BIO.3; *see* BIO.27 (“combatting potentially fatal diseases through compulsory vaccination”).³ But for purposes of this comparability analysis, New York suddenly claims a niche interest in “promot[ing] the health and safety of the small proportion of students who cannot be vaccinated for medical reasons.” BIO.19.

New York’s attempt to recast its asserted interest should not be credited. What matters is the State’s “contemporaneous” interest in enacting the law at issue, not any interest “invented *post hoc* in response to litigation.” *Kennedy*, 597 U.S. at 543 n.8 (citation omitted). The interest New York asserted contemporaneously with the repeal of the religious exemption was “the prevention of disease outbreaks.” Bill Jacket at 4A. Thus, it is not Petitioners who “cabin[ed] the State’s interest in vaccinating schoolchildren,” BIO.18 n.15—it is New York itself.

³ New York relies on a study not in evidence below, *see* BIO.4 n.2, while not addressing other record evidence that undermines its purported interest, *see, e.g.*, A-42 to 43, 288 to 292, 319 to 322, 708 to 898. Citations to “A-” are to the appendix in the Second Circuit.

When it comes to the State's actual asserted interest, both medical nonvaccination and religious nonvaccination pose the same risk to "the prevention of disease outbreaks." Bill Jacket at 4A; *see Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting from denial of application for injunctive relief) ("[A]llowing a [person] to remain unvaccinated undermines the State's asserted public health goals equally whether that [person] happens to remain unvaccinated for religious reasons or medical ones.").

New York suggests that the medical nonvaccination it permits is somehow different because it is "limited in duration and scope." BIO.6. But even if that were true, it would not matter. The government cannot "treat secular activity more favorably than religious activity simply because the disparate treatment is only temporary." *Doe*, 19 F.4th at 1186 (Ikuta, J., dissenting). A temporary denial of free exercise rights, "for even minimal periods of time," is still a denial of free exercise rights. *Roman Cath. Diocese*, 592 U.S. at 19.

Finally, medical nonvaccination is not the only comparable activity PHL 2164 allows. New York also allows nonvaccination of noncompliant students, adults both inside and outside of schools, and children who congregate outside of schools in various settings. *See* Pet.26-27. New York hardly addresses these activities, suggesting only that Petitioners have not adequately alleged that they are comparable. *See* BIO.21-22. The complaint proves otherwise. *See* A-32 to 33 (describing all of these activities as part of the "comparability analysis").

Second, New York argues that PHL 2164 is generally applicable because it does not provide for “discretionary, individualized exemptions.” BIO.24. That is wrong because PHL 2164’s medical exemption entails substantial discretion on the part of multiple decisionmakers. *See* Pet.14. But even if it did not, that would be beside the point.

A “formal mechanism for granting exceptions” triggers strict scrutiny when it allows “the government to decide which reasons for not complying with [a law] are worthy of solicitude.” *Fulton*, 593 U.S. at 537. That can happen when the exemptions are “discretion[ary].” *Id.* at 535 (citation omitted). And it can also happen when the exemptions are “categorical.” *Fraternal Ord. of Police*, 170 F.3d at 365; *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (categorical exemptions for the “slaughter of animals for food, eradication of insects and pests, and euthanasia” triggered strict scrutiny).

Indeed, the free exercise problem may well be heightened when the exemptions are categorical. *See Lukumi*, 508 U.S. at 542 (“All laws are selective to some extent, but *categories* of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” (emphasis added)); *Fraternal Ord. of Police*, 170 F.3d at 365 (explaining that the free exercise concern is “only further implicated when the government ... actually creates a *categorical* exemption” (emphasis added)).

Contrary to New York’s suggestion, neither *Fulton* nor *Smith* turned on any distinction between discretionary and categorical exemptions. *See* BIO.23-24. What mattered in each was whether the law provided “a mechanism for individualized exemptions” that did not extend to religious exercise. *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). Here, New York cannot seriously dispute that PHL 2164 provides for individualized exemptions. *See* N.Y. Pub. Health Law § 2164(8) (“If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child’s health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child’s health.”).

Third, New York incorrectly argues that PHL 2164 does not “fall[] directly under *Yoder*.” BIO.25.

Yoder applied strict scrutiny to a law that “substantially interfer[ed] with the religious development of the Amish child.” 406 U.S. at 218. Following *Yoder*, *Mahmoud* likewise applied strict scrutiny to a law that “‘substantially interfer[ed] with the religious development’ of ... parents’ children.” 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218). PHL 2164 also substantially interferes with the religious development of Amish children by requiring them to “commit some specific practice forbidden by their religion.” *Id.* at 549. Yet the Second Circuit nonetheless refused to apply strict scrutiny.

This Court in *Mahmoud* warned that *Yoder* cannot be “confined ... to its facts.” *Id.* at 558. But New York (like the Second Circuit, *see* Pet.App.21a) continues to do just that. New York suggests that *Yoder* is limited to “school programs of instruction that implicate ‘the potentially coercive nature of classroom instruction.’” BIO.25 (citation omitted). Taking the error one step further, New York now suggests that *Mahmoud* is similarly limited “principally ... to curricular requirements.” BIO.25 (citation omitted). This “breez[y] dismiss[al]” of *Yoder* is precisely the sort of disregard for free exercise that *Mahmoud* rejected. 606 U.S. at 558.

C. The case is important and a good vehicle.

New York does not dispute that “[t]he correct interpretation of the Free Exercise Clause is a question of great importance.” *Fulton*, 593 U.S. at 553 (Alito, J., concurring in judgment). Nor does New York dispute that the Second Circuit’s decision will have consequences that reach far beyond New York, and far beyond the vaccine context. *See* Pet.33-34.

New York instead suggests that this case is not a good vehicle because PHL 2164 would satisfy strict scrutiny in any event. *See* BIO.27-31. That is wrong. Neither the district court nor the Second Circuit held that PHL 2164 would satisfy strict scrutiny. *See* Pet.App.19a (no strict scrutiny analysis); Pet.App.63a (same). And as Petitioners have explained, it would not. *See* Pet.32-33.

New York still fails to meaningfully articulate any *particularized* compelling interest in requiring these “*particular* [Amish] claimants” to vaccinate their children against their faith. *Fulton*, 593 U.S. at 541 (emphasis added) (citation omitted). Its asserted “interest in preventing the spread of communicable diseases,” BIO.3, is too “broadly formulated” to satisfy the First Amendment, *Fulton*, 593 U.S. at 541 (citation omitted).

Furthermore, experience in 46 States (and New York for more than 50 years) shows that there exist “measures less restrictive of ... First Amendment activity” for serving New York’s purported interest. *Tandon*, 593 U.S. at 63; *see* Pet.32-33. As 21 of those States explained to this Court, the “vast majority of States have not found it necessary to discriminate against religion in order to protect schoolchildren.” State Amici Br.18; *see* Florida Amicus Br.18-20 (listing several “less restrictive ways of accomplishing the State’s goals”).⁴ That New York previously had a “measles outbreak,” BIO.1, or that other States have “confirmed cases of measles,” BIO.5, does not establish

⁴ New York properly recognizes that West Virginia provides for religious exemptions pursuant to an executive order and Mississippi provides for religious exemptions pursuant to a federal court injunction. BIO.29 n.21; *see* Pet.8 n.4. New York’s suggestion that it is not an outlier merely because three other States show similar disrespect for free exercise rights, *see* BIO.29, ignores what it means to be an outlier, *see M.A. ex rel. H.R. v. Rockland Cnty. Dep’t of Health*, 53 F.4th 29, 41 (2d Cir. 2022) (Park, J., concurring) (labeling New York an “extreme outlier”).

that running the Amish out of New York is the least restrictive way to prevent future outbreaks.

II. If *Smith* Allows the Result Here, the Court Should Reconsider *Smith*.

New York cannot dispute that a majority of the Court has already called for reconsidering *Smith*. See *Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 553 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment); *id.* at 627 (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in judgment).

New York suggests only that the Court should not reconsider *Smith* in the context of “public health, safety, and child welfare.” BIO.32. This is not the first time governments have urged an “anything goes when it comes to public health” approach to the Free Exercise Clause. This Court has properly rejected such reasoning before—including in an emergency pandemic context not implicated here. See, e.g., *Roman Cath. Diocese*, 592 U.S. at 19 (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”); *id.* at 21 (Gorsuch, J., concurring) (“Government is not free to disregard the First Amendment in times of crisis.”); cf. *Fulton*, 593 U.S. at 532-38 (clarifying *Smith* in the context of child welfare); *Tandon*, 593 U.S. at 62-65 (clarifying *Smith* in the context of public health).

“*Smith* committed a constitutional error. Only [this Court] can fix it.” *Fulton*, 593 U.S. at 627 (Gorsuch, J., concurring in judgment). This case provides an excellent vehicle for doing so.

III. At the Very Least, the Court Should Grant, Vacate, and Remand in Light of *Mahmoud*.

New York wrongly asserts that the Second Circuit's decision accords with *Mahmoud*. BIO.25-26; *see supra* pp.9-10. Relying on the Fourth Circuit's now-reversed decision in *Mahmoud*, the Second Circuit invoked "Yoder's limitations." Pet.App.21a n.16 (citing *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024)). According to the Second Circuit, *Yoder* "took pains explicitly to limit its holding" to its facts. Pet.App.21a (citation omitted). That directly contravenes this Court's instruction in *Mahmoud* that it has "never confined *Yoder* to its facts." 606 U.S. at 558. Rather, *Yoder* is just like "any other precedent." *Id.* The Second Circuit erred in not applying it.

For all the reasons above, this Court should grant certiorari to either resolve persistent confusion over *Smith*'s meaning or to reconsider *Smith*'s unworkable holding. At a minimum, the Court should grant, vacate, and remand, directing the Second Circuit to reconsider its decision in light of *Mahmoud*. *See* Pet.37-38; BIO.26.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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