No. 26-438

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

BRIEF OF THE HERITAGE FOUNDATION AND YOUNG AMERICA'S FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Heritage Foundation is a research and educational institution whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense. Those principles include respect for the natural and constitutional rights of parents to direct the upbringing, education, and care of their children, and for families to order their lives in accordance with conscience and religious conviction. The Heritage Foundation has a substantial interest in ensuring that constitutional protections for parental authority, religious exercise, and individual conscience are not diminished merely because the State invokes public-health authority. That assertion of state power reaches deeply into the family and burdens precisely the parental, religious, and conscience interests that The Heritage Foundation has long defended in its scholarship and policy work.

Young America's Foundation ("YAF") is a national nonprofit organization whose mission is to educate and inspire young Americans with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF fulfills its mission in part through student-led chapters on college campuses. YAF members commonly face discrimination and bias from administrators and student governments, and their

1. No counsel for a party authored this brief in whole or in part, and no person other than *Amici Curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief. Counsel for the parties received timely notice of the intention to file a brief as *Amici Curiae*.

free exercise rights are affected by rules that privilege secular over religious reasons. This case is important to YAF because it presents this Court the opportunity to strengthen the foundational freedom of religion and to provide clarity on general applicability, protecting YAF members' abilities to live out their faith in school.

SUMMARY OF ARGUMENT

After the Court granted, vacated, and remanded this case for reconsideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025), the Second Circuit reaffirmed its determination that the New York childhood vaccine mandate is neutral and generally applicable. This case, therefore, reaches this Court in essentially the same substantive posture as it did a year ago. Now, as then, the Second Circuit's decision mangles Free Exercise Clause analysis and exacerbates the existing confusion among and within the circuit courts about when a law is generally applicable under *Employment Division v. Smith*, 494 U.S. 872 (1990).

General applicability asks whether the challenged law regulates religious conduct more harshly than similarly situated secular conduct; essentially, whether the law applies to everyone. A law fails to be generally applicable if it has a system of individualized exceptions or is underinclusive in scope (regulating religious activity but not comparable secular activity). The Second Circuit's error is twofold: first, it decided that categorical exemptions, like the medical exemption, do not trigger strict scrutiny if the purpose of the categorical exemption aligns with the purpose of the law; second, it allowed the state to define the law's purpose at an artificially high level

of generality. The result is that the Second Circuit deemed generally applicable a law containing facial exceptions for *identical* conduct based only on the state's opinion that a secular reason for that conduct is justified while a religious reason is not. This result flies in the face of the Free Exercise Clause.

Several circuit courts now consider the existence of explicit exemptions to a law to trigger strict scrutiny only where those exemptions are purely discretionary, as in *Fulton v. City of Philadelphia,* 593 U.S. 522 (2021), but not where the exemptions have "objective" eligibility criteria. For "objective" categorical exemptions, these courts ask whether the secular exemption furthers the government's general policy goals in determining whether it renders a law not generally applicable. And in answering that question, they both abstract the government's interest (a highly manipulable approach) and focus on the purpose of the exception instead of the purpose of the rule. But categorical exemptions (whatever their purpose) are just as problematic as discretionary exemptions, because both reflect the value judgment that secular reasons for conduct are more important or worthy of accommodation than religious reasons. The government's reason for treating religious conduct less favorably than identical secular conduct is properly analyzed at the strict scrutiny stage, not as the threshold question under a quasi-rational basis standard. The Free Exercise Clause means very little under such an approach.

The degree of the present confusion has resulted in some circuits having decisions going both ways (sometimes within the same case). Whether this confusion is endemic to the *Smith* framework, *see M.A. on behalf of H.R. v.*

Rockland Cnty. Dep't of Health, 53 F.4th 29, 41–42 (2d Cir. 2022) (Park, J., concurring), or remediable within it, clarification from this Court is needed.

ARGUMENT

"*Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable." *Fulton v. City of Phila.*, 593 U.S. 522, 533 (2021) (citing *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990)). General applicability essentially asks whether the law applies to everyone, and a law can fail to do so in multiple ways: first, by including "a system of individual exemptions," *Smith*, 494 U.S. at 884; second, by treating religious conduct less favorably than comparable secular conduct, *e.g. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542–43 (1993). The Second Circuit's decision, like similar decisions in the First, Third, and Ninth circuits,[2] *see Does 1–6 v. Mills*, 16 F.4th 20 (1st Cir. 2021); *Spivack v. City of Phila.*, 109 F.4th 158 (3d Cir. 2024); *Doe v. S.D. Unified Sch. Dist.*, 19 F.4th 1173 (9th Cir. 2021), misses the point of both questions.

2. Notably, cases going the other way include cases within the First and Third Circuits, *see Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023); *Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999).

I. A Law Ceases to Be Generally Applicable When It Creates a Mechanism for Individual Exceptions, Even if Eligibility Criteria Are Objective

"The creation of a formal mechanism for granting exceptions renders a policy not generally applicable." *Fulton*, 593 U.S. at 537; *Smith*, 494 U.S. at 884. The Second Circuit (and others) interpret this holding to refer only to laws with discretionary exceptions. *Miller v. McDonald*, 180 F.4th 420, 431 (2d Cir. 2026) (determining that the medical exemption was not an individualized exemption because it was "mandatory" and applied to an "objectively defined group"); *Spivack*, 109 F.4th at 173 (same); *S.D. Unified Sch. Dist.*, 19 F.4th at 1180 (same); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) (same), *rev'd on other grounds 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1082 (9th Cir. 2015) (same). These courts do not consider categorical exemptions—that is, exemptions available to a category of individuals based on their fulfillment of objective eligibility criteria—to trigger strict scrutiny:

> A system of individualized exemptions is one that gives rise to the application of a subjective test. Conversely, an exemption is not "individualized" simply because it contains express exceptions for objectively defined categories of persons . . . while of course it takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption, that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by

> the *Smith* court in its discussion of *Sherbert* and related cases.

303 Creative, 6 F.4th at 1187; *Stormans*, 794 F.3d at 1082 ("Because the exemptions at issue are tied directly to limited, particularized, business-related, objective criteria, they do not create a regime of unfettered discretion[3] that would permit discriminatory treatment of religion or religiously motivated conduct.").

But this narrow reading of the principle ultimately articulated in *Fulton* fails to capture what a formal mechanism for granting individualized exceptions is. Although the exception at issue in *Fulton* was purely discretionary, discretionary exceptions are only a subset of individualized exceptions. *See Fulton*, 593 U.S. at 537 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude—*here,* at the Commissioner's 'sole discretion.'") (quotation and citation omitted, emphasis added). Exceptions available based on "objective" eligibility criteria are also formal systems of individualized exemptions. Indeed, the "good

3. Courts may be placing so much emphasis on the discretionary nature of the exception in *Fulton* because they are conflating the Free Exercise Clause's general applicability analysis with the Free Speech Clause's unbridled discretion analysis, *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). Unlike the Free Exercise Clause's general applicability analysis, which determines only whether strict scrutiny applies, the existence of "unbridled discretion" under the Free Speech Clause is automatically unconstitutional.

cause" exemption to South Carolina's Unemployment Compensation Act that was at issue in *Sherbert v. Verner,* 374 U.S. 398 (1963), and upon which *Smith* relied for the "individualized exemption" prong of its general applicability analysis was of comparable objectivity to the medical exemption at issue here. *Compare, e.g.*, *Stone Mfg. Co. v. S.C. Emp. Sec. Com'n*, 64 S.E.2d 644, 647 (S.C. 1951) (Describing "good cause" as "a failure of industry to provide stable employment," and noting that "a laudable motive for leaving employment and a 'good cause' within the meaning of the Act are entirely different things.") *with* N.Y. Pub. Health L. § 2164(8) (providing an exemption where a physician asserts that a vaccine "may be detrimental to a child's health").

Instead, a formal system of individualized exceptions means that the law prescribes a process by which an individual who *is subject* to the law can apply for an exemption from that law. Contrast this with a law that defines its scope to simply not apply to certain conduct. *Lukumi* is a classic example: the ordinance's scope was gerrymandered to target religious conduct by declining to regulate the same conduct when done for secular reasons. *Lukumi*, 508 U.S. at 554–56. Hunters, slaughterhouses, and people removing rodents or other pests did not have to apply for exemptions; the ordinance simply did not apply to them. *Id*. A law of gerrymandered scope regulates inconsistently in the first place; a law with a system of individualized exceptions regulates consistently but then provides certain regulated individuals an opportunity to apply for an exemption. The former, in which a law leaves *comparable* conduct unregulated, is the *Tandon* form of general applicability failure. *See Tandon v. Newsom*, 593 U.S. 61, 62 (2021). The latter, in which a law regulates

everything in the same way but then provides exemptions to some, is the *Fulton* form of general applicability failure, regardless of whether the exemptions are subjective or objective. The defining characteristic that distinguishes between the *Tandon* comparable conduct approach and the *Fulton* exemption approach is the opportunity and necessity of applying to qualify for an exception.

The method of determining whether to grant an individual exemption is not relevant to general applicability. That is, a law with explicit exceptions is not generally applicable regardless of whether the exemptions are defined based on objective criteria or are available at an official's discretion. The question, rather, is whether there exists the possibility for some secular conduct to be exempt from regulation in ways that religious conduct is not. Put another way, the *general applicability* problem with discretionary exemptions is not the discretion, it's the exemption. A discretionary (or "subjective") exemption gives government the opportunity "to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 593 U.S. at 537. A categorical (or "objective") exemption reflects that the government has already taken that opportunity and decided that certain secular circumstances are more worthy of accommodation than religious ones. *See Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999) ("[I]t is clear from [*Smith* and *Lukumi*] that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not

for individuals with a religious objection").[4] Both trigger strict scrutiny. *Id.*

Because it provides a formal system whereby children who would otherwise be required to receive vaccinations can apply to qualify for an exemption, New York's vaccination mandate is not generally applicable. The Second Circuit's decision to the contrary only worsens the substantial confusion existing in the circuit courts and warrants correction.

II. Comparability Focuses on How Conduct Relates to Particular Interests, Not on How Different Exceptions Relate to General Public Policy Goals

Even if *Tandon*'s comparability test applied, the decision below also confuses that analysis. In *Tandon*, the Court explained that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise," and that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."

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4. Even if categorical exemptions are not the same as "individualized" exemptions, that does not mean that they do not also undermine general applicability. *See Fraternal Ord. of Police*, 170 F.3d at 365. *Cf. Carson as next friend of O. C. v. Makin*, 596 U.S. 767, 787 (2022) ("In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why.").

593 U.S. at 62. Purporting to apply this test, the Second Circuit found that the childhood vaccine mandate was generally applicable despite allowing a secular exception because it deemed the purpose of the exception to be consistent with the purpose of the mandate. *Miller*, 180 F.4th at 429–30. But to do that, it considered an abstract, highly generalized policy interest: protecting health. *Id.* Then, the Second Circuit considered whether the *purpose* of the exception, rather than the *effect* of the exception, comported with that policy interest. Both are wrong and together make comparability analysis akin to rational basis review.

A. General applicability should not be judged against a generalized, abstract policy goal or outcome-justifying slogan but should look to the law's operative aim.

Interests at a "society-wide level of generality" inappropriately skew the Free Exercise Clause analysis. *See Does 1–3 v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting from denial of *certiorari*). Compared to "rarified values," a person's "highly particularized and individual interest in the exercise of a civil right" inevitably "appear[s] the less significant.'" *Id.* (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014)) (internal quotation marks omitted). Comparability should not be judged against a generalized, abstract policy goal. Instead, the inquiry should focus on how the law operates. In this case, the vaccine mandate accomplishes a general policy purpose of protecting public health by striving to increase vaccination rates. Comparability should turn on conduct's impact on the law's operative goal of increasing

vaccination rates rather than the general policy goal of furthering public health.[5]

In *Lukumi,* for example, the city provided two policy purposes for not prohibiting all killing of animals: preventing cruelty to animals and protecting the public health. 508 U.S. at 543. As the city noted, killing animals for food and eliminating rodents at the very least furthers the public health, *id.* at 543–44, as would killing animals "in the interest of medical science." *Id.* The city described animal sacrifice as "different," however. *Id.* at 544. That is, animal sacrifice did not align with the city's policy purposes. *Lukumi,* though, asks "why religion alone must bear the burden of the ordinances." *Id.* If the City of Hialeah's only flaw was in failing to devise sufficiently creative policy purposes, then the vast majority of religious exercise can be discriminatorily regulated with impunity.

Abstract interests like "public health" are also extremely manipulable. Because "laws can have various purposes and advance various interests," the generality of the government's interest can easily be dialed up or down, depending on the needs of litigation, *M.A. on behalf of H.R. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 41–42 (2d Cir. 2022) (Park, J., concurring).

> The more narrowly a law's purpose is construed, the more difficult it is for an exception to undercut it—at a granular enough level, the

5. While some cases in which the government asserts a generalized government interest as a pretextual, post-hoc justifications for a law, *see, Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting) (collecting cases), generalized interests remain problematic even when they are genuine.

> purpose of any law is simply to "appl[y] to everything it applies to." Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 16 (2016). Conversely, a law's purpose could be framed broadly—for example, "to promote public health"—so that an exception would rarely undermine it.

Id. at 42. *Carson v. Makin* is a good example. When parents in Maine challenged the state's exclusion of religious schools from its school choice program, Maine defined its school choice program's purpose as to provide a "secular education." *Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 784–85 (2022). "The definition of a particular program can always be manipulated to subsume the challenged condition." *Id.* at 784. This is true whether the asserted interest is a litigator's post-hoc rationalization or is supported by the legislative history (as the Second Circuit thought here, *see* 180 F.4th at 429–30). But if the Court's Free Exercise decisions have any meaning, the analysis must resist such manipulation and turn on "the substance of Free Exercise protections, not on the presence or absence of magic words." *Carson*, 596 U.S. at 785. If the Court retains *Smith*, whose "general-applicability test embraces a purposivist approach that is vulnerable to manipulation and arbitrariness," *Rockland County*, 53 F.4th at 42 (Park., J., concurring), the government's interest must be defined specifically and determined based on the law's actual operation rather than abstract policy goals. Free Exercise analysis must turn on substance, not definitional maneuvering.

B. Comparability analysis should focus on how the exempted conduct impacts the purpose of the mandate, not on the reasons for permitting other exemptions.

Comparability focuses on the risks of conduct, not on the reasons for conduct, *Tandon*, 593 U.S. at 62; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 22 (2020), but the decision below focused on the reasons. Once it held that the purpose of the mandate was to "protect health," the decision below found that the medical exemption furthers exempted students' health and, therefore, disregarded it as a secular comparator. But "[t]his argument incorrectly focuses on the reasons for the exemption rather than the asserted interest that justifies the mandate." *Doe v. S.D. Unified Sch. Dist.*, 19 F.4th 1173, 1185 (9th Cir. 2021) (Ikuta, J., dissenting). The conduct at issue is identical—attending school unvaccinated; therefore, the medical exception is a direct secular comparator, regardless of why the legislature allowed medical exemptions. And, of course, both New York and the Second Circuit act as if only exemptions furthering *physical* health actually further "health," while actions that further *spiritual* health may be disregarded.

"Secular exceptions defeat general applicability no matter how important, justified, or sensible." Douglas Laycock & Steven T. Collis, Generally Applicable Law and the Free Exercise of Religion, 95 Neb. L. Rev. 1, 15 (2016). When a law treats people differently despite engaging in the same conduct, the reason they engage in that conduct is irrelevant. Any differentiation based on the government's belief that certain reasons for that conduct are important, "necessary," or "essential,"

triggers strict scrutiny. *See Lukumi*, 508 U.S. at 537–38; *Diocese of Brooklyn*, 592 U.S. at 22 ("The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces. . . . That is exactly the kind of discrimination the First Amendment forbids."). Certainly, exempting students for whom vaccination poses a health hazard is wise, but the fact remains that they are *exempted* from the vaccination mandate. And once others are exempted, religious objectors must receive the same treatment unless the government can satisfy strict scrutiny. *Smith*, 494 U.S. at 884.

The government's reason for making an exception for a secular reason but not a religious one goes to compelling interest, not general applicability. General applicability asks whether the government makes exceptions; strict scrutiny asks if the government's reason for refusing religious exceptions is good enough. For example, in *Diocese of Brooklyn*, while the Court was skeptical of the state's definition of "essential" businesses, the analysis did not turn on the relative essentiality of religious services; it turned on the rough similarity of those activities' risk of spreading COVID-19. 592 U.S. at 17. And, indeed, the relative risks need not be identical for secular and religious activities to be comparable. *Diocese of Brooklyn* contained no such analysis and overturned a decision that did. *See Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 227 (2d Cir. 2020), *rev'd & remanded sub nom. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020) ("Before the District Courts, the State also explained why gatherings at certain large commercial stores deemed essential are not meaningfully comparable to religious gatherings. Unlike shopping at large stores, an in-person religious

service or ceremony necessarily involves a community of adherents arriving and leaving at the same time and interacting and praying together over an extended period of time. The State provided unrebutted evidence that this type of purposeful interaction poses a higher risk of transmission of the coronavirus . . . .").

The decision below (as well as the others within the circuit split) continue to apply this defunct analysis, determining that religious exceptions are not comparable to medical exceptions if they are (or could be) more numerous, of longer duration, or not related to physical health. *See Miller*, 180 F.4th at 429 ("Secular conduct is not always 'comparable' to religious conduct. It is 'comparable' when the secular conduct poses risks 'at least as harmful to the legitimate government interests' justifying the law as posed by the religious conduct incidentally burdened by the law."); *We the Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 76 F.4th 130, 154–55 (2d Cir. 2023); *Does 1–6*, 16 F.4th at 31–32; *S.D. Unified Sch. Dist.*, 19 F.4th at 1178.

Such considerations pertain to compelling interest, not comparability.

> There may be cases where an unusual secular reason for acting is so important that the government has a compelling interest in treating that secular act more favorably than analogous religious acts. . . . But that limited consideration of the reasons for secular exceptions goes at the end of the case, subject to strict scrutiny under the compelling-interest test.

Laycock and Collis, *supra* at 16. And even if the reason is ultimately compelling, narrow tailoring requires the government to make much more effort to accommodate religious concerns. *Diocese of Brooklyn*, 592 U.S. at 18; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728–29 (2014). If New York is going to destroy the Amish school system in the name of public health, it must at least explore less destructive alternatives.

Ultimately, the Second Circuit's application of the general applicability test, which is designed to determine whether rational basis or strict scrutiny applies, looks a lot like rational basis in the first instance. *See* Laycock and Collis, *supra* at 16 ("[The compelling-interest test] is very different from comparing reasons at the beginning of the case under a much more deferential standard of review . . . and holding that a rule riddled with exceptions is really generally applicable if there appear to be plausible reasons for the secular exceptions."). The Free Exercise Clause means very little if the government can excuse religious discrimination as long as exempting others bears a rational relation to the legislature's general purpose.

* * *

Whether allowing medical exemptions requires allowing religious exemptions is not a new question, but *Fraternal Order of Police* effectively governed it until the COVID-19 pandemic prompted regulations that "str[uck] at the very heart of the First Amendment's guarantee of religious liberty," *see Diocese of Brooklyn*, 592 U.S. at 19–20. The years since have seen a circuit split develop, worsen, and become entrenched. *See Dr. A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from

denial of certiorari). And as it stands, general applicability analysis is woefully confused, even to the point where cases within the same circuit take opposite positions. *Compare Spivack*, 109 F.4th at 173 (holding categorical exemptions do not trigger strict scrutiny) *with Fraternal Ord. of Police*, 170 F.3d at 365 (holding categorical exemptions do trigger strict scrutiny); and *compare Does 1-6*, 16 F.4th at 30–32 (holding Maine's healthcare workers vaccine mandate generally applicable because medical and religious exemptions were not comparable) *with Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023) (holding Maine's healthcare workers vaccine mandate subject to strict scrutiny because medical and religious exemptions were comparable). If there is any time for the Supreme Court to provide clarity on what the Free Exercise Clause requires, it is now.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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