No. 21A____

In the Supreme Court of the United States

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S., NURSE S., PHYSICIAN LIAISON X.,

Applicants,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. HOWARD A. ZUCKER, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Respondents.

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit

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Dated: November 12, 2021

QUESTIONS PRESENTED

1. Whether an administrative rule is generally applicable when it bans specific religiously motivated conduct inside a covered facility while expressly permitting otherwise identical secular conduct in the same facility at the same time.

2. Whether an administrative rule mandating vaccination for health care workers is religiously neutral for purposes of the Free Exercise Clause when it targets religion by removing a religious exemption while retaining a medical exemption, when the governor declared that the removal was intentional and that religious objectors to vaccination are "not doing what God wants," and when the State enforces that view by punitively denying unemployment benefits to terminated religious objectors.

3. Whether a state administrative rule can forbid private employers from offering any religious accommodations under Title VII other than exclusion from the employer's premises.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 29.6, Applicants Doctor A, Nurse A, Doctor C, Nurse D, Doctor F, Doctor G, Therapist I, Doctor J, Nurse J, Doctor M, Nurse N, Doctor O, Doctor P, Technologist P, Doctor S, Nurse S, and Physician Liaison X were plaintiffs below in proceedings before both the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Northern District of New York, and they each represent that they do not have any parent entities and do not issue stock.

Respondents, who were defendants in the state court proceedings, are Kathy Hochul, in her official capacity as Governor of the State of New York, Dr. Howard A. Zucker, in his official capacity as Commissioner of the New York State Department of Health, and Letitia James, in her official capacity as the Attorney General of the State of New York.

Respectfully submitted,

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Dated: November 12, 2021

LIST OF RELATED PROCEEDINGS

Dr. A. v. *Hochul*, No. 21-2566, (2d Cir. Nov. 4, 2021), Appx.1-54.

Dr. A. v. *Hochul*, No. 1:21-cv-1009 (N.D.N.Y., Oct. 12, 2021), Appx.55-88.

We the Patriots, Inc. v. *Hochul*, No. 21A125 (Application for injunctive relief, Nov. 1, 2021).

We the Patriots, Inc. v. *Hochul*, No. 21-2179 (2d Cir. Nov. 4, 2021).

We the Patriots, Inc. v. *Hochul*, No. 1:21-cv-04954 (E.D.N.Y., Sept. 13, 2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other authorities

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court for the Second Circuit:

Pursuant to Rules 22 and 23 of this Court, and 28 U.S.C. 1651(a), Applicants respectfully request an injunction preventing enforcement of New York's ban on religious exemptions for healthcare workers opposed to mandatory COVID vaccination. In the alternative, Applicants ask that enforcement of New York's rule be stayed, and/or this application be treated as a petition for certiorari and granted, so that this Court can promptly address on its merits docket the important issues presented here. In either case, Applicants request an administrative stay during the emergency briefing and deliberations on this application.

This application arises from New York's extraordinarily punitive COVID vaccine mandate, which the district court rightly held is "not a neutral law," but a "'religious gerrymander'" that "targets religious opposition to the available COVID-19 vaccines." New York is a national outlier: While 47 states and the federal government respect religious objectors, New York punishes them. In fact, after originally announcing that it would respect religious objections, New York made a U-turn, revoking the religious exemption entirely, while at the same time *broadening* its medical exemption. It now allows medically exempt unvaccinated employees to continue normal job responsibilities so long as they wear personal protective equipment (PPE), but it refuses to allow unvaccinated religious objectors to work on-site at all. Worse, New York now even *bars religious objectors who lose their jobs from receiving unemployment compensation*. Other workers' unemployment claims "are reviewed on

a case-by-case basis," but healthcare workers fired over the vaccine mandate without a medical exemption "will be ineligible" for unemployment benefits.

New York's approach is therefore nothing like the "across-the-board" law in *Smith* that only "incidentally" burdened religion, and it should easily have triggered strict scrutiny under *Fulton* and *Tandon*—as the district court correctly held. Indeed, New York's recent addition of a categorical denial of unemployment compensation to religious objectors makes this an easy case under this Court's unemployment-compensation cases—*Sherbert, Thomas,* and *Hobbie*—which all survived *Smith*.

The Second Circuit candidly acknowledged that New York's mandate imposes "meaningful burdens" on Applicants' religious exercise. But it held that those "meaningful burdens"—even on a textual constitutional right—were not "of a constitutional dimension." The panel openly admitted that it is "reasonable" to treat unvaccinated employees as "present[ing] statistically comparable risks" of spreading COVID, whether they were unvaccinated for religious or medical reasons. And the panel acknowledged that medically exempt employees were allowed to "continue normal job responsibilities" while wearing PPE—an option categorically denied to religious objectors. But the panel nevertheless applied only rational basis review, relying in part on decisions from other circuits that have badly misconstrued the Free Exercise Clause, including the heavily criticized decisions in *303 Creative LLC* v. *Elenis*, 746 Fed. Appx. 709 (10th Cir. 2018), and *Stormans* v. *Wiesman*, 794 F.3d 1064 (9th Cir. 2015), cert. denied, 136 S. Ct. 2433 (2016) (No. 15-862) (Alito, J., dissenting). And it deepened the circuit split between *Dahl* v. *Board of Trustees of Western*

Michigan University, 15 F.4th 728 (6th Cir. 2021) and *Does* v. *Mills*, No. 21-1826, 2021 WL 4860328 (1st Cir. Oct. 19, 2021). As a result, Applicants and thousands of other healthcare workers are poised to suffer irreparable harm, even while 47 other states and the federal government demonstrate that such harm is entirely unnecessary.

The panel did agree that New York's mandate cannot override the civil rights protections provided to employees by Title VII. And on November 5, the federal government issued its own vaccine mandates which repeatedly emphasized that religious employees retain their full Title VII right to reasonable accommodation. Yet rather than interpret its rule to be consistent with Title VII and the new federal rules, New York has now informed this Court that its rule allows far less: the *only* accommodation New York will allow is complete removal of the religious employee from the category of "personnel" under the rule. Response Br. at 36, *We the Patriots, Inc.* v. *Hochul*, No. 21A125 (Nov. 10, 2021) (citing the definition of "personnel" at Section 2.61(a)(2)). New York now even admits that the injunction in *this* case was "preventing" New York from "interfering" with employers' voluntary grants of religious exemptions. Response Br. at 13. Under Title VII, an employer who can reasonably accommodate an employee's religious exercise *must* do so, and states are not empowered to "interfere" with federal law. New York's aggressive position also directly contradicts recent EEOC guidance on Title VII, and it means that Applicants cannot be accommodated on-site, *even when their employers previously determined that they could be accommodated without undue hardship.*

If New York reverses course here and agrees to (1) allow employers to offer the *full* scope of Title VII protections and (2) allow religious objectors to continue their "normal job responsibilities" alongside their medically-exempt coworkers who are doing the same, then this Court could safely deny the petition. Ideally, any such denial would be accompanied by a statement clarifying that the basis for doing so is New York's acknowledgement that its law allows employers to offer what Title VII and the Free Exercise Clause require. But if New York offers anything less—if it continues to assert the power to "interfere" in religious but not medical accommodations—then this Court should either issue an injunction or grant certiorari now to address these recurring issues on the merits docket.

Finally, while a typical employment dispute will not necessitate emergency intervention, this case is anything but typical. Applicant healthcare workers face what the panel deemed "difficult, apparently unusual questions as to imminent irreparable harm." That is because the panel found it "not at all clear" that Applicants could ever recover meaningful remedies from either the State or employers under the current mandate. Worse, unlike typical Title VII plaintiffs, Applicants will be foreclosed by the State from pursuing other job prospects in their fields and simultaneously prevented even from obtaining unemployment benefits to feed their families while their case proceeds. New York has attainted them in all but name.

Just as with COVID worship restrictions, vaccine mandates raise difficult questions about balancing indubitably strong public health interests on one side and core constitutional rights on the other. But it is not difficult to see that New York's

uniquely punitive treatment of religious objectors, which is an extreme outlier nationally, violates the Free Exercise Clause. All Americans, especially our healthcare workers, deserve better.

JURISDICTION

Applicants appeal from the Second Circuit's reversal of the district court's grant of a preliminary injunction. This Court has jurisdiction under 28 U.S.C. 1651.

BACKGROUND AND PROCEDURAL HISTORY

A. The Applicants

"Heroes work here." This phrase describes Applicants, healthcare workers who have served tirelessly during all phases of the COVID pandemic, since long before vaccines were available. For example, Therapist I is a Catholic brain injury specialist who temporarily served in the COVID unit of a nursing home to help with staffing shortages, and then returned to his rehabilitation clinic. Appx.155 ¶¶ 91-92.[1] Doctor J is a Catholic OB/GYN who treated many patients with COVID while she herself was pregnant. Appx.156 ¶ 99. Dr. O is a Catholic surgeon who treated many COVID patients, Appx.163 ¶ 141, and Dr. F is a Catholic oral surgeon who never turned away a patient with COVID who needed care in the rural upstate region that his clinic serves. Appx.152 ¶ 76. Dr. P is a third-year OB/GYN resident who cared for many COVID patients during her ICU rotation. Appx.165 ¶ 151. Three Applicants are

[1] Applicants' verified complaint contains signed, sworn declarations from each Applicant confirming its accuracy. Respondents have not refuted any of Applicants' factual assertions. As permitted by the district court, Applicants are proceeding under pseudonyms due to the tangible harms, including retaliation, that they would experience by identifying themselves publicly. Appx.87; Appx.140-143.

currently breastfeeding, and four have already recovered from COVID. Appx.156, 158, 161-162, 165, 167-169.

All 17 Applicants have uncontested sincere religious objections to the COVID vaccines due to their origin from "abortion-derived fetal cell lines in testing, development, or production." Appx.144-145. These objections are rooted in the devout Catholic beliefs of 16 Applicants and the devout Baptist beliefs of Nurse J. Neither the Respondents nor the courts have questioned Applicants' sincerity or religiosity.

B. New York's Mandate

As the district court recognized, New York's state of emergency officially ended in June 2021.[2] Yet the state's use of emergency powers did not. On August 18, 2021, Respondent Zucker issued an initial vaccine mandate for health care workers which included an explicit medical and religious exemption, with the stated goal of "reduc[ing] the spread of the Delta variant."[3] The religious exemption provided that "[c]overed entities *shall grant* a religious exemption for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief" contrary to receiving the COVID vaccine. Appx.103-104 at (c)(2) (emphasis added). The medical exemption applied if "any licensed physician or certified nurse practitioner certifie[d]" that receiving the vaccine would be "detrimental" based on a "specific pre-existing health condition," "only until" the vaccine is no longer "detrimental to the health" of that employee. Appx.103 at (c)(1).

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[2] N.Y. Exec. Order 210 (June 24, 2021), https://perma.cc/HA9J-DYR4.

[3] N.Y. State Governor's Office, *Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers* (Aug. 16, 2021), https://perma.cc/ZBP3-Y778.

Eight days later, on August 26, New York announced an updated version of the mandate. Governor Kathy Hochul explained at a news conference that the religious exemption was "left off," and that this omission was done "intentionally."[4] At the same conference, Governor Hochul stated that she is not aware of a "sanctioned religious exemption from any organized religion" and that "everybody from the Pope on down is encouraging people to get vaccinated."[5] This new "emergency" mandate, issued by the same commissioner (Respondent Zucker) and adopted by the Department of Health, is the operative mandate before this Court and requires most healthcare workers to be vaccinated within 30 days. Appx.107-131. The primary change in the August 26 rule was to remove the religious exemption entirely. The only changes to the medical exemption made it *broader*; the rule added that it is "inapplicable" entirely in the case of medical exemptions instead of requiring they be "subject to a reasonable accommodation," and it removed the requirement that medical exemptions are for "specific" conditions. Compare Appx.109, § 2.61(d)(1) with Appx.103 at (c)(1).

New York's about-face immediately harmed Applicants, other religious objectors, and the healthcare system. Four Applicants had received religious exemptions before August 26, only to have them revoked after the mandate removed religious exemptions. Appx.148 ¶ 49 (Nurse A); Appx.152 ¶ 77 (Dr. F); Appx.163-164 ¶¶ 142-143 (Dr. O); Appx.169 ¶ 174 (Dr. S). Nurse A's employer explained that it "must follow

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[4] N.Y. State Governor's Office, *Video & Rough Transcript: Governor Hochul Holds Q&A Following COVID-19 Briefing* (Sept. 15, 2021), https://perma.cc/5DY6-S7KM.

[5] *Ibid.*

NYS DOH requirements as they evolve. This means that [the hospital] can no longer consider any religious exemptions to the COVID vaccination *even those previously approved*." Appx.148 ¶ 49. Dr. O's employer revoked his religious exemption because "under the emergency regulations the NYS DOH will not permit exemptions or deferrals for sincerely held religious beliefs." Appx.164 ¶¶ 142-143. Several other employers told employees that they wanted to grant religious exemptions, but the state mandate prevented them. See, *e.g.*, Appx.158-159 ¶ 112 (Nurse J was advised by executive director of home care agency that "my hands are tied" because no religious exemption is possible due to the mandate). Thousands of healthcare workers must now either violate their consciences or lose their jobs.[6] At the same time, New York faces a severe shortage of medical professionals, which Governor Hochul has declared a "statewide disaster emergency." The governor has authorized calling in medical personnel who are not licensed in New York, authorizing practice by recent graduates not yet licensed anywhere, bringing medical professionals from other countries, and, if necessary, deploying the National Guard.[7]

After prohibiting religious exemptions, New York then announced that employees terminated for declining the vaccine would be made ineligible for unemployment insurance. New York introduced this additional penalty on September 25, just two days before the original deadline for vaccination. As Governor Hochul's office

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[6] Rob Frehse, *New York State Health Care Workers Will No Longer Have Religious Exemption to COVID-19 Vaccine Mandate, Court Rules,* CNN (Oct. 29, 2021, 10:29 PM), https://perma.cc/UK6M-EHKR.

[7] See N.Y. Exec. Order No. 4 (Sept. 27, 2021), https://perma.cc/F2H9-VXDY.

explained in a press release: "The Department of Labor has issued guidance to clarify that workers who are terminated because of refusal to be vaccinated are not eligible for unemployment insurance absent a valid doctor-approved request for medical accommodation."[8] The Department's FAQ document emphasizes that while workers' cases are generally "reviewed on a case-by-case basis," healthcare workers who "are terminated for refusing an employer-mandated vaccination will be ineligible."[9]

Governor Hochul also publicly condemned religious objectors for rejecting "what God wants" and failing to be "true believers" who will say "thank you, God" for the COVID vaccine "[t]hat is from God to us."[10] In September, she spoke at two church services in Brooklyn and Harlem, explaining: "[God] made them come up with a vaccine. That is from God to us and we must say, thank you, God."[11] She added "[a]ll of you, yes, I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are. I need you to be my apostles."[12] She told another congregation:

> How can you believe that God would give a vaccine that would cause you harm? That is not the truth. Those are just lies out there on social media. And all of you, have to be not just the true believers, but our apostles to go

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[8] N.Y. State Governor's Office, *In Preparation for Monday Vaccination Deadline, Governor Hochul Releases Comprehensive Plan to Address Preventable Health Care Staffing Shortage* (Sept. 25, 2021), https://perma.cc/2GJV-TLQW.

[9] N.Y. State Dep't of Health, *Unemployment Insurance Top Frequently Asked Questions* (Sept. 25, 2021), https://perma.cc/Y4LL-KKFR.

[10] N.Y. State Governor's Office, *Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center* (Sept. 26, 2021), https://perma.cc/KP48-4YVK.

[11] *Ibid.*

[12] *Ibid.*

> out there and spread the word that we can get out of this once and for all, if everybody gets vaccinated.[13]

C. District Court Proceedings

On September 14, the district court granted Applicants' motion for temporary restraining order against the mandate. Appx.56-60. On October 12, the district court issued a preliminary injunction, determining that Applicants were likely to succeed on their Free Exercise claim because Section 2.61 is "not a neutral law" but a "'religious gerrymander' that triggers heightened scrutiny" because it "effectively targets religious opposition to the available COVID-19 vaccines." Appx.79, 80. The court also found that Section 2.61 is not generally applicable because it includes a broad medical exemption, although the unvaccinated for medical reasons pose the same "unacceptable" workplace risk as the unvaccinated for religious reasons. Appx.81. Respondents were likely to fail strict scrutiny because they did not explain why the reasonable accommodations that Section 2.61 guarantees for the medically exempt could not also extend to religious objectors, nor did they explain "why they chose to depart from * * * other jurisdictions that include the kind of religious exemption that was originally present in the August 18 order." Appx.83.

The court also held that Applicants were likely to prevail on their argument that Title VII preempted Section 2.61, because Title VII demands "favored treatment" for religious employees through reasonable accommodations. Appx.74 (quoting *EEOC* v.

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[13] N.Y. State Governor's Office, *Video, Audio, Photos & Rush Transcript: Governor Hochul Attends Services at Abyssinian Baptist Church in Harlem* (Sept. 12, 2021), https://perma.cc/PV76-EWAZ.

Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775 (2015)). Yet the "broad scope" of Section 2.61 has "effectively foreclosed the pathway to seeking a religious accommodation that is guaranteed under Title VII," by preventing Applicants' employers from granting religious exemptions or engaging in the interactive process that Title VII requires. Appx.76.

Though this injunction merely gave employers the *ability* to provide religious exemptions, without *requiring* any, employers quickly granted religious exemptions to roughly 2.4% of the healthcare workforce (15,844 employees statewide), demonstrating that they could do so without undue hardship.[14] This injunction also protected 15 of the 17 Applicants, who either received religious exemptions for the first time, had their original exemptions restored, or were allowed to continue working under indefinite status. Appx.201-202.

D. Second Circuit Proceedings

On October 29, 2021, the Second Circuit issued an order reversing the Northern District's grant of preliminary injunction in this case and affirming the Eastern District's denial of preliminary injunction in *We the Patriots, Inc.* v. *Hochul*. The panel issued a partial mandate immediately, ordering the district court to vacate its injunction and conduct "further proceedings consistent with this Order and the forthcoming opinion of this Court." Appx.2-3.

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[14] Rob Frehse, *New York State Health Care Workers Will No Longer Have Religious Exemption to COVID-19 Vaccine Mandate, Court Rules,* CNN (Oct. 29, 2021, 10:29 PM), https://perma.cc/UK6M-EHKR.

The Second Circuit followed with a per curiam opinion on November 4. The court acknowledged that Applicants here are "subject to meaningful burdens on their religious practice" yet described their harm as "not of a constitutional dimension." Appx.46. Citing the Ninth Circuit's decision in *Stormans* v. *Wiesman* and the Tenth Circuit's *303 Creative* v. *Elenis*, the Second Circuit emphasized that "[t]he mere existence of an exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct," does not trigger strict scrutiny. Appx.37 (internal quotation marks omitted). Finding the mandate neutral and generally applicable, the Second Circuit concluded that it is subject to only rational basis review. Appx.39. Without claiming any difference in the risk of spreading COVID, the panel found that an unvaccinated medically exempt employee could nevertheless be "substantially distinguish[ed]" from an unvaccinated religious objector by relying heavily on "limited data" suggesting religious objections were more common, drawn from affidavits New York filed in a state-court action weeks after the injunction was entered here. Appx.34. Despite recognizing that "this case raises difficult, apparently unusual questions as to imminent irreparable harm," the Second Circuit also concluded that the mandate didn't violate Title VII because it "does not foreclose all opportunity" for religious claimants "to secure a reasonable accommodation" since religious objectors could be given remote "assignments—such as telemedicine." Appx.41-42, 47.

On November 5, the U.S. District Court for the Northern District of New York vacated the preliminary injunction. Appx.56-60.

E. Consequences for Applicants

As result of the mandate, Applicants will lose their current jobs, lose their ability to find any other jobs in their field throughout New York, and be denied unemployment benefits. For example, the six Applicants who are doctors and surgeons will lose admitting privileges at hospitals, rendering them unable to practice their medical specialties or perform surgeries. Appx.150 ¶¶ 61-62; Appx.153 ¶¶ 79-80; Appx.154 ¶¶ 86-87; Appx.157 ¶¶ 103-104; Appx.164 ¶¶ 144-145; Appx.169 ¶¶ 174-177 (hospital administration notified Dr. S that failure to prove vaccination will result in suspension of hospital privileges). For Nurse D, who has $50,000 in student loans and whose job provides "a vital source" of income and health insurance for her family, the mandate and its punitive denial of unemployment benefits will prove financially devastating. Appx.151 ¶¶ 66-69. Two Applicants who are residents, Dr. M and Dr. P, face the imminent loss of their residencies and destruction of their careers, since they cannot practice independently without a residency, will not be able to find other residencies anywhere in New York to accept them, and will face adverse consequences for licensure. Appx.160-161, 165-166.

These consequences directly harm the patients and communities that Applicants serve. For example, Dr. C will no longer be able to perform eye surgeries, even though his clinic did 10,000 surgeries during 2020 without any COVID cases (or staff vaccinations). Appx.149-150 ¶ 57. Oral surgeon Dr. F, whose private clinic is vital to his rural upstate area and never turned away a patient with COVID, will no longer be able to perform surgeries. Appx.152-153 ¶¶ 76, 79. And all this is occurring at a

time when Governor Hochul herself publicly emphasized New York's need for more healthcare workers.[15]

What is more, the Second Circuit recognized that Applicants lack a remedy for the devastating financial losses they face—yet didn't "place any weight" on that issue. Appx.47. The court acknowledged that seeking lost wages would likely be fruitless: if Applicants seek money damages under Title VII, the Second Circuit opined that their employers could "make a persuasive argument that they should not have to pay because they were in effect compelled by law to terminate the employment," and if Applicants sought to sue New York, sovereign immunity would likely prevent recovery of damages. Appx.47.

REASONS FOR GRANTING THE APPLICATION

Under the All Writs Act, this Court "may issue all writs necessary or appropriate" that aid its jurisdiction and are permitted by law. 28 U.S.C. 1651(a). An injunction pending disposition of a petition for a timely writ of certiorari is permissible where "applicants have clearly established their entitlement to relief pending appellate review." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam) (granting injunctions pending appeal to application filed under 28 U.S.C. 1651(a)). This showing is made where applicants demonstrate "that their First Amendment claims are likely to prevail, that denying them relief would lead to

[15] In September, Governor Hochul declared a "Statewide Disaster Emergency" because of the shortage of healthcare workers, justifying bringing in licensed providers from other states and countries, unlicensed recent graduates, and, if necessary, deploying the National Guard. See N.Y. Exec. Order No. 4 (Sept. 27, 2021), https://perma.cc/34X8-UFQ6.

irreparable injury, and that granting relief would not harm the public interest." *Ibid.* (citing *Winter* v. *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)); see also *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (same). Applicants satisfy this standard.

I. Applicants are likely to prevail because New York's ban on religious exemptions violates the Free Exercise Clause.

A. Applicants have made out a *prima facie* Free Exercise case because their claims are both sincere and religious.

No claim under the Free Exercise Clause can be made unless it is both sincere and religious. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972). Proving so is the religious claimant's burden. See *id.* at 235. Here, Applicants have put unchallenged sworn evidence into the record that their beliefs are sincere and have maintained them in the face of loss of job, career, and unemployment benefits. Appx.147-172. And they have also presented sworn testimony that their beliefs are religious, based in their respective Catholic and Baptist beliefs. *Ibid.* Moreover, Applicants have also explained the severe burden on those beliefs. *Ibid.* Accordingly, New York has not contested these issues, and the courts below accepted them as proven. Appx.66, 9.

B. New York's ban is not neutral or generally applicable.

Though it acknowledged that the religious exemption ban subjects Applicants "to meaningful burdens on their religious practice," the Second Circuit said those burdens were "not of a constitutional dimension" under *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Appx.46. But New York's rule is not subject to *Smith* because it is neither neutral nor generally applicable in several ways: it permits secular conduct while banning comparable religious conduct that occurs in exactly

the same place and at the same time, it contains an individualized exemption for medical exemptions, it targeted religion by removing a religious exemption, government officials confirmed the targeting in announcements surrounding the new rule, and it punitively and selectively denies unemployment compensation.

The rule is therefore subject to strict scrutiny, a test New York cannot satisfy.

1. New York's medical exemption treats comparable secular conduct better than religious conduct.

A law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); accord *Tandon*, 141 S. Ct. at 1296. "Comparability is concerned with the risks various activities pose, not the reasons why" those activities are undertaken. *Tandon*, 141 S. Ct. at 1296.

As the district court correctly found, New York fails this test. New York forbids religious objectors from working on-site—deeming their risk of COVID spread "unacceptably high"—but then tolerates precisely the same risk from those with a medical exemption. Appx.81-82. Employees with a medical exemption are not required by the State to work off-site, or even to undertake any special precautions to prevent contracting or transmitting COVID other than using PPE. Instead, medically exempt employees are permitted to continue their normal job duties. Where the government grants accommodations for secular interests, as here, it "may not refuse to extend" those accommodations "to cases of 'religious hardship' without compelling reason." *Fulton*, 141 S. Ct. at 1878 (quoting *Smith*, 494 U.S. at 884).

The Second Circuit resisted this conclusion, but only superficially. First, the panel did not dispute the central claim—"that any individual unvaccinated employee is likely to present statistically comparable risks of both contracting and spreading COVID-19 at any given healthcare facility, irrespective of the reason that the employee is unvaccinated." Appx.33 (admitting this claim is "reasonable"). Nor has New York at any point disputed that an unvaccinated employee carries the same risk of COVID spread regardless of their reasons for remaining unvaccinated. Presumably that is because the virus is no respecter of persons. A medically exempt employee presents exactly the same risk of COVID spread as a religiously exempt one.

Second, the panel credited the State's claim that the exemptions are not comparable because the medical exemption is needed to ensure those employees "are able to continue working" and therefore will not contribute to "staffing shortages." Appx.30. But a fired religious objector, of course, will not be able "to continue working" either and likewise will contribute to "staffing shortages." Appx.30.

Third, the court of appeals also allowed New York to rely on later-filed affidavits from a state trial-court proceeding to assert that there are more religious objections than medical exemptions, an assertion that factored heavily into the court's analysis on comparability.[16] That is simply an effort to distract—even the possibility of secular

[16] The Second Circuit repeatedly claimed that Applicants had failed to meet their evidentiary burden to obtain a preliminary injunction. Appx.22, 29, 43. But to substantiate this claim, the court leaned heavily on Respondents' extra-record evidence that was never before the district court, was not cited until the appeal, and was only admitted in a state trial-court proceeding where the Applicants never had an opportunity to contest it. Appx.15-16. Among other problems with this evidence is

exemptions that undermine the government's interest "in a similar way" as religious conduct defeats general applicability. *Fulton*, 141 S. Ct. at 1877. Here, New York has now acknowledged to this Court that there are *thousands* of people with medical exemptions who are currently allowed to continue doing their jobs. Response Br. at 13-14, *We the Patriots, Inc.*, No. 21A125 (Nov. 10, 2021). If thousands of unvaccinated people can be exempt for secular reasons, then the law is not generally applicable, and New York needs to satisfy strict scrutiny as to why it allows zero religious exemptions.[17]

2. New York's broadened medical exemption is an individualized exemption.

New York's medical exemption means that many employees are eligible for and receive exemptions based on their individual circumstances as viewed by their

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that it does not clearly demonstrate the central point for which it is cited: the number of religious objectors. Appx.16. Rather, the raw data on which Respondents rely only shows that hospitals cited non-medical bases for exemption, which Respondents self-servingly extrapolated to be synonymous with "religious" requests. Appx.16.

[17] In light of vaccination rates well above 90% in the healthcare sector, New York has failed to explain why medically exempt employees can be permitted to remain on-site while religious objectors are banished. Although New York has never specified its target, in *Does* v. *Mills*, the Director of Maine's CDC also stated a goal of 90% vaccination rate in healthcare facilities, No. 21A90, 2021 WL 5027177, at *4 (Oct. 29, 2021) (Gorsuch, J., dissenting), a goal New York has already exceeded. If New York wishes to defend this treatment of religious objectors, it must satisfy strict scrutiny by demonstrating that its differential treatment is the least restrictive way of furthering a compelling governmental interest. But even under New York's suspect numbers, 96% of hospital healthcare workers have received at least one dose of the vaccine, and New York only claims that 1.3% of hospital workers raised a religious objection to COVID vaccination. Appx.15-16. New York has not explained how, at those levels, eliminating religious exemptions allowed by virtually every other state and the federal government is the least restrictive means of achieving a compelling government interest.

individual healthcare providers. But a "law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877.

The panel found that these medical exemptions were not "individualized exemptions" by relying on *303 Creative* and *Stormans* for the proposition that an exemption that "objectively defined categories of persons" is not individualized. Appx.36. According to the panel, "[t]he 'mere existence of an exemption procedure,' absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct is not enough to render a law not generally applicable." Appx.37. But this Court's cases say the exact opposite, that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given," *Fulton*, 141 S. Ct. at 1879, and New York has already demonstrated that it *does* favor secular medical reasons over religious reasons for remaining unvaccinated, *Mills*, 2021 WL 5027177, at *2 (Gorsuch, J., dissenting) (discussing Maine's individualized exemptions from its vaccine mandate).

3. New York targeted religion by removing the religious exemption.

Government actions are not neutral when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. Here, New York failed to act neutrally when it removed an existing religious exemption while broadening the medical exemption. The Second Circuit excused this action as not "intended to 'target'" religious objectors. Appx.26. But New York made a deliberate choice to burden religious conduct *qua* religious

conduct while broadening the exemption for comparable secular conduct. This is on its face not neutral as to religion, and it is certainly not the type of "across-the-board criminal prohibition" that "incidentally" burdened religion in *Smith*. 494 U.S. at 884. Laws that fail to operate "without regard to religion," or that otherwise "single out the religious" for disfavored treatment, "clear[ly] * * * impose[] a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2020-2021 (2017).

Applicants' experiences confirm this non-neutrality. Four of them had been offered exemptions by their employers, and those exemptions were permitted under New York's August 18 rule. Appx.148 ¶ 49 (Nurse A); Appx.152 ¶ 77 (Dr. F); Appx.163 ¶ 142 (Dr. O); Appx.169 ¶ 174 (Dr. S). New York then categorically forbade religious exemptions on August 26. And Applicants' employers revoked the prior accommodations precisely *because the objections were religious*. Appx.148 ¶ 49 (hospital revoking Nurse A's religious exemption because it "must follow NYS DOH requirements as they evolve. This means that [the hospital] can no longer consider any religious exemptions to the COVID vaccination *even those previously approved*"); Appx.163-164 ¶¶ 142-143 (hospital revoking Dr. O's religious exemption because "under the emergency regulations the NYS DOH will not permit exemptions or deferrals for sincerely held religious beliefs"). That is not "neutral" treatment that just happens "incidentally" to burden religion.

4. New York officials targeted religious objectors.

New York officials' speech surrounding the revocation of the religious exemption demonstrated that the ban was not religiously neutral, but rather reflected antipathy toward religious objectors. Governor Hochul spoke twice to religious audiences using disparaging language about religious objectors that could not have been misconstrued: "How can you believe that God would give a vaccine that would cause you harm? That is not the truth. Those are just lies out there on social media."[18] At another church service, she said, "All of you, yes, I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are."[19] And when explaining why New York "left off" religious exemptions "intentionally," Hochul explained that she is not aware of a "sanctioned religious exemption from any organized religion" and that "everybody from the Pope on down is encouraging people to get vaccinated."[20]

This is the opposite of "the requisite religious neutrality that must be strictly observed" by the government. *Masterpiece Cakeshop Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018). "[E]ven slight suspicion" that state action

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[18] See N.Y. State Governor's Office, *Video, Audio, Photos & Rush Transcript: Governor Hochul Attends Services at Abyssinian Baptist Church in Harlem* (Sept. 12, 2021), https://perma.cc/PV76-EWAZ.

[19] See N.Y. State Governor's Office, *Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center* (Sept. 26, 2021), https://perma.cc/KP48-4YVK.

[20] N.Y. State Governor's Office, *Video & Rough Transcript: Governor Hochul Holds Q&A Following COVID-19 Briefing* (Sept. 15, 2021), https://perma.cc/3254-8ZLM.

against religious conduct "stem[s] from animosity to religion" is enough to give pause under the First Amendment. *Id.* at 1731. And if Government actions are indeed based on "impermissible hostility toward * * * sincere religious beliefs," they are per se unconstitutional. *Id.* at 1729. Given that not even courts should "undertake to dissect religious beliefs" or resolve "intrafaith differences" because they "are not arbiters of scriptural interpretation," governors *certainly* lack that power. *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715-716 (1981).

The Second Circuit excused Governor Hochul's sermons as mere "personal opinion" consistent with a "religion-neutral government interest." Appx.28-29. But accusing religious objectors of not "listening to God and what God wants," and declaring that "God would [not] give a vaccine that would cause you harm," *supra* at 9-10, are not the words of a "neutral decisionmaker who would give full and fair consideration" to contrary religious beliefs. *Masterpiece*, 138 S. Ct. at 1732. Rather, they improperly "suggest[]" that "the religious ground for [Applicants'] conscience based objections is * * * illegitimate." *Id.* at 1731. That's particularly true when the words are considered in context, coming shortly after New York removed its religious exemption, and shortly before Governor Hochul's office announced that New York would categorically deny unemployment benefits to workers fired because of the vaccine mandate.

None of this is "neutral" lawmaking that only "incidentally" burdens religious exercise. To the contrary, by removing an existing religious exemption, denouncing the beliefs of religious objectors, and proclaiming that God was on the side of the

State, New York officials have—yet again—failed to act neutrally. See *Diocese of Brooklyn*, 141 S. Ct. at 65-66 (enjoining "very severe restrictions" that "treat[ed] houses of worship much more harshly than comparable secular facilities"). Strict scrutiny applies.

C. New York's ban independently triggers strict scrutiny by categorically denying unemployment compensation to religious objectors.

New York's approach also triggers strict scrutiny because of its newest feature: the selective and punitive deprivation of unemployment benefits. Governor Hochul announced on September 25—just days before the vaccination deadline—that the State had gerrymandered its unemployment insurance coverage to target religious objectors. The governor warned that New York was eliminating unemployment benefits for employees terminated for refusing a COVID vaccination.[21] While *other* workers will have their applications "reviewed on a case-by-case basis," healthcare workers who "are terminated for refusing an employer-mandated vaccination will be ineligible."[22] The only exception is for terminated employees who seek a "*medical* accommodation." See *supra* n.21. Thus, Applicants are categorically "ineligible" for refusing vaccination because of their religious beliefs.[23]

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[21] N.Y. State Governor's Office, *In Preparation for Monday Vaccination Deadline, Governor Hochul Releases Comprehensive Plan to Address Preventable Health Care Staffing Shortage* (Sept. 25, 2021), https://perma.cc/2GJV-TLQW.

[22] N.Y. State Dep't of Health, *Unemployment Insurance Top Frequently Asked Questions* (Sept. 25, 2021), https://perma.cc/Y4LL-KKFR.

[23] *Ibid.*

New York has prejudged that religious reasons for refusing vaccination can never amount to good cause for losing one's job. This vindictive approach is the quintessential example of a law that violates the Free Exercise Clause, even under *Smith*. Cf. *Sherbert* v. *Verner*, 374 U.S. 398, 401, 403-404 (1963) (striking down state unemployment commission decision that a religious objection to working on Saturday was not "good cause" for refusing work).

Smith observed that the Court had applied strict scrutiny to invalidate state unemployment compensation rules three times: in *Sherbert, Thomas*, and *Hobbie* v. *Unemployment Appeals Commission of Florida,* 480 U.S. 136 (1987). 494 U.S. at 883. *Smith* expressly distinguished these as unemployment benefits cases, characterizing them as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* at 884; see *Hobbie*, 480 U.S. at 146 (explaining that, under the Free Exercise Clause of the First Amendment, the government "may not force an employee 'to choose between following the precepts of her religion and forfeiting benefits, . . . and abandoning one of the precepts of her religion in order to accept work'" (citation omitted)). But that is exactly what New York has done here: religious objectors are categorically ineligible for unemployment benefits. Under *Sherbert*, *Thomas*, and *Hobbie*—which *Smith* emphasized were not overruled—the vaccine mandate violates the Free Exercise Clause.

D. New York's ban fails strict scrutiny.

Since the rule is not neutral and generally applicable, New York bears the burden of satisfying strict scrutiny. *Tandon*, 141 S. Ct. at 1296. Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). To meet strict scrutiny, New York must show that it has a compelling interest, which is an interest "of the highest order," in requiring these specific Applicants to violate their religious beliefs. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-430 (2006). Even when the government has identified such an interest, the restriction on religious exercise "must be actually necessary to the solution." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 799 (2011). "That is a demanding standard." *Ibid*. And "because [the government] bears the risk of uncertainty, ambiguous proof will not suffice." *Id.* at 799-800 (internal citations omitted). "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

Even though this Court has held that limiting the spread of COVID is a compelling government interest, see *Diocese of Brooklyn*, 141 S. Ct. at 67, New York cannot show that its vaccine mandate and vindictive punishments of healthcare workers even after they are fired is the least restrictive means of advancing its interests.

1. New York has not shown that it needs greater restrictions than 47 other states and the federal government.

New York's restrictions are a national outlier. First, even though they face the same public health problems, 47 other states have not imposed any COVID vaccination mandate on private-sector healthcare workers, have allowed religious

exemptions, or have allowed accommodations like weekly testing. See Addendum. Only 14 states and the District of Columbia require private-sector healthcare workers to be vaccinated against COVID. Of these, all but three either provide for religious exemptions or allow employees to undergo testing instead of vaccination. Only New York, Rhode Island, and Maine require private-sector healthcare workers to receive COVID vaccines with no religious accommodation or testing alternative. "[W]hen so many" other jurisdictions "offer an accommodation, [New York] must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt* v. *Hobbs*, 574 U.S. 352, 369 (2015).

When enacting COVID vaccine mandates at the national level, the federal government has likewise been careful to emphasize that religious employees continue to be protected by federal employment laws such as Title VII. Thus, when enacting the federal employee vaccine mandate, the government stated that federal agencies are "required to provide a reasonable accommodation to employees * * * because of a sincerely held religious belief, practice, or observance."[24] And both the Occupational Safety and Health Administration (OSHA) mandate for private employers and the Center for Medicare and Medicaid Services (CMS) mandate for certain health care providers state that Title VII requires employers to offer reasonable accommodations to employees who object to the vaccine on religious grounds.[25] Where, as here, New

[24] Safer Federal Workforce, *Vaccinations*, https://perma.cc/599Q-XQWR.

[25] Under the OSHA mandate, private employers that mandate vaccines in the healthcare context or elsewhere must allow exemptions for sincere religious objections. 86 Fed. Reg. 61,402, 61,447 (Nov. 5, 2021) ("sincerely-held religious

York "has available to it a variety of approaches that appear capable of serving its interests," it must explain why it cannot take the more common path. *McCullen* v. *Coakley*, 573 U.S. 464, 493-494 (2014) (considering policies of other states under intermediate scrutiny); *Holt*, 574 U.S. at 368-369 (same under strict scrutiny).

New York's response to this argument is only that it considered and rejected alternatives to vaccination as "inadequate." Appellants' Reply Br. at 18, 20. But that does not explain the difference between New York and the 47 states and the federal government that do not require vaccination for the small percentage of their healthcare workforce that requests religious exemptions.[26] That alone means they flunk strict scrutiny. *Holt*, 574 U.S. at 368-369.

2. New York has shown that it *can* accommodate religious objectors.

New York also fails strict scrutiny because it has not explained why it cannot treat employees with religious objections like those who receive medical exemptions from the mandate. There is no reason that New York's "interests could [not] be achieved

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beliefs" make employees "legally entitled to a reasonable accommodation under federal civil rights laws"). Under the CMS mandate, health care providers and suppliers that receive Medicare and Medicaid are "required" to create a process for employees to request exemptions under federal employment law, including Title VII. 86 Fed. Reg. 61,555, 61,572 (Nov. 5, 2021) ("we require that providers and suppliers * * * implement a process by which staff may request an exemption * * * based on an applicable Federal law").

[26] The fact that some other states may take a significantly more protective approach toward religious objectors does not *require* New York to take the exact same approach. See *McCullen*, 573 U.S. at 493-494 (The State need not "enact all or even any" of the less restrictive means identified). But when the vast majority of states and the federal government have refrained from the punitive actions New York has taken, New York must show why it is entitled to outlier status in its treatment of a constitutional right. New York has not done so.

by narrower [laws] that burdened religion to a far lesser degree." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). That is, the precautions New York takes for medically exempt workers to ensure that they can continue working in the same facilities as religious objectors should apply just as well to religious objectors. *Holt*, 574 U.S. at 365 ("[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it."). The Second Circuit noted that "healthcare entities may permit a medically exempt employee to continue normal job responsibilities provided they comply with requirements for personal protective equipment," Appx.43 n.33, but it neglected to "requir[e] the State to explain why it could not safely permit" religious objectors to exercise the same "precautions used [for] secular" objectors. *Tandon*, 141 S. Ct. at 1297. Thus, New York has failed to meet its "most demanding" burden of proof under strict scrutiny. *City of Boerne*, 521 U.S. at 534.

The closest New York gets is that, as alleged in the affidavits it filed in a different case in state court, during the brief time that religious accommodations were legal in New York, the number of religious accommodation requests was higher than the number of medical exemptions. Appx.32. But even accepting those numbers, *supra* n.16, in the counties that the Second Circuit identified as having a higher proportion of religious accommodation requests, the overall vaccination rate for health care workers was above 90%. Appx.15-16. And the fact that religious exemptions are somewhat more common is not, by itself, a reason to deny them. To the contrary, the existence of these accommodations confirms that many healthcare employers have

found it entirely possible to safely accommodate religious employees in their facilities without undue hardship.

3. New York's categorical denial of unemployment benefits is not the least restrictive means of serving any valid interest.

New York also fails strict scrutiny by irrationally denying religious objectors unemployment benefits. See *supra* at 8-9. Even if firing religious objectors from their jobs was somehow the least restrictive way to meet its interests in curbing the spread of the virus and maintaining healthcare workers, depriving religious objectors of the ability to feed their families contributes to neither of those interests if they are already out of work. "[P]roperly narrowed," then, "we must conclude that the interests advanced by the state do not justify the burden placed on the free exercise of religion." *Thomas*, 450 U.S. at 719.

II. New York's categorical ban on religious accommodations directly conflicts with Title VII.

Under Title VII, "[a]n employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship." *Abercrombie & Fitch*, 575 U.S. at 775-776 (Alito, J., concurring). In order to meet their Title VII obligations, employers must engage in a good faith process involving "bilateral cooperation" with their employees who request religious accommodations. *Ansonia Bd. of Educ.* v. *Philbrook,* 479 U.S. 60, 69 (1986). While an employer is not required to accept an employee's preferred accommodation, it is per se unreasonable for employers to deny a religious accommodation if they have already granted similar

accommodations to other employees for secular reasons. *Id.* at 71. That is because, once an employer has authorized an accommodation, it "may not be doled out in a discriminatory fashion," since "discrimination against religious practices * * * is the antithesis of reasonableness." *Ibid.*

Consistent with this rule, when adopting its own "Health Care Staff Vaccination" regulation last week, the federal government recognized that health care employers "may also be required to provide appropriate accommodations" under Title VII "for employees who request and receive exemption from vaccination because of a * * * sincerely held religious belief, practice, or observance."[27] And when issuing guidance for employers implementing vaccine mandates, the EEOC emphasized that they must "thoroughly consider all possible reasonable accommodations"—listing examples such "wear[ing] a face mask, work[ing] at a social distance from coworkers or non-employees, work[ing] a modified shift, get[ting] periodic tests," teleworking, or reassignment.[28]

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[27] 86 Fed. Reg. at 61,568-61,569; see also 86 Fed. Reg. at 61,552 (allowing employers to exempt employees "[w]ho are legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices, or observances that conflict with the vaccination requirement").

It bears emphasizing that this case is not a collection of individual Title VII claims. The district court rightly recognized that it did not have to determine the merits of a future Title VII suit, but that New York's rule "has effectively foreclosed the pathway to seeking a religious accommodation that is guaranteed under Title VII." Appx.76.

[28] See K.2., K.12., and L.3. at EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Oct. 28, 2021), https://perma.cc/E3WH-WH7Q.

By contrast, Section 2.61 directly conflicts with Title VII. It requires vaccination for all on-site employees, and only allows employers to grant one kind of exemption, for medical reasons. Appx.109 at (c), (d). For unvaccinated employees with medical exemptions, "any reasonable accommodation may be granted." *Id.* at (d)(1). But for unvaccinated employees with religious objections, the law allows no exemptions.

In both its public-facing communications and in its Second Circuit briefing, New York took the position that the only "accommodation" consistent with Section 2.61 was to put the religious health care provider in a position where she would have no physical contact with patients or other employees and thus would not qualify as "personnel" under the Rule. Appx.41 (citing New York's brief).[29] The Second Circuit held there was no conflict between Section 2.61 and Title VII, because "Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule." Appx.42.

But New York's so-called accommodation falls far short of the actual accommodations New York permits under the medical exemption, which include things like continuation of normal duties while wearing PPE. Appx.109 at (d)(1). And that, by itself, violates Title VII, because once an employer has authorized an accommodation for secular purposes, it "may not be doled out in a discriminatory

[29] See also New York Dep't of Labor, *Frequently Asked Questions (FAQs) Regarding the August 26, 2021 – Prevention of COVID-19 Transmission of Covered Entities Emergency Regulation*, https://perma.cc/YZV2-YK8U (allowing "accommodation" but specifying that "covered entities cannot permit unvaccinated individuals to continue in 'personnel' positions such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients, or residents to the disease.").

fashion" that excludes religious accommodation. *Ansonia*, 479 U.S. at 71. It is not "reasonable" to banish employees who are unvaccinated for religious reasons from the worksite while accommodating employees who are unvaccinated for medical reasons with alternatives like PPE.[30]

Section 2.61's promulgation immediately caused employers to violate Title VII.[31] Nurse A, Dr. F, Dr. S, and Dr. O had all previously received religious accommodations from their employers, only to see those accommodations rescinded once Section 2.61 made them illegal.[32] Appx.148 ¶ 49 (Nurse A); Appx.152 ¶ 77 (Dr. F); Appx.169 ¶ 174 (Dr. S); Appx.163 ¶ 142 (Dr. O); see Appx.148 ¶ 49 (hospital revoking Nurse A's religious accommodation because it "must follow NYS DOH requirements as they

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[30] In many cases, exclusion from the worksite is no accommodation at all. Applicants who are surgeons and OB/GYNs, for example, cannot repair an eye or deliver a baby remotely. See Appx.149-150 (ophthalmologist with surgical practice); Appx.152-153 (oral surgeon); Appx.156-158, 165-166 (OB/GYNs).

[31] Of course, the employers continue to be liable for violating Title VII. As even the Second Circuit has recognized elsewhere, Title VII "explicitly relieves employers from any duty to observe a state hiring provision 'which purports to require or permit' any discriminatory employment practice." *Gulino* v. *New York State Educ. Dep't*, 460 F.3d 361, 380 (2d Cir. 2006); see also 42 U.S.C. 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice* under this subchapter.") (emphasis added). But as the Second Circuit observed in this case, the employers' defense that they were complying with state law could significantly limit employees' ability to recover damages. Appx.47.

[32] The Second Circuit dismissed this evidence as mere "say-so" and held that it was clear error for the district court to rely on it. That was error. These statements appeared in Applicants' verified complaint, and New York never contested them. "[S]ince they have not yet been denied or contradicted by countervailing affidavits or evidence," the facts in the verified complaint "must be accepted as true." *O'Connor* v. *Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1302 (1980).

evolve. This means that [the hospital] can no longer consider any religious exemptions to the COVID vaccination even those previously approved"); Appx.163-164 ¶¶ 142-143 (hospital revoking Dr. O's religious accommodation because "under the emergency regulations the NYS DOH will not permit exemptions or deferrals for sincerely held religious beliefs").

Conversely, once Section 2.61 was enjoined, health care employers moved quickly to accommodate their employees, granting religious exemptions to an estimated total of 15,844 health care workers (2.4% of the workforce), including 15 of the 17 Applicants.[33]

But when the Second Circuit vacated the district court injunction, employers once again revoked their religious accommodations due to Section 2.61. For example, one Applicant received this notice:

[33] Rob Frehse, *New York State Health Care Workers Will No Longer Have Religious Exemption to COVID-19 Vaccine Mandate, Court Rules,* CNN (Oct. 29, 2021, 10:29 PM), https://perma.cc/UK6M-EHKR. Following the district court injunction in this case, 15 out of 17 Applicants either received religious exemptions for the first time, had their original exemptions restored, or were allowed to continue working under indefinite status. Appx.201-202.

Date: November 2, 2021

To: Employees

From: [redacted], Administrator

Re.: Mandate Leave Updated to reflect Federal Court Ruling Eliminating Religious Exemptions for Covid 19 Vaccine

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This is to inform you that on Friday, October 29, 2021 the Second Circuit Court of Appeals vacated the temporary injunction that allowed religious exemptions, which means that New York State healthcare workers will no longer be able to claim a religious exemption to the COVID-19 vaccine.

As a result you are being placed on Mandate Leave effective today, November 2, 2021. Employees may be on Mandate Leave for up to 60 days from today. The Employer may terminate any employee on Mandate Leave at any time after 30 days. All employees still on Mandate Leave at 60 days, will be terminated from employment; however, they may reapply should circumstances change allowing them to work.

This leads to the most obvious Title VII violation: the mandate has forced employers who *can* accommodate their employees' religious beliefs and *want* to accommodate them to nonetheless exclude them from the worksite. See *supra* at 7-8 & n.29. Instead, no matter how easy it might be to accommodate employees, and no matter how dramatic the consequences from letting them go, the mandate requires exclusion. Title VII requires the exact opposite.

III. Immediate injunctive relief is warranted to prevent irreparable harm and would serve the public interest.

The Second Circuit found New York's law compatible with Title VII. But on Wednesday, New York doubled down in this Court, passing up the chance to moderate its position after the federal government's new rules reiterated Title VII's requirement of reasonable accommodation, and instead admitting its desire to "interefer[e]" with employers granting religious exemptions. Response Br. at 13, *We the Patriots*. In light of New York's unyielding position, Applicants have clearly

established that New York is violating both the First Amendment (under *Smith*, *Sherbert*, or any other standard) and Title VII. Absent immediate relief, Applicants face irreparable harm not only to their First Amendment and civil rights, injuries alone sufficient to justify protection pending appeal, *Diocese of Brooklyn*, 141 S. Ct. at 67, but also to their ability to provide for their families—losing their jobs, losing their admitting privileges or residencies, losing the ability to obtain other jobs in their fields, being barred from receiving unemployment, and potentially being unable to obtain damages.

Applicants are already receiving notices of termination or unpaid leave. See *supra* at 34. They need immediate relief. Providing that relief and allowing essential workers to be accommodated by their willing employers will help, rather than harm, the public interest because compliance with the First Amendment and Title VII is in the public interest, and because the public is not well served by firing healthcare workers who are in short supply.

For these reasons, "applicants have clearly established their entitlement to relief pending appellate review." *Diocese of Brooklyn*, 141 S. Ct. at 66 (granting injunction pending appeal to application filed under 28 U.S.C. 1651(a)).

IV. Alternatively, Applicants respectfully request that the Court either stay enforcement of New York's mandate or treat this application as a petition for certiorari and grant certiorari forthwith.

Stay. In the alternative, Applicants respectfully request that the Court grant a stay of enforcement of the mandate to permit a "reasonable time" for Applicants to petition for certiorari. See 28 U.S.C. 2101(f); Sup. Ct. R. 23. A stay is appropriate upon a showing that there is a "fair prospect" that the lower court judgment will be

reversed, a likelihood of "irreparable harm," and that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam) (further noting that, in close cases, courts will also "balance the equities and weigh the relative harms").

As shown above, there is more than a "fair prospect" that the lower court judgment will be reversed, given its conflict with so many of this Court's decisions, that Applicants face obvious irreparable harms, and that the equities and relative harms favor Applicants. Furthermore, in light of the recent three-Justice dissents in *Mills*, 2021 WL 5027177, *Roman Catholic Diocese* v. *Emami*, No. 20-1501, 2021 WL 5043558 (Nov. 1, 2021), and *Dignity Health* v. *Minton*, No. 19-1135, 2021 WL 5043742 (Nov. 1, 2021), there is at least a "reasonable probability" that a fourth justice will consider the questions presented sufficiently worthy of certiorari. *Hollingsworth*, 558 U.S. at 190.

Certiorari. While New York has been an outlier on multiple fronts, religiously discriminatory COVID-19 restrictions are an ongoing problem of nationwide scope. More to the point, New York's targeted denial of religious exemptions—coming less than a year after its targeted shutdown of houses of worship—is itself an issue of "imperative public importance," Sup. Ct. R. 11. Prompt merits consideration by this Court will provide much-needed guidance to governments, employers, employees, and lower courts as to how to navigate this important group of cases before many people suffer harms even the panel recognized would be irreparable.

Certiorari is further warranted given the conflicts between the Second Circuit's decision and decisions of other circuits and of this Court. The Second Circuit declined to apply heightened scrutiny even though the Rule treated religious objectors worse than healthcare workers with a medical exemption. By contrast, the Sixth Circuit subjected a Michigan college's COVID-19 vaccination order to heightened scrutiny because it discriminated against student religious objectors and in favor of other students, including students with a medical exemption. *Dahl*, 15 F.4th 728. And the Third Circuit has held that even a single secular exemption to an otherwise-applicable prohibition can render a law not neutral and generally applicable as applied to religion, regardless of whether other secular conduct is likewise banned. *Fraternal Ord. of Police* v. *City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999); see *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2613 (Kavanaugh, J., dissenting) ("The point is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is *not* regulated." (citation omitted) (emphasis in original)).

Moreover, as explained above, the Second Circuit's Free Exercise analysis runs afoul of this Court's well-settled precedent under *Smith*, *Sherbert*, or any other standard. This case—in which New York's punitive treatment of religious objectors is a textbook violation of the Free Exercise Clause—is the proper vehicle to resolve these conflicts and remind the Nation that, even in a pandemic, the Constitution and the Courts continue to provide protection.

CONCLUSION

The Court should issue an injunction prohibiting enforcement of New York's mandate until disposition of a petition for certiorari. Alternatively, the Court should convert the application to a petition for certiorari and grant certiorari now to address these important issues on the merits docket.

Respectfully submitted,

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