# 21-2179

**IN UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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WE THE PATRIOTS USA, INC., DIANE BONO, MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI

*Plaintiffs-Appellants*,

v.

KATHLEEN HOCHUL, HOWARD ZUCKER,

*Defendants-Appellees*,

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On Appeal from the United States District Court for the Eastern District of New York, No. 1:21-cv-04954-WFK

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**REPLY BRIEF OF THE PLAINTIFFS-APPELLANTS**

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October 8, 2021

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## INTRODUCTION

The Constitution does not contain a public health exception. While courts have been deferential to public health measures during the ongoing COVID-19 pandemic, they cannot allow the Constitution to go on a permanent sabbatical. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 70 (2020) (Gorsuch, J. concurring). The Defendants, however, seek the continuation of its sabbatical with respect to New York State Health Regulation, Title 10, § 2.61, which imposes a COVID-19 vaccination mandate on New York healthcare workers that allows for medical, but not religious, exemptions.

The Supreme Court has gradually curtailed the deference shown to state policymakers when they infringe on constitutional liberties, particularly in First Amendment free exercise cases. It has also made clear that its prior precedents do not establish exceptions to normal rules of constitutional analysis. The Defendants have failed to show that § 2.61 passes muster under well-established Supreme Court precedent, and the Plaintiffs respectfully ask the Court to reverse the district court's denial of their motion for a preliminary injunction.

## ARGUMENT

### I. Neither This Court Nor The Supreme Court Have Upheld A Mandatory Vaccination Requirement Without A Religious Exemption In A Case Where Parties Have Fully And Fairly Litigated The Issue.

The Defendants boldly assert that courts have long upheld mandatory vaccination mandates, but they fail to cite a single Supreme Court case or a single case from this Court where parties fully and fairly litigated a Free Exercise challenge to a mandatory vaccination requirement. *See* Br. For Appellees (Br) at 36-40. No such case exists.

To support their assertion, the Defendants first turn to familiar Supreme Court precedents in public health cases: *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Zucht v. King*, 260 U.S. 174 (1922); and *Prince v. Massachusetts*, 321 U.S. 158 (1944). Br. at 36-37. Their reliance falters because none of these cases actually considered Free Exercise challenges.

In *Jacobson*, the Supreme Court considered and rejected a challenge to Boston's smallpox vaccination mandate that only stated claims of generalized liberty under the Fourteenth Amendment, that the mandate violated the preamble of the federal Constitution, and that the mandate violated the spirit of the Constitution. 197 U.S. at 13-14. Although the Defendants make much of the fact the Supreme Court held that the mandate did not violate "any right given or secured by the Constitution," *see id.* at 25-26, they fail to consider that the Supreme Court had not

incorporated the Bill of Rights against the states or developed an unenumerated rights jurisprudence before deciding *Jacobson*. Thus, the universe of "rights given or secured by the Constitution" in *Jacobson* did not include the First Amendment's Free Exercise Clause or fundamental unenumerated rights under the Fourteenth Amendment.

In *Zucht*, the Supreme Court rejected a challenge that a mandatory school vaccination mandate deprived a plaintiff of her liberty without due process of law. 260 U.S. at 175. After summarily rejecting the plaintiff's Fourteenth Amendment due process claim by simply citing *Jacobson*, the Supreme Court also rejected the possibility of an unreasonable classification challenge under the Fourteenth Amendment's Equal Protection Clause. *Id*. at 176-77. As in their treatment of *Jacobson*, the Defendants fail to consider that the First Amendment had not been incorporated against the states at the time the Supreme Court decided *Zucht* and that the Supreme Court had not developed its modern unenumerated rights jurisprudence.[1]

In *Prince*, the Supreme Court considered whether Massachusetts labor laws prohibiting children from passing out religious literature violated the First

[1] This Court already recognized *Jacobson*'s shortcomings as a precedent that controlled cases stating free exercise claims because the Free Exercise Clause had not been incorporated against the states. *Philips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015).

Amendment Free Exercise Clause. 321 U.S. at 160. In the process of arriving at its conclusion that they did not, *see id*. at 270, the Supreme Court stated in dicta that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease of the latter to ill health or death." *Id*. at 166-67. The Defendants hold this statement up as evidence that "[c]ourts have specifically recognized that generally applicable vaccination requirements do not infringe on religious liberties." Br. at 37. Their argument, however, falters because the Supreme Court did not consider or decide such a serious question in a fully and fairly litigated proceeding, and it made the statement almost 50 years before it developed the "generally applicable" standard for free exercise claims. To assign controlling weight to dicta that has since been replaced would strain logic and the principles of full and fair adversarial litigation that underly the American legal system.

Likewise, the Defendants point to *Emp. Div., Dep't of Hum. Res. Of Oregon v. Smith*, 494 U.S. 872 (1990) as containing similar dicta. Br. at 37. They misapprehend *Smith*'s language though. In the particular passage that the Defendants rely on from *Smith*, the Supreme Court rejected a proposed constitutional test that would deem "*presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Smith*, 494 U.S. at 888 (emphasis in original). The *Smith* Court then enumerated civic

obligations that would cease to exist under this constitutional rule and named "compulsory vaccination laws" as one. *Id*. at 888-89. It, however, never uttered dicta on whether compulsory vaccination laws would fail the "general applicability" test that it created in *Smith*. Thus, the Defendants' reliance on *Smith* sorely misconstrues what the Supreme Court actually did and said.

The Defendants then turn to circuit court precedent from this Court and the Fourth Circuit. Br. at 37-39. First, they argue that this Court definitively settled the question of whether mandatory vaccination regulations that do not allow religious exemptions violate the Free Exercise Clause in *Philips v. City of New York*, 775 F.3d 538 (2d Cir. 2015). *Philips* did not concern a vaccination mandate directly, but rather a temporary exclusion of unvaccinated children from school during a chickenpox outbreak, which this Court found to be constitutional. *Philips*, 775 F.3d at 543. This Court stated in dicta that "New York could constitutionally require all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs." *Id*. at 543. It, however, also stated that the Supreme Court's dicta in *Prince* was "consonant" with the neutrality and general applicability tests established by *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). *Id*. at 543. Thus, despite its dicta and contrary to the Defendants' assertion, this Court never categorically relieved the Defendants of their obligations

to comply with the "neutrality" and "general applicability" requirements of modern Free Exercise jurisprudence, much less considered a vaccination mandate that allowed secular exemptions but not religious ones.

The Defendants then turn to an unpublished Fourth Circuit opinion,[2] *Workman v. Mingo County Bd. of Educ*., 419 Fed.Appx. 348 (4th Cir. 2011). In *Workman*, the Fourth Circuit considered a challenge to West Virginia's mandatory vaccination laws on multiple grounds, including that they substantially burdened the free exericse of religion. 419 Fed.Appx at 352-354. The *Workman* plaintiff claimed that West Virginia's denial of her child's medical exemption violated her First Amendment right to free exercise, but the Fourth Circuit does not articulate the basis for her argument.[3] *Id*. at 351. The Fourth Circuit assumed that strict scrutiny applied and held that *Jacobson* and *Prince* compelled the conclusion that mandatory school vaccination did not violate the First Amendment's Free Exercise Clause. *Id*. at 353-54.

The Fourth Circuit, however, did not analyze *Jacobson*'s historical context or *Prince* as only providing dicta – an analysis that this Court conducted in *Philips*.

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[2] Unpublished Fourth Circuit opinions are not binding precedent within the Fourth Circuit. *Workman v. Mingo County Bd. of Educ.*, 419 Fed.Appx 348, 350 (4th Cir. 2011).

[3] The *Workman* plaintiff does not appear to have raised a "general applicability" argument, relying instead on a hybrid rights argument. *Workman*, 419 Fed.Appx at 353.

Candidly, it had no reason to do so as the case did not present even the possibility of a "general applicability" challenge to the vaccination mandate at issue. Thus, *Workman* provides no support to the Defendants in the context of the case before this Court because of the drastic differences in the claims raised and subsequent Supreme Court precedent.

The cases that the Defendants cite for the proposition that vaccination mandates that provide medical exemptions but not religious ones are constitutional do not constitute settled law. Instead, they point to an inevitable conclusion. No federal court of appeals has considered, after full and fair litigation, whether vaccination mandates that provide medical exemptions but not religious ones are constitutional. Thus, the Court should discount the Defendants' claim that settled law dooms the Plaintiffs' claims.

## II. New York State Health Regulation, Title 10, § 2.61 Creates A System Of Individualized Exemptions That Vests Broad Power In Doctors And Employers, And The "Substantially Underinclusive" Test Does Not Provide An End Run Around The "General Applicability" Requirement.

Contrary to the Defendants' assertions, New York State Health Regulation, Title 10, § 2.61 creates a system of individualized exemptions while excluding religious exemptions. Any limitations that it places on doctors and employers are ambiguous, leaving plenty of room for medical exemptions outside of federally recognized contraindications and precautions. The Defendants also seek to use this Court's holding in *Central Rabbinical Cong. v. New York City Dep't of Health &*

*Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) to create an end run around the Free Exercise Clause's "General Applicability" requirement.

The operative language of § 2.61 belies the Defendants' assertions that it does not create a system of individualized medical exemptions:

> any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a preexisting health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services).

APP.17, § 2.61(d)(1).

While this language instructs doctors and employers to consider guidance from the federal government, it does not confine them to adhering just to that guidance despite the Defendants' claim that it does and for good reason. Br. at 46-47. The CDC only lists two contraindications to COVID-19 vaccines: (1) "Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine…," and (2) "[i]mmediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19

vaccine."[4] It also states that people who have precautions to the COVID-19 vaccine "can and should be administered vaccine."[5]

The CDC's guidance leaves no room for doctors to assess a patient's other medical conditions such as heart complications and other cardiovascular conditions. The plain language of § 2.61, however, does provide doctors and employers the flexibility to medically exempt patients and employees based on their individual medical conditions in accordance with "generally accepted medical standards."

In *Fulton v. City of Philadelphia, Pennsylvania*, 141 S.Ct. 1868, 1877 (Jun. 17, 2021), the Supreme Court reaffirmed the individualized exemption definition that it adopted in *Smith*: An individualized exemption system permits "the government to grant exemptions based on the circumstances underlying each application." § 2.61 indisputably provides for a state-mandated individualized exemption process and charges employers and doctors with administering it under the Defendants' supervision. APP.17, § 2.61(f). The mandated process requires both employers and doctors to look at the circumstances underlying each application. If the reason for the application is religious in nature, § 2.61 mandates its denial categorically. If the reason for the application is medical, § 2.61 mandates an inquiry

[4] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#Contraindications
[5] https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#Contraindications

into the circumstances underlying the reason and mandates that doctors and employers exercise discretion in deciding which exemptions to approve.

The Defendants' claim that the standards governing discretion in a system of individualized exemptions must be broad and ambiguous to justify First Amendment review has no basis in precedent from the Supreme Court or this Court. *Fulton* and *Smith* are clear. When exemptions are issued based on the circumstances underlying each individual application, a system of individualized exemptions exists and must accommodate religious ones as well. *Fulton*, 141 S.Ct. at 1877.

The Defendants also attempt to bootstrap this Court's decision in *Central Rabbinical Cong. v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) into an end run around the Free Exercise Clause's "general applicability" requirements. In *Central Rabbinical Cong.*, the Court held that a law is "not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." 763 F.3d at 197. *Central Rabbinical Cong.*'s formulation of the "substantially underinclusive" test, however, no longer predominates in the aftermath of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) and *Tandon v. Newsom*, 141 S.Ct. 1294 (Apr. 9, 2021).

*Tandon* establishes that "government regulations are not neutral and generally applicable, and therefore trigger scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." 141 S.Ct. at 1296 (citing *Cuomo*, 141 S.Ct. at 67-68) (emphasis in original). In the context of the COVID-19 pandemic, *Cuomo* and *Tandon* both establish that "comparability" examines whether secular and religious activities pose the same risks to spreading COVID-19. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. Their emphasis on "*any* comparable secular activity" does not permit the consideration of collective impact, but rather of the individual risk posed by individualized exemption.

The Defendants concede that "the medical exemption does raise the risk of COVID-19 transmission from medically ineligible staff…." Br. at 51-52. They, however, argue that it does not rise to the same degree as religious exemptions do though under a collective impact theory. Br. at 51-55.

Their concession is fatal to their efforts to avoid strict scrutiny because it concedes that the risks are the same. Although the Defendants stopped just short of admitting that a medically exempt person poses the exact same risks of contracting and transmitting COVID-19 as a religiously exempt person does, no scientific or logical evidence would require the Court to stop there. COVID-19 will not walk up to an unvaccinated healthcare worker in a hospital, tap them on the shoulder, and

ask them why they are not vaccinated before infecting them. It will not ask them why they are not vaccinated before using them to transmit COVID-19 or any of its variants. In other words, unvaccinated individuals who assert a religious exemption pose the same risks that unvaccinated individuals who assert a medical exemption do. Thus, § 2.61's allowance of the latter, but not the former, fails the general applicability analysis required by *Cuomo*, *Tandon*, and *Fulton*.

## III. New York Can Reach Herd Immunity In Its Healthcare Community Without Eliminating Its Religious Exemption, Thus Failing The Narrow Tailoring Prong Of Strict Scrutiny.

The Defendants argue that the Plaintiffs err in arguing that the emergency rule is unnecessary because New York's healthcare sector has reached herd immunity. Br. at 61, n.61. They, however, distort the Plaintiffs' argument. The Plaintiffs do not argue that a COVID-19 vaccination mandate is unnecessary to achieve herd immunity. Instead, they argue that eliminating religious exemptions are unnecessary to achieve herd immunity, and the Defendants' own data supports the Plaintiffs' position.

According to the World Health Organization (WHO), the highest vaccination rate necessary to achieve herd immunity for any known disease is 95% for measles.[6] While neither independent scientists or the Defendants' public health experts have

[6] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

definitively established a percentage of vaccination necessary to achieve herd immunity against COVID-19,[7] the Defendants obviously do not believe that herd immunity for COVID-19 needs to be 100% or they would not allow medical exemptions in § 2.61.

According to an October 5, 2021 declaration of the Defendants' Deputy Director the Center for Health Care Provider Services and Oversight at the New York State Department of Health, Valerie A. Deetz, New York will achieve a 97.4% fully vaccinated rate among nursing home healthcare workers once they have completed all of their vaccinations according to self-reported data. *See* ADD34 to Brief of The Appellees. 0.5% have received medical exemptions, and 2.1% have received "other" exemptions, which Ms. Deetz assumes to constitute religious exemptions only. *See* ADD34 to Brief of the Appellees.

Likewise, in adult care facilities that self-reported data, the data shows that 91.7% of healthcare workers will be fully vaccinated once they complete all of their vaccinations. *See* ADD34 to Brief of the Appellees. Only 0.5% have claimed medical exemptions while 1.4% have claimed "other" status, which Ms. Deetz

[7] The foremost authority on the pandemic, Dr. Anthony Fauci, has never gone higher than 85% on his prognostication of what percentage of the population needs to be vaccinated to achieve herd immunity. He also bet his house that COVID-19 is not as contagious as measles. *See* https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

concedes is not indicative of religious exemptions. *See* ADD34 to Brief of the Appellees.

This data – combined with the Defendants' concession by act that herd immunity does not require a 100% vaccination rate, Dr. Fauci's herd immunity/vaccination prognostications, and the highest vaccination rates for herd immunity reported by the WHO – conclusively demonstrate that religious exemptions do not pose any more of a threat to securing the public's health and safety through herd immunity than medical exemptions do.

The Defendants' reliance on the dangers posed by the Delta variant do not change the equation. Br. at 61, n.61. No vaccines exist to specifically combat the Delta variant. Instead, the Defendants will rely on the same COVID-19 vaccines to offer protection against the Delta variant. In other words, the Delta variant changes nothing about the nature of the vaccinations being administered to control it, and eliminating religious exemptions to the Defendants' COVID-19 vaccination mandate are wholly unnecessary to achieve herd immunity.

Thus, even if the Court permits the Defendants to justify individualized exemptions with a comparative, collective impact analysis,[8] it still fails a "narrow tailoring" analysis, which requires the Defendants to show that the collective impact

[8] The Plaintiffs do not concede such an analysis is permissible under or consistent with the Supreme Court's Free Exercise Clause precedents.

of religious exemptions would be more dangerous than the collective impact of medical exemptions to establishing herd immunity and cannot be effectively addressed by any other means. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). Neither religious exemptions nor medical exemptions threaten the Defendants' interest in achieving a vaccination rate high enough to establish herd immunity to COVID-19. Based on the data that the Defendants have supplied, religious exemptions account for just over 2% of unvaccinated healthcare workers, which is 3 percentage points lower than the highest vaccination rate for herd immunity for any disease and 13 percentage points lower than Dr. Fauci's prognostications. Combined with medical exemptions, New York healthcare workers exempt from vaccination requirements make up less than 3% of its total healthcare population.

The Defendants could have achieved herd immunity simply by issuing a version of § 2.61 that allowed for both religious and medical exemptions. The same accommodations that applied for medical exemptions can be equally effective as applied to religious exemptions.[9] If they had concerns about the abuse of religious exemptions, they could have mandated steps to curb such abuse. In other words, the

[9] The Defendants' explanation for why the same accommodations will not work for those who are religiously exempt borders on a concession that the precautions are only mitigative instead of preventive. Br. at 60-61 (reciting the limitations of masks and testing). They return to their collective impact argument, which the Plaintiffs have addressed at length already. Br. at 62-63.

Defendants did not need to take the harsh step of banishing those with sincere religious beliefs against taking the currently available COVID-19 vaccines from the healthcare industry. They had far more reasonable and equally effective options to achieve their interests. Thus, § 2.61 fails a "narrow tailoring" analysis.

## IV. The Defendants' Accusation That The Plaintiffs Claim A Substantive Due Process Right To Expose Themselves And Others To Infection Improperly Distorts The Plaintiffs' Claim And Fails To Address Its Merits At All.

The Defendants characterize the Plaintiffs' substantive due process claim as a claim "that they have a right to work at healthcare facilities in positions where they could expose themselves and others to infection without receiving a vaccination." Br. at 63. They do not even bother to challenge the Plaintiffs' actual assertions of fundamental unenumerated rights to privacy, medical freedom, and bodily autonomy – rights with a firm foundation in the Supreme Court precedents of *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990); and *Winston v. Lee*, 470 U.S. 753 (1985). Thus, the Court should find that they have waived any challenge to the actual fundamental unenumerated rights claims that the Plaintiffs have asserted.

Even if the Court finds that the Defendants have not waived their challenge to the fundamental nature of the unenumerated rights that the Plaintiffs assert, the Defendants' challenge is unworthy of the Court's consideration. They have focused

completely on launching a personal attack on the Plaintiffs' decisions on what is best for their health, well-being, and morals instead of actually disputing whether the Constitution protects the rights that the Plaintiffs assert.

The only legal argument that the Defendants make is that *Philips* has foreclosed all Fourteenth Amendment fundamental unenumerated rights claims. Br. at 63. *Philips*, however, simply relied on *Jacobson* to summarily dispose of claims of generalized Fourteenth Amendment liberty. *Philips*, 775 F.3d at 542. As Justice Gorsuch's *Cuomo* concurrence indicates, the law has changed significantly since *Philips*, and courts must apply ordinary rules of constitutional scrutiny rather than *Jacobson*'s plenary override rule in the public health context. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 70-71 (2020) (Gorsuch, J. concurring).

The Defendants offer nothing to dispute this proposition, and, beyond urging a blind adherence to non-controlling precedent, they cannot dispute it. New York State Health Regulation, Title 10, § 2.61 clearly burdens all of the fundamental unenumerated rights that the Plaintiffs assert. Thus, consistent with the precedents establishing those rights, the Court should apply strict scrutiny to § 2.61 in consideration of the Plaintiffs' Fourteenth Amendment claim, and the Defendants offer no argument as to whether § 2.61 can survive strict scrutiny on the Plaintiffs' Fourteenth Amendment claim. For those reasons, the Court should reverse the

district court's denial of a preliminary injunction on the Plaintiffs' Fourteenth Amendment claims.

## CONCLUSION

For the foregoing reasons as well as those contained in the Plaintiffs' opening brief, the Court should reverse the district court's denial of the Plaintiffs' motion for a preliminary injunction.

Dated: October 8, 2021

Respectfully Submitted,

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1. This brief complies with the type-volume limitation of Local R. 32.1 because it contain 3,891 words, excluding the parts of the brief exempted by Fed. R. App. P. 32, as determined by the word counting feature of Microsoft Word 2016.
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Dated: October 8, 2021

/s/ Cameron L. Atkinson /s/
Cameron L. Atkinson

**CERTIFICATE OF SERVICE**

I hereby certify that, on October 8, 2020, an electronic copy of the foregoing Brief Of The Plaintiffs-Appellants was filed with the Clerk of the Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Cameron L. Atkinson /s/
Cameron L. Atkinson