No. 23-643

# In the Supreme Court of the United States

WE THE PATRIOTS USA, INC., ET. AL.,
*Petitioners,*

v.

CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT, ET. AL.
*Respondents.*

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

## REPLY BRIEF FOR PETITIONERS


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Four states[1] have recently joined West Virginia in excluding, from public, private, and religious K-12 schools, children who may not receive vaccinations because of their religious beliefs, while granting medical exemptions to other children. Together, these states encompass 20% of the United States' population.[2] Every other state recognizes that religious liberty is compatible with public health.

Respondents minimize the harshness of these religious exemption repeals, recasting them as well-established and long-standing public health measures. They are incorrect. These states have departed from the religious tolerance that continues to mark compulsory vaccination laws in forty-five states.

The questions presented by Petitioners' Free Exercise challenge to Connecticut's repeal of its religious exemption cry out for the Court's intervention. The courts below misapplied the Court's precedents and denied thousands of children access to education because of their religious beliefs. The Second Circuit's decision has already further harmed religious liberty, with a federal district court relying on it to uphold New York's denial of religious exemptions against a Free Exercise challenge. *See Miller v. McDonald*, 2024 WL 1040777 (W.D.N.Y. Mar. 11, 2024).

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[1] California, Connecticut, Maine, New York. West Virginia has never allowed religious exemptions. Pet.App. 2a.

[2] https://www.census.gov/quickfacts/fact/table/WV,CT,ME,NY,CA,US/POP010220

Because of this trend to abolish religious exemptions to school vaccination mandates and with one-fifth of the nation's population already subject to religious intolerance, the Court should not wait to correct lower courts' misapplication of its precedents and restore religious liberty to Petitioners and all others similarly situated.

Respondents counter by claiming that this petition presents a contrived circuit split. Their arguments, however, drive home the very point this petition presents. In conducting comparability analysis, some lower courts have focused on broader public policy goals for laws instead of on how exemptions affect the laws' regulatory objectives. *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) forbids this approach. Other lower courts have properly conducted comparability analyses focusing on the extent to which secular and religious exemptions have undermined specific regulatory objectives.

Contrary to Respondents' submissions, this case presents a clean and uncomplicated opportunity for the Court to clarify a widespread and entrenched circuit split over how to apply its Free Exercise precedents, and to consider whether *Employment Div. v. Smith*, 494 U.S. 872 (1990) should be overruled or recalibrated.

## ARGUMENT

### I. Petitioners Have Not Waived Their Argument That Connecticut's Mandate Is Not Generally Applicable Because It Contains A Legacy Exemption.

The Respondents claim that Petitioners waived their general applicability argument regarding the

legacy exemption for students who received religious exemptions before the repeal's effective date by not presenting it to the lower courts. State Br., 31-33. *Id*. Their argument is meritless because the Court has held that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp*., 513 U.S. 374, 379 (1995) (cleaned up).

*Lebron* illustrates this rule. In the lower courts, Petitioner Lebron expressly disavowed the argument that Amtrak was "the Government itself" rather than "a private entity." *Id*. at 378. After the Court granted certiorari, Lebron reversed course, arguing that "Amtrak is part of the Government…." *Id*. at 379. The Court construed Lebron's argument as a new argument supporting his original claim that Amtrak had violated his First Amendment rights, rather than as a new claim. *Id*.; *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992) (recognizing that physical takings and regulatory takings arguments constituted a single Takings Clause claim).

Petitioners satisfy the *Lebron* and *Yee* criteria. First, they have explicitly asked the Court to consider whether the legacy exemption deprives Connecticut's vaccination law of neutrality and general applicability. Pet., ii.

Second, Petitioners presented a claim to the lower courts that Connecticut's school vaccination law violates their free exercise rights, and argued that the law was not neutral or generally applicable. Those courts passed on each question.

Third, Petitioners argued below that the legacy exemption deprived the law of its neutrality, invoking the same under-inclusiveness that Petitioners now

argue deprives it of general applicability (and that Judge Bianco relied on in dissent). Pet.App. 71a-72a. In response, the Second Circuit relied on *Walz v. Tax Comm'r of City of New York*, 397 US 664, 669 (1970) to argue that the under-inclusiveness created by the legacy exemption should be viewed as "benevolent neutrality" toward religion, rather than as "undermin[ing] the General Assembly's conclusion that the increasing prevalence of religious exemptions constituted a threat to the health and safety of students and the public." Pet.App. 32a n.18. It reasoned that the legacy exemption's "benevolent neutrality" justified the under-inclusiveness that would otherwise deprive it of general applicability. Respondents endorse that very reasoning. State Br., 32 (invoking "benevolent neutrality").

Thus, Petitioners satisfy *Lebron* and *Yee* because they fairly presented a Free Exercise claim below, and their contention that the legacy exemption renders Public Act No. 21-6 ("the Act") not generally applicable is a new argument turning on the legacy exemption's features on which the Second Circuit has already passed, rather than a new claim.

## II. The Court's Precedents Establish That The Second Circuit Joined The Wrong Side Of A Well-Entrenched Circuit Split In Holding The Medical Exemption Generally Applicable.

Defending the Second Circuit's treatment of the Act's medical exemption, Respondents argue that Petitioners crafted an imaginary circuit split over how lower courts approach *Tandon*'s comparability analysis. They submit that the lower courts' decisions actually support their argument that the Act creates a neutral and generally applicable vaccination

mandate subject only to rational-basis review. Respondents' argument, however, misconstrues numerous decisions, including the one below, to obtain rational-basis review at all costs. They ignore the very crux of the circuit split – whether *Tandon*'s comparability analysis focuses entirely on a law's regulatory objective or the broader state interests comprising the rationale for its exemptions. Instead, Respondents demand that the Court narrow its focus to lower-court precedents in vaccination cases.

Respondents have no answer to three justices' recognition that this circuit "split is widespread, entrenched, and worth addressing." *Dr. A. v. Hochul*, 142 S.Ct. 2569(Mem), 2570 (2022) (Thomas, J., dissenting from denial of certiorari; joined by Alito, J. and Gorsuch, J.). Their response is instead that the Second Circuit got it right. As the petition explained, the Second Circuit's decision was erroneous, and both its errors and the circuit split plainly warrant the Court's intervention.

The Second Circuit waded into the circuit split and erred by straying from the Court's comparability precedents. A law lacks general applicability, and is subject to strict scrutiny, 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). The Act prohibits Petitioners' children from attending school if they refuse vaccination for religious reasons, while allowing attendance by children who refuse vaccination on medical grounds. Whether attendance by the religiously-objecting child is "comparable" to attendance by the medically-contraindicated child

"must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S.Ct. at 1296. Here, the State's *regulatory* interest in mandating vaccinations as a condition for attending school is achieving herd immunity and preventing disease outbreaks. Because a medically-exempt child poses precisely the same risk to that regulatory objective as a child who is denied a religious exemption by the Act, the Act is not generally applicable, and strict scrutiny applies.

The Second Circuit offered two grounds for rejecting this conclusion. First, it characterized the State's interest as "promoting health and safety," and held that the medical exemption was not comparable because, unlike a religious exemption, it would protect the medically-exempt student's health. Pet.App. 41a-42a. Second, it took judicial notice of statistics in the legislative history indicating that far more students received religious exemptions than medical ones, and held that this data "bolstered" its comparability analysis. Pet.App. 42a-43a.

The first ruling adds to the circuit split over whether comparability analysis should consider the State's purpose for making an exception to a regulatory command, as the Second Circuit did, or is limited to the command's purpose. Pet. 15-17. Respondents do not deny that this circuit split exists. *See* State Br., 18. Instead, they argue that the Second Circuit correctly concluded that the medical exemption and the vaccination mandate both advance "Connecticut's interest in protecting public health," thereby somehow making the circuit split irrelevant. *Id*.

The Second Circuit, however, took sides in this circuit split by accepting Respondents' overly general characterization of its interest in the vaccination mandate as "protecting public health." It did not dispute that the medical exemption detracts from achieving herd immunity to precisely the same extent – child-for-child – as a religious exemption would. Instead, it relied on the medical exception's underlying purpose – protecting children from medical harm from vaccination – to conclude that the medical exemption, unlike a religious exemption, "advance[s] the State's interest in promoting health and safety," and thus is not comparable. Pet.App. 42a.

Respondents downplay the important role this ruling played in the Second Circuit's decision. State Br., 22. They argue "the Second Circuit's overriding rationale for why the two exemptions are not comparable is the disproportionate risk the religious exemption poses to herd immunity and disease outbreaks." State Br., 23. Not so. Respondents admit the Second Circuit referenced the medical exemption's goal of protecting the exempted student's health to show that it "advances the vaccine mandate's broader goal to protect public health, while the religious exemption does not." State Br., 22-23 (citing Pet.App. 41a-42a). Relying on this "broader goal" rather than the vaccination mandate's regulatory objective, the Second Circuit ruled that "exempting a student from the vaccination requirement because of a medical condition and exempting a student who declines to be vaccinated for religious reasons are not comparable in relation to the State's interest." Pet.App. 41a. Based on this ruling, which turns on the risks associated with individual exemptions, not the relative numbers of exempted students, the Second Circuit held that

"religious but not medical exemptions undermine the State's interest." Pet.App. 44a.

That startling conclusion underscores why comparability analyses must be conducted by reference to the State's regulatory purpose, not its reasons for creating exceptions. Connecticut decided that the physical harm a child might suffer from vaccination warrants an exemption, yet now refuses religious exemptions that would shield a child from spiritual harm. When a State "devalues religious reasons" in this way, its law is not generally applicable, and strict scrutiny applies. *Church of Lukumi Babablu Aye, Inc. v. Hialeah*, 508 U.S. 520, 587 (1993).

Respondents, however, claim that the lower courts unanimously agree that the relative frequency of religious and secular exemptions should be assessed in the comparability inquiry, and that this Court's precedents compel that approach. State Br., 23-27. Therefore, they argue, the Court should deny certiorari because the Second Circuit correctly held that the greater frequency of pre-Act religious exemptions shows that the medical exemption is not comparable. *Id.*

This Court's cases, however, plainly imply that "[i]f the estimated number of those who might seek different exemptions is relevant, it comes only later in the proceedings when we turn to strict scrutiny." *Dr. A. v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting from the denial of injunctive relief). *Tandon* itself applied strict scrutiny to invalidate California's prohibition on religious gatherings of more than three households in private homes, because California permitted venues such as "retail stores"

and "indoor restaurants" to "bring together more than three households" at a time. 141 S.Ct. at 1297. The Court did not compare how often "the religious exercise at issue" would occur with how often more than three households would gather in stores and restaurants. Rightly so. *Tandon* holds that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296.

Respondents emphasize *Roman Catholic Diocese of Brooklyn v. Cuomo*'s comparison of the number of persons who were permitted to gather in a "large store in Brooklyn" with a state regulation prohibiting more than "10 or 25 people inside for a worship service." 141 S.Ct. 63, 66-67 (2020); State Br. 26-27. But that is precisely the one-to-one comparison this Court's cases envision: the relative risks of Covid transmission associated with one large unrestricted store and one restricted place of worship. Respondents ignore that this Court applied strict scrutiny in *Cuomo* without inquiring about the relative numbers of large stores and places of worship, or the aggregate numbers of shoppers and worshipers.

As for the lower courts, the parties agree that the First, Second, and Ninth Circuits have included the expected numbers of medical and religious exemptions in conducting comparability analyses. Their decisions, however, are inconsistent with the Third, Sixth, and Eleventh Circuits' approach. *Fraternal Order of Police v. City of Newark*, 170 F3d 359 (3d Cir. 1999) determined that the medical exemption from the Newark Police Department's no-

beard policy was comparable to the religious exemption the plaintiffs sought, without considering how many officers invoked the medical exception, or how many would seek a religious one. *Monclova Christian Academy v Toledo-Lucas Health Dept.*, 984 F3d 477 (6th Cir. 2020) held that locked-down parochial schools were comparable to businesses that remained open without any inquiry into the numbers of schools and businesses. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004) found that private clubs permitted in a business district were comparable to "exclude[ed] religious assemblies" because they equally impacted the town's "interest in retail synergy," based on the town's zoning regulations, not the numbers of private clubs and places of worship.

Thus, the circuit split is broad and well-defined. The Court's precedents demonstrate that the Second Circuit joined the wrong side, and the Respondents' arguments do not rehabilitate its errors.

## III. The Legacy Exemption Poses An Important Constitutional Question With National Implications.

Respondents urge this Court not to consider the general applicability of Connecticut's legacy exemption because no other state has enacted such a provision. State Br., 33. But what Connecticut has done, other states may imitate to facilitate the repeal of religious exemptions, and Respondents take great pains to avoid addressing the legacy exemption's merits.

The legacy exemption discriminates in favor of children who obtained religious exemptions before the

Act's passage, and against all children who are denied religious exemptions by the Act's repeal of that provision. This unprecedented discrimination with regard to a religious exemption raises a pure question of constitutional law: is a law generally applicable if it prohibits religious conduct while permitting other identical religious conduct that undermines the government's asserted interests to precisely the same extent?

On the merits, Respondents offer no reason why the general applicability requirement should not apply to legislation whose "underinclusion is substantial, not inconsequential," *Lukumi*, 508 US at 543, because it prohibits some religious conduct while grandfathering substantially more of the identical religious conduct. Nor should this Court deny review because "the number of students using the [legacy] exemption shrinks with each passing year." State Br., 33. Petitioners' children (and thousands of other religious objectors) "are irreparably harmed by the loss of free exercise rights 'for even minimal periods of time,'" *Tandon*, 141 S.Ct. at 1297, and the Act has been in effect for more than three years.

## IV. Overruling Or Recalibrating *Smith* Does Not Require The Court To Overrule Prior Precedents Addressing Vaccination.

Respondents claim that overruling *Smith* would not change the outcome of this case unless the Court overruled *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). State Resp. Br., pp. 28-31.

The Court, however, decided *Jacobson* and *Zucht* before it incorporated the Free Exercise Clause against the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and upheld vaccination mandates by applying the prevailing tests for substantive due process and (in *Zucht*) equal protection claims.

*Prince* did not consider a vaccination mandate, but rather an as-applied free exercise challenge to a child labor law. *Prince*, 321 U.S. at 159-63. In dicta, the Court cited *Jacobson* and state authority to compel vaccination as an example of a constitutional limit on the Free Exercise right. *Id*. at 166-67. Moreover, that dicta was limited in *Sherbert v. Verner*, 374 U.S. 398 (1963), which "took great care to confine *Prince* to a narrow scope." *Wisconsin v. Yoder,* 406 U.S. 205, 230 (1972).

Neither *Jacobson*, *Zucht*, nor *Prince* will control this case if the Court overrules *Smith*. That will simply render *Sherbert* and its progeny controlling and require the application of strict scrutiny, which the Act's repeal of the religious exemption will not survive. *See* Pet. 27-31.

Respondents, however, submit that *Prince* indirectly dictates affirmance if the Court applies *Smith*'s hybrid-rights exception, because *Sherbert* and *Yoder* agreed with *Prince* that free exercise rights do not shield conduct that poses "some substantial threat to public safety, peace or order." *Yoder*, 406 U.S. at 230 (cleaned up). Far from dictating affirmance, however, *Sherbert* and *Yoder*, at a minimum, require heightened scrutiny under which Petitioners must be given the opportunity to contest, through evidentiary presentation, whether there is a "substantial threat to public safety…." *Id*. at 234. The lower courts did not

afford Petitioners that opportunity because the Second Circuit holds that *Smith*'s hybrid-rights exception does not exist. Pet.App. 55a.

Thus, using *Yoder* as the hybrid-rights template here would require reversal and remand for the evidentiary fact-finding that the lower courts denied to Petitioners. Petitioners have always denied that the repeal of the religious exemption was necessary to avert a "substantial threat to public safety." Their concession that "protecting public health is a compelling government interest," Pet.App. 48a, may be conclusive under rational-basis review, but it is only a starting point for a strict scrutiny inquiry into the danger and imminence of the alleged health risks posed by the religious exemptions that forty-five States continue to tolerate.

## CONCLUSION

For these reasons, the Court should grant the petition.

Respectfully submitted,

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