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

STATE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Connecticut began mandatory vaccinations for schoolchildren in 1882. In 1923, the State exempted children for whom vaccines are medically contraindicated. Thirty-six years later, Connecticut created a second exemption for religious objectors.

In 2021, confronted by skyrocketing claims of religious exemptions that compromised community ("herd") immunity and threatened disease outbreaks, Connecticut returned to its pre-1959 status quo. Data showed that the religious exemption was invoked at least an order of magnitude more often than the medical exemption, which only a negligible number of children claimed. So eliminating the religious exemption gave the State the best chance to vindicate its interest in improving student and community health by safeguarding herd immunity. But Connecticut deferred to religious objectors' reliance interests by allowing legacy objectors–current students with religious exemptions as of the law's effective date–to remain enrolled.

The questions presented here are:

1. Whether, under the facts in the record here, the Free Exercise Clause forbids Connecticut from mandating vaccination for every school child who can be safely vaccinated;

2. Whether petitioners' challenge based on the exemption for legacy religious objectors, which was never presented below, is properly before the Court; and

3. Whether the Court should revisit *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in the context of this school vaccine mandate case.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i
TABLE OF AUTHORITIES v
PROCEEDINGS RELATED TO THIS CASE........ xii
INTRODUCTION 1
STATEMENT OF THE CASE 3
A. Connecticut's Long History of Requiring Vaccination for Healthy School Children – and Its Relatively New Religious Exemption. 3
B. With Herd Immunity Threatened, Connecticut Eliminates Its Largest, and Only Non-Medical, Vaccine Exemption. 5
C. Procedural History. 12
REASONS FOR DENYING THE PETITION 15
I. There Is No Circuit Split On How Courts Assess "Comparability" Under *Tandon* And *Smith*. 15
A. Appellate Courts Unanimously Agree that Common Religious and Rare Medical Exemptions Do Not Pose Comparable Risks to a State's Public Health Goals. 16
B. Petitioners' Claimed Methodological Circuit Splits Are Imagined and Irrelevant, and Their Claims of Error Are Substantively Incorrect. 18

II. The Act Is Constitutional Under Pre-*Smith* Precedent, so This Case Offers No Opportunity to Reconsider *Smith*. 28
III. Petitioners Waived any Challenge Based on the Legacy Provision, and There Is No Reason to Review that Claim in any Event. 31
IV. This Court's Precedent, Including *Wisconsin v. Yoder*, Precludes a Purported Hybrid-Rights Claim Here. 33
CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Abeel v. Clark, 84 Cal. 226 (1890) 18

Bush v. Gore, 531 U.S. 98 (2000) 33

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 25, 26

Cutter v. Wilkinson, 544 U. S. 709 (2005) 32

Daimler AG v. Bauman, 571 U.S. 117 (2014) 32

Doe v. Board of Regents of the University of Colorado, Docket Nos. 21-1414, 22-1027, 2024 U.S. App. LEXIS 11190 (10th Cir. May 7, 2024)... 20

Doe v. Mills, 16 F.4th 20 (1st Cir. 2021)...... 16, 21, 24

Doe v. Mills, 142 S. Ct. 1112 (2022) 16

Doe v. San Diego Unified Sch. District, 19 F.4th 1173 (9th Cir. 2021).......................... 16, 21, 24, 26

Doe v. San Diego Unified Sch. District, 142 S. Ct. 1099 (2022)..16, 17

Dr A. v. Hochul, 142 S. Ct. 2569 (2022) 16, 18

Duffield v. Sch. Dist., 162 Pa. 476 (1894) 18

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) .... ii, 2, 3, 12, 14, 15, 16, 17, 28, 30, 31, 33, 34, 36

F.F. v. New York, 194 A.D.3d 80 (N.Y. App. Div. 2021)... 8, 16

Fox v. Makin, Docket No. 2:22-cv-00251-GZS, 2023 U.S. Dist. LEXIS 142983 (D. Me. Aug. 16, 2023)……………………………………………………18

Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999)........................... 19, 23, 25

Fulton v. City of Philadelphia, 141 S.Ct. 1868 (2021) 12, 15, 28, 30

Heath v. Alabama, 474 U.S. 82 (1985) 32

Jacobson v. Massachusetts, 197 U.S. 11 (1905)..... 4, 17, 28, 29, 30, 34, 35

Larson v. Valente, 456 US 228 (1982) 32

Lowe v. Mills, 68 F.4th 706 (1st Cir. 2023)... 16, 17, 21, 24, 26

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 19, 24, 25

Monclova Christian Academy v. Toledo-Lucas Health Dept., 984 F.3d 477 (6th Cir. 2020) . 19, 24

Morris v. Columbus, 102 Ga. 792 (1898).............. 17

Nordlinger v. Hahn, 505 U.S. 1 (1992).................. 33

Pierce v. *Society of Sisters*, 268 U.S. 510
(1925).. 33, 34

Prince v. Massachusetts, 321 U.S. 158 (1944)........ 7,
29, 30, 34, 35

Roman Catholic Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020) 26, 27

Royce v. Bonta, Docket No. 3:23-cv-02012-H-BLM,
2024 U.S. Dist. LEXIS 52973 (S.D. Cal.
Mar. 25, 2024) 18

Sherbert v. *Verner*, 374 U.S. 398 (1963)................ 35

Tandon v. Newsom, 141 S. Ct. 1294 (2021) 2, 12,
13, 15, 26

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646
(1995) 31

Viemeister v. White, 179 N.Y. 235 (1904)................ 4

W. Va. Parents v. Christiansen, No. 23-1887
(4th Cir.) 18n

Walz v. Tax Comm'n of City of New York,
397 U.S. 664 (1970) 32

We the Patriots USA, Inc. v. Hochul, 17 F.4th 266 (2d Cir. 2021) 16, 17

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 33, 34, 35, 36

Workman v. Mingo County Bd. of Educ., 419 Fed. Appx. 348 (4th Cir. 2011) 17

Zucht v. King, 260 U.S. 174 (1922) 4n, 29

STATUTES

Conn. Gen. Stat. § 10-204a(a)(2) (Rev. to 2019) 5, 10

Conn. Gen. Stat. § 10-204a(a)(3) (Rev. to 2019) 5

PUBLIC ACTS

Conn. PA 21-6 .... 1, 8

Conn. PA 21-6, § 1(a)-(b) 10

OTHER AUTHORITIES

John Duffy, *School Vaccination: The Precursor to School Medical Inspection*, J. Hist. Med. & Allied Sci. 344, 345 (1978) 4, 5

Erwin Chemerinsky and Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 Nw. U.L. Rev. 589, 596, 606 (2016) 4

Eileen Wang et al., *Nonmedical Exemptions from School Immunization Requirements: A Systematic Review*, 104 Am. J. Pub. Health e62 (2014) 4, 9

James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 849 n.126 (2002) 4

Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 Ann. Health L. 277, 282 (2003) 5

Andrew Meriwether, *The Complicated History Of Religious Exemptions To Vaccines*, WBEZ Chicago (Sep. 16, 2021, 6:00 am), https://tinyurl.com/4wjrdw75 5

Neal D. Goldstein et al., *Trends and Characteristics of Proposed and Enacted State Legislation on Childhood Vaccination Exemption, 2011-2017*, 109 Am. J. Pub. Health 102, 102 (2019).. 6

U.S. Dep't of Health & Human Servs., *How Does Community Immunity Work?* (Apr. 29, 2021), https://www.hhs.gov/immunization/basics/work/protection/index.html.. 6

Patricia Firmender, *Connecticut School Immunization Survey and Exemption Data* (Oct. 13, 2023), https://tinyurl.com/589z3ykm.. 7, 11

https://www.business.ct.gov/dph/newsroom/press-releases---2021/dph-confirms-a-second-case-of-measles-in-fairfield-county-household 8

Testimony Presented Before the Public Health Committee by Acting Commissioner Deidre S. Gifford, H.B. 6423, S.B. 568, 2021 Sess. (Conn. 2021), https://tinyurl.com/k7xmdjk7 9

Conn. H.R. (Apr. 19, 2019) (statements of Repr. Steinberg) 9

Conn. S. (Apr. 27, 2021 (statement of Senator Daughtery Abrams) 9

Connecticut Department of Public Health, *Student Medical Exemption Certificate for Required Immunizations*, https://tinyurl.com/mvm95rjr (last visited Apr. 4, 2024) 10

John W. Correira et al., *School Vaccine Coverage and Medical Exemption Uptake After the New York State Repeal of Nonmedical Vaccination Exemptions*, JAMA Netw Open. (Feb. 2, 2024), https://tinyurl.com/4krdduyk............................ 11

Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2021 Cato Sup. Ct. Rev. 33, 59 (2021)............... 30

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United States Court of Appeals for the Second Circuit, No. 22-249-cv, *We The Patriots USA, Inc., et al. v. Connecticut Office of Early Childhood Development, et al.*, judgment entered September 18, 2023. The panel decision is available at 76 F.4th 130.

United States District Court for the District of Connecticut, No. 3:21-cv-00597, *We The Patriots USA, Inc., et al. v. Connecticut Office of Early Childhood Development, et al.*, judgment entered January 12, 2022. The district court decision is available at 579 F.Supp.3d 290.

INTRODUCTION

Like every other state, Connecticut requires all children to be vaccinated against certain communicable diseases as a condition of school enrollment. This requirement protects students and the broader public by reducing the risk of transmission and ensuring every community in the state achieves herd immunity, preventing outbreaks. Courts across the country have repeatedly upheld similar vaccination laws against constitutional attack, including on Free Exercise grounds.

Although it was not constitutionally required to, Connecticut adopted a religious exemption to its vaccine requirement in 1959 and maintained it for many years because it did not impede the State's immunity goals. But not long ago, that changed. The number of claimed religious exemptions rose to the point that many schools fell below the herd immunity threshold, with many more in jeopardy of following suit. Similarly-declining vaccination rates attributable to religious exemptions in other states caused a nationwide measles outbreak in 2018, reopening the door to a disease thought eliminated in this country since 2000.

Faced with this emergent public health threat, the Connecticut General Assembly repealed a religious exemption that the Constitution never required it to have. *See* Conn. Public Acts No. 21-6 ("the Act"). But it chose to maintain a separate medical exemption that students rarely use and which continues to have no meaningful effect on the State's herd immunity goals.

Petitioners sued, claiming the Act is not "generally applicable" under *Employment Division, Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), because it retains the medical exemption. Every Circuit Court to have considered this issue has concluded, as the Second Circuit did here, that rare medical exemptions and common religious exemptions are not "comparable" in this context because one frustrates the vaccine requirement's public health goals in a way the other does not. The Circuits are also unanimous in how they get there. They assess comparability in terms of the aggregate risk each exemption poses to a state's asserted interest, rather than limiting themselves to a one-to-one comparison of the impact if a single person invokes each exception. That consensus is compelled by this Court's precedents, which stress that comparability turns on "the asserted government interest that justifies the regulation at issue" and "the risks various activities pose" to achieving it. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Faced with judicial unanimity against them, Petitioners move the goal posts. They ask this Court to resolve a purported Circuit split about whether *Smith*'s "comparability" analysis properly focuses on the interests advanced by the vaccine mandate itself or instead on the interests behind the mandate's exemptions. That split does not exist. Every Circuit Court agrees that the relevant interest is in the interest behind the mandate. But even if there were a split, it is not implicated here. The Connecticut General Assembly, State Respondents, and the Second Circuit all appropriately focused on the public health goals behind the vaccine requirement.

Nor should the Court consider Petitioners' other claims. *First*, this case presents no opportunity to overrule *Smith*. The Act also survives under this Court's pre-*Smith* cases, so overturing *Smith* cannot be outcome determinative. *Second*, Petitioners forfeited any claim about the law's legacy provision, and that claim implicates no Circuit split and lacks merit because the legacy provision applies equally to all religions and enhances religious exercise rather than burden it. *Third*, Petitioners' purported hybrid-rights claim is foreclosed by the very case they say established it – *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) – which squarely held that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."

STATEMENT OF THE CASE

A. Connecticut's Long History of Requiring Vaccination for Healthy School Children – and Its Relatively New Religious Exemption.

Connecticut has long mandated immunization against serious communicable diseases, like measles and pertussis, for every school child healthy enough to receive the vaccines.

Connecticut first instituted a statewide smallpox vaccine mandate in 1882 – the same year it began requiring elementary school attendance. Pet. App. 5a. That timing put Connecticut in line with a national trend starting in 1855, when

Massachusetts became "the first state to enact a compulsory school vaccination" law.[1] A wave of states and municipalities followed suit, from New York in 1862 to Arkansas in 1882 to Pennsylvania in 1895.[2] By 1904, "[n]early every state of the Union ha[d] statutes to encourage or, directly or indirectly to require vaccination, and this [wa]s true of most nations of Europe." *Viemeister v. White*, 179 N.Y. 235, 239-240 (1904). Today, every state mandates vaccination as a precondition for school attendance.[3] This Court has repeatedly upheld state vaccine mandates, and no U.S. court has ever declared one unconstitutional.[4]

Limited exemptions for children who cannot be safely vaccinated have long been a feature of our school vaccination tradition. Every state exempts children with medical contraindications to immunization, and many have done so for a century or more.[5] Connecticut joined this national trend

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[1] John Duffy, *School Vaccination: The Precursor to School Medical Inspection*, 33 J. Hist. Med. & Allied Sci. 344, 345 (1978).

[2] Erwin Chemerinsky and Michele Goodwin, *Compulsory Vaccination Laws are Constitutional*, 110 Nw. U.L. Rev. 589, 596 (2016).

[3] Eileen Wang et al., *Nonmedical Exemptions from School Immunization Requirements: A Systematic Review*, 104 Am. J. Pub. Health e62 (2014).

[4] *Zucht v. King*, 260 U.S. 174, 176 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905); Erwin Chemerinsky and Michele Goodwin, *Compulsory Vaccination Laws and Constitutional*, 110 Nw. U.L. Rev. 589, 606 (2016).

[5] James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 849 n.126 (2002); John Duffy,

when it enacted its own medical exemption in 1923. Pet. App. 5a; *see* Conn. Gen. Stat. § 10-204a(a)(2) (Rev. to 2019).

By contrast, religious exemptions from vaccine mandates are a relatively recent innovation. Here, again, Connecticut is typical. It did not institute its first religious exemption until 1959 – 36 years after its medical exemption and 77 years after its first vaccine mandate. Pet. App. 5a; *see* Conn. Gen. Stat. § 10-204a(a)(3) (Rev. to 2019). Many states did not create religious exemptions until the 1960s and 70s.[6] One – West Virginia – has never had a religious exemption. Pet. App. 8a. Another, Mississippi, had no religious exemption between 1979 and 2023. Pet. App. 9a. And four other states have eliminated their religious exemptions in the past few years – California, Maine, New York, and Connecticut. Pet. App. 10a.

B. With Herd Immunity Threatened, Connecticut Eliminates Its Largest, and Only Non-Medical, Vaccine Exemption.

For many years, Connecticut's two exemptions had no appreciable effect on the State's key public health goal of reaching community

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School Vaccination: The Precursor to School Medical Inspection, 33 J. Hist. Med. & Allied Sci. 344, 346 (1978).

[6] *See, e.g.*, Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 Ann. Health L. 277, 282 (2003); Andrew Meriwether, *The Complicated History Of Religious Exemptions To Vaccines*, WBEZ Chicago (Sep. 16, 2021, 6:00 am), https://tinyurl.com/4wjrdw75.

("herd") immunity.[7] According to the U.S. Department of Health and Human Services, a community achieves herd immunity "when enough people are vaccinated against a certain disease."[8] For highly contagious diseases like measles, that requires at least a 95% vaccination rate across the community. Pet. App. 7a. Once that threshold is reached, "even people who can't get vaccinated will have some protection from getting sick. And if a person does get sick, there's less chance of an outbreak because it's harder for the disease to spread. Eventually, the disease becomes rare – and sometimes, it's wiped out altogether."[9] *See* Pet. App. 7a.

But in 2021, Connecticut's General Assembly received data showing that skyrocketing claims of religious exemption were threatening community immunity in Connecticut's schools. So it rethought its only non-health-related exemption, returning to the pre-1959 status quo to further the State's

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[7] *See, e.g.*, Neal D. Goldstein et al., *Trends and Characteristics of Proposed and Enacted State Legislation on Childhood Vaccination Exemption, 2011-2017*, 109 Am. J. Pub. Health 102, 102 (2019) ("A primary goal of vaccination policy is to obtain and sustain a sufficient level of vaccinated individuals to establish community immunity against vaccine-preventable diseases").

[8] U.S. Dep't of Health & Human Servs., *How Does Community Immunity Work?* (Apr. 29, 2021), https://www.hhs.gov/immunization/basics/work/protection/index.html.

[9] *Id.*

interest in protecting the health of school children, their communities, and the public.[10]

Connecticut's rate of medical exemptions is negligibly small and shows no signs of increasing. Between 2012-2020, only around 0.2% to 0.3% of Connecticut students sought and obtained a medical exemption each year. Pet. App. 8a. In 2023, only 57 school children statewide obtained a medical exemption from any of the mandated vaccines.[11]

But the rate of students with religious exemptions exploded, growing by 64% – from 1.4% to 2.3% of all students K-12 – between 2012 and 2020 alone. That means at least ten times more students sought religious exemptions than medical exemptions. Pet. App. 6a-7a.[12]

Troublingly, the rise in exemption claims and the consequent drop in vaccination rates were clustered in some schools and communities. For

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[10] Since at least *Jacobson*, this Court has recognized that states mandate vaccination to further their compelling interest in protecting the public health and safety. 197 U.S. at 25. And school vaccination in particular promotes the overriding state interest in both protecting communities from "communicable disease" and children from "ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

[11] Patricia Firmender, *Connecticut School Immunization Survey and Exemption Data* (Oct. 13, 2023), https://tinyurl.com/589z3ykm.

[12] Petitioners have never disputed this data or the indisputable fact it shows: the religious exemption – not the medical exemption – has caused the declining vaccination rates in Connecticut. To the contrary, Petitioners attached the data to their complaint.

instance, in 2021, Connecticut's average vaccination rate for measles, mumps, and rubella ("MMR") in private schools was only 92.1%, well below the herd immunity threshold of 95%. Pet. App. 6a. And of schools with more than thirty kindergarten students, 120 had MMR rates below 95% and 26 had MMR rates below 90%. Pet. App. 6a. Precisely this kind of clustering caused the 2018 nationwide measles outbreak centered in Rockland County, New York, even though measles had been thought eliminated from the United States since 2000. *See F.F. v. New York*, 194 A.D.3d 80, 83 (N.Y. App. Div. 2021), *cert. denied sub nom. F.F. ex rel. Y.F. v. New York*, 142 S. Ct. 2738 (2022). By 2021, multiple cases of measles had been confirmed in Connecticut too.[13]

Seeking to stem the tide and forestall similar outbreaks in Connecticut, the General Assembly passed Public Act 21-6, repealing the religious exemption. The Act's proponents repeatedly stressed – and Petitioners concede – that the repeal was not motivated by any religious animosity. Instead, it was driven by the new risk the growing religious exemption – by far the larger of the only two exemptions Connecticut allowed – posed to the vaccine mandate's public health goals.

For example, Connecticut's Public Health Commissioner explained in legislative testimony that "[n]umerous published studies indicate that higher rates of vaccine exemption in a school community drive lower vaccination rates and

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[13] https://www.business.ct.gov/dph/newsroom/press-releases---2021/dph-confirms-a-second-case-of-measles-in-fairfield-county-household (last visited May 15, 2024).

increase the risk of vaccine preventable disease in that community."[14] She testified that the State respected the sincere beliefs of religious objectors – but that the religious exemption, because of its unique scale, threatened "herd or community immunity."[15] The Act's primary legislative sponsor likewise noted that "[t]he key data describe a clear trend" of religious exemptions causing "as many as a hundred schools at any given time with vaccination rates below the community immunity threshold," and emphasized the acute need for the State to act "before we have an epidemic, an epidemic that we can prevent."[16] Another proponent stressed that "[w]e have over 30 schools that have religious exemption rates over 10%, some as high as 25%," causing a "significant vulnerability . . . in our schools and communities."[17]

Although it repealed the religious exemption going forward, the General Assembly recognized the reliance interests of students with existing exemptions. It balanced those interests with the

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[14] Testimony Presented Before the Public Health Committee by Acting Commissioner Deidre S. Gifford, H.B. 6423, S.B. 568, 2021 Sess., at 4 (Conn. 2021), https://tinyurl.com/k7xmdjk7; *see also, e.g.*, Eileen Wang et al., *Nonmedical Exemptions from School Immunization Requirements: A Systematic Review*, 104 Am. J. Pub. Health e62 (2014) ("Where [non-medical exemptions] are high enough to compromise herd immunity at the local level, the risk of vaccine-preventable disease outbreak increases.").

[15] *Id.*

[16] Conn. H.R. (Apr. 19, 2019) (statements of Repr. Steinberg).

[17] Conn. S. (Apr. 27, 2021) (statement of Senator Daugherty Abrams).

State's public health goals by grandfathering in all religious exemptions granted before the Act's effective date. PA 21-6, § 1(a)-(b) ("the legacy provision"). Through this temporally limited provision, the General Assembly sought to "accommodate[] religious objectors to an extent the legislators believed would not seriously undermine the Act's goals." Pet. App. 30a.

Unlike the legacy provision, and unlike the broad religious exemption that predated the Act, Connecticut's sole remaining exemption – the medical exemption – is limited in both scope and duration. Under the Act, a student can only obtain a medical exemption using a statutorily prescribed certificate. Conn. Gen. Stat. § 10-204a(a)(2). That certificate limits each medical exemption to a specific immunization that a qualified provider attests is medically contraindicated.[18] And it allows the exemption to last only for a specific, delimited, medically necessary duration.[19]

The General Assembly took other steps to ensure that the medical exemption would remain narrow and focused. Section 8 of the Act established a standing Advisory Committee on Medically Contraindicated Vaccination. While the Committee has no power to individualize exemptions by second-guessing specific provider decisions, it is charged with reviewing data to – among other things – recommend any precautions that should be taken

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[18] Connecticut Department of Public Health, *Student Medical Exemption Certificate for Required Immunizations*, https://tinyurl.com/mvm95rjr (last visited Apr. 4, 2024).

[19] *Id.*

before medically-exempt students can attend school. Thanks to that careful monitoring, Connecticut knows that, as of October 2023, only 57 children statewide have obtained a medical exemption from any of the mandated vaccines.[20]

The General Assembly also kept the focus on the primary state interest behind the mandate itself: building herd immunity. That is why the Act's Section 9 commands Connecticut's Department of Public Health to collaborate with the Department of Education and Office of Early Childhood to connect, evaluate, and annually report data on exemptions to the General Assembly. So now Connecticut knows, for instance, that the rate of vaccine-exempt students fell from 2.5% in 2021 to 0.5% in 2023, and that the total percentage of kindergarteners vaccinated against MMR has risen from 95.3% in 2021 – perilously close to the statewide community immunity threshold – to 97.3% in 2023.[21]

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[20] Patricia Firmender, *Connecticut School Immunization Survey and Exemption Data* (Oct. 13, 2023), https://tinyurl.com/589z3ykm.

[21] *Id*. These post-enactment data are similar to data out of New York state, which eliminated its religious exemption in 2019. There, a study showed that eliminating the religious exemption increased overall vaccine uptake, improving herd immunity, and did not increase medical exemption uptake. John W. Correira et al., *School Vaccine Coverage and Medical Exemption Uptake After the New York State Repeal of Nonmedical Vaccination Exemptions*, JAMA Netw Open. (Feb. 2, 2024), https://tinyurl.com/4krdduyk.

C. Procedural History.

Petitioners are two associations and three parents who sued after Connecticut passed the Act, seeking religious exemptions for their children. Among several other claims they have since abandoned, Petitioners alleged below that the vaccine mandate is subject to (and, they claim, will not survive) strict scrutiny under *Employment Division v. Smith* because it retains the medical exemption. The district court dismissed that claim for lack of jurisdiction and failure to state a claim, and Petitioners appealed. Pet. App. 84a-127a. The Second Circuit affirmed, noting that it was joining a "consensus" among state and federal appellate courts holding that "the absence or repeal of a religious exemption" does not make a school vaccination law unconstitutional. Pet. App. 3a-4a.

Applying this Court's analysis from *Smith* and its progeny, the Second Circuit began by recognizing that a law is not "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Pet. App. 24a (quoting *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021)). It also faithfully applied this Court's instruction that whether two exemptions are "comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . . ." Pet. App. 37a (quoting *Tandon*, 141 S. Ct. at 1296). It then assessed and upheld the law under this established framework.

First, the Second Circuit carefully identified the State's interest behind the vaccine mandate itself – not the medical exemption to it – as being "to protect the health and safety of Connecticut students and the broader public." Pet. App. 37a. In particular, the Second Circuit emphasized Connecticut's clearly stated goals to "protect community health" and "avoid a real public health crisis" by "prevent[ing] an outbreak" of "serious illnesses that have been well-controlled for many decades, such as measles, tuberculosis, and whooping cough, but have reemerged." Pet. App. 38a.

Next, applying *Tandon*, the Second Circuit asked whether the risk the religious and medical exemptions pose to the vaccine requirement's public health goals is "comparable" or "similar." It rejected Petitioners' claim that comparability turns on a one-to-one comparison of the impacts if a single person uses each exemption, instead reading *Tandon* to require that courts must assess "the risks posed [to the asserted governmental interest] by groups of various sizes in various settings," which in this case means "considering aggregate data about transmission risks" rather than "individual behaviors." Pet. App. 40a-41a.

Applying that framework, the Second Circuit held that the religious exemption "detract[s]" from the vaccine requirement's underlying public health goals "by increasing the risk of transmission of vaccine-preventable diseases among vaccinated and unvaccinated students alike." Pet. App. 42a. And it held that the religious exemption's risk was not "comparable" to the medical exemption's since ten

times more students seek religious exemptions than medical exemptions, with a far greater disparity in "clustering" communities. That disparity, the Court explained, creates an "acute" risk of disease outbreak that the medical exemption does not. Pet. App. 43a; *see also* Pet. App. 44a-45a (restating the disparity).

Finally, the Second Circuit followed its own longstanding precedent and rejected Petitioners' "hybrid rights" claim under *Smith*. Pet. App. 55a.

Judge Bianco dissented, but not because of any disagreement with the majority's articulation or application of this Court's precedent. To the contrary, he agreed that the comparability analysis "need not be limited to 'a one-to-one comparison of the transmission risk posed by an individual [with a religious exemption] and . . . an individual [with a medical exemption],'" and that the analysis appropriately focuses on "aggregate data about transmission risks." Pet. App. 69a. He instead parted ways with the majority over whether the data Petitioners attached to their complaint adequately showed that the comparative risk from the religious exemption was, in the aggregate, "materially greater than that posed by students unvaccinated due to medical objections." Pet. App. 69a. Even though Petitioners have never disputed the singular and disproportionate impact the religious exemption has on maintaining Connecticut's herd immunity, Judge Bianco would have allowed discovery to proceed but ultimately would have resolved the case using the majority's analytical framework.

REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split On How Courts Assess "Comparability" Under *Tandon* And *Smith*.

Nobody disputes the "general applicability" standard the Second Circuit applied. A law lacks general applicability when it prohibits religious conduct but permits any "comparable" secular conduct that frustrates the government's asserted interests "in a similar way." Pet. 9 (quoting *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021); *Tandon*, 141 S.Ct. at 1296). Whether "two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon*, 141 S.Ct. at 1296.

The Second Circuit correctly applied that settled standard to the facts. It asked, appropriately, whether the record shows that the rarely invoked medical exemption and the far more common religious exemption pose "similar" and "comparable" risks to the vaccine requirement's public health goals. It answered that question just like all the other lower courts have, and for the same reasons.

So lower courts have not "struggled" to reason or decide consistently around vaccine mandates or exemptions to them. Pet. 2. Instead, the Circuit Courts' unanimous conclusions and analytical methodologies are internally consistent and compelled by this Court's precedent. There is no Circuit split to resolve or "grave misapplication" of precedent for this Court to correct. Pet. 3.

A. Appellate Courts Unanimously Agree that Common Religious and Rare Medical Exemptions Do Not Pose Comparable Risks to a State's Public Health Goals.

The First and Ninth Circuits – the only other circuits to reach the issue – agree with the Second Circuit that medical and religious exemptions are not "comparable" in this context because they do not undermine the vaccine mandate's public health goals in similar ways or to similar degrees. *See Doe v. Mills*, 16 F.4th 20, 30-32 (1st Cir. 2021); *Doe v. San Diego Unified Sch. District*, 19 F.4th 1173, 1177-80 (9th Cir. 2021) ("*SDUSD*"); *see also We The Patriots USA, Inc. v. Hochul,* 17 F.4th 266, 273, 284-86 (2d Cir. 2021) (holding that New York's COVID vaccine mandate, with a medical but not religious exemption, was generally applicable). Like the Second Circuit, both courts emphasize that the numerical disparity between people who seek each exemption can resolve the comparability analysis, especially when the disparity is so great that the religious exemption impedes the states' critical public health goals while the medical exemption does not. *Lowe v. Mills*, 68 F.4th 706, 715-16 (1st Cir. 2023); *SDUSD*, 19 F.4th at 1177-78. The only state appellate decision to have addressed the issue post-*Smith* reached the same conclusion for largely the same reasons. *See F.F. ex rel. Y.F.*, 194 A.D.3d at 83 (emphasizing religious exemption's impact on herd immunity). This Court already denied review in all these cases. *F.F. ex rel. Y.F. v. New York*, 142 S. Ct. 2738 (2022); *Dr A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022); *Doe v. Mills*, 142 S. Ct. 1112 (2022); *Doe v.*

San Diego Unified Sch. District, 142 S. Ct. 1099, 1099 (2022).

Despite Petitioner's protestations, Pet. 12-13, the First Circuit followed this framework in *Lowe*. There, Maine explicitly disclaimed a statistical comparison of the impacts each exemption had because it claimed its asserted public health interest "[wa]s *not* based on comparative assessments of risk . . . ." *Lowe,* 68 F.4th at 715 (emphasis in original; quotation marks omitted). Maine's rejection of that numerical comparison of risk – which Connecticut explicitly relied on here – was the primary reason the First Circuit let the claim proceed past a motion to dismiss. *Id.* at 715. But in doing so the First Circuit cited Second Circuit caselaw to emphasize that the result would have been different if Maine had argued (as Connecticut has here) that medical exemptions are "rarer, more time limited, or more geographically diffuse than religious exemptions, such that the two exemptions would not have comparable public health effects." *Id.* at 715-16 (citing *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286 (2d Cir. 2021)). Far from conflicting with the Second Circuit's approach, *Lowe* expressly followed it.

This post-*Smith* judicial consensus is nothing new or extraordinary. States have long enacted mandatory vaccine laws with medical but not religious exemptions. *See supra* at 3-5. For just as long, this Court and others have upheld those laws against constitutional attack. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348 (4th Cir. 2011); *Morris v. Columbus*, 102 Ga. 792, 793

(1898); *Duffield v. Sch. Dist.*, 162 Pa. 476, 483 (1894); *Abeel v. Clark*, 84 Cal. 226, 228 (1890).[22]

B. Petitioners' Claimed Methodological Circuit Splits Are Imagined and Irrelevant, and Their Claims of Error Are Substantively Incorrect.

Without a circuit split on the substantive issue, Petitioners fall back on question-begging. They claim that the Second Circuit's decision "exacerbates a broad split of authority" about whether a law can be generally applicable "if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves." Pet. 8 (quoting *Dr A. v. Hochul*, 142 S.Ct. 2569, 2570 (Mem) (2022) (Thomas, J., dissenting from denial of certiorari)). But the entire question here is whether the common religious exemption and rare medical exemption "similarly frustrate[]" Connecticut's interest in protecting public health. They do not. The Second Circuit correctly followed precedent, and

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[22] Challenges to state vaccine laws with medical but not religious exemptions are pending in the First, Fourth, and Ninth Circuits. *See W. Va. Parents v. Christiansen*, No. 23-1887 (4th Cir.) (fully briefed on appeal); *Royce v. Bonta*, Docket No. 3:23-cv-02012-H-BLM, 2024 U.S. Dist. LEXIS 52973, at *2 (S.D. Cal. Mar. 25, 2024) (granting motion to dismiss with leave to amend); *Fox v. Makin*, Docket No. 2:22-cv-00251-GZS, 2023 U.S. Dist. LEXIS 142983, at *18 (D. Me. Aug. 16, 2023) (denying motion to dismiss Free Exercise claim). So the Court will have other opportunities to consider these issues if it is inclined to, and allowing these cases to percolate will generate more reasoned decisions to aid this Court's potential review.

aligned with the First and Ninth Circuits, in saying so.

Those courts' holdings do not conflict with any of the Third, Sixth, and Eleventh Circuit decisions Petitioners cite. Pet. 9-10. None of Petitioners' cases arose in the vaccine context, and they all involved secular exemptions that – on the facts in those cases – did "similarly frustrate" the state interests at issue there. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 366-67 (3d Cir. 1999) (addressing no-beard policy designed to foster "uniform appearance" on police force, and concluding "there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties" for than those who wear beards for medical reasons); *Monclova Christian Academy v. Toledo-Lucas Health Dept.*, 984 F.3d 477, 480 (6th Cir. 2020) (concluding that allowing secular businesses to remain open during the pandemic not only similarly frustrated the town's interest in slowing the spread of COVID-19, it "presented a 'more serious health risk' than the religious conduct did"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1233, 1235 (11th Cir. 2004) ("[i]ncluding private clubs and lodges as permitted uses in [the] business district, while simultaneously excluding religious assemblies, violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues").

All of these courts asked precisely the same question the First, Second, and Ninth Circuits did in

the vaccine cases. They just reached different fact-bound conclusions in unrelated contexts involving different governmental interests. That does not "exacerbate[] a broad split of authority" on any point of law, Pet. 8, especially when the Circuits that have addressed the question in this factual context unanimously reach the same conclusion as the Second Circuit.[23]

Next, without any circuit split on either legal tests or outcomes, Petitioners conjure up three methodological issues that purportedly need this Court's attention. Each time, they fail to identify a circuit split or even an error.

First, Petitioners devote most of their brief to arguing a point nobody disputes: the "comparability" analysis, they insist, properly focuses on the interests advanced by the vaccine mandate itself as opposed to the exemptions to it. Pet. 10-20. State Respondents agree. So does every court Petitioners claim has created a split on this issue in the vaccine mandate context. Again: all those courts properly identify the state's interest in a vaccine mandate; focus on the risk each exemption poses to that interest; and hold that common religious exemptions

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[23] The Tenth Circuit's recent decision invalidating two University of Colorado vaccine policies during the pandemic addresses none of these comparability issues. *Doe v. Board of Regents of the University of Colorado*, Docket Nos. 21-1414, 22-1027, 2024 U.S. App. LEXIS 11190, at *45, 57-58 (10th Cir. May 7, 2024). It instead assumed comparability in an entirely different factual context – a single university's vaccine policy – that did not implicate the broader herd immunity goals at issue here or the wildly disparate threat the religious exemption poses to that critical state interest.

undermine the vaccine mandate's public health goals in a way and to a degree that rare medical exemptions do not. *Mills*, 16 F.4th at 30-32; *SDUSD*, 19 F.4th at 1177-80; *see Lowe*, 68 F.4th at 715-16. The Second Circuit is no different. Pet. 37a-43a.

Petitioners transform this agreement into a dispute only by mischaracterizing the State's position and the Second Circuit's analysis, which they claim improperly focused on the medical exemption's public health rationale. Pet. 14, 15-16, 18-19. But the State repeatedly justified the repeal by focusing on the immunity-related public health goals behind the vaccine mandate itself and the singular risk the religious exemption poses to that interest. *E.g.,* 2d Cir. ECF Doc. No. 53 at 38-39 (identifying the purpose behind the vaccine mandate and arguing that the religious and medical exemptions do not impede that interest in a similar way because of their numerical disparity); *id.* at 41 (focusing on the herd immunity goals behind the mandate itself and arguing that "[i]t was not irrational for the General Assembly to have concluded that removing the religious exemption would increase the overall percentage of vaccinated students, thereby decreasing the likelihood of a disease outbreak"); *id.* at 43-44 (identifying the State's interest that justifies the repeal as its "wish to prevent the spread of communicable diseases" before vaccination rates fall below the herd immunity threshold and epidemics occur); *id.* at 57-58 (similar); *id.* at 3-4 and n.1 (emphasizing the General Assembly's goal to stem the tide of declining vaccination rates overwhelmingly caused by religious exemptions).

The Second Circuit did the same. It specifically identified the state interest behind the vaccine mandate – not the medical exemption to it – which the Court described generally as being "to protect the health and safety of Connecticut students and the broader public," and more specifically "to protect community health" and "avoid a real public health crisis" by "prevent[ing] an outbreak." Pet. App. 37a-38a; *see also* Pet. App. 41a (focusing on "the State's interest in mandating vaccination in schools"). The Court then appropriately analyzed the degree to which each exemption undermines the mandate's public health goals, focusing primarily on the disparate risk the religious exemption poses to herd immunity and the "acute" risk of outbreaks it creates. Pet. App. 42a-43a (discussing how the Act advances the vaccine mandate's immunity-based goals for "vaccinated and unvaccinated students alike," noting that the religious exemption "only detract[s]" from that interest and that it does so in a way that "differ[s] in magnitude" and that creates an "acute" risk of outbreaks that the medical exemption does not).

By contrast, the related public health goal behind the medical exemption – to prevent harm to the small group of students who cannot safely get a vaccine – took up only half a sentence in State Respondents' Second Circuit brief and only one and a half sentences in the Second Circuit's analysis. Both State Respondents and the Second Circuit referenced it only to show that the medical exemption is consistent with and advances the vaccine mandate's broader goal to protect public health, while the religious exemption does not. 2d Cir. ECF Doc. No. 53 at 38 ("Allowing children who

cannot safely be vaccinated to be exempt from the requirement does not undermine th[e vaccine mandate's public health] interest (but in fact advances it by preserving the health of those children)"); Pet. App. 41a (noting that "[a]llowing students for whom vaccination is medically contraindicated to avoid vaccination . . . advance[s] the State's interest in promoting health and safety"); Pet. App. 42a ("the medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict on them"). But regardless of that internal consistency, both the State's and 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. That rationale does not depend on the interest behind the medical exemption in any way.

Second, Petitioners complain that the Second Circuit defined the vaccine mandate's interest too broadly. They suggest the only relevant interest is the vaccine mandate's specific goals related to immunity and preventing disease outbreaks, and not a broader goal to protect the health and safety of students or the public generally (which, they say, the medical exemption satisfies but not for immunity-based reasons). Pet. 12, 15, 17, 19. But Petitioners identify no Circuit split on that issue warranting this Court's review. Nor could they. The non-vaccine cases Petitioners cite did not consider disputes about the scope of the state's asserted interest. *See Fraternal Order*, 170 F.3d at 366-67 (accepting department's asserted public safety "interest in fostering a uniform appearance through its 'no-

beard' policy"); *Monclova*, 984 F.3d at 479 (accepting department's asserted goal "to slow the spread of COVID-19"); *Midrash*, 366 F.3d at 1233, 1235 (accepting town's "proffered interests of retail synergy"). And the vaccine cases Petitioners cite all define the state's interest behind vaccine mandates broadly as being – among other more specific goals – to protect public health and safety. Pet. 37a; *Mills*, 16 F.4th at 31 (describing Maine's interest as, among other things, "protecting the health and safety of all Mainers, patients and healthcare workers alike"); *SDUSD*, 19 F.4th at 1178 (describing California's "primary interest for imposing the mandate" as "protecting student 'health and safety'"). That includes the First Circuit's decision in *Lowe*, *contra* Pet. 15, which specifically adopted Maine's assertion of a "more general interest in 'protecting the lives and health of Maine people'" but simply held on the facts alleged there that "the medical exemption undermines these interests in a similar way to a hypothetical religious exemption." *Lowe*, 68 F.4th at 715.

More importantly, any phantom Circuit split on this methodological point is not relevant since neither the Connecticut General Assembly nor State Respondents relied on an abstract public health interest to justify the repeal. They relied instead – precisely as Petitioners claim they should have – on the vaccine mandate's very specific immunity-related goals, and in particular the State's goal to maintain herd immunity and "prevent an outbreak" or epidemic in the face of "rising number of nonmedical exemptions." Pet. App. 37a-38a; 2d Cir. ECF Doc. No. 53 at 3-4 and n.1, 38-39, 41, 43-44, 57-58. That interest justified a broad mandate, and

explains why the rare medical exemption and common religious exemption are not relevantly similar. Pet. App. 43a-44a.

Third, Petitioners contend that courts must assess "comparability" through person-to-person comparisons rather than by examining each exemption's aggregate impact on the State's asserted interest. Pet. 20-22. But they identify no circuit split on that issue either. They could not if they tried, since two of the non-vaccine cases they rely on – *Fraternal Order* and *Midrash* – did not address the issue, and the third – *Monclava* – rejected their theory and supports State Respondents.

In *Monclava*, the Sixth Circuit expressly held that "[w]hether conduct is analogous (or 'comparable') for purposes of this rule does not depend on whether the religious and secular conduct involve similar forms of activity," but on whether the secular and religious activity – even if similar in form – "endangers the[State's] interests in a similar or greater degree . . . ." 984 F.3d at 480 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993)). That is fully consistent with every other Circuit's formulation of the inquiry in the vaccine context, and even with Judge Bianco's dissent here. Pet. App. 40a-41a (holding that courts can and should "consider[] aggregate data about transmission risks" rather than one-to-one comparisons); Pet. App. 69a (Bianco, J. dissenting) (agreeing with the majority that the comparability analysis "need not be limited to 'a one-to-one comparison of the transmission risk posed by an individual [with a religious exemption] and . . . an

individual [with a medical exemption],'" and that the analysis appropriately focuses on "aggregate data about transmission risks"); *Lowe*, 68 F.4th at 715-16 (agreeing with the Second Circuit and "reject[ing] the plaintiffs' apparent view that the only relevant comparison is between the risks posed by any one individual who is unvaccinated for religious reasons and one who is unvaccinated for medical reasons"); *SDUSD*, 19 F.4th at 1178 (considering the number of each exemption sought in determining whether "the 'risk' each exemption poses to the government's asserted interests" is comparable).

This lower court unanimity is again consistent with and compelled by precedent. "Comparability is concerned with the risks various activities pose" to the State's asserted interest. *Tandon*, 141 S. Ct. at 1296. Those comparative risks can just as easily differentiate themselves through collective scale as they can through individual conduct, and this Court has never suggested that courts can consider only the latter but not the former. To the contrary, the Sixth Circuit rightly noted that *Lukumi* held otherwise when it instructed that religious and secular activities are not comparable if one impedes the State's interest to a "greater degree." *Monclava*, 984 F.3d at 480 (citing *Lukumi*, 508 U.S. at 543). The Court suggested the same in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020), *contra* Pet. 21-22, where its comparability analysis expressly looked to numbers and aggregate group activities by comparing a "large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day'" with a "nearby church or synagogue [that] would be prohibited from allowing more than

10 or 25 people inside for a worship service." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66-67.

These aggregate comparisons are especially appropriate in this context where numbers indisputably matter and are part and parcel of the State's asserted interest. Herd immunity is a quantitative threshold that, for some communicable diseases, requires a 95% vaccination rate. The data show – and Petitioners do not contest – that the high number of religious exemptions already pushed the State below that threshold in dozens of schools, with many more in jeopardy of following suit. Meanwhile, the miniscule medical exemption poses no risk to the threshold at all. Nothing in the Free Exercise Clause or this Court's precedent compels application of strict scrutiny when the risk each exemption poses to the State's public health goals is so obviously not the same.

The religious exemption is not comparable to the medical exemption for other reasons of scope and duration that further counsel against this Court's review. The religious exemption is a blanket exemption. It is not specific to any disease or vaccine. It is not temporally limited, instead following the student until graduation. And it can be invoked without any verification of the student's religious beliefs or whether and how a vaccine conflicts with them. By contrast, the medical exemption must be backed by an attestation from a physician or other qualified medical provider (but not a state official); may issue only on a vaccine-by-vaccine basis; and is temporally limited by the duration of the student's medical contraindications. *See supra* at 11-12. So unlike religious objectors,

children with medical exemptions may receive some, if not most, of the vaccines required by Connecticut law, and may receive all of them if their medical condition improves. These limitations on the medical exemption's scope and duration make it different from the religious exemption in kind, not just in degree.

II. The Act Is Constitutional Under Pre-*Smith* Precedent, so This Case Offers No Opportunity to Reconsider *Smith*.

This case is not an appropriate vehicle to reconsider or overrule *Smith*. Pet. 36-37. As in *Fulton*, this Court would only reconsider *Smith* if it first concluded the Act is neutral and generally applicable under that precedent. *See Fulton*, 141 S.Ct. at 1876-77; *id.* at 1883 (Barrett, J. concurring). But this Court's precedent – which both predates and survives *Smith* – upholds neutral and generally applicable vaccine requirements that impose burdens on religion. Unless the Court also is willing to reconsider those cases, which Petitioners have not asked it to do, overruling *Smith* cannot be outcome determinative. The same result obtains "whether *Smith* stays or goes." *Fulton*, 141 S.Ct. at 1883 (Barrett, J. concurring).

Three of this Court's precedents protect the Act even absent *Smith*. *Jacobson* upheld the constitutionality of vaccine mandates with medical but not religious exemptions more than 100 years ago. As here, the mandate in *Jacobson* "ma[de] an exception in favor of children certified by a registered physician to be unfit subjects for vaccination," but made no similar exception for

adults and contained no religious exemption at all. 197 U.S. at 30. This Court had no trouble upholding the ordinance against equal protection and due process challenge because even "liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will" and must give way when necessary "to secure the general comfort, health, and prosperity of the State . . . against an epidemic of disease which threatens the safety of its members." *Id.* at 26-27. That is true, this Court explained, regardless of whether it conflicts with an individual's "personal wishes or his pecuniary interests, *or even his religious or political convictions* . . . ." *Id.* at 29 (emphasis added).

This Court later confirmed *Jacobson's* holding in *Zucht v. King*, 260 U.S. 174, 176-77 (1922), which characterized attacks on vaccine mandates as "not . . . substantial in character." As support it cited a "long line of decisions by this Court" holding that states are free to make classifications within such laws when it is reasonably necessary to protect public health and safety, and that such laws do not offend the constitution "merely because [they are] not all-embracing." *Id.*

The holdings in *Jacobson* and *Zucht* predate the First Amendment's incorporation, but their holdings were reinforced post-incorporation by *Prince v. Massachusetts*, 321 U.S. 158 (1944). Reiterating *Jacobson's* instruction that neither children nor their parents are "beyond regulation in the public interest, as against a claim of religious liberty," this Court rejected a parent's claim that a child labor law violated the Free Exercise right because the law was "within the state's police power"

notwithstanding any "religious scruples [that] dictate contrary action." *Id.* at 168-69. It reached that conclusion against the backdrop of a state interest – protecting children from "the crippling effects of child employment" – that pales in comparison to the State's paramount interest in protecting all its residents from the dangers of communicable disease and death. *See id.* at 167-69. And it expressly cited *Jacobson's* example of a mandatory vaccine law with medical but not religious exemptions as the quintessential law that states may enact over individuals' religious objections. *Id.* at 166-67 and n.12.

Any outcome-determinative reconsideration of *Smith* in the school vaccine context would also require reconsidering *Prince* and its progenitors, and might even cast into doubt other applications of state police power authority that *Prince* identified as being all-but-indisputable notwithstanding any religious objections. *Id.* at 166-67 and ns.9-11 (citing examples of requiring school attendance, prohibiting child labor, and "many other" examples).

Whether or not reconsidering *Smith* in some other context might be warranted, it is singularly inappropriate and fraught here. Vaccines implicate public safety concerns of the highest order, and mandates responding to such "physical harms, actual or likely, are most likely to implicate overriding interests." Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, 2021 Cato Sup. Ct. Rev. 33, 59 (2021); *and see Fulton*, 141 S. Ct. at 1901-03 (Alito, J., concurring in the judgment) (suggesting that Founding-era Free Exercise Clause cognates

anticipated that "the right does not protect conduct that would endanger 'the public peace' or 'safety'"). That is especially true in schools, where state interests are at their peak and a range of constitutional rights apply differently than in other contexts. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-657 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere. . . . For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases").

III. Petitioners Waived any Challenge Based on the Legacy Provision, and There Is No Reason to Review that Claim in any Event.

Certiorari also is not warranted to review Petitioners' newly minted claim that the legacy provision deprives the Act of general applicability under *Smith* by treating religious objectors with existing exemptions more favorably than those without. Pet. 22-27.

First, Petitioners forfeited this claim by failing to raise it below. Their *Smith* argument at the Second Circuit focused solely on the medical exemption, nowhere mentioning the Act's legacy provision or any of the Establishment Clause and equal protection cases Petitioners now cite. *Compare* 2d Cir. ECF Doc. No. 50 at 21-42 *with* Pet. 24. So the Second Circuit did not "simply ignore[]" the issue. Pet. 22. It did not address the issue, because Petitioners never asked it to. This Court's

"longstanding rule" is to "not pass on arguments that lower courts have not addressed." *Daimler AG v. Bauman*, 571 U.S. 117, 146-147 (2014); *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005); *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

Second, even if the claim were preserved, this Court should not be the first in the country to decide it. Petitioners do not claim a Circuit split on this issue; they cannot identify a trial or appellate decision that has addressed it; and they concede this Court has never before considered anything like it. Pet. 23 ("[t]his Court's precedents have indeed only engaged in general applicability analysis by contrasting 'free exercise' with 'comparable secular activity'").

Third, the claim has no basis in law. It is instead premised on a theory imported wholesale from an inapposite Establishment Clause case in which this Court applied strict scrutiny to a law that that gave "denominational preferences" to some religions but not others. Pet. 24 (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). But the Act's legacy provision applies equally to all religious objectors regardless of their religion or denomination. And it enhances religious exercise rather than burdening it, permitting more religious exemptions than the State was constitutionally required to allow. The Free Exercise Clause does not compel Connecticut to be less solicitous and accommodating toward religion than it chose to be here. *See, e.g., Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970) (states may act with "benevolent neutrality" toward religion).

Fourth, Petitioners ultimately acknowledge this claim for what it really is: an equal protection claim wrapped up in free exercise garb. Pet. 24-25 (equating this case to *Bush v. Gore*, 531 US 98, 104-105 (2000)). The lower courts properly rejected Petitioners' equal protection claim, and Petitioners chose not to press it in their petition. *See* Pet. 52a-54a, 119a-122a; *see also Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) ("classifications serving to protect legitimate expectation and reliance interests do not deny Equal Protection of the laws").

Finally, certiorari also is not warranted given the legacy provision's limited scope and duration. No other state has enacted a similar provision, so any resolution will be limited to the facts of this case. Even in Connecticut the impacts will be fleeting. The number of students using the exemption shrinks with each passing year, and the exemption will sunset when the last class of kindergarteners who could invoke the exemption graduate high school. Those limited and diminishing returns further counsel against this Court's review.

IV. This Court's Precedent, Including *Wisconsin v. Yoder*, Precludes a Purported Hybrid-Rights Claim Here.

Finally, Petitioners' claim that the Court should "revitalize" a purported hybrid-rights theory established in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and recognized in *Smith* warrants little attention. Pet. 32-35. *Yoder* invalidated a compulsory school attendance law based on its burden on religion coupled with "the right of parents, acknowledged in *Pierce* v. *Society of Sisters*,

268 U.S. 510 (1925), to direct the education of their children." *Smith*, 494 U.S. at 881. Whatever vitality that theory might have left in other contexts, this is not a viable vehicle to revive it because *Prince* and *Yoder* itself both preclude its application here.

Start with *Prince*, which Petitioners inexplicably ignore but which rejected the same hybrid-rights theory they advance. 321 U.S. at 164 (describing the hybrid theory). This Court acknowledged the parental right to educate children but then immediately explained that the right "is not beyond regulation in the public interest, as against a claim of religious liberty," and that "neither rights of religion nor rights of parenthood" prevent states from "guard[ing] the general interest in youth's well being . . . ." *Prince*, 321 U.S. at 166. It then cited *Jacobson,* and other compulsory vaccination laws, as quintessential instances when "the state as *parens patriae* may restrict the parent's control" despite religious objections. *Id.* at 166-67 and n.12. As the Court put it, a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds," and "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* Or more directly, no constitutional theory – hybrid or otherwise – permits parents "to make martyrs of their children" or others in the community. *Id.* at 170.

This Court confirmed that common sense conclusion in *Yoder*. There, the Court struck down a compulsory school attendance law because the record established that forcing Amish students to

undergo "one or two years" of additional schooling after eighth grade posed no threat to public health and safety and "would do little" to advance the state's goal to "prepare citizens to participate effectively and intelligently in our open political system." 406 U.S. at 221, 230, 233-34. But the Court expressly distinguished that holding from *Prince* and other cases where the religious activity "poses some substantial threat to public safety, peace or order." *Id.* at 230 (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963)); *see id.* at 220 (citing *Prince*, 321 U.S. 158). The Court could not have been clearer on that point: "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 233-34. And like *Prince* before it, *Yoder* explicitly cited *Jacobson* and compulsory vaccination laws as fitting that bill. *Id.* at 230 and n.20. So did Justice White's three-justice concurrence, which emphasized that "[t]he challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did, analysis under the Free Exercise Clause would be substantially different." *Id.* at 239 n.1 (White, J. concurring) (citing *Jacobson*, 197 U.S. 11 and *Prince*, 321 U.S. 158).

This case involves precisely the kind of compulsory vaccine law, designed to advance critical public health and safety goals, that *Jacobson*, *Prince*, and *Yoder* firmly establish is well within the State's police power notwithstanding Petitioners' religious and parental objections. So as with any interest this Court might have in reconsidering or

overturning *Smith*, it should wait to "revitalize" *Yoder's* purported hybrid-rights theory in a case where it might actually impact the outcome.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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Dated: May 20, 2024