142 S.Ct. 2569
Supreme Court of the United States.

DR. A., et al.
v.
Kathy HOCHUL, Governor of New York, et al.

No. 21-1143
|
Decided June 30, 2022

Case below, 17 F.4th 266.

Opinion
The petition for a writ of certiorari is denied.

Justice THOMAS, with whom Justice ALITO and Justice GORSUCH join, dissenting from the denial of certiorari.
In August 2021, New York mandated that all healthcare workers receive a COVID–19 vaccine. See 10 N. Y. Admin. Code § 2.61 (2021). It did so to "stop the spread" of the then-prevailing Delta variant ***2570** of the COVID–19 virus. New York State Governor's Office, Governor Cuomo Announces COVID–19 Vaccination Mandate for Healthcare Workers (Aug. 16, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers. The State exempted employees from the mandate if vaccination would be "detrimental to [their] health." § 2.61(d)(1). However, the State denied a similar exemption to those with religious objections. See *Dr. A.* v. *Hochul*, 595 U. S. ——, ——, 142 S.Ct. 552, 553, 211 L.Ed.2d 414 (2021) (GORSUCH, J., dissenting from denial of application for injunctive relief). Consequently, those who qualified for the broad medical exemption simply had to employ standard protective measures and could keep their jobs. But those who objected for religious reasons would be fired, even if they took the same protective measures. See *id.*, at —— – ——, 142 S.Ct., at 553-554.

Petitioners are 16 healthcare workers who served New York communities throughout the COVID–19 pandemic. They object on religious grounds to all available COVID–19 vaccines because they were developed using cell lines derived from aborted children. Pet. for Cert. 8. Ordered to choose between their jobs and their faith, petitioners sued in the U. S. District Court for the Northern District of New York, claiming that the State's vaccine mandate violated the Free Exercise Clause. The District Court agreed and issued a preliminary injunction. 567 F.Supp.3d 362, 374-375 (N.D.N.Y. 2021). The Court of Appeals reversed. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (C.A.2 2021) (*per curiam*); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 368 (C.A.2 2021) (*per curiam*). This Court then denied petitioners' emergency application to reinstate the injunction, which three of us would have granted. See *Dr. A.*, 595 U. S., at ——, 142 S.Ct., at 552. Since then, "every Petitioner except one has been fired, forced to resign, lost admitting privileges, or been coerced into a vaccination." Pet. for Cert. 13–14, and n. 10.

Petitioners now ask us to review the Court of Appeals' decision vacating the District Court's preliminary injunction. I would grant the petition. We have held that a "law ... lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton* v. *Philadelphia*, 593 U. S. ——, ——, 141 S.Ct. 1868, 1877, 210 L.Ed.2d 137 (2021). Yet there remains considerable confusion over whether a mandate, like New York's, that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves. Three Courts of Appeals and one State Supreme Court agree that such requirements are not neutral or generally applicable and therefore trigger strict scrutiny.[1] Meanwhile, the Second Circuit has joined three other Courts of Appeals refusing to apply strict scrutiny.[2] This split is widespread, entrenched, and worth addressing.

***2571** This case is an obvious vehicle for resolving that conflict. The New York mandate includes a medical exemption but no religious exemption, even though "allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones." *Dr. A.*, 595 U. S., at ——, 142 S.Ct., at 556 (opinion of GORSUCH, J.). The Court could give much-needed guidance by simply deciding whether that single secular exemption renders the state law not neutral and generally applicable.

Moreover, I would not miss the chance to answer this recurring question in the normal course on our merits docket. Over the last few years, the Federal Government and the States have enacted a host of emergency measures to address the COVID–19 pandemic. Many were not neutral toward

religious exercise or generally applicable. See, *e.g., Tandon* v. *Newsom*, 593 U. S. ——, ——, 141 S.Ct. 1294, 1297, 209 L.Ed.2d 355 (2021) (*per curiam*) (listing four other cases from the Ninth Circuit alone); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U. S. ——, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020). Circumstances forced us to confront challenges to those measures in an emergency posture, a practice that Members of this Court have criticized. See, *e.g., Merrill* v. *Milligan*, 595 U. S. ——, ——, 142 S.Ct. 879, 889, —— L.Ed.2d —— (2022) (KAGAN, J., dissenting from grant of application for stay) (lamenting use of the so-called "shadow docket to signal or make changes in the law, without anything approaching full briefing and argument"). Here, the Court could grant a petition that squarely presents the disputed question and consider it after full briefing, argument, and deliberation.

Unfortunately, the Court declines to take this prudent course. Because I would address this issue now in the ordinary course, before the next crisis forces us again to decide complex legal issues in an emergency posture, I respectfully dissent.

All Citations

142 S.Ct. 2569 (Mem), 213 L.Ed.2d 1126, 22 Cal. Daily Op. Serv. 6637, 2022 Daily Journal D.A.R. 6979, 29 Fla. L. Weekly Fed. S 627

Footnotes

1 See *Monclova Christian Academy v. Toledo-Lucas Cty. Health Dept.*, 984 F.3d 477, 482 (C.A.6 2020); *Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1234–1235 (C.A.11 2004); *Fraternal Order of Police v. Newark*, 170 F.3d 359, 365–366 (C.A.3 1999); *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 15–16 (Iowa 2012).

2 See *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 284–290 (C.A.2 2021) (*per curiam*); *Doe v. San Diego Unified School Dist.*, 19 F.4th 1173, 1177–1178 (C.A.9 2021); *Doe 1–6 v. Mills*, 16 F.4th 20, 29–31 (C.A.1 2021); *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1186 (C.A.10 2021), cert. granted, 595 U. S. ——, 142 S.Ct. 1106, 212 L.Ed.2d 6 (2022) (granting certiorari to review a Free Speech Clause claim).