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Health Law
Vaccine Mandates and Religion

Dorit Reiss¹

Introduction

This chapter addresses the issue of whether, in light of the Supreme Court's recent cases on religious freedom, vaccine mandates without religious exemptions are constitutional.

The issue is of timely importance for two reasons. First, since 2015, four states—California, Maine, New York, and Connecticut (given in chronological order)—have removed the non-medical exemption from their school immunization mandate. If a religious exemption from school vaccine mandates is constitutionally required, these states are in violation.

Second, the Court has showed a recent solicitude for claims of religious freedom. In 1990, in *Employment Division v. Smith*, the Court held that a generally applicable, facially neutral law need not provide a religious exemption.² But since 2014, the Supreme Court has gradually expanded the protection of free exercise of religion. Since October 2020, that pace has quickened. On September 18, 2020, Justice Ruth Bader Ginsburg died, and, in October, Justice Amy Coney Barrett was confirmed in her place. On November 25, 2020, the Supreme Court ruled on the first of a series of cases finding restrictions on houses of worship unconstitutional. The decision, *Roman Catholic Diocese v. Cuomo*,³ emphasized the importance of religious freedom and was based on the view that restrictions specific to houses of worship must withstand strict scrutiny. The Court granted an emergency stay of the restrictions, and although the case was decided per curiam, the separate opinions make clear that Justice Barrett was the deciding vote for the stay. Stays in previous, similar cases were often denied in 5–4 decisions the other way.

¹ Excerpted and adapted from Dorit Reiss, *Vaccine Mandates and Religion: Where are We Headed With the Supreme Court?*, 49 J.L. MED. & ETHICS 552 (2021).

² 494 U.S. 872, 875–78 (1990).

³ 141 S. Ct. 63 (2020).

Cuomo was followed by several other shadow-docket cases, most notably *Tandon v. Newsom*, where the Court struck down a restriction on in-home gatherings, for religious reasons or not, as violating religious freedom based on the fact that secular business—like stores—were not subject to the same limitations.⁴ Observers read *Tandon* and other decisions as not just strengthening protection of religious freedom but also carving out a large exception to *Smith*: any secular exception from a rule means that *Smith* does not apply and subjects the lack of a religious exemption to strict scrutiny.

Shortly after *Tandon*, the Supreme Court decided a case that could have dramatically changed the First Amendment discussion. In *Fulton v. City of Philadelphia*,⁵ the Court confronted the question of whether the City of Philadelphia's choice to terminate a contract with a Catholic adoption agency because the agency refused to certify same-sex couples as foster parents violated the First Amendment. During the case, the Court considered overruling *Smith*. Although the Court declined to do so, finding, instead, that *Smith* did not apply because the failure of the city to apply an existing discretionary exemption to allow the agency's religious objection violated strict scrutiny, three justices—Justices Alito, Gorsuch, and Thomas—would have overturned *Smith*.

These developments raise questions for vaccine mandates without religious exemptions. Although courts had, since *Smith*, consistently ruled that the First Amendment does not require vaccine mandates to have a religious exemption, the combination of the shadow-docket cases and *Fulton* now has opened the door to reconsidering whether vaccine mandates must offer a religious exemption. Because vaccine mandates are always accompanied by a medical exemption for those who cannot safely be given a specific vaccine, is the provision of a medical exemption but the disallowance of a religious exemption consistent with the First Amendment?

In 2021, the Supreme Court denied a stay in two cases where a COVID-19 vaccine mandate did not offer a religious exemption.⁶ But these cases do not resolve the question. Both

⁴ 141 S. Ct. 1294, 1294–99 (2021) (per curiam).

⁵ 141 S. Ct. 1868 (2021).

⁶ *Does v. Mills*, 142 S. Ct. 17 (2021); *Dr. A. v. Hochul*, 142 S. Ct. 522 (2021).

cases focused on whether to grant an emergency stay, rather than a ruling on the merits. And in one of them, *Doe v. Mills*, Justice Barrett, joined by Justice Kavanaugh, concurred to emphasize that fact. Justice Barrett worried that granting emergency relief would encourage applicants to

use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument. In my view, this discretionary consideration counsels against a grant of extraordinary relief in this case, which is the first to address the questions presented.⁷

Thus, whether a religious exemption to vaccine mandates is constitutionally required is an open question.

This chapter argues that, for children, a religious exemption is not required. Nor should a religious exemption generally be required for adults, though there may be exceptions. I will address children first, then adults.

The case for requiring a religious exemption is weakest when it comes to children because child-focused vaccine mandates sit on especially strong legal ground, drawing on state police powers to act in the public health and on the limits on parental rights to act against the child's welfare. Unvaccinated children are themselves at risk, left at higher risk of contracting a dangerous preventable disease than their peers, and risk others because they can infect others with a transmissible disease. Religious freedoms are also at their weakest when invoked on behalf of a child—who cannot yet choose religion themselves—and when used to impose a health risk on others. In other words, a parent's right to allow the child to be harmed or die is limited because the child has health rights too, and a parent's right to create a risk for the child's classmates is even more limited.

Further, even if the Supreme Court were poised to overrule *Smith*, cases dating long before *Smith* have upheld school vaccine mandates without a religious exemption. Some have even found that such mandates survive strict scrutiny because protecting children's health is a compelling interest, and there is no

⁷ *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring).

alternative that would provide the level of protection that school mandates without a religious exemption provide.

In the 1944 case *Prince v. Massachusetts*, a case upholding the prosecution of a guardian for violating child-labor laws by allowing her niece to help distribute religious pamphlets promoting Jehovah Witnesses' beliefs, the Supreme Court ruled that even the combination of parental rights and religious freedom does not prevent the state from regulating to protect child welfare. A parent's religious freedom cannot be used to put a child at risk. In dictum, the Court stated that the same reasoning applies to compulsory child vaccination, because "[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."⁸ *Prince* has been cited repeatedly in cases rejecting Free Exercise Clause challenges to school immunization mandates, before and after *Smith*.

Children's vaccine mandates without a religious exemptions are on very strong grounds because they vindicate three important interests. The first is the rights of the child, who is too young to make their own religious decisions, and for whom—in almost every case—the risks of vaccinating are substantially smaller than risks of not vaccinating. The second is the rights of other children in the school for a safe environment (and of their parents to send their children into a safe environment). And the third is the community's interest in public health, which can be negatively affected by outbreaks. Parents who do not want to vaccinate their school-age children due to their own religious beliefs infringe all three interests. Courts have not been sympathetic to that position.

For adults, the case for vaccine mandates without religious exemptions is weaker because adults are acting according to their own religious beliefs, and the tension between public health and religious freedom is more direct because the impact is on the believer directly. Nonetheless, even were the Court to overturn *Smith*, vaccine mandates without religious exemptions should continue to be held to a rational-basis standard, not strict scrutiny. That is so for three reasons.

First, on policy grounds, vaccine mandates are justified to protect the public's safety in an area where broad compliance is needed to achieve the targeted goal of herd immunity.

⁸ *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

Unvaccinated individuals free ride on a public good—herd immunity—while refusing to contribute to it. And if enough individuals refuse to be vaccinated, they can prevent herd immunity for the community.

Second, the risk of abuse of vaccine-mandate exemptions—i.e., using a religious exemption to support opposition that is not, in fact, religiously based—is high. And preventing abuse—policing the sincerity of claims of religious objections—is challenging, if not impossible.

Third, as Justice Alito pointed out in his concurrence in *Fulton*, applying rational basis is most appropriate under the First Amendment when a general law is aimed at actions that pose a substantial threat to public safety, peace, or order.⁹ Allowing vaccine mandates with no religious exemptions fits that goal and is consistent with original understandings of the First Amendment.

Does the inclusion of medical exemptions require the inclusion of religious exemptions? Several reasons suggest no. First, medical exemptions are usually well defined and require medical documentation; that is different than an undefined, discretionary exemption of the type implicated in *Fulton*. Second, under existing jurisprudence, a medical exemption is likely constitutionally required; thus, legislatures are not choosing to favor secular interests over religious interests. Finally, the logic of medical exemptions fits the logic of the mandate: mandates say that those who can be safely vaccinated should be. A medical exemption leaves out those who cannot be safely vaccinated but captures everyone else—achieving the mandate's goal, rather than creating an out.¹⁰

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⁹ *Fulton*, 141 S. Ct. at 1902–04 (Alito, J., concurring).

¹⁰ For another discussion of this point, see Lindsay F. Wiley & Steve Vladeck, *Why Carefully Designed Vaccination Mandates Can—and Should—Withstand Constitutional Challenge*, LAWFARE BLOG (Aug. 12, 2021).

