

25-2504

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**SARA ROYCE; SARAH CLARK; TIFFANY BROWN; and KRISTI
CARAWAY,**

Appellants,

v.

ERICA PAN,

in her official capacity as the State Public Health Officer,
Appellee.

On Appeal from the United States District Court
for the Southern District of California
Case No. 3:23-cv-02012-H-BLM
The Honorable Judge Marilyn L. Huff

APPELLANTS' REPLY BRIEF

ADVOCATES FOR FAITH & FREEDOM
Robert Tyler
Erin Elizabeth Mersino
Julianne Fleischer
25026 Los Brisas Road
Murrieta, California 92562
Telephone: 951.600.2733
Email: emersino@faith-freedom.com

Counsel for Appellants

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REPLY

The State's brief confirms the necessity to correct the lower court's legal error. The First Amendment does not allow a State to prohibit Appellants from obtaining a religious exemption while it is freely granting secular exemptions that identically undermine the State's public-health objective (achieving a higher number of vaccinated students). Ans. Br. at 23. The State's position is irreconcilable with *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Tandon v. Newsom*, 593 U.S. 61 (2021).

The State does not contest that S.B. 277 substantially burdens Appellants' religious exercise under the First Amendment. Ans. Br. at 38. The question then shifts to whether S.B. 277 allows for a scheme of individualized exemptions. It does. The State insists its medical exemptions are not individualized and therefore do not trigger *Fulton's* analysis, but S.B. 277 expressly requires a case-by-case determination conducted by a physician—a quintessentially individualized determination. The State then fails to address why or how its other exemptions are not individualized, thereby waiving this argument as to each of S.B. 277's other exemptions, to which there are many. Ans. Br. at

20-23. The State’s forfeiture of its argument and the exemptions allowed in the law establish that S.B. 277 does not meet the “threshold requirement of being neutral and generally applicable.” *Fulton*, 141 S. Ct. at 1871. Under the standard set forth in *Fulton*, S.B. 277 “invites the government to consider the particular reasons for a person’s conduct by creating a mechanism for individualized exemptions.” *Id.*

S.B. 277 is also fails to meet the “neutral and generally applicable” standard under *Tandon’s* comparator analysis. *Tandon*, 141 S. Ct. at 1297-98. The State dances around the central holding in *Tandon*: the comparator analysis boils down to the *risk* an exemption, or its unregulated activity, poses—not the reason. *Id.* at 1296. S.B. 277’s exemption of over 700,000 students with IEPs (more than 11% of the student population) poses a risk. Exempting all students over the age of eighteen poses a risk. Allowing medical exemptions poses a risk. Decidedly not regulating any other activity or location outside of the classroom poses a risk. Decidedly only regulating non-exempt children, while exempting students over the age of eighteen and all adult staff and volunteers, poses a risk. These risks are far greater or comparable to the risk of exempting Appellants’ children. Furthermore, taking to heart the

State's percentages argument, Appellants' children pose far less risk than the State's other exemptions because Appellants' children represent only 0.000173519% of California's reported students attending private and public school in the State. Opening Br. at 13.

The State argues that this Court need not address the risk posed by Appellants, but by an unestablished, potential number of other people who might come forward seeking a religious exemption. The State, however, has never provided a number or percentage for how many Californians might hold a sincerely held religious belief that would satisfy the rigor of qualifying for a religious exemption from S.B. 277. The State's former "personal belief exemption" did not meet nor require the elements necessary to establish a First Amendment religious free exercise claim. And the State's argument has never been the test. Under strict scrutiny review, the State explicitly carries the burden, not of proving it "has a compelling interest in enforcing [S.B. 277] generally, but whether it has such an interest in denying an exception to" Appellants. *Fulton*, 141 S. Ct. at 1881. S.B. 277's exemptions and unregulated activities defeat the State's arguments.

Finally, the State waves away unambiguous evidence of animus. Senator Richard Pan, the bill’s author, declared that religious objectors should be “opted out of American society” and compared them to drunk drivers. ER-45, ¶ 66, 67. Another legislator called them “oxygen thieves.” ER-45, ¶ 68. Such hostility independently requires strict scrutiny under *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm’n*, 584 U.S. 617 (2018).

The district court’s rational-basis deference was error. This Court should reverse and remand with instructions to apply strict scrutiny.

ARGUMENT

I. S.B. 277 IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE.

The State does not dispute that S.B. 277 provides a mechanism for exemptions for following reasons:

1. Medical purposes, as determined on a case-by-case basis by a physician, Ans. Br. at 3;
2. A 30-day period when first enrolling, Ans. Br. at 4;
3. Homeschooled students with individualized study programs, Ans. Br. at 6;

4. Students with an Individualized Educational Program (IEP) when “accessing any special education and related services,” Ans. Br. at 6-7;

5. Immigrant students, foster care students, homeless students, and students whose parents are in the military for a conditional period of time. Cal. Educ. Code §§ 48204.7, 48850, 48852.7, 49069.5, 49701; Cal. Health & Safety Code § 120341;

6. Students under the age of eighteen attending “any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center.” Cal. Health & Safety Code § 120335(b), Ans. Br. at 19;

7. Students with grandfathered exemptions. Cal. Health & Safety Code § 120335(g).

The lower court recognized S.B. 277’s multiple exemptions in its factual findings but erred in its legal analysis as the law’s exemptions create a scheme that forces it outside of the bounds of a neutral or generally applicable law. ER-7. The lower court’s decision rests entirely on the assertion that rational-basis review applies. That finding fails for three independent reasons.

A. S.B. 277 Contains a System of Individualized Exemptions That Triggers Strict Scrutiny Under *Fulton*.

The State’s primary argument is that medical exemptions under § 120370 are “categorical” and “objective” rather than individualized. Ans. Br. at 19–23. That argument is misguided. The State argues that “[i]n any event, plaintiffs have identified nothing in the law that gives *government officials* meaningful discretion in whether to grant a medical exemption.” Ans. Br. at 20 (emphasis in original). However, it is the State’s officials who determined that S.B. 277 would provide a medical exemption, it is the State’s officials who determined medical exemptions would be determined on a case-by-case basis, and it is the State’s officials who supply and process the individualized exemption based on the system it created when enacting S.B. 277. By creating the exemption (which is an individualized exemption), the State has rendered the law not generally applicable under *Fulton*. It matters not that the State employs physicians to make individualized determinations. It matters not that the State uses agency to make the determinations instead of providing medical exams with its own hands. What matters is how the State constructed the law: with or without secular exemptions.

The State’s medical-exemption authorizes physicians to make individualized determinations, to consider factors like “family medical history”—an inherently individualized, case-by-case determination. Cal. Health & Safety Code § 120370(a)(3); ER-44, ¶ 52. A physician’s judgment whether a particular child’s family history warrants exemption is the definition of individualized assessment. This provision distinctly allows “medical discretion” as cabined by the physician’s professional training and as exercised using the relevant standard of care. Ans. Br. at 21-22. The State argues that it has tightened its medical exemption, but it continues to deliberately retain discretion in determining whether legitimate individualized medical circumstances exist and a factor used in determining that exemption continues to be family-history. The process is purely “objective.” It is the kind of discretionary, individualized exemption system that the Supreme Court in *Fulton* held destroys general applicability. 141 S. Ct. at 1878–79.

The State is not insulated because it has statutorily provided that physicians should use discretion to grant medical exemptions, instead of solely determining the qualifications for medical exemptions themselves. This was recognized in *Fulton*, as the Supreme Court noted that even

when the government passes sole discretion to an independent contractor, the government remains in a managerial role of its internal operations. 141 S. Ct. at 1878. So, the State cannot legitimately claim that the medical exemption it created and oversees does not involve the State, nor can it legitimately argue that the exemption is inconsequential.

The State's characterizes its exemptions as fleeting, yet there is nothing in S.B. 277 that would suggest that any medical exemptions under Cal. Health & Safety Code § 120370(a) would be temporary in nature. In fact, the medical exemption could extend for the entire duration that the student has his or her medical condition or contraindication, which could be the child's lifetime. ER-54-55, ¶ 111, 113-14.

Even if medical exemptions were purely objective (they are not), *Fulton* still controls because S.B. 277 contains numerous other individualized pathways out of the vaccination requirement, including independent study/home-schooling (§ 120335(f)), which parents and teachers may determine on a case-by-case basis; IEPs (§ 120335(h)), which require case-by-case determinations by school teams; temporary

exemptions based on moving, or foster, care status, or homelessness, or military-family status, each based on individualized determinations to determine if a student indeed qualifies or should be granted the exemption. The State, however, does not mention nor defend these provisions of S.B. 277 in its Answering Brief, and therefore forfeits the argument that these exemptions, expressly carved out in S.B. 277, are not based on individualized, case-by-case determinations. Ans. Br. at 18-23.

The only argument the State claims regarding these individualized exemptions is that they are “narrow” or pose less risk under *Tandon*. Ans. Br. at 23–36. But *Fulton* does not ask whether the discretionary system is narrow; it asks whether one exists at all. Once secular officials may grant exemptions based on case-by-case judgment, requests for religious exemption claims must receive the same consideration. 141 S. Ct. at 1878 (“A law is not generally applicable if it *invites* the government to consider *the particular reasons for a person’s conduct* by providing a mechanism for individualized exemptions.”) (quotation marks omitted) (emphasis added). The State’s creation of individual exemptions to S.B. 277 is sufficient to trigger strict scrutiny. *Id.* at 1878.

Post-*Fulton*, various courts have held that vaccine laws that provide medical exemptions, but intentionally deny a request for a religious exemption, trigger strict scrutiny. See *Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022); *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022); see also *Dahl v. Bd. of Trs. of W. Michigan Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (holding that since the university allowed for medical and religious exemptions—both requiring consideration on an individual basis, but categorically did not allow a religious exemption for student athletic participation, meant that the university “retain[ed] discretion to extend exemptions in whole or in part.” Therefore, the denial of a religious exemption for student athletic participation was “not generally applicable.”); *Fox v. Makin*, 2023 WL 5279518; Dkt. No. 2:22-cv-00251-GZS (D. Me., Aug. 16, 2023) (finding that a complaint may state a plausible claim under the Free Exercise Clause when it alleges that a vaccine mandate has eliminated a religious exemption while maintaining its medical exemption).

The State repeatedly cites to *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1175–76 (9th Cir. 2021). In *Doe*, this Court initially granted plaintiffs, a 16-year-old high school student and her parents, emergency

injunctive relief pending appeal. *Id.* This Court found that so long as the defendant provided deferred vaccination for pregnant students, plaintiffs were entitled to an injunction against the defendant's mandatory vaccination requirement. *Id.* After initial injunctive relief was granted, this Court determined that the injunction had terminated on its own terms and denied a further injunction pending appeal. *Id.* In doing so, two members of the three-judge panel preliminarily determined that the defendant's conditional enrollment and IEP exemptions did not persuade the Court to grant an injunction pending appeal, but the dissenting judge pointed out the majority's reasoning "again confuses the *reasons* for the exemption with the *asserted interest* that justifies the mandate. While the School District may have a good reason to give new enrollees who meet certain criteria thirty days to comply with the mandate, the in-person attendance of such unvaccinated conditional enrollees poses an identical risk to the School District's asserted interest in preventing the spread of COVID-19 as the in-person attendance of unvaccinated students seeking a religious exemption. . . . Therefore, the mandate is not generally applicable." *Doe*, 19 F.4th at 1186 (Ikuta, J., dissenting) (citing *Tandon*, 141 S. Ct. at 1296). *Doe* was eventually dismissed on mootness

and other grounds without a final decision on the merits of plaintiff's claims. After *Doe*, the 2-judge panel's "neutrality and general applicability" analysis has not been followed. *Bacon v. Woodward*, 104 F.4th 744, 751 (9th Cir. 2024). The decision to deny an injunction pending appeal in *Doe* does not control this Court's decision in the instant case. Here, the record requires a finding that the State has created a mechanism for individualized exemptions.

B. S.B. 277 Treats Comparable Secular Conduct More Favorably Than Religious Exercise in Violation of *Tandon*.

The State's comparability analysis fails to explain how Appellants' children pose more a risk to herd immunity than the hundreds of thousands of students that it exempts through S.B. 277. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98 (2021). S.B. 277 allows for students to be exempt from vaccination for myriad secular reasons, such as having an IEP, a medical exemption, being over eighteen years of age, or having a certain economic, familial, or military status (exemptions that could last from thirty days, to over a schoolyear, to permanently). S.B. 277 fails to extend to other people who come into the classroom, such as adult staff and adult volunteers. S.B. 277 fails to regulate the numerous other places where children, students, and people congregate in large numbers for

extended periods of time such as amusement parks, shopping malls, churches, close contact sporting events, movie theaters, public transportation, etc. When the State decidedly exempts and leaves unregulated hundreds of thousands to millions of people, activities, and locations that pose a similar risk, it has undermined its asserted interest to a similar degree as the prohibited religious exercise (granting Appellants a religious exemption), and strict scrutiny applies. *Tandon*, 593 U.S. at 62. California permits millions of unvaccinated children and adults to gather in far less regulated settings—theme parks, movie theaters, shopping malls, sporting events, extracurricular activities, public transportation—while banning religiously objecting children from school.

The State does not explain anything unique about the Appellants that makes them the lynch pin to gaining herd immunity. Indeed, the ACLU—now filing as amicus for the State—previously warned the California Legislature that herd immunity is a population-wide phenomenon, not school-specific, and that eliminating personal-belief exemptions would have negligible public-health impact because most

transmission occurs outside schools. ER-75; S.B. 277. The State does not address this damaging admission by its own amicus.

The State's stated compelling interest is to "protect the health and safety of students and the public at large from the spread of infectious diseases" and to achieve herd immunity. Ans. Br. at 23, 40, 41. The State, however, provides no data for how an exemption for Appellants would destroy herd immunity. Appellants' children represent only 0.000173519% of California's reported students attending private and public school in the State. Opening Br. at 13.

The State does not provide data for how such a small percentage of the population would deny it of herd immunity, nor does the State provide a number or any data to explain how allowing an exemption for individual students who sincerely held religious beliefs recognized under the First Amendment would affect herd immunity. The risk posed by the State's secular exemptions would be the same, or far less, than that posed by granting Appellants' religious exemptions. The State's own exemptions defeat its argument. While the State claims that only a small percentage of students with IEPs are unvaccinated, the truth is that more than 700,000 students could be under the IEP exemption alone. The State's

Brief tries to downplay this exemption, but in its minimization is an admission: “If a student’s existing IEP called for that student to receive certain classroom-based services, the school could not summarily bar them from receiving those services if it discovered that the student lacked one or more required immunizations.” Ans. Br. at 31.

The State is correct to follow federal law, pursuant to the Individuals with Disabilities Act, and refuse to summarily bar students with IEPs from receiving public education and the services they need. The State, however, has not established why it is barring Appellants’ children from all public and private education for asserting their federal right to the free exercise of religion. The State’s risk-distinction argument is indistinguishable from the Ninth Circuit’s reversed holding in *Tandon*. The Supreme Court rejected that approach. The same result must follow here.¹

¹ The State repeatedly cites to *Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025) as persuasive authority. The statute in *Miller*, however, New York Public Health Law § 2164 only provides a medical exemption and does not follow the same statutory scheme as S.B. 277, which exempts large swaths of students who pose the same or comparable risk.

C. Legislative Animus Toward Religion Provides an Independent Basis for Strict Scrutiny.

The State has banned Appellants from all public and private schools due to their sincerely held religious beliefs. Burdens on one's free exercise may be direct. See *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 877–78 (1990). “[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions,” however, also trigger heightened scrutiny under the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017). A law that intentionally forces a person to choose between observing his/her sincerely held faith and receiving a generally available government benefit for which he/she is otherwise qualified burdens her free exercise rights. *Fulton*, 141 S. Ct. at 1878; *Trinity Lutheran*, 137 S. Ct. at 2023. In short, a State cannot deny a person “an equal share of the rights, benefits, and privileges enjoyed by other citizens” because of his/her faith to discourage the practice of his/her religious belief. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Yet this is what the State did.

The State dismisses the hostile statements of its legislators as mere criticism. That is not accurate. The author of S.B. 277, Senator Pan,

openly stated that people who seek religious exemptions should be “opted out of American society” and compared them to drunk drivers who forfeit driving privileges. ER-45, ¶ 67. He did not say this about parents who obtain medical exemptions for family-history reasons, or about the hundreds of thousands who homeschool, or about IEP parents. He targeted religious exercise specifically. Another legislator called religious objectors “oxygen thieves.” ER-45, ¶ 68. The Senate Judiciary Committee analysis acknowledged the bill raised serious Free Exercise concerns but passed it anyway. This is precisely the kind of “hostility” and “derogatory” treatment the Supreme Court found in *Masterpiece Cakeshop*. 584 U.S. at 1729–38. The State’s suggestion that hostility must be overtly spelled out is inconsistent with the Supreme Court’s holding in *Lukumi. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 534 (1993). “Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt.” *Id.* Here, the legislative record shows the object of the law was to suppress religious (but not secular) objections to vaccination. *Id.* at 534–

42. The legislature specifically knew that removing a religious exemption from the law would require students, like Appellants' children, to be banned from all public and private school, and yet the legislature passed the law anyway. Less restrictive means abound. Forty-six States allow religious exemptions; none has suffered public-health collapse. Opening Br. at 10. Conditional enrollment, testing, masking, quarantine during outbreaks, improved enforcement and prevention of infectious disease, remedial measures such as handwashing and use of UV-C lights to kill viruses and bacteria, improved disinfection—all used during COVID—are all measures to explore prior to banning students from all public and private schools throughout the State due to their sincerely held religious beliefs.

II. THE STATE'S REMAINING ARGUMENTS ARE MERITLESS.

The State's and Amici's reliance on *Jacobson v. Massachusetts* is misplaced. 197 U.S. 11 (1905). *Jacobson* predates modern Free Exercise doctrine prior to the Free Exercise clause's incorporation against the States and was decided under a deferential standard the Supreme Court has repeatedly distinguished in the COVID era. See *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring).

Finally, the State and its *amici* warn of dire consequences if Appellants' religious exemptions are required. But 46 States already require such exemptions without apocalypse. The State has not established that Appellants would have any detrimental effect of their stated compelling interest of achieving herd immunity. The State's parade of horrors is unfounded and overblown. But the effect of the State's actions: banning children from all public and private schools in the State of California due to their religious beliefs is real.

CONCLUSION

Based on the arguments presented in the foregoing and in Appellants' Opening Brief, the district court erred by granting Appellee's motion. This Court should reverse and remand for further proceedings with instructions to apply strict scrutiny and enter judgment for Appellants on their as-applied Free Exercise claim, or at minimum remand for further proceedings under the correct legal standard.

Respectfully submitted,

ADVOCATES FOR FAITH AND FREEDOM

/s/ Erin Elizabeth Mersino

Erin Elizabeth Mersino

Robert Tyler

Julianne Fleischer

25026 Las Brisas Road
Murrieta, California 92562
Telephone: 951.600.2733
Email: emersino@faith-freedom.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of Cir. R. 32-1, because this brief contains 3,610 words, excluding the items exempted by Fed. R. App. P. 32(f). This document complies with the type-case requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared using Microsoft Word in 14-point Century Schoolbook font.

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino

CERTIFICATE OF SERVICE

I certify that on November 28, 2025, this document was electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Erin Elizabeth Mersino
Erin Elizabeth Mersino