No. 25-133

IN THE

Supreme Court of the United States

JOSEPH MILLER, *et al.*,

Petitioners,

v.

JAMES V. MCDONALD, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THOMAS MORE SOCIETY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES:

Page

INTEREST OF *AMICUS CURIAE*.[1]

Amicus Curiae, the Thomas More Society ("TMS"), is a not-for-profit, national public interest law firm based in Chicago, Illinois, dedicated to restoring respect in law for human life, family, and religious liberty. TMS has been actively involved in defending religious liberty in the context of vaccine mandates in recent years, including serving as plaintiffs' counsel in several of the cases discussed below. TMS thus has a distinct interest in this Court resolving a clear circuit split over whether allowing medical but not religious vaccine exemptions triggers strict scrutiny under the Free Exercise Clause. It also has an interest in this Court bringing clarity to the oft-confused general applicability test even beyond the context of vaccine mandates. Alternatively, it has a longstanding interest in this Court overruling *Employment Division v. Smith*, and in recognizing parents' fundamental Free Exercise rights to direct the religious upbringing of their children, as recently re-affirmed in *Mahmoud v. Taylor*.

1. No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than *Amicus Curiae*, their members, or their counsel contributed money intended to fund the brief. Counsel were notified of this filing pursuant to Supreme Court Rule 37.2 on August 20, 2025, more than 10 days before Respondents' original September 3, 2025 deadline for filing their brief in opposition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Second Circuit's decision below exacerbates a diametrical circuit split over whether vaccine mandates that allow medical but not religious exemptions trigger strict scrutiny under the Free Exercise Clause. The Second Circuit held that medical exemptions to New York's vaccine requirement for school children further New York's broad asserted interest in "protect[ing] the health of all New Yorkers," but "[e]xempting religious objectors . . . detracts from that interest." *Miller v. McDonald*, 130 F.4th 258, 267 (2d Cir. 2025) (first alteration in original).

Circuits are now split 4 to 3 on whether medical exemptions are comparable to religious exemptions in the context of Free Exercise challenges to vaccine mandates. *See infra*. This split is fully ripe and in need of this Court's intervention—especially given the American Academy of Pediatrics' ("AAP's") renewed recommendation for eliminating *non*-medical exemptions from school vaccine mandates.[2]

Additionally, the decision below violates this Court's longstanding recognition that government may not *devalue* religious interests when pursuing secular goals. And it exposes widespread confusion about how to conduct general applicability analysis that at minimum requires this Court's clarification.

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2. Hackell, Jesse M., et al., "Medical vs Nonmedical Immunization Exemptions for Child Care and School Attendance: Policy Statement," Vol. 156, Issue 2, American Academy of Pediatrics (August 2025), https://tinyurl.com/ynzuhpn4.

Even if New York's actions were neutral and generally applicable, this case confirms the need to overrule *Employment Division v. Smith*, which effectively eliminated the Free Exercise Clause's textual protection from the *special burdens* religious observers sometimes bear under rules that are generally applicable only in the most formal sense. Alternatively, this Court should at least reverse under *Mahmoud v. Taylor*, 606 U.S. ----, 145 S. Ct. 2332 (2025), as New York's burden on the Old Order Amish Plaintiffs here is of precisely "the same character" as the burden imposed on the Old Order Amish parents and children in *Yoder*.

ARGUMENT

I. Circuits are diametrically split over the comparability of medical and religious exemptions in the context of vaccine mandates.

Since this Court denied emergency relief in *Does 1-3 v. Mills* four years ago, *see* 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting petition challenging denial of religious but not medical vaccine exemptions was "the first to address the questions presented"), a diametrical circuit split has emerged over whether medical exemptions are comparable to religious exemptions in the context of vaccine mandates, and thus whether such policies are subject to strict scrutiny under the Free Exercise Clause. This split is fully ripe; the decision below improperly devalues religious interests; and this case is of national importance.

A. There is a widespread circuit split over the comparability of medical and religious exemptions to vaccine mandates.

While the question of medical and religious vaccine exemption comparability may have been nascent in 2021, it is not so today. Currently, the **First**, **Fifth**, **Sixth**, and **Tenth Circuits** have recognized the comparability of medical and religious exemptions from vaccine mandates, while the **Second**, **Third**, and **Ninth Circuits** have held to the contrary (but with internal conflicts in at least the Second and Ninth Circuits).

As to circuits recognizing comparability, the Tenth Circuit recently observed that "**a government [vaccine] policy that grants an exemption for *medical* reasons but denies the same exemption for *religious* reasons is not generally applicable**." *Does 1-11 v. Bd. of Regents of the Univ. of Colorado*, 100 F.4th 1251, 1277 (10th Cir. 2024) (emphasis added) (internal quotation marks omitted). The Court held the University's COVID-19 vaccine exemption policy was "not generally applicable, and [thus] subject to strict scrutiny," because it allowed "secular medical exemptions" on "more favorable terms than religious exemptions." *Id.* at 1277-78. Further, the University's policy failed strict scrutiny in part because it did not explain why the Plaintiffs "pose[d] more of a risk" of spreading COVID-19 than their "unvaccinated . . . coworkers[] or other classmates." *Id.* at 1278. The Tenth Circuit thus squarely held that if government allows medical exemptions from a vaccine mandate, it must allow religious exemptions on equal terms or otherwise undergo strict scrutiny. This is in direct conflict with the Second Circuit's decision below.

The First Circuit has reached a similar conclusion, deeming it plausible that "the inclusion of [ ] medical exemption[s]" in Maine's COVID-19 vaccine mandate for healthcare workers "undermines the State's interests in the same way that a religious exemption would by introducing unvaccinated individuals into healthcare facilities." *Lowe v. Mills*, 68 F.4th 706, 715 (1st Cir. 2023). While the Court opined that comparability *also* hinges on a comparison of the total number of medical and religious exemptions, *see id.* at 715-16, its holding still departs from the Second Circuit's decision in *Miller* that "maintaining [a] medical exemption" is *per se* non-comparable.[3]

The Fifth and Sixth Circuits have also recognized the comparability of medical and religious exemptions in the context of challenges to the Department of Defense's ("DOD's") COVID-19 vaccine mandate under the Religious Freedom Restoration Act ("RFRA"). Both circuits held that DOD's allowance of medical exemptions, but not

3. To be sure, the Second Circuit further opined that medical exemptions' allegedly shorter duration and more limited number "are meaningfully different" than religious exemptions. *Miller*, 130 F.4th at 268 (emphasis added). But this argument merely *supplemented* its prior conclusion that medical exemptions are *per se* non-comparable. *See id.* Regardless, the Second Circuit's refusal to allow discovery on aggregate risk data despite the extremely small number of Amish students attending the three isolated Plaintiff schools, *see, e.g.*, Petition at 15, still directly conflicts with the First Circuit's remand for discovery on aggregate risk comparability, *cf. Lowe*, 68 F.4th at 71. The Second Circuit's decision also directly conflicts with prior Second Circuit precedent itself. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286 (2d Cir. 2021) (holding at *preliminary injunction* stage that "factual development" may show that medical and religious exemptions are comparable in the aggregate).

religious exemptions, rendered its COVID-19 vaccine mandate "underinclusive" for purposes of RFRA's compelling interest test. *See U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022); *Doster v. Kendall*, 54 F.4th 398, 423 (6th Cir. 2022), *vacated on other grounds by Kendall v. Doster*, 144 S. Ct. 481 (2023). Underinclusiveness is also the touchstone of Free Exercise comparability analysis. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544-45 (1993); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). Accordingly, the Fifth and Sixth Circuit's holdings also directly conflict with the Second Circuit's decision below

But, as noted, at least three Circuits have reached the opposite conclusion. In addition to the Second Circuit's decision in *Miller*—following its similar decisions in *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) ("*Hochul*") and *We The Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023) ("*We The Patriots*")—both the Third and Ninth Circuits have also held that medical and religious exemptions are not comparable in the context of Free Exercise challenges to vaccine mandates. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 172-73 (3d Cir. 2024) ("Unlike a religious exemption, a medical exemption furthers the [government's] interest in keeping its employees safe and healthy by allowing employees for whom the COVID-19 vaccine would cause death or illness to abstain from vaccination."); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (9th Cir. 2021) (medical exemption to COVID-19 vaccine mandate "serves [the school's] primary interest . . . [in] protecting student 'health and safety'—

and so does not undermine the District's interests as a religious exemption would").[4]

Still, internal conflict exists in both the Second and Ninth Circuits. In *M.A. on behalf of H.R. v. Rockland County Department of Health*, the Second Circuit held that a county's allowance of medical exemptions from its measles vaccine mandate *might* trigger strict scrutiny under the Free Exercise Clause, depending on "what governmental interest the [mandate] was intended to serve." 53 F.4th 29, 39 (2d Cir. 2022) (reversing summary judgment and remanding for "fact-intensive" inquiry into the interests underlying the mandate). Judge Park opined separately that the mandate was *per se* "not generally applicable because, by allowing a medical exemption, it 'prohibit[ed] religious conduct while permitting secular conduct that undermine[d] the government's interests in a similar way.'" *Id.* at 41 (Park, J., concurring) (quoting *Fulton v. City of Phila.*, 593 U.S. 522, 534 (2021) (alterations in original)). His conclusion did not hinge on aggregate risk data or the level of generality of the government's interest—contrary to *Miller*.

Additionally, Judge Bianco dissented in *We The Patriots* and would have held that medical exemptions plainly "pose[] the same health risk to another student as an unvaccinated student with a religious objection." 76 F.4th at 165, 169 (Bianco, J., partially dissenting).

4. The Sixth Circuit has also previously opined in dicta that "compulsory vaccination laws with only medical exemptions do not violate any federal constitutional right." *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1906)). But that statement is in tension with the Sixth Circuit's more recent holding in *Doster*. *See* 54 F.4th at 423.

He also noted the majority's affirmance of the dismissal of Plaintiffs' claims conflicted with *Rockland County*'s holding on "the need for a fully developed record at trial on the comparable risks associated with religious and secular exemptions." *Id.*

In the Ninth Circuit, no fewer than 10 active Circuit judges, along with Judge O'Scannlain, would have held that allowing medical exemptions from a COVID-19 vaccine mandate triggered strict scrutiny under the Free Exercise Clause. *See Doe v. San Diego Unified School District*, 22 F.4th 1099, 1104-05 (9th Cir. 2022) (Bumatay, J., dissenting from denial of reh'g *en banc*, joined by Callahan, Ikuta, R. Nelson, Collins, Lee, and Van Dyke, J.J.); *id.* at 1114 (O'Scannlain, J., statement "agree[ing] with the views expressed by Judge Bumatay"); *id.* at 1114-15 (Bress, J., dissenting from denial of reh'g *en banc*, joined by Bade, J.); *id.* at 1115 (Forrest, J., dissenting from denial of reh'g *en banc*).

Accordingly, there is now a deep and widespread circuit split—along with internal strife in several circuits—over whether medical exemptions from vaccine mandates are comparable to religious exemptions and thus trigger strict scrutiny under the Free Exercise Clause. This Court should grant certiorari to resolve the split.

B. Allowing medical but not religious exemptions impermissibly devalues religious reasons for seeking exemption.

The purpose of general applicability analysis is to discern whether the government "has made a value judgment that" secular motivations for exemption "are important enough to overcome its general interest

[underlying the particular mandate at issue] but that religious motivations are not." *Fraternal Order*, 170 F.3d at 366. Allowing medical exemptions, but not religious exemptions, from vaccine mandates plainly violates this principle.

The Tenth Circuit recognized as much in *Does 1-11*: "The [challenged] Policy on its face makes a value judgment in favor of secular motivations because it has a lower bar for denying religious exemptions" as compared to "secular medical exemption[s]." 100 F.4th at 1277. Indeed, if medical exemptions are important enough for seeking exemption but religious exemptions are not (or are subject to less favored treatment), the government has "*of necessity* devalue[d] religious reasons for [avoiding vaccination] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537-38 (emphasis added).

Circuits holding that medical and religious vaccine exemptions are not comparable assume that so long as government is pursuing sufficiently broad interests in *physical* "health," it can leave religious interests for avoiding vaccination behind. *See, e.g.*, *We The Patriots*, 76 F.4th at 151 (medical exemption consistent with vaccine mandate's furtherance of "health and safety of Connecticut students"); *Miller*, 130 F.4th at 267 (same); *San Diego*, 19 F.4th at 1178 (same). This assumption is particularly stark in decisions stating that medical exemption comparability depends on the particular interest *asserted* by the government in promulgating its respective mandate. *See Rockland Cnty.*, 53 F.4th at 39; *Spivack*, 109 F.4th at 175.

But this Court has made clear that "[t]he Free Exercise Clause protect[s] religious observers against unequal treatment." *Lukumi*, 508 U.S. at 542 (internal

quotes omitted). Thus, it cannot be true that government can pursue *any* interest at the expense of religious exercise, or that comparability hinges on a government's mere "say so." Justice Kavanaugh explained as much in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), where Nevada sought to re-open casinos and restaurants on a more favorable basis than churches "to jump-start business activity and preserve the economic well-being of its citizens" during COVID-19. *Id.* at 2614 (Kavanaugh, J., dissenting). Nevada's approach "reflect[ed] an implicit judgment that for-profit assemblies are important and religious gatherings are less so," thus "'devaluing religious reasons' for congregating 'by judging them to be of lesser import than nonreligious reasons,' in violation of the Constitution." *Id.* (quoting *Lukumi*, 508 U.S. at 537-38). Applied here, the practice of allowing medical but not religious exemptions reflects an implicit judgment that *religious* well-being is "of lesser import" than *physical* well-being—even as it remains *objectively undeniable* that a medical exemption allows one to remain unvaccinated against the precise disease the otherwise-required vaccine is designed to prevent (or ameliorate). That is hardly "equal treatment" for religious observers. *Accord We The Patriots*, 76 F.4th at 172 (Bianco, J., partially dissenting) (stating same).

Justice Thomas opined similarly in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), noting that when government argues it may not "endorse" religion, it "communicates a message that religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion," *id.* at 494 (Thomas, J., concurring) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) (content-based restrictions "tilt public debate in a preferred direction")). The same

applies here: allowing medical exemptions in service of *physical* health while precluding religious exemptions has the effect of exalting physical over religious well-being and thereby "communicates a message that religion is dangerous and in need of policing." *Id.* at 494 (Thomas, J., concurring).

This is all the more true where, as here, the sole object of the legislation is to *eliminate* a previously existing religious exemption while leaving the availability of medical exemptions in place. *See Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (recognizing that elimination of previously existing religious exemption from COVID-19 vaccine mandate "leave[s] little doubt that the revised mandate was specifically directed at the applicants' unorthodox religious beliefs and practices"); *see also Lukumi*, 508 U.S. at 531 ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

Accordingly, New York's direct elimination of religious exemptions while maintaining medical exemptions indicates an impermissible value judgment favoring physical over religious well-being—contrary to the Free Exercise Clause's minimum promise of equal treatment treatment for religious observers.

C. This question is urgent and of national importance.

In August 2025, the AAP renewed its position calling for the elimination of "nonmedical" exemptions from school vaccine mandates. *See* Hackell, et al., *supra* n.2 at pp. 73-77. The AAP specifies that "nonmedical exceptions

based on religious belief can substantially limit the public health value of vaccine requirements for school attendance" and thus allegedly render schools "less safe." *Id.* at p. 75. The AAP also alleges that *no* "major world religious traditions" officially "preclude adherents from being vaccinated"—confirming the anti-"unorthodox" bias behind its recommendation. Notably, the AAP originally adopted this position in 2016. *See* Hackell, "AAP: Nonmedical exemptions to school immunization requirements should be eliminated," AAP (July 28, 2025).[5] Since then, Maine, New York, and Connecticut have eliminated religious exemptions from their school vaccine requirements, *see* Petition at 9, following California's elimination of the same in 2015, *see id.*

Such a marked trend, buoyed by the AAP's express support, confirms the urgency and national importance of clarifying whether government vaccine policies allowing medical but not religious exemptions (or at least those *eliminating* previously existing religious exemptions consistent with the AAP's advocacy) trigger strict scrutiny under the Free Exercise Clause. *See also, e.g.*, Erika Edwards, "Vaccinations rise when states button up religious loopholes," NBC News (July 5, 2025) (discussing pending Massachusetts bill to remove "nonmedical exemptions" from mandatory vaccination in public schools).[6] Guidance from this Court on the constitutionality of such policies is urgently needed.

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5. https://publications.aap.org/aapnews/news/32619/AAP-Nonmedical-exemptions-to-school-immunization.

6. https://www.nbcnews.com/health/health-news/vaccinations-rise-states-religious-loopholes-exemptions-rcna212334.

II. This Court should clarify the comparability test under *Smith* to the extent possible, or otherwise reverse *Smith* to restore *substantive* equality for religious observers.

The decision below exacerbates great confusion in the lower courts about how to conduct comparability analysis under *Smith*. This Court's intervention is sorely needed at least to clarify the extent to which governments can assert broad interests at sky-high levels of generality and thus effectively load the dice of comparability analysis before it gets off the ground. It should also clarify whether general applicability turns on a comparison of aggregate numbers of total or actual expected exemptions (even for non-parties), especially after this Court's recent recognition in *Trump v. CASA, Inc.*, 606 U.S. ---- , 145 S. Ct. 2540 (2025) that federal courts generally cannot issue universal injunctions.

Moreover, *Miller* confirms the need to overrule *Smith*, which eliminated the Free Exercise Clause's promise of *substantive* equality for religious believers to allow reprieve from *special burdens* they can suffer from rules that are "generally applicable" only in the most formalistic sense.

A. Level of generality of government's interests.

Because this Court has stated that general applicability turns on "the government's *asserted* interests" underlying the relevant mandate, *Fulton*, 593 U.S. at 534 (emphasis added), several lower courts have looked to *extra-textual legislative indicia* in deciding whether an available secular exemption undermines a challenged law's purpose.

See, e.g., *Spivack*, 109 F.4th at 175 (*Tandon* "indicates we must give some deference to how the government characterizes its own interests"). But that approach easily allows lawmakers to effect religious gerrymanders by strategically-placed statements in the record. *Accord We the Patriots*, 76 F.4th at 171 (Bianco, J., partially dissenting). This Court should cut off that trend.

As Judge Park has recognized, *Smith*'s general-applicability test "embraces a purposivist approach that is vulnerable to manipulation and arbitrariness." *Rockland Cnty.*, 53 F.4th at 42 (Parker, J., concurring). Justices Gorsuch, Thomas, and Alito have thus warned courts not to "restat[e] the State's interests . . . at an artificially high level of generality" based on "*post-hoc* reimaginings" that are broader than "the government's *actually asserted* interests." *Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting, joined by Thomas, J., and Alito, J.) (original emphasis).

But some courts have responded by relying on "actually asserted" broad interests lurking in the record. *See We The Patriots*, 76 F.4th at 151-52 (noting legislative history asserting purpose to "protect the public health" and concluding "there is [thus] no cause to fear that Connecticut or the district court has 'restat[ed] the State's interest . . . at an artificially high level of generality'") (alterations in original) (quoting *Does* 1-3, 142 S. Ct. at 20 (Gorsuch, J., dissenting)); *accord Spivack*, 109 F.4th at 175 (similar); *Miller*, 130 F.4th at 267 (looking to "Sponsor's Memorandum" and "Bill Jacket").

Missing from these courts' analyses, however, is the Free Exercise Clause's longstanding protection against

"religious gerrymander[s]." *Lukumi*, 508 U.S. at 535 (internal quotations omitted). For this reason, the general-applicability test's vulnerability to manipulation requires more than bare judicial reliance on a government's (or policymaker's) mere say-so in the record. Otherwise, governments could enact *de facto* gerrymanders "by adjusting the dials" of a challenged law's asserted purpose "*just right*." *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 652 (2018) (Gorsuch, J., concurring) (original emphasis).

Instead, courts should look to whether a secular exemption undermines at least *one* of a challenged law's *objective* purposes. If so, strict scrutiny applies. Judge Bianco recognized as much in his *We The Patriots* dissent, noting that while a medical exemption "may support the State's interest in one way (namely, avoiding any harm to that student from the vaccination)," it "may also undermine the state's interest in another way that is similar to the impact of a religious exemption (namely, avoiding the spread of disease in public schools)." *We The Patriots*, 76 F.4th at 168 (Bianco, J., partially dissenting). This approach is consistent with then-Judge Alito's analysis of the no-beard requirement in *Fraternal Order*. Surely the medical exemption for officers with "pseudo folliculitis barbae" promoted a healthy police force. *See* 170 F.3d at 360. And "almost any state action might be said to touch on '. . . health and safety.'" *Does 1-3*, 142 S. Ct. at 20 (Gorsuch, J., dissenting) (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014)). But the medical exemption "*undoubtedly* undermine[d]" the no-beard rule's *objective* purpose "in fostering a uniform appearance." *Fraternal Order*, 170 F.3d at 366 (emphasis added); *see* Laycock, *Generally Applicable Law and the Free Exercise of*

Religion, 95 Neb. L Rev. 1, 8 (2016) (noting a law's "object" includes "simply what the law does, or what it is intended to do, regardless of why legislators wanted to do those things").

Accordingly, this Court should clarify that if a secular exemption undermines at least one of the law's objective purposes (even if statements lurking in the record also assert much broader interests) to the same or greater extent as a requested religious exemption, general applicability is lacking and strict scrutiny applies.

B. One-to-one or aggregate comparison.

In *Trump v. CASA, Inc.*, this Court held that universal injunctions violate the "long" "equitable tradition" that "courts generally may administer complete relief *between the parties*." 145 S. Ct. at 2557 (original emphasis). Yet in *Hochul*, the Second Circuit denied relief for 17 discrete, individual plaintiffs spread throughout New York based on "data" allegedly "indicat[ing] that claims for religious exemptions" in the "aggregate"—*even by non-parties*—"are far more numerous" than requests for medical exemptions. 17 F.4th at 287. Multiple courts have since followed that approach. *See We the Patriots*, 76 F.4th at 152; *Lowe*, 68 F.4th at 716; *Spivack*, 109 F.4th at 179 n.16; *Miller*, 130 F.4th at 268.

But as Justice Gorsuch has explained, "this Court's general applicability test doesn't turn on that kind of numbers game." *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting). Justice Gorsuch's rationale rings all the more true after *CASA*: "Laws operate on individuals; rights belong to individuals. And the relevant question here involves a one-to-one comparison between the *individual*

seeking a religious exemption and one benefiting from a secular exemption." *Id.* (emphasis added).

In contrast, *Hochul* insisted this Court's decisions in "*Roman Catholic Diocese* [*of Brooklyn v. Cuomo*, 592 U.S. 14 (2020)] and *Tandon* did not involve a one-to-one comparison of the transmission risk posed by an individual worshiper and[ ] an individual shopper," but instead of "the risks posed by groups of various sizes in various settings." 17 F.4th at 287. But the plaintiffs in those cases were seeking to *gather in groups*—and thus comparison to other *group settings* was required. In neither case did this Court look to the aggregate risks posed by even *non-plaintiff* religious gatherings in comparison to permitted secular gatherings. *See Tandon*, 593 U.S. at 62 (focusing on "the religious exercise at issue"); *Roman Catholic Dioc.*, 592 U.S. at 17-18 (highlighting particular plaintiffs' "admirable safety records").

As Justice Gorsuch has explained, courts might consider aggregate exemption numbers at the strict scrutiny stage if a state asserts a compelling interest in limiting the overall number of exemptions (say, to achieve herd immunity). *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting). Even then, however, the state's aggregate exemption limit would need to be "divided in a nondiscriminatory manner between medical and religious objectors." *Id.* at 556-57. "But none of this bears on the preliminary question whether such a mandate is generally applicable or whether it treats a religious person less favorably than a secular counterpart." *Id.* at 557.

This Court should grant certiorari and clarify this issue.

C. *Smith* fails to ensure *substantive* equality for religious observers and should be overruled.

Alternatively, this Court should simply reverse *Smith*. In addition to the workability problems of its general applicability test discussed above, *Smith* "relegate[d] a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already prohibits." *Emp't Div. v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring); *see also Rockland Cnty.*, 53 F.4th at 42 (Park, J., concurring) (criticizing *Smith*'s "inflexible," "all-or-nothing" general applicability test). But this Court has long "recognized that the Free Exercise protects values distinct from those protected by the Equal Protection Clause," including because "the language of the Clause itself makes clear" that "an individual's free exercise of religion is a *preferred* constitutional activity." *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring) (emphasis added).

In other words, *Smith* wrongly transformed the Free Exercise Clause into a rule of formal equality, ensuring only that secular and religious actors are subject to the same burdens *from the government's perspective*. But as a rule of religious *liberty*, the Free Exercise Clause is inherently ordered toward "reliev[ing] [religious] individuals of a *special burden* that others do not suffer." *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 454 (7th Cir. 1981) (emphasis added) (interpreting Title VII's analogous religious accommodation requirement); *see also* 118 Cong. Rec. 705 (1972) (statement of Sen. Randolph explaining that Section 701(j), codified at §2000e(j), reflects "the same concepts as are included in the first amendment").

As Justices Alito, Thomas, and Gorsuch have noted, "the absence of any language referring to equal treatment" in the Free Exercise Clause "is striking." *Fulton*, 593 U.S. at 569 (Alito, J., concurring, joined by Thomas, J., Gorsuch, J.). Indeed, "[t]he Founders understood that the right to free exercise would require more than simple neutrality toward religion," but rather "that the government *accommodate* the religious practice, rather than the reverse." *Horvath v. City of Leander*, 946 F.3d 787, 796 (5th Cir. 2020) (Ho, J., partially concurring). Congress adopted this precise concept into Title VII, *see E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) ("Title VII requires otherwise-neutral policies to give way for the need for an accommodation"), further evincing that the Free Exercise Clause protects more than merely formal equality.[7] *See also* Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. Pa. J. Cons. L. 850, 880 (2001) ("*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule . . . to an equality rule.").

In reality, restoring the Free Exercise Clause's liberty rule would paradoxically restore *substantive* equality for religious believers. During the Prohibition, for example, the government exempted "the sacramental use of wine by the Roman Catholic Church." *Smith*, 494 U.S. at 913 n.6 (Blackman, J., dissenting). Absent an exemption, the general ban on wine would have undoubtedly burdened Catholics' religious beliefs more than those of non-

7. That Justice Scalia (who authored *Abercrombie*) so clearly perceived the insufficiency of neutral rules in the Title VII context confirms the error of his contrary conclusion in the Free Exercise context in *Smith*.

Catholics. The same was true in *Wisconsin v. Yoder*, 406 U.S. 207 (1972), where the state's compulsory education law plainly burdened members of the Amish religion *more* than others. *Yoder*'s enforcement of the Free Exercise Clause's liberty rule restored the Amish to equal footing with other members of society whose philosophical or religious beliefs were not burdened by the challenged law.

The same is true here. Treating the Free Exercise Clause as a liberty rule would remove the special burdens imposed by New York's vaccination requirement on the Amish plaintiffs' unique religious beliefs—or at least require New York to show it has a sufficiently tailored compelling interest to override those beliefs—regardless of whether the law is "neutral and generally applicable" in a formal sense. The *free exercise* of religion requires nothing less. This Court should overturn *Smith*.

III. Plaintiffs are suffering a burden of the "same character" as in *Yoder*.

If this Court does not find a lack of general applicability or overturn *Smith*, it should reverse under *Mahmoud*. In the case below, plaintiffs asserted that *Wisconsin v. Yoder*, 406 U.S. 205 (1972) controlled because *Yoder*, like this case, involved the education decisions of Amish parents, the Amish community's unique status in American society, and a state policy forcing Amish families to forego religious practices. *Mahmoud* confirms that Plaintiffs were correct.

Rather than follow Supreme Court precedent, the Second Circuit constrained *Yoder* to its unique facts.

Citing its own precedent, the Second Circuit concluded that the Supreme Court "took pains explicitly to limit [*Yoder*'s] holding." *Miller*, 130 F.4th at 270 (citing *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003)). As the Second Circuit saw it, *Yoder* was *sui generis*, and only meant that a state cannot force Amish children to attend high school. *Yoder*, therefore, would only apply when the Amish face an "existential threat" to their faith or way of life. *Id.* at 271. And to reassure itself, the Second Circuit relied on the Fourth Circuit's now overruled holding in *Mahmoud v. McKnight*, 102 F.4th 191, 211 (4th Cir. 2024), *rev'd and remanded sub nom. Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025). *Miller,* 130 F.4th at 270 n. 16.

This Court's decision in *Mahmoud* shows that the Fourth Circuit's application of *Yoder* was deeply flawed. Rather than being limited to its circumstances, "*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority." *Mahmoud*, 145 S. Ct. at 2357.

"When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny." *Id.* at 2361. A policy need only "substantially interfere with the religious development of the parent's children" or "pose a very real threat of undermining the religious beliefs and practices that parents wish to instill in their children." *Id.* (cleaned up). This Court's *Mahmoud* decision shows that the "same character" standard applies to a broad range of coercive measures taken by school officials.

In *Yoder*, the Court analyzed a compulsory attendance law requiring all Wisconsin children to attend school until the age of 16. *Yoder*, 406 U.S. at 207. The parent plaintiffs objected to sending their 14- and 15-year-old children to any school at all, because doing so removed their children from their community during a formative adolescent period. *Id.* at 211. This Court noted that Wisconsin's law would "ultimately result in the destruction of the Old Order Amish church community." *Id.* at 212. Given that the Wisconsin community included only about 250 children, this threat was real. *Id.* at 245 (Douglas, J., dissenting in part). As Justice Sotomayor recently explained, "[t]he problem in Yoder was . . . that it compelled Amish parents to do what their religion forbade." *Mahmoud* 145 S. Ct. at 2389 (Sotomayor, J., dissenting).

In *Mahmoud*, however, there was no such existential threat to plaintiffs' religions. The plaintiffs, who were Muslim, Catholic, and Orthodox (*id.* at 2347-2348), never asserted that Montgomery County would extinguish their billion- and million-member religions. Nor did the *Mahmoud* parents assert that their religions explicitly "forbade" their children to read pro-LGBT books. Nonetheless, the Court concluded that "the burden [was] of the *exact same character* as the burden in *Yoder*." *Id.* (emphasis added).

This case, too, presents a burden of the "exact same character as the burden in *Yoder*" because New York's policy interferes with and poses a very real threat of undermining the religious upbringing of plaintiffs' children. Indeed, it is an even closer parallel to *Yoder* than *Mahmoud* was, because Plaintiffs' religious beliefs "do not permit them to inject their children with vaccines."

Miller, 130 F.4th at 262 (cleaned up). New York is forcing parents to "do what their religion forb[ids]." *Mahmoud,* 145 S. Ct. at 2389 (Sotomayor, J., dissenting) (citing *Yoder*). If *Mahmoud* was the "exact same character" as *Yoder*, this case is *Yoder*'s identical twin.

The foundation of the Second Circuit's decision—that *Yoder* is a *sui generis* case limited to its facts—is simply false. This Court has confirmed that *Yoder* reaches much further than the Second Circuit's limitations. At minimum, therefore, this Court should correct the Second Circuit's misinterpretation of *Yoder*.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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