

IN THE
Supreme Court of the United States

KRYSTLE PERRY, INDIVIDUALLY AND ON BEHALF
OF THEIR MINOR CHILD K.P., *et vir*,

Petitioners,

v.

STACY MARTENEY, AS THE VIRTUAL LEARNING
COORDINATOR OF THE UPSHUR COUNTY
VIRTUAL SCHOOL, *et al.*,

Respondents.

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

**BRIEF FOR *AMICI CURIAE* GOVERNOR OF
WEST VIRGINIA AND THE SECRETARY OF
THE WEST VIRGINIA DEPARTMENT OF
HEALTH IN SUPPORT OF PETITIONERS**

J. ZAK RITCHIE

Counsel of Record

HISSAM FORMAN DONOVAN RITCHIE PLLC

700 Virginia Street East, Suite 210

Charleston, WV 25301

(681) 265-3802

zritchie@hfdrlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I. The Fourth Circuit’s Decision Conflicts with This Court’s Precedent and Creates Uncertainty for State Officials	5
A. The Fourth Circuit’s Rule Makes Free Exercise Protection Turn on an Earlier Secular Choice	6
B. The Governor’s Duty to Faithfully Execute the Law Includes Protecting Free Exercise	7
C. Public-Health Rules Should Turn on Objective Risks, Not Personal Motives	9
II. The Virtual-School Setting Shows Why the Constitutional Comparison Should Turn on Actual Public-Health Risk	9

Table of Contents

	<i>Page</i>
A. Virtual Learning Presents Different Public-Health Risks	10
B. Different Educational Models Should Not Be Treated Differently Based on Labels Alone	11
C. Public-Health Rules Should Reflect the Actual Risks of the Educational Setting	12
III. This Case Presents an Important Question About the Reach of <i>Mahmoud</i> Beyond Curricular Requirements	12
A. This Court Has Long Protected Parents' Right to Direct Their Children's Upbringing and Education.....	13
B. <i>Mahmoud</i> Is Not Categorically Limited to Curricular Requirements.....	14
IV. This Case Provides a Narrow Vehicle to Review a Broader and Recurring Constitutional Rule	15
CONCLUSION	17

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022).....	8
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025)	1, 4, 8, 12, 13, 14, 15
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	13
<i>Mirabelli v. Bonta</i> , 607 U.S. 492 (2026).....	4, 13, 14
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925).....	13
<i>Roman Catholic Diocese of Brooklyn v. Cuomo</i> , 592 U.S. 14 (2020).....	6
<i>Tandon v. Newsom</i> , 593 U.S. 61 (2021).....	5, 6, 7, 9, 11, 16
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 582 U.S. 449 (2017).....	15
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	13

Cited Authorities

	<i>Page</i>
STATUTES AND OTHER AUTHORITIES:	
U.S. Const. amend. I	1, 4
U.S. Const. amend. XIV	13
W. Va. Const. art. IV, § 5	1, 7
W. Va. Const. art. VII, § 5	1, 7
W. Va. Code § 16-1-1	2
W. Va. Code § 16-1-3	2
W. Va. Code § 16-1-4	2

INTEREST OF AMICI CURIAE

Amici Curiae are high-ranking state executive officials whose responsibilities include enforcing state law and protecting public health.¹

The Governor of the State of West Virginia, Patrick Morrisey, serves as the chief executive officer of the State. Under Article VII, Section 5 of the West Virginia Constitution, he has the solemn duty to “take care that the laws be faithfully executed,” and under Article IV, Section 5 he has sworn to support the United States and West Virginia Constitutions. W. Va. Const. art. VII, § 5; *id.* art. IV, § 5. Those duties include ensuring that state law is administered consistently with the First Amendment’s protection of religious exercise. For the Governor, protecting the free exercise of religion is part of faithfully executing the law—it is no mere collateral concern. This Court recently reaffirmed that parents’ direction of their children’s religious upbringing receives substantial constitutional protection, including when those children participate in public education. *Mahmoud v. Taylor*, 606 U.S. 522, 546–47 (2025). The Governor thus has a critical institutional interest in ensuring that religious exercise receives the full protection the Constitution requires. That interest is especially important where, as here, the

1. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of Amici’s intent to file this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief, in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

State is called upon to administer public-health laws in a manner consistent with protections for religious freedom.

The Secretary of the West Virginia Department of Health, Dr. Arvin Singh, oversees the State's public-health structure, disease-prevention frameworks, and public health regulations. See W. Va. Code §§ 16-1-1, -3, -4. The Secretary has a direct interest in ensuring that constitutional rules governing public-health measures are clear enough to administer and reflect the risks being regulated. Public-health administration routinely requires officials to distinguish among settings and activities based on the risks they actually present. The constitutional rule governing those distinctions is therefore a significant practical concern for the Secretary.

Together, Amici have a strong interest in ensuring that state government works effectively while respecting fundamental constitutional guarantees. Accordingly, Amici submit this brief to explain how the Fourth Circuit's rule makes it harder for state officials to protect public health while fully respecting religious liberty.

Amici write not to repeat Petitioners' legal arguments, but to offer the perspective of state officials responsible for both protecting public health and respecting constitutional liberty. They do not regard the Free Exercise Clause as an obstacle to effective government—it is one of the vital constitutional guarantees that public officials must honor and protect. Protecting religious exercise is therefore not an exception to responsible government—it is one of the obligations responsible government must fulfill.

Nor do Amici believe that vigorous protection of religious exercise is incompatible with effective public-

health policy. State officials can protect religious exercise without weakening public-health authority if they ask whether religious and secular conduct pose comparable risks to the interest the State is trying to protect. Responsible governance requires objective, risk-based legal standards rather than rigid administrative labels. The Fourth Circuit's rule instead makes constitutional treatment turn on why a person chose a program in the past, rather than on how the regulated conduct affects the State's interest. Amici respectfully urge the Court to grant review and provide a clear, workable constitutional rule for state officials.

SUMMARY OF ARGUMENT

The decision below creates an unnecessary conflict not only with this Court's precedent, but also between effective state government and protection of religious exercise. The Fourth Circuit held that strict scrutiny does not apply even when a regulation favors comparable secular conduct, unless the claimant's underlying choice of program or school was itself religiously motivated. That rule creates administrative uncertainty, distorts the general-applicability inquiry in the virtual-school context, and raises an important question about the reach of this Court's parental-rights precedents beyond curricular requirements.

First, the Fourth Circuit's antecedent-motivation rule creates administrative uncertainty for state officials. Under the decision below, the constitutional analysis can turn on why someone originally chose a public program or job rather than on the State's asserted interest and the risk involved. Two people subject to the same rule, asserting the same religious objection, and presenting the

same risk could therefore receive different constitutional treatment based solely on why they entered the program in the first place. The Governor's duty to faithfully execute the law includes an affirmative obligation to ensure that state programs respect the First Amendment's protection of religious exercise. That duty is better served by clear constitutional rules than by a standard that makes religious protection depend on a person's past motives.

Second, K.P.'s at-home virtual-school setting shows why comparability should turn on the State's asserted interest and the actual exposure risk. Petitioners' minor child, K.P., received her public education remotely from home and was not physically present in a classroom with other students. Pet. App. 7a, 126a–128a, 142a. That does not mean an at-home student presents no communicable-disease risk. Rather, it means that participation in the regulated educational program presents a different exposure setting. Those differences matter because the constitutional comparison should remain tied to the health-and-safety interest the State invokes.

Third, the decision below presents an important recurring question about the non-curricular reach of this Court's parental-rights precedents. In *Mahmoud v. Taylor*, this Court applied strict scrutiny based on the character of the burden without resolving the parents' separate neutrality and general-applicability arguments. *Mirabelli v. Bonta* later held that parents challenging a non-curricular school policy had shown a likelihood of success because strict scrutiny likely applied. This case squarely presents whether those principles extend beyond curricular requirements in a concrete setting where the alleged religious burden is neither curricular nor

ideological but instead arises from a religious objection to a vaccination requirement imposed as a condition of public education.

Finally, this case provides a narrow vehicle to review a broader constitutional rule. The Fourth Circuit’s antecedent-motivation approach is not limited to vaccination or virtual schooling; by its logic, it may apply whenever a religious objection arises after a person has entered a public program. Yet because this case involves a student receiving her regular instruction remotely from home, the Court can address that legal rule without deciding broader questions concerning the State’s authority to enforce health requirements for students physically present in school classrooms. The petition should be granted.

ARGUMENT

I. The Fourth Circuit’s Decision Conflicts with This Court’s Precedent and Creates Uncertainty for State Officials.

The Fourth Circuit panel concluded that West Virginia’s vaccine mandate treats certain secular categories of students—such as homeschooled children and those in learning pods or microschools—more favorably than virtual public-school students by exempting them from immunization requirements. Pet. App. 16a. Yet the panel reasoned that strict scrutiny under *Tandon v. Newsom*, 593 U.S. 61 (2021), did not apply because Petitioners did not allege that K.P.’s initial choice to enroll in virtual public school was itself religiously motivated. In the panel majority’s view, the statute therefore treated

“some secular activity more favorably than other secular activity.” Pet. App. 16a (majority concluding that since “the Perrys do not allege that K.P.’s desire to attend the Virtual Academy is religiously motivated. . . [it] is merely an instance of West Virginia treating some secular activity more favorably than other secular activity”). In addition to conflicting with this Court’s precedent, the panel’s holding creates substantial administrative uncertainty for state executive officials.

A. The Fourth Circuit’s Rule Makes Free Exercise Protection Turn on an Earlier Secular Choice.

From the chief executive’s perspective, state government benefits from constitutional standards that do not turn on the personal reason a citizen originally selected a public program or service. The comparability inquiry under *Tandon* is objective: whether a regulation prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interest in a similar way. That comparison ordinarily asks how the regulated conduct affects the government’s asserted interest, not why the person earlier chose the program in which the regulation applies. The relevant religious conduct here is declining vaccination on religious grounds; the relevant governmental interest is disease prevention. Indeed, *Tandon* instructs that “[c]omparability is concerned with the risks various activities pose, not the reasons why people gather.” 593 U.S. at 62 (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 21 (2020) (Gorsuch, J., concurring)). That instruction is difficult to reconcile with a rule that makes comparability turn on why a family chose a public program before the religious objection arose.

In its opinion, the Fourth Circuit panel reasoned that the *Tandon* analysis would have been different if Petitioners had alleged a religious reason for choosing the virtual school. Pet. App. 16a. That approach makes the governing standard difficult to administer consistently. Consider two families subject to the same vaccination requirement in the same virtual program who assert the same religious objection to vaccination. Under the panel majority’s reasoning, the constitutional analysis could differ solely because one family selected the program for secular reasons while the other did so for religious reasons—even though the later religious objection, the regulatory requirement, and the government’s asserted interest are identical.

The problem is not limited to vaccination or virtual schooling. By its logic, the Fourth Circuit’s rule makes a person’s reason for entering any public program potentially controlling even when a religious objection to a later requirement arises. In short, the Fourth Circuit’s rule makes the constitutional standard less predictable because it focuses on why someone chose a program, rather than on the State’s interest and how the conduct affects that interest.

B. The Governor’s Duty to Faithfully Execute the Law Includes Protecting Free Exercise.

The Governor is charged under Article VII, Section 5 of the West Virginia Constitution with the non-discretionary duty to “take care that the laws be faithfully executed,” and under Article IV, Section 5 with an oath to support the United States and West Virginia Constitutions. Those duties require more than efficient administration

of regulatory programs. They require the State to administer its laws consistently with the constitutional freedoms those laws must respect.

Free Exercise is one of the highest among those freedoms. As this Court recently emphasized, “[t]he practice of educating one’s children in one’s religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution.” *Mahmoud v. Taylor*, 606 U.S. 522, 547 (2025). Drawing on an “enduring American tradition,” the Court reiterated that parents have long held the right to direct “the religious upbringing” of their children. *Ibid.* (cleaned up). And that protection does not stop when parents choose public education: “The right of parents ‘to direct the religious upbringing of their’ children would be an empty promise if it did not follow those children into the public school classroom.” *Ibid.* (cleaned up). After all, Free Exercise protects “not only the right to harbor religious beliefs inwardly and secretly.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). It also safeguards “the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through the performance of (or abstention from) physical acts.” *Ibid.* (cleaned up).

For the Governor, then, Free Exercise is not an external obstacle to effective state government—it is part of the constitutional law he is duty-bound to enforce. That responsibility is better served by a clear rule focused on the State’s asserted interest and on how religious and secular conduct affect that interest, rather than one that makes constitutional protection depend on why a person entered a public program in the past.

C. Public-Health Rules Should Turn on Objective Risks, Not Personal Motives.

Public-health officials typically administer health rules using objective criteria such as population, exposure, and setting. A person's reason for choosing a school or job does not itself change the transmission risk that public-health officials must manage. Those practical considerations, rather than the personal reason why a citizen chose a school or job, bear directly on the public-health interest.

When evaluating general applicability, public-health administrators benefit from a legal standard that compares how religious and secular conduct affect the government's asserted interest. Making a person's historical motive part of the constitutional test makes that rule harder to apply consistently.

II. The Virtual-School Setting Shows Why the Constitutional Comparison Should Turn on Actual Public-Health Risk.

Public-health rules work best when the distinctions they draw match the risks they are meant to address. *Tandon v. Newsom*, 593 U.S. 61 (2021) likewise asks whether religious and secular activities pose comparable risks to the State's asserted interest. In this case, K.P.'s at-home mode of public education presents materially different exposure considerations from physical classroom attendance. That makes this case a particularly useful setting in which to apply *Tandon*'s risk-based comparison.

A. Virtual Learning Presents Different Public-Health Risks.

Public-health officials routinely draw distinctions based on the risks presented in the particular setting being regulated. The same activity can present very different risks depending on whether it occurs in a crowded physical space or remotely from home.

The Fourth Circuit described the State's interest broadly as reducing the spread and severity of infectious disease. Pet. App. 9a–10a. Amici do not contest the importance of that interest. The question is whether the distinctions drawn by the vaccination regime correspond to differences in the risks relevant to that interest. To be sure, K.P.'s at-home mode of public education presents materially different exposure considerations from physical classroom attendance. Those differences should inform the comparison because the relevant question is how the regulated conduct affects the State's interest, not what label the educational program carries. Of course, K.P., like anyone else, may encounter others in ordinary life. Even accepting the State's broadly stated interest in reducing the spread and severity of infectious disease, K.P.'s mode of participation in the regulated program is directly relevant to the comparative-risk inquiry.

Here, the record establishes that K.P. received her instruction online at home, was not physically present in a classroom with other students, and was not required to interact in person with her virtual classmates. Pet. App. 7a, 126a–128a, 142a. Those facts materially change the exposure associated with K.P.'s participation in the

regulated educational program. For K.P., a requirement designed for students who attend school in person applies in a materially different setting. As Judge Niemeyer wrote in dissent, the injunction entered by the district court “hardly affects West Virginia’s compelling interest in preventing the spread of infectious disease, as the injunction treats virtual students the same as other West Virginia students not physically attending a school while, at the same time, preserving the Perrys’ free exercise rights.” Pet. App. 27a.

B. Different Educational Models Should Not Be Treated Differently Based on Labels Alone.

The Fourth Circuit itself identified home instruction, learning pods, and microschools as categories treated more favorably than K.P.’s virtual public-school program under the vaccination regime. Pet. App. 16a. But whatever differences may exist among those educational models, K.P.’s own program meant that she received her regular instruction remotely from home. Pet. App. 4a–5a, 126a–128a. The comparison shows why program labels should not replace a direct look at how the religious and secular conduct affect the State’s public-health interest.

To be clear, Amici do not contend that those models are identical in every respect. But *Tandon* does not require exact likeness in every respect; comparability is judged against the governmental interest the regulation serves. 593 U.S. at 62–63. The key question is therefore whether the differences among those educational models bear on the State’s asserted disease-prevention interest.

C. Public-Health Rules Should Reflect the Actual Risks of the Educational Setting.

The constitutional point is narrow: Free Exercise comparability should ask how the relevant religious and secular conduct affect the State’s asserted interest in the setting being regulated. State officials can then determine how to implement that rule. In K.P.’s case, the public educational service at issue was delivered virtually—not in a physical classroom surrounded by other young students. That difference is relevant to the State’s asserted public-health justification.

The Fourth Circuit panel noted that virtual academy students must appear in person for periodic testing and can participate in school-provided extracurricular activities. Pet. App. 24a. Those discrete points of physical contact are relevant to risk, and state officials may account for them. But they do not make remote instruction equivalent to daily classroom attendance. The constitutional comparison should follow the actual exposure setting—including any required in-person activities—rather than the program’s formal label. That approach protects religious exercise without preventing public-health officials from accounting for the risks that actually exist.

III. This Case Presents an Important Question About the Reach of *Mahmoud* Beyond Curricular Requirements.

The Fourth Circuit distinguished *Mahmoud v. Taylor*, 606 U.S. 522 (2025), on the ground that the challenged vaccination requirement is a “public health measure” rather than a curricular or ideological requirement.

Pet. App. 21a. The panel also considered *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), but deemed it distinguishable because that case “did not involve a public health measure.” Pet. App. 21a–22a n.1. That treatment presents an important question about the reach of *Mahmoud*: whether a non-curricular burden on parents’ religious exercise falls outside *Mahmoud* simply because the challenged requirement serves a public-health purpose.

A. This Court Has Long Protected Parents’ Right to Direct Their Children’s Upbringing and Education.

For over a hundred years, the Court has recognized that the liberty guaranteed by the Fourteenth Amendment encompasses the fundamental right of parents to direct the upbringing, education, and moral development of their children. See *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972). Together, those cases establish constitutional protection for parental authority over a child’s upbringing and education; *Yoder* further shows the significance of that authority when it is intertwined with religious exercise. The Court has thus treated parents’ direction of their children’s religious development as a protected constitutional interest, not merely a matter of educational preference.

In *Mahmoud*, 606 U.S. at 546–65, the Court concluded that the burden there was “of the same character” as the burden in *Wisconsin v. Yoder* and therefore proceeded to strict scrutiny without resolving the parents’

separate neutrality and general-applicability arguments. Subsequently, in *Mirabelli v. Bonta*, 607 U.S. 492, 495–97 (2026) (per curiam), the Court granted interim relief and concluded that the applicant parents were likely to succeed on the merits because the challenged policies likely triggered strict scrutiny. For present purposes, *Mirabelli* matters because the challenged policy was not itself a curricular requirement. The Court nevertheless treated *Mahmoud* as relevant, undermining any categorical rule that *Mahmoud* is limited to curricular requirements.

B. *Mahmoud* Is Not Categorically Limited to Curricular Requirements.

As noted, the Fourth Circuit distinguished *Mahmoud* by reasoning that the vaccination requirement is a “public health measure” rather than an “instrument of ideological indoctrination.” Pet. App. 21a. That distinction identifies the question this case presents: whether *Mahmoud*’s analysis is confined to curricular or ideological burdens.

But *Mirabelli* confirms that *Mahmoud* is not categorically confined to curricular requirements. 607 U.S. at 495–97. The relevant question is therefore not simply whether the challenged rule concerns curriculum or public health, but whether the burden it imposes is of the kind *Mahmoud* recognizes as substantially interfering with parents’ direction of their child’s religious development.

A vaccination requirement is plainly non-curricular. The alleged burden arises because access to a public educational program is conditioned on conduct the parents contend violates their religious obligations. *Mahmoud* makes clear that once a condition on public education

burdens religious exercise, it is no answer that parents can simply forgo the public benefit: “Public education is a public benefit, and the government cannot ‘condition’ its ‘availability’ on parents’ willingness to accept a burden on their religious exercise.” 606 U.S. at 561 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). The question here is whether a non-curricular vaccination requirement imposes the kind of burden on parents’ direction of their child’s religious development that *Mahmoud* protects against. *Mirabelli* reinforces that *Mahmoud* is not categorically limited to curricular requirements.

IV. This Case Provides a Narrow Vehicle to Review a Broader and Recurring Constitutional Rule.

The factual setting is narrow, but the Fourth Circuit’s rule is not. By making general applicability turn on why a claimant earlier entered a public program, the decision creates a rule capable of recurring whenever a religious objection arises after enrollment, employment, or participation has begun. This case presents that broader legal question in a particularly focused setting, which allows the Court to address the Free Exercise principle without resolving broader questions about vaccination policy or diminishing the States’ traditional public-health authority.

Some public-health cases raise concerns about limiting the States’ authority to control communicable disease in shared physical settings. This case does not.

Amici do not ask the Court to prescribe state public-health policies generally or to restrict state authority. This is an as-applied challenge involving a student whose

regular instruction occurred virtually at home. Pet. App. 4a–5a, 28a, 30a. Nor does this case require the Court to invalidate vaccination requirements generally, determine which religious objections qualify for accommodation, design an exemption process, or prescribe how the State should respond to outbreaks. Those questions are not presented here and can be addressed by state officials and the lower courts as appropriate.

Nor does the preliminary-injunction posture prevent review of the legal question presented here. The Fourth Circuit squarely held that the secular educational comparators did not trigger *Tandon* because K.P.’s decision to enroll in virtual school was not itself religiously motivated. Pet. App. 16a. Whether that antecedent motive properly belongs in the general-applicability inquiry is a legal question that the Court can resolve without deciding the details of West Virginia’s vaccination policy.

Granting review would therefore allow the Court to clarify the governing constitutional rule without taking over state public-health administration. The Court can explain how Free Exercise comparability applies when exposure risks differ, while leaving implementation to state officials.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

J. ZAK RITCHIE

Counsel of Record

HISSAM FORMAN DONOVAN RITCHIE PLLC

700 Virginia Street East, Suite 210

Charleston, WV 25301

(681) 265-3802

zritchie@hfdrlaw.com

Counsel for Amici Curiae