

No. 26-319

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

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INTEREST OF AMICUS CURIAE¹

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 life, family, and religious liberty. Together with Li-Mandri & Jonna LLP, TMS represented the parents and teachers who applied to this Court in *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), in which this Court applied *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and concluded that school policies substantially interfering with parents’ right to guide their children’s religious development likely trigger strict scrutiny. TMS has also represented plaintiffs challenging vaccine mandates and filed an amicus brief in *Miller v. McDonald*, No. 25-133. TMS therefore has a particular interest in the proper application of *Mirabelli* and *Mahmoud* to the Perrys’ claim that conditioning their daughter’s school enrollment on vaccinations contrary to their religious convictions substantially interferes with their right to guide her religious development.

¹ Counsel of record for all parties received notice of amicus curiae’s intent to file this brief at least 10 days before its due date. Sup. Ct. R. 37.2. No counsel for a party authored this brief in whole or in part. 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 amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. Sup. Ct. R. 37.6.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Circuit’s decision narrows the protection of religious upbringing recognized in *Mahmoud* and applied beyond classroom instruction in *Mirabelli*. West Virginia conditions K.P.’s enrollment in a public school offering online instruction at home, with periodic testing at school, on vaccinations her parents believe their faith forbids. Pet. App. 4a–5a, 24a; Verified Compl. ¶¶ 68, 76–78, Pet. App. 125a, 127a. The court withheld strict scrutiny because vaccination serves public health rather than exposing children to beliefs contrary to their parents’ faith. Pet. App. 20a–22a. That reasoning fails to examine the religious observance the condition requires this family to abandon.

Mirabelli applied *Mahmoud* beyond curricular requirements, concluding that school policies likely triggered strict scrutiny by substantially interfering with parents’ religious direction of their children. 607 U.S. at 496–497. *Mirabelli*’s preliminary posture does not weaken its reasoning or its force in the likelihood-of-success inquiry required here. Following this Court’s vacatur and remand for reconsideration in light of *Mahmoud*, the Second Circuit acknowledged that *Mirabelli* extends *Mahmoud* beyond classroom instruction but endorsed the Fourth Circuit’s reasoning in *Perry* that compulsory vaccination does not impose the kind of burden on religious upbringing that triggers strict scrutiny. *Miller v. McDonald*, No. 24-681, slip op. at 25–28 (2d Cir. June 30, 2026) (per curiam).

Mahmoud requires strict scrutiny when a government policy imposes a burden on religious upbringing of the same character as that recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), regardless of whether

the policy is neutral or generally applicable. 606 U.S. at 565. An asserted public-health interest does not excuse interference with religious upbringing. The State must satisfy strict scrutiny. *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), do not resolve this claim under *Mahmoud*. For a child educated principally at home, the State must justify denying a religious accommodation in light of her actual school contacts and the availability of less restrictive alternatives.

The Fourth Circuit’s general-applicability ruling independently warrants review. The court acknowledged that West Virginia permits children educated at home, in learning pods, or in microschools to remain unvaccinated, while requiring vaccination for K.P., who likewise receives her instruction principally at home. Pet. App. 16a–17a. But it dismissed those comparisons because K.P.’s choice of virtual public schooling was not religiously motivated. *Ibid*. That reasoning confuses the family’s educational choice with the religious conduct for which they seek accommodation: their refusal to authorize vaccination. Under *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021), and *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam), comparability turns on the risks that religious and secular conduct pose to the State’s asserted interests, not the reasons for choosing one educational setting over another.

Parents raise their children in their faith through observance as well as instruction. Since 2018, the Perrys have refrained from vaccinating K.P. in accordance with religious convictions governing her care and spiritual welfare. Verified Compl. ¶¶ 58–60, 65–67, Pet. App. 121a–122a, 124a–125a. Requiring them to violate those convictions as the price of public

education substantially interferes with their right to guide K.P.’s religious development. The State need not teach a contrary lesson or secretly displace the parents to impose that burden. This Court should grant review to reaffirm the protection of religious upbringing recognized in *Mahmoud* and *Mirabelli* and correct the Fourth Circuit’s independent error in its general-applicability analysis.

ARGUMENT

I. *Mirabelli*’s application of *Mahmoud* beyond the curriculum cannot be dismissed as merely preliminary.

In *Mirabelli*, this Court reaffirmed that the Free Exercise Clause protects parents’ right to guide their children’s religious development against substantial governmental interference, including interference outside the school curriculum. 607 U.S. at 496–497. Applying *Mahmoud*, the Court concluded that California’s policies likely triggered strict scrutiny because they substantially interfered with that right. *Ibid*. The Fourth Circuit nevertheless dismissed *Mirabelli* in a footnote, distinguishing it as “a preliminary action that did not involve a public health measure.” Pet. App. 21a n.1. Neither distinction addresses the governing question: whether conditioning K.P.’s access to public education on conduct contrary to her parents’ religious obligations imposes the kind of burden on religious upbringing that *Mahmoud* requires the State to justify under strict scrutiny. *Mirabelli*’s preliminary posture does not diminish the relevance of its reasoning, which applies with full force to vaccination.

A. Both cases required an assessment of likelihood of success under *Mahmoud*.

The panel identified a single issue on appeal: whether the Perrys were likely to succeed on the merits. Pet. App. 5a. *Mirabelli* likewise assessed likelihood of success on an application to vacate a stay of a permanent injunction. 607 U.S. at 494–496. Although its assessment was preliminary, this Court applied the same religious-upbringing standard and concluded that the religious objectors were “likely to succeed on the merits of their Free Exercise Clause claim,” because the policies “likely trigger strict scrutiny” under *Mahmoud*. *Id.* at 496.

Mahmoud itself reviewed the denial of a preliminary injunction and held the parents entitled to relief. 606 U.S. at 530, 545–546. It supplied the governing religious-upbringing standard; *Mirabelli* applied that standard beyond curricular requirements. The Fourth Circuit cannot dismiss *Mirabelli*’s reasoning merely because it assessed likelihood of success; the panel was required to assess likelihood of success under the same governing constitutional standard.

“Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.” *Trump v. Boyle*, 606 U.S. 989, 989 (2025) (order granting stay). Whether *Perry* and *Mirabelli* are alike in the relevant respect turns on the interference with religious upbringing. Calling *Mirabelli* preliminary does not answer that question.

B. *Mirabelli* applied *Mahmoud* to policies outside the curriculum.

The Ninth Circuit had treated *Mahmoud* as “a narrow decision focused on uniquely coercive

‘curricular requirements.’” 607 U.S. at 495. This Court instead applied it to school policies that socially transitioned children without parental notice and consent—“regardless of their parents’ wishes.” *Id.* at 492–493, 496–497.

The Court explained that the religious objectors “feel a religious obligation to raise their children in accordance with those beliefs.” 607 U.S. at 496. The policies likely triggered strict scrutiny because they substantially interfered with that obligation. *Ibid.* Justice Barrett’s concurrence, joined by the Chief Justice and Justice Kavanaugh, described the Ninth Circuit as having “significantly misunderstood *Mahmoud*.” *Id.* at 500–501.

Mirabelli’s reasoning leaves no basis for making contrary classroom instruction a prerequisite to protection of religious upbringing.

The Second Circuit has adopted the Fourth Circuit’s narrow reading of *Mahmoud*. After *Mahmoud*, this Court vacated the Second Circuit’s judgment upholding New York’s school-vaccination law and remanded for further consideration. *Miller v. McDonald*, 146 S. Ct. 879 (2025) (mem.). The order required reconsideration without resolving the merits. The Second Circuit affirmed again on June 30, 2026, after considering *Mirabelli* and *Perry*. *Miller*, slip op. at 27–28.²

Miller acknowledged that “*Mirabelli* confirms that *Mahmoud* reaches beyond curriculum.” Yet it found *Perry* persuasive: “Although *Perry* arose in a different educational setting, its reasoning on the character of a compulsory vaccination requirement is persuasive

² A petition seeking review of the Second Circuit’s decision is pending. *Miller v. McDonald*, No. 26-438 (U.S. filed Sept. 28, 2026).

here.” *Miller*, slip op. at 27–28. The Second Circuit’s endorsement of the Fourth Circuit’s reasoning demonstrates that the question extends beyond this case. Whether compulsory vaccination imposes the kind of burden on religious upbringing protected by *Mahmoud* and *Mirabelli* warrants this Court’s review. See Sup. Ct. R. 10(c).

II. The Fourth Circuit’s reasons for withholding strict scrutiny do not withstand review.

Once a burden of the character recognized in *Yoder* is established, *Mahmoud* requires strict scrutiny regardless of the State’s asserted interest. 606 U.S. at 565. The Perrys therefore advance two independent grounds for strict scrutiny: substantial interference with religious upbringing under *Mahmoud* and the unequal treatment of comparable secular conduct under *Fulton* and *Tandon*. The Fourth Circuit rejected both.

A. An asserted public-health interest does not excuse interference with religious upbringing.

Mirabelli identified the interference with religious upbringing before considering California’s asserted “compelling interest in student safety and privacy.” 607 U.S. at 496. The Court concluded that the policies likely failed strict scrutiny, observing that California undercut its alleged compelling interest because “those policies cut out the primary protectors of children’s best interests: their parents” and appeared to fail narrow tailoring. *Id.* at 496–497. Whatever West Virginia’s justification, the inquiry follows the same

order: identify the burden, then examine the State’s justification and tailoring.

Roman Catholic Diocese of Brooklyn v. Cuomo required narrow tailoring of restrictions imposed to combat COVID–19. 592 U.S. 14, 18 (2020) (per curiam); see *Tandon v. Newsom*, 593 U.S. 61, 62–63 (2021) (per curiam); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538, 546–547 (1993). Under these cases, a law serving public health must satisfy strict scrutiny when that standard otherwise applies.

B. *Prince* and *Jacobson* do not resolve the religious-upbringing claim presented here.

The Fourth Circuit called *Prince* and *Jacobson* “directly on point” and said “we are bound to follow them.” Pet. App. 22a. It invoked *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), which requires lower courts to follow this Court’s controlling decisions until this Court overrules them. *Ibid.* Neither *Prince* nor *Jacobson* resolved the as-applied religious-upbringing claim presented here. Review would allow this Court to clarify how those precedents apply alongside the standard subsequently reaffirmed in *Mahmoud*. See Sup. Ct. R. 10(c).

Prince stated that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.” 321 U.S. at 166. That statement was dictum. *Prince* did not involve vaccination; it concerned child labor in distributing religious literature on a public street, and the Court cautioned that “[o]ur ruling does not extend beyond the facts the case presents.” *Id.* at 161–162, 171. And *Prince* certainly did not decide whether a vaccination

condition substantially interfering with religious upbringing must satisfy the strict scrutiny subsequently prescribed in *Mahmoud*.

Jacobson upheld an adult’s conviction. 197 U.S. at 38–39. His objections rested on the Preamble, the Fourteenth Amendment, and “the spirit of the Constitution.” *Id.* at 13–14. It did not address a religious objection. It also preceded incorporation of the Free Exercise Clause against the States. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). *Zucht v. King*, 260 U.S. 174, 176–177 (1922), found the Fourteenth Amendment challenge to the validity of school-vaccination ordinances insubstantial under *Jacobson*. It dismissed the writ of error, explaining that a separate unequal-administration claim required review by certiorari. Neither case analyzed a parental free-exercise claim of the kind recognized in *Mahmoud*.

C. The majority’s rational-basis analysis does not establish narrow tailoring.

The majority called West Virginia’s interest “legitimate—indeed, compelling,” Pet. App. 10a, and observed that even “the strictest scrutiny” does not require “perfection,” *id.* at 11a. But it expressly held the law “subject to rational basis scrutiny,” *id.* at 22a. Pointing to possible extracurricular attendance and periodic testing at school, it concluded that “differentiation need not be striking in order to survive rational-basis scrutiny.” *Id.* at 24a (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 28 (1989)). That analysis does not establish narrow tailoring.

Strict scrutiny requires examining “the asserted harm of granting specific exemptions to particular religious claimants.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021) (quoting *Gonzales v. O Centro*

Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006)). The State must explain why less restrictive measures would not serve its interest. *Tandon*, 593 U.S. at 63. The district court rightly relied on exemptions available in other States in finding narrow tailoring lacking, along with the fact that West Virginia exempts children in learning pods or microschools. Pet. App. 94a–97a. The complaint’s allegations that staff work on campus without meeting the same vaccination requirements and that the public attends school events without proof of vaccination further undermine both the alleged compelling interest and narrow tailoring of the State’s policy. Verified Compl. ¶¶ 121, 193, 195–196, Pet. App. 139a, 155a–156a.

D. The family’s reasons for choosing public school do not resolve the independent question of general applicability.

The petition’s first question asks whether strict scrutiny applies when a law permits secular exemptions but burdens religious exercise through an act, such as school attendance, that is not itself religiously motivated. Pet. i, 14–22. A law lacks general applicability “if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton*, 593 U.S. at 534. The comparison concerns “the risks various activities pose, not the reasons why people gather.” *Tandon*, 593 U.S. at 62.

The majority acknowledged that children outside the school system “are treated more favorably than children attending the Virtual Academy,” but rejected the comparison because “the Perrys do not allege that

K.P.’s desire to attend the Virtual Academy is religiously motivated.” Pet. App. 16a. The majority then acknowledged the relevant religious conduct: “[t]he only religiously motivated conduct at issue here is K.P.’s refusal to get vaccinated.” *Id.* at 17a. That refusal is the conduct for which the Perrys seek accommodation. A secular reason for choosing public school does not make that refusal any less religious. Once the religious exercise is properly identified, the question is whether West Virginia permits secular conduct that poses comparable risks to its asserted public-health interests.

West Virginia’s exclusions for home instruction, learning pods, and microschools therefore remain relevant comparators even though the Perrys chose virtual public schooling for secular reasons. Whether those arrangements constitute comparable secular conduct turns on the risks they pose to the State’s asserted public-health interests. *See* Pet. App. 16a; *id.* at 30a, 37a, 40a–41a (Niemeyer, J., dissenting). The Perrys’ secular reason for selecting virtual public school is irrelevant to that comparison. The majority compared virtual-school students’ contacts with those of these excluded groups only in its rational-basis analysis. *Id.* at 16a, 22a–24a. That sequence allowed a mistaken inquiry into educational motivation to foreclose the scrutiny that comparable secular exceptions would require.

The distinction between public-school enrollment and alternative educational arrangements does not show that the excluded children present materially different public-health risks. As Judge Niemeyer explained, K.P.’s circumstances are “far more akin” to those of the exempt children. Pet. App. 40a–41a (Niemeyer, J., dissenting). Nor does the statute’s coverage

resolve the constitutional comparison: the question is whether West Virginia tolerates comparable risks from secular educational arrangements while refusing accommodation of the Perrys' religious exercise.

The majority also concluded that medical exemptions serve distinct health interests and therefore are not comparable to religious exemptions. Pet. App. 17a–19a. The majority is wrong, for “a government policy that grants an exemption for medical reasons but denies the same exemption for religious reasons is not generally applicable, as it devalues religious reasons by judging them to be of lesser import than non-religious reasons.” *Does 1-11 v. Bd. of Regents of Univ. of Colo.*, 100 F.4th 1251, 1277 (10th Cir. 2024) (cleaned up). And the majority's conclusion does not resolve the Perrys' separate reliance on children educated outside the public school system. Exclusions for home instruction, learning pods, and microschools reflect different educational arrangements that similarly undermine general applicability.

III. The vaccination condition requires the Perrys to surrender a religious decision about their daughter's care as the price of public education.

The Free Exercise Clause protects parents' religious exercise in raising their children. *Mahmoud*, 606 U.S. at 546–547. When a law imposes a burden of the same character as that in *Yoder*, strict scrutiny applies regardless of neutrality or general applicability. *Id.* at 565. The majority accepted that rule but deemed this burden “not remotely ‘of the same character’” because vaccination protects health without exposing children to hostile beliefs. Pet. App. 20a–21a. But religious upbringing encompasses observance as

well as instruction. *Mirabelli* confirms as much: California’s policies taught children nothing, yet they likely substantially interfered with parents’ “religious obligation to raise their children in accordance with those beliefs.” 607 U.S. at 496. The State interferes with that upbringing by requiring parents to abandon religious practices governing how they raise their children, even without teaching a contrary lesson.

A. The condition requires the parents to authorize conduct that their religious obligations toward K.P. forbid.

The Perrys allege religious obligations governing K.P.’s care and spiritual welfare. Since 2018, they have refrained from vaccinating her because they believe participation would make them complicit in abortion and potentially “endanger their and K.P.’s souls.” Verified Compl. ¶¶ 58–60, 65, Pet. App. 121a–122a, 124a. They also allege a separate religious objection to preventive medical intervention where no serious illness exists. *Id.* ¶¶ 66–67, Pet. App. 124a–125a. These allegations assert a religious observance through which they seek to protect their daughter’s spiritual welfare. The enrollment condition requires them to authorize the conduct that observance forbids as the price of public education.

B. The Perrys’ observance of religious obligations governing K.P.’s care is part of her religious upbringing.

The protection of religious upbringing rests on a longstanding recognition of parental authority. *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923), recognized parental liberty under the Fourteenth Amendment to direct children’s upbringing and

education. *Pierce v. Society of Sisters*, 268 U.S. 510, 534–535 (1925), reaffirmed that liberty against the State’s attempt to require instruction by public teachers alone. Drawing on those decisions, *Yoder* described *Pierce* as “a charter of the rights of parents to direct the religious upbringing of their children.” 406 U.S. at 232–233.

Yoder protected religious formation through a whole way of life. Amish children learned through daily work, example, and participation in community life. 406 U.S. at 211–212. Compulsory secondary schooling would disrupt that formation, substantially interfere with their religious development, and contravene religious tenets and practice “both as to the parent and the child.” *Id.* at 218. The law also compelled parents “to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” *Ibid.* The interference concerned how the parents raised their children in their faith, not merely what the children were taught.

The right asserted was the parents’ own. Responding to Justice Douglas’s partial dissent, *Yoder* explained that its holding did not depend on a separate assertion of the children’s religious interests; the constitutionality of imposing criminal penalties on the parents turned on their Free Exercise rights. 406 U.S. at 230–231. The Perrys likewise need not establish a separately asserted religious claim by K.P. They must establish interference with their own religious exercise in directing her upbringing.

Mahmoud reaffirmed that protection. Parents’ right to direct religious upbringing “extends to the choices that parents wish to make for their children outside the home.” 606 U.S. at 547. Drawing on *West Virginia State Board of Education v. Barnette*, 319

U.S. 624 (1943), it contrasted compelled affirmations with the “more subtle forms of interference” recognized in *Yoder. Mahmoud*, 606 U.S. at 547–549. The inquiry concerns whether a requirement would “substantially interfer[e] with the religious development” of the child or pose “a very real threat of undermining” the beliefs and practices the parents seek to instill. *Id.* at 556 (quoting *Yoder*, 406 U.S. at 218).

The Second Circuit distinguished *Mirabelli* because it involved concealment and displacement of parents’ role in their children’s upbringing. *Miller*, slip op. at 27. It concluded that vaccination neither imposed contrary instruction nor displaced parental religious formation. *Id.* at 25–27. Those are only two ways of interfering, and neither explains why compelled abandonment of religious observance governing a child’s care falls outside the protection.

The Perrys’ allegations supply the connection at issue. They seek to follow religious obligations in caring for K.P., not merely teach her what those obligations require. Verified Compl. ¶¶ 52, 58–60, 65–67, Pet. App. 121a–122a, 124a–125a. Requiring them to authorize vaccination compels the very participation their observance forbids. Freedom to explain the prohibition does not preserve their ability to observe it in raising her. The burden thus concerns a practice governing their daughter’s religious upbringing. Compelling this departure substantially interferes with the Perrys’ right to guide K.P.’s religious development and imposes a burden of *Yoder*’s character.

C. The option to leave public school does not remove the burden.

The availability of private or home education does not eliminate a burden on religious upbringing.

Mahmoud explained that “[p]ublic education is a public benefit,” whose availability cannot be conditioned on accepting a burden on religious exercise. 606 U.S. at 561; see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017). Compulsory education reinforces that pressure by requiring parents who leave public school to obtain an adequate substitute. *Mahmoud*, 606 U.S. at 561 & n.10.

K.P. was disenrolled because her parents would not authorize the required vaccinations, while West Virginia continued to require a lawful means of educating her. Verified Compl. ¶¶ 75–79, Pet. App. 126a–127a; W. Va. Code §§ 18-8-1, 18-8-1a, 18-8-2. The State must justify the enrollment condition; it cannot answer the claim merely by telling the family to leave public school.

CONCLUSION

This Court should grant review to reject the Fourth Circuit's restrictions on religious-upbringing claims and its mistaken identification of the conduct relevant to general applicability. The substantial interference alleged here requires the State to satisfy strict scrutiny.

The petition for a writ of certiorari should be granted.

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