

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.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

**BRIEF OF *AMICUS CURIAE*
PHYSICIANS FOR INFORMED CONSENT
SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a law that exempts people based on secular criteria but not religious reasons is subject to strict scrutiny even when the religious burden is implicated by an act—like attending school or working—that is not itself religiously motivated.
2. Whether a law is subject to strict scrutiny under *Mahmoud v. Taylor*, 606 U.S. 522 (2025), when it imposes a non-curricular requirement that substantially burdens parents' rights to guide the religious development of their child.

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*¹

This case began when the State refused the Perry family a religious exemption from a vaccine requirement even though their daughter attended a public virtual school that only met online. At the same time, the State exempted children who—like the Perrys’ daughter—never set foot in public schools because they were homeschooled or attended microschools or learning pods. This disparate treatment of religious beliefs is contrary to this Court’s precedents. Yet the Fourth Circuit sanctioned it. In doing so, it departed from this Court’s free-exercise precedent and left lawmakers free to deny religious exemptions to parents across the country. The petition should be granted to correct those harmful errors.

This Court’s precedents rightly understand that laws like West Virginia’s can threaten the free-exercise rights of parents. The Court has thus subjected such policies to strict scrutiny in two circumstances. Under *Tandon v. Newsom*, a regulation is not neutral and generally applicable, and therefore triggers strict scrutiny, if it “treat[s] *any* comparable secular activity more favorably than religious exercise.” 593 U.S. 61, 62 (2021) (per curiam). And under *Mahmoud v. Taylor*, a policy that “substantially interfere[s] with the religious development of children” by their parents is subject to

¹ This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel or members has made a monetary contribution toward the brief’s preparation or submission. Counsel of record for all parties received timely notice of *amicus*’ intent to file.

strict scrutiny even if it is neutral and generally applicable. 606 U.S. 522, 546, 564-565 (2025); accord *Mirabelli v. Bonta*, 607 U.S. 492, 496 (2026) (per curiam).

Despite these mandates, many states condition access to public education on the willingness of parents like the Perrys to engage in activity that they consider sinful—all while exempting students for other secular reasons. To reject free-exercise claims on these facts, the Fourth Circuit misapplied the clear lessons of *Tandon*, inappropriately cabined *Mahmoud* and *Mirabelli* to their facts, and treated the State’s public-health interest as enough to distinguish *Mahmoud*.

Those errors are troubling to *Amicus* Physicians for Informed Consent. *Amicus* is a 501(c)(3) nonprofit educational organization that publishes data on infectious disease and vaccines and supports voluntary vaccination. *Amicus* agrees with petitioners that the question of whether laws granting secular exemptions are generally applicable is worthy of this Court’s review. *Amicus* writes to emphasize two points. First, the question is nationally important. Legislatures, schools, and parents need a clear free-exercise equality rule before they set policy or make family decisions. Second, informed-consent ethics and the comparative-risk record show that the public-health justification the Fourth Circuit found sufficient would have been contestable if the Fourth Circuit had applied the strict scrutiny that this Court requires.

Because the Fourth Circuit departed from this Court’s precedent and denied the Perrys a religious

exemption based on a contestable public-health justification, this Court should grant the petition and reverse.

STATEMENT

West Virginia requires public school children to be vaccinated. App.105a (W. Va. Code §16-3-4). But it exempts three groups: (1) children who are homeschooled, attend learning pods, or attend microschools; (2) adults who work in schools; and (3) children with medical exemptions. App.16a. The State does not exempt students who oppose vaccination for religious reasons or who attend public school only virtually. App.30a.

Krystle and Anthony Perry enrolled their daughter K.P. in the West Virginia Virtual Academy, a public school that students attend remotely. App.141a-142a. The Perrys are Christians and believe that abortion is a sin and that medicine should only be used after efforts to fight off sickness with God-given immunity have failed. App.121a-125a. They stopped vaccinating K.P. after learning that certain vaccines were developed using fetal cell lines and concluding that using preventative vaccines evinced a lack of faith. App.124a-125a.

When the school district found out that K.P. was not fully vaccinated, it disenrolled her. App.127a. The Perrys began homeschooling their daughter, but since Mr. Perry is disabled and Mrs. Perry works, K.P.'s education suffered. App.126a-129a.

The Perrys sued, claiming that the State had violated their free-exercise rights. App.162a-164a. The district court granted their motion for a preliminary

injunction so that K.P. could continue to attend public virtual school, but a divided Fourth Circuit panel reversed. App.43a-44a; App.3a, 5a-6a. The panel held that the law is generally applicable, and so subject only to rational-basis review, reasoning that the Perrys did not allege that K.P.’s attendance at virtual school was itself religiously motivated. App.16a. It also held that *Mahmoud* does not reach public-health measures and declined to apply strict scrutiny. App.21a-22a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit Withheld the Strict Scrutiny that *Tandon* and *Mahmoud* Require.

The Fourth Circuit made two fundamental errors that will be devastating to religious exercise if allowed to stand or to spread to other courts. First, it withheld strict scrutiny under *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), because it viewed the act that brought K.P. under the rule—the desire to attend virtual public school—as not itself religiously motivated. App.16a. Second, it withheld strict scrutiny under *Mahmoud v. Taylor*, 606 U.S. 522 (2025), because the state law was a public-health measure and did not deal with curriculum. App.21a. But neither case brooks departures for the reasons the Fourth Circuit gave. The Court should grant the petition and settle both questions before those departures become the general rule in the lower courts.

A. The Fourth Circuit’s decision will eclipse *Tandon*’s holding in the ordinary free-exercise case.

In concluding that the vaccine mandate was generally applicable, the Fourth Circuit applied a test that promises to eviscerate *Tandon* and sow confusion by treating the secular motivation of the underlying act as a reason to withhold strict scrutiny.

1. Neutral and generally applicable laws that burden religious exercise only need a rational basis. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). But this Court in *Tandon* clarified that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. And “whether two activities are comparable” requires courts to look to the “asserted government interest” to determine whether the proposed “religious worship” would “present[] similar risks.” *Ibid.*

Here, the State allows parents who homeschool or send their children to microschools or learning pods to refuse to vaccinate those children. App.16a. But it does not allow parents who object to vaccination for religious reasons to opt out, even when their children only participate in virtual public school. Pet.5. That is a quintessential failure of general applicability as defined in *Tandon*. The State treats some children who do not attend traditional brick-and-mortar public schools differently than others, even though their predominantly at-home education poses similarly limited public-health risks.

In holding otherwise, the Fourth Circuit dodged *Tandon*. Although the Perrys' decision not to vaccinate K.P. was motivated by their religious beliefs, the Fourth Circuit withheld strict scrutiny because it treated their enrollment in virtual public school as an unrelated secular choice, discounting the fact that the State's vaccination requirement effectively forced them to choose between their religious beliefs and access to in-person public schooling. See App.16a. The court thus felt no obligation to explain why the State could treat virtual public-school students who asserted religious exemptions differently than other similarly situated students who study at home. This inserted a loophole in the Fourth Circuit's free-exercise jurisprudence that would allow courts to apply rational basis whenever the need for a religious exemption occurs in a secular context.

2. That this exception to *Tandon*'s bright-line rule is a creature of the Fourth Circuit's own making is reason enough to grant the petition and reverse. But the harms of the decision are compounded by the confusion this divergence from precedent invites. Courts in the Fourth Circuit are now free to dive into the rational-basis escape hatch if they can simply label the underlying action that made the exemption necessary as secular. That cannot be right.

The need for religious exemptions frequently arises in the secular context, as even a cursory look at this Court's recent religion cases shows. See, e.g., *Mahmoud*, 606 U.S. at 537-538 (education); *Groff v. DeJoy*, 600 U.S. 447, 454-455 (2023) (employment). Yet the fact that a secular decision subjected a claimant to a rule conflicting with her sincerely held

religious beliefs has never been of any constitutional moment. If the underlying act's motivation can defeat strict scrutiny, then the Fourth Circuit's new rule will eclipse *Tandon* in the ordinary free-exercise case.

This Court should not wait to clarify that what matters for purposes of determining general applicability is “the asserted government interest that justifies the regulation at issue,” not the religious motivation of the act that brought the claimant under the rule. *Tandon*, 593 U.S. at 62. For plaintiffs like the Perrys, the loss of First Amendment freedoms for any period causes irreparable harm. *Mahmoud*, 606 U.S. at 569. The risk of harm from allowing that deviation from precedent to stand—and potentially to spread to other courts—is too great for the First Amendment to bear.

B. The Fourth Circuit carved all public-health laws from *Mahmoud*'s reach.

By treating parental rights as less protected in the public-health sphere than they are with respect to the curricular decisions directly at issue in *Mahmoud*, the Fourth Circuit risked the same harm as its departure from *Tandon*.

Mahmoud held that “the rights of parents to direct the religious upbringing of their children” are violated when “government policies *** substantially interfere with the religious development of children.” 606 U.S. at 546 (cleaned up). When the burden is of that character, strict scrutiny applies even if the law is neutral and generally applicable. *Id.* at 564-565.

This Court has repeatedly held that this principle applies broadly. In *Mahmoud*, this Court held that

Yoder was “an exception to the general rule that governments may burden religious exercise pursuant to neutral and generally applicable laws” “because of the special character of the burden in that case.” *Ibid.* (discussing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). And the Court emphasized that strict scrutiny would apply even if a law did not mirror the particular facts of *Yoder*. *Yoder* was “never confined *** to its facts”; it was “a statement of general principles.” *Id.* at 558.

Later cases haven’t confined *Mahmoud* to its facts either. In *Mirabelli v. Bonta*, this Court held that a law allowing “unconsented facilitation of a child’s gender transition” “substantially interfere[d] with the right of parents to guide the religious development of their children.” 607 U.S. 492, 496 (2026) (per curiam) (cleaned up). This was the same kind of burden that triggered strict scrutiny in *Yoder* and *Mahmoud* because it violated parents’ ability to raise their children in accordance with their beliefs about sex and gender. *Ibid.*

Yet the Fourth Circuit made the same mistake here that this Court tried to correct in *Mirabelli*. It artificially cabined *Mahmoud* to curricular indoctrination and dismissed *Mirabelli* in a footnote because—like *Mahmoud*—“it did not involve a public health measure.” App.21a & n.1. But nothing in *Mahmoud* or *Mirabelli* supports such a narrowing distinction.

To the contrary, this case presents the same burden that triggered strict scrutiny in *Mahmoud*. There, the Court clarified that the challenged curriculum “impose[s] upon children *** a psychological pressure to conform,” just like the law in

Yoder. Mahmoud, 606 U.S. at 554 (cleaned up). If government actions that merely *pressure* children to violate their parents’ religious beliefs trigger strict scrutiny, laws that *require* children to do so to participate in public school implicate the same concern.

The Fourth Circuit’s refusal to apply *Mahmoud* in these circumstances will thus narrow it to the classroom. A State will be able to compel the very burden *Mahmoud* said triggered strict scrutiny simply by *requiring* a child to violate a parent’s religious beliefs—so long as the government can describe its law as a health measure.

Worse, if the Fourth Circuit’s decision stands, *Mirabelli* will have corrected efforts to limit *Mahmoud* to curriculum only to have a new artificial limitation take its place. *Mahmoud* clarified that the character of the burden, not the State’s label, is what decides whether the *Yoder* exception applies. Just as this Court should not leave in place the Fourth Circuit’s departure from *Tandon*, it should not leave in place its inversion of *Mahmoud*.

C. The rules applied below will likely lead to harm in other circuits.

Nor is the confusion over what *Tandon* and *Mahmoud* require confined to courts in the Fourth Circuit. Indeed, lawsuits have been filed seeking religious exemptions to vaccine requirements in Connecticut, New York, Maine, and California.²

² See, e.g., *Spillane v. Lamont*, 323 A.3d 1007, 1014 (Conn. 2024); *Miller v. McDonald*, 180 F.4th 420 (2d Cir. 2026), *petition for cert. docketed*, No. 26-438 (U.S. Oct. 2, 2026); *We the Patriots USA, Inc.*

Schools and parents in the Fourth Circuit and in the States with the same exemption structure as West Virginia need guidance on what the Free Exercise Clause requires. This Court should therefore grant the petition and decide whether a religious objection may be denied because the underlying act was secular or because the State has called the rule a health measure.

II. The Fourth Circuit Treated a Contestable Health Interest as Given.

The Fourth Circuit’s blind deference to the State’s asserted interest in public health is another powerful reason to grant review. The Fourth Circuit repeatedly cited the State’s purported public-health interest. See, e.g., App.6a, 12a, 18a-19a, 21a-23a. To the Fourth Circuit, that asserted interest was enough to distinguish this case from *Mahmoud* and *Mirabelli* and provided a rational basis for refusing K.P.’s religious exemption. But even though the State has a general interest in protecting public health, the public-health justification for that mandate should have been contestable through strict-scrutiny review under *Mahmoud* and *Tandon*. The State’s naked assertion of a contestable interest is a poor reason to withhold strict scrutiny.

v. *Makin*, No. 2:26-CV-00369-SDN, 2026 WL 2837787, at *1 (D. Me. Sep. 22, 2026); *Grimsby v. Pan*, No. 5:25-CV-01575-AB-JC, 2025 WL 2829502, at *1 (C.D. Cal. Aug. 29, 2025), *appeal docketed*, No. 25-6100 (9th Cir. Sep. 29, 2025).

A. A mandate without a religious exemption flouts established principles of informed consent.

One reason the State's interest is shaky is that physicians universally recognize their ethical obligation to provide informed consent. A mandate without a religious exemption lets the legislature dictate a family's medical decisions by threatening access to public school. But it is well-established that "[p]atients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care."³ Such informed consent should "precede vaccination administration" just as it should precede any other medical care.⁴ And "[p]atients who decline vaccination should continue to be supported with appropriate care options that honor their autonomous choices."⁵

Successful doctor-patient relationships depend on safeguarding the patient's right to informed refusal. Vaccination, an invasive medical procedure that punctures the skin for direct access to the patient's tissue and bloodstream, does carry risk. Government institutions that coerce patients into accepting this procedure violate fundamental principles of medical

³ *AMA Code of Medical Ethics: Opinion 2.1.1, Informed Consent*, Am. Med. Ass'n, <https://tinyurl.com/4cr58m79> (last visited Oct. 11, 2026).

⁴ *Committee Opinion No. 829, Ethical Issues With Vaccination in Obstetrics and Gynecology*, Am. Coll. of Obstetricians & Gynecologists (July 2021), <https://tinyurl.com/4cr5j2r8>.

⁵ *Ibid.*

ethics. Any asserted interest in public health should be guided by those principles.

B. Comparative risk makes the State’s health justification contestable.

A parent cannot give informed consent to take a vaccine without knowing how the risk of the vaccine compares with the risk of the disease. A review of those comparative risks shows that the interest the Fourth Circuit treated as given should and would have been contestable had the court properly applied strict-scrutiny review.

1. *Amicus* has long striven to understand how disease risk empirically compares to vaccine risk, and it has spent the last ten years studying this question using mainstream scientific sources. In 2025, *Amicus* published its rigorous scientific findings in a book called *Vaccines and the Diseases They Target: An Analysis of Vaccine Safety and Epidemiology* (“*Silver Booklet*”).⁶ In the *Silver Booklet*, *Amicus* reviewed a wealth of scientific studies and concluded that “[f]or normal-risk U.S. children the data” about the risk of vaccines compared to the diseases they are designed to prevent “is inconclusive.”⁷ *Amicus* also showed that some data suggests that “[v]accines may cause more death or permanent disability than the diseases they

⁶ Physicians for Informed Consent, *Vaccines and the Diseases They Target: An Analysis of Vaccine Safety and Epidemiology* (2025), <https://tinyurl.com/2faupt48>.

⁷ *Id.* at 2.

target.”⁸ Those findings are the record a court applying strict scrutiny would have had to confront.

Although this Court would not have to weigh that evidence at this stage—or even on the merits after a grant—it supports review here. K.P. is vaccinated as required for all but two vaccines—MMR and varicella. App.136a. But even for those vaccines, she has received the first dose. *Ibid.* According to the Centers for Disease Control and Prevention, one dose of the MMR vaccine is approximately 93% effective against measles, 78% against mumps, and 97% against rubella.⁹ And one dose of the varicella vaccine is approximately 82% effective against chickenpox and 98% against severe disease.¹⁰ K.P. has thus already received substantial protection. The relevant question is whether the State’s asserted public-health interest justifies its conditioning her access to predominantly virtual public education on receiving those additional doses when the State exempts other home-schooled children.

The *Silver Booklet* suggests that the answer is no, concluding that MMR and varicella vaccines have not been proven safer than the diseases they target for normal-risk children. It estimates that, without

⁸ *Ibid.*

⁹ *Measles, Mumps, and Rubella Vaccination: Information for Health Care Providers*, Ctrs. for Disease Control & Prevention (Jan. 26, 2021), <https://www.cdc.gov/vaccines/hcp/by-disease/mmr.html>.

¹⁰ Adriana Lopez et al., *Varicella*, in Ctrs. for Disease Control, U.S. Dep’t Health & Hum. Servs., *Epidemiology and Prevention of Vaccine-Preventable Diseases*, ch. 22 (14th ed. 2024), <https://tinyurl.com/2vzpyju2>.

vaccination, the cumulative ten-year risk of death or permanent disability for normal-risk U.S. children under age ten is approximately 1.0 per 100,000 for measles (among children with normal vitamin A levels), 0.6 per 100,000 for mumps, 0.5 per 100,000 for fatal rubella acquired after birth (excluding congenital rubella syndrome), and 1.0 per 100,000 for fatal varicella (chickenpox).¹¹ By contrast, available safety studies lack the statistical power to rule out a risk of death or permanent disability as high as 42 per 100,000 children for the MMR vaccine and 109 per 100,000 for the varicella vaccine.¹² It is thus “not known whether the actual vaccine risk is less than, equal to, or greater than the disease risk.”¹³

The *Silver Booklet* also reports that seizures occur in approximately 1 in 640 children following the first dose of MMR vaccination and estimates that seizures may occur in approximately 1 in 940 children following varicella vaccination.¹⁴ And it further explains that the Institute of Medicine found the evidence inadequate to accept or reject causal relationships between MMR vaccination and certain neurological and autoimmune disorders, including meningitis and hearing loss.¹⁵ The evidence is also inadequate to rule out links between varicella vaccination and conditions

¹¹ *Silver Booklet*, *supra* note 6, at 2-3 & fig.1.

¹² *Ibid.*

¹³ *Id.* at 2.

¹⁴ *Id.* at 34, 44.

¹⁵ *Id.* at 30-31.

such as arthropathy (joint pain or arthritis), Guillain-Barré syndrome, and stroke.¹⁶

But the vaccines that K.P. is missing are not the only ones for which serious risks have not been definitively ruled out. For example, polio and DTaP vaccines carry a potential risk of sudden infant death syndrome.¹⁷ DTaP, varicella, and hepatitis B vaccines carry a potential risk of neurological disorders.¹⁸ And several vaccines carry a risk of seizures.¹⁹ Against these risks, a properly informed parent would have to consider the fact that the diseases themselves are rarely fatal among normal-risk children, even in populations without mass vaccination.²⁰ And, although the inconclusive findings do not establish vaccine causation, they identify uncertainties relevant to informed medical decision-making. The *Silver Booklet* thus concludes that it is “not accurate to state that vaccines have been *proven* safer than those diseases.”²¹

More generally, the public-health rationale for school vaccine requirements differs among diseases. Tetanus is not transmitted from person to person, and hepatitis B is not transmitted through ordinary classroom contact.²² And the *Silver Booklet* also

¹⁶ *Id.* at 34-35.

¹⁷ *Id.* at 14-15, 22-23.

¹⁸ *Id.* at 6-7, 14-15, 34-35.

¹⁹ *Id.* at 6-7, 22-23, 30-31, 34-35.

²⁰ *Id.* at 4-5, 8-13, 20-21, 24-25, 32-33.

²¹ *Ibid.* (emphasis added).

²² *Id.* at 4, 10.

explains that the inactivated polio, diphtheria, and acellular pertussis vaccines can protect against disease but do not prevent asymptomatic infection or transmission.²³ These distinctions reinforce the importance of examining the unique justification for each requirement rather than treating all vaccines as scientifically interchangeable.

2. The *Silver Booklet* also shows that many required vaccines cause internal exposure to aluminum compounds that a parent may reasonably decide is unacceptable. Both the Food and Drug Administration and the Agency for Toxic Substances and Disease Registry have raised concerns about the negative effects of aluminum exposure in humans.²⁴ And scientific studies have shown that small amounts of aluminum can interfere with cellular and metabolic processes in the nervous system.²⁵ The most damaging effects can range from motor skill impairment to encephalopathy.²⁶ Yet up to 22 doses of aluminum-containing vaccines are administered to children, with 11 of those doses administered from birth to 6 months of age.²⁷

While the Court need not examine the science in detail to grant review, it is enough that the interest the Fourth Circuit treated as given under rational-basis review would be contestable had the Fourth Circuit applied the proper standard of review—strict

²³ *Id.* at 9, 13, 14, 22.

²⁴ *Id.* at 38-40.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Id.* at 38 fig.1.

scrutiny. The Court should grant the petition to allow the lower courts to consider the scientific record in the first instance.

CONCLUSION

The Fourth Circuit wrongly refused to apply *Mahmoud* and *Tandon* and overstated the State's public-health interest. These fundamental errors threaten further confusion and litigation. The Court should grant review and reverse.

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