No. 26-438

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* FOOTHILLS CHRISTIAN CHURCH IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does New York's compulsion of permanent acts inconsistent with the religious beliefs and practices parents wish to instill in their children violate the Free Exercise Clause under *Mahmoud v. Taylor* as applied to the petitioner Amish parents and schools?

2. Does New York's refusal to allow religious exemptions to a law that allows secular exemptions and other comparable secular activity violate the Free Exercise Clause as applied to the petitioner Amish parents and schools?

3. Should this Court reconsider *Employment Division, Department of Human Resources of Oregon v. Smith*?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

STRICT SCRUTINY APPLIES WHENEVER A LAW SUBSTANTIALLY INTERFERES WITH THE CRITICAL RIGHT OF PARENTS TO GUIDE THE RELIGIOUS DEVELOPMENT OF THEIR CHILDREN.....4

A. The Free Exercise of Religion Is a Fundamental Constitutional Right.....4

B. *Mahmoud* Establishes That Strict Scrutiny Applies When a Law Substantially Interferes with the Right of Parents to Guide the Religious Development of Their Children; The Rule of *Smith*, Itself a Departure from Court Precedent, Does Not Apply.....6

C. The Second Circuit Erroneously Applied Rational Basis Review to New York's School Vaccination Mandate Law 9

Table of Contents

Page

D. The Majority Opinion in *Perry* Likewise Expressly Discounts *Mahmoud* When It Finds Incorrectly That West Virginia's School Immunization Statute Is Constitutional Under Rational Basis Review Without a Religious Exemption. 13

E. *Miller* and *Perry* Reflect the Analytical Slippage in Pre-*Mahmoud* School Vaccination Cases 15

1. Pre-*Mahmoud* Mandatory Vaccination Challenges Rely Heavily on the Framing of the Government's Interest 15

2. *Miller* and *Perry* Have Adopted Salient Portions of the Faulty Reasoning in These Pre-*Mahmoud* Cases 18

F. The Burdens of the Return to Pre-*Mahmoud* Free Exercise Jurisprudence Fall Hardest on Adherents to Minority Religions and on Smaller Religious Institutions Such as *Amicus* 20

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases

Association for Education Fairness v. Montgomery County Board of Education, No. 26-12 4

Boston Parent Coalition for Academic Excellence Corp. v. the School Committee for the City of Boston (Boston Parent Coalition), ___ U.S. ___, 145 S. Ct. 15 (2024) 4

Cantwell v. Connecticut, 310 U.S. 296 (1940) 5

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 5

Coalition for TJ v. Fairfax County School Board, ___ U.S. ___, 146 S. Ct. 541 (2024) 4

Doe v. San Diego Unified School District, 19 F.4th 1173 (9th Cir. 2021) 15, 16, 17, 18, 19

Does 1-3 v. Mills, ___ U.S. ___, 142 S. Ct. 17, 20 (2021) 9

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 3, 5, 6, 8, 9, 13, 15, 20

Cited Authorities

Page

Fulton v. City of Philadelphia, Pennsylvania,
593 U.S. 522 (2021) 6, 8, 9, 20, 21, 22

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,
565 U.S. 171 (2012) 8

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 14

Mahmoud v. Taylor,
606 U.S. 522 (2025) 2, 3, 6, 7, 11, 12, 13, 15, 18, 20

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,
584 U.S. 617 (2018) 6, 8

McDaniel v. Paty,
435 U.S. 618 (1978) 5

Mirabelli v. Bonta,
607 U.S. 492 (2026) 2, 3, 7, 12, 13, 20

Perry v. Marteney,
172 F.4th 315 (4th Cir. 2026) 3, 13, 14, 15, 18, 19, 20, 21

Prince v. Massachusetts,
321 U.S. 158 (1944) 14

Page

Sherbert v. Verner,
374 U.S. 398 (1963) 5

Tandon v. Newsom,
593 U.S. 61 (2021) 10

Thomas v. Review Board of the Indiana Employment Security Division,
450 U.S. 707 (1981) 5

United States v. Seeger,
380 U.S. 163 (1965) 6

We The Patriots USA, Inc. v. Connecticut Office of Early Childhood Development,
76 F.4th 130 (2d Cir. 2023) 18

Wisconsin v. Yoder,
406 U.S. 205 (1972) 3, 7, 12, 15, 20

Zucht v. King,
260 U.S. 174 (1922) 14

Statutes and Other Authorities

§ 2164 . . . . . .10, 11

McConnell, The Origins and Historical Understanding of Free Exercise of Religion,
103 Harv. L. Rev. 1409 (1990) 21

Cited Authorities

Page

N.Y. Sponsor's Memorandum, 2019 S.B. S2994-A. 10

New King James Version (1982) 1, 22

Resolution of July 18, 1775, in 2 Journals of the Continental Congress, 1774–1789, p. 189 (W. Ford ed. 1905) 21

Rule 37.2 1

INTEREST OF AMICUS CURIAE[1]

Foothills Christian Church (Foothills) is a nondenominational Christian church dedicated to reaching people with the truth of Jesus, being a family that encourages one another to follow Him, building the Kingdom of God on earth, and raising up the next generation to continue the work. It declares the Lordship of Christ in every sphere through the preaching of His Word, through prayer, and the lifestyle of the believer.

Foothills counsels its members concerning vaccination exemption. It believes that the protection of conscience is fundamental to religious liberty. There are several places in the Bible where the New Testament teaches that Christians should follow the dictates of their conscience (Rom. 14:23; Acts 5:29; 1 Cor. 8-10) (New King James Version) (1982) (NKJV). A free and just society should do all it can to make allowances for these sincere religious beliefs.

Foothills believes that the government should not determine whether a religious belief is sufficiently important or theologically correct. Parents rather bear the primary moral responsibility for the upbringing of their children, including decisions involving conscience,

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1. Under Rule 37.2, *amicus curiae* gave 10 days' notice of its intent to file this brief to all counsel. *Amicus curiae* states further that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

bodily integrity, medicine, and religious observance. Government has legitimate authority to protect children, but it should not presumptively replace parents as the moral decisionmaker (Eph. 6:4, Deut. 6:6-7).

Foothills believes that conditioning education on violating conscience can function as a substantial penalty on religious exercise. A vaccine mandate is a particularly invasive regulation. An injection is an intervention upon the body and, once performed, cannot be undone. Many vaccines furthermore were developed originally or tested with cells derived from aborted babies. Christians debate the ethical implications of using a medical advancement that is implicated in abortion. But it is certainly a valid and sincere objection that many Christians hold to those vaccinations.

SUMMARY OF ARGUMENT

In *Mahmoud v. Taylor*, 606 U.S. 522, 564-65 (2025) (*Mahmoud*), this Court held that when a law substantially interferes with the right of parents to guide the religious development of their children, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable. In *Mirabelli v. Bonta*, 607 U.S. 492, 495 (2026) (*Mirabelli*), it clarified that strict scrutiny applies to burdens on free religious exercise beyond the curricular requirements in *Mahmoud*.

The courts of appeals are returning this Court's free exercise jurisprudence to its pre-*Mahmoud* days through a combination of irrelevant distinction and analytical slippage. The decision of the Second Circuit here is a prime example. *Miller* declined to apply strict scrutiny

to petitioners' free exercise claims because "the burden does not operate in the way the burdens in *Yoder* and *Mahmoud* did. Section 2164 . . . imposes a health-and-safety condition on in-person school attendance to reduce the spread of communicable disease." App.22a-23a.

Miller is not alone. In *Perry v. Marteney*, 172 F.4th 315, 326-27 (4th Cir. 2026) (*Perry*), the Fourth Circuit rejected the Perrys' argument that strict scrutiny applied to a school vaccination mandate law without a religious exemption. It found that the need to protect public health "was not present in *Yoder* or *Mahmoud*." *Id.* at 327.

These cases accomplish indirectly what this Court has prohibited directly in *Mahmoud* and *Mirabelli*: they limit *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (*Yoder*) to its facts. App.22a-23a; *Perry, supra,* at 327; see *Mahmoud, supra*, at 558; *Mirabelli, supra,* at 495.

The doctrinal infirmities of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (*Smith*) provide the most effective vehicle for this back-to-the-future jurisprudence. *Smith*'s abandonment of strict scrutiny in free exercise cases challenging what it calls "neutral" and "generally applicable" laws is contrary to the Constitution's original public meaning and is unworkable. Under *Smith*, circumventing strict scrutiny is as easy as over-generalizing the government's asserted interest. The overwhelming weight of *Smith*'s deficiencies moreover falls on adherents to minority religions and on small religious groups such as Foothills.

On October 19, 2026, this Court granted certiorari in *Association for Education Fairness v. Montgomery County Board of Education*, No. 26-12, a challenge to a facially neutral admissions policy as racially discriminatory. It did so after having denied certiorari on similar challenges in 2024 in *Coalition for TJ v. Fairfax County School Board*, ___ U.S. ___, 146 S. Ct. 541 (2024), and again in *Boston Parent Coalition for Academic Excellence Corp. v. the School Committee for the City of Boston* (*Boston Parent Coalition*), ___ U.S. ___, 145 S. Ct. 15 (2024). In his dissent in *Boston Parent Coalition*, Justice Alito observed that "[w]e have now twice refused to correct a glaring constitutional error that threatens to perpetuate race-based affirmative action in defiance of *Students for Fair Admissions*." *Id.* at 18.

This Court should not wait for peak defiance of its free exercise jurisprudence before taking action. This Court should grant certiorari.

ARGUMENT

STRICT SCRUTINY APPLIES WHENEVER A LAW SUBSTANTIALLY INTERFERES WITH THE CRITICAL RIGHT OF PARENTS TO GUIDE THE RELIGIOUS DEVELOPMENT OF THEIR CHILDREN.

A. The Free Exercise of Religion Is a Fundamental Constitutional Right.

"The Free Exercise Clause of the First Amendment, which applies to the states through the Fourteenth Amendment, provides in relevant part that 'Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' " *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (*Lukumi Babalu*); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny. See *Lukumi Babalu, supra,* at 546; see also *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963).

"The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion), quoting *Yoder, supra,* at 215; see also *Lukumi Babalu, supra,* at 546. Where the government seeks to enforce a law that is neutral and of general applicability, however, it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices. See *Lukumi Babalu, supra,* at 531; *Smith, supra,* at 878-79.

Because "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires," courts are not permitted to inquire into the centrality of a professed belief to the adherent's religion or to question its validity in determining whether a religious practice exists. *Smith, supra,* at 877; see also *id.* at 886-87. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 714 (1981). An individual claiming

violation of free exercise rights need only demonstrate that the beliefs professed are "sincerely held" and in the individual's "own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965); see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 635 (2018).

In *Fulton v. City of Philadelphia, Pennsylvania*, 593 U.S. 522 (2021) (*Fulton*), this Court reaffirmed the centrality of religious liberty to our constitutional order. It observed that at the time when our Bill of Rights was ratified, "the right to religious liberty already had a long, rich, and complex history in this country." *Fulton, supra,* at 572 (Alito, J., concurring in the judgment).

In many state constitutions, Justice Alito noted, "freedom of religion enjoyed broad protection, and the right was universally said to be an unalienable right." *Id.* at 574 (internal quotation omitted). Freedom of religion was understood at the time to provide "broad protection for the free exercise of religion except where public 'peace' or 'safety' would be endangered." *Id.* at 578.

B. *Mahmoud* Establishes That Strict Scrutiny Applies When a Law Substantially Interferes with the Right of Parents to Guide the Religious Development of Their Children; The Rule of *Smith*, Itself a Departure from Court Precedent, Does Not Apply.

In *Mahmoud*, parents of public elementary school students and an unincorporated association of parents and teachers brought an action against a public school board alleging the board's refusal to provide notice when

"LGBTQ+-inclusive" storybooks would be taught and an opportunity to opt out of this instruction violated their First Amendment right of free exercise. *Mahmoud, supra,* at 540-43. They sought a preliminary and permanent injunction prohibiting the School Board from forcing their children and other students – over the objection of their parents – to read, listen to, or discuss the storybooks. *Id.* at 543. The District Court denied relief, and a divided panel of the Fourth Circuit affirmed. *Id.* at 544-45.

This Court reversed. *Mahmoud, supra,* at 569-70. Relying on *Yoder*, it found that when a law substantially interferes with the critical right of parents to guide the religious development of their children, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable. *Id.* at 564-65. It found that the School Board's introduction of the "LGBTQ+-inclusive" storybooks, along with its decision to withhold opt outs, places an unconstitutional burden on the parents' rights to the free exercise of their religion. *Id.* at 569.

The jurisprudence of this Court following *Mahmoud* has been consistent with these principles. In *Mirabelli*, this Court found that parents who seek religious exemption from policies preventing schools from telling them about their children's efforts to engage in gender transitioning at school unless the children consent to parental notification and requiring that schools use children's preferred names and pronouns regardless of their parents' wishes were likely to succeed on the merits of their free exercise claims. *Mirabelli, supra,* at 497-98.

As to *Smith* itself, members of this Court observed, even at the time *Smith* was decided, that *Smith* departed significantly from prior Court precedent. In *Smith*, Justice O'Connor wrote that *Smith* is "incompatible with our Nation's fundamental commitment to individual religious liberty." *Smith, supra*, at 891 (O'Connor, J., concurring in the judgment). As Justice Alito has observed in his concurrence in *Fulton*, *Smith* "ignored the 'normal and ordinary' meaning of the constitutional text, . . . and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption." *Fulton, supra,* at 595 (Alito, J., concurring in the judgment) (internal citation omitted).

Smith furthermore disregarded substantial contrary Court precedent. In *Smith*, Justice Blackmun wrote in his dissenting opinion that the majority opinion "perfunctorily dismiss[ed]" the "settled and inviolate principle of this Court's First Amendment jurisprudence" that state laws burdening religious freedom may stand only if justified by a compelling interest that cannot be served by a less restrictive means. *Smith, supra,* at 908 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). Justice Alito further observed in *Fulton* that *Smith* is "discordant" with such authority as *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) and *Masterpiece Cakeshop*. See *Fulton, supra,* at 600-01 (Alito, J., concurring in the judgment).

Smith's workability in practice has been subject to similar challenge. In his dissent from the denial of an application for injunctive relief related to a Maine regulation mandating COVID-19 vaccinations for healthcare workers, Justice Gorsuch highlighted

Smith's malleability depending upon the casting of the government's interest in the challenged law: "[W]hen judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's actually asserted interests as applied to the parties before it count – not post-hoc reimaginings of those interests expanded to some society-wide level of generality." *Does 1-3 v. Mills*, _ U.S. _, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting).

Justice Alito amplified these fidelity and workability concerns in his concurrence in *Fulton* where he noted that the application of *Smith* could have such "startling consequences" as permitting a ban on sacramental wine during Prohibition and prohibiting the circumcision of infants. *Fulton, supra,* at 545; *id.* at 545-46 (Alito, J., concurring in the judgment).

C. The Second Circuit Erroneously Applied Rational Basis Review to New York's School Vaccination Mandate Law.

The Second Circuit found under *Smith* that the enforcement of the school vaccination mandate against petitioners without a religious exemption did not violate their free exercise rights because the law was both "neutral" and "generally applicable." App.11a-20a. The law was "neutral," the court of appeals found, because it does not evidence hostility to religion. App.12a. It was "generally applicable," the court of appeals found, because the medical exemption and the religious exemption are not comparable and because the law does not extend broad discretion to government officials to grant exemptions

based on their subjective assessments of a party's reasons for requesting an exemption. App.15a-20a.

As to comparability, the court of appeals found that "New York's interest in passing § 2164 was in 'protect[ing] the health of all New Yorkers, particularly our children,' N.Y. Sponsor's Memorandum, 2019 S.B. S2994-A, from 'disease outbreaks' by 'sustaining a high vaccination rate among school children,' Bill Jacket at 4A." App.15a. It found that religious exemptions increase the risk of transmission of vaccine-preventable diseases in both vaccinated and unvaccinated students. App.16a.

The court of appeals found that a religious exemption is not comparable to a medical exemption because the two "are meaningfully different in scope and duration." App.16a. A medical exemption is limited to a specific immunization and lasts only "until such immunization is found no longer to be detrimental to the child's health." *Ibid.* (internal quotation omitted). A religious exemption applies to all vaccines and applies for the entire duration of a child's school admission. *Ibid.*

The court of appeals went on to find that even petitioners' relative isolation favored repeal of the religious exemption. App.16a-18a. It rejected petitioners' argument that Amish religious practice occurred in settings limited to the practitioners themselves and that the number of Amish practitioners was far smaller than the number of unvaccinated children statewide. App.16a-18a. The court of appeals rejected "the notion that the comparability analysis should be governed by a one-to-one comparison." App.17a (internal quotation omitted). It found, relying on *Tandon v. Newsom,* 593 U.S. 61 (2021), that the proper

comparators were aggregations of individual behaviors, not the individual behaviors themselves. *Ibid.*

The court of appeals found that exclusively Amish schools with religious-based objection to vaccines "are made up of a clustered population of almost 100% unvaccinated students – precisely the circumstances that most concerned the State." App.17a. It observed that the presence of communicable diseases in Amish communities "demonstrate[s] that **Amish isolation does not protect their communities from disease**. Thus, the unique attributes of Amish communities do not present a lesser risk as it pertains to the State's interest in protecting New Yorkers from disease." *Ibid.* (emphasis in original).

As to individualized exemptions, the court of appeals found that the medical exemption is constitutionally permissible because it is mandatory and applies to an objectively defined group. App.19a-20a.

The court of appeals acknowledged at least implicitly that both a religious exemption and a medical exemption work against New York's stated interest. App.15a-16a. It found though that "[r]epealing the religious exemption decreases to the greatest extent medically possible the number of unvaccinated students and thus the risk of disease; maintaining the medical exemption allows the small proportion of students who medically cannot be vaccinated to avoid the health consequences that taking a particular vaccine would inflict." *Ibid.* (internal quotation omitted).

The court of appeals distinguished *Mahmoud* on the basis that New York's law conditioning in-person school

attendance on vaccination does not burden petitioners' religious exercise in precisely the same way that *Yoder* and *Mahmoud* burdened free religious exercise: "[New York's vaccination law] does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents' faith, and does not enlist school officials to displace parental religious formation." App.22a. It found rather that the vaccination requirement was a public health measure intended to reduce the spread of communicable diseases. App.22a-23a. Although it found the burden on free religious exercise to be "serious," it found the burden not to be "the kind of state interference with a child's religious development that triggered strict scrutiny in *Yoder* or *Mahmoud*." App.23a.

The Second Circuit distinguished *Mirabelli* similarly narrowly. It found that *Mirabelli* "remains a case about school officials concealing from parents a matter central to their child's identity and upbringing, and thus displacing the parents' role in it." App.23a. Because New York's vaccination law does not involve concealment from parents or usurpation of their authority over their children's religious upbringing, strict scrutiny does not apply. App.23a-24a.

The court of appeals' fine distinctions do not permit, let alone compel, the result it reached. Vaccination is permanent. Petitioners have sincere religious beliefs about vaccination. New York's interference with petitioners' religious beliefs is at least as substantial as the interference in *Yoder*, *Mahmoud*, and *Mirabelli*. See *Mahmoud, supra,* at 550. Strict scrutiny applies

to petitioners' claims. *Mahmoud, supra,* at 569-70; *Mirabelli, supra,* at 497-98.

D. The Majority Opinion in *Perry* Likewise Expressly Discounts *Mahmoud* When It Finds Incorrectly That West Virginia's School Immunization Statute Is Constitutional Under Rational Basis Review Without a Religious Exemption.

In *Perry*, Anthony and Krystle Perry brought suit to obtain a religious exemption from West Virginia Code section 16-3-4. *Perry, supra,* 172 F.4th at 318. They enrolled their daughter in the Virtual Academy, which provides online education. *Id.* at 319.

When Mrs. Perry confirmed that her daughter was not fully vaccinated, school officials disenrolled her daughter from the school. *Perry, supra, at 319.* The Perrys sought a religious exemption but were informed that religious exemptions were not available. *Ibid.*

They brought suit on the ground that the lack of a religious exemption to the compulsory vaccination law violated their right to exercise their Christian faith under the First Amendment. *Perry, supra,* at 319. They sought a preliminary injunction allowing their daughter to re-enroll in the Virtual Academy while their lawsuit continued. *Id.* at 320.

The district court granted the Perrys relief. *Perry, supra*, at 320. Following *Smith*, it found that West Virginia Code section 16-3-4 was neither generally applicable nor narrowly tailored to serve a compelling state interest. *Ibid.*

The Fourth Circuit disagreed. *Perry, supra*, at 323. Finding that the compulsory vaccination law is neutral and generally applicable, the court of appeals noted that a law can withstand rational basis review so long as it is rationally related to a legitimate governmental interest. *Id.* at 322.

The court of appeals found that West Virginia has a compelling interest in reducing the spread and severity of infectious diseases. *Perry, supra,* at 322. The court of appeals placed principal reliance on *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), *Zucht v. King*, 260 U.S. 174, 176-77 (1922), and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Perry, supra,* at 320-21.

The court of appeals disagreed with the district court that the law is not generally applicable because the process for granting medical exemptions involves significant individualized discretion. *Perry, supra,* at 323. It found that there was no discretion exercised at all. *Id.* at 324. West Virginia denies them all. *Ibid.*

Concerning the inapplicability of the statute to other groups that pose a similar hazard to public health – children educated outside of the school system (*i.e.*, educated at home, in learning pods, or in microschools); adults working in schools; or children attending school who have been granted a medical exemption – the court of appeals found that treatment of these groups differently from the Perrys' daughter does not treat comparable secular activity more favorably than religious exercise. *Perry, supra,* at 324-25.

The court of appeals found that "[t]he burden imposed by West Virginia's compulsory vaccination law is not remotely 'of the same character' as those imposed in *Yoder* and *Mahmoud*. [Citation omitted.] The law is a public health measure, not an instrument of ideological indoctrination. It does not expose children to values or beliefs that might be hostile to their parents' religious beliefs. It does not require that school instruction extoll the virtues of vaccines. All the law requires is that, in the interest of protecting others, children get themselves vaccinated before attending school. The need for some to protect the health and well-being of all was not present in *Yoder* or *Mahmoud*." *Perry, supra,* at 327; but see *id.* at 329 (Niemeyer, J., dissenting). The court of appeals finally rejected the Perrys' argument that the law did not even survive rational basis review because the Perrys' daughter was attending school virtually. *Id.* at 328.

E. *Miller* and *Perry* Reflect the Analytical Slippage in Pre-*Mahmoud* School Vaccination Cases.

Miller and *Perry* reflect an analytical slippage which occurs frequently under *Smith* in cases considering the constitutionality of mandatory vaccination statutes. *Smith* can be, and very often is, read to permit a court to strike a balance between government regulation and free exercise that is different from the one our Constitution strikes.

1. Pre-*Mahmoud* Mandatory Vaccination Challenges Rely Heavily on the Framing of the Government's Interest.

In *Doe v. San Diego Unified School District*, Doe sought an injunction pending appeal barring the San

Diego Unified School District (SDUSD) from requiring compliance with a student COVID-19 vaccination mandate. *Doe v. San Diego Unified School District*, 19 F.4th 1173, 1175 (9th Cir. 2021) (*Doe*). SDUSD's mandate allowed for medical exemptions as well as conditional enrollment in on-site education for 30 days for certain categories of newly enrolling students (students who are homeless, in "migrant" status, in foster care, or in military families), and provided certain accommodations for students with Individualized Education Programs (IEPs). *Id.* at 1176. It did not have a religious exemption. *Ibid.* Doe brought a free exercise challenge to the mandate, alleging that the mandate was unconstitutional on its face and applied to her because it treated comparable secular conduct more favorably than religious exercise. *Ibid.*

The Ninth Circuit denied her request for an injunction. *Doe, supra,* at 1175. The court of appeals found that the mandate was both neutral and generally applicable. *Id.* at 1180.

The court of appeals found that the medical exemption and a religious exemption were not comparable. *Doe, supra,* at 1177-78. It found that "[t]he medical exemption is limited to students with contraindications or precautions recognized by the Centers for Disease Control and Prevention or the vaccine manufacturer, and the request must be certified by a physician. Limitation of the medical exemption in this way serves the primary interest for imposing the mandate — protecting student 'health and safety' — and so does not undermine the District's interests as a religious exemption would." *Id.* at 1178. It concluded therefore that "[a]ppellants have not demonstrated a likelihood of success in showing that the

district court erred by applying rational basis review." *Id.* at 1180.

The dissent countered that the majority had reached its result by misframing SDUSD's interest. *Doe, supra,* at 1184 (Ikuta, J., dissenting). The dissent contended that the majority's formulation allowed it incorrectly to take into account that the reason for medical exemption is to protect the health of students with recognized contraindications or precautions for vaccination. *Id.* at 1185. The dissent found that SDUSD's interest was to " 'ensure the highest-quality instruction in the *safest environment* possible for all students and employees' by preventing the transmission and spread of COVID-19." *Ibid.* (emphasis in original). Measured against this interest, the reasons why a given person is exempt are irrelevant. *Ibid.* All exempt people pose the same risks to the health and safety of students and employees regardless of why they are exempt. *Ibid.*

The dissent therefore reasoned that "[b]ecause in-person attendance by students who are unvaccinated for religious reasons poses 'similar risks' to the school environment as in-person attendance by students who are unvaccinated for medical or logistical reasons, the mandate is not generally applicable." *Doe, supra,* at 1184. Applying strict scrutiny, the dissent would have granted Doe's application for an injunction pending appeal. *Id.* at 1188.

The vindication of Doe's fundamental constitutional right of free exercise of religion thus turned on whether the court framed SDUSD's interest in its COVID-19 vaccine mandate as "protecting student health and safety" or as "ensur[ing] the highest-quality instruction in the

safest environment possible for all students and employees by preventing the transmission and spread of COVID-19." See *Doe, supra,* at 1178, 1185 (emphasis in original); see also W*e The Patriots USA, Inc. v. Connecticut Office of Early Childhood Development*, 76 F.4th 130, 151-55 (2d Cir. 2023) (repeal of religious exemption to school vaccine mandate while retaining medical exemption "generally applicable" and thus constitutional under rational basis review because medical exemption protects the health of medically exempt persons by not forcing them to take medically contraindicated vaccine); but see *id.* at 165 ("To the extent the asserted interest justifying the Act is the prevention of the spread of communicable diseases among Connecticut students entering a school, it is obvious that an unvaccinated student with a medical objection who is allowed to attend school poses the same health risk to another student as an unvaccinated student with a religious objection.") (Bianco, J., concurring in part and dissenting in part).

2. *Miller* and *Perry* Have Adopted Salient Portions of the Faulty Reasoning in These Pre-*Mahmoud* Cases.

The Second Circuit here found that repeal of the religious exemption was more strongly rationally related to New York's interest because it imposed a greater burden on petitioners' free religious exercise. App.17a-18a. *Perry* finds similarly that the lack of a religious exemption in the West Virginia statute is constitutional because the statute disallows all religious exemptions. *Perry, supra,* at 323-24. In *Miller*, as in *Perry*, the relative isolation of the plaintiffs was not significant to the court's determination of the statute's constitutionality.

App.17a-18a; see *Perry, supra,* at 328. *Miller* and *Perry* both rejected arguments that the exclusion from the vaccination mandate of other classes of people who pose the same risk if not vaccinated rendered the statute an impermissible burden on religious exercise. App.17a-18a, & fn. 13; see *Perry, supra,* at 324-25. As *Doe* shows, a broad characterization of the asserted governmental interest in a statute or policy burdening religious exercise can, like the one here, increase the likelihood that a statute or policy will be found constitutional. *Doe, supra,* 19 F.4th at 1178, 1185.

Like the other cases discussed above, the lower court here proceeds from a very broad characterization of New York's asserted interest in its mandatory vaccination statute. The court of appeals identified the interest as "protecting the health of all New Yorkers, particularly our children." App.15a (internal quotation omitted); see also *id.* at 17a-18a. *Perry* likewise identified the interest of the vaccination statute broadly as "protect[ing] the health and well-being of school children." *Perry, supra,* at 318.

Mahmoud has abrogated the flawed reasoning of these cases. *Mahmoud, supra*, at 564-65, 569-70. Under *Mahmoud* and *Mirabelli*, strict scrutiny applies to petitioners' claims. *Mahmoud, supra,* at 569-70; *Mirabelli, supra,* at 497-98.

This Court has clarified further that *Yoder* is not limited to its facts. *Mahmoud, supra*, at 558; *Mirabelli, supra,* at 495. Courts such as the lower court here nevertheless have decided cases such as this one as if *Mahmoud* and *Mirabelli* were limited to their facts. App.22a-23a; *Perry, supra,* at 327.

This Court should grant certiorari to prevent this misapplication of its jurisprudence from continuing.

F. The Burdens of the Return to Pre-*Mahmoud* Free Exercise Jurisprudence Fall Hardest on Adherents to Minority Religions and on Smaller Religious Institutions Such as *Amicus*.

Strict scrutiny in free exercise cases protects minority religious practice and small religious institutions from majoritarian indifference. *Mahmoud, supra,* at 564-65. The burdens of this resurgence of pre-*Mahmoud* lack of clarity fall hardest on adherents to minority religions and on smaller religious institutions such as *amicus*. See *Fulton, supra,* at 587 (Alito, J., concurring in the judgment).

As Justice Gorsuch observed in his concurrence in *Fulton*, this Court's failure in *Fulton* to overrule *Smith* was a matter of great practical consequence: "Its litigation has already lasted years – and today's

(ir)resolution promises more of the same. Had we followed the path Justice [Alito] outlines – holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable — this case would end today. Instead, the majority's course guarantees that this litigation is only getting started. . .." *Id.* at 624 (Gorsuch, J., concurring in the judgment). He continues, "The City has expressed its determination to put [Catholic Social Services (CSS)] to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children." *Id.* at 625.

Perry refers to Revolutionary War-era smallpox vaccination mandates for soldiers to show that vaccination as a common health measure "stretches back to our nation's founding." *Perry, supra,* 172 F.4th at 320. Justice Alito, however, in his concurrence in *Fulton*, noted that the Continental Congress granted exemptions for Revolutionary War service to religious objectors "because conscription would do 'violence to their consciences.' Resolution of July 18, 1775, in 2 Journals of the Continental Congress, 1774–1789, p. 189 (W. Ford ed. 1905) (quoted in [McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1469 and n. 299 (1990)]). This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers, the very survival of the new Nation often seemed in danger, and the Members of Congress faced bleak personal prospects

if the war was lost. Yet despite these stakes, exemptions were granted." *Fulton, supra,* at 583-84 (Alito, J., concurring in the judgment). Religious exemptions to vaccination mandates, then, also stretch back to our nation's founding. See *ibid.*

Religious objection to vaccination is often rooted in the use of aborted fetal cell lines in vaccine research, development, and production; the Biblical mandate to honor the body as the temple of the Holy Spirit; and a belief that the right of bodily autonomy is God-given and pre-political. See Gen. 1:27; Ps. 139:13-14; 1 Cor. 6:19-20 (NKJV). It is not anti-scientific obstinacy.

For every Roman Catholic Church, for every Jack Phillips, there are hundreds of people and hundreds of small religious groups forced to yield to the effects of laws which unconstitutionally burden their free religious exercise.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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