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 *Amicus Curiae* of America's Future, Public Advocate of the United States, Public Advocate Fdn., U.S. Constitutional Rights Legal Def. Fund, Clare Boothe Luce Center for Conservative Women, and the Center for Medical Freedom of the Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Def. Fund, Clare Boothe Luce Center for Conservative Women, and Center for Medical Freedom of the Conservative Legal Defense and Education Fund, are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

This Court granted, vacated and remanded an earlier petition in this case, No. 25-133, "for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025)." Some of these *amici* filed *amicus* briefs in support of the Petitioners in *Mahmoud* U.S. Supreme Court, No. 24-297: Brief *Amici Curiae* of America's Future, et al. (Oct. 16, 2024) and Brief *Amici Curiae* of America's Future, et al. (Mar. 10, 2025). Most of these *amici* filed *amicus* briefs in support of the Application to Vacate Stay in *Mirabelli v. Bonta*, U.S. Supreme

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Court No. 25A810: Brief *Amicus Curiae* of America's Future, et al. (Jan. 21, 2026).

STATEMENT OF THE CASE

New York's school vaccination mandate long included a religious exemption. Until 2019, PHL 2164(9) provided: 'This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school....'" *Miller v. McDonald*, 720 F. Supp. 3d 198, 203 (W.D. N.Y. 2024) ("*Miller I*"). In 2019, the legislature repealed the religious exemption. *Id.*

The state then enforced the vaccination laws against students in religious schools who were previously exempt based on the religious beliefs of their parents. New York's Department of Health ("DOH") initiated actions against three Amish schools. *Id.* at 204. As requested by DOH, an administrative law judge imposed massive fines against the schools: "a $52,000 penalty against Dygert Road School, representing the $2,000 maximum civil penalty for 26 students who were found to be noncompliant with PHL § 2164 for one day; a $46,000 penalty against Twin Mountains School ... and a $20,000 penalty against Shady Lane School." *Id.* at 205.

The schools and two fathers of children in those schools, who also served as members of the school boards, filed a complaint in the Western District of

New York against the New York Commissioner of Health and the New York Commissioner of Education. *Id.* at 202-04. The district court viewed the law as neutral and generally applicable, seeing no evidence of overt hostility toward the Amish Petititoners' religious beliefs. *Id.* at 210-17. Accordingly, the court concluded that the statute was subject only to **rational basis** review, under the doctrine of *Employment Division v. Smith*, 494 U.S. 872 (1990). *Miller I* at 217. The court found that the vaccination mandate was rational, and dismissed the complaint. *Id.* at 218.

On appeal, the Second Circuit affirmed. Like the district court, the Second Circuit found that law to be neutral. *Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025) ("*Miller II*"). Relying on *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), the court declared that "the Supreme Court and this Court have consistently viewed immunization laws with approval." *Id.* at 265.

Plaintiffs filed a petition for certiorari on July 31, 2025, No. 25-133, and on December 8, 2025 this Court ordered: "The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025)." *Miller v. McDonald*, 146 S. Ct. 879 (2025).

On remand, the Second Circuit again found the law to be neutral and generally applicable. *Miller v. McDonald*, 180 F.4th 420, 428-31 (2d Cir. 2026)

("*Miller III* "). The Second Circuit rejected Plaintiffs' reliance on this Court's decision in *Mahmoud,* ruling that "*Mahmoud* asks whether a burden is 'of the same character' as the burden in *Yoder*, not whether it is more or less serious.... A greater burden in degree is not necessarily the same burden in kind." *Id.* at 433.

SUMMARY OF ARGUMENT

Petitioners assert that "[b]ecause PHL 2164 burdens Petitioners' parental free exercise rights," the statute cannot stand. Petition for Certiorari ("Pet.") at 18. They further state:

> [T]he Second Circuit again erroneously limited this Court's precedents to their facts. The Second Circuit essentially held that unless a law imposes the exact same burden on parental rights as in *Yoder, Mahmoud*, or *Mirabelli*, the law does not trigger **strict scrutiny**. But that would have the effect of limiting *Yoder*, *Mahmoud*, and *Mirabelli* to the particular circumstances presented in those cases, which *Mahmoud* instructs is wrong. Because PHL 2164 "'undermin[es]' the religious beliefs and practices that [Petitioner] parents wish to instill in their children," *Mahmoud*, 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218), it [violates free exercise.] [Pet. at 20 (emphasis added).]

Petitioners contend this Court should grant certiorari to correct the lower court's refusal to apply **strict scrutiny** to PHL 2164 — a test which they

argue the law cannot pass, and therefore violates the Free Exercise Clause. These *amici* also urge this Court to grant certiorari, but for a different reason, and to reach a different decision. The courts below should not have used rational basis or strict scrutiny or any other "judge-empowering interest-balancing inquiry"[2] to determine if the Free Exercise Clause was violated. Rather, they should have applied the Free Exercise Clause using the same approach that this Court did in applying the Second Amendment to a statute — by examining the text, history, and tradition of the Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) and *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1, 20 (2022). After all, as Chief Justice Roberts explained during the 2008 oral argument in *District of Columbia v. Heller*, "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up."[3] Such interest balancing tests improperly give modern judges justification for allowing prohibitions on the Free Exercise of Religion as understood when ratified. However, as Justice Scalia wrote for the Court: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller* at 634. For that reason, this Court rejected the use of balancing tests in applying the Second Amendment, and they now should be

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[2] *See Heller* at 634 (internal quotation omitted).

[3] Transcript of Argument, *District of Columbia v. Heller*, No. 07-290, at 44 (Mar. 18, 2008).

jettisoned in applying the Free Exercise Clause as well.

In re-establishing the Free Exercise of Religion, this Court also will need to come to grips with the fact that "Religion" is a noun, not a verb, and it is Religion that is protected — not just "religious" people such as the Amish. The Free Exercise of Religion can be claimed by the Amish, persons of any other faith, or persons of no faith at all. The word "Religion" has a meaning that was well established prior to its use in the First Amendment. As James Madison described it in his famous "Memorial and Remonstrance": "**Religion"** — which is "the duty which we owe to our Creator and the manner of discharging it" — can be "directed only by reason and conviction" but "**not by force or violence**" — which are the instruments of the state.[4] (Emphasis added). The decision to receive medical treatment — including being vaccinated — is a matter of conscience between each individual and God. The state has no power, no authority, and no jurisdiction, to criminalize or otherwise punish a person's refusal to accept medical treatment, including vaccines.

If this Court grants certiorari, it can return to a constitutionally faithful path to understand the meaning of "religion." At a minimum, it would require New York to demonstrate historically relevant antecedents from the Founding Era. If such antecedents cannot be shown, the New York

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[4] I Letters and Other Writings of James Madison 162. (1884).

mandatory vaccine law would follow the fate of its "good cause" requirement to carry a firearm under *Bruen* which had no relevant historical antecedent. Nothing in the text, history, or tradition of the Free Exercise Clause supports such an egregious violation of the free exercise of religion by plaintiffs. *Mahmoud* rightly instructed that the Free Exercise Clause knows no "Amish zone" where Amish parents have robust rights to refuse vaccines for their children, while Catholic, Muslim, Orthodox, Evangelical, Jewish, agnostic, and atheist parents do not. *"Yoder* ... cannot be breezily dismissed as a special exception granted to one particular religious minority. It instead embodies a principle of general applicability, and that principle provides ... robust protection for religious liberty...." *Mahmoud* at 558.

Further, the Second Circuit relied on this Court's heavily criticized opinions in *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), to render the First Amendment's protection of the Free Exercise of Religion, in the words of Jefferson, "a mere thing of wax in the hands of the judiciary."[5]

These *amici* agree with Petitioners that this Court should hear this case, and overrule *Smith* and its "neutral and generally applicable" test that has been employed to allow innumerable govenment violations of the Free Exercise of Religion. These *amici* also

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[5] Thomas Jefferson, "Letter to Spencer Roane" (Sept. 6, 1819), in X Writings of Thomas Jefferson 141 (Paul Ford, ed., 1899).

believe that this Court should reconsider *Jacobson* and demonstrate that the exercise of state police power must yield to enumerated constitutional rights, including particularly, as relevant here, matters of conscience protected by the Free Exercise Clause.

ARGUMENT

I. THE COURTS BELOW FAILED TO PROTECT PETITIONERS FROM NEW YORK PROHIBITING THEIR FREE EXERCISE OF RELIGION.

A. The Free Exercise Clause Draws Its Genesis from Madison's Virginia Declaration of Rights.

The First Amendment provides, "Congress shall make no law ... prohibiting the free exercise [of religion]." Following this Court's decision in *Employment Division v. Smith*, the circuit court read this language to mean that compulsory vaccination laws were permissible, as long as they were not targeted against the Petitioners. "A neutral and generally applicable law's burden on religion is constitutional if the law passes the relatively low hurdle of rational basis review." *Miller II* at 265 (citing *Smith*).

But that understanding stands in direct opposition to the historical truth that the Free Exercise Clause embodies James Madison's revolutionary ideal that government has **no jurisdiction** with respect to lawful matters of conscience. Such matters are

matters of **religion**, because they are **duties owed only to God**. The government has no jurisdiction, no authority, no power, to compel an individual to take a substance into his body if his conscience does not permit it.

No deference to legislatures is possible because unlike some early state constitutions which provided only for government "tolerance" of religion,[6] Virginia charted a different path that led directly to the First Amendment as written. Dr. Charles C. Haynes, founding director of the Religious Freedom Center of the Newseum Institute, describes how Virginia embarked on the "world's boldest ... experiment in religious freedom," based on Madison's and Jefferson's ideal of "**liberty of conscience**, for all:"[7]

> [I]n 1776 ... at the convention called to declare Virginia's independence ... Madison successfully called for an amendment to the venerable George Mason's draft of the Virginia Declaration of Rights, **changing "toleration in the exercise of religion" to "free exercise of religion.**"
>
> With that small change in language, Virginia moved from toleration to full religious

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[6] *See, e.g.*, Massachusetts Constitution, section XXVIII, Sources of Our Liberties (Richard Perry & John Cooper, eds., rev'd ed. 1978).

[7] Charles Haynes, Ph.D., "James Madison: Champion of the 'cause of conscience,'" *Washington Times* (Dec. 12, 2016) (emphasis added).

> freedom — a precedent that would greatly influence the new nation's commitment to free exercise of religion under the First Amendment. **No longer would government have the power** to decide which groups to "tolerate" and what **conditions to place on the practice of their religion**. [*Id*. (emphasis added).]

B. This Court Has Defined "Religion" following Madison's Definition.

In *Reynolds v. United States*, 98 U.S. 145 (1879), this Court viewed the Virginia Declaration of Rights as the ideological precursor to the Free Exercise Clause. Noting that "'religion' is not defined in the Constitution" (*Reynolds* at 162), this Court looked to Madison's definition in the Declaration of Rights. *See Reynolds* at 162-63. Section 16 of the Declaration of Rights declared that **religion** is:

> the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, **not by force or violence**. [Constitution of Virginia, Section 16, reprinted in Sources of Our Liberties at 312 (emphasis added).]

"Force" and "violence" (and fines) are the tools of the state and may not be employed to prohibit the free exercise of religion. The *Reynolds* Court recognized that "religion" was exactly as Madison defined it, a subject area "not within the cognizance of civil government." *Reynolds* at 163. The Court explained

that this **jurisdictional principle** was detailed in James Madison's Memorial and Remonstrance, submitted to the Virginia Assembly in 1785, some nine years after the Declaration of Rights, in support of Thomas Jefferson's Bill for Establishing Religious Freedom. Quoting from the Declaration, Madison wrote these words:

> [W]e hold it for a fundamental and undeniable truth, "that **Religion** or **the duty which we owe to our Creator and the manner of discharging it**, can be directed only by **reason and conviction**, not by **force or violence**" [citing the Virginia Declaration of Rights]. The Religion then of every man must be left to the conviction and **conscience** of every man; and it is the right of every man to exercise it as these may dictate.... We maintain therefore that in matters of Religion, **no man's right is abridged by** the institution of **Civil Society** and that **Religion is wholly exempt from its cognizance**.[8]

Four months later, the General Assembly passed Jefferson's "Act for Establishing Religious Freedom." In the preamble, as the *Reynolds* Court noted, this

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[8] James Madison, "Memorial and Remonstrance" to the Honorable General Assembly of the Commonwealth of Virginia (June 20, 1785), reprinted in 5 The Founders' Constitution at 82 (item #43) (Phillip Kurland & Ralph Lerner, eds., U. of Chi.: 1987) (emphasis added).

same **jurisdictional principle** was reaffirmed. *See Reynolds* at 163. The preamble read:

> Whereas Almighty God hath created the mind free; that **all attempts to influence it by temporal punishments or burthens, or by civil incapacitations** ... are a departure from the plan of the Holy author of our religion, who being Lord both of **body** and mind, yet chose not to propagate it by **coercion**s on either, as was in his Almighty power to do....[9]

Accordingly, the *Reynolds* Court incorporated Madison's definition of "religion" as the best expression of the intent of the Framers of the Free Exercise Clause.

Compulsory vaccination against religious belief forces the victim to act in opposition to his or her convictions. It inserts the government into an area over which, Madison recognized, it has no jurisdiction. The Free Exercise of Religion **does not protect "religious" people**; rather, it protects a sphere of our lives — termed "**religion**" — from any governmental intrusion. "Religion" describes all lawful matters that are matters of conscience — such as our convictions as to what may be injected into our bodies — which are areas where no government may coerce.

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[9] Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution at 84 (item #44) (emphasis added).

C. Compulsory Vaccination Against Conscience Violates the Free Exercise of Religion.

As Jefferson and Madison saw it, and as the *Reynolds* Court later agreed, the Free Exercise Clause must be understood by the plan of its framers. It cannot be understood in terms of judicial "levels of scrutiny" that have given judges the power to manipulate the text of the Constitution ever since they were introduced in the mid-1900s. Under the Free Exercise Clause, government has no jurisdiction whatsoever over the area of "religion." No jurisdiction means no power and no authority. Under balancing, government can intrude on the rights of Americans if judges believe such intrusion meets the terms of some judge-made, atextual test. Historically, persons with contagious diseases may have been quarantined, but new prohibitions on free exercise such as mandatory vaccines cannot be imposed even in service to "public health" concerns. Where there is no jurisdiction, there are no competing interests to balance. The Bill of Rights are "the very product of an interest balancing by the people." *Heller* at 635. The domain of religion is "wholly exempt from [the] cognizance" of the civil magistrate. *See* Memorial and Remonstrance.

The Second Circuit decision on remand was written as if *Mahmoud* had never been decided, although acknowledging that the compulsion of the vaccine mandate "may weigh on Plaintiffs more heavily than the policy in *Mahmoud*." The Second Circuit believed only that "*Mahmoud* asks whether a burden is 'of the same character' as the burden in

Yoder, not whether it is more or less serious." *Miller III* at 433 and n. 17.

Actually, in *Mahmoud*, this Court rejected the idea that only government mandates that compel citizens to act in opposition to their beliefs violate the Free Exercise Clause.

> [*West Virginia Bd. of Ed. v.*] *Barnette* [319 U.S. 624 (1943)] dealt with an especially egregious kind of direct coercion: a requirement that students make an affirmation contrary to their parents' religious beliefs. But that does not mean that the protections of the First Amendment extend **only to policies that compel children** to depart from the religious practices of their parents. To the contrary, in *Yoder*, we held that the Free Exercise Clause protects against policies that impose **more subtle forms of interference** with the religious upbringing of children. [*Mahmoud* at 548.]

In other words, this Court found that simply teaching against the religious beliefs of the parents is less of a burden than direct compulsion, and that the same First Amendment that undeniably protects against the greater burden protects against the lesser as well. It certainly did not say — nor could it have — that the greater burden of actual compulsion forbidden in *Barnette* and echoed by DOH here is permissible unless it is the precise type as the lesser burden of indoctrination imposed in *Mahmoud*.

II. THE TEXT, HISTORY, AND TRADITION OF THE FREE EXERCISE CLAUSE DEMANDS REJECTION OF *SMITH'S* "NEUTRAL AND GENERALLY APPLICABLE" TEST.

These *amici* argue that this Court should grant certiorari in this case, and overrule the "neutral and generally applicable" test derived from *Smith*. The "neutral and generally applicable" exception has operated to give judges impermissible latitude to render the free exercise of religion "a second-class right, subject to an entirely different [and more infringing] body of rules than the other Bill of Rights guarantees." *Bruen* at 70. And indeed,

> this Court has often permitted exemptions from generally applicable laws in [other] First Amendment cases. For instance, in *Boy Scouts of America v. Dale*, 530 U.S. 640 ... (2000), [this Court] granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Inc., 515 U.S. 557 ... (1995), parade sponsors' speech was exempted from the requirements of a similar law. [*Fulton v. City of Philadelphia*, 593 U.S. 522, 602 (2021) (Alito, J., concurring).]

The First Amendment states plainly, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." A requirement that citizens violate their conscience, even if the law was "neutral and generally applicable,"

necessarily prohibits free exercise. Legislative malice is not the only way free exercise can be violated.

This Court has warned that exceptions "cannot be construed in a manner that would swallow the rule." *United States v. Cooley*, 593 U.S. 345, 354 (2021). But the "neutral and generally applicable" doctrine's "exception" to the First Amendment's "make no law" not only threatens to swallow the rule. Any creative legislator can craft a law that prohibits religious expression to make it apply to the religious and non-religious alike. Justice O'Connor warned of this in her *Smith* dissent:

> [F]ew States would be so naive as to enact a law **directly prohibiting** or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State **directly targets** a religious practice. [*Smith* at 894 (O'Connor, J., concurring) (emphasis added).]

Sadly, Justice O'Connor's warning has proven prescient. In 2021, Justice Alito issued a clear call to revisit and overturn the "neutral and generally applicable" test. He called out the *Smith* majority for its abrupt departure from text, history, and tradition:

> ***Smith* ... paid shockingly little attention to the text of the Free Exercise Clause.** Instead of examining what readers would have understood its words to mean when adopted, the opinion merely asked whether it was "permissible" to read the text to have the meaning that the majority favored.... This strange treatment of the constitutional text cannot be justified — and is especially surprising since it clashes so sharply with the way in which *Smith's* author, Justice Scalia, generally treated the text of the Constitution (and, indeed, with his entire theory of legal interpretation). [*Fulton* at 564 (Alito, J., concurring) (emphasis added).]

Justice Alito then went on to undertake the review of the text, history, and tradition of the Free Exercise Clause that he called on this entire Court to undertake in reviewing *Smith*.

> "To **prohibit**" meant either "[t]o forbid" or "to hinder." 2 S. Johnson, A Dictionary of the English Language (1755) (Johnson (1755)). The term "**exercise**" had both a broad primary definition ("[p]ractice" or "outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private").... And "**free**," in the sense relevant here, meant "unrestrained." 1 Johnson (1755). [*Id*. at 566-67 (emphasis added).]

To this word study, Justice Alito added the central flaw of *Smith*:

> If we put these definitions together, **the ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices** or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. **It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted**. [*Id.* at 567 (emphasis added).]

It is not sufficient that the government permit Petitioners to have the personal belief that accepting a vaccine violates their conscience. The First Amendment empowers each individual to act consistent with their conscience and refuse a coerced vaccine without penalty. The Second Circuit violated the principle Justice Jackson famously set out in 1943:

> The **very purpose of a Bill of Rights** was to **withdraw certain subjects from the vicissitudes of political controversy**, to place them **beyond the reach of majorities and officials** and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, **freedom of worship** and assembly, and other fundamental rights **may not be submitted to vote; they depend on the outcome of no elections**. [*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).]

Justice Alito further hammered home the point that the reason for placing a liberty into the Bill of Rights is to give that liberty a status that is protected to a degree not granted to unenumerated rights. "The key point ... is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the 'exercise of religion') the right to do so without hindrance." [*Fulton* at 567-68 (Alito, J., concurring).] Justice Alito was correct: "*Smith* was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom." *Id.* at 614 (Alito, J., concurring).

III. THE COMMON LAW PROTECTS THE FUNDAMENTAL RIGHT OF THE INDIVIDUAL IN BODY AND LIMB.

Over 120 years ago, this Court decided *Jacobson*, upholding the police powers of states to impose a modest fine for violation of a vaccine mandate. That decision was relied on by Justice Oliver Wendell Holmes as authority for this Court's justification of sterilization in pursuit of the pseudo-science of eugenics. *See Buck v. Bell*, 274 U.S. 200, 207 (1927) ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."). Neither case has been explicitly overruled by this Court, and *Jacobson* is routinely used to justify all manner of penalties for refusing vaccines.

However, when *Jacobson* was decided, this Court offered at least lip service to the principle that enumerated rights trump state police powers. "A local

enactment or regulation, even if based on the acknowledged police power of a State, must always yield in case of conflict with ... any right which [the Constitution] gives or secures." *Id.* at 25. More recently, that basic principle was expressed by multiple justices in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), and *Agudath Israel of America v. Cuomo*, 592 U.S. 1119 (Nov. 25, 2020). (*See also Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540, 558 (1902); *Dobbins v. Los Angeles*, 195 U.S. 223, 237 (1904)).

While in *Jacobson* this Court failed to act consistently with its own admonition, it did so several years earlier. In *Union P. R. Co. v. Botsford*, 141 U.S. 250 (1891), this Court held that a court could not compel a party to submit to a surgical examination to determine if the extent of an injury was as serious as the party claimed. This Court recognized that:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "**The right to one's person may be said to be a right of complete immunity**: to be let alone." [*Id.* at 251 (emphasis added).]

The principle that bodily integrity is protected from government power dates back to William Blackstone, who recognized "[t]he right of personal

security [which] consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[10] This right to bodily integrity Blackstone placed among "[t]he absolute rights of every Englishman (which, in a political sense, are usually called their liberties) [and] are coeval with our form of government.... The rights themselves consist in a number of private immunities; which are indeed no other, than either **that residual of natural liberty, which is not required by the laws of society to be sacrificed to public convenience."** *Id.* at 17-18 (emphasis added). Blackstone explained that "[a] man's limbs enable him to protect himself from external injuries in a state of nature. **To these, therefore, he has a natural, inherent right**; and they cannot be wantonly destroyed or disabled without a **manifest breach of civil liberty**." *Id.* at 19 (emphasis added).[11]

Then-judge Cardozo also echoed this understanding even after *Jacobson*. "Every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 129 (N.Y. 1914). *See also Pratt v. Davis*, 118 Ill. App. 161, 166 (1905), *aff'd.* 224 Ill. 300, 79 N.E. 562 (Ill. 1906).

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[10] I William Blackstone, Commentaries on the Laws of England 18 (R. Kerr, ed., 1873).

[11] John Locke likewise wrote that "every Man has a Property in his own Person. This no Body has any Right to but himself." John Locke, Second Treatise on Government Section 27 (1689).

As this Court has repeatedly recognized, the Constitution has its genesis in the common law and must be interpreted by that history. "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v. Alabama*, 124 U.S. 465, 478 (1888). *See also Ex parte Grossman,* 267 U.S. 87, 108-09 (1925).

The Second Circuit's approval of penalties being imposed on the exercise of lawful religious liberties violates our Constitution's protection of what Blackstone identified as "a natural, inherent right" which "is not required by the laws of society to be sacrificed to public convenience."

IV. *JACOBSON* HAS BEEN INTERPRETED TO JUSTIFY STATES PROHIBITING THE FREE EXERCISE OF RELIGION AND SHOULD BE RECONSIDERED.

While *Jacobson v. Massachusetts* has long been cited for the claim that state police powers over health and safety trump constitutional objections, this is not what it held. In 1905, this Court had not yet incorporated the First Amendment against the states. Petitioner Jacobson did not argue free exercise, but only due process, equal protection, and a liberty interest in control of his own body.[12] This Court did

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[12] Josh Blackman, "The Irrepressible Myth of *Jacobson v. Massachusetts*," 70 Buffalo L. Rev. 131, 170-72 (2022) (hereinafter "Blackman").

not consider specific enumerated rights in its ruling, let alone free exercise. *Id.*

Further, *Jacobson* contains an implied limitation. This Court upheld only a *de minimis* five-dollar fine against Jacobson, who simply paid the fine and remained unvaccinated. The Court never held that the state could physically force the vaccination on Jacobson. Blackman at 181. Jacobson's counsel noted that, even by 1905, "[t]hree-quarters of the States have not entered upon the policy of enforcing vaccination by legal penalty. Not one of the States undertakes forcible vaccination." *Jacobson* at 11 (argument for plaintiff in error). And indeed, the Court expressly limited its holding to the facts at hand. "We now decide only that the statute covers **the present case**, and that nothing clearly appears that would justify this court in holding it to be unconstitutional." *Id.* at 39.

But it did not take the Court long to forget that *Jacobson* never considered free exercise. In 1944, the Court stated in *dictum*, citing *Jacobson*, that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Jacobson* at 166 n.12). Two decades later, Justice Brennan for the Court completely mischaracterized *Jacobson*, falsely claiming that the case in fact implicated free exercise, and thus opening the door for state police powers to trump enumerated constitutional rights.

> **[T]he Court has rejected challenges under the Free Exercise Clause** to governmental regulation of certain overt acts prompted by religious beliefs or principles, for even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., ... *Jacobson* ..." [*Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (internal quotations omitted) (emphasis added).]

In 2020, COVID turned the reinvented *Jacobson,* with its supra-constitutional powers over enumerated rights, into a "superprecedent":

> Between February 1905 and March 2020, *Jacobson* was cited in about 700 federal and state cases — about five times per year over the course of 115 years.... But in the first nine months of the pandemic — from March through December 2020 — *Jacobson* was cited more than 200 times. The citation rate increased by more than 5,000%! [Blackman at 227.]

In *S. Bay United Pentecostal Church v. Newsom*, 590 U.S. 965 (2020), this Court had refused *per curiam* to enjoin a "stay at home order" in which California forbade in-person worship services during COVID. Chief Justice Roberts wrote an influential concurrence drawing on the erroneous conclusion based on *Jacobson*: "those restrictions appear consistent with

the Free Exercise Clause of the First Amendment.... Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States...." *S. Bay United Pentecostal Church* at 966-67 (Roberts, C.J., concurring).

Courts across the nation immediately began using *Jacobson* as a cudgel against religious exercise.

> Roberts's single citation to *Jacobson* led to a jurisprudential revolution almost overnight. Between June and December of 2020, Chief Justice Roberts's *South Bay* concurrence became a 'superprecedent.' Approximately 140 cases cited the solo opinion, more than 90 of which also cited *Jacobson*. For a time, those five paragraphs became constitutional gospel." [Blackman at 238.]

This Court was soon forced to dial back the *Jacobson* "superprecedent" lest it swallow the entire Constitution. By the end of 2020, this Court had drastically course-corrected, this time upholding attendance at worship services against "public health" emergency restrictions. In his concurrence, Justice Gorsuch opened fire on the repeated reincarnation of *Jacobson* as a limitation on free exercise:

> Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, **courts must resume applying the Free Exercise Clause**.... ***Jacobson*** **hardly**

> **supports cutting the Constitution loose during a pandemic**. [*Roman Catholic Diocese* at 23 (Gorsuch, J., concurring) (emphasis added).]

Justice Gorsuch cut to the heart of the mistake begun in *Prince* and *Sherbert*. "Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, **it does not follow that the same fate should befall the textually explicit right to religious exercise**." *Id.* at 24 (emphasis added).

Other judges have agreed. Judge Ho of the Fifth Circuit noted, "Officials may take appropriate emergency public health measures to combat a pandemic. But '[n]othing in *Jacobson* supports the view that an emergency displaces normal constitutional standards.'" *Spell v. Edwards*, 962 F.3d 175, 181 (5th Cir 2020) (Ho, J., concurring) (quoting *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 942 (9th Cir. 2020) (Collins, J., dissenting)).

In his dissenting Ninth Circuit opinion, Judge Collins noted,

> *Jacobson* had no occasion to address a Free Exercise claim, because none was presented there. (That is unsurprising, because the Free Exercise Clause had not yet been held to apply to the States....) Consequently, *Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, *enumerated* constitutional right;

> **on the contrary, Jacobson explicitly states that other constitutional limitations may continue to constrain government conduct**." *Id.* [(Collins, J., dissenting) (bold added).]

Justice Gorsuch's concurrence in *Roman Catholic Diocese* encapsulates these *amici's* argument here in three sentences:

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? ... [W]e may not shelter in place when the Constitution is under attack. Things never go well when we do. [*Roman Catholic Diocese* at 25 (Gorsuch, J., concurring).]

CONCLUSION

For all these reasons, this Court should grant certiorari to review New York's law prohibiting Petitioners' Free Exercise of Religion.

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