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 *AMICI CURIAE* THOMAS MORE SOCIETY AND SIX RELIGIOUS PARENTS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* THOMAS MORE SOCIETY.[1]

Amicus Curiae, the Thomas More Society ("TMS"), is a not-for-profit, national public interest law firm based in Chicago, Illinois, dedicated to restoring respect in law for human life, family, and religious liberty. TMS has been actively involved in defending religious liberty in the context of vaccine mandates in recent years, including serving as plaintiffs' counsel in several of the cases discussed below. TMS also litigates cases in defense of parental rights in education, including serving as Plaintiffs' counsel in *Mirabelli v. Bonta*, 607 U.S. 492 (2026). TMS thus has a distinct interest in this Court resolving a clear circuit split over whether allowing medical exemptions but not religious exemptions to vaccine mandates triggers strict scrutiny under the Free Exercise Clause. It also has an interest in this Court bringing clarity to the oft-confused general applicability test even beyond the context of vaccine mandates. Alternatively, it has a longstanding interest in this Court reevaluating *Employment Division v. Smith*, and in recognizing parents' fundamental Free Exercise and Due Process rights to direct the religious upbringing of their children, as

[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money intended to fund the brief. Counsel of record for all parties received timely notice of amici's intent to file this brief under Supreme Court Rule 37.2 on October 22 and 23, 2026, at least 10 days before its November 2, 2026 due date.

recently confirmed in *Mahmoud v. Taylor* and *Mirabelli v. Bonta.*

INTEREST OF *AMICI CURIAE* SIX RELIGIOUS PARENTS

Amici Curiae Jonathon and Nicole Mulford, Nurhan Ayling, Marceline Bachert, Beatriz Narbon, and Raquel Steineman are six religious parents who reside in New York and have deeply held religious and conscientious objections to some vaccinations for their children. *Amici* are either Catholic or Muslim and seek to raise their children in accord with their religious beliefs—including with respect to the unnecessary proximate cooperation with evil to the extent some vaccines were developed with the use of aborted fetal cell lines. They also seek to protect their children's physical health pursuant to their fundamental right to direct their children's education and upbringing.

The impact on *Amici* of New York's elimination of religious exemptions (but not medical) from its school vaccination requirement accentuates New York's flagrant violation of parental rights in this case. Although the Old Order Amish Petitioners ask only for narrow as-applied relief, eliminating religious exemptions from N.Y. Public Health Law §2164 ("PHL §2164") also has a pernicious effect on *Amici* and other religious parents across New York. Whereas "the right of parents to direct the religious upbringing of their children would be an empty promise if it did not follow those children into the *public* school classroom," *Mahmoud v. Taylor*, 606 U.S. 522, 547 (2025)

(emphasis added) (internal quotation marks omitted), under New York's regime, parents' fundamental rights *do not even follow their children into religious school* classrooms, which are now categorically barred from considering parents' requests for vaccine religious exemptions for their children. Thus, even more than in *Mahmoud*, New York's policy flagrantly "cut[s] out" parents from directing the education and upbringing of their children. *Mirabelli v. Bonta*, 607 U.S. 492, 496–97 (2026).

New York's aggressive enforcement of PHL §2164 will have devastating effects on *Amici*. Some plan to leave the State—in some cases separating from generational New York roots at great psychological, financial, and emotional cost, for the sake of their children. Others do not have that option, even while homeschooling remains practicably infeasible for single or dual-working parents amidst New York's ever-increasing high cost of living. Either way, like the Petitioners in this case, *Amici* face substantial pressure to forgo their religious and conscientious convictions by forcing their children to succumb to state-mandated vaccination, *no questions asked*. Therefore, *Amici* have an interest in this Court granting the Petition and confirming that being put to that kind of false "choice"—absent a showing by the State of a "compelling" need and no less restrictive alternatives—flagrantly violates parental rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

With this case, U.S. Circuit Courts are now split 4 to 4 on whether medical exemptions are comparable to religious exemptions in the context of Free Exercise challenges to vaccine mandates. *See infra*. This split is fully ripe and cries out for this Court's intervention—especially given the American Academy of Pediatrics' ("AAP's") renewed recommendation for eliminating *non*-medical exemptions from school vaccine mandates.[2]

Here, the Second Circuit held that New York's elimination of *religious* exemptions from its school student vaccine mandate, but not medical exemptions, furthers New York's broad asserted interest in "protect[ing] the health of all New Yorkers," while "[e]xempting religious objectors . . . [allegedly] detracts from that interest." *Miller v. McDonald*, 180 F.4th 420, 429 (2d Cir. 2026) (per curiam), Pet. App. 15a–16a (first alteration in original). That decision violates this Court's longstanding recognition that government may not *devalue religious interests* when pursuing secular goals. And it exposes widespread confusion about how to conduct general applicability analysis that at minimum requires this Court's clarification.

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[2] Jesse M. Hackell et al., "Medical vs Nonmedical Immunization Exemptions for Child Care and School Attendance: Policy Statement," 156 Pediatrics e2025072714 (Aug. 2025), https://tinyurl.com/ynzuhpn4.

Additionally, this Court should reverse under *Mahmoud v. Taylor*, 606 U.S. 522 (2025), and *Mirabelli v. Bonta*, 607 U.S. 492 (2026). That's because New York's categorical prohibition on religious exemptions from its student vaccine requirements—*even at private religious schools*—directly interferes with parents' rights (including religious rights) to direct the education and upbringing of their children and thus at least triggers strict scrutiny.

Finally, even if New York's actions were neutral and generally applicable, and even if *Mahmoud* and *Mirabelli* don't apply, this case confirms the need to reevaluate *Employment Division v. Smith*, which effectively eliminated the Free Exercise Clause's plain-text protections against the *special burdens* religious observers sometimes bear under rules that are generally applicable only in the most formal sense.

ARGUMENT

I. Circuits are diametrically split 4 to 4 on the comparability of medical and religious exemptions in the context of vaccine mandates.

Since this Court denied emergency relief in *Does 1-3 v. Mills* five years ago, *see* 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting petition challenging denial of religious but not medical vaccine exemptions was "the first to address the questions presented"), a diametrical circuit split has emerged

over whether medical exemptions are comparable to religious exemptions in the context of vaccine mandates, and thus whether such a policy is subject to strict scrutiny under the Free Exercise Clause. This split is fully ripe; the decision below improperly devalues religious interests; and this case is of national importance.

A. There is a widespread circuit split over the comparability of medical and religious exemptions to vaccine mandates.

While the question of medical and religious vaccine exemption comparability may have been nascent in 2021, it is not so today. Currently, the **First**, **Fifth**, **Sixth**, and **Tenth Circuits** have recognized the comparability of medical and religious exemptions from vaccine mandates, while the **Second**, **Third**, **Fourth**, and **Ninth Circuits** have held to the contrary (but with internal conflicts in at least the Second and Ninth Circuits).

As to circuits recognizing comparability, the Tenth Circuit recently observed that "**a government [vaccine] policy that grants an exemption for *medical* reasons but denies the same exemption for *religious* reasons is not generally applicable**." *Does 1-11 v. Bd. of Regents of the Univ. of Colo.*, 100 F.4th 1251, 1277 (10th Cir. 2024) (emphasis added) (internal quotation marks omitted). The court held the University's COVID-19 vaccine exemption policy was "not generally applicable, and [thus] subject to strict scrutiny," because it allowed

"secular medical exemptions" on "more favorable terms than religious exemptions." *Id.* at 1277-78. Further, the University's policy failed strict scrutiny in part because it did not explain why the Plaintiffs "pose[d] more of a risk" of spreading COVID-19 "than other unvaccinated patients, coworkers, or classmates." *Id.* at 1278. The Tenth Circuit thus squarely held that if government allows medical exemptions from a vaccine mandate, it must allow religious exemptions on equal terms or otherwise undergo strict scrutiny. This is in direct conflict with the Second Circuit's decision below.

The First Circuit has reached a similar conclusion, deeming it plausible that "the inclusion of [ ] medical exemption[s]" in Maine's COVID-19 vaccine mandate for healthcare workers "undermines the State's interests in the same way that a religious exemption would by introducing unvaccinated individuals into healthcare facilities." *Lowe v. Mills*, 68 F.4th 706, 715 (1st Cir. 2023). While the court opined that comparability *also* hinges on a comparison of the total number of medical and religious exemptions, *see id.* at 715-16, its holding still departs from the Second Circuit's decision in *Miller* that "maintaining [a] medical exemption" is *per se* non-comparable.[3] *Miller*, 180 F.4th at 429.

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[3] To be sure, the Second Circuit further opined that medical exemptions' allegedly shorter duration and more limited number "are meaningfully different" than religious exemptions. Pet. App. 16a. But this argument merely *supplemented* its prior conclusion that medical exemptions are *per se* non-comparable. *See id.* Regardless, the Second Circuit's refusal to allow discovery on aggregate risk data despite the extremely small number of

The Fifth and Sixth Circuits have also recognized the comparability of medical and religious exemptions in the context of challenges to the Department of Defense's ("DOD's") COVID-19 vaccine mandate under the Religious Freedom Restoration Act ("RFRA"). Both circuits held that DOD's allowance of medical exemptions, but not religious exemptions, rendered its COVID-19 vaccine mandate "underinclusive" for purposes of RFRA's compelling interest test. *See U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022); *Doster v. Kendall*, 54 F.4th 398, 423 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023) (mem.). Underinclusiveness is also the touchstone of Free Exercise comparability analysis. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 544-45 (1993); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). Accordingly, the Fifth and Sixth Circuits' holdings also directly conflict with the Second Circuit's decision below.

But, as noted, at least four Circuits have reached the opposite conclusion. In addition to the Second Circuit's decision in *Miller*—following its

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Amish students attending the three isolated Plaintiff schools, *see, e.g.*, Petition at 15, still directly conflicts with the First Circuit's remand for discovery on aggregate risk comparability, *cf. Lowe*, 68 F.4th at 715–16. The Second Circuit's decision also directly conflicts with prior Second Circuit precedent itself. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 286 (2d Cir. 2021) (holding at *preliminary injunction* stage that "factual development" may show that medical and religious exemptions are comparable in the aggregate).

similar decisions in *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021) ("*Hochul*") and *We The Patriots USA, Inc. v. Conn. Office of* Early *Childhood Dev.*, 76 F.4th 130 (2d Cir. 2023) ("*We The Patriots*")—the Third, Fourth, and Ninth Circuits have also held that medical and religious exemptions are not comparable in the context of Free Exercise challenges to vaccine mandates. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 176-77 (3d Cir. 2024) ("Unlike a religious exemption, a medical exemption furthers the [government's] interest in keeping its employees safe and healthy by allowing employees for whom the COVID-19 vaccine would cause death or illness to abstain from vaccination."); *Perry v. Marteney*, 172 F.4th 315, 326 (4th Cir. 2026) (asserting that "medical exemptions will often not be comparable to religious exemptions when the government's asserted interest relates to health"), petition for cert. filed, No. 26-319 (U.S. Sept. 4, 2026); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (9th Cir. 2021) (medical exemption to COVID-19 vaccine mandate "serves [the school's] primary interest . . . [in] protecting student 'health and safety'—and so does not undermine the District's interests as a religious exemption would").[4]

Still, internal conflict exists in both the Second and Ninth Circuits. In *M.A. on behalf of H.R. v.*

[4] The Sixth Circuit has also previously opined in dicta that "compulsory vaccination laws with only medical exemptions do not violate any federal constitutional right." *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). But that statement is in tension with the Sixth Circuit's more recent holding in *Doster*. *See* 54 F.4th at 423.

Rockland County Department of Health, the Second Circuit held that a county's allowance of medical exemptions from its measles vaccine mandate *might* trigger strict scrutiny under the Free Exercise Clause, depending on "what governmental interest the [mandate] was intended to serve." 53 F.4th 29, 39 (2d Cir. 2022) (vacating summary judgment and remanding for "fact-intensive" inquiry into the interests underlying the mandate). Judge Park opined separately that the mandate was *per se* "not generally applicable because, by allowing a medical exemption, it 'prohibit[ed] religious conduct while permitting secular conduct that undermine[d] the government's asserted interests in a similar way.'" *Id.* at 41 (Park, J., concurring) (quoting *Fulton v. City of Phila.*, 593 U.S. 522, 534 (2021) (alterations in original)). His conclusion did not hinge on aggregate risk data or the level of generality of the government's interest—contrary to *Miller*.

Additionally, Judge Bianco dissented in *We The Patriots* and would have held that medical exemptions plainly "pose[] the same health risk to another student as an unvaccinated student with a religious objection." 76 F.4th at 165, 169 (Bianco, J., concurring in part and dissenting in part). He also noted the majority's affirmance of the dismissal of Plaintiffs' claims conflicted with *Rockland County*'s holding on "the need for a fully developed record at trial on the comparable risks associated with religious and secular exemptions." *Id.*

In the Ninth Circuit, no fewer than 10 active Circuit judges, along with Judge O'Scannlain, would

have held that allowing medical exemptions from a COVID-19 vaccine mandate triggered strict scrutiny under the Free Exercise Clause. *See Doe v. San Diego Unified Sch. Dist.*, 22 F.4th 1099, 1104-05 (9th Cir. 2022) (Bumatay, J., dissenting from denial of reh'g *en banc*, joined by Callahan, Ikuta, R. Nelson, Collins, Lee, and VanDyke, JJ.); *id.* at 1114 (O'Scannlain, J., statement "agree[ing] with the views expressed by Judge Bumatay"); *id.* at 1114-15 (Bress, J., dissenting from denial of reh'g *en banc*, joined by Bade, J.); *id.* at 1115 (Forrest, J., dissenting from denial of reh'g *en banc*).

Accordingly, there is now a deep and widespread circuit split—along with internal strife in several circuits—over whether medical exemptions from vaccine mandates are comparable to religious exemptions and thus trigger strict scrutiny under the Free Exercise Clause. This Court should grant certiorari to resolve the split.

B. Allowing medical but not religious exemptions impermissibly devalues religious reasons for seeking exemption.

The purpose of general applicability analysis is to discern whether the government "has made a value judgment that" secular motivations for exemption "are important enough to overcome its general interest [underlying the particular mandate at issue] but that religious motivations are not." *Fraternal Order*, 170 F.3d at 366. Allowing medical exemptions,

but not religious exemptions, from vaccine mandates plainly violates this principle.

The Tenth Circuit recognized as much in *Does 1-11*: "The [challenged] Policy on its face makes a value judgment in favor of secular motivations because it has a lower bar for denying religious exemptions" as compared to "secular medical exemption[s]." 100 F.4th at 1277. Indeed, if medical exemptions are important enough for seeking exemption but religious exemptions are not (or are subject to less favored treatment), the government has "*of necessity* devalue[d] religious reasons for [avoiding vaccination] by judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537-38.

Circuits holding that medical and religious vaccine exemptions are not comparable assume that so long as government is pursuing sufficiently broad interests in *physical* "health," it can leave religious interests for avoiding vaccination behind. *See, e.g.*, *We The Patriots*, 76 F.4th at 151 (medical exemption consistent with vaccine mandate's furtherance of "health and safety of Connecticut students"); Pet. App. 15a–16a (same); *San Diego*, 19 F.4th at 1178 (same). This assumption is particularly stark in decisions stating that medical exemption comparability depends on the particular interest *asserted* by the government in promulgating its respective mandate. *See Rockland Cnty.*, 53 F.4th at 39; *Spivack*, 109 F.4th at 175.

But this Court has made clear that "[t]he Free Exercise Clause protect[s] religious observers against

unequal treatment." *Lukumi*, 508 U.S. at 542 (internal quotation marks omitted). Thus, it cannot be true that government can pursue *any* interest at the expense of religious exercise, or that comparability hinges on a government's mere "say so." Justice Kavanaugh explained as much in *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), where Nevada sought to re-open casinos and restaurants on a more favorable basis than churches "to jump-start business activity and preserve the economic well-being of its citizens" during COVID-19. *Id.* at 2614 (Kavanaugh, J., dissenting). Nevada's approach "reflect[ed] an implicit judgment that for-profit assemblies are important and religious gatherings are less so," thus "'devalu[ing] religious reasons' for congregating 'by judging them to be of lesser import than nonreligious reasons,' in violation of the Constitution." *Id.* (quoting *Lukumi*, 508 U.S. at 537-38). Applied here, the practice of allowing medical but not religious exemptions reflects an implicit judgment that *religious* well-being is "of lesser import" than *physical* well-being—even as it remains *objectively undeniable* that a medical exemption allows one to remain unvaccinated against the precise disease the otherwise-required vaccine is designed to prevent (or ameliorate). That is hardly "equal treatment" for religious observers. *Accord We The Patriots*, 76 F.4th at 172 (Bianco, J., concurring in part and dissenting in part) (stating same).

Justice Thomas opined similarly in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020), noting that when government argues it may not "endorse" religion, it "communicates a message that

religion is dangerous and in need of policing, which in turn has the effect of tilting society in favor of devaluing religion," *id.* at 494 (Thomas, J., concurring) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011) (content-based restrictions "tilt public debate in a preferred direction")). The same applies here: allowing medical exemptions in service of *physical* health while precluding religious exemptions has the effect of exalting physical over religious well-being and thereby "communicates a message that religion is dangerous and in need of policing." *Id.* at 494 (Thomas, J., concurring).

This is all the more true where, as here, the sole object of the legislation is to *eliminate* a previously existing religious exemption while leaving the availability of medical exemptions in place. *See Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting) (recognizing that elimination of previously existing religious exemption from COVID-19 vaccine mandate "leave[s] little doubt that the revised mandate was specifically directed at the applicants' unorthodox religious beliefs and practices"); *see also Lukumi*, 508 U.S. at 531 ("Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

Accordingly, New York's direct elimination of religious exemptions while maintaining medical exemptions indicates an impermissible value judgment favoring physical over religious well-being—contrary to the Free Exercise Clause's

minimum promise of equal treatment for religious observers.

C. This question is urgent and of national importance.

In August 2025, the AAP renewed its position calling for the elimination of "nonmedical" exemptions from school vaccine mandates. *See* Hackell et al., *supra* note 2. The AAP specifies that "[n]onmedical exceptions based on religious belief can substantially limit the public health value of vaccine requirements for school attendance" and thus allegedly render schools "less safe." *Id.* The AAP also alleges that *no* "major world religious traditions" officially "preclude adherents from being vaccinated"—confirming the anti-"unorthodox" bias behind its recommendation. Notably, the AAP originally adopted this position in 2016. *See* Hackell, "AAP: Nonmedical exemptions to school immunization requirements should be eliminated," AAP (July 28, 2025).[5] Since then, Maine, New York, and Connecticut have eliminated religious exemptions from their school vaccine requirements, *see* Petition at 9, following California's elimination of the same in 2015, *see id.*

Such a marked trend, buoyed by the AAP's express support, confirms the urgency and national importance of clarifying whether government vaccine policies allowing medical but not religious exemptions (or at least those *eliminating* previously existing

[5] https://publications.aap.org/aapnews/news/32619/AAP-Nonmedical-exemptions-to-school-immunization.

religious exemptions consistent with the AAP's advocacy) trigger strict scrutiny under the Free Exercise Clause. *See also, e.g.*, Erika Edwards, "Vaccinations rise when states button up religious loopholes," NBC News (July 5, 2025) (discussing pending Massachusetts bill to remove "nonmedical exemptions" from mandatory vaccination in public schools).[6] Guidance from this Court on the constitutionality of such policies is urgently needed.

II. *Mahmoud* and *Mirabelli* require reversal.

Alternatively, this Court should grant the petition and ultimately reverse in light of *Mahmoud* and *Mirabelli*. Categorically prohibiting parents even from requesting vaccine religious exemptions for their children *even at private religious schools* quintessentially interferes with First and Fourteenth Amendment parental rights. Such interference must be justified by strict scrutiny—and New York's broad categorical prohibition on religious exemptions almost certainly does not suffice.

The Second Circuit in this case has now *twice* misconstrued *Yoder* and its progeny. It first asserted that the Supreme Court "took pains explicitly to limit [*Yoder*'s] holding," *Miller v. McDonald*, 130 F.4th 258, 270 (2d Cir. 2025) (quoting *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003)), *vacated*, 146 S. Ct. 879 (2025) (mem.)—in direct conflict with this Court's subsequent holding in *Mahmoud*. *See* 606 U.S. at 557-

[6] https://www.nbcnews.com/health/health-news/vaccinations-rise-states-religious-loopholes-exemptions-rcna212334.

58. Then, after this Court vacated and remanded in light of *Mahmoud*, *see* 146 S. Ct. 879 (2025) (mem.), the Second Circuit again held that New York's categorical anti-religious-exemption policy "is not the kind of state interference with a child's religious development that triggered strict scrutiny in *Yoder* or *Mahmoud*." *Miller*, 180 F.4th at 433. The Second Circuit also considered this Court's decision in *Mirabelli* and limited it to its facts, holding that New York's law "conceals nothing from parents and displaces no part of their authority over a child's religious upbringing." *Id.* (citing *Mirabelli*, 607 U.S. at 492-93, 498).

The Second Circuit badly misconstrued *Mahmoud* and *Mirabelli*. Both those decisions confirm that *categorically* stripping parents of their right to request school vaccine religious exemptions for their children directly interferes with parental rights and triggers strict scrutiny.

Specifically, *Mahmoud* explained that "*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority." *Mahmoud*, 606 U.S. at 558. "When the burden imposed is of the same character as that imposed in *Yoder*, we need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny." *Id.* at 564. A policy need only "substantially interfere with the religious development of the parents' children" or "pose a very real threat of undermining the religious beliefs and practices that parents wish to instill in their children." *Id.* at 565 (cleaned up). This Court's

Mahmoud decision shows that the "same character" standard applies to a broad range of coercive measures taken by school officials.

In *Yoder*, the Court analyzed a compulsory attendance law requiring all Wisconsin children to attend school until the age of 16. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972). The parent plaintiffs objected to sending their 14- and 15-year-old children to any school at all, because doing so removed their children from their community during a formative adolescent period. *Id.* at 207, 211. This Court noted that Wisconsin's law would "ultimately result in the destruction of the Old Order Amish church community." *Id.* at 212. Given that the Wisconsin community included only about 250 children, this threat was real. *Id.* at 245 (Douglas, J., dissenting in part). As Justice Sotomayor recently explained, "[t]he problem in Yoder was . . . that it compelled Amish parents to do what their religion forbade." *Mahmoud*, 606 U.S. at 606 (Sotomayor, J., dissenting).

In *Mahmoud*, however, there was no such existential threat to plaintiffs' religions themselves. The plaintiffs, who were Muslim, Catholic, and Orthodox (606 U.S. at 540–41), never asserted that Montgomery County would extinguish their billion- and million-member religions. Nor did the *Mahmoud* parents assert that their religions explicitly "forbade" their children to read pro-LGBT books. Nonetheless, the Court concluded that "the burden [was] of the *exact same character* as the burden in *Yoder*." *Id.* at 565 (emphasis added).

This case, too, presents a burden of the "exact same character as the burden in *Yoder*" because New York's policy interferes with and poses a very real threat of undermining the religious upbringing of plaintiffs' children. Indeed, it is an even closer parallel to *Yoder* than *Mahmoud* was, because Plaintiffs' religious beliefs "do not permit them to inject their children with vaccines." Pet. App. 3a (cleaned up). New York is forcing parents to "do what their religion forb[ids]." *Mahmoud,* 606 U.S. at 606 (Sotomayor, J., dissenting) (citing *Yoder*). If *Mahmoud* was the "exact same character" as *Yoder*, this case is its identical twin.

The same is true with respect to *Mirabelli.* Like California's categorical policy on gender-transition secrecy for students—prohibiting even fit, non-abusive parents from knowing about and consenting to their children's "social transitions" at school—New York's categorical bar on vaccine religious exemptions *even in private religious schools* "substantially interfere[s] with the right of parents to guide the religious development of their children." *Mirabelli*, 607 U.S. at 496 (internal quotation marks omitted). It also interferes with parents' fundamental due process rights to direct their children's education and upbringing by "shut[ting] [them] out of participation in decisions regarding their children's [*physical*] health." *Id.* at 497. Although *concealment* is not the constitutional evil underlying New York's policy, that policy still effectively *forces* parents to submit their children to all school-mandated vaccines *no questions asked*—i.e., without any opportunity for religious exemption.

The supposed alternative of homeschooling "is no answer." *Mahmoud*, 606 U.S. at 561. "[W]hen the government chooses to provide public benefits"—including free public education and protections for private religious education—"it may not condition the availability of those benefits upon a recipient's willingness to surrender his religiously impelled status." *Id.* (cleaned up). But New York's anti-religious-exemption policy does just that. Additionally, many families have single or two-working-parent homes. Thus, many "cannot afford such a substitute" as homeschooling. *Id.* New York's policy indeed coerces parents into either violating their religious beliefs and forcing their children to succumb to all school-mandated vaccines without exemption, or abiding their religious beliefs and violating state law. Religious parents are thus effectively "shut out of participation in decisions regarding their children's [physical] health" with respect to vaccines, *Mirabelli*, 607 U.S. at 497—unless they remove their children from public or private schools in New York altogether, which is not a real option for many.

At minimum, therefore, this Court should grant the petition and ultimately reverse in light of *Mahmoud* and *Mirabelli*.

III. This Court should reevaluate *Smith*.

Alternatively, this case confirms the need to reevaluate *Smith*, which eliminated the Free Exercise Clause's promise of *substantive* equality for religious

believers that intentionally allowed reprieve from *special burdens* they can suffer from rules that are "generally applicable" only in the most formalistic sense. In addition to the workability problems of its general applicability test discussed above, *Smith* "relegate[d] a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides." *Emp't Div. v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring in the judgment) (internal quotation marks omitted); *see also Rockland Cnty.*, 53 F.4th at 42 (Park, J., concurring) (criticizing *Smith*'s "inflexible," "all-or-nothing" general applicability test). But this Court has long "recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause," including because "the language of the Clause itself makes clear" that "an individual's free exercise of religion is a *preferred* constitutional activity." *Smith*, 494 U.S. at 901-02 (O'Connor, J., concurring in the judgment) (emphasis added).

In other words, *Smith* wrongly transformed the Free Exercise Clause into a rule of formal equality, ensuring only that secular and religious actors are subject to the same burdens *from the government's perspective*. But as a rule of religious *liberty*, the Free Exercise Clause is inherently ordered toward "reliev[ing] [religious] individuals of a *special burden* that others do not suffer." *Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445, 454 (7th Cir. 1981) (emphasis added) (interpreting Title VII's analogous religious accommodation requirement); *see also* 118 Cong. Rec. 705 (1972)

(statement of Sen. Randolph explaining that Section 701(j), codified at 42 U.S.C. §2000e(j), reflects "the same concepts as are included in the first amendment").

As Justices Alito, Thomas, and Gorsuch have noted, "the absence of any language referring to equal treatment" in the Free Exercise Clause "is striking." *Fulton*, 593 U.S. at 569 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment). Indeed, "[t]he Founders understood that the right to free exercise would require more than simply neutrality toward religion," but rather "that the government *accommodate* the religious practice, rather than the reverse." *Horvath v. City of Leander*, 946 F.3d 787, 796 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). Congress adopted this precise concept into Title VII, *see E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) ("Title VII requires otherwise-neutral policies to give way to the need for an accommodation"), further evincing that the Free Exercise Clause protects more than merely formal equality.[7] *See also* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 880 (2001) ("*Smith* and *Lukumi* have transformed the Free Exercise Clause from a liberty rule . . . to an equality rule.").

[7] That Justice Scalia so clearly perceived the insufficiency of neutral rules in the Title VII context confirms the error of his contrary conclusion in the Free Exercise context in *Smith*.

In reality, restoring the Free Exercise Clause's liberty rule would paradoxically restore *substantive* equality for religious believers. During the Prohibition, for example, the government exempted "the sacramental use of wine by the Roman Catholic Church." *Smith*, 494 U.S. at 913 n.6 (Blackmun, J., dissenting). Absent an exemption, the general ban on wine would have undoubtedly burdened Catholics *more* than non-Catholics. The same was true in *Yoder*, where the state's compulsory education law plainly burdened members of the Amish religion *more* than others. *Yoder*'s enforcement of the Free Exercise Clause's liberty rule restored the Amish to equal footing with other members of society whose philosophical or religious beliefs were not burdened by the challenged law.

The same is true here. Treating the Free Exercise Clause as a liberty rule would remove the special burdens imposed by New York's vaccination requirement on the Amish plaintiffs' unique religious beliefs—or at least require New York to show it has a sufficiently tailored compelling interest to override those beliefs—regardless of whether the law is "neutral and generally applicable" in a formal sense. The *free exercise* of religion requires nothing less. This Court should reevaluate *Smith*.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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