

No. 26-319

In the
Supreme Court of the United States

KRYSTLE PERRY, ET AL.,
Petitioners,

v.

STACY MARTENEY, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE*
THE CLAREMONT INSTITUTE'S CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The Center for Constitutional Jurisprudence is the public-interest law arm of the Claremont Institute, whose mission is to restore the principles of the American Founding to their rightful authority in national life. Foremost is that government is instituted to secure rights, not dispense them; and among the rights retained upon establishing civil government is the liberty of religious conscience. *See* U.S. Const. amend. I.

The Center has participated as *amicus curiae* in numerous cases involving religious liberty, including *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018); and *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Its prior briefs address the historical protection of conscience in public service, commerce, and professional life. This case presents the same concern: whether a concededly religious objection receives diminished constitutional protection because it arises within an activity undertaken for secular reasons. History and this Court's precedents reject that distinction.

¹ The notice requirements of Rule 37.2 have been satisfied. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae*, its members, or its counsel made such a monetary contribution. *See* Sup. Ct. R. 37.6.

SUMMARY OF ARGUMENT

Religious conscience is protected within civil life, not merely within activities undertaken for religious purposes. A citizen need not enter an occupation to fulfill a religious duty before invoking a religious objection to something government requires within it. Neither must parents choose a particular school for religious reasons before their objection to a condition of attendance receives the constitutional analysis that religious exercise demands.

The Fourth Circuit reasoned otherwise. It recognized that K.P.’s refusal to be vaccinated was religiously motivated. Yet it excluded the more favorable treatment of children educated at home, in learning pods, or in microschools because the Perrys had not alleged a religious reason for choosing the Virtual Academy—West Virginia’s tuition-free online public school, whose students do not attend in person but receive their instruction remotely, at home. Pet. App. 16a–17a; *see id.* at 141a–42a. The practical effect is a second religious-motivation requirement: the objection to the governmental command must be religious, and so must the antecedent decision that brought the citizen within the command’s reach. Nothing in the Free Exercise Clause makes the first protection depend upon the second.

The founding generation’s treatment of conscience supplies a concrete demonstration. The Constitution permits an affirmation in lieu of an oath upon entering public office. The First Congress implemented that accommodation for the judges and clerks who would administer the new government’s laws for those who were “religiously scrupulous” of taking an oath. Ratification-era discussions addressed comparable accommodations for witnesses and litigants seeking

ordinary legal redress. None conditioned protection on a religious reason for holding office, testifying, or invoking the courts. The religious question concerned the act required within the civil activity, not the reason for undertaking the activity itself.

The same distinction appears in accommodations for citizens conscientiously opposed to bearing arms. Pennsylvania's Constitution coupled the obligation to contribute to the common defense with protection against personally bearing arms, subject to an equivalent contribution. Ratification proposals and assurances addressed the same concern. Madison supplied the explanation: entering civil society did not extinguish obligations that the believer understood to precede it.

That history does not decide every claim to exemption from a neutral law. It does establish why the secular character of the surrounding activity cannot make the religious objection disappear from the relevant comparison. This Court's decisions supply the governing rule. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 143–44 (1987), focused on the burden on religious observance even though the claimant adopted her conflicting beliefs after entering employment. *Tandon v. Newsom*, 593 U.S. 61, 62–63 (2021) (*per curiam*), requires comparison of the risks that favored secular conduct and burdened religious exercise present to the government's asserted interest. It does not permit courts to exclude comparators because the claimant's choice of school or occupation was secular.

The State may demonstrate that different educational arrangements present materially different risks. It may not avoid that inquiry by pointing to the Perrys' educational reasons for selecting their

daughter's school. Nor does the importance of vaccination supply the missing comparison. Washington's military inoculation order, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), establish the seriousness of the public interest, not an exception to the prohibition on unequal treatment of religious exercise.

The parental-rights question reinforces the need for review. Religious formation includes the practices parents teach their children to observe, not merely the propositions a school teaches them to believe. A condition requiring parents to procure conduct their faith forbids therefore cannot be dismissed simply because it is non-curricular. Whether it imposes a burden of the character addressed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Mahmoud v. Taylor*, 606 U.S. 522 (2025), requires attention to that burden, not a label describing the government's purpose. The petition should be granted. The first question also overlaps with the first question on which this Court granted review in *St. Mary Catholic Parish in Littleton v. Roy*, No. 25-581 (cert. granted Apr. 20, 2026). At a minimum, the petition should be held pending the decision in that case.

ARGUMENT

I. THE FOUNDING GENERATION PROTECTED RELIGIOUS CONSCIENCE IN ORDINARY CIVIL LIFE.

A. The Constitution and First Congress accommodated conscience within public office and the administration of justice.

The Constitution's protection for conscientious objections did not begin at the church door. It began, in part, at the entrance to public office. Article II

prescribes an “Oath or Affirmation” before the President executes his office. Article VI binds federal and state officers by “Oath or Affirmation” to support the Constitution and prohibits a religious test for federal office. U.S. Const. art. II, § 1, cl. 8; *id.* art. VI, cl. 3. The oath requirements serve civil ends: fidelity to constitutional government and faithful performance of public duties. The alternative form of affirmation allows a citizen to undertake those duties without performing a religiously forbidden act.

The point of the alternative was not that promising fidelity lacked importance. The Framers placed the President’s undertaking in the constitutional text itself and extended the obligation to support the Constitution to officers of the States. They nevertheless declined to make swearing an oath the exclusive means of assuming those responsibilities. As Professor McConnell explains, religious objections to oath-taking would otherwise have excluded members of several religious communities, including Quakers, from office. The federal text avoided that exclusion by making affirmation available to everyone, without requiring an inquiry into the individual’s scruples. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1475 (1990).

The First Congress made the principle operational. Section 7 of the Judiciary Act required each clerk, before entering upon his office, to “solemnly swear, or affirm” that he would faithfully record the court’s proceedings and discharge his duties. It then directed that the words “so help me God” be omitted whenever an affirmation was admitted instead of an oath. Section 8 likewise prescribed an oath or affirmation for

this Court’s Justices and the district judges. Judiciary Act of 1789, ch. 20, §§ 7–8, 1 Stat. 73, 76.

A clerk’s daily work was the keeping of records; a judge’s, the administration of justice. Neither provision asked why the officer sought the position. The accommodation attached to the required undertaking, not to a religious purpose for entering public service.

The ratification debates confirm the point. Discussing oaths in the North Carolina convention, James Iredell explained: “In regard to the form of an oath, that ought to be governed by the religion of the person taking it.” North Carolina Convention Debates (July 30, 1788), in 30 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 407, 408 (John P. Kaminski et al. eds., 2019) (hereinafter “DOCUMENTARY HISTORY”). He illustrated the point with English proceedings in which a witness used an uplifted hand and an East Indian litigant swore according to his own religion. Denying the latter redress because of his different faith, Iredell explained, would reproach the country’s justice. *Id.* at 408.

Iredell’s explanation turned on the form of the undertaking government required, not on a religious reason for witnessing an event or seeking redress.

Virginia’s convention supplied an even more explicit text. Its proposed declaration of rights condemned warrants unsupported by sufficient cause established upon oath, while expressly allowing an “affirmation of a person religiously scrupulous of taking an oath.” Virginia Convention, Proposed Declaration of Rights § 14 (June 27, 1788), in 10 DOCUMENTARY HISTORY 1552 (John P. Kaminski et al. eds., 1993). The proposed guarantee placed protection for conscience within the ordinary administration of criminal

justice, allowing that administration to proceed without compelling the religiously objectionable act. The Fourth Amendment ultimately adopted the familiar “Oath or affirmation” formulation, without Virginia’s religious qualification. U.S. Const. amend. IV.

Maryland’s adopted Declaration of Rights had already made the same accommodation concrete. Article 36 recognized the objections of Quakers, Dunkers, and Mennonites to oath-taking and authorized their affirmations for specified warrants and testimony in non-capital criminal cases. Md. Declaration of Rights of 1776, art. 36, reprinted in 12 DOCUMENTARY HISTORY 775 (John P. Kaminski et al. eds., 2015). The text accommodated the religious objection to the oath without requiring a religious purpose for participating in the administration of justice.

The accompanying objection to religious tests likewise concerned civil participation. Daniel Shute warned the Massachusetts convention that a test would exclude otherwise qualified persons from office, “which I take to be a privation of part of their civil rights.” Massachusetts Convention Debates (Jan. 31, 1788), in 6 DOCUMENTARY HISTORY 1375, 1375–76 (John P. Kaminski et al. eds., 2000). Shute’s immediate subject was the religious test. His explanation nevertheless exposes the error in treating the secular character of the position as a reason to discount the religious injury. The injury was exclusion from civil participation on account of conscience. Public office did not have to become a religious activity before that injury mattered.

B. The duty to defend the community coexisted with protection for conscientious objectors.

The common defense presented a more demanding application of the same principle. Pennsylvania's 1776 Constitution began its treatment of the subject by recognizing the reciprocal obligations of citizenship: one who enjoyed society's protection owed a proportionate contribution to its expense and personal service when necessary. In the same provision, it declared that a person conscientiously scrupulous of bearing arms could not justly be compelled to do so upon payment of an equivalent. Pa. Const. of 1776, Declaration of Rights, § VIII.

The pairing matters. The exemption was not premised on the citizen's having joined the community for religious reasons. Nor did conscientious objection dissolve his obligation to contribute to its protection. The constitutional arrangement distinguished the public end from the particular conduct that violated conscience, and preserved the former through a substitute for the latter.

That understanding reappeared during ratification. Virginia proposed that a person religiously scrupulous of bearing arms be exempted "upon payment of an equivalent to employ another to bear arms in his stead." Virginia Convention, Proposed Declaration of Rights § 19 (June 27, 1788), in 10 DOCUMENTARY HISTORY 1553. North Carolina's Hillsborough convention proposed the same accommodation, although that convention did not then ratify the Constitution. North Carolina Convention, Proposed Declaration of Rights § 19 (Aug. 1, 1788), in 30 DOCUMENTARY HISTORY 455. Rhode Island included an equivalent-payment protection in its 1790 ratification instrument. Rhode Island

Ratification § 18 (May 29, 1790), in 26 DOCUMENTARY HISTORY 999 (John P. Kaminski et al. eds., 2013). These provisions differed in legal status, but each addressed a religious objection embedded in a civic obligation.

Federalist assurances also recognized the concern. Answering an objection that the proposed government could compel conscientious objectors to bear arms, the Albany Federal Committee explained that such citizens had long received legislative attention and predicted “the same generous attention” under the new government. Albany Federal Committee, *An Impartial Address* (c. Apr. 20, 1788), in 21 DOCUMENTARY HISTORY 1388, 1393 (John P. Kaminski et al. eds., 2005). The committee promised legislative protection for conscience as part of its public defense of constitutional government. Accommodation was not understood necessarily to repudiate the obligations government exists to enforce.

Washington expressed the balance with particular care. Writing to the Society of Quakers in 1789, he urged tenderness toward conscientious scruples and accommodation as extensive as “a due regard to the Protection and essential Interests of the Nation may Justify, and permit.” Letter from George Washington to the Society of Quakers (c. Oct. 13, 1789). The nation’s essential interests qualified the accommodation; they did not make the claim of conscience irrelevant.

C. Those accommodations reflected rights retained upon entering civil society.

Madison supplied the underlying explanation in his *Memorial and Remonstrance*. Religious obligation, he wrote, was “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.” A

person entering civil society did so with a reservation of the allegiance he understood himself to owe to the Creator. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 1 (1785). The legislature's authority was derivative and limited; it could not acquire from the people an unlimited power over rights they had retained. *Id.* ¶ 2.

The immediate occasion was a religious assessment, but Madison's explanation illuminates the concrete accommodations as well. Religion could govern what a citizen did in public office, in court, or in defense of the community because his duties of conscience did not cease when his civil duties began. The protection was not a gratuity available only to those who made religious purposes the reason for every civil undertaking. It secured an antecedent liberty against the government established to protect it.

Madison later made the point in terms particularly apt here. "Conscience is the most sacred of all property," he wrote; protecting houses and enforcing debts did not entitle government to invade conscience or withhold the protection pledged to it by the original conditions of the social compact. James Madison, *Property* (1792), reprinted in 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). The benefits of civil government were not a purchase price for authority over conscience.

Pennsylvania's 1776 Declaration of Rights made the connection to civil participation express: a person acknowledging the existence of God could not justly be deprived of civil rights because of religious sentiments or mode of worship. Pa. Const. of 1776, Declaration of Rights, § II.

The court below opened with the proposition that rights do not stand apart from the social compact and that the benefits of society permit corresponding exactions. Pet. App. 3a. At that level of generality, the proposition is unobjectionable. But the compact establishes the terms of political authority; it does not supply a reason to disregard those terms. Pennsylvania addressed contribution and conscience in the same constitutional provision. The federal Constitution protected an alternative to swearing while prescribing the duties of office. The historical answer to the claimed opposition between civic responsibility and religious liberty was to consider both, not to use the existence of one to foreclose consideration of the other.

There is a substantial historical debate about when a general free-exercise guarantee, without an express accommodation, required an exemption from civil law. *Compare* McConnell, *supra*, at 1466–73, *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915, 917, 948 (1992). The present argument does not require that debate to be resolved. Express accommodations, legislative exemptions, and judicial remedies are different things. They nevertheless addressed the same intelligible injury: a civil requirement could burden religious conscience although the surrounding activity was secular. The source of the remedy did not alter the character of the objection.

The Fourteenth Amendment made the federal free-exercise guarantee applicable to the States. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The founding evidence informs the nature of the protected liberty; this Court’s governing precedents determine the constitutional analysis of West Virginia’s law.

Neither requires the Perrys to show that the decision to enroll their daughter was itself an exercise of religion.

II. THE COURT BELOW EXCLUDED SECULAR COMPARATORS BY ASKING THE WRONG QUESTION ABOUT RELIGIOUS MOTIVATION.

A. The religious objection, not the antecedent school choice, identifies the protected exercise.

The decisive passage is not the Fourth Circuit's recognition that States possess substantial public-health authority. It is the court's reason for excluding the educational comparators. The majority acknowledged that children educated outside the school system received more favorable treatment than children attending the Virtual Academy. It then reasoned that, because "the Perrys do not allege that K.P.'s desire to attend the Virtual Academy is religiously motivated," the distinction concerned only different secular activities. Pet. App. 16a. The next page acknowledged that K.P.'s refusal to be vaccinated *was* religiously motivated. *Id.* at 17a.

The latter acknowledgment should have identified the religious exercise for the former comparison. Instead, the majority changed the subject from the condition the Perrys religiously opposed to the school they educationally preferred. That move effectively required religious motivation twice: once for refusing the mandated conduct and again for entering the program that mandated it. The Perrys need not believe that God commands attendance at this particular school before their religious objection to a condition of

attendance receives the proper constitutional analysis.

This Court has already rejected a closely related effort to make the antecedent employment decision controlling. In *Hobbie*, the claimant adopted religious beliefs incompatible with Saturday work after accepting employment. Florida argued that the resulting conflict was attributable to her own change of beliefs. The Court found the timing immaterial to identifying the burden: “the salient inquiry under the Free Exercise Clause is the burden involved.” 480 U.S. at 144. The question was the pressure on religious observance created by the denial of unemployment benefits, not whether religion had originally led the claimant to take the job.

Thomas is equally instructive. A worker left his employment after a transfer required him to participate in manufacturing armaments contrary to his religious convictions. The Court examined that conflict, including the worker’s distinction between different kinds of participation, rather than demanding a religious reason for his original employment. *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 710–12, 715–18 (1981). The ordinary commercial character of manufacturing did not convert his conscientious refusal into secular conduct. Nor was the judiciary entitled to redraw the boundaries of the religious obligation for him. *Id.* at 715–16.

Those unemployment cases do not establish that every conflict arising at work or school commands an exemption. *Employment Division v. Smith*, 494 U.S. 872, 883–84 (1990), distinguished their setting when addressing the level of scrutiny. But that distinction, even if correct (and *amicus* has previously urged *Smith* to be overruled), does not support redefining

the religious exercise itself. Whether an objection is religious and whether a law burdening it is constitutionally justified are separate questions. *Smith* permits application of neutral, generally applicable laws to religious conduct; it does not declare that religiously forbidden conduct becomes secular whenever a person encounters it in an ordinary occupation. *Id.* at 878–79.

The same separation governs here. The State’s purpose in requiring vaccination may be entirely secular. The Perrys’ purpose in choosing a school may likewise be secular. Their objection to the condition can nevertheless be religious. The majority recognized that it was. The court therefore had to compare the treatment of that exercise with favored secular conduct, not first require the family to supply a religious explanation for its educational choice. This Court rejected the same move when the civil undertaking was public office: that a person “is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution.” *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961); see *McDaniel v. Paty*, 435 U.S. 618, 633–34 (1978) (Brennan, J., concurring in the judgment) (rejecting the argument that participation in the state constitutional convention was “a voluntary activity not itself compelled by religious belief”: “*Torcaso* answers that contention”).

Nor does the availability of another educational arrangement itself dispose of the burden. *Mahmoud* rejected the contention that parents could resolve the conflict by homeschooling or purchasing private education. Public education is a public benefit whose availability could not be conditioned on accepting the religious burden at issue there. 606 U.S. at 560–62.

The Perrys’ access to an alternative therefore does not excuse analyzing the burden attached to the public program they seek to use.

B. *Tandon* requires comparison of risks, not labels assigned to the surrounding activity.

Tandon states the rule directly: a regulation is not neutral and generally applicable when it treats “any comparable secular activity more favorably than religious exercise.” 593 U.S. at 62. Comparability “must be judged against the asserted government interest,” and it “is concerned with the risks various activities pose, not the reasons why people gather.” *Id.* *Fulton* similarly distinguishes two ways a law may fail general applicability: discretionary individual exemptions and permission for secular conduct that undermines the government’s interest in a comparable way. 593 U.S. at 533–34. Rejecting the former does not dispose of the latter.

The comparison here concerns unvaccinated children in educational arrangements the State permits and a child seeking to remain unvaccinated for religious reasons while receiving virtual instruction. The statutory structure supplies the differential treatment; the asserted health interest supplies the measure of comparability. *See* W. Va. Code § 16-3-4(b), (c), (h); *id.* § 18-8-1(c), (n)(1), (n)(8); Pet. App. 16a. A student’s reason for choosing the Virtual Academy does not establish whether she presents a greater health risk than a student in a learning pod or microschool. Conversely, a secular educational classification does not establish that she presents the same risk. It identifies the question the court must answer, not a substitute for answering it.

The same discipline applies to the formulation of the governmental interest. An interest in protecting children's own health calls for an explanation of why the educational classification materially changes that concern. An interest in preventing transmission through school contacts calls for comparison of the relevant contacts. Defining the interest simply as securing compliance by everyone whom the State has chosen to regulate would make the general-applicability inquiry circular. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–46 (1993).

There is nothing novel about comparing conduct across different institutional settings. *Tandon* rejected California's more favorable treatment of specified commercial activities while restricting religious gatherings in homes. The activities were different; the relevant inquiry was whether they were comparable in relation to the asserted risk. 593 U.S. at 62–64. Likewise, *Lukumi* examined the relationship between the city's asserted concerns and the secular animal killing its ordinances left untouched. 508 U.S. at 543–46. A government cannot establish general applicability merely by defining the regulated category to contain the religious claimant and then observing that everyone within that category faces the same rule. The court below reasoned that a law “does not lack general applicability merely because it makes classifications,” because “[a]ll laws do so to one degree or another.” Pet. App. 16a. That analysis was rejected by this Court in *Lukumi*, which noted: “[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Lukumi*, 508 U.S. at 542.

The majority did discuss physical contact later in its opinion. It observed that virtual students could participate in school-provided extracurricular activities and had to attend periodic testing in person. Pet. App. 24a. Those possibilities belong in the comparability analysis. Instead, the majority considered them under rational-basis review, emphasizing that distinctions need not be striking and that the State could address a problem incrementally. *Id.* at 23a–24a. That is not the inquiry *Tandon* requires to determine whether rational-basis review applies in the first place.

The relevant analysis must address the nature and extent of the contacts associated with the requested accommodation and with the educational arrangements the State leaves unrestricted by this mandate. The availability of extracurricular activities is not necessarily equivalent to participation in them. Periodic testing may present a risk that requires measures different from those appropriate to instruction at home. Learning pods and microschools, in turn, cannot be assumed to eliminate interpersonal contact merely because they stand outside the ordinary school system. Their significance must be assessed against the same asserted interest. Administrative affiliation is not a measure of contagion.

If the State establishes materially different risks, those differences may support different treatment. If the permitted secular conduct presents comparable risks, strict scrutiny follows, and the State must justify denying the requested religious accommodation. *Tandon*, 593 U.S. at 62–64. That inquiry includes whether appropriate precautions or a more limited accommodation would address the particular risk; it is not satisfied by establishing that vaccination generally promotes health. *See Tandon*, 593 U.S. at 63;

Fulton, 593 U.S. at 541. As of October 2024, forty-five other States offered religious or philosophical exemptions from their school vaccination mandates. Pet. App. 94a; *see id.* at 145a–46a & n.19 (collecting statutes). When so many jurisdictions offer an accommodation, the State “must, at a minimum, offer persuasive reasons why it believes that it must take a different course.” *Holt v. Hobbs*, 574 U.S. 352, 369 (2015) (RLUIPA); *cf. Mahmoud*, 606 U.S. at 566–68. The record and the governing burden of proof, rather than a threshold demand for religious school choice, must control.

This is also a workable limiting principle. A religious claimant does not prevail by identifying any statutory distinction or any unregulated activity. There must be religious exercise, a burden on it, favored secular conduct, and comparability measured against the government’s interest. The historical argument removes none of those requirements. It removes only the extraneous demand that the claimant’s antecedent civil choice be religious too. Nor does this argument depend on resolving the separate questions whether medical exemptions are comparable or whether medical judgment constitutes the kind of discretion addressed in *Fulton*. The educational comparators require their own analysis.

C. Public-health authority does not eliminate the general-applicability inquiry.

Jacobson recognized the community’s authority to protect itself against epidemic disease. 197 U.S. at 25–27. *Prince* explained that neither religious liberty nor parental authority creates an unrestricted right to expose a child or the community to communicable disease. 321 U.S. at 166–67 & n.12. Those propositions are serious constraints on the relief a religious

claimant may obtain. Neither answers whether the State may favor comparable secular conduct while burdening religious exercise. “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (*per curiam*); *see id.* at 23 (Gorsuch, J., concurring) (*Jacobson* “involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction”). The Perrys’ first question concerns that unequal treatment, not an immunity from public-health law merely upon invoking conscience.

Tandon itself concerned governmental measures to prevent the transmission of infectious disease. Public health was the asserted interest, not a reason to dispense with the comparison. 593 U.S. at 62–64. *Smith*’s reference to compulsory vaccination likewise appeared in its discussion of exemptions from otherwise generally applicable obligations. 494 U.S. at 888–89. It cannot establish that a vaccination requirement is generally applicable regardless of the secular conduct the government permits. That would turn a premise of the rule into a categorical exception from it.

Washington’s inoculation order does not supply such an exception either. The majority correctly noted that he ordered inoculation of the Continental Army against smallpox. Pet. App. 6a–7a; Letter from George Washington to William Shippen, Jr. (Feb. 6, 1777), in 8 THE PAPERS OF GEORGE WASHINGTON, REVOLUTIONARY WAR SERIES 264 (Frank E. Grizzard, Jr. ed., 1998). That episode refutes any suggestion that the founding generation categorically rejected compulsory inoculation. It does not resolve the treatment of religious objections alongside secular

exceptions, still less whether the reasons for entering a school or occupation must themselves be religious. The historical evidence must be read together.

The error is consequential precisely because ordinary civil life is where many conflicts of conscience arise. A government employee may take a position for its salary and later confront a Sabbath requirement. A student may choose a school for its academics and encounter a condition forbidden by her faith. Under the majority's approach, otherwise relevant secular comparators could be excluded because neither person can supply a religious explanation for the original choice. That rule threatens to withdraw the comparison required by *Tandon* wherever the citizen entered a regulated setting for the same ordinary reasons as everyone else.

The Court need not choose between recognizing public-health authority and enforcing the Free Exercise Clause. It need only insist that the former be exercised consistently with the latter. Review would not require overruling *Smith*, reconsidering vaccine efficacy, or recognizing an unrestricted parental veto. It would require courts to apply the existing test to the religious exercise actually burdened.

III. RELIGIOUS FORMATION OCCURS THROUGH CONDUCT, NOT ONLY CLASSROOM INSTRUCTION.

The second question presents a complementary error. The majority contrasted an "instrument of ideological indoctrination" with a "public health measure" and concluded that this case fell outside *Yoder* and *Mahmoud*. Pet. App. 21a. But a description of the government's purpose does not establish the character of the burden on a family's religious practice. Teaching a

child to observe a religious obligation can be frustrated by requiring contrary conduct even when no teacher advocates the contrary belief. The Free Exercise Clause “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’” *Kennedy v. Bremerton School District*, 597 U.S. 507, 524 (2022) (quoting *Smith*, 494 U.S. at 877).

The historical concern for parental religious formation extended to the arrangements under which a child would live and learn. Wilson described Pennsylvania law as barring the placement of an orphan with a guardian or apprenticeship master whose religious persuasion differed from that of the child’s parents. Elsewhere, he explained that a parent delegated only part of his authority to the person entrusted with the child’s education. 2 James Wilson, *COLLECTED WORKS OF JAMES WILSON* 909, 1076 (Kermit L. Hall & Mark David Hall eds., 2007).

Yoder protected against compulsory education that threatened the religious life parents were seeking to preserve, not merely against compelled professions of belief. 406 U.S. at 218–19. *Mahmoud* likewise directs attention to the substantial interference with parents’ ability to guide their children’s religious development. Where the burden is of the character found unacceptable in *Yoder*, strict scrutiny applies without regard to neutrality and general applicability. 606 U.S. at 559, 564–65. The protected interest is religious formation; classroom content is one way to burden it, not its constitutional definition.

Mahmoud itself illustrates the point through *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 629–31, 642 (1943), which invalidated a

requirement that students salute the flag contrary to their religious beliefs as a condition of school attendance. 606 U.S. at 548. *Barnette* itself rested on compelled expression rather than religion, 319 U.S. at 634–35, but *Mahmoud* treated it as an early example of the limits on government interference with a student’s religious upbringing, 606 U.S. at 547–48, and explained that the First Amendment’s protections do not “extend only to policies that compel children to depart from the religious practices of their parents,” *id.* at 548. Compulsion to act contrary to religious practice is thus a form of interference, not a category excluded from the inquiry. *See id.* at 549.

This Court has already declined to confine *Mahmoud* to curriculum. In *Mirabelli v. Bonta*, 607 U.S. 492, 495–96 (2026) (*per curiam*), the court of appeals had treated *Mahmoud* as confined to uniquely coercive curricular requirements. This Court vacated the stay as to parents, concluding that they were likely to succeed on their free-exercise challenge to policies involving the “unconsented facilitation of a child’s gender transition.” *Id.* at 496–97. That emergency disposition did not decide a vaccination claim. It is irreconcilable with treating non-curricular status as sufficient, by itself, to remove a substantial interference with religious formation from *Mahmoud*’s reach.

The Second Circuit has nevertheless held that vaccination imposes a different kind of burden, while acknowledging that *Mahmoud* reaches beyond curriculum. *Miller v. McDonald*, 180 F.4th 420, 432–33 (2d Cir. 2026) (*per curiam*). Its distinction requires an answer about religious formation, not simply an assertion that vaccination is more burdensome or irreversible. *Yoder* itself identified the character of the burden

it condemned: the law “affirmatively compel[led]” parents “to perform acts undeniably at odds with fundamental tenets of their religious beliefs.” 406 U.S. at 218. Even the *Mahmoud* dissent read *Yoder* to condemn a law that “compelled Amish parents to do what their religion forbade.” 606 U.S. at 606 (Sotomayor, J., dissenting). When parents seek to teach a child to observe a religious obligation through their shared practice, requiring the parents to procure the contrary act can undermine the very practice they seek to instill. Whether that interference is substantial requires examination of the asserted practice and the supporting record; the State’s health objective does not resolve that inquiry by itself.

The Perrys allege a shared religious obligation: their beliefs forbid them from vaccinating K.P., and maintaining both their own and K.P.’s religious convictions has required sacrificing the educational arrangement in which she had been succeeding. Pet. App. 111a, 98a–99a. Those allegations identify the conduct at issue. The further question is whether conditioning enrollment on the parents’ procuring that conduct substantially interferes with their guidance of K.P.’s religious development. The court below should have examined that question rather than treating the measure’s public-health purpose and absence of contrary classroom instruction as sufficient to distinguish *Yoder* and *Mahmoud*.

That does not make every parental objection a *Yoder* claim. Parents must establish a sincere religious practice and a substantial interference with their guidance of the child’s religious development; a disagreement about medical policy, without more, is insufficient. Nor does identifying the burden settle whether it is justified. *Yoder* itself distinguished

claims involving threats to public safety or physical health. 406 U.S. at 230, 233–34. The State’s asserted risks therefore remain central to the required analysis. They cannot be used to relabel a burden on religious practice as something categorically outside religious formation.

The distinction preserves both parental responsibility and lawful protection of children. It asks what compliance requires the family to do, how that requirement affects the child’s religious development, and whether the State has supplied the constitutionally necessary justification. It does not ask whether the command appears in a curriculum. The Court should grant review to prevent the same mistaken separation of religious conscience from ordinary civil life from narrowing either line of precedent.

CONCLUSION

The freedom to live according to religious conscience would be a diminished liberty if it protected only those who could explain every antecedent civil choice in religious terms. The founding generation’s accommodations rejected that division of life. This Court’s precedents require comparison of the burdens and risks that government actually creates, not a second inquiry into why a citizen chose a school, a profession, or a public program. The Fourth Circuit’s contrary reasoning reaches far beyond this family. The petition for a writ of certiorari should be granted or, at a minimum, held pending the decision in *St. Mary*, No. 25-581.

Respectfully submitted,

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