United States Court of Appeals

FOR THE

SECOND CIRCUIT

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-six.

Present:

RAYMOND J. LOHIER, JR.,
Chief Judge,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
BETH ROBINSON,
MYRNA PÉREZ,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN,
Circuit Judges.

Joseph Miller, Ezra Wengerd, Jonas Smucker, Dygert Road School, Pleasant View School, Shady Lane School,

Plaintiffs-Appellants,

v. 24-681

James V. McDonald, in his official capacity as Commissioner of Health of the State of New York,

Defendant-Appellee,

Betty A. Rosa, in her official capacity as Commissioner of Education of the State of New York,

Defendant.

For Plaintiffs-Appellants:	Shannon G. Denmark, Lehotsky Keller Cohn LLP, Washington, DC (Kyle Hawkins, Lehotsky Keller Cohn LLP, Austin, TX; Scott A. Keller, Mary Elizabeth Miller, Jacob B. Richards, Lehotsky Keller Cohn LLP, Washington, DC; Christopher D. Wiest, Covington, KY; Hiram Sassar, Justin Butterfield, First Liberty Institute, Plano, TX; Elizabeth A. Brehm, Walker D. Moller, Siri & Glimstad LLP, New York, NY, *on the briefs*).
For Defendant-Appellee:	Mark S. Grube, Senior Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, *on the briefs*), *for* Letitia James, Attorney General of the State of New York, New York, NY.
For Amici Curiae State of Alabama and 19 Other States in support of Plaintiffs-Appellants:	Steve Marshall, Alabama Attorney General, Edmund G. LaCour Jr., Alabama Solicitor General, Robert M. Overing, Alabama Deputy Solicitor General, Montgomery, AL.

Following disposition of this appeal on June 30, 2026, an active judge of the Court requested a poll on whether to rehear the case in banc. A poll having been conducted and there being no majority favoring in banc review, rehearing in banc is hereby **DENIED**.

Michael H. Park, *Circuit Judge*, joined by Joseph F. Bianco and Steven J. Menashi, *Circuit Judges*, dissents by opinion from the denial of rehearing in banc.

Steven J. Menashi, *Circuit Judge*, joined by Joseph F. Bianco and Michael H. Park, *Circuit Judges*, dissents by opinion from the denial of rehearing in banc.

Matthew A. Schwartz, *Circuit Judge*, took no part in the consideration or decision of this matter.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

PARK, *Circuit Judge*, joined by BIANCO and MENASHI, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

All fifty states have vaccine mandates for children to attend school, but in 2019, New York became just the second state (after California) to disallow religious exemptions. Parents in the Amish community refused to comply because of their religious beliefs. So New York fined Plaintiffs (three Amish schools) a crippling $118,000 per day, leading to this lawsuit.

In March 2025, a panel of this Court upheld New York's law, concluding that it was neutral, generally applicable, and satisfied rational-basis review. Plaintiffs petitioned for certiorari. A few months later, the Supreme Court held in *Mahmoud v. Taylor*, 606 U.S. 522 (2025), that laws that "substantially interfere with the religious development of the parents' children" or "pose a very real threat of undermining the religious beliefs and practices that the parents wish to instill" are subject to strict scrutiny. *Id.* at 565 (cleaned up). So it sent this case back, but the panel reached the same conclusion on remand, holding that *Mahmoud* does not apply.

This was incorrect because New York's law directly burdens "the rights of parents to direct the religious upbringing of their children." *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 486 (2020) (cleaned up). The panel's errors misstate First Amendment law and threaten dire consequences for Amish families in New York. I respectfully dissent from the denial of rehearing *en banc*.

I

A

New York passed its compulsory school vaccination law,

Public Health Law ("PHL") 2164, in 1966. Children were exempt from the vaccine requirement if a doctor certified that an immunization may be detrimental to their health or if their parents held "genuine and sincere religious beliefs which are contrary to the practices herein required." *See* Act of Feb. 1, 1966, ch. 994, § 2, 1966 N.Y. Laws 3331, 3333 (formerly codified at N.Y. Pub. Health Law § 2164(9)), *repealed by* Act of June 13, 2019, ch. 35, § 1, 2019 N.Y. Laws 133.

In 2019, following measles outbreaks in Brooklyn and Rockland County, New York eliminated the religious exemption. Some lawmakers expressed concerns that the exemption was overbroad.[1] Several criticized religious objectors, comparing their beliefs to racism, human sacrifice, and "Un-American" activities.[2] Others

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[1] *See, e.g.*, N.Y. Assembly, Transcript of Floor Proceedings, 242d Session 53 (June 13, 2019) ("Assembly Tr.") (statement of Assemb. Steck) (observing that many claimants were arguing "based on their own research and opinions," "not a religious claim"); *id.* at 73 (statement of Assemb. Goodell) (noting that most unvaccinated people do not have religious objections, but "simply don't want to do it [o]r haven't gotten around to do it"). Both chambers rejected compromises, such as "defining the exemption listed in the statute more specifically" to prevent deceit, requiring medical consultation before granting a religious exemption, or ensuring "uniform treatment" of exemptions without "stifl[ing]" "sincere and genuine religious beliefs." *See* Assembly Tr. at 55 (statement of Assemb. Colton); N.Y. Senate, Transcript of Floor Proceedings, 242d Session 5250, 5372 (June 13, 2019) ("Senate Tr.") (statement of Sen. Boyle); *Id*. at 5375 (statement of Sen. Ranzenhofer). The bill's sponsor in the Senate did not "have the answer to" why "tightening up the religious exemption" was not an adequate solution. *Id.* at 5408 (statement of Sen. Hoylman). New York repealed the religious exemption anyway.

[2] *See* Assembly Tr. at 97 (statement of Assemb. Jacobson); *id*. at 114 (Statement of Assemb. Wallace); *id.* at 115 (statement of Assemb. Burke).

doubted their sincerity. The bill's sponsor in the Assembly declared that he was "not aware of anything in the Tora[h], the Bible, the Koran or anything else that would suggest you should not get vaccinated." Assembly Tr. at 68 (statement of Assemb. Dinowitz).[3]

B

"[T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . . in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world.'" *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). That command defines their close-knit, agrarian society, famously separated from "outside communities." App'x at 694. It demands "group education" for their children to provide "practical and spiritual guidance they could not [receive] if isolated at home and taught outside of a group setting." *Id.* at 693. And it dictates "the way [they] try to remain healthy." *Id.* at 22. As the parents explain: "We believe it would be an abomination to our Creator to inject such [vaccines] into our bodies." *Id.* at 23.

For these traditional Old Order Amish, homeschooling "is not an option" because it removes children from their community and denies them the opportunity to learn its values. *Id.* at 26. To pass on those values and to prepare their children for life in their church

[3] Senators expressed similar sentiments. *See, e.g.*, Senate Tr. at 5433 (statement of Sen. Savino) (insisting there is no "such a thing as a real religious exemption"); *id.* at 5443 (statement of Sen. Skoufis) ("The matter of fact is the religious exemption in New York State is made up. It's fake. Because there is no religion that objects to vaccines. Not Islam, not Catholicism, not Judaism.").

district, the Amish commonly maintain one- or two-room rural schoolhouses staffed by Amish teachers. *See* Steven M. Nolt, *The Amish: A Concise Introduction* 75–79 (2016). Plaintiffs operate three such schools.

C

In 2021, the New York Department of Health audited Plaintiffs for compliance with PHL 2164. No case of measles had been reported in the Amish community in New York, but the legislature instructed DOH to target private schools with high rates of religious exemptions,[4] which included Plaintiffs. *See* App'x at 82–85. DOH found Plaintiffs out of compliance and fined them $118,000, representing "one day of noncompliance, for each school, respectively" based on a fine of $2,000 per student per day. *Id.* at 112.

Plaintiffs sued New York State's Commissioner of Health, Defendant James McDonald, and its Commissioner of Education, Betty Rosa, under Section 1983, claiming that the vaccination law violated the Free Exercise Clause. They sought a declaratory judgment that PHL 2164 was unconstitutional as applied to them and an injunction barring Defendants from enforcing it. The district court dismissed the motion for a preliminary injunction as moot and dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), finding the law neutral and generally applicable.

[4] *See* Div. of Budget Bill Mem., Bill Jacket, L. 2019, Ch. 35 at 6 ("DOH will be conducting focused audits on private schools to ensure compliance and implementation of the new requirements, with additional focus on auditing schools with high rates of religious exemptions for compliance.").

On appeal, the panel applied rational-basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990), and affirmed. *Miller v. McDonald*, 130 F.4th 258 (2d Cir. 2025). Plaintiffs petitioned for certiorari, and the Supreme Court granted the petition, vacated the panel decision, and remanded for reconsideration in light of *Mahmoud v. Taylor*. *See Miller v. McDonald*, 146 S. Ct. 879 (2025). On remand, the panel again affirmed, holding that *Mahmoud* is limited to cases involving "ideological indoctrination" and distinguishing compulsory-vaccination laws because the state's interest in health and safety is especially important. *Miller v. McDonald*, 180 F.4th 420, 433 (2d Cir. 2026).

II

Laws that "substantially interfere with the religious development of the parents' children" or "pose a very real threat of undermining the religious beliefs and practices that the parents wish to instill in their children" are subject to strict scrutiny. *Mahmoud*, 606 U.S. at 565 (cleaned up). PHL 2164 does that because it forces Amish parents to choose between giving their children vaccinations that their faith forbids or providing the education that their faith requires. To impose a burden like that, New York must show that the law is narrowly tailored to achieve a compelling government interest. The panel erred by limiting *Mahmoud* to cases of "ideological indoctrination" and misapplying the state's interest in "health-and-safety" conditions. *Miller*, 180 F.4th at 433.

A

American law has "long recognized the rights of parents to direct the religious upbringing of their children." *Espinoza*, 591 U.S. at 486 (cleaned up). *Wisconsin v. Yoder* held that a law violates these

rights by "substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community." 406 U.S. at 218. And in *Mahmoud*, the Court held that "when a law imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable." 606 U.S. at 565. So if a law "substantially interfere[s] with the religious development of the parents' children" or "undermin[es] the religious beliefs and practices that the parents wish to instill," then it is subject to strict scrutiny. *Id.* (cleaned up). This rule forbids both "direct coercion"—that is, "policies that *compel* children to depart from the religious practices of their parents"—and "more subtle forms of interference with the religious upbringing of children," like the curricular choices at issue in *Mahmoud*. *Id.* at 548. Identifying such interference requires a "fact-intensive" inquiry into the "specific religious beliefs and practices asserted," "the specific nature of the educational requirement," and the "specific context." *Id.* at 550.

B

By disallowing religious exemptions, New York's school vaccine mandate violates Plaintiffs' First Amendment rights. Like many Old Order Amish, Plaintiffs' sincere religious beliefs forbid vaccination. But PHL 2164 "compels" Amish parents to "depart from" those beliefs anyway. That is the kind of burden that is subject to strict scrutiny under *Yoder* and *Mahmoud*.

In *Yoder*, the compulsory-schooling law "substantially interfer[ed] with the religious development of the Amish child[ren]" by taking them "away from their community, physically and emotionally, during the crucial and formative adolescent period" and

denying them an opportunity to learn the "traits, skills, and attitudes" of Amish life. 406 U.S. at 218, 211. Its "impact . . . on respondents' practice of the Amish religion" was "not only severe, but inescapable," because the law "affirmatively compel[led] them . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. As the Court emphasized in *Mahmoud*, the "special character of the burden in [*Yoder*]" was that the law "substantially interfere[d] with the religious development of the parents' children" and posed "a very real threat of undermining the religious beliefs and practices that the parents wish[ed] to instill." 606 U.S. at 565 (cleaned up).

PHL 2164 poses such a threat by "compel[ling] children to depart from the religious practices of their parents." *Id.* at 548. Unless parents consent to a procedure their faith forbids, their children will be denied a communal education and their schools will face fines of $2,000 per student per day.

The state's alternative of homeschooling is inadequate because it would remove Amish children from their close-knit religious community. Moreover, the state may not "effectively penalize[] the free exercise of religion" "by conditioning the availability of benefits" on parents' willingness to abstain from religious practices. *Carson v. Makin*, 596 U.S. 767, 780 (2022) (cleaned up); *see also Mahmoud*, 606 U.S. at 562 (explaining that it is "both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths"). PHL 2164 forces Amish parents to choose between two forbidden alternatives "at odds with . . . their religious beliefs." *Yoder*, 406 U.S. at 218. To impose such a burden, New York must satisfy strict scrutiny.

C

The panel decision is wrong for two main reasons. First, it misconstrues *Mahmoud*'s "fact-intensive" inquiry as an "ideological-indoctrination" requirement. Second, it turns *Mahmoud* on its head by assessing the character of a burden based on the strength of the state's interest. We should instead recognize the First Amendment burden and then determine whether the state's interest was compelling and the means to achieve it were narrowly tailored.

1

The panel concluded incorrectly that PHL 2164's "burden does not operate in the way the burdens in *Yoder* and *Mahmoud* did." *Miller*, 180 F.4th at 432. It noted that the law "does not regulate what children are taught," "require them to affirm any belief," "expose them to state-selected instruction," or "displace parental religious formation." *Id.* at 432–33. The panel thus thought that it was "not an instrument of ideological indoctrination." *Id.* at 433 (quoting *Perry v. Marteney*, 172 F.4th 315, 327 (4th Cir. 2026)).

But *Mahmoud* is not limited to "ideological indoctrination." Although the policies at issue in *Mahmoud* involved "unmistakably normative" instruction, 606 U.S. at 550, the Court emphasized that parental-rights cases are not "tailored to [their] specific evidence" or "confined" to their facts, *id.* at 558. *Mahmoud*, like *Yoder*, makes a "statement of general principles." *Id.* Lower courts once mistakenly treated *Yoder* as a narrow, fact-bound decision. The panel reprises this mistake by limiting *Mahmoud* to ideological-indoctrination cases.

Indeed, the Supreme Court made clear in *Mirabelli v. Bonta*, 607 U.S. 492 (2026), that *Mahmoud* was not limited to the curricular

context. The plaintiffs in that case sought to enjoin a California policy that forbade schools from disclosing a student's gender transition to her parents. *Id.* at 494. The Ninth Circuit stayed the injunction by confining *Mahmoud* to "uniquely coercive curricular requirements." *Id.* at 495 (internal quotation marks omitted). The Supreme Court vacated the stay. It concluded that the plaintiffs were likely to succeed on the merits because California's policy "substantially interfere[d] with the 'right of parents to guide the religious development of their children'" by causing a "greater" "intrusion on parents' free exercise rights" than what was "sufficient to trigger strict scrutiny in *Mahmoud*." *Id.* at 496.

The panel minimizes *Mirabelli* to "a case about school officials concealing from parents a matter central to their child's identity and upbringing, and thus displacing the parents' role in it." 180 F.4th at 433. But this misses the forest for the trees. *Mirabelli* stands for the principle that parents' right to direct the religious upbringing of their children is not confined to the curriculum. Just as the school policy in *Mirabelli* displaced parents' influence on the gender identity of their children, PHL 2164 displaces parental authority over vaccination. And the panel's judgment about the "centrality" of gender identity versus vaccination is misguided because "it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Smith*, 494 U.S. at 887 (alteration omitted).[5]

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[5] *See also Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *United States v. Lee*, 455 U.S. 252, 257 (1982) ("It is not within the judicial function and judicial competence, however, to determine

Second, the panel confused the order of operations by relying on the strength of the government's interest to assess the character of the burden that the law imposes. To distinguish "compulsory vaccination from . . . *Yoder* and *Mahmoud*," the panel emphasized the importance of vaccines: "The need for some to protect the health and well-being of all was not present in *Yoder* or *Mahmoud*." 180 F.4th at 433 (quoting *Perry*, 172 F.4th at 327). It found PHL 2164 "different" from *Mahmoud* because it aims to "reduce the spread of communicable disease." *Id.* at 432–33.

That analysis is backwards. We should first ask whether a law "substantially interfere[s] with the religious development of the child or pose[s] a very real threat of undermining the religious beliefs and practices the parent wishes to instill." *Mahmoud*, 606 U.S. at 556 (cleaned up). If it does, then the "government must demonstrate that its policy advances interests of the highest order and is narrowly tailored to achieve those interests." *Id.* at 565 (internal quotation marks omitted). Protecting the health and well-being of students may well be a state interest of the highest order. But that enters into the analysis only *after* deciding whether the law burdens the free exercise of religion.

In other words, we consider the reason New York enacted a vaccine mandate when applying strict scrutiny, but it does not change whether the law infringes religious liberty in the first place. A

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whether appellee or the Government has the proper interpretation of the Amish faith; courts are not arbiters of scriptural interpretation.") (cleaned up); *Kravitz v. Purcell*, 87 F.4th 111, 123 (2d Cir. 2023) ("[C]ourts should not inquire into the centrality of a litigant's religious beliefs.").

compelling reason and a frivolous one have the same effect: Parents must perform an act their faith forbids or deny their children the schooling it demands. That is why we ask what a law *does* before we ask if the state had a good reason and chose the right means to do it.[6] Otherwise, the free exercise right under *Yoder* and *Mahmoud* would end wherever government's good intentions begin.[7]

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[6] For the same reason, the burden analysis in *Yoder* depended on the law's effect, not its chosen means: "The impact of the compulsory-attendance law on [the] practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels [the Amish], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. How the law imposes a burden makes no difference because it is "too late in the day to doubt that the liberties of religion . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). So a wide range of obligations and enforcement mechanisms impose unconstitutional burdens: laws that compel children to violate their parents' faith, on pain of being "expelled from school and [] threatened with exclusion," *see W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943); laws that oust children from their religious community via fines and criminal prosecution, *see Yoder*, 406 U.S. at 218; and laws that expose children to instruction at odds with their religious beliefs as a condition of receiving a free public education, *see Mahmoud*, 606 U.S. at 530.

[7] A final error by the panel is its reliance on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). As we have observed, "*Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and did not address the free exercise of religion." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (internal quotation marks omitted). Indeed, it is doubtful that *Jacobson* applies to free exercise challenges at all. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 23 (2020) (Gorsuch, *J.*, concurring) ("*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of

III

Finally, PHL 2164 imposes exceptional hardship on the Amish in New York State. New York chose to target the Amish schools for enforcement even though not a single Amish student had been infected with measles during the 2019 outbreak. It then fined Plaintiffs $118,000 for a single day of noncompliance, which may well result in the "seizure of [their] farms or schools." App'x at 951. If the panel decision stands, PHL 2164 appears likely to result in the closure of every Amish school in the state.

I respectfully dissent from the denial of rehearing *en banc*.

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analysis, an entirely different right, and an entirely different kind of restriction."); *Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. 1042, 1049 (2020) (Alito, *J.*, joined by Thomas and Kavanaugh, *JJ.*, dissenting from denial of application for an injunction) ("It is a considerable stretch to read [*Jacobson*] as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment.").

MENASHI, *Circuit Judge*, joined by BIANCO and PARK, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

As the other dissent explains, the panel in this case improperly excused New York from the burden of justifying a law that "pose[s] 'a very real threat of undermining' the religious beliefs and practices that parents wish to instill in their children." *Mahmoud v. Taylor*, 606 U.S. 522, 543 (2025) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). The panel concluded that the means by which the law poses that threat—"a health-and-safety condition on in-person school attendance"—immunizes it from strict scrutiny. *Miller v. McDonald*, 180 F.4th 420, 433 (2d Cir. 2026). But the Supreme Court has focused on the effect: It has explained that the rights of parents "to direct the religious upbringing of their children" are "violated by government policies that substantially interfere with the religious development of children." *Mahmoud*, 606 U.S. at 546 (internal quotation marks and alteration omitted). The plaintiffs here allege that Public Health Law § 2164 substantially interferes with their children's religious development. They say that communal Amish schooling is vital to their children's religious development, but § 2164 requires them either to violate their faith by submitting to the vaccination of their children or to forgo that form of religious upbringing altogether.

It is not the role of a secular court to tell Amish parents that their beliefs about vaccination and communal schooling do not even implicate "a matter central to their child's identity and upbringing." *Miller*, 180 F.4th at 433. A court must avoid "passing judgment on 'the centrality of different religious practices,' which is a misguided enterprise that the Supreme Court has called 'akin to the unacceptable business of evaluating the relative merits of differing religious claims.'" *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004)

(quoting *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990)). The state may argue "that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way." *Yoder*, 406 U.S. at 221. But the question in this case is whether the state is required to justify its interference with those practices in the first place. Under *Mahmoud* and *Yoder*, it must provide that justification.

I write separately to note that, even if the panel were correct that *Mahmoud* and *Yoder* do not apply in this case, strict scrutiny would still be required because § 2164 is not generally applicable.

I

A law is not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021). The Supreme Court has emphasized that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Whether two activities are comparable "must be judged against the asserted government interest that justifies the regulation at issue" because "[c]omparability is concerned with the risks various activities pose, not the reasons why people" engage in those activities. *Id.*

Public Health Law § 2164 permits a child who is unvaccinated for medical reasons to attend school, but it bars a child who is unvaccinated for religious reasons from attending school. The government interest that justifies § 2164 is "the prevention of disease outbreaks" by "sustaining a high vaccination rate among school

children" and thereby "protecting the health of all New Yorkers." *Miller*, 180 F.4th at 425, 429 (alteration omitted) (quoting legislative history). Measured against that interest, medical non-vaccination and religious non-vaccination are comparable: A medically unvaccinated child attending school and a religiously unvaccinated child attending school will both pose the same risk of facilitating disease transmission.

The panel avoided this straightforward conclusion by redefining the government interest to include medical exemptions and to exclude religious exemptions. The panel said that § 2164 "decreases 'to the greatest extent *medically possible*' the number of unvaccinated students and thus the risk of disease." *Id.* at 429 (emphasis added) (quoting *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 153 (2d Cir. 2023)). But the government interest may not be defined to incorporate the secular exemption that must be evaluated for comparability. Defining the interest to include secular but not religious exemptions is another way of saying that the state has an interest in favoring secular activities over comparable religious activities.

If such favoritism were a legitimate government interest, the free-exercise case law would look very different. The Newark Police Department, for example, could have simply said that it wanted to limit the wearing of beards by officers "to the greatest extent medically possible," and medical exemptions would have been rendered noncomparable by definition. *But see Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (holding that because under the beard policy "exemptions are made for medical reasons" but not "for officers whose religious beliefs prohibit them from shaving their beards," the "policy violates the First Amendment"). The "principle of general applicability" is

"violated" when "the secular ends asserted in defense of the laws" are "pursued only with respect to conduct motivated by religious beliefs." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). Here, New York decided to pursue its public-health interest only with respect to religiously motivated conduct by "[r]epealing the religious exemption" while "maintaining the medical exemption." *Miller*, 180 F.4th at 429.[1]

The fact that the state allows medically unvaccinated children to attend school shows that it is willing to accommodate students who are unvaccinated for secular reasons that the state favors. *Cf. We the Patriots*, 76 F.4th at 168 (Bianco, J., concurring in part and dissenting in part) ("[T]he student with the medical objection to vaccinations can avoid that harm and other schoolchildren would be protected from disease if the student with the medical objection was not exempt and was left with the option of being homeschooled, which is now the only option under the Act available for students with a religious objection."). It is no answer to say that there are more requests for religious than for medical exemptions. *But cf. Miller*, 180 F.4th at 429-30. Even if the government could establish that it is able to accommodate only a limited number of unvaccinated students, that would not justify allocating all the accommodations to secular objectors and none to religious objectors.

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[1] New York also does not apply the vaccination requirement to students who have turned eighteen or to the teachers and employees who work in the schools. *See* N.Y. Pub. Health Law § 2164(1)(b) (defining "child" to "include any person between the ages of two months and eighteen years"); *Miller*, 180 F.4th at 430 n.13 (acknowledging that the plaintiffs "allege there are 66,000 unvaccinated students without an exemption and other unvaccinated people in schools, such as teachers and maintenance staff").

To be sure, "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause," *Thomas v. Rev. Bd.*, 450 U.S. 707, 713 (1981), so the state does not need to accommodate "a matter of personal preference," *Yoder*, 406 U.S. at 216. Before it was changed in 2019, § 2164 reasonably limited religious exemptions to children of parents with "genuine and sincere religious beliefs." N.Y. Pub. Health Law § 2164(9) (repealed 2019). "While the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs, courts are clearly competent to determine whether religious beliefs are sincerely held." *Kravitz v. Purcell*, 87 F.4th 111, 127 (2d Cir. 2023) (internal quotation marks and citation omitted). But the state has not questioned the sincerity of the Amish plaintiffs, and "the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Yoder*, 406 U.S. at 216.[2]

II

The panel's decision entrenches a circuit split. The First Circuit has explained that when the state identifies the prevention of communicable disease as "its principal interest in permitting medical but not religious exemptions" to a vaccine mandate, it is "plausible" that "the medical exemption undermines these interests in a similar way to a hypothetical religious exemption." *Lowe v. Mills*, 68 F.4th 706, 714-15 (1st Cir. 2023). "The availability of a medical exemption, like a religious exemption, could reduce vaccination rates among

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[2] *See also* Brief of Amicus Curiae Old Order Amish Bishop Elmer Stoltzfus in Support of Petitioners at 16, *Miller v. McDonald*, No. 26-438 (U.S. Nov. 2, 2026) ("Many Amish hold sincere religious objections to vaccines, and their refusal is itself an act of educating children in their faith.").

healthcare workers and increase the risk of disease spread in healthcare facilities, compared to a counterfactual in which the [m]andate contains no exceptions, all workers must be vaccinated, and neither religious objectors nor the medically ineligible can continue working in healthcare facilities." *Id.* at 715 (citing *Tandon*, 593 U.S. at 63).

The Tenth Circuit has similarly recognized that "a government 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 Univ. of Colo.*, 100 F.4th 1251, 1277 (10th Cir. 2024) (quoting *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006)). The Tenth Circuit held that a vaccination requirement was not generally applicable because, even though it allowed both medical and religious exemptions, it set "a lower bar for denying religious exemptions." *Id.* By establishing "a lower threshold for denying religious exemptions," the vaccination requirement made "a 'value judgment in favor of secular motivations, but not religious motivations.'" *Id.* at 1277-78 (quoting *Grace United Methodist Church*, 451 F.3d at 654). For that reason, it was "not generally applicable" and was "subject to strict scrutiny." *Id.* at 1278.

Other circuits have recognized the same principles in different contexts. The Sixth Circuit has acknowledged that "comparability depends on whether the secular conduct 'endangers [the government's] interests in a similar or greater degree than' the religious conduct does." *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 543). And the Eleventh Circuit has said that it "violates the principles of neutrality and general applicability" when an ordinance pursues an interest "only against religious assemblies, but not other non-commercial assemblies, thus devaluing the religious reasons for

assembling." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004). If "private clubs and lodges" implicate the interest "as much or more than churches and synagogues," the "failure to treat the analogous groups equally indicates that [the government] improperly targeted religious assemblies." *Id.* at 1235.

Our court, however, has joined those circuits that allow the government to pursue its interests only against conduct motivated by religious belief. The Third Circuit has said that "policies need not permit religious exemptions to be neutral," even if the policies permit medical exemptions, "so long as the lack of an exemption does not reflect policymakers' hostility toward religion." *Spivack v. City of Philadelphia*, 109 F.4th 158, 168 (3d Cir. 2024). The Fourth Circuit has said that "medical exemptions will often not be comparable to religious exemptions when the government's asserted interest relates to health," so a "state that limits the scope of a health law for medical reasons is not thereby compelled to grant religious or other non-health exemptions." *Perry v. Marteney*, 172 F.4th 315, 326 (4th Cir. 2026). And the Ninth Circuit has said that a vaccine mandate that "allows for medical exemptions" but "does not allow for an exemption to the mandate on the basis of religious belief" was neutral and generally applicable because the challengers could not show "that the mandate was implemented with the aim of suppressing religious belief, rather than protecting the health and safety of students, staff, and the community." *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176-77 (9th Cir. 2021).

* * *

Strict scrutiny applies when a law "will 'substantially interfere' with the parents' ability to direct the 'religious development' of their children," *Mahmoud*, 606 U.S. at 554 (alteration omitted) (quoting

Yoder, 406 U.S. at 218), or "treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon*, 593 U.S. at 62. Public Health Law § 2164 does both, yet the panel excused New York from having to justify it. I would rehear this case *en banc* to require New York to meet that burden. Because the court declines to do so, I dissent.