

# VACCINES, RELIGIOUS LIBERTY, AND THE GVR AS DOCTRINAL SIGNAL

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## INTRODUCTION

In December 2025, without oral argument or a written opinion, the Supreme Court did something it had never done before: It set aside a lower court judgment upholding a vaccine mandate that lacked religious exemptions. In *Miller v. McDonald*,<sup>1</sup> the Court granted certiorari, vacated the Second Circuit’s decision, and remanded “for further consideration in light of *Mahmoud v. Taylor*,”<sup>2</sup> its newest religious liberty ruling in which it held that public school policies substantially burden parents’ free exercise rights when they interfere with children’s religious development.<sup>3</sup> That was the entirety of the Court’s reasoning.<sup>4</sup> Yet the signal is difficult to ignore. A case about opt-outs from LGBTQ-inclusive storybooks is now the lens through which a lower court must consider public-health mandates.

By treating *Mahmoud* as relevant to a paradigmatic public-health mandate, the Court has invited constitutional exemptions not only from what children are taught, but also from what the state requires to keep them, and others, safe. Vaccine mandates have long served as the canonical limit case, the example the Supreme Court has consistently invoked to mark where religious liberty does *not* reach.<sup>5</sup> If the Court is signaling that *Mahmoud* extends to vaccine mandates, it has quietly unsettled one of the most enduring premises of its free exercise jurisprudence.<sup>6</sup>

The *Miller* grant-vacate-remand (GVR) is, in that sense, a case study in how some GVRs function — not as routine housekeeping directing a

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<sup>1</sup> 146 S. Ct. 879 (2025) (mem.).

<sup>2</sup> 145 S. Ct. 2332 (2025); *Miller*, 146 S. Ct. at 879.

<sup>3</sup> *Mahmoud*, 145 S. Ct. at 2341–42.

<sup>4</sup> *Miller*, 146 S. Ct. at 879.

<sup>5</sup> See *infra* Part II, pp. 289–93.

<sup>6</sup> That reading is not mere conjecture. In a different circuit, Judge Niemeyer, writing in dissent in *Perry v. Marteney*, described the *Miller* grant-vacate-remand as “binding . . . and dispositive instruction” to apply *Mahmoud* to vaccine mandates. No. 24-2132, 2026 WL 946152, at \*15 (4th Cir. Apr. 8, 2026) (Niemeyer, J., dissenting). See *infra* note 82.

lower court to apply clearly relevant intervening precedent,<sup>7</sup> but as a mechanism for extending recent precedent into territory it did not address and that existing doctrine appears to foreclose. When a GVR points one way and the Court's prior statements point another, the result is a forced choice. In *Miller*, the GVR leaves the lower court caught between the Court's century of statements treating vaccines as the outer boundary of religious liberty and an order that unsettles that premise — a choice that risks error either way. That dilemma matters beyond *Miller*, illuminating how some GVRs do substantive doctrinal work without openly saying so.

This Essay proceeds in four Parts. Part I traces the doctrinal baseline, showing that vaccines have long functioned as the limit case for religious liberty. Part II briefly describes the doctrinal changes of the COVID-19 era — the Supreme Court's expansion of religious equality doctrine, and its emergency-docket denials that left vaccine mandates formally unresolved — before explaining why the GVR in *Miller* signals a different move: the extension of the religious liberty framework to vaccine mandates, bypassing the comparability analysis that had allowed most courts to sustain them under the equality model. Part III turns to *Miller* itself and the Second Circuit's decision upholding New York's repeal of its religious exemption. Part IV returns to the *Miller* GVR as a window into the Court's broader practice of communicating consequential legal directions through orders, and argues that the GVR is best understood as doing substantive doctrinal work by treating *Mahmoud* as bearing on vaccine mandates. In doing so, the GVR unsettles a century-old premise about religious liberty and children's health and forces the lower court into an interpretive bind, given that the Court has not squarely repudiated the older baseline.

## I. BACKGROUND

Vaccines have served as the limiting case across every era of the Court's free exercise jurisprudence, the example invoked to show that some exercises of state power are simply beyond religious liberty challenge. The doctrinal foundation is *Jacobson v. Massachusetts*,<sup>8</sup> the 1905 decision in which the Supreme Court addressed a Cambridge ordinance requiring residents to be vaccinated against smallpox or pay a five-dollar fine.<sup>9</sup> The Court held that “a community has the right to

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<sup>7</sup> See, e.g., Benjamin B. Johnson, *A History of Vacatur*, 135 YALE L.J. 761, 794 (2026) (“The Court now uses the GVR to manage its docket.”); *id.* at 789–90 (describing how “the Court will often hold some of the petitions pending its decision in others . . . [and] once that opinion has issued, the Court uses the GVR to send the cases back to the lower courts”). Notably, the petition in *Miller* was filed only after the Court had issued *Mahmoud*. So the Court did not hold the petition, as it often does when it grants a GVR.

<sup>8</sup> 197 U.S. 11 (1905).

<sup>9</sup> *Id.* at 12.

protect itself against an epidemic of disease which threatens the safety of its members.”<sup>10</sup>

For more than a century, *Jacobson* functioned as the Court’s leading infectious-disease decision and a principal authority for the constitutionality of vaccine mandates.<sup>11</sup> *Jacobson* was not a free exercise case — it predated the incorporation of the Free Exercise Clause against the states by thirty-five years — but once free exercise was incorporated in 1940,<sup>12</sup> *Jacobson*’s logic was absorbed into the Court’s understanding of free exercise’s boundaries.<sup>13</sup>

The Court made the point explicit in the child-welfare context in 1944,<sup>14</sup> when it upheld a child-labor law against a Jehovah’s Witness guardian.<sup>15</sup> The state’s authority over children’s welfare, the Court explained, “reaches beyond the scope of its authority over adults.”<sup>16</sup> Pointedly, the Court observed that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>17</sup>

That principle was reaffirmed in the Court’s two leading twentieth-century free exercise decisions recognizing constitutional protection for religious claimants against the state,<sup>18</sup> and repeatedly elsewhere as well.<sup>19</sup> Finally, in *Employment Division v. Smith*<sup>20</sup> — the Court’s canonical 1990 decision — Justice Scalia, writing for the Court, specified “compulsory vaccination laws” as among those laws that obviously do

<sup>10</sup> *Id.* at 27.

<sup>11</sup> See, e.g., James Colgrove & Ronald Bayer, *Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v. Massachusetts*, 95 AM. J. PUB. HEALTH 571, 571 (2005) (“*Jacobson* has served as a precedent in numerous cases that have challenged vaccination laws.”).

<sup>12</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states).

<sup>13</sup> See *infra* note 18.

<sup>14</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>15</sup> *Id.* at 170.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 166–67 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

<sup>18</sup> In *Sherbert v. Verner*, 374 U.S. 398 (1963), the unemployment benefits decision widely regarded as establishing heightened scrutiny for free exercise claims, the Court clarified that challenges are “rejected” when they “pose[] some substantial threat to public safety, peace or order,” *id.* at 403, listing *Jacobson* and *Prince* among its examples of this limiting principle. See *id.* And, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) — the only case outside the employment benefits context during this period in which the Court ruled for a free exercise claimant — the Court carefully distinguished its holding from *Prince*, emphasizing that no “harm to the physical or mental health of the child or to the public safety, peace, order, or welfare ha[d] been demonstrated,” *id.* at 230 (citing *Jacobson*, 197 U.S. at 11).

<sup>19</sup> For example, in 1968, the Court summarily affirmed a lower court decision permitting blood transfusions for children over parental religious objections, citing only *Prince*. See *Jehovah’s Witnesses in State of Wash. v. King Cnty. Hosp. Unit No. 1 (Harbor-View)*, 390 U.S. 598, 598 (1968) (per curiam) (citing *Prince*, 321 U.S. at 158).

<sup>20</sup> 494 U.S. 872 (1990).

not require religious exemptions,<sup>21</sup> citing as an example a state supreme court decision holding that parents were not entitled to a religious exemption from a school vaccination requirement.<sup>22</sup>

In a word, the doctrinal line was clear for over a century: Religious liberty does not encompass the right to expose communities to communicable disease. Unsurprisingly, all courts to address a free exercise challenge to a vaccine mandate rejected it.<sup>23</sup> Indeed, courts treated the suggestion that religious freedom could entitle one to opt out of a vaccine mandate as barely worthy of engagement,<sup>24</sup> and some courts went further, striking down religious exemptions from vaccine mandates as unconstitutional given the health risks they impose on others.<sup>25</sup>

<sup>21</sup> *Id.* at 889 (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

<sup>22</sup> *Cude*, 377 S.W.2d at 818.

<sup>23</sup> See Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106, 1108–09 (2022) [hereinafter Rothschild, *Individualized Exemptions*]; Erwin Chemerinsky & Michele Goodwin, Essay, *Compulsory Vaccination Laws Are Constitutional*, 110 NW. U. L. REV. 589, 604 (2016) (“[E]very court to consider challenges to compulsory vaccination laws has upheld the statutes.”); Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1559–61 (2014) (“No court — state or federal — has ever required a state to create a religious exemption,” *id.* at 1560); *Caviezel v. Great Neck Pub. Schs.*, 739 F. Supp. 2d 273, 284 (E.D.N.Y. 2010), *aff’d*, 500 F. App’x 16 (2d Cir. 2012) (“Moreover, the Court is aware of no federal court that, after addressing the relevant Supreme Court opinions, has explicitly held that the First Amendment does provide a religious exemption from mandatory inoculation.”). One arguable exception is *Lewis v. Sobol*, 710 F. Supp. 506 (S.D.N.Y. 1989), in which the court found that the denial of a religious exemption from a school vaccination requirement violated the plaintiffs’ First Amendment rights. *Id.* at 507. But the court’s constitutional analysis was parasitic on its statutory holding. Having determined that the plaintiffs held sincere religious beliefs entitling them to an exemption under New York’s statutory religious exemption provision, section 2164(9) of the New York Public Health Law, *Lewis*, 710 F. Supp. at 515–17, the court treated the wrongful denial of that statutory entitlement as a constitutional violation for damages purposes, *id.* at 517–18. The court conducted no independent free exercise analysis — no compelling interest balancing, no examination of the state’s public health authority. The case does not represent a considered judicial conclusion that the Free Exercise Clause independently requires exemptions from vaccine mandates. See *Caviezel*, 739 F. Supp. 2d at 284 (finding it significant that the *Lewis* court did not “discuss[] whether the First Amendment in fact provides this right, nor . . . mention any of the relevant case law from the Supreme Court”). This consensus held until 2021, when the Court introduced an expansionist religious equality doctrine. See *infra* Part II, pp. 289–93.

<sup>24</sup> See, e.g., *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (“[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs.”); *Cude*, 377 S.W.2d at 819 (“According to the great weight of authority, it is within the police power of the State to require that school children be vaccinated against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise. In fact, this principle is so firmly settled that no extensive discussion is required.”).

<sup>25</sup> See *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (“hold[ing] that the provision providing an exception from the operation of the statute because of religious belief is in violation of the Fourteenth Amendment” because “it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute”).

## II. VACCINES AND FREE EXERCISE: RELIGIOUS EQUALITY VS. LIBERTY

Doctrinal change began during the COVID-19 pandemic. Following Justice Barrett's confirmation in 2020, the Court significantly expanded the meaning of religious discrimination through two new rules. First, in *Tandon v. Newsom*,<sup>26</sup> the Court held that heightened scrutiny applies whenever religiously motivated activity is treated less favorably than "comparable" secular activity, such that even a single secular exception to a law can trigger strict scrutiny of the denial of religious exceptions.<sup>27</sup> Second, in *Fulton v. City of Philadelphia*,<sup>28</sup> the Court established an "anti-discretion" rule: Whenever officials retain discretion to grant exemptions, refusing a religious exemption is presumptively unconstitutional even if officials have never granted an exemption for any reason.<sup>29</sup> These principles led some lower federal courts to hold that governments must provide religious exemptions from vaccine mandates,<sup>30</sup> though most courts resisted that conclusion.<sup>31</sup>

The Supreme Court, for its part, also stopped short of extending those principles to vaccine mandates. In late 2021, the Court declined to grant emergency relief in *Does 1–3 v. Mills*,<sup>32</sup> a religious

<sup>26</sup> 141 S. Ct. 1294 (2021) (per curiam).

<sup>27</sup> *Id.* at 1296 ("First, 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."); see Zalman Rothschild, Essay, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453, 477 (2025) [hereinafter Rothschild, *Religious Equality*] ("Even a single secular exemption renders a law not generally applicable and thus discriminatory toward religion if it does not also provide a blanket exemption for all similar religiously motivated activities."); Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. 2397, 2399 (2021) ("[*Tandon*] held that regulations are presumptively unconstitutional 'whenever they treat *any* comparable secular activity more favorably than religious exercise . . . .").

<sup>28</sup> 141 S. Ct. 1868 (2021).

<sup>29</sup> *Id.* at 1879 ("Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . ."); see Rothschild, *Individualized Exemptions*, *supra* note 23, at 1114–15 (arguing that the Court's "anti-any-and-all-discretion rule," *id.* at 1114, in *Fulton* means that "any time the government reserves any discretion regarding whether to exempt anyone or anything from a general rule, it cannot deny an exemption to religious actors or interests," *id.* at 1114–15).

<sup>30</sup> See, e.g., *Dahl v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021) (per curiam); *Dr. A. v. Hochul*, 567 F. Supp. 3d 362, 377 (N.D.N.Y. 2021), *rev'd in part, vacated in part sub nom.*, *We the Patriots USA v. Hochul*, 17 F.4th 266, 273 (2d Cir. 2021) (per curiam); *Thoms v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CV-21-01781, 2021 WL 5162538, at \*13 (D. Ariz. Nov. 5, 2021); *Grantonz v. Earley*, No. 21CV2137, 2021 WL 5866978, at \*4 (N.D. Ohio Dec. 10, 2021); see also Rothschild, *Individualized Exemptions*, *supra* note 23, at 1110 ("With a powerful new free-exercise-as-equality doctrine on the books, lower courts have been enabled and emboldened to strike down laws as applied to religious objectors in a range of cases, including — for the first time in history — cases adjudicating vaccine mandates.").

<sup>31</sup> See cases cited *infra* note 41.

<sup>32</sup> 142 S. Ct. 17 (2021) (mem.).

discrimination challenge to Maine’s healthcare worker vaccine mandate.<sup>33</sup> The Court provided no explanation, but Justice Barrett, joined by Justice Kavanaugh, offered a procedural rationale: It is generally preferable to avoid granting such relief to prevent petitioners from using “the emergency docket to force the Court to give a merits preview . . . on a short fuse without benefit of full briefing and oral argument.”<sup>34</sup> This rationale, however, sat uneasily with those same Justices’ willingness to grant emergency relief in other COVID-19 religious equality cases that raised the same procedural concerns.<sup>35</sup> Justice Gorsuch, joined by Justices Thomas and Alito, wrote a strongly worded dissent.<sup>36</sup> The Court again denied emergency relief in another vaccine mandate case, *Dr. A. v. Hochul*,<sup>37</sup> a few months later; Justice Gorsuch, joined by Justice Alito, again wrote a dissenting opinion.<sup>38</sup> The Court denied certiorari in several similar challenges, with Justices Thomas, Alito, and Gorsuch dissenting from at least one denial.<sup>39</sup>

The GVR in *Miller v. McDonald* — involving a religious liberty challenge to a childhood vaccine mandate — marks the first time the Court has addressed vaccine mandates since those COVID-19 denials.<sup>40</sup> This time, a majority of the Court was willing to vacate a lower court decision upholding a vaccine mandate without religious exemptions. What explains the shift? The answer likely lies in the difference between the religious equality logic the Court developed during COVID-19 and the religious liberty rule *Mahmoud* established. The pandemic-era cases focused on whether secular and religious exemptions are

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<sup>33</sup> *Id.* at 18 (Gorsuch, J., dissenting from the denial of application for injunctive relief).

<sup>34</sup> *Id.* (Barrett, J., concurring in the denial of application for injunctive relief).

<sup>35</sup> See Thomas P. Schmidt, *Orders Without Law*, 122 MICH. L. REV. 1003, 1021–22 (2024) (reviewing STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023)) (identifying Justice Barrett’s concurrence in *Does 1–3* as “a turning point in the Court’s shadow docket practices,” *id.* at 1021, and noting that emergency grants fell from twenty-four in the 2020 Term to six in the 2022 Term, *id.* at 1020). Professor Schmidt’s observation raises a question he does not address: Why *this* case? The Court had been granting emergency orders in COVID-related religious equality challenges for over a year by then, under identical procedural circumstances. My hypothesis is that vaccines were perceived as different. Justices Kavanaugh and Barrett may have recognized that extending emergency docket interventions to vaccine mandates would implicate a century of settled precedent in a way that COVID-era gathering restrictions did not, and pulled back — at least when the claim rested on controversial comparisons to demonstrate religious discrimination. *Mahmoud* may have presented a new opportunity precisely because, as a religious liberty precedent, it does not rely on such comparisons.

<sup>36</sup> *Does 1–3*, 142 S. Ct. at 18–22 (Gorsuch, J., dissenting from the denial of application for injunctive relief).

<sup>37</sup> 142 S. Ct. 552 (2021) (mem.).

<sup>38</sup> *Id.* at 552–59 (Gorsuch, J., dissenting from the denial of application for injunctive relief).

<sup>39</sup> *E.g.*, *Dr. A. v. Hochul*, 142 S. Ct. 2569, 2569–71 (2022) (Thomas, J., joined by Alito & Gorsuch, JJ., dissenting from denial of certiorari).

<sup>40</sup> *Miller v. McDonald*, 146 S. Ct. 879 (2025) (mem.).

comparable, a question most courts answered in the state's favor.<sup>41</sup> *Mahmoud*, by contrast, asks only whether the mandate substantially interferes with a child's religious upbringing.<sup>42</sup>

In *Mahmoud*, several religious parents challenged their school district's policy of not granting opt-outs from instruction involving LGBTQ-inclusive storybooks for students in prekindergarten through fifth grade.<sup>43</sup> They argued that the picture books conveyed normative views about same-sex marriage and gender identity contrary to their religious beliefs.<sup>44</sup> In a 6–3 decision authored by Justice Alito, the Court held that the school district's refusal to provide opt-outs substantially burdened the parents' free exercise rights by interfering with their ability to direct the religious upbringing of their children.<sup>45</sup> Relying heavily on *Wisconsin v. Yoder*,<sup>46</sup> the Court's 1972 decision exempting Amish families in Wisconsin from compulsory high school attendance,<sup>47</sup> the Court concluded that government policies that “substantially interfer[e] with the religious development” of children trigger strict scrutiny, even when those policies are neutral and generally applicable.<sup>48</sup>

The significance of that framework for vaccine mandates lies in what it sidesteps. Under the Court's recent religious equality rule, heightened scrutiny is triggered whenever the government permits secular conduct that undermines its asserted interest to the same or greater degree as would the religious conduct it burdens.<sup>49</sup> That rule has incentivized courts to define the government's interest at the level of generality most likely to yield their preferred outcome, particularly in the vaccine

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<sup>41</sup> See, e.g., *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 155 (2d Cir. 2023); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1180 (9th Cir. 2021); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288 (2d Cir. 2021) (per curiam); *Does 1–6 v. Mills*, 16 F.4th 20, 29–32 (1st Cir. 2021).

<sup>42</sup> See *infra* notes 48, 113–15 and accompanying text.

<sup>43</sup> *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2341–42 (2025).

<sup>44</sup> *Id.* at 2348.

<sup>45</sup> See *id.* at 2341–42.

<sup>46</sup> 406 U.S. 205 (1972).

<sup>47</sup> See *id.* at 234; Zalman Rothschild, *The Right to Exit Religion*, 113 GEO. L.J. 1459, 1469 (2025) (“In the Court's telling, Amish culture's distinctiveness was matched only by its vulnerability. Without judicial intervention, there was a ‘very real threat of [Wisconsin] undermining the Amish community and religious practice as they exist today.’” (quoting *Yoder*, 406 U.S. at 218)).

<sup>48</sup> *Mahmoud*, 145 S. Ct. at 2361 (quoting *Yoder*, 406 U.S. at 218); see also *id.* at 2350. For further analysis and criticism of *Mahmoud*, see generally Richard B. Katskee & Ira C. Lupu, *Mahmoud v. Taylor: Cause or Effect of Disruptions in Public Schools?*, 24 FIRST AMEND. L. REV. 253 (2026), and Micah Schwartzman et al., *The Supreme Court, 2024 Term — Comment: The Structure of Religious Preference*, 139 HARV. L. REV. 211 (2025).

<sup>49</sup> See Andrew Koppelman, Essay, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA L. REV. 2237, 2241 (2023) (“If any comparable activity is being treated better than religion, strict scrutiny applies.”); Rothschild, *Religious Equality*, *supra* note 27, at 476; Tebbe, *supra* note 27, at 2399 (“[T]he *Tandon* Court applied what some are calling the ‘most favored nation’ approach to religious discrimination.”).

context.<sup>50</sup> Most courts addressing vaccine mandates have reasoned that while a religious exemption would undermine the state’s interest in “public health” — understood at a high level of generality rather than in more granular terms, such as immunizing the populace against a specific disease — existing medical exemptions, in fact, advance it.<sup>51</sup>

Religious liberty is, in that respect, a cleaner vehicle.<sup>52</sup> It requires only a showing that the claimant holds a sincere religious belief that prevents compliance with the law, after which the state must satisfy strict scrutiny.<sup>53</sup> The same feature that likely explains the Court’s shift, that liberty bypasses the comparability thicket, also makes the move

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<sup>50</sup> See Rothschild, *Religious Equality*, *supra* note 27, at 507 (“[C]omparability . . . depend[s] on the extent to which secular and religious exemptions undermine the law’s interests, [and thus,] courts hoping to avoid striking down a law as applied to religious objectors can characterize the law’s interests at higher levels of abstraction, while courts wishing to side with the religious plaintiffs can select among various other levels of generality to reach their preferred outcome — or vice versa.”); *id.* at 506–08 (explaining how the doctrine has incentivized courts “to pick the ‘interest’ that will yield their preferred outcome,” *id.* at 507; illustrating how so long as “Maine’s interests were grounded in general public health, it would be fair to say that exemptions for the medically contraindicated not only did not undermine its interests but reinforced them], but that so long as the] interests were more specific and pertained to stemming the tide of COVID-19, [medical exemptions] would undermine those interests to the same degree as would religious exemptions,” *id.* at 506; and noting that “[t]he trend of selecting the preferable level of abstraction for describing the government’s interests in a given law or policy — be it at a high level or a low level — is quickly becoming commonplace in religious equality cases,” *id.* at 507–08).

<sup>51</sup> See, e.g., *Does 1–6 v. Mills*, 16 F.4th 20, 30–31 (1st Cir. 2021); Rothschild, *Religious Equality*, *supra* note 27, at 506–08.

<sup>52</sup> This explains why religious freedom advocates continue to press for the restoration of religious liberty and protection from incidental burdens on religious exercise — by overturning *Employment Division v. Smith*, 494 U.S. 872 (1990) — even alongside the expansive new equality doctrine. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring) (“[W]hile precedent should not lightly be cast aside, the Court’s error in *Smith* should now be corrected.”); Brief of *Amicus Curiae* Stephanie Barclay in Support of Petitioners at 2, *Miller v. McDonald*, 146 S. Ct. 879 (2025) (No. 25-133). In other respects, religious liberty is messier — which is in part why Justice Scalia replaced it with what I have elsewhere described as a rule of anti-intentional-discrimination. See Rothschild, *Religious Equality*, *supra* note 27, at 461–62.

<sup>53</sup> To be sure, reframing the claim as one of religious liberty solves only the threshold question of what triggers constitutional review. In theory, the same comparative analysis resurfaces at the next step, when courts apply strict scrutiny. A state can argue that it has a compelling interest in mandating vaccines. But states that offer medical exemptions — which is every state — undercut their own claim of necessity under the Court’s free exercise strict scrutiny doctrine. See *infra* notes 126–27 and accompanying text. That analysis, too, ends up turning on comparability, see *supra* notes 49–50 and accompanying text, though with a subtle difference. The demand for *necessity* opens the door to evidence beyond medical exemptions. The Supreme Court has pointed to other states granting religious exemptions and to a state’s own prior willingness to grant them as indications that it is not necessary to deny them. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 368 (2015) (observing that “so many other prisons allow inmates to grow beards while ensuring prison safety and security”); *Ramirez v. Collier*, 142 S. Ct. 1264, 1276, 1279–80 (2022) (looking to the state’s own past practice of allowing prayer and to other jurisdictions); *cf.* *Does 1–3 v. Mills*, 142 S. Ct. 17, 18–19, 22 (2021) (Gorsuch, J., dissenting from the denial of application for injunctive relief) (noting that “many other States have adopted religious exemptions” while Maine “charted a different course,” *id.* at 22). So even if a court were to conclude that the medical exemptions are not comparable to religious exemptions, it might still find the state’s claim of necessity undermined by this additional evidence.

more consequential. A right that does not depend on comparative treatment is a right that is harder to resist.

In earlier work, I observed that while “courts operating under the liberty model”<sup>54</sup> had not been “willing to even entertain the notion that free exercise includes entitlement to an exemption from a vaccine mandate,”<sup>55</sup> the structure and rhetoric of religious equality allowed courts to venture where it was previously considered anathema to go.<sup>56</sup> In *Miller*, the Court appears to be taking a step neither it nor any known court in American history has taken: extending religious liberty to vaccine mandates when the objection involves vaccines administered to children — an inversion of *Prince v. Massachusetts*’s<sup>57</sup> foundational premise that the state’s authority over children rests on stronger constitutional footing than its authority over adults.<sup>58</sup> On that view, the presence of children no longer weakens the claim for a religious exemption; it strengthens it. The Court’s choice of a GVR rather than a merits decision, however, suggests some continuing hesitation about saying so outright.

### III. *MILLER V. MCDONALD*

*Miller v. McDonald* concerns New York’s 2019 decision, following a severe measles outbreak, to remove religious exemptions from its school vaccination requirement.<sup>59</sup> The outbreak was the worst in the United States in nearly three decades.<sup>60</sup> Nearly a thousand cases were confirmed in New York alone,<sup>61</sup> concentrated in communities where vaccination rates had fallen dangerously low.<sup>62</sup> Dozens were hospitalized.<sup>63</sup>

<sup>54</sup> Rothschild, *Religious Equality*, *supra* note 27, at 485–86.

<sup>55</sup> *Id.* at 486.

<sup>56</sup> *See id.* at 487 (explaining, among other things, how “equality is a structural rather than individual right: It is concerned with the *government’s* placing burdens on religion rather than the specific burdens on *individuals’* religious practices”).

<sup>57</sup> 321 U.S. 158 (1944).

<sup>58</sup> *See supra* notes 14–17 and accompanying text.

<sup>59</sup> N.Y. PUB. HEALTH LAW § 2164(1), (7)(a) (McKinney 2020); *see Miller v. McDonald*, 130 F.4th 258, 262–63 (2d Cir. 2025) (per curiam).

<sup>60</sup> Manisha Patel et al., *National Update on Measles Cases and Outbreaks — United States, January 1–October 1, 2019*, 68 MORBIDITY & MORTALITY WKLY. REP. 893, 893 (2019) (“During January 1–October 1, 2019, a total of 1,249 measles cases and 22 measles outbreaks were reported in the United States. This represents the most U.S. cases reported in a single year since 1992 . . .”).

<sup>61</sup> *See Jane R. Zucker et al., Consequences of Undervaccination — Measles Outbreak, New York City, 2018–2019*, 382 NEJM 1009, 1011 (2020).

<sup>62</sup> Sharon Otterman, *New York Confronts Its Worst Measles Outbreak in Decades*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/nyregion/measles-outbreak-jews-nyc.html> [https://perma.cc/8W3B-36Q8] (“[H]ealth officials discovered that some religious schools, or yeshivas, in ultra-Orthodox communities in Rockland County had vaccination rates as low as 60 percent, far below the state average of 92.5 percent.”).

<sup>63</sup> *See Zucker et al., supra* note 61, at 1012 (reporting that of the 649 confirmed cases, “49 patients (7.6%) . . . were hospitalized”).

Twenty were admitted to intensive care.<sup>64</sup> The outbreak threatened the nation's measles elimination status.<sup>65</sup> The state legislature responded by repealing its religious exemption, which had driven the sharp decline in vaccination.<sup>66</sup> Three Amish schools were fined approximately \$120,000 for allowing unvaccinated children to attend.<sup>67</sup>

The schools and several parents challenged the law under the Free Exercise Clause.<sup>68</sup> They cast the case in *Yoder's* terms: The mandate, they said, forced Amish parents to choose between vaccinating their children against their religious beliefs and abandoning communal schooling,<sup>69</sup> which they described as a “vital part” of their children's spiritual development.<sup>70</sup>

The Second Circuit rejected the challenge.<sup>71</sup> The court carefully engaged the precedents, with *Yoder* foremost among them, that *Mahmoud* would later rely on.<sup>72</sup> It concluded that *Yoder* did not apply because the risk to free exercise posed by vaccination requirements was “not equivalent to the existential threat the Amish faced in *Yoder*.”<sup>73</sup> The vaccination mandate did not imperil the continued survival of the Amish community in the way that compulsory high school attendance did.<sup>74</sup>

The court also stressed the public health limitation that *Yoder* itself recognized.<sup>75</sup> It emphasized that *Yoder* was “limited by the state's interest in protecting public health,” pointing to what *Yoder* described as

<sup>64</sup> *Id.* at 1012 (reporting that among the hospitalized, “20 (40.8%) were admitted to an intensive unit care [sic]”).

<sup>65</sup> *Id.* at 1010 (“Measles was declared eliminated in the United States in 2000.”).

<sup>66</sup> See *Miller v. McDonald*, 130 F.4th 258, 263 (2d Cir. 2025) (per curiam); *Department of Health and Office of Children and Family Services Issue Emergency Regulations to Strengthen Medical Exemption Process for School Vaccinations*, N.Y. DEP'T OF HEALTH (Aug. 16, 2019), [https://www.health.ny.gov/press/releases/2019/2019-08-16\\_vaccinations\\_emergency\\_regulations.htm](https://www.health.ny.gov/press/releases/2019/2019-08-16_vaccinations_emergency_regulations.htm) [https://perma.cc/NDZ8-5R92] (noting that “[a]s a result of non-medical vaccination exemptions” — the only such exemption in New York was the religious exemption — “many communities across New York have unacceptably low rates of vaccination . . .”); see also Anemona Hartocollis, *Parents Tried to Shield Their Children from Vaccines. Instead They Got Measles.*, N.Y. TIMES (Mar. 3, 2026), <https://www.nytimes.com/2026/03/03/us/politics/south-carolina-measles-outbreak-vaccines.html> [https://perma.cc/Q6UW-VCYK] (discussing schools with low vaccination rates — including one with only twenty-one percent — in Spartanburg County, South Carolina, where the total “percentage of students with religious exemptions ha[d] more than doubled to 9.6 percent from 4.5 percent in the 2021-2022 school year”).

<sup>67</sup> *Miller*, 130 F.4th at 263.

<sup>68</sup> See *id.* at 264.

<sup>69</sup> *Id.* at 271 (“They claim that the school immunization law mandates two impossible options: inject their children with vaccines, forcing conduct against their religious beliefs, or forego educating their children in a group setting, requiring them to sacrifice a central religious practice.”).

<sup>70</sup> *Id.* at 264.

<sup>71</sup> *Id.* at 272.

<sup>72</sup> *Id.* at 270–71.

<sup>73</sup> *Id.* at 271.

<sup>74</sup> *Id.* at 270–71.

<sup>75</sup> The Second Circuit's opinion was unusually concrete about the public health record: The legislature cited plummeting immunization rates, clusters of schools with extremely low coverage, and dramatic growth in the use of religious exemptions, including schools with religious-exemption rates as high as twenty percent. See *id.* at 263.

*Prince*'s "apparently uncontroversial proposition that a parent 'cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds' because the 'right to practice religion freely does not include liberty to expose the community or the child to communicable disease.'"<sup>76</sup> And it underscored *Yoder*'s own assurance that the exemption there would not cause "harm to the physical or mental health of the child," an assurance exemptions from vaccination mandates could not possibly offer.<sup>77</sup>

But on December 8, 2025, without oral argument or a written opinion, the Court granted the plaintiffs' petition, vacated the Second Circuit's judgment, and remanded "for further consideration in light of *Mahmoud v. Taylor*."<sup>78</sup>

#### IV. WHAT'S IN A GVR?

That GVR makes *Miller* a case study in a broader phenomenon. The Court has increasingly communicated consequential legal signals to lower courts through orders that lack the reasoning those courts need to implement them. The dynamic is especially acute on the emergency docket, where the Court has resolved high-stakes disputes through emergency orders — often without majority opinions and sometimes without any explanation at all — while leaving lower courts to decide what weight to give those orders.<sup>79</sup> Recent commentary has described this as the lower courts' "foreshadow" problem: When the Court's orders signal a doctrinal shift without changing the law on the merits, lower courts face the task of deciding whether to adhere to existing doctrine or anticipate where the Court is heading.<sup>80</sup>

Yet a GVR like *Miller* poses a harder version of the problem. The order does not merely signal a future doctrinal direction. It vacates a judgment and directs reconsideration in light of a decision that does not obviously apply, thereby communicating something substantive about

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<sup>76</sup> *Id.* at 271 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944)).

<sup>77</sup> *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972)).

<sup>78</sup> *Miller v. McDonald*, 146 S. Ct. 879, 879 (2025) (mem.).

<sup>79</sup> See generally Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) (documenting the Court's increasing use of unexplained emergency orders to resolve high-stakes disputes and the resulting lack of reasoned analysis available to lower courts); STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (expanding the account to show how the Court's reliance on unsigned, unexplained orders has become a systematic practice that deprives lower courts — and the public — of the reasoning needed to understand and apply the Court's directives).

<sup>80</sup> See Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851, 855 (2024) (reviewing PHILOSOPHICAL FOUNDATIONS OF PRECEDENT (Timothy Endicott et al. eds., 2023)).

that decision's scope.<sup>81</sup> The lower court must decide how to respond to that communication, though it lacks guidance about what, exactly, must change — and though, as in *Miller*, the GVR's implicit instruction cuts against the Court's own earlier pronouncements.<sup>82</sup>

The costs of this practice have become impossible to ignore. Recently, Justice Gorsuch, joined by Justice Kavanaugh, admonished district judges for failing to follow a prior emergency ruling: “Lower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them.”<sup>83</sup> The targeted judge publicly apologized, explaining that he “simply did not understand that orders on the emergency docket were precedent.”<sup>84</sup> But a different district judge offered a more pointed response:

[I]t is unhelpful and unnecessary to criticize district courts for “defy[ing]” the Supreme Court when they are working to find the right answer in a rapidly evolving doctrinal landscape, where they must grapple with both existing precedent and interim guidance from the Supreme Court that appears to set that precedent aside without much explanation or consensus.<sup>85</sup>

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<sup>81</sup> Professor Ben Johnson has recently observed that the Court sometimes uses vacatur as a license to opine extensively about the law without having to issue a judgment; thus, “vacatur bec[omes] the means of lawmaking.” Johnson, *supra* note 7, at 808. This Essay identifies a different species of the same phenomenon. Where Johnson describes vacatur as a vehicle for the Court to speak at length, the GVR in *Miller* illustrates how vacatur can enable the Court to say almost nothing — and yet still communicate something significant. By remanding in light of a precedent that does not obviously govern the case, the Court can engage in a form of lawmaking, though not in so many words — indeed, in practically no words at all. The sheer instruction to apply a decision to a new factual context can, as this Essay seeks to show, speak volumes.

<sup>82</sup> That dilemma is already visible in a recent appellate decision involving a childhood vaccine mandate. Writing for the majority, Judge Wilkinson concluded that West Virginia's compulsory school vaccination law was likely not constitutionally required to provide religious exemptions. *See Perry v. Marteney*, No. 24-2132, 2026 WL 946152, at \*10 (4th Cir. Apr. 8, 2026). He “note[d]” the *Miller* GVR, *id.* at \*7, but reasoned that the Court's “precedents,” which the court was “bound to follow,” cut the other way, emphasizing that lower courts must “follow Supreme Court decisions until the Court itself overrules them,” *id.* at \*9. In dissent, Judge Niemeyer argued that the majority's “conclusion was flatly contradicted by the Supreme Court,” which in the *Miller* GVR had “indicated that a similar compulsory vaccination law, to which a similar religious objection was made, should be considered again in light of *Mahmoud*,” *id.* at \*14 (Niemeyer, J., dissenting), and described *Miller*, along with other “decisions,” as “binding . . . and dispositive instruction for cases of the kind before us,” *id.* at \*15. *See also* Zalman Rothschild, Opinion, *A Disturbing Dissent Lies Beneath a New Ruling on Childhood Vaccines*, WASH. POST (Apr. 15, 2026, at 06:15 ET), <https://www.washingtonpost.com/opinions/2026/04/15/scotus-should-uphold-childhood-vaccinations> [<https://perma.cc/4WUZ-QADW>] (discussing the *Perry* split and its broader implications). The split illustrates the bind this Essay describes.

<sup>83</sup> *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring in part and dissenting in part).

<sup>84</sup> Nate Raymond, *Judge Accused by Gorsuch, Kavanaugh of Defying US Supreme Court Apologizes*, REUTERS (Sep. 2, 2025, at 16:22 ET), <https://www.reuters.com/legal/government/judge-accused-by-gorsuch-kavanaugh-defying-us-supreme-court-apologizes-2025-09-02> [<https://perma.cc/LW79-JL7P>] (quoting Judge Young's remarks at a hearing).

<sup>85</sup> *President & Fellows of Harvard Coll. v. DHS*, 798 F. Supp. 3d 77, 106 n.9 (D. Mass. 2025) (second alteration in original) (quoting *Am. Pub. Health Ass'n*, 145 S. Ct. at 2663 (Gorsuch, J., concurring in part and dissenting in part)).

Granted, *Miller* is not quite the same as these interim orders. The intervening precedent, *Mahmoud v. Taylor*, is a merits decision, decided after full briefing and oral argument, with a majority opinion spanning several dozen pages. Yet the Second Circuit received no guidance on how that opinion applies to vaccine mandates, a context *Mahmoud* did not address and that much of its reasoning appears to exclude.<sup>86</sup> Often, the instruction is obvious — the Court has just replaced one test with another, and the GVR directs the lower court to apply it.<sup>87</sup> Here, the instruction to issue a new decision “in light of *Mahmoud*”<sup>88</sup> demands more deduction, if not divination, from the court of appeals.

The difficulty is that *Mahmoud* lends itself to a narrow construction — one most lower courts have adopted<sup>89</sup> — that confines it to a specific curricular context and education’s distinctive capacity to shape children’s religious development, though the opinion’s language also sweeps more broadly.<sup>90</sup> Under the narrow reading, *Mahmoud*’s central holding does not apply to vaccine mandates. But even under a more expansive construction that extends *Mahmoud* beyond the curriculum — one the Court appears to have embraced in a subsequent emergency order regarding a public school student pronoun policy<sup>91</sup> — the

<sup>86</sup> See *infra* notes 89–90 and accompanying text.

<sup>87</sup> See generally, e.g., *Murphy v. Schmitt*, 143 F.4th 914 (8th Cir. 2025) (after GVR in light of *Gonzalez v. Trevino*, 144 S. Ct. 1663 (2024) (per curiam), reaching the opposite result on remand after applying *Gonzalez*’s clarified test that a First Amendment retaliatory-arrest plaintiff need not identify “virtually identical and identifiable comparators,” *id.* at 1667); *United States v. Perez-Gallan*, 125 F.4th 204 (5th Cir. 2024) (after GVR in light of *United States v. Rahimi*, 144 S. Ct. 1889 (2024), applying *Rahimi*’s less demanding “historical analogue” approach rather than the earlier “historical twin” formulation, *id.* at 1903 (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2133 (2022))); *Mast v. County of Fillmore*, 993 N.W.2d 895 (Minn. Ct. App. 2023) (after GVR in light of *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), applying *Fulton*’s requirement that the government justify a substantial burden on religious exercise through “a more precise analysis,” *id.* at 1881, rather than through “broadly formulated” interests, *id.* (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006))).

<sup>88</sup> *Miller v. McDonald*, 146 S. Ct. 879, 879 (2025) (mem.).

<sup>89</sup> See, e.g., *Grimsby v. Pan*, No. 25-cv-01575, 2025 WL 2829502, at \*6 (C.D. Cal. Aug. 29, 2025) (“The vaccine mandate here is not comparable to the kind of educational instruction that was directly contrary to the religious teachings of the *Mahmoud* plaintiffs: it a [sic] public health mandate, it is not instruction and does not compel any curriculum or viewpoint, nor does it permit discretionary exemptions.”); *Kondilis v. City of Chicago*, 160 F.4th 866, 871 n.4 (7th Cir. 2025) (“The character of the burden alleged here is not like *Yoder* or *Mahmoud*, both of which involved compulsory school programs that infringed on parents’ fundamental right to direct the education of their children.”); *Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836, at \*7 (6th Cir. Aug. 26, 2025) (“[T]he bathroom policy was not an educational requirement or curricular feature . . .”).

<sup>90</sup> See *infra* notes 105–07 and accompanying text. I engage extensively with *Mahmoud*’s purported “indoctrination” limitation, and the broader language that cuts against it, in a forthcoming article. See generally Zalman Rothschild, *Religious Parental Rights*, 111 MINN. L. REV. (forthcoming 2027).

<sup>91</sup> See *infra* notes 113–18 and accompanying text.

question remains whether *Mahmoud* extends to vaccines, which for over a century have been treated as beyond the reach of liberty challenges.<sup>92</sup>

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A grant-vacate-remand order, to be sure, is not a holding. But neither is it empty.<sup>93</sup> The Court has explained that a GVR is appropriate only when intervening developments “reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.”<sup>94</sup> Vacatur is costly: It wipes out a judgment, imposes delay, and consumes lower court resources. The Court’s own teaching is that this power should be used “sparingly.”<sup>95</sup> The point is not that one should read meaning into a GVR that is not there.<sup>96</sup> It is that the lower court cannot now proceed as if nothing happened.

The question, then, is what the *Miller* GVR demands the lower court do differently. The answer requires working through the possible

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<sup>92</sup> While it is rare, the Court or some Justices in concurrence can and occasionally do provide such guidance. See generally, e.g., *Mast v. Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring in the decision to GVR) (instructing the lower court to — and, at some length, how to — apply *Fulton*’s more demanding strict scrutiny standard in a Religious Land Use and Institutionalized Persons Act case).

<sup>93</sup> *Miller* thus highlights that not all GVRs are alike. Some function as routine housekeeping, directing lower courts to apply clearly relevant intervening precedent. Others, like *Miller*, operate as a method of extending recent ambiguous Supreme Court doctrine.

<sup>94</sup> *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam); *id.* at 170 (“We are therefore more ready than the dissent to issue a GVR order in cases in which recent events have cast substantial doubt on the correctness of the lower court’s . . . disposition.”); *id.* at 171 (“[W]e have GVR’d on the basis of a reasonable probability of a change in result . . . .”); *id.* at 171–72 (describing standard for granting as “reasonable probability that giving the lower court the opportunity to consider that point anew will alter the result,” *id.* at 172); *id.* at 174 (“Respect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket all counsel against undisciplined GVR’ing.”); *id.* at 191–92 (Scalia, J., dissenting) (describing the standard for issuing a GVR as “where an intervening factor has arisen that has a legal bearing upon the decision”); see also STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 5.12(b) (11th ed. 2019) (describing the Court’s GVR practice and the standard for granting a GVR in light of an intervening decision).

<sup>95</sup> *Lawrence*, 516 U.S. at 173. Indeed, Justice Jackson has underscored the significance of vacatur in a related context. Dissenting from a *Munsingwear* vacatur of a moot case, *United States v. Munsingwear, Inc.*, 340 U.S. 46 (1950), she observed that “our common-law system assumes that judicial decisions are valuable and should not be cast aside lightly, especially because judicial precedents ‘are not merely the property of private litigants,’ but also belong to the public and ‘legal community as a whole.’” *Chapman v. Doe ex rel. Rothert*, 143 S. Ct. 857, 858 (2023) (Jackson, J., dissenting) (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 26–27 (1994)).

<sup>96</sup> See, e.g., *Youngblood v. West Virginia*, 547 U.S. 867, 873 (2006) (Scalia, J., dissenting) (“If the majority suspects that the court below erred, there is a chance that the GVR-in-light-of-nothing will induce [the West Virginia court] to change its mind on remand, sparing us the trouble of correcting the suspected error.”); see also Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs — And an Alternative*, 107 MICH. L. REV. 711, 715 (2009) (“[A]ccording to Scalia, the GVR was a subtle (or not so subtle) hint that the court below might wish to try again, else the Supreme Court might be roused to actually reverse.”).

readings of the order — asking what, exactly, justified the vacatur. The most natural reading is that the lower court must now apply *Mahmoud* to the vaccine mandate.<sup>97</sup> That means treating *Mahmoud*'s core holding as applicable here and recognizing a presumptive parental right to exemptions from challenged requirements whenever they interfere with raising one's children in accordance with one's religious beliefs.<sup>98</sup> The alternative is that the Second Circuit erred by treating *Wisconsin v. Yoder* as inapplicable.<sup>99</sup> But that yields the same result, because to apply *Yoder* as it has been reconstructed by the Court in *Mahmoud* means that parents have the same presumptive right.

One might imagine a narrower possibility: that the Second Circuit was right to find *Yoder* inapplicable, but it did so for the wrong reason. It should not have limited *Yoder*'s applicability to cases involving the preservation of a vulnerable religious community<sup>100</sup> — a fact-bound narrowing that *Mahmoud* rejected — though it could have distinguished *Yoder* on other grounds, such as that education, unlike vaccination mandates, uniquely implicates *Yoder*'s parental religious-upbringing right as *Mahmoud* construed it.

The problem is that the Second Circuit said exactly that and devoted ample space to explaining how *Yoder* is distinguishable on precisely that ground: It involved education, which is categorically different from vaccination mandates rooted in public health.<sup>101</sup> The court explained that “*Yoder*'s holding is limited by the state's interest in protecting public health,”<sup>102</sup> and emphasized that the *Yoder* Court “specifically distinguished the facts from *Prince v. Massachusetts*,”<sup>103</sup> in which the Court had declared that the “right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>104</sup>

And even if the Second Circuit erred in distinguishing *Yoder* for the wrong reason, it would be harmless error in its purest form — an error that could not possibly have changed the outcome. It would mean that if the Second Circuit had added a single sentence noting that vaccines are not curriculum — which it in fact did in spades — the Supreme Court would have denied certiorari. On that account, to rectify

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<sup>97</sup> See Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 517 (2004) (noting the “problem . . . that a GVR order may appear inherently ambiguous to the lower court”).

<sup>98</sup> See *supra* notes 43–48 and accompanying text.

<sup>99</sup> See *Miller v. McDonald*, 130 F.4th 258, 271 (2d Cir. 2025) (per curiam) (“[A]n analogy to *Yoder*'s facts is unconvincing.”).

<sup>100</sup> See *id.* at 270 (distinguishing *Yoder* on the ground that “compulsory high school attendance would [have] ‘result[ed] in the destruction of the Old Order Amish church community as it exists in the United States today’” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972))).

<sup>101</sup> *Id.* at 270–71.

<sup>102</sup> *Id.* at 271.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944)).

matters, the court of appeals could now simply add a footnote. A vacatur that forces a full redo is a strange instrument for so small a correction.

What remains is the only reading that makes the vacatur intelligible: The Court is signaling that *Mahmoud's* “*Yoder* exception”<sup>105</sup> extends beyond the curricular context. On that view, whenever the burden is “of the same character” as in *Yoder*, strict scrutiny applies irrespective of neutrality and general applicability.<sup>106</sup> And that “character” is defined in terms not limited to education. It refers to any policy that “substantially interfer[es] with the [child’s] religious development,” regardless of context.<sup>107</sup> Here, that would mean that parents have a presumptive right to refuse vaccines for their children when compliance interferes with their ability to raise them according to their religious beliefs.<sup>108</sup> And of course it does. It is hard to teach children the religious value of refusing vaccination while injecting them with vaccines.<sup>109</sup>

One might object that I am reading too much into a GVR — that it signals nothing more than that the Court is undecided or prefers lower courts to take the first pass before weighing in itself.<sup>110</sup> That may be so as a general matter. But not all GVRs are alike, and *Miller* is a case in point. The lower court cannot now simply repeat its previous analysis, this time appending a line stating merely that “we have considered the intervening Supreme Court decision.” On remand, it must determine what in the new decision requires it to alter its previous reasoning. Usually, this is straightforward: The Court has replaced one test with another, and the lower court must apply the new one. But when the Court’s new decision is not obviously applicable — as it was not in *Miller*<sup>111</sup> — the very fact that the Court has informed the lower court that the decision bears on its case carries independent substantive weight.

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<sup>105</sup> By “*Yoder* exception,” I mean the category of claims that *Mahmoud* treated as falling outside *Employment Division v. Smith's* ordinary rule for neutral and generally applicable laws. See 494 U.S. 872, 881 (1990). *Smith* had held that such laws ordinarily do not trigger strict scrutiny, *see id.* at 879–81, but *Mahmoud* read *Yoder* to require strict scrutiny where the burden is “of the same character” as the one imposed there, *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025) (“And we explained that the general rule did not apply in *Yoder* because of the special character of the burden in that case. Thus, 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.” (citation omitted)).

<sup>106</sup> *Mahmoud*, 145 S. Ct. at 2361.

<sup>107</sup> *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)). To be sure, the vaccine mandate in *Miller* pertained to education in a literal sense — it conditioned school attendance on vaccination. But the mandate’s substance was a health care measure, not a curricular one.

<sup>108</sup> See *supra* note 45 and accompanying text.

<sup>109</sup> *Miller*, 130 F.4th at 270–71 (“Plaintiffs’ objection to vaccines is premised on the same ‘fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.’” (quoting *Yoder*, 406 U.S. at 210)).

<sup>110</sup> Cf. Bruhl, *supra* note 96, at 712 (describing the GVR as a device that gives the lower court the “initial opportunity” to assess the “possible impact of [an] intervening development[.]”).

<sup>111</sup> See *supra* notes 86–92 and accompanying text.

The lower court is not free to shrug and say, “Nope, it doesn’t.” If that is right, the *Miller* GVR is communicating something significant about how the Court understands the scope of the right it recognized in *Mahmoud*.<sup>112</sup>

That *Mahmoud*’s reach extends beyond the curricular context is no longer speculative. A few months after *Miller*, the Court took another step in *Mirabelli v. Bonta*.<sup>113</sup> In an emergency order, it vacated a Ninth Circuit stay and thereby reinstated a district court injunction against a California school policy requiring educators to use students’ preferred names and pronouns while withholding from parents information about students’ social transition.<sup>114</sup> The Court invoked *Mahmoud*. The case did not involve storybooks, lessons, or anything that looked like classroom pedagogy. Even so, *Mahmoud* was treated as controlling.<sup>115</sup>

Still, lower courts’ narrow reading of *Mahmoud* is neither surprising nor unreasonable. *Mahmoud* itself was a study in deliberate ambiguity — it announced a broad right in sweeping language while emphasizing factual details that seemed to cabin it, leaving lower courts to guess which signal to follow.<sup>116</sup> When the Ninth Circuit in *Mirabelli*, like nearly all other lower courts,<sup>117</sup> read the ambiguity as narrowing — confining *Mahmoud* to the curricular context — the Court responded not so much by clarifying as by chastising, using an emergency order to declare that the court of appeals had problematically “brushed aside *Mahmoud*” by treating the decision as overly “narrow.”<sup>118</sup>

Vaccine mandates, though, have long stood apart. The Court has stated repeatedly that religious liberty does not include a right to refuse vaccination.<sup>119</sup> By treating *Mahmoud* as transferable in *Miller*, the

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<sup>112</sup> Indeed, *Miller* is not the only case in which litigants asked the Court to GVR in light of *Mahmoud* — but in the others, including *Apache Stronghold v. United States*, 146 S. Ct. 285 (2025) (mem.), they were turned away. That the Court granted a GVR in *Miller* but denied one elsewhere suggests it is not extending *Mahmoud* reflexively, making its decision to GVR a vaccine mandate case all the more significant. See, e.g., Petition for Rehearing at 2, *Apache*, 146 S. Ct. 285 (No. 24-291); Petitioner’s Supplemental Brief in Support of Rehearing at 1–4, *Apache*, 146 S. Ct. 285 (No. 24-291) (arguing that *Mahmoud*’s “objective danger” test, *id.* at 2, and rejection of narrow coercion requirement, *id.* at 3, warrant GVR of Ninth Circuit decision permitting destruction of Apache sacred site at Oak Flat). True, *Mahmoud* had not yet been granted certiorari when *Apache* was decided. But the Court also GVRs in light of decisions that had not yet been granted certiorari when the court below ruled. See, e.g., *Fields v. Colorado*, 145 S. Ct. 1136 (2025) (mem.) (GVR’ing Colorado Court of Appeals decision for further consideration in light of *Erlinger v. United States*, 144 S. Ct. 1840 (2024), which had not been granted certiorari when the court below decided the case).

<sup>113</sup> 146 S. Ct. 797 (2026) (per curiam).

<sup>114</sup> *Id.* at 800–02.

<sup>115</sup> *Id.* at 802 (“[T]he intrusion on parents’ free exercise rights here — unconsented facilitation of a child’s gender transition — is greater than the introduction of LGBTQ storybooks we considered sufficient to trigger strict scrutiny in *Mahmoud*.”).

<sup>116</sup> See *supra* note 90.

<sup>117</sup> See cases cited *supra* note 89.

<sup>118</sup> *Mirabelli*, 146 S. Ct. at 802.

<sup>119</sup> See *supra* notes 8–25 and accompanying text.

Court has unsettled that premise without saying so directly, leaving it unclear whether the vaccine limitation still holds. The result is a genuine bind for the lower court. The Supreme Court's accumulated statements point one way; the order points the other. The lower court must decide whether to adhere to those statements or to read the order as signaling that they have been superseded.<sup>120</sup>

One response to that bind is to return the favor. If the Supreme Court is going to communicate significant doctrinal views through unexplained orders — a form of cryptic (and false) minimalism<sup>121</sup> — the court of appeals can decline to take the hint, forcing the Court to do the radical work itself rather than delegating it to lower courts.<sup>122</sup> The court would be well within its rights to hold the Supreme Court to its own repeated statements, and treat the vaccine limitation as intact, until it explicitly repudiates them.<sup>123</sup> That would not constitute “defy[ing]”<sup>124</sup> the Supreme Court so much as faithfully following the Court's own prior instructions.<sup>125</sup>

The alternative, as discussed, is to read the GVR as communicating what its logic most plausibly implies — that parents have a presumptive

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<sup>120</sup> To be sure, these “accumulated statements” occupy an unusual doctrinal position. *Jacobson v. Massachusetts* includes a direct holding, but it is a police power decision that predated the incorporation of the Free Exercise Clause by thirty-five years. Its logic was absorbed into the Court's free exercise framework, but the notion that religious liberty does not extend to vaccine mandates — though the Court said as much, repeatedly and in no uncertain terms, *see supra* notes 18–21 and accompanying text — was never squarely a free exercise holding, presumably because the Court never deemed a case presenting the question cert-worthy in the first place. *But see* *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (“While these statements are dicta, this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings.”). That these pronouncements are “dicta” cuts in both directions. It weakens the Second Circuit's ability to treat them as formally binding. But it also means the Supreme Court need not formally overrule anything to proceed as though the limitation no longer applies, which is arguably what the GVR accomplishes. The Second Circuit is thus caught between pronouncements that, while not technically “holdings,” reflect what the Court plainly regarded as an obvious point, and an order that signals, without stating, that the point no longer holds.

<sup>121</sup> *See supra* note 81 and accompanying text.

<sup>122</sup> Although not technically bound by the *Miller* GVR in the way the Second Circuit is, Judge Wilkinson's majority opinion in *Perry v. Marteney*, No. 24-2132, 2026 WL 946152 (4th Cir. Apr. 8, 2026), discussed *supra* note 82, can be understood as taking precisely this path — declining the hint and holding the Court to its prior statements.

<sup>123</sup> That dynamic — a lower court caught between a century of precedent pointing one way and an order pointing another — is not unique to *Miller*, but *Miller* brings it into unusually sharp relief. The episode also reveals a structural limitation of the method: Signaling through GVRs and emergency orders works only if lower courts are willing to treat those signals as overriding precedent the Court has not formally disturbed. When a lower court has strong doctrinal ground to resist, as the Second Circuit does here, the method's limits come into view. *See, e.g., supra* note 82.

<sup>124</sup> *See supra* note 83 and accompanying text.

<sup>125</sup> The Supreme Court has instructed that its precedent must be followed unless it has been “overruled” by the Court, which would suggest that the Court must have been explicit that it overruled the relevant precedent. *See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

right to refuse vaccination on religious grounds, triggering strict scrutiny. To survive that test, the state would need to prove that denying religious exemptions is necessary to fulfill its compelling interests, a showing that would be difficult under the Court's recent free exercise strict scrutiny jurisprudence. The mere fact that the state does offer some exemptions, just not religious ones, undermines its claim that it is impossible to provide a religious exemption — that is, that the law “brook[s] no departures”<sup>126</sup> whatsoever, the standard the Court has required.<sup>127</sup> If strict scrutiny operates here as it has for the Court in free exercise cases in recent years — as a practically insurmountable bar — the recognition of a presumptive right virtually guarantees its vindication.<sup>128</sup>

And regardless of the mandate's ultimate outcome, the *Miller* GVR has already transformed the constitutional status of vaccination requirements from a self-evident limit on religious liberty to a question within it.

### CONCLUSION

*Miller* is a case study in how some GVRs extend doctrine by implication. The Court used a GVR to signal that its newest religious liberty decision bears on a context that the decision did not address and that a century of authority appeared to foreclose — not through a holding, but by vacating a judgment and invoking a precedent that does not

<sup>126</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

<sup>127</sup> See Rothschild, *Religious Equality*, *supra* note 27, at 497 (“The test is impossible to meet so long as the government has extended any exceptions (or, for that matter, if its law is ‘underinclusive’ in any other way . . .). Even a single exemption (or any other underinclusivity) precludes the government from claiming it is necessary to not — meaning, not possible to — exempt religion.” (emphasis omitted)). Further, the Court requires that the compelling interest be framed not at the level of the policy’s general objective — preventing communicable disease — but as an interest in denying the religious exemption specifically. At that level of particularity, existing medical exemptions make it difficult for the state to claim it has a compelling interest in not exempting religion when it already provides exemptions. See *id.* at 496 (“In *Fulton*, Chief Justice Roberts . . . explained that to survive strict scrutiny (in the context of free exercise, at least), the government must demonstrate a ‘compelling interest’ not just ‘in enforcing its . . . policies generally, but . . . in denying an exception’ to the religious objector.” (second and third omissions in original) (quoting *Fulton*, 141 S. Ct. at 1881)); see also *id.* n.249 (“Rather than rely on ‘broadly formulated interests,’ courts must ‘scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.’” (alteration in original) (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006))). The only plausible basis for surviving strict scrutiny, then, is that the medical exemption is not comparable to a religious exemption, and thus does not undermine New York’s position. Justice Gorsuch, however, has argued that medical exemptions can be treated as incomparable to religious exemptions only when “the state’s interests [are described as] public health writ large . . . [and] ‘expanded to some society-wide level of generality,’” whereas, when the interest is framed more granularly — and, in his view, more appropriately — as an interest in achieving immunity against a specific disease, the exemptions are identical in the relevant sense because both undermine that more specific interest. *Id.* at 507 (quoting *Does 1–3 v. Mills*, 142 S. Ct. 17, 20 (2021) (Gorsuch, J., dissenting)). See also *supra* note 53 (discussing additional reasons the state’s necessity defense may fail strict scrutiny).

<sup>128</sup> *Id.* at 498.

obviously govern. In doing so, it unsettled what was long treated as one of the Court's clearest constitutional baselines: that the state's authority to protect children and the community from communicable disease marks the outer boundary of religious liberty, not an occasion for its vindication. For more than a century — from *Jacobson* to *Prince* to *Smith* — that baseline kept vaccination requirements out of the exemption machinery, treating them instead as a paradigmatic exercise of the police power. The *Miller* GVR unsettles that premise without squarely repudiating it, leaving lower courts to choose between two forms of error: performing the work of doctrinal revolution in the Court's stead, or adhering to precedent the Court has arguably already displaced, thereby risking the charge of “defy[ing]” the Court's remand.<sup>129</sup> Either choice breeds instability in an area where lives depend on legal certainty. If the Court is prepared to rethink the constitutional status of vaccination mandates, it should say so explicitly — and bear the consequences.

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<sup>129</sup> See *supra* note 83 and accompanying text.