# SUBSIDIARITY AS FREE EXERCISE: *MAHMOUD V. TAYLOR* AND THE "CHARACTER" OF *YODER*

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## INTRODUCTION

The touchstone of modern free exercise doctrine, beginning with the Supreme Court's 1990 decision in *Employment Division v. Smith*, is the principle that neutral and generally applicable laws may incidentally burden religious exercise without triggering heightened scrutiny.[1] One notable exception was *Wisconsin v. Yoder*, which *Smith* preserved as a "hybrid rights" case involving religious exercise intertwined with parental authority.[2] In the years since *Smith*, however, *Yoder* has largely been confined to its facts. The Supreme Court went more than three decades without relying on *Yoder* to invalidate a neutral law burdening religious exercise.[3]

The Court's recent decision in *Mahmoud v. Taylor* breathes new life into *Yoder*.[4] Confronting a school district's refusal to permit religious opt-outs from certain elementary school instruction, the Court held that when a burden on religious exercise is "of the same character" as the burden in *Yoder*, courts may bypass *Smith* altogether and apply strict scrutiny even if the challenged policy is neutral and generally applicable.[5] Yet the Court declined to explain what, precisely, constitutes the relevant "character" of a *Yoder*-like burden. Is *Mahmoud* best understood as a resurrection of hybrid rights, a soft overruling of *Smith*, or the recognition of a distinct category of free exercise harms?

This Note argues that *Mahmoud* is best understood neither as a hybrid rights case nor as a repudiation of *Smith*, but as identifying a burden rooted in overlapping claims of authority and resolved

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1 *See* Emp. Div. v. Smith, 494 U.S. 872, 878–79 (1990).

2 *See id.* at 881; Wisconsin v. Yoder, 406 U.S. 205 (1972).

3 *See infra* Section I.C.

4 *See* Mahmoud v. Taylor, 145 S. Ct. 2332 (2025).

5 *See id.* at 2361.

through the principle of subsidiarity. *Mahmoud* treats certain free exercise claims as disputes over institutional authority (between families and schools) rather than clashes between individual conscience and government regulation. When school policies substantially interfere with parents' ability to direct their children's religious formation, the constitutional question is whether the state has usurped a domain of authority that belongs, in the first instance, to parents. Framed as such, *Mahmoud* is not a *sui generis* exception but rather is entirely consistent with the Court's longstanding role in upholding counter-majoritarian rights claims.

Part I of this Note traces the history of the Court's free exercise doctrine leading up to *Mahmoud*. Part II explains *Mahmoud*'s doctrinal shift. Part III justifies *Mahmoud* in terms of the principle of subsidiarity and identifies some practical implications for courts seeking to understand which burdens are "of the same character" as *Yoder* and which are not.

## I. FREE EXERCISE BEFORE *MAHMOUD V. TAYLOR*

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion.[6] For the first century-and-a-half after the Constitution was ratified, the Supreme Court had only one occasion to interpret this provision: *Reynolds v. United States*, which upheld a federal anti-bigamy statute as applied against adherents of the LDS faith in the Utah Territory.[7] The *Reynolds* Court understood the Free Exercise Clause to protect freedom of religious belief, but not to permit people to act contrary to otherwise applicable laws merely because of their religious beliefs.[8] Such a system, the Court reasoned, would "make the professed doctrines of religious belief superior to the law of the land," and "permit every citizen to become a law unto himself."[9]

Things changed in the middle of the twentieth century, when the Court incorporated the Free Exercise Clause against the States through the Fourteenth Amendment in *Cantwell v. Connecticut*.[10] *Cantwell* overturned the criminal conviction of three Jehovah's Witnesses for distributing books and pamphlets in violation of a state anti-

6 U.S. CONST. amend. I.

7 Reynolds v. United States, 98 U.S. 145, 168 (1879).

8 *Id.* at 166–67.

9 *Id.* at 167; *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) (arguing that Founding-era Americans "tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws").

10 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 480 (1991).

solicitation statute.[11] The Court rejected *Reynolds*'s belief/act distinction, holding that the Free Exercise Clause, at a minimum, protects against "absolute restraint[s]" on religious practice such as preaching.[12] At the same time, it recognized the legitimate powers of the State to enact "general and non-discriminatory legislation" to "safeguard the peace, good order and comfort of the community."[13] This basic balancing framework—weighing the asserted liberty interest on the one hand against the State's general police power on the other—laid the groundwork for the Court's free exercise jurisprudence going forward.[14]

### *A. Substantial Burdens:* Wisconsin v. Yoder

The Court continued to build out its free exercise jurisprudence in the years following *Cantwell*,[15] leading to the "compelling interest" test established by *Sherbert v. Verner*.[16] *Sherbert* struck down a law denying unemployment compensation to a member of the Seventh-Day Adventist Church who was fired because of her religious objection to working on Saturdays.[17] The Court held that a generally applicable regulation that burdens sincere religious belief must be justified by a compelling state interest.[18] In the absence of such an interest, the petitioner was entitled to an exemption from the law.[19]

The *Sherbert* compelling interest test reached its zenith in *Wisconsin v. Yoder*.[20] *Yoder* concerned a challenge brought by members of the

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11 *Cantwell*, 310 U.S. at 301–03.

12 *Id.* at 304.

13 *Id.*

14 *See* Glendon & Yanes, *supra* note 10, at 480–81. Glendon and others have noted that, though *Cantwell* was a free exercise case, the asserted free speech interest was also important to the Court's decision. *See, e.g.*, *id.* at 480 ("There can be little doubt that the strength of Cantwell's free exercise claim was augmented by the free speech interest with which it was inextricably bound."); Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception"*, 108 PENN. ST. L. REV. 573, 577 (2003) ("While *Cantwell* is often regarded as principally a free exercise case, it is clear that the defendants' free speech rights also carried great weight with the Court.").

15 *See* JOHN WITTE JR., JOEL A. NICHOLS & RICHARD W. GARNETT, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 156–65 (5th ed. 2022).

16 Sherbert v. Verner, 374 U.S. 398 (1963).

17 *Id.* at 399.

18 *Id.* at 403.

19 *Id.* at 406–09.

20 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Aden & Strang, *supra* note 14, at 577 (describing *Yoder* as "the high water mark of free exercise mandated exemptions"); WITTE, NICHOLS & GARNETT, *supra* note 15, at 168 ("The *Yoder* case was especially solicitous of the traditional religious communitarian practices of the Old Order Amish—much more

Old Order Amish community to Wisconsin's compulsory education law.[21] The case thus teed up a challenge between "a State's interest in universal education" on the one hand versus "fundamental rights and interests," including the right to the free exercise of religion and the "traditional interest of parents with respect to the religious upbringing of their children" on the other.[22]

Chief Justice Burger applied *Sherbert*'s compelling interest test to resolve this tension.[23] The first step was to determine whether the burden was religious in nature, as opposed to merely a secular philosophy or personal preference.[24] In part thanks to an extensive record developed in the lower courts, Chief Justice Burger concluded that the traditional Amish way of life was a matter "of deep religious conviction," and compulsory education represented an existential threat to that way of life.[25] In particular, the Chief Justice reasoned:

> [S]econdary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.[26]

Note a few salient features of the burden the Court identifies. First, "expos[ure]" to "values contrary to beliefs" was a relevant (though not necessarily dispositive) factor.[27] Exposure is a lower bar to clear than coercion—the Amish children need not have been required to accept or affirm the values inculcated by the public education system in order for those materials to impose a substantial burden. This sets *Yoder* apart from the Court's other First Amendment jurisprudence in education, such as the mandatory flag salute struck down in *West Virginia State Board of Education v. Barnette*.[28] Interference need not rise to the level of coercion to be constitutionally objectionable.

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solicitous than later cases would be in treating traditional Jewish and Native American communal norms.").

21 *Yoder*, 406 U.S. at 207–09.

22 *Id.* at 214.

23 *Id.* at 215 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

24 *Id.* at 215–16.

25 *Id.* at 216, 216–18; *see* Glendon & Yanes, *supra* note 10, at 505.

26 *Yoder*, 406 U.S. at 218.

27 *Id.*

28 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is

Second, the conjunctive "and" leaves ambiguous whether the Court is articulating two distinct burdens (one of exposure and another of interference with religious development) or a single burden (exposure that creates substantial interference). However, the second reading seems more plausible, since the Court discusses at length the nature of the burden (singular) and its impact on the Amish community.[29] Put a different way, exposure alone would not have been enough—the exposure must create "substantial[] interfer[ence]" to implicate the Free Exercise Clause.[30]

Finally, this law not only substantially interfered with Amish religious practice, but it did so in an "inescapable" way—the Amish parents could not withdraw their children without facing criminal sanctions.[31] Thus, the Wisconsin law posed a "very real threat" to the Amish faith—the sort of "objective danger" the First Amendment "was designed to prevent."[32]

Once the burden was established, the Court made relatively quick work of the State's asserted interest in preparing students to be self-reliant citizens and informed participants in the democratic process.[33] It noted that the Amish had a long history as a "successful social unit," and thus an additional year or two of formal high school "would do little to serve" the State's interests.[34] Therefore, compulsory education with no opt-outs was not the least restrictive means of achieving that interest, and the law violated the Free Exercise Clause.[35]

One might have expected *Yoder* to signal a new era for religious liberty, especially given the Warren Court's proclivity towards expanding individual rights.[36] Indeed, though he felt the decision didn't go far enough, Justice Douglas heralded *Yoder* as "open[ing] the way to give organized religion a broader base than it has ever enjoyed."[37]

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the purpose of the First Amendment to our Constitution to reserve from all official control.").

29 *Yoder*, 406 U.S. at 209–13, 215–18.

30 *Id.* at 218. This reading was later confirmed by *Mahmoud*. *See* Mahmoud v. Taylor, 145 S. Ct. 2332, 2361 (2025).

31 *Yoder*, 406 U.S. at 218.

32 *Id.*

33 *Id.* at 221–22.

34 *Id.* at 222; *accord id.* at 235 ("It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life.").

35 *Id.* at 234.

36 *See* Glendon & Yanes, *supra* note 10, at 507.

37 *Yoder*, 406 U.S. at 247 (Douglas, J., dissenting in part). Justice Douglas argued that *Yoder* didn't go far enough, first by not taking into account the religious views of the Amish children, *id.* at 241, and then by distinguishing between religious beliefs as such and other philosophical or personal beliefs, *id.* at 247–49. He argues that the religion clauses protect any "sincere and meaningful belief which occupies in the life of its possessor a place parallel

But though the compelling interest test remained on the books for two decades after *Yoder*, it rarely lived up to its promise that "only those interests of the highest order" would "overbalance legitimate claims to the free exercise of religion."[38] With the exception of unemployment compensation cases—which fell squarely under *Sherbert*—the Court failed to grant any religious exemptions under the *Yoder* regime.[39] To take just one example, the Court in *Bowen v. Roy* rejected a request by a Native American plaintiff for an exemption to a law requiring that a Social Security number be assigned to his daughter.[40] Chief Justice Burger—who authored *Yoder* a decade prior—held that the state need only show "that a challenged requirement for governmental benefits . . . is a reasonable means of promoting a legitimate public interest"[41]—a far cry from the "searching[] examin[ation]" of the state interest supposedly required by *Yoder*.[42]

### *B. Neutral and Generally Applicable:* Employment Division v. Smith

The Court's repeated narrowing of the Free Exercise Clause after *Yoder* paved the way for its landmark decision in *Employment Division v. Smith*.[43] *Smith* involved a challenge brought by two members of the Native American Church who were fired from their jobs at a drug rehabilitation center because they ingested peyote as part of a religious ritual and were subsequently denied unemployment compensation by the state of Oregon because peyote usage was prohibited by state law.[44] Neither party to the case asked the Court to reconsider the *Sherbert* test, rather the briefing focused on whether Oregon's interest in regulating peyote use was sufficient to overcome the respondents' free exercise claim.[45] But, writing for the majority, Justice Scalia eschewed the

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to that filled by . . . God." *Id.* at 248 (quoting United States v. Seeger, 380 U.S. 163, 176 (1965)).

38 *Id.* at 215 (majority opinion).

39 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990) (noting that between *Yoder* and *Smith*, "the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent"); *see also* WITTE, NICHOLS & GARNETT, *supra* note 15, at 170–77 (collecting cases).

40 Bowen v. Roy, 476 U.S. 693, 695–700 (1986).

41 *Id.* at 708 (plurality opinion).

42 *Yoder*, 406 U.S. at 221.

43 Emp. Div. v. Smith, 494 U.S. 872 (1990).

44 *Id.* at 874–75.

45 *See* Brief for Petitioners at 5–8, *Smith*, 494 U.S. 872 (No. 88-1213); Brief for Respondents at 3–5, *Smith*, 494 U.S. 872 (No. 88-1213). It's worth noting that Justice O'Connor would have reached the same result under the *Sherbert* test by holding that the state's

*Sherbert* balancing test and instead established a categorical rule that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[46]

The Court's view was that mere belief in the sacramental value of peyote did not place the respondents beyond the reach of otherwise neutral criminal laws.[47] Anything less would allow each person "to become a law unto himself."[48] The Court distinguished *Sherbert* and the other unemployment compensation cases on the grounds that they did not involve exemptions from criminal laws.[49] And Justice Scalia noted that the Court had never granted an exemption under *Sherbert* outside the unemployment compensation context.[50] *Smith* thus established categorical rational basis review for free exercise claims—a framework that remains in place to the present day, though it has since been limited in various ways.[51]

### *C. Hybrid Rights:* Yoder *after* Smith

The *Smith* Court faced a problem: reconciling its new rule with prior cases that explicitly repudiated its interpretation of the Free Exercise Clause.[52] The Court distinguished *Yoder* and a small handful of other free exercise cases on the grounds that those cases "involved not the Free Exercise Clause alone, but the Free Exercise Clause in

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interest in prohibiting possession of peyote would have been unduly undermined by granting an exemption. *See Smith*, 494 U.S. at 906–07 (O'Connor, J., concurring in judgment).

46 *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgement)).

47 *See id.* at 878–79.

48 *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

49 *Id.* at 884.

50 *Id.* at 883.

51 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533–34 (1993) (holding facially neutral laws that target religious practice are subject to heightened scrutiny); Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017) (holding that "denying a generally available benefit solely on account of religious identity" is not neutral); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 639 (2018) (holding comments made by adjudicators expressing "hostility to religion" violate *Smith*'s neutrality requirement); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (holding a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way").

52 *Compare* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."), *with Smith*, 494 U.S. at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

conjunction with other constitutional protections."[53] In particular, the fact that *Yoder* rested on a religious exercise claim *combined with* a parental rights claim meant that it was entitled to heightened scrutiny.[54] Thus *Smith* preserved *Yoder*, but only insofar as it protected "hybrid" rights—notwithstanding the fact that *Yoder* explicitly relied on the Free Exercise Clause.[55]

The hybrid rights rationale has never gained much traction. Between 1990 and 2025, the Court never used *Yoder* to strike down an otherwise neutral and generally applicable law.[56] And two circuits treat *Smith*'s hybrid rights language as mere dicta.[57] Even among circuits that acknowledge the existence of hybrid rights, courts are divided as to whether a hybrid rights claim requires two independently viable claims, or whether a claimant need merely state a "colorable" claim—and if the latter, what constitutes a colorable claim.[58] Lower courts have also invoked the unique features of *Yoder*—particularly its heavy reliance on the factual record—to conclude that it should not be applied beyond its facts.[59] *Yoder* was never overturned, but reliance on it has ranged from haphazard to nonexistent in the half-century it has been on the books.

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53 *Smith*, 494 U.S. at 881.

54 *See id.* at 881 n.1.

55 *See id.* at 896 (O'Connor, J., concurring in judgment); *Yoder*, 406 U.S. at 219–20.

56 The closest the Court came to doing so was in *Danville Christian Academy v. Beshear*, in a memorandum opinion where the Court acknowledged that amici had raised a *Yoder* argument but declined to consider it because the appellants did not "squarely" raise it. *See* Danville Christian Acad., Inc. v. Beshear,141 S. Ct. 527, 528 (2020) (mem.).

57 *See* Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) ("[*Smith*'s] language relating to hybrid claims is dicta and not binding on this court."); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) ("[U]ntil the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exceptionless state regulations under the Free Exercise Clause.").

58 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1918 (2021) (Alito, J., concurring in judgment); *see also* Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2226–34 (2005).

59 *See, e.g.*, Miller v. McDonald, 130 F.4th 258, 270–71 (2d Cir.), *vacated*, 146 S. Ct. 879 (2025) (mem.); Parker v. Hurley, 514 F.3d 87, 100 (1st Cir. 2008); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 250 (3d Cir. 2008) (per curiam); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1067 (6th Cir. 1987); Fellowship Baptist Church v. Benton, 815 F.2d 485, 497 (8th Cir. 1987); *see also* Heather M. Good, Comment, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 675 (2005).

## II. "OF THE SAME CHARACTER": *MAHMOUD V. TAYLOR*

Amidst this doctrinal backdrop, *Mahmoud v. Taylor* represents a significant shift.[60] *Mahmoud* involved a challenge to a public school system that sought to incorporate "LGBTQ+-inclusive" storybooks into its elementary school curriculum.[61] Initially the school board permitted parents to opt their children out of instruction on the books, but eventually rescinded the opt-out policy, in part because it was difficult to accommodate the growing number of opt-outs.[62] A group of Christian and Muslim plaintiffs sued the Montgomery County school board on the grounds that their free exercise rights were infringed by the no-opt-out policy.[63]

The Fourth Circuit, over a dissent, held that the parents had not shown a cognizable burden because they had not shown that the policy created any coercion or pressure to abandon their religious beliefs.[64] The court confined *Yoder* to its facts, noting that it had been "markedly circumscribed" and "tailored to the specific evidence in that record."[65] Judge Quattlebaum's dissent took the view that the no-opt-out policy amounted to imposing the choice on parents between their faith and a generally available public benefit.[66] Thus, it both triggered and flunked strict scrutiny under *Sherbert* and *Fulton v. City of Philadelphia*.[67]

Had the Supreme Court merely wanted to further narrow *Smith*'s neutrality requirement, Judge Quattlebaum gave them the blueprint. It is all the more striking, then, that they departed from *Smith* entirely. Justice Alito, writing for the majority, noted that *Smith* generally applies in free exercise cases, but reasoned that the "character of the burden" on the parents in this case required a different approach.[68] By its own terms, "[w]hen the burden imposed is *of the same character* as that imposed in *Yoder*, [the Court] need not ask whether the law at issue is neutral or generally applicable before proceeding to strict scrutiny."[69] *Mahmoud* and *Yoder* thus provide an avenue to bypass *Smith*. Normally,

60 Mahmoud v. Taylor, 145 S. Ct. 2332 (2025).

61 *Id.* at 2343 (quoting Verified First Amended Complaint at 15, Mahmoud v. McKnight, 688 F. Supp. 3d 265 (2023) (Civ. No. 23-1380)). Both the majority opinion and the dissent discuss the contents of the books in detail. For the competing characterizations, see *id.* at 2343–44; *id.* at 2382–83 (Sotomayor, J., dissenting).

62 *Id.* at 2346 (majority opinion).

63 *Id.* at 2347–49.

64 *See* Mahmoud v. McKnight, 102 F.4th 191, 210–11 (4th Cir. 2024), *rev'd sub nom.*, *Mahmoud*, 145 S. Ct. 2332 (2025).

65 *Id.*

66 *Id.* at 222 (Quattlebaum, J., dissenting).

67 *Id.* at 222, 224–25; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

68 *Mahmoud*, 145 S. Ct. at 2361, 2360–61.

69 *Id.* at 2361 (emphasis added).

a neutral and generally applicable law can incidentally burden religion without requiring strict scrutiny.[70] But under *Mahmoud*, even an incidental burden on religious exercise can be protected by the Free Exercise Clause—as long as it's "of the same character" as the burden in *Yoder*.[71]

However, the *Mahmoud* Court did not adopt a general rule for determining the relevant "character" required to invoke the *Yoder* exception. One obvious possibility is that the "special character" of the burden is simply its status as a hybrid rights case, as *Smith* thought.[72] That view has some salience given that the major similarity between *Yoder* and *Mahmoud* is that they implicate both parental rights and religious exercise.[73] But the Court chose to remain agnostic on the status of hybrid rights claims, and contented itself with deciding that the symmetry between the burden in *Yoder* and the burden in *Mahmoud* was such that no further analysis was necessary.[74]

How best, then, to understand the principle that *Mahmoud* extracted from *Yoder*? There are at least three possibilities: first, that *Mahmoud* really is a hybrid rights case in practice, if not in theory; second, that *Mahmoud* represents a soft overruling of *Smith*, embracing a broader pre-*Smith* exemption scheme; or third, that *Mahmoud* is in a category of its own, and will take on a life of its own in the years to come. In the remainder of this Part, I examine and ultimately reject each of the first two possibilities. In Part III, I sketch a potential theoretical framework for making sense of *Mahmoud*'s place in the Court's free exercise jurisprudence.[75]

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70 *See* Emp. Div. v. Smith, 494 U.S. 872, 880–81 (1990).

71 *Mahmoud*, 145 S. Ct. at 2361.

72 *Smith*, 494 U.S. at 881 n.1 (holding "the interests of parenthood . . . combined with a free exercise claim" conferred special status on *Yoder* (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

73 *Mahmoud*, 145 S. Ct. at 2361 ("The Board's policies, like the compulsory-attendance requirement in *Yoder*, 'substantially interfer[e] with the religious development' of the parents' children." (alteration in original) (quoting *Yoder*, 406 U.S. 205, 218 (1972))).

74 *Id.* at 2361, n.14 ("We need not consider whether the case before us qualifies as such a 'hybrid rights' case. Rather, it is sufficient to note that the burden imposed here is of the exact same character as that in *Yoder*." (citation omitted)). *But see id.* at 2400 (Sotomayor, J., dissenting) ("Only in [hybrid rights cases] does the Court set aside its neutral and generally applicable inquiry.").

75 There is at least one possible explanation that has gone unmentioned: the possibility that the Court didn't have a particular justification in mind for carving out *Yoder*, and its existence is simply an artifact of the difficulties of getting consensus on a majority opinion while trying to respect a shaggy and often contradictory set of precedents. In other words, "there is no there there." GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (Vintage Books 1973) (1937). If that's the case, then this Note is squinting too hard at something that inherently defies rational explanation. Of course, almost any Supreme Court decision is open to the critique that its legal reasoning is merely a mask for the Justice's political and

### *A. Hybrid Rights*

One easy way to make sense of *Mahmoud* is to argue that it breathes life into *Smith*'s hybrid rights exception. Hybrid rights have not gotten much traction in the three decades since *Smith*.[76] That may be based in part on a rather cynical reading of the hybrid rights exception: the view that it was born as an attempt to distinguish precedents which, in truth, aren't meaningfully distinguishable from *Smith*.[77] But the hybrid rights exception can also be understood—less cynically—as Justice Scalia's attempt to draw a categorical rule out of a set of notoriously difficult-to-apply cases in order to preserve the institutional benefits of stability and predictability while respecting stare decisis.[78] And though the Court rarely frames its own actions in hybrid rights terms, it's not particularly uncommon for it to draw on multiple constitutional provisions to reach a decision (including in rights cases).[79] If all a "hybrid right" really involves is the claim that individual provisions of the Constitution should be interpreted with an eye towards the meaning and purpose of the "whole instrument," then perhaps it's neither as unusual nor as controversial a move as it initially appears.[80]

In some ways, *Yoder* is a "quintessential example" of a hybrid rights claim.[81] That's because the *Yoder* Court identified two distinct rights at stake: parental rights on the one hand and religious exercise on the

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moral priors. *See, e.g.*, Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 52 (Martin P. Golding & William A. Edmundson eds., 2005) (arguing that "judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons"). Part of the persistence of this critique lies in the fact that it's so difficult to falsify. But given that courts remain committed to stare decisis, I take the underlying goal of most legal scholarship to be the search for the line of best fit that explains a doctrine—even when that doctrine has disparate or ambiguous elements. To that end, I assume for purposes of this Note that (1) there is a coherent conceptual legal landscape, and (2) it is worthwhile to situate doctrinal development within it.

76 *See supra* Section I.C.

77 *See* McConnell, *supra* note 39, at 1121 ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* . . . .").

78 *See* Aden & Strang, *supra* note 14, at 608.

79 *See* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1077–91 (2016) [hereinafter Coenen, *Combining Constitutional Clauses*] (collecting cases); Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2364–66 (2020) [hereinafter Coenen, *Hybrid Rights*] ("[C]ourts routinely interpret ambiguous texts located within more expansive written instruments . . . with an attentiveness to other terms embodied in that same document." *Id.* at 2364.).

80 *See* Coenen, *Hybrid Rights*, *supra* note 79, at 2363; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) (stating that under the whole-text canon, "[t]he text must be construed as a whole," "in view of its structure and of the physical and logical relation of its many parts").

81 Aden & Strang, *supra* note 14, at 601.

other.[82] And conceptualizing *Yoder* and *Mahmoud* as hybrid rights cases would help explain why religious exercise *by parents* gets greater deference than other types of religious exercise. On its face it's not clear why one category of religious exercise would get an exception from *Smith* that no other type of religious exercise gets. But if the Court's concern is a "free exercise plus" concern—that is, free exercise plus parental rights—it's easier to understand why interference with that hybrid right is always subject to strict scrutiny. This framework could help to carve a path forward for hybrid rights (at least vis-à-vis free exercise).[83] If "pure" free exercise claims are subject to the *Smith* test while "hybrid" free exercise claims get to bypass it, then we would seem to be much closer to actualizing the test Justice Scalia envisioned when he wrote *Smith*.

But this reading doesn't fit particularly well with *Mahmoud* itself. Even though the *Mahmoud* Court remained agnostic as to the status of hybrid rights claims, it certainly did not analyze the case in hybrid rights terms. The bedrock parental rights case *Pierce v. Society of Sisters* is cited just once in the majority opinion.[84] And in the same paragraph, the Court identifies "[t]he practice of educating one's children in one's religious beliefs" as a "religious act[]."[85] On the Court's own analysis, the right to educate one's children consistent with one's religious beliefs is a sufficient basis for a free exercise claim without being tied to a parental rights claim.[86] And without the need to go beyond the text of the Free Exercise Clause, the Court decided not to engage in any extended discussion of parental rights *qua* parental rights, despite the invitation from several amici to do so.[87]

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82 *See id.*; Wisconsin v. Yoder, 406 U.S. 205, 213–15 (1972).

83 *See* Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1181 (2015) (arguing for a more expansive hybrid-rights-based system of free exercise exemptions).

84 *See* Mahmoud v. Taylor, 145 S. Ct. 2332, 2351 (2025) (invoking *Pierce* for the basic proposition that "[the Constitution] protects, for example, a parent's decision to send his or her child to a private religious school instead of a public school"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

85 *See Mahmoud*, 145 S. Ct. at 2351.

86 *See id.*; *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020) ("Religious education is vital to many faiths practiced in the United States."); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2261 (2020) ("[W]e have long recognized the rights of parents to direct 'the religious upbringing' of their children." (quoting *Yoder*, 406 U.S. at 213)).

87 *See, e.g.*, Brief of Amica Curiae Melissa Moschella, Ph.D. in Support of Petitioners at 9–29, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297) (arguing that the Court could have decided *Mahmoud* on parental rights grounds alone); Brief of the State of West Virginia, Commonwealth of Virginia, and 24 Other States as Amici Curiae in Support of Petitioners at 3–12, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297) (describing the roots of parental rights in the common law and prevailing Founding-era beliefs).

Nor did the Court need to embrace hybrid rights in order to justify its reliance on *Yoder*. The *Yoder* Court described the "values of parental direction of the religious upbringing and education" as "fundamental rights . . . specifically protected by the Free Exercise Clause."[88] Though it identified two distinct rights that were implicated by the compulsory education policy (parental rights and free exercise rights), the Free Exercise Clause alone provided the textual hook for the Court's decision.[89]

The other problem for the hybrid rights explanation is the difficulty posed by the hybrid rights doctrine itself. First, most (if not all) religious exercise claims implicate other rights claims, including speech, association, and due process, so it's difficult to disentangle "pure" free exercise claims from "hybrid" ones.[90] Even *Smith* itself could arguably be described in hybrid rights terms.[91]

Second, this framework poses significant workability problems.[92] If a plaintiff brings two constitutional claims, neither of which are independently sufficient to trigger strict scrutiny, it's unclear how or when the combination of the two would somehow get the plaintiff over the line.[93] Even defenders of hybrid rights recognize that such decisions would require courts to engage in a kind of mathematical modeling of constitutional clauses, adding together various "conclusions of partial clausal consistency" to get to an "overall conclusion of total constitutionality."[94] But constitutional values do not easily lend themselves to precise mathematical valuations. And even assuming those

88 *Yoder*, 406 U.S. at 213–14.

89 *See* Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 55 (2001) ("Even a cursory reading of Chief Justice Burger's opinion yields the inescapable conclusion that this was no 'hybrid' right to which he referred. . . . [O]nly claims based on religion[] could ever be the basis for such an exemption.").

90 *Id.* at 63–70.

91 McConnell, *supra* note 39, at 1122 ("If burning a flag is speech because it communicates a political belief, ingestion of peyote is no less. . . . [F]ollowing the logic of *Smith*'s explanation of *Yoder*, why shouldn't their claim prevail as a 'hybrid' with their free exercise claim?" (footnote omitted)).

92 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1915 (2021) (Alito, J., concurring) (criticizing hybrid rights doctrine as "unworkable" and noting that it "has never been recognized outside of *Smith*").

93 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in judgment) (describing the hybrid rights distinction as "untenable"); Frederick Mark Gedicks, *Three Questions About Hybrid Rights and Religious Groups*, 117 YALE L.J. POCKET PART 192, 192 (2008) (criticizing the doctrine as "ephemeral" and "nonsensical"); *see also* Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77 (2004).

94 Coenen, *Combining Constitutional Clauses*, *supra* note 79, at 1092, 1092–94.

calculations could be made accurately, such valuations create "complexity and unpredictability costs" arising from the "exponentially large[r] number of combinations that can be assembled from the constituent clauses of the text."[95]

Though *Mahmoud* did not take the opportunity to reject hybrid rights claims, it certainly did not extend the doctrine. Whatever kind of exception *Mahmoud* stands for, it does not rest on *Smith*'s hybrid rights formulation.

### *B. A Workaround for* Smith*?*

It's fair to conclude that *Mahmoud* is doing something more than merely parroting *Smith*'s hybrid rights rationale. That leaves the question of where to draw the line as to which burdens on religious exercise are "of the character" of *Yoder* and which are not. At the highest level of generality, *any* substantial interference with free exercise could be the "character" that *Yoder* sought to protect. Under the pre-*Smith* regime, the question was merely whether the government action in fact burdened religious exercise. That's what the *Yoder* Court sought to elucidate by describing the culture and practices of the Amish.[96] There was no need to distinguish between burdens of one "character" or another—any substantial burden was sufficient to trigger strict scrutiny.

But such a reading of *Mahmoud* would leave nothing of *Smith*. A true embrace of *Yoder*'s view that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion" contradicts *Smith* almost to the letter.[97] The Court has cautioned against assuming its decisions are overruled by implication.[98] And it has previously declined to overrule *Smith* when specifically presented with the opportunity to do so.[99] Thus, without a more explicit statement from the Court, it is premature to leave *Smith* for dead.

As a purely descriptive matter, it is of course possible that the Court could move towards ending *Smith* notwithstanding the logic of *Mahmoud* itself. One hallmark of the Roberts Court is the practice of narrowing precedents without overruling them—a practice described

95 *Id.* at 1113, 1116.

96 *See* Wisconsin v. Yoder, 406 U.S. 205, 214–19 (1972); *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

97 *Yoder*, 406 U.S. at 220.

98 *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

99 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021) ("[Petitioner] urges us to overrule *Smith* . . . . But we need not revisit that decision here.").

by critics as "stealth overruling."[100] And one need not look far in the Court's religion clause jurisprudence to see examples of this phenomenon. For example, the three-part Establishment Clause test articulated in *Lemon v. Kurtzman*[101] was repeatedly ignored or skirted before the Court finally announced in 2022 that it had been "long ago abandoned."[102] If the Court intends—consciously or unconsciously—to send *Smith* the way of *Lemon*, then *Mahmoud* may well be a canary in the coal mine. As it stands, however, such predictions can be no more than speculation.

## III. APPLYING *MAHMOUD*

At first glance, *Mahmoud*, like its predecessor *Yoder*, sits as something of an odd duck among related free exercise decisions. This Part seeks to understand *Mahmoud* in terms of the principle of subsidiarity and argues that the fundamental question *Mahmoud* poses is one of authority: whether parents or states bear ultimate responsibility for the moral education of children. In answering in favor of the former, the Court continued in a long tradition of respecting the natural limits placed on the state by the structure of the family unit.

### *A. Overlapping Authorities*

*Mahmoud* is not, on its own terms, a parental rights case.[103] Parents' right to direct the religious upbringing of their children comes under the umbrella of free exercise doctrine.[104] But the existence of such a right presupposes the existence and legitimacy of parental authority. This much is clear from the Court's use of the words "direct" and "interference" in *Mahmoud*.[105] "Direct" means, roughly, to "aim," "cause," "guide," "govern," or "instruct."[106] And "interference" involves "obstructing normal operations or intervening or meddling in

100 *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010); *see also* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–67, 1863 n.2 (2014) (defending the practice but also collecting criticisms of it).

101 *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *abrogation recognized by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

102 *See Kennedy*, 142 S. Ct. at 2427; WITTE, NICHOLS & GARNETT, *supra* note 15, at 228–29.

103 *See supra* Section II.A. For a general overview of the Court's parental rights jurisprudence, see Melissa Moschella, *Do Parental Rights Extend Beyond the Schoolhouse Door? Correcting Misinterpretations of* Pierce *in Light of History and Tradition*, 100 NOTRE DAME L. REV. 1607 (2025).

104 *See* Mahmoud v. Taylor, 145 S. Ct. 2332, 2351 (2025).

105 *Id.* at 2351–52.

106 *See Direct*, BLACK'S LAW DICTIONARY (12th ed. 2024).

the affairs of others."[107] It would make no sense to assert that parents had a constitutional right to direct their children's religious upbringing free from substantial interference if not for the existence of a sphere of authority that rightly belongs to parents and is not usurped by schools. Reasonable people will disagree about the source of this authority, and that baseline disagreement will lead to different conclusions about the natural limits of the authority. For present purposes, it is sufficient to point out that this authority (1) exists, and (2) gives rise to the right recognized in *Mahmoud*.

Understood in this light, *Mahmoud* is fundamentally a "who decides?" question. There are two unique authorities in the child's life: his or her parents on the one hand, and the school system on the other. Schools have substantial abilities to control the conduct of students in their care.[108] And this control is linked to the role of the school in forming young minds for good citizenship.[109] Nevertheless, the *Mahmoud* Court concluded that, when it comes to instruction on controversial moral and religious matters, it is the parents—not the school or the courts—who have basic decisionmaking authority as to the age-appropriateness of instruction.[110] In *Mahmoud*, this move is justified by precedent—*Yoder* foremost, but other religious education decisions as well, including *Our Lady of Guadalupe v. Morrissey-Berru* and *Espinoza v. Montana Department of Revenue*.[111] But this only kicks the can down the road—why recognize parental authority in this arena at all?

The Court doesn't reach this question directly, but the best answer lies in the principle of subsidiarity: the notion that "it is unjust for a higher authority to usurp the self-governing authority that lower authorities, acting in the service of their own members (groups and persons), rightly have over those members."[112] More specifically, the basic natural authority of parents over their children gives them the primary responsibility over the moral formation and education of their

107 *See Interference*, BLACK'S LAW DICTIONARY (12th ed. 2024).

108 *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045–46 (2021).

109 *See* Richard Garnett, *Is Religious Freedom Possible in State Schools?*, SCOTUSBLOG (July 25, 2025, at 10:12 ET), https://www.scotusblog.com/2025/07/is-religious-freedom-possible-in-state-schools/ [https://perma.cc/NQR7-XKT6].

110 *See Mahmoud*, 145 S. Ct. at 2353.

111 *See id.* at 2351 (first citing Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020); and then citing Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246, 2261 (2020)).

112 John Finnis, *Subsidiarity's Roots and History: Some Observations*, 61 AM. J. JURIS. 133, 134 (2016) (footnote omitted); *see also* Richard W. Garnett, *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 144–45 (2000).

children. Subsidiarity counsels that the state should support and uphold that responsibility, but it should not usurp it or supersede it.[113]

To take a lower-stakes example, it would be wrong for me to tell my two-year-old niece that Santa Claus isn't a real person, because by doing so I would be claiming for myself an authority that belongs to her parents, not to me. A family's choice of holiday traditions belongs to that family. This authority is not primarily a *legal* construct (I won't go to jail if I ruin Christmas). It is a product of the natural relation between parent and child—the recognition that parents have a unique right and responsibility for their own children.[114]

The relationship between citizens and the state is different than that between my niece and me, but the underlying principle remains the same.[115] *Mahmoud* actualizes the principle of subsidiarity by putting parents in the initial position to judge whether, in their own view, a particular school policy substantially interferes with their child's religious development or not. It can be overcome by the school showing either that the policy does not in fact interfere or that the policy is justified by a sufficiently compelling interest. But in either case, it is not the court's role to judge the substantive reasonableness of either the parents' views or the school's instructional material, it is merely to determine whether the character of the policy is such that the school is justified in claiming final authority over and above the wishes of the parents.

Before considering the practical import of this position, it's worth addressing a few criticisms of the doctrine. First, it's true that *Mahmoud* functionally privileges religious claims over nonreligious claims. But this merely reflects judicial restraint, not, as critics argue, "special treatment to religion."[116] The Court is generally self-conscious about not ruling on more than is necessary to decide the case at hand.[117] Here, because the Court could rest its decision on clear precedent, it did not

113 *See* Garnett, *supra* note 112, at 145.

114 *See* Moschella, *supra* note 103, at 1628.

115 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (recognizing that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

116 *See* Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 231 (2025).

117 *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) ("[C]ourts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring))); *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021); Vidal v. Elster, 144 S. Ct. 1507, 1523 (2024).

need to venture into unenumerated rights territory.[118] This leads to the somewhat anomalous result that, under current doctrine, parental objections rooted in religion are entitled to solicitude that parental objections rooted in secular moral concerns are not. But nothing in the Court's reasoning would preclude extending the same solicitude to parents with secular objections in a future case. The only difference is that the Court would need to rely on its parental rights decisions rather than the Free Exercise Clause.[119]

Second, *Mahmoud* is not, as the dissent suggests, an inappropriate usurpation of the democratic process,[120] nor does it require the Court to endorse a bespoke Aristotelian-Thomistic political philosophy.[121] As an initial matter, there are no cases in which *Mahmoud* would permit a single challenger to override an educational requirement for everyone, because the remedy for a plaintiff is a singular opt-out. More fundamentally, if a burden under *Mahmoud* is a question of overlapping spheres of authority, then the court's role is to determine whether the type of authority exercised by the school in issuing a particular requirement rightly belongs to the state in the first instance. Courts are no strangers to this type of analysis. As Justice Robert Jackson put it more than eight decades ago, even a school board must give way if it "transcends constitutional limitations on [its] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[122]

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118 *See* Mahmoud v. Taylor, 145 S. Ct. 2332, 2361 & n.14 (2025) ("[T]he burden in this case is of the exact same character as the burden in *Yoder*." *Id.* at 2361.).

119 *See* Moschella, *supra* note 103, at 1627–34 (articulating an argument for parental rights that does not hinge on religion).

120 *See Mahmoud*, 145 S. Ct. at 2396 (Sotomayor, J., dissenting) ("The Court today subverts Maryland's functioning democratic process . . . ."); *see also* Richard M. Re, *The Supreme Court 2024 Term—Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 59–60 (2025) (describing *Mahmoud* as "probably the most 'activist' ruling of the [2024–25] Term," *id.* at 59); Clara Spera & Katherine Fleming, *Conservative Family Values as Constitutional Law: Private Regulation and the Erosion of Fundamental Rights*, 65 SANTA CLARA L. REV. 651, 698 (2025) ("*Mahmoud* represents a particularly aggressive form of private regulation because in it the Court empowered individual parents to override democratically elected school boards' curricular decisions based on religious objections to LGBTQ+ existence.").

121 *See generally* Finnis, *supra* note 112.

122 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *cf.* Mark L. Rienzi, *Religious Liberty and Judicial Deference*, 98 NOTRE DAME L. REV. 337, 374 (2022) (arguing that the Court's post-2012 religious liberty cases "embrac[e] a *Barnette*-style approach to religious liberty, in which the First Amendment provides strong, judicially enforceable protections for religious minorities and religious pluralism").

### *B. Litigating Opt-Outs in the Lower Courts*

Lower courts thus far have been (generally) reluctant to extend *Mahmoud* beyond its immediate facts.[123] To take just one example, the court in *Grimsby v. Pan* considered and rejected a *Mahmoud* challenge to vaccine mandates, reasoning that *Mahmoud* had to do with "matters of discretionary pedagogical choice," while vaccine policies "do[] not compel any curriculum or viewpoint, nor . . . permit discretionary exemptions."[124]

This narrow view finds some support in the "fact-intensive" nature of the *Mahmoud* analysis.[125] The Court instructed lower courts to consider the "specific religious beliefs and practices," the "specific nature of the educational requirement or curricular feature," and whether the regulation arose from a "specific context" evincing hostility to religion or pressure to conform to a particular viewpoint.[126] General entry requirements, like vaccine mandates, don't obviously implicate those interests the way that, say, a pedagogy aimed at "disrupt[ing]" "heteronormativity" and "cisnormativity" might.[127]

But drawing the line at curriculum undercuts *Mahmoud*'s basic logic. First, that approach raises its own line-drawing problems (is a policy requiring Muslim schoolgirls to remove their hijabs during gym class a curricular requirement, or something else?). Second, as *Yoder* itself shows, the actual interference may be downstream of the policy. A compulsory attendance policy does not on its face involve a pedagogy that is contrary to the Amish religion. It was enough for the *Yoder* Court that the policy would have the end result of "undermining the Amish community and religious practice."[128] To return to the example above, a policy that says "no student may cover their head during gym class" may be neutral and generally applicable, but it would nevertheless have

123 *See, e.g.*, Doe No. 1 v. Bethel Loc. Sch. Dist. Bd. of Educ., No. 23-3740, 2025 WL 2453836, at *6–7 (6th Cir. Aug. 26, 2025) (holding *Mahmoud* inapplicable to bathroom policies); Mirabelli v. Bonta, No. 25-8056, 2026 WL 44874, at *1–2 (9th Cir. Jan. 5, 2026) (per curiam), *vacated in part*, 146 S. Ct. 797 (2026) (per curiam) (same, but to student gender transition policies); Perry v. Marteney, 172 F.4th 315, 324–25 (4th Cir. 2026) (same, to vaccine mandates); Grimsby v. Pan, No. 25-cv-01575, 2025 WL 2829502, at *6 (C.D. Cal. Aug. 29, 2025), *appeal filed*, No. 25-6100 (9th Cir. Sep. 29, 2025) (same, to vaccine mandates); Mead v. Rockford Pub. Sch. Dist., 800 F. Supp. 3d 836, 845 (W.D. Mich. 2025) (same, to student pronoun policies); Doe v. Franklin Square Union Free Sch. Dist., No. 21-cv-05012, 2025 WL 2733457, at *2 (E.D.N.Y. Sep. 25, 2025) (same, to COVID-era mask mandates); *cf.* Alan L. v. Lexington Pub. Schs., 814 F. Supp. 3d 61, 64 (D. Mass. 2025) (granting a preliminary injunction where the challenge fell squarely within the facts of *Mahmoud*).

124 *Grimsby*, 2025 WL 2829502, at *6.

125 *See Mahmoud*, 145 S. Ct. at 2353.

126 *Id.*

127 *Id.* at 2343 (citation omitted).

128 Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

the predictable effect of undermining an important tenet of faith for many Muslim communities.[129]

As the *Mahmoud* Court noted, students are subject to coercive regulations all day long and can be disciplined for failure to comply.[130] That holds true outside the classroom just as much as within it. There's little reason to think that policies within the classroom are inherently more burdensome than policies outside of it—for example, a hypothetical policy that forces a Jewish child to choose between a non-Kosher cafeteria lunch and going hungry certainly burdens his parents' ability to raise him according to their faith traditions.[131]

The same could be said for other school policies, like vaccine mandates. It's true that vaccines are not pedagogical tools. But for parents with religious objections to getting a vaccine—for instance because of worries about moral complicity in abortion,[132] or because they may contain animal byproducts[133]—a vaccine policy with no possibility for religious opt-outs puts them in the position of either forgoing their religious commitments or facing legal liability. That kind of double bind was the exact sort of burden the Court acknowledged in *Mahmoud*.[134]

The most natural reading of *Mahmoud* covers all school policies, not just curricular requirements. If parents can make the threshold showing of substantial interference, *Mahmoud* requires that the school

129 I have put the cart slightly before the horse in assuming that a "no head covering" policy interferes with the religious upbringing of the Muslim child in the same way that a controversial curriculum might, but the harm to religious upbringing is substantially the same. A parent cannot efficaciously raise their child in their faith unless that child is permitted to obey the tenets of the faith (subject to the normal limits that civil law places on the free exercise of religion). If the state places unavoidable obstacles in the path to that adherence—particularly in a way that evinces hostility or pressure to conform—it is certainly appropriate to say that the state has "interfered" with the parental direction of the child's upbringing. As Judge Larsen noted in a recent concurrence, "If the school cannot require Jewish students to read books 'designed to' undermine their commitment to keeping Kosher, why would the school be able to more directly compel them to eat a grilled ham and cheese?" *Bethel*, 2025 WL 2453836, at *12 (Larsen, J., concurring in part and concurring in judgment).

130 *See Mahmoud*, 145 S. Ct. at 2357.

131 *See Bethel*, 2025 WL 2453836, at *12 (Larsen, J., concurring in part and concurring in judgment).

132 *See, e.g.*, *Catholic Women Issue Statement Opposing Use of 'Abortion-Tainted Vaccines'*, NAT'L CATH. REG. (Mar. 9, 2021), https://www.ncregister.com/cna/catholic-women-issue-statement-opposing-use-of-abortion-tainted-vaccines [https://perma.cc/X9RP-YM9H].

133 *E.g.*, *Halal but not Halal-Certified? Key Concerns About Approved COVID-19 Vaccines*, SALAAM GATEWAY (Dec. 18, 2020), https://salaamgateway.com/story/halal-but-not-halal-certified-key-concerns-about-approved-covid-19-vaccines [https://perma.cc/YFJ7-ZA22].

134 *See Mahmoud*, 145 S. Ct. at 2359 ("[Parents] have an obligation—enforceable by fine or imprisonment—to send their children to public school unless they find an adequate substitute. And many parents cannot afford such a substitute." (footnote omitted) (citation omitted)).

policy at issue survive strict scrutiny, whether it is curricular in nature or not.[135] There are already indications that the Court is moving in this direction. In *Miller v. McDonald*, a group of Amish parents and Amish community schools challenged New York's school vaccination mandate under the Free Exercise Clause and under a *Yoder* hybrid rights theory.[136] The Second Circuit rejected their free exercise claim and distinguished *Yoder* as inapplicable to regulations implicating public health.[137] In response, the Supreme Court vacated and remanded *Miller* for further consideration in light of *Mahmoud*.[138] On remand, the Second Circuit again rejected the claim on the grounds that vaccine mandates do not fall within *Mahmoud*'s ambit.[139] Nevertheless, the Supreme Court's clear message was that *Mahmoud* counsels in favor of grappling more thoroughly with the asserted parental rights.[140]

The Court took up *Mahmoud* more squarely (albeit in an interim relief posture) in *Mirabelli v. Bonta*.[141] There, the district court granted a permanent injunction enjoining a policy which prevented school employees from sharing information about a student's gender expression with the student's parents unless the student gave permission to do so.[142] That injunction was later stayed by the Ninth Circuit.[143] The Supreme Court vacated the Ninth Circuit's stay, ruling that parents who have "sincere religious beliefs about sex and gender" were likely to

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135 *See id.* at 2361 (explaining that because the challenged policy "'substantially interfer[ed] with the religious development' of the parents' children," thus posing a " very real threat of undermining' the religious beliefs and practices that the parents wish[ed] to instill in their children," the policy had to survive strict scrutiny to be valid (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972))).

136 *See* Miller v. McDonald, 130 F.4th 258, 261 (2d Cir.), *vacated*, 146 S. Ct. 879 (2025) (mem.).

137 *Id.* at 264–71.

138 *Miller*, 146 S. Ct. at 879 (mem.).

139 Miller v. McDonald, 180 F.4th 420, 432–34 (2d Cir. 2026) (per curiam) ("[The vaccine mandate] does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents' faith, and does not enlist school officials to displace parental religious formation. It imposes a health-and-safety condition on in-person school attendance to reduce the spread of communicable disease." *Id.* at 432–33). Though the Second Circuit acknowledged that *Mahmoud* "reaches beyond curriculum," it asserted that the vaccine mandate "displaces no part" of parents' "authority over a child's religious upbringing," and thus declined to apply strict scrutiny. *Id.* at 433.

140 *See Mahmoud*, 145 S. Ct. at 2357 ("*Yoder* is an important precedent of this Court, and it cannot be breezily dismissed as a special exception granted to one particular religious minority.").

141 Mirabelli v. Bonta, 146 S. Ct. 797 (2026) (per curiam).

142 *See* Mirabelli v. Olson, 820 F. Supp. 3d 1123, 1160 (S.D. Cal. 2025), *aff'd sub nom.*, Mirabelli v. Bonta, No. 25-8056, 2026 WL 44874 (9th Cir. Jan. 5, 2026) (per curiam), *vacated in part*, 146 S. Ct. 797 (2026) (per curiam).

143 *See Mirabelli*, 2026 WL 44874, at *4.

succeed on their free exercise claim challenging the school policy because they face the same kind of burden as in *Mahmoud* and *Yoder*.[144] While this preliminary posture has limitations, it signals that a majority of the Court understands *Mahmoud* to apply beyond just curriculum.

But taking subsidiarity seriously need not imply unlimited opt-outs, as Justice Sotomayor worried in her *Mahmoud* dissent.[145] Even among those policies that cause substantial religious interference, there are some—especially those related to health and safety—that may in fact be sufficiently narrowly tailored to achieve compelling state interests. In other words, strict scrutiny need not be fatal in fact. For example, after Congress passed RFRA (but before it was invalidated as applied to the states), the Ninth Circuit dealt with a challenge to a knife ban in schools which functionally prevented Sikh students from carrying ceremonial blades called kirpans.[146] Since RFRA codified the *Sherbert/ Yoder* test,[147] the Ninth Circuit's legal analysis involved roughly the same type of substantial burden analysis that would be required today under *Mahmoud*.[148] Both the majority and the dissent agreed that the policy imposed a substantial burden on the students' sincere religious exercise.[149] They disagreed over whether the total ban on knives was sufficiently tailored to achieve the school district's interest in protecting the safety of its students, and whether the school board's compromise plan—which involved sewing the kirpans to their sheaths—was a suitable alternative.[150]

Under the pre-*Mahmoud* regime, the kirpan case would have been an easy one. The court could say that the knife ban was rationally related to protecting student safety and end its analysis there. But the new regime requires courts facing the same question to take seriously the needs of Sikh families, to respect their deeply held commitments,

144 *Mirabelli*, 146 S. Ct. at 802, 801–02.

145 *See Mahmoud,* 145 S. Ct. at 2394 (2025) (Sotomayor, J., dissenting) ("[R]equiring schools to provide advance notice and the opportunity to opt out of every book, presentation, or field trip where students might encounter materials that conflict with their parents' religious beliefs will impose impossible administrative burdens on schools."); *see also* Schwartzman, Schragger & Tebbe, *supra* note 116, at 234 ("This is a we-know-it-when-we-see-it type of inquiry, and it elicits all the objections one might expect against ad hoc, fact-bound tests."); *cf.* 1 BILL WATTERSON, THE COMPLETE CALVIN AND HOBBES 43 (2005) (in which the protagonist decides it is "worth a shot" to refuse to solve the equation "2 + 7" on the grounds that "it is against [his] religious principles" to do so).

146 *See* Cheema v. Thompson, 67 F.3d 883, 884 (9th Cir. 1995), *overruled on other grounds by*, City of Boerne v. Flores, 521 U.S. 507 (1997). For a brief overview of RFRA and the Court's response, see Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645, 651–58 (1998).

147 *See* 42 U.S.C. § 2000bb(b) (2018).

148 *See* Mahmoud v. Taylor, 145 S. Ct. 2232, 2361 (2025).

149 *Cheema*, 67 F.3d at 885; *id.* at 889 (Wiggins, J., dissenting).

150 *Id.* at 886 (majority opinion); *id.* at 889 (Wiggins, J., dissenting).

to encourage finding a suitable compromise if possible, and in the final analysis to ensure that any interference with the ability of parents to raise their children according to their faith is justified by a compelling interest. This is, no doubt, a heavier lift for courts and litigants, but it is one that more fully respects the protections for religious exercise embodied in our constitutional order.

## CONCLUSION

*Mahmoud* succeeds in both recognizing legitimate parental authority in the sphere of moral education, and in encouraging school boards to err on the side of accommodation and responsiveness to concerns of parents in their communities. Under *Mahmoud*, all school policies face the same threshold question, but they need not come down on the side of exemptions in every case. To return to the vaccine example, schools have important interests in protecting student safety and in achieving herd immunity against specific diseases—interests that may be undercut by widespread religious exemptions.[151] Whether a policy is in fact narrowly tailored in any given case will depend on specific empirical findings. To say that substantial religious interference must survive strict scrutiny is not to say that all will flunk, it is simply to say that the court may not ignore its duty to examine a policy carefully when major constitutional interests are in play.

151 *See, e.g.*, Miller v. McDonald, 130 F.4th 258, 271 (2d Cir.), *vacated*, 146 S. Ct. 879 (2025) (mem.) ("[R]eligious exemptions impeded the immunization law from functioning; it resulted in clusters of low vaccination rates and an inability to achieve herd immunity in certain communities.").