No. 25-4531

In the United States Court of Appeals for the Ninth Circuit

AMY DOESCHER, STEVE DOESCHER, DANIELLE JONES, KAMRON JONES, individually and on behalf of their minor children,
Appellants,

v.

ERICA PAN, in her official capacity as Department of Public Health Director and as the State Public Health Officer,
Appellee.

Appeal from a Decision of the
United States District Court for the
Eastern District of California,
Case No. 2:23-cv-02995-KJM-JDP
The Honorable Kimberly J. Mueller, District Judge

REPLY BRIEF OF APPELLANTS

THE NICOL LAW FIRM
Jonathon D. Nicol, SB# 238944
1801 Century Park East, 24th Floor
Los Angeles, CA 90067
Telephone: 816.514.1178

Counsel for Appellants

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INTRODUCTION

California claims SB 277 is a straightforward public health measure deserving minimal judicial scrutiny. But the statute tells a different story. SB 277 grants hundreds of thousands of students permission to attend school unvaccinated through medical, educational, temporal, and circumstantial exemptions—while categorically barring only those with religious objections. This selective enforcement violates the First Amendment.

SB 277's structure is telling. Physicians grant medical exemptions based on "family medical history," an individualized, case-by-case determination. Students with Individualized Educational Programs ("IEPs") can access school services regardless of vaccination status. Newly-enrolled students receive a 30-day grace period. Homeschooled children are exempt. Immigrant students, foster children, homeless students, and military families receive conditional exemptions lasting years. The law does not apply to students over eighteen or unvaccinated adults who enter school buildings daily.

Yet when Appellants seek the same individualized consideration for their sincerely held religious beliefs, California slams the door. The

message is clear: secular reasons merit case-by-case evaluation; religious reasons merit automatic exclusion from education.

This disparate treatment violates bedrock principles of religious liberty. Under *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), and *Tandon v. Newsom*, 141 S.Ct. 1294 (2021), laws creating systems of individualized exemptions while denying religious accommodations are neither neutral nor generally applicable and must satisfy strict scrutiny. SB 277 fails that test on multiple grounds.

First, SB 277's medical exemption system epitomizes individualized governmental assessment. As *Fulton* made clear, the government cannot "consider the particular reasons for a person's conduct" through secular exemptions while categorically rejecting religious ones. 141 S.Ct. at 1878. Even if the medical exemption were somehow deemed objective, SB 277 contains numerous other exemptions requiring individualized determinations: IEP exemptions, independent study exemptions, and temporary exemptions based on military status, homelessness, foster care placement, or immigration.

Second, under *Tandon's* comparability framework, SB 277 fails. California permits hundreds of thousands of unvaccinated students to

attend school for secular reasons while excluding Appellants' children solely because their objection is religious. California makes no attempt to regulate countless secular settings where children and adults mingle: amusement parks, theaters, malls, public transit, pools, and houses of worship. If California's interest is achieving herd immunity, excluding a statistically insignificant number of religiously objecting schoolchildren while leaving these venues unregulated is not narrowly tailored; it is arbitrary.

Third, *Mahmoud v. Taylor*, 145 S.Ct. 2332 (2025), independently requires strict scrutiny. *Mahmoud* confirmed what *Wisconsin v. Yoder*, 406 U.S. 205 (1972) established: when government educational policies substantially interfere with parents' fundamental right to direct their children's religious upbringing, heightened judicial review applies. SB 277 forces religious parents into an impossible choice: violate core religious beliefs or forfeit formal education entirely.

California argues *Mahmoud* applies only to "curricular" matters, but this distinction finds no support in the Supreme Court's reasoning. *Mahmoud* focused on whether the policy "substantially interfere[d] with the religious development" of children—a functional inquiry examining

the character and degree of the burden. Under California's reading, parents could demand strict scrutiny to object to a single book but receive only rational basis review when their children are excluded from school entirely. The Supreme Court's precedents do not countenance such absurdity.

California has not carried its burden under strict scrutiny because it cannot. Its statute exempts hundreds of thousands based on secular considerations while excluding a handful based on religion. Its asserted interest in herd immunity is undermined by its own sprawling exemptions and failure to regulate comparable secular gatherings.

This Court should reverse the district court's judgment, apply strict scrutiny, and hold that SB 277's categorical exclusion of religious objectors violates the Free Exercise Clause and the fundamental right of parents to direct their children's religious upbringing.

ARGUMENT

I. SB 277 IS SUBJECT TO STRICT SCRUTINY BECAUSE IT IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE.

California concedes that SB 277 contains multiple exemption categories:

1. Medical exemptions: Determined individually by a licensed physician on a case-by-case basis;

2. Grace period exemption: A 30-day exemption window when a student first enrolls in a school;

3. Homeschool exemption: Students participating in homeschool programs with individualized study plans are exempt from the vaccination requirement;

4. Special education exemption: Students with an IEP are exempt when "accessing any special education and related services";

5. Temporary exemptions for vulnerable student populations: Immigrant students, students in foster care, homeless students, and children of active military personnel receive conditional exemptions for long periods. See Cal. Educ. Code §§ 48204.7, 48850, 48852.7, 49069.5, 49701; Cal. Health & Safety Code § 120341;

6. Age and setting-based exemption: Students under eighteen years of age are exempt when attending "any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center." Cal. Health & Safety Code § 120335(b);

7. Grandfather clause: Students with pre-existing exemptions obtained before SB 277's enactment retain those exemptions. Cal. Health & Safety Code § 120335(g).

The district court acknowledged these exemptions in its factual findings but committed legal error in its analysis. The breadth and nature of these exemptions undermine SB 277's neutrality and general applicability, thereby precluding rational-basis review. The district court's conclusion that rational-basis scrutiny applies is incorrect for two reasons.

A. SB 277's System of Individualized Exemptions Triggers Strict Scrutiny Under *Fulton*.

California's principal contention is that medical exemptions under § 120370 are "objective" rather than individualized. Ans. Br. at 19. This argument collapses upon review.

1. The Medical Exemption System Mandates Individualized Governmental Discretion.

California asserts there is nothing in SB 277 that gives government officials meaningful discretion in whether to grant a medical exemption. Ans. Br. at 20. This assertion ignores facts:

California officials created the medical-exemption framework; California officials determined that exemptions would be evaluated case-by-case; and California officials administer and process individualized exemptions through the system they designed. By establishing this individualized exemption mechanism, California has rendered the law not generally applicable under *Fulton*.

The method of implementation is irrelevant. Whether California employs physicians to make individualized determinations or uses intermediary agencies rather than conducting medical examinations directly does not change the constitutional analysis. What matters is the law's structure: whether it includes secular exemptions permitting individualized assessments.

The medical exemption explicitly authorizes physicians to make individualized determinations based on factors such as "family medical history." Cal. Health & Safety Code § 120370(a)(3). Such history is an *inherently* case-specific, individualized inquiry. A physician's professional judgment regarding whether a particular child's family history warrants an exemption epitomizes individualized assessment. This provision deliberately grants express "medical discretion"

constrained only by the physician's professional training and the applicable standard of care. Ans. Br. at 20.

The medical exemption process operates as follows: parents create an account in the CAIR-ME system and visit their physician to request a medical exemption. The physician reviews the child's medical history and, if the child meets the narrow CDC-stated contraindications or precautions for a specific vaccine, may grant a temporary or permanent exemption for that particular vaccine. At this initial stage, no medical records are uploaded to the system. The parent receives documentation indicating which vaccines are exempted and the duration of each exemption, which is then submitted to the school for verification in CAIR-ME.

Following this initial approval, CDPH (or its third-party contractor) reviews medical exemptions and revokes a significant percentage of them, either because the exemption does not meet the applicable standard or because CDPH demands additional proof. Parents then have thirty days to appeal, during which time the child may remain in school. The appeal requires parents to instruct their

physician to upload the child's complete medical files to CAIR-ME for CDPH's review, which typically results in denial.

This review process is critical to understanding why California cannot shield itself from scrutiny by claiming it has delegated exemption authority to physicians. While physicians make initial exemption determinations, California itself—through CDPH—makes the final determinations by reviewing and revoking most exemptions. California's involvement is not merely supervisory; it is substantive and determinative.

While California argues it has narrowed the medical exemption's scope, it continues to vest discretion in determining whether legitimate individualized medical circumstances exist – and family history remains a permissible consideration. California's characterization of this process as purely 'objective" is inaccurate. This is precisely the type of discretionary, individualized exemption system that the Supreme Court in *Fulton* held destroys general applicability. 141 S. Ct. at 1878–79.

California cannot shield itself from scrutiny merely because it has statutorily delegated exemption authority to physicians rather than

making exemption determinations itself. *Fulton* forecloses this argument, recognizing that even when the government delegates sole discretion to independent contractors, it retains a managerial role over its internal operations. 141 S. Ct. at 1878. Consequently, California cannot credibly claim that the medical exemption that it created and oversees does not involve state action, nor can it legitimately argue that this exemption is constitutionally inconsequential.

California characterizes its exemptions as temporary or fleeting, yet nothing in SB 277 indicates that medical exemptions under Cal. Health & Safety Code § 120370(a) are time-limited. To the contrary, a medical exemption may persist for the *entire* duration of the student's medical condition or contraindication—potentially for the child's lifetime and always during the duration of schooling. ER-117, ¶ 47.

2. SB 277 Contains Multiple Additional Individualized Exemption Pathways.

Even if medical exemptions were purely objective (which they are not), *Fulton* nonetheless mandates strict scrutiny because SB 277 contains numerous other individualized ways that students may be exempted from vaccination requirements:

- Independent study/homeschooling exemption (§ 120335(f)), determined case-by-case by parents and teachers;
- IEP exemption (§ 120335(h)), requiring individualized determinations by school assessment teams; and
- Temporary exemptions based on relocation, foster care status, homelessness, or military-family status—each requiring individualized determinations to establish whether a student qualifies and should receive the exemption.

California conspicuously fails to address or defend the individualized nature of these provisions in its Answering Brief, thereby forfeiting any argument that these exemptions, expressly carved out in SB 277, are not based on individualized, case-by-case determinations.

3. California's "Narrow" Exemption Argument Misapplies *Fulton*.

California's sole argument regarding SB 277's individualized exemptions is that they are "narrow" or pose less risk under *Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98 (2021). Ans. Br. at 22, 52. But *Fulton* does not inquire whether a discretionary system is narrow; it asks whether such a system exists at all. Once secular officials may

grant exemptions through case-by-case judgment, religious exemption requests must receive equivalent consideration. 141 S. Ct. at 1878 ("A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions.") (quotation marks omitted) (emphasis added). California's creation of individualized exemptions to SB 277 is sufficient to trigger strict scrutiny. *Id.*

4. Post-*Fulton* Jurisprudence Supports Strict Scrutiny.

Following *Fulton*, numerous courts have held that vaccine laws providing medical exemptions while intentionally denying religious exemptions trigger strict scrutiny. *See Doster v. Kendall*, 48 F.4th 608 (6th Cir. 2022); *U.S. Navy SEALs 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022); *see also Dahl v. Bd. of Trs. of W. Michigan Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (holding that because the university allowed individualized medical and religious exemptions, but categorically denied religious exemptions for student athletic participation, the university "retain[ed] discretion to extend exemptions," rendering the denials "not generally applicable"); *Fox v. Makin*, 2023 WL 5279518,

Dkt. No. 2:22-cv-00251-GZS (D. Me. Aug. 16, 2023) (finding that a complaint may state a plausible Free Exercise Clause claim when alleging a vaccine mandate eliminated religious exemptions while maintaining medical exemptions).

5. *Doe v. San Diego Unified School District* Does Not Control.

California repeatedly cites *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1175–76 (9th Cir. 2021). In *Doe*, this Court initially granted emergency injunctive relief pending appeal to plaintiffs, a 16-year-old high school student and her parents. *Id*. This Court determined that as long as the defendant provided deferred vaccination for pregnant students, plaintiffs were entitled to an injunction against the mandatory vaccination requirement. *Id*.

After granting initial injunctive relief, this Court later determined that the injunction had terminated on its own terms and denied further injunctive relief pending appeal. *Id*. In that decision, two panel members preliminarily concluded that the defendant's conditional enrollment and IEP exemptions did not warrant granting an injunction

pending appeal. However, the dissenting judge astutely observed that the majority's reasoning:

> "again confuses the *reasons* for the exemption with the *asserted interest* that justifies the mandate. While the School District may have a good reason to give new enrollees who meet certain criteria thirty days to comply with the mandate, the in-person attendance of such unvaccinated conditional enrollees poses an identical risk to the School District's asserted interest in preventing the spread of COVID-19 as the in-person attendance of unvaccinated students seeking a religious exemption.... Therefore, the mandate is not generally applicable."

Doe, 19 F.4th at 1186 (Ikuta, J., dissenting) (citing *Tandon*, 141 S. Ct. at 1296).

Doe was ultimately dismissed on mootness and other grounds *without* a final merits determination on the plaintiffs' claims. Following *Doe*, the two-judges' "neutrality and general applicability" analysis has not been adopted by subsequent decisions. *Bacon v. Woodward*, 104 F.4th 744, 751 (9th Cir. 2024). Thus, this decision denying an injunction pending appeal in *Doe* does not control the Court's decision in the instant case.

B. SB 277 Violates *Tandon* By Treating Comparable Secular Conduct More Favorably Than Religious Exercise.

California's comparability analysis is irreparably broken, as it fails to articulate how Appellants' children pose a materially greater threat to herd immunity than the hundreds of thousands of students exempted under SB 277's sprawling secular carveouts. SB 277 permits exemptions across a vast spectrum of secular grounds: students with IEPs, medical exemptions, those over eighteen, or individuals with particular economic, familial, or military circumstances. Such exemptions range from thirty days to permanent dispensation. Meanwhile, SB 277 remains silent about adult staff and volunteers who enter classrooms, and SB 277 imposes no constraints whatsoever on the countless venues where children and adults congregate in comparable or greater numbers: amusement parks, shopping centers, houses of worship, contact sports facilities, cinemas, public transit, and more.

When California deliberately exempts or leaves unregulated hundreds of thousands of individuals, activities, and settings that present analogous risks, it undermines its purported interest to a

degree equivalent to the prohibited religious exercise. Strict scrutiny therefore applies. *Tandon*, 593 U.S. at 62. California allows a multitude of unvaccinated children and adults to gather in far less regulated environments—theaters, malls, sporting events, swimming pools, libraries, mass transit—while categorically excluding a few religiously objecting children from attending school.

California offers no coherent explanation for what distinguishes Appellants as uniquely determinative for achieving herd immunity. The ACLU, which has appeared as amicus for California in a related Ninth Circuit appeal (*Royce v. Pan*, 25-2504), previously cautioned the California Legislature that herd immunity constitutes a *population-wide* phenomenon, not a school-specific one, and that eliminating personal-belief exemptions would yield negligible public health benefits because most disease transmission occurs outside educational settings. California conspicuously fails to address this damaging concession from its own supporting party.

California's asserted compelling interests are "in protecting public health by preventing the spread of infectious diseases" and "achieving and maintaining herd immunity for the protection of public health."

Ans. Br. at 13, 52. Yet California provides no empirical evidence demonstrating how exempting Appellants would imperil herd immunity. Appellants' children and those with the same beliefs constitute a statistically-insignificant percentage of California's enrolled private and public-school students. Opening Br. at 23.

California proffers neither data nor reasoned analysis explaining how such an infinitesimal percentage could compromise herd immunity, nor does it quantify the threshold at which accommodating individual students with sincerely held religious beliefs—rights expressly protected by the First Amendment—would materially affect disease prevention. The risk posed by the California's secular exemptions would equal or exceed that of granting Appellants' religious accommodation. California's own exemptions eviscerate its position. While California attempts to minimize the scope of IEP-based exemptions, the reality is stark: more than 800,000 students potentially qualify under this provision alone. ER-064.

Notably, under an IEP, schools cannot simply provide IEP services in isolation while excluding such students from general school activities. Instead, the school must include the IEP student in regular

class and for non-academic activities such as art, music, lunch, and recess. *Sacramento City School Dist. v. Rachel H.*, 14 F 3d 1398, 1404 (9th Circuit 1994).

California's Answering Brief inadvertently concedes the point in attempting to downplay it: "If a student's existing IEP called for that student to receive certain classroom-based services, the school could not summarily bar them from receiving those services if it discovered that the student lacked one or more required immunizations." Ans. Br. at 30.

California rightly complies with federal law under the Individuals with Disabilities Education Act by declining to summarily exclude students with IEPs from public education and requisite services. What California has not established is why it must categorically bar Appellants' children from public and private education for exercising their federal right to free religious exercise. California's purported risk-distinction is analytically indistinguishable from the Ninth Circuit's holding in *Tandon*—a holding the Supreme Court reversed. The same result is compelled here.

II. *MAHMOUD V. TAYLOR* AND THE PARENTAL RIGHTS DOCTRINE REQUIRE STRICT SCRUTINY.

California's forfeiture argument is a procedural smokescreen that cannot withstand scrutiny, an argument that shows how concerned the Appellees are about new guidance from the Supreme Court. Appellants plainly preserved their parental-rights claim by invoking *Yoder* in their complaint and presenting the underlying constitutional principles to the district court. ER-109. But even if preservation were somehow deficient, and it's not, the argument fails because: the *de novo* standard of review eliminates any prejudice; *Mahmoud v. Taylor*, 145 S.Ct. 2332 (2025) constitutes an intervening change in law decided mere days after the district court's ruling; and sound judicial policy favors addressing this important constitutional question that involves pure legal issues fully briefed by both parties. California's reliance on forfeiture doctrine is particularly inappropriate here, where declining to reach the merits would not prevent this issue from recurring but would simply delay its inevitable resolution while potentially creating uncertainty in the lower courts. For these reasons, the Court should reject the California's

forfeiture argument and proceed to evaluate Appellants parental rights claim on its merits.

A. Appellants Properly Raised *Mahmoud* and Parental Rights Arguments on Appeal.

California's forfeiture argument should be rejected for several distinct reasons. First, the argument was adequately preserved below. Second, even if preservation were questionable, the *de novo* standard of review eliminates any prejudice to California. Third, the intervening-change-in-law exception applies. Fourth, forfeiture is inappropriate where the legal theory was reasonably available but its application was clarified by subsequent Supreme Court authority.

1. The Parental Rights Argument Was Adequately Preserved Below.

California's characterization of the record is both selective and misleading. Preservation does not require magic words or a specific doctrinal label; it requires only that the district court had a fair opportunity to rule on the substance of the claim. *United States v. Cotterman*, 709 F.3d 952, 960 (9th Cir. 2013) ("[w]e may consider an

issue that has not been adequately raised on appeal if such a failure will not prejudice the opposing party.")

Appellants invoked parental rights throughout their district court filings. The complaint quoted *Wisconsin v. Yoder*, 406 U.S. 205 (1972) for the fundamental proposition that parents have the right to direct their children's religious upbringing. This was not a mere peripheral citation but instead citing *Yoder* articulated a constitutional foundation of Appellants' claims. The complaint thus put the district court on notice that parental autonomy in religious education was central to the case.

Appellants' opposition to the motion to dismiss presented the constitutional framework necessary for evaluating their claims, even if they did not explicitly demand strict scrutiny under a *Yoder*-based parental rights theory. The relevant constitutional principles were before the district court. Indeed, the district court was aware of *Yoder*, discussed it at the motion to dismiss hearing (ER-40), and had the opportunity to apply its reasoning.

California thus conflates two distinct concepts: (1) raising the underlying constitutional claim, and (2) advocating for a particular

standard of review or analytical framework. Appellants clearly did the former and likely also did the latter. That they did not frame their argument in the precise doctrinal terms later crystallized by *Mahmoud* does not constitute forfeiture. *United States v. Payne*, 99 F.4th 495, 503, n. 3 (9th Cir. 2024) (new legal theory based on facts in record or wholly distinct legal theories not forfeited).

2. *De Novo* Review Eliminates Any Prejudice.

Even assuming *arguendo* that Appellants should have been more express in their framing below, forfeiture would still be inappropriate under the *de novo* standard of review applicable here. This Court reviews *de novo* both the district court's dismissal and the legal question of what level of scrutiny applies. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009).

Where review is *de novo*, this Court stands in the shoes of the district court and evaluates legal questions independently. The purposes of forfeiture doctrine—promoting judicial efficiency and preventing unfair surprise—are not implicated when this Court must decide the legal issue anew regardless of how it was presented below.

California cannot credibly claim prejudice. The legal question of what standard of review governs parental rights claims challenging educational mandates requires no factual development. Indeed, the matter below never reached the discovery phase. California has had full opportunity to brief the issue on appeal. What is before the Court is a pure question of law that this Court must review *de novo*.

3. The Intervening-Change-in-Law Exception Applies.

California acknowledges that "an exception to the waiver rule exists for intervening changes in the law," *Big Horn Cnty. Elec. Co-op., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000), but dismisses this exception without meaningful analysis.

Mahmoud was decided mere days *after* the district court granted California's motion to dismiss. ER-4. While *Mahmoud* did not create parental rights *ex nihilo*, it fundamentally clarified the analytical framework for evaluating such claims in the educational context. The Supreme Court held that when government educational policies substantially interfere with parents' ability to direct their children's religious upbringing, strict scrutiny applies. *Mahmoud*, 606 U.S. at

564. This holding resolved ambiguity about whether and when heightened scrutiny applies to parental rights claims in school settings.

Before *Mahmoud*, reasonable lawyers could disagree about the proper standard of review. The Supreme Court had not squarely addressed this question in the decades since *Yoder*, and lower courts had reached varying conclusions. *Mahmoud* settled the issue. This is precisely the type of legal development that justifies considering an argument on appeal even if not presented with full clarity below.

California argues that because Appellants cited *Yoder* in their complaint, they should have anticipated *Mahmoud*'s reasoning and pressed that theory more forcefully. This logic goes too far. If citing controlling precedent in one's complaint created an obligation to predict how the Supreme Court would extend that precedent years later, the intervening-change-in-law exception would be meaningless. Parties cannot be faulted for failing to prophesy.

California also faults Appellants for not requesting that the district court defer ruling pending *Mahmoud* or seeking reconsideration afterward. But *Mahmoud* was decided *after* the district court ruled. Appellants could not have requested deferral of a decision that had

already been rendered. As for reconsideration, Appellants chose instead to pursue this appeal, a choice well within their discretion and one that does not forfeit arguments based on *Mahmoud*.[1]

4. Policy Concerns Favor Reaching the Merits.

Courts of appeals frequently exercise discretion to address important legal questions even when preservation is imperfect, particularly where: (1) the issue involves pure legal questions requiring no additional factual development; (2) the issue is likely to recur; (3) the parties have fully briefed the issue on appeal; and (4) the legal landscape has shifted since the district court's decision. All four factors are present here.

The parental rights question presented is exceptionally important and will recur in future cases. Educational policies implicating religious upbringing affect families nationwide. Declining to reach the merits here would not prevent the issue from arising again; it would

[1] Notably, on December 8, 2025, the Supreme Court granted a petition for writ of certiorari in *Miller et al. v. McDonald, Comm'r, et al.*, 25-133, which concerns a challenge brought by religious families in New York who argue that denying religious exemptions to school vaccine requirements violates their First Amendment rights. The Supreme Court remanded *Miller* to the United States Court of Appeals for the Second Circuit for further consideration in light of *Mahmoud*.

simply delay resolution and potentially lead to inconsistent lower court decisions in the interim.

Moreover, California's invocation of the "court of review, not first view" principle is inapposite. That principle primarily concerns factual determinations and discretionary judgments where the district court's institutional advantages justify deference. *See, e.g., Roth v. Foris Ventures, LLC*, 86 F.4th 832, 838 (9th Cir. 2023). Here, by contrast, the question is one of pure law: which constitutional standard applies. This Court is not being asked to make factual findings or exercise discretion in the first instance, but rather to apply Supreme Court precedent to undisputed facts—a quintessentially appellate function.

The forfeiture argument should be rejected. Appellants preserved their parental rights claim below, the *de novo* standard eliminates any prejudice to the State, *Mahmoud* represents an intervening change in law, and sound policy favors addressing this important constitutional question on its merits. The Court should proceed to the merits of Appellants' parental rights argument.

B. Strict Scrutiny is Required Under *Mahmoud*.

California's attempt to distinguish *Mahmoud* and *Yoder* fails on each of its three grounds. Far from being inapplicable, these cases compel strict scrutiny here because SB 277 substantially interferes with parents' ability to direct their children's religious upbringing. This is the very right the Supreme Court has repeatedly recognized as fundamental.

1. The Curriculum/Non-Curriculum Distinction Is Illusory and Unsupported.

California's central argument—that *Mahmoud* applies only to "curricular requirements"—finds no support in the Supreme Court's reasoning and eviscerates parental rights protection.

a. *Mahmoud* and *Yoder* Protect Parental Direction of Religious Development, Not Just Curriculum Choices.

California fundamentally misreads *Mahmoud's* holding. The Supreme Court did not cabin its analysis to curriculum. Rather, it held that strict scrutiny applies when government educational policies "substantially interfere with the religious development" of children.

Mahmoud, 606 U.S. at 546 (quoting *Yoder*, 406 U.S. at 218). The Supreme Court focused on whether the government action burdened parents' fundamental right to direct their children's religious upbringing—a right that extends far beyond objections to reading materials.

The *Mahmoud* court repeatedly emphasized the character and degree of the burden, not the administrative category (curriculum vs. policy) in which it falls. The Court asked whether the requirement "impose[d] upon children a set of values and beliefs" contrary to their religious training. *Id*. at 554. That functional inquiry about whether the requirement substantially interferes with religious development applies equally to immunization mandates that force families to choose between religious exercise and education.

California's reliance on *Doe No.1 v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 23-3740, 2025 WL 2453836 (6th Cir. Aug. 26, 2025) is misplaced. First, that Sixth Circuit decision is not binding on the Ninth Circuit (or even in the Sixth, as it is unpublished). Second, even that court acknowledged that it was addressing a narrow question about restroom policies, not the comprehensive exclusion from education that

Appellants face here. Third, the Sixth Circuit's reasoning conflicts with the Supreme Court's functional approach to substantial burdens.

b. Immunization Mandates Impose Severe Burdens on Religious Development.

California claims that immunization requirements, being "operational policies" rather than curriculum, cannot substantially interfere with religious development. This is demonstrably false.

SB 277 forces religious parents into an impossible choice: violate core religious beliefs by accepting immunizations, or forgo formal education entirely. This is not a mere inconvenience or administrative hurdle; it is total exclusion from the public school system and most private schools. *See* Cal. Health & Safety Code § 120335(b). For many families, homeschooling is not financially or practically feasible, making the exclusion effectively permanent.

This burden is far more severe than what the *Mahmoud* plaintiffs faced. Those parents objected to specific books but their children remained enrolled in school, participating in the broader educational community. Here, children are barred entirely from the educational environment—excluded from classrooms, teachers, peers,

extracurricular activities, and the entire social and intellectual ecosystem of schooling.

California argues that the immunization requirement applies "prior to first admission" and thus before children "formed a relationship with any teacher." Ans. Br. 49. This misses the point entirely. The burden is not the timing of the requirement; it is instead the total exclusion from school that results from refusal. Preventing a child from ever forming those relationships, ever entering that classroom, ever participating in that community is a more substantial interference with their development (religious and otherwise) than objecting to particular curricular materials while remaining enrolled.

c. California's Limiting Principle Would Produce Absurd Results.

If accepted, California's curriculum/non-curriculum distinction would mean that parental rights receive robust protection when parents object to a single book, but no protection when government excludes children entirely from school. This inversion makes no sense.

Under California's theory, a policy requiring students to read one objectionable book triggers strict scrutiny (*Mahmoud*), but a policy

entirely excluding unvaccinated students from education triggers only rational basis review. A parent could demand strict scrutiny to opt out of a single class period, but not to opt out of a medical procedure as a condition of attending any classes at all. California provides no principled reason for this distinction.

The proper inquiry is not whether the challenged policy appears in the curriculum section or in the operations section of the education code. It is whether the policy substantially interferes with parents' direction of their children's religious upbringing. California's immunization mandate clearly does.

2. The Health and Safety Exception Is Overstated and Inapplicable.

California's second argument (that health-and-safety concerns categorically exempt immunization laws from strict scrutiny) misconstrues *Yoder*, ignores *Mahmoud*, and conflates the standard of review with the government's likelihood of satisfying that standard.

a. *Yoder* Did Not Create a Health and Safety Exception to Strict Scrutiny.

California claims that *Yoder* established that "substantial threats to the health and safety of children" exempt regulations from strict scrutiny. Ans. Br. 51-52. This is incorrect. *Yoder* held that health and safety concerns are *compelling interests* that can justify burdens on religious exercise under strict scrutiny, *not* that such concerns eliminate the need for strict scrutiny altogether.

The *Yoder* Court stated: "It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." 406 U.S. at 220. But the Court then applied strict scrutiny, requiring the state to show that its interest was "of the highest order" and could not be "otherwise served." *Id.* The Court did not exempt health and safety regulations from heightened review. Rather, it *subjected* them to it.

California quotes *Yoder's* statement that the challenged law did not implicate "any harm to the physical or mental health of the child." *Id.* at 230. But this language addressed whether the state had a

compelling interest, not whether strict scrutiny applied. The Court was explaining why the state failed strict scrutiny in that case, not creating a categorical exception for cases where health interests exist. No such exception arose from *Yoder* or any other authority, and so one cannot apply here.

b. California's Cited Cases Do Not Support a Categorical Exception.

California cites *Prince v. Massachusetts*, 321 U.S. 158 (1944) and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), for the proposition that immunization laws are exempt from strict scrutiny. Neither case supports this claim.

Prince involved child labor laws and predated the modern Free Exercise Clause framework established in *Sherbert v. Verner*, 374 U.S. 398 (1963), and applied in *Yoder*. Although *Prince* stated that parental rights have limits, it did not hold that health and safety regulations receive only rational basis review. Indeed, *Prince* applied a form of heightened scrutiny appropriate to its era, carefully weighing the government's interest against religious freedom.

Jacobson is even less applicable. Decided in 1905, it predated incorporation of the Free Exercise Clause against the states and the entire modern framework of strict scrutiny for fundamental rights. More importantly, *Jacobson* involved a direct mandate on adults during a smallpox epidemic with criminal penalties for refusal—not a conditional educational requirement for children. The Court's deferential approach in *Jacobson* has been repeatedly limited by subsequent precedent. *See, e.g., Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 67 (2020) (rejecting broad application of *Jacobson* to COVID restrictions).

It is possible for the Court to respect those precedents by confining them to their literal holdings. At the same time, more recent guidance from the Supreme Court on the issues presented in this case cannot be ignored. And California has not even shown that applying strict scrutiny to this law would undermine other important school safety or health regulations. The number of religious objectors is small. California can respect them and the Constitution with little practical effect on health and safety. *See Section III*, *infra.*

c. *Mahmoud* Reaffirms That Strict Scrutiny Applies Despite Government Interests.

Most tellingly, California ignores that *Mahmoud* itself involved government assertions of important interests. The school district in *Mahmoud* argued it had compelling interests in promoting tolerance, preventing bullying, and creating an inclusive environment, which are all important educational and safety objectives. 606 U.S. at 560-62. The Supreme Court did not hold that these interests exempted the policy from strict scrutiny. Instead, the Court applied strict scrutiny and found the policy failed because it was not narrowly tailored. *Id.*

If the mere assertion of health, safety, or welfare interests exempted policies from strict scrutiny, *Mahmoud* would have come out differently. The Court's application of strict scrutiny despite the government's important interests confirms that such interests are analyzed under strict scrutiny, not as a threshold exception to it.

d. Strict Scrutiny Is the Proper Framework for Evaluating Competing Interests.

California again conflates two distinct questions: (1) what standard of review applies, and (2) whether the government can satisfy

that standard. Strict scrutiny is specifically designed to balance fundamental rights against compelling government interests. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).

Appellants do not argue that their religious exercise categorically trumps public health. They instead argue that when government substantially burdens the fundamental right to direct children's religious upbringing, it must prove its policy is narrowly tailored to serve a compelling interest. California might well be able to make that showing for certain vaccines under certain circumstances. But the analysis belongs in strict scrutiny, not rational basis review.

The availability of religious exemptions in 45 other states (ER-121), suggests that California's absolute ban is not narrowly tailored. Many states achieve high vaccination rates while accommodating religious objections, undermining California's claim that its categorical rule is the least restrictive means of protecting public health.

3. The Complaint Adequately Alleges a Substantial Burden.

California's third argument—that the complaint fails to allege sufficient facts—is both procedurally improper and substantively wrong.

a. California Waived This Argument.

California never raised a Rule 12(b)(6) challenge based on insufficient factual allegations about substantial interference with religious development. Its motion to dismiss challenged standing and argued that rational basis review applied as a matter of law. Having failed to raise a particularity-of-pleading objection below, California cannot raise it for the first time on appeal. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

b. The Complaint Adequately Alleges Substantial Interference.

Even if the Court considers this argument, it fails. At the motion to dismiss stage, plaintiffs need only allege facts that, if proven, would establish their claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The complaint alleges that Appellants hold sincere religious beliefs that preclude vaccination. ER-109-111. It alleges that California's law provides no religious exemption. ER-112. It alleges that enforcement of this law requires Appellants to choose between their religious convictions and their children's education. ER-113. It alleges that this has forced Appellants' children out of school or prevented them from enrolling. ER-110-111.

These allegations, accepted as true, establish that SB 277 substantially interferes with Appellants' direction of their children's religious upbringing. California wants a "fact-intensive inquiry," but then faults Appellants for not conducting discovery that California's successful motion to dismiss prevented. This is backwards. The adequacy of Appellants' factual allegations should be evaluated under Rule 12(b)(6) standards, which these allegations satisfy.

California notes that Appellants cite primarily to standing allegations. Ans. Br. 54. But standing allegations and merits allegations substantially overlap here. The same facts that establish injury (exclusion from school due to religious objections) establish the substantial burden on religious exercise. There is no requirement that

Appellants duplicate factual allegations in separate sections of their complaint.

c. *Mahmoud* Confirms the Complaint's Sufficiency.

The allegations here are at least as detailed as those in *Mahmoud*. The *Mahmoud* complaint alleged that parents held religious beliefs about marriage and sexuality, that the school's curriculum conflicted with those beliefs, and that this conflict burdened their parental rights. 606 U.S. at 547-48. The Supreme Court found this sufficient to state a claim requiring strict scrutiny.

Similarly, plaintiffs here allege religious objections to vaccination, a government policy requiring vaccination, and resulting exclusion from education. If *Mahmoud's* allegations sufficed, so must Appellants.

4. The State's Parade of Horribles Is Unpersuasive.

California warns that applying *Mahmoud* to immunization requirements would allow parents to opt out of drug policies or other safety rules. Ans. Br. 47. This argument fails for several reasons.

First, it proves too much. The same logic would suggest *Mahmoud* itself was wrongly decided, since it might allow parents to

opt children out of anti-bullying curricula or diversity training. Yet the Supreme Court was unmoved by such concerns.

Second, strict scrutiny is not a rubber stamp for religious objections. Government can satisfy strict scrutiny where it has compelling interests and narrowly tailored means. School safety policies preventing drug use on campus likely satisfy strict scrutiny because schools have compelling interests in immediate safety and order, and blanket prohibitions on drug use during school hours are narrowly tailored to those interests.

Third, there are meaningful distinctions between on-campus conduct rules (like drug prohibitions) and off-campus medical decisions (like vaccination) that serve as conditions of enrollment. The former involve immediate threats requiring real-time management; the latter involve medical choices made outside school that government conditions on access to education. Moreover, as detailed in Section III, *supra*, there are myriad less-restrictive yet fully effective practices California can exercise in the interest of vaccine-related health and safety, such as periodic testing.

Fourth, the State's comparison to *Employment Division v. Smith*, 494 U.S. 872 (1990), is inapposite. *Smith* involved generally applicable criminal laws, not laws specifically targeting educational contexts where parental rights receive heightened protection. *Yoder* and *Mahmoud* establish that the hybrid right of parents to direct their children's religious upbringing receives greater protection than individual religious exercise alone.

Again, showing how much it concerns it, California attempts to cabin *Mahmoud* fail at every turn. The curriculum/non-curriculum distinction is textually unsupported in the decision and functionally absurd. The health and safety "exception" is a misreading of *Yoder* and *Prince* that conflicts with *Mahmoud's* application of strict scrutiny despite governmental interests. And the complaint adequately alleges facts establishing substantial interference with parental direction of religious upbringing.

When government forces families to choose between religious convictions and educational access, by excluding children entirely from school rather than accommodating religious exercise, strict scrutiny

applies. The Court should reject California's arguments and evaluate SB 277 under the appropriate strict scrutiny standard.

III. SB 277 Fails Strict Scrutiny.

Fulton confirmed that strict scrutiny requires the government to advance "interests of the highest order" through narrowly tailored means, and that "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." 141 S. Ct. 1868, 1881 (2021).

California's interests do not rise to "the highest order." A law cannot protect "an interest of the highest order" "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520, 547 (1993); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006). California's own statutes demonstrate this. The state provides medical exemptions under Cal. Health & Safety Code § 120335, conditional admission for incompletely vaccinated children under § 120340, unconditional admission for foster children under § 120341, exemptions for special education students under § 120335(h), and personal belief exemptions for additional vaccines under § 120338.

This extensive flexibility undermines any claim that California's interests are of the highest order. SB 277 thus fails strict scrutiny's first prong.

SB 277 is also not narrowly tailored. The law is underinclusive because it targets only students in schools while permitting nonvaccination of adults (including teachers, administrators, and staff), homeschooled children, and children in non-school settings—all of whom present similar transmission risks. It is overinclusive because, as *Mahmoud* recognized, permit religious exemptions "without widespread consequences." 145 S. Ct. 2334, 2363 (2025). California could adopt numerous less restrictive alternatives these states employ: periodic testing, independent-study programs, targeted quarantine protocols, remote learning options during outbreaks, health screenings, visitor restrictions, or designated areas for unvaccinated students. The availability of these alternatives—proven effective in 45 states—demonstrates that SB 277's categorical exclusion is not narrowly tailored.

CONCLUSION

SB 277 violates the Free Exercise Clause by creating a discriminatory system that is not generally applicable and, under strict scrutiny, fails review. The district court's dismissal should be reversed and the case should be remanded for further proceedings.

Dated: January 28, 2026 THE NICOL LAW FIRM

By: /s/ *Jonathon D. Nicol*
Jonathon D. Nicol

Attorneys for Appellants Amy Doescher, Steve Doescher, Danielle Jones, and Kamron Jones, individually and on behalf of their minor children

CERTIFICATE OF COMPLIANCE TO FED. R. APP. 32(A) AND CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a) and Ninth Circuit Rule 32-1, I certify that Appellants' Reply Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,987 words.

Dated: January 28, 2026 THE NICOL LAW FIRM

By: /s/ *Jonathon D. Nicol*
Jonathon D. Nicol

Attorneys for Appellants Amy Doescher, Steve Doescher, Danielle Jones, and Kamron Jones, individually and on behalf of their minor children

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

REPLY BRIEF OF APPELLANTS

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *Jonathon D. Nicol*
Jonathon D. Nicol