No. 21-

IN THE

Supreme Court of the United States

F.F., ETC., *et al.*,

Petitioners,

v

STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In June 2019, New York State repealed the long-standing religious exemption to its school vaccination requirement, leaving in place a medical exemption. The vaccination scheme does not require students over 18, or any other adult in the school environment, to be vaccinated. In supporting the repeal, various legislators, including leadership and the law's sponsors, made religiously hostile comments, rejecting the notion of a true religious objection to vaccination and belittling such objectors as "anti-vaxxers" and misguided fools. As a result of the repeal, thousands of children who were previously exempted from the vaccine requirement based on their religions objections have been evicted from all public, private and religious schools and put in the position of choosing between their religious beliefs and access to school-based education.

Does New York's religious exemption repeal violate the First Amendment's Free Exercise clause because (1) either (a) it allows for secular exemptions and, thus, is not generally applicable, or (b) its enactment was motivated by religious bias and, thus, it is not neutral; and (2) it is both under- and over-inclusive and, thus, not narrowly tailored to achieve a compelling governmental interest?

PARTIES TO THE PROCEEDING BELOW

Petitioners herein were plaintiffs in New York State Supreme Court and appellants in the Appellate Division, Third Judicial Department. The State of New York, Governor Andrew Cuomo and Attorney General Letitia James were the defendants and respondents in the trial and appellate courts, respectively. The State of New York and Letitia James in her official capacity as Attorney General of the State of New York are Respondents. Andrew Cuomo is now substituted as a Respondent by Kathy Hochul in her official capacity as Governor of the State of New York.

RELATED CASES

F.F., et al. v. State of New York, et al., No. 4108-19, Supreme Court of the State of New York, County of Albany (Aug. 23, 2019) (order denying preliminary injunction)

F.F., et al. v. State of New York, et al., No. 529906, Supreme Court of the State of New York, Appellate Division, Third Judicial Department (Sept. 5, 2019) (order denying preliminary injunction)

F.F., et al. v. State of New York, et al., No. 4108-19, Supreme Court of the State of New York, County of Albany (Dec. 3, 2019) (judgment dismissing complaint and declaring challenged law constitutional)

F.F., et al. v. State of New York, et al., No. 530783, Supreme Court of the State of New York, Appellate Division, Third Judicial Department (Mar. 18, 2021) (order affirming trial court judgment)

F.F., et al. v. State of New York, et al., No. 2021-443, State of New York, Court of Appeals (Oct. 12, 2021) (order dismissing appeal and denying leave to appeal)

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PRELIMINARY STATEMENT

New York requires children to be vaccinated against certain communicable diseases as a condition of attending school. Since 1966, the State allowed for both medical and religious exemptions to this requirement. But, in June 2019, the State repealed the religious exemption.

There is no doubt that vaccines are tremendously important to our country. Most people believe in vaccines and take them without a second thought. We do not pretend otherwise.

But equally important to our country is the foundational principle that one's sincerely-held religious beliefs ought be respected. So vital is this principle, it is enshrined in our Constitution. As it happens, a small minority of our population objects to vaccinations on religious grounds. We cannot simply disregard these few just because most of us might believe otherwise or because other legitimate, or even vital, interests might be at stake. Such would be antithetical to our founding ideals. Rather, we must respect all religious views, no matter how foreign or peculiar they may seem to us.

This is the fundamental theme of this Court's Free Exercise jurisprudence. A law cannot target religion, and, if enacted with even the slightest hint of animus, it cannot stand. Further, a law not explicitly hostile to religion must be truly neutral and generally applicable – that is, burdening religion must not be its object, and it may not provide a mechanism for individualized, non-religions exemptions or otherwise treat comparable secular activity more favorably.

But the State Court here failed to faithfully apply this Court's precedents. The repeal is not generally applicable because it applies only to religious exemptions. Further, the remaining vaccination scheme not only explicitly allows individualized medical exemptions, it also does not apply to everyone in the school community – not to teachers, administrators, maintenance staff, students over age 18 or any other adult who might visit a school on a regular basis, from parents to guest speakers to spectators of sporting events. Each of these individuals, if unvaccinated or not otherwise immune, is just as capable of transmitting disease as a student under age 18 and who objects on religious grounds.

Nor is the repeal neutral. Indeed, several legislators, including the bills' sponsors, made public statements hostile to religion – explicitly calling into question the sincerely-held beliefs of thousands of New Yorkers by asserting that no true religion objects to vaccinations and belittling them as "anti-vaxxers" and selfish, misguided fools who do not believe in science.

What's more, the results are devastating – tens of thousands of children have been deprived the ability to attend school without violating their sincerely-held religious beliefs. And New York's elimination of its religious exemption appears to be part of a nationwide trend, with at least four other states recently adopting similar repeals, and bills pending in at least one other. Given these nationwide ramifications, and the need to clarify an appropriate uniform rule, the Court, respectfully, should grant *certiorari*.

Finally, this case presents a question almost identical to that raised in two recent cases arising on the Court's

emergency docket – *Doe v. Mills* and *Dr. A. v. Hochul*. In both, the Court was presented with a mandatory vaccination scheme allowing medical, but prohibiting religious, exemptions and asked to determine whether same should be enjoined as to religious objectors as violative of their free exercise rights. In both cases, three Justices would have granted emergency relief, and it appears the critical factor causing denial of the applications was the procedural posture in which they arose – on the emergency docket, without full development below or full briefing and argument in this Court. In this way, our case presents an ideal vehicle to resolve the same question presented in those cases as it arises through the traditional route on a petition for *certiorari*.

OPINIONS BELOW

The Judgment of the New York State Supreme Court, County of Albany, which dismissed plaintiffs' complaint and declared the challenged law constitutional, is reported at 66 Misc.3d 467 (Sup.Ct. Albany County 2019) and reproduced herein at 18a. The Appellate Division, Third Judicial Department's Opinion and Order affirming the trial court's Judgment is reported at 194 A.D.3d 80 (3d Dep't. 2021) and reproduced herein at 2a. The New York State Court of Appeals' Order dismissing the appeal and denying leave to appeal is reported at 37 N.Y.3d 1040 (2021) and reproduced herein at 1a.

JURISDICTION

The New York State Court of Appeals denied review on October 12, 2021, *see* 1a, and this Petition is filed within ninety days thereof. This Court therefore has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13 of this Court's Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

STATEMENT OF THE CASE

A. Factual background.[1]

1. Overview.

New York State requires parents to vaccinate their children against a host of communicable diseases as a condition of enrolling in any public or private school. *See* N.Y. Pub. Health L. § 2164. In 1966, the State enacted a religions exemption from this requirement for children whose families held genuine and sincere religious beliefs against vaccinations.

Petitioners are parents from throughout New York, who have not vaccinated their children because of their sincerely-held religious beliefs. Historically, they applied for, and were granted, religious exemptions. They are from diverse religions; some are not affiliated with any organized religion. What binds them are religious beliefs

1. The facts set forth herein are drawn from Petitioners' Verified Complaint, found at pages R-56-91 of the Supplemental Record on Appeal in the Appellate Division, Third Department (No. 530783). External sources for publicly-available information are also cited herein.

that compel them not to vaccinate their children, as well as the effect of the challenged action – exclusion of their children from any school-based education in New York.

The religious exemption has hardly been a rubber stamp process in New York, and many school districts, such as New York City schools, rejected the overwhelming majority of applications. For the 2017-18 school year, some 26,000 students in New York held religious exemptions, making up a mere 0.79% of school enrollees. Another 0.14% of students had medical exemptions, which permitted them to enroll in school without vaccinations.

For decades, New York balanced religious exemptions from vaccinations with a concern for public health. Specifically, State regulations permit the exclusion of students exempted from vaccination from a school after another student in that school presents with a case of a vaccine-targeted contagious disease. *See* 10 N.Y.C.R.R. § 66-1.10. State law also allows County Health Commissioners and the State Health Commissioner to isolate or quarantine those infected with a contagious disease and to seal off and clean places those with such contagious diseases frequented, including schools. *See* N.Y. Pub. Health L. § 2100.

The New York State Constitution requires the Legislature to provide for a system of free common schools, wherein all children may be educated, regardless of race, religion, sexual orientation or ability. *See* N.Y. Const., art. 9, § 1. By statute, the State guarantees those between ages five and twenty-one a free public education. *See Id.* § 3202. Through its compulsory attendance law, the State requires students aged six to sixteen to attend school

or receive home instruction. *See* N.Y. Educ. L. § 3205. Parents who fail to comply with compulsory education laws may face serious sanctions, including, potentially, the loss of parental rights over their children. *See* N.Y. Educ. L. § 3205(1)(c); N.Y. Fam. Ct. Act § 1012(f)(i)(A); *See also* NYS Office of Children & Family Services & NYS Education Department, *Navigating K-12 Educational Challenges During the COVID-19 Pandemic: New York State Office of Children and Family Services and the NYS Education Department Joint Guidance for Educators and Child Welfare Workers*, available at, http://www.nysed.gov/common/nysed/files/programs/coronavirus/navigating-k-12-educational-challenges-covid-19-joint-guidance.pdf (last visited Jan. 6, 2021).

In short, without a religious exemption, Petitioners are deprived of the State's guarantee of a public education for their children unless they disregard their sincerely-held religious beliefs. More critically, unless they violate those beliefs, they cannot abide by the repeal and satisfy the compulsory education laws, thereby subjecting themselves to serious consequences.

2. The State's deficient response to a 2018 measles outbreak.

In late September 2018, seven cases of measles [one of the diseases covered by the challenged vaccination regime] were reported in Rockland County. They did not originate in the United States, and the persons so infected were identified and known to public health authorities, as was the source of their infection. The Rockland County Health Commissioner did not then isolate or quarantine these persons.

In October 2018, cognizant of the Rockland County outbreak, and following existing regulations, both the State and County Health Commissioners advised certain schools where cases had been reported to exclude children with religious exemptions. In the counties where measles cases were reported between late September 2018 and late April 2019, neither the State nor County Health Commissioners ordered the quarantine or isolation of any infected persons nor those living with them and, thereby, exposed.

Between September 2018 and June 13, 2019, the State Health Commissioner did not promulgate any directive or order preventing children with religious exemptions from attending daycare or private or public schools. Simply put, between September 2018 and June 2019, neither the State nor the affected counties fully utilized the means and methods provided by state law to effectively resolve the outbreak of measles.

3. The legislative process lacked urgency or fact-finding.

Despite its long tradition of respecting and accommodating sincerely-held religious beliefs and its existing effective methods of responding to outbreaks, the State abruptly changed course. In January 2019, as in at least the prior three sessions, legislation to repeal the religious exemption was introduced in both the State Assembly [A.B. 2371-A] and State Senate [S.B. 2994-A]. Both bills were referred to the respective chambers' Health Committees. Between January and June 2019, despite multiple requests from Petitioners and other constituents, no committee convened a single public

hearing. The Legislature did not take any action, let alone expedited action, to repeal the religious exemption when the number of active measles cases was at its highest in those few areas experiencing an outbreak. Rather, the legislation languished for months.

Neither the Assembly nor the Senate, nor any committee thereof, engaged in any fact-finding process to determine [a] the number of statewide active measles cases; [b] the proportion of the population that is vaccinated; [c] the proportion of unvaccinated individuals holding religious exemptions; [d] the actual risk, if any, posed to vaccinated persons by those with religious exemptions; [e] whether those who had contracted measles were vaccinated; [f] whether those who contracted measles had religious exemptions; [g] whether any case of measles likely had been contracted from such an unvaccinated minor; or [h] whether herd immunity had been achieved throughout the state. Nor did the Assembly or Senate debate or provide answers to questions critically interrelated to the elimination of the religious exemption, including: [a] what enforcement action could or would be taken against parents whose sincerely-held religious beliefs prevent them from vaccinating their children; [b] what local school districts and the State Education Department would do with the thousands of children who were, at once, obliged to attend a public or private school but are now disallowed from such attendance; and [c] what doctors thought about the "effective immediately" clause and its health and safety ramifications.

There was neither a showing that those with religious exemptions had in fact spread a single case of measles nor that other less restrictive or narrowly tailored measures,

as were then permitted by the State law, insufficiently responded to the measles outbreak. Indeed, in the floor debates, proponents repeatedly avoided mention of the number of *active* measles cases and deceivingly referred to the cumulative number of cases since September 2018 as if this represented the number of active cases on June 13, 2019, or at any other point in time.

As the measles outbreak diminished in intensity, and amidst a flurry of very public attacks on those of faith with religious exemptions, on June 13, 2019, the Senate and Assembly passed legislation repealing the religious exemption. *See* L. 2019, Ch. 35. The votes followed debates replete with references to the "fraud" being perpetrated on the general public by those holding "alleged" religious beliefs. The bills' sponsors in both chambers publicly attacked those with religious exemptions, claiming they rejected modern science and that their beliefs were "utter garbage."

While the Legislature so acted, it did not require vaccination of students aged 18 and older or for college-age students. It also failed to require that adults working in the State's schools have any vaccinations, let alone the full panoply of those required of school-aged children.[2] The religious repeal took effect immediately. Students benefitting from religious exemptions were denied admission to summer camps, excluded from summer schools, and are now disallowed from any school in the state.

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2. From pre-kindergarten through 12th grade, there are approximately 27 mandated doses of vaccinations for 12 childhood illnesses. *See* NYS Dep't. of Health, New York State Immunization Requirements, available at: https://www.health.ny.gov/publications/2370.pdf (last visited Jan. 6, 2022).

4. The repeal was motivated by active hostility toward religion.

The challenged legislation was intended to regulate the religious conduct of those who had been granted an exemption to vaccinate on the basis of their sincerely-held religious beliefs. Its enforcement trammels their religious beliefs and practices and causes their children to be deprived of a free public education, or a religious education as chosen by their parents in accordance with their beliefs.

In the public debate and discourse preceding passage of this legislation, numerous leading proponents expressed active hostility toward the religious exemption and ridiculed those who held such exemptions. Illustrative of this, in her closing remarks at the end of the legislative session, just days after the repeal, Senate Majority Leader Andrea Stewart-Cousins mocked and disregarded Petitioners' religious beliefs, stating, "We've chosen science over rhetoric." *See* Gotham Gazette, *In 'Most Historic and Productive' Session, Albany Democrats Move Extensive Agenda to Transform New York*, Jun. 24, 2019, *available at*, https://www.gothamgazette.com/state/8629-historic-productive-session-democrats=albany-cuomo-transform-new-york (last visited Jan. 6, 2022).

One of the Senate bill's co-sponsors, Senator James Skoufis, stated during a press conference: "Let me be clear: There is not one religious institution, not one single one that denounces vaccines. So, here we have a religious exemption pretending as if there is a religion out there that has a problem with the vaccines . . . Whether you are Christian, whether you are Jewish or Scientologist, none of these religions . . . have texts or dogmas that denounce

vaccines. Let's as a state stop pretending like they do." *See* Facebook, James Skoufis, Videos, *available at*, https://www.facebook.com/watch/?v=444618979690331 (last visited Jan. 6, 2022). Skoufis later mockingly tweeted, "Stay classy, anti-vaxxers . . . . In a few moments, I look forward to casting a 'yes' vote on this important bill." *See* Twitter, James Skoufis (@JamesSkoufis), *available at,* https://twitter.com/JamesSkoufis/status/1139278102629158913 (last visited Jan. 6, 2022).

In an op-ed, Senator Skoufis referred to the "so-called 'religious exemption,'" writing: "the time is now to end the state's nonsensical and dangerous religious exemption." *See* Patch.com, *OP-ED: Vaccines: Protecting Our Children from Measles*, May 3, 2019, *available at*, https://patch.com/new-york/midhudsonvalley/op-ed-vaccines-protecting-our-children-measles (last visited Jan. 6, 2022). "In other words," Skoufis continued, "our state's religious exemption currently allows some individuals and groups to pretend as if there are genuine religious reasons to opt-out when, in fact, every religion from Christianity to Islam to Judaism to Scientology has no issues whatsoever with immunization." *Id.*

Another principal proponent, Senator David Carlucci, explained: "We are removing this religious notion to it [vaccination]. Not everybody is the same. Religion cannot be involved here. We have to govern by science. Removing all non-medical exemptions will help to lower the stigma that happens." He further stated: "[A] group of people has decided their ideological beliefs are more important than public health. Putting people in harm's way . . . is selfish and misguided. Vaccines save lives and with the current measles outbreaks, legislation to end non-medical exemptions is paramount."

The Senate bill's lead sponsor, Senator Brad Holyman, further deprecated those with religious exemptions, stating, "Let's face it. Non-medical exemptions are essentially religious loopholes, where people often pay for a consultant to try to worm their way out of public health requirements that the rest of us are following." *See* N.Y. Legislative Press Conference, May 6, 2019 at 8:13-8:30, available at, https://youtu.be/wn5CI071U2w?t=8m11s (last visited Jan. 6, 2022). Senator Holyman manifested the same hostility in other remarks: "The goal should be to take religion out of the equation . . . . We can't put our public health officials or our school officials into that position of deciding if a religious belief is sincere or not. That is why we need to remove it altogether." *See Id.* at 31:47-32:34.

Assembly sponsor Jeffrey Dinowitz echoed and extended this sentiment: "There are other people who don't get their kids vaccinated because of the religious exemption. There is a provision in the law which says that if somebody has legitimate, you know truly has religious reasons for not doing it, they can be exempt as well. The problem is that most people in my opinion use that as an excuse not to get the vaccinations for their kids. There is nothing, nothing in the Jewish religion, in the Christian religion, in the Muslim religion . . . that suggests that you can't get vaccinated. It is just utter garbage." *See* Dinowitz interview, May 19, 2019, at 2:52-3:28, available at, https://youtu.be/X99d27D-mZo?t=2m52s (last visited Jan. 6, 2022).

In other public comments, Dinowitz repeated his hostility to those with such religious beliefs: "Even if people may think they have a religious problem with

it, the truth is that the overwhelming majority of these people are exercising what is in fact a personal belief exemption." *See* NYS Legislative News Conference, May 6, 2019, available at, https://www.youtube.com/watch?v=wn5CI071U2w&feature=youtu.be&t=29m30s (last visited Jan. 6, 2022). And, on another occasion, Mr. Dinowitz remarked, "There are many people who are claiming religious exemption when in fact it has nothing to do with religion." *See* N.Y. Daily News, *N.Y. Lawmakers Push to End Vaccination Exemptions in State amid Growing Measles Outbreak*, Apr. 29, 2019, available at, https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmczcsugupu2m-story.html (last visited Jan. 6, 2022).

Finally, Rockland County Executive Ed Day, who lobbied for the repeal, repeatedly expressed antipathy toward those with religious exemptions in Rockland County, where a measles outbreak occurred within a large ultra-Orthodox Jewish community. On March 28, 2019, Mr. Day issued a "Declaration of Local State of Emergency for Rockland County," aimed at, and only at, children with religious exemptions to vaccination and seeking to ban such children from any place of public assembly, including their schools, synagogues, churches, malls and parks, precisely during the period of Passover and Easter celebrations. By Order dated April 5, 2019, Rockland County Supreme Court enjoined this Declaration, finding that no emergency existed in Rockland County justifying such an order. *See W.D. v. County of Rockland*, 63 Misc.3d 932 (Sup.Ct. Rockland County 2019).[3]

3. The Appellate Division, Second Judicial Department then denied the County's application for an emergency stay.

Without any factual basis, Day stated, "The religious exemption has been abused and it has been used as a personal preference exemption." *See* N.Y. Daily News, *N.Y. Lawmakers Push to End Vaccination Exemptions in State Amid Growing Measles Outbreak*, Apr. 29, 2019, available at, https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmczcsugupu2m-story.html (last visited Jan. 6, 2022). He remarked further: "The truth is that the purported religious exemption for vaccinations as a requirement to enter public and private schools is a total myth and fabrication. In fact, it has become a 'personal belief' exemption and that is NOT allowable under existing law." *See* Day comment May 10, 2019 available at, https://drive.google.com/file/d/1F74xfYygJWTj1kjT4ZZqEc3XsBzAx5pX/view (last visited Jan. 6, 2022).

5. The repeal has devastated New York families.

The challenged action has caused Petitioners and thousands of similarly situated families irreparable harm by forcing them to choose between violating their religious beliefs and depriving their children of a school-based education, be it a free public education, as guaranteed by state law, or a religious education as their religion may mandate. It also forced them to find immediate ways to homeschool their children, requiring additional expenditures on childcare, disruption to their careers and financial strain. Petitioners were also forced to choose between violating their religious beliefs and depriving their children of summer activities, including summer day and sleep-away camps and other recreational activities like school-affiliated sports leagues. Kindergartners lost out on their first days of school and high school seniors

were denied their last year (and many, the opportunity for scholarships to college).

B. Prior proceedings.

1. Proceedings in New York State Supreme Court.

On July 17, 2019, on behalf of themselves and a putative class of similarly-situated families, Petitioners filed their Verified Complaint in New York State Supreme Court, County of Albany, seeking to invalidate the repeal because it violated, *inter alia*, their right under the First Amendment to freely exercise their religion.[4] They also moved for temporary and preliminary injunctive relief, seeking to enjoin enforcement of the repeal pending adjudication on the merits.

On August 23, 2019, Supreme Court denied Petitioners' request for a preliminary injunction and, on September 5, 2019, the Appellate Division, Third Judicial Department similarly denied such relief. Thereafter, on December 3, 2019, Supreme Court granted the defendants' pre-answer motion to dismiss the complaint and entered a declaratory judgment that the repeal legislation was constitutional. *See* 18a-50a.

In doing so, the Court first cited cases upholding general vaccine mandates as valid exercises of the State's

4. Petitioners also argued the repeal violated their federal Constitutional rights to Equal Protection and Free Speech, as well as the New York State Constitution. Here, they advance only their Free Exercise claim. While some of their Equal Protection argument is applicable to the Free Exercise analysis and so incorporated herein, Petitioners do not rely upon a distinct Equal Protection claim.

police power. *See* 26a (citing *Matter of Viemeister*, 179 N.Y. 235 (1904); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). It then pointed to *dictum* in *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), and the Second Circuit's holding in *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015), as authority for the proposition that the lack of a religious exemption does not violate the First Amendment. *See* 27a-28a. It also cited decisions from other states lacking religious exemptions upholding their school vaccination regimes. *See* 28a.

Moving to this Court's Free Exercise jurisprudence, the trial court reasoned that the State's compulsory vaccination regime, allowing for medical exemptions but prohibiting religious ones, is a neutral law of general applicability and, thus, subject only to rational basis review, which it satisfies. *See* 29a-40a. In doing so, it first concluded that "Public Health Law § 2164, as amended, is a law that is neutral on its face and is generally applicable to all children who attend schools in the State." 30a. It eschewed the notion that the circumstances surrounding the repeal's enactment suggested religious hostility, concluding it was rational for the Legislature to delay six months before passing the bill without any public hearings, *see* 30a-36a, and effectively ignoring the blatantly religiously-hostile comments of various legislators by declining to "extend" the rationale of *Masterpiece Cakeshop* "to the collective decision-making of New York's State's Legislature and Executive." 37a. Viewing the cited statements as "isolated remarks," the Court concluded that Petitioners "have not met the high burden that would warrant crossing the boundaries underlying the separation of powers doctrine to probe the views of individual state legislators about whether they harbor discriminatory animus against religious beliefs." 38a-39a.

Finally, the Court concluded that, even if strict scrutiny applied, Petitioners would lose because the State has a compelling interest in "[p]rotecting public health, and children's health in particular, through attainment of threshold inoculation levels for community immunity from vaccine-preventable, highly contagious diseases that pose the risk of severe health consequences." 42a. And, it reasoned, other less restrictive reactive means, such as temporarily excluding unvaccinated students from schools with outbreaks and quarantines, are insufficient to meet the State's compelling interest in preventing outbreaks. *See* 43a.

2. Proceedings in the Appellate Division, Third Judicial Department.

Upon entry of the trial court's judgment, Petitioners timely appealed to the Appellate Division, Third Judicial Department. On March 18, 2021, that Court affirmed the trial court's judgment.

Like the trial court, the Appellate Division concluded that the repeal and remaining vaccination scheme are neutral and generally applicable and, thus subject only to rational basis review. *See* 5a-12a. In doing so, like the trial court, it found that the circumstances leading to repeal did not evince religious hostility, and it discounted the various comments of prominent legislators as either not religiously hostile or not representative of the entire decision-making body. *See* 7a-11a.

3. Proceedings in the New York State Court of Appeals.

Upon entry of the Third Department's Order, Petitioners timely noticed their appeal to the New York State Court of Appeals, asserting they had an automatic right to appeal on the ground that the matter directly involves a substantial constitutional question. *See* N.Y. Const., art. VI, § 3(b)(1); N.Y. C.P.L.R. § 5601(b)(1). Alternatively, Petitioners also timely filed a motion seeking leave to appeal. *See* N.Y. C.P.L.R. §§ 5516 & 5602(a).

On October 12, 2021, the Court of Appeals summarily dismissed the appeal on the ground it does not directly involve a substantial constitutional question and denied leave to appeal. *See* 37 N.Y.3d 1040 (2021); *See also* 1a.

REASONS FOR GRANTING THE PETITION

I. The State Court's order conflicts with this Court's Free Exercise jurisprudence.

As applied to the states through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the First Amendment to the U.S. Constitution provides, as pertinent here: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const., amend I. This Court has long recognized that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Furthermore, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection." *Church*

of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)); *See also Dr. A. v. Hochul*, ___ U.S. ___, (slip op at 11) (2021) (Gorsuch, J., dissenting).

To be sure, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quotations & citations omitted). But, "[t]he Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Lukumi*, 508 U.S. at 547. A law that is not neutral or generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

Here, the State Court concluded that the religious exemption repeal was neutral and generally applicable, and it applied a rational basis test to find it passed constitutional muster. This was plain error. In doing so, the State Court misapprehended and misapplied this Court's Free Exercise jurisprudence, as made clear in recent decisions, including *Fulton v. City of Philadelphia*, ___ U.S. ___, 141 S. Ct. 1868 (2021) and *Tandon v. Newsom*, ___ U.S. ___, 141 S. Ct. 1294 (2021) (per curiam). This Court should grant *certiorari* to cure this error and ensure the uniformity and supremacy of its Free Exercise jurisprudence.

A. The religious exemption repeal is not generally applicable.

As an initial matter, the legislation that repealed the religious exemption – namely Chapter 35 of the Laws of 2019 – is not generally applicable because it applies only to the religious exemption. In other words, this single statute did not eliminate the medical exemption or expand the vaccination requirement beyond students under 18. Rather, the religious exemption was its sole target.

Even the Appellate Division acknowledged that, "at first blush, the repeal of the religious exemption naturally seems to target the First Amendment . . . ." 11a. But it concluded this was "not the case" because, in the end, the objective of the repeal legislation was to make the *underlying vaccination scheme* generally applicable by eliminating the religious exemption. *See* 11a-12a. Thus, the court reasoned, the legislation did not create a more favored secular class, but rather "subjects those in the previously covered class to vaccine rules that are generally applicable to the public." 12a.

This reasoning was faulty for at least two reasons. First, it focuses on the underlying existing vaccination scheme as opposed to the religious exemption repeal, which was itself a separate piece of legislation. There is no question the repeal law itself, by it terms, applies only to the religious exemption.

But second, and even more critically, to the extent the analysis must focus on the underlying vaccination scheme, the repeal of the religious exemption did *not* render the entire scheme generally applicable. Indeed, "[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." *Fulton*, 141 S. Ct. at 1877(quotations & citations omitted) (alterations accepted). In other words, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884. "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

This is precisely what the vaccination scheme here does – it prohibits religious exemptions while permitting medical exemptions. And allowing a medical exemption undermines the State's asserted public health goals in the same way as allowing a religious exemption.

What's more, others in the school environment are not even subject to the mandate – there is no requirement that teachers, administrators or visiting parents or guests be similarly vaccinated. If the goal is to attain herd immunity in the school environment and protect students from contracting a communicable disease, then permitting unvaccinated adults or medically-exempt children undermines the goal in the same way as a religious exemption would. *See Fulton*, 141 S. Ct. at 1877; *Tandon*, 141 S. Ct. at 1296 ("[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue.").

Justice Gorsuch's recent dissent in *Dr. A. v. Hochul* is directly on point and aptly illustrates why the legislation here is not generally applicable. In explaining why New York's mandatory COVID-19 vaccination requirement for healthcare workers, which permits medical exemptions while prohibiting religious ones, is not generally applicable, His Honor reasoned as follows:

> [A] law loses its claim to generally applicability when it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. This is exactly what New York's regulation does: It prohibits exemptions for religious reasons while permitting exemptions for medical reasons. And, as the applicants point out, allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones.
>
> To be sure, the State speculates that a religious exemption could undermine the purpose of its vaccine mandate differently from a medical exemption if *more people* were to seek a religious exemption than a medical exemption. But this Court's general applicability test doesn't turn on that kind of numbers game. At this point in the proceedings, the only question is whether the challenged law contains an exemption for a secular objector that undermines the government's asserted interests in a similar way an exemption for a religious objector might.

> Laws operate on individuals; rights belong to individuals. And the relevant question here involves a one-to-one comparison between the individual seeking a religious exemption and one benefiting from a secular exemption.
>
> If the estimated number of those who might seek different exemptions is relevant, it comes only later in the proceeding when we turn to the application of strict scrutiny. At that stage, a State might argue, for example, that it has a compelling interest in achieving herd immunity against certain diseases in a population. It might further contend the most narrowly tailored means to achieve that interest is to restrict vaccine exemptions to a particular number divided in a nondiscriminatory manner between medical and religious objectors. With sufficient evidence to support claims like these, the State might prevail. But none of that bears on the preliminary question whether such a mandate is generally applicable or whether it treats a religious person less favorably than a secular counterpart.

Hochul, *supra* (slip op at 8-9) (quotations and citations omitted) (emphasis in original); *See also Doe v. Mills*, ___ U.S. ___, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting) (applying similar analysis to illustrate why Maine's mandatory COVID-19 vaccination regime for healthcare workers, which allows medical, but not religious, exemptions, is not generally applicable).

The same reasoning applies here and the same conclusion obtains: by leaving medical exemptions in place, and by not otherwise requiring vaccination of all others in the school environment, the religious exemption repeal allows for secular exceptions to the vaccination regime that undermine the State's asserted interests in a manner similar to that a religious exemption might, and, thus, the law is not generally applicable. Any argument the State might assert as to *why* it feels justified in departing from generally applicability can be examined under the strict scrutiny analysis. But the Appellate Division never got that far, finding the law to be neutral and generally applicable and, thus, applying only a rational basis test.[5]

This Court should grant *certiorari* to correct the State Court's manifest error and maintain the uniformity and supremacy of its Free Exercise jurisprudence.

B. The religious exemption repeal is not neutral.

The repeal legislation is also not neutral, as evidenced by the religious hostility tainting its enactment, as well as its under- and over-inclusiveness.

It is clear that, "[a]t minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Evaluating

5. Though it concluded that rational basis applied, the trial court also conducted a strict scrutiny analysis in the alterative, *see* 41a-43a, but for the reasons set forth in Section I.C. below, that analysis was flawed.

neutrality requires a careful eye. As the Court explained in *Lukumi*:

> Facial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids subtle departures from neutrality and covert suppression of religious beliefs. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirements of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.

Id. at 534 (quotations & citations omitted). In evaluating the legislature's objective "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Lukumi*, 508 U.S. at 540 (*quoting Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977)).

In short, "[t]he Constitution commits government itself to religious tolerance, and *upon even the slightest suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their high duty to the

Constitution and to the rights it secures." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, ___, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 547) (emphasis added).

Even more to the point, as Justice Gorsuch pointed out in his *Hochul* dissent, "where 'official expressions of hostility to religion' accompany laws or policies burdening free exercise, we have simply 'set aside' such policies without further inquiry." *Hochul*, *supra* (slip op at 6) (quoting *Masterpiece Cakeshop*, *supra*). Thus, "actions burdening religious practice should be 'set aside' if there is even 'slight suspicion' that those actions 'stem from animosity to religion or distrust of its practices.'" *Id*. at 7 (quoting *Masterpiece Cakeshop*, *supra*).

Here, contemporaneous public statements by the repeal's Senate and Assembly sponsors, legislative leadership and other lawmakers evince blatant religious hostility. They claimed that organized religions do not countenance such exemptions and that those seeking exemptions were frauds. They did not seek to distinguish those with *bona fide* and sincerely-held religious beliefs from those who might have other reasons and seek to exploit the exemption. Instead, these lawmakers grouped together *everyone* who held such an exemption and, by eliminating it, made it impossible for *anyone* to obtain one, including, most notably, those with sincerely-held religious beliefs.

For example, the Senate bill's principal sponsor, Senator Holyman, stated: "Let's face it. Non-medical exemptions are essentially religious loopholes, where people often pay a consultant to worm their way out

of public health requirements that the rest of us are following." The leading Assembly sponsor, Assemblyman Dinowitz, stated: "Even if people may think they have a religious problem with it, the truth is that the overwhelming majority of these people are exercising what is in fact a personal belief exemption." He also asserted: "The problem is that most people in my opinion use that [religious exemption] as an excuse not to get the vaccinations for their kids. There is nothing in the Jewish religion, in the Christian religion, in the Muslim religion . . . that suggests that you can't get vaccinated. It is just utter garbage." And, in reference to the repeal, Senate Majority Leader Stewart-Cousins boasted: "We have chosen science over rhetoric."

Senator Skoufis, a co-sponsor, stated, "Let me be clear: There is not one religious institution, not one single one that denounces vaccines. So, here is a religious exemption pretending as if there is a religion out there that has a problem with the vaccines. Whether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do." And Senator Carlucci from Rockland County explained: "We are removing this religious notion to it [vaccination]. Not everybody is the same. Religion cannot be involved here. We have to govern by science. Removing all non-medical exemptions will help to lower the stigma that happens." He also asserted: "[A] group of people has decided their ideological beliefs are more important than public health. Putting people in harm's way . . . is selfish and misguided."

These comments raise more than a slight suspicion that religious animosity tainted the repeal. This evidence

is arguably much stronger than that which caused this Court to reverse the Colorado Human Rights Commission in *Masterpiece Cakeshop*.

The State Court, however, wrote these statements off, reasoning that, even if demonstrating religious animus, the Legislature as a whole was motivated by legitimate public health concerns. But even if two motives existed, where one reflects active religious hostility, the challenged action must be stricken. *See Hochul*, *supra* (slip op at 6, 7). *Masterpiece Cakeshop* could not make that any clearer, and the principles therein enunciated require courts to discern whether religious animus even subtly tainted state decisions. Dual or mixed motivations do not save actions influenced by religious animus. This is a testament to the fundamental importance of state neutrality towards religion.

It is analogous to the prohibition of race as a factor influencing adverse state action. How much racism is enough to invalidate a decision? "Any," is the correct answer. As the Second Circuit wrote in holding that the State of New York could be held liable for the creation of racial segregation in Yonkers' schools: "The plaintiff need not show . . . that a government decision-maker was motivated solely, primarily or even predominantly by concerns that were racial, for 'rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even a particular purpose was the 'dominant' or 'primary' one.'" *United States v. City of Yonkers*, 96 F.3d 600, 611-12 (2d Cir. 1996) (*quoting Arlington Heights*, 429 U.S. at 265)). And the same applies to religious animus and hostility; even a little discriminatory motivation is too much.

In short, these public statements not only demonstrate the non-neutrality of the repeal; the religious hostility they evidence warrant setting aside the law "without further inquiry." *See Hochul*, *supra* (slip op at 6, 7); *See also Masterpiece Cakeshop*, *supra*.

Beyond these public statements, the law's under-inclusiveness and over-inclusiveness also demonstrate its non-neutrality. Indeed, where a measure fails to cover secular conduct that might undermine the State's asserted interests or broadly sweeps up too much protected activity in manner not tailored to address the cited harms, one can conclude that the law is not neutral, but rather targets religion. That is the case here.

As already discussed, the vaccination scheme is under-inclusive because it allows for medical exemptions and also does not apply to students over 18, teachers, administrators or any other adult who might regularly be in the school environment. "All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. New York's rule is not a broad, general mandate to the entire population. Rather, it applies only to students under 18, prohibiting their enrollment if unvaccinated. Yet, in doing so, it omits large groups of people who, unless vaccinated or otherwise immune, are just as capable of transmitting disease in the school environment as an unvaccinated religious objector. If the State's aim were to reduce and eliminate the spread of communicable diseases in the school community, the law, as it exists, is underinclusive to achieve these ends. *See Id.* at 543 (holding ordinances prohibiting animal sacrifice underinclusive to achieve ends

of protecting public health and preventing animal cruelty where other forms of animal killings not prohibited).

The scheme is also overinclusive. The State asserts that the repeal is necessary to achieve herd immunity, which it defines as a vaccination rate of at least 93% to 95%. But, at the time the repeal was enacted, statewide, less than 1% (about 0.79%) of students had religious exemptions, a number that has a negligible impact on herd immunity. To the extent the State argues that this statewide figure is misleading because religious exemptions are concentrated in certain communities where vaccination rates are below the herd immunity threshold, such argument only magnifies the over-inclusiveness of the outright, statewide repeal. Indeed, if the State is correct, then eliminating the religious exemption statewide – including in the vast majority of communities where herd immunity has obtained – sweeps in far too much protected activity in the name of avoiding certain localized harms.

The State also argues, and the Appellate Division held, that the repeal was not motivated by religious animus, but rather, was intended to confront the legitimate concern that people without sincerely held religious beliefs were defrauding the system and exploiting the religious exemption for non-religious purposes. But if that was truly the case, then there were certainly means less restrictive of religious liberties to address this problem. For starters, as means to deter such conduct, the State could impose penalties for those found to have intentionally defrauded the system. Or it could use already existing penal laws to pursue those filing fraudulent exemption requests. *See, e.g.*, N.Y. Penal L. §§ 175.05, 175.30, 175.35 [Falsifying Business Records and Offering a False Instrument

for Filing]; *Id.* §§ 210.05, 210.10, 210.45 [Perjury and Making a Punishable False Written Statement]. It could also standardize a method for reviewing applications for exemptions to ensure they are given only to those truly holding sincere religious beliefs. But by eliminating, wholesale, the religious exemption, thereby burdening those with sincere religious beliefs, as a means of preventing those without such beliefs from abusing the system, when it could have taken other action against fraudsters not restrictive of religious rights, the State did nothing more than target religion. *See Lukumi*, 508 U.S. at 539 ("The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.").

In short, when this Court's Free Exercise jurisprudence is faithfully applied, one cannot escape the conclusion that the repeal legislation and remaining vaccination scheme are neither neutral nor generally applicable. Thus, the Appellate Division clearly erred when it applied only a rational basis test and failed to conduct a more searching inquiry under the strict scrutiny rubric.

C. The religious exemption repeal does not survive strict scrutiny.

"A government policy can survive strict scrutiny only when it advances interests of the highest order and is narrowly tailored to achieve those interest." *Fulton*, 141 S. Ct. at 1881 (quotations & citations omitted). And "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547.

The State argues that it enacted the repeal to further its compelling interest in ensuring a level of herd immunity to prevent the spread of dangerous communicable diseases in school communities. Assuming this satisfies the first prong of the analysis, which is dubious given that the compulsory vaccination scheme permits many potentially unvaccinated people into the school environment, *see id.*, it fails the second prong.

Indeed, as already discussed, the repeal and remaining vaccination scheme are both over-inclusive and under-inclusive, both tell-tale signs a law is not narrowly tailored. *See Lukumi*, 508 U.S. at 578 (Blackman, J., concurring). Indeed, when a law is over-inclusive, its "broad scope . . . is unnecessary to serve the interest, and the statute fails for that reason." *Id.* When it is under-inclusive, "the fact that allegedly harmful conduct falls outside [its] scope belies a governmental assertion that it has genuinely pursued an interest of the highest order." *Id.*

Here, not only does the State already have less restrictive means on the books in the form of temporary school exclusions and quarantines, s*ee* N.Y. Pub. Health L. § 2100; N.Y.C.R.R. § 66-1.10, nothing prevented it from enacting other additional methods less restrictive than an outright, statewide repeal of all religious exemptions. This both swept too broadly (over-inclusive) while at the same time failing adequately to address the alleged evils sought to be cured (under-inclusive).

The Court should grant *certiorari* so that the correct level of constitutional scrutiny may be applied.

II. This case raises an issue of tremendous public concern with nationwide ramifications and presents an ideal vehicle to resolve hard, yet important, questions of constitutional magnitude.

While this case arises in New York and comes up through the state court system, it has nationwide implications and involves important questions about how to balance constitutional values of the highest order against the State's interest in protecting public safety. At the time New York enacted its repeal, four other states had eliminated non-medical exemptions from their school vaccination requirements, including California, Maine, Mississippi and West Virginia. Since New York repealed its religious exemption, Connecticut has followed suit and bills to do so are currently pending in the Massachusetts Legislature. And it goes without saying that vaccination mandates are currently a hot-button issue, with many recently imposed and challenged, including on religious grounds. *See, e.g., Doe, supra; Hochul, supra*.

This case presents an ideal vehicle through which the Court can address and resolve the critical question of whether, when and to what extent a state must accommodate sincerely-held religious beliefs when seeking to protect the public health through compulsory vaccination schemes.

III. At the very least, the Court should grant *certiorari*, vacate the judgment and remand with instructions to reconsider in light of *Fulton* and *Tandon*.

If the Court is not inclined to review and decide the question presented in this case, it should grant *certiorari*,

vacate the State Court's judgment and remand this matter for reconsideration in light of its recent decisions in *Fulton* and *Tandon*. The Court routinely issues such so-called "GVR" orders where a recently issued decision would likely have informed the lower court's decision had it been issued at the time that court initially reviewed the case. *See Henry v. City of Rock Hill*, 376 U.S. 776 (1964). Such is the case here.

This Court's Free Exercise jurisprudence is somewhat in a state of flux. *Smith's* holding has been seriously questioned since the decision issued more than 30 years ago, including by the four Justices who did not join the majority. *See, e.g., Smith*, 494 U.S. at 891-907 (O'Connor, J. concurring); *Id.* at 907-21 (Blackmun, J., dissenting); *Lukumi*, 508 U.S. at 559-77 (Souter, J. concurring); *Id.* at 577-80 (Blackmun, J., concurring); *Fulton*, 141 S. Ct. at 1882-83 (Barrett, J., concurring); *Id.* at 1883-1926 (Alito, J., concurring); *Id.* at 1926-31 (Gorsuch, J., concurring). Just last term, in *Fulton*, the Court accepted the invitation to revisit *Smith*, but declined to alter it, finding instead that the challenged regulation there did not satisfy *Smith* because it was not generally applicable. In doing so, the Court elaborated upon and clarified *Smith's* general applicability prong.

Further, over the last two years, the Court has entertained several emergency applications challenging COVID-19-related restrictions by religious objectors claiming to be burdened in their free exercise of religion. Most notably, drawing from its recent decision in *Fulton*, the Court, in *Tandon*, struck down a California restriction, finding it was likely unconstitutional because it was neither neutral nor generally applicable and failed strict scrutiny.

Both *Fulton* and *Tandon* were decided after the Appellate Division issued its opinion affirming the trial court's judgment and after Petitioners filed their application with the New York State Court of Appeals seeking discretionary review. While Petitioners submit that substantive review by this Court is warranted based upon the State Court's departure even from the pre-*Fulton* and *Tandon* line of cases, at the very least, vacation of the Judgment below and remand for reconsideration in light of these recent cases would be prudent.

CONCLUSION

For the reasons set forth above, a writ of *certiorari* should enter.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE COURT OF APPEALS OF NEW YORK , DATED OCTOBER 12, 2021

COURT OF APPEALS OF NEW YORK

Motion No: 2021-443

F.F., ETC., *et al.*,

Appellants,

v

STATE OF NEW YORK, *et al.*,

Respondents.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Motion for leave to appeal denied.

APPENDIX B — OPINION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, FILED MARCH 18, 2021

SUPREME COURT THE STATE OF NEW YORK
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

March 18, 2021, Decided

530783

F.F., AS PARENT OF Y.F. *et al.*, INFANTS, *et al.*,

Appellants,

v

STATE OF NEW YORK *et al.*,

Respondents.

OPINION AND ORDER

Before: Garry, P.J., Lynch, Aarons, Pritzker and Reynolds Fitzgerald, JJ.

Pritzker, J.

Appeal from a judgment of the Supreme Court (Hartman, J.), entered December 11, 2019 in Albany County, which, among other things, granted defendants' motion to dismiss the complaint.

Appendix B

Public Health Law § 2164 requires children from the ages of two months to 18 years to be immunized from certain diseases, including measles, in order to attend any public or private school or child care facility (*see* Public Health Law § 2164 [7] [a]). Initially, the school vaccination law contained two exemptions to this requirement: a medical exemption requiring a physician's certification that a certain vaccination may be detrimental to a child's health (hereinafter the medical exemption) and a non-medical exemption that required a statement by the parent or guardian indicating that he or she objected to vaccination on religious grounds (hereinafter the religious exemption) (*see* Public Health Law § 2164 [8]; former § 2164 [9]).

In 2000, public health officials declared that measles had been eliminated from the United States (*see* Sponsor's Mem, Senate Bill S2994A [2019]). However, after seven cases of measles were reported in Rockland County in the fall of 2018, a nationwide measles outbreak[1] occurred that

1. The World Health Organization defines a measles outbreak as "two or more laboratory-confirmed cases that are temporally related (with dates of rash onset occurring 7-23 days apart) and epidemiologically- or virologically-linked, or both" (*Measles Outbreak Toolbox*, World Health Organization, https://www.who. int/emergencies/outbreak-toolkit/disease-outbreak-toolboxes/measles-outbreak-toolbox [November 2019 update]). The records of the floor debate in the Senate reveal that, in May 2019, there were 266 cases of measles in Rockland County. "According to the [Centers for Disease Control and Prevention], from January 1 to April 11, 2019, some 555 individual cases of measles were confirmed in 20 states, the second-largest number of cases reported in the United States since measles was eliminated in 2000" (*C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 56 [2020]).

was largely concentrated in communities in Brooklyn and Rockland County with "precipitously low immunization rates" (Sponsor's Mem, Senate Bill S2994A [2019]). That October, following state regulations, both the State and County Commissioners of Health advised certain schools with reported cases of measles to exclude children who had not been vaccinated pursuant to the religious exemption. In January 2019, companion bills were introduced in the Senate and Assembly that proposed to repeal the religious exemption (*see* 2019 NY Senate-Assembly Bill S2994A, A2371A). On June 13, 2019, the Legislature voted to adopt the bills (hereinafter the repeal), which went into effect immediately (*see* Public Health Law § 2164, as amended by L 2019, ch 35, §§ 1, 2).

Plaintiffs are parents from throughout the state who, prior to the repeal, were granted religious exemptions from their children's schools due to a myriad of religious beliefs. They commenced this declaratory judgment action seeking to have the repeal declared unconstitutional and the legislation enjoined. Defendants thereupon submitted a pre-answer motion to dismiss the complaint for failure to state a claim, which plaintiffs opposed. Supreme Court granted defendants' motion, finding, among other things, that the repeal was a neutral law of general applicability driven by public health concerns and not tainted by hostility towards religion. Ultimately, the court concluded that the complaint failed to plausibly allege free exercise, equal protection or compelled speech claims and thus dismissed the complaint in its entirety. Plaintiffs appeal.

Appendix B

Plaintiffs raise a number of constitutional challenges, but primarily contend that the complaint alleged a viable cause of action that the repeal was motivated by active hostility towards religion and thus violated the Free Exercise Clause. "[I]n a motion to dismiss pursuant to CPLR 3211, a 'court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [the] plaintiff the benefit of every possible inference'" (*Koziatek v SJB Dev. Inc.*, 172 AD3d 1486, 1487, 99 N.Y.S.3d 480 [2019], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]). "The question to be resolved on such a motion is not whether [the] plaintiff can ultimately establish [his or] her allegations and is likely to prevail, but whether, if believed, [his or] her complaint sets forth facts that constitute a viable cause of action" (*Mason v First Cent. Natl. Life Ins. Co. of N.Y.*, 86 AD3d 854, 855-856, 927 N.Y.S.2d 694 [2011] [internal quotation marks, brackets and citations omitted]). However, "the favorable treatment accorded to a plaintiff's complaint is not limitless and, as such, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss" (*Rodriguez v Jacoby & Meyers, LLP*, 126 AD3d 1183, 1185, 3 N.Y.S.3d 793 [2015] [internal quotation marks and citations omitted], *lv denied* 25 NY3d 912 [2015]).

To begin our analysis, we must first determine the proper constitutional standard of review by answering the key question: given that the repeal eliminated a religious exemption, is it nonetheless a *neutral law of general applicability*? It is well settled that, "the right of

free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" (*Employment Div., Dept. of Human Resources of Oregon v Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 [1990] [internal quotation marks and citation omitted]). As such, to state a federal free exercise claim, a plaintiff generally must establish that "the object or purpose of a law is the suppression of religion or religious conduct" (*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 [1993]). Significantly, if the law is neutral and of general applicability, a rational basis is all that is required to meet constitutional muster under the First Amendment, even if the law "proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" *Employment Div., Dept. of Human Resources of Oregon v Smith*, 494 U.S. at 879; *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 526, 859 N.E.2d 459, 825 N.Y.S.2d 653 [2006], *cert denied* 552 U.S. 816 [2007]).

"Neutrality" and "general applicability" are not synonymous, but are "interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest" (*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. at 531-532). With regard to the "neutrality" factor, "[t]he Free Exercise Clause

bars even subtle departures from neutrality on matters of religion" (*Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 584 U.S. ____, ____, 138 S Ct 1719, 1731, 201 L. Ed. 2d 35 [2018] [internal quotation marks and citations omitted]). "Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body" (*id.* [internal quotation marks and citation omitted]).

Here, plaintiffs allege three reasons in their complaint why the repeal was not a neutral law: first, that the Legislature failed to act during the height of the measles outbreak, asserting that the timing of the legislation undermines the public health concerns it relied upon in adopting the repeal; second, that, despite multiple requests from plaintiffs and others in the six months between the proposal of the bills and their adoption, no public hearings were held on the matter; and third, that the alleged religious animus is reflected in certain statements made by some of the legislators.

First, we do not find that the timing of the repeal reveals political or ideological motivation; rather, the record reflects that the repeal simply worked its way through the basic legislative process and was motivated by a prescient public health concern. As to the public health concerns, the American Medical Association, the Medical Society of the State of New York, the American Academy

of Pediatrics and the New York State American Academy of Pediatrics, as amici curiae in support of defendants' position, offered their conclusion that eliminating religious exemptions is in the best interest of public health. They describe the highly contagious nature of measles,[2] noting that effective prevention will occur when 93% to 95% of the population becomes immune, requiring that "the vaccine be given to virtually everyone who can safely receive it." The amici curiae note that they submitted statements to the Legislature in support of the repeal and were joined by 26 other organizations with expertise in medicine and public health. They further describe that the evidence before the Legislature at the time the repeal was adopted "was accurate and consistent with the scientific literature" and that the determination to eliminate the religious exemption was a "sound, evidence-based decision in the interest of public health." Given the foregoing, the timing of the repeal fails to demonstrate any neutrality infraction by the Legislature, and instead reveals a reasonably prompt deliberation and targeted

2. As noted by the amicus brief, "[f]or infectious diseases, epidemiologists estimate the basic reproductive number (called R_0), which is the average number of other people that an infectious person will infect with an agent in a completely susceptible population" (citation omitted). Alarmingly, the R_0 for COVID-19 has been estimated to be between 2.43 and 3.10 (Marco D'Arienzo and Angela Coniglio, *Assessment of the SARS-CoV-2 Basic Reproduction Number, R_0, Based on the Early Phase of COVID-19 Outbreak in Italy*, 2 Biosafety and Health 57, 58 [2020]), while the R_0 for measles is as high as 18 (*see* Catherine I. Paules, Hilary D. Marston and Anthony S. Fauci, *Measles in 2019 — Going Backward*, 380 New England Journal of Medicine 2185, 2185 [2019]).

response to a very serious public health issue.[3] Moreover, plaintiffs' allegations regarding the timing of the repeal are unpersuasive, considering that most public schools in the state complete the academic year in mid-to late June. As the repeal was enacted on June 13, 2019, the 14-day grace period allowed under Public Health Law § 2164 would carry most students through the end of the academic year, allowing parents ample time to arrange for their children to be vaccinated over the summer vacation prior to returning to school. Furthermore, the reality is that bills, even exigent ones, take time to pass.

Second, we find plaintiffs' claims regarding the Legislature's failure to hold hearings to be equally unavailing, given the Legislature's reliance upon data from the Centers for Disease Control and Prevention and other public health officials, including the amici, which represent various medical experts in the state and have confirmed that the data contemplated by the Legislature was scientifically accurate. Further, the legislative history reveals a spirited floor debate among the legislators, particularly in the Assembly, where many representatives professed both their personal concerns as well as concerns of their constituents regarding the repeal's impact on religion. The ultimate floor vote reflected the many different views among the lawmakers. Finally, the extensive bill jacket reveals that several hundred letters

3. As noted in the amicus brief, it has been estimated that, prior to the vaccine, measles killed seven to eight million children each year (*see* Martin Ludlow, Stephen McQuaid, Dan Milner, Rik L. de Swart and W. Paul Duprex, *Pathological Consequences of Systemic Measles Virus Infection*, 235 Journal of Pathology 253 [2015]).

were received, mostly in opposition to the repeal, which address religious issues.

Third, we reject plaintiffs' claims that, based upon statements by some of the legislators, the repeal was motivated by religious animus.[4] Significantly, the 11 statements alleged to suggest religious hostility were attributed to only five of the over 200 legislators in office at any given time. Although a suggestion of animosity towards religion is sufficient to state a cause of action under the Free Exercise Clause, that the comments here were made by less than three percent of the Legislature does not, under these circumstances, taint the actions of the whole (*compare Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 138 S Ct at 1729; *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. at 541; *New Hope Family Servs., Inc. v Poole*, 966 F3d 145, 167-168 [2d Cir 2020]). More importantly, many of the statements do not demonstrate religious animus, as plaintiffs suggest, but instead display a concern that there were individuals who abused the religious exemption to evade the vaccination requirement based upon non-religious beliefs. Indeed, some legislators were concerned that parents may be hiring consultants to evade the vaccination requirement — suggesting that parents attempted to falsify religious beliefs to receive exempt status. The repeal relieves public school officials from the challenge of distinguishing sincere expressions of religious beliefs from those that may be fabricated. In

4. Given this finding, plaintiffs' argument that laws motivated by religious animus are per se unconstitutional is rendered academic.

fact, one of the quotes cited by plaintiffs refers to so-called "anti-vaxxers," implying a secular, rather than religious, movement resistant to vaccination. Another comment refers not to religion at all, but to "ideological beliefs." One of the comments goes so far as to explicitly state that "[r]eligion cannot be involved here," explaining that the priority must be to "govern by science," not only with the goal of promoting public health, but also to "lower the stigma that happens" against religious communities in the aftermath of viral outbreaks. To be sure, there were certain insensitive comments that could be construed as demonstrating religious animus. However, by and large, these comments highlight the tension between public health and socio-religious beliefs — a unique intersection of compelling personal liberties that was to be balanced against the backdrop of a measles outbreak that could be repeated (*compare Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 138 S Ct at 1729; *New Hope Family Servs. v Poole*, 966 F3d at 165-166).

The repeal is also a law of "general applicability." Although, at first blush, the repeal of a religious exemption naturally seems to target the First Amendment, such is not the case here. In *Roman Catholic Diocese of Brooklyn v Cuomo* (U.S. ___, ___, 141 S Ct 63, 66, 208 L. Ed. 2d 206 [2020]), the Supreme Court of the United States determined that an executive order that imposed restrictions on attendance at religious services in certain areas in response to the COVID-19 pandemic would likely not be considered neutral and of general applicability and thus must satisfy strict scrutiny. As noted by Justice Kavanaugh in a concurring opinion, the regulation

created a favored class of businesses and it thus needed to justify why houses of worship were excluded from that favored class (*id.* at 73 [Kavanaugh, J., concurring]; *see C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 76 [2020]). By contrast, here, the religious exemption previously created a benefit to the covered class, and now the elimination of the exemption subjects those in the previously covered class to vaccine rules that are generally applicable to the public (*compare Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct at 66-67). In fact, the sole purpose of the repeal is to make the vaccine requirement generally applicable to the public at large in order to achieve herd immunity. Overall, even when viewed in the light most favorable to plaintiffs, Supreme Court did not err by concluding as a matter of law that the repeal is a neutral law of general applicability, not based upon hostility towards religion and not infringing upon the free exercise of religion.[5] Accordingly, given the significant public health concern, the repeal is supported by a rational basis and does not violate the Free Exercise Clause (*see e.g. C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d at 78).

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5. Conversely, the failure to vaccinate a child for a communicable disease may hamper others who wish to congregate, including those wanting to safely and freely worship by attending religious services without undo fear of infection (*see e.g.* Rebecca Randall, *Should Pastors Speak Up About the COVID-19 Vaccine*, Christianity Today [Dec. 11, 2020], https://www. christianitytoday.com/ct/2020/december-web-only/should-pastors-speak-up-about-covid-19-vaccine.html; Sarah Pulliam Bailey, *A Pastor's Life Depends on a Coronavirus Vaccine*, The Washington Post [Dec. 11, 2020], https://www.washingtonpost.com/religion/2020/12/11/pastors-covid-vaccine-skeptics/).

Plaintiffs' claim pursuant to the NY Constitution is equally unavailing. "[W]hen the [s]tate imposes 'an incidental burden on the right to free exercise of religion' [this Court] must consider the interest advanced by the legislation that imposes the burden, and that 'the respective interests must be balanced to determine whether the incidental burdening is justified'" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 525 [brackets omitted], quoting *La Rocca v Lane*, 37 NY2d 575, 583, 338 N.E.2d 606, 376 N.Y.S.2d 93 [1975], *cert denied* 424 U.S. 968 [1976]). "[S]ubstantial deference is due the Legislature, and . . . the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 525). Given the Legislature's substantial interest in protecting the public health, plaintiffs fall short of establishing such a claim (*see id.* at 528).

Plaintiffs also contend that Supreme Court erred in holding that the complaint failed to state an equal protection claim. Specifically, plaintiffs assert that because the repeal was directed only towards students holding religious exemptions, and not students with medical exemptions, students over the age of 18 and adults employed by schools, it was "suspiciously underinclusive." The Equal Protection Clause prohibits "governmental decisionmakers from treating differently persons who are in all relevant respects alike" (*Nordlinger v Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 [1992]). In undertaking an equal protection analysis, "unless a

classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest" (*id.*; *see Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 167 AD3d 88, 99, 88 N.Y.S.3d 259 [2018]).

Here, since none of the classifications are inherently suspect nor do they jeopardize the exercise of a fundamental right, rational basis review applies. To this end, we reject plaintiffs' argument that the repeal makes classifications based on religion, which could implicate a fundamental right and require heightened scrutiny. Instead, the repeal places all school-aged children who are not medically exempt on equal footing, which does not offend equal protection. For example, the Supreme Court of the United States has held that "there is no denial of equal protection in excluding [Jehovah's Witnesses'] children from doing . . . what no other children may do" (*Prince v Massachusetts*, 321 U.S. 158, 171, 64 S. Ct. 438, 88 L. Ed. 645 [1944]), and, indeed, there is no equal protection violation where children are not permitted to attend school without a vaccination (*see Zucht v King*, 260 U.S. 174, 176-177, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 [1922]). Significantly, "in the exercise of the police power[,] reasonable classification may be freely applied, and that regulation is not violative of the [E]qual [P]rotection [C]lause merely because it is not all-embracing" (*id.* at 177).

Appendix B

Under the well-settled case law and the facts presented here, the repeal easily survives rational basis review. The group targeted by the Legislature is, and has been since the enactment of Public Health Law § 2164, school children. This is a logical place from which to start, as it ensures that the vast majority of children — who will quickly grow into the vast majority of adults — are vaccinated. Further, school children, by their very environment and nature, spend significant portions of their time in close contact with one another. Most parents, no doubt, are well aware of the speed with which a virus can sweep through a classroom. Targeting school children, as such, is a rational approach to stemming the spread of communicable diseases. From there, certain exceptions were carved out for those who would be particularly burdened or harmed by vaccination — namely, the medical and religious exemptions. While perhaps no vaccination regime may ever be perfect, it became clear from the 2018 measles outbreak that there were cracks in New York's prevention scheme. The Legislature, determined to increase the vaccination rate, distinguished between the two existing exemptions. Although parallels may be made between the two, the groups they address are not similarly situated. Those school children with medical exemptions have been advised by a physician that certain immunizations may be detrimental to their physical health (*see* Public Health Law § 2164 [8]). There are many arguments to be made as to how children formerly subjected to the religious exemption may also be detrimentally impacted, however, documented concerns as to the physical well-being of children with medical exemptions is a sufficient basis upon which to distinguish the two groups. Indeed, it would be

irrational to sacrifice the physical health of some children in the pursuit of protecting public health. In attempting to address the vulnerabilities in its current immunization scheme, the Legislature was permitted to exercise such "broad discretion required for the protection of the public health" (*Zucht v King*, 260 U.S. at 177). Accordingly, Supreme Court properly determined that plaintiffs have failed to state a cause of action pursuant to the equal protection clause.

Finally, contrary to their contention, plaintiffs' freedom of speech claim fails as a matter of law. "[F]reedom of speech prohibits the government from telling people what they must say" (*Rumsfeld v Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 [2006]). Expressive conduct, however, is protected by the First Amendment if it is "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative" (*Clark v Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S. Ct. 3065, 82 L. Ed. 2d 221 [1984]; *see Matter of Gifford v McCarthy*, 137 AD3d 30, 41, 23 N.Y.S.3d 422 [2016]). Given this two-part test, plaintiffs' compliance with Public Health Law § 2164 is merely conduct, not constitutionally protected speech. Although the repeal may force parents to make difficult decisions for their families, it "does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 523). Rather, plaintiffs remain free to express whatever views they may have on the subject of vaccination (*see Matter of*

Gifford v McCarthy, 137 AD3d at 41). As such, plaintiffs' claim that the repeal interferes with their rights of free speech is without merit, as the conduct allegedly compelled is not sufficiently expressive to trigger First Amendment protections (*see id.* at 42). Accordingly, Supreme Court did not err in granting defendants' motion and dismissing the complaint. Plaintiffs' remaining contentions have been examined and have been found to lack merit.

Garry, P.J., Lynch, Aarons and Reynolds Fitzgerald, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTERED:

/s/_____
Robert D. Mayberger
Clerk of the Court

APPENDIX C — DECISION AND JUDGMENT OF THE SUPREME COURT OF NEW YORK, ALBANY COUNTY, DATED DECEMBER 3, 2019

SUPREME COURT OF NEW YORK
ALBANY COUNTY

4108-19

F.F. on behalf of her minor children, Y.F., E.F. Y.F.; M. & T. M. on behalf of their minor children, C.M. and B.M.; E.W., on behalf of his minor son, D.W.; Rabbi M., in behalf of his minor children I.F.M., M.M. & C.M.; M.H. on behalf of W.G.; C.O., on behalf of her minor children, C.O., M.O., Z.O. and Y.O.; Y. & M. on behalf of their minor children M.G., P.G., M.G., S.G., F.G. and C.G.; J.M. on behalf of his minor children C.D.M. & M.Y.M.; J.E., on behalf of his minor children, P.E., M.E., S.E., D.E., F.E. and E.E.; C.B. & D.B., on behalf of their minor children, M.M.B. and R.A.B.; T.F., on behalf of her minor children, E.F., H.F. and D.F.; L.C., on behalf of her minor child, M.C.; R.K., on behalf of her minor child, M.K.; R.S. & D.S. on behalf of their minor children, E.S. and S.S.; J.M. on behalf of her minor children, S.M. & A.M.; F.H., on behalf of her minor children, A.H., H.H. and A.H.; M.E. on behalf of his minor children, M.E. & P.E.; D.B., on behalf of her minor children, W.B., L.B. & L.B.; R.B., on behalf of her minor child, J.B.; L.R., on behalf of her minor child, E.R.; G.F., on behalf of his minor children, C.F. & A.F.; D.A., on behalf of her minor children, A.A. & A.A.; T.R., on behalf of her minor children, S.R. and F.M.; B.N., on behalf of her minor children, A.N., J.N. &

M.N.; M.K., on behalf of her minor child, A.K.; L.B., on behalf of her minor children, B.B., A.B. & S.B.; A.V.M., on behalf of her minor children, B.M. and G.M.; N.L., on behalf of her minor children, H.L. and G.L.; L.G., on behalf of her minor children, M.C. and C.C.; L.L., on behalf of her minor child, B.L.; C.A., on behalf of her minor children, A.A., Y.M.A., Y.A. and M.A.; K.W., on behalf of her minor child, K.W.; B.K., on behalf of her minor children, N.K., S.K., R.K. and L.K.; W.E. and C.E., on behalf of their minor Child, A.E.; R.J. & A.J., on behalf of their minor Child, A.J.; S.Y. and Y.B., on behalf of their minor children, I.B. and J.B.; T.H., on behalf of her minor child, J.H.; K.T., on behalf of her minor children, A.J.T. & A.J.T.; L.M., on behalf of her minor child, M.M., D.Y.B., on behalf of her minor child, S.B.; A.M., on behalf of her minor child, G.M.; F.M., on behalf of his three minor children, A.M.M., D.M.M. and K.M.M.; H.M., on behalf of her minor child, R.M.; M.T. & R.T., on behalf of their minor child R.T.; E.H., on behalf of her minor children M.M.S.N. and L.Y.N., Rabbi M.B. on behalf of his minor child, S.B. and S.L. & J.F. on behalf of their minor child C.L., A-M.P., on behalf of her minor child, M.P.; R.L., on behalf of her minor children, G.L., A.L. and M.L.; N.B., on behalf of her minor child, M.A.L.; B.C., on behalf of her minor child, E.H. and J.S. and W.C., on behalf of their minor children, M.C. and N.C., S.L., on behalf of his three minor children, A.L., A.L. and A.L., L. M., on behalf of her two minor children, M.M. and M.M., N.H., on behalf of his three minor children, J.H., S.H. and A.H., on their own behalves and on behalf of thousands of

similarly-situated parents and children in the State of New York,

Plaintiffs,

against

STATE OF NEW YORK; ANDREW CUOMO, Governor; LETITIA JAMES, Attorney General,

Defendants.

December 3, 2019, Decided

Hon. Denise A. Hartman, Acting Justice of the Supreme Court.

Hartman, J.

Plaintiffs commenced this declaratory judgment action on or about July 10, 2019, to challenge the constitutionality of legislation, enacted June 13, 2019, which repealed New York's Public Health Law provision that had allowed religious exemptions from mandatory vaccinations for children who attend public and private schools in the State. The named plaintiffs are parents of diverse religious beliefs who previously had obtained or had qualified for religious exemptions from mandatory vaccinations for their children. Plaintiffs claim that New York's legislative repeal of the religious exemption violates their rights under the Free Exercise Clause of the First Amendment of the United States Constitution and Article

1, § 3 of the New York Constitution. They also claim that the repeal violates the Equal Protection Clause of the United States Constitution and forces them to engage in compelled speech in violation of the First Amendment.

On August 26, 2019, this Court denied plaintiffs' application for a preliminary injunction to enjoin enforcement of the legislative repeal of the religious exemption. On September 5, 2019, the Appellate Division similarly denied plaintiffs' application for a preliminary injunction. Defendants, pre-answer, now move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). Plaintiffs oppose. For the reasons stated below, defendants' motion is granted: The challenged repeal is not unconstitutional.

Background

New York's Public Health Law mandates that every parent or guardian of a child "shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B," which meet federal and state standards and specifications (Public Health Law § 2164 [2] [a]). The statute provides generally that a child may not be admitted or attend a "school" in this State without a certificate from a health care provider or other proof that the child has received the mandated vaccines (Public Health Law § 2164 [5], [7]). For purposes of the mandatory vaccination statute, "school" is defined broadly to mean "any public, private

or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school" (Public Health Law § 2164 [1] [a]).

For decades, New York's Public Health Law provided for two types of exemptions from these vaccination requirements: a medical exemption, where a physician certifies that immunization "may be detrimental to a child's health" (Public Health Law § 2164 [8]); and a non-medical, religious exemption, where parents or guardians certify that they "hold genuine and sincere religious beliefs which are contrary" to the required vaccinations (Public Health Law § 2164 [9]). On June 13, 2019, the Legislature repealed the provision authorizing non-medical, religious exemptions (*see* L 2019, ch 35, § 1). Thus, all children attending schools in New York State must now receive the mandated vaccines unless they have a medical exemption.

The Complaint

The complaint alleges that plaintiffs and the class they represent hold genuine and sincere religious beliefs against vaccinating their children. Some plaintiffs are affiliated with various organized religions. Others are not affiliated with any organized religion. Their children had attended or were expected to attend public or private schools or nursery programs, unvaccinated under a religious exemption. But, now that the religious exemption is repealed, they are unable to attend unless they receive the mandated vaccines or obtain a medical exemption.

Appendix C

The complaint further alleges that the Legislature acted with religious animus when enacting the repeal, notwithstanding the official statements in the memoranda supporting the legislation. The complaint alleges that "[r]ather than being motivated by any serious concern for public health and despite the rhetoric of the Governor, in the public debate and discourse which preceded the passage of this repeal legislation, numerous leading proponents of the legislation expressed active hostility toward the religious exemption and ridiculed and scorned those who held such exemptions." They cite as examples the statement of the Senate majority leader that "We've chosen science over rhetoric," and other legislators who referred to those who claim religious exemptions as selfish and misguided in their views of the science regarding such vaccines. They also cite the statement of a bill sponsor that, "[w]hether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do"; and of another legislator calling many people's professed religious rationale for the exemption "garbage." And they cite numerous statements by legislators who expressed their views that the religious exemption has become in effect a personal belief exemption influenced largely by disagreement with the prevailing scientific and medical views underlying mandatory vaccination.

Plaintiffs point out that neither legislative body held public hearings before enacting the repeal legislation and that, to the extent the legislation was responsive to recent measles outbreaks, the Legislature did not establish a factual basis for repealing the religious exemption

when other measures are available to protect the public health. And they argue that the government's response to the prior year's measles outbreak in Rockland County demonstrates that less restrictive means are available to protect the public health, if and when outbreaks occur.

On August 26, 2019, this Court denied plaintiffs' application for a preliminary injunction. On September 5, 2019, the Appellate Division similarly denied their application for a preliminary injunction.[1] Defendants now move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Analysis

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court "must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference" (*Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*, 171 AD3d 1377, 1378, 98 N.Y.S.3d 652 [3d Dept 2019], quoting *Matter of Dashnaw v Town of Peru,* 111 AD3d 1222, 1225, 976 N.Y.S.2d 288 [3d Dept 2013]). Generally, "a motion to dismiss a declaratory judgment action prior

1. Three other trial courts have denied preliminary injunctions against enforcement of the legislative repeal of the religious exemption (*see V.D. v New York*, 2019 U.S. Dist LEXIS 139815, 2019 WL 3886622 [ED NY, August 19, 2019, 2:19-cv-04306-ARR-RML]; *Stoltzfus v New York*, Sup Ct, Seneca County, November 4, 2019, Doyle, J, index No. 20190311]; *Sullivan-Knapp v Cuomo*, Sup Ct, Steuben County, October 9, 2019, Wiggins, J, index No. E2019-1339CV).

to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*id.*, quoting *North Oyster Bay Baymen's Assn. v Town of Oyster Bay,* 130 AD3d 885, 890, 16 N.Y.S.3d 555 [2d Dept 2015]; *see Matter of Dashnaw v Town of Peru,* 111 AD3d at 1225). But, "on a motion to dismiss pursuant to CPLR 3211 (a) (7), courts may reach 'the merits of a properly pleaded cause of action for a declaratory judgment . . . where no questions of fact are presented by the controversy'" (*id.*, quoting *Matter of Tilcon NY, Inc. v Town of Poughkeepsie,* 87 AD3d 1148, 1150, 930 N.Y.S.2d 34 [2d Dept 2011]; *see Matter of Dashnaw v Town of Peru,* 111 AD3d at 1225). "Under such circumstances, the 'motion [to dismiss for failure to state a cause of action] should be taken as a motion for a declaration in the defendant's favor and treated accordingly'" (*Matter of Tilcon NY, Inc. v Town of Poughkeepsie,* 87 AD3d at 1150, quoting Siegel, NY Prac. § 440, at 745 [4th ed] [citations omitted]; *see Garcia v New York City Dept. of Health & Mental Hygiene,* 31 NY3d 601, 621, 81 N.Y.S.3d 827, 106 N.E.3d 1187 n 4 [2018] [granting declaratory judgment on preanswer motion to dismiss where plaintiffs challenged on constitutional grounds New York City's regulation requiring flu shots for children attending daycare and preschool programs within the City]).

Plaintiffs' Free Exercise Claim

Plaintiff's principal claim is that the 2019 amendment repealing the religious exemption to compulsory

vaccination violates the Free Exercise Clause of the United States Constitution.[2] This Court, in its decision and order denying plaintiffs' motion for a preliminary injunction, surveyed the courts' precedents regarding mandatory vaccination laws, beginning with *Matter of Viemeister* (179 NY 235, 72 N.E. 97 [1904]). There, the New York Court of Appeals upheld a provision of New York's Public Health Law mandating vaccination of school children for smallpox as a valid exercise of the State's police power, notwithstanding New York's constitutional duty to provide a system of free common schools wherein all children may be educated (*id.* at 240-241). One year later, in *Jacobson v Massachusetts* (197 U.S. 11, 25-27, 38, 25 S. Ct. 358, 49 L. Ed. 643 [1905]), the Supreme Court upheld Massachusetts' compulsory vaccination laws as

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2. In response to defendants' motion, plaintiffs have not advanced their claim that the repeal of the religious exemption violates the Free Exercise Clause of the New York State Constitution, which involves elevated scrutiny in the form of a balancing test that requires plaintiffs to show that the challenged legislation constitutes an "unreasonable interference with religious freedom" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 525, 859 N.E.2d 459, 825 N.Y.S.2d 653 [2006], *rearg denied* 8 N.Y.3d 866, 863 N.E.2d 1019, 831 N.Y.S.2d 767 [2007], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 [2007]). Plaintiffs' State constitutional claim is deemed abandoned (*see Matter of Spence v New York State Dept. of Agric. & Mkts.*, 154 AD3d 1234, 1235, 64 N.Y.S.3d 328 n 2 [3d Dept 2017], *affd* 32 NY3d 991, 86 N.Y.S.3d 413, 111 N.E.3d 307 [2018]). In any event, because the Court concludes that plaintiffs' federal Free Exercise Clause claim fails under strict scrutiny, plaintiffs' State constitutional claim would necessarily fail as well (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 525-527).

a valid exercise of the state's police power, rejecting the plaintiff's claim that a law requiring children to be vaccinated as a condition to attending public or private schools violated the guarantee of individual liberty under the United States Constitution (*see also Zucht v King,* 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 [1922]). While *Viemeister* and *Jacobson* did not expressly address claims that compulsory vaccination laws violate the Free Exercise Clause, the Supreme Court in *Prince v Massachusetts* (321 U.S. 158, 166-167, 64 S. Ct. 438, 88 L. Ed. 645 [1944], *reh denied* 321 U.S. 804, 64 S. Ct. 784, 88 L. Ed. 1090 [1944]) later observed that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."

Bringing this precedent forward to recency, in 2015 the Second Circuit held that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause" (*Phillips v City of New York,* 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S. Ct. 104, 193 L. Ed. 2d 37 [2015]). There, the Court rejected a claim that the temporary exclusion of the plaintiffs' children, who had religious exemptions under New York's former law, from schools during a chicken pox outbreak violated the Free Exercise Clause, reasoning as follows:

> "New York could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an

> exemption for parents with genuine and sincere religious beliefs. Because the State could bar [the plaintiffs'] children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of vaccine-preventable disease is clearly constitutional" (*id.*).

In addition to recounting the historical precedent upholding compulsory vaccination laws, the Court in its preliminary injunction decision also examined the current state of the compulsory vaccination laws across the Nation. Four other states have eliminated all personal belief and religious exemptions to compulsory vaccination of school children: California, Maine, West Virginia, and Mississippi. And the courts have consistently upheld those state's laws in the face of Free Exercise Clause challenges (*see Workman v Mingo County Bd. of Educ.,* 419 Fed Appx 348, 354 [4th Cir 2011], *cert denied* 565 U.S. 1036, 132 S. Ct. 590, 181 L. Ed. 2d 424 [2011]; *Whitlow v California,* 203 F Supp 3d 1079, 1085-1087 [SD Cal 2016]; *Love v State Dept. of Education,* 29 Cal. App. 5th 980, 996, 240 Cal. Rptr. 3d 861 [3d App Dist 2018]; *Brown v Smith,* 24 Cal App 5th 1135, 1144-1145, 235 Cal. Rptr. 3d 218 [2d App Dist 2018]; *see also McCarthy v Boozman,* 212 F Supp 2d 945, 948 [WD Ark 2002], *appeal dismissed* 359 F3d 1029 [2004] ["The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."])

Against this backdrop, the Court turns to the specific claims and arguments pressed by plaintiffs in

this case. Plaintiffs contend that New York's legislation is distinguishable because, in repealing the religious exemption, the Legislature targeted plaintiffs and the class they claim to represent on the basis of their religious beliefs, and that it did so with discriminatory animus in violation of the Free Exercise Clause. Plaintiffs maintain that, at the very least, they are entitled to proceed with their claims because there are questions of fact regarding the extent to which religious animus infected the legislative decision-making process. And, they argue, on account of such alleged targeting and animus, the requisite standard of judicial review is strict scrutiny, which the State cannot meet.

The Requirement that All School Children Receive Mandated Vaccinations Regardless of Religious Belief (Unless Exempt for Medical Reasons) Is a Law of Neutral and General Applicability; It Does Not Target Religious Believers.

For purposes of the federal Free Exercise Clause, a neutral law of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening religious practice (*see Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 [1990], *reh denied* 496 U.S. 913, 110 S. Ct. 2605, 110 L. Ed. 2d 285 [1990]; *Catholic Charities of Diocese of Albany v Serio,* 7 NY3d 510, 521-522, 859 N.E.2d 459, 825 N.Y.S.2d 653 [2006], *rearg denied* 8 N.Y.3d 866, 863 N.E.2d 1019, 831 N.Y.S.2d 767 [2007], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 [2007]; *Matter*

of Gifford v McCarthy, 137 AD3d 30, 38-40, 23 N.Y.S.3d 422 [3d Dept 2016]). "[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 on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 U.S. at 879 [internal quotation marks and citations omitted]; *see Catholic Charities of Diocese of Albany v Serio,* 7 NY3d at 521-522]). "A 'neutral' law, the Supreme Court has explained, is one that does not 'target[] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation'" (*Catholic Charities of Diocese of Albany v Serio,* 7 NY3d at 522, quoting *Church of Lukumi Babalu Aye., Inc. v Hialeah,* 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 [1993]).

In determining whether a law impermissibly targets religion, the Court must "begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face" (*Church of Lukumi Babalu Aye., Inc. v Hialeah,* 508 U.S. at 533). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context" (*id.*). Public Health Law § 2164, as amended, is a law that is neutral on its face and is generally applicable to all children who attend schools in the State.

But "[f]acial neutrality is not determinative" because a law that "targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality" (*id.* at 534). Thus, the Court's analysis extends beyond a finding

of facial neutrality; it must also examine the facts and circumstances surrounding the law's enactment (*see id.*). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body'" (*Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n,* 138 S Ct 1719, 1731, 201 L. Ed. 2d 35 [2018], quoting *Church of Lukumi Babalu Aye v Hialeah,* 508 U.S. at 540).

Here, the overall history and context of New York's vaccination law, the series of events leading up to the repeal of the religious exemption, and the legislative history of the repeal, all lead to the inexorable conclusion that the repeal was driven by public health concerns, not religious animus. Mandatory vaccination laws have been in effect in New York for well over a century (*see Matter of Viemeister,* 179 NY 235, 237, 72 N.E. 97 [1904]). The statute at issue, Public Health Law § 2164, was enacted in its current form in 1966 (*see* L 1966, ch 994). In 1968, the Legislature added requirements of vaccinations for measles and smallpox (*see* L 1968, ch 1094). It set forth the following public health findings:

> "1. Among the truly great medical advances of this generation have been the development of proved methods of reducing the incidence of smallpox and measles, the once great cripplers. Public health statistics show clearly that immunization is effective and safe.

"2. Out of apathy or ignorance, millions of Americans are still not properly immunized. Many millions of the unimmunized are pre-school children under the age of six years. Studies indicate that the majority of these unprotected persons are in the lower socio-economic group who reside in congested urban areas and who are generally apathetic towards immunization. The typical victim is a child less than six years of age in an underprivileged family.

"3. Consequently, the large numbers of pre-school children who are unprotected against small pox and measles must be immunized and protected in their own self-interest as well as for the health and economic well-being of the community.

"4. The legislature therefore finds and declares that pre-school children must be adequately immunized against smallpox and measles before being permitted to attend a public, private or parochial school in this state. The state should be prepared to pay for the cost of providing and administering such immunizing dose or doses of prophylactic agent against smallpox and measles which meet the standards approved by the United States public health service for such biological products and which are approved by the state department of health."

(L 1968, ch 1094, § 1; *see Garcia v NY City Dept of Health and Mental Hygiene,* 31 NY3d 601, 614, 81 N.Y.S.3d 827, 106 N.E.3d 1187 [2018]; *Matter of Christine M.,* 157 Misc 2d 4, 11-12, 595 N.Y.S.2d 606 [Fam Ct, Kings County 1992]).

Similarly, the legislative memoranda accompanying the bills leading to the June 2019 legislation repealing the religious exemption discussed the public health objective of the legislation, as did the Governor's approval statement: All described the objective of the repeal as the protection of public health from vaccine-preventable diseases. They explained that the repeal was prompted by recent outbreaks nationally and in New York, particularly in communities with low vaccination rates. While acknowledging respect for religious beliefs, the legislative memoranda expressed the collective legislative view that public health concerns should prevail.

The Introducer's Memorandum to the Senate Bill (Sponsor's Mem, S2994A [2019]) explained that the nation was experiencing the worst outbreak of measles in decades, a disease which had been declared eliminated from the United States in 2000. It observed that 880 cases of measles had been confirmed nationwide in the first months of 2019, and that outbreaks in New York were the primary driver of the epidemic. Of the 810 cases of measles in New York State between October 2018 and May 2019, the outbreaks were largely concentrated in Brooklyn and Rockland Counties, areas with precipitously low immunization rates. And it acknowledged, that while "freedom of religious expression is a founding tenet of this nation, there is longstanding precedent establishing that

one's right to free religious expression does not include the right to endanger the health of the community, one's children, or the children of others."

Along the same lines, the Introducer's Memorandum for the parallel Assembly Bill (Sponsor's Mem, A2371 [2019]) noted that, according to the Center for Disease Control (CDC), "sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles." It cited to State data from 2013-2014, revealing that "there are at least 285 schools in New York with an immunization rate of below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity."

And on June 13, 2019, when Governor Cuomo signed the repeal into law, he explained in a press release: "While I understand and respect freedom of religion, our first job is to protect the public health and by signing this measure into law, we will help prevent further transmissions and stop this [measles] outbreak right in its tracks."

Notwithstanding these uniform pronouncements, plaintiffs contend that the June 2019 legislation repealing the religious exemption, by definition, is a law that targets those with religious beliefs. And, they argue, the "targeted," non-neutral law substantially burdens their free exercise rights, so the Court must apply strict scrutiny. But from the perspective of Public Health Law § 2164 as a whole, the compulsory vaccination statute is, with or without the religious exemption, a neutral law of

general applicability (*see Matter of Viemeister,* 179 NY at 241 [observing that the compulsory vaccination law at issue there "operate[d] impartially upon all children in the public schools, and [was] designed not only for their protection but for the protection of all the people of the state"]). That the Legislature repealed a previously authorized religious exemption does not in and of itself transmute the law into a non-neutral law that targets religious beliefs (*cf. Catholic Charities of Diocese of Albany v Serio,* 7 NY3d 510, 522-523 [2006], *rearg denied* 8 N.Y.3d 866, 863 N.E.2d 1019, 831 N.Y.S.2d 767 [2007], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 [2007] [stating fact that challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability]); *see also Phillips v City of New York,* 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S. Ct. 104, 193 L. Ed. 2d 37 [2015] [treating exclusion of students with religious exemptions from public schools during chicken pox outbreak as law of "neutral and . . . general applicability [that] need not be justified by a compelling governmental interest"]). Nor does the fact that the Legislature retained the medical exemption, while at the same time repealing the religious exemption, suggest religious animus. The stated purpose of the legislation is the protection of public health; the elimination of the medical exemption would be contrary to that purpose (*see Brock v Boozman,* 2002 WL 1972086, *7-8, 2002 U.S. Dist LEXIS 15479, *21-24 [ED Ark 2002], *appeal dismissed* 359 F3d 1029 [8th Cir 2004]).

Next, plaintiffs argue that the object of the legislative repeal to target religion, not concern for public health, is illustrated by the timing of the repeal — the bills were

presented in January but not enacted until June, months after the apex of the measles outbreak. Their argument is unpersuasive. The Legislature addresses many priorities each session. The fact that the Legislature chose to address other priorities, such as the State budget, earlier in the same session does not detract from the public health objective of the proposed repeal legislation. The Legislature enacted the repeal in June, giving affected families and schools at least some time for decision making and planning before the start of the new school year, when further outbreaks could recur. Likewise, the fact that the Legislature enacted the repeal without public hearings and debate does not suggest religious animus. The Legislature is entitled to rely on findings and recommendations of the CDC and other public health officials; it was not required to hold factfinding hearings and debates about the science and medicine of vaccinations and the impacts on those with sincerely held religious beliefs before enacting the repeal (*see Matter of Viemeister,* 179 NY at 239-240).

But plaintiffs' most strenuous argument for applying strict scrutiny is that the repeal legislation was infected by statements made by individual legislators whose comments, they say, demonstrate unconstitutional hostility toward plaintiffs' sincerely held religious beliefs. For this argument, plaintiffs cite *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n* (138 S Ct 1719, 201 L. Ed. 2d 35 [2018]), where the Supreme Court relied on the comments of individual members of the Colorado Civil Rights Commission, which sanctioned a baker for his refusal to make a wedding cake for a same sex couple. Finding that the commission members expressed clear hostility to the baker's religious belief

about the nature of marriage, the Court concluded that the administrative determination was "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion" (*id.* at 1732). The Court observed that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" (*id.* at 1731).

This Court declines to extend that part of the Supreme Court's analysis in *Masterpiece Cakeshop*, which probed the comments of individual members of a decision-making body, to this case, which involves a challenge to the collective decision-making of New York State's Legislature and Executive. True, the Supreme Court has expressly listed among the factors to be considered in determining whether the government has acted neutrally or has targeted religious beliefs the "contemporaneous statements made by members of the decisionmaking body" (*id.* [internal quotation marks and citation omitted]). But, in *Masterpiece Cakeshop*, the Court considered the remarks of members of a seven-member administrative body, not a state legislature. [3] The *Masterpiece Cakeshop* decision itself noted this distinction, stating: "Members of the [Supreme] Court have disagreed on the question

3. Unlike the seven-member appointed administrative body in *Masterpiece Cakeshop*, the New York Legislature is comprised of two separate bodies — the Senate consists of 63 members and the Assembly consists of 150 members. And, of course, passage of state-wide legislation involves the participation of an entirely separate branch of state government, the executive.

whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion" (*id.* at 1730, citing *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 U.S. 520, 540-542, 113 S. Ct. 2217, 124 L. Ed. 2d 472 [1993]; *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 U.S. at 558 [Scalia, J, concurring in part and concurring in judgment]). It went on to say that in the case before it, "however, the remarks were made in a very different context — by an adjudicatory body deciding a particular case" (*id.*).

In this Court's view, inquiries into the motives of individual legislators "are a hazardous matter" (*United States v O'Brien,* 391 U.S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 [1968], *reh denied* 393 U.S. 900, 89 S. Ct. 63, 21 L. Ed. 2d 188 [1968]). "[I]t is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant" (*South Carolina Edu. Ass'n v Campbell,* 883 F2d 1251, 1262 [4th Cir 1989], *cert denied* 493 U.S. 1077, 110 S. Ct. 1129, 107 L. Ed. 2d 1035 [1990] [citation omitted]). That is why "isolated remarks are entitled to little or no weight, particularly when they are unclear or conflict with one another, as distinguished from a legislative committee's formal report on its enactment" (*Murphy v Empire of America, FSA,* 746 F2d 931, 935 [2d Cir 1984]). Here, the comments of some legislators, even if susceptible to inferences of discriminatory animus and even taking such inferences as true, would not transmute the collective decision of the New York State Legislature and Governor to repeal the religious exemption from a neutral law of general applicability to one that targets religious beliefs. Plaintiffs have not met the high burden

that would warrant crossing the boundaries underlying the separation of powers doctrine to probe the views of individual state legislators about whether they harbor discriminatory animus against their religious beliefs.[4]

The Supreme Court's decision in *Church of Lukumi Babalu Aye v Hialeah* (508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 [1993]) does not require a different result. That case involved municipal legislative action, not state legislative action. And the surrounding facts and circumstances strongly suggested that the challenged municipal action unconstitutionally targeted religious beliefs regarding animal sacrifice. The Church of Lukumi

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4. Many of the individual legislators' comments that plaintiffs cite may well reflect legitimate concerns about those who have invoked the religious exemption when they really disagreed with the prevailing scientific and medical findings (*see e.g. Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S. Ct. 104, 193 L. Ed. 2d 37 [2015]; *Mason v General Brown Cent. School Dist.*, 851 F2d 47, 51 [2d Cir 1988]; *NM v Hebrew Acad. Long Beach*, 155 F Supp 3d 247, 258 [ED NY 2016]; *Caviezel v Great Neck Pub. Sch.*, 701 F Supp 2d 414, 429 [ED NY 2010], *affd* 500 Fed Appx 16 [2d Cir 2012], *cert denied* 569 U.S. 947, 133 S. Ct. 1997, 185 L. Ed. 2d 866 [2013]; *Farina v Board of Educ. of City of New York*, 116 F Supp 2d 503, 508 [SD NY 2000]). Skepticism over the genuineness of some who claimed religious exemptions does not equate to hostility toward legitimate religious beliefs. Moreover, the broad and delicate construction that must be given the phrase "sincerely held religious belief" can pose difficulties for enforcement and be inimical to the overriding goal of protecting the public health (*see Jolly v Coughlin*, 76 F3d 468, 476 [2d Cir 1996]; *Ford v McGinnis*, 352 F3d 582, 588 [2d Cir 2003]; *Mason v General Brown Cent. School Dist.*, 851 F2d at 50; *Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp 81, 97-98 [ED NY 1987]).

Appendix C

Babalu Aye and its congregants practice the Santeria religion, a religion that involves the fusion of traditional African religions and Roman Catholicism and holds as a central tenet the ritual of animal sacrifice. When the Church acquired land and obtained permits to build a house of worship, school and cultural center within city limits, the public expressed concerns. The City, after holding a series of public hearings, enacted several ordinances aimed at prohibiting animal sacrifice. The Supreme Court found that all the facts and circumstances of the enactment of the ordinances, not just the statements of municipal officials, "compel[ed] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances" (*id.* at 534). In contrast, the facts and circumstances presented here, even affording plaintiffs' allegations all reasonable inferences, do not give rise to a conclusion that the New York Legislature's repeal of the religious exemption to longstanding compulsory vaccination requirements in the face of recent measles outbreaks was motivated by animus targeting religious beliefs.[5]

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5. In response to defendants' motion, plaintiffs have also not pressed their prior argument that heightened scrutiny is required under a "hybrid rights" theory (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 521-522, 859 N.E.2d 459, 825 N.Y.S.2d 653 [2006], *rearg denied* 8 N.Y.3d 866, 863 N.E.2d 1019, 831 N.Y.S.2d 767 [2007], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 [2007]; *see Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 U.S. at 881). The Court, therefore, does not address this argument.

But this Court does take the opportunity to express its view that some form of searching inquiry, albeit less than strict scrutiny, should be applied to governmental mandates enacted under the states' police power that substantially impair an individual's

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In Any Event, the Repeal of the Religious Exemption Satisfies Strict Scrutiny.

Even if the Court were to apply strict scrutiny, plaintiffs nevertheless cannot prevail on their Free Exercise Clause claim. The courts addressing this question have uniformly concluded that compulsory vaccination laws without religious exemptions are constitutional, regardless of whether rational basis or strict scrutiny applies (*see e.g., Workman v Mingo County Bd. of Educ.,* 419 Fed Appx 348, 353-354 [4th Cir 2011], *cert denied* 565 U.S. 1036, 132 S. Ct. 590, 181 L. Ed. 2d 424 [2011]; *Brown v Smith,* 24 Cal App 5th 1135, 1144-1145, 235 Cal. Rptr. 3d 218 [2d App Dist 2018]; *Love v State Dept. of Education,* 29 Cal. App. 5th 980, 996, 240 Cal. Rptr. 3d 861 [3d App Dist 2018]).

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right to make autonomous decisions about medical treatment and bodily integrity for their children and themselves (*see Wisconsin v Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 32 L. Ed. 2d 15 [1972]; *Roe v Wade*, 410 U.S. 113, 155-156, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]; *Griswold v Connecticut*, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]). This view accords with longstanding, related state court precedent requiring more searching analyses of government attempts to override an individual's choice to undergo or forego medical treatment and procedures (*see Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226-228, 551 N.E.2d 77, 551 N.Y.S.2d 876 [1990]; *Rivers v Katz*, 67 NY2d 485, 495-496, 495 N.E.2d 337, 504 N.Y.S.2d 74 [1986]; *Matter of Storar*, 52 NY2d 363, 377, 420 N.E.2d 64, 438 N.Y.S.2d 266 [1981]). Absent scrutiny with teeth, the government's police power to protect the "public health" could swallow up fundamental constitutional liberties. Again, however, because the legislation in this case passes strict scrutiny, it would pass a lesser level of scrutiny (*see* n 2, *supra*).

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Protecting public health, and children's health in particular, through attainment of threshold inoculation levels for community immunity from vaccine-preventable, highly contagious diseases that pose the risk of severe health consequences "'has been long recognized as the gold standard for preventing the spread of contagious diseases'" and is unquestionably a compelling state interest (*Love v State Dept. of Education,* 29 Cal App 5th at 993-994, quoting *Brown v Smith,* 24 Cal App 5th at 1146; *see Workman v Mingo County Bd. of Educ.,* 419 Fed Appx at 353).[6] For such vaccine-preventable diseases, the courts have routinely held that the states need not wait for vaccination rates to fall below the recommended threshold or for outbreaks to occur before mandatory inoculations are required for children to attend school. They have upheld proactive compulsory vaccination requirements for school-aged children even where there has been no recent outbreak, in order to attain and maintain community immunity to prevent future outbreaks (*see Zucht v King,* 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 [1922]; *Workman v Mingo County Bd. of Educ.,* 419 Fed Appx at 353-354; *McCarthy v Boozman,* 212 F Supp 2d 945, 948 [WD Ark 2002], *appeal dismissed* 359 F3d 1029 [2004]; *Sherr v Northport-East Northport*

6. Plaintiffs have not differentiated among the various vaccines and argue only that the repeal of the religious exemption from the mandatory vaccines in the aggregate is unconstitutional. Because they have not argued that one or more of the mandated vaccines are for non-contagious diseases, the Court has not separately considered whether requiring vaccination for tetanus, or any other non-contagious, vaccine-preventable diseases would pass strict scrutiny.

Union Free School Dist., 672 F Supp at 88 ; *Davis v State*, 294 Md 370, 379, 451 A.2d 107 n 8 [1982]).

Plaintiffs argue that there are less restrictive means to protect the public health, such as temporarily excluding unvaccinated students from schools when there is an outbreak of a vaccine-preventable disease. While such measures may reduce dangers to unvaccinated individuals, they do not prevent or eliminate them. Because an infected person may be asymptomatic while still being contagious, waiting for an outbreak to manifest places exposed, unvaccinated persons at risk of serious illness or death. As the Legislature apparently concluded, reactive measures to outbreaks, like quarantining individuals once they show symptoms of an illness or keeping unvaccinated individuals home, are simply less effective at protecting the public health than proactive measures aimed at attaining and maintaining threshold community immunity to contagious diseases before outbreaks occur.

Plaintiffs' Equal Protection Claim

In their complaint, plaintiffs allege that the repeal violates the Equal Protection Clause "because it eliminates the religious exemption for children while allowing students enrolled [in] higher education as well as employees of schools, both private and public, either to maintain their religious exemptions or to continue their employment without vaccinations." In their memoranda of law in opposition to defendants' motion to dismiss, they contend that they are being treated differently than (1) students who are unvaccinated under the medical

exemption; (2) adults in the schools, both staff and students who have turned 18 years old; and (3) students who have "fallen through the cracks" because schools have not enforced the vaccination mandate.

Because these legislative distinctions are not based upon suspect classifications, plaintiffs' equal protection claims are subject to rational basis review (*see Nordlinger v Hahn,* 505 U.S. 1, 10-12, 112 S. Ct. 2326, 120 L. Ed. 2d 1 [1992]; *Lighthouse Shores, Inc. v Town of Islip,* 41 NY2d 7, 11-12, 359 N.E.2d 337, 390 N.Y.S.2d 827 [1976]; *Sullivan v Paterson,* 80 AD3d 1051, 1053, 915 N.Y.S.2d 403 [3d Dept 2011]; *Matter of Joseph LL.,* 97 AD2d 263, 264, 470 N.Y.S.2d 784 [3d Dept 1983], *affd* 63 NY2d 1014, 473 N.E.2d 736, 484 N.Y.S.2d 508 [1984]); plaintiffs do not argue otherwise. Under rational basis analysis, a law will be deemed valid as long as "any classifications it creates between similarly-situated individuals are 'rationally related to a legitimate government interest'" (*Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.,* 167 AD3d 88, 98, 88 N.Y.S.3d 259 [3d Dept 2018], quoting *Matter of Walton v New York State Dept. of Correctional Servs.,* 13 NY3d 475, 492, 921 N.E.2d 145, 893 N.Y.S.2d 453 [2009]). And the challenger is required to "negate every conceivable basis which might support the state's interest whether or not the basis has a foundation in the record" (*Sullivan v Paterson,* 80 AD3d at 1053 [internal quotation marks, brackets, emphasis and citations omitted], *see Heller v Doe,* 509 U.S. 312, 320-321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 [1993]; *Affronti v Crosson,* 95 NY2d 713, 719, 746 N.E.2d 1049, 723 N.Y.S.2d 757 [2001], *cert denied* 534 U.S. 826, 122 S. Ct. 66, 151

L. Ed. 2d 32 [2001]). Taking their allegations as true, plaintiffs have failed to demonstrate that Public Health Law § 2164, as amended, violates their rights under the Equal Protection Clause.

First, children who are unvaccinated under the medical exemption are not similarly situated to plaintiffs' children and, in any event, there is a rational reason for treating medically exempt children differently. The very purpose of Public Health Law § 2164 is the protection of public health. Not exempting children who cannot be vaccinated for medical reasons would be antithetical to the purpose of the statute.

Second, the Legislature's choice to focus prophylactic vaccination efforts on school-aged children is rational. Public Health Law § 2164 requires that "[e]very parent in parental relation to a child in this state shall have administered to such child" the vaccines listed in the statute; and that no school shall admit a child between the ages of two months and 18 years without proof of vaccination or a medical exemption. New York's Legislature has chosen to mandate vaccination of school-aged children, both for their immediate protection while they are in close, daily proximity to each other and as the primary means to achieve community immunity from vaccine-preventable diseases (*cf. Garcia v New York City Dept. of Health & Mental Hygiene,* 31 NY3d 601, 612, 81 N.Y.S.3d 827, 106 N.E.3d 1187 [2018]). That there may be other statutory or regulatory regimes that target adults who come into contact with vulnerable populations does not detract from the rationality of the legislative policy choice to enhance community immunity in this way.

Finally, plaintiffs argue that they are being treated differently than those students who have no exemptions from compulsory vaccination whatsoever, but are still allowed to attend schools, citing news reports. This claim was not raised in the complaint. To the extent that such claim is properly before the Court, the fact that the State can do more to enforce the vaccination mandate does not detract from the rationality of the Legislature's decision to increase vaccination rates to provide greater community immunity by repealing the religious exemption.

In short, plaintiffs' bare legal conclusion that the legislative repeal of the religious exemption violates their rights under the Equal Protection Clause fails to state a cause of action.

Plaintiffs' Compelled Speech Claim

Plaintiffs argue that the repeal of the religious exemption compels parents to either vaccinate their children, so that they can be educated in public or private schools, or to home school. They maintain that, because of their religious beliefs, their children are unable to attend private or public schools. Thus, they contend, they have no choice but to home school.

In *Matter of Gifford v McCarthy* (137 AD3d 30, 41, 23 N.Y.S.3d 422 [3d Dept 2016]), the Appellate Division, Third Department summarized the analytic framework for a compelled speech claim:

> "The First Amendment of the U.S. Constitution guarantees that 'Congress shall make no

law . . . abridging the freedom of speech.' This constitutional protection extends to 'the right to refrain from speaking' (*Wooley v Maynard,* 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 [1977]), as well as the right to be free from government-compelled speech or conduct (*see Rumsfeld v Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 [2006]; *West Virginia Bd. of Ed. v Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 [1943]). Thus, the government may not require an individual to personally speak a governmental message or require an individual 'to host or accommodate another speaker's message' (*Rumsfeld v Forum for Academic & Institutional Rights, Inc.,* 547 U.S. at 63; *see Wooley v Maynard,* 430 U.S. at 715-717). In assessing a claim of compelled expressive conduct, the threshold inquiry is whether the conduct allegedly compelled was sufficiently expressive so as to trigger the protections of the First Amendment (*see Clark v Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 n 5 [1984]; *Catholic Charities of Diocese of Albany v Serio,* 28 AD3d 115, 129, 808 N.Y.S.2d 447 [3d Dept 2006], *affd* 7 NY3d 510, 859 N.E.2d 459, 825 N.Y.S.2d 653 [2006], *cert denied* 552 U.S. 816, 128 S. Ct. 97, 169 L. Ed. 2d 22 [2007]). Conduct is considered inherently expressive when there is "'[a]n intent to convey a particularized message'" and there is a

> likelihood that the intended "'message [will] be understood by those who view[ ] it'" (*Texas v Johnson,* 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 [1989], quoting *Spence v Washington,* 418 U.S. 405, 410-411, 94 S. Ct. 2727, 41 L. Ed. 2d 842 [1974])."

The Court disagrees with plaintiffs' contention that "[o]bviously, the decision not to vaccinate is sufficiently expressive to trigger the protections of the First Amendment." To the contrary, the statutory requirement that children be vaccinated before attending schools or be home schooled is not "inherently expressive" and does not require parents to convey a "particularized message." Plaintiffs' reliance on *Clark v Community for Creative Non-Violence* (468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221, n 5 [1984]) is misplaced. There, the Supreme Court upheld a ban on overnight sleeping in a demonstration as a time, place and manner restriction; it assumed, but did not decide, that such conduct constituted expressive speech. The repeal of the religious exemption is not connected with the exercise of free speech rights at a demonstration and plaintiffs have articulated no other connection between the mandated conduct and expressive speech. Plaintiffs have therefore failed to state a cause of action for unconstitutional compelled speech.

Accordingly, it is

Ordered and Adjudged that defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), is granted; and it is

Ordered, Adjudged, and Declared that the Laws of 2019, ch 35, § 1, the legislative repeal of the religious exemption to compulsory vaccination, and Public Health Law § 2164, as amended, are not unconstitutional in violation of plaintiffs' rights under the Free Exercise Clause of the First Amendment of the United States Constitution, or the New York State Constitution; and it is

Ordered, Adjudged, and Declared that Public Health Law § 2164, as amended, is not unconstitutional in violation of plaintiffs' rights under the Equal Protection Clause of the United States Constitution; and it is

Ordered, Adjudged, and Declared that Public Health Law § 2164, as amended, is not unconstitutional in violation of plaintiffs' right to free speech, and freedom from compelled speech, under the First Amendment of the United States Constitution; and it is

Ordered and Adjudged that the complaint is otherwise dismissed.

The original decision and judgment is being transmitted to defendants' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and judgment does not constitute entry or filing under CPLR 2220 and 5016 and counsel is not relieved from the applicable provisions respecting filing and service.

Dated: December 3, 2019
Albany, New York

Appendix C

Hon. Denise A. Hartman
Acting Justice of the Supreme Court