No. 22-404

IN THE

Supreme Court of the United States

JANE GOE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILD, *et al.*,

Petitioners,

v.

HOWARD ZUCKER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the U.S. Court of Appeals for the Second Circuit properly hold that Petitioners' proposed amended complaint failed to state a claim for a violation of Petitioners' constitutional rights under the Fourteenth Amendment?

2. Did the U.S. Court of Appeals for the Second Circuit properly hold that Petitioners' proposed amended complaint failed to state a claim for a violation of Petitioners' rights under the Rehabilitation Act?

3. Did the U.S. Court of Appeals for the Second Circuit properly affirm the District Court's dismissal of Petitioners' complaint?

CORPORATE DISCLOSURE

Lansing Central School District has no parent corporation and no publicly held company owns 10% or more in corporate stock.

Coxsackie-Athens School District has no parent corporation and no publicly held company owns 10% or more in corporate stock.

Penfield Central School District has no parent corporation and no publicly held company owns 10% or more in corporate stock.

DIRECTLY RELATED CASES

Supreme Court of the United States, No. 20A135, *Doe, et al. v. Zucker, et al.*, application for injunctive relief denied by Justice Sotomayor on January 29, 2021, refiled application for injunctive relief denied by the Court on March 8, 2021.

U.S. Court of Appeals for the Second Circuit, No. 21-537, *Goe, et al. v. Zucker, et al.*, Judgment entered July 29, 2022.

U.S. Court of Appeals for the Second Circuit, No. 20-3915, *Doe, et al. v. Zucker, et al.*, Stipulation Withdrawing Appeal Pursuant to Local Rule 42.1 So Ordered on March 23, 2021.

U.S. District Court for the Northern District of New York, No. 1:20-cv-00840, *Doe, et al. v. Zucker, et al.*, Judgment entered February 17, 2021.

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INTRODUCTION

Respondents Lansing Central School District, Coxsackie-Athens School District, Penfield Central School District (collectively, the "School Districts"), and their respective administrators, Chris Pettograsso, Christine Rebera, Lorri Whiteman, Randall Squier, Freya Mercer, and Dr. Thomas Putnam i/s/h/a Dr. Thomas Putman (collectively the "Administrators" and, collectively with the School Districts, "Respondents")[1] respectfully submit this brief in opposition to the Petition for a Writ of Certiorari submitted by Petitioners Jane Doe, Jane Coe, Sr., John Coe, Sr., and Jane Goe, Sr. (collectively referred to as "Petitioners")[2]. Petitioners' characterization

1. Respondents' motion to dismiss also included defendants Shenendehowa Central School District, Dr. L. Oliver Robinson, Sean Gnat, and Andrew Hills (the "Shenendehowa Defendants"). *See* Motion to Dismiss, *Doe et al. v Zucker et al.*, 1:20-cv-840-BKS-CFH (N.D.N.Y. 2020), Sept. 24, 2020, ECF 78. On October 26, 2020, Petitioners filed a Notice of Voluntary Dismissal for all claims against the Shenendehowa Defendants. *See* Notice of Voluntary Dismissal, *Doe et al. v Zucker et al.*, 1:20-cv-840-BKS-CFH (N.D.N.Y. 2020), Oct. 26, 2020, ECF 99. Accordingly, on November 2, 2020, the Shenendehowa Defendants were dismissed as parties in the underlying District Court action, *see* Text Order (Sannes, J.), *Doe et al. v Zucker et al.*, 1:20-cv-840-BKS-CFH (N.D.N.Y. 2020), Nov. 2, 2020, ECF 104, and are therefore not addressed herein.

2. As no class has yet been certified, Respondents only address herein arguments and allegations directed specifically at them as asserted on behalf of John Doe, John Coe, Jane Coe, and Jane Goe, as well as the related findings of the lower courts. Further, to the extent that Childrens Health Defense ("CHD") brought claims against Respondents, CHD did not make any independent allegations against Respondents or allege how Respondents' actions specifically caused any purported injuries.

of the questions presented does not accurately capture the issues posed, argued, and decided in the proceedings below, to wit, whether Petitioners' proposed amended complaint stated a claim against Respondents under the Fourteenth Amendment and the Rehabilitation Act. The question before the courts below, and this Court now, is not whether a particular fundamental right exists, but whether Petitioners sufficiently alleged in their proposed amended complaint that their rights under the Fourteenth Amendment and the Rehabilitation Act were violated. Both the U.S. Court of Appeals for the Second Circuit (the "Second Circuit") and the United States District Court for the Northern District of New York (Sannes, J.) (the "District Court") properly determined Petitioners did not. Moreover, in their Petition for a Writ of Certiorari (the "Petition"), Petitioners seemingly misstate certain facts and misconstrue applicable law. Thus, for the reasons set forth below and the reasons set forth by the lower courts, the Petition should be denied.

STATEMENT OF THE CASE

Petitioners, a group of parents of minor children who submitted requests for medical exemptions from vaccinations required under New York State Public Health Law ("PHL") § 2164 on their children's behalf, filed a purported Class Action Complaint on July 23, 2020 (the "Complaint") arising out of separate but similar decisions by the Respondents to reject Petitioners' medical exemption requests. *See* Complaint, *Doe et al. v Zucker et al.*, 1:20-cv-840-BKS-CFH (N.D.N.Y. 2020), July 23, 2020, ECF 1.[3] Petitioners subsequently filed a motion for

3. ECF refers to numbered entries in the District Court's docket for the underlying case, *Doe et al. v Zucker et al.*, 1:20-cv-

a temporary restraining order and preliminary injunctive relief, both of which were ultimately denied by the District Court.[4] *See* Motion for Temporary Restraining Order, Motion for Preliminary Injunction, Aug. 25, 2020, ECF 41; Order to Show Cause (Sannes, J.), Aug. 27, 2020, ECF 46; *Doe v. Zucker,* 496 F. Supp. 3d 744 (N.D.N.Y. 2020), Pet. App. 151a-177a.

In lieu of an answer, Respondents filed a motion to dismiss the Complaint. *See* Motion to Dismiss, Sept. 24, 2020, ECF 78 ("Motion to Dismiss"). Subsequently, Petitioners sought to file an amended complaint. *See* Motion to Amend/Correct Complaint, Oct. 22, 2020, ECF 93. Petitioners subsequently filed a revised proposed amended complaint (the "Amended Complaint" or "AC").[5]

840-BKS-CFH (N.D.N.Y. 2020). Citations that include ECF will thus not include the full case citation.

4. Petitioners appealed the District Court's denial of Petitioners' motion for preliminary injunctive relief to the Second Circuit. *See Doe, et al. v. Zucker, et al.,* No. 20-3915, (2d Circ. 2020). Petitioners also filed a motion for emergency injunction pending appeal, which was denied by the Second Circuit. *See* Motion Order, *Doe, et al. v. Zucker, et al.,* No. 20-3915, (2d Circ. 2020), Jan. 5, 2021, Doc. 63. Petitioners subsequently filed an emergency application for writ of injunction with this Court on January 25, 2021. *See Doe, et al. v. Zucker, et al.,* Supreme Court of the United States, No. 20A135 (2020). This application was denied by Justice Sotomayor on January 29, 2021, and the refiled application for injunctive relief was referred to the Court by Justice Gorsuch and denied on March 8, 2021. *Id.*

5. The Petition cites to the originally proposed amended complaint (ECF 93-2). *See* Petition 6. However, the District Court's decision was based on the version of the Amended Complaint cited here (ECF 99-2). *See* Pet. App. 38a, n. 3.

See AC, Oct. 26, 2020, ECF 99-2. In deciding the Motion to Dismiss and Petitioners' motion to amend, the District Court applied the arguments made in the Motion to Dismiss to the Amended Complaint, which had been filed in the interim. *See* Pet. App. 40a.

The Amended Complaint, like the Complaint, contained six causes of action – four based on the Fourteenth Amendment and two based on the Rehabilitation Act – arising from Respondents' decisions to reject Petitioners' requests for medical exemptions from mandatory immunizations. In the Amended Complaint, Petitioners purport to challenge both the facial and as applied constitutionality of regulations promulgated by the New York State Department of Health ("NYSDOH") in 2019 (the "Regulations") regarding PHL § 2164. Petitioners also challenged the role that principals and other school district administrators are legally permitted – if not required – to play in the medical exemption request process under the Regulations.

A. New York State Public Health Law § 2164 and the Regulations

Pursuant to PHL § 2164, all children in New York between the ages of two months and eighteen years are required to have certain immunizations prior to attending any "public, private or parochial . . . elementary, intermediate or secondary school." *See* PHL §§ 2164(1)(a)-(b), 2164(7)(a). Under the statute, "[n]o principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate [of immunization] provided for in subdivision five of this

section or some other acceptable evidence of the child's [required] immunization[s] . . . ." PHL § 2164(7)(a). There is, however, a medical exemption in the statute, namely that "[i]f any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health." PHL § 2164(8).

In 2019, the NYSDOH enacted the Regulations, which define "may be detrimental to the child's health" as used in PHL § 2164(8) to mean "that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care." 10 NYCRR § 66-1.1(l). Further, the Regulations state that a "principal or person in charge of a school" is prohibited from admitting an unvaccinated child not in the process of being vaccinated unless they are provided with "[a] signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated." 10 NYCRR § 66-1.3(c). Medical exemptions "must be reissued annually" and "[t]he principal or person in charge of the school may require additional information supporting the exemption." *Id.*

B. Petitioner Jane Doe[6]

Petitioner Jane Doe is the mother of John Doe, a fifteen-year-old student within the Coxsackie-Athens School District. AC ¶ 50. John Doe's parents submitted a medical exemption on his behalf on August 23, 2019. *Id.* ¶ 97. Respondent Randall Squier,[7] Superintendent of Coxsackie-Athens Central School District, "denied the medical exemption based on the of [sic] Dr. Stephen G. Hassett ('Dr. Hassett'), an emergency medicine physician acting under his supervision who is a paid consultant" to the school district, on September 16, 2019. *Id.* ¶ 99. John Doe's parents subsequently submitted a second medical exemption on October 5, 2019, which was also denied by Respondent Squier "on the recommendation of Dr. Hassett." *Id.* ¶¶ 104-05. Petitioners concede that "the building principal, defendant Freya Mercer, exercised absolutely no oversight or input into the process." *Id.* ¶ 122.

As a result of the denial of his medical exemption requests, John Doe has been excluded from his school district since October 7, 2019. *Id.* ¶ 113. On or about November 5, 2019, John Doe's family "hired an attorney

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6. Though sections of the Statement of the Case include allegations made in the Amended Complaint, this is done in light of the applicable standard of review for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Respondents do not concede that the allegations in the Amended Complaint are true and reserve the right to dispute the accuracy of any factual allegation in the Amended Complaint if this case proceeds past this appeal.

7. Respondents presume that allegations regarding defendant "Squire," *see, e.g.,* AC ¶ 99, contain typographical errors and are intended to address Superintendent Squier. Thus, such allegations are included herein.

to file an appeal with the Commissioner of Education." *Id.* ¶ 116. The Commissioner of Education denied John Doe's appeal and upheld the decision of the school district. *See id.* ¶ 117.

C. Petitioners Jane Coe, Sr. and John Coe, Sr.

Petitioners Jane Coe, Sr. and John Coe, Sr. have two children, John Coe and Jane Coe, who are students in the Lansing Central School District. AC ¶ 157. They submitted a medical exemption request to the school district on their children's behalf in August of 2019. *Id.* ¶ 167. After reviewing the medical exemptions in consultation with medical staff as well as the New York State Department of Health, on January 21, 2020, Respondent Chris Pettograsso, Superintendent of the Lansing School District, informed the Coes that Respondents Christine Rebera and Lorri Whiteman, the school principals, denied both medical exemptions. *Id.* ¶¶ 171-72. John and Jane Coe have been excluded from their school district since January 29, 2020. *Id.* ¶ 182.

D. Petitioner Jane Goe, Sr.

Petitioner Jane Goe, Sr. is the mother of Jane Goe, a seventeen-year old in the Penfield Central School District. *See* AC ¶¶ 206-07. On or about August 18, 2019, Jane Goe's physician submitted a medical exemption on her behalf to the school district. *Id.* ¶ 213. Jane Goe's medical exemption was initially denied on September 11, 2019 "on the advice of the School District's consulting doctor, Dr. Robert J. Tuite," who was "acting under the supervision of defendant Thomas Putnam," the Superintendent of Penfield Central School District. *Id.* ¶ 216. Jane Goe

was temporarily removed from school; however, upon submitting additional information, her medical exemption request was granted and she returned to school less than two weeks later. *See id.* ¶¶ 221-224. Ultimately, Jane Goe attended classes through the end of her senior year of high school and was "set to graduate on July 30, 2020." *Id.* ¶ 228.

E. Decisions of the Lower Courts

On February 17, 2021, the District Court granted Respondents' Motion to Dismiss, denied Petitioners' motion to amend as futile, and ordered that the Complaint be dismissed.[8] Pet. App. 145a. Petitioners appealed the District Court's decision.[9] *See Doe, et al. v. Zucker, et al.*, No. 21-0537, (2d Circ. 2021). On July 29, 2022, the Second Circuit issued an opinion and order affirming the District Court's decision. *See* Pet. App. 1a-33a. In affirming the District Court's decision, the Second Circuit found "as a procedural matter, that the [District Court] properly applied the motion to dismiss standards" and "as a substantive matter, that neither the new regulations nor the enforcement thereof violated the Due Process Clause or the Rehabilitation Act." Pet. App. 6a.

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8. The Complaint was dismissed in its entirety after all defendants filed motions to dismiss and all were granted by the District Court.

9. As a result of this appeal, a stipulation was signed and filed withdrawing the appeal *Doe, et al. v. Zucker, et al.,* No. 20-3915, pursuant to Local Rule 42.1; this stipulation was So Ordered on March 23, 2021. *See* Order of USCA, March 23, 2021, ECF 143.

REASONS FOR DENYING CERTIORARI

I. THE FACTS SET FORTH IN THE PETITION REGARDING THE DENIAL OF MEDICAL EXEMPTION REQUESTS ARE NOT ALIGNED WITH THOSE IN THE AMENDED COMPLAINT

In the Petition, Petitioners claim that "[e]ach Petitioner submitted medical exemptions from one or more New York licensed physician certifying that their child is at risk of serious harm or death from a vaccine. They were arbitrarily denied." Petition 10. However, this is not what is alleged in the Amended Complaint regarding the exemption requests submitted on behalf of John Doe, John and Jane Coe, or Jane Goe.

A. Allegations Regarding John Doe

The Amended Complaint alleges that John Doe has a myriad of diagnoses, describes his alleged conditions, claims that "[a]voiding triggers, including certain foods, chemicals, and immunizations, has been critical to prevent regression of one or more of John's auto-immune diseases and in managing his disorders," and states that both of the doctors who submitted documents regarding a medical exemption for John Doe "concurred that it was unsafe for John to receive any immunization given his multiple chronic and serious conditions and the risk that immunization could trigger a regression." AC ¶¶ 92-95, 98. However, regarding the documentation actually submitted to John Doe's school district, the Amended Complaint states only that "John's parents submitted a medical exemption from John's pediatrician, Dr. Peter Forman ('Dr. Forman'), a licensed New York physician

who has been John's primary care physician for more than ten years" and that "Dr. Forman included a supplemental letter from Dr. Papanicolaou ('Dr. Papanicolaou'), John's treating physician at the Massachusetts clinic he has attended for eleven years." *Id.* ¶ 97. It is not alleged in the Amended Complaint whether Dr. Papanicolaou is licensed in New York. Similarly, nowhere in the Amended Complaint does it allege what information was contained in the medical exemption request. As to John Doe's second submitted request, the Amended Complaint states in a conclusory manner that "[o]n Saturday, October 5, 2019, the family submitted a second medical exemption letter in which Dr. Forman detailed for each vaccine how the child's conditions qualified under the ACIP guidance as a precaution or contraindication." *Id.* ¶ 104. However, no additional information is given about what specific information was included in the request, nor are any details given about the sufficiency of the requests pursuant to the requirements stated in the Regulations.

Moreover, there was nothing arbitrary about the denials of John Doe's requests. The Amended Complaint alleges that John Doe's medical exemption requests were denied "based on the [opinion] of . . . [Dr. Hassett] an emergency medicine physician acting under [Respondent Squier's] supervision who is a paid consultant to the Coxsackie-Athens Central School District" and who "recommended denying the exemption based on his opinion that the letters did not specify how the exemption request qualified under the ACIP contraindications or precautions." *Id.* ¶¶ 99-100. Moreover, the Amended Complaint alleges that "[a]fter the denial, Dr. Forman called Dr. Hassett. During this phone conversation, Dr. Hassett indicated that he had no discretion to hear any

supplemental information or support for the exemption and was obligated to follow the strict guidelines set forth by ACIP based only on the information he received on the form." *Id.* ¶ 103. This is not relevant; the pertinent question is the sufficiency of the submitted medical exemption request, the details of which the Amended Complaint does not allege.

Regarding the denial of John Doe's second medical exemption request, the Amended Complaint alleges that "[Respondent Squier] again denied the application, again on the recommendation of Dr. Hassett, who said the second certification was 'not supported.' He did not specify why he did not think the exemption was 'supported' even though it detailed how it complied with ACIP." *Id.* ¶ 105. The Amended Complaint then alleges that "[w]hen Jane Doe called regarding the second denial, Dr. Hassett conceded that the exemption letter submitted the second time followed the ACIP guidelines verbatim" but "said he would not 'debate' with Jane Doe or provide her with any explanation about his denial and ended the call." *Id.* ¶¶ 106-107. However, other allegations in the Amended Complaint essentially concede that the school district's decision was not arbitrary: "[w]ithin a week after the original of this complaint was filed, the Commissioner of Education issued a decision denying John relief . . . . The Commissioner limited the review to whether the decision to deny John was 'arbitrary and capricious' and violated the regulations." *Id.* ¶ 117. The Amended Complaint's description of the Commissioner of Education's ruling, *see id.* ¶¶ 118-121, further supports that Respondents' decision was not arbitrary.

B. Allegations Regarding John and Jane Coe

The allegations about John and Jane Coe in the Amended Complaint also do not specifically speak to what was included in their medical exemption requests. The Amended Complaint states only that "the parents submitted applications for medical exemptions explaining the family history and the children's medical history signed by a Dr. Christopher Scianna, who is licensed to practice in New York" and that "[t]he exemption application also attached a letter from the genetic counselor." AC ¶¶ 167, 169. Although the Amended Complaint alleges that "Dr. Scianna concluded that it was unsafe for either child to be vaccinated due to their current states of vulnerable health and their genetic analysis and family history of significant adverse vaccine reactions, including two deaths," *id.* ¶ 168, it is unclear from the Amended Complaint whether that was included in the medical exemption request.

Also, despite Petitioners' claims to the contrary, the denial of the Coes' requests was not arbitrary. The Amended Complaint alleges that the exemption requests were rejected by the school principals and that "the school had received a recommendation from the NYSDOH and by unspecified members of a 'medical team' locally," but "the building principals each ultimately made the decision to reject the medical exemptions 'independently.'" *Id.* ¶¶ 171-172. Moreover, the Amended Complaint alleges that "[a]ttached to the letter from the school was a letter dated December 5, 2019 written by Defendant Elizabeth Rausch-Phung, M.D., M.P.H., the Director of the Bureau of Immunizations at the New York State Department of Health" that "stated that the adverse reactions of family members (including death) are not contraindications for

immunization under ACIP and concluded that she didn't have enough information or knowledge to understand if the genetic vulnerabilities were a ground for contraindication." *Id.* ¶¶ 174-75. Claiming the decision was arbitrary is disingenuous.

In addition to the broad statements noted above, the Petition also states the following regarding the Coe family:

> [t]he Coe family has lost *two* young children to documented adverse vaccine death, and most members of the father's line have had severe vaccine reactions. The Coe children share a rare genetic mutation and vulnerabilities with their deceased family members and have never been vaccinated on the advice of multiple physicians. *Id.* at 52. The DOH recommended their principals deny them accommodation on the ground that the death of a sibling is not listed in ACIP as a contraindication.

Petition 10. However, these statements are misleading in light of the actual allegations in the Amended Complaint. According to the Amended Complaint, the "young children" that passed away due to "documented adverse vaccine death" were John Coe, Sr.'s brother and John Coe, Sr.'s cousin. AC ¶¶ 158-159. Accordingly, these family members were not siblings of John and Jane Coe, but rather their uncle and first cousin once removed. The statement that "[t]he Coe children share a rare genetic mutation and vulnerabilities with their deceased family members and have never been vaccinated on the advice of multiple physicians," Petition 10, is similarly misleading. The allegations in the Amended Complaint are:

> 162. Upon the advice of medical professionals and considering the family history, John and Jane have never been vaccinated and have had exemptions since they were born.
>
> 163. Both children have multiple food, environmental and drug allergies, and precarious health.
>
> 164. The family sees a genetic counselor who has identified several genetic mutations and markers that could explain the significant family pattern of adverse reactions and the children's predisposition towards health issues.
>
> 165. In addition to a family history of vaccine injury and death, there is a family history of numerous autoimmune and other conditions consistent with the genetic profile of the children.

AC ¶¶ 162-165. These allegations make no mention of whether this alleged condition is rare and does not allege that the children have the "genetic mutations and markers that could explain the significant family pattern of adverse reactions," as is stated in the Petition.

Finally, the Petition states that "[t]he DOH recommended their principals deny them accommodation on the ground that the death of a sibling is not listed in ACIP as a contraindication," Petition 10. This is a misstatement of the allegations in the Amended Complaint, which are as follows:

> 174. Attached to the letter from the school was a letter dated December 5, 2019 written by Defendant Elizabeth Rausch-Phung, M.D., M.P.H., the Director of the Bureau of Immunizations at the New York State Department of Health.
>
> 175. Dr. Rausch-Phung stated that the adverse reactions of family members (including death) are not contraindications for immunization under ACIP and concluded that she didn't have enough information or knowledge to understand if the genetic vulnerabilities were a ground for contraindication. 'There is not sufficient information included regarding the genetic testing performed to conclude that vaccines required for school attendance would be contraindicated in a child with variations in the reported SNPs. The specific source of the genetic tests, the results of these tests, and review and recommendations of this child's genetic findings by a medical genetics specialist would be needed to determine if these results preclude this student from being vaccinated.'

AC ¶¶ 174-175. Nowhere is there a statement about "the death of a sibling," nor would one have made sense given that the Amended Complaint does not allege that John and Jane Coe ever lost a sibling due to an adverse reaction to a vaccine.

C. Allegations Regarding Jane Goe

Similar to the other Petitioners, the allegations in the Amended Complaint about Jane Goe do not support that

Jane Goe, Sr. "submitted medical exemptions from one or more New York licensed physician certifying that their child is at risk of serious harm or death from a vaccine" that were "arbitrarily denied." Petition 10. The Amended Complaint describes Jane Goe's diagnoses, family history, and treatment, *see* AC ¶¶ 206, 209-212, but regarding the content of the medical exemption, only says that "Dr. Grover submitted a duly certified medical exemption from immunization, noting that Jane was suffering from a flare up of her acute autoimmune conditions and could not safely be immunized for at least one year or until her autoimmune conditions were under control," *id.* ¶ 213. The Petition's statements overstate the Amended Complaint's allegations.

The initial denial of Jane Goe's medical exemption requests was not arbitrary. Jane Goe's request was initially denied "on the advice of the School District's consulting doctor, Dr. Robert J. Tuite ('Dr. Tuite')," which was "that Jane would have had to have suffered Gullian-Barre Syndrome (which causes paralysis) within six weeks of getting a vaccine and that 'it is up to the parents and/or physician to contact pediatric infectious disease/immunology or the DOH department of immunizations to get the specialist's input' for the exemption to be considered." *Id.* ¶¶ 216-217. Jane Goe submitted a second medical exemption request that was also initially rejected based on the advice of Dr. Tuite. *Id.* ¶ 219. Jane Goe subsequently submitted a letter from another doctor which resulted in Jane Goe being granted a medical exemption for the remainder of the fall semester. *Id.* ¶¶ 223-224. Jane Goe submitted a follow-up medical exemption request in January 2020 and "has not heard back, either with an acceptance or denial." *Id.* ¶¶ 226, 228. As a result, Jane

attended school for the remainder of the year and "is set to graduate on July 30, 2020." *Id.* ¶ 228. Thus, her medical exemption request was ultimately not denied at all, let alone in an arbitrary manner.

II. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

As stated by the Rules of the Supreme Court of the United States, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 of the Supreme Court of the United States ("Rule 10"). Rule 10 outlines the "character of the reasons the Court considers" when granting a petition for a writ of certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question

> of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id.

A. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISIONS OR DECISIONS OF OTHER CIRCUITS

The Second Circuit's decision is in line with both this Court's precedent and the decisions of other circuits. In *Jacobson v. Commonwealth of Massachusetts,* this Court rejected a challenge to a statute requiring vaccination, finding that that state had authority to enact such a statute pursuant to its police power. *See* 197 U.S. 11, 12-13, 24-26, 39 (1905). This holding was reiterated in *Zucht v. King*, where this Court rejected, *inter alia*, a due process challenge to an ordinance that stated that "no child or other person shall attend a public school or other place of education without having first presented a certificate of vaccination." 260 U.S. 174, 175-77 (1922). In the present matter, the Second Circuit explicitly relied on *Jacobson* in its decision, stating that "in *Jacobson v. Massachusetts*, the Supreme Court explained that medical exemptions from mandatory immunization laws may be limited to cases in which it is 'apparent or can be *shown with reasonable certainty*' that the vaccine would be harmful." Pet. App. 21a (citing 197 U.S. 11, 39, (1905) (emphasis added)). Moreover, the Second Circuit relied on this Court's precedent that "there is no fundamental right to an education" when determining that strict scrutiny is

not required here. Pet. App. 21a (citations omitted). Thus, the Second Circuit's decision does not conflict with this Court's decisions.

Similarly, the Second Circuit's decision is in line with other circuits. Petitioners claim that the Second Circuit "[cited] a case from the Eastern District of Arkansas to hold that *Jacobson* allows deviation from recognizing fundamental parental rights in cases of immunization, Pet. App. 22a." Petition 26. This is inaccurate. While the Second Circuit did cite to a case from the Eastern District of Arkansas, it did so in support of the proposition that "courts have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny"; further, the Second Circuit also cited to cases from the Eighth Circuit and the Fourth Circuit in support of that same proposition. *See* Pet. App. 22a. Moreover, the Second Circuit has previously recognized that "no court appears ever to have held" that *Jacobson* mandates strict scrutiny. *See Phillips v. City of New York*, 775 F.3d 538, 543 n. 5 (2d Cir. 2015). Thus, the Second Circuit's rejection of Petitioners' substantive due process and strict scrutiny arguments does not conflict with other circuits either.

B. THE FACTS OF THIS CASE DO NOT PRESENT AN IMPORTANT FEDERAL QUESTION UNANSWERED BY THIS COURT

Curiously, Petitioners list their Questions Presented as follows:

> 1. Whether families have a fundamental right to a medical exemption in cases where their

> child's state licensed physician determines that the child is at risk of serious harm from a state-mandated vaccine.
>
> 2. Whether the unconstitutional conditions doctrine prohibits states from conditioning access to school and services on a family's waiver of the right to protect their child from serious harm in accordance with medical advice.
>
> 3. Whether *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) permits courts to avoid strictly scrutinizing infringements on well-defined fundamental rights if the case involves public health.

Petition *i*. However, despite Petitioners' attempt to depict it otherwise, the Second Circuit's decision was a ruling on a motion to dismiss a complaint and not an important federal question unanswered by this Court. *See* Pet. App. 1a-33a. Thus, the question before the Second Circuit was whether the Petitioners sufficiently stated a claim for the six causes of action in the Amended Complaint: (i) violations of substantive due process rights; (ii) violation of 14th Amendment by burdening liberty interest in parenting; (iii) violation of 14th Amendment by burdening liberty interest in informed consent; (iv) violation of 14th Amendment by unconstitutionally burdening minors' right to pursue an education at any public or private school in New York; and (v) two claims regarding violations of Rehabilitation Act of 1973. *See* AC ¶¶ 78-85.

Moreover, the federal questions involved with Petitioners' constitutional claims[10] have already been answered by this Court in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) and *Zucht v. King,* 260 U.S. 174 (1922). These cases formed the basis for the Second Circuit's previous rejection of a substantive due process challenge to New York's "requirement that all children be vaccinated in order to attend public school." *See Phillips v. City of New York,* 775 F.3d 538, 540, 542-43 (2d Cir. 2015) (citations omitted). In *Phillips,* the Second Circuit held that:

> Plaintiffs argue that New York's mandatory vaccination requirement violates substantive due process. This argument is foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) . . . . Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors. *See id.* at 37–38, 25 S.Ct. 358. Plaintiffs' substantive due process challenge to the mandatory vaccination regime is therefore no more compelling than Jacobson's was more than a century ago. *See Caviezel v. Great Neck Pub. Schs.,* 500 Fed.Appx. 16, 19 (2d Cir.2012) (summary order) (rejecting

10. Based on the Petition and Petitioners' Questions Presented, it does not appear that Petitioners challenge the Second Circuit's decision regarding the Rehabilitation Act of 1973 claims. Thus, those claims are not addressed further herein.

> substantive due process challenge to vaccination mandate based on *Jacobson*).

Id. (internal footnote omitted). The Second Circuit also stated in that decision the following:

> Plaintiffs argue that *Jacobson* requires that strict scrutiny be applied to immunization mandates. Even assuming that *Jacobson* does demand this level of scrutiny, which no court appears ever to have held, *Jacobson* addressed a law mandating that all persons over age twenty-one be vaccinated for small pox and the *criminal prosecution* of the plaintiff for refusing to submit to vaccination. 197 U.S. at 12, 25 S.Ct. 358. Here, New York's mandate requires only that children who are not otherwise exempted be vaccinated in order to attend school. Because 'there is no substantive due process right to public education,' *Bryant v. N.Y.S. Educ. Dep't,* 692 F.3d 202, 217 (2d Cir. 2012), plaintiffs' substantive due process claim fails even under their reading of *Jacobson.*

Id. at 543 n. 5. This Court denied the petition for writ of certiorari filed regarding the Second Circuit's *Phillips* decision. *See Phillips v. City of New York, N.Y.*, 577 U.S. 822 (2015). Petitioners essentially ask this Court to opine on the same questions it declined to consider in *Phillips*. Thus, the Court should deny the Petition.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari in its entirety and award such other relief as the Court deems appropriate.

Respectfully submitted,

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