No. _____

In the Supreme Court of the United States

JOSEPH MILLER; EZRA WENGERD; JONAS SMUCKER; DYGERT ROAD SCHOOL; PLEASANT VIEW SCHOOL; SHADY LANE SCHOOL,

Petitioners,

v.

JAMES V. MCDONALD, in his official capacity as Commissioner of Health of the State of New York; BETTY A. ROSA, in her official capacity as Commissioner of Education of the State of New York,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For more than 50 years, New York permitted both medical and religious exemptions to its school vaccine requirement. But in 2019, the New York Legislature categorically eliminated religious exemptions. Sponsors of that law denigrated "fake" and "garbage" religious beliefs that they deemed "selfish and misguided." But they kept in place a regime of medical exemptions. And they continued to permit nonvaccination of nonstudents (such as teachers) and children outside of school. Today in New York, if a vaccine would harm your lungs, you may be exempted; but if it would harm you soul, you may not.

This makes New York an outlier. Forty-six other States (and the District of Columbia) allow religious exemptions to their school vaccine requirements.

In this case, New York has imposed existential penalties on three Old Order Amish schools for failing to require vaccines that violate their sincerely held religious beliefs. These private schools are in rural Amish communities on private Amish land and are attended only by Amish children. The Second Circuit invoked *Employment Division v. Smith*, 494 U.S. 872 (1990), to find that New York's law did not violate the Free Exercise Clause as applied to the Amish.

The questions presented are:

1. Whether a law that categorically disallows religious exemptions but permits secular exemptions and other comparable secular activity violates the Free Exercise Clause as applied to these Amish parents and schools.

2. Whether *Smith* should be reconsidered.

PARTIES TO THE PROCEEDING

Petitioner Joseph Miller was appellant in the Second Circuit and plaintiff in the district court.

Petitioner Ezra Wengerd was appellant in the Second Circuit and plaintiff in the district court.

Petitioner Jonas Smucker was appellant in the Second Circuit and plaintiff in the district court.

Petitioner Dygert Road School was appellant in the Second Circuit and plaintiff in the district court.

Petitioner Pleasant View School was appellant in the Second Circuit and plaintiff in the district court.

Petitioner Shady Lane School was appellant in the Second Circuit and plaintiff in the district court.

Respondent James V. McDonald, in his official capacity as Commissioner of Health of the State of New York, was appellee in the Second Circuit and defendant in the district court.

Respondent Betty A. Rosa, in her official capacity as Commissioner of Education of the State of New York, was not a party in the Second Circuit but was defendant in the district court.

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Miller v. McDonald, No. 24-681, United States Court of Appeals for the Second Circuit. Judgment of the district court affirmed on March 3, 2025.

Miller v. McDonald, No. 1:23-CV-00484 EAW, United States District Court for the Western District of New York. Case dismissed on March 11, 2024.

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INTRODUCTION

For more than 50 years, from 1966 to 2019, New York permitted both medical and religious exemptions to its school vaccine requirement, codified at N.Y. Public Health Law § 2164 ("PHL 2164"). But in 2019, New York categorically eliminated its religious exemption. Sponsors of that law in the Legislature denigrated "fake" and "garbage" religious beliefs that they deemed "selfish and misguided." At the same time, New York left PHL 2164's medical exemption untouched. And it continued to permit nonvaccination of nonstudents (such as teachers), children outside of school, and tens of thousands of noncompliant students. New York now stands as an "extreme outlier," *M.A. ex rel. H.R. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 41 (2d Cir. 2022) (Park, J., concurring), as 46 States (and the District of Columbia) continue to offer religious exemptions to their school vaccine requirements.

This case involves New York's effort to use the newly amended PHL 2164 to prohibit the Amish from practicing their religion in the State. The Amish share "a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). Their way of life has "not altered in fundamentals for centuries." *Id.* at 217. It requires them to reject many of the comforts and conveniences of contemporary society. And, as relevant here, it encompasses a sincere and abiding objection to vaccination.

New York in this case imposed ruinous penalties under PHL 2164 on Amish parents and three private Amish schools for declining to violate their faith by requiring their students to be vaccinated. These private schools are in small Amish communities on private Amish land and are attended only by Amish children. Contrary to the Amish principles of peace and harmony, they were left with no choice but to seek to enjoin New York's enforcement efforts in defense of their constitutional right to free exercise. But the Second Circuit relied on *Employment Division v. Smith*, 494 U.S. 872 (1990), to hold that PHL 2164 did not violate the Free Exercise Clause as applied to the Amish. That decision effectively permits the State of New York to outlaw the practice of the Amish faith within its borders.

The Second Circuit's decision implicates an acknowledged "split [that] is widespread, entrenched, and worth addressing." *Dr. A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari). Like the Second Circuit, the Third and Ninth Circuits have held that laws barring religious exemptions but permitting secular exemptions are subject to rational basis review under *Smith*. But the First, Sixth, and Eleventh Circuits, as well as the Supreme Court of Iowa, have recognized that such laws can fall outside *Smith*. That acknowledged split is ripe for this Court's resolution, as it has shown no signs of resolving itself.

The Second Circuit is on the wrong side of that split. In *Smith*, this Court held that certain "neutral" and "generally applicable" laws are subject only to

rational basis review—even if they burden free exercise. 494 U.S. at 881, 885. But this Court in recent years has gone to great pains to clarify the limits of *Smith*. And those limits should have led the Second Circuit to the opposite result in this case.

Smith does not apply, for instance, to a law that "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). PHL 2164 does just that, as it continues to allow nonvaccination for medical reasons, as well as nonvaccination of nonstudents (such as teachers) and children in settings outside of school. *Smith* also does not apply to a law that provides "a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (citation omitted). PHL 2164's medical exemption is precisely such a mechanism. Finally, *Smith* does not apply if the religious "burden imposed is of the same character as that imposed in *Yoder*." *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025). That, too, is true here, as PHL 2164 "pose[s] 'a very real threat of undermining' the religious beliefs and practices that [Amish] parents wish to instill in their children." *Id.* (quoting *Yoder*, 406 U.S. at 218).

Moreover, New York's status as an extreme outlier confirms that this case does not implicate the concerns *Smith* sought to mitigate. This Court in *Smith* emphasized that it would "court[] anarchy" to allow religious exemptions to the controlled substances law at issue there. 494 U.S. at 888. But here, the experience of 46 States (and the District of Columbia) shows that school vaccine requirements are

eminently amenable to religious exemptions. New York itself recognized as much for more than 50 years. Unlike in *Smith*, religious exemptions to school vaccine requirements have not courted, and would not court, anarchy.

If *Smith* allows the result the Second Circuit reached in this case, then *Smith* should be reconsidered. Five current Justices of the Court recently agreed that *Smith* should be reconsidered given the opportunity. *See Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 553 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment). This case presents that opportunity.

The petition for a writ of certiorari should be granted, and the Second Circuit should be reversed.

OPINIONS BELOW

The Second Circuit's opinion (App.1a-24a) is reported at 130 F.4th 258. The district court's opinion (App.25a-64a) is reported at 720 F. Supp. 3d 198.

JURISDICTION

The Second Circuit entered judgment on March 3, 2025. App.1a. On April 17, 2025, Justice Sotomayor granted an extension of the time to file a petition for a writ of certiorari until July 31, 2025. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …."

PHL 2164 is reprinted in the appendix to this petition. App.93a-106a.

STATEMENT

A. Factual Background

1. Petitioners belong to small Amish communities that live apart from society and shun the trappings of modernity.

Petitioners are three Amish individuals and three Amish schools that belong to small Old Order Amish communities in rural New York. *See* A-32 n.4.[1] Mr. Miller and Mr. Smucker are fathers of Amish children who attend Amish schools. App.2a-3a. Mr. Wengerd is a representative of Amish families and schools in their dealings with the government. App.2a. The three school Petitioners are private Amish community schools that are funded solely by the Amish, located on Amish land within Amish communities, and attended exclusively by Amish children. App.2a; *see* A-77.

The Amish "are religiously committed to living separately from the modern world." *Mast v. Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring in decision to grant, vacate, and remand);

[1] Citations to "A-" are to the appendix in the Second Circuit.

see Yoder, 406 U.S. at 210 ("Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence."). The Amish way of life has "not altered in fundamentals for centuries." *Yoder*, 406 U.S. at 217. It has "remained constant" despite "unparalleled progress in human knowledge generally." *Id*. at 216.

The "Old Order Amish religion pervades and determines virtually their entire way of life." *Id.* "They grow their own food, tend their farms using pre-industrial equipment, and make their own clothes." *Mast*, 141 S. Ct. at 2430 (Gorsuch, J., concurring in decision to grant, vacate, and remand). They have "reject[ed] … telephones, automobiles, radios, and television." *Yoder*, 406 U.S. at 217. The Amish "have established their own elementary schools in many respects like the small local schools of the past." *Id.* at 212. And at those schools, they "educat[e] their children in the Amish way, with Amish teachers, … on Amish owned property." A-11.[2]

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[2] Homeschooling is not an option for the Amish. The Amish believe that "[c]hildren learn important spiritual lessons about interacting with authority figures and their peers while at school, while they also receive practical and spiritual guidance they could not if isolated at home." A-693. Furthermore, "because the Amish lifestyle demands types of work by both parents … , it is not realistic for Amish families in New York to homeschool their children." A-693.

2. The Amish share a sincere religious objection to vaccination.

Inherent in the Amish "traditional way of life," *Yoder*, 406 U.S. at 216, is an undisputedly sincere and abiding religious objection to vaccination. Mr. Miller explained that objection through written testimony to the State in this case.

> Our forefathers came to America for freedom of religion in concerns of living a God fearing life + bringing up our children in a way, to hope through salvation, an everlasting life in eternity. To do this we need to put our full trust in the Almighty God. Proverbs 3:5[.] Then in verse 6 we have the sure promise that He will direct our paths. Also in Mark 8:35 for whosoever seeketh to save his life shall lose it. But whosoever loses his life for my sake and the gospel's, the same shall save it. Yes our Almighty God wants us to fully put our faith + trust in Him. Which is in conflict to put our trust in vaccines. We are also commanded to not be conformed to this world. Romans 12:1-2. If we honestly obey this, then it will affect everything we do, yes even in the way we try to remain healthy. Forcing us to violate our religious beliefs will create a conflict which has no solution[.] A large percentage of the Amish + Mennonite famil[ies] will choose other consequences before going against our religious convictions.
>
> Also since some of the vaccines are based on fetal or aborted cell lines, we believe it would

> be an abomination to our Creator to inject such into our bodies.

A-76 to 77 (formatting altered).

This objection to vaccination is deeply held. In Mr. Wengerd's words, the Amish "will choose prison time or a martyr's death before going against their convictions." A-39.[3]

B. Regulatory Background

1. Virtually all States grant medical and religious exemptions to their school vaccine requirements.

All States require that children receive certain vaccines in order to attend school. Every State offers a medical exemption to its school vaccine requirement. And virtually every State also offers a religious exemption.

Religious exemptions have long been the norm when it comes to school vaccine requirements. Forty-six States (plus the District of Columbia) currently offer religious exemptions to their school vaccine requirements.[4]

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[3] *See, e.g.*, Carmen Blackwell, *Ashland County Amish Community Members Appear in Court to Answer for Buggy Violations*, WKYC (Apr. 14, 2023), https://perma.cc/LA5K-3AX4; Ben Forer, *Eight Amish Men Jailed over Orange Safety Triangles*, ABC News (Sept. 15, 2011), https://perma.cc/C442-NZ33; *Amish Farmer Gets Jail in Outhouse Dispute*, NBC News (Mar. 17, 2009), https://tinyurl.com/3by2z5d2.

[4] *See* Ala. Code § 16-30-3(1); Alaska Admin. Code tit. 7, § 57.550(c)(2); Ariz. Rev. Stat. Ann. §§ 15-872(G), -873(A)(1); Ark.

Only four States do not. And for all of them, that is a relatively recent development. California eliminated its religious exemption in 2015. *See* Cal. Health & Safety Code § 120325 *et seq*. New York and Maine did the same in 2019. *See* Me. Stat. tit. 20-A, § 6355; N.Y. Pub. Health Law § 2164. And Connecticut eliminated its religious exemption in 2021. *See* Conn. Gen. Stat. § 10-204a.

Code Ann. § 6-18-702(d)(4)(A); Colo. Rev. Stat. §§ 25-4-902, -903(2.3)(b)(V); Del. Code Ann. tit. 14, § 131(a)(6); D.C. Code §§ 38-501, -506(1); Fla. Stat. § 1003.22(1); Ga. Code Ann. § 20-2-771(e); Haw. Rev. Stat. §§ 302A-1154, -1156(2); Idaho Code § 39-4801(6); 105 Ill. Comp. Stat. § 5/27-8.1(8); Ind. Code § 21-40-5-6; Iowa Code § 139A.8(4)(a)(2); Kan. Stat. Ann. § 72-6262(b)(2); Ky. Rev. Stat. Ann. §§ 214.034(1), .036(1)(b); La. Stat. Ann. §§ 17:170(E)(1), 40:31.16(D); Md. Code Ann., Educ. § 7-403(b)(1); Mass. Gen. Laws ch. 76, § 15; Mich. Comp. Laws §§ 333.9208, .9215(2); Minn. Stat. § 121A.15(3)(d); Mo. Rev. Stat. §§ 167.181(3), 210.003; Mont. Code Ann. §§ 20-5-403, -405(1)(a); Neb. Rev. Stat. §§ 79-217, -221(2); Nev. Rev. Stat. §§ 392.435, .437; N.H. Rev. Stat. Ann. §§ 141-C:20-a, -c; N.J. Stat. Ann. § 26:1A-9.1; N.M. Stat. Ann. §§ 24-5-1, -3(A); N.C. Gen. Stat. §§ 130A-155, -157; N.D. Cent. Code § 23-07-17.1(3); Ohio Rev. Code Ann. § 3313.671(B)(4); Okla. Stat. tit. 70, §§ 1210.191, .192; Or. Rev. Stat. § 433.267(1)(c)(A); 28 Pa. Code §§ 23.83, .84; 16 R.I. Gen. Laws § 16-38-2(a); S.C. Code Ann. § 44-29-180(D); S.D. Codified Laws § 13-28-7.1; Tenn. Code Ann. § 49-6-5001(b)(2); Tex. Educ. Code Ann. § 38.001(c)(1)(B); Utah Code Ann. § 53G-9-303(3); Vt. Stat. Ann. tit. 18, §§ 1121, 1122(a)(3)(A); Va. Code Ann. §§ 22.1-271.2(C), 32.1-46(D)(1); Wash. Rev. Code §§ 28A.210.080, .090(1)(c); Wis. Stat. § 252.04(3); Wyo. Stat. Ann. § 21-4-309(a). Mississippi offers religious exemptions pursuant to a federal-court injunction. *See Bosarge v. Edney*, 669 F. Supp. 3d 598, 625 (S.D. Miss. 2023). And West Virginia offers religious exemptions pursuant to an executive order from its Governor. *See* W. Va. Exec. Order No. 7-25 (Jan. 14, 2025).

2. From 1966 to 2019, New York granted medical and religious exemptions to its school vaccine requirement.

This case involves New York's elimination of its longstanding religious exemption to PHL 2164.

a. New York's school vaccine requirement is codified at PHL 2164. PHL 2164 requires children who attend schools to be vaccinated for "poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B." N.Y. Pub. Health Law § 2164(2)(a). Generally speaking, no school "shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days" without proof of the required vaccinations. *Id.* § 2164(7)(a). This requirement applies broadly to "any public, private or parochial" school. *Id.* § 2164(1)(a). But it does not apply to teachers, aides, administrators, bus drivers, or any adults who work in or with schools.

Each violation of PHL 2164 can trigger a civil penalty of up to $2,000. *See id.* §§ 12(1), 206(4)(c). The State has taken the position that each day each student attends school without the required vaccinations is a separate violation. App.5a n.9.

b. For more than 50 years, from 1966 until 2019, New York offered two exemptions to PHL 2164. *First*, it provided a medical exemption. Pursuant to that exemption, a child need not be vaccinated if "any physician licensed to practice medicine in this state

certifies that such immunization may be detrimental to a child's health." N.Y. Pub. Health Law § 2164(8) (2018). *Second,* New York provided a religious exemption. Pursuant to that exemption, a child did not need to be vaccinated if the child's "parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to" vaccination. *Id.* § 2164(9).

3. In 2019, driven by hostility to "fake" and "garbage" religious beliefs, New York categorically abolished religious exemptions to its school vaccine requirement.

In 2019, New York reversed its 50-year tradition of religious accommodation. Rather than focus on bringing noncompliant students into compliance with PHL 2164, which could have increased the number of vaccinated students by tens of thousands, New York instead chose to scapegoat religious practice by eliminating PHL 2164's religious exemption. *See* 2019 N.Y. Laws ch. 35, §§ 1, 2. It left, however, the medical exemption intact. Today, New York continues to offer medical exemptions to PHL 2164. But it refuses to offer any religious exemption.

a. The bill repealing the religious exemption was introduced in the New York Legislature on the heels of a measles outbreak that was largely concentrated in the New York City area.[5] None of the

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[5] *Cf.* Sarah Maslin Nir & Michael Gold, *An Outbreak Spreads Fear: Of Measles, of Ultra-Orthodox Jews, of Anti-Semitism*, N.Y. Times (Mar. 29, 2019), https://perma.cc/9P59-C73Z (As a result

measles cases in that outbreak occurred in the Amish communities at issue in this case. A-41.

At the time of the repeal, lawmakers questioned whether there was any evidence that religious exemptions—as opposed to medical exemptions, noncompliance, or non-students who are not subject to the school vaccine requirement—were responsible for the outbreak.[6] But the bill's sponsors could not be deterred from their attack on religious exercise and exemptions. Several of the bill's sponsors spoke candidly of their disdain for and distrust of religious exemptions.

- Senator James Skoufis, a sponsor of the bill in the Senate, decried religious opposition to vaccines as a sham: "The matter of fact is the religious exemption in New York State is made up. It's fake. Because there is no religion that objects to vaccines. Not Islam, not Catholicism, not Judaism."[7]

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of the outbreak, "some residents say they now wipe public bus seats and cross the street when they see ultra-Orthodox Jews. Hasidic leaders said they feared not only a rise in anti-Semitism but an invasion of their cloistered community by the authorities under the guise of public health.").

[6] *See, e.g.*, Transcript of Assembly Proceedings ("Assembly Tr.") at 91 (June 13, 2019), https://perma.cc/HX39-CNKK ("There has not been one instance that has been pointed out to us that anyone with a religious exemption had measles during the last outbreak.").

[7] Transcript of Senate Proceedings at 5443 (June 13, 2019), https://perma.cc/J4FA-PDC7.

- Senator David Carlucci, another sponsor of the bill in the Senate, vilified those who had invoked the religious exemption: "[A] group of people has decided their ideological beliefs are more important than public health. Putting people in harm[']s way who are now receiving life-saving treatment is selfish and misguided."[8]
- Assemblyman Jeffrey Dinowitz, the primary sponsor of the bill in the Assembly, expressed a similar sentiment: "There's nothing, nothing in the Jewish religion, the Christian religion, in the Muslim religion … that suggests that you can't get vaccinated …. It is just utter garbage."[9] And he likened those who invoke the religious exemption to those who "tried [Galileo] as a heretic."[10]

The bill repealing the religious exemption ultimately passed both houses of the Legislature. It was immediately signed into law by then-Governor

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[8] Brad Hoylman-Sigal, N.Y. State Senate, *As New York Faces Worst Measles Outbreak in Decades, Hoylman, Dinowitz, Carlucci, Childhood Cancer Survivors, and Transplant Recipients Urge End to Non-Medical Exemptions for Vaccination* (May 28, 2019), https://perma.cc/RBH7-JT9L.

[9] *Assembly Update* at 3:11 (Mar. 19, 2019), https://tinyurl.com/yvkebum2; *see* Assembly Tr. at 68 ("I'm not aware of anything in the Tora[h], the Bible, the Koran or anything else that would suggest that you should not get vaccinated.").

[10] Assembly Tr. at 102.

Andrew Cuomo, and its repeal of the religious exemption took effect on June 13, 2019.

b. Although it repealed the religious exemption to PHL 2164, the Legislature preserved the medical exemption. That exemption permits students to forgo vaccination where a "physician … certifies … [it] may be detrimental to [their] health." N.Y. Pub. Health Law § 2164(8).

The process of obtaining a medical exemption begins with a determination and certification by a doctor "that a child has a medical contraindication or precaution to a specific immunization consistent with [Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care." 10 N.Y. Comp. Codes R. & Regs. § 66-1.1(l). This certification is then presented to the relevant school official, who has discretion to "require additional information supporting the exemption," *id.* § 66-1.3(c), and to decide whether to "grant a medical exemption from the State's school immunization requirements," *Goe v. Zucker*, 43 F.4th 19, 33 (2d Cir. 2022).

c. Tens of thousands of students in New York are noncompliant with PHL 2164. According to the State, that number may be as high as 97,900. A-574, 644. Those students have not obtained any exemption to PHL 2164, yet they remain unvaccinated.

C. Procedural Background

1. In 2022, New York enforced PHL 2164 against Petitioners.

Three years after the elimination of the religious exemption, New York's Commissioner of Health charged Petitioner schools with violating PHL 2164 by allowing students to attend without proof of vaccination. App.5a. The charges notified the schools that civil penalties of up to $2,000 per violation could be imposed. App.33a. This meant a possible $52,000 penalty for the Dygert Road School (based on 26 noncompliant students for one day), a possible $46,000 penalty for the Twin Mountains School (based on 23 noncompliant students for one day), and a possible $20,000 penalty for the Shady Lane School (based on the assumption that at least one student was noncompliant for ten days). App.6a n.9.

After a hearing, an administrative law judge determined that all three schools had violated PHL 2164. She also determined, however, that penalties should not be imposed because the schools did not have adequate pre-enforcement notice of the religious exemption's repeal. App.91a-92a. As she noted, the Department of Health guidance regarding the repeal "was only made available online and [was] thus inaccessible to" the Amish. App.84a. And the Department of Health also "failed to offer reasonable accommodation for [the schools'] distinct religious and cultural differences throughout the audit process." App.87a.

The Commissioner of Health "adopt[ed] the [administrative law judge's] recommendation to sustain the charges against each of the … schools" but "reject[ed] her recommendation to impose no civil penalty." App.66a. She determined that Appellants "were aware of the legal requirements" but did "not … comply because of an irreconcilable conflict between their religious beliefs and PHL § 2164." App.67a. The Commissioner of Health imposed the full extent of penalties sought by the State—totaling $118,000. App.68a-69a.

2. Left with no alternative, Petitioners brought this claim under Section 1983 in defense of their free exercise rights.

Mr. Wengerd explained to the State that the Amish were "sincerely sorry that we are causing the State a prob[lem]." A-76 (formatting altered). He explained that "[i]n previous years we were always able with the help of God to work out our differences with the States or governments, concerning our schools[,] churches[,] etc." A-77 (formatting altered). He expressed his community's "utmost desire to live a quiet peaceful[] und[i]sturbed life and obey those in authority over us. But once those laws are in conflict with what the [B]ible teaches then we are commanded to obey God rather th[a]n man. Acts 5:29." A-77 (formatting altered).

Faced with penalties that would shutter their schools, followed by potential foreclosure of their property, Petitioners were left with no option but to file a complaint in federal court to protect their free

exercise rights. They view the litigation as defending themselves and feel shame when it is framed as the Amish proactively suing the State. Petitioners assert a single, as-applied claim under 42 U.S.C. § 1983 for violation of their First and Fourteenth Amendment rights. They seek a permanent injunction preventing the State from enforcing PHL 2164 against them.

Petitioners moved for a preliminary injunction, and the State moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).[11] After a hearing on both motions, the district court granted the motion to dismiss and denied the motion for a preliminary injunction as moot. App.64a.

The Second Circuit affirmed. App.24a. That court concluded that Petitioners "have failed to allege that § 2164 is anything but neutral and generally applicable." App.19a.

First, the Second Circuit determined that PHL 2164 did not "treat[] comparable secular conduct more favorably than religious beliefs." App.14a. The court acknowledged that New York's purpose in eliminating the religious exemption was the prevention of "'disease outbreaks' by 'sustaining a high vaccination rate among school children.'" App.14a (citation omitted). According to the court, eliminating the religious exemption served that purpose by decreasing "the number of unvaccinated students." App.15a. The court acknowledged that the medical exemption

[11] The State also moved to dismiss defendant Betty A. Rosa for lack of standing. The district court granted the motion, App.38a-41a, and Dr. Rosa was not a party in the Second Circuit.

allows some students to remain unvaccinated. App.15a. But it explained that such nonvaccination allows those students to "avoid the health consequences that 'taking a particular vaccine would inflict.'" App.15a (citation omitted).

Second, the Second Circuit determined that PHL 2164 does not "extend[] broad discretion to government officials to grant exemptions" for secular reasons. App.17a. The court acknowledged that the medical exemption applies only to certain students based on those students' particular circumstances. App.17a-18a. But it determined that the exemption is constitutionally unproblematic because it "is 'mandatory,'" "applies to an 'objectively defined' group," and does not confer "discretionary" authority on either doctors or school officials to "'approve or deny exemptions on a case-by-case basis' for *any reason*." App.18a (citations omitted).

Third, the Second Circuit determined that the threat to free exercise posed by PHL 2164 is "not equivalent to the existential threat the Amish faced in *Yoder*." App.22a. The court reasoned that *Yoder* "took pains explicitly to limit its holding." App.21a (citation omitted). And, according to the court, PHL 2164 "would not forcibly remove Amish children from their community at the expense of the Amish faith or the Amish way of life." App.22a.

The Second Circuit therefore concluded that PHL 2164 is subject to rational basis review under *Smith* and, because "Plaintiffs have conceded that the law satisfies rational basis review," affirmed the district court's order of dismissal. App.19a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve Acknowledged Confusion on the Scope and Meaning of *Smith*, *Tandon*, and *Fulton*.

A. Courts are divided on whether the Free Exercise Clause demands strict scrutiny for a law that disallows religious exemptions but permits secular exemptions.

Multiple Justices have already recognized the "considerable confusion over whether a mandate … that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves." *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari); *see Fulton*, 593 U.S. at 609 (Alito, J., concurring in judgment) ("There is confusion about the meaning of *Smith*'s holding on exemptions from generally applicable laws."). Since then, the split has only grown more "entrenched"—and the issue even more "worth addressing." *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari).

1. The Second, Third, and Ninth Circuits have held that laws barring religious exemptions but permitting secular exemptions are subject to rational basis review under *Smith*.

The Second Circuit here held that PHL 2164 was neutral and generally applicable, and therefore subject to rational basis review, even though it barred religious exemptions but permitted medical

exemptions. The Second Circuit held that medical nonvaccination was not "comparable" to religious nonvaccination. App.14a. And it also held that the medical exemption did not trigger strict scrutiny because it was not "discretionary." App.18a.

The Third and Ninth Circuits have held similarly. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 172-73 (3d Cir. 2024) (vaccine requirement that barred religious exceptions but allowed medical exemptions would not trigger strict scrutiny)[12]; *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (9th Cir. 2021) (vaccine requirement that barred religious exceptions but allowed medical and other secular exemptions did not trigger strict scrutiny). *But see Doe*, 19 F.4th at 1184 (Ikuta, J., dissenting) ("[R]eligious and secular [nonvaccination] pose identical risks … because both result in the presence

[12] *Spivack* appears contrary to (but did not purport to overrule) another case from the Third Circuit, authored by then-Judge Alito. *Compare Spivack*, 109 F.4th at 171-72 (only "discretionary" secular exemptions trigger strict scrutiny, not those "with objective criteria"), *with Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) ("If anything, th[e] concern [with devaluing religious exercise] is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection."). Other recent cases from the Third Circuit continue to follow then-Judge Alito's guidance. *See Smith v. City of Atlantic City*, 138 F.4th 759, 770-72 (3d Cir. 2025) (relying on *Fraternal Order of Police* and applying strict scrutiny to fire department's grooming policy).

of unvaccinated students in the classroom, who could spread COVID-19 to other students and employees.").

2. The First, Sixth, and Eleventh Circuits, as well as the Supreme Court of Iowa, have all held that laws barring religious exemptions but permitting secular exemptions can fall outside of *Smith* and warrant strict scrutiny.

In *Lowe v. Mills*, the First Circuit declined to dismiss a free exercise challenge to Maine's requirement that "certain healthcare facilities … ensure that their non-remote workers are vaccinated against COVID-19," which "permit[ted] workers to seek exemptions for medical reasons, but not for religious ones." 68 F.4th 706, 709 (1st Cir. 2023). The First Circuit rejected Maine's argument that its medical exemption was "fundamentally different ... [from] a religious exemption." *Id.* at 715 (citation omitted). The First Circuit instead found it plausible "that the inclusion of the medical exemption undermines the State's interests in the same way that a religious exemption would by introducing unvaccinated individuals into healthcare facilities." *Id.*

In *Monclova Christian Academy v. Toledo-Lucas County Health Department*, the Sixth Circuit applied strict scrutiny to a county resolution closing all schools, including religious schools, but permitting "gyms, tanning salons, office buildings, and a large casino" to remain open. 984 F.3d 477, 479 (6th Cir. 2020). As that court explained, "secular facilities are 'comparable' for purposes of spreading COVID-19." *Id.* at 482.

In *Midrash Sephardi, Inc. v. Surfside*, the Eleventh Circuit applied strict scrutiny to a zoning ordinance that excluded churches and synagogues from the business district but allowed private clubs. 366 F.3d 1214, 1234-35 (11th Cir. 2004).[13] The court explained that the ordinance "violates the principles of neutrality and general applicability because private clubs and lodges endanger [the town's] interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235. Although it focused on the Religious Land Use and Institutionalized Persons Act, the court also held that the town "violated Free Exercise requirements of neutrality and general applicability." *Id.* at 1232.

Finally, in *Mitchell County v. Zimmerman*, the Supreme Court of Iowa applied strict scrutiny to a county ordinance that protected county roads by banning vehicles with tires that had steel protrusions. 810 N.W.2d 1, 4-6 (Iowa 2012).[14] The ordinance had secular exemptions for school buses, tire chains, and certain tires with ice grips or tire studs during certain months of the year, but it did not allow for religious exemptions for, for example, Amish buggies. *Id.* at 15-16. As the Supreme Court of Iowa explained, the county "chose to prohibit only a particular source of harm to the roads that had a religious origin." *Id.* at

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[13] *Midrash* remains good law after *Fulton* and *Tandon*. *See Dr. A.*, 142 S. Ct. at 2570 n.1 (Thomas, J., dissenting from denial of certiorari) (recognizing *Midrash* as part of a live split).

[14] *Zimmerman*, too, remains good law. *See Dr. A.*, 142 S. Ct. at 2570 n.1 (Thomas, J., dissenting from denial of certiorari) (recognizing *Zimmerman* as part of a live split).

16; *see Horen v. Commonwealth*, 23 Va. App. 735, 743 (1997) (applying strict scrutiny to law that, "while allowing for a variety of legitimate secular uses of owl feathers, … inexplicably denies an exception for bona fide religious uses").

* * *

This "widespread" and "entrenched" split has shown no signs of resolving itself. *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari). This Court should grant review and finally resolve it.

B. The Second Circuit's decision is wrong.

1. PHL 2164 falls outside of *Smith* and is therefore subject to strict scrutiny.

The Free Exercise Clause, which is applicable to the States through the Fourteenth Amendment, bars the government from making any "law ... prohibiting the free exercise" of religion. U.S. Const. amend. I. This provision "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (citation omitted).

In *Smith*, this Court held that certain laws that are both "neutral" and "generally applicable" are subject only to rational basis review—even if they burden free exercise. 494 U.S. at 881. This Court has since clarified that a law does not fall within *Smith* "if it 'prohibits religious conduct while permitting secular

conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.'" *Kennedy*, 597 U.S. at 526 (citation omitted). A law also does not fall within *Smith* "[w]hen the burden imposed is of the same character as that imposed in *Yoder*." *Mahmoud*, 145 S. Ct. at 2361. Under these precedents, PHL 2164 falls outside of *Smith*.

a. PHL 2164 falls outside *Smith* because it "treat[s] … comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. When assessing whether religious and secular conduct is comparable, courts are "concerned with the risks [the] activities pose, not the reasons why" the activities are carried out. *Id*. Those risks "must be judged against the government interest that justifies the regulation at issue." *Id*.

The State's purported interest in eliminating the religious exemption to PHL 2164 was "the prevention of disease outbreaks." Bill Jacket at 4A, N.Y. A.B. 2371 (2019), https://perma.cc/L7SR-EQPD. Rather than focus on bringing noncompliant students into compliance with PHL 2164, which could have increased the number of vaccinated students by tens of thousands, New York chose to scapegoat religious practice. It barred *religiously motivated* nonvaccination of students but still permits *secularly motivated* nonvaccination of students (and others). This treats "comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62. In fact, it treats the *very same* activity—

nonvaccination—more favorably when motivated by secular rather than religious reasons.

First, through its medical exemption, PHL 2164 permits nonvaccination of students for medical reasons. But the risk of transmission that nonvaccination poses does not differ depending on motivation. A student who is not vaccinated for medical reasons does not "pose a lesser risk of transmission than [Petitioners'] proposed religious exercise." *Tandon*, 593 U.S. at 63.

The Second Circuit's contrary conclusion was wrong. The Second Circuit suggested that, unlike the religious exemption, the medical exemption "avoid[s] the health consequences" of taking particular vaccines. App.15a. But that was not an interest the State "asserted" when repealing the religious exemption. *Fulton*, 593 U.S. at 541. The Second Circuit's reasoning "incorrectly focuses on the reasons for the exemption rather than the asserted interest that justifies the mandate." *Doe*, 19 F.4th at 1185 (Ikuta, J., dissenting). And it also "decid[es] that secular motivations are more important than religious motivations." *Fraternal Ord. of Police*, 170 F.3d at 365.

The Second Circuit also suggested that the medical exemption is limited "in scope and duration," whereas the religious exemption is not. App.15a. Even if true, the government cannot "treat secular activity more favorably than religious activity simply because the disparate treatment is only temporary." *Doe*, 19 F.4th at 1186 (Ikuta, J., dissenting). The fact remains that those who are not vaccinated for medical reasons for a particular disease for a particular time still

present the same risk of transmission of that disease and during that time as those who are not vaccinated for religious reasons.

Finally, the Second Circuit's assertion that "the unique attributes of Amish communities" do not lessen the riskiness of nonvaccination, App.16a-17a, contradicts the allegations in the complaint and was inappropriate at this motion to dismiss stage. Petitioners alleged that "none" of the recent measles cases involved any of the "tiny number of healthy Amish children" at issue in this case. A-41. Those "factual allegations" should have been "accept[ed] as true." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

Second, PHL 2164 permits nonvaccination of people other than students and in contexts outside of schools. PHL 2164 freely allows for nonvaccination of adults both in and out of schools, children who congregate outside of schools in a variety of settings, and children who are homeschooled. Notably, PHL 2164 does not require vaccination of teachers in schools, who gather and work closely with students on a daily basis. Nor does it require vaccination of aides, administrators, bus drivers, or any adults who work in or with schools. *See supra* p.10. Such nonvaccination is permitted even though it, like religiously motivated nonvaccination, presents a risk of transmission.

The State has also allowed for noncompliant nonvaccination through its lax efforts to enforce PHL 2164. These lax enforcement efforts have resulted in the nonvaccination of at least 66,000 students who have not claimed any medical exemption. A-32 to 33;

see A-574 (suggesting the number may be as high as 97,900). That number is substantially larger than the number of children at issue here. *See* A-694 (explaining that the children of "26 families" attend the schools at issue). Targeting a small group of Amish students rather than the willfully noncompliant bespeaks the sort of religious hostility the First Amendment prohibits.

The Second Circuit all but ignored this comparably risky secular behavior, dismissing it in a footnote as "wholly speculative." App.17a n.13. But the text of PHL 2164 is clear that it requires vaccination only of "child[ren]" and only in "school[s]." N.Y. Pub. Health Law § 2164(7)(a). And the State did not dispute that tens of thousands of students remain noncompliant with PHL 2164. *See* A-574. In any event, at this motion to dismiss stage, the Second Circuit should have "accept[ed] as true all of the factual allegations contained in the complaint." *Swierkiewicz*, 534 U.S. at 508 n.1.

b. PHL 2164 also falls outside *Smith* because it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 593 U.S. at 533 (citation omitted). Where the government has such a mechanism in place, it "may not refuse to extend [it] to cases of 'religious hardship' without compelling reason." *Id.* at 535 (citation omitted). The government may not "decide which reasons for not complying with [its] policy are worthy of solicitude" and which are not. *Id.* at 537 (citation omitted).

PHL 2164 does precisely that. PHL 2164 "incorporates a system of individual exemptions" in cases of medical hardship but categorically refuses to extend this exemption to cases of religious hardship. *Id.* at 535. A child may receive a medical exemption if "any physician licensed to practice medicine in [New York] certifies that such immunization may be detrimental to [the] child's health." N.Y. Pub. Health Law § 2164(8). This determination is performed on a student-by-student basis. *See supra* p.14.

The Second Circuit reasoned that PHL 2164's system of individualized exemptions does not trigger strict scrutiny because it is not "discretionary." App.18a. That reasoning is doubly wrong.

As an initial matter, the scheme *does* confer significant discretion. *See supra* p.14. In any event, it is the "creation of a formal mechanism for granting exceptions [that] renders a policy not generally applicable," not how discretionary such exceptions are. *Fulton*, 593 U.S. at 537. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, for example, the secular exceptions to the animal slaughter laws were objectively defined, such as the "slaughter of animals for food, eradication of insects and pests, and euthanasia." 508 U.S. 520, 537 (1993). Yet the Court still found the laws to be not neutral and generally applicable. *Id.* at 542, 545-46.

What the First Amendment is concerned with is whether an exemption allows for "the prospect of the government's deciding that secular motivations are more important than religious motivations." *Fraternal Ord. of Police*, 170 F.3d at 365. This concern can be

present whether the exemption is phrased objectively or discretionarily—and in fact may be heightened when the government grants a categorical exemption using objective terms. *See Lukumi*, 508 U.S. at 542 ("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." (emphasis added)).

c. PHL 2164 falls outside *Smith* for the additional reason that "the burden imposed is of the same character as that imposed in *Yoder*." *Mahmoud*, 145 S. Ct. at 2361. In *Yoder*, this Court held that the Amish were exempt from a state law requiring all students to remain in school until the age of 16. 406 U.S. at 234. As the Court noted, "[f]ormal high school education beyond the eighth grade is contrary to Amish beliefs." *Id.* at 211. Forcing the Amish to violate these beliefs pursuant to compulsory secondary education laws was "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id.* at 218. Absent an exemption, the Amish would "not only expose themselves to the danger of the censure of the church community, but … also endanger their own salvation and that of their children." *Id.* at 209.

PHL 2164 likewise "pose[s] 'a very real threat of undermining' the religious beliefs and practices that [Amish] parents wish to instill in their children." *Mahmoud*, 145 S. Ct. at 2361 (quoting *Yoder*, 406 U.S. at 218). As in *Yoder*, vaccination is "in marked variance with Amish values and the Amish way of life." 406 U.S. at 211; *see supra* pp.7-8. And as in

Yoder, forcing Amish parents to vaccinate their children would "endanger their own salvation and that of their children." *Id.* at 209.

If anything, PHL 2164 is even more of an affront to free exercise than the compulsory education law in *Yoder*. Whereas the compulsory education law involved "more subtle forms of interference with the religious upbringing of children," under PHL 2164 "Amish children would be compelled to commit some specific practice forbidden by their religion." *Mahmoud*, 145 S. Ct. at 2352. "[T]he protections of the First Amendment" undoubtedly extend "to policies that *compel* children to depart from the religious practices of their parents." *Id.*

The Second Circuit suggested that *Yoder* "took pains explicitly to limit its holding" to its facts. App.21a (citation omitted). But as this Court recently explained, "there is no reason to conclude that the decision [in *Yoder*] is '*sui generis*' or uniquely 'tailored to [its] specific evidence.'" *Mahmoud*, 145 S. Ct. at 2357 (citation omitted). This Court has "never confined *Yoder* to its facts." *Id.* "To the contrary," it has "treated it like any other precedent." *Id.*

The Second Circuit also suggested that "*Yoder*'s holding is limited by the state's interest in protecting public health." App.22a. This Court, however, has already soundly rejected such a public health exception to the Free Exercise Clause. *See, e.g.*, *Tandon*, 593 U.S. at 64 (Free Exercise Clause did not permit "California's COVID restrictions on religious exercise"); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16-21 (2020) (per curiam) (Free Exercise

Clause did not permit New York's COVID-19 restrictions on religious exercise).

d. It is not surprising that PHL 2164 falls outside of *Smith* because PHL 2164 is readily amenable to workable religious exemptions. In that way, PHL 2164 is fundamentally unlike the controlled substances law at issue in *Smith*.

When applying rational basis review in *Smith*, this Court emphasized that the controlled substances law at issue was not amenable to religious exemptions. To permit such exemptions would be "to permit every citizen to become a law unto himself." 494 U.S. at 879 (citation omitted). Such a state of affairs would, in the majority's words, "be courting anarchy." *Id.* at 888; *see United States v. Lee*, 455 U.S. 252, 260 (1982) (denying religious exemption to Social Security taxes because "the tax system could not function" with religious exemptions).

In the three and a half decades since *Smith*, "experience has disproved the *Smith* majority's fear that retention of the Court's prior free exercise jurisprudence would lead to 'anarchy.'" *Fulton*, 593 U.S. at 554 (Alito, J., concurring) (citation omitted). That is particularly true when it comes to religious exemptions from school vaccine requirements.

At present, 46 States offer religious exemptions to their school vaccine requirements. *See supra* p.8 & n.4. And until recently, that number was even higher. *See supra* p.9. Indeed, New York itself historically offered a religious exemption to its school vaccine requirement. *See supra* pp.10-11. Like virtually all

other States, New York was able to accommodate religious practice without "courting anarchy" for more than 50 years. *Smith*, 494 U.S. at 888. Only recently did New York become an "extreme outlier." *M.A.*, 53 F.4th at 41 (Park, J., concurring).

This widespread experience with workable religious exemptions to school vaccine requirements indicates that the provision of such exemptions is not "infeasible or unworkable." *Mahmoud*, 145 S. Ct. at 2362. And it also indicates that, as in *Yoder*, the categorical denial of religious exemptions is a "relatively recent development." 406 U.S. at 226.

2. PHL 2164 fails strict scrutiny.

Because PHL 2164 falls outside of *Smith*, it is subject to strict scrutiny, which it cannot satisfy.

New York lacks a sufficiently compelling interest in requiring these "*particular* [Amish] claimants" to vaccinate their children. *Fulton*, 593 U.S. at 541 (emphasis added) (citation omitted); *see Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring in decision to grant, vacate, and remand) (the compelling interest must relate to "the *specific* application of [the challenged] rules to *this* community"). As noted, Petitioners live in communities removed from modern society. *See supra* pp.5-6.

PHL 2164 is not narrowly tailored because it is both under- and overinclusive. PHL 2164 is underinclusive because, as explained, it applies to only one place where transmission may occur (schools) and covers only one group who may transmit (students). *See supra* p.26. It also allows students to

remain nonvaccinated for secular reasons. *See supra* pp.25-27. PHL 2164 is overinclusive because, as demonstrated by "States across the country" that permit religious exemptions "without widespread consequences," *Mahmoud*, 145 S. Ct. at 2363, New York could readily prevent transmission while retaining a religious exemption.

C. This question is important, and this case is an ideal vehicle.

1. "The correct interpretation of the Free Exercise Clause is a question of great importance." *Fulton*, 593 U.S. at 553 (Alito, J., concurring in judgment). As experience demonstrates, school vaccine requirements and a respect for free exercise can feasibly coexist. The Second Circuit's decision that States may disregard free exercise—even when they have no need to—will have negative consequences that reach far beyond New York, and far beyond the vaccine context.

As noted, in recent years, a few States have eliminated longstanding religious exemptions to their school vaccine requirements. *See supra* p.9. Those States remain outliers, but other States are considering similar measures. In Massachusetts, for example, lawmakers are considering a bill to repeal the State's religious exemption to its school vaccine requirement.[15] A similar bill was introduced earlier this year in Hawaii.[16] Both pieces of legislation

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[15] *See* Mass. H.B. 2554 (2025); Mass. S.B. 1557 (2025).

[16] *See* Haw. H.B. 1118 (2025).

received significant backlash.[17] This Court's guidance now would allow States looking to follow in New York's footsteps to legislate against the backdrop of the proper understanding of the Free Exercise Clause.

This issue is also broader than just vaccines. If allowed to stand, the Second Circuit's decision would allow States to refuse to accommodate all manner of long-accommodated religious practices. A police department could refuse to allow facial hair for religious reasons, even if it allows facial hair for medical reasons. *Cf. Fraternal Ord. of Police*, 170 F.3d at 364-67 (rejecting this result under the Free Exercise Clause). Likewise for a fire department. *Cf. Atlantic City*, 138 F.4th at 768-74 (similar). And a county could refuse to allow Amish buggies on its roadways, even if it allows other vehicles that cause similar harm to those roadways. *Cf. Zimmerman*, 810 N.W.2d at 16 (same).

2. This case is an ideal vehicle. Petitioners have brought an as-applied challenge dismissed at the Rule 12(b)(6) stage. There are no material factual disputes that could prevent this Court from reaching the questions presented. And the questions presented here arise "in the ordinary course" of litigation, outside of any "crisis" or "emergency posture." *Dr. A.*, 142 S. Ct. at 2571 (Thomas, J., dissenting from denial

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[17] *See* Angela Matthew, *Mass. Considers Scrapping Religious Exemptions for Vaccinations*, Boston Globe (June 22, 2025), https://perma.cc/EN97-KVUX; Mark Ladao, *Heated Debate Surrounds Hawai'i Measure to Ban Non-medical Vaccine Exemptions in Schools*, HPR (Feb. 10, 2025), https://perma.cc/22VQ-9LKS.

of certiorari); *cf. M.A.*, 53 F.4th at 42 (Park, J., concurring) ("Until *Smith* is overruled, its ill-defined test means that free-exercise rights risk being perennially trumped by 'the next crisis.'").

This case also involves a particularly stark example of ahistorical disregard for free exercise. As noted, 46 States (and the District of Columbia) offer religious exemptions to their school vaccine requirements. *See supra* p.8 & n.4. So too did New York for more than 50 years. *See supra* pp.10-11. New York's status as an "extreme outlier," *M.A.*, 53 F.4th at 41 (Park, J., concurring), is a "relatively recent development," *Yoder*, 406 U.S. at 226. And it is a glaring red flag that New York's disregard for religious exercise does not comport with "our society's deep-rooted commitment to religious liberty." *Fulton*, 593 U.S. at 554 (Alito, J., concurring in judgment).

II. If *Smith* Allows the Result Here, the Court Should Reconsider *Smith*.

This case presents another "important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected." *Fulton*, 593 U.S. at 545 (Alito, J., concurring in judgment).

In recent years, this Court has clarified *Smith*'s limits in several cases—including *Fulton*, *Tandon*, and others. Those cases should have prevented the outcome here. *See supra* pp.23-32. But if they do not, and if *Smith* allows New York to categorically

disregard free exercise in this way, then this Court should reconsider *Smith*. There is no reason that violations of the Free Exercise Clause should be subjected to a less searching standard of review than violations of other constitutional freedoms.

This Court has already recognized the need to reconsider *Smith*. In *Fulton*, the Court "granted certiorari to decide whether to overrule [*Smith*]." *Fulton*, 593 U.S. at 540 (citation omitted). But it ultimately had "no occasion to reconsider" *Smith* because the "case [fell] outside *Smith*." *Id.* at 533, 541.

Five current Justices in *Fulton*, however, made clear that *Smith* should be reconsidered given the opportunity. *See id.* at 543 (Barrett, J., joined by Kavanaugh, J., concurring) ("As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination."); *id.* at 553 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment) ("We should reconsider *Smith* without further delay."); *id.* at 627 (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in judgment) ("*Smith* committed a constitutional error. Only we can fix it.").

The concerns voiced by those Justices are not new. Several Justices disagreed with *Smith* at the time it was decided. *See Smith*, 494 U.S. at 901 (O'Connor, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in judgment) ("The Court today gives no convincing reason to depart from settled First Amendment jurisprudence."); *id.* at 908 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting)

("[T]he majority is able to arrive at this view only by mischaracterizing this Court's precedents.").

And several other Justices have registered their disagreement with *Smith* since then. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting) (expressing a desire to consider "the question whether [*Smith*] was correctly decided"); *Lukumi*, 508 U.S. at 559 (Souter, J., concurring in part and concurring in judgment) ("[T]he Court should re-examine the rule *Smith* declared."); *see also supra* p.36.

If *Smith* permits the outcome reached by the Second Circuit, then this case presents an excellent "occasion to reconsider" *Smith*. *Fulton*, 593 U.S. at 541. Cases like this one "will keep coming until the Court musters the fortitude to supply an answer." *Id.* at 627 (Gorsuch, J., concurring in judgment).

III. At the Very Least, the Court Should Grant, Vacate, and Remand in Light of *Mahmoud*.

If this Court is not inclined to grant the petition for full consideration on the merits, then it should at minimum grant, vacate, and remand in light of *Mahmoud*.

Petitioners argued in the Second Circuit that "their claims should not have been dismissed because they are essentially the same as the claims in *Wisconsin v. Yoder*." App.20a. The Second Circuit acknowledged that "§ 2164 burdens [Petitioners'] religious beliefs and practices," as in *Yoder*. App.22a. And it acknowledged that "[Petitioners'] objection to vaccines is premised on the same 'fundamental belief'"

as in *Yoder*. App.22a. But the Second Circuit nonetheless dismissed Petitioners' argument out of hand, suggesting that *Yoder* "took pains explicitly to limit its holding" to its facts. App.21a (citation omitted).[18]

Mahmoud made clear the Second Circuit's approach is wrong. This Court has "never confined *Yoder* to its facts." 145 S. Ct. at 2357. "To the contrary," it has "treated it like any other precedent." *Id.* Yet the Second Circuit here, like the Fourth Circuit in *Mahmoud*, "breezily dismissed" *Yoder*, barely acknowledging that it "is an important precedent of this Court." *Id.* If this Court is not inclined to grant the petition, it should at the very least grant, vacate, and remand, directing the Second Circuit to reconsider its decision in light of *Mahmoud*.

[18] The Second Circuit also suggested that the burden in *Yoder* was "forcibly remov[ing] Amish children from their community." App.22a. That was not the burden in *Yoder*. As *Mahmoud* clarified, the burden in *Yoder*—as here—was "'substantial[] interfer[ence] with the religious development' of the parents' children." 145 S. Ct. at 2361 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 3, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2024
Argued: November 18, 2024
Decided: March 3, 2025

Docket No. 24-681

JOSEPH MILLER, EZRA WENGERD, JONAS SMUCKER, DYGERT ROAD SCHOOL, PLEASANT VIEW SCHOOL, SHADY LANE SCHOOL,

Plaintiffs-Appellants,

v.

JAMES V. MCDONALD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Defendant-Appellee,

BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendant.[*]

[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Appendix A

Before: CABRANES, WESLEY, and LEE, *Circuit Judges*.

PER CURIAM:

New York has long regulated immunization in schools. In 1860, New York "directed and empowered" school officials to deny the admission of unvaccinated students,[1] making it the second state in the nation to mandate school vaccination.[2] In 1966, New York enacted a school immunization law in which students who could not be vaccinated for medical reasons or students whose parents held religious objections to vaccines were exempted.[3]

New York maintained both exemptions until 2019. During 2018 and 2019, the United States experienced the worst measles outbreak in over twenty-five years; New York was the epicenter. Most cases occurred in communities with clusters of unvaccinated individuals. Following that outbreak, the legislature repealed the religious beliefs exemption while retaining the medical exemption. Plaintiffs-Appellants are three "Amish community schools"—Dygert Road School, Pleasant View School a/k/a Twin Mountain School, and Shady Lane School—that have been fined for failing to comply with New York's immunization law; Ezra Wengerd, an elected representative of all Amish schools in New York; and Jonas

1. Ch. 438 § 1, 1860 N.Y. Laws 761, 761.

2. *See* John Duffy, *School Vaccination: The Precursor to School Medical Inspection*, 33 J. Hist. Med. & Allied Scis. 344, 346 (1978).

3. Ch. 994 § 2, 1966 N.Y. Laws 3331, 3332-33.

Smucker and Joe Miller, board members of their children's Amish community schools (collectively, "Plaintiffs"). The schools do not require a certificate of immunization to attend because the parents "have sincerely held religious beliefs which do not permit them to inject" their children with vaccines.[4] J.A. 13.

Plaintiffs brought a claim pursuant to 42 U.S.C. § 1983 against Defendant-Appellee Dr. James V. McDonald, in his official capacity as the Commissioner of Health of the State of New York ("the State"), alleging that the immunization law infringes on their free exercise rights under the First and Fourteenth Amendments.[5] The parents also argue that the law is unconstitutional because it impairs Amish parents' right to control the religious upbringing of their children as recognized in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Plaintiffs moved to preliminarily enjoin the law's enforcement against them; the State moved to dismiss. Chief Judge Elizabeth A. Wolford granted the State's motion to dismiss, concluding that Plaintiffs failed to plausibly allege a constitutional violation. The court denied Plaintiffs' request for a preliminary injunction as moot. We affirm.

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4. For purposes of reviewing the district court's decision on the motion to dismiss, we accept as true the facts alleged in the complaint. *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (per curiam).

5. Plaintiffs also brought official-capacity claims against Dr. Betty A. Rosa, the current Commissioner of Education of the State of New York. The district court granted the State's motion to dismiss those claims for lack of standing. Because Plaintiffs do not appeal that aspect of the district court's decision, we do not address it.

Appendix A

BACKGROUND[6]

New York Public Health Law § 2164 requires that children who attend public, private, or parochial schools for more than fourteen days be immunized against certain diseases. N.Y. Pub. Health Law § 2164(1), (2)(a), (7). As noted above, New York previously allowed two exemptions from that requirement: if a licensed physician certified that immunization would be "detrimental to a child's health," *id.* § 2164(8), or if a child's parent or guardian held "genuine and sincere religious beliefs which are contrary to the [vaccination] practices," *id.* § 2164(9) (repealed 2019).

The legislature repealed the religious beliefs exemption on June 13, 2019. The legislature recognized that "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." N.Y. Bill Jacket at 4A, 2019 A.B. 2371, Ch. 35.[7] Immunization rates in New York had plummeted "far below the [Centers for Disease Control and Prevention]'s

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6. The following facts are drawn from Plaintiffs' verified complaint and the legislative and administrative records. *See Goe v. Zucker*, 43 F.4th 19, 29 (2d Cir. 2022). Consistent with the parties' briefs, we also draw from the preliminary injunction record.

7. We accord "contemporaneous interpretation of a statute . . . considerable weight in discerning legislative intent." *Brokamp v. James*, 66 F.4th 374, 398 n.22 (2d Cir. 2023) (quoting *Vatore v. Comm'r of Consumer Affs.*, 83 N.Y.2d 645, 651, 634 N.E.2d 958, 612 N.Y.S.2d 357 (1994)).

goal of at least a 95% vaccination rate to maintain herd immunity."[8] *Id.* Data from 2013 and 2014 indicated that "at least 285 schools in New York" had "an immunization rate below 85%, including 170 schools below 70%." *Id.*

Shortly before its repeal, the percentage of students invoking the religious exemption in private and parochial schools increased from 0.54% to 1.53%. N.Y. Senate, Tr. Floor Proceedings, 242d Sess. 5250, 5389 (June 13, 2019) ("Senate Tr."). Indeed, its use tripled or quadrupled in some areas. *Id.* In six schools in Rockland County—the hotspot of the measles outbreak—up to 20% of students had religious exemptions. N.Y. Assembly, Tr. Floor Proceedings, 242d Sess. 1, 58-59 (June 13, 2019) ("Assembly Tr."). Religious exemptions far outpaced medical exemptions—five to one. *Id.* at 70.

In November and December 2021, New York's Department of Health ("DOH") audited Plaintiff schools' compliance with the immunization law. In March 2022, the DOH concluded that students went to those schools for more than fourteen days during the 2021-2022 school year without a certificate of immunization, documentation of immunity, or a signed medical exemption. It therefore charged the schools with violating § 2164(7)(a). After an administrative hearing, the Commissioner of Health sustained the charges and imposed fines totaling $118,000.[9]

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8. "Herd immunity" refers to the percentage of individuals in a community who must be vaccinated to reduce the likelihood of a vaccine-preventable disease's transmission. J.A. 584.

9. Each violation of § 2164 is subject to a fine of up to $2,000. The DOH considers each day that an unvaccinated student attends school

On June 2, 2023, Plaintiffs sued the State under 42 U.S.C. § 1983, claiming that New York Public Health Law § 2164 violates their First and Fourteenth Amendment rights. They allege that the Amish faith commands a self-reliant lifestyle separate from the modern world. As a consequence of their "commitment to a century's old way of life," "many Amish maintain profound religious objections to vaccines." J.A. 11. "Their beliefs also consider abortion murder and aborted fetuses are inextricably intertwined with vaccine development . . . ." J.A. 35. Consistent with those religious beliefs, Plaintiff schools "do not require proof of vaccination from students to attend school." J.A. 11.

Plaintiffs refuse to comply with § 2164—either by vaccinating or homeschooling their children. They assert that "a vital part of [Amish] children's spiritual development" is to learn "in a group setting." J.A. 15. They contend the fines and threat of additional penalties will shutter the Amish community's schools and their ability

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to be a violation. The Commissioner of Health concluded the total fines were "principled and conservative under the circumstances." J.A. 127. More specifically, the Commissioner of Health's order imposed a $52,000 fine against Dygert Road School, a $46,000 fine against Twin Mountains School, and a $20,000 fine against Shady Lane School. To calculate the fines against Dygert Road and Twin Mountains, the DOH multiplied the number of out-of-compliance students in each school by the maximum penalty (under the modest assumption that each of those students was out of compliance for only one day). Because Shady Lane provided no documentation for its students, the DOH assumed that one student was not compliant for at least ten days.

to educate children in a group setting. Plaintiffs sought an injunction to prohibit the State's enforcement of § 2164 against them, a declaration of the law's unconstitutionality as applied to them, and attorney's fees.

Shortly after filing their complaint, Plaintiffs moved for a preliminary injunction. The State opposed the preliminary injunction request and moved to dismiss Plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court granted the State's motion to dismiss.[10] *Miller v. McDonald*, 720 F. Supp. 3d 198, 218 (W.D.N.Y. 2024). It applied this Court's reasoning in *We The Patriots USA, Inc. v. Connecticut Office of Early Childhood Development*, in which we held that Connecticut's repeal of the religious exemption to its school immunization law, while maintaining the medical exemption, did not violate the Free Exercise Clause. 76 F.4th 130, 156 (2d Cir. 2023). The district court explained that § 2164 was "not materially different" from "Connecticut's mandatory school vaccination regime." *Miller*, 720 F. Supp. 3d at 203. Therefore, *We The Patriots* "compel[led] dismissal" of Plaintiffs' free exercise claim. *Id.* at 202.

The district court also dismissed the free exercise claim that was combined with the parents' right "to regulate the upbringing and education of their children." *Id.* at 218. The district court noted it was "not free to disregard Second Circuit precedent," which does not apply

10. Dismissing all claims, the district court also denied Plaintiffs' motion for a preliminary injunction as moot. *Miller v. McDonald*, 720 F. Supp. 3d 198, 218 (W.D.N.Y. 2024).

a heightened standard to such "hybrid rights" claims. *Id.* This appeal followed.

DISCUSSION

To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). We review the district court's decision on the motion to dismiss *de novo*, accepting as true the facts alleged in the complaint and drawing all reasonable inferences in Plaintiffs' favor. *We The Patriots*, 76 F.4th at 144. "In addition to the facts alleged in the complaint, 'as a fundamental matter, courts may take judicial notice of legislative history.'" *Id.* at 136 (quoting *Goe v. Zucker*, 43 F.4th 19, 29 (2d Cir. 2022)).

I. Free Exercise Claims

The Free Exercise Clause of the First Amendment applies to the states pursuant to the Fourteenth Amendment, and provides that the states "shall make no law . . . prohibiting the free exercise" of religion. However, "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).'" *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, *J.*, concurring)).

A neutral and generally applicable law's burden on religion is constitutional if the law passes the relatively low hurdle of rational basis review—that the state has chosen a means for addressing a legitimate government interest rationally related to achieving that goal. *See, e.g., Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (per curiam). If a law is not neutral or generally applicable, however, the government must demonstrate that the law satisfies strict scrutiny, which requires the law "to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 593 U.S. 61, 64-65, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (per curiam) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). As the Supreme Court explained in *Smith*, requiring all laws that burden religion to satisfy the demands of strict scrutiny "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," including "compulsory vaccination laws." 494 U.S. at 888-89. "[A]dopting such a system would be courting anarchy." *Id.* at 888.

Indeed, the Supreme Court and this Court have consistently viewed immunization laws with approval. In *Jacobson v. Massachusetts*, the Supreme Court held that a state had the power to mandate vaccination against smallpox for adults who were "fit subject[s] of vaccination." 197 U.S. 11, 38-39, 25 S. Ct. 358, 49 L. Ed. 643 (1905). In *Zucht v. King*, the Supreme Court upheld a city ordinance requiring children to present a certificate of vaccination before attending school. 260 U.S. 174, 175-77, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922). This Court

has repeatedly upheld neutral and generally applicable immunization laws in the face of free exercise challenges.[11]

Plaintiffs concede that New York Public Health Law § 2164 satisfies rational basis review—immunization programs reduce disease. However, they argue this case is different from the long line of cases upholding immunization laws because § 2164 is not neutral or generally applicable. Plaintiffs further argue that the law cannot withstand strict scrutiny, and therefore it is unconstitutional as applied to them.

A. Neutrality

Plaintiffs contend that § 2164's text and the statements of several legislators reveal a discriminatory motive. Rejecting those arguments, the district court concluded that the law did not "target[] religious belief," and that

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11. *See, e.g., We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 147-48 (2d Cir. 2023) (repeal of Connecticut's religious exemption to its school immunization law was a neutral and generally applicable law and survived rational basis review); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam) (temporary school exclusion of children with religious exemptions during chicken pox outbreak not unconstitutional because "New York could constitutionally require that all children be vaccinated in order to attend public school"); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 290 (2d Cir. 2021) (per curiam) (plaintiffs not likely to succeed in showing that mandatory vaccination of healthcare employees without religious exemption was not neutral or generally applicable); *Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (per curiam) (vaccine mandate for teachers "plainly satisfies" rational basis review).

the legislative record revealed "no evidence of hostility." *Miller*, 720 F. Supp. 3d at 210-11. We agree with the district court.

A state "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021). "[I]t is not enough for a law to simply *affect* religious practice; the law or the process of its enactment must demonstrate 'hostility' to religion." *We The Patriots*, 76 F.4th at 145.

New York Public Health Law § 2164 is neutral on its face. It does not target or affirmatively prohibit religious practices. *Cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam) (applying strict scrutiny and enjoining regulation that "single[d] out houses of worship for especially harsh treatment"); *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 194 (2d Cir. 2014) (applying strict scrutiny to regulation that targeted only "religious actors performing a religious practice, and during a religious ceremony"). The law simply applies New York's school immunization requirements to *all* schoolchildren who do not qualify for the law's medical exemption. Moreover, the act of repealing the religious exemption did not "in and of itself transmute" this otherwise neutral law into one "that targets religious beliefs." *We The Patriots*, 76 F.4th at 149 (quoting *F.F. ex rel. Y.F. v. State*, 66 Misc. 3d 467, 478, 114 N.Y.S.3d 852 (Sup. Ct. 2019), *aff'd sub nom. F.F. v. State*, 194 A.D.3d 80, 143 N.Y.S.3d 734 (3d Dep't 2021)).

Nor does the legislative history reveal an anti-religious bias. Plaintiffs argue that statements made by a small number of legislators, some of whom sponsored the amendments in their respective houses, evidence religious animus. But Plaintiffs have not alleged facts to suggest that those remarks infected "a sizeable portion" of legislators' votes or otherwise influenced the law's enactment. *See United States v. Suquilanda*, 116 F.4th 129, 143-44 (2d Cir. 2024); *see also F.F.*, 194 A.D.3d at 86 (statements from three percent of the legislature did not "taint the actions of the whole" in passing § 2164). To the contrary, the legislative record is full of respectful statements in support of religious freedoms.[12] The final vote passing the legislation—84 to 61 in the Assembly and 36 to 26 in the Senate—further reflects the "spirited floor debate among the legislators" and their thoughtful consideration of the interests at stake. *F.F.*, 194 A.D.3d at 86; Bill Jacket at 3-4.

These circumstances differ from where discriminatory intent can be ascribed to a small group of decision-making officials. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court held that statements made by several of seven commissioners were hostile to religion and therefore "cast doubt on the fairness

12. *See, e.g.*, N.Y. Sponsor's Memorandum, 2019 S.B. S2994-A, 242d Sess. (acknowledging that "freedom of religious expression is a founding tenet of this nation"); Senate Tr. at 5414 ("I mean, we're talking about freedom of religion; . . . [i]t is not an easy decision."); *id.* at 5451 ("I will be recorded in the negative on this vote, but I do appreciate the debate and the respectfulness with which this issue was approached today.").

and impartiality" of the administrative enforcement proceeding, particularly given that no one disavowed the substance of the statements. 584 U.S. 617, 634-36, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018). The remarks were made "by an adjudicatory body deciding a particular case"—"a very different context" from "statements made by lawmakers." *Id.* at 636. Similarly, in *M.A. v. Rockland County Department of Health*, this Court remanded for a jury to consider whether statements made by the two government officials responsible for issuing a challenged emergency declaration evinced religious animus. 53 F.4th 29, 37-38 (2d Cir. 2022).

By contrast, the motives of a small number of legislators cannot be attributed to the legislative body as a whole. A member of the Assembly speaks for himself in the well of the chamber, for each legislator has "a duty to exercise their judgment and to represent their constituents." *Cf. Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 689-90, 141 S. Ct. 2321, 210 L. Ed. 2d 753 (2021). It is "insulting to suggest" that legislators voting for a bill are simply acting at the bill's sponsors' behest. *Id.* at 690. Plaintiffs have not plausibly alleged that § 2164 is not neutral.

B. General Applicability

A law is not generally applicable in two circumstances: (1) when the law treats comparable secular conduct more favorably than religious activity, *Tandon*, 593 U.S. at 62, or (2) when "it 'invites' the government to consider the particular reasons for a person's conduct by providing

'a mechanism for individualized exemptions,'" *Fulton*, 593 U.S. at 533 (alteration omitted) (quoting *Smith*, 494 U.S. at 884). Plaintiffs argue that both circumstances are present here.

1. Treatment of Comparable Secular Activity

Plaintiffs contend that exempting students for medical reasons treats comparable secular conduct more favorably than religious beliefs. The district court concluded that *We The Patriots* "forecloses the argument that the medical exemption and the repealed religious exemption are comparable." *Miller*, 720 F. Supp. 3d at 217. We agree.

Secular conduct is not always "comparable" to religious conduct. It is "comparable" when the secular conduct poses risks "at least as harmful to the legitimate government interests" justifying the law as posed by the religious conduct incidentally burdened by the law. *See Cent. Rabbinical Cong.*, 763 F.3d at 197; *see also Tandon*, 593 U.S. at 62.

New York's interest in passing § 2164 was in "protect[ing] the health of all New Yorkers, particularly our children," N.Y. Sponsor's Memorandum, 2019 S.B. S2994-A, from "disease outbreaks" by "sustaining a high vaccination rate among school children," Bill Jacket at 4A. When repealing its religious exemption, Connecticut identified effectively the same interest: to "protect the health and safety of Connecticut students and the broader public." *We The Patriots*, 76 F.4th at 151. As such, the same reasons justifying the lack of comparability in *We The*

Patriots apply here. Repealing the religious exemption decreases "to the greatest extent medically possible" the number of unvaccinated students and thus the risk of disease; maintaining the medical exemption allows "the small proportion of students" who medically "cannot be vaccinated" to avoid the health consequences that "taking a particular vaccine would inflict." *Id.* at 153. Exempting religious objectors, however, detracts from that interest. Religious exemptions increase "the risk of transmission of vaccine-preventable diseases among vaccinated and unvaccinated students alike." *Id.*

The two exemptions also are meaningfully different in scope and duration. The medical exemption is granted only with "sufficient" documentation of the child's contraindication to "**a specific immunization**." N.Y. Comp. Codes R. & Regs. 10 § 66-1.3(c) (emphasis added). It has limits; it lasts only "until such immunization is found no longer to be detrimental to the child's health," N.Y. Pub. Health Law § 2164(8), and "must be reissued annually," N.Y. Comp. Codes R. & Regs. § 66-1.3(c). Meanwhile, the religious exemption was generalized to *all vaccines* for the duration of that child's school admission. The religious exemption's sweep had a far greater ability to undermine the State's interest in preventing the spread of disease.

Plaintiffs argue that analyzing risk in the aggregate, as we did in *We The Patriots*, misses the point: They note that the risk of transmission of the "tiny" Amish population, who live "in isolated, remote communities," "pales in comparison" to the "sum total of medically unvaccinated children statewide." Appellants' Br. 34-

35. To begin with, we have rejected the notion that the comparability analysis should be governed by a "one-to-one comparison." *Hochul*, 17 F.4th at 287; *see We The Patriots*, 76 F.4th at 152-53 (explaining that the Supreme Court in *Tandon* compared "gatherings that were religious or secular, private or commercial" and that the focus is on "aggregations of individual behaviors, not individual behaviors themselves"). A closer look at the State's interest in passing § 2164 exposes the flaw in Plaintiffs' argument.

New York passed § 2164 in response to the 2018 to 2019 measles outbreak. Legislators felt particularly concerned about the concentration of unvaccinated children with religious exemptions in the same schools. *See, e.g.*, Senate Tr. at 5385 (noting that the New York City Department of Health traced 44 measles cases, including 26 students with religious exemptions, to one child with a religious exemption); Assembly Tr. at 34; Bill Jacket at 4A. Plaintiffs allege that nearly all Amish schoolchildren are unvaccinated. That means their schools are made up of a clustered population of almost 100% unvaccinated students—precisely the circumstances that most concerned the State. The examples included in the record of measles, pertussis, tetanus, and/or polio recently spreading in certain Amish communities across the nation and in New York demonstrate that **Amish isolation does not protect their communities from disease**. Thus, the unique attributes of Amish communities do not present a lesser risk as it pertains to the State's interest in

protecting New Yorkers from disease.[13] Plaintiffs have not plausibly alleged that the law favors comparable secular conduct.

2. Individualized Exemptions

A law also is not generally applicable when it extends broad discretion to government officials to grant exemptions based on their assessment of "which reasons for not complying" with the law "are worthy of solicitude." *Fulton*, 593 U.S. at 537 (explaining that allowing an official "sole discretion" to grant an exemption "renders a policy not generally applicable"). Plaintiffs contend § 2164's medical exemption creates just that kind of problem. Again, we disagree.

The medical exemption works as follows: A child whose physician certifies that a vaccine "may be detrimental to [the] child's health" does not have to receive that vaccine "until such immunization is found no longer to be detrimental to the child's health." N.Y. Pub. Health Law § 2164(8). "May be detrimental to the child's health" means "that a child has a medical contraindication or precaution to a specific immunization consistent with [Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based

13. Plaintiffs also allege there are 66,000 unvaccinated students without an exemption and other unvaccinated people in schools, such as teachers and maintenance staff. They argue these allegations demonstrate the law is significantly underinclusive. But these wholly speculative allegations, stripped of any context, do not raise an inference of *unfavorable* treatment towards religious conduct.

standard of care." N.Y. Comp. Codes R. & Regs. 10 § 66-1.1(*l*). The child's parent must provide a completed medical exemption certification form, "containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated." *Id.* § 66-1.3(c). School officials are authorized to ask for "additional information supporting the exemption." *Id.*

New York's medical exemption fits neatly within the contours of other exemptions to immunization that we have held to be constitutionally permissible. The statutory exemption is "mandatory," *We The Patriots*, 76 F.4th at 150, and applies to an "objectively defined" group, *Hochul*, 17 F.4th at 289. In addition, the authority conferred to physicians is not discretionary; a physician's use of her professional medical judgment is limited by the statute and regulations. *Id.* The same is true of the authority conferred upon school officials. Even though school officials have the authority to conclude that the documents submitted in support of a medical exemption contain sufficient (or insufficient) information, they do not have "discretion to approve or deny exemptions on a case-by-case basis" for *any reason*.[14] *We The Patriots*, 76 F.4th at 151; *cf. Fulton*, 593 U.S. at 536-37.

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14. Plaintiffs argue this conclusion is at odds with *Goe v. Zucker*, in which we described the delegation of "authority to grant a medical exemption" to school officials. 43 F.4th 19, 33 (2d Cir. 2022). The power to accept a child's application is beside the point. The statute does not allow school officials to "decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Philadelphia*, 593 U.S. 522, 537, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021).

Practically speaking, Plaintiffs argue that school officials have "the power to press the red or green light on each medical exemption request." J.A. 31. For example, they allege that up to 50% of students had medical exemptions in one school while zero students had a medical exemption in another school in the same community and that medical exemptions are granted inconsistently year to year. Those allegations do not change our conclusion. Without information about a student population and its medical needs, there is no way to infer a discretionary element from the school officials' acceptance of medical exemption requests. Moreover, for the reasons explained, the statute does not create a system in which school officials are given improper discretion to evaluate the reasons given for a requested medical exemption.

* * *

In sum, Plaintiffs have failed to allege that § 2164 is anything but neutral and generally applicable. The district court therefore did not err in applying rational basis review. As noted, Plaintiffs have conceded that the law satisfies rational basis review. *See also Zucker*, 43 F.4th at 32 (finding the protection against disease through immunization a "legitimate" state interest); *We The Patriots*, 76 F.4th at 156 (immunization requirement rationally limited to schools "because only at school is attendance mandated by law"). Accordingly, we affirm the district court's holding that Plaintiffs have failed to allege a free exercise claim.

II. Hybrid Rights Claims

The Supreme Court has implied that a neutral and generally applicable law may nonetheless be subject to heightened scrutiny if a free exercise claim is brought "in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. This Court has characterized that language describing so-called "hybrid rights claims" as dicta, *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001), and has declined to apply a heightened standard of review, *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003).

Plaintiffs agree with the district court that hybrid rights claims are generally not viewed as viable in this Circuit. *See Miller*, 720 F. Supp. 3d at 218. Yet, they contend their claims should not have been dismissed because they are essentially the same as the claims in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).[15] There, the Supreme Court invalidated a Wisconsin law under the Free Exercise Clause that mandated conventional school attendance until the age of sixteen. *Id.* at 207. Members of the Amish faith challenged the law, seeking to educate their fourteen- and fifteen-year-olds through their "long-established program of informal vocational education." *Id.* at 207, 222. The Supreme Court held that Wisconsin failed to demonstrate an "interest of sufficient magnitude" to overcome "the interests of parenthood" when "combined with a free

15. The hybrid rights claims here focus on Plaintiffs' ability to direct the upbringing of *their children*. We therefore assume that these claims are asserted on behalf of only the parent Plaintiffs.

exercise claim of the nature revealed by this record." *Id.* at 214, 233.

We have observed that the Supreme Court in *Yoder* "took pains explicitly to limit its holding."[16] *Leebaert*, 332 F.3d at 144. The trial record demonstrated that the state law effected a "severe" and "inescapable" burden on the parents' ability to pass onto their children the Amish religion and "the fundamental mode of life mandated by the Amish religion." *Yoder*, 406 U.S. at 217-19. Compulsory high school attendance would take Amish children away "from their community, physically and emotionally, during the crucial and formative adolescent period of life." *Id.* at 211. That removal would "substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community." *Id.* at 218. One expert opined that compulsory high school attendance would "result in the destruction of

16. Our sister circuits also have highlighted *Yoder*'s limitations. *See, e.g., Mahmoud v. McKnight*, 102 F.4th 191, 211 (4th Cir. 2024) ("As the Supreme Court itself recognized in *Yoder*, its holding was tailored to the specific evidence in that record regarding how Wisconsin's compulsory secondary education law would have 'inescapabl[y]' coerced the Amish to act or believe in violation of their religious views." (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972))); *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008) (per curiam) ("*Yoder*'s reach is restricted by the Court's limiting language and the facts suggesting an exceptional burden imposed on the plaintiffs."); *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008) ("Tellingly, *Yoder* emphasized that its holding was essentially sui generis, as few sects could make a similar showing of a unique and demanding religious way of life that is fundamentally incompatible with *any* schooling system.").

the Old Order Amish church community as it exists in the United States today." *Id.* at 212. Wisconsin also failed to offer any evidence to support its purported interests in mandating, at most, two additional years of high school attendance. *Id.* at 221-22.

Plaintiffs' objection to vaccines is premised on the same "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." *Id.* at 210. They claim that the school immunization law mandates two impossible options: inject their children with vaccines, forcing conduct against their religious beliefs, or forego educating their children in a group setting, requiring them to sacrifice a central religious practice. True, Plaintiffs have shown that § 2164 burdens their religious beliefs and practices; but those burdens are not equivalent to the existential threat the Amish faced in *Yoder*. Unlike in *Yoder*, compliance with § 2164 would not forcibly remove Amish children from their community at the expense of the Amish faith or the Amish way of life.

Moreover, *Yoder*'s holding is limited by the state's interest in protecting public health. In fact, in *Yoder*, the Supreme Court specifically distinguished the facts from *Prince v. Massachusetts*, where the Supreme Court upheld a child labor law against a parent's free exercise challenge. 321 U.S. 158, 159, 170, 64 S. Ct. 438, 88 L. Ed. 645 (1944). The Supreme Court in *Prince* found support from the apparently uncontroversial proposition that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds"

because the "right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67. In *Yoder*, the Supreme Court acknowledged that non-compliance with the school attendance law would not result in any "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare." 406 U.S. at 230. Given the State's interest here—protecting New Yorkers, particularly schoolchildren, from disease—an analogy to *Yoder*'s facts is unconvincing.

Finally, Plaintiffs emphasize that "this case involves the *same* religious group" as in *Yoder*. Appellants' Br. 58. But the Amish have never been exempted from all neutral and generally applicable laws that burden religion. For example, in *United States v. Lee*, the Supreme Court rejected a claim that an exemption for an Amish employer from paying social security taxes was constitutionally required.[17] 455 U.S. at 254. The Supreme Court noted the tax law challenge was "[u]nlike the situation presented in *Wisconsin v. Yoder*," because permitting religious exemptions to the tax system would unduly interfere with the government's significant interest "in maintaining a

17. *See also, e.g., Gingerich v. Kentucky*, 382 S.W.3d 835, 844 (Ky. 2012) (law mandating the use of slow moving vehicle emblem "aimed at protecting public safety on the highways" was at odds with "Amish way of life" but not unconstitutional); *In re Miller*, 252 A.D.2d 156, 158, 684 N.Y.S.2d 368 (4th Dep't 1998) (photograph requirement on pistol license incidentally affected religious beliefs of Amish but did not violate Free Exercise Clause); *Slabaugh v. United States*, 474 F.2d 592, 593 (6th Cir. 1973) (per curiam) (no exemption from alternate civil service constitutionally required for Amish man classified as a conscientious objector).

sound tax system" to the point that it simply "could not function." *Id.* at 259-60.

Similarly, the system of religious exemptions impeded the immunization law from functioning; it resulted in clusters of low vaccination rates and an inability to achieve herd immunity in certain communities. Re-introducing religious exemptions would cut directly against the State's interest in passing § 2164, whereas the exemption permitted in *Yoder* affected only the students who participated in the alternative schooling. *Yoder*'s reasoning does not apply to the circumstances here.

Therefore, we conclude that the district court properly dismissed Plaintiffs' hybrid rights claims.

CONCLUSION

We have considered Plaintiffs' remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, FILED MARCH 11, 2024

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

1:23-CV-00484 EAW

JOSEPH MILLER, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN ATTENDING AN AMISH SCHOOL IN CLYMER AND AS A BOARD MEMBER OF THAT SCHOOL, EZRA WENGERD, AS REPRESENTATIVE OF ALL AMISH SCHOOLS IN THE STATE OF NEW YORK, JONAS SMUCKER, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, DYGERT ROAD SCHOOL, PLEASANT VIEW SCHOOL A/K/A TWIN MOUNTAINS SCHOOL, AND SHADY LANE SCHOOL,

Plaintiffs,

v.

DR. JAMES V. MCDONALD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK, AND DR. BETTY A. ROSA, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

Appendix B

DECISION AND ORDER

INTRODUCTION

New York, like every other state in the nation, requires that schoolchildren be vaccinated against various contagious diseases, including measles, polio, varicella (chicken pox), and pertussis (whooping cough). *See* N.Y. Pub. Health Law ("PHL") § 2164(1), (7). Prior to amendments made in 2019, PHL § 2164 "provided two statutory exemptions from its school immunization requirements"—a medical exemption and a religious exemption. *Goe v. Zucker*, 43 F.4th 19, 25 (2d Cir. 2022), *cert. denied sub nom. Goe v. McDonald*, 143 S. Ct. 1020, 215 L. Ed. 2d 188 (2023). Under the now-repealed religious exemption, "a child was not required to be immunized if that child had a parent or guardian who held 'genuine and sincere religious beliefs' against immunization." *Id.* (quoting PHL § 2164(9) (repealed 2019)).

In 2018 and 2019, the United States experienced a nationwide measles outbreak, with New York "as an epicenter." (*Id.*). In response, and recognizing that measles outbreaks within New York were "largely concentrated in communities with low immunization rates," the New York legislature repealed the religious exemption. *Id.*; *see also* Act of June 13, 2019, ch. 35, 2019 N.Y. Laws 153, 153-54. As such, an exemption is now available only "[i]f any physician licensed to practice medicine in [New York] certifies that . . . immunization may be detrimental to a child's health[.]" PHL § 2164(8).

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Plaintiffs are three individual adherents of the Amish faith and three private Amish schools. (Dkt. 1 at ¶ 2). The individual plaintiffs have sincere religious objections to vaccines and run the plaintiff schools, where they "do not require proof of vaccination from students to attend school." (*Id.*). In March of 2022, the New York State Department of Health ("NYSDOH") charged the plaintiff schools with non-compliance with PHL § 2164. (*Id.* at ¶ 32). Following administrative proceedings (*see id*. at ¶¶ 36-53), NYSDOH issued an order sustaining the charges and imposing penalties of $52,000 against plaintiff Dygert Road School, $46,000 against plaintiff Pleasant View School a/k/a Twin Mountains School, and $20,000 against plaintiff Shady Lane School. (*Id.* at ¶¶ 54-56).

Plaintiffs thereafter commenced the instant action, asserting that PHL § 2164 violates their First Amendment right to freely exercise their religion and seeking injunctive and declaratory relief. (*Id.* at ¶¶ 59-108).[1] Plaintiffs further move for a preliminary injunction, asking the Court to enjoin defendants from "implementing and enforcing" PHL § 2164 "unless they provide the option for a religious exemption." (Dkt. 9 at 1-2). Defendants—Dr. James V. McDonald, in his official capacity as Commissioner of Health of the State of New York ("Dr. McDonald") and Dr. Betty A. Rosa, in her official capacity as Commissioner of Education of the State of New York ("Dr. Rosa")—oppose Plaintiffs' motion and have made their own request that the matter be dismissed on the merits. (Dkt. 25).

1. As discussed below, Plaintiffs also allege that PHL § 2164 "implicates" their rights "to free speech, to associate, and to regulate the up bringing and education of their children." (Dkt. 1 at ¶ 74).

Defendants have further argued that Plaintiffs' claims against Dr. Rosa must be dismissed for lack of standing and for lack of subject matter jurisdiction. (*Id.*).

For the reasons that follow, the Court agrees with Defendants that Plaintiffs lack standing to assert their claims against Dr. Rosa. Further, the Court finds that *We the Patriots USA Inc. v. Connecticut Office of Early Childhood Development*, 76 F.4th 130 (2d Cir. 2023), *petition for cert. filed* (U.S. Dec. 14, 2023) (No. 23-643), which was issued after the instant motions were filed but before briefing was complete, compels dismissal of Plaintiffs' remaining claims on the merits. In *We the Patriots*, the Second Circuit affirmed the dismissal of a free exercise claim attacking Connecticut's mandatory school vaccination regime, which is not materially different from New York's. However colorable Plaintiffs' claims may have been at the outset of this action, this Court is bound by the Second Circuit's intervening decision in *We the Patriots*. Accordingly, the Court grants Defendants' motion to dismiss and denies Plaintiffs' motion for a preliminary injunction.

BACKGROUND

I. Factual Background

A. New York's Mandatory Vaccination Laws

New York became the second state in the nation to impose vaccination requirements on schoolchildren in 1860, when it enacted a law allowing local school boards

to deny admission to any child not vaccinated against smallpox. *See* Ch. 438, § 1, 1860 N.Y. Laws 761, 761. New York's vaccine mandate has evolved over time, and today schoolchildren in New York are required to be vaccinated against "poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B[.]" PHL § 2164(2)(a). "No 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," unless the child presents acceptable evidence of vaccination. *Id.* § 2164(7)(a). "School" is defined in this context to "mean[] and include[] any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school." *Id.* § 2164(1)(a).

Prior to being repealed, PHL § 2164(9) provided: "This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school." As discussed above, PHL § 2164(9) was repealed effective June 13, 2019, in response to a nationwide measles outbreak. *See* Act of June 13, 2019, ch. 35, 2019 N.Y. Laws 153, 153-54; *see also* New York Bill Jacket, 2019 A.B. 2371, Ch. 35 ("According to the Centers for Disease Control, 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. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity.").

The current version of PHL § 2164 contains a single exemption: "If any physician licensed to practice medicine in [New York] 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). Regulations adopted by the NYSDOH further provide: "**May be detrimental to the child's health** means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP [Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care." 10 N.Y. Comp. Codes R. & Regs. ("NYCRR") § 66-1.1 (emphasis in original).

> NYSDOH's regulations additionally provide:
>
> A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with one of the following:
>
> (a) A certificate of immunization, as described in section 66-1.6 of this Subpart, from a health care practitioner or from NYSIIS or the CIR,

> documenting that the child has been fully immunized according to the requirements of section 66-1.1(f) of this Subpart.
>
> (b) Documentation that the child is in process of receiving immunizations as defined in section 66-1.1(j) of this Subpart. A principal or person in charge of a school shall not refuse to admit a child to school, based on immunization requirements, if that child is in process.
>
> (c) 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. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.

Id. § 66-1.3.

B. Amish Education and Opposition to Vaccines

"Members of the Amish faith are religiously committed to living separately from the modern world." (Dkt. 1 at ¶ 1 (quotation omitted)). That commitment requires them

to grow their own food, make their own clothing, and use pre-industrial equipment in farming. (*Id.*). The Amish also educate their children "in the Amish way, with Amish teachers, in Amish schools, on Amish owned property." (*Id.* at ¶ 2). The plaintiff schools—Dygert Road School, Pleasant View School a/k/a Twin Mountain School, and Shady Lane School—are "Amish community schools that do not receive any public funding [and] are located within their respective Amish communities." (*Id.* at ¶ 8).

Plaintiffs Jonas Smucker ("Smucker") and Joe Miller ("Miller") are "fathers of children who attend different Amish schools, and they are also both board members of their children's respective schools." (*Id.* at ¶ 9). Specifically, Miller's children "attend an Amish-run school in Chautauqua County." (*Id.*).[2] Plaintiff Ezra Wengerd ("Wengerd") "was elected by the Amish community as a representative of all Amish schools in [New York] State to deal with issues with the State[.]" (*Id.*). "[M]any Amish"—including the individual plaintiffs—"maintain profound religious objections to vaccines." (*Id.* at ¶¶ 2, 9, 13).

C. State Administrative Proceedings Against the Plaintiff Schools

In November and December of 2021, NYSDOH audited the records of the plaintiff schools. (*Id.* at ¶ 31). On March 11, 2022, NYSDOH mailed a Statement of Charges and Notice of Hearing to the plaintiff schools, charging

2. The complaint is silent on the location of the school that Smucker's children attend.

them with non-compliance with PHL § 2164. (*Id.* at ¶¶ 32-33). The Notice of Hearing advised that a hearing would be held on May 2, 2022, and that civil penalties of up to $2,000 per violation, as well as additional action authorized by the PHL, could be imposed. (*Id.* at ¶ 34).

A hearing was held before administrative law judge ("ALJ") Natalie J. Bordeaux on May 2, 2022. (*Id.* at ¶¶ 36-37, Ex. C). Wengerd represented the plaintiff schools at the hearing. (*Id.* at ¶ 38). He read a statement into the record indicating that the plaintiff schools were not in compliance with PHL § 2164 due to their sincere religious opposition to vaccination. (*Id.* at ¶¶ 38-39). Wengerd also advanced the argument that the plaintiff schools were operating as "home schools" under New York law, but indicated that individual homeschooling was "not an option" because "we believe in working together and having our children together in a happy social life in our schools." (*Id.* at ¶¶ 44-45). Wengerd asked for a religious exemption from PHL § 2164. (*Id.* at ¶ 42). NYSDOH responded that there is no provision in PHL § 2164 allowing for a nonmedical exemption. (*Id.* at ¶ 43).

NYSDOH sought: a $52,000 penalty against Dygert Road School, representing the $2,000 maximum civil penalty for 26 students who were found to be non-compliant with PHL § 2164 for one day; a $46,000 penalty against Twin Mountains School, representing the $2,000 maximum civil penalty for 23 students who were found to be non-compliant with PHL § 2164 for one day; and a $20,000 penalty against Shady Lane School on the grounds it was more probable than not that at least one

student in attendance violated PHL § 2164 and would have attended the school for more than ten days, with each day of attendance constituting a separate violation. (*Id.* at ¶ 46). On May 25, 2022, the ALJ issued a report and recommendation concluding that all three of the plaintiff schools had violated PHL § 2164 and recommending that the charges be sustained, but further recommending that no penalties be imposed due to a lack of adequate notice. (*Id.* at ¶ 47, Ex. D).

NYSDOH issued exceptions to the ALJ's report and recommendation on June 21, 2022. (*Id.* at ¶ 49, Ex. E). Specifically, NYSDOH objected to the ALJ's recommendation that no penalties be assessed, contending that in light of "Respondents' admission that they violated the statute and their promise to continue violating the law of man, the failure to impose a penalty would amount to administrative nullification of a duly enacted law, in violation of the separation of powers doctrine inherent in the State Constitution." (*Id.* at ¶ 50 (internal citation and quotations omitted)). NYSDOH further contended that "Respondents testified that they were aware of the requirements placed on them and made it clear that the matter could not be resolved with the Department because they have no intention of complying with the requirements," and that failing to impose a penalty would accordingly "send a clear message to the Respondents and every school in the State that violations of this type will not result in Department sanctions." (*Id.* at ¶ 51 (internal quotations omitted)).

In an order dated December 15, 2022, NYSDOH adopted the ALJ's recommendation that the charges be sustained, but rejected her recommendation that no penalties be imposed. (*Id.* at ¶ 54). The order explained that "Respondents testified that they were aware of the legal requirements but intend not to comply because of an irreconcilable conflict between their religious beliefs and PHL §2164" and that while there was no dispute about the genuineness of the religious objections, "the Legislature amended PHL § 2164 to remove the religious exemption, leaving medical exemptions as the only exception to the school immunization requirements in the statute." (*Id.* at ¶ 55 (citations omitted)). The order imposed a $52,000 penalty against Dygert Road School, a $46,000 penalty against Twin Mountains School, and a $20,000 penalty against Shady Lane School. (*Id.* at ¶ 56).

II. Procedural Background

Plaintiffs filed the instant action on June 2, 2023. (Dkt. 1). Shortly after commencing this litigation, Plaintiffs filed their motion for a preliminary injunction. (Dkt. 9). The parties thereafter entered into a stipulation providing that Defendants would not "seek, collect upon, or enforce" the December 15, 2022 order, or "issue any additional violations concerning, or otherwise enforce, Public Health Law 2164 against Plaintiffs and any of the schools they represent" pending this Court's resolution of the preliminary injunction motion. (*See* Dkt. 19).

Defendants then filed their opposition to the preliminary injunction motion, as well as their competing

motion to dismiss. (Dkt. 25). After Defendants filed their dismissal motion, but while briefing in this matter was still ongoing, the Second Circuit issued its decision in *We the Patriots*, which the parties addressed in their responses and replies. (*See* Dkt. 28; Dkt. 29). The Court heard oral argument on October 27, 2023, and reserved decision. (Dkt. 32).

DISCUSSION

I. Defendants' Motion to Dismiss

The Court must resolve Defendants' pending motion to dismiss before turning to Plaintiffs' motion seeking to preliminarily enjoin enforcement of PHL § 2164. In other words, if Plaintiffs' lawsuit does not survive Defendants' motion to dismiss, then they are not entitled to any relief—injunctive or otherwise.

Defendants have moved for dismissal of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), arguing that: (1) Plaintiffs lack standing to bring claims against Dr. Rosa; (2) Plaintiffs' claims against Dr. Rosa are barred by sovereign immunity; and (3) Plaintiffs' First Amendment claim is foreclosed by binding Supreme Court and Second Circuit precedent. (*See* Dkt. 25-1). For the reasons discussed below, the Court agrees that Plaintiffs lack standing to assert their claims against Dr. Rosa. The Court further finds that Plaintiffs' claims against Dr. McDonald fail as a matter of law, and that dismissal of the complaint is accordingly required.

Appendix B

A. Legal Standard—Subject Matter Jurisdiction

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it, such as when . . . the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms, S.á.r.l*, 790 F.3d 411, 416-17 (2d Cir. 2015) (quotation and citation omitted). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "When considering a motion to dismiss for lack of subject matter jurisdiction . . ., a court must accept as true all material factual allegations in the complaint." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). In addition, a court is not limited to the allegations in the complaint and can "refer to evidence outside the pleadings," *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002), but it "may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. v. Attica Central Schools*, 386 F.3d 107, 110 (2d Cir. 2004). "Indeed, a challenge to the jurisdictional elements of a plaintiff's claim allows the Court to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Celestine v. Mt. Vernon Neighborhood Health Ctr.*, 289 F. Supp. 2d 392, 399 (S.D.N.Y. 2003) (quotation omitted), *aff'd*, 403 F.3d 76 (2d Cir. 2005). "Where, as here, the defendant moves for dismissal under Rule 12(b)(1), Fed. R. Civ. P., as well as on other grounds, the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter

jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990) (quotation omitted).

B. Plaintiffs Lack Standing as to the Claims Against Dr. Rosa.

Defendants argue that the Court lacks subject matter jurisdiction over Plaintiffs' claims against Dr. Rosa, in her official capacity as Commissioner of Education of the State of New York, because "Plaintiffs do not allege any facts to show that the [New York State Department of Education ("NYSDOE")] had any part in auditing, notifying, conducting the hearing, or assessing charges." (Dkt. 25-1 at 20). According to Defendants, Dr. Rosa is therefore an inappropriate defendant, because: (1) Plaintiffs have not alleged harm traceable to NYSDOE; and (2) "Plaintiffs do not, nor can they, allege that Commissioner Rosa had some connection with enforcing PHL § 2164 against them, much less demonstrated a willingness to exercise that duty here." (*Id.* at 22-24). For the reasons discussed below, the Court agrees that Plaintiffs lack standing with respect to their claims against Dr. Rosa. Accordingly, the Court need not and does not reach Defendants' sovereign immunity argument.

"[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). The Second Circuit has explained:

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> To satisfy the requirements of Article III standing, plaintiffs must demonstrate "(1) [an] injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief."

Hu v. City of New York, 927 F.3d 81, 89 (2d Cir. 2019) (quoting *Selevan v. New York Thruway Auth.*, 711 F.3d 253, 257 (2d Cir. 2013)). "These elements are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Id.* (quotation and alteration omitted).

At the pleading stage, to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) based on lack of standing, a plaintiff must "allege facts that affirmatively and plausibly suggest that it has standing to sue." *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Hollingsworth v. Perry*, 570 U.S. 693, 704, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013) (quotation omitted).

Here, Plaintiffs' sole factual allegation about Dr. Rosa is that she "is empowered to adjudicate parental requests or appeals following exclusion from schools under N.Y. Educ. Law § 310, and is tasked with implementing

and enforcing, and does implement and enforce, the mandatory educational instruction and supervision of school requirements pursuant to the authority granted to her in N.Y. Educational Law § 305(1) and (2)." (Dkt. 1 at ¶ 11). The Court agrees with Defendants that this vague allegation is insufficient to plausibly suggest standing. In particular, Plaintiffs have not alleged Dr. Rosa, or NYSDOE, took or threatened to take any action against them with respect to PHL § 2164. "Nor are there allegations that [Dr. Rosa or the NYSDOE] forbade any of the Amish students from pursuing an education because he/she/they were not vaccinated or that she threatened or will threaten to shut down the schools." (Dkt. 25-1 at 23).

Plaintiffs argue in opposition that "if Plaintiffs' children are denied the ability to attend their own Amish schools, because administrators are fearful of further fines, the appeal of such denials may need to run to Dr. Rosa." (Dkt. 28 at 23-24). This speculative contention is insufficient to establish standing. *See, e.g., Butler v. Obama*, 814 F. Supp. 2d 230, 240 (E.D.N.Y. 2011) ("As the jurisprudence of the Supreme Court and Second Circuit has clearly articulated, . . . speculation is insufficient to confer Article III standing."). Only two of the plaintiffs are even alleged to have children attending Amish schools, and it is not alleged that those schools (which are not identified in the complaint with any specificity and of which Smucker and Miller are board members) have any intention of denying Smucker's or Miller's children the ability to attend school based on PHL § 2164. To the contrary, and as discussed below, Plaintiffs affirmatively allege that the Amish community will never comply with

PHL § 2164. As such, while PHL § 2164(7)(b) provides that "[a] parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law," Plaintiffs have not alleged a non-speculative scenario where such an appeal would occur.

Because Plaintiffs have not plausibly alleged that Dr. Rosa has played or will play in the future any role in the actions of which they complain—namely, the enforcement of PHL § 2164 against them via the imposition of fines—injunctive relief against Dr. Rosa would not redress their alleged injury. Accordingly, they lack standing to pursue their claims against her. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 431, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021) ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."). The Court dismisses those claims without prejudice for lack of subject matter jurisdiction.

C. Legal Standard—Failure to State a Claim

Defendants do not dispute that the Court has subject matter jurisdiction over Plaintiffs' claims against Dr. McDonald. Accordingly, the Court turns to their merits-based arguments, made under Rule 12(b)(6).

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may

consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). A court should consider the motion by "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). To withstand dismissal, a claimant must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). "To state a plausible claim, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 218 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555).

In considering a motion to dismiss, "as a fundamental matter, courts may take judicial notice of legislative history." *Goe*, 43 F.4th at 29. "The same is true for administrative record filings[.]" *Id.*

D. Plaintiffs' Claims Against Dr. McDonald Fail as a Matter of Law

1. PHL § 2164 is Subject to Rational Basis Review

Plaintiffs' claim in this action is that PHL § 2164, as applied to them, violates their First Amendment rights. (*See* Dkt. 1 at 37 (asking the Court to "[d]eclare that N.Y. Public Health Law § 2164 is unconstitutional as applied to Plaintiffs and their schools, including against any principal, teacher or person in charge, for the students they enroll whose parents have a sincerely held religious belief against administering one or more vaccines required by N.Y. Public Health Law § 2164" and to enjoin enforcement of the law against Plaintiffs); Dkt. 28 at 34 ("[T]he complaint in this action *only* sought relief against [PHL § 2164] specifically 'as applied' to Plaintiffs and hence relief is limited thereby." (emphasis in original))).

The primary constitutional right that Plaintiffs claim has been violated by PHL § 2164 is the right to freely exercise one's religion. "A law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review." *We the Patriots*, 76 F.4th at 144 (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879, 110

S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). If the law at issue "is not neutral or not generally applicable, it is subject to strict scrutiny, and the burden shifts to the government to establish that the law is narrowly tailored to advance a compelling government interest." *Id.*

Initially, the Court notes that the Second Circuit held in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause" and that New York had—at that point in time—"go[ne] beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs." *Id.* at 543; *see also We the Patriots*, 76 F.4th at 150 ("[T]he government may constitutionally elect to accommodate religious believers but is not constitutionally *required* to do so." (emphasis in original)). *Phillips*, like all Second Circuit precedent, is binding on this Court. Accordingly, the crux of the matter before the Court is whether the *repeal* of the religious exemption, while leaving in place the medical exemption, violated the Free Exercise Clause. The Court's analysis of that question is dictated by the decision in *We the Patriots*, wherein the Second Circuit was called upon to determine whether Connecticut's mandatory vaccination statute—which, like PHL § 2164, had been recently amended to repeal an exemption based on religious objections, but continued to allow for medical exemptions—violated the First Amendment's Free Exercise Clause. *See* 76 F.4th at 144-57.[3]

3. Plaintiffs suggest that the as-applied nature of their claim "materially distinguishes this case from *We the Patriots*." (Dkt.

a. Neutrality

In *We the Patriots*, the Second Circuit first considered whether the Connecticut statute was neutral. *Id.* at 148. The *We the Patriots* court explained that a law is not neutral if the enacting authority "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id.* at 145 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021)). In order to be found non-neutral, "it is not enough for a law to simply *affect* religious practice; the law or the process of its enactment must demonstrate 'hostility' to religion." *Id.* The Connecticut statute was determined to be neutral because its legislative history was devoid of any "evidence of hostility to religious believers, even when read with an eye toward 'subtle departures from neutrality' or 'slight suspicion of religion or distrust of its practices.'" *Id.* at

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28 at 34). However, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (emphasis added). Accordingly, and contrary to Plaintiffs' argument, *We the Patriots* provides the appropriate framework for the Court's analysis.

Plaintiffs also contended at oral argument that *We the Patriots* is inconsistent with the Supreme Court's decision in *Fulton*. However, this Court is not free to disregard binding Second Circuit precedent based on a competing interpretation of the relevant legal standard.

148 (quoting *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 584 U.S. 617, 638, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)). The Second Circuit affirmatively rejected the argument that "repealing any existing religious exemption is hostile to religion per se." *Id.* at 149.

In the complaint, Plaintiffs allege that PHL § 2164 is not neutral because "the State targeted religious adherents by eliminating [the] long-standing religious exemption while leaving the medical exemption process in place." (Dkt. 1 at ¶ 70). This allegation fails to establish non-neutrality. Nothing in the text of PHL § 2164 as amended demonstrates any hostility to religion. To the contrary, PHL § 2164 is neutral on its face, neither targeting religious belief nor singling it out for particularly harsh treatment. And, as previously noted, *We the Patriots* affirmatively held that the repeal of a previously existing religious exemption is not, of itself, hostile to religion. *See* 76 F.4th at 149; *cf. Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) ("Surely the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future, especially if experience teaches the accommodation brings with it genuine safety problems that can't be addressed at a reasonable price. If the rule were otherwise, it would only invite the unwelcome side effect of discouraging . . . officials from granting the accommodation in the first place[.]").

Moreover, the legislative history related to the repeal of the non-medical exemption contains no evidence of hostility towards religious belief. Those sponsoring the

relevant legislation in both the New York State Senate and the New York State Assembly made clear that their concern was public health. *See, e.g.*, Sponsor Memo, 2019 N.Y. Senate Bill S2994A; Memorandum in Support of Legislation, 2019 N.Y. Assembly Bill A2371. In addition, rather than evidencing hostility to religious belief, the state legislature was concerned about individuals who were claiming a nonmedical exemption despite not having a religious belief regarding vaccination. N.Y. Senate, Tr. of Floor Proceedings, 242d Sess., at 5400-01 (June 13, 2019).

The state legislature considered the available scientific data, which showed that in the areas of the state most impacted by the measles outbreak, infections were primarily in unvaccinated children. *See* N.Y. Assembly, Tr. of Floor Proceedings, 242d Sess., at 58-59 (June 13, 2019). It noted that the New York City Department of Health had reported a case in which one infected child with a religious exemption resulted in 44 additional cases of measles, 26 of which were also in fellow students with religious exemptions. *See* N.Y. Senate, Tr. of Floor Proceedings, 242d Sess., at 5385 (June 13, 2019). The state legislature also considered data showing the number and percentage of religious exemptions in nonpublic schools had tripled or quadrupled in certain geographic areas in recent years, potentially causing the loss of herd immunity in those communities. *Id.* at 5388-89.

The state legislature considered alternatives, such as eliminating the religious exemption only with respect to the measles vaccine or otherwise narrowing the religious exemption, but ultimately determined such

alternatives would not be effective in protecting New York's schoolchildren from all vaccine-preventable illnesses. *Id.* at 5402, 5408. The state legislature also "acknowledged the impact [repealing the nonmedical exemption] would have on children and families who hold religious objections to vaccination but balanced that impact against the risks to public health." *We the Patriots*, 76 F.4th at 148; *see also F.F. v. State*, 194 A.D.3d 80, 85-87, 143 N.Y.S.3d 734 (3d Dep't 2021) (discussing the legislative history of the repeal of the religious exemption and concluding that it was neutral).

Plaintiffs further allege that the enforcement of PHL § 2164 is not neutral, because of statements made and actions taken by NYSDOH during the administrative proceedings against the plaintiff schools. (Dkt. 1 at ¶ 71). In particular, Plaintiffs take issue with NYSDOH's characterization of their actions as "willful non-compliance" with PHL § 2164. (Dkt. 10 at 21 ("The DOH was clear about its animus towards Plaintiffs and their religious beliefs, characterizing such beliefs as willful non-compliance. It also pushed for a significant penalty because, 'Respondents' admission that they violated the statute and their promise to continue violating the law of "man" is in essence a recommendation for administrative nullification of a duly enacted law.' And DOH's final order reflected this animus in assessing ruinous fines[.]" (internal citations omitted)).

The statements pointed to by Plaintiffs are not indicative of religious animus by NYSDOH. Indeed, Plaintiffs have failed to explain precisely what it is they

object to in the identified statements, which are fully consistent with the positions they took before the ALJ and the positions they have taken in this Court. The statement that Wengerd read at the hearing stated: "It is our utmost desire to live a quiet peaceful undesturbed [sic] life and obey those in authority over us. But once those laws are in conflict with what the bible teaches then we are commanded to obey God rather than man." (Dkt. 1 at ¶ 39). The statement also asked the ALJ to grant the plaintiff schools "an exemption of immunization for our children on religious and ethical grounds," (*id.*), despite the fact the PHL § 2164 does not allow for any such exemption. In the instant action, Plaintiffs have asserted that they will "choose prison time or a martyr's death before going against their convictions." (Dkt. 1 at ¶ 41). They have alleged: "For the avoidance of all doubt, Plaintiffs do not, will not, and cannot comply with" PHL § 2164. (*Id.* at ¶ 58). In other words, Plaintiffs' own complaint confirms that their noncompliance with PHL § 2164 is willful, and not the result of inadvertence or misunderstanding of what the law requires. *See Merriam-Webster Dictionary*, Willful, https://www.merriam-webster.com/dictionary/willful ("done deliberately : intentional | *willful* disobedience") (last accessed Mar. 10, 2024). This distinction was plainly relevant in the context in which it was raised, which was whether NYSDOH should adopt the ALJ's recommendation that no penalty be assessed due to a lack of notice. NYSDOH's characterization of Plaintiff's position towards PHL § 2164, which is grounded in fact, cannot plausibly be interpreted as demonstrating animus.

Nor does the imposition of substantial penalties reflect hostility to religion. "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). However, "adverse impact will not always lead to a finding of impermissible targeting." *Id.* NYSDOH explained in its order that imposition of no penalty despite plaintiff schools' undenied violation of PHL § 2164 "would be contrary to public policy, [NYSDOH's] mission, and the clear intent of the state legislature[.]" (Dkt. 1-6 at 5). Further, NYSDOH concluded that allowing the plaintiff schools to deliberately violate PHL § 2164 without consequence would "encourage other schools to ignore the law's requirements and assert a religious exemption," thereby putting NYSDOH "in the position of nullifying a duly enacted statute, . . . and failing to carry out its vital purpose of protecting the health of all New Yorkers." (*Id.* at 5-6). NYSDOH's refusal to functionally recognize a religious exemption that is statutorily unavailable does not constitute hostility to religion.

Moreover, while Plaintiffs allege before this Court that "[b]ecause the schools are not publicly funded and have no reserve cash, they are unable to pay the penalties" (Dkt. 1 at ¶ 58), they do not allege that they ever made this argument to NYSDOH. To the contrary, NYSDOH's order states that "Respondents have not argued that they cannot afford" the penalties sought. (Dkt. 1-6 at 6).[4] The allegedly

4. To be clear, the Court is making no determination about the financial impact of the penalties imposed on the plaintiff schools. Instead, the Court has cited NYSDOH's order "to explain the decision-making of state authorities." *Goe*, 43 F.4th at 29.

financial ruinous nature of the imposed penalties cannot plausibly demonstrate religious animus where NYSDOH was not on notice thereof.

Plaintiffs' complaint further alleges that "there are comparable secular activities (from a risk perspective) that are permitted, while religious exemptions are forbidden, which also undermines neutrality." (Dkt. 1 at ¶ 71; *see also* Dkt. 10 at 23 ("New York's purported concern for public safety is only urgent when it seeks to eradicate religious observance related to mandatory vaccination for school. In contrast, in all other contexts, the State is disinterested in the purported threats posed by those unvaccinated in virtually every other area of life, including the over 66,000 children enrolled in school without required vaccination and without a medical exemption.")). The alleged underinclusivity of PHL § 2164 is properly assessed under the general applicability analysis. *See Fulton*, 593 U.S. at 534 ("A law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."). The Court performs that analysis below and concludes that PHL § 2164 does not permit comparable secular activities. Accordingly, this argument also necessarily fails with respect to neutrality.

For these reasons, the Court finds as a matter of law that PHL § 2164, as amended in 2019, is neutral. Strict scrutiny does not apply on this basis.

b. General Applicability

The Court also finds that PHL is generally applicable. 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*, 593 U.S. at 533 (alteration and quotations omitted). "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." *Id.* at 534. Plaintiffs allege that both of these conditions are satisfied here.[5]

With respect to the matter of individualized exemptions, Plaintiffs allege that PHL § 2164 "fails the general applicability test because it allows discretionary medical exemptions, but prohibits a similar exemption process for those who, like Plaintiffs, possess sincerely held religious reasons for declining compulsory vaccination." (Dkt. 1 at ¶ 62). The Court disagrees. The Connecticut statute at issue in *We the Patriots*, like PHL § 2164, contains a medical exemption. Specifically, it provides that a student "shall be exempt" from the mandatory vaccination requirement "if, for instance, the student

5. Plaintiffs also argue that "[i]n repealing its religious exemption but leaving the medical exemption intact, the state made a conscious choice that non-vaccination for secular reasons was 'worthy of solicitude,' but that non-vaccination for religious reasons must be eliminated. Thus, the statute fails the general applicability test from the outset." (Dkt. 28 at 26 (citations omitted)). This argument must fail in light of *We the Patriots*, where Connecticut had also repealed its religious exemption but left a medical exemption in place.

'presents a certificate . . . from a physician, physician assistant or advanced practice registered nurse stating that in the opinion of such physician, physician assistant or advanced practice registered nurse such immunization is medically contraindicated because of the physical condition of such child.'" 76 F.4th at 150 (quoting Conn. Public Act 21-6 § 1(a)(2)). The *We the Patriots* court explained that "where a law provides for an objectively defined category of people to whom the vaccination requirement does not apply, including a category defined by medical providers' use of their professional judgment, such an exemption affords no meaningful discretion to the State" and thus does not render the law not generally applicable. *Id.* at 151 (quotation omitted).

PHL § 2164(8) provides: "If 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." (emphasis added). This exemption, like the exemption at issue in *We the Patriots*, is phrased in mandatory terms and applies to an objectively defined group of people.[6] Accordingly, it is not—under binding Second Circuit case law—an individualized exemption triggering strict scrutiny.

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6. As previously explained, New York regulations define "may be detrimental to the child's health" in objective terms as meaning that "a physician has determined that a child has a medically 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(m).

Plaintiffs attempt to distinguish PHL § 2164 from the Connecticut statute at issue in *We the Patriots* by pointing to the last sentence of 10 NYCRR § 66-1.3, which allows the principal or person in charge of a school to "require additional information supporting the exemption." (*See* Dkt. 28 at 28-29). According to Plaintiffs, under this regulation, "school officials are delegated enormous independent and personalized discretion to override a physician's medical recommendation, including the ability to require additional information and ultimately make the final discretionary decision to grant or deny a medical exemption." (*Id.* at 28). This argument lacks merit. Nothing in the language of 10 NYCRR § 66-1.3 suggests that school officials may request information other than that necessary to confirm that the requirements of PHL § 2164(8) have been satisfied, or that a school official has any discretion to deny an exemption that complies with the statutory requirements. And, even were there some ambiguity in 10 NYCRRR § 66-1.3, under New York law, "in the event of a conflict between a statute and a regulation, the statute controls." *Sciara v. Surgical Assocs. of W. New York, P.C.*, 104 A.D.3d 1256, 1257, 961 N.Y.S.2d 640 (4th Dep't 2013). Here, the statute is clear and mandatory.

Plaintiffs make much of the Second Circuit's statement in *Goe* that "New York State law . . . delegates to school officials the authority to grant a medical exemption from the State's school immunization requirements." 43 F.4th 19. But non-discretionary duties and discretionary duties are both capable of delegation. That school officials are the state employees ultimately charged with determining whether PHL § 2164(8) has been satisfied does not

mean that they are free to "decide which reasons for not complying with the policy are worthy of solicitude." *We the Patriots*, 76 F.4th at 151 (quotation omitted and concluding that the Connecticut statute's "requirement that specified documents supporting requests for medical exemptions be acknowledged by, *inter alia*, state and local officials" did not "afford[] such officials the discretion to approve or deny exemptions on a case-by-case basis.").[7]

Plaintiffs argue that "New York has administratively granted over 97,900 nonmedical exceptions by not enforcing [PHL § 2164] for students not vaccinated for secular reasons." (Dkt. 28 at 29). This argument lacks merit for multiple reasons. Plaintiffs base this claim on a statement by Dr. Debra Blog, the medical director of NYSDOH's Bureau of Immunization, that "[a]fter the religious exemption was repealed in New York, the average percentage of school-aged children completely immunized in the State steadily grew, from 93% of children in the 2017-2018 school year (pre-repeal) to 96% in the 2021-2022 school year." (Dkt. 25-3 at ¶ 19; *see* Dkt. 28 at 14)[8].

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7. Plaintiffs have also argued that variances in medical exemption rates between schools are evidence of discretionary action by school officials. (*See* Dkt. 1 at ¶ 65). This is pure speculation. There are any number of reasons why one school would have more requests for medical exemptions than another. Moreover, even if some school officials in New York are not complying with their duties under PHL § 2164(8), that does not mean the statute is not mandatory—it means those school officials are not performing their statutory duties. New York law provides mechanisms to address any such issues.

8. The Court notes that this increase brought the number above the 95% recognized as necessary for herd immunity, as was the state legislature's stated goal.

Plaintiffs have taken the 96% number provided by Dr. Blog and extrapolated therefrom that "[t]he [remaining] 4% amounts to over 97,900 students who are permitted to attend school in New York without mandated school vaccines." (Dkt. 28 at 14).[9]

The flaws in Plaintiffs' logic are apparent. First, there is nothing in Dr. Blog's statement to suggest that the 4% of school-aged children who are not completely immunized are attending schools, as opposed to being homeschooled. Second, there is nothing in Dr. Blog's statement to support Plaintiffs' conclusion that these students are unvaccinated for secular as opposed to religious reasons. Third, 10 NYCRR §§ 66-1.1(j) and 66-1.3(b) permit schools to admit children who are in the process of receiving the immunizations required by PHL § 2164. In other words, a child could be in the process of obtaining his or her immunizations, and thus lawfully permitted to attend school in New York, but not yet completely immunized.

Fourth, and perhaps most importantly, the fact that NYSDOH has not achieved perfect compliance with PHL § 2164 does not mean that it is not generally applicable. That is a standard that virtually no law could meet.

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9. In their complaint, Plaintiffs estimated the number of "unvaccinated children that attend schools in New York without a medical exemption" as "approximately 66,000." (Dkt. 1 at ¶ 67). They revised this number upward in their subsequent briefing based on Dr. Blog's statement. (*See* Dkt. 28 at 14 (concluding based on Dr. Blog's statement that "the 66,000-student estimate was well *below* the actual number" (emphasis in original))). The 66,000 estimate was also based on guesswork. (*See* Dkt. 1 at ¶ 67 n.4).

Plaintiffs have not alleged that NYSDOH has declined to take steps to enforce PHL in any similarly situated secular school, and the Court finds their assertion that New York has granted "functional exemptions" to 97,000 school-age children unsupported by factual allegations. *See First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994) ("Under Rule 12(b)(6), the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." (quotation omitted)).

For the reasons set forth above, the Court rejects Plaintiffs' contention that PHL § 2164 allows for individualized exemptions and is therefore subject to strict scrutiny. The Court accordingly turns to Plaintiffs' argument that PHL § 2164 treats comparable secular activity more favorably than religious exercise. As an initial matter, the Court notes that Plaintiffs rely heavily on the fact that they are making an as-applied challenge, contending that the general applicability inquiry should thus focus on the extent to which granting "an Amish-specific religious exemption" would undermine New York's interests. (Dkt. 28 at 34). Plaintiffs are incorrect. They cite *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006), but *Gonzales* involved application of the "strict scrutiny test" required by the Religious Freedom Restoration Act. *Id.* at 430-31. It says nothing about determining whether a law is generally applicable under the governing legal framework.

Similarly, the portion of *Fulton* cited by Plaintiffs involved the application of strict scrutiny *after* the Court had already determined that the ordinance at issue was not generally applicable. *See* 593 U.S. at 541. At that stage of the inquiry, the focus is indeed on whether the state has "an interest in denying an exception to" the particular claimant. *Id.* However, in determining in the first instance whether a statute is generally applicable, the focus is not so narrow. The general applicability standard looks, as the Supreme Court has stated, at whether the government has "in a selective manner impose[d] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Accordingly, the general applicability analysis does not turn on whether the secular activity identified by Plaintiffs is comparable in terms of risk to allowing only them to be exempt from PHL § 2164 for religious reasons. It turns on whether it is comparable in terms of risk to allowing a religious exemption for all who would potentially claim it.[10]

"[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the

10. Plaintiffs also cite *Central Rabbinical Cong. of the U.S. v. N.Y.C. Dep't of Hlth. & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) and assert that it held that a "law intended to counteract infectious disease failed general applicability test on under-inclusivity grounds as it pertained to the Orthodox Jewish community." (Dkt. 33 at 42-43). This is an inaccurate statement of the holding in *Central Rabbinical*. The Second Circuit in that case was "unable to conclude" that the law at issue was generally applicable because it "applie[d] exclusively to religious conduct implicating fewer than 10% of the cases of neonatal HSV infection," while failing to regulate at all the non-religious conduct "accounting for all other cases." *Id.* at 196-97.

asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 593 U.S. 61, 62, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021). "Therefore, [the Court] must first determine what interest [New York] has asserted justifies [PHL § 2164], then decide whether permitting medical exemptions and repealing religious exemptions promote the State's interest." *We the Patriots*, 76 F.4th at 151.

New York's asserted interest in PHL § 2164 is twofold. "First, it aims to protect the health of children while they are physically present in the school environment. Second, it aims to protect the health of the public in general against disease outbreaks both in and outside of school; it does this by serving as the apparatus that ensures that, the vast majority of children—who will quickly grow into the vast majority of adults—are vaccinated." (Dkt. 25-1 at 40-41). Plaintiffs contend that these interests are "*post-hoc* asserted interests" that are "at war with each other." (Dkt. 28 at 32-33). The Court disagrees. The interests asserted by Defendants in this litigation are the same as those asserted by the state legislature at the time the religious exemption was repealed. In the record before it, the Court does not "find any sign that the State has offered for litigation purposes a *post hoc* rationalization of a decision originally made for different reasons." *We the Patriots*, 76 F.4th at 152.

As to whether these interests are served by repealing the religious exemption while keeping the medical exemption in place, *We the Patriots* is on point. There, Connecticut asserted that its interest was to protect

the health and safety of its schoolchildren. *Id.* The Second Circuit determined that maintaining the medical exemption served this interest, while "maintaining the repealed religious exemption would not." *Id.* The Second Circuit rejected the plaintiffs' argument that it "should cabin [its] analysis to the risk an individual child who is unvaccinated—whether for medical or religious reasons—might pose to the health and safety of Connecticut students." *Id.* at 153. The Second Circuit explained that "exempting a student from the vaccination requirement because of a medical condition and exempting a student who declines to be vaccinated for religious reasons are not comparable in relation to the State's interest," because the Connecticut statute seeks to "promote[] the health and safety of *vaccinated* students by decreasing, to the greatest extent medically possible, the number of unvaccinated students (and, thus, the risk of acquiring vaccine-preventable diseases) in school." *Id.* (emphasis in original). The Connecticut statute "also promotes the health and safety of *unvaccinated* students. Not only does the absence of a religious exemption decrease the risk that unvaccinated students will acquire a vaccine-preventable disease by lowering the number of unvaccinated peers they will encounter at school, but the medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict on them." *Id.* (emphasis in original). This analysis applies with full force to PHL § 2164, and forecloses the argument that the medical exemption and the repealed religious exemption are comparable for free exercise purposes.

Appendix B

Plaintiffs have identified additional alleged "comparable secular activities" allowed by New York: " 1) granting functional exemptions, due to lax enforcement, to an estimated 97,900 [PHL § 2164] non-compliant schoolchildren who have not claimed any exemption; (2) allowing unvaccinated adults to work in the school system; (3) permitting homeschooled children to congregate in unlimited numbers in educational settings without vaccination requirements; (4) permitting children who have not been vaccinated against Covid, flu, and numerous other diseases for which vaccines exist, or the around 1,400 pathogens for which no vaccine exists, to attend school; [and] (5) allowing citizens to congregate *en masse* for every activity imaginable without any vaccine mandate[.]" (Dkt. 28 at 35-36). The Court has already discussed at length why Plaintiffs' argument regarding so called "functional exemptions" lacks merit. The remaining alleged "comparable secular activities" were equally present in *We the Patriots*,[11] yet did not cause the Second Circuit to conclude that the Connecticut statute was not generally applicable. The Court finds no basis in the record before it to reach a different conclusion here.

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11. Connecticut, like New York, requires vaccinations for measles, rubella, poliomyelitis, mumps, diphtheria, tetanus, pertussis, hepatitis B, Hib, varicella, pneumococcal disease, and meningococcal disease, and additionally requires vaccination for hepatitis A and influenza. *Compare* PHL § 2164(a)(2) *with* CT ADC § 10-204a-2a. The Connecticut statute at issue in *We the Patriots* also does not regulate unvaccinated adults working in schools, unvaccinated homeschooled children, or unvaccinated children and adults in non-school settings.

PHL § 2164, like the Connecticut statute at issue in *We the Patriots*, is generally applicable for free exercise purposes. Strict scrutiny does not apply on this basis.

c. Implication of Other Constitutional Rights

Finally, Plaintiffs argue that strict scrutiny applies because this case involves "hybrid rights"—that is, in addition to their free exercise rights, they allege that PHL § 2164 impacts their rights to freedom of speech, to freedom of association, and to regulate the upbringing and education of their children. (Dkt. 28 at 43-44; *see* Dkt. 1 at ¶ 74). However, courts in the Second Circuit "do not apply heightened scrutiny to 'hybrid rights' claims." *We the Patriots*, 76 F.4th at 159. In particular, the fact that Plaintiff's free exercise claim is "connected with a communicative activity or parental right" does not trigger heightened scrutiny under Second Circuit precedent. *Id.* (quotation omitted and finding that the district court "correctly held that plaintiffs' claim that the Act violates their liberty interest in childrearing was coextensive with their Free Exercise Clause claim"). While the Court understands that Plaintiffs disagree with that holding (*see* Dkt. 28 at 44 ("Plaintiffs maintain *Smith*'s hybrid rights analysis stands as settled law, and that the hybrid rights presented here are subject to strict scrutiny.")), this Court is not free to disregard Second Circuit precedent. The Court will not apply strict scrutiny on this basis.

The Court also does not view the complaint as asserting freestanding claims for violation of the rights to freedom of speech, assembly, or to regulate the upbringing

of one's children, distinct from the free exercise claim. The complaint contains a single count, which is denominated "VIOLATION OF PLAINTIFFS' FIRST AMENDMENT FREE EXERCISE RIGHTS." (Dkt. 1 at 20). The Court concludes that Plaintiffs' claims for infringement of their other constitutional rights are coextensive with their free exercise claim and rise or fall therewith.

2. PHL § 2164 Satisfies Rational Basis Review

For all the reasons set forth above, the Court concludes that PHL § 2164 is subject to rational basis review. To survive such review, it is necessary only that the challenged law be "reasonably related to a legitimate state objective." *Goe*, 43 F.4th at 32.

Plaintiffs have not argued that PHL § 2164 cannot satisfy rational basis review—to the contrary, Plaintiffs' counsel conceded at oral argument that it could. This is plainly correct. As the Second Circuit held in *We the Patriots*, "protecting public health is a compelling government interest." 76 F.4th at 156. Further, repealing the religious exemption was "rationally related to that interest because it seeks to maximize the number of students . . . who are vaccinated against vaccine-preventable diseases." *Id.* Further, the requirement that children be vaccinated to attend school, as opposed to participate in other types of social gatherings, "is rational because only at school is attendance mandated by law[.]" *Id.* Accordingly, Plaintiffs have not plausibly alleged that PHL § 2164 violates the Free Exercise Clause, and their claims against Dr. McDonald must be dismissed.

II. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs have asked the Court for a preliminary injunction. (Dkt. 9). The Court's determination that Plaintiffs' claims must be dismissed eliminates any possibility that the Court could grant their request for preliminary injunctive relief. Accordingly, Plaintiffs' motion for a preliminary injunction is denied as moot.

CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to dismiss (Dkt. 25) and denies Plaintiff's motion for a preliminary injunction (Dkt. 9) as moot. More particularly, Plaintiffs' claims against Dr. Rosa are dismissed without prejudice for lack of subject matter jurisdiction, while Plaintiffs' claims against Dr. McDonald are dismissed with prejudice for failure to state a claim. The Clerk of Court is instructed to enter judgment in favor of Defendants and close the case.

SO ORDERED.

/s/ Elizabeth A. Wolford
ELIZABETH A. WOLFORD
Chief Judge
United States District Court

Dated: March 11, 2024
Rochester, New York

APPENDIX C — ORDER OF THE STATE OF NEW YORK, DEPARTMENT OF HEALTH, FILED DECEMBER 15, 2022

STATE OF NEW YORK : DEPARTMENT OF HEALTH

MISC-22-019

In the Matter of

Mary T. Bassett, M.D., M.P.H., Commissioner of Health of the State of New York, to determine the action to be taken with respect to:

Dygert Road School,
Pleasant View School (a/k/a)Twin Mountain School and Shady Lane School,

Respondents.

In a proceeding arising out of alleged violations of Article 21 of the Public Health Law and Title 10, NYRR 10

Filed December 15, 2022

ORDER

A notice of hearing and a statement of charges were served on Dygert Road School, Twin Mountain School, and Shady Lane School (Respondents). The statement of charges alleges that the three Respondents admitted students and allowed those students to attend the respective schools for more than fourteen days without documentation that they were fully vaccinated or a signed medical exemption form completed by a physician, in violation

of PHL Section 2164(7)(a) and 10 NYRR §§ 66-1.3 and 66-1.4.

On May 2, 2022, Administrative Law Judge Natalie Bordeaux (ALJ)held a hearing on these charges via WebEx. The Department appeared by Vanessa Murphy, Esq. The Respondents were represented by Ezra Wengerd. Evidence was received, witnesses were sworn and examined, and a digital recording of the proceeding was made.

On May 25, 2022, the ALJ issued her Report and Recommendation. The ALJ concluded that the Department met its burden of proof and recommended that the Commissioner sustain the changes against each Respondent, but recommended that no monetary penalty be imposed for the violations. The Department submitted Exceptions.

After reviewing the ALJ's Report and the entire record in this case, I adopt the ALJ's recommendation to sustain the charges against each of the Respondent schools, but reject her recommendation to impose no civil penalty for the reasons stated in the Department's Exceptions.

The ALJ asserts that no civil penalty is appropriate because it is "unclear whether Respondents were given a proper opportunity to respond."[1] As more fully explained in the Department's Exceptions, these arguments are unsupported by the record. More importantly, they are

1. ALJ's Report at 14 and 15.

not arguments advanced by the Respondents themselves. The Respondents testified that they were aware of the legal requirements but intend not to comply because of an irreconcilable conflict between their religious beliefs and PHL §2164.

The Department does not doubt the genuineness of the Respondents' religious assertions. However, to impose no penalty would be contrary to public policy, the Department's mission, and the clear intent of the State legislature, as affirmed by the Courts. In 2019, in response to a nationwide measles epidemic, the Legislature amended PHL § 2164 to remove the religions exemption, leaving medical exemptions as the only exception to the school immunization requirements in the statute.[2] The Supreme Court, Third Department, upheld the amendment against a constitutional challenge in *FF v. State*, 194 AD3d 80, (2021) *aff'd, 37 N.Y.3d 1040 (2022),*[3] As the State's public health agency, the Department is obligated to enforce this law, and the Department's sole means of enforcement is imposition of a civil monetary penalty on schools that fail to comply.

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2. Laws of 2019, Chapter 35.

3. The Court found that the amendment, which also narrowed the medical exemption was "a rule of general applicability driven by public health concerns and not tainted by hostility toward relgion. . . . 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 applicabilitiy on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)." *Id.* at 84.

To impose no monetary sanctions in this case on schools that have admitted to violiating the statute would encourage other schools to ignore the law's requirements and assert a religious exemption. It would put the Department in the position of nullifying a duly enacted statute, in violation of the doctrine of separation of powers embodied in New York State's Constitution, and failing to carry out its vital purpose of protecting the health of all New Yorkers.

The penalties requested by the Department are principled and conservative under the circumstances. Respondents have not argued that they cannot not afford them.

NOW, on reviewing the record herein and the ALJ's Report, I hereby adopt the ALJ's finding that the Department met its burden of proof and her recommendation to sustain the charges, but reject her recommendation to impose no monetary penalties for the reasons stated in the Department's exceptions.

IT IS HEREBY *ORDERED*:

1. Charge 1 against Dygert Road School is SUSTAINED.

2. A civil penalty of $52,000 is imposed against Dygert Road School.

3. Charge 1 against Pleasant View/Twin Mountain School is SUSTAINED.

4. A civil penalty of $46,000 is imposed against Pleasant View/Twin Mountain School.

5. Charge 1 against Shady Lane School is SUSTAINED.

6. A civil penalty of $20,000 is imposed against Shady Lane School.

7. This Order shall be effective upon service on the Respondents by personal service or by registered or certified mail as required under PHL §12-a(4).

Dated: Albany, New York

Dec. 15, 2022

BY: Mary T. Bassett
Mary T. Bassett, M.D., M.P.H.
Commissioner of Health

TO: Vanessa Murphy, Esq.
Bureau of Administrative Hearings
New York State Department of Health
Coming Tower, Room 2412
Empire State Plaza
Albany, New York 12237-0026

Ezra Wengerd
139 H. Jones Road
Canajoharie, New York 13317

APPENDIX D — REPORT AND RECOMMENDATION OF THE STATE OF NEW YORK, DEPARTMENT OF HEALTH, FILED MAY 25, 2022

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the matter of
Mary T. Bassett, M.D., M.P.H., as Commissioner of the New York State Department of Health, to determine the action to be taken with respect to

Dygert Road School,
Twin Mountain School, and
Shady Lane School

Respondents,

arising out of alleged violations of Article 21 of the Public Health Law and Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

To: The Honorable Mary T. Bassett, M.D., M.P.H.
Commissioner of Health, State of New York

Hearing before: Natalie Bordeaux
Administrative Law Judge

Held at: Montgomery County Annex Building,
Room 214
20 Park Street
Fonda, New York 12068

Appendix D

Hearing date: May 2, 2022

Parties: New York State Department of Health
Corning Tower, Room 2412
Empire State Plaza
Albany, New York 12237-0029
By: Vanessa Murphy, Esq.

Dygert Road School
Twin Mountain School
Shady Lane School

By: Ezra Wengerd
139 H. Jones Road
Canajoharie, New York 13317

Report and Recommendation

JURISDICTION

By notices of hearing and statements of charges dated March 7, 2022, the New York State Department of Health (the Department) advised Dygert Road School, Twin Mountain School[1], and Shady Lane School (the Respondents) that hearings would be held pursuant to Public Health Law (PHL) § 12-a on charges that they admitted students, and continued to allow such students to attend their schools for more than fourteen days without

1. Twin Mountain School is incorrectly referenced in the Department's records as "Pleasant View School." (Recording @ 12:56.)

documentation that the students were immunized against the diseases delineated in PHL § 2164 or medically exempt from the immunization requirements. These hearings were consolidated at the request of the Respondents' representative.

The Department seeks to impose a monetary penalty on each Respondent pursuant to PHL § 12. This enforcement process requires a hearing to be held in accordance with procedures set forth at PHL § 12-a and 10 NYCRR Part 51. The Department has the burden of proof. 10 NYCRR § 51.11(d)(6).

HEARING RECORD

Department witnesses:	James Brewster, Public Health Field Services Representative, Bureau of Immunization Barbara Joyce, Regional Coordinator, Bureau of Immunization
Department exhibits:	1-12
Respondent exhibits:	A

A digital recording of the hearing was made. (2:14:42 in duration.)

Appendix D

SUMMARY OF FACTS

1. The Respondents-are schools as defined in PHL § 2164(1)(a) and 10 NYCRR § 66-1.1(a), operated by members of the Old Order Amish and Mennonite Community Churches who have no access to the internet or other technologies, other than limited telephone use. (Recording @ 1:29:58; Exhibit 12.)

Dygert Road School

2. By notice dated November 9, 2021, the Department advised Dygert Road School's principal of record by mail at his home address (Recording @ 32:40), that an audit of the school's immunization records would be conducted on November 23, 2021 at 11:00 am at the school to determine its compliance with PHL § 2164. The school was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all susceptible students.
- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 4.]

3. On November 23, 2021, Public Health Field Services Representative James Brewster arrived at Dygert Road School and audited students' immunization records. He was given twenty-six immunization cards that contained student names but were otherwise blank. Mr. Brewster did not request the school's policies and procedures regarding compliance with PHL § 2164 and did not request information pertaining to susceptible students, including those with medical exemptions. (Recording @ 34:35; Exhibit 7.)

4. The Department mailed a notice dated December 13, 2021 to Dygert Road School's principal of record at his home address, advising him that the immunization records of twenty-six students were reviewed at the school and found to be out of compliance with school attendance immunization requirements. The Department ordered Dygert Road School to immediately exclude students identified by the Department in an "attached list" until or unless they had evidence of compliance with immunization requirements. The Respondent was also required to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 9.)

Appendix D

Shady Lane School

5. By notice dated November 8, 2021, the Department advised the principal of Shady Lane School by mail at his home address, that an audit would be conducted on November 23, 2021 at 1:00 pm at the school to review the school's immunization records and determine compliance with PHL § 2164. Shady Lane School was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all of the susceptible students.
- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 5.]

6. On November 23, 2021, Mr. Brewster arrived at Shady Lane School and attempted to audit the school's compliance with immunization requirements but was not provided with any documentation by the adult on the premises. (Recording @ 58:40.)

7. The Department mailed a notice dated December 13, 2021 to Shady Lane School's principal at his home address to inform him that the school was required to

exclude all students from school until or unless they had evidence of compliance with immunization requirements. The Respondent was also required to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 10.)

Twin Mountain School ("Pleasant View School" per Department records)

8. By notice dated November 8, 2021, the Department advised Beneal Fisher by mail at his home address, that an audit would be conducted on November 23, 2021 at 9:00 am at "Pleasant View" School to determine its compliance with PHL § 2164. The school was advised to have the following information prepared for the audit:

- A list of all students that includes the grade in which they are enrolled.

- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).

- The immunization records for all of the susceptible students.

- A copy of the school's policies and procedures regarding compliance with PHL Section 2164. [Exhibit 6.]

9. The school's name was not correct, and Mr. Fisher was no longer affiliated with "Pleasant View," "Twin Mountain," or any other school. (Recording @ 14:45, 18:56.)

10. On November 23, 2021, Mr. Brewster arrived at Twin Mountain School and reviewed students' immunization documentation provided by a teacher. He found one student to be fully compliant with immunization requirements, and several other students in the process of receiving required immunizations. He did not request the school's policies and procedures regarding compliance with PHL § 2164 and did not request information pertaining to all susceptible students, including those with medical exemptions. (Recording @ 1:08:40.)

11. The Department mailed a December 13, 2021 letter to Beneal Fisher at his home address to advise him that twenty-four students at "Pleasant View" School identified in an "attached list" were out of compliance with school attendance immunization requirements. The notice required the school to submit the following information to the Department via email: (1) a summary of students and their compliance with immunization requirements within seven calendar days; (2) a written corrective action plan for continued review of all student immunization records within fourteen calendar days; and (3) a current list of excluded students with a completed, signed and notarized affirmation within thirty calendar days. (Exhibit 11.)

12. The Department did not send the December 13 correspondence to the current school principal or other responsible party before serving the March 7, 2022 notice of hearing and statement of charges. (Recording @ 1:30:51, 1:46:46.)

ISSUES

Did the Respondents violate school attendance immunization requirements?

If so, what penalties should be imposed?

APPLICABLE LAW

Every person in parental relation to a child in the State of New York 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 meets the standards approved by the United States public health service for such biological products, and which is approved by the Department under such conditions as may be specified by the:public health council. PHL § 2164(2)(a).

A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with one of the following: (a) a certificate of immunization documenting that the child has been fully immunized according to the

requirements of 10 NYCRR § 66-1.1(f); (b) documentation that the child is in process of receiving immunizations; or (c) a signed, completed medical exemption form approved by the Department 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. The medical exemption must be reissued annually. PHL § 2164(7)(a); 10 NYCRR § 66-1.3. Effective June 13, 2019, there is no longer a religious exemption to the requirement that children be vaccinated against the measles and other diseases to attend either public, private or parochial school (for students in prekindergarten through 12th grade), or child day care settings.

A principal or person in charge of a school shall not permit a child to continue to attend such a school for more than fourteen days unless a person in parental relation to the child has furnished the school with one of the documents specified in 10 NYCRR § 66-1.3. The fourteen day attendance limit may be extended to not more than thirty days where the student is transferring from out of state or from another county and can show a good faith effort to get the necessary evidence or where the parent, guardian or any other person in parental relationship can demonstrate that a child has received the first age-appropriate dose in each immunization series and that they have age-appropriate scheduled appointments for follow-up doses to complete the immunization series in accordance with the Center for Disease Control

(CDC)'s Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18. School Vaccine Requirements FAQ [Frequently Asked Questions] issued August 2019, New York State Department of Health, available at: https://www.health.ny.gov/prevention/immunization/schools/school_vaccines/docs/2019- 08_vaccination_requirements_faq.pdf.

For the diseases listed in PHL § 2164, in the event of an outbreak of a vaccine preventable disease in a school, the commissioner may order school officials to exclude from attendance all students who have either been medically exempted from immunization pursuant to 10 NYCRR § 66-1.3(c) or are in the process of receiving required immunizations (susceptible students). 10 NYCRR § 66-1.10(a). Schools must maintain a list of susceptible students who should be excluded from attendance in the event of an outbreak of vaccine preventable disease. The list must include all students who have been excused from immunization under 10 NYCRR § 66-1.3(c) and students who are in the process of completing immunization series or awaiting the results of serologic testing for any vaccine preventable disease specified under 10 NYCRR § 66-1.3(b). 10 NYCRR § 66-1.10(c).

DISCUSSION

The Department's sole charge against each of the three named Respondents is:

> Admitting and continuing to allow students to attend school more than fourteen days without

immunization documentation. PHL § 2164(7)(a), 10 NYCRR § 66-1.3 and § 66-1.4.

The Respondents acknowledged that not all students attending the schools were vaccinated. They explained that the current school immunization requirements violate their deeply held religious beliefs. (Recording @ 1:52:45, 2:07:31.)

The Respondents contended that they are home schools operating on private property and therefore should not be subject to New York State immunization requirements. (Recording @ 1:55:10.) Their claim is not consistent with applicable law and Department policy. The Department has determined that group instruction organized by parents and provided by a tutor for a majority of the instructional program constitutes the operation of a nonpublic school and is not home instruction. As such, students attending these programs must abide by immunization requirements. *See* School Vaccine Requirements FAQ issued August 2019, New York State Department of Health.

The Respondents also argued that their schools should be exempt from student immunization requirements because they do not receive funding from the State of New York. (Recording @ 1:54:34.) Here too, the Department has determined that a school's receipt or non-receipt of State funding is irrelevant with respect to its stated concern for increasing immunization rates amongst children. School Vaccine Requirements FAQ issued June 18, 2019, New York State Department of Health,

available at: https://www.p12.nysed.gov/sss/documents/nonmedical%20vaccine%20exemption%20FAQ%200618%20final.pdf.

In light of the Respondents' acknowledgements that they did not comply with immunization requirements, the stated charge (Charge 1) against each Respondent school should be sustained.

Civil penalty determination.

Any person who violates, disobeys or disregards any regulation for which a civil penalty is not otherwise expressly prescribed by law shall be liable for a civil penalty not to exceed two thousand dollars for every such violation. PHL § 12. The Department seeks the maximum civil penalty of $2,000 for each student that it has determined did not comply with immunization requirements.

Specifically, the Department seeks a $52,000 civil penalty against Dygert Road School, representing the $2,000 maximum civil penalty for twenty-six students whose immunization cards Mr. Brewster was given during his November 23, 2021 visit. (Recording @ 1:59:30.) The Department seeks a $46,000 civil penalty against Twin Mountain School because Mr. Brewster determined that twenty-three students at that school were not properly immunized. Although his December 13, 2021 post-audit letter asserts that twenty-four students were deemed out of compliance with immunization requirements (Exhibit 11), Mr. Brewster subsequently revised his determination

downward to exclude one child who was too young to attend school (Recording @ 1:59:45.)

The Department seeks the imposition of a $20,000 civil penalty against Shady Lane School on the tenuous grounds that it was more probable than not that at least one student in attendance violated immunization requirements and would have attended the school for more than ten days, with each day of attendance constituting a separate violation. (Recording @ 2:00:29.) Since schools are permitted to allow a student who has not satisfied immunization requirements to attend school for fourteen days before even a potential violation occurs, the stated basis for the Department's computation is legally incorrect, in addition to being unsupported by the evidence.

The Department's recommendation is intended to serve as a deterrent to future violations. (Recording @ 2:02:00.) However, for the reasons set forth below, it is recommended that no penalty be imposed against the Respondents.

Changes in school immunization requirements took effect on June 13, 2019. The Department's guidance regarding these changes states that "[a] joint notification by the NYS Department of Health, State Education Department, and Office of Children and Family Services was distributed to schools and child day care settings beginning on June 15, 2019," to apprise these entities that they were not allowed to admit students who were not immunized for religious reasons. School Vaccine Requirements FAQ issued June 18, 2019, New York State

Department of Health. This guidance, however, was only made available online and thus inaccessible to the Respondents. (Recording @ 26:30.)

This hearing record contains no information regarding if or when the Respondents and/or members of the Amish and Mennonite communities were advised that they were no longer able to avail themselves of religious exemptions from immunization requirements. (Recording @ 25:33, 1:27:26.) Mr. Brewster, the Department's witness, recalled that Eli Mast, the principal of Dygert Road School, called him after receiving the December 13 post-audit letter, and expressed confusion regarding students' inability to be exempt from immunization requirements on religious grounds. (Recording @ 55:01.) Mr. Brewster also recalled auditing Respondent Shady Lane School in or around June 2019, just around the time when school immunization requirements changed, but was unable to say whether that school was notified of the changes. (Recording @ 1:27:26.)

Barbara Joyce, Regional Coordinator for the Department's Bureau of Immunization, was also unable to confirm how or that the Respondents were made aware of the change. She explained that the Montgomery County Department of Health works closely with the Amish and Mennonite communities but she did not know if that local department of health notified the Respondents about applicable law changes. (Recording @ 1:45:55.) Ezra Wengerd, the Respondents' representative, explained that he read about the law change in a newspaper and "heard people talking about it," but he also could not

confirm whether the Amish and Mennonite communities received notification from either the State or local county departments of health. (Recording @ 2:07:02.)

The Department's notifications regarding and conduct of the audit process and its ultimate determinations are inconsistent. The Department's November 8 and 9, 2021 audit notices advised individuals identified by the Montgomery County Depatiment of Health as the principals of the three Respondent schools (Recording @ 32:40, 58:01), that audits would be conducted of certain records regarding students' immunization. The schools were specifically advised to provide lists of enrolled students, lists of susceptible students who may require exclusion in the event of a disease outbreak, immunization records for all susceptible students, and the schools' policies and procedures regarding compliance with PHL § 2164. (Exhibits 4-6.) Nevertheless, when the audits were conducted by Public Health Field Services Representative James Brewster on November 23, 2021, he only sought information regarding students' actual receipt of vaccinations and did not request the information specified in the pre-audit letters. (Recording @ 59:35, 1:32:27, 1:34:52.)

After the audits were conducted, the Department sent its December 13, 2021 letters informing the Respondents of the audit findings. The December 13 letters advised that the schools failed to provide lists of susceptible students required to be excluded from school in the event of a disease outbreak and did not have policies and procedures regarding compliance with school attendance

immunization requirements. (Exhibits 9-11.) However, that information was not requested during the audits. (Exhibits 7, 8.)

The December 13 letters to Dygert Road School and Pleasant View (Twin Mountain) School also stated that "[b]ased on the information available as part of this audit, the attached list indicates which students are not in compliance with school attendance immunization requirements." (Exhibits 9, 11.) Mr. Brewster, who prepared and sent these letters to the Respondent's principals, stated that he had attached lists of students who did not meet immunization requirements to the letters. (Recording @ 1:29:22.) The letters offered and moved into evidence did not include lists of students nor did the Department produce any such lists. (Exhibits 9, 11; Recording @ 1:29:58.)

All three December 13, 2021 letters required the Respondents to email the Department their compliance information, corrective action plans, and current lists of excluded students. (Exhibits 9-11.) Mr. Brewster, who acknowledged his awareness that the Respondent schools were operated by members of the Amish and Mennonite communities and therefore do. not utilize the internet, conceded that he did not know how the Respondents would be able to access email to comply with the Department's requirements. (Recording @ 1:29:58.)

The Department accurately points out that notice is not required before or after an audit. (Recording @ 1:49:49, 2:04:53.) However, when determining a penalty,

it is appropriate to consider the adequacy of the notice provided and how such notice might reasonably impact actions taken in response. It is also reasonable to consider the deficiencies in the Department's communications with the Respondents and in its evidence offered at the hearing to support the requested penalties. Key information was omitted from the notices, from the Department's directives with respect to the ensuing enforcement actions, and this hearing record.

The Department failed to offer reasonable accommodation for the Respondents' distinct religious and cultural differences throughout the audit process. Based upon the information offered at this hearing, the Respondents were likely not apprised of legal changes to school immunization requirements. Reading the pre-audit letters would also not have aided their preparation for the November 23 audits. Nor were they able to address issues raised during the audits before this hearing due to being required to do so by email submissions.

While the Department's direct examination of Mr. Brewster suggested that the Respondents made no attempt to resolve the issues raised in the audits (Recording @ 56:00, 1:04:30, 1:26:30), that characterization is inappropriate as it presupposes that the Respondents were afforded a full and fair opportunity to address these matters before this hearing. Although the mailing affidavits for the hearing notices and statements of charges attest to having enclosed a proposed stipulation and order, no stipulation and order was included in the notices that the Department presented at this hearing.

(Exhibits 1-3.) It is therefore unclear whether the Respondents were given a proper opportunity to settle those charges by stipulation.

Ben Fisher, who was identified as the principal of "Pleasant View School," phoned Mr. Brewster and left a voicemail message to inform him that he was no longer affiliated with the school. The voicemail offered and moved into evidence contained neither a date nor a time stamp (Exhibit 12), markers routinely included with voicemail messages, and Mr. Brewster was unable to provide a date (Recording @ 1:25:15.) There is no evidence that the Department made any attempt after receiving that notification to discuss the audit findings with the person responsible for the affairs of the school. (Recording @ 1:30:51, 1:46:46.) Instead, the Department simply issued a statement of charges and a hearing notice.

Largely as a result of the Depatiment's communication failures, the Respondents had little opportunity to resolve this matter with the Department. These small schools are instead now confronted with an unreasonable and vaguely justified demand, which is little more than an estimate-on the Department's part of the number of violations that *may* have occurred, for $118,000 in civil penalties.

The information provided through the Depatiment's evidence and witness testimony does not justify as reasonable the penalties the Department seeks to impose. Factors that should be considered include:

- The charges have only been established because the Respondents were forthcoming

and candid in their admission that they were dealing with a situation in which members of their community vehemently objected to the required immunizations.

- There is cause to question the reasonableness of the Department's communication with the Respondents, beginning with whether or when the Amish and Mennonite communities were informed that religious exemptions no longer applied to school immunization requirements and that school age children could not continue attending school without immunizations, proof of natural immunity (when applicable), or documented medical exemptions.

- Even when presented with information showing that certain students had begun obtaining immunizations (Exhibit 8), the Department did not consider those students as having vaccinations in progress and request information regarding those students' follow-up appointments for remaining doses. 10 NYCRR § 66-1.3(b); School Vaccine Requirements FAQ issued June 18, 2019. Instead, those students were simply deemed not compliant with requirements. (Exhibits 3, 8.)

- Despite explicit instructions regarding students deemed susceptible in the event of a disease outbreak in pre-audit letters and in applicable law (those medically exempted and those whose vaccinations are still in progress), the

Department made no attempt to distinguish those students when formulating these charges or requested penalties.

- The Respondents were deprived of a reasonable opportunity to understand what the November 23, 2021 audits would be assessing (all immunization records rather than information regarding susceptible students.)

- The Department's determination that only fully immunized students would be deemed compliant with immunization requirements is a clear departure from applicable law.

- The Respondents were not presented with a reasonable opportunity to show compliance with requirements since the Department required submission of information by email only.

- The evidence fails to support the Department's representation that a stipulation and order accompanied the hearing notices and statements of charges. Mailing affidavits at the hearing specifically attest to including stipulations in those notices, but the Department did not produce the stipulations.

- The Department's calculations purporting to justify its proposed fine were poorly supported by specific facts, relying instead largely on assumptions and estimates in order to arrive at

> a six-figure fine for three small schools, with total enrollment far below 100 students. Consequently, the Department has not provided an intelligible basis for its penalty demand.

The Department's stated concern for overburdening the public health system (Recording @ 2:02:50), which the Respondents do not utilize, cannot override its obligation to provide adequate notice and reasonable opportunity to comply. Those obligations extend to all citizens of the State of New York subject to enforcement proceedings. For these reasons, it is recommended that no penalty be imposed on the Respondents.

RECOMMENDATION:

1. Charge 1 should be sustained with respect to Dygert Road School.

2. No penalty should be imposed against Dygert Road School.

3. Charge 1 should be sustained with respect to Twin Mountain School.

4. No penalty should be imposed against Twin Mountain School.

5. Charge 1 should be sustained with respect to Shady Lane School.

6. No penalty should be imposed against Shady Lane School.

DATED: May 25, 2022
Menands, New York

/s/ Natalie Bordeaux
Natalie J. Bordeaux
Administrative Law Judge

APPENDIX E — STATUTORY PROVISION INVOLVED

N.Y. Pub. Health Law § 2164

Definitions; immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B

1. As used in this section, unless the context requires otherwise:

a. The term "school" means and includes any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.

b. The term "child" shall mean and include any person between the ages of two months and eighteen years.

c. The term "person in parental relation to a child" shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or

their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law[1] as a person in parental relation to the child.

d. The term "health practitioner" shall mean any person authorized by law to administer an immunization.

2. **a.** Every person in parental relation to a child in this state 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 meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

b. Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by the United

1. NY General Obligations Law § 5-1551 et seq.

States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

c. Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease as recommended by the advisory committee on immunization practices of the centers for disease control and prevention, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health and planning council.

3. The person in parental relation to any such child who has not previously received such immunization shall present the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.

4. If any person in parental relation to such child is unable to pay for the services of a private health practitioner,

such person shall present such child to the health officer of the county in which the child resides, who shall then administer the immunizing agent without charge.

5. The health practitioner who administers such immunizing agent against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B to any such child shall give a certificate of such immunization to the person in parental relation to such child.

6. In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent

shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a consent by such person and it shall also state that such person need not execute such consent if subdivision eight of this section applies to such child.

7. **(a)** No 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 provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization.

(b) A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

8. If 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.

8-a. Whenever a child has been refused admission to, or continued attendance at, a school as provided for in subdivision seven of this section because there exists no certificate provided for in subdivision five of this section or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall:

a. forward a report of such exclusion and the name and address of such child to the local health authority and to the person in parental relation to the child together with a notification of the responsibility of such person under subdivision two of this section and a form of consent as prescribed by regulation of the commissioner, and

b. provide, with the cooperation of the appropriate local health authority, for a time and place at which an immunizing agent or agents shall be administered, as required by subdivision two of this section, to a child for whom a consent has been obtained. Upon failure of a local health authority to cooperate in arranging

for a time and place at which an immunizing agent or agents shall be administered as required by subdivision two of this section, the commissioner shall arrange for such administration and may recover the cost thereof from the amount of state aid to which the local health authority would otherwise be entitled.

9. *Repealed by L. 2019, c. 35, § 1, eff. June 13, 2019.*

10. The commissioner may adopt and amend rules and regulations to effectuate the provisions and purposes of this section.

11. Every school shall annually provide the commissioner, on forms provided by the commissioner, a summary regarding compliance with the provisions of this section.

Appendix E

N.Y. Pub. Health Law § 2164 (2018)

Definitions; immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B

1. As used in this section, unless the context requires otherwise:

a. The term "school" means and includes any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.

b. The term "child" shall mean and include any person between the ages of two months and eighteen years.

c. The term "person in parental relation to a child" shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of

the general obligations law[1] as a person in parental relation to the child.

d. The term "health practitioner" shall mean any person authorized by law to administer an immunization.

2. **a.** Every person in parental relation to a child in this state 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 meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

b. Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by

1. General Obligations Law § 5-1551 et seq.

the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

c. Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease as recommended by the advisory committee on immunization practices of the centers for disease control and prevention, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health and planning council.

3. The person in parental relation to any such child who has not previously received such immunization shall present the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.

4. If any person in parental relation to such child is unable to pay for the services of a private health practitioner, such person shall present such child to the health officer of the county in which the child resides, who shall then administer the immunizing agent without charge.

5. The health practitioner who administers such immunizing agent against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B to any such child shall give a certificate of such immunization to the person in parental relation to such child.

6. In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite

to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a consent by such person and it shall also state that such person need not execute such consent if subdivision eight or nine of this section apply to such child.

7. **(a)** No 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 provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization.

(b) A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to

the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

8. If 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.

8-a. Whenever a child has been refused admission to, or continued attendance at, a school as provided for in subdivision seven of this section because there exists no certificate provided for in subdivision five of this section or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall:

a. forward a report of such exclusion and the name and address of such child to the local health authority and to the person in parental relation to the child together with a notification of the responsibility of such person under subdivision two of this section and a form of consent as prescribed by regulation of the commissioner, and

b. provide, with the cooperation of the appropriate local health authority, for a time and place at which an

immunizing agent or agents shall be administered, as required by subdivision two of this section, to a child for whom a consent has been obtained. Upon failure of a local health authority to cooperate in arranging for a time and place at which an immunizing agent or agents shall be administered as required by subdivision two of this section, the commissioner shall arrange for such administration and may recover the cost thereof from the amount of state aid to which the local health authority would otherwise be entitled.

9. This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

10. The commissioner may adopt and amend rules and regulations to effectuate the provisions and purposes of this section.

11. Every school shall annually provide the commissioner, on forms provided by the commissioner, a summary regarding compliance with the provisions of this section.