

No. 22-404

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IN THE  
**Supreme Court of the United States**

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JANE GOE, SR.,  
on Behalf of Herself and Her Minor Child, et al.,  
*Petitioners,*

v.

JAMES V. McDONALD, et al.,  
*Respondents.*

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

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**BRIEF IN OPPOSITION FOR STATE RESPONDENTS**

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## **QUESTIONS PRESENTED**

New York law generally requires that children be immunized against certain diseases in order to attend school. A child is exempt from a required vaccination if a New York-licensed physician certifies that the vaccination may be detrimental to his or her health. In 2019, the New York State Department of Health promulgated a regulation clarifying that a medical exemption must be supported by reference to a nationally recognized, evidence-based standard of care. The questions presented are:

1. Whether petitioners have a substantive due process right to a medical exemption from a required vaccination based solely on an unsupported and unreviewable certification from their children's physicians.

2. Whether the Department's requirement that a medical exemption from a required vaccination find support in a nationally recognized, evidence-based standard of care imposes an unconstitutional condition on children's access to education.

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## INTRODUCTION

New York, like every other State, requires schoolchildren to be immunized against several vaccine-preventable diseases. These vaccines are safe and effective for the vast majority of children. But state law provides that a child may receive a medical exemption from the school immunization requirement on the basis of a physician's certification that a specific vaccine may be detrimental to the child's health. In 2019, after the Nation's worst measles outbreak in a quarter century and in light of declining vaccination rates, the New York State Department of Health promulgated a regulation clarifying that a medical exemption must be supported by reference to a nationally recognized, evidence-based standard of care. This regulation protects the public health by ensuring that medical exemptions are available only to the very few schoolchildren who are genuinely at risk of harm from a vaccine.

Petitioners are parents of schoolchildren who allegedly were denied medical exemptions for specific vaccines. They brought a facial challenge to the Department's regulation,<sup>1</sup> alleging that it violates their children's substantive due process rights and imposes an unconstitutional condition on their children's access

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<sup>1</sup> This case was originally brought against Howard Zucker in his official capacity as Commissioner of Health for the State of New York. Commissioner Zucker resigned and has since been replaced by Acting Commissioner of Health James V. McDonald. Acting Commissioner McDonald is automatically substituted as a respondent under Rule 35.3.

As explained below, petitioners also brought as-applied challenges against their schools, which are separately represented. The district court dismissed those claims, and the Second Circuit affirmed. Those claims are not presented by this petition for certiorari.



to education. The district court dismissed these claims and the Second Circuit affirmed. As the Second Circuit explained, petitioners' argument in favor of strict scrutiny of the Department's regulation presupposes a fundamental right to a vaccine-related medical exemption based solely on the unsupported and unreviewable recommendation of a physician. But no court has ever recognized a right to a medical exemption from immunization based solely on a physician's say-so. To the contrary, this Court has held that medical exemptions may be limited to individuals for whom it is "apparent or can be shown with reasonable certainty that" a vaccine would cause harm. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 39 (1905).

Petitioners do not show that the Second Circuit's decision implicates any split in authority. Nor have they otherwise shown that this case warrants the Court's review. Because the regulation preserves a medical exemption for any student who is genuinely at risk of serious harm from a vaccine, the predicate for petitioners' constitutional claims is not present, and certiorari is not warranted to address whether the regulation's requirement of support for an exemption violates substantive due process or imposes an unconstitutional condition on children's access to education. Finally, certiorari is not warranted to review whether this Court's decision in *Jacobson* has been wrongly read to create a public-health exception to the strict scrutiny of laws burdening fundamental constitutional rights because, as the Second Circuit correctly held, no fundamental right is implicated here.

## STATEMENT

1. In 1860, New York became the second State, following close behind Massachusetts, to enact vaccination requirements for schoolchildren. Ch. 438, § 1, 1860 N.Y. Laws 761, 761.<sup>2</sup> That law “directed and empowered” local school boards to refuse to admit any child who was not vaccinated against smallpox. *Id.* Over time, more States adopted mandatory school vaccination laws, which, by 1981, were universal throughout the Nation.<sup>3</sup> As a result of widespread vaccination, smallpox has been eradicated; community transmission of polio was, until recently, eliminated in the United States; and the frequency of measles, diphtheria, pertussis (whooping cough), and other formerly common childhood illnesses is significantly diminished.<sup>4</sup>

Today, New York’s school immunization law, like that of every other State, requires students to be immunized against several contagious diseases, including measles, polio, varicella (chicken pox), and pertussis.<sup>5</sup> These diseases are enumerated by statute in New York.

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<sup>2</sup> See James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002).

<sup>3</sup> James Colgrove, *State of Immunity: The Politics of Vaccination in Twentieth-Century America* 177 (2006).

<sup>4</sup> [United States Centers for Disease Control and Prevention, \*Achievements in Public Health, 1900-1999, Impact of Vaccines Universally Recommended for Children—United States, 1990-1998\*, 48 Morbidity & Mortality Weekly Rep. 243 \(Apr. 2, 1999\)](#). (For sources available on the internet, full URLs appear in the Table of Authorities. All URLs were last visited on February 2, 2023.)

<sup>5</sup> [United States Centers for Disease Control and Prevention, Center for State, Tribal, Local, and Territorial Support, \*State School Immunization Requirements and Vaccine Exemption Laws\* 8 \(Feb. 2022\)](#).

See N.Y. Public Health Law (P.H.L.) § 2164(2). The statute provides that any child who is not immune to any of the enumerated diseases based on past exposure must be vaccinated against that disease to enter or attend any public or non-public childcare center, nursery school, or elementary, intermediate, or secondary school. *Id.* § 2164(1), (7). The statute refers to guidance from the Centers for Disease Control and Prevention’s Advisory Committee on Immunization Practices (ACIP) regarding scheduling and dosage requirements. *See id.* § 2164(2)(c); *see also* 42 U.S.C. §§ 243, 247b.

New York’s law contains a medical exemption: If a New York-licensed physician certifies that a specific vaccine “may be detrimental to a child’s health,” the child may attend school without receiving that vaccine until it “is found no longer to be detrimental to the child’s health.” P.H.L. § 2164(8). The law also previously included a religious exemption. *See id.* former § 2164(9). As explained further below, that exemption was repealed in 2019.

New York delegates to local school officials the authority to enforce immunization requirements, P.H.L. § 2164(7)(a), and the Department has promulgated regulations instructing them on how to do so. These regulations direct that a school may not admit a child unless the parents have furnished either (a) proof of immunization, (b) documentation that the child is in the process of receiving vaccines, or (c) a medical exemption form signed by a New York-licensed physician certifying that a vaccine “may be detrimental to the child’s health.” N.Y. Comp. Codes R. & Regs. tit. 10 (10 N.Y.C.R.R.), § 66-1.3. The physician’s certification recommending a medical exemption must “contain[] sufficient information to identify a medical contraindication to a specific immunization and specify[] the length of time the immu-

nization is medically contraindicated.”<sup>6</sup> *Id.* § 66-1.3(c). These rules predate the challenged regulation, which is described below.

School officials may consult with the Department regarding whether to grant a medical exemption.<sup>7</sup> If a school denies a medical exemption, the parents may administratively appeal that decision to the Commissioner of Education. *See* P.H.L. § 2164(7)(b); N.Y. Educ. Law § 310. Alternatively, parents may seek judicial review of the school’s denial. *See Check v. N.Y. City Dep’t of Educ.*, No. 13-CV-791, 2013 WL 12113679, at \*4 (E.D.N.Y. Sept. 11, 2013); *Lynch v. Clarkstown Cent. Sch. Dist.*, 155 Misc. 2d 846, 849, 590 N.Y.S.2d 687, 689 (N.Y. Sup. 1992).

2. In 2018 and 2019, the Nation experienced its worst measles outbreak in a quarter-century. New York State was the epicenter of this outbreak. While travel from other countries initiated the outbreak, low vaccination rates in certain communities contributed to its spread. *See* Pet. App. 7a-8a. For instance, in the 2017-2018 school year, there were 280 schools in the State with measles vaccination rates of only 85% or less, and 211 schools with rates below 70%. Pet. App. 101a-102a. These pockets of under-vaccination posed a significant

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<sup>6</sup> A “contraindication” indicates that, because of the child’s current condition, the vaccine should not currently be administered. A “precaution” indicates that the vaccine may be administered if the benefit outweighs the risk. *See* [United States Centers for Disease Control and Prevention, \*Vaccine Recommendations and Guidelines of the ACIP, Contraindications and Precautions\* \(Oct. 18, 2022\)](#).

<sup>7</sup> *See* [New York State Department of Health, \*Medical Exemption Review Procedures for Schools Outside New York City\* \(Mar. 2022\)](#).

public health risk by jeopardizing herd immunity across the State.<sup>8</sup>

In order to increase vaccination rates, the New York Legislature repealed the religious exemption to the school immunization requirement in 2019. *See* Ch. 35, §§ 1-4, 2019 McKinney’s N.Y. Sess. Laws 153, 153-54.<sup>9</sup> The Department anticipated that some parents who had previously relied on the religious exemption would now try to obtain a medical exemption, even where they lacked any valid medical reason for doing so. *See* Pet. App. 25a. In this respect, California’s experience was instructive: After that State repealed a non-medical exemption from its mandatory school vaccination law, the rate of medical exemptions tripled. Pet. App. 25a.

The Department thus promulgated the challenged regulation to clarify the criteria for a medical exemption and forestall a rise in excessive and unwarranted exemptions that would threaten herd immunity. The regulation clarifies when medical exemptions are appropriate by defining the phrase “may be detrimental to the child’s health” to mean that “a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.” 10 N.Y.C.R.R. § 66-1.1(*l*). Absent a physician’s

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<sup>8</sup> *See* Jane R. Zucker et al., *Consequences of Undervaccination—Measles Outbreak, New York City, 2018-2019*, 2020 N. Engl. J. Med. 1009.

<sup>9</sup> New York State courts rejected a constitutional challenge to the repeal of the religious exemption, *see F.F. v. State*, 194 A.D.3d 80, 143 N.Y.S.3d 734 (App. Div.), *appeal dismissed, leave to appeal denied*, 37 N.Y.3d 1040, 176 N.E.3d 304 (2021), and this Court denied certiorari, *F.F. v. New York*, 142 S. Ct. 2738 (2022).

certification that satisfies this regulation, an unvaccinated child may not attend school. *Id.* § 66-1.3.

While the 2018-2019 measles outbreak dissipated, declining vaccination rates remain a significant threat to public health. In 2022, Rockland County in New York State reported a case of polio contracted within the State. This was only the second instance of community transmission since polio was eradicated in the United States in 1979.<sup>10</sup> Pockets of under-vaccination again contributed to the spread of this vaccine-preventable disease; polio vaccination rates for young children in Rockland County fell to 60.3% in August 2022, with one zip code at 37.3%, compared to the national rate of 92.7%.<sup>11</sup> New York's school immunization law is the State's principal defense against further outbreaks of vaccine-preventable diseases.

3. Petitioners are seven families with children who sought medical exemptions for the 2019-2020 school year. Five families were allegedly denied such exemptions by their schools because their physicians had not pointed to any contraindication or precaution consistent with a nationally recognized evidence-based standard of care, as required by the Department's regulation. Pet. App. 52a-53a, 58a, 62a-63a, 73a, 77a. These parents chose not to vaccinate their children and homeschooled them. Of the children from the two other families, one obtained a medical exemption and the other was able to attend school while her exemption request remained pending. Pet. App. 12a.

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<sup>10</sup> Ruth Link-Gelles et al., *Public Health Response to a Case of Paralytic Poliomyelitis in an Unvaccinated Person and Detection of Poliovirus in Wastewater—New York, June-August 2022*, 71 *Morbidity & Mortality Weekly Rep.* 1065 (Aug. 19, 2022).

<sup>11</sup> *See id.* at 1066.

While petitioners' schools were ultimately responsible for deciding petitioners' medical exemption requests, at least two of petitioners' schools consulted with the Department. *See* Pet. App. 117a-118a, 121a-122a. In one case, the Department's then-Director of the Bureau of Immunizations, Dr. Elizabeth Rausch-Phung, advised that petitioners John and Jane Coe had not submitted sufficient information to establish their children's entitlement to medical exemptions, but that they might be able to do so based on further explanation of their alleged genetic vulnerabilities. *See* Pet. App. 63a. In the other case, Dr. Rausch-Phung advised that petitioner Jane Boe had not established a contraindication to the meningococcal vaccine but that vaccination could be delayed because of Boe's acute illness. *See* Pet. App. 59a, 117a-118a.

Although each of the petitioners had the statutory right to appeal the school's denial of a medical exemption to the Commissioner of Education, *see* P.H.L. § 2164(7)(b); N.Y. Educ. Law § 310, only two did so. Pet. App. 11a-12a. The Commissioner affirmed the denials. Pet. App. 12a. Petitioners did not seek state court judicial review.

Petitioners filed this putative class action in federal court, claiming that the Department's 2019 regulation violates their right to substantive due process on its face. Pet. App. 17a. They also asserted as-applied substantive due process claims against their schools for denying their medical exemption requests. Pet. App. 28a. The district court denied petitioners' motion for a preliminary injunction and granted respondents' motion to dismiss, holding that petitioners had failed to make out a substantive due process claim. Pet. App. 144a, 176a. The Second Circuit denied petitioners' emergency application for an injunction pending appeal, as did this

Court. *See* Pet. App. 12a; *see also Doe v. Zucker*, No. 20A135 (Mar. 8, 2021).

The Second Circuit later affirmed the district court’s dismissal. The court held that the regulation does not implicate fundamental rights, and thus strict scrutiny does not apply, because “[t]he State is not forcing any child to be vaccinated against her parents’ will.” Pet. App. 20a. Moreover, the court rejected petitioners’ assertion of their purported “right to a medical exemption from immunization based solely on the recommendation of a physician.” Pet. App. 21a. As the court noted, no court has ever recognized such a right nor found it to be “implicit in the concept of ordered liberty, or deeply rooted in this Nation’s history and tradition.” Pet. App. 21a (quoting *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003)). To the contrary, the court noted, this Court in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), “explained that medical exemptions from mandatory immunization laws may be limited to cases in which it is ‘apparent or can be *shown with reasonable certainty*’ that the vaccine would be harmful.” Pet. App. 21a (quoting *Jacobson*, 197 U.S. at 39 (emphasis added)).

Applying the rational basis test, the court held that the Department’s regulation is “reasonably related to furthering the State’s interest in protecting communities against serious disease.” Pet. App. 24a-25a. As the court explained, the regulation merely ensures that medical exemptions are granted only to those children who are genuinely at risk of harm from a vaccine. Pet. App. 26a. And the regulation is not limited to contraindications and precautions listed in the ACIP guidance. Nor is it otherwise “arbitrarily narrow.” Pet. App. 26a. Rather, the court explained, any nationally recognized, evidence-based standard will suffice, including guidance



contained in manufacturers' vaccine inserts. Pet. App. 26a. The court further held that the regulation does not violate the unconstitutional conditions doctrine. Pet. App. 27a. Finally, the court upheld the district court's dismissal of the as-applied claims against petitioners' schools. Pet. App. 28a.

### **REASONS FOR DENYING THE PETITION**

The Court should deny the petition. Preliminarily, petitioners point to no split in authority. Nor could they. It is well settled that school immunization requirements like New York's are constitutional. And this Court made clear in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), that a State may require evidentiary support for a vaccine-related medical exemption. The Department's regulation preserves a medical exemption for those who are genuinely at risk of serious harm from a vaccine, and the decision below, upholding that regulation, is consistent with this Court's precedent. Thus, certiorari is not warranted to review petitioners' substantive due process or unconstitutional conditions claims. And while petitioners attempt to manufacture a conflict between the decision below and the Court's abortion-related medical exemption case law, this case does not present any such conflict, and therefore there is no occasion here to consider the continuing vitality of those cases after *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). Nor is there occasion to address whether *Jacobson* has been misread to create a public-health exception to the strict scrutiny of laws burdening fundamental rights.

**I. THE DECISION BELOW ACCORDS WITH SETTLED LAW AND DOES NOT IMPLICATE ANY SPLIT IN AUTHORITY.**

**A. Certiorari Is Not Warranted to Review Whether the Department’s Regulation Violates Substantive Due Process or the Unconstitutional Conditions Doctrine.**

The decision below is consistent with this Court’s vaccine-related medical exemption jurisprudence. Moreover, this case is a poor vehicle for revisiting that jurisprudence because petitioners’ claims rest on a misreading of the Department’s regulation.

1. This Court upheld compulsory vaccination over a century ago in *Jacobson*. There, the Court addressed a challenge to a Massachusetts law that authorized the City of Cambridge to adopt a compulsory vaccination program, with allowance for medical exemptions, in response to a smallpox outbreak. 197 U.S. at 12-13. The Court rejected the claim that the statute violated the Fourteenth Amendment, explaining that a community “has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. The Court thus upheld the vaccination statute as a rational means of protecting the public health. *Id.* at 31-32.

In *Zucht v. King*, this Court applied *Jacobson* to an ordinance passed by the City of San Antonio requiring proof of vaccination for any individual who wished to attend school—public or private—in the city. 260 U.S. 174, 175 (1922). The plaintiff there claimed that the ordinance violated her due process rights by “making vaccination compulsory,” and was void because it gave local authorities discretion “to determine when and

under what circumstances the requirement shall be enforced” without adequate guidance. *Id.* The Court rejected both arguments. Citing *Jacobson*, the Court noted the “settled” rule that “it is within the police power of a state to provide for compulsory vaccination.” *Id.* at 176. The Court also relied on the settled rule that a “municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law.” *Id.*

Every State now requires vaccination against certain diseases as a condition of attending school.<sup>12</sup> Relying on *Jacobson* and *Zucht*, lower courts have consistently upheld such laws against substantive due process claims. *See B.W.C. v. Williams*, 990 F.3d 614, 622 (8th Cir. 2021); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App’x 348, 355-56 (4th Cir. 2011); *Boone v. Boozman*, 217 F. Supp. 2d 938, 956-57 (E.D. Ark. 2002). Petitioners point to no contrary authority.

It is also well settled that a government entity may require evidentiary support for a vaccine-related medical exemption. This Court made clear in *Jacobson* that medical exemptions may be limited to those cases in which “it be apparent or *can be shown with reasonable certainty* that” the vaccine would harm an individual. 197 U.S. at 39 (emphasis added). The Court thus endorsed the principle that a State may require evidentiary support for a medical exemption from compulsory vaccination. Of course, if an individual could marshal that evidence, the Court noted, the judiciary would “be

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<sup>12</sup> *See* United States Centers for Disease Control and Prevention, Center for State, Tribal, Local, and Territorial Support, *supra* n.5.

competent to interfere and protect the health and life of the individual concerned.” *Id.*

2. The decision below is consistent with *Jacobson* and *Zucht*. The Second Circuit correctly noted that the Department’s regulations “continue to *permit* a medical exemption”; they merely “clarify *when* an exemption is appropriate and specify *how* parents may seek an exemption.” Pet. App. 20a. Thus, parents must obtain a physician’s certification that a specific vaccine is contraindicated in accordance with a nationally recognized, evidence-based standard of care. The certification must contain enough information to identify the contraindication or precaution to a specific vaccine and specify the length of time vaccination is contraindicated. *See* 10 N.Y.C.R.R. §§ 66-1.1(*l*), 66-1.3(c). By requiring such evidentiary support, the regulation prevents physicians from certifying a medical exemption in a conclusory fashion or for a non-medical reason. *See* Pet. App. 20a. This requirement is consistent with *Jacobson*’s holding that governments may require a showing of harm to a “reasonable certainty” before granting a medical exemption.

The Second Circuit properly rejected petitioners’ assertion of a novel, fundamental right to a vaccine-related medical exemption “based *solely* on the recommendation—or say-so—of a child’s treating physician.” Pet. App. 20a. Petitioners have cited no authority in support of that purported right. As the decision below observed, “no court has ever held that there is a right to a medical exemption from immunization based solely on the recommendation of a physician.” Pet. App. 21a. This Court should not disturb the settled law that governments may impose reasonable standards on those seeking medical exemptions from vaccine requirements.

3. The Second Circuit also properly rejected petitioners' claim that the regulation "artificially constrain[s]" a treating physician's judgment. Pet. 16. Petitioners' claim rests on a misreading of the regulation. Properly construed, the regulation permits a medical exemption for any student who is genuinely at risk of serious harm from a vaccine.

In determining whether to certify a medical exemption, physicians may consult ACIP guidance, which lists all conditions that are generally accepted by the medical community as contraindications or precautions to specific vaccines. But physicians are not limited to the four corners of the ACIP guidance. Physicians may also rely on any other relevant information—including, as petitioners themselves urge, "clinical examination, family history, [and] emerging peer-reviewed evidence," Pet. 16—to assess whether a medical exemption is appropriate. The regulation thereby preserves a physician's independent medical judgment. Physicians must simply tie their judgments to some evidence-based standard; their say-so is not enough. *See* Pet. App. 31a.

The record bears out the regulation's flexibility. For example, as the Second Circuit noted, the medical exemption form refers to guidance contained in manufacturers' vaccine inserts. Pet. App. 26a, 104a. And Dr. Rausch-Phung advised that petitioners John and Jane Coe may be entitled to medical exemptions—despite not having a condition specifically identified by ACIP guidance as supporting a contraindication or precaution—subject to further review of their alleged genetic vulnerabilities. *See* Pet. App. 63a. Additionally, John Foe was able to obtain a medical exemption and attend school despite not meeting the criteria for a contraindication or precaution under the ACIP guidance. *See* Pet. App. 12a.

Because the regulation allows physicians to certify medical exemptions based on their properly supported clinical judgments, this is not an appropriate case to consider whether a school vaccination requirement—in the absence of an adequate medical exemption—may place an unconstitutional condition on the right to attend school. An individual child who is improperly denied a medical exemption may seek judicial review in either state or federal court. *See, e.g., Check*, 2013 WL 12113679, at \*4. But an alleged improper denial would not warrant the broad, facial relief petitioners seek. As this Court held in rejecting a facial challenge to a federal ban on a particular abortion procedure, an as-applied challenge to the ban was “the proper means to consider exceptions” to the ban upon a showing “that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.” *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). Certiorari is not warranted to consider petitioners’ facial challenge to the Department’s regulation.

**B. Certiorari Is Not Warranted to Revisit This Court’s Abortion-Related Medical Exemption Case Law.**

Unable to point to any split in authority on the issue presented here, petitioners attempt to manufacture a conflict between the decision below and this Court’s decision in *Dobbs*, on the one hand, and the Court’s cases requiring a medical exemption from restrictions on abortion, on the other hand. Pet. 19-21; *see, e.g., Doe v. Bolton*, 410 U.S. 179 (1973); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *but see Gonzales*, 550 U.S. at 163-64. Relatedly, this Court has held that a

ent judgment when seeking a medical exemption from an abortion restriction. *Doe*, 410 U.S. at 192, 199-200; *see also Whalen v. Roe*, 429 U.S. 589, 603 & n.31 (1977). Petitioners argue that even if those cases have lost vitality in the abortion context after *Dobbs*, they stand for a general principle that supports petitioners' claim for the existence of a fundamental right to a medical exemption based on the unsupported and unreviewable recommendation of a physician.

The extent to which this Court's abortion-related medical exemption jurisprudence was abrogated by *Dobbs* may very well be an open question, as the Second Circuit observed. Pet. App. 22a-23a. But that question is not presented here. Parents retain ample ability under the 2019 regulation to protect the life and health of their children by obtaining medical exemptions. The regulation seeks only to ensure that the exemptions are genuinely warranted by requiring reference to a nationally recognized, evidence-based standard of care. And in the event of a denial in an individual case, parents may seek administrative and judicial review. This case therefore does not implicate the "unnecessary risk of tragic health consequences" driving the medical exemption jurisprudence in the abortion context. *Stenberg*, 530 U.S. at 937. Thus, there is no conflict between this case and the abortion cases cited by petitioner, much less any occasion in this case to consider the continuing vitality of *Doe v. Bolton* and its progeny.

**II. THE PETITION DOES NOT PRESENT THE CLAIM THAT *JACOBSON* HAS BEEN MISCONSTRUED TO CREATE A PUBLIC-HEALTH EXCEPTION TO STRICT SCRUTINY.**

This case is a poor vehicle to decide whether *Jacobson* has been broadly misread to create a public-health exception to the strict scrutiny of laws burdening fundamental constitutional rights. Pet. 23-30. The decision below did not rely on any such exception; rather, the Second Circuit declined to apply strict scrutiny because the regulation does not implicate fundamental rights. Pet. App. 22a. In reaching that conclusion, the court cited *Jacobson*'s instruction that "medical exemptions from mandatory immunization laws may be limited to cases in which it is 'apparent or can be *shown with reasonable certainty*' that the vaccine would be harmful." Pet. App. 21a (quoting *Jacobson*, 197 U.S. at 39 (emphasis added)). There is no reason to abandon this aspect of *Jacobson*. It does not conflict with subsequent decisions of this Court, nor is it the subject of a circuit split. And there is otherwise no good reason to revisit it.

To be sure, there has been some criticism of *Jacobson*, or lower court decisions applying it, for giving too much weight to public health considerations and not enough weight to constitutional rights. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring) (noting that lower courts relied on *Jacobson* "to slacken their enforcement of constitutional liberties" during the COVID-19 pandemic). But the court below did not rely on that aspect of *Jacobson*, and it therefore is not at issue here.



**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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