No. 23-

IN THE

# Supreme Court of the United States

WE THE PATRIOTS USA, INC., CT FREEDOM ALLIANCE, LLC, CONSTANTINA LORA, MIRIAM HIDALGO AND ASMA ELIDRISSI,

*Petitioners,*

*v.*

CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, BETHEL BOARD OF EDUCATION, GLASTONBURY BOARD OF EDUCATION AND STAMFORD BOARD OF EDUCATION

*Respondents.*

**ON PETITION FOR A 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

Concerned about falling vaccination rates in its schools, Connecticut repealed its 62-year-old religious exemption to its school vaccination requirement in 2021. It expanded its longstanding medical exemption and created "legacy" exemptions allowing children who had obtained a religious exemption prior to the repeal to remain unvaccinated for the remainder of their primary and secondary educations. Connecticut's revised school vaccination mandate excludes non-legacy children who are religiously commanded not to receive required vaccinations from attending public, private, and religious daycares, preschools, and K-12 schools.

Applying rational-basis review after holding that Connecticut's vaccination mandate is neutral and generally applicable, the Second Circuit affirmed the district court's dismissal of the Petitioners' free exercise claims under *Employment Division v. Smith.*

The questions presented are:

1. Whether, as four circuits have held, a mandate that does not exempt religious conduct is not neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest the mandate advances, or whether, as two circuits have held, such a mandate is neutral and generally applicable if the secular exemption advances a different (or more general) state interest that the religious conduct does not?

2. Whether a law that provides for legacy religious exemptions valid for the entirety of each legacy child's remaining K-12 education, but affords no religious exemptions to non-legacy children, is neutral and generally applicable?

3. Whether *Employment Division v. Smith*'s hybrid-rights exception should be revitalized, or whether *Smith* should be overruled?

## PARTIES TO THE PROCEEDINGS

Petitioners are We The Patriots USA, Inc., CT Freedom Alliance, LLC, Constantina Lora, Miriam Hidalgo, and Asma Elidrissi.

Respondents are the Connecticut Office of Early Childhood Development, Connecticut Department of Public Health, Bethel Board of Education, Glastonbury Board of Education, and Stamford Board of Education.

## CORPORATE DISCLOSURE STATEMENT

We The Patriots USA, Inc. does not have any parent entities, and no parent entity or publicly held company owns 10% or more of its stock.

CT Freedom Alliance, LLC does not have any parent entities, and no parent entity or publicly held company owns 10% or more of its stock.

## RELATED PROCEEDINGS

United States Court of Appeals for the Second Circuit, No. 22-249-cv, *We The Patriots USA, Inc., et al. v. Connecticut Office of Early Childhood Development, et al.*, judgment entered September 18, 2023. The panel decision is available at 76 F.4th 130.

United States District Court for the District of Connecticut, No. 3:21-cv-00597, *We The Patriots USA, Inc., et al. v. Connecticut Office of Early Childhood Development, et al.*, judgment entered January 12, 2022. The district court decision is available at 579 F.Supp.3d 290.

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## INTRODUCTION

For over fifty years, Connecticut provided religious exemptions to its mandatory student vaccination requirements, as forty-four other states and the District of Columbia still do.[1] Responding to concerns that school vaccination rates were falling, Connecticut repealed its religious exemption on April 28, 2021. Its new school vaccination mandate broadened the pre-existing medical exemption and added a "legacy" exemption allowing K-12 students who claimed a religious exemption prior to April 28, 2021 to attend school unvaccinated for the remainder of their K-12 educations. The mandate requires vaccinations for all non-exempt children attending public, private, and religious daycares, pre-schools, kindergartens, and K-12 schools. Conn. Gen. Stat. § 10-204a (hereinafter, "§ 10-204a").

Connecticut's revised mandate severely penalizes religious parents and children whose faith does not permit them to receive the mandated vaccinations by denying them access to the foundational institution of our republic: education in any school of their choice. These parents have three options: (1) contravene their faith to obtain schooling for their children, (2) homeschool their children from grades K-12, or (3) relocate to a state that offers religious exemptions.

Petitioners Constantina Lora, Miriam Hidalgo, and Asma Elidrissi are Connecticut parents who now face this trilemma. They each hold a sincere religious belief that the use of cell lines derived from aborted fetuses in

1. App.8a-10a; App.73a (Bianco, J., dissenting in part).

vaccination testing and production is deeply immoral. As devout Muslims, Elidrissi's children may not consume pork products contained in certain vaccines.

The Free Exercise Clause does not permit any government to impose this draconian choice on Lora, Hidalgo, and Elidrissi and the members of Petitioners – We The Patriots USA, Inc. and CT Freedom Alliance, LLC. Lower courts, however, have struggled to apply the Court's decision in *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) to vaccination mandates. Their decisions have yielded repeated and recurring applications to the Court for relief as governments grant medical, but not religious, exemptions to vaccination mandates.[2] They have also exposed deeply entrenched splits of authority among the lower courts on how to apply the Court's free exercise precedents.

The Second Circuit's decision below exacerbates this split. Although § 10-204a discriminates on its face against non-legacy religious objectors to mandated vaccinations, the Second Circuit upheld the dismissal of Petitioners' claims by applying rational-basis scrutiny under *Employment Div. v. Smith*, 494 U.S. 872 (1990) based on three misapplications of this Court's precedents.

First, it held that the medical exception does not undermine Connecticut's general interest in children's

2. *See, e.g.*, *Doe v. San Diego Unified School District*, 142 S.Ct. 1099(Mem) (2022); *Dr. A. v. Hochul*, 142 S.Ct. 2569(Mem) (2022); *Does 1-3 v. Mills*, 142 S.Ct. 1112(Mem) (2022); *Dr. A. v. Hochul*, 142 S.Ct. 552(Mem) (2021); *We The Patriots USA, Inc. v. Hochul*, 142 S.Ct. 734(Mem) (2021); *Does 1-3 v. Mills*, 142 S.Ct. 17(Mem) (2021).

health to the extent that a religious exemption would, rather than comparing the extent to which the medical exemption and a religious exemption would undermine § 10-204a's specific purpose. Second, it rejected *Smith*'s explicit recognition of hybrid-rights claims as mere dicta. Both rulings entrench persistent splits of authority among lower courts on how to apply the Court's free exercise precedents.

Third, the Second Circuit did not consider whether the legacy exemption deprives § 10-204a of general applicability, upholding it as "rationally related because it accommodates religious believers who are already in school without extending the accommodation to younger children." App.48a.

The Second Circuit's dismissal of Petitioners' free exercise claims nullifies the free exercise clause's protections for hundreds of thousands of schoolchildren. This Court's review is warranted to resolve the circuit split and correct the Second Circuit's grave misapplications of *Smith* and *Tandon*. Finally, if the Second Circuit properly applied the Court's precedents, the Court should recalibrate or overrule *Smith* and replace it with a standard that better protects the diverse religious exercise that the First Amendment protects.

## DECISIONS BELOW

The district court's decision granting Respondents' motion to dismiss is reported at 579 F.Supp.3d 290. (D.Conn. 2022) and reprinted at App.84a-127a. The Second Circuit decision affirming the dismissal in part and reversing it in part is reported at 76 F.4th 130 (C.A.2 2023)

and reprinted at App.1a-83a. The Second Circuit order denying rehearing *en banc* is unreported but reprinted at App.128a-129a.

## JURISDICTION

The Second Circuit issued its panel opinion on August 4, 2023. It denied rehearing *en banc* on September 11, 2023 and entered its judgment mandate on September 18, 2023. The Court has jurisdiction under 28 U.S.C. §§ 1254 and 1651.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The relevant provisions of Conn. Gen. Stat. § 10-204a are set forth in the appendix.

## STATEMENT OF THE CASE

### I. Factual Background

On April 28, 2021, Connecticut repealed the religious exemption to the school vaccination mandate that it had provided since 1959.[3] Conn. Public Act No. 21-6; *see also*

3. Conn. Public Act No. 21-6 amended Conn. Gen. Stat. § 10-204a, which is the operable law the Petitioners challenge.

1959 Conn. Pub. Acts ch. 588, § 1. The law's provisions prohibit unvaccinated children from attending a public, private, or religious daycare, pre-school, or K-12 school unless they assert a valid medical exemption. Conn. Gen. Stat. § 10-204a. § 10-204a permits K-12 students who obtained religious exemptions prior to April 28, 2021 to complete their education without receiving vaccinations. *Id.*

The three individual Petitioners – Constantina Lora, Miriam Hidalgo, and Asma Elidrissi – sued, alleging that §10-204a violates their rights to free-exercise of religion, medical freedom and privacy, equal protection, and childrearing by leaving them without options to educate their children without violating their faith. App.18a. They religiously object to the use of cell lines artificially developed from aborted fetuses in the research, development, testing, and production of vaccines. App.16a-17a. Hildago also raises her children as vegan in her faith and objects to vaccines containing cells from animals. App.17a. Finally, as devout Muslims, Elidrissi's children may not consume pork products – an ingredient in some vaccines. App.17a.

We The Patriots USA, Inc. and CT Freedom Alliance, LLC joined the individual Petitioners' claims on behalf of their members. App.16a.

§ 10-204a deprives Lora, Hildago, and Elidrissi of all options to educate their children, except homeschooling, without violating their religious beliefs and vaccinating them. Homeschooling, however, deprives their children of the best education that they can provide their children in

their circumstances[4] and imposes a tremendous financial hardship on Petitioners.

## II. Proceedings Below

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

The respondents – two Connecticut state agencies[5] and three local school boards charged with enforcing § 10-204a – moved to dismiss all of the Petitioners' claims under Fed. R. Civ. P. 12(b)(6). The district court granted their motions. App.18a. It reasoned that the Court's decisions in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Prince v. Massachusetts*, 321 U.S. 158 (1944) and the Second Circuit's decision in *Philips v. City of New York*, 775 F.3d 538 (C.A.2 2015) established that school vaccination mandates without religious exemptions do not violate the Free Exercise Clause. App.103a-107a. Alternatively, the district court accepted the state's claimed general interest in protecting children's health and safety and applied rational basis review to hold § 10-204a constitutional. App.107a-118a.

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4. For example, Petitioner Elidrissi's child has special needs that require specialized professional services that she simply cannot provide through homeschooling. App.57a.

5. The state agencies also asserted Eleventh Amendment immunity. The district court granted them immunity and denied the Petitioners leave to amend to substitute the agency heads. The Second Circuit held that denial of leave to amend was improper but deemed it harmless error because of its merits decision. App.19a-20a, n.14.

In a 2-1 decision, the Second Circuit affirmed the district court in part and reversed it in part. It vacated the district court's dismissal of Petitioner Elidrissi's IDEA claim and affirmed its dismissal of the remaining claims. Unlike the district court, it concluded that *Jacobson*, *Prince*, and *Philips* were not controlling because they did not directly consider free exercise claims. App.25a-29a & n.17.

Rather than focusing on the specific interest advanced by the vaccination mandate – preventing the spread of contagious disease among school children – the Second Circuit accepted Connecticut's assertion of a general interest in protecting the "health and safety of the students." App.37a. It then reasoned that a categorical medical exemption served that general interest by protecting the health and safety of medically vulnerable children while a religious exemption did not. App.41a-43a. Relying on legislative history, the court also ruled that religious exemptions far outnumbered medical exemptions in Connecticut schools, which undermined Connecticut's interest far more than medical exemptions. App.42a-45a. It did not analyze the impact of the legacy exemption in its general applicability analysis. App.37a-46a. After concluding that § 10-204a is generally applicable, it applied rational basis scrutiny and affirmed the district court. App.47a-49a.

Judge Bianco dissented only as to the majority's general applicability analysis. In his view, Petitioners "plausibly alleged that [§ 10-204a], in repealing the religious exemption while maintaining a medical exemption," was "substantially underinclusive," and hence "lacks general applicability," because "it regulates

religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." App.67a. He argued that further fact-finding was necessary to determine whether § 10-204a is generally applicable, and that Petitioners should be given "the basic opportunity of discovery to attempt to show . . . that such a law should be subject to strict scrutiny." App.83a.

The Second Circuit denied *en banc* review on September 11, 2023. App.128a-129a.

## REASONS FOR GRANTING THE PETITION

### I. The Second Circuit's Decision Exacerbates A Pre-existing Circuit Split Over Which Categorical Secular Exemptions Deprive A Law Of Neutrality And General Applicability Under *Smith*.

The Second Circuit's decision exacerbates a broad split of authority 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. v. Hochul*, 142 S.Ct. 2569, 2570(Mem) (2022) (Thomas, J., joined by Alito and Gorsuch, JJ, dissenting from denial of certiorari). At stake is whether courts analyze a free exercise claim under strict scrutiny or rational basis scrutiny, which frequently determines whether the claim succeeds or fails. Three justices have characterized this split as "widespread, entrenched, and worth addressing." *Id*. This case presents an ideal vehicle for resolving this question, because it involves the factual setting – vaccination mandates containing medical

exemptions – over which lower-court judges have most often and sharply disagreed. Further percolation will not yield any different approaches to the question, thus making it ripe for the Court's intervention.

### A. The recurring disagreement in the lower courts over whether mandatory vaccination laws with medical, but not religious, exemptions are generally applicable is at the center of the broader split among six circuits and one state supreme court over categorical secular exemptions' effect on general applicability.

A law lacks general applicability when "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1877 (2021). Lower courts, however, continue to disagree about how to conduct this inquiry into whether the exempted secular conduct is "comparable" to the prohibited religious conduct. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). As in *Dr. A* – and the present case – this split has increasingly centered on mandatory vaccination laws with medical, but not religious, exemptions.

In the years after *Smith*, the Third, Sixth, and Eleventh Circuits held that laws that provided secular, but not religious, exemptions for conduct that undermined the law's objectives in similar ways were not generally applicable. *See Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (C.A.3 1999) (holding that a police department's no-beard policy was not generally applicable because it provided medical exemptions and prohibited religious exemptions); *Monclova Christian Academy v.*

*Toledo-Lucas Health Dept.*, 984 F.3d 477 (C.A.6 2020) (holding that a county public health order closing all schools, including religious schools, was not generally applicable because it permitted various secular businesses to remain open); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (C.A.11 2004) (finding a zoning ordinance lacking in general applicability for permitting nightclubs, but not synagogues, in a business district). The Iowa Supreme Court employed the same approach. *See Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (holding a law prohibiting the use of tire studs on highways lacked general applicability because it permitted school buses to use them, but prohibited a Mennonite farmer from using them for religious reasons).

In determining whether secular exemptions similarly undermined the state's interest, these courts focused on the specific interests advanced by the law's regulatory provisions – not on the interests advanced by the secular exemptions. For example, in *Fraternal Order of Police*, the Third Circuit described the "[Police] Department's interest in fostering a uniform appearance through its 'no-beard' policy" and concluded that the medical exemption undermined that interest in the same way that a religious exemption would. 170 F.3d at 366. The exemption for undercover officers, by contrast, did not undermine that interest, because undercover officers do not identify themselves to the public as law enforcement. *Id*. The court focused solely on the interest served by the no-beard policy, not the interests served by either of these secular exceptions.

Similarly, in *Monclova Christian Academy*, the Sixth Circuit focused on whether permitting secular businesses

to remain open would similarly undermine the purpose of the resolution closing schools – to slow the spread of COVID-19. 984 F.3d at 479. Rather than asking what public benefits might justify keeping various businesses open, it applied strict scrutiny because "[t]he Resolution's restrictions . . . impose greater burdens on the plaintiffs' conduct than on secular conduct." *Id.* at 482; *see also Midrash Sephardi*, 366 F.3d at 1233 (comparing how permitting private clubs, but not churches or synagogues, affected a zoning ordinance's "objectives of promoting retail activity and synergy"); *Zimmerman,* 810 N.W.2d at 15-16 (analyzing the impact of an exemption for school buses to use studded tires on an ordinance intended to prevent damage to county roads).[6] Free Exercise challenges to vaccination mandates containing medical but not religious exemptions ended this apparent consensus and divided the lower courts, including the Second Circuit.

The Ninth Circuit reached the question first in *Doe v. Unified School Dist.*, 19 F.4th 1173 (C.A.9 2021). A San Diego public high school student sought a religious exemption from the School District's COVID-19 vaccination mandate. *Id.* at 1176 n.3. The District denied her requested exemption because its mandate only permitted medical exemptions, causing her to lose access to in-person education and extracurricular activities. *Id.* at 1176. The Ninth Circuit found that the medical exemption was generally applicable because it served "the primary

6. The *Zimmerman* court did consider the possibility that the school-bus exemption could be defended as establishing a "mixed purpose to protect the roads from damage except when necessary for safety reasons," but concluded that, even on this understanding, the fact that the exemption applied year-round defeated general applicability. 810 N.W.2d at 16.

interest for imposing the mandate – protecting student 'health and safety' and [did not] undermine the District's interests as a religious exemption would." *Id.* at 1178; *but see id.* at 1182, 1184 (Ikuta, J., dissenting) (applying strict scrutiny, because "the policy allows in-person attendance by students unvaccinated for medical reasons" but "does not allow *any* form of in-person attendance by students unvaccinated for religious reasons").

The First Circuit initially addressed the issue in *Does 1-6 v. Mills*, 16 F.4th 20 (C.A.1 2021). It considered a Maine regulation mandating COVID-19 vaccinations for healthcare workers that provided medical, but not religious, exemptions. *Does 1-6*, 16 F.4th at 24. The First Circuit held that the regulation was generally applicable, reasoning that the medical exemption furthered Maine's interest in public health in a way that a religious exemption would not by protecting medically-contraindicated workers from physical harm caused by COVID-19 vaccines. *Id.* at 31. This Court denied the claimants' request for injunctive relief over a dissent by Justice Gorsuch, joined by Justices Thomas and Alito, arguing, *inter alia*, that the First Circuit had erred by "restating the State's interests on its behalf . . . at an artificially high level of generality." *Does 1-3 v. Mills,* 142 S.Ct. 17(Mem), 20 (2021) (Gorsuch, J., dissenting).

In a subsequent case challenging Maine's COVID-19 vaccination mandate for healthcare workers, the First Circuit reversed its position on the general applicability of the mandate. *Lowe v. Mill*s, 68 F.4th 706 (C.A.1 2023). *Lowe* rejected Maine's argument that its medical exemption was "fundamentally different… [from] a religious exemption because a medical exemption aligns

with the State's interest in protecting public health and more specifically, medically vulnerable individuals from illness and infectious disease, while non-medical exemptions… do not." *Id.* at 715 (internal quotation marks and citations omitted). Instead, the First Circuit 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.* at 715. Thus, the First Circuit held that the plaintiffs had sufficiently pled that the mandate was not generally applicable and remanded the free exercise claim for discovery as to other issues affecting the comparability issue.[7] *Id.* at 718.

For its part, the Second Circuit, in denying preliminary injunctive relief in *Dr. A. v Hochul* and related cases, went beyond the state's specific interest in requiring vaccination "to prevent the spread of COVID-19 in healthcare facilities." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285 (C.A.2 2021). Because "[v]accinating a healthcare employee who is known or expected to be injured by the vaccine would harm her health and make it less likely she could work," the court accepted the state's contention that denying the medical exemption – unlike "any religious exemption" – "would undermine the government's asserted interest in protecting the health of covered personnel," and thus was not comparable. *Id.*; *but see Dr. A. v. Hochul*, 142 S.Ct. 552, 556 (Gorsuch, J., dissenting from denial of injunctive relief) ("allowing a healthcare

7. A Maine district court has already applied *Lowe* in denying a motion to dismiss a free exercise challenge to Maine's repeal of its religious exemption to its school vaccination mandate. *Fox v. Makin*, 2023 WL 5279518 (D. Me. 2023).

worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones").

In Petitioners' case, the Second Circuit similarly ruled that § 10-204a is generally applicable by invoking the state's asserted interest in the medical exemption, rather than focusing on that exemption's impact on the purpose of the vaccination mandate itself. The court accepted without question Connecticut's assertion of a general interest in protecting the "health and safety of the students." App.39a. On that basis, it argued that, unlike a religious exemption, "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." App.42a. It therefore found that "[a]llowing students for whom vaccination is medically contraindicated to avoid vaccination while requiring students with religious objections to be vaccinated does, in both instances, advance the State›s interest in promoting health and safety." App.41a.

Concluding that § 10-204a was generally applicable, the Second Circuit applied rational basis scrutiny to dismiss Petitioners' free exercise claims. App.47a-49a.

### B. The Court's intervention is necessary to clarify that lower courts must analyze a law's regulatory objective rather than its exemptions' purposes, and this case is an ideal vehicle to do so.

The question that has created this circuit split is whether comparability analyses should focus exclusively on the state's specific regulatory interest in mandating or prohibiting the primary conduct at issue, or whether courts should accept a broader framing of the state's interests that includes the interests advanced by whatever secular exemptions the law makes. The Second and Ninth Circuits have permitted states to frame their interests in vaccination mandates in broad public-health terms, thereby virtually guaranteeing that the vaccination requirements will be deemed generally applicable despite a medical exemption (and whatever its scope). The First Circuit has rejected that approach, acknowledging that a medical exemption can preclude a vaccination mandate from being generally applicable. More generally, as described *supra*, the Third, Sixth, and Eleventh Circuits and the Iowa Supreme Court have, in a variety of regulatory contexts, focused exclusively on the impact of secular exemptions on the specific regulatory interests served by laws lacking religious exemptions.

In addition to the inherent importance of the issue and the division of opinion in the lower courts, the Court should grant certiorari because the Ninth and Second Circuits have gravely misinterpreted *Tandon*'s instructions regarding comparability. *Tandon* holds that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted

government interest that justifies the *regulation* at issue." 141 S.Ct. at 1296 (emphasis added). What justifies a "regulation" is the interest the state expects to advance by mandating or prohibiting primary conduct – not whatever interest explains why the state made an *exception* to the "regulation." In other words, "the question is whether religious and secular activities would similarly undermine the purpose *of the law itself*, not whether the exempt secular activity itself serves a valuable countervailing purpose." William T. Sharon, *Religious and Secular Comparators*, 30 Geo. Mason L. Rev. 763, 801 (2023).

*Tandon* also explained that "comparability is concerned with the risks various activities pose, not the reasons why people [engage in them]." 141 S.Ct. at 1296. That instruction leads to the same conclusion about the nature of the relevant state interest. When some states made exceptions to COVID restrictions for activities they deemed "essential," this Court did not evaluate the strength of the interests justifying those classifications. Instead, as *Tandon* requires, the Court simply compared the COVID-spreading risks posed by those exempted activities to those of the religious exercise the states were treating less favorably. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020) (comparing restrictions on religious gatherings with restrictions on secular activities, whether classified as "essential" or "non-essential," provided that they posed similar COVID-transmission risks).The courts straying from this rule have ignored the laws' actual objectives and considered whether an argument could be made that the exemptions served a broader public policy interest. Both the Second and Ninth Circuits ignored that the vaccination mandates before them specifically sought to prevent the

spread of contagious disease by excluding unvaccinated children from schools. Instead, both courts focused on whether categorical medical exemptions served a broader public health interest in protecting the health and safety of students. App.41a-42a, *Doe*, 19 F.4th at 1178.

Analytical errors of this nature gut *Tandon*'s comparability analysis. *Tandon* wisely directs courts to focus on how and to what end a law regulates, rather than inviting self-serving assertions of broad public policy interests by regulators eager to defeat legal challenges.

This case is an ideal vehicle for the Court to correct these errors and resolve the split among the lower courts. As the pre-*Dr. A.* cases demonstrate, how to define a government's interests and analyze exemptions to a mandate can arise in various contexts. These questions, however, have repeatedly risen in challenges to vaccine mandates, and, in that context, there are now rulings on both sides of the question in highly similar factual settings.

Unlike *Dr. A.* or *Does 1-6*, this case presents the question cleanly. It does not require the Court to address the question in the rushed setting of emergency injunctive relief or the complicating presence of nuanced factual disputes. Instead, it asks the Court to decide, in the context of a motion to dismiss, whether the lower courts correctly resolved the legal questions presented.

### C. Connecticut's school vaccination mandate is not neutral and generally applicable under *Tandon*, and strict scrutiny establishes its unconstitutionality.

Connecticut's medical and legacy exemptions deprive its school vaccination mandate of neutrality and general applicability under a proper comparability analysis. The Second Circuit's failure to apply strict scrutiny here underscores the need for this Court to resolve the circuit split and ensure that lower courts uniformly apply its comparability precedents. Under strict scrutiny, the mandate is clearly unconstitutional.

#### 1. The medical exemption.

Connecticut's school vaccination mandate contains a categorical medical exemption available upon certification that vaccination is medically contraindicated. App.14a. The Second Circuit claimed 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," App.41a, which the Court described as "the health and safety of Connecticut's schoolchildren." App.46a. The sole basis for that assertion was the court's finding that the medical exemption "advance[s] the State's interest in promoting health and safety," while a religious exemption "would only detract from the State's interest in promoting public health…." App.41a-42a.

Comparing Connecticut's interest in providing a medical exemption with its interest in providing a religious exemption is not how comparability analysis works

under *Tandon*. What "justifies the regulation at issue" (the school vaccination mandate), *Tandon*, 141 S.Ct. at 1296, is Connecticut's interest in preventing the spread of contagious disease by requiring children to receive vaccinations as a condition of attending schools.

The question under *Tandon*, therefore, is whether a medically-exempt, unvaccinated child undermines Connecticut's interest in universal school vaccination as much as (or more than) a child who declines a vaccination because receiving one is religiously forbidden. The Second Circuit did not dispute that all "unvaccinated children are at heightened risk of developing and transmitting vaccine-preventable illnesses, regardless of their reason for not being vaccinated." App.41a.

That is to say: *the undermining of Connecticut's specific regulatory interest is identical, child-for-child.*

For that reason, the medical exemption Connecticut provides is comparable to the religious exemption that Connecticut denies to all new applicants, depriving § 10-204a of general applicability and requiring the application of strict scrutiny.

The Second Circuit rejected this straightforward reasoning. Instead, under the rubric of protecting students' health, it lumped together Connecticut's interests in mandating vaccination and in "allow[ing] 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." App.42a. But if Connecticut's overriding objective was protecting students' health, it would *abolish* the medical exemption

and require children for whom vaccinations are medically contraindicated to pursue education at home, just as it requires religiously-objecting children to do (unless they are fortunate enough to have a legacy exemption).

Instead, Connecticut retained (and expanded) the medical exemption to ensure that medically contraindicated children and their parents will not be forced to choose between receiving vaccinations and being required to homeschool. Yet Connecticut forces children and their parents who are religiously forbidden to receive a mandated vaccine to choose between violating their religious beliefs and compulsory home-schooling. Why? The answer can only be that Connecticut has made a value judgment that the physical harm a child *might* suffer from taking a medically contraindicated vaccine is categorically more important than the spiritual harm a child *will* suffer from taking a religiously forbidden vaccine. Because this value judgment "devalues religious reasons" for refusing vaccination "by judging them to be of lesser import than nonreligious reasons," § 10-204a is not generally applicable, and strict scrutiny applies. *Lukumi*, 508 U.S. at 537.

Seeking to bolster its conclusion that the medical exemption is not "comparable," the Second Circuit judicially noticed legislative history suggesting that far more Connecticut children seek religious exemptions than medical ones. App.42a-43a. As Judge Bianco explained, that scanty and unreliable evidence was insufficient to foreclose fuller factual development on this issue. App.79a-81a (Bianco, J., dissenting in part). More fundamentally, the Second Circuit erroneously concluded that the comparability inquiry requires a comparison

of the frequency with which a secular exemption and a religious exemption would be invoked. App.40a-41a.

The Court's precedents do not support this approach. In its decisions applying strict scrutiny to state COVID restrictions on religious gatherings, this Court never compared how many religious gatherings were anticipated with how many secular gatherings of various kinds were subject to less stringent restrictions. Instead, the Court simply asked whether – considering relevant facts such as the number of persons permitted to attend a gathering and the size of the venue – the Covid-transmission risks of some forbidden religious gatherings were comparable to those of some permitted secular gatherings. *See. e.g.*, *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021) (statement of Justice Gorsuch) (applying strict scrutiny because "[s]ince the arrival of COVID–19, California has openly imposed more stringent regulations on religious institutions than on many businesses").

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, this Court gave the example of "a large store in Brooklyn that could 'literally have hundreds of people shopping there on any given day,'" while "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." 141 S. Ct. 63, 67 (2020) (cleaned up). That "troubling result[]" illustrated why New York's restrictions were not generally applicable and triggered strict scrutiny. *Id*. at 66-67. The Court's conclusion did not depend on how many religious gatherings could be expected or how many total worshippers might attend in the absence of the restrictions. And for good reason. The possibility that a religious exemption will protect the free exercise rights

of a relatively large number of believers may be relevant to whether a law survives strict scrutiny, but it does not counsel against applying strict scrutiny when the law contains a comparable secular exemption. "If the estimated number of those who might seek different exemptions is relevant, it comes only later in the proceedings when we turn to the application of strict scrutiny." *Dr. A v. Hochul*, 142 S. Ct. at 556 (Gorsuch, J., dissenting from denial of injunctive relief).

**2. The legacy exemption.**

Connecticut's legacy exemption also deprives § 10-204a of neutrality and general applicability, independently triggering strict scrutiny. The Second Circuit excluded the legacy exemption from its general applicability analysis by narrowly construing *Fulton*'s statement that a law is not generally applicable if it "prohibits religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way." 141 S.Ct. at 1877 (emphasis added). It apparently inferred that a law remains generally applicable if it prohibits religious conduct while permitting other *religious* conduct, even if the favored religious conduct undermines the government's asserted interests in an identical way. Accordingly, the Second Circuit simply ignored the legacy exemption in determining whether § 10-204a is generally applicable. App.37a-46a.

This Court's precedents have indeed only engaged in general applicability analysis by contrasting "free exercise" with "comparable secular activity." *See, e.g.*, *Tandon*, 141 S.Ct. at 1296. The Court's phrasing, however, is attributable to the fact that none of the challenged laws

in its precedents have treated some religious exercise more favorably than other, comparably risky religious exercise. The words "generally applicable" mean what they say: a law must treat all similar conduct similarly, whether that conduct is secular or religious.

Therefore, a law is not generally applicable if it treats some religious conduct less favorably than other similar religious conduct. In such a case, no less than one in which secular conduct is favored, free-exercise strict scrutiny applies because the *disfavored* conduct is religious. Imagine that, after *Smith*, a state enacted a law prohibiting ingestion of peyote, but added an exemption allowing all persons who had previously used peyote for religious worship to continue doing so. Although this hypothetical legacy law would enable some members of the Native American Church to use peyote for worship, it would deny that religious liberty to Church members who were too young to have used peyote before the law's enactment, or who later immigrated from other states. Surely the *Smith* Court would not have treated it as generally applicable and subject only to rational-basis review. There is no meaningful difference between this hypothetical and Connecticut's legacy religious exemption.

The rationale for requiring strict scrutiny whenever a law burdening religious exercise is not generally applicable confirms this analysis. When such a law contains *any* exception for comparable conduct, the State treats the favored conduct as more deserving of solicitude and accommodation than the religious conduct the law prohibits. That discrimination against conduct protected by the Free Exercise Clause warrants strict scrutiny, whether the favored conduct is secular or religious.

Indeed, a law that extended such preferential treatment to conduct required by one religion, but not to similar conduct required by another, would trigger strict scrutiny under the Establishment Clause. *Larson v. Valente*, 456 US 228, 246 (1982) ("when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality"). Moreover, *Larson* recognizes that this reasoning has free-exercise implications as well. *Id*. at 245 (""Free exercise thus can be guaranteed only when legislators – and voters – are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations"). By the same token, a state preference for certain religious conduct over other identical religious conduct should, at a minimum, deprive a law of neutrality for free exercise purposes. *Cf. Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion").

This Court's decisions employing Equal Protection strict scrutiny when a state law discriminates with regard to an unenumerated fundamental right also support applying strict scrutiny to the discrimination created by the legacy exemption. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Board of Elections*, 383 US 663, 670 (1966). Thus, for example, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 US 98, 104-105 (2000). Here,

having granted the right to a religious exemption on equal terms, Connecticut has arbitrarily valued the religious liberty of those with pre-Act exemptions over the religious liberty of those prevented by youth, prior residence, or other irrelevant factors from having obtained one prior to April 28, 2021. Even if § 10-204a did not contain a medical exemption, this discrimination would warrant strict scrutiny because it would constitute a permissible accommodation of "fundamental" religious liberty for some and an arbitrary denial of that same religious liberty for others.

*Smith* itself suggests a final reason why strict scrutiny applies when a state accommodates some religious objectors while refusing to accommodate others whose conduct poses no greater risks to the state's regulatory objective. *Smith* stressed that, in addition to the rights afforded by the Free Exercise Clause, "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 494 U.S. at 890. It also acknowledged that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but argued that this "unavoidable consequence of democratic government" was preferable to a free exercise regime in which all laws burdening religion are subject to strict scrutiny. *Id.*

Whether *Smith*'s controversial curtailment of strict scrutiny was correct or not, the legacy exemption is not so much a consequence of "democratic government" as a technique for overcoming public opposition to repealing a "negative protection accorded to religious belief" by Connecticut since 1959. Much of the opposition to

unqualified repeal of the religious exemption came from families whose children had already obtained exemptions. The legacy exemption enabled them to keep their children's exemptions and removed their primary reason for opposing repeal.[8] The repeal's failure to apply neutrally and generally served as a potent divide-and-conquer strategy for abolishing an exemption that protected a "religious practice[] that is not widely engaged in." *Smith*, 494 U.S. at 890. The legacy exemption's distortion of the political process at the expense of a religious minority provides yet another reason why strict scrutiny of § 10-204a is appropriate. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that heightened scrutiny is appropriate when prejudice or some other "special condition . . . tends seriously to curtain the operation of those political processes ordinarily to be relied upon to protect minorities").

For these reasons, the legacy exemption warrants strict scrutiny. Nevertheless, believing that the legislature's failure to enact "even broader accommodations does not detract from the accommodations it did provide,"[9]

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8. The legislative history of the legacy exemption confirms this characterization. The Act originally limited legacy exemptions to students in the seventh and later grades. App.12a (Bianco, J., dissenting in part). During debate, "the House amended the legislation twice," expanding the legacy exemption to include kindergarten through sixth grade, and specifying that legacy exemptions would remain valid if students moved to a different school in Connecticut. App.12a-13a (Bianco, J., dissenting in part).

9. In addition to repealing the religious exemption, Connecticut's legislature rejected "a proposed amendment that would have preserved the religious exemption for nonpublic schools, colleges and universities, and childcare centers." App.32a.

the Second Circuit applied rational-basis review and concluded that the legacy exemption "struck a rational balance between the competing goods legislators were weighing." App.32a n.18. But because the legacy exemption discriminates against some religious objectors, the fact that it accommodates others does not justify treating § 10-204a as neutral and generally applicable and insulating it from strict scrutiny.

### 3. Conn. Gen. Stat. § 10-204a Does Not Survive Strict Scrutiny.

"A government policy can survive strict scrutiny only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 141 S.Ct. at 1881 (internal citations and quotation marks omitted). Connecticut's interest in ensuring that school children are vaccinated to prevent the spread of contagious disease is compelling only in the abstract.

*Lukumi* teaches that "a law cannot be regarded as protecting an interest of the highest order… when it leaves appreciable damage to that supposedly vital interest unprohibited." 508 U.S. at 547 (internal citations and quotation marks omitted). The "damage" here easily surpasses that threshold.

Connecticut permits both pre-existing and future medical exemptions. It permits all pre-existing religious exemptions to continue through high school, yet it refuses to permit the much smaller number of new religious exemptions that it expects will be sought in any given future year. Many years will elapse before the number of students who will be denied religious exemptions under

§ 10-204a exceeds the number who continue to benefit from its medical and legacy exemptions. Because Connecticut has "fail[e]d to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Id*. at 546-547.

Although the Second Circuit did not apply strict scrutiny, it rejected Judge Bianco's argument that "the accommodations contained in the Act undermine the General Assembly's conclusion that the increasing prevalence of religious exemptions constituted a threat to the health and safety of students and the public." App.32a, n.18. According to the majority, this argument implies that "the Act would better withstand a free exercise challenge if it were less solicitous of religious concerns" and "is inconsistent with the principle that government may act with 'benevolent neutrality' toward religion." App.32a, n.18 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). In effect, the majority declared that, even under a strict-scrutiny analysis of § 10-204a, the legacy exemption must be *excluded* from assessing the mandate's under-inclusiveness. As discussed previously, however, the legacy exemption is properly *included* in the neutrality and general-applicability analysis that triggers strict scrutiny, and it follows *a fortiori* that it must be considered under strict scrutiny.

The Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) confirms that the legacy exemption must be included in assessing the extent of § 10-204a's under-inclusiveness. *Gonzales* held that RFRA entitled a religious sect to use hoasca although it contains a substance subject to the "outright ban on all importation and use" under Schedule 1 of the

Controlled Substances Act. 546 U.S. at 439. In applying strict scrutiny, the Court relied on the fact that Congress has created an exception for the religious use of peyote (also a Schedule 1 substance) by Native Americans. *Id.* at 434-35. The Court then applied *Lukumi* to hold that the United States did not have a compelling interest in rejecting an exception for religious use of hoasca because the exception for peyote left "appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 434 (quoting *Lukumi*, 508 U.S. at 547) (cleaned up).

The same is true of § 10-204a's medical and legacy exemptions. Although the percentage of medically-exempt students has historically been small (0.2-0.3%), § 10-204a "broadened the grounds on which a provider may determine that a vaccine is contraindicated for a patient." App.15a. Beyond that, based on the limited data in the legislative record, it appears likely that legacy exemptions will be given to roughly 1.5%-2.5% of all students who were enrolled in schools in Connecticut prior to the changes to § 10-204a. App.7a. That same percentage range presumably would have applied to students seeking the new religious exemptions that § 10-204a now excludes. Thus, for example, "the purportedly large number of kindergartners with religious exemptions from 2019 to 2020, upon which Connecticut relies to demonstrate an alarming increase in religious exemptions that risks an acute outbreak of disease, will be permitted to attend school while unvaccinated for over a decade." App.71a-72a (Bianco, J., dissenting in part). Connecticut "offers no compelling reason why it has a particular interest in denying an exception" to all new religious claimants "while making them available to others" who, in far greater numbers, previously received them. *Fulton*, 141 S.Ct. at 1882.

In addition to its fatal underinclusiveness, § 10-204a fails strict scrutiny because it is not narrowly tailored. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest." *Tandon*, 141 S.Ct. at 1296-97. Because the courts below applied rational-basis scrutiny and dismissed Petitioner's claims, Connecticut was not required to prove narrow tailoring. For the reasons that follow, Connecticut cannot do so, and the Court should hold that § 10-204a is not narrowly tailored even if the Court concludes that it is not fatally underinclusive.

To begin with, Connecticut refuses to permit non-legacy religious exemptions for *any* of the vaccines it mandates. Yet Connecticut's evidence of a potential breakdown of herd immunity concerns only one of at least 10 vaccines schoolchildren must receive at various ages: measles, an extremely contagious disease which, for that reason, has a very high herd immunity threshold of 95%. App.7a. Less contagious diseases have lower herd immunity thresholds. For example, the herd immunity threshold for influenza has been estimated at 80%. *See generally* Pedro Plans-Rubio, *The Vaccination Coverage Required To Establish Herd Immunity Against Influenza Viruses*, J. Prev. Med., Vol. 55(1), 72-77 (2012)J. Prev. Med., Vol. 55(1. There is no evidence in the record that schools in Connecticut are at risk of falling below that threshold. Nevertheless, instead of simply ending religious exemptions from the measles vaccine, § 10-204a abolishes religious exemptions from *all* required vaccines. That is not narrow tailoring.

A second "particular concern to public health officials and legislators was the fact that unvaccinated students were not evenly distributed throughout the State." App.6a. For example, in 2019-2020, 22% of schools with more than 30 kindergartners had measles vaccination rates below 95%. App.6a-7a. Connecticut could have mandated that schools not enroll students who have not received the measles vaccine if doing so would drop the school's vaccination rate below 95%, and required them to refer the children to other schools. Instead, again painting with a broad brush, § 10-204a forbids a non-legacy family from obtaining a religious exemption even if their child is enrolled in one of the 78% of schools with rates exceeding 95%. That is not narrow tailoring.

Instead, § 10-204a insists that only vaccination will suffice – unless it is medically-contraindicated or the student has a legacy exemption. It eschews less restrictive alternatives, is highly under-inclusive, and fails strict scrutiny.

## II. The Second Circuit's Decision Exemplifies Why The Court Should Revitalize *Smith*'s Hybrid-Rights Exception Or Overrule *Smith*.

In *Fulton,* this Court granted certiorari to reconsider *Smith*, 141 S.Ct. at 1876, but ultimately concluded that it could resolve that case by applying *Smith*'s holding that a law is not neutral and generally applicable if it establishes an individualized exemption system. *See id.* at 1883 (Barrett, J., concurring). In the present case as well, the Court can rule in Petitioners' favor by holding that § 10-204a's categorical exemptions deprive it of general applicability under *Smith. See* Part I *supra*. If

the Court concludes otherwise, it should revisit *Smith* and either overrule it or revitalize *Smith*'s "hybrid-rights" exception, which the Second Circuit erroneously treated as mere dicta.

### A. *Smith* is unworkable without its recognition of hybrid-rights claims, and the Second Circuit is among the minority of circuits who reject them.

The *Smith* Court took great care to reconcile the Court's precedents with its holding that neutral, generally applicable laws are not subject to strict scrutiny. It faced two major challenges in that task: *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 25 (1972). It reconciled *Sherbert* and its progeny by reading them as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U.S. at 884. Invoking that rule, this Court applied strict scrutiny to Philadelphia's refusal to grant a religious exemption in *Fulton.* 141 S.Ct. at 1878-79.

*Smith*'s preservation of the principle for which *Yoder* stands is no less deserving of application by the Court to this case. *Smith* asserted that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press… or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), to direct

the education of their children…" 494 U.S. at 881 (citing *Yoder*, 406 U.S. 205). *Smith* quoted approvingly Yoder's rationale for using strict scrutiny:

> *Yoder* said that "the Court's holding in Pierce stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."

*Id.* at 881 n.1.

*Smith* thereby distinguished *Yoder*, without disturbing its strict-scrutiny holding. In *Fulton*, three Justices of this Court described *Smith*'s "hybrid rights' exception, which was essential to preserving *Yoder*," as "a holding of this Court." 141 S. Ct. at 1918 (Alito, J., concurring in the judgment). Yet three circuits "have taken the extraordinary step of refusing to follow this part of *Smith*'s interpretation."[10] *Id.* The Second Circuit is among them, reaffirming in this case that "we do not apply heightened scrutiny to 'hybrid rights' claims" and holding that Petitioners' "liberty interest in childrearing was coextensive with their Free Exercise claim."

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10. *See Combs v. Homer School Dist.*, 540 F.3d 231, 247 (C.A.3 2008); *Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (C.A.6 1993) (describing hybrid-rights claims as "completely illogical")

App.55a. That was error. *Smith* plainly reaffirms that a free exercise claim "in conjunction with … the right of parents . . . to direct the education of their children" will sometimes require strict scrutiny, in contrast to "a free exercise claim unconnected with any . . . parental right." 494 U.S. at 881, 882. *Smith* did not confine *Yoder* to its facts, let alone overrule it.

Whether or not *every* hybrid-rights claim involving parental rights qualifies for strict scrutiny under *Yoder* and *Smith*,[11] Petitioners' claim surely does. *Yoder* upheld a claim by traditional Amish parents that compulsory school-attendance laws requiring them to educate their children past the eighth grade violated their free exercise rights. 406 U.S. at 234. The Court found that "compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.* at 218.

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11. The five circuits that recognize hybrid-rights claims disagree on the appropriate standard for them. The First and D.C. Circuits require an independently viable claim to accompany the free exercise claim, rendering the free-exercise claim irrelevant. *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 331 (D.C. Cir. 2018), *Gary S. v. Manchester School Dist.*, 374 F.3d 15, 19 (C.A.1 2004).

The Fifth, Ninth, and Tenth Circuits require the non-free-exercise claim to be colorable. *Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127, 136, n.8 (C.A.5 2009); *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1032-33 (C.A.9 2004); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (C.A.10 2004).

As in *Yoder*, the burdens Connecticut has imposed on Petitioners' ability to educate their children in accordance with their religious beliefs are "not only severe, but inescapable." *Yoder*, 406 U.S. at 218. § 10-204a bars them from obtaining childcare and educating their children at any public, private, or religious daycare or school unless they vaccinate them in violation of their religious beliefs. App.14a. At the same time, Connecticut mandates that Petitioners provide their children with an education in the subjects required by law from age 5 to 18. Conn. Gen. Stat. § 10-184.

Consequently, Connecticut forbids Petitioners from educating their children in a religious school that shares their faith[12] (or a public school that tolerates it) and *requires* them to home school their children even if Petitioners lack the skills or means to do so. Their only alternatives are to violate their deeply-held religious objections to certain vaccines or leave Connecticut. "Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses" – precisely because of the "considerable sacrifice" it entails and the uncertainty of more tolerant jurisdictions existing. *Yoder*, 406 U.S. at 218 n.9.

To apply rational-basis scrutiny under these circumstances would eviscerate the principle for which *Yoder* stands.

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12. *See Milford Christian Church v. Russell-Tucker*, 2023 WL 8358016 (D.Conn. 2023) (dismissing a church daycare's free exercise challenge to § 10-204a under the Second Circuit's decision).

### B. If the Second Circuit correctly applied *Smith* and its progeny, then this Court should overrule *Smith*.

As Justice Alito explained in his *Fulton* concurrence, *Smith*'s primary weakness is its inconsistency with the Free Exercise Clause's text. That text guarantees broad, affirmative protection for religious liberty. *Smith* provides only watered-down equal protection for religious exercise. Its equal protection regime yields unconscionable derogations of religious liberty.

This petition presents a case in point. If the Second Circuit properly interpreted and applied *Smith*, then states are free to ban Petitioners from not only school, but also society, if they do not abandon their deeply held religious beliefs regarding abortion, pork products, and veganism. As Judge Bianco pointed out in dissent:

> The majority opinion's analysis is also not limited to schools. Any vaccination mandate imposed by a governmental entity upon its employees, or even its residents, would be analyzed with the low constitutional bar of rational basis review even if it had a medical exemption but no exemption for objections based upon sincerely held religious beliefs.

App.82a.

If *Smith* requires consequences such as these, *Smith* should be overruled. Subsequent experience has refuted *Smith*'s argument that heightened scrutiny as the norm in free-exercise cases would lead to religious anarchy. Congress enacted RFRA and RLUIPA after

*Smith*. States enacted their own versions of RFRA. Both federal and state courts have proved capable of deciding claims under those statutes through the *Sherbert* test that they re-established. Thus, the Court could readily replace *Smith* with *Sherbert* or a fine-tuned version of it. Alternatively, a text, history, and tradition analysis might be viable in the free exercise clause context. See *Fulton*, 141 S.Ct. at 1899-1907 (Alito, J. concurring) (exploring the original meaning of the free exercise clause and the history of the right to religious exemptions). Either approach would restore the strong affirmative protection for free exercise that the First Amendment commands.

## CONCLUSION

For these reasons, Petitioners respectfully ask the Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 4, 2023**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022

October 13, 2022, Argued
August 4, 2023, Decided

Docket No. 22-249-cv

WE THE PATRIOTS USA, INC.; CT FREEDOM ALLIANCE, LLC; CONSTANTINA LORA; MIRIAM HIDALGO; ASMA ELIDRISSI,

*Plaintiffs-Appellants*,

v.

CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT; CONNECTICUT STATE DEPARTMENT OF EDUCATION; CONNECTICUT DEPARTMENT OF PUBLIC HEALTH; BETHEL BOARD OF EDUCATION; GLASTONBURY BOARD OF EDUCATION; STAMFORD BOARD OF EDUCATION,

*Defendants-Appellees.*

On Appeal from the United States District Court for the District of Connecticut.

*Appendix A*

CHIN, *Circuit Judge*:

This case requires us to decide whether a State that has for many years exempted religious objectors from its vaccination requirements for students and participants in childcare programs violates the Free Exercise Clause and other federal constitutional and statutory guarantees by repealing that exemption to protect the public health and safety.

All States have such vaccination requirements. The vast majority of States offer religious exemptions from vaccination requirements. In 2021, Connecticut became the fifth State to cease allowing such religious exemptions, following in the footsteps of Mississippi, California, New York, and Maine. West Virginia has never exempted religious objectors. Plaintiffs-appellants are two membership organizations and three individuals ("plaintiffs") who allege that Public Act 21-6 (the "Act"), which revised the Connecticut General Statutes to, *inter alia*, repeal the religious exemptions, violates the Free Exercise Clause of the First Amendment of the U.S. Constitution; other guarantees under the Fourth, Fifth, and Fourteenth Amendments; and the Individuals with Disabilities Education Act (the "IDEA"), 20 U.S.C. § 1400 *et seq.* Defendants-appellees are three state agencies and three local boards of education ("defendants"). Plaintiffs argue, *inter alia*, that the Act demonstrates hostility to religious believers, impermissibly treats religious and nonreligious reasons for declining vaccination differently, jeopardizes their rights to medical freedom and childrearing, unlawfully discriminates on the basis

of age, and denies one plaintiff's disabled child a free appropriate public education in the least restrictive environment possible.

Plaintiffs asked the district court to enter judgment declaring that the Act violates the Constitution and the IDEA, as well as an injunction prohibiting defendants from enforcing the Act. The district court granted defendants' motion to dismiss plaintiffs' complaint in its entirety, holding that (1) the defendant state agencies were immune from suit under the Eleventh Amendment of the U.S. Constitution; (2) the organizational plaintiffs lacked standing to sue; and (3) all five counts of the complaint failed to state a claim.

Only one court -- state or federal, trial or appellate -- has ever found plausible a claim of a constitutional defect in a state's school vaccination mandate on account of the absence or repeal of a religious exemption. *See Bosarge v. Edney*, ___ F. Supp. 3d ___, No. 22-cv-233, 2023 U.S. Dist. LEXIS 67439, 2023 WL 2998484 (S.D. Miss. Apr. 18, 2023) (entering preliminary injunction requiring state officials to offer religious exemption from school immunization mandate). *But see, e.g.*, *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015) (per curiam); *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 352-54 (4th Cir. 2011) (unpublished disposition); *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-89 (S.D. Cal. 2016); *Love v. State Dep't of Educ.*, 29 Cal. App. 5th 980, 240 Cal. Rptr. 3d 861, 868 (Cal. App. 2018); *F.F. ex rel. Y.F. v. State*, 194 A.D.3d 80, 143 N.Y.S.3d 734, 742 (3d Dep't 2021), *cert. denied sub nom. F.F. ex rel. Y.F. v. New York*, 142 S. Ct. 2738, 212 L. Ed. 2d 797 (2022).

We decline to disturb this nearly unanimous consensus. For the reasons that follow, we AFFIRM the district court's dismissal of the first four counts of the complaint. But we VACATE the portion of the district court's judgment dismissing the fifth count of the complaint and REMAND for further proceedings with respect to that claim.

## STATEMENT OF THE CASE

In reviewing the district court's decision to grant defendants' motion to dismiss, we take all the material facts alleged in the complaint to be true, and we draw all reasonable inferences in plaintiffs' favor. *See Eliahu v. Jewish Agency for Israel*, 919 F.3d 709, 712 (2d Cir. 2019) (per curiam) (discussing standards of review for motions to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)). In addition to the facts alleged in the complaint, "as a fundamental matter, courts may take judicial notice of legislative history." *Goe v. Zucker*, 43 F.4th 19, 29 (2d Cir. 2022) (citing *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27, 79 S. Ct. 274, 3 L. Ed. 2d 257, 17 Alaska 779 (1959)), *cert. denied*, 143 S. Ct. 1020, 215 L. Ed. 2d 188 (2023).

### I. Statutory Background

#### A. Public Health Concerns

States have long conditioned enrollment in schools and other educational programs on students being immunized against communicable diseases. In Connecticut, vaccination

mandates for schoolchildren date back to 1882, the same year the State began requiring attendance at school for children aged eight to fourteen. *See* 1882 Conn. Pub. Acts ch. 80, § 2, ch. 135, § 1.[1] In 1923, the Connecticut General Assembly first formally carved out medical exemptions, providing that a child need not be vaccinated upon presentation of "a certificate from a physician . . . certifying that, in the opinion of such physician, such vaccination would not be prudent on account of the physical condition of such child." 1923 Conn. Pub. Acts ch. 271, § 1. Religious exemptions followed in 1959, when the legislature began to exempt a child from vaccination upon a parent's or guardian's submission of "a statement . . . that such vaccination would be contrary to the religious beliefs of such child." 1959 Conn. Pub. Acts ch. 588, § 1. Unlike many other States, Connecticut has never allowed students or their parents to claim exemption from vaccination on the basis of non-religious personal beliefs. *See generally* Elena Conis & Jonathan Kuo, *Historical Origins of the Personal Belief Exemption to Vaccination Mandates: The View from California*, 76 J. Hist. Med. & Allied Scis. 167, 172 (2021).[2]

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1. Subject to exceptions not relevant here, Connecticut today mandates attendance at school (or its equivalent, such as homeschooling that offers "instruction in the studies taught in the public schools") from ages five to eighteen. Conn. Gen. Stat. § 10-184.

2. Non-religious personal beliefs encompass such views as that vaccines pose immediate or long-term risks to individuals' physical and mental health, vaccine-preventable illnesses are rare, and people should be allowed to decide for themselves whether to receive vaccination. As of May 2022, only fifteen States allowed non-religious personal beliefs of this sort to serve as grounds for exemption from vaccination. *See* National Conference of State

In recent years, Connecticut has witnessed declines in the proportion of schoolchildren who are immunized against contagious diseases, particularly measles. During the 2012-2013 school year, 97.1% of the State's kindergartners received a full course of vaccines against measles, mumps, and rubella ("MMR"). By the 2019-2020 school year, however, the rate had dropped to 96.2% (92.1% in private schools). With 527,829 students enrolled in public schools across the State in kindergarten through twelfth grade that school year, and taking private school enrollment into account, the total number of unvaccinated students approached or exceeded 20,000. *See* Conn. Dep't of Educ., *Enrollment Report*, EdSight, https://public-edsight.ct.gov/Students/Enrollment-Dashboard/Enrollment-Report-Legacy?language=en_US (last visited Aug. 3, 2023).

Of particular concern to public health officials and legislators was the fact that unvaccinated students were not evenly distributed throughout the State. In the 2019-2020 school year, some 22% of the 544 schools enrolling thirty or more kindergartners had MMR vaccination rates below 95%.[3] Twenty-six schools had rates below 90%.[4] The

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Legislatures, *States with Religious and Philosophical Exemptions from School Immunization Requirements*, https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements (last updated May 25, 2022).

3. *See* Testimony Presented Before the Public Health Committee by Acting Commissioner Deidre S. Gifford, H.B. 6423, S.B. 568, 2021 Sess., at 4 (Conn. 2021), https://www.cga.ct.gov/2021/PHdata/Tmy/2021HB-06423-R000216-Department of Public Health-TMY.PDF (hereinafter "DPH Testimony").

4. *See* Connecticut General Assembly House Proceedings, H.B. 6423, 2021 Sess., at 966 (Conn. 2021) (hereinafter "House Proc.");

Centers for Disease Control and Prevention recommends that "at least 95% of school students need to be vaccinated against measles" to maintain community immunity. DPH Testimony at 4.[5]

As the rate of vaccination against MMR and other vaccine-preventable diseases was declining, the percentage of Connecticut kindergartners whose families claimed exemption from vaccination on religious grounds was on the rise. In school year 2012-2013, 1.4% of kindergartners were exempt from one or more vaccinations on account of religious objections; in school year 2018-2019, the percentage rose to a high of 2.5%, before dropping slightly, to 2.3%, in school year 2019-2020. The overall trend was toward an increase in religious exemptions.[6] In contrast,

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Connecticut General Assembly Senate Proceedings, H.B. 6423, 2021 Sess., at 671 (Conn. 2021) (hereinafter "Senate Proc."). Both the House and Senate proceedings are contained in the full legislative history of the Act available at https://ctatatelibrarydata.org/wp-content/uploads/lh-bills/2021_PA6_HB6423.pdf. In citing the House and Senate proceedings, we refer to the continuous pagination inserted into this PDF document by the Connecticut State Library. *See also* DPH Testimony at 4.

5. "Community immunity," sometimes also called "herd immunity," is the phenomenon that occurs when "a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely." Centers for Disease Control and Prevention, *Glossary*, *Vaccines and Immunizations*, https://www.cdc.gov/vaccines/terms/glossary.html (last visited Aug. 3, 2023).

6. Indeed, even as the rate of religious exemptions declined slightly for kindergartners in school year 2019-2020, 3% of students enrolled in prekindergarten programs claimed a religious exemption

the percentage of Connecticut kindergartners claiming a medical exemption from vaccination remained roughly constant, at 0.2-0.3%, over the same period.

Faced with this data, and troubled that declining rates of vaccination would leave Connecticut students and the broader public vulnerable to outbreaks of disease, the Connecticut General Assembly took up the legislation that would become Public Act 21-6.

In doing so, Connecticut was following in other States' footsteps. West Virginia has never offered a religious exemption from school immunization mandates. There, exemptions are available only upon presentation of "the certification of a licensed physician stating that the physical condition of the child is such that immunization is contraindicated or there exists a specific precaution to a particular vaccine." W. Va. Code Ann. § 16-3-4 (West). *See Workman*, 419 F. App'x at 352-54 (rejecting Free Exercise Clause challenge). In Mississippi, more than four decades ago, the state high court struck down a provision limiting religious exemptions to those who could prove, by presenting a certificate issued by a "recognized denomination," that they "are bona fide members of a recognized denomination whose religious teachings require reliance on prayer or spiritual means of healing." *Brown v. Stone*, 378 So.2d 218, 219 (Miss. 1979) (quoting Miss. Code. Ann. § 41-23-37 (1972 Supp.)). The legislature never replaced the invalidated provision,

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that school year -- the highest percentage of any grade level. *See* DPH Testimony at 6.

and until July 15, 2023, exemptions were only available when "offered on behalf of a child by a duly licensed physician" and "accepted by the local health officer when, in his opinion, such exemption will not cause undue risk to the community." Miss. Code. Ann. § 41-23-37 (West). *See generally* James Colgrove & Abigail Lowin, *A Tale of Two States: Mississippi, West Virginia, and Exemptions to Compulsory School Vaccination Laws*, 35 Health Affs. 348, 349-51 (2016).[7]

7. This year, a court in the Southern District of Mississippi entered a preliminary injunction requiring state officials to "develop a process by which persons may request a religious exemption from the Compulsory Vaccination Law." *Bosarge*, 2023 U.S. Dist. LEXIS 67439, 2023 WL 2998484, at *17. State officials complied, *see* No. 22-cv-233, Dkt. 82 (S.D. Miss. July 7, 2023), and the case is set for trial on April 1, 2024, *see id.* Dkt. 79. *Bosarge* is an outlier among school vaccination cases, however, because the Mississippi Attorney General conceded that the state's vaccination mandate "would substantially burden the rights of some people with sincerely-held religious objections" under Mississippi's Religious Freedom Restoration Act ("MRFRA") but argued that MRFRA, independently of the Free Exercise Clause, required the state to provide religious exemptions because the vaccination mandate could not satisfy strict scrutiny. *Bosarge*, 2023 U.S. Dist. LEXIS 67439, 2023 WL 2998484, at *7-8. The court rejected the Attorney General's argument and held that plaintiffs had demonstrated a likelihood of success on their free exercise claim. *See* 2023 U.S. Dist. LEXIS 67439, [WL] at *8. In a single paragraph, the court concluded that "[b]ecause the evidence shows that there was a method by which Mississippi officials could consider secular exemptions . . . the Compulsory Vaccination Law would not be neutral or generally applicable." 2023 U.S. Dist. LEXIS 67439, [WL] at *10.

More recently, three States preceded Connecticut in repealing religious or philosophical exemptions from school immunization requirements. California did so in 2015; Maine and New York followed suit in 2019. *See* 2015 Cal. Legis. Serv. ch. 35 (West) (amending Cal. Health & Safety Code § 120325 *et seq.*); 2019 N.Y. Sess. Laws ch. 35 (McKinney) (amending N.Y. Public Health Law § 2164(9)); 2019 Me. Legis. Serv. ch. 154 (West) (amending Me. Rev. Stat. Ann. tit. 20-A, §§ 6355, 6358, 6359; tit. 22, §§ 802, 8402).[8] Courts have upheld the California and New York laws against Free Exercise Clause challenges. *See Whitlow*, 203 F. Supp. 3d at 1086-87; *Love*, 240 Cal. Rptr. 3d at 868; *F.F.*, 143 N.Y.S.3d at 742.[9]

### B. The Legislative Record

As in these other States, the Act was not adopted without controversy. The legislative record reflects a

8. A recent report of the Centers for Disease Control and Prevention indicates that kindergartners in these States, along with West Virginia and Connecticut, have some of the highest rates of MMR vaccination. *See* Ranee Seither et al., *Vaccination Coverage with Selected Vaccines and Exemption Rates among Children in Kindergarten -- United States, 2021-22 School Year*, Morbidity & Mortality Wkly Rep. (Jan. 13, 2023), https://www.cdc.gov/mmwr/volumes/72/wr/mm7202a2.htm?s_cid=mm7202a2_w.

9. A challenge to Maine's statute is pending. *See Fox v. State of Maine et al.*, No. 22-cv-251 (D. Me. Aug. 17, 2021). Defendants in the Maine case have withdrawn portions of their motions to dismiss in light of the First Circuit's decision in *Lowe v. Mills*, 68 F.4th 706 (1st Cir. 2023), which reversed and remanded the dismissal of a complaint alleging that a vaccination mandate for Maine healthcare workers violated the Free Exercise Clause.

spirited debate that unfolded over several years. At public hearings in February 2021, some 2,000 individuals requested to testify concerning what were then two identical pieces of legislation, House Bill 6423 and Senate Bill 568. The legislature's joint Public Health Committee heard from approximately 250 speakers over a twenty-four-hour period. Members of the public submitted more than 1,700 written comments. Some 95% of those who spoke and submitted comments opposed the Act. In the minority, however, were numerous public health agencies and associations, including the Connecticut Department of Public Health, the Connecticut Hospital Association, the Connecticut Children's Medical Center, and the Connecticut Nursing Association, which all advocated in favor of the Act.

In the State House of Representatives, the final debate, which began on April 19, 2021, ran for more than fifteen hours and concluded well past midnight. The Act's primary sponsor referred to "a clear trend over the past decade towards higher levels of religious exemptions resulting in as many as a hundred schools at any given time with vaccination rates below the community immunity threshold." House Proc. at 791. Other proponents said that the Act would prevent "a real public health crisis, just over the horizon." *Id.* at 847. Opponents predicted that the Act would create "religious refugees," *id.* at 909; said that it would "segregat[e]" and "separat[e]" families, especially those with some, but not all, children already in school, *id.* at 868; and worried that it would worsen food insecurity by prohibiting students from not only attending school but also receiving free or subsidized meals, *id.* at 1215-

16. Some opponents expressed concern about the Act's "legacy" provision, which provided that certain children who were already enrolled in school and had previously been granted religious exemptions would remain exempt.[10] According to these opponents, the inclusion of the legacy provision in the bill undermined the notion that Connecticut was facing a public health emergency. Other opponents argued that students who are unvaccinated due to medical contraindication pose the same public health risk as those who receive religious exemptions.[11]

During the debate, the House amended the legislation twice. The original version of the Act made legacy exemptions available only to students in the seventh and later grades, but the House voted to extend the legacy provision to those enrolled in kindergarten through sixth grade as well. A second amendment clarified that

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10. Both sets of parties, as well as members of the General Assembly, referred to this provision as the "grandfather clause."

11. The legislative history includes numerous references to a third category of individuals, those who are "noncompliant" with Connecticut's mandated schedule of vaccines. Some legislators expressed the view that the Act permitted noncompliant students to remain unvaccinated while mandating vaccination for those who sought religious exemptions. As the Act's sponsor in the Senate explained, however, noncompliant students are those who have developed a plan with their healthcare provider to catch up on missed vaccines. The Act expressly permits healthcare providers to certify that "initial immunizations have been given . . . and additional immunizations are in process." Public Act 21-6 § 1(a)(1). Other than its medical exemptions and legacy provision, the Act does not allow unvaccinated students to enroll or remain enrolled in school without presenting such a certificate.

students with religious exemptions would not lose them if they moved from one Connecticut school to another. The amended legislation passed the House, 90-53.

A similar debate unfolded when the State Senate convened to consider the Act on April 27, 2021. Proponents again stated that the Act's purpose was to proactively protect public health in the face of declining vaccination rates; a supporter called it "a very modest and highly incremental response to a major crisis in public health and a major public health problem." Senate Proc. at 788-89; *see also id.* at 616 (alluding to "the significant vulnerability present in our schools and communities"), 707 ("[W]e are supposed to make policies to prevent illnesses"). Opponents raised many of the same objections as in the House, with one senator calling the Act "fundamentally wrong, immoral and I would say even anti American." *Id.* at 636. Although senators proposed four further amendments, none passed. The Senate adopted the legislation, 22-14. Governor Ned Lamont signed it the following day, April 28, 2021, and nearly all provisions of the Act became effective immediately upon the Governor's signature. *See* Public Act 21-6 §§ 1-9, 12.[12]

### C. Public Act 21-6

The Act amended vaccination requirements scattered across several titles of the Connecticut General Statutes.

12. As described further below, sections 10 and 11 of the Act require that certain insurance plans cover extended consultations between patients and medical providers concerning vaccination. These provisions took effect January 1, 2022. *See* Public Act 21-6 §§ 10-11.

As to children enrolled in public and nonpublic schools, the Act repealed the exemption from immunization for children whose parents present "a statement . . . that such immunization would be contrary to the religious beliefs of such child or the parents or guardians of such child." Conn. Gen. Stat. § 10-204a (2020). The Act did not repeal the exemptions for students who present "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," or who provide documentation that they had had a confirmed case of, or were too old to receive immunization against, certain diseases. Public Act 21-6 § 1(a)(2)-(5). As amended, the Act provided that children enrolled in kindergarten through twelfth grade who had been previously granted religious exemptions would remain exempt. *See id.* § 1(b). The Act did not, however, extend the same accommodation to students in preschool and prekindergarten programs. *See id.* § 1(c). As Connecticut had done since 1882, the Act required that local or regional boards of education provide vaccinations free of charge to those unable to pay. *See id.* § 1(d); *see also* 1882 Conn. Pub. Acts ch. 135, § 1. It did not change the schedule of required immunizations, which is determined by Connecticut's Commissioner of Public Health. Public Act 21-6 § 1(e).[13]

13. The Act became law during the COVID-19 pandemic, and the legislative debates are replete with references to COVID-19. Nevertheless, as we explain further below, the Act did not mandate vaccination against COVID-19. At the time the legislature passed the Act, COVID-19 vaccines were not authorized for all children.

Other provisions of the Act concerned students enrolled in public and private institutions of higher education, as well as children who attend childcare centers and group childcare homes. *Id.* §§ 3-6. Broadly speaking, the Act treated college and university students the same as those enrolled in kindergarten through twelfth grade: It permitted those who had previously been granted religious exemptions to remain exempt, but it provided that new exemptions would be granted only for medical contraindication. *Id.* §§ 3(b), 4. As to participants in childcare programs, the Act contained a legacy provision for children enrolled in kindergarten through twelfth grade. *Id.* §§ 5(b)(2)-(3), 6(g)(2)-(3).

Because the Act makes vaccination or exemption a condition of enrollment in any licensed Connecticut school, institution of higher education, or childcare program, unvaccinated children who do not qualify for a medical exemption or the legacy provision may not attend.

The Act contained several miscellaneous provisions relevant to this appeal. In setting forth the contents of the certificates of medical exemption that healthcare providers may issue, the Act broadened the grounds on which a provider may determine that a vaccine is contraindicated for a patient. *Id.* § 7. These grounds may now include reasons that are "not recognized by the National Centers for Disease Control and Prevention" but that nevertheless, "in [the provider's] discretion," constitute contraindication. *Id.* The Act also established within the Connecticut Department of Public Health an Advisory Committee on Medically Contraindicated Vaccinations,

which among other responsibilities is charged with ensuring consistency in the administration of medical exemptions as well as offering continuing education for medical providers. *Id.* § 8. The Act required state officials to collect data concerning exemptions and report annually to relevant committees of the General Assembly. *Id.* § 9. And to educate the public about the benefits of vaccines, the Act mandated that certain individual and group health insurance plans cover "at least a twenty-minute consultation" between medical providers and persons eligible to be vaccinated. *Id.* §§ 10-11.

## II. The Parties and Prior Proceedings

On April 30, 2021, two days after Governor Lamont signed the Act, plaintiffs commenced this lawsuit. Plaintiffs include two not-for-profit organizations: We The Patriots USA, Inc., and CT Freedom Alliance, LLC are public interest organizations dedicated to advocating for constitutional rights, including religious freedom (the "Organizational Plaintiffs"). Plaintiffs also include three individuals who each have at least one child who must be vaccinated to attend school under the Act (the "Individual Plaintiffs").

The Individual Plaintiffs object to vaccination on religious grounds; some of the specific reasons vary from individual to individual, but they all object to the use of "cell lines descended from aborted fetuses" in the research, development, testing, and production of vaccines. App'x at 41. Constantina Lora, a Greek Orthodox Christian, is the parent of a preschooler in Bethel, Connecticut, as well

as of middle and high school students who have legacy exemptions. Lora and her family moved from New York to Connecticut after New York repealed its religious exemption. Miriam Hidalgo is a Roman Catholic and the parent of two children in Glastonbury, Connecticut. In fall 2021, her children became eligible for preschool. Pursuant to Hidalgo's religious beliefs, she and her spouse are raising their children as vegans; they object to vaccines that contain cells from animals. Asma Elidrissi, a Muslim, is the parent of two children in Stamford, Connecticut. When the Act took effect, one of her children had not completed registering for kindergarten; the other was eligible for preschool beginning in fall 2021. Elidrissi and her spouse object to vaccinating their children on two religious grounds not shared by the other plaintiffs. First, they abstain from consuming pork products, which they allege are used as a stabilizer in some vaccines. Second, after one of Elidrissi's children received the MMR vaccine, he developed "serious symptoms and ultimately a speech and learning disorder for which he now receives special services." App'x at 44. Elidrissi holds a religious belief that harming children is morally wrong, and she objects to vaccinating her children further because of the harm she alleges the previous vaccine caused. *Id.*

Plaintiffs named six defendants. Three of them are state agencies: the Connecticut Office of Early Childhood Development, the Connecticut State Department of Education, and the Connecticut Department of Public Health (the "State Agency Defendants"). The other three are the local school boards in Bethel, Glastonbury, and Stamford (the "School Board Defendants").

Plaintiffs sought declaratory and injunctive relief, along with attorney's fees. The complaint enumerated five counts. Plaintiffs contended the Act violates (1) the Free Exercise Clause of the First Amendment; (2) a right to privacy and medical freedom that plaintiffs argued is implied in the First, Fourth, Fifth, and Fourteenth Amendments; (3) the Equal Protection Clause of the Fourteenth Amendment; and (4) the liberty interest in childrearing implicit in the Due Process Clause of the Fourteenth Amendment. Plaintiffs brought these four counts against all defendants. The complaint's fifth and final count, claiming that the Act violates the IDEA, was brought by Elidrissi alone against the State Agency Defendants and the Stamford Board of Education.

In the district court, the State Agency Defendants requested a pre-filing conference, which the court held on June 30, 2021. Plaintiffs declined the district court's invitation to amend the complaint following the pre-filing conference. Defendants subsequently moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and (6). The State Agency Defendants argued that the first four counts of the complaint should be dismissed as to them on sovereign immunity grounds; all the claims of the Organizational Plaintiffs should be dismissed for lack of standing; and all five counts should be dismissed for failure to state a claim. The Glastonbury Board of Education moved to dismiss the first four counts for failure to state a claim. The Bethel and Stamford Boards of Education joined the State Agency Defendants' motion to dismiss, except as to the State Agency Defendants' assertion of immunity under the Eleventh Amendment.

*Appendix A*

On January 11, 2022, the district court issued an extensive order granting defendants' motions to dismiss. *See We The Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 579 F. Supp. 3d 290 (D. Conn. 2022). The district court dismissed the first four counts of the complaint as to the State Agency Defendants, concluding that they are immune from suit under the Eleventh Amendment; moreover, it denied plaintiffs' request for leave to amend the complaint to name agency officials, rather than the agencies themselves, as defendants. Separately, the district court dismissed all claims brought by the Organizational Plaintiffs, holding that they had not met the constitutional requirements for associational standing.[14] These rulings did not preclude the district

14. We do not reach the district court's disposition of these jurisdictional issues because plaintiffs agree that the district court properly applied binding precedent in deciding that the State Agency Defendants are immune from suit under the Eleventh Amendment and because the issue is mooted by the fact that the district court dismissed on the merits all four counts of the complaint brought by the Organizational Plaintiffs and we are affirming that portion of the district court's ruling.

We note, however, that one of the reasons the district court gave for its decision to deny leave to amend the complaint was that, at the time it decided the motion to dismiss, its individual rules of practice warned that the court "ordinarily will not grant leave to amend" where a plaintiff chooses not to amend a complaint after learning of grounds for dismissal at a pre-filing conference. *Pretrial Preferences*, U.S. Dist. Ct. Dist. of Conn. (Jan. 24, 2022), https://www.ctd.uscourts.gov/content/janet-bond-arterton [https://web.archive.org/web/20220124064903/https://ctd.uscourts.gov/content/janet-bond-arterton]; *see also We The Patriots USA, Inc.*, 579 F. Supp. 3d at 300 n.5. The district court subsequently amended its rules, which

court from reaching the merits of the complaint's five claims, all of which the court dismissed under Federal Rule of Civil Procedure 12(b)(6). Judgment was entered the following day. Plaintiffs timely filed their notice of appeal.

Following oral argument, we held this case in abeyance pending the decision of another panel of this Court in *M.A. v. Rockland County Department of Health*, 53 F.4th 29 (2d Cir. 2022) ("*Rockland County*"). As we describe more fully below, *Rockland County* involved a Free Exercise Clause challenge to a set of emergency orders issued by county officials in response to an outbreak of measles. The panel

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now provide that "[a]t the pre-filing conference, the plaintiff will be given leave to amend the complaint to address issues that will be the subject of a motion to dismiss." *Pretrial Preferences*, U.S. Dist. Ct. Dist. of Conn., https://www.ctd.uscourts.gov/content/janet-bond-arterton (last visited Aug. 3, 2023). As an alternative basis for its decision, the district court concluded that amendment would be futile because it dismissed all counts of the complaint on the merits. *See We The Patriots USA, Inc.*, 579 F. Supp. 3d at 300 n.5.

We have cautioned that individual rules of practice may not contravene federal procedural rules. *See Fruit of the Loom, Inc. v. Am. Marketing Enters., Inc.*, 192 F.3d 73, 75 (2d Cir. 1999). In *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015), we ruled that a district court may not deny a plaintiff leave to replead on the ground that the plaintiff failed to take advantage of the opportunity to do so before learning how the district court would rule on the defendant's motion to dismiss. The court's denial of leave in this case was impermissible for the same reason. The error was harmless, however, because as we discuss below, the court properly dismissed those counts on the merits and amendment would indeed have been futile.

issued its decision on November 9, 2022. We ordered the parties to submit supplemental briefing as to the effect of the *Rockland County* decision on this case, and we have now considered those submissions.

## DISCUSSION

We review *de novo* the district court's dismissal of each of the complaint's five claims pursuant to Federal Rule of Civil Procedure 12(b)(6), "accepting as true all facts alleged in the complaint and drawing all reasonable inferences in favor of" plaintiffs. *Phillips*, 775 F.3d at 542. To overcome a motion to dismiss for failure to state a claim, a plaintiff's complaint "must contain sufficient factual matter . . . to 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) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The plaintiff must offer more than facts suggesting a "sheer possibility" the defendant is liable, or facts that are "merely consistent with" that conclusion. *Id.* (quoting *Twombly*, 550 U.S. at 557).

We begin with plaintiffs' challenge to the Act under the Free Exercise Clause, which is the gravamen of the complaint. We then turn to plaintiffs' other constitutional claims. Finally, we address Elidrissi's claim under the IDEA.

*Appendix A*

## I. The Free Exercise Claim

### A. Applicable Law

#### 1. Incidental Burdens on Religious Exercise

Under the Free Exercise Clause, which the Fourteenth Amendment incorporated as to the States, *see Cantwell v. Connecticut*, 310 U.S. 296, 304-05, 60 S. Ct. 900, 84 L. Ed. 1213 (1940), the government may sometimes burden the external practice of religion. In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the Supreme Court reaffirmed that a law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review. If the law 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. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97, 209 L. Ed. 2d 355 (2021) (per curiam); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

The Court traced the principle animating *Smith* back to the late nineteenth century, collecting a series of cases that "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879

(internal quotation marks and citation omitted); *see also id.* at 879-80 (citing *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878); *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982); *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961) (plurality opinion); *Gillette v. United States*, 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971)).

A law is not neutral under *Smith* if the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877, 210 L. Ed. 2d 137 (2021) (citation omitted). A law may fail the neutrality prong either facially, that is, "if it explicitly singles out a religious practice," or on account of improper legislative intent, that is, "if it targets religious conduct for distinctive treatment." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 281 (2d Cir. 2021) ("*Hochul*") (per curiam) (internal quotation marks omitted), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied sub nom. Dr. A v. Hochul*, 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022). To fail the neutrality prong, 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. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rts. Comm'n*, 138 S. Ct. 1719, 1729, 201 L. Ed. 2d 35 (2018). The Supreme Court has stressed, however, that even "subtle departures from neutrality" violate the Free Exercise Clause, and thus "upon even

slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 1731 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 534, 547) (internal quotation marks omitted). To determine whether the government has acted neutrally, courts look to factors such as the background of the challenged decision, the sequence of events leading to its enactment, and the legislative or administrative history. *See id.* (summarizing *Church of Lukumi Babalu Aye*, 508 U.S. at 540)).

A law is generally applicable when it treats similar conduct similarly, without regard to whether the conduct is religiously motivated. The Supreme Court has explained that a law is *not* generally applicable in at least two circumstances: first, where it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," and second, where it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (internal quotation marks omitted). We have described this second inquiry in terms of whether a law is "substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Hochul*, 17 F.4th at 284 (quoting *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014)).

In a series of decisions about limitations on the operation of houses of worship during the COVID-19 pandemic, the Supreme Court clarified how courts should determine whether a challenged law is generally applicable. Most relevant here, the Court held that regulations "are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue, . . . [and] not the reasons why people gather." *Id.*

**2. Vaccination Mandates**

Both the Supreme Court and this Court have considered whether vaccination mandates violate the Constitution.[15] The earliest such case, *Jacobson v. Massachusetts*, held that a state's police power included the capacity to mandate vaccination against smallpox for all adult residents who were "fit subject[s] of vaccination." 197 U.S. 11, 38-39, 25 S. Ct. 358, 49 L. Ed. 643 (1905). *Jacobson*, which concerned a criminal penalty the town of Cambridge imposed on those who refused vaccination, "pre-dated the modern tiers of scrutiny" but "essentially applied rational basis review." *Roman Cath. Diocese of*

15. So has the Connecticut Supreme Court, which upheld an early predecessor of the Act against challenges under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See Bissell v. Davison*, 65 Conn. 183, 32 A. 348, 350 (Conn. 1894).

*Brooklyn v. Cuomo*, 141 S. Ct. 63, 70, 208 L. Ed. 2d 206 (2020) (Gorsuch, *J.*, concurring). In *Zucht v. King*, 260 U.S. 174, 175, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922), the Supreme Court upheld a city ordinance requiring that children be vaccinated before attending any school, public or private. In *Prince v. Massachusetts*, which followed the incorporation of the First Amendment against the States, the Supreme Court considered a Free Exercise Clause challenge to child labor laws. *See* 321 U.S. at 159-60. Citing *Jacobson*, the Court commented in dictum that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67.

Recent cases of this Court, many of which have applied the *Smith* test, have reached similar conclusions. In *Phillips*, we held that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." 775 F.3d at 543. During the recent pandemic, we denied under *Smith* a request to preliminarily enjoin a regulation, which lacked a religious exemption, requiring healthcare workers to be vaccinated against COVID-19. *See Hochul*, 17 F.4th at 273-74. In *Goe*, we decided that because the federal Constitution confers no fundamental right to an education, rational basis review applied to a regulation limiting medical exemptions to school immunization requirements to cases where physicians identified a contraindication or precaution that was consistent with nationally recognized medical standards. *See* 43 F.4th at 30-32.

Most recently, we considered a county executive's emergency declaration mandating that, during an outbreak of measles, unvaccinated children be excluded from places of public assembly, including schools. *See Rockland County*, 53 F.4th at 34. The emergency declaration exempted children whose physicians confirmed that they were immune from the disease or medically unable to receive vaccination. *Id.* The plaintiffs, who objected to vaccination on religious grounds, claimed that the emergency declaration violated the Free Exercise Clause because it targeted them on account of their beliefs. *Id.* at 34-35. The defendants, the county health department and various county officials, moved for summary judgment, which the district court granted. *See W.D. v. Rockland County*, 521 F. Supp. 3d 358, 371 (S.D.N.Y. 2021). Applying *Smith*, the district court held that the emergency declaration was neutral and generally applicable; it also held that the declaration satisfied rational basis review. *Id.* at 397-407.

We reversed because we found there were disputes of material fact as to at least three issues: (1) whether county officials acted out of anti-religious animus, (2) whether there were children in the county who were unvaccinated for reasons other than religious objection or medical contraindication, and (3) what the county's purpose was in enacting the emergency declaration. *See Rockland County*, 53 F.4th at 36. As to *Smith*'s neutrality prong, we held that a reasonable juror could find that the county officials acted out of animus. *Id.* at 36-38. As to the general applicability prong, we decided that the defendants presented insufficient evidence about the

purpose and scope of the emergency declaration. *Id.* at 38-39.[16] Our decision in *Rockland County* did not, however, reach the constitutional question that case and this one share.

### B. Application

The district court dismissed plaintiffs' free exercise challenge for failure to state a claim, on two grounds. First, the district court held that our precedents, especially *Phillips* and *Hochul*, foreclose plaintiffs' claim. Second, the district court also concluded that, even if that were not the case, the Act is subject to and passes rational basis review under *Smith*.

Plaintiffs' free exercise challenge presents a question of first impression for this Court: whether a State, having previously accommodated religious objections to vaccination by providing a mechanism for objectors to obtain exemptions, may repeal that mechanism without offending the Free Exercise Clause.[17] We conclude that

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16. Judge Park concurred. He agreed that the district court had erred in granting summary judgment. Rather than remanding, however, Judge Park would have applied "*Smith* to facts not in dispute" to find that "the Emergency Declaration was neither neutral nor generally applicable." *Rockland County*, 53 F.4th at 40 (Park, *J.*, concurring). Judge Park noted that New York repealed its religious exemption following the events at issue in *Rockland County* but that this Court has not considered whether the revised vaccination mandate is constitutional. *See id.* at 41. He also urged that *Smith* be overruled. *Id.* at 41-42.

17. Although our decision in *Phillips* contains persuasive dictum, we decided that case before New York repealed its religious

the Act satisfies both prongs of the *Smith* test and also satisfies rational basis review.

### 1. Neutrality

We begin with neutrality. The Act's legislative history does not contain evidence of hostility to religious believers, even when read with an eye toward "subtle departures from neutrality" or "slight suspicion" of "animosity to religion or distrust of its practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Although plaintiffs contend in their supplemental brief that they find "implicit hostility" in the legislative debate, they have not pointed to any specific expressions of animus. Appellants' Suppl. Br. at 8; *see also* Appellants' Br. at 29. Nor did plaintiffs make

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exemption, and the issue there concerned only the temporary exclusion of unvaccinated children from school during an emergency. *See* 775 F.3d at 543. In *Hochul*, a draft of the challenged regulation contained a religious exemption, but the final regulation did not, so there was no repeal of a previously enacted exemption. *See* 17 F.4th at 282-83. Moreover, *Hochul* denied preliminary injunctive relief and thereby considered only the plaintiffs' *likelihood* of success on the merits; it did not definitively resolve the merits of the controversy. *Id.* at 286-88. *Goe* concerned the criteria for medical exemptions, not the availability of religious exemptions. *See* 43 F.4th at 31. And as we discuss further below, *Rockland County* is factually distinguishable from this case: It concerned a temporary measure undertaken in the context of an outbreak of contagious disease; it involved plausible allegations that government officials acted with anti-religious animus; and the scope of those affected by the county's emergency declaration was unclear. Rockland County may have permitted children to remain unvaccinated on the basis of non-religious personal beliefs, but Connecticut law has never done so. *See* 53 F.4th at 36-39.

such a claim before the district court. *See We The Patriots USA, Inc.*, 579 F. Supp. 3d at 306 ("Plaintiffs have not advanced an argument that P.A. 21-6 was motivated by any religious animus and the legislative history suggests, as Defendants argue, that the enactment of this law was based upon declining student vaccination rates.").

Both houses of the General Assembly debated the Act respectfully, albeit vigorously. Many of the Act's proponents acknowledged the impact it would have on children and families who hold religious objections to vaccination but balanced that impact against the risks to public health. *See F.F.*, 143 N.Y.S.3d at 741 (noting that to "highlight the tension between public health and socio-religious beliefs" does not constitute anti-religious animus). To the extent the debate contained intemperate language, it was more on the part of legislators who denounced the Act because it was "fundamentally wrong, immoral, and I would say even anti American," Senate Proc. at 636; it would create "even more segregation in the state of Connecticut," House Proc. at 892; or it would turn families into "religious refugees," *id.* at 911.

Far from expressing hostility, legislators accommodated religious objectors to an extent the legislators believed would not seriously undermine the Act's goals. Four accommodations deserve particular mention. Most significant is the legacy provision. The Department of Public Health expressed concern about this provision in written testimony before the General Assembly's Public Health Committee. *See* DPH Testimony at 5. Yet, contrary to the department's

advice, the legislature expanded the legacy provision to include students enrolled in kindergarten and above. Indeed, some legislators who opposed the final version of the Act supported the amendment that extended the legacy provision to younger children. Proponents recognized that expanding the legacy provision at a time when vaccination rates for kindergartners had dipped substantially "represents some measure of risk" even as it also "postpones . . . a day of reckoning" for some families. House Proc. at 809. Second, another amendment the legislature adopted made explicit that legacy students would not be required to be vaccinated if they changed schools.

Next, the legislature crafted some of the Act's provisions to make it less difficult for families to obtain medical exemptions if a healthcare provider finds vaccination to be medically contraindicated. Recognizing that some families were unable to obtain a medical exemption under Connecticut's previous, stricter regime, the legislature redefined the medical exemption to encompass contraindications not enumerated by federal public health agencies. *See* Public Act 21-6 § 7. Finally, the legislature recognized that some families declined vaccination because they did not have access to adequate information about its benefits and risks. In the Act, therefore, the legislature required that many insurance plans cover longer consultations between families and healthcare providers. *See id.* §§ 10-11.

These provisions demonstrate the legislature's solicitude for the concerns of religious objectors.[18] That the legislature declined to pursue other, even broader accommodations does not detract from the accommodations it did provide. For example, the House of Representatives defeated a proposed amendment that would have preserved the religious exemption for nonpublic schools, colleges and universities, and childcare centers. The Senate voted against an amendment that would have granted legacy status to students, including out-of-state college students, who move to Connecticut after obtaining religious exemptions in other States. While these and other proposals would have made the Act less jarring in effect, the record contains no indication the legislature rejected them out of hostility to religion, rather than for reasons of health and safety.

At bottom, plaintiffs' argument that the Act is not neutral under *Smith* boils down to the proposition that repealing any existing religious exemption is hostile to

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18. The dissent argues that the accommodations contained in the Act undermine the General Assembly's conclusion that the increasing prevalence of religious exemptions constituted a threat to the health and safety of students and the public. *See post*, at 16-17. But on the dissent's logic, the Act would better withstand a free exercise challenge if it were *less* solicitous of religious concerns. That proposition is inconsistent with the principle that government may act with "benevolent neutrality" toward religion, *see Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), and cannot be the law. Moreover, as we discuss below, the accommodations the General Assembly provided struck a rational balance between the competing goods legislators were weighing.

religion per se. *See* Appellants' Br. at 28-29. We find this argument unpersuasive, for four reasons.

First, the Supreme Court has used a consistent cluster of terms to describe the kind of official attitude that violates the neutrality prong of *Smith* --"hostility," "animosity," "distrust," "a negative normative evaluation." *Masterpiece Cakeshop*, 138 S. Ct. at 1731 (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 537, 547). These terms denote a subjective state of mind on a government actor's part, not the mere fact that government action has affected religious practice. Here, the legislative record simply reveals no evidence of any such animus.

Second, we are persuaded to follow the common-sense approach of the New York state courts that considered a Free Exercise Clause challenge to the repeal of New York's religious exemption. These courts explained that, in deciding whether the legislature's action was neutral, the law should be considered "as a whole." *F.F. ex rel. Y.F. v. State*, 66 Misc. 3d 467, 114 N.Y.S.3d 852, 864 (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); *see also Hochul*, 17 F.4th at 282 ("The absence of a religious exception to a law . . . does not, on its own, establish non-neutrality such that a religious exception is constitutionally required."). "That the Legislature repealed a previously authorized religious exemption does not in and of itself transmute the law into a non-neutral law that targets religious beliefs." *F.F.*, 114 N.Y.S.3d at 864. Viewed in this light, Connecticut's amended school immunization law mentions religion only to provide legacy exemptions. It contains no suggestion of hostility to religion.

Third, the Supreme Court has long described religious exemptions as part of a mutually beneficial "play in the joints" between the Establishment Clause and Free Exercise Clause. *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). As with many of the other exemptions that benefit individuals and communities of faith -- not requiring religious organizations to pay income and property tax, for instance -- the government may constitutionally elect to accommodate religious believers but is not constitutionally *required* to do so. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987, 2000, 213 L. Ed. 2d 286 (2022) (holding States need not subsidize private education, including private religious schools, but must make any subsidies equally available to religious and nonreligious schools). Plaintiffs' argument, which would make every exemption permanent once granted, threatens to distort the relationship between the Clauses. In this respect, we find persuasive the Tenth Circuit's analysis in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014) (Gorsuch, *J.*), which concerned a Wyoming prison's decision to discontinue allowing a Native American prisoner to use a sweat lodge on prison property. "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." *Id.* at 58.

Finally, adopting plaintiffs' rule would disincentivize States from accommodating religious practice in the first place. *See id.* Few reasonable legislators or other government actors would be willing to tie the

hands of generations of their successors by enacting accommodations that could not be repealed or changed if they no longer served the public good.

For all these reasons, we conclude, as a matter of law, that the Act is neutral within the meaning of *Smith*.

### 2. General Applicability

We turn next to the question of general applicability, considering both whether the Act contains "individualized exemptions" and whether it is "substantially underinclusive." *Hochul*, 17 F.4th at 284.

#### a. Individualized Exemptions

The Act does not provide "a mechanism for individualized exemptions," meaning that it does not give government officials discretion to decide whether a particular individual's reasons for requesting exemption are meritorious. *Fulton*, 141 S. Ct. at 1877 (citing *Smith*, 494 U.S. at 884). The medical exemptions the Act provides are instead mandatory and framed in objective terms: A student "shall be exempt" if, for instance, the student "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." Public Act 21-6 § 1(a)(2).[19]

19. This language requires the healthcare provider to reach a determination about medical contraindication that is more certain

Likewise, a student "shall be exempt" from immunization against measles, mumps, and rubella upon presentation of "a certificate from a physician, physician assistant or advanced practice registered nurse or from the director of health in such child's present or previous town of residence, stating that the child has had a confirmed case of such disease." *Id.* § 1(a)(3). In *Hochul*, we joined other Circuits in holding 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." 17 F.4th at 289; *see also Doe v. Bolton*, 410 U.S. 179, 199, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) ("If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment.").

Plaintiffs are incorrect that the Act's requirement that specified documents supporting requests for medical exemptions be acknowledged by, *inter alia*, state and local officials affords such officials the discretion to approve or deny exemptions on a case-by-case basis. *See, e.g.*, Public Act 21-6 § 1(a)-(c). As in *Hochul*, these elements of the Act's medical exemption regime do not allow "the government

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than what at least one other State requires. In *Doe 1-3 v. Mills*, 142 S. Ct. 17, 211 L. Ed. 2d 243 (2021), the Supreme Court declined to grant injunctive relief to healthcare workers challenging Maine's COVID-19 vaccination mandate. Dissenting, Justice Gorsuch criticized the Maine law for permitting medical providers to grant exemptions where immunization simply "may be" inapposite. *Id.* at 19 (Gorsuch, *J.*, dissenting from denial of injunctive relief).

to decide which reasons for not complying with the policy are worthy of solicitude." 17 F.4th at 289 (quoting *Fulton*, 141 S. Ct. at 1879 (internal quotation marks omitted)).

**b. Substantial Underinclusiveness**

The second way the Act might arguably fail the general applicability prong calls for more complex analysis. As we have explained above, under this prong the Act may not pass muster if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . . [and] not the reasons why people gather." *Tandon*, 141 S. Ct. at 1296.

Therefore, we must first determine what interest Connecticut has asserted justifies the Act, then decide whether permitting medical exemptions and repealing religious exemptions promote the State's interest. We conclude that the Act's purpose is "to protect the health and safety of Connecticut students and the broader public," Appellees' Suppl. Br. at 9, and that medical but not religious exemptions serve this interest. It is only at this stage of the analysis that the dissent parts ways.

The State has described its interest in the Act in consistent terms throughout the legislative process, before the district court, and on appeal. For instance, the acting commissioner of the Department of Public Health testified

before the Public Health Committee that the legislation "outline[d] a plan to strengthen the health of our school communities." DPH Testimony at 1. The Act's proponent in the State Senate asked rhetorically, "Why this Bill now?", and answered, "It is our obligation to protect the public health" in view of the rising number of nonmedical exemptions. Senate Proc. at 615. Other legislators spoke of the need to avoid "a real public health crisis," House Proc. at 847; said that "good public health policy is, by definition, proactive not reactive," *id.* at 1001, 1167; and noted that "the nature of a public health approach is to prevent an outbreak," *id.* at 1261. Upon signing the Act, Governor Lamont said that "[t]his legislation is needed to protect our kids against serious illnesses that have been well-controlled for many decades, such as measles, tuberculosis, and whooping cough, but have reemerged." Office of the Governor, *Governor Lamont Signs Legislation Updating School Immunization Requirements* (Apr. 28, 2021), https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/04-2021/Governor-Lamont-Signs-Legislation-Updating-School-Immunization-Requirements.

At oral argument before the district court, defendants "maintained that Connecticut's interest in P.A. 21-6 was to 'protect the health and safety of Connecticut's schoolchildren.'" *We The Patriots USA, Inc.*, 579 F. Supp. 3d at 307 (quoting Defs.' Mem. at 20). Although plaintiffs argued that the State had framed its interest at too high a degree of generality, the district court concluded that "the state legislators identified that the purpose of this law is to protect community health and Plaintiffs make no

showing that this interest is pretextual or unwarranted." *Id.* at 307-08. On appeal, plaintiffs have not challenged these findings of the district court, and at oral argument before us, the State reiterated that its interest is in the "health and safety of the students." Recording of Oral Arg. at 11:21-23; *see also* 19:34 ("the health and safety of the students is paramount").

We conclude from the consistency of defendants' assertions that there is no cause to fear that Connecticut or the district court has "restat[ed] the State's interests . . . at an artificially high level of generality" to sidestep the general applicability requirement. *Mills*, 142 S. Ct. at 20 (Gorsuch, *J.*, dissenting); *see Rockland County*, 53 F.4th at 42 (Park, *J.*, concurring). Nor do we find any sign that the State has offered for litigation purposes a *post hoc* rationalization of a decision originally made for different reasons. *See Does 1-3*, 142 S. Ct. at 20 (Gorsuch, *J.*, dissenting).[20] We therefore turn to whether medical and religious exemptions serve the State's interest in students' health and safety.

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20. The dissent faults Connecticut for, at times, "broaden[ing] [its] interest to include protecting the health and safety of the general public." *Post*, at 12. But it is not contradictory for the State to focus primarily on the health and safety of students while also acknowledging that the incidence of vaccine-preventable illness among students has implications for public health at large. "[T]he health of our school communities," DPH Testimony at 1, necessarily includes the health of persons other than students, including teachers, staff, parents, and members of the broader public.

The district court found that while the Act's medical exemptions further Connecticut's interest, maintaining the repealed religious exemption would not. *See We The Patriots USA, Inc.*, 579 F. Supp. 3d at 308. We agree.

In comparing the two types of exceptions, we must determine how the Supreme Court's guidance in *Tandon* -- which concerned limits on religious worship during the pandemic -- applies to the Act. In *Hochul*, we rejected plaintiffs' argument that the Supreme Court's precedents "require[d] us to confine our analysis to evaluating the risk of COVID-19 transmission posed by each unvaccinated individual." 17 F.4th at 286. Instead, we highlighted the Supreme Court's reference to "the risks posed by groups of various sizes in various settings," concluding that this "suggests the appropriateness of considering aggregate data about transmission risks." *Id.* at 287. Indeed, when in *Tandon*, the Court discussed "the risks various activities pose," 141 S. Ct. at 1296, the "activities" in question were not individual behaviors but instead aggregations of individual behavior -- gatherings that were religious or secular, private or commercial -- that might transmit COVID-19. When the Court spoke of "comparable secular businesses *or other activities*," it directed courts assessing COVID-19 restrictions to compare the risk posed by operating a store as opposed to offering a religious service, not the risk posed by or to any individual shopper or worshipper. *Id.* (emphasis added). The Court reiterated the point by treating *in pari materia* the terms "secular activities" and "religious worship" and, likewise, "other activities" and "religious exercise." *Id.* at 1296, 1297. All these terms refer to aggregations of individual behaviors, not individual behaviors themselves.

We therefore reject plaintiffs' argument that we should cabin our 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. On plaintiffs' view, "[w]hen two unvaccinated children walk through the schoolhouse door, disease will not walk up to them and ask them why they are . . . unvaccinated." Appellants' Br. at 32; *see also* Appellants' Suppl. Br. at 8. In other words, plaintiffs argue, because unvaccinated children are at heightened risk of developing and transmitting vaccine-preventable illnesses, regardless of their reason for not being vaccinated, medical and religious exemptions are comparable, and, under *Fulton*, the State may not prefer a medical reason over a religious one when the medical reason "undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877.

This reasoning, however, is based on a misunderstanding of the State's interest in mandating vaccination in schools, which the law requires nearly all of Connecticut's five-to eighteen-year-olds to attend. *See* Conn. Gen. Stat. § 10-184. Allowing students for whom vaccination is medically contraindicated to avoid vaccination while requiring students with religious objections to be vaccinated does, in both instances, advance the State's interest in promoting health and safety. To the contrary, 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.

The Act promotes 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. The Act 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. It is for these reasons that the acting commissioner of the Department of Public Health testified that "[h]igh vaccination rates protect not only vaccinated children, but also those who cannot be or have not been vaccinated." DPH Testimony at 1. In contrast, exempting religious objectors from vaccination would only detract from the State's interest in promoting public health by increasing the risk of transmission of vaccine-preventable diseases among vaccinated and unvaccinated students alike.

This analysis is bolstered by the public health data and expert testimony the General Assembly considered before adopting the Act, some of which are summarized in a document plaintiffs appended to the complaint. *See* App'x at 117-22. The material attached to the complaint is sparse, but, as we noted above, we may take judicial notice of the facts and analysis in the legislative record, including the testimony of the acting commissioner of the Department of Public Health and comments from numerous medical

authorities. These materials show there is no question that there is a difference in magnitude between the number of religious and medical exemptions that Connecticut families claimed prior to the Act's adoption. In school years 2018-2019 and 2019-2020, more than ten times as many kindergartners claimed religious exemptions compared to medical exemptions. The legislative history, moreover, contains numerous indications that significant numbers of religiously exempt students attend the same schools. Against this backdrop, the Legislature reasonably judged that the risk of an outbreak of disease was acute, even if not necessarily imminent, and that continuing to permit religious exemptions, the State's only kind of nonmedical exemption, to multiply would increase that risk.

Plaintiffs and the dissent suggest that further development of the factual record might reveal that medical exemptions and religious exemptions are comparable for Free Exercise Clause purposes. But because the Act's medical exemptions further the State's interest in a way a religious exemption would not, permitting plaintiffs to proceed to discovery would require more of the State than what the Supreme Court has prescribed. Laws and regulations that incidentally burden religious exercise are subject to rational basis review unless they fail a prong of the *Smith* test. *See Tandon*, 141 S. Ct. at 1296. If, after the legislature and governor have made a policy decision, the State must go through discovery notwithstanding plaintiffs' failure to proffer evidence that medical and religious exemptions are similarly situated, that would impermissibly shift onto the State a burden that remains on plaintiffs so long as the Act is subject to rational basis

review. *See id.*; *see also, e.g.*, *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002) ("Where the government seeks to enforce a law that is neutral and of general applicability, however, then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices.").

The cases on which plaintiffs and the dissent rely are not to the contrary. First, this case differs substantially from those in which courts have held that comparable religious and secular activities *both* undermined a government interest. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366-67 (3d Cir. 1999) (Alito, *J.*), for instance, the court struck down a police department's policy allowing medical but not religious exemptions from the requirement that officers be clean-shaven. Because the department's asserted interest was in the appearance of its officers, that interest was *equally* undermined when officers grew beards for religious and medical reasons. *See also Monclova Christian Acad. v. Toledo-Lucas Health Dep't*, 984 F.3d 477, 480-82 (6th Cir. 2020) (comparing pandemic-era restrictions on religious schools and secular businesses); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234-35 (11th Cir. 2004) (comparing effect of business district zoning ordinance on houses of worship and private clubs and lodges). Here, as we have explained, religious but not medical exemptions undermine the State's interest. Moreover, a police department's interest in the *appearance* of its officers is of a different nature from a state's interest in the health of its schoolchildren.

Second, the data about the relative prevalence of religious and medical exemptions distinguish this case from both *Central Rabbinical Congress* and *Hochul*. In the 2019-2020 school year, 2.3% of Connecticut kindergartners had religious exemptions, compared to 0.2% who had medical exemptions. *See* App'x at 119-20. Even though the proportion of students with religious exemptions declined slightly from school year 2018-2019 to school year 2019-2020, still more than ten times as many students had religious exemptions than medical exemptions. *See id.* The Act does not, therefore, offend the Free Exercise Clause because it is "substantially underinclusive." *Cent. Rabbinical Cong.*, 763 F.3d at 197. In contrast, in *Central Rabbinical Congress*, the proportions of religious and secular conduct at issue were effectively reversed: "[F]ewer than 10%" of cases of neonatal herpes simplex virus infection were caused by religious conduct, compared with "approximately 85%" of cases caused by transmission from mother to child during birth. *See id.* at 187, 197. And in *Hochul*, we had "only limited data regarding the prevalence of medical ineligibility and religious objections" among healthcare providers regarding vaccination against a disease that had appeared less than two years before suit was filed. 17 F.4th at 287. Denying plaintiffs' request for a preliminary injunction, we explained that, even on a "sparse" record, "what data we do have indicates that claims for religious exemptions are far more numerous." *Id.* at 287-88.[21]

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21. In *Central Rabbinical Congress* and *Rockland County*, moreover, there were reasons for concern that the challenged government actions were not religiously neutral. We decided *Central Rabbinical Congress* under the neutrality prong of *Smith*, finding

Third, this case does not present meaningful uncertainties as to the scope or purpose of the Act. As we have described above, the General Assembly enacted, and Governor Lamont signed, the Act to promote the health and safety of Connecticut's schoolchildren and, consequently, the broader public; the State has articulated that interest throughout this litigation. The Act's text and legislative history make clear that students who are not vaccinated or in the process of being vaccinated may only attend school if they have received a medical exemption; there are no other possible bases for exemption. *See* Public Act 21-6 § 1(a)(1)-(2); Senate Proc. at 661. In contrast, in *Rockland County* there were serious factual questions about both the county's purpose in enacting the emergency declaration and the categories of children that were affected by it.

For all these reasons, we conclude that religious and medical exemptions are not comparable in reference to the State's interest in the health and safety of Connecticut's children and the broader public.[22]

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that even if the regulation in question were "facially neutral . . . it is abundantly clear that [it] is not neutral in operation, as assessed in practical terms." 763 F.3d at 194 (citation and internal quotation marks omitted). And in *Rockland County*, we held that the presence or absence of religious animus was "the sort of close factual question that should be left to the jury." 53 F.4th at 37-38.

22. In this regard, the Act's medical exemptions are analogous to the medical exemption contained in the statute at issue in *Smith*, which permitted the possession of controlled substances "obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice."

### 3. Rational Basis Review

Because the Act and its legislative history contain no trace of hostility toward religion but rather reflect significant accommodations on the part of the legislature, because the Act does not provide for a system of individualized exemptions, and because it is not substantially underinclusive, it is neutral and generally applicable. The district court did not err, therefore, when it concluded the Act is subject to rational basis review.

Although we are bound by *Smith* and its progeny, other reasons also support this conclusion. First, both the Supreme Court and this Court have long held that neither education nor absolute freedom from unwanted vaccination is a fundamental right. *See, e.g.* , *Plyler v. Doe*, 457 U.S. 202, 223, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *Goe*, 43 F.4th at 31. Second, as we discuss more fully below, courts that have reviewed substantive due process challenges to vaccination mandates have also applied rational basis review, whether or not those who objected to vaccination gave religious reasons. Indeed, some courts have upheld these laws "based on historical experience without the need for legislative fact-finding hearings." *F.F. on behalf of Y.F. v. State*, 65 Misc. 3d 616, 108 N.Y.S.3d 761, 776 (Sup. Ct. 2019). Third, courts in two

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Or. Rev. Stat. § 475.992(4) (1987); *see also Smith*, 494 U.S. at 874; *Hochul*, 17 F.4th at 289-90. The State's interest in preventing the unauthorized manufacture or delivery of controlled substances was not undermined when a licensed professional prescribed a substance or supplied it licitly but was undermined when the drug was made or distributed on the black market.

of the three other States that since 2015 have repealed religious exemptions from school immunization mandates have upheld the revised statutes against Free Exercise Clause claims without deciding that strict scrutiny was required. *See Love*, 240 Cal. Rptr. 3d at 868; *Whitlow*, 203 F. Supp. 3d at 1089; *F.F.*, 143 N.Y.S.3d at 742-43.

Plaintiffs do not dispute that the Act satisfies rational basis review. *See* Appellants' Br. at 40-42. They concede that protecting public health is a compelling government interest. *Id.* at 40 n.4. The Act's repeal of the religious exemption is rationally related to that interest because it seeks to maximize the number of students in Connecticut who are vaccinated against vaccine-preventable diseases. The Act's requirement that children be vaccinated to attend school -- as opposed to participate in "community sports leagues, religious gatherings, and social gatherings of all types," *see post*, at 5 -- is rational because only at school is attendance mandated by law, *see* Conn. Gen. Stat. § 10-184. The Act's legacy provision is rationally related because it accommodates religious believers who are already in school without extending that accommodation to younger children. Also rationally related to the State's interest are the Act's other provisions: broadening eligibility for medical exemptions (in part as a way of curtailing misuse of the religious exemption), ensuring consistency in the administration of medical exemptions, and facilitating conversations about vaccination between individuals and healthcare providers.

Therefore, plaintiffs have not stated a plausible claim that the Act offends the Free Exercise Clause.

Nor have they plausibly claimed the Act imposes unconstitutional conditions on the receipt of education or other state services, because it is a constitutional exercise of Connecticut's police power. *See Goe*, 43 F.4th at 34 n.16. We need not and do not decide whether the Act would also satisfy strict scrutiny.

## II. The Other Constitutional Claims

### A. Medical Freedom and Privacy

In their complaint, plaintiffs argued that the Act also violates their rights to privacy and medical freedom under the First, Fourth, Fifth, and Fourteenth Amendments. They subsequently narrowed their argument to encompass only the Fourteenth Amendment. This claim, however, is foreclosed by binding precedent.

In *Phillips*, we squarely rejected a substantive due process challenge to New York's then-existing vaccination mandate. 775 F.3d at 542-43; *see also Caviezel v. Great Neck Pub. Schs.*, 500 F. App'x 16, 19 (2d Cir. 2012) (summary order). Again in *Hochul*, we observed that "[b]oth this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." 17 F.4th at 293 (first citing *Jacobson*, 197 U.S. at 25-31, 37; and then citing *Phillips*, 775 F.3d at 542-43). In *Goe*, moreover, we reaffirmed that the federal Constitution confers no fundamental right to an education. We also

noted that "no court has ever held that there is a right" for an individual to claim even a "medical exemption from immunization," where there is no "reasonable certainty" a vaccine would cause harm. 43 F.4th at 31 (quoting *Jacobson*, 197 U.S. at 39). "Nor has any court held that such a right is implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Id.* (internal quotation marks and citation omitted); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2283, 213 L. Ed. 2d 545 (2022) (reiterating standard for substantive due process claims).

These precedents dictate the result here, and we see no reason to depart from them. First, plaintiffs attempt to distinguish *Hochul* (on the basis that the regulation challenged in that case was promulgated during an emergency and affected a smaller number of individuals than the Act) as well as *Phillips* (on the basis that the plaintiffs in that case described the right they claimed at too high a level of generality). *See* Appellants' Br. at 43. But plaintiffs give no reason why emergency circumstances or the number of individuals whose rights are affected should factor into our analysis. Our decision in *Phillips* was not premised on the level of specificity of the right the plaintiffs claimed, and indeed the *Phillips* plaintiffs invoked a right to "religious freedom, privacy[,] and bodily autonomy" not unlike that described by plaintiffs here. Reply Brief for Plaintiffs-Appellants at 20, *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) (per curiam) (No. 14-2156), 2014 WL 4794681, at *20. Plaintiffs have therefore failed to demonstrate why our holdings in *Phillips* and *Hochul* do not foreclose their claim.

Second, plaintiffs have offered no evidence that the right to be free from unwanted vaccination is either implicit in the concept of ordered liberty or deeply rooted in U.S. history and tradition. To the contrary, for more than a century, courts have consistently rejected the notion that there is a "fundamental right ingrained in the American legal tradition" to avoid vaccination. *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *see also, e.g.*, *Jacobson*, 197 U.S. at 31; *Zucht*, 260 U.S. at 176; *Workman*, 419 F. App'x at 355-56; *Phillips*, 775 F.3d at 542; *Hochul*, 17 F.4th at 293; *Goe*, 43 F.4th at 30-31; *Doe v. Zucker*, 520 F. Supp. 3d 218, 251 (N.D.N.Y. 2021); *B.W.C. v. Williams*, 990 F.3d 614, 622 & n.16 (8th Cir. 2021). Other cases have alluded to the balance that the law has long struck between individuals' freedom to refuse medical treatment and the government's interest in public health. *See, e.g.*, *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990). To the extent that plaintiffs rely on precedents regarding medical privacy that the Supreme Court overruled in *Dobbs*, that decision undercuts their arguments. *See* Dkt. No. 71 (defendants' letter filed pursuant to Fed. R. App. P. 28(j)).

Finally, although the Act imposes substantial consequences where a student or childcare participant is not vaccinated or does not obtain a medical exemption, defendants are correct that the Act "does not compel vaccination, but simply makes it a condition for enrolling in school." Appellees' Br. at 51. What we said in *Hochul* applies with equal force here: "[I]ndividuals who object to receiving the vaccines on religious grounds have a hard choice to make, [but] they do have a choice." 17 F.4th at

293-94; *see also Goe*, 43 F.4th at 31; *Doe v. Zucker*, 520 F. Supp. 3d at 252. For this and the foregoing reasons, the Act does not violate plaintiffs' substantive due process rights to privacy and medical freedom.

### B. Equal Protection

Plaintiffs contend the Act is also subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because the legacy provision, by continuing to exempt children enrolled in kindergarten and later grades but not children who are younger, creates an age-based classification that burdens their free exercise rights. U.S. Const., amend. XIV, § 1. We agree with the district court that strict scrutiny does not apply, and we affirm its dismissal of this claim.

Under the Equal Protection Clause, claims that the government has discriminated based on age are typically subject to rational basis review because age is not a suspect classification. *See Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). Where an age-based "classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," however, strict scrutiny applies. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *see also Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

In *Zucht*, the Supreme Court upheld a school vaccination mandate against an Equal Protection Clause

challenge. 260 U.S. at 176-77. Although *Zucht* was decided before the categories of modern equal protection law developed, the Supreme Court anticipated what today we call rational basis review when it held that "in the exercise of the police power reasonable classification may be freely applied, and [a] regulation is not violative of the equal protection clause merely because it is not all-embracing." *Id.* at 177; *see also Workman*, 419 F. App'x at 354-55 (relying on *Zucht* to dismiss religiously based equal protection challenge to West Virginia's school vaccination requirement).

While plaintiffs are correct that the free exercise of religion is a fundamental constitutional right, we have already concluded that the Act does not impermissibly burden plaintiffs' free exercise rights. *See supra* Part I(B). Plaintiffs' attempt to argue that they need only "demonstrate a burden on a fundamental constitutional right," Appellants' Br. at 48, rather than plead a Free Exercise Clause claim under the applicable tests, is without support in the Supreme Court's cases. In *Williams v. Rhodes*, 393 U.S. 23, 30-34, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968), on which plaintiffs attempt to rely, the Court had no need to make such a distinction because the laws under review patently violated Ohio voters' associational rights under the First Amendment. In *Murgia*, likewise, the Court listed cases reaffirming fundamental rights without suggesting that courts should apply different tests when those rights are alleged to have been violated in a discriminatory way. 427 U.S. at 312 n.3. Because there is no reason to apply heightened scrutiny to plaintiffs' equal protection challenge, we evaluate it under rational basis review.

We decided above that the legacy provision, like the law at issue in *Zucht*, is rationally related to the State's interest in protecting the health and safety of Connecticut's students. *See supra* Part I(B). As the district court observed, although the legacy provision will delay the full implementation of the Act, "[t]he class of unvaccinated students who may keep their religious exemptions will diminish as the students graduate, allowing the state to reduce the number of unvaccinated students, protect the public's health, and balance the expectation interests of parents with currently enrolled students." *We The Patriots USA, Inc.*, 579 F. Supp. 3d at 312. Therefore, the district court did not err in dismissing this claim.

### C. Childrearing

Plaintiffs next argue that the Act violates the fundamental liberty interest in childrearing protected by the Fourteenth Amendment because the Act's "vaccination requirement that prohibits the Plaintiffs from educating their children in any forum -- public or private -- completely interferes with their right to decide what is best for their children's health and to raise them according to their religious beliefs." App'x at 48. This claim also fails.

As plaintiffs note, the Supreme Court has repeatedly held that parents have a liberty interest "in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (collecting cases including *Prince*). In applying *Troxel*, we

have cautioned that the Supreme Court "left the scope of that right undefined." *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003). In the educational context, we have joined other Circuits in holding there is not a parental right, absent a violation of the Religion Clauses, to "direct *how* a public school teaches their child." *Skoros v. City of New York*, 437 F.3d 1, 41 (2d. Cir 2006) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)); *see also Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 535 (1st Cir. 1995), *abrogated on other grounds as stated in Martinez v. Cui*, 608 F.3d 54, 63 (1st Cir. 2010); *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 700 (10th Cir. 1998).

In *Smith*, the Supreme Court observed that even where a law is neutral and generally applicable, some heightened level of scrutiny might apply where a petitioner brings forward a free exercise claim connected with a "communicative activity or parental right." 494 U.S. at 882. We have held, however, that this language was dictum because the plaintiffs in *Smith* presented no such claim. *See Leebaert*, 332 F.3d at 143 (citing *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001)). Accordingly, like at least one other Circuit, we do not apply heightened scrutiny to "hybrid rights" claims. *Id.*; *see also Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993).

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. Therefore, upon deciding that the free exercise claim

was without merit, the district court correctly dismissed plaintiffs' childrearing claim as well. Indeed, this claim is foreclosed by our precedents: As in *Leebaert* and *Skoros*, plaintiffs assert no liberty interest in the rearing of their children that is not encompassed in their free exercise claim.

## III. The IDEA Claim

Finally, plaintiff Elidrissi brings a claim against the State Agency Defendants and the Stamford Board of Education. The latter is responsible for the education of Elidrissi's son.

### A. Applicable Law

The IDEA requires States that receive federal funding to provide children with disabilities a "free appropriate public education that emphasizes special education and related services." 20 U.S.C. § 1400(d)(1)(A). Where a State is sued for a violation of the IDEA, legal and equitable remedies "are available . . . to the same extent as those remedies are available for such a violation in the [*sic*] suit against any public entity other than a State." *Id.* § 1403(b).

As defined in the IDEA, a "child with a disability" is a child who experiences one or more of a list of enumerated disabilities, including "speech or language impairments," and "who, by reason thereof, needs special education and related services." *Id.* § 1401(3)(A)(i)-(ii). A child who requires "related services" but not "special education" does not qualify as a "child with a disability." 34 C.F.R.

§ 300.8(a)(2)(i). "Special education," as defined in the IDEA, is "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29).

### B. Application

The district court dismissed Elidrissi's IDEA claim because the complaint pled that her child receives only "special services," not "special education." *We The Patriots USA, Inc.*, 579 F. Supp. 3d at 314-15; *see* App'x at 44. The court held there was no "factual basis to infer that the child's condition could fall under the regulatory definition of a 'child with a disability' and not just a 'speech and learning disorder for which he needs special services.'" *We The Patriots USA, Inc.*, 579 F. Supp. 3d at 314.

The district court's distinction between "special services" and "special education" was overly strict. The IDEA and its associated regulations do not use the phrase "special services." A reasonable inference from the allegation that Elidrissi's son suffers from "a speech and learning disorder for which he now receives special services," combined with the allegation that he "is disabled within the meaning of the IDEA," is that the "special services" the complaint mentions constitute "special education" rather than "related services." App'x at 44, 49. Therefore, although it is close, we conclude that because the district court parsed the complaint too restrictively, failing to draw reasonable inferences in Elidrissi's favor, the court erred when it found Elidrissi had not stated a plausible claim for relief under the IDEA.

*See Iqbal*, 556 U.S. at 678 (holding that a claim is plausible where a plaintiff's allegations enable the court to draw a "reasonable inference" the defendant is liable).

We therefore vacate and remand this aspect of the district court's judgment. On remand, it will be for the district court to consider defendants' challenges to the merits of Elidrissi's claim.

## CONCLUSION

For the reasons stated above, we AFFIRM the district court's judgment to the extent that it dismissed the first four counts of the complaint. We VACATE the portion of the district court's judgment dismissing the fifth count of the complaint and REMAND for further proceedings with respect to that claim.

JOSEPH F. BIANCO, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority opinion as to all claims, except for its affirmance of the district court's dismissal of plaintiffs' claim challenging Public Act 21-6 (the "Act") under the Free Exercise Clause. I respectfully part company with the majority opinion as to Section I Parts B(2)(b) and B(3) where the majority concludes, *at the motion to dismiss stage*, that the Act passes constitutional muster under rational basis review pursuant to the legal standard articulated by the Supreme Court in *Emp. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

I emphasize, as a preliminary matter, that this case is not about a state's general authority to enact a mandatory vaccination law for schoolchildren. The Supreme Court and this Court have made clear, and with good reason, that it is within a state's police powers to establish such a requirement. *See Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922) ("[I]t is within the police power of a state to provide for compulsory vaccination." (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905)); *accord Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam). Instead, today, we address a narrower question: whether a mandatory vaccination requirement, which repeals its previously existing religious exemption and allows *some* unvaccinated students—those with medical exemptions—to join their peers in schools, but excludes students who are unvaccinated due to religious objections, raises a plausible free exercise claim that survives a motion to dismiss. On this narrower question, the district court erred in concluding that plaintiffs' free exercise claim is foreclosed by our prior precedent. Indeed, as the majority opinion acknowledges, "[p]laintiffs' free exercise challenge presents a question of first impression for this Court."[23] *Ante*, at 33.

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23. In *Phillips*, we stated that "New York could constitutionally require that *all children* be vaccinated in order to attend public school." 775 F.3d at 543 (emphasis added). However, as the majority opinion notes, that portion of our decision in *Phillips* was dictum. *Ante*, at 33 n.17. In any event, as Judge Park has correctly observed in another case, "we have never said that allowing some unvaccinated students (*i.e.*, those with medical exemptions) to mingle with their peers in schools, while excluding religious objectors, would be

In addition, it is important to note the limited task before us at this juncture. Specifically, we must determine whether, at the motion to dismiss stage, plaintiffs have stated a *plausible* free exercise claim by asserting that the Act, which requires students in public or private school to be vaccinated against certain communicable diseases and maintains a secular exemption while simultaneously eliminating a religious exemption, fails to satisfy the requirements for rational basis review articulated by the Supreme Court in *Smith*, and thus must be subject to strict scrutiny. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (holding that, to survive a motion to dismiss, the complaint "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))). A determination that plaintiffs have plausibly asserted such a free exercise claim would not invalidate the Act, but rather would allow plaintiffs to conduct discovery on, *inter alia*, the disputed factual issues that bear upon what level of scrutiny should apply in reviewing the constitutionality of the Act under the Free Exercise Clause.

Under *Smith*, a state's law that burdens religious exercise avoids strict scrutiny only if it is "a valid and neutral law of general applicability." 494 U.S. at 879 (internal quotation marks and citation omitted). A law is "not generally applicable if it is substantially underinclusive such that it regulates religious conduct

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constitutional." *M.A. ex rel. H.R. v. Rockland Cnty. Dep't of Health*, 53 F. 4th 29, 41 n.4 (2d Cir. 2022) (Park, *J.*, concurring).

while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene* (*Cent. Rabbinical Cong.*), 763 F.3d 183, 197 (2d Cir. 2014).

Here, for over fifty years, Connecticut maintained a religious exemption to the mandatory vaccination requirement for students. Connecticut contends that the Act's elimination of the religious exemption in 2021 was necessary to protect the health and safety of its schoolchildren. However, as set forth below, an analysis of the Act raises a plausible claim that it is substantially underinclusive to the extent it fails to regulate secular conduct, including by allowing an exemption to the mandatory vaccination law for students with medical objections, that is at least as harmful to the legitimate interest of promoting the health and safety of students and the public as is the religious conduct.

Although Connecticut asserts that this differing treatment between religious and secular exemptions was prompted by a substantial increase over recent years in the number of religious exemptions and an acute risk of an outbreak of disease, Connecticut fails to explain how forty-four states and the District of Columbia have maintained a religious exemption for mandatory student vaccinations without jeopardizing public health and safety. Connecticut also fails to articulate how having the "grandfather clause" in the Act that allows students with current religious exemptions to remain unvaccinated until they graduate high school (which could be over a decade

if they were in kindergarten at the time of the passage of the Act) is consistent with its position that the elimination of the religious exemption was necessary to prevent an acute risk of an outbreak of disease among students.

Moreover, while preventing unvaccinated students with religious objections from attending school to avoid the spread of disease among students, Connecticut has done nothing to address the reality that those same unvaccinated students may continue to interact with other children and the general public in numerous places outside the school setting including, for example, community sports leagues, religious gatherings, and social gatherings of all types. Nor does Connecticut deal with the fact that students will also continue to interact with unvaccinated adults, as the State does not regulate vaccination requirements for adults.

Notwithstanding these many fact-intensive questions regarding whether this law satisfies the general applicability requirement under *Smith*, the majority opinion closes the courthouse doors to plaintiffs on their free exercise claim on a motion to dismiss before any discovery and before plaintiffs had an opportunity to present evidence bearing on the general applicability requirement in this particular context. The majority opinion does so by concluding, *inter alia*, that medical and religious exemptions are not comparable for free exercise purposes as a matter of law. Neither Supreme Court precedent nor this Court's jurisprudence allows a court to so summarily cast aside the fundamental constitutional right of individuals to the free exercise of religion. In

reaching this conclusion before the development of any factual record in discovery, the majority opinion ignores two recent decisions by this Court addressing similar COVID-19 vaccination requirements. In both of these cases, we recognized that a plaintiff ultimately may be able to put forth evidence establishing that this precise type of differential treatment fails to satisfy the general applicability requirement in *Smith*—thereby subjecting the law to strict scrutiny.

Not only is the majority opinion's holding incorrect at this stage given the factual allegations in this case, but its analysis also has troubling implications for the future of the Free Exercise Clause as it relates to all types of vaccination requirements for students and other members of the public, including for COVID-19. In other words, under the majority opinion's analysis, a state or other governmental entity could expand mandatory vaccination requirements and simultaneously eliminate religious exemptions (while maintaining broad medical exemptions) and easily satisfy the low constitutional bar of rational basis review by invoking generalized concerns about public health and safety. If the allegations in this case cannot survive a motion to dismiss, many other "general applicability" challenges to vaccination requirements that contain a similar secular exemption but no religious exemption, will undoubtedly suffer the same fate.

In sum, for the reasons discussed below, I conclude that plaintiffs have stated a plausible free exercise claim and the question of what level of scrutiny applies to that claim cannot be resolved at the motion to dismiss stage

in this particular case. Accordingly, I would vacate the judgment of the district court and remand for further proceedings as to the free exercise claim (along with the IDEA claim) and, therefore, respectfully dissent from that portion of the majority opinion.

**DISCUSSION**

The First Amendment bars the government from "prohibiting the free exercise" of religion. U.S. Const., amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (incorporating the Free Exercise Clause against the states). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. "The Free Exercise Clause thus protects an individual's private right to religious belief, as well as the performance of (or abstention from) physical acts that constitute the free exercise of religion." *Kane v. De Blasio*, 19 F.4th 152, 163-64 (2d Cir. 2021) (per curiam) (internal quotation marks and citation omitted). Therefore, "government enforcement of laws or policies that substantially burden the exercise of sincerely held religious beliefs is subject to strict scrutiny." *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). However, under the framework established by the Supreme Court in *Smith*, "[w]here the government seeks to enforce a law that is neutral and of general applicability . . . then it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. City of*

*Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) & *Smith*, 494 U.S. at 878-79).

Here, there is no question that the imposition of a mandatory vaccination requirement for students to be able to attend a private or public school in Connecticut, with no religious exemption, substantially burdens the free exercise of religion. *See Trinity Lutheran Church of Columbia, Inc. v Comer*, 582 U.S. 449, 462, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017) ("To condition the availability of benefits upon a recipient's willingness to surrender his religiously impelled status effectively penalizes the free exercise of his constitutional liberties." (alterations adopted) (internal quotation marks and citation omitted)). As to the level of review, plaintiffs argue that, because of the existence of the medical exemption and the repeal of the religious exemption to the mandatory vaccination regime for students, the Act both lacks neutrality and general applicability and, therefore, is subject to strict scrutiny. I agree with the majority opinion that plaintiffs have failed to plausibly allege that the Act lacks neutrality. Plaintiffs concede that they have no particular allegations of religious animus and, instead, argue that non-neutrality is demonstrated by the elimination of the religious exemption from the Act. As the majority opinion notes, we have held that "[t]he absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 282 (2d Cir.) (per curiam), *opinion clarified*, 17 F.4th 266, 287 (2d Cir. 2021), and *cert. denied sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022). I agree with the

majority opinion that the repeal of a religious exemption, by itself, also does not render a statute non-neutral for purposes of *Smith*. Given the lack of particular allegations of religious animus or hostility with respect to the passage of the Act, plaintiffs have failed to plausibly allege that the Act is non-neutral under *Smith*.

However, with regard to general applicability, I respectfully disagree with the majority opinion and would conclude that plaintiffs have plausibly alleged that the Act lacks general applicability.[24] The general applicability requirement in *Smith* "protects religious observers against unequal treatment, and inequality that results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Cent. Rabbinical Cong.*, 763 F.3d at 196-97 (alterations adopted) (quoting *Church of Lukumi*, 508 U.S. at 542-43). Under *Smith*, a law is not generally applicable if it (1) "invites the government to consider the particular reasons

24. As an initial matter, I note that I agree with Judge Park's discussion in *Rockland County* which states that "the general-applicability test embraces a purposivist approach that is vulnerable to manipulation and arbitrariness" and "[u]ntil *Smith* is overruled, its ill-defined test means that free-exercise rights risk being perennially trumped by the next crisis." 53 F. 4th at 42 (Park, *J.*, concurring) (internal quotation marks and citation omitted). In fact, "since *Smith*, several Supreme Court justices have written or joined in expressing doubt about Smith's free exercise jurisprudence." *303 Creative LLC v. Elenis*, 6 F. 4th 1160, 1205 n.11 (10th Cir. 2021) (Tymkovich, *C.J.*, dissenting), *rev'd*, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023). In any event, *Smith* continues to be binding precedent, and I apply its framework here.

for a person's conduct by providing a mechanism for individualized exemptions," or (2) "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877, 210 L. Ed. 2d 137 (2021) (alteration adopted) (internal quotation marks and citations omitted). Although the Act does not raise any issue under *Smith* with regard to a mechanism for individualized exemptions, I conclude that plaintiffs have plausibly alleged that the Act, in repealing the religious exemption while maintaining a medical exemption, "is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it" and thus lacks general applicability under *Smith*. *Cent. Rabbinical Cong.*, 763 F.3d at 197; *see also Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360, 365-66 (3d Cir. 1999) (holding, with respect to a "no-beard policy," "that the [Police] Department's decision to provide medical exemptions while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* . . . .").

"[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296, 209 L. Ed. 2d 355 (2021) (per curiam) (citing *Roman Cath. Diocese of Brook. v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) (per curiam) (listing secular activities treated more favorably than religious worship that either "have

contributed to the spread of COVID-19" or "could" have presented similar risks)). "Comparability is concerned with the risks various activities pose, not the reasons why people [undertake an activity]." *Id.*

As an initial matter, Connecticut was less than precise in describing the scope of its asserted interest at the time of the Act's passage and should not be permitted under *Smith* to rely upon *post-hoc* rationalizations. *See Doe 1-3 v. Mills*, 142 S. Ct. 17, 20, 211 L. Ed. 2d 243 (2021) (Gorsuch, *J.*, dissenting from the denial of application for injunctive relief related to regulation mandating COVID-19 vaccinations for Maine healthcare workers) (explaining that "when judging whether a law treats a religious exercise the same as comparable secular activity, this Court has made plain that only the government's *actually asserted* interests as applied to the parties before it count—not *post-hoc* reimaginings of those interests expanded to some society-wide level of generality"). As the majority opinion acknowledges, Connecticut maintained in the district court that its interest in the Act was to "protect the health and safety of Connecticut's schoolchildren," *We the Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 579 F. Supp. 3d 290, 307 (D. Conn. 2022) (internal citation omitted), and reasserted that same interest at oral argument in this Court, Oral Argument at 11:21, 19:34, *We the Patriots* (No. 22-249). At other times in its appellate papers, Connecticut has broadened that interest to also include protecting the health and safety of the general public. In any event, even adopting the broader articulation of Connecticut's asserted interests in the Act (as the majority opinion

does), the failure to regulate secular conduct in the form of medical exemptions while regulating religious conduct raises substantial questions regarding whether the Act meets the general applicability requirement under *Smith*, which should not be decided on a motion to dismiss.

To the extent the asserted interest justifying the Act is the prevention of the spread of communicable diseases among Connecticut students entering a school, it is obvious that an unvaccinated student with a medical objection who is allowed to attend school poses the same health risk to another student as an unvaccinated student with a religious objection. To be sure, the majority opinion is correct that we have emphasized that the analysis need not be limited to "a one-to-one comparison of the transmission risk posed by an individual [with a religious exemption] and . . . an individual [with a medical exemption]," to ascertain comparability for general applicability purposes. *Hochul*, 17 F.4th at 287; *see also Ante*, at 46-49. Thus, the majority opinion focuses on "aggregate data about transmission risks." *Ante*, at 47 (internal quotation marks and citation omitted). However, even when comparing the relative risks of the two groups of unvaccinated students in the aggregate, substantial factual questions remain as to whether the comparative risk of harm to other students posed by students unvaccinated due to religious objections is materially greater than that posed by students unvaccinated due to medical objections.

Connecticut cites limited data in its brief in support of its argument that the risks posed by the two groups are not comparable for free exercise purposes. In particular,

it relies on data attached to the complaint, which shows that from 2019 to 2020, 2.3% of kindergarteners claimed a religious exemption to Connecticut's vaccine requirements while only 0.2% of kindergarteners claimed a medical exemption. *See* Appellee's Br. at 3-4, 38. The majority opinion acknowledges that this aggregate public health data that plaintiffs presented in an appendix to the complaint "is *sparse*." *Ante*, at 50 (emphasis added). The majority opinion then seeks to bolster this sparse record by utilizing legislative history, including comments by legislators who "spoke of the need to avoid 'a real public health crisis.'" *Id.* at 45 (quoting Connecticut General Assembly House Proceedings, H.B. 6423, 2021 Sess., at 847 (Conn. 2021)). For example, the majority opinion notes that "[i]n school years 2018-19 and 2019-20, more than ten times as many kindergartners claimed religious exemptions compared to medical exemptions." *Id.* at 51. The majority opinion further notes that these statistics reflect that "[t]he overall trend was toward an increase in religious exemptions," while medical exemptions remained constant. *Id.* at 9. Based on the threadbare data and unsupported statements in the legislative history, the majority opinion leaps to the legal conclusion "that religious and medical exemptions are not comparable in reference to the State's interest in the health and safety of Connecticut's children and the broader public," *id.* at 55, in part, because "the Legislature reasonably judged that the risk of an outbreak of disease was acute, even if not necessarily imminent, and that continuing to permit religious exemptions, the State's only kind of nonmedical exemption, to multiply would increase that risk," *id.* at 51.

The limited statistics in the "sparse record" hardly compel the conclusion as a matter of law that the aggregate risks associated with medical exemptions are not comparable to religious exemptions because of the increasing number of students seeking religious exemptions. As an initial matter, the percent of kindergartners claiming religious exemptions actually dropped (albeit slightly) from the 2018-19 school year compared to the 2019-20 school year. In any event, the increase of religious exemptions over the last ten years, by itself, does not demonstrate that the risks associated with such exemptions are no longer comparable to the medical exemptions. Much more data and expert opinion would be necessary to engage in a meaningful analysis of the comparable risks, such as the levels of herd immunity for various illnesses that are the subject of the immunization requirements and whether the increase in exemptions has had any meaningful impact in Connecticut on such herd immunity. That type of fact-intensive analysis should not be conducted, as the majority opinion does, on a sparse record at the motion to dismiss stage.

In addition, the majority opinion does not explain why, if Connecticut's interest in repealing a decades-old religious exemption is justified by an acute risk of outbreak of disease among children and "a real public health crisis," *id.* at 14, 45, it would enact a law that still allows students with current religious exemptions, from kindergarten to the 12th grade, to be "grandfathered in" and continue to attend school unvaccinated until they graduate from high school. In other words, under the Act, the purportedly large number of kindergartners with religious exemptions

from the 2019 to 2020, upon which Connecticut relies to demonstrate an alarming increase in religious exemptions that risks an acute outbreak of disease, will be permitted to continue to attend school while unvaccinated for over a decade. *See* Public Act 21-6 § 1(b).

Moreover, although the Act may successfully keep students who are unvaccinated due to religious objections out of public and private schools, it does nothing to eliminate the comingling of those unvaccinated students with children (including those unvaccinated for medical reasons), in any other place of assembly including church, community sports events, restaurants, or any other social setting where children tend to gather. For this same reason, the Act appears to be substantially underinclusive to the extent it is aimed at the risk of disease purportedly created by "clustering." Appellees' Br. at 4 n.1. As described by Connecticut, "clustering," is "a phenomenon whereby individuals with religious objections to vaccines tend to cluster in particular communities, causing that community's vaccination rate to be especially low." *Id.* However, the students who refuse to be vaccinated for religious reasons even after passage of the Act and are clustered in a particular community and homeschooled, will likely continue to interact not only with each other, but also (as noted above) with children outside the clustered community in all types of public settings.

Even if Connecticut's interest is broadened to extend to the health and safety of the public in general, substantial questions remain regarding the Act's ability to satisfy the general applicability requirement in *Smith*.

For example, even if the Act is successful in compelling religious objectors to vaccinate their children in order to be able to send them to school, the Act does not cover unvaccinated adults, who (whether clustered or not) could spread diseases and substantially undermine the State's asserted public health goal in eliminating the free exercise rights of students in this context.

Connecticut's assertion (adopted by the majority opinion), that the aggregate risk of disease to schoolchildren posed by religious exemptions is acute compared to the much lower risk posed by medical exemptions, also overlooks the fact that currently forty-four states, as well as the District of Columbia, have a religious exemption to state laws requiring children attending public school to be vaccinated. *See* Nat't Conf of State Legislatures, *States With Religious and Philosophical Exemptions From School Immunization Requirements*, https://www.ncsl.org/health/states-with-religious-and-philosophical-exemptions-from-school-immunization-requirements (last updated May 25, 2022). That data suggests that the harm posed to students by religious exemptions to vaccination requirements may, indeed, be comparable to the harm posed by non-religious exemptions.

The majority opinion sidesteps many of these questions by suggesting 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, *inter alia*, the medical exemption allows students "to avoid the harms

that taking a particular vaccine inflict on them." *Ante*, at 48-49. That assertion, however, seems to ignore the fact that a medical exemption, which may support the State's interest in one way (namely, avoiding any harm to that student from the vaccination), may also undermine the State's interest in another way that is similar to the impact of a religious exemption (namely, avoiding the spread of disease in schools).

Furthermore, the student with the medical objection to vaccinations can avoid that harm *and* other schoolchildren would be protected from disease if the student with the medical objection was not exempt and was left with the option of being homeschooled, which is now the only option under the Act available for students with a religious objection. In other words, the statute at issue here is not a mandatory vaccination requirement for children at large, but rather for children attending public or private schools. Thus, the State's asserted interest in protecting schoolchildren from the spread of disease by unvaccinated students and its corresponding interest in not mandating a vaccine that would cause medical harm to certain students are *both* furthered if the Act treats medical objectors in the same manner as religious objectors and does not allow medical objectors into the school. Therefore, contrary to the majority opinion's analysis, a mandatory vaccination statute that excludes religious objections, but provides an exemption to students with medical objections, does not automatically avoid a general applicability issue under *Smith* simply by pointing to concerns about avoiding medical harm to a student from the vaccine.

Indeed, this Court has recently acknowledged, on two separate occasions, that a compulsory vaccination law or regulation, which does not include a religious exemption but has a medical exemption, may raise potential general applicability problems under *Smith*. The first instance was in *We the Patriots USA, Inc. v. Hochul*, where although we determined that a preliminary injunction against New York's emergency rule was not appropriate, we noted that a general applicability problem may arise after further fact development. 17 F.4th at 287-88. The second occasion was in *M.A. ex rel. H.R. v. Rockland Cnty. Dep't of Health*, when we decided that summary judgment in favor of the county was unwarranted because the record contained factual disputes as to, *inter alia*, whether the law at issue was generally applicable under *Smith*. 53 F. 4th 29, 38-39 (2d Cir. 2022).

In *Hochul*, we reviewed two cases in tandem, both concerning New York's emergency rule requiring healthcare facilities to ensure that their employees were vaccinated against COVID-19 and containing a medical exemption but no exemption for religious objectors. 17 F.4th 266. Plaintiffs, in each of those cases, brought an action claiming, *inter alia*, that the emergency vaccination rule violated the Free Exercise Clause and moved for a preliminary injunction. *Id.* at 277-79. One district court granted the preliminary relief requested, enjoining the rule insofar as it prevented healthcare workers from being eligible for an exemption based on religious belief; the other denied it. *See A. v. Hochul*, 567 F. Supp. 3d 362 (N.D.N.Y. 2021) (granting preliminary injunction); *We the Patriots USA, Inc. v. Hochul*, No. 21-cv-4954, 2021 WL

4048670 (E.D.N.Y. Sept. 12, 2021) (denying preliminary injunction). On appeal, we reversed the grant of the preliminary injunction relating to the emergency rule and affirmed the denial of the preliminary injunction in the tandem case. *Hochul*, 17 F.4th at 296.

In doing so, although we determined that a preliminary injunction was not appropriate at that early stage, we left open the possibility that further development of the record, including information about the risks posed by the two types of exemptions and the number of each type of exemption claimed, may raise a general applicability problem. *Id.* at 286-88. In particular, we concluded that "[w]ith a record as undeveloped on the issue of comparability as that presented here, we cannot conclude that the above vaccination requirements are *per se* not generally applicable . . . so as to support a preliminary injunction." *Id.* at 287-88. However, we also noted, because "[t]he record before us contains only limited data regarding the prevalence of medical ineligibility and religious objections," *id.* at 287, the risks associated with medical exemptions and religious exemption "may, after factual development, be shown to be too insignificant to render the exemptions incomparable," *id.* at 286. Therefore, far from suggesting that a compulsory vaccination with a medical exemption, but not a religious one, is generally applicable as a matter of law, we recognized that fact-finding regarding the comparability of the two exemptions could be critical to determining whether such a law is generally applicable. *See also Cent. Rabbinical Cong.*, 763 F.3d at 197 (vacating denial of preliminary injunction involving a free exercise claim because, *inter alia*, "[i]n

light of the sparse record at this preliminary stage, we cannot conclude that [the Ordinance at issue] is generally applicable"); *Bosarge v. Edney*, No. 22-cv-233, 2023 U.S. Dist. LEXIS 67439, 2023 WL 2998484, at *10 (S.D. Miss. April 18, 2023) (granting preliminary injunction preventing enforcement of Mississippi's compulsory vaccination law requiring students to be vaccinated in order to attend public and private schools in the State and explaining that "[b]ecause the evidence shows that there was a method by which Mississippi officials could consider secular exemptions, particularly medical exemptions, [but not religious objections,] their interpretation of the Compulsory Vaccination Law would not be neutral or generally applicable").

More recently, in *Rockland County*, we explicitly confirmed the need for a fully developed record at trial on the comparable risks associated with religious and secular exemptions, in order to determine the general applicability of a law involving compulsory vaccinations for children. 53 F.4th at 38-40. More specifically, we held that fact issues precluded summary judgment in a Free Exercise Clause challenge to an emergency declaration that barred unvaccinated children from places of public assembly, other than those with medical exemptions. *Id.* at 39. In that case, the parents of minor children brought an action against the Rockland County Department of Health and several Rockland County officials asserting various claims, including a violation of the Free Exercise Clause, based on orders that excluded children who were not vaccinated against measles from attending school and an emergency declaration that barred unvaccinated

children, other than those with medical exemptions, from places of public assembly. *Id.* at 32-33. The defendants moved for summary judgement, which the district court granted, determining that the challenged restrictions did not violate the Free Exercise Clause because *Phillips* "expressly held that 'mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause.'" *W.D. v. Rockland County*, 521 F. Supp. 3d 358, 405 (S.D.N.Y. 2021) (quoting *Phillips*, 775 F.3d at 543).

On appeal, however, we reversed, holding as to the general applicability prong that the defendants presented insufficient evidence about, *inter alia*, the purpose and scope of the emergency declaration. *Rockland Cnty. Dep't of Health*, 53 F.4th at 39. We decided that that the record was undeveloped as to "what governmental interest the Declaration was intended to serve, which [was] relevant to the question of whether the Declaration was 'substantially underinclusive,' and therefore, not generally applicable." *Id.* (citing *Hochul*, 17 F.4th at 284-85). We noted that "Rockland County's interest in issuing the Declaration could [have been] to stop the transmission of measles, which [could] lead a factfinder to question why there was a medical exemption, where . . . medically exempt children are every bit as likely to carry undetected measles as a child with a religious exemption and are much more vulnerable to the spread of the disease and serious health effects if they contract it." *Id.* (alteration adopted) (internal quotation marks and citation omitted). We further noted, "[o]n the other hand . . . the purpose of the Declaration could be to encourage vaccination." *Id.* In such a situation, we concluded that what animates a

seemingly facially neutral regulation that appears to be underinclusive is a "fact-intensive question that should be explored at trial through the examination of evidence that supports or undermines" the various potential purposes. *Id.* Accordingly, we held that, "because factual questions about the Emergency Declaration pervade the issues of neutrality and general applicability, the question of what level of scrutiny applies cannot be resolved on summary judgment, and Defendants fail to meet the high burden required to prevail at this stage."[25] *Id.*

Notwithstanding this precedent and the many factual and legal questions regarding the general applicability prong in this particular case, including the imprecise nature of Connecticut's asserted interest in regulating religious conduct in this manner, the majority opinion concludes as a matter of law, at the motion to dismiss stage, that medical exemptions and religious exemptions are not comparable for free exercise purposes in the context of this mandatory vaccination statute. The majority does so even though it concedes that the aggregate health data supporting such a distinction is "sparse," and even though a remand would not only provide Connecticut with an opportunity to more clearly articulate its asserted interests in regulating religious conduct in this context,

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25. I agree with the majority that *Rockland County* also contained facts regarding potential anti-religious animus, which impacted the neutrality prong of the *Smith* test, and are absent in this case. *See Ante*, at 31-32. However, our denial of summary judgment on the general applicability prong in *Rockland County* was separate and independent from the evidence of anti-religious animus supporting the plaintiffs' claim on the neutrality prong in that case.

but also would also allow plaintiffs the opportunity to engage in discovery regarding why Connecticut asserts that allowing medically exempt children to attend school poses a lower risk of spreading communicable diseases than allowing religiously exempt children would. This would require further fact-finding about, among other things, the number of students trying to claim a religious exemption, who would not be subject to the legacy provision, versus the number trying to claim a medical exemption. Such information may help uncover the comparable risks and threats posed to school children by the two classes of exemptions. In addition, facts concerning the impact on herd immunity levels based on the number and types of exemptions being claimed would further help explain if the two exemptions are comparable in light of the asserted interest.[26] Obviously, after gathering such discovery

26. The majority opinion quotes Governor Lamont who stated upon the signing of the Act that "[t]his legislation is needed to protect our kids against serious illnesses that have been well-controlled for many decades, such as measles, tuberculosis, and whooping cough, but have reemerged." *Ante*, at 44 (internal citation omitted). However, it is entirely unclear from the record at this juncture that these serious illnesses have re-emerged in a substantial way in Connecticut. For example, according to the Connecticut State Department of Health, with respect to confirmed cases of measles in Connecticut, there were four cases in 2019, zero cases in 2020, and two cases in 2021. Conn. State Dep't of Pub. Health, *Case Occurrence of Selected Diseases (Connecticut)*, https://portal.ct.gov/DPH/Immunizations/Case-Occurrence-of-Selected-Diseases-Connecticut (last visited July 19, 2023). Moreover, there was also at least one confirmed measles case in Connecticut in 2010, 2011, and 2012, all of which were before the purported concern regarding the material increase in religious exemptions. *Id.* Furthermore, while justifying the repeal of religious exemptions based on this articulated concern

from Connecticut, plaintiffs would have the opportunity to submit any evidence to the district court at summary judgment undermining Connecticut's position.

I emphasize that, after such discovery, plaintiffs may be unable to demonstrate that the risks associated with religious and medical exemptions under the Act are comparable, and the district court may conclude that the Act falls within the broad ambit of public policy that satisfies rational basis review. Moreover, even if plaintiff demonstrates that the Act lacks general applicability following discovery, Connecticut will have the opportunity to argue that the Act survives strict scrutiny. At this stage though, I narrowly conclude that it was error for the district court to find the free exercise claim implausible as a matter of law by making that critical fact-intensive determination on a sparse record before plaintiffs have had the opportunity to conduct discovery or to present evidence supporting their position on this issue to the court.

The majority opinion's analysis not only extinguishes the free exercise rights of Connecticut schoolchildren in the context of this Act, but has much broader ramifications for free exercise rights of individuals in the context of vaccine mandates more generally. The mandatory vaccinations

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about the risk of re-emergence of illnesses caused by the increasing number of those exemptions, the Act actually *expanded* medical exemptions so as to allow reasons that are "not recognized by the National Centers for Disease Control and Prevention" but that "in [the provider's] discretion results in the vaccination being medically contraindicated." Public Act 21-6 § 7.

required under the Act are not limited to illnesses like measles, tuberculosis, and whooping cough. Rather, the requirement extends to other illnesses, including a mandatory flu vaccination for students. Public Act 21-6 § 1(a) (requiring "each child to be protected by adequate immunization against diphtheria, pertussis, tetanus, poliomyelitis, measles, mumps, rubella, haemophilus influenzae type B and any other vaccine required by the schedule for active immunization adopted pursuant to section 19a-7f"). Thus, if Connecticut or any other state or government entity were to determine that mandatory COVID-19 vaccines for students were necessary in the future, Connecticut could do so without providing any religious exemption and survive rational basis review by invoking generalized concerns about the need to protect the health of students and the general public.

The majority opinion's analysis is also not limited to schools. Any vaccination mandate imposed by a governmental entity upon its employees, or even its residents, would be analyzed with the low constitutional bar of rational basis review even if it had a medical exemption but no exemption for objections based upon sincerely held religious beliefs. Therefore, challenges to any such mandatory vaccination laws, whether for COVID-19 or any other illness which the government deems sufficiently serious to warrant mandatory vaccinations in the future, would similarly be unable to survive a motion to dismiss on general applicability grounds under the majority opinion's analysis once the government invoked generalized concerns about public safety. Such an approach allows the fundamental right of the free exercise of religion to

be swept away under the mantle of rational basis review without any meaningful factual inquiry as to whether the differing treatment between the secular exemption and the religious exemption is warranted, even where a religious exemption has existed under the laws of a state for decades. This narrowing of judicial review of the government's decision to regulate religious conduct in the name of public health, while simultaneously allowing the same conduct for one or more secular reasons, is extremely troubling and inconsistent with the important religious rights enshrined in the Free Exercise Clause. *See generally Roman Cath. Diocese* , 141 S. Ct. at 68 ("Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten.").

Instead, consistent with the jurisprudence of the Supreme Court and this Court, we should allow plaintiffs in such situations, before they are stripped of their free exercise rights, the basic opportunity of discovery to attempt to show that the *Smith* standard has not been met and, therefore, that such a law should be subject to strict scrutiny.

Accordingly, I respectfully dissent from the portion of the majority's opinion in Section I Parts B(2)(b) and B(3) where it holds, as matter of law at the motion to dismiss stage, that the Act does not lack general applicability and affirms the dismissal of the free exercise claim under rational basis review.

## APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, FILED JANUARY 11, 2022

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

January 11, 2022, Decided;
January 11, 2022, Filed

Civil No. 3:21cv597 (JBA)

WE THE PATRIOTS USA, INC.; CT FREEDOM ALLIANCE, LLC; CONSTANTINA LORA; MIRIAM HIDALGO; AND ASMA ELIDRISSI,

*Plaintiffs,*

v.

CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT; CONNECTICUT STATE DEPARTMENT OF EDUCATION; CONNECTICUT DEPARTMENT OF PUBLIC HEALTH; BETHEL BOARD OF EDUCATION; GLASTONBURY BOARD OF EDUCATION; AND STAMFORD BOARD OF EDUCATION,

*Defendants.*

### ORDER GRANTING MOTIONS TO DISMISS

The Religion Clause of the First Amendment itself contains two clauses—the Establishment Clause and the

Free Exercise Clause. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."). "[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 719, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (concluding that the state did not violate the Free Exercise Clause where it refused to provide scholarship aid to students seeking devotional theology degrees). Religious exemptions to vaccine mandates provide such an example. *See Phillips v. City of N.Y.*, 775 F.3d 538, 543 (2d Cir. 2015) ("New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs.").

Connecticut Public Act No. 21-6 ("P.A. 21-6") requires students in public or private school to be vaccinated against certain communicable diseases. (Compl. [Doc. # 1] ¶ 17.) Connecticut law previously allowed students to obtain a religious exemption to the vaccine requirement, but section one of P.A. 21-6 provides no religious exemption to students that do not have a prior existing exemption. (*Id.*) Plaintiffs seek to permanently enjoin Defendants from enforcing P.A. 21-6 and request a declaratory judgment that P.A. 21-6 violates the Free Exercise Clause of the First Amendment; the right to privacy and medical freedom under the First, Fourth, Fifth, and Fourteenth Amendments; the Equal Protection Clause of the Fourteenth Amendment; the right to child rearing under the Fourteenth Amendment; and the Individuals with Disabilities Education Act ("IDEA"). (*Id.* at 14.) Defendants move to dismiss all five counts [Docs. ##

21, 22, 23]. Child USA, Americans United for Separation of Church and State, Central Conference of American Rabbis, Interfaith Alliance Foundation, Men of Reform Judaism, Reconstructionist Rabbinical Association, Union for Reform Judaism, and Women of Reform Judaism join as amici curiae, urging dismissal of Plaintiffs' complaint [Docs. ## 25, 27].

For the reasons that follow, the Court GRANTS Defendants' Motions to Dismiss [Docs. ## 21, 22, 23]. In summary, the Court concludes that Counts One through Four against the State Agency Defendants must be dismissed for lack of subject matter jurisdiction because the state agencies are "arms of the state" and entitled to Eleventh Amendment Immunity. Counts One through Five brought by the associational plaintiffs are also dismissed for lack of jurisdiction because these plaintiffs lack associational standing.

The individual counts must be dismissed for failure to state a claim. Count One, alleging a violation of the Free Exercise Clause, is dismissed because mandatory vaccination as a condition to school enrollment does not violate the Free Exercise Clause. However, even if P.A. 21-6 was not foreclosed by Supreme Court and Second Circuit precedent, it is constitutional because it is a neutral law of general applicability which is rationally related to a legitimate state purpose. Plaintiffs' second count, alleging a violation of the right to privacy and medical freedom, fails to state a claim because there is no overriding privacy right to decline vaccination. Count Three, alleging a violation of the Equal Protection Clause, fails to state a

claim because Plaintiffs do not plead facts that overcome the rationality of the state's classification. Count Four is dismissed because Plaintiffs allege a violation of the right to childrearing that is coextensive with its dismissed Free Exercise Clause count. Finally, Count Five, brought under IDEA, is dismissed because Plaintiffs failed to plead that they receive special education under IDEA.

## I. Facts Alleged

### A. Connecticut Public Act No. 21-6

Connecticut law requires students to receive immunization against certain communicable diseases before enrolling in school. Conn. Gen. Stat. § 10-204a(a).[1] Prior to April 28, 2021, students could apply for medical and religious exemptions to the immunization requirement. (Compl. ¶¶ 15-18; *see* Pl.'s Opp'n at 2-3). Under P.A. 21-6, students in kindergarten through grade twelve who had

1. § 10-204a(a) provides that:

> [e]ach local or regional board of education, or similar body governing a nonpublic school or schools, shall require each child to be protected by adequate immunization against diphtheria, pertussis, tetanus, poliomyelitis, measles, mumps, rubella, haemophilus influenzae type B and any other vaccine required by the schedule for active immunization adopted pursuant to section 19a-7f before being permitted to enroll in any program operated by a public or nonpublic school under its jurisdiction. Before being permitted to enter seventh grade, a child shall receive a second immunization against measles.

already received a religious exemption continue to be exempt from the vaccination requirement.[2] (Compl. ¶ 17.) Children in preschool or prekindergarten programs who previously claimed a religious exemption, however, must be vaccinated by September 1, 2022 or two weeks after transferring to another school program, whichever is later. (*Id.*; Ex. B, Compl., at 5.) No religious exemption is available to them. (Compl. ¶ 17.)

### B. Vaccinations

Plaintiffs allege that there are ten identified vaccines that contain cell lines derived from aborted fetal cells. (*Id.* ¶¶ 20-23.) They further allege that vaccinations are harmful because the "presence of very small amounts of human fetal cells and DNA in the human blood can create

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2. § 10-204a(b) provides that:

> The immunization requirements provided for in subsection (a) of this section shall not apply to any child who is enrolled in kindergarten through twelfth grade on or before April 28, 2021 if such child presented a statement, prior to April 28, 2021, from the parents or guardian of such child that such immunization is contrary to the religious beliefs of such child or the parents or guardian of such child, and such statement was acknowledged, in accordance with the provisions of sections 1-32, 1-34 and 1-35, by (1) a judge of a court of record or a family support magistrate, (2) a clerk or deputy clerk of a court having a seal, (3) a town clerk, (4) a notary public, (5) a justice of the peace, (6) an attorney admitted to the bar of this state, or (7) notwithstanding any provision of chapter 6, a school nurse.

a very strong autoimmune reaction in a person by which his [sic] body turns against itself and starts killing its own cells and tissues." (*Id.* ¶ 24.) They also assert that certain vaccines include animal cells and pork derivatives. (*Id.* ¶¶ 34, 39.)

### C. The Parties

This case is brought by five plaintiffs: two associations and three individuals. The first associational plaintiff, We the Patriots USA, Inc. ("WTP"), is a nonprofit charity that is "dedicated to promoting constitutional rights and other freedoms" and seeks to "advanc[e] religious freedom, medical freedom, parental rights, and educational freedom for all." (*Id.* ¶ 2.) WTP states that "[a] significant number of its members are Connecticut parents affected by matters complained of herein." (*Id.*) The second associational plaintiff, CT Freedom Alliance, LLC ("Alliance"), is a public interest organization similarly committed to "advocating for religious freedom, medical freedom, parental rights, and educational freedom among others." (*Id.* ¶ 3.) Alliance asserts that "[m]ost of its members are parents affected by the legislation complained of herein." (*Id.*) Neither Associational Plaintiff identifies any individual member by name. (*See id.* ¶¶ 2-3.)

Plaintiff Costantina Lora is a Connecticut resident with a child enrolled in preschool in Bethel, Connecticut. (*Id.* ¶ 25.) Her child previously received a religious exemption but will need to be vaccinated to enroll in kindergarten under P.A. 21-6. (*Id.* ¶ 30.) As a Greek Orthodox Christian, she objects to vaccinating her

children because vaccines contain "aborted fetal cells," and she believes that injecting herself and her children with these cells "would constitute participation in what she feels was an act of intentional, premeditated murder." (*Id.* ¶ 27.) She also objects to the presence of cells from other animals and chemicals in vaccines, as she believes this is "morally wrong." (*Id.*) Further, she "personally hold[s] a general religious belief that harming children is morally wrong" and believes that vaccinating her children "would harm them, thus rendering it wrong." (*Id.* ¶ 28.)

Plaintiff Miriam Hidalgo is a Connecticut resident whose children will be subject to the vaccination requirement in Glastonbury, Connecticut. (*Id.* ¶ 31.) She is Catholic and believes that the use of "aborted fetal cells" in vaccines constitutes murder and violates her family's religious beliefs. (*Id.* ¶¶ 32-33.) She also objects to vaccines that contain the "cells of other animals," because as part of her religion, she raises her children as vegans. (*Id.* ¶ 34.)

Plaintiff Asma Elidrissi is a Connecticut resident with two children subject to P.A. 21-6's vaccination requirement. (*Id.* ¶ 36.) One child "has not fully completed registration for kindergarten" and the other "will be eligible for preschool in the fall of 2021." (*Id.*) Plaintiff Elidrissi is Muslim and alleges three religious objections to vaccines. (*Id.* ¶ 37.) First, she believes that vaccines constitute participation in murder because vaccines contain "aborted fetal cells." (*Id.* ¶ 38.) Next, she alleges that there are pork derivatives in vaccines, and she abstains from pork as a part of her religion. (*Id.* ¶ 39.) Finally, she does not harm children on religious and moral grounds and alleges that

vaccines harm children. (*Id.* ¶ 40.) Plaintiff Elidrissi also states that after her son was given the measles, mumps, and rubella vaccination, he "suffer[ed] serious symptoms and ultimately a speech and learning disorder for which he now receives special services." (*Id.*)

This case is brought against six defendants: three state agencies and three local boards of education. Defendants Connecticut Office of Early Childhood Development, Connecticut State Department of Education, and Connecticut Department of Public Health ("State Agency Defendants") are state agencies and move to dismiss all claims by the associational Plaintiffs and Counts One through Four under Rule 12(b)(1) for lack of subject matter jurisdiction and Counts One through Five under Rule 12(b)(6) for failure to state a claim. (State Agency Defs.' Mot. to Dismiss [Doc. # 22] at 1.) Defendants Bethel and Stamford Boards of Education join this motion [Doc. #23]. Defendant Glastonbury Board of Education moves to dismiss Counts One through Four, which are the counts directed against it [Doc. # 21].[3]

3. The three school boards submit memoranda mirroring the State Agency Defendants without certain defenses. Defendants Bethel Board of Education and Stamford Board of Education do not assert Eleventh Amendment immunity [Doc. # 23]. Defendant Glastonbury Board of Education neither asserts Eleventh Amendment immunity nor responds to Count Five. (Mem. of Law in Supp. of Def. Glastonbury Board of Education's Mot. to Dismiss [Doc. # 21-1] at 1.) Because the school boards' memoranda mirror the State Agency Defendants' memorandum, the Court cites to the State Agency Defendants' memorandum ("Defs.' Mem.").

## II. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) requires dismissal of claims over which a court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Where a court does not have statutory or constitutional power to adjudicate a claim, it lacks subject matter jurisdiction. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008). "When considering a motion to dismiss pursuant to Rule 12(b)(1), the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff." *Sweet v. Sheahan*, 235 F.3d 80, 83 (2d Cir. 2000). The party asserting subject matter jurisdiction must prove its existence by a preponderance of the evidence. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

Under Rule 12(b)(6), the Court must determine whether the plaintiff has stated a legally cognizable claim by making allegations that, if true, would plausibly show that the plaintiff is entitled to relief, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), assuming all factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor, *see Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015). However, this principle does not apply to "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). Because "only a complaint that states a plausible claim for relief survives a motion to dismiss," *Iqbal*, 556 U.S. at 679, a complaint

must contain "factual amplification . . . to render a claim plausible," *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009)), and a complaint that only "offers 'labels and conclusions'" or "naked assertions devoid of further factual enhancement" will not survive. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

## III. Discussion

### A. Eleventh Amendment Immunity

The State Agency Defendants seek to dismiss Counts One through Four against them, on grounds that they are shielded by sovereign immunity under the Eleventh Amendment as "arms of the state." (Defs.' Mem. at 6.)

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. amend. XI. Eleventh amendment immunity was extended to suits brought against states by citizens of the same state, *see Papasan v. Allain*, 478 U.S. 265, 276, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); *Hans v. Louisiana*, 134 U.S. 1, 10, 10 S. Ct. 504, 33 L. Ed. 842 (1890), and also includes a "state entity that is an 'arm of the [s]tate,'" *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007). An agency is the arm of the state, and entitled to Eleventh Amendment immunity "where, for practical purposes, the agency is the alter ego of the state and the state is the real

party in interest." *Santiago v. N.Y. State Dept. of Corr. Servs.*, 945 F.2d 25, 28 n.1 (2d Cir. 1991)). The Eleventh Amendment, however, is not without exception. Congress may abrogate a state's immunity by statute, a state may waive its immunity, or a state official may be sued in his or her official capacity under the *Ex Parte Young* doctrine. *In re Deposit Ins. Agency*, 482 F.3d at 617.

The State Agency Defendants contend that the exceptions to sovereign immunity do not apply to Counts One through Four, because Congress has not abrogated the state's immunity, Connecticut has not consented to a waiver of immunity, and *Ex Parte Young* is inapplicable to state agencies. (Defs.' Mem. at 7.) While Plaintiffs "concede that Supreme Court precedent supports the State Agency Defendants' position and that the Court is bound to follow those positions," they nonetheless argue that the State Agency Defendants are not immune based upon a strict reading of the text of Eleventh Amendment. (Pls.' Opp'n at 8-9.)[4]

Because a state agency is considered an "arm of the state" and is entitled to immunity, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984), and this case does not present an exception to the state's Eleventh Amendment immunity, the State Agency Defendants are protected under the Eleventh Amendment and are immune from suit in Counts One through Four. Thus, these

4. In the alternative, Plaintiffs request leave to amend their complaint to name the agency officials as defendants. (Pls.' Opp'n at 9.)

counts against Defendants Connecticut Office of Early Childhood Development, Connecticut State Department of Education, and Connecticut Department of Public Health are dismissed for lack of subject matter jurisdiction.[5]

### B. Standing

Defendants argue that Plaintiffs WTP and Alliance fail to "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Rodriguez v. Winski*, 444 F. Supp. 3d 488, 496-97 (S.D.N.Y. 2020) (internal citations omitted).[6] They view the allegations that "[a] significant number of its members are Connecticut parents affected by the matters complained of herein," and "[m]ost of its members are parents affected by the legislation complained of herein" as insufficiently specific to confer standing to the associations. (*See* Defs.' Mem. at 9.) Plaintiffs concede that they did not specifically identify any members of their organizations that had standing in their complaint. (Pls.' Opp'n at 10.)

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5. The Court denies Plaintiffs' request for leave to amend their Complaint to name the agency officials as defendants. The claim of Eleventh Amendment immunity was identified at the parties' pre-filing conference, and Plaintiffs declined the offered opportunity to amend their Complaint in anticipation of Defendants' motions to dismiss on this basis. Moreover, as discussed *infra*, since all counts will be dismissed, adding individual state officials in their official capacities would be futile.

6. Defendants also argue that the associational Plaintiffs do not have standing to sue on their own behalf because they do not have their own redressable injury. (Defs.' Mem. at 8 n.9.) This is not rebutted by Plaintiffs. (*See* Pls.' Opp'n at 9-10.)

They argue, but do not plead, that the three individual Plaintiffs, who each have individual standing to sue, are members of both WTP and Alliance, which they claim is implied in their complaint. (*Id.* ("It takes no great leap of logic for the Court to conclude, as implied, that Plaintiffs Lora, Hidalgo, and Elidrissi are members of both We The Patriots USA, Inc. and CT Freedom Alliance, LLC.").)

Standing requires an "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27, 283 U.S. App. D.C. 216 (D.C. Cir. 1990)). An association may sue on behalf of its members when it establishes that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); *see also Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004).

There is disagreement in the Second Circuit as to whether the first prong of the *Hunt* doctrine requires an association to identify, by name, a member with standing in its complaint. *Rodriguez*, 444. F. Supp. 3d at 496 n.3 (discussing split in the Second Circuit); *compare Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 320 (2d Cir. 2020) ("Unless '*all* the members of an organization are affected by the challenged activity,' Plaintiff must name at least

one of its 'affected members' to establish associational standing at the pleading stage." (internal quotations and citations omitted)), *with NRDC, Inc. v. Wheeler*, 367 F. Supp. 3d 219, 227 (S.D.N.Y. 2019) ("While the organization need not identify any member with standing in his or her own right by name, it must nevertheless establish that 'at least one identified member ha[s] suffered or would suffer harm.'" (internal quotations and citations omitted)). However, at a minimum, a plaintiff must plead "facts that affirmatively and plausibly suggest" that an identified member has suffered harm. *Faculty v. N.Y. Univ.*, 11 F.4th 68, 75-76 (2d Cir. 2021) (internal quotations and citations omitted).

In *Faculty v. New York University*, the Second Circuit affirmed the dismissal of Plaintiff-Appellant Faculty, Alumni, and Students Opposed to Racial Preferences' ("FASORP") complaint for lack of standing because the association failed to demonstrate that its individual members had standing to sue. 11 F.4th at 71. There, the association pleaded that its members were subject to race and sex discrimination because New York University gave preference to "women and racial minorities" when selecting articles for its Law Review, an editorial board for its Law Review, and faculty for its Law School. *Id.* at 73. FASORP alleged that its members included "faculty members or legal scholars who have submitted articles to the Law Review in the past, and who intend to continue submitting their scholarship to the Law Review in the future" and "individuals who have sought and applied for entry-level or lateral teaching positions at the Law School and intend to do so again the future, or remain

potential candidates." *Id.* The Second Circuit concluded that such allegations were "plainly insufficient to show that FASORP's members have suffered the requisite harm" and noted that the associational plaintiff could have been more specific, asking: "When did FASORP's members submit articles or apply for jobs at NYU? Have those members drafted articles they intend to submit? If so, when do they plan to submit?" *Id.* at 76.

Here, Plaintiffs undeniably do not provide the names of individuals with standing in their complaint, and while Plaintiffs ask the Court to infer that three named individuals are members of the associations, "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he [or she] is a proper party to invoke judicial resolution of the dispute," *Warth v. Seldin*, 422 U.S. 490, 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), and "[i]t is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings," *Steinberger v. Lefkowitz*, 634 F. App'x 10, 12 (2d Cir. 2015) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990)). Further, the allegations that "[a] significant number of its members are Connecticut parents affected by the matters complained of herein," and "[m]ost of its members are parents affected by the legislation complained of herein" are insufficient to demonstrate that identified members were subject to harm. *See Faculty*, 11 F.4th at 76. The Associational Plaintiffs do not detail, for example, the school districts or grade level of these members' children or whether these members have previously sought a religious exemption. Further, the Associational Plaintiffs

do not provide facts detailing how their members would be "affected by the legislation" such that they would suffer harm.

Since the Associational Plaintiffs have failed to plead facts demonstrating that at least one identified member had or would suffer harm, they lack standing and Counts One through Five brought by them are dismissed for lack of jurisdiction.

### C. Count One: Free Exercise Clause

Individual Plaintiffs allege that the P.A. 21-6 violates their right to free exercise of religion under the First Amendment as the Act provides a medical exemption to its vaccination requirement without providing a religious exemption. (Compl. ¶¶ 42-51.) Plaintiffs argue that the failure to provide a religious exemption "forces parents to either renounce their religious beliefs and vaccinate their children or homeschool their children—something that many parents cannot do—thus depriving them of any education opportunities." (Compl. ¶ 50.)

The First Amendment, applicable to the states through the Fourteenth Amendment, "declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); U.S. Const. amend. I. It "embraces two concepts": the "freedom to believe" and the "freedom to act." *Cantwell*, 310 U.S. at 303. While the freedom to believe is "absolute," the freedom to act "cannot be."

*Id.* at 304; *see also Employment Div. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes.)'" (citations omitted)).

There are two standards of review to a challenge based on the Free Exercise Clause—rational basis and strict scrutiny. *Cent. Rabbinical Cong. of the United States & Canada v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 n.2 (2d Cir. 2014). Under rational basis review, "legislation is presumed to be valid and will be sustained if the [burden imposed] by the statute is rationally related to a legitimate state interest." *Id.* (quoting *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007)). Strict scrutiny requires that the law "be justified by a compelling government interest and . . . be narrowly tailored to advance that interest." *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)).

Defendants contend that the Court does not need to decide which level of scrutiny to use as Plaintiffs' Free Exercise claim is foreclosed by Second Circuit and Supreme Court precedent. (Defs.' Mem. at 11.) They alternatively argue that P.A. 21-6 survives both rational basis and strict scrutiny review. (*Id.*) Plaintiffs maintain that there is no "public health exception to the First Amendment," and thus, P.A. 21-6 must be reviewed under strict scrutiny. (Pls.' Opp'n at 11-23.)

*Appendix B*

## 1. Second Circuit and Supreme Court Precedent

Over a century ago, the United States Supreme Court in *Jacobson v. Massachusetts* rejected a Fourteenth Amendment challenge to Massachusetts's mandatory vaccination law. 197 U.S. 11, 12, 25 S. Ct. 358, 49 L. Ed. 643 (1905). While *Jacobson* did not address the First Amendment, which had not yet been applied to the states, the Supreme Court concluded that the law "did not invade[] any right secured by the Federal Constitution." *Jacobson*, 197 U.S. at 38. The Supreme Court later instructed that *Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922). Subsequently, when the Supreme Court was called to decide if a child labor law violated the First Amendment in *Prince v. Massachusetts*, it considered the limitations of the rights of religion and parenthood, and stated in dicta that a parent could not "claim freedom from compulsory vaccination for the child more than for himself on religious grounds." 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (citing *Jacobson*, 197 U.S. at 25).

With this jurisprudential backdrop, the Second Circuit affirmed the dismissal of a Free Exercise challenge to a New York statute requiring students to be vaccinated to attend public school and a regulation which allowed unvaccinated students to be temporarily excluded from school during an outbreak of a "vaccine-preventable disease." *Phillips*, 775 F.3d at 540-41. The plaintiffs in *Phillips* argued that the statute and regulation infringed

on their free exercise of religion as Catholics. *Id.* at 541-42. Analyzing *Jacobson* and *Prince*, the Second Circuit concluded that "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." *Id.* at 543. While New York's mandatory vaccination law contained both religious and medical exemptions, the court noted that New York law goes "beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs." *Id.* As the state could bar the unvaccinated "children from school altogether," the Second Circuit concluded that a "limited exclusion during an outbreak of a vaccine-preventable disease" was constitutional. *Id.*

Defendants argue that federal courts have "uniformly rejected free exercise challenges to mandatory school vaccination laws." (Defs.' Mem. at 13); *see, e.g., Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir. 2011) (holding that district court did not err in granting summary judgment because West Virginia's mandatory vaccination program for school admission did not violate the Free Exercise Clause under strict scrutiny); *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d 1079, 1085-87 (S.D. Cal. 2016) (denying a motion for a preliminary injunction because the parents challenging a bill that repealed a religious exemption to the state's vaccination requirement for new school children were unlikely to succeed on the merits of their claim that the bill violated the Free Exercise Clause, the Equal Protection Clause, or the right to education under the California Constitution); *W.D. v. Rockland Cnty.*, 521 F. Supp. 3d 358, 409-10 (S.D.N.Y. 2021) (granting the defendants' motion for summary

judgment and finding as a matter of law that excluding vaccinated children from school during a measles outbreak did not violate the Free Exercise Clause). Defendants urge dismissal of Plaintiffs' claims for failure to state a claim under the Free Exercise clause.

Plaintiffs present three arguments on why this precedent does not foreclose their Free Exercise claim. (Pls.' Opp'n at 11.) They assert that "even during a public health emergency the First Amendment's prohibition on the attachment of special disabilities to religion still applies in full force," citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) and *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889, 208 L. Ed. 2d 448 (2020). (*Id.*) Next, they view *Jacobson* and *Zucht* as distinguishable because they did not involve the Free Exercise Clause and the decision in *Prince* was limited to the facts of the case. (*Id.* (citing *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring).) Finally, to the extent that *Jacobson* does establish that vaccine mandates are permissible under the state's police power, Plaintiffs conclude that the "Second Circuit's reliance on it and *Zucht* in *Phillips* errs," and this Court should not follow *Phillips*. (*Id.*)

In *Roman Catholic Diocese of Brooklyn*, the Supreme Court enjoined the Governor of New York from enforcing his "severe restrictions on the applicants' religious services" where an Executive Order limited attendance at religious services in certain areas of New York during the COVID-19 pandemic while not imposing the same restrictions on secular businesses. 141 S. Ct. at 66, 69.

Concluding that the restrictions were neither "neutral" nor of "generally applicability," the Supreme Court determined that the applicants were likely to succeed on the merits of their claim under strict scrutiny because "other less restrictive rules could be adopted." *Id.* at 67. Justice Neil Gorsuch concurred, positing that "*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id.* at 70. Similarly, the Supreme Court in *Harvest Rock Church, Inc. v. Newsom* granted injunctive relief where the Governor of California restricted attendance at in-person worship services during the COVID-19 pandemic and remanded the case for "further consideration in light of *Roman Catholic* Diocese of Brooklyn." 141 S. Ct. at 889.

This Court recognizes that these cases reaffirm the proposition that when considering public health, "the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 68; *see Harvest Rock Church, Inc.*, 141 S. Ct. at 889. While Plaintiffs argue that "a public health interest does not swallow the First Amendment," (Pls.' Opp'n at 11), Plaintiffs miss the point. *Roman Catholic Diocese of Brooklyn* enjoined officials from enforcing an Executive Order which "single[d] out houses of worship for especially harsh treatment" and failed to narrowly tailor its requirements, 141 S. Ct. at 65-67, but it does not stand for Plaintiffs' broad proposition that there is no "public health exception to the First Amendment." (Pls.' Opp'n at 11.) Rather, states cannot violate the First Amendment, *see Roman Cath. Diocese*

*of Brooklyn*, 141 S. Ct. at 68, and "mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." *Phillips*, 775 F.3d at 543.[7]

The Court further acknowledges that *Jacobson* and *Zucht* do not involve challenges under the Free Exercise Clause, *see id.* ("*Jacobson* does not specifically control [Plaintiffs'] free exercise claim" as it did not involve a First Amendment challenge); *Zucht*, 260 U.S. at 176 (San Antonio's vaccine mandate did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment), and that *Prince* was expressly limited to its facts, *Prince*, 321 U.S. at 171 ("Our ruling does not extend beyond the facts the case presents."). However, as viewed by the Second Circuit, the reasoning in these cases—despite their limitations—suggests that vaccination as a condition of school admission does not violate the Free Exercise clause because they are "consonant with [Supreme Court and Second Circuit] precedent holding that 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Phillips*, 775 F.3d at 543 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531); *see also Workman*, 419 F. App'x at 353-54.

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7. Professor John Fabian Witt documents a "long tradition of judicial decisions upholding state authority to fight pandemics" in *American Contagions: Epidemics and the Law from Smallpox to COVID-19. See* John Fabian Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* 60 (2020).

In viewing *Phillips* as wrongly decided, Plaintiffs set out a history of the Fourteenth Amendment which they argue demonstrates that *Jacobson* cannot be squared with modern constitutional jurisprudence. (Pl.'s Opp'n at 15.) As an example, Plaintiffs examine *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), which held that the criminalization of same-sex sexual conduct was unconstitutional, and argue that if *Jacobson* were controlling law, a state would be allowed to "criminalize homosexual intimacy" to curb the spread of HIV/AIDs. (*Id.*)

However, Plaintiffs' arguments do not provide a basis for the Court to ignore Second Circuit precedent. In another case brought by WTP, the Second Circuit considered challenges to an emergency rule requiring healthcare workers to receive a COVID-19 vaccine with no religious exemptions. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d. Cir. 2021). In denying their application for a preliminary injunction, the Second Circuit stated that WTP's "alternative contention that *Jacobson* and *Phillips* have been implicitly overruled by the Supreme Court likewise finds no support in caselaw." *Id.* at 293.[8] The Second Circuit in *Phillips* was certainly aware of the evolution of the Fourteenth Amendment and nonetheless concluded that mandatory vaccination as a condition to school enrollment did not violate the Free Exercise Clause based on *Jacobson* and *Prince*. *Phillips*, 775 F.3d

8. We the Patriots USA's application for injunctive relief in this case was subsequently denied by the Supreme Court. *We the Patriots USA, Inc. v. Hochul*, 142 S. Ct. 734, 211 L. Ed. 2d 413, 2021 U.S. LEXIS 6278, 2021 WL 5873122 (2021).

at 543. Because religious exemptions to vaccine mandates "go[] beyond what the Constitution requires," *see id.*, Connecticut's decision to eliminate religious exemptions does not alter this conclusion. Accordingly, Plaintiffs fail to state a claim for relief under the Free Exercise Clause. *Id.* However, even if Plaintiffs' claim was not foreclosed, P.A. 21-6 would only be subject to rational basis review, which it survives.

### 2. Rational Basis

A court will sustain a "religiously neutral and generally applicable law [that] incidentally burdens free exercise rights" if it is "rationally related to a legitimate government interest." *Doe v. Mills*, 16 F.4th 20, 29 (1st Cir. 2021) (affirming the denial of a preliminary injunction because petitioners were unlikely to succeed on the merits of their claim that Maine's mandatory vaccination law for healthcare workers, which did not offer a religious or philosophical exemption, violated the Free Exercise clause). Plaintiffs contend that Supreme Court cases from this past term compel the conclusion that P.A. 21-6 is not "generally applicable" after *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021) and *Tandon v. Newsom*, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021).

#### a. Neutrality

A law is neutral when it does not target religion or religious practices. *Cent. Rabbinical Cong. of the United States*, 763 F.3d at 193; *Fulton*, 141 S. Ct. at 1877 ("Government fails to act neutrally when it proceeds in a

manner intolerant of religious beliefs or restricts practices because of their religious nature.").

By its terms, P.A. 21-6 does not target religion or "single out [religion] for especially harsh treatment." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. 63. Instead, the law requires all students to receive common vaccinations, exempting those with medical exemptions and those in grades kindergarten through twelve with existing religious exemptions. "The absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required." *See We the Patriots USA, Inc.*, 17 F.4th at 282 (finding that a challenge to an emergency rule requiring healthcare workers to receive the COVID-19 vaccine without religious exemption was unlikely to succeed on the merits because the rule was neutral and generally applicable). Plaintiffs have not advanced an argument that P.A. 21-6 was motivated by any religious animus and the legislative history suggests, as Defendants argue, that the enactment of this law was based upon declining student vaccination rates. *See* Conn. H.R. (Apr. 19, 2019) (statement of Repr. Steinberg) ("The key data describe a clear trend over the past decade towards higher levels of religious exemptions resulting in as many as a hundred schools at any given time with vaccination rates below the community immunity threshold."); *see also* Conn. S. (Apr. 27, 2021) (statement of Senator Daugherty Abrams) ("We have over 30 schools that have religious exemption rates over 10%, some as high as 25%. So when you hear that our vaccination rates in Connecticut are high, remember that those figures are overall and do not reflect the significant

vulnerability present in our schools and communities.")[9] (Defs.' Mem. at 17-18.) As such, P.A. 21-6 is neutral.

**b. General Applicability**

Plaintiffs contend that the law cannot be considered "generally applicable" as it "provides for secular exemptions (medical) from its vaccination mandate while completely eliminating religious exemption." (Pls.' Opp'n at 18.) They argue that medical exemptions and religious exemptions are "comparable" under the First Amendment and predict that the law invites the state to provide impermissible individualized exemptions under *Fulton*. (Pl.'s Opp'n at 18.)

A law is generally applicable when it does not selectively "impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 543. If a law "treat[s] *any* comparable secular activity more favorably than religious exercise," then it is not generally applicable. *Tandon*, 141 S. Ct. at 1296. Further, a law is not generally applicable if it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884).

9. In fact, Plaintiffs have not offered a clear argument on how the law is not neutral in any respect. Instead, they have conflated their analysis of neutrality and general applicability.

**i. Comparable Secular Activity**

In *Tandon v. Newsom*, the Supreme Court reasoned that "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue," and "[c]omparability is concerned with the risks various activities pose." 141 S. Ct. at 1296. Additionally, the Supreme Court held in *Smith* that "a law criminalizing controlled substance possession was deemed generally applicable even though it contained an exception for substances prescribed for medical purposes." *We the Patriots, Inc.*, 17 F.4th at 285 (citing *Smith*, 494 U.S. at 874, 878-82).

At oral argument, the Defendants maintained that Connecticut's interest in P.A. 21-6 was to "protect the health and safety of Connecticut's schoolchildren." (*See* Defs.' Mem. at 20.) They maintain that medical and religious exemptions differ because medical exemptions further the state's interest in health and safety while religious exemptions undercut that same interest. Plaintiffs contend that the Defendants' interest is drawn too broadly, and instead, the legislative history suggests that the asserted interest is "preventing the spread of contagious disease." (Pl.'s Opp'n at 19.) With this narrower interest, Plaintiffs assert that the medical exemptions undermine Connecticut's statutory purpose, as an individual unvaccinated for religious reasons and an individual unvaccinated for medical reasons pose the same risk. (*Id.*) In enacting P.A. 21-6, however, the state legislators identified that the purpose of this law

is to protect community health[10] and Plaintiffs make no showing that this interest is pretextual or unwarranted.

Plaintiffs' reliance on *Tandon* does not lead this Court to a different conclusion. In *Tandon*, the Supreme Court concluded that the petitioners were likely to succeed on their Free Exercise challenge to California's restrictions on the number of households that could gather for in-home religious worship. 141 S. Ct. at 1297-98. California did not impose similar restrictions on secular activities. *Id.* *Tandon*, however, "did not involve a one-to-one comparison of the transmission risk posed by an individual worshiper and, for example, an individual grocery shopper," and instead looked at the risk of groups. *We the Patriots, Inc.*, 17 F.4th at 287; *see Tandon*, 141 S. Ct. at 1297. While "[c]omparability is concerned with the risks various activities pose," here, when considering the risk of the group, religious exemptions and medical exemptions are not comparable. As data attached to Plaintiffs' complaint show, 2.3% of kindergarteners have a religious exemption to the Connecticut's vaccine requirements while only 0.2% of kindergarteners have a medical exemption. (Ex. D, Pl.'s Compl. [Doc. # 1-4] at 3-5.) "We doubt that, as

10. *See e.g.*, Conn. H.R. (Apr. 19, 2019) (statement of Repr. Steinberg) ("Vaccine hesitancy is becoming a direct and serious threat to the public health. It demands a proactive approach, not a reactive one dependent on quarantines or contact tracing. We've seen how that's gone. We need to act and act before we have an epidemic, an epidemic that we can prevent. That's what we're here for today."); *see also* Conn. S. (Apr. 27, 2021) (statement of Senator Daugherty Abrams) ("Why this Bill now? It is our obligation to protect the public health.).

an epidemiological matter, the number of people seeking exemptions is somehow excluded from the factors that the [s]tate must take into account in assessing the relative risks to the health of the [impacted community] and the efficacy of its vaccination strategy in actually preventing the spread of the disease." *We the Patriots, Inc.*, 17 F.4th at 287.

Further, medical exemptions are not comparable to religious exemptions when considering the "interest that justifies the regulation at issue." *Tandon*, 141 S. Ct. at 1296. The state has an interest in protecting the health of Connecticut's schoolchildren. Medical exemptions further this interest by ensuring that children are not harmed by vaccines that are contraindicated. *See Doe*, 16 F.4th at 31 (concluding that a medical exemption to a vaccine mandate for healthcare workers would not undermine Maine's interests in protecting the health of healthcare professionals, those who cannot be vaccinated, and of all Mainers because "providing healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care"). Connecticut has chosen to protect the safety of schoolchildren by requiring all students who may be safely vaccinated to be vaccinated, exempting those in grades kindergarten through twelve with existing religious exemptions, and this same interest is not advanced by an overarching religious exemption which jeopardizes the community immunity.

### ii. Individualized Exemptions

"General applicability may be absent when a law provides 'a mechanism for individualized exemptions,' because it creates the risk that administrators will use their discretion to exempt individuals from complying with the law for secular reasons, but not religious reasons." *We the Patriots, Inc.*, 17 F.4th at 288 (quoting *Smith*, 494 U.S. at 884) (citations omitted); *see also Church of the Lukumi Babalu Aye, Inc.*, 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."). In *Smith*, the Court considered an exemption that was granted for "good cause" as an example of such "individualized exception." 494 U.S. at 884. Similarly, in *Fulton*, a city official was able to create exemptions in his or her "own discretion," which was violative of the general applicability framework. *Fulton*, 141 S. Ct. at 1878-79.

P.A. 21-6 allows individuals to receive medical exemptions, but this categorical exemption is not a "mechanism for individualized exemptions." *Smith*, 494 U.S. at 884. The Act, instead, "provides for an objectively defined category of people to whom the vaccine requirement does not apply," *We the Patriots, Inc.*, 17 F.4th at 289, and requires 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." P.A. 21-6 § 1(a). "[N]o

case of the Supreme Court holds that a single objective exemption renders a rule not generally applicable." *Doe*, 16 F.4th at 30. P.A. 21-6 affords government officials no discretion[11] to grant or deny exemptions and the existence of a medical exemption thus does not render the law not generally applicable. *See We the Patriots, Inc.*, 17 F.4th at 289-90.

Plaintiffs' reliance on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) is unavailing. There, the court determined that the police department's regulation on beards, which provided medical but not religious exemptions to its policy on facial hair, was subject to heightened scrutiny. *Id.* at 365-66. The police department's interest was in a "uniform appearance," and the decision "to allow officers to wear beards for medical reasons undoubtedly undermine[d] the Department's interest in fostering a uniform appearance through its 'no-beard' policy." *Id.* at 366. Here, Connecticut's interest in P.A. 21-6 is to "protect the health and safety of Connecticut's schoolchildren." (Defs.' Mem. at 20.) The decision to exempt individuals from the vaccine requirement for medical reasons does not undermine its interest, as Connecticut would not be protecting the health and safety of schoolchildren if it required these children to undergo medically contradicted treatment. *See Doe*, 16 F.4th at 34 (concluding that the medical exemption in

11. Those that present a certificate from a physician, physician assistant or advanced practice registered nurse stating that a vaccine is "medically contraindicated . . . shall be exempt from the appropriate provisions of this section." Conn. Gen. Stat. § 10-204a(a)(2).

*Fraternal Order* was distinguishable from Maine's vaccine mandate with a medical exemption because "medical exemptions support Maine's public health interests" by not forcing its healthcare workers to undergo contraindicated medical treatment). Because medical exemptions do not undermine Connecticut's interest, *Fraternal Order* is unpersuasive authority for Plaintiffs' argument.

**c. Plaintiffs' Alternative Arguments**

Contending that rational basis review cannot apply to P.A. 21-6, Plaintiffs raise two alternative arguments. First, they opine that the Connecticut vaccine requirement presents a "hybrid-rights situation" under *Smith* which forestalls the application of rational basis review. (Pl.'s Opp'n at 20.) In *Smith*, the Supreme Court noted that the neutral, general applicability framework may be inappropriate for certain "hybrid situation[s]" where a Free Exercise Clause challenge is brought "in conjunction with other constitutional protections," such as the rights of parents. 494 U.S. at 881-82. Plaintiffs maintain that they have established a "hybrid right" because their Free Exercise Clause challenge is brought in conjunction with their constitutionally protected parental rights claim, so the Court should apply strict scrutiny. (Pls.' Opp'n at 21.) The Second Circuit has concluded that *Smith*'s "language relating to hybrid claims is dicta and not binding on this court," *Knight v. Conn. Dept. of Public Health*, 275 F.3d 156, 167 (2d Cir. 2001), and held that a stricter standard of review should not be used to analyze hybrid claims. *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003) ("'[A]t least until the Supreme Court holds that legal

standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard' to evaluate hybrid claims." (quoting *Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177 (6th Cir.1993))).

Plaintiffs concede that the Second Circuit has refused to apply strict scrutiny to hybrid claims but contend that this "Court must follow Supreme Court precedent before it follows Second Circuit precedent." (Pls.' Opp'n at 20.) Because the language in *Smith* "is dicta and not binding on this court," *see Knight*, 275 F.3d at 167, Plaintiffs' reasoning is misplaced. This Court will adhere to Second Circuit precedent which does not support a heightened level of scrutiny based on a hybrid-rights theory. *See Leebaert*, 332 F.3d at 144.

Plaintiffs also assert that that *Smith*'s neutrality and general applicability framework cannot be squared with the text and history of the First Amendment, so the Court should not apply this framework. (*Id.* at 20-21.) However, the Court is bound by *Smith*'s neutrality and general applicability framework and lacks authority to deviate to apply strict scrutiny to P.A. 21-6 based solely on what Plaintiffs view as a "historically and textually faithful constitutional analysis." (*Id.* at 21); *see In re United States v. Manzano*, 945 F.3d 616, 627 (2d Cir. 2019).

**d. Application of Rational Basis Review**

When a law is neutral and of generally applicability, "it need only demonstrate a rational basis for its enforcement,

even if enforcement of the law incidentally burdens religious practice." *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574 (2d Cir. 2002). Rational basis review requires only that the law "be rationally related to a legitimate state interest," *Lange-Kessler v. Department of Educ.*, 109 F.3d 137, 140 (2d Cir. 1997), and as long as there is a rational basis for the Act, the law must be upheld, *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Plaintiffs "have the burden to negat[e] every conceivable basis which might support" the law. *Id.* at 315.

The state has a legitimate interest in protecting the public health of the community. At oral argument, Plaintiffs conceded that the state's interest was not only legitimate, but also compelling. *See also Workman*, 419 F. App'x at 352. The Act is rationally related to this interest, where the number of religious exemptions sought has increased, impacting the safety of herd immunity. (Defs.' Mem. at 33 ("[T]he percentage of incoming kindergarten students claiming religious exemptions had been increasing almost every year since 2012 . . . [and] it was reasonable for the legislature to have believed that that trend was likely to continue, and that children then-enrolled in pre-K would claim more religious exemptions . . . ."); *see also* Ex. D, Pls.' Compl. [Doc. # 1-4] at 4.) The decision to allow medical exemptions but not religious exemptions does not render the law irrational, as medical exemptions further the health of schoolchildren by not requiring the vaccination of children for whom vaccinations are contraindicated. (*See* Pls.' Compl. at ¶ 47.) Since Plaintiffs do not plead facts from which an inference can be drawn that the law

lacks any legitimate purpose, P.A. 21-6 withstands rational basis review.

### D. Count Two: Medical Freedom and Privacy

Plaintiffs complain that P.A. 21-6 violates their rights to privacy and medical freedom under the First, Fourth, Fifth and Fourteenth Amendment. (Compl. ¶¶ 53, 56.) At oral argument, however, Plaintiffs clarified that this right is housed under a Fourteenth Amendment liberty or privacy theory and will be analyzed as such. *See We the Patriots, Inc.*, 17 F.4th at 293 n.34 (concluding that WTP was unlikely to succeed on the merits of their claim asserting a right to privacy, medical freedom, and bodily autonomy and noting that WTP did "not make any particularized argument for why the fundamental rights they assert may be implicated by constitutional provisions other than the Fourteenth Amendment").

The Supreme Court and the Second Circuit both have held that the "Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." *Id.* at 293 (citing *Jacobson*, 197 U.S. at 25-31, 37; *Phillips*, 775 F.3d at 542-43.) In light of the Second Circuit's recent reliance on *Jacobson*, Plaintiffs' contention at oral argument that it is outdated and nonbinding lacks force here. *Id.* at 293 n.35, 294 ("*Jacobson* remains binding precedent.").

While Plaintiffs' argument that their privacy right to decline vaccination for themselves and their children is

supported by *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), (Pls.' Opp'n at 23-24), these cases do not establish such a broad privacy right to refuse vaccination, and "[t]his Court cannot find an overriding privacy right when doing so would conflict with *Jacobson*." *We the Patriots, Inc.*, 17 F.4th at 293 n.35 (rejecting WTP's argument that *Roe, Planned Parenthood*, and *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) established "a broad fundamental privacy right for all medical decisions").

The Court concludes that Plaintiffs' medical freedom and privacy claim must be dismissed for failure to state a claim.

**E. Count Three: Equal Protection Clause**

Plaintiffs argue that P.A. 21-6 violates the Equal Protection Clause because the Act "creates age-based classes on who may continue to exercise their religious beliefs while still availing themselves of an education" and denies an educational benefit to individuals who do not "waive their religious identity while affording the same benefit to parents and children who assert a medical exemption." (Compl. ¶ 60-61.)

The Equal Protection Clause requires that no state "deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV. To

demonstrate that an individual's right to equal protection has been violated, a movant must show that he or she was "selectively treated compared with other similarly situated [individuals], and that selective treatment was based on impermissible considerations such as . . . religion." *Knight v. Conn. Dep't of Public Health*, 275 F.3d 156, 166 (2d Cir. 2001) (quoting *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000)). When reviewing an Equal Protection claim, courts apply rational basis review where there is an absence of intentional discrimination or where the "classification at issue does not implicate a suspect class." *See W.D.*, 521 F. Supp. 3d at 410 (citing *Vance v. Bradley*, 440 U.S. 93, 96-97, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979)) (granting the defendants' motion for summary judgment and finding as a matter of law that excluding vaccinated children from school during a measles outbreak did not violate the Equal Protection Clause by treating religious individuals differently from those with medical exemptions and treating those under eighteen differently than those over the age of eighteen).

Plaintiffs acknowledge that "age is not a suspect classification on its own for Fourteenth Amendment Equal Protection clams," but assert that "[w]hen a state's age-based classification burdens the exercise of a fundamental right . . . the Fourteenth Amendment requires courts to employ strict scrutiny." (*Id.* at 26.) Given that this Court has concluded that Plaintiffs failed to state a claim under the Free Exercise Clause, no strict scrutiny is applied. *See W.D.*, 521 F. Supp. 3d at 410 ("[W]here a law subject to an equal protection challenge 'does not violate [a plaintiff's] right of free exercise of religion,' courts do not 'apply to

the challenged classification a standard of scrutiny stricter than the traditional rational-basis test'") (quoting *A.M. ex rel. Messineo v. French*, 431 F. Supp. 3d 432, 447 (D. Vt. 2019)); *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83, 120 S. Ct. 631, 145 L. Ed. 2d 522, (2000) ("[A]ge is not a suspect classification under the Equal Protection Clause.").

When conducting rational basis review at the motion to dismiss stage, "a plaintiff must plead sufficient facts that, treated as true, overcome the presumption of rationality that applies to government classifications." *Progressive Credit Union v. City of N.Y.*, 889 F.3d 40, 49-50 (2d Cir. 2018). "A court is not confined to the particular rational or irrational purposes that may have been raised in the pleadings." *Id.* Survival of Plaintiffs' equal protection claim thus depends on whether Plaintiffs have asserted facts demonstrating that the government's actions were irrational. *See W.D.*, 521 F. Supp. 3d at 410 (quoting *A.M. ex rel. Messineo*, 431 F. Supp. 3d at 447).

Plaintiffs have failed to make such a showing. Plaintiffs' complaint asserts that P.A. 21-6 "singles out religious beliefs for less favorable treatment under the law and creates age-based classes on who may continue to exercise their religious beliefs while still availing themselves of an education." (Compl. ¶ 64.) However, allowing children in grades kindergarten through twelve to keep "existing religious exemptions" to "protect the expectation interests of their parents, who had relied on the prior version of [the Act] when making decision about how to educate their children" is not irrational. (*See* Defs.' Mem. at 32-33.)

At oral argument, Plaintiffs asserted that it was plainly irrational for Defendants to believe that public health will be undermined by a narrow class of preschoolers but not be impacted by the larger class of unvaccinated students who keep their religious exemptions. But Plaintiffs focus on a specific moment in time. The class of unvaccinated students who may keep their religious exemptions will diminish as the students graduate, allowing the state to reduce the number of unvaccinated students, protect the public's health, and balance the expectation interests of parents with currently enrolled students. (*See* Ex. D, Pls.' Compl. [Doc. # 1-4] at 4 (demonstrating that the number of religious exemptions in kindergarteners has increased 0.9% overall since 2012-2013).) This consideration does not make the state's action irrational in the Court's view. Plaintiffs also plead that P.A. 21-6 allows medically exempted children to attend school while denying that benefit to children whose parents will "not waive their religious identity." (Compl. ¶ 60.) As discussed above, medical exemptions protect the health of individuals for whom vaccinations are contraindicated, and do not negate the state's presumption of rationality.[12] As Plaintiffs fail to plead facts demonstrating the irrationality of the state's actions, Count Three is dismissed for failure to state a claim.

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12. In Plaintiffs' Opposition, they advance the additional argument that "every child currently enrolled in kindergarten through grade 12 with a religious exemption poses the same 'danger' that the Plaintiffs' children supposedly do, and they will continue to pose that 'danger' for another decade." (Pls.' Opp'n at 29.) Even if pleaded, this argument does not demonstrate that P.A. 21-6 is irrational under the same analysis above.

### F. Count Four: Fourteenth Amendment Right to Childrearing

In Count Four, Plaintiffs claim that P.A. 21-6 violates the Fourteenth Amendment's protection of a parent's fundamental interest in the "care, custody, and control of their children" in deciding what is best for their child's health. (Compl. ¶¶ 63-64 (citing *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).) Count Four is coextensive with the Plaintiffs' Free Exercise claim. (*See* Defs.' Mem. at 34-35; Pl.'s Opp'n at 30); *see also Prince*, 321 U.S. at 164 n.8 (concluding that appellant's parental rights claim "as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter").

Plaintiffs rely on *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) to "clearly establish that the Plaintiffs possess a fundamental right to control and otherwise direct the upbringing of their children, including opting to decline a medical treatment that violates their faith." (Pl.'s Opp', at 31-32.) In *Pierce*, the Supreme Court affirmed a preliminary injunction precluding enforcement of a statute requiring children in Oregon to attend public school, finding that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their

control." 268 U.S. at 534-35. In *Troxel*, the Supreme Court invalidated a Washington state statute which allowed "'[a]ny person' to petition a superior court for visitation right 'at any time' . . . whenever 'visitation may serve the best interest of the child,'" 530 U.S. at 60, because the statute "failed to provide any protection for [the] fundamental constitutional right to make decisions concerning the rearing" of a child. *Id.* at 69-70. While *Troxel* recognized that parents have an interest in the "care, custody, and control of their children," the "scope of that right [was left] undefined." *Leebaert*, 332 F.3d at 141-42 (concluding that parents did not enjoy a fundamental right to "tell a public school what his or her child will and will not be taught"). The Second Circuit also observed that *Yoder*, where the Supreme Court invalidated a compulsory high-school attendance law in response to complaints by Amish parents "took pains explicitly to limit its holding" based on the record before it and the religious culture of the Amish." *Id.* at 144-45.

Because Plaintiffs' parental rights challenge is contingent on the viability of their Free Exercise challenge, which the Court has dismissed, Plaintiffs have failed to state a claim under the Fourteenth Amendment for the broad fundamental right of child rearing that they assert.

### G. Count Five: Individuals with Disabilities Education Act

Plaintiffs allege unlawful discrimination in violation of IDEA. (Compl. at 12.) They request a declaratory judgment

that P.A. 21-6 violates IDEA, that IDEA preempts P.A. 21-6, and that IDEA "requires the Defendants to provide disabled children with a free appropriate public education in the least restrictive environment possible even if their parents decline to vaccinate them because of their religious beliefs." (Compl. at 14.) Their Complaint represents that Plaintiff Elidrissi's oldest child "is disabled within the meaning of IDEA" because he "suffer[s from] a speech and learning disorder for which he now receives special services." (Compl. ¶¶ 4, 71.) Defendants maintain that this is insufficient to establish that Plaintiff Elidrissi's child is a "child with a disability" under IDEA. (Defs.' Mem. at 36.)

Under 20 U.S.C. § 1401(3)(A), a "child with a disability" includes a child with a (1) "speech or language impairment[]" (2) "who, by reason thereof, needs special education and related services." Speech or language impairments are further defined in 34 C.F.R. 300.8(a)(1) as a "communication disorder, such as stuttering, impaired articulation, a language impairment, or voice impairment, that adversely affects a child's educational performance." A child that requires only services, but not "special education" does not qualify as a "child with a disability" under IDEA. *See* 34 C.F.R. 300.8(a)(2); *see also Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 641 (7th Cir. 2010) ("The law is perfectly clear on this point: if a child has a health problem 'but only needs a related service and not special education, the child is not a child with a disability.'"). Special education is a type of "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29); *see also Weixel v. Bd. of Educ. of City*

*of N.Y.*, 287 F.3d 138, (2d Cir. 2002) (reversing the district court's dismissal of an IDEA claim where the complaint alleged that the child had "other health impairments" which limited her "strength vitality and alertness" and required "special education and related services" in the form of homeschooling).

While Plaintiffs state that the child has "speech and learning disorders," they allege only that this child receives "special services" and not "special education." (Compl. ¶ 40.) At oral argument Plaintiffs acknowledged that failing to include the child's eligibility for special education may have been a defect in the complaint but asserted that the claim could withstand a motion to dismiss with all inferences drawn in their favor. However, absent any factual basis to infer that the child's condition could fall under the regulatory definition of a "child with a disability" and not just a "speech and learning disorder for which he needs special services," Plaintiffs have not demonstrated that they are entitled to relief. *See Twombly*, 550 U.S. at 577. Plaintiffs' allegation that Plaintiff Eldrissi's child "is disabled within the meaning of IDEA" is nothing more than a "naked assertion[] devoid of further factual enhancement," *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557), and fails to give any factual basis for the conclusion that the child requires special education. *See* 34 C.F.R. 300.8(a)(2) (mandating that a child with a covered disability that "only needs a related service and not special education . . . is not a child with a disability").

As Plaintiffs failed to plead facts establishing that they are entitled to relief under IDEA, their allegation of unlawful discrimination under IDEA and request for declaratory judgment cannot stand. Therefore, Count Five is dismissed.

**IV. Conclusion**

For the foregoing reasons, Defendants' Motions to Dismiss [Docs. ## 21, 22, 23] are GRANTED.

IT IS SO ORDERED.

/s/
Janet Bond Arterton,
U.S.D.J.

Dated at New Haven, Connecticut
this 11th day of January 2022.

**APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 11, 2023**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-249

WE THE PATRIOTS USA, INC., CT FREEDOM ALLIANCE, LLC, CONSTANTINA LORA, MIRIAM HIDALGO, ASMA ELIDRISSI,

*Plaintiffs - Appellants,*

v.

CONNECTICUT OFFICE OF EARLY CHILDHOOD DEVELOPMENT, CONNECTICUT STATE DEPARTMENT OF EDUCATION, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, BETHEL BOARD OF EDUCATION, GLASTONBURY BOARD OF EDUCATION, STAMFORD BOARD OF EDUCATION,

*Defendants - Appellees.*

**ORDER**

Appellants, We The Patriots USA Inc., CT Freedom Alliance, LLC, Constantina Lora, Miriam Hidalgo, and Asma Elidrissi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that

determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/_____

## APPENDIX D — RELEVANT STATUTORY PROVISION

### CONN. GEN. STAT. § 10-204a (Excerpted)

(a) Each local or regional board of education, or similar body governing a nonpublic school or schools, shall require each child to be protected by adequate immunization against diphtheria, pertussis, tetanus, poliomyelitis, measles, mumps, rubella, haemophilus influenzae type B and any other vaccine required by the schedule for active immunization adopted pursuant to section 19a-7f before being permitted to enroll in any program operated by a public or nonpublic school under its jurisdiction. Before being permitted to enter seventh grade, a child shall receive a second immunization against measles. Any such child who (1) presents a certificate from a physician, physician assistant, advanced practice registered nurse or local health agency stating that initial immunizations have been given to such child and additional immunizations are in process (A) under guidelines and schedules specified by the Commissioner of Public Health, or (B) in the case of a child enrolled in a preschool program or other prekindergarten program who, prior to April 28, 2021, was exempt from the appropriate provisions of this section upon presentation of a statement that such immunizations would be contrary to the religious beliefs of such child or the parents or guardian of such child, as such additional immunizations are recommended, in a written declaration, in a form prescribed by the Commissioner of Public Health, for such child by a physician, a physician assistant or an advanced practice registered nurse; or (2) presents a certificate, in a form prescribed by the

commissioner pursuant section 19a-7a, 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; or (3) in the case of measles, mumps or rubella, presents a certificate from a physician, physician assistant or advanced practice registered nurse or from the director of health in such child's present or previous town of residence, stating that the child has had a confirmed case of such disease; or (4) in the case of haemophilus influenzae type B has passed such child's fifth birthday; or (5) in the case of pertussis, has passed such child's sixth birthday, shall be exempt from the appropriate provisions of this section. The statement described in subparagraph (B) of subdivision (1) of this subsection shall be acknowledged, in accordance with the provisions of sections 1-32, 1-34 and 1-35, by a judge of a court of record or a family support magistrate, a clerk or deputy clerk of a court having a seal, a town clerk, a notary public, a justice of the peace, an attorney admitted to the bar of this state, or notwithstanding any provision of chapter 6, a school nurse.

(b) The immunization requirements provided for in subsection (a) of this section shall not apply to any child who is enrolled in kindergarten through twelfth grade on or before April 28, 2021, if such child presented a statement, prior to April 28, 2021, from the parents or guardian of such child that such immunization is contrary to the religious beliefs of such child or the parents or guardian of such child, and such statement was acknowledged, in

accordance with the provisions of sections 1-32, 1-34 and 1-35, by (1) a judge of a court of record or a family support magistrate, (2) a clerk or deputy clerk of a court having a seal, (3) a town clerk, (4) a notary public, (5) a justice of the peace, (6) an attorney admitted to the bar of this state, or (7) notwithstanding any provision of chapter 6, a school nurse.

(c) Any child who is enrolled in a preschool program or other prekindergarten program prior to April 28, 2021, who presented a statement, prior to April 28, 2021, from the parents or guardian of such child that the immunization is contrary to the religious beliefs of such child or the parents or guardian of such child, which statement was acknowledged, in accordance with the provisions of sections 1-32, 1-34 and 1-35, by (1) a judge of a court of record or a family support magistrate, (2) a clerk or deputy clerk of a court having a seal, (3) a town clerk, (4) a notary public, (5) a justice of the peace, (6) an attorney admitted to the bar of this state, or (7) notwithstanding any provision of chapter 6, a school nurse, but did not present a written declaration from a physician, a physician assistant or an advanced practice registered nurse stating that additional immunizations are in process as recommended by such physician, physician assistant or advanced practice registered nurse, rather than as recommended under guidelines and schedules specified by the Commissioner of Public Health, shall comply with the immunization requirements provided for in subparagraph (A) of subdivision (1) of subsection (a) of this section on or before September 1, 2022, or not later than fourteen days after transferring to a program operated by a public

or nonpublic school under the jurisdiction of a local or regional board of education or similar body governing a nonpublic school or schools, whichever is later.