

No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New York has effectively prohibited the practice of the Amish faith within its borders. The Amish hold a sincere religious objection to vaccination. For more than 50 years, New York allowed religious exemptions to its school vaccine mandate. But as of 2019, it no longer does. This makes New York an outlier, as 45 other States (and the District of Columbia) allow religious exemptions to their school vaccine mandates.

New York here imposed existential penalties on Old Order Amish schools for failing to require vaccines that would violate their faith. The Second Circuit invoked *Employment Division v. Smith*, 494 U.S. 872 (1990), to find that New York had not violated the Free Exercise Clause as applied to the Amish. This Court granted certiorari, vacated the Second Circuit's opinion, and remanded in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). But on remand, the Second Circuit doubled down, even with the benefit and guidance of *Mirabelli v. Bonta*, 607 U.S. 492 (2026).

The questions presented are:

1. Whether, as applied to the Amish Petitioners, New York's compulsion of permanent acts that are inconsistent with the religious beliefs and practices parents wish to instill in their children violates the Free Exercise Clause under *Mahmoud*.
2. Whether, as applied to the Amish Petitioners, New York's refusal to allow religious exemptions to a law that allows secular exemptions and other comparable secular activity violates the Free Exercise Clause.
3. Whether *Smith* should be reconsidered.

PARTIES TO THE PROCEEDING

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

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

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

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

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

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

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

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

RELATED PROCEEDINGS

The proceedings directly related to this case are:

Miller v. McDonald, No. 24-681, United States Court of Appeals for the Second Circuit. Judgment of the district court affirmed on June 30, 2026. Judgment of the district court affirmed on March 3, 2025.

Miller v. McDonald, No. 25-133, Supreme Court of the United States. Judgment of the Second Circuit vacated and remanded on December 8, 2025.

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

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INTRODUCTION

This case is about whether the Constitution permits New York to effectively prohibit the practice of the Amish faith within its borders. The Amish came to America on the promise of religious liberty. As early as the 1830s, the Amish began to settle in New York.¹ They contributed to the wellbeing of the State as “good farmers and citizens.” *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972). Following bedrock free exercise principles enshrined in our Constitution, New York accommodated their faith.

In line with their “fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence,” *id.* at 210, the Amish attend private Amish schools on private Amish farms. And they also hold a sincere religious objection to vaccination. For more than 50 years, New York permitted religious exemptions to its school vaccine requirement codified at N.Y. Public Health Law § 2164 (“PHL 2164”). These religious exemptions allowed the Amish in New York to attend their private Amish schools and tend to their health as their faith demands.

But New York recently ended this long tradition of religious accommodation. In 2019, New York repealed the religious exemption to PHL 2164. Sponsors of the repeal bill in the Legislature denigrated “fake” and “garbage” religious beliefs that they deemed “selfish and misguided.” At the same time, New York continued to permit tens of thousands

¹ See Karen M. Johnson-Weiner, *New York Amish: Life in the Plain Communities of the Empire State* 2 (2d ed. 2017).

of noncompliant students to attend school, allowed nonvaccination of nonstudents (such as teachers) and children outside of school, and left PHL 2164's medical exemption untouched. New York is now an "extreme outlier." *M.A. ex rel. H.R. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 41 (2d Cir. 2022) (Park, J., concurring). Forty-five States (and the District of Columbia) continue to offer religious exemptions to their school vaccine requirements.

In this case, New York seeks to enforce PHL 2164 to impose massive penalties on three Old Order Amish schools for declining to require vaccination in violation of their faith. These private Amish schools are in small Amish communities on private Amish farms and are attended only by Amish children. Contrary to the Amish principles of peace and harmony, Petitioners were left with no choice but to seek to enjoin New York's enforcement efforts lest they be forced to leave New York to practice their faith. But the Second Circuit relied on *Employment Division v. Smith*, 494 U.S. 872 (1990), to hold that PHL 2164 did not violate the Free Exercise Clause as applied to the Amish.

Petitioners then filed their first petition for a writ of certiorari in this Court. *See Miller v. McDonald*, No. 25-133. This Court granted the petition, vacated the Second Circuit's opinion, and remanded in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). On remand, however, the Second Circuit dug in its heels, proclaiming that "*Mahmoud* does not change the result." App.4a.

Once again, Petitioners must turn to this Court so they are not driven from New York. *See Yoder*, 406

U.S. at 218 n.9 (“Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses.”). Certiorari is warranted to address three important questions.

First, the Court should take the opportunity to correct persistent misapplication of its precedents protecting “the rights of parents to direct the religious upbringing of their children.” *Id.* at 233. Prior to *Mahmoud*, some lower courts had cabined *Yoder* “to its facts.” *Mahmoud*, 606 U.S. at 558. This Court corrected that error in *Mahmoud*. Lower courts then began misinterpreting that correction, cabining *Mahmoud* to “uniquely coercive ‘curricular requirements.’” *Mirabelli v. Bonta*, 607 U.S. 492, 495 (2026) (per curiam) (citation omitted). This Court corrected that error in *Mirabelli*. Even with the benefit of *Mirabelli*, however, lower courts—including the Second Circuit here—continue to make the same error.

It should have been plain to the Second Circuit that *Yoder*, *Mahmoud*, and *Mirabelli* demand strict scrutiny in this case. PHL 2164 “compel[s]” Petitioners to commit a “specific practice forbidden by their religion.” *Mahmoud*, 606 U.S. at 549. That practice—vaccination—is permanent and irreversible. Petitioners undisputedly “have sincere religious beliefs” about vaccination, and PHL 2164 interferes with their ability to honor their “religious obligation to raise their children in accordance with those beliefs.” *Mirabelli*, 607 U.S. at 496. That interference is at least as “substantial[]” as the interference in *Yoder*, *Mahmoud*, and *Mirabelli*. *Mahmoud*, 606 U.S. at 550.

Second, the Court should resolve persistent confusion over the meaning and scope of *Smith*; *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021); and *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam). Multiple Justices have observed this confusion over the years, *see Dr. A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., joined by Alito and Gorsuch, JJ., dissenting from denial of certiorari); *Fulton*, 593 U.S. at 609 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment), and it has only intensified in the meantime.

In this case, the Second Circuit contributed to that confusion by deeming PHL 2164 generally applicable under *Smith* even though it disallows religious exemptions while allowing comparable secular activity and exemptions. That holding is inconsistent with this Court’s precedents, which hold that strict scrutiny applies when a law either “treat[s] *any* comparable secular activity more favorably than religious exercise,” *Tandon*, 593 U.S. at 62, or provides “a mechanism for individualized exemptions,” *Fulton*, 593 U.S. at 533 (citation omitted). PHL 2164 does both.

Third, if *Smith* allows New York to effectively prohibit the practice of the Amish faith within its borders, then *Smith* should be reconsidered. Five current Justices of the Court recently agreed that *Smith* should be reconsidered if given the opportunity. *See Fulton*, 593 U.S. at 543 (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 553 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in judgment). This case presents that opportunity.

The Amish have long been a litmus test for our Nation’s continued commitment to religious liberty. *See, e.g., Yoder*, 406 U.S. at 235-36. If the Second Circuit’s opinion is allowed to stand, we are failing that test. The message would be clear: we no longer tolerate the Amish faith.

New York’s “discrimination against religion raises a serious First Amendment issue.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 29 (2020) (Kavanaugh, J., concurring). This Court should grant certiorari, reverse the Second Circuit, and restore to the Amish in New York the free exercise rights our Constitution guarantees.

OPINIONS BELOW

The Second Circuit’s opinion (App.1a-25a) is reported at 180 F.4th 420. The Second Circuit’s pre-remand opinion (App.27a-50a) is reported at 130 F.4th 258. The district court’s opinion (App.51a-90a) is reported at 720 F. Supp. 3d 198.

JURISDICTION

The Second Circuit issued its opinion on June 30, 2026. App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

PHL 2164 is reprinted in the appendix to this petition. App.119a-133a.

STATEMENT**A. Factual Background**

1. Petitioners are three Amish schools and three Amish individuals that belong to small Old Order Amish communities in rural New York. A-12 to 13.² The three school Petitioners are private Amish community schools that are funded solely by the Amish, located on Amish land within Amish communities, and attended exclusively by Amish children. App.3a; *see* A-77. Mr. Miller and Mr. Smucker are fathers of Amish children who attend Amish schools. App.3a. And Mr. Wengerd is a representative of Amish families and schools in their dealings with the government. App.3a.

2. The Amish “are religiously committed to living separately from the modern world.” *Mast v. Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring in decision to grant, vacate, and remand); *see Yoder*, 406 U.S. at 210 (“Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”). The Amish way of life has “not altered in fundamentals for centuries.” *Yoder*, 406 U.S. at 217. It has “remained constant” despite “unparalleled progress in human knowledge generally.” *Id.* at 216.

The Amish “grow their own food, tend their farms using preindustrial equipment, and make their own

² Citations to “A-” are to the appendix in the Second Circuit.

clothes.” *Mast*, 141 S. Ct. at 2430 (Gorsuch, J., concurring in decision to grant, vacate, and remand). They have “reject[ed] ... telephones, automobiles, radios, and television.” *Yoder*, 406 U.S. at 217. The Amish “have established their own elementary schools in many respects like the small local schools of the past.” *Id.* at 212. And at those schools, they “educat[e] their children in the Amish way, with Amish teachers, ... on Amish owned property.” A-11.³

3. The Amish also share an undisputedly sincere and abiding religious objection to vaccination. Mr. Wengerd explained that objection to the State in this case:

Our forefathers came to America for freedom of religion in concerns of living a God fearing life + bringing up our children in a way, to hope through salvation, an everlasting life in eternity. To do this we need to put our full trust in the Almighty God. Proverbs 3:5[.] Then in verse 6 we have the sure promise that He will direct our paths. Also in Mark 8:35 for

³ Homeschooling is not an option for the Amish. The Amish believe that “[c]hildren learn important spiritual lessons about interacting with authority figures and their peers while at school, while they also receive practical and spiritual guidance they could not if isolated at home.” A-693. Homeschooling also is not feasible “because the Amish lifestyle demands types of work by both parents.” A-693. And the significant interaction with the State that homeschooling would demand, *see, e.g.*, 8 N.Y. Comp. Codes R. & Regs. § 100.10, would be contrary to the “fundamental [Amish] belief that salvation requires life in a church community separate and apart from the world and worldly influence,” *Yoder*, 406 U.S. at 210.

whosoever seeketh to save his life shall lose it. But whosoever loses his life for my sake and the gospel's, the same shall save it. Yes our Almighty God wants us to fully put our faith + trust in Him. Which is in conflict to put our trust in vaccines. We are also commanded to not be conformed to this world. Romans 12:1-2. If we honestly obey this, then it will affect everything we do, yes even in the way we try to remain health[y].

A-76 (formatting altered).

This religious objection to vaccination is deeply held. In Mr. Wengerd's words, the Amish "will choose prison time or a martyr's death before going against their convictions." A-39.⁴

B. Regulatory Background

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

Religious exemptions have long been the norm when it comes to school vaccine requirements. Forty-

⁴ See, e.g., Carmen Blackwell, *Ashland County Amish Community Members Appear in Court to Answer for Buggy Violations*, WKYC (Apr. 14, 2023), <https://tinyurl.com/mraka7nm>; Ben Forer, *Eight Amish Men Jailed over Orange Safety Triangles*, ABC News (Sept. 15, 2011), <https://perma.cc/4D8D-P723>; *Amish Farmer Gets Jail in Outhouse Dispute*, NBC News (Mar. 17, 2009), <https://tinyurl.com/3by2z5d2>.

five States (and the District of Columbia) currently offer religious exemptions. Only five States do not. And for most of them, that is a relatively recent development. *See* Cal. Health & Safety Code § 120325 *et seq.* (religious exemption eliminated in 2015); Me. Stat. tit. 20-A, § 6355 (religious exemption eliminated in 2019); N.Y. Pub. Health Law § 2164 (same); Conn. Gen. Stat. § 10-204a (religious exemption eliminated in 2021); *see also* W. Va. Code § 16-3-4 (no religious exemption).⁵

2. This case involves New York’s elimination of its longstanding religious exemption to PHL 2164. That statute requires children who attend schools to receive one or more vaccines for certain diseases. N.Y. Pub. Health Law § 2164(2)(a); *see* A-737 to 738. Generally speaking, no school “shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days” without proof of the required vaccines. N.Y. Pub. Health Law § 2164(7)(a). This requirement applies broadly to “any public, private or parochial” school. *Id.* § 2164(1)(a). But it does not apply to teachers, aides, administrators, or any adults who work in or with schools. Each violation

⁵ When the prior petition was filed in this case, West Virginia was governed by an executive order that would provide a religious exemption. *See* W. Va. Exec. Order No. 7-25 (Jan. 14, 2025). But West Virginia’s Board of Education has since refused to honor that executive order. *See* Press Release, W. Va. Dep’t of Educ., *West Virginia Board of Education Reinstates Policy on Compulsory Vaccination Law* (Dec. 2, 2025), <https://perma.cc/F78M-JQM2>.

of PHL 2164 can trigger a civil penalty of up to \$2,000. *See id.* §§ 12(1), 206(4)(c).⁶

3. For more than 50 years, from 1966 until 2019, New York offered two exemptions to PHL 2164.

First, New York provided a religious exemption. Pursuant to that exemption, a child did not need to be vaccinated if the child’s “parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to” vaccination. N.Y. Pub. Health Law § 2164(9) (2018).

Second, New York provided (and still provides) a medical exemption. A child need not be vaccinated if “any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child’s health.” N.Y. Pub. Health Law § 2164(8). The process of obtaining a medical exemption begins with a determination and certification by a doctor “that a child has a medical contraindication or precaution to a specific immunization consistent with [Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care.” 10 N.Y. Comp. Codes R. & Regs. § 66-1.1(l). This certification is then presented to the relevant school official, who has discretion to “require additional information supporting the exemption,” *id.* § 66-1.3(c), and to decide whether to “grant a medical exemption

⁶ The State has taken the position that each day each student attends school without the required vaccinations is a separate violation. App.6a n.9.

from the State’s school immunization requirements,” *Goe v. Zucker*, 43 F.4th 19, 33 (2d Cir. 2022).

4. New York eliminated PHL 2164’s religious exemption in 2019. *See* 2019 N.Y. Laws ch. 35, §§ 1, 2. In the preceding year, there was a measles outbreak that was largely concentrated in the New York City area.⁷ None of the cases in that outbreak occurred in the Amish communities at issue here. A-41. And lawmakers questioned whether there was any evidence that religious exemptions were responsible for the outbreak.⁸

But the Legislature plowed ahead, targeting religious communities rather than addressing the significant number of noncompliant students attending public schools in New York. Tens of thousands of students remain unvaccinated but have not obtained any exemption to PHL 2164. According to the State, that number may be as high as 97,900. A-574, 644. That is more than quadruple the *total* Amish population in New York. A-32 n.4 (estimating that

⁷ Cf. Sarah Maslin Nir & Michael Gold, *An Outbreak Spreads Fear: Of Measles, of Ultra-Orthodox Jews, of Anti-Semitism*, N.Y. Times (Mar. 29, 2019), <https://tinyurl.com/4aew63hc> (“[S]ome residents say they now wipe public bus seats and cross the street when they see ultra-Orthodox Jews. Hasidic leaders said they feared not only a rise in anti-Semitism but an invasion of their cloistered community by the authorities under the guise of public health.”).

⁸ *See, e.g.*, Transcript of Assembly Proceedings (“Assembly Tr.”) at 91 (June 13, 2019), <https://perma.cc/MW7X-EG88> (“There has not been one instance that has been pointed out to us that anyone with a religious exemption had measles during the last outbreak.”).

New York’s Amish population is “21,000 souls, including children and adults”).

The repeal bill’s sponsors did not hide their disdain for religion. They denigrated “fake”⁹ and “garbage”¹⁰ religious beliefs, declaring those who hold a religious objection to vaccination “selfish and misguided.”¹¹ The bill’s primary sponsor in the Assembly likened those who invoked the religious exemption to those who “tried [Galileo] as a heretic.”¹²

C. Procedural Background

1. Three years after the religious exemption was repealed, and for the first time in the nearly two centuries the Amish have resided in New York, New York charged Petitioner schools with violating PHL 2164 by allowing students to attend without proof of vaccination. App.6a. The State sought a \$52,000 penalty from the Dygert Road School (based on 26 noncompliant students for one day), a \$46,000 penalty from the Pleasant View School (based on 23 noncompliant students for one day), and a \$20,000 penalty from the Shady Lane School (based on the

⁹ Transcript of Senate Proceedings at 5443 (June 13, 2019), <https://perma.cc/8P94-35WP>.

¹⁰ *Assembly Update* at 3:11 (Mar. 19, 2019), <https://tinyurl.com/yvkebum2>.

¹¹ Brad Hoylman-Sigal, N.Y. State Senate, *As New York Faces Worst Measles Outbreak in Decades, Hoylman, Dinowitz, Carlucci, Childhood Cancer Survivors, and Transplant Recipients Urge End to Non-Medical Exemptions for Vaccination* (May 28, 2019), <https://tinyurl.com/3e62hx5s>.

¹² Assembly Tr. at 102.

assumption that at least one student was noncompliant for ten days). App.7a n.9.

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

The State would not accommodate. After a hearing, the New York State Department of Health determined that all three schools had violated PHL 2164 and imposed the full extent of penalties sought by the State—totaling \$118,000. App.94a-95a.

2. Faced with enormous penalties for their communities and the threat of having to leave New York, Petitioners were left with no option but to turn to the courts for protection. For Petitioners, this litigation is fundamentally defensive—the option of last resort. They feel shame when it is framed as the Amish proactively suing the State.

Petitioners filed a complaint in federal court asserting a single, as-applied claim under 42 U.S.C. § 1983 for violation of their First and Fourteenth Amendment rights. They seek a permanent injunction preventing the State from forcing them to violate their

faith—permanently and irreversibly—through a compelled medical procedure.

Petitioners promptly moved for a preliminary injunction, and the State moved to dismiss. After a hearing, the district court granted the motion to dismiss and denied the motion for a preliminary injunction as moot. App.90a.

The Second Circuit affirmed. App.50a. It held that Petitioners “have failed to allege that § 2164 is anything but neutral and generally applicable.” App.45a. *First*, the Second Circuit determined that the threat to free exercise posed by PHL 2164 is “not equivalent to the existential threat the Amish faced in *Yoder*.” App.48a. The court reasoned that “*Yoder* ‘took pains explicitly to limit its holding’” to its facts. App.47a (citation omitted). *Second*, the Second Circuit determined that PHL 2164 did not “treat[] comparable secular conduct more favorably than religious beliefs.” App.40a. *Third*, the Second Circuit determined that PHL 2164 does not “extend[] broad discretion to government officials to grant exemptions” for secular reasons. App.43a. The court accordingly applied rational basis review, which it determined PHL 2164 satisfied. App.45a.

3. Petitioners successfully sought review in this Court. After granting Petitioners’ petition for a writ of certiorari, this Court vacated the Second Circuit’s opinion and remanded the case for reconsideration in light of *Mahmoud*. App.26a.

On remand, the Second Circuit again affirmed the district court. App.2a. It reiterated its holding that

“Plaintiffs have failed to allege that § 2164 is anything but neutral and generally applicable.” App.20a. And it determined that “*Mahmoud* does not change the result.” App.4a.

The Second Circuit acknowledged that PHL 2164 imposes a “serious” burden that “may weigh on [Petitioners] more heavily than the policy in *Mahmoud*.” App.23a & n.17. But it nonetheless declined to apply strict scrutiny because PHL 2164 was not the same “kind” of law as in *Yoder*, *Mahmoud*, and *Mirabelli*. App.23a. Distinguishing *Yoder* and *Mahmoud*, the Second Circuit suggested that PHL 2164 “does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents’ faith, and does not enlist school officials to displace parental religious formation.” App.22a. Distinguishing *Mirabelli*, the Second Circuit suggested that PHL 2164 allegedly “conceals nothing from parents and displaces no part of their authority over a child’s religious upbringing.” App.23a-24a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Bring an End to the Circuits’ Persistent Misapplication of *Yoder*, *Mahmoud*, and *Mirabelli*.

Yoder long ago recognized “the rights of parents to direct the religious upbringing of their children.” 406 U.S. at 233. For years, lower courts—including the Second Circuit in this case—limited *Yoder* to its facts. This Court in *Mahmoud* made clear that was wrong. 606 U.S. at 558. But now, lower courts—including the

Second Circuit in this case—are limiting *Mahmoud* to its facts. This Court tried to correct that “significant[] misunderstand[and]ing” in *Mirabelli*. 607 U.S. at 501 (Barrett, J., concurring). But the lower courts still are not listening. And in this case, the Second Circuit’s refusal to listen will have the effect of driving a religious community from New York. This Court should grant certiorari to remind lower courts that they may not so “breezily dismiss[]” this Court’s precedents. *Mahmoud*, 606 U.S. at 558.

A. The Second Circuit Flouted *Mahmoud* on Remand from This Court.

1. Before this Court reversed the Fourth Circuit’s opinion in *Mahmoud*, the Second Circuit relied on that opinion in suggesting that “*Yoder* ‘took pains explicitly to limit its holding.’” App.47a & n.16 (citation omitted). But as this Court later clarified in *Mahmoud*, the Court has “never confined *Yoder* to its facts.” 606 U.S. at 558. Rather, it has treated *Yoder* “like any other precedent.” *Id.*

Mahmoud made clear that “when a law imposes a burden of the same character as that in *Yoder*, strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable.” *Id.* at 565. A burden is of the same character as that in *Mahmoud* and *Yoder* when it “‘substantially interfer[es] with the religious development’ of the parents’ children” and “pose[s] ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill in their children.” 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218).

In light of this guidance in *Mahmoud*, the Court vacated the Second Circuit’s initial opinion in this case and remanded. While the case was pending on remand, this Court provided further guidance in *Mirabelli*. That case confirms that burdens on parental decisionmaking regarding a child’s medical care may be of the same character as those in *Yoder* and *Mahmoud*. The policies at issue in *Mirabelli* facilitated children’s efforts to engage in gender transitioning without their parents’ consent. 607 U.S. at 493. The parents in *Mirabelli* had “sincere religious beliefs about sex and gender, and they fe[lt] a religious obligation to raise their children in accordance with those beliefs.” *Id.* at 496. This Court held that the policies at issue, like the laws in *Yoder* and *Mahmoud*, “interfere[d] with the ‘right of parents to guide the religious development of their children.’” *Id.* (citation omitted).

2. This should be an easy case after *Mahmoud* and *Mirabelli*. PHL 2164 unquestionably “substantially interfer[es] with the religious development” of Petitioners’ children. *Mahmoud*, 606 U.S. at 546 (citation omitted). Petitioners have “sincere religious beliefs” about vaccination, “and they feel a religious obligation to raise their children in accordance with those beliefs.” *Mirabelli*, 607 U.S. at 496. PHL 2164 prevents them from doing so. Indeed, it “compel[s]” Petitioners to commit a “specific practice forbidden by their religion.” *Mahmoud*, 606 U.S. at 549. That compelled practice is permanent and irreversible. It is therefore an even “greater” affront to free exercise than this Court faced in *Mahmoud*,

where the instruction at school could be counteracted at home. *Mirabelli*, 607 U.S. at 496.

Because PHL 2164 burdens Petitioners’ parental free exercise rights, strict scrutiny applies. *See Mahmoud*, 606 U.S. at 565. PHL 2164 cannot satisfy strict scrutiny. New York lacks a sufficiently compelling interest in requiring these “*particular* [Amish] claimants” to vaccinate their children. *Fulton*, 593 U.S. at 541 (emphasis added) (citation omitted); *see Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring in decision to grant, vacate, and remand) (the compelling interest must relate to “the *specific* application of [the challenged] rules to *this* community”). New York offered the Amish a religious exemption for more than 50 years, and the record contains no evidence that any measles cases during the 2019 outbreak occurred in the Amish communities at issue. *See supra* pp.10-11.

PHL 2164 also is not narrowly tailored because it is both under- and overinclusive. PHL 2164 is underinclusive because it applies to only one place where transmission may occur (schools) and covers only one group who may transmit (students). *See supra* p.9. It also allows students to remain nonvaccinated for secular reasons. *See supra* pp.10-11. PHL 2164 is overinclusive because, as demonstrated by the “States across the country” that permit religious exemptions “without widespread consequences,” *Mahmoud*, 606 U.S. at 568, New York could readily prevent transmission while retaining a religious exemption for the small number of Amish students in this case.

3. Rather than heed *Mahmoud* and *Mirabelli*, the Second Circuit doubled down. The Second Circuit candidly recognized that the “burden” imposed by PHL 2164 is “serious” and “may weigh on [Petitioners] more heavily than the policy in *Mahmoud*.” App.23a & n.17. But, according to the Second Circuit, a “greater burden in degree is not necessarily the same burden in kind.” App.23a. The Second Circuit applied rational basis review because PHL 2164 did not impose the exact same “kind” of burden as in *Yoder*, *Mahmoud*, and *Mirabelli*. App.23a. Unlike the laws in *Yoder* and *Mahmoud*, the Second Circuit suggested, PHL 2164 “does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents’ faith, and does not enlist school officials to displace parental religious formation.” App.22a. Unlike the policies in *Mirabelli*, the Second Circuit suggested, PHL 2164 allegedly “conceals nothing from parents and displaces no part of their authority over a child’s religious upbringing.” App.23a-24a. Because this case does not involve the very same “kind” of burden on parental free exercise rights as in *Yoder*, *Mahmoud*, and *Mirabelli*, the Second Circuit held, those precedents “do[] not change the result.” App.4a, 23a.

That hair-splitting reading of *Yoder*, *Mahmoud*, and *Mirabelli* is wrong both factually and legally. Factually, PHL 2164 *does* “enlist school officials to displace parental religious formation” and “authority over a child’s religious upbringing.” App.22a, 24a. It demands that schools and school officials require

children to undergo permanent medical acts that are contrary to their parents' religious beliefs and the beliefs their parents want to instill in them. *See, e.g.*, N.Y. Pub. Health Law § 2164(6), (7)(a), (8-a), (11). In this case, Amish school officials who *themselves* share the religious objection to vaccination must enforce the religious violations—unless their community leaves the State to seek religious refuge elsewhere.

Legally, the Second Circuit again erroneously limited this Court's precedents to their facts. The Second Circuit essentially held that unless a law imposes the exact same burden on parental rights as in *Yoder*, *Mahmoud*, or *Mirabelli*, the law does not trigger strict scrutiny. But that would have the effect of limiting *Yoder*, *Mahmoud*, and *Mirabelli* to the particular circumstances presented in those cases, which *Mahmoud* instructs is wrong. *See supra* p.16. Because PHL 2164 “undermin[es]” the religious beliefs and practices that [Petitioner] parents wish to instill in their children,” *Mahmoud*, 606 U.S. at 565 (quoting *Yoder*, 406 U.S. at 218), it triggers strict scrutiny.

B. The Circuits Misinterpret *Mahmoud*, Even After *Mirabelli*.

The Second Circuit's repeated error in this case is emblematic of a broader trend among circuits that calls for this Court's intervention. This Court in *Mirabelli* rejected the Ninth Circuit's holding that *Mahmoud* “focused on uniquely coercive ‘curricular requirements.’” 607 U.S. at 495 (citation omitted). But even in *Mirabelli*'s wake, circuits continue to unduly cabin *Mahmoud*. The Second Circuit did so here. *See*

supra pp.19-20. And the Fourth Circuit has also done so. *See Perry v. Marteney*, 172 F.4th 315, 327 (4th Cir. 2026) (holding that strict scrutiny does not apply where the “law is a public health measure” rather than “an instrument of ideological indoctrination”).

The fact that a law “imposes a health-and-safety condition,” App.22a, or a “public health measure,” *Perry*, 172 F.4th at 327, does not mean that it cannot also burden a parent’s ability to direct the religious upbringing of her children. As this case illustrates, religious beliefs can and frequently do relate to health. A-76 (“If we honestly obey [our faith], then it will affect everything we do, yes even in the way we try to remain healt[h]y.”); *see Mirabelli*, 607 U.S. at 496 (“The parents who assert a free exercise claim have sincere religious beliefs about sex and gender.”). A burden on health-related religious beliefs and practices is still a burden on “religious beliefs and practices.” *Mahmoud*, 606 U.S. at 530.

The circuits continue to “significantly misunderst[and]” *Mahmoud*. *Mirabelli*, 607 U.S. at 501 (Barrett, J., concurring). And they now significantly misunderstand *Mirabelli* too. This Court should step in to remind the circuits that its precedents “cannot be breezily dismissed.” *Mahmoud*, 606 U.S. at 558.

II. The Court Should Clarify the Scope and Meaning of *Smith*, *Fulton*, and *Tandon*.

A. Circuits Disagree on Whether a Law That Prohibits Religious Exemptions But Allows Comparable Secular Exemptions Is Generally Applicable.

Certiorari is also warranted to address considerable “confusion about the meaning of *Smith*’s holding on exemptions from generally applicable laws.” *Fulton*, 593 U.S. at 609 (Alito, J., concurring in judgment). This case exemplifies that confusion and implicates acknowledged disagreement “over whether a mandate ... that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves.” *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari).

1. In this case, the Second Circuit subjected PHL 2164 to rational basis review even though it disallows religious exemptions but permits comparable secular exemptions and conduct. App.45a. The Third, Fourth, and Ninth Circuits have likewise applied rational basis review to laws that do not exempt religious conduct but permit comparable secular exemptions. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 172-73 (3d Cir. 2024) (vaccine requirement that prohibited religious exemptions but allowed medical exemptions would not

trigger strict scrutiny)¹³; *Perry*, 172 F.4th at 328 (vaccine requirement that prohibited religious exemptions for virtual school but allowed medical exemptions for in-person learning did not trigger strict scrutiny); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177-78 (9th Cir. 2021) (vaccine requirement that prohibited religious exemptions but allowed medical and other exemptions did not trigger strict scrutiny).

2. The First, Sixth, and Eleventh Circuits, as well as the Supreme Court of Iowa, have meanwhile held that a law disallowing religious exemptions but allowing comparable secular exemptions triggers strict scrutiny.

In *Lowe v. Mills*, the First Circuit held that a vaccine requirement that barred religious exemptions but allowed medical exemptions may trigger strict scrutiny. 68 F.4th 706, 717 (1st Cir. 2023). In *Monclova Christian Academy v. Toledo-Lucas County Health Department*, the Sixth Circuit held that a county resolution closing religious schools but permitting “gyms, tanning salons, office buildings,

¹³ *Spivack* appears contrary to (but does not purport to overrule) another case from the Third Circuit, authored by then-Judge Alito. See *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (“[T]he 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* and *Lukumi*.”). Other recent cases from the Third Circuit continue to follow then-Judge Alito’s guidance. See *Smith v. City of Atlantic City*, 138 F.4th 759, 770-72 (3d Cir. 2025).

and a large casino” to remain open triggered strict scrutiny. 984 F.3d 477, 479, 482 (6th Cir. 2020). In *Midrash Sephardi, Inc. v. Surfside*, the Eleventh Circuit held that a zoning ordinance that excluded churches and synagogues from the business district but allowed private clubs triggered strict scrutiny. 366 F.3d 1214, 1232-35 (11th Cir. 2004). And in *Mitchell County v. Zimmerman*, the Supreme Court of Iowa held that a county ordinance prohibiting Amish buggy wheels while allowing other tires with steel protrusions triggered strict scrutiny. 810 N.W.2d 1, 3-4 (Iowa 2012).¹⁴

In each of these jurisdictions, this case would have come out differently. PHL 2164’s “inclusion of the medical exemption undermines the State’s interests in the same way that a religious exemption would by introducing unvaccinated individuals.” *Lowe*, 68 F.4th at 715. Because New York nonetheless “chose to prohibit only a particular source of harm ... that had a religious origin,” *Zimmerman*, 810 N.W.2d at 16, these courts would require New York to justify that choice under the demanding rubric of strict scrutiny.

B. The Second Circuit Is Wrong.

The Free Exercise Clause bars the government from making any “law ... prohibiting the free exercise” of religion. U.S. Const. amend. I. This provision “does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds

¹⁴ *Midrash* and *Zimmerman* remain good law after *Fulton* and *Tandon*. See *Dr. A.*, 142 S. Ct. at 2570 n.1 (Thomas, J., dissenting from denial of certiorari).

to live out their faiths in daily life through ‘the performance of (or abstention from) physical acts.’” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (citation omitted).

In *Smith*, this Court held that certain laws that are both “neutral” and “generally applicable” are subject only to rational basis review—even if they burden free exercise. 494 U.S. at 881. This Court has since clarified that a law is not generally applicable “if it ‘prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way,’ or if it provides ‘a mechanism for individualized exemptions.’” *Kennedy*, 597 U.S. at 526 (citation omitted). PHL 2164 does both. It therefore triggers strict scrutiny, which it cannot satisfy. *See supra* p.18.

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

The State’s purported interest in eliminating the religious exemption to PHL 2164 was “the prevention of disease outbreaks.” Bill Jacket at 4A, N.Y. A.B. 2371 (2019), <https://tinyurl.com/bdd55vn9>. Nonvaccination poses the same claimed risk of transmission regardless whether it is motivated by religious or secular reasons. But New York has barred

religiously motivated nonvaccination of students while still permitting *secularly motivated* nonvaccination of students (and others). This treats at least three categories of “comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62; *see Calvary Chapel Dayton Valley v. Sisolak*, 591 U.S. 1042, 1056 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) (“The question is whether a single secular analog is not regulated.” (emphasis and citation omitted)).

First, the State allows noncompliant nonvaccination through its lax enforcement efforts. At least 66,000 students without a medical exemption remain unvaccinated, A-32 to 33, and New York has indicated that number may be as high as 97,900, A-574. Both figures dwarf the “tiny number of healthy Amish children” at issue here. A-41, 694; *see supra* pp.11-12. This rampant noncompliant nonvaccination does not “pose a lesser risk of transmission than [Petitioners’] proposed religious exercise.” *Tandon*, 593 U.S. at 63.

Rather than focus on bringing noncompliant students into compliance with PHL 2164, New York chose to scapegoat religious practice. New York’s decision to target a small group of religious adherents rather than the tens of thousands of willfully noncompliant students bespeaks the sort of religious hostility the First Amendment prohibits. *See Calvary Chapel*, 591 U.S. at 1059-60 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (putting religious practice “on worse footing”

than secular activity “discriminat[es] against religion”).

The Second Circuit all but ignored this comparable secular behavior, dismissing it in a footnote as “wholly speculative.” App.18a n.13. But Petitioners alleged in their complaint that 66,000 students remain noncompliant. A-32 to 33. The State did not dispute those allegations but rather indicated that the number is closer to 97,900. A-574. At least at this motion to dismiss stage, Petitioners’ factual allegations should have been “accept[ed] as true.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

Second, PHL 2164 permits nonvaccination of people other than students and in contexts outside of schools. PHL 2164 freely allows for nonvaccination of adults both in and out of schools, children who congregate outside of schools, and children who are homeschooled. Notably, PHL 2164 does not require vaccination of teachers, who gather and work closely with students in schools on a daily basis. Nor does it require vaccination of aides; parents dropping off their children; the mothers who rotate making and dropping off lunch for the students; the church leaders, including the bishops, ministers, and deacons who interact with the students; the caretaker assigned to the school building; friends and relatives who sign the guest book and sit in the back of the school; or any other adults who work in or with schools. *See supra* p.9. This nonvaccination is permitted even though it, like religiously motivated nonvaccination, presents the same claimed risk of transmission.

The Second Circuit again brushed off this secular analog as “wholly speculative.” App.18a n.13. But PHL 2164 is clear that it requires vaccination only of “child[ren]” and only in “school[s].” N.Y. Pub. Health Law § 2164(7)(a).

Third, PHL 2164 permits nonvaccination of students for medical reasons. But a student who is unvaccinated for medical reasons poses the same claimed risk of transmission as a student who is unvaccinated for religious reasons. *See Doe*, 19 F.4th at 1184 (Ikuta, J., dissenting) (“[R]eligious and secular [nonvaccination] pose identical risks ... because both result in the presence of unvaccinated students in the classroom, who could spread [disease] to other students and employees.”).

The Second Circuit’s contrary conclusion was wrong. The Second Circuit suggested that, unlike the religious exemption, the medical exemption “avoid[s] the health consequences” that may be associated with vaccination. App.16a. But that was not an interest the State “asserted” when repealing the religious exemption. *Fulton*, 593 U.S. at 541. The Second Circuit’s reasoning “incorrectly focuses on the reasons for the exemption rather than the asserted interest that justifies the mandate.” *Doe*, 19 F.4th at 1185 (Ikuta, J., dissenting).

The Second Circuit also suggested that the medical exemption is limited “in scope and duration.” App.16a. Even if true, States cannot “treat secular activity more favorably than religious activity simply because the disparate treatment is only temporary.” *Doe*, 19 F.4th at 1186. The fact remains that those who

are not vaccinated for medical reasons for a particular disease for a particular time still present the same claimed risk of transmission of that disease during that time as those who are not vaccinated for religious reasons.

Finally, the Second Circuit reasoned that “the unique attributes of Amish communities” do not lessen the riskiness of nonvaccination. App.17a. But Petitioners alleged that “none” of the recent measles cases involved any of the “tiny number of healthy Amish children” at issue in this case. A-41. Those factual allegations should have been accepted as true. *See supra* p.27.

2. PHL 2164 also falls outside *Smith* because it “‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” *Fulton*, 593 U.S. at 533 (citation omitted). Where the government has such a mechanism in place, it “may not refuse to extend [it] to cases of ‘religious hardship’ without compelling reason.” *Id.* at 535 (citation omitted).

New York is doing precisely that. PHL 2164 “incorporates a system of individual exemptions” in cases of medical hardship but refuses to extend an exemption to cases of religious hardship. *Id.* A child may receive a medical exemption if “any physician licensed to practice medicine in [New York] certifies that such immunization may be detrimental to [the] child’s health.” N.Y. Pub. Health Law § 2164(8). This individualized determination is performed, and medical exemptions are extended, on a student-by-

student basis. *See supra* pp.10-11. Yet New York refuses to extend exemptions for religious reasons.

The Second Circuit reasoned that PHL 2164's system of individualized exemptions does not trigger strict scrutiny because it is not "discretionary." App.19a. That reasoning is doubly wrong. As an initial matter, the scheme *does* confer significant discretion. *See* A-697 to 706. In any event, it is the "creation of a formal mechanism for granting exceptions [that] renders a policy not generally applicable," not how discretionary such exceptions are. *Fulton*, 593 U.S. at 537.

3. It makes sense that PHL 2164 falls outside *Smith*. PHL 2164 does not implicate *Smith*'s animating fear because PHL 2164 is amenable to religious exemptions. When applying rational basis review in *Smith*, this Court stressed that the controlled substances law at issue was not amenable to religious exemptions. To permit such exemptions, the Court feared, would "be courting anarchy" by "permit[ting] every citizen to become a law unto himself." 494 U.S. at 879, 888 (citation omitted); *see United States v. Lee*, 455 U.S. 252, 260 (1982) (denying religious exemption to Social Security taxes because "the tax system could not function" with religious exemptions).

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

vaccine requirements. Forty-five States (and the District of Columbia) presently offer such exemptions. And until recently, that number was even higher. *See supra* pp.8-9. New York itself accommodated religious practice without “courting anarchy” for more than 50 years. *Smith*, 494 U.S. at 888.

This nationwide experience with religious exemptions to school vaccine requirements, coupled with New York’s own history of administering such exemptions, indicates that such exemptions are not “infeasible or unworkable.” *Mahmoud*, 606 U.S. at 567. There is no reason why New York is uniquely incapable of providing such an exemption with respect to the “tiny number of healthy Amish children” at issue here. A-41.

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

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

In recent years, this Court has clarified *Smith*’s limits in several cases—including *Fulton*, *Tandon*, *Mahmoud*, *Mirabelli*, and others. Those cases should prevent the outcome here. *See supra* pp.16-20, 24-31. But if they do not, and if *Smith* allows New York to prohibit the exercise of the Amish faith within its borders, then this Court should reconsider *Smith*.

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

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

If *Smith* permits New York to effectively outlaw the practice of the Amish faith, then this case presents an excellent “occasion to reconsider” *Smith*. *Fulton*, 593 U.S. at 541.

IV. This Case Is an Excellent Vehicle to Address These Important Free Exercise Issues.

A. New York’s “discrimination against religion raises a serious First Amendment issue.” *Roman Cath. Diocese*, 592 U.S. at 29 (Kavanaugh, J., concurring).

The seriousness of this case for the Amish in New York cannot be overstated. As explained, the Amish have a profound and sincerely held religious objection to vaccination. *See supra* pp.7-8. But New York has prohibited them from exercising that religious belief in the State. Unable to practice their faith in New York, the Amish will have no choice but to pack up and seek religious refuge elsewhere. Such “[f]orced migration of [a] religious minorit[y] was an evil that lay at the heart of the Religion Clauses.” *Yoder*, 406 U.S. at 218 n.9.

This case also has serious implications for parental rights. This Court has long honored parents’ constitutional right to “direct the religious upbringing of their children,” *Yoder*, 406 U.S. at 233, in all manner of contexts, *see Mirabelli*, 607 U.S. at 496 (gender transitioning); *Mahmoud*, 606 U.S. at 547 (curricular requirements); *Espinoza v. Montana Dep’t of Revenue*, 591 U.S. 464, 486 (2020) (school choice); *Yoder*, 406 U.S. at 233 (school attendance). But the lower courts are not doing the same. *See supra* pp.20-21. If those courts are permitted to continue refusing to apply this Court’s precedents beyond their particular facts, the States will in turn be permitted to require parents to “endanger their own salvation and that of their children” in all manner of ways—here, in a permanent and irreversible way. *Yoder*, 406 U.S. at 209. This would render the Free Exercise Clause “an empty promise,” *Mahmoud*, 606 U.S. at 547 (citation omitted), and the profound consequences would be self-evident.

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

Earlier this month, Justices Alito and Gorsuch recognized the significance of the powerful free exercise problems posed by PHL 2164. *Doe v. McDonald*, 2026 WL 2639174, at *1 (U.S. Sept. 8, 2026). The importance of deciding those issues on the merits in this case is clear from the history of the case itself and the fact that Petitioners are once again seeking this Court’s intervention. Without that intervention, the Amish will be driven from New York.

B. This case is an ideal vehicle. Petitioners brought an as-applied challenge that was dismissed under Federal Rule of Civil Procedure 12(b)(6). *See supra* pp.13-14. There are no material factual disputes that could prevent this Court from reaching the questions presented. And those questions arise “in the ordinary course” of litigation, outside of any “crisis” or “emergency posture.” *Dr. A.*, 142 S. Ct. at 2571 (Thomas, J., dissenting from denial of certiorari).

This case also involves a particularly stark example of ahistorical disregard for free exercise. As noted, 45 States (and the District of Columbia) offer religious exemptions to their school vaccine requirements. *See supra* pp.8-9. So too did New York for more than 50 years. *See supra* p.10. New York’s status as an “extreme outlier,” *M.A.*, 53 F.4th at 41 (Park, J., concurring), is a “relatively recent development,” *Yoder*, 406 U.S. at 226. And it is a glaring red flag that New York’s disregard for religious exercise does not comport with “our society’s deep-rooted commitment to religious liberty.” *Fulton*, 593 U.S. at 554 (Alito, J., concurring in judgment).

C. The Court will hear argument this Term in *St. Mary Catholic Parish in Littleton v. Roy*, No. 25-581, which also raises free exercise issues. It is not uncommon for this Court to hear multiple cases involving the same constitutional right in a single Term, including when it comes to the Free Exercise Clause.¹⁵ That is unsurprising given the profound importance of that constitutional guarantee. *See supra* pp.32-34; *cf. Calvary Chapel*, 591 U.S. at 1056 (Kavanaugh, J., dissenting from denial of application for injunctive relief) (“Religion cases are among the most sensitive and challenging in American law.”).

¹⁵ This happened, for example, in the 2024 Term, *see Mahmoud*, 606 U.S. 522; *Okla. Statewide Charter Sch. Bd. v. Drummond ex rel. Oklahoma*, 605 U.S. 165, 166 (2025), and the 2021 Term, *see Carson v. Makin*, 596 U.S. 767 (2022); *Kennedy*, 597 U.S. 507.

Plenary review is warranted in this case even in light of *St. Mary* for three primary reasons.

First, this case gives the Court an opportunity to correct the circuits' persistent misapplication of *Mahmoud* and *Mirabelli* that *St. Mary* does not. *See supra* pp.15-21. That issue has profound independent importance. *See Mahmoud*, 606 U.S. at 546 (“[F]or many people of faith across the country, there are few religious acts more important than the religious education of their children.”). The circuits continue to misread this Court’s parental free exercise precedents—making them all but a nullity. *See supra* pp.20-21. *St. Mary* does not implicate that error. *See St. Mary Cath. Par. in Littleton v. Roy*, 154 F.4th 752, 764 (10th Cir. 2025) (not citing *Mahmoud*). But this case does. This Court should grant plenary review here to remind lower courts that *Yoder*, *Mahmoud*, and *Mirabelli* mean what they say.

Second, this case presents exceptionally good circumstances for addressing the undeniable confusion over *Smith*, *Fulton*, and *Tandon*. Both this case and *St. Mary* implicate that “widespread” confusion. *Dr. A.*, 142 S. Ct. at 2570 (Thomas, J., dissenting from denial of certiorari). But each does so in the context of a different state law with a different set of exemptions (and textual or practical carve-outs, *see supra* pp.26-28) as applied to different religious adherents. *See supra* p.13; *St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 978 (D. Colo. 2024).

This Court’s guidance on PHL 2164 in particular is sorely needed. This is not the only free exercise

challenge to PHL 2164 to have reached this Court. *See, e.g., Doe*, 2026 WL 2639174. PHL 2164 is an “extreme outlier.” *M.A.*, 53 F.4th at 41 (Park, J., concurring). Nearly all States accommodate religious objections to vaccination, and New York itself did so for more than half a century. *See supra* pp.8-10. It is therefore especially clear in this case that the religious exemption the Amish request is workable, and that the law they challenge is amenable to such exemptions. *See supra* pp.30-31. Yet New York and the Second Circuit continue to deny them that exemption. And by doing so, they guarantee one result: prohibition of the Amish faith in New York. This Court should step in before the Amish must flee the State to seek religious refuge elsewhere.

Third, and relatedly, this Court’s plenary review is necessary to finally bring an end to this case. This case is already on its second trip to the Court in as many years. After the Second Circuit made its initial error, this Court vacated and remanded. App.26a. On remand, the Second Circuit repeated its error. *See supra* pp.19-20. Petitioners are now back in this Court, again seeking protection against New York’s uneven application of PHL 2164.

The remand route has already failed once. Remanding a second time would only prolong the ultimate resolution of this case and the period of uncertainty the Amish must endure in the meantime. *See App.6a n.9* (reflecting New York’s position that each day each student attends school without the required vaccinations is a separate violation subject to a separate \$2,000 fine). This Court’s full consideration

on the merits is necessary to provide the guidance the Second Circuit has now twice demonstrated it needs.

Only this Court's intervention will prevent the Amish in New York from being "forced to migrate to some other and more tolerant region." *Yoder*, 406 U.S. at 218. This Court should grant certiorari, reverse the Second Circuit, and finally restore to the Amish in New York the free exercise rights they are constitutionally guaranteed.

CONCLUSION

The petition should be granted. At minimum, the petition should be held for *St. Mary*.

Respectfully submitted.

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SEPTEMBER 2026

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT,
FILED JUNE 30, 2026**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 24-681

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

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

Defendant.

August Term 2024
Argued: November 18, 2024
Decided: June 30, 2026

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

Appendix A

In 2019, New York repealed the religious beliefs exemption to its school immunization law. The law now applies to all students attending public, private, or parochial schools, except those who qualify for the law’s medical exemption. Plaintiffs—Amish parents, Amish community schools, and a representative of Amish schools in New York—sued under 42 U.S.C. § 1983, claiming that the law violates the Free Exercise Clause and their parental free-exercise rights under *Wisconsin v. Yoder*. The district court dismissed the complaint. We previously affirmed, but the Supreme Court vacated our judgment and remanded for reconsideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). Having reconsidered the case with the benefit of supplemental briefing, we again **AFFIRM**.

PER CURIAM:

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

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

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

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

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New York maintained both exemptions until 2019. During 2018 and 2019, the United States experienced the worst measles outbreak in over twenty-five years; New York was the epicenter. Most cases occurred in communities with clusters of unvaccinated individuals. Following that outbreak, the legislature repealed the religious beliefs exemption while retaining the medical exemption.

Plaintiffs-Appellants are three “Amish community schools”—Dygert Road School, Pleasant View School a/k/a Twin Mountain School, and Shady Lane School—that have been fined for failing to comply with New York’s immunization law; Ezra Wengerd, an elected representative of all Amish schools in New York; and Jonas Smucker and Joe Miller, board members of their children’s Amish community schools (collectively, “Plaintiffs”). The schools do not require a certificate of immunization to attend because the parents “have sincerely held religious beliefs which do not permit them to inject” their children with vaccines.⁴ J.A. 13.

Plaintiffs brought a claim pursuant to 42 U.S.C. § 1983 against Defendant-Appellee Dr. James V. McDonald, in his official capacity as the Commissioner of Health of the State of New York (“the State”), alleging that the immunization law infringes on their free exercise rights under the

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

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First and Fourteenth Amendments.⁵ The parents also argue that the law is unconstitutional because it impairs Amish parents' right to control the religious upbringing of their children as recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Plaintiffs moved to preliminarily enjoin the law's enforcement against them; the State moved to dismiss. Chief Judge Elizabeth A. Wolford granted the State's motion to dismiss, concluding that Plaintiffs failed to plausibly allege a constitutional violation. The court denied Plaintiffs' request for a preliminary injunction as moot. In March 2025, we affirmed.

The Supreme Court then granted certiorari, vacated our judgment, and remanded for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). *Miller v. McDonald*, 146 S. Ct. 879 (2025). We directed supplemental briefing and received Rule 28(j) letters addressing *Mahmoud*, the Supreme Court's subsequent decision in *Mirabelli v. Bonta*, 607 U.S. 492 (2026) (per curiam), and the Fourth Circuit's decision in *Perry v. Marteney*, 172 F.4th 315 (4th Cir. 2026). Having reconsidered Plaintiffs' parental free-exercise claim under *Yoder* in light of those authorities, we conclude that *Mahmoud* does not change the result and accordingly reaffirm the district court's judgment.

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

*Appendix A***BACKGROUND⁶**

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

The legislature repealed the religious beliefs exemption on June 13, 2019. The legislature recognized that “sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles.” N.Y. Bill Jacket at 4A, 2019 A.B. 2371, Ch. 35.⁷ Immunization rates in New York had plummeted “far below the [Centers for Disease Control and Prevention]’s goal of at least a 95% vaccination rate to maintain herd

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

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

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immunity.”⁸ *Id.* Data from 2013 and 2014 indicated that “at least 285 schools in New York” had “an immunization rate below 85%, including 170 schools below 70%.” *Id.*

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

In November and December 2021, New York’s Department of Health (“DOH”) audited Plaintiff schools’ compliance with the immunization law. In March 2022, DOH concluded that the schools had permitted some students to attend beyond § 2164’s fourteen-day grace period without a certificate of immunization, documentation of immunity, or a valid medical exemption. DOH therefore charged the schools with violating § 2164(7)(a). After an administrative hearing, the Commissioner of Health sustained the charges and imposed fines totaling \$118,000.⁹

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

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

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

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

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

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against them, a declaration of the law’s unconstitutionality as applied to them, and attorney’s fees.

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

The district court also dismissed the free exercise claim that was combined with the parents’ right “to regulate the upbringing and education of their children.” *Id.* at 218. The district court noted it was “not free to disregard Second Circuit precedent,” which does not apply a heightened standard to such “hybrid rights” claims. *Id.* This appeal followed.

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

*Appendix A***DISCUSSION**

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

I. Free Exercise Claims

The Free Exercise Clause of the First Amendment applies to the states pursuant to the Fourteenth Amendment, and provides that the states “shall make no law . . . prohibiting the free exercise” of religion. However, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, *J.*, concurring)).

A neutral and generally applicable law’s burden on religion is constitutional if the law passes the relatively low hurdle of rational basis review—that the state has chosen

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a means for addressing a legitimate government interest rationally related to achieving that goal. *See, e.g., Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (per curiam). If a law is not neutral or generally applicable, however, the government must demonstrate that the law satisfies strict scrutiny, which requires the law “to further ‘interests of the highest order’ by means `narrowly tailored in pursuit of those interests.’” *Tandon v. Newsom*, 593 U.S. 61, 64-65 (2021) (per curiam) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)). As the Supreme Court explained in *Smith*, requiring all laws that burden religion to satisfy the demands of strict scrutiny “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” including “compulsory vaccination laws.” 494 U.S. at 888-89. “[A]dopting such a system would be courting anarchy.” *Id.* at 888. The Supreme Court recently reaffirmed this general rule, explaining that “the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.” *Mahmoud*, 606 U.S. at 564.

Indeed, the Supreme Court and this Court have consistently viewed immunization laws with approval. In *Jacobson v. Massachusetts*, the Supreme Court held that a state had the power to mandate vaccination against smallpox for adults who were “fit subject[s] of vaccination.” 197 U.S. 11, 38-39 (1905). In *Zucht v. King*, the Supreme Court upheld a city ordinance requiring children to present a certificate of vaccination before attending school. 260 U.S. 174, 175-77 (1922). This Court has repeatedly

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

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

A. Neutrality

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

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

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the legislative record revealed “no evidence of hostility.” *Miller*, 720 F. Supp. 3d at 210-11. We agree.

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

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

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

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

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

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

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

B. General Applicability

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

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593 U.S. at 533 (alteration omitted) (quoting *Smith*, 494 U.S. at 884). Plaintiffs argue that both circumstances are present here.

1. Treatment of Comparable Secular Activity

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

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

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

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

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

Plaintiffs argue that analyzing risk in the aggregate, as we did in *We The Patriots*, misses the point: They note that the risk of transmission of the “tiny” Amish population, who live “in isolated, remote communities,” “pales in comparison” to the “sum total of medically

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unvaccinated children statewide.” Appellants’ Br. 34-35. To begin with, we have rejected the notion that the comparability analysis should be governed by a “one-to-one comparison.” *Hochul*, 17 F.4th at 287; *see We The Patriots*, 76 F.4th at 152-53 (explaining that the Supreme Court in *Tandon* compared “gatherings that were religious or secular, private or commercial” and that the focus is on “aggregations of individual behaviors, not individual behaviors themselves”). A closer look at the State’s interest in passing § 2164 exposes the flaw in Plaintiffs’ argument.

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

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

2. Individualized Exemptions

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

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

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

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

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

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

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

* * *

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

*Appendix A***II. The *Yoder/Mahmoud* Claim¹⁵**

Plaintiffs’ remaining argument is that, even if § 2164 is neutral and generally applicable, it burdens the parental free-exercise right recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and clarified in *Mahmoud v. Taylor*. We conclude that it does not.

In *Yoder*, the Supreme Court held that the Free Exercise Clause entitled Amish parents to an exemption from a compulsory-attendance law requiring their children to continue formal schooling beyond the eighth grade, where exposure to worldly influences would undermine the religious upbringing central to the Amish way of life. 406 U.S. at 218. *Mahmoud* rejected the view that *Yoder* is confined to its facts.¹⁶ Instead, it held that *Yoder* states a

15. Plaintiffs framed this argument as a “hybrid rights” claim combining free exercise with parental rights. This Court has declined to treat *Smith*’s reference to free-exercise claims brought “in conjunction with other constitutional protections” as an independent trigger for heightened scrutiny. *Smith*, 494 U.S. at 881; *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001). We therefore analyze Plaintiffs’ claim under the *Yoder* standard as clarified by *Mahmoud*.

16. Before *Mahmoud*, several courts—including the decision the Supreme Court reversed in *Mahmoud*—had read *Yoder* as limited to its facts. *See, e.g., Mahmoud v. McKnight*, 102 F.4th 191, 211 (4th Cir. 2024); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 250 (3d Cir. 2008) (per curiam); *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008). *Mahmoud* rejected that understanding. 606 U.S. at 558. Our analysis does not depend on confining *Yoder* to its facts; it turns on the character of the burden § 2164 imposes upon Plaintiffs.

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rule extending beyond compulsory-education laws: When a law imposes a burden “of the same character as that” in *Yoder*, “strict scrutiny is appropriate regardless of whether the law is neutral or generally applicable.” 606 U.S. at 565. A burden is “of the same character” when it “substantially interfer[es] with the religious development” of a child and “pose[s] ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.” *Id.* (quoting *Yoder*, 406 U.S. at 218).

Mahmoud applied that principle to a school board’s refusal to allow parents to opt their young children out of classroom instruction using storybooks that conveyed normative messages contrary to the parents’ religious beliefs. 606 U.S. at 550-54. The Court held that the policy, like the compulsory-attendance law in *Yoder*, threatened to interfere with the children’s religious development by subjecting them to schooling that pressured them toward views at odds with their parents’ faith. *See id.* at 553-54, 565.

Section 2164 is different. Even assuming that the statute burdens Plaintiffs’ religious exercise by conditioning in-person school attendance on vaccination, the burden does not operate in the way the burdens in *Yoder* and *Mahmoud* did. Section 2164 does not regulate what children are taught, does not require them to affirm any belief, does not expose them to state-selected instruction contrary to their parents’ faith, and does not enlist school officials to displace parental religious formation. It imposes a health-and-safety condition on in-person school attendance to reduce the spread of

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communicable disease. N.Y. Pub. Health Law § 2164(1), (2)(a), (7). The burden may be serious, but it is not the kind of state interference with a child’s religious development that triggered strict scrutiny in *Yoder* or *Mahmoud*.

Plaintiffs respond that § 2164 actually imposes a greater burden than the law in *Mahmoud* and therefore must impose a burden of the same character. In their view, vaccination is an affirmative and irreversible act, while unwanted classroom instruction can be resisted at home. But that argument measures the wrong thing. *Mahmoud* asks whether a burden is “of the same character” as the burden in *Yoder*, not whether it is more or less serious. 606 U.S. at 565. A greater burden in degree is not necessarily the same burden in kind.¹⁷

The Supreme Court’s decision in *Mirabelli* does not require a different result. There, the Court vacated a stay of an injunction against policies that allegedly barred schools from telling parents that their child was undergoing a gender transition at school unless the child consented. *Mirabelli*, 607 U.S. at 492-93, 498. *Mirabelli* confirms that *Mahmoud* reaches beyond curriculum. It remains a case about school officials concealing from parents a matter central to their child’s identity and upbringing, and thus displacing the parents’ role in it. Section 2164 does neither. It conceals nothing from parents

17. For example, a heavy fine is not of the same character as a sentence of imprisonment, even if the former burdens a defendant more than a brief jail term would. So too, § 2164 does not impose a burden of that character merely because it may weigh on Plaintiffs more heavily than the policy in *Mahmoud*.

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and displaces no part of their authority over a child's religious upbringing.

Our conclusion accords with the Fourth Circuit's post-*Mahmoud* decision in *Perry v. Marteney*, 172 F.4th 315 (4th Cir. 2026) (Wilkinson, J.). There, the court vacated a preliminary injunction imposing a religious exemption from West Virginia's school-vaccination law, which, like § 2164, contains a medical exemption but no religious exemption. *Perry*, 172 F.4th at 319. The Fourth Circuit distinguished compulsory vaccination from the educational burdens in *Yoder* and *Mahmoud* in terms directly applicable here:

The burden imposed by West Virginia's compulsory vaccination law is not remotely "of the same character" as those imposed in *Yoder* and *Mahmoud*. The law is a public health measure, not an instrument of ideological indoctrination. It does not expose children to values or beliefs that might be hostile to their parents' religious beliefs. It does not require that school instruction extoll the virtues of vaccines. All the law requires is that, in the interest of protecting others, children get themselves vaccinated before attending school. The need for some to protect the health and well-being of all was not present in *Yoder* or *Mahmoud*.

Id. at 327 (citation omitted); cf. *Kondilis v. City of Chicago*, 160 F.4th 866, 871 n.4 (7th Cir. 2025) (concluding,

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after *Mahmoud*, that a COVID-19 vaccination-status reporting requirement did not impose a burden of the same character as *Yoder* or *Mahmoud*). Although *Perry* arose in a different educational setting, its reasoning on the character of a compulsory vaccination requirement is persuasive here.¹⁸

Therefore, we conclude that the district court properly dismissed Plaintiffs' *Yoder* claim.

CONCLUSION

We have reconsidered our decision in light of *Mahmoud*, the parties' supplemental briefs, and their Rule 28(j) submissions, and we adhere to our conclusion. We have also reconsidered Plaintiffs' remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

18. Other district courts have reached similar conclusions in post-*Mahmoud* challenges to school-vaccination requirements. See, e.g., *Grimsby v. Pan*, No. 5:25-cv-01575, 2025 WL 2829502, at *6 (C.D. Cal. Aug. 29, 2025), *appeal docketed*, No. 25-6100 (9th Cir. Sept. 29, 2025) (concluding that a school vaccine mandate is “not comparable to the kind of educational instruction that was directly contrary to the religious teachings of the *Mahmoud* plaintiffs”).

**APPENDIX B — OPINION OF THE UNITED STATES
SUPREME COURT, DATED DECEMBER 8, 2025**

SUPREME COURT OF THE UNITED STATES

No. 25-133

JOSEPH MILLER, *et al.*,

Petitioners,

v.

JAMES V. MCDONALD, COMMISSIONER, NEW
YORK STATE DEPARTMENT OF HEALTH, *et al.*,

December 8, 2025

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522, 145 S.Ct. 2332, 222 L.Ed.2d 695 (2025).

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

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Docket No. 24-681

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee,

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

*Defendant.**

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

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

PER CURIAM:

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

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

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

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

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

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

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

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

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

*Appendix C***BACKGROUND⁶**

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

The legislature repealed the religious beliefs exemption on June 13, 2019. The legislature recognized that “sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles.” N.Y. Bill Jacket at 4A, 2019 A.B. 2371, Ch. 35.⁷ Immunization rates in New York had plummeted “far below the [Centers for Disease Control and Prevention]’s

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

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

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

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

In November and December 2021, New York’s Department of Health (“DOH”) audited Plaintiff schools’ compliance with the immunization law. In March 2022, the DOH concluded that students went to those schools for more than fourteen days during the 2021-2022 school year without a certificate of immunization, documentation of immunity, or a signed medical exemption. It therefore charged the schools with violating § 2164(7)(a). After an administrative hearing, the Commissioner of Health sustained the charges and imposed fines totaling \$118,000.⁹

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

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

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

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

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

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

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

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

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

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

DISCUSSION

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

I. Free Exercise Claims

The Free Exercise Clause of the First Amendment applies to the states pursuant to the Fourteenth Amendment, and provides that the states “shall make no law . . . prohibiting the free exercise” of religion. However, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, *J.*, concurring)).

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

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

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

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

A. Neutrality

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

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

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

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

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

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

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

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

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

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

B. General Applicability

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

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

1. Treatment of Comparable Secular Activity

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

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

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

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

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

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

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

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

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

2. Individualized Exemptions

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

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

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

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

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

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

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

* * *

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

*Appendix C***II. Hybrid Rights Claims**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK

1:23-CV-00484 EAW

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

Plaintiffs,

v.

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

Defendants.

*Appendix D***DECISION AND ORDER****INTRODUCTION**

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

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

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

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

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

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

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

BACKGROUND**I. Factual Background****A. New York's Mandatory Vaccination Laws**

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

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

Prior to being repealed, PHL § 2164(9) provided: "This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school." As discussed above, PHL § 2164(9) was repealed effective June 13, 2019, in response to a nationwide measles outbreak. *See* Act of June 13, 2019, ch. 35, 2019 N.Y. Laws 153, 153-54; *see also* New York Bill Jacket, 2019 A.B. 2371, Ch. 35 ("According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as

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measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity.”).

The current version of PHL § 2164 contains a single exemption: “If any physician licensed to practice medicine in [New York] certifies that such immunization may be detrimental to a child’s health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child’s health.” PHL § 2164(8). Regulations adopted by the NYSDOH further provide: “**May be detrimental to the child’s health** means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP [Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care.” 10 N.Y. Comp. Codes R. & Regs. (“NYCRR”) § 66-1.1 (emphasis in original).

NYSDOH’s regulations additionally provide:

A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with one of the following:

(a) A certificate of immunization, as described in section 66-1.6 of this Subpart, from a health care practitioner or from NYSIIS or the CIR,

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documenting that the child has been fully immunized according to the requirements of section 66-1.1(f) of this Subpart.

(b) Documentation that the child is in process of receiving immunizations as defined in section 66-1.1(j) of this Subpart. A principal or person in charge of a school shall not refuse to admit a child to school, based on immunization requirements, if that child is in process.

(c) A signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.

Id. § 66-1.3.

B. Amish Education and Opposition to Vaccines

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

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

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

C. State Administrative Proceedings Against the Plaintiff Schools

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

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

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

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

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

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

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

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

II. Procedural Background

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

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

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

DISCUSSION**I. Defendants' Motion to Dismiss**

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

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

*Appendix D***A. Legal Standard—Subject Matter Jurisdiction**

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Legal Standard—Failure to State a Claim

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

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

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

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

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

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

1. PHL § 2164 is Subject to Rational Basis Review

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

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

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

Initially, the Court notes that the Second Circuit held in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), that “mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause” and that New York had—at that point in time—“go[ne] beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs.” *Id.* at 543; *see also We the Patriots*, 76 F.4th at 150 (“[T]he government may constitutionally elect to accommodate religious believers but is not constitutionally *required* to do so.” (emphasis in original)). *Phillips*, like all Second Circuit precedent, is binding on this Court. Accordingly, the crux of the matter before the Court is whether the *repeal* of the religious exemption, while leaving in place the medical exemption, violated the Free Exercise Clause. The Court’s analysis of that question is dictated by the decision in *We the Patriots*, wherein the Second Circuit was called upon to determine whether Connecticut’s mandatory vaccination statute—which, like PHL § 2164, had been recently amended to repeal an exemption based on religious objections, but continued to allow for medical exemptions—violated the First Amendment’s Free Exercise Clause. *See* 76 F.4th at 144-57.³

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

*Appendix D***a. Neutrality**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Appendix D***b. General Applicability**

The Court also finds that PHL is generally applicable. A law is not generally applicable if it “invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton*, 593 U.S. at 533 (alteration and quotations omitted). “A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* at 534. Plaintiffs allege that both of these conditions are satisfied here.⁵

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

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

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

PHL § 2164(8) provides: “If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child’s health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child’s health.” (emphasis added). This exemption, like the exemption at issue in *We the Patriots*, is phrased in mandatory terms and applies to an objectively defined group of people.⁶ Accordingly, it is not—under binding Second Circuit case law—an individualized exemption triggering strict scrutiny.

6. As previously explained, New York regulations define “may be detrimental to the child’s health” in objective terms as meaning that “a physician has determined that a child has a medically contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.” 10 NYCRR § 66-1.1(m).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Implication of Other Constitutional Rights

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

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

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

2. PHL § 2164 Satisfies Rational Basis Review

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

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

*Appendix D***II. Plaintiffs' Motion for a Preliminary Injunction**

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

CONCLUSION

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

SO ORDERED.

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

Dated: March 11, 2024
Rochester, New York

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

STATE OF NEW YORK : DEPARTMENT OF HEALTH

MISC-22-019

In the Matter of

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

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

Respondents.

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

Filed December 15, 2022

ORDER

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

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

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

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

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

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

1. ALJ's Report at 14 and 15.

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

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

2. Laws of 2019, Chapter 35.

3. The Court found that the amendment, which also narrowed the medical exemption was "a rule of general applicability driven by public health concerns and not tainted by hostility toward religion. . . . It is well-settled that the right of free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)." *Id.* at 84.

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

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

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

IT IS HEREBY ORDERED:

1. Charge 1 against Dygert Road School is SUSTAINED.
2. A civil penalty of \$52,000 is imposed against Dygert Road School.
3. Charge 1 against Pleasant View/Twin Mountain School is SUSTAINED.

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4. A civil penalty of \$46,000 is imposed against Pleasant View/Twin Mountain School.
5. Charge 1 against Shady Lane School is SUSTAINED.
6. A civil penalty of \$20,000 is imposed against Shady Lane School.
7. This Order shall be effective upon service on the Respondents by personal service or by registered or certified mail as required under PHL §12-a(4).

Dated: Albany, New York

Dec. 15, 2022

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

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

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

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

STATE OF NEW YORK
DEPARTMENT OF HEALTH

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

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

Respondents,

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

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

Hearing before: Natalie Bordeaux
Administrative Law Judge

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

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Hearing date: May 2, 2022

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

Dygert Road School
Twin Mountain School
Shady Lane School

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

Report and Recommendation

JURISDICTION

By notices of hearing and statements of charges dated March 7, 2022, the New York State Department of Health (the Department) advised Dygert Road School, Twin Mountain School¹, and Shady Lane School (the Respondents) that hearings would be held pursuant to Public Health Law (PHL) § 12-a on charges that they admitted students, and continued to allow such students to attend their schools for more than fourteen days without

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

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

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

HEARING RECORD

Department witnesses: James Brewster, Public Health
Field Services
Representative, Bureau of
Immunization
Barbara Joyce, Regional
Coordinator, Bureau of
Immunization

Department exhibits: 1-12

Respondent exhibits: A

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

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SUMMARY OF FACTS

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

Dygert Road School

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

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

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

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

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Shady Lane School

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

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

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

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

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

Twin Mountain School (“Pleasant View School” per Department records)

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

- A list of all students that includes the grade in which they are enrolled.
- A list of susceptible students who may require exclusion in the event of a disease outbreak (also specified in PHL Section 2164).
- The immunization records for all of the susceptible students.

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

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

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

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

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

ISSUES

Did the Respondents violate school attendance immunization requirements?

If so, what penalties should be imposed?

APPLICABLE LAW

Every person in parental relation to a child in the State of New York shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B which meets the standards approved by the United States public health service for such biological products, and which is approved by the Department under such conditions as may be specified by the public health council. PHL § 2164(2)(a).

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

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requirements of 10 NYCRR § 66-1.1(f); (b) documentation that the child is in process of receiving immunizations; or (c) a signed, completed medical exemption form approved by the Department from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. PHL § 2164(7)(a); 10 NYCRR § 66-1.3. Effective June 13, 2019, there is no longer a religious exemption to the requirement that children be vaccinated against the measles and other diseases to attend either public, private or parochial school (for students in prekindergarten through 12th grade), or child day care settings.

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

Civil penalty determination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- There is cause to question the reasonableness of the Department's communication with the Respondents, beginning with whether or when the Amish and Mennonite communities were informed that religious exemptions no longer applied to school immunization requirements and that school age children could not continue attending school without immunizations, proof of natural immunity (when applicable), or documented medical exemptions.
- Even when presented with information showing that certain students had begun obtaining immunizations (Exhibit 8), the Department did not consider those students as having vaccinations in progress and request information regarding those students' follow-up appointments for remaining doses. 10 NYCRR § 66-1.3(b); School Vaccine Requirements FAQ issued June 18, 2019. Instead, those students were simply deemed not compliant with requirements. (Exhibits 3, 8.)
- Despite explicit instructions regarding students deemed susceptible in the event of a disease outbreak in pre-audit letters and in applicable law (those medically exempted and those whose vaccinations are still in progress), the

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

- The Respondents were deprived of a reasonable opportunity to understand what the November 23, 2021 audits would be assessing (all immunization records rather than information regarding susceptible students.)
- The Department's determination that only fully immunized students would be deemed compliant with immunization requirements is a clear departure from applicable law.
- The Respondents were not presented with a reasonable opportunity to show compliance with requirements since the Department required submission of information by email only.
- The evidence fails to support the Department's representation that a stipulation and order accompanied the hearing notices and statements of charges. Mailing affidavits at the hearing specifically attest to including stipulations in those notices, but the Department did not produce the stipulations.
- The Department's calculations purporting to justify its proposed fine were poorly supported by specific facts, relying instead largely on assumptions and estimates in order to arrive at

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

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

RECOMMENDATION:

1. Charge 1 should be sustained with respect to Dygert Road School.
2. No penalty should be imposed against Dygert Road School.
3. Charge 1 should be sustained with respect to Twin Mountain School.
4. No penalty should be imposed against Twin Mountain School.
5. Charge 1 should be sustained with respect to Shady Lane School.

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

DATED: May 25, 2022
Menands, New York

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

**APPENDIX G — STATUTORY PROVISION
INVOLVED**

N.Y. Pub. Health Law § 2164

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

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

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

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

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

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title fifteen-A of article five of the general obligations law¹ as a person in parental relation to the child.

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

- 2. a.** Every person in parental relation to a child in this state shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, *Haemophilus influenzae* type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B, in accordance with regulations issued by the commissioner, utilizing generally accepted medical standards and taking into consideration recommendations of the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, the American College of Physicians, the Advisory Committee on Immunization Practices, and/or other similar nationally or internationally recognized scientific organizations.

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

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

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and tetanus toxoids, and an acellular pertussis vaccine, in accordance with regulations issued by the commissioner, utilizing generally accepted medical standards and taking into consideration recommendations of the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, the American College of Physicians, the Advisory Committee on Immunization Practices, and/or other similar nationally or internationally recognized scientific organizations.

c. Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease in accordance with regulations issued by the commissioner, utilizing generally accepted medical standards and taking into consideration recommendations of the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, the American College of Physicians, the Advisory Committee on Immunization Practices, and/or other similar nationally or internationally recognized scientific organizations.

3. The person in parental relation to any such child who has not previously received such immunization shall present

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the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.

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

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

6. In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to

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have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a consent by such person and it shall also state that such person need not execute such consent if subdivision eight of this section applies to such child.

7. (a) No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, *Haemophilus influenzae* type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or

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from another country and can show a good faith effort to get the necessary certification or other evidence of immunization.

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

8. If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health.

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

a. forward a report of such exclusion and the name and address of such child to the local health authority and to the person in parental relation to the child together with a notification of the responsibility of

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such person under subdivision two of this section and a form of consent as prescribed by regulation of the commissioner, and

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

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

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

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

Credits

Added L. 1966, c. 994, § 1. Amended L. 1968, c. 1094, § 4; L. 1970, c. 265, § 1; L. 1971, c. 974, § 1; L. 1972, c. 145, § 1; L. 1975, c. 633, §§ 1, 2; L. 1976, c. 926, §§ 1, 2; L. 1978,

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c. 550, § 37; L. 1979, c. 443, §§ 2, 3; L. 1981, c. 116, § 1; L. 1989, c. 405, § 2; L. 1989, c. 538, §§ 2, 3; L. 1990, c. 634, § 1; L. 1994, c. 521, §§ 1 to 8; L. 1999, c. 416, §§ 1 to 3, eff. Aug. 31, 1999; L. 2004, c. 157, § 1, eff. Jan. 1, 2005; L. 2004, c. 207, §§ 1 to 3, eff. July 20, 2004; L. 2004, c. 430, § 1, eff. Jan. 1, 2005; L. 2005, c. 119, § 3, eff. June 30, 2005; L. 2006, c. 189, § 1, eff. July 26, 2006; L. 2006, c. 506, § 1, eff. Sept. 1, 2007; L. 2015, c. 401, § 1, eff. Oct. 26, 2015; L. 2019, c. 35, §§ 1, 2, eff. June 13, 2019; L. 2026, c. 115, § 1, eff. May 15, 2026.

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N.Y. Pub. Health Law § 2164 (2018)

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

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

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

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

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

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title fifteen-A of article five of the general obligations law¹ as a person in parental relation to the child.

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

2. **a.** Every person in parental relation to a child in this state shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, *Haemophilus influenzae* type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

b. Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

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

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

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

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

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

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

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consent by such person and it shall also state that such person need not execute such consent if subdivision eight or nine of this section apply to such child.

7. (a) No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, *Haemophilus influenzae* type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization.

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

8. If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall

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be inapplicable until such immunization is found no longer to be detrimental to the child's health.

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

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

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

Appendix G

amount of state aid to which the local health authority would otherwise be entitled.

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

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

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

Credits

Added L. 1966, c. 994, § 1. Amended L. 1968, c. 1094, § 4; L. 1970, c. 265, § 1; L. 1971, c. 974, § 1; L. 1972, c. 145, § 1; L. 1975, c. 633, §§ 1, 2; L. 1976, c. 926, §§ 1, 2; L. 1978, c. 550, § 37; L. 1979, c. 443, §§ 2, 3; L. 1981, c. 116, § 1; L. 1989, c. 405, § 2; L. 1989, c. 538, §§ 2, 3; L. 1990, c. 634, § 1; L. 1994, c. 521, §§ 1 to 8; L. 1999, c. 416, §§ 1 to 3, eff. Aug. 31, 1999; L. 2004, c. 157, § 1, eff. Jan. 1, 2005; L. 2004, c. 207, §§ 1 to 3, eff. July 20, 2004; L. 2004, c. 430, § 1, eff. Jan. 1, 2005; L. 2005, c. 119, § 3, eff. June 30, 2005; L. 2006, c. 189, § 1, eff. July 26, 2006; L. 2006, c. 506, § 1, eff. Sept. 1, 2007; L. 2015, c. 401, § 1, eff. Oct. 26, 2015.