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DENISE A. HARTMAN
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EMILY LUSIGNAN
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JOANNE LOCKE
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August 23, 2019

Helena Lynch, Esq.
NYS Office of the Attorney General
The Capitol
Albany, New York 12224-0341

Re: F.F. on behalf of her minor children, et al. v State of New York, et al.
Index No. 4108-19

Dear Counselor:

Enclosed is the executed Decision and Order with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision and order and the original supporting papers have been sent to the County Clerk for placement in the file.

Very truly yours,

Joanne Locke

Joanne Locke
Secretary to Judge

Enclosure
cc: Michael H. Sussman, Esq.
Sussman & Associates
PO Box 1005
Goshen, New York 10924

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

F.F. on behalf of her minor children, Y.F., E.F. Y.F.; M. & T. M. on behalf of their minor children, C.M. and B.M.; E.W., on behalf of his minor son, D.W.; Rabbi M., in behalf of his minor children I.F.M., M.M. & C.M.; M.H. on behalf of W.G.; C.O., on behalf of her minor children, C.O., M.O., Z.O. and Y.O.; Y. & M. on behalf of their minor children M.G., P.G., M.G., S.G., F.G. and C.G.; J.M. on behalf of his minor children C.D.M. & M.Y.M.; J.E., on behalf of his minor children, P.E., M.E., S.E., D.E., F.E. and E.E.; C.B. & D.B., on behalf of their minor children, M.M.B. and R.A.B.; T.F., on behalf of her minor children, E.F., H.F. and D.F.; L.C., on behalf of her minor child, M.C.; R.K., on behalf of her minor child, M.K.; R.S. & D.S. on behalf of their minor children, E.S. and S.S.; J.M. on behalf of her minor children, S.M. & A.M.; F.H., on behalf of her minor children, A.H., H.H. and A.H.; M.E. on behalf of his minor children, M.E. & P.E.; D.B., on behalf of her minor children, W.B., L.B. & L.B.; R.B., on behalf of her minor child, J.B.; L.R., on behalf of her minor child, E.R.; G.F., on behalf of his minor children, C.F. & A.F.; D.A., on behalf of her minor children, A.A. & A.A.; T.R., on behalf of her minor children, S.R. and F.M.; B.N., on behalf of her minor children, A.N., J.N. & M.N.; M.K., on behalf of her minor child, A.K.; L.B., on behalf of her minor children, B.B., A.B. & S.B.; A.V.M., on behalf of her minor children, B.M. and G.M.; N.L., on behalf of her minor children, H.L. and G.L.; L.G., on behalf of her minor children, M.C. and C.C.; L.L., on behalf of her minor child, B.L.; C.A., on behalf of her minor children, A.A., Y.M.A., Y.A. and M.A.;

DECISION AND ORDER

Index No. 4108-19

children, N.K., S.K., R.K. and L.K.; W.E. and C.E., on behalf of their minor Child, A.E.; R.J. & A.J., on behalf of their minor Child, A.J.; S.Y. and Y.B., on behalf of their minor children, I.B. and J.B.; T.H., on behalf of her minor child, J.H.; K.T., on behalf of her minor children, A.J.T. & A.J.T.; L.M., on behalf of her minor child, M.M., D.Y.B., on behalf of her minor child, S.B.; A.M., on behalf of her minor child, G.M.; F.M., on behalf of his three minor children, A.M.M., D.M.M. and K.M.M.; H.M., on behalf of her minor child, R.M.; M.T. & R.T., on behalf of their minor child R.T.; E.H., on behalf of her minor children M.M.S.N. and L.Y.N., Rabbi M.B. on behalf of his minor child, S.B. and S.L. & J.F. on behalf of their minor child C.L., A-M.P., on behalf of her minor child, M.P.; R.L., on behalf of her minor children, G.L., A.L. and M.L.; N.B., on behalf of her minor child, M.A.L.; B.C., on behalf of her minor child, E.H. and J.S. and W.C., on behalf of their minor children, M.C. and N.C., S.L., on behalf of his three minor children, A.L., A.L. and A.L., L. M., on behalf of her two minor children, M.M. and M.M., N.H., on behalf of his three minor children, J.H., S.H. and A.H., on their own behalves and on behalf of thousands of similarly-situated parents and children in the State of New York,

Plaintiffs,

-against-

STATE OF NEW YORK; ANDREW CUOMO, GOVERNOR; LETITIA JAMES, ATTORNEY GENERAL,

Defendants.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

SUSSMAN & ASSOCIATES
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LETITIA JAMES
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Albany, New York 12224-0341

Hartman, J.

Plaintiffs commenced this action on or about July 10, 2019, to challenge the constitutionality and legality of legislation, enacted June 13, 2019, which repealed New York's Public Health Law provision allowing religious exemptions from mandatory vaccinations for children who attend most public and private schools in the State of New York. The named plaintiffs are parents of diverse religious beliefs who had obtained a religious exemption or who had qualified for a religious exemption from mandatory vaccinations. Seeking to litigate the case as a class action, plaintiffs claim that New York's repeal of the religious exemption was based on religious discrimination and violates their rights to free exercise of religion under the First Amendment of the United States Constitution and Article 1, § 3 of the New York Constitution. They also claim that the repeal violates the Equal Protection Clause of the United States Constitution and forces plaintiffs to engage in compelled speech or violate New York's compulsory education laws.

On July 12, 2019, Supreme Court (Mackey, J.) denied plaintiffs' request for a temporary restraining order. Plaintiffs now seek a preliminary injunction enjoining enforcement of the legislative repeal of the religious exemption. Because plaintiffs have not demonstrated a likelihood of success on the merits, the Court denies the request for a preliminary injunction; the legislative repeal of the religious exemption remains in effect.

Background

New York's Public Health Law mandates that every parent or guardian of a child "shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diptheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B," which meet federal and state standards and specifications (Public Health § 2164 [2] [a]). The statute provides generally that a child may not be admitted or attend a "school" in this State without a certificate from a health care provider or other proof that the child has received the mandated vaccines (Public Health § 2164 [5], [7]). For purposes of the mandatory vaccination statute, "school" is defined broadly to mean "any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school" (Public Health Law § 2164 [1] [a]). Before June 13, 2019, New York's Public Health Law provided for two types of exemptions: a medical exemption, where a physician certifies that immunization "may be detrimental to a child's health" (Public Health Law § 2164 [8]); and a non-medical, religious exemption, where parents or guardians "hold genuine and sincere religious beliefs which are contrary" to the required vaccinations (Public Health Law § 2164 [9]).

On June 13, 2019, the Legislature repealed the provision authorizing non-medical, religious exemptions (L 2019, ch 35, § 1). The Introducer's Memorandum in Support of Senate Bill 2994A explained the public health concerns underlying the legislation:

> The United States is currently experiencing the worst outbreak of measles since 1994, a disease that, in a major health victory, officials declared eliminated from the United States in 2000. 880 cases of measles have been confirmed nationwide so far in 2019.
>
> Outbreaks in New York have been the primary driver of this epidemic. As of May 20, 2019, there have been at least 810 confirmed cases of measles in New York State since October 2018. The outbreaks have largely been concentrated in communities in Brooklyn and Rockland County with precipitously low immunization rates, some as low as 70 percent.

The Introducer's Memorandum cited California's recent experience when it repealed all non-medical exemptions to that State's vaccination requirements after an outbreak of measles at Disneyland in 2014. After the repeal, vaccination rates improved particularly in schools with the lowest rates of compliance, and overall vaccination rates "improved demonstrably," up nearly five percentage points to just over 95% from 2014-2015 to 2017-2018. While acknowledging that "freedom of religion is a founding tenet of this nation," the Introducer's Memorandum noted "longstanding precedent establishing that one's right to free religious expression does not include the right to endanger the health of the community, one's children, or the children of others."

Similarly, the Memorandum in Support of A2371A, the parallel Assembly bill, described the legislation's public health objective:

> According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity.

After floor debates in both the Senate and the Assembly, the respective legislative bodies voted to repeal the religious exemption in subdivision 9 of Public Health Law. On June 13, 2019, Governor Cuomo signed the repeal into law. He explained in a press release, "While I understand and respect freedom of religion, our first job is to protect the public health and by signing this measure into law, we will help prevent further transmissions and stop this [measles] outbreak right in its tracks."

Under the current statute and Department of Health guidance, children entering or attending school this fall who do not have required immunizations (or valid medical exemptions) must receive their first dose of mandated vaccinations, or overdue follow-up doses, within 14 days after their first day of school. Within 30 days after the first day of school, parents or guardians of such children must show that they have scheduled appointments for their

children's next required doses in accordance with the Advisory Committee on Immunization Practice schedule (*see* Public Health Law § 2164 [7] [a]).

Procedural History

Plaintiffs commenced this nominal class action on or about July 10, 2019 claiming that the repeal of the religious exemption violates their constitutional rights. On or about the same date, plaintiffs sought a temporary restraining order and preliminary injunction enjoining enforcement of the repeal. By Decision and Order dated July 12, 2019, another justice of this Court (Mackey, J.) denied the application for a temporary restraining order, finding that plaintiffs had not shown a likelihood of success on the merits. The motion for a preliminary injunction has now been fully submitted and the Court has heard oral argument of the motion.

The complaint alleges that plaintiffs and the class they represent hold genuine and sincere religious beliefs against vaccinating their children. Some plaintiffs are affiliated with various organized religions. Others are not affiliated with any organized religion. Their children, unvaccinated under a religious exemption, have heretofore attended public or private schools or nursery programs. Others were expected to attend such schools and nursery programs. But, now that the religious exemption is repealed, they will not be able to attend unvaccinated.

The complaint further alleges that the Legislature acted with religious animus when enacting the repeal, notwithstanding the official statements in the memoranda supporting the legislation. The complaint alleges that "[r]ather than being motivated by any serious concern for public health and despite the rhetoric of the Governor, in the public debate and discourse which preceded the passage of this repeal legislation, numerous leading proponents of the legislation expressed active hostility toward religious exemption and ridiculed and scorned those who held such exemptions." They cite as examples the statement of the Senate majority leader that "We've chosen science over rhetoric," and other legislators who referred to those who claim religious exemptions as selfish and mistaken in their views of the science regarding such vaccines. They also cite the statement of a bill sponsor that, "[w]hether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do"; and of another legislator calling many people's professed religious rationale for the exemption "garbage." And they cite numerous statements by legislators who have expressed their views that the religious exemption has become in effect a personal belief exemption influenced largely by disagreement with the prevailing scientific and medical views underlying mandatory vaccination.

Plaintiffs point out that neither legislative body held public hearings before enacting the repeal legislation and that, to the extent that the

legislation was responsive to recent measles outbreaks, the legislature did not establish a factual basis for repealing the religious exemption when other measures are available to protect the public health. Plaintiffs posit that the government's response to the 2018-2019 measles outbreak in Rockland County demonstrates that less restrictive means are available to protect the public health, if and when outbreaks occur.

Plaintiffs' counsel submitted 330 affidavits from plaintiffs and other parents around the State describing the nature of their religious opposition to vaccinations, the hardships imposed on them and their children if enforcement of the legislative repeal is not enjoined, and the hostility they have experienced from legislators and their communities resulting from the assertion of a religious exemption from vaccination. Many parents expressed heartfelt concern that if the repeal is not enjoined they will be faced with the choice of pulling their children out of the schools they attend or plan to attend and provide home-schooling – requiring them to give up their own careers or employment to educate their children at home and causing their children to lose the opportunities for formal instruction and interaction with their peers. Or, they claim, they will be forced to move their families to another state that still recognizes religious or personal belief exemptions from vaccination requirements.

In addition, plaintiffs' counsel submitted affidavits from more than a dozen parents explaining the source of their religious objections to mandated vaccinations to demonstrate the bona fides of such objections. Some parents ground their beliefs in the Jewish, Christian, and Muslim texts. Others attributed their objections to the teachings of Buddhism and Hinduism.

The State defendants have opposed the motion for a preliminary injunction. They argue that the repeal of the religious exemption was prompted by the measles outbreaks in New York and across the Nation in 2018 and 2019. They cite statistics from the sponsors' memoranda regarding recent measles outbreaks, 25 years after the disease was thought to have been eradicated in this country: 880 cases of measles confirmed nationwide in the first five of six months of 2019, with outbreaks in New York being the primary driver of this epidemic with 810 confirmed cases between October 2018 and May 2019. They also cite data from 2013-2014 showing that 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 community immunity.

The State defendants' opposition includes an affidavit from Dr. Debra Blog, Director of Epidemiology in the New York State Health Department. She explains that measles, an airborne viral disease, is one of the most contagious diseases known, with 90% of susceptible people developing the disease

following exposure. She states that the disease is characterized by a high fever, followed by cough, coryza, and/or conjunctivitis and, two to four days later, a red rash that lasts five to six days. The disease is contagious from four days before through four days after the rash appears. The disease can cause serious complications, particularly for those under five years of age and adults over 20 years of age. About one child in 1,000 will develop encephalitis, which can result in seizures, hearing loss, or permanent disability. About one in 20 children will development pneumonia. She avers that, for every 1,000 cases of measles, one or two children will die despite medical care. Measles can also cause premature birth, low birth weight, and miscarriage.

Dr. Blog describes the extent of the recent measles outbreak in New York, the first in 25 years since the disease was thought to have been eliminated in the United States. She notes that there were 379 confirmed cases in New York outside of New York City – 283 in Rockland County, 55 in Orange County, 18 in Westchester County, 14 in Sullivan County, seven in Monroe County, one in Suffolk County, and one in Greene County. Most of the Rockland County cases were school-aged students.

Dr. Blog reports that the number of children entering schools with a valid religious exemption rose from 14,059 in 2010-2011 to 26,627 in 2017-2018. Meanwhile, the number of children entering schools declined from 3,437,226 in 2010-2011 to 3,348,544 in 2017-2018. And the number of children

entering schools with medical exemptions rose only slightly from 3,365 in 2010-2011 to 4,571 in 2017-2018. Rockland County, where the outbreak was most severe, has the second lowest measles vaccination rate in the State and experienced a steep decline in vaccination rates in recent years. In 2010-2011, the measles vaccination rate was reported at 97.9%, with 531 religious exemptions; by 2017-2018, it was 94%, with 1,453 religious exemptions. In the localized area of the Orange County outbreak, 2018 data showed that children ages one to three have only a 59.4% vaccination rate, and children ages four to eighteen have only a 53.8% vaccination rate.

Dr. Blog explained the concept of "herd immunity," also called "community immunity," which historically has been considered achieved when 95% of the population has been immunized. She stated that one dose of the measles vaccine is about 93% effective in preventing the disease if exposed; two doses are about 97% effective in preventing the disease. Although 3% of those vaccinated are still at risk of getting the disease, the symptoms will be milder, and they are less likely to spread the disease. She reports that the vaccine is extremely safe and side effects are rare, citing two independent studies concluding that vaccines do not cause autism. She explained that, prior to widespread inoculation, thousands of children in the United States each year died or were left with life-long disabilities. Vaccines have resulted in the worldwide eradication of smallpox and near worldwide eradication of

poliomyelitis. Rubella and diphtheria have become rare in the United States as a result of routine vaccination. More recently, measles and chicken pox vaccines have resulted in those diseases becoming more rare. Before vaccinations, these diseases historically occurred at high rates particularly in pre-school and school-aged children because of their highly contagious transmission modes. Dr. Blog added that, given people's increased mobility in and out of areas where vaccination rates are relatively low, more outbreaks of measles and other diseases are likely to occur in New York and the United States as vaccination rates decline.

Analysis

A preliminary injunction is considered a drastic remedy and "should be issued cautiously" (*Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d 1092, 1094-1095 [3d Dept 2014] [internal quotation marks and citations omitted]; *see Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236, 241 [1992]; *Troy Sand & Gravel Co., Inc. v Town of Nassau*, 101 AD3d 1505, 1509 [3d Dept 2012]). The party seeking preliminary injunctive relief "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of the equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *accord Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d at 1095; *see* CPLR 6301; *Doe v Axelrod*, 73 NY2d

748, 750 [1988]). "The ruling on a motion for a preliminary injunction . . . does not establish the law of the case nor is it an adjudication on the ultimate merits of the underlying action" (*Rural Community Coalition, Inc. v Village of Bloomingburg*, 118 AD3d at 1095; *see Town of Concord v Duwe*, 4 NY3d 870, 875 [2005]).

Here, plaintiffs have established the potential for irreparable harm. If the preliminary injunction is denied, pending resolution of this case, they will be required to make one of three choices: (1) violate their religious beliefs by having their children vaccinated; (2) home school their children, impacting parents' careers and disrupting children's educational and social structure; or (3) move their families to another state that permits a religious or personal belief exemption from vaccination mandates. Having read the hundreds of affidavits from plaintiffs and potential plaintiffs about the difficult choices and consequences to their lives if the repeal is enforced, the Court acknowledges the magnitude of disruption and potential harm they would suffer.

On the other hand, if the legislative repeal of the religious exemption is enjoined, people who are unvaccinated, because they are too young or for medical reasons or because they otherwise did not receive childhood inoculations,[1] are placed at increased risk of contracting diseases which, as

[1] Adults may not have been vaccinated for many reasons. Aside from medical reasons, some adults may not be vaccinated because certain vaccines may not have been

history shows, can result in life-long disabilities or death. Mandatory vaccination programs permitting only minimal exemptions unquestionably would reduce their exposure and risk of severe illness, allowing them to more freely attend schools and participate in community activities. In communities where there have been recent outbreaks of measles, people at increased risk because they have not been vaccinated for medical reasons were compelled to remain home, jeopardizing their ability to attend schools and participate in the community. As noted, according to Dr. Blog, vaccine-preventable illnesses can be contagious for days before definitive symptoms present and quarantine measures are undertaken.

Thus, the Court is hard-pressed to conclude that plaintiffs have shown that the balance of equities tips decidedly in their favor. Just as the Court cannot overstate the potential harm to plaintiffs if the injunction is denied, the Court cannot overstate the potential harm to unvaccinated individuals if the injunction is granted. Regardless of whether plaintiffs have demonstrated that the balance of equities tips in their favor, the Court views plaintiffs' likelihood of success on the merits to be determinative of this motion, as discussed below.

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medically available during their childhood. And in this age of increased mobility, some adults now living in New York may not be vaccinated because childhood vaccinations were not required or available in their states or countries of origin.

Plaintiffs' Claim that the Repeal Violates Their Right to Free Exercise of Religion

For at least a century, the courts have repeatedly upheld the states' compulsory vaccination laws. In *Jacobson v Commonwealth of Massachusetts* (197 US 11, 25-27, 38 [1905]), the Supreme Court held that mandatory vaccination laws are within the states' police power and rejected plaintiff's claim that a law requiring children to be vaccinated as a condition to attending public or private schools violated the guarantee of individual liberty under the United States Constitution (*see also Zucht v King*, 260 US 174, 176 [1922]). In *Matter of Viemeister* (179 NY 235 [1904]), the New York Court of Appeals likewise upheld compulsory vaccination of school children. It upheld the mandate notwithstanding New York's constitutional duty to provide a system of free public schools, and notwithstanding the absence of a recent outbreak, based on historical and international experience (*id.* at 240-241).

While these cases did not expressly address claims that compulsory vaccination laws violate the Free Exercise Clause,[2] the Supreme Court in *Prince v Massachusetts* (321 US 158, 166-167 [1944]) stated in dicta that a

[2] The Free Exercise Clause of the First Amendment applies to the States through the Fourteenth Amendment (see *Cantwell* v *Connecticut*, 310 US 296 [1940]). Plaintiffs also claim that the repeal violates Article 1, § 3 of the New York Constitution, but they have not pressed their State constitutional claim or differentiated it from their federal constitutional claims in arguments on this motion for a preliminary injunction (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510 [2006], *rearg denied* 9 NY3d 866 [2007], *cert denied* 128 S Ct 97 [2007] [discussing review under New York Constitution]).

parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Relying on *Jacobson* and the "persuasive" dicta in *Prince*, the Second Circuit recently held that "mandatory vaccination as a condition for school does not violate the Free Exercise Clause" (*Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S Ct 104 [2015]). The Second Circuit, in rejecting a claim that the temporary exclusion of plaintiffs' children who had religious exemptions under New York's former law from schools during a chicken pox outbreak, observed:

> "New York could constitutionally require that all children be vaccinated in order to attend public school. New York goes beyond what the Constitution requires by allowing exemption for parents with genuine and sincere religious beliefs. Because the State could bar [plaintiffs'] children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of vaccine-preventable disease is clearly constitutional" (*id.*).

The Second Circuit's decision is not altogether on all fours with this challenge to New York's recent repeal of the religious exemption, but the quoted language is highly persuasive dicta supporting the constitutionality of the challenged legislation here.

There are now five states that do not allow religious exemptions to compulsory vaccination of children who attend schools. Beside New York, California, Maine, West Virginia, and Mississippi provide for no religious or

other non-medical exemptions from compulsory vaccination laws, and the Court is aware of no cases striking down those states' laws. The Fourth Circuit has squarely rejected a Free Exercise Clause challenge to West Virginia's law mandating vaccination as a condition for admission to school (*see Workman v Mingo County Bd. of Educ.*, 419 Fed Appx 348, 354 [4th Cir 2011], *cert denied* 132 S Ct 590 [2011]). Likewise, both the federal and state courts in California have rejected Free Exercise Clause challenges to that state's recent repeal of its personal belief exemption, which encompassed religious objections (*see e.g. Whitlow v California*, 203 F Supp 3d 1079, 1085-1087 [SD Cal 2016] [denying preliminary injunction]; *Love v State Dept of Educ.*, 29 Cal App 5th 980, 996 [3d App Dist 2018] [dismissing constitutional challenges]; *Brown v Smith*, 24 Cal App 5th 1135, 1144-1145 [2d App Dist 2018] [dismissing constitutional challenges]; *see also McCarthy v Boozman*, 212 F Supp 2d 945, 948 [WD Ark 2002], *appeal dismissed* 359 F3d 1029 [2004] ["The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."])

Generally, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice (*see Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 US 872, 879 [1990]). New York's Court of Appeals expounded on this rule in *Catholic Charities of Diocese*

of Albany v Serio, stating "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)" (7 NY3d at 521 [internal quotation marks and citations omitted]; *see Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 US at 879; *United States v Lee*, 455 US 252, 263 n 3 [1982, Stevens, J., concurring]). "A neutral law, the Supreme Court has explained, is one that does not 'target[] religious beliefs as such' or have as its 'object . . . to infringe upon or restrict practices because of their religious motivation'" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 521, quoting *Church of Lukumi Babalu Aye., Inc. v Hialeah*, 508 US 520, 533 [1993]).

Plaintiffs argue, however, that the general rule permitting the government to enact neutral laws under its police powers, notwithstanding incidental effects on religious practices, does not apply here. They argue for strict scrutiny on three separate grounds.

First, they contend that the June 2019 legislation repealing the exemption is not a neutral law; rather the repeal of a religious exemption, by definition, is a law that targets those with religious beliefs. They argue that because the repeal is a "targeted," non-neutral law, which substantially burdens their free exercise rights, the Court must apply strict scrutiny. The Court is not convinced at this preliminary injunction phase that plaintiffs' view

on this question is likely to prevail. In this Court's view, the more persuasive way of looking at the question is from the perspective of Public Health Law § 2164 as a whole. There is no question that the compulsory vaccination statute, as it exists with or without the religious exemption, is a neutral law of general applicability. The fact that the legislature first allowed for a religious exemption and later repealed that exemption does not in and of itself turn the law into one that targets religious beliefs (*cf. Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 522-533 [stating fact that challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability]).

Second, plaintiffs argue that strict scrutiny is required under the "so-called 'hybrid rights'" exception to *Smith's* general rule. As the Court of Appeals explained, the "notion of 'hybrid rights'" is derived from dictum in which the *Smith* Court distinguished certain of its previous cases by saying:

> "The only decisions in which we have held that the First Amendment bars application of neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents . . . to direct the education of their children" (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 523 [internal quotation marks and citation omitted]; *see Employment Div., Dept. of Human Resources of Ore. v Smith*, 494 US at 881).

The discussion of "hybrid rights" is dicta in both *Smith* and *Catholic Charities*, and this area of the law is not well developed. However, some courts have criticized and eschewed the doctrine of "hybrid rights" in favor of rational basis review in similar contexts (*see Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S Ct 104 [2015]; *Whitlow v California*, 203 F Supp 3d 1079, 1086 n 4 [SD Cal 2016]). But assuming, without deciding, the viability of the "hybrid rights" theory, plaintiffs' constitutional interests do appear to be two-fold – the right to free exercise of religion and the right of parents to make educational and medical decisions for their children (*see Wisconsin v Yoder*, 406 US 205 [1972]). Plaintiffs present at least a colorable argument that elevated scrutiny may be required under a "hybrid rights" theory.

Third, plaintiffs argue in favor of strict scrutiny in reliance on *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n* (138 S Ct 1719 [2017]), where the Supreme Court observed that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" (*id.* at 1731-1732). "[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general" (*Church of Lukumi Babalu Aye v Hialeah*, 508 US at 532). "At a

minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" (*id.*). "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest" (*id.* at 533 [citation omitted]). "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body'" (*Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n*, 138 S Ct at 1731, quoting *Church of Lukumi Babalu Aye v Hialeah*, 508 US at 540).

But "[i]nquiries into [legislative] motives or purposes are a hazardous matter" (*United States v O'Brien*, 391 US 367, 383 [1968], *reh denied* 393 US 900 [1968]), and "it is the motivation of the entire legislature, not the motivation of a handful of voluble members that is relevant" (*South Carolina Edu. Ass'n v Campbell*, 883 F2d 1251, 1262 [4th Cir 1989], *cert denied* 493 US 1077 [1990] [citation omitted]; *see Citizens Union of City of N.Y. v Att'y Gen. of N.Y.*, 269 F Supp 3d 124, 146-147 [SDNY 2017]; *Murphy v Empire of Am., FSA*, 746 F2d 931, 935 [2d Cir 1984]; *Matter of Kelly*, 841 F2d 908, 912 n 3 [9th Cir

1988]). "[I]solated remarks are entitled to little or no weight, particularly when they are unclear or conflict with one another, as distinguished from a legislative committee's formal report on its enactment" (*Murphy v Empire of America, FSA*, 746 F2d 931, 935 [2d Cir 1984]). "Instead, the best indication of legislative intent is the law itself" (*Citizens Union of City of N.Y. v Att'y Gen. of N.Y.*, 269 F Supp 3d at 147 [internal quotation marks and citation omitted]).

The Court is not convinced that strict scrutiny is likely required under the *Masterpiece Cakeshop* theory. Here, the legislative memoranda in support of the bills that were enacted, and the Governor's approval statement, expressly state that the objective of the repeal is the protection of the public health from vaccine-preventable diseases. Also, they acknowledge respect for religious beliefs, but express the view that public health concerns must prevail.

The repeal was enacted on the heels of the most serious outbreak of measles in New York in 25 years, which was concentrated in areas of low vaccination rates. Although plaintiffs argue that the legislators' animus is illustrated by the timing of the repeal – which was presented and enacted months after the apex of the measles outbreak – legislative priorities may have made it impractical to address this issue in January when it was addressing the State budget, with the proposed repeal rising as a priority in June to give affected families and schools time for decision making and planning before the start of the new school year.

Moreover, this is not a case where the government singled out those with religious beliefs and imposed an affirmative burden on them in the first instance. Rather, the challenged legislation removed a religious exemption, where others having secular, scientific or philosophical beliefs had been provided none. Nor does the fact that the legislature retained the medical exemption, while at the same time repealing the religious exemption, suggest religious animus. The ultimate purpose of the legislation is the protection of public health. The elimination of the medical exemption would be contrary to the ultimate purpose of the statute (*see Brock v Boozman*, 2002 WL 1972086, *7-8, 2002 US Dist LEXIS 15479, *21-24 [ED Ark 2002], *appeal dismissed* 359 F3d 1029 [8th Cir 2004]). For this reason, *Fraternal Order of Police Newark Lodge No. 12 v City of Newark* (170 F3d 359 [3d Cir 1999]), upon which plaintiffs' rely, is distinguishable (*see Brock v Boozman*, 2002 WL 1972086, *7-8, 2002 US Dist LEXIS 15479, *21-24 [ED Ark 2002]). Given the congruence of the purposes of the medical exemption with Public Health Law § 2164, continuing the medical exemption in the absence of the religious exemption raises no suspicion of religious animus (*see id.* [rejecting argument that a medical exemption to compulsory immunization reflects "a value judgment in favor of secular motivations but not religious motivations"]).

Finally, many, although perhaps not all, of the legislative comments that plaintiffs argue demonstrate hostility to religious beliefs are susceptible to

more than one meaning. Many of these comments may merely reflect frustration with parents who have asserted the religious exemption not on bona fide religious grounds, but because they disagree with scientific and medical consensus that vaccines are safe and effective. Skepticism over the genuineness of some claimed religious exemptions does not necessarily equate to hostility toward legitimate religious beliefs. And other legislators' comments may merely express the view that the public health of all children, and the public generally, supersedes even bona fide religious interests.

For purposes of this motion, there is no dispute that plaintiffs hold genuine and sincere religious beliefs that are contrary to vaccination practices. The Court appreciates the affidavits plaintiffs and other nominal class members have provided to explain the basis of their religious beliefs. But, while many do hold genuine and sincere religious beliefs, it cannot be denied that there are individuals who have attempted to assert religious exemptions when they, in actuality, disagree with the prevailing scientific and medical consensus that vaccines are safe for their children and are a highly effective way to protect public health (*see e.g. Phillips v City of New York*, 775 F3d at 541; *Mason v General Brown Cent. School Dist.*, 851 F2d 47, 51 [2d Cir 1988]; *NM v Hebrew Acad. Long Beach*, 155 F Supp 3d 247, 258 [EDNY 2016]; *Caviezel v Great Neck Pub. Sch.*, 701 F Supp 2d 414 [EDNY 2010], *affd* 500

Fed Appx 16 [2d Cir 2012], *cert denied* 569 US 947 [2013]; *Farina v Board of Educ. of City of New York*, 116 F Supp 2d 503, 508 [SDNY 2000]).

Moreover, as a constitutional matter, the phrase "religious belief" must be construed broadly to encompass not just the tenets of organized religions, but also views of sub-groups or individuals derived from organized religions, and religious views that are wholly individual, unconnected to any organized religion (*see Mason v General Brown Cent. School Dist.*, 851 F2d at 50; *Matter of Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp 81, 97-98 [EDNY 1987]). And the Second Circuit has admonished that the State must tread delicately in this realm (*see Jolly v Coughlin*, 76 F3d 468, 476 [2d Cir 1996] ["it is a delicate task to evaluate religious *sincerity* without questioning religious *verity*"]; *Ford v McGinnis*, 352 F3d 582, 588 [2d Cir 2003]). Thus, the legislators' statements may reflect their view that continued recognition of a broadly-construed religious exemption poses difficulties for enforcement and is incompatible with the overriding goal of protecting the public health. In sum, plaintiffs have not convinced the Court that they are likely to prevail in their argument that strict scrutiny is required because the legislation was driven by religious animus.

In any event, even if the Court were to apply strict scrutiny, plaintiffs nevertheless have failed to demonstrate that they are likely to succeed on their Free Exercise Clause claim. The courts addressing this question have

concluded that compulsory vaccination laws without religious exemptions are constitutional, regardless of whether rational basis or strict scrutiny applies (*see e.g.*, *Workman v Mingo County Bd. of Educ.*, 419 Fed Appx 348, 354 [4th Cir 2011], *cert denied* 132 S Ct 590 [2011]; *Whitlow v California*, 203 F Supp 3d 1079, 1085-1087 [SD Cal 2016]; *Brown v Smith*, 24 Cal App 5th 1135, 1144-1145 [2d App Dist 2018]; *Love v State Dep't of Educ.*, 29 Cal App 5th 980, 996 [3d App Dist 2018]).

Protecting public health, and children's health in particular, through attainment of threshold inoculation levels for community immunity from communicable diseases is unquestionably a compelling state interest (*see Workman v Mingo County Bd. of Educ.*, 419 Fed Appx at 353).[3] The courts have routinely held that the states need not wait for vaccination rates to fall below the community immunity threshold or for outbreaks to occur before mandatory inoculations are required for children to attend school. They have upheld proactive compulsory vaccination requirements for school-aged children even where there has been no recent outbreak, in order to maintain community immunity to prevent future outbreaks (*see Zucht v King*, 260 US 174, 176

[3] For purposes of this preliminary injunction motion, the Court has not differentiated among the various vaccines in analyzing plaintiffs' free exercise claims. Plaintiffs briefly note that tetanus is not a communicable disease in the way that polio, smallpox, diphtheria, and whooping cough are but, perhaps because the tetanus vaccine is bundled with other vaccines, they have not pressed the argument.

[1922]; *Workman v Mingo County Bd. of Educ.*, 419 Fed Appx at 353-354; *McCarthy v Boozman*, 212 F Supp 2d 945, 948 [WD Ark 2002], *appeal dismissed* 359 F3d 1029 [2004]; *Matter of Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp at 88; *Davis v State*, 294 Md. 370, 379 n 8 [Md 1982]). And the courts have upheld such requirements based on historical experience without the need for legislative fact-finding hearings (*see Matter of Viemeister*, 179 NY 235, 240-241 [1904]; *Noyes v Erie &Wyoming Farmers Co-op Corp.*, 281 NY 187, 194-195 [1939]). Here, lawmakers had access to CDC reports and publications from medical associations about the risks posed by vaccine preventable diseases and the effectiveness and safety of vaccines; knowledge of the recent outbreaks in New York which predominately occurred in communities with low vaccination rates; and data showing that those asserting religious exemptions have nearly doubled in recent years, despite declining student enrollment.

Plaintiffs' argument that there are less restrictive means to protect the public health, such as the temporary exclusion from schools as was done during the outbreak in Rockland County, is also likely to be unavailing. While such measures may mitigate dangers to unvaccinated individuals, they do not prevent or eliminate them. As Dr. Blog averred, diseases may be contagious for days before definitive symptoms appear, placing exposed, unvaccinated persons at risk of serious illness or death. Reactive measures to outbreaks, like

quarantines and keeping unvaccinated individuals home, simply are not as effective at protecting public health as proactive measures aimed at attaining and maintaining threshold community immunity to contagious diseases before outbreaks occur.

In conclusion, given the long line of cases upholding the exercise of the State's police power to require children to be vaccinated before they may attend public and private schools, the Court does not, at this early stage of the litigation, see a path for plaintiffs to succeed on the merits. The Court is therefore constrained to deny plaintiffs' request for a preliminary injunction, and to allow the legislative policy choice to repeal the religious exemption to remain in effect.

Plaintiffs' Equal Protection and Compelled Speech Claims

Plaintiffs only briefly developed their claims that the repeal of the religious exemption violates the Equal Protection Clause and requires them to engage in compelled speech or violate the State's compulsory education laws. They have failed to demonstrate a likelihood of success on those claims.

In their complaint, plaintiffs allege that the repeal violates the Equal Protection Clause "because it eliminates the religious exemption for children while allowing students enrolled in higher education as well as employees of schools, both private and public, either to maintain their religious exemptions or to continue their employment without vaccinations." In their memoranda of

law in support of preliminary relief, plaintiffs contend that they are being treated differently than the adults in the schools, both staff and students who have turned 18 years old. The adult class that plaintiffs point to are not similarly situated to plaintiffs. Public Health Law § 2164 requires that "[e]very parent in parental relation to a child in this state shall have administered to such child" the vaccines listed in the statute; and that no school shall admit a child between the ages of two months and 18 years without proof of vaccination or a medical exemption. New York's legislature has chosen to target school-aged children, both for their immediate protection while they are in close, daily proximity to each other and as the primary means to achieve community immunity from vaccine-preventable diseases. Plaintiffs have not shown that this approach is irrational. That there may be other statutory or regulatory regimes that target adults who come into contact with vulnerable populations does not detract from the rationality of the legislative policy choice to enhance community immunity in this way.

Plaintiffs also argue that they are being treated differently than those students who have no exemptions from compulsory vaccination whatsoever but are still allowed to attend schools, citing news reports. This claim was not raised in the complaint and is not well-developed in the submissions on this preliminary injunction motion. Even if this claim of differential treatment were properly before the Court, plaintiffs have not demonstrated a likelihood of

success on any claim that the repeal violates their equal protection rights because the mandatory vaccination requirements are not being adequately enforced by school officials.

Finally, plaintiffs' submissions address their compelled speech claims only in the most abbreviated manner. To the best the Court can discern, plaintiffs' claim that the repeal of the religious exemption compels speech because they will be forced to home school their children. The record at this stage does not disclose potential mechanisms for home schooling children or otherwise develop this argument. Plaintiffs have come nowhere near establishing a likelihood of success on this claim.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is denied.

This constitutes the decision and order of the Court. The original decision and order is being transmitted to defendants' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and order does not constitute entry or filing under CPLR 2220 and counsel is not relieved from the applicable provisions of that rule respecting filing and service.

Dated: Albany, New York
August 23, 2019

Denise A. Hartman

HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered

1. Order to Show Cause, dated July 12, 2019;
2. Summons, dated July 10, 2019;
3. Class Action Complaint, verified on July 9, 2019;
4. Affirmation of Michael H. Sussman, Esq., dated July 10, 2019, with Exhibits 1-10;
5. Plaintiffs' Brief in Support of Entry of TRO, undated, received by the Albany County Clerk on July 17, 2019;
6. Affidavit of Mary S. Holland, sworn to July 6, 2019;
7. Affirmation of William (Zev) Epstein, affirmed on July 8, 2019;
8. Defendants' Memorandum of Law in Opposition to Plaintiffs' Ex Parte Application for a Temporary Restraining Order, dated July 11, 2019;
9. Affirmation of Helena Lynch, Esq., undated, received by the Albany County Clerk on July 29, 2019, with Exhibits 1-11;
10. Affidavit of Debra Blog, MD, MPH, sworn to July 29, 2019;
11. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, dated July 29, 2019;
12. Plaintiffs' Memorandum of Law in Support of Preliminary Injunction, undated, received by the Albany County Combined Courts on July 31, 2019;
13. Reply Affirmation of Michael H. Sussman, Esq., dated July 30, 2019, with 330 supporting affidavits;
14. Reply Affirmation of Michael H. Sussman, Esq., dated August 6, 2019, with 17 supporting affidavits;
15. Plaintiffs' Reply Brief in Support of Preliminary Injunction, undated, received by the Albany County Combined Courts on August 6, 2019; and
16. Defendants' Reply Memorandum of Law in Further Opposition to Plaintiffs' Motion for a Preliminary Injunction, dated August 13, 2019.