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DENISE A. HARTMAN
Acting Justice of the Supreme Court

EMILY LUSIGNAN
Law Clerk
JOANNE LOCKE
Secretary

December 3, 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 Judgment with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision 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.; K.W., on

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DECISION AND JUDGMENT

Index No. 4108-19

Hon. Denise A. Hartman, AJSC December 3, 2019

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Plaintiffs,

-against-

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

Defendants.

APPEARANCES

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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DECISION AND JUDGMENT

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Plaintiffs,

-against-

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

Defendants.

APPEARANCES

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Hartman, J.

Plaintiffs commenced this declaratory judgment action on or about July 10, 2019, to challenge the constitutionality of legislation, enacted June 13, 2019, which repealed New York's Public Health Law provision that had allowed religious exemptions from mandatory vaccinations for children who attend public and private schools in the State. The named plaintiffs are parents of diverse religious beliefs who previously had obtained or had qualified for religious exemptions from mandatory vaccinations for their children. Plaintiffs claim that New York's legislative repeal of the religious exemption violates their rights under the Free Exercise Clause of 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 them to engage in compelled speech in violation of the First Amendment.

On August 26, 2019, this Court denied plaintiffs' application for a preliminary injunction to enjoin enforcement of the legislative repeal of the religious exemption. On September 5, 2019, the Appellate Division similarly denied plaintiffs' application for a preliminary injunction. Defendants, pre-answer, now move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). Plaintiffs oppose. For the reasons stated below, defendants' motion is granted: The challenged repeal is not unconstitutional.

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, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B," which meet federal and state standards and specifications (Public Health Law § 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 Law § 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]).

For decades, New York's Public Health Law provided for two types of exemptions from these vaccination requirements: 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 certify that they "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 (*see* L 2019, ch 35, § 1). Thus, all children attending schools in New York State must now receive the mandated vaccines unless they have a medical exemption.

The Complaint

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 had attended or were expected to attend public or private schools or nursery programs, unvaccinated under a religious exemption. But, now that the religious exemption is repealed, they are unable to attend unless they receive the mandated vaccines or obtain a medical exemption.

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 the 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 misguided 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 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 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. And they argue that the government's response to the prior year's measles outbreak in Rockland County demonstrates that less restrictive means are available to protect the public health, if and when outbreaks occur.

On August 26, 2019, this Court denied plaintiffs' application for a preliminary injunction. On September 5, 2019, the Appellate Division similarly

denied their application for a preliminary injunction.[1] Defendants now move to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Analysis

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court "must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide the plaintiff the benefit of every possible inference" (*Metro Enters. Corp. v New York State Dept. of Taxation & Fin.*, 171 AD3d 1377, 1378 [3d Dept 2019], quoting *Matter of Dashnaw v Town of Peru*, 111 AD3d 1222, 1225 [3d Dept 2013]). Generally, "a motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*id.*, quoting *North Oyster Bay Baymen's Assn. v Town of Oyster Bay*, 130 AD3d 885, 890 [2d Dept 2015]; *see Matter of Dashnaw v Town of Peru*, 111 AD3d at 1225). But, "on a motion to dismiss pursuant to CPLR 3211 (a) (7), courts may reach 'the merits of a properly pleaded cause of action for a

[1] Three other trial courts have denied preliminary injunctions against enforcement of the legislative repeal of the religious exemption (*see V.D. v New York*, 2019 US Dist LEXIS 139815, 2019 WL 3886622 [ED NY, August 19, 2019, 2:19-cv-04306-ARR-RML]; *Stoltzfus v New York*, Sup Ct, Seneca County, November 4, 2019, Doyle, J, index No. 20190311]; *Sullivan-Knapp v Cuomo*, Sup Ct, Steuben County, October 9, 2019, Wiggins, J, index No. E2019-1339CV).

declaratory judgment . . . where no questions of fact are presented by the controversy'" (*id.*, quoting *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]; *see Matter of Dashnaw v Town of Peru*, 111 AD3d at 1225). "Under such circumstances, the 'motion [to dismiss for failure to state a cause of action] should be taken as a motion for a declaration in the defendant's favor and treated accordingly'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150, quoting Siegel, N.Y. Prac. § 440, at 745 [4th ed] [citations omitted]; *see Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 621 n 4 [2018] [granting declaratory judgment on preanswer motion to dismiss where plaintiffs challenged on constitutional grounds New York City's regulation requiring flu shots for children attending daycare and preschool programs within the City]).

Plaintiffs' Free Exercise Claim

Plaintiff's principal claim is that the 2019 amendment repealing the religious exemption to compulsory vaccination violates the Free Exercise Clause of the United States Constitution.[2] This Court, in its decision and order

[2] In response to defendants' motion, plaintiffs have not advanced their claim that the repeal of the religious exemption violates the Free Exercise Clause of the New York State Constitution, which involves elevated scrutiny in the form of a balancing test that requires plaintiffs to show that the challenged legislation constitutes an "unreasonable interference with religious freedom" (*Catholic Charities of Diocese of Albany v Serio,* 7 NY3d 510, 525 [2006], *rearg denied* 8 NY3d 866 [2007], *cert denied* 552 US 816 [2007]). Plaintiffs' State constitutional claim is deemed abandoned (*see Matter of Spence v New York State Dept. of Agric. & Mkts.*, 154 AD3d 1234, 1235 n 2 [3d Dept 2017], *affd* 32 NY3d 991 [2018]). In any event, because the Court concludes

denying plaintiffs' motion for a preliminary injunction, surveyed the courts' precedents regarding mandatory vaccination laws, beginning with *Matter of Viemeister* (179 NY 235 [1904]). There, the New York Court of Appeals upheld a provision of New York's Public Health Law mandating vaccination of school children for smallpox as a valid exercise of the State's police power, notwithstanding New York's constitutional duty to provide a system of free common schools wherein all children may be educated (*id.* at 240-241). One year later, in *Jacobson v Massachusetts* (197 US 11, 25-27, 38 [1905]), the Supreme Court upheld Massachusetts' compulsory vaccination laws as a valid exercise of the state's police power, rejecting the 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]). While *Viemeister* and *Jacobson* did not expressly address claims that compulsory vaccination laws violate the Free Exercise Clause, the Supreme Court in *Prince v Massachusetts* (321 US 158, 166-167 [1944], *reh denied* 321 US 804 [1944]) later observed that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right

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that plaintiffs' federal Free Exercise Clause claim fails under strict scrutiny, plaintiffs' State constitutional claim would necessarily fail as well (*see Catholic Charities of Diocese of Albany v Serio*, 7 NY3d at 525-527).

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."

Bringing this precedent forward to recency, in 2015 the Second Circuit held that "mandatory vaccination as a condition for admission to 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]). There, the Court rejected a claim that the temporary exclusion of the plaintiffs' children, who had religious exemptions under New York's former law, from schools during a chicken pox outbreak violated the Free Exercise Clause, reasoning as follows:

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

In addition to recounting the historical precedent upholding compulsory vaccination laws, the Court in its preliminary injunction decision also examined the current state of the compulsory vaccination laws across the Nation. Four other states have eliminated all personal belief and religious exemptions to compulsory vaccination of school children: California, Maine, West Virginia, and Mississippi. And the courts have consistently upheld those state's laws in the face of Free Exercise Clause challenges (*see Workman v Mingo County Bd. of Educ.*, 419 Fed Appx 348, 354 [4th Cir 2011], *cert denied*

565 US 1036 [2011]; *Whitlow v California*, 203 F Supp 3d 1079, 1085-1087 [SD Cal 2016]; *Love v State Dep't of Educ.*, 29 Cal App 5th 980, 996 [3d App Dist 2018]; *Brown v Smith*, 24 Cal App 5th 1135, 1144-1145 [2d App Dist 2018]; *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."])

Against this backdrop, the Court turns to the specific claims and arguments pressed by plaintiffs in this case. Plaintiffs contend that New York's legislation is distinguishable because, in repealing the religious exemption, the Legislature targeted plaintiffs and the class they claim to represent on the basis of their religious beliefs, and that it did so with discriminatory animus in violation of the Free Exercise Clause. Plaintiffs maintain that, at the very least, they are entitled to proceed with their claims because there are questions of fact regarding the extent to which religious animus infected the legislative decision-making process. And, they argue, on account of such alleged targeting and animus, the requisite standard of judicial review is strict scrutiny, which the State cannot meet.

The Requirement that All School Children Receive Mandated Vaccinations Regardless of Religious Belief (Unless Exempt for Medical Reasons) Is a Law of Neutral and General Applicability; It Does Not Target Religious Believers.

For purposes of the federal Free Exercise Clause, a neutral law of general applicability need not be justified by a compelling governmental interest, even if the law has the incidental effect of burdening religious practice (*see Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US 872, 879 [1990], *reh denied* 496 US 913 [1990]; *Catholic Charities of Diocese of Albany v Serio,* 7 NY3d 510, 521-522 [2006], *rearg denied* 8 NY3d 866 [2007], *cert denied* 552 US 816 [2007]; *Matter of Gifford v McCarthy,* 137 AD3d 30, 38-40 [3d Dept 2016]). "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (*Employment Div., Dept. of Human Resources of Ore. v Smith,* 494 US at 879 [internal quotation marks and citations omitted]; *see Catholic Charities of Diocese of Albany v Serio,* 7 NY3d at 521-522]). "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 522, quoting *Church of Lukumi Babalu Aye., Inc. v Hialeah,* 508 US 520, 533 [1993]).

In determining whether a law impermissibly targets religion, the Court must "begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face" (*Church of Lukumi Babalu Aye., Inc. v Hialeah*, 508 US at 533). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context" (*id.*). Public Health Law § 2164, as amended, is a law that is neutral on its face and is generally applicable to all children who attend schools in the State.

But "[f]acial neutrality is not determinative" because a law that "targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality" (*id.* at 534). Thus, the Court's analysis extends beyond a finding of facial neutrality; it must also examine the facts and circumstances surrounding the law's enactment (*see id.*). "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 1719, 1731 [2018], quoting *Church of Lukumi Babalu Aye v Hialeah*, 508 US at 540).

Here, the overall history and context of New York's vaccination law, the series of events leading up to the repeal of the religious exemption, and the

legislative history of the repeal, all lead to the inexorable conclusion that the repeal was driven by public health concerns, not religious animus. Mandatory vaccination laws have been in effect in New York for well over a century (*see Matter of Viemeister*, 179 NY 235, 237 [1904]). The statute at issue, Public Health Law § 2164, was enacted in its current form in 1966 (*see* L 1966, ch 994). In 1968, the Legislature added requirements of vaccinations for measles and smallpox (*see* L 1968, ch 1094). It set forth the following public health findings:

> "1. Among the truly great medical advances of this generation have been the development of proved methods of reducing the incidence of smallpox and measles, the once great cripplers. Public health statistics show clearly that immunization is effective and safe.
>
> "2. Out of apathy or ignorance, millions of Americans are still not properly immunized. Many millions of the unimmunized are pre-school children under the age of six years. Studies indicate that the majority of these unprotected persons are in the lower socio-economic group who reside in congested urban areas and who are generally apathetic towards immunization. The typical victim is a child less than six years of age in an underprivileged family.
>
> "3. Consequently, the large numbers of pre-school children who are unprotected against small pox and measles must be immunized and protected in their own self-interest as well as for the health and economic well-being of the community.
>
> "4. The legislature therefore finds and declares that pre-school children must be adequately immunized against smallpox and measles before being permitted to attend a public, private or parochial school in this state. The state should be prepared to pay for the cost of providing and administering such immunizing dose or doses of prophylactic agent against smallpox and measles which

> meet the standards approved by the United States public health service for such biological products and which are approved by the state department of health."

(L 1968, ch 1094, § 1; *see Garcia v NY City Dept of Health and Mental Hygiene*, 31 NY3d 601, 614 [2018]; *Matter of Christine M.*, 157 Misc 2d 4, 11-12 [Fam Ct, Kings County 1992]).

Similarly, the legislative memoranda accompanying the bills leading to the June 2019 legislation repealing the religious exemption discussed the public health objective of the legislation, as did the Governor's approval statement: All described the objective of the repeal as the protection of public health from vaccine-preventable diseases. They explained that the repeal was prompted by recent outbreaks nationally and in New York, particularly in communities with low vaccination rates. While acknowledging respect for religious beliefs, the legislative memoranda expressed the collective legislative view that public health concerns should prevail.

The Introducer's Memorandum to the Senate Bill (Sponsor's Mem, S2994A [2019]) explained that the nation was experiencing the worst outbreak of measles in decades, a disease which had been declared eliminated from the United States in 2000. It observed that 880 cases of measles had been confirmed nationwide in the first months of 2019, and that outbreaks in New York were the primary driver of the epidemic. Of the 810 cases of measles in New York State between October 2018 and May 2019, the outbreaks were

largely concentrated in Brooklyn and Rockland Counties, areas with precipitously low immunization rates. And it acknowledged, that while "freedom of religious expression is a founding tenet of this nation, there is 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."

Along the same lines, the Introducer's Memorandum for the parallel Assembly Bill (Sponsor's Mem, A2371 [2019]) noted that, according to the Center for Disease Control (CDC), "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." It cited to State data from 2013-2014, revealing that "there are at least 285 schools in New York with an immunization rate of below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity."

And on June 13, 2019, when 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."

Notwithstanding these uniform pronouncements, plaintiffs contend that the June 2019 legislation repealing the religious exemption, by definition, is a law that targets those with religious beliefs. And, they argue, the "targeted," non-neutral law substantially burdens their free exercise rights, so the Court must apply strict scrutiny. But from the perspective of Public Health Law § 2164 as a whole, the compulsory vaccination statute is, with or without the religious exemption, a neutral law of general applicability (*see Matter of Viemeister,* 179 NY at 241 [observing that the compulsory vaccination law at issue there "operate[d] impartially upon all children in the public schools, and [was] designed not only for their protection but for the protection of all the people of the state"]). That the Legislature repealed a previously authorized religious exemption does not in and of itself transmute the law into a non-neutral law that targets religious beliefs (*cf. Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 522-533 [2006], *rearg denied* 8 NY3d 866 [2007], *cert denied* 552 US 816 [2007] [stating fact that challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability]); *see also Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S Ct 104 [2015] [treating exclusion of students with religious exemptions from public schools during chicken pox outbreak as law of "neutral and . . . general applicability [that] need not be justified by a compelling governmental interest"]). Nor does the fact that the Legislature

retained the medical exemption, while at the same time repealing the religious exemption, suggest religious animus. The stated purpose of the legislation is the protection of public health; the elimination of the medical exemption would be contrary to that purpose (*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]).

Next, plaintiffs argue that the object of the legislative repeal to target religion, not concern for public health, is illustrated by the timing of the repeal – the bills were presented in January but not enacted until June, months after the apex of the measles outbreak. Their argument is unpersuasive. The Legislature addresses many priorities each session. The fact that the Legislature chose to address other priorities, such as the State budget, earlier in the same session does not detract from the public health objective of the proposed repeal legislation. The Legislature enacted the repeal in June, giving affected families and schools at least some time for decision making and planning before the start of the new school year, when further outbreaks could recur. Likewise, the fact that the Legislature enacted the repeal without public hearings and debate does not suggest religious animus. The Legislature is entitled to rely on findings and recommendations of the CDC and other public health officials; it was not required to hold factfinding hearings and debates about the science and medicine of vaccinations and the impacts on those with

sincerely held religious beliefs before enacting the repeal (*see Matter of Viemeister,* 179 NY at 239-240).

But plaintiffs' most strenuous argument for applying strict scrutiny is that the repeal legislation was infected by statements made by individual legislators whose comments, they say, demonstrate unconstitutional hostility toward plaintiffs' sincerely held religious beliefs. For this argument, plaintiffs cite *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n* (138 S Ct 1719 [2018]), where the Supreme Court relied on the comments of individual members of the Colorado Civil Rights Commission, which sanctioned a baker for his refusal to make a wedding cake for a same sex couple. Finding that the commission members expressed clear hostility to the baker's religious belief about the nature of marriage, the Court concluded that the administrative determination was "inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion" (*id.* at 1732). The Court observed that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the 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).

This Court declines to extend that part of the Supreme Court's analysis in *Masterpiece Cakeshop*, which probed the comments of individual members

of a decision-making body, to this case, which involves a challenge to the collective decision-making of New York State's Legislature and Executive. True, the Supreme Court has expressly listed among the factors to be considered in determining whether the government has acted neutrally or has targeted religious beliefs the "contemporaneous statements made by members of the decisionmaking body" (*id.* [internal quotation marks and citation omitted]). But, in *Masterpiece Cakeshop*, the Court considered the remarks of members of a seven-member administrative body, not a state legislature.[3] The *Masterpiece Cakeshop* decision itself noted this distinction, stating: "Members of the [Supreme] Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion" (*id.* at 1730, citing *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 540-542 [1993]; *Church of Lukumi Babalu Aye, Inc. v Hialeah*, 508 US at 558 [Scalia, J, concurring in part and concurring in judgment]). It went on to say that in the case before it, "however, the remarks were made in a very different context – by an adjudicatory body deciding a particular case" (*id.*).

[3] Unlike the seven-member appointed administrative body in *Masterpiece Cakeshop*, the New York Legislature is comprised of two separate bodies – the Senate consists of 63 members and the Assembly consists of 150 members. And, of course, passage of state-wide legislation involves the participation of an entirely separate branch of state government, the executive.

In this Court's view, inquiries into the motives of individual legislators "are a hazardous matter" (*United States v O'Brien*, 391 US 367, 383 [1968], *reh denied* 393 US 900 [1968]). "[I]t 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]). That is why "isolated 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]). Here, the comments of some legislators, even if susceptible to inferences of discriminatory animus and even taking such inferences as true, would not transmute the collective decision of the New York State Legislature and Governor to repeal the religious exemption from a neutral law of general applicability to one that targets religious beliefs. Plaintiffs have not met the high burden that would warrant crossing the boundaries underlying the separation of powers doctrine to probe the views of individual state legislators about whether they harbor discriminatory animus against their religious beliefs.[4]

[4] Many of the individual legislators' comments that plaintiffs cite may well reflect legitimate concerns about those who have invoked the religious exemption when they really disagreed with the prevailing scientific and medical findings (*see e.g. Phillips v City of New York*, 775 F3d 538, 543 [2d Cir 2015], *cert denied* 136 S Ct 104 [2015];

The Supreme Court's decision in *Church of Lukumi Babalu Aye v Hialeah* (508 US 520 [1993]) does not require a different result. That case involved municipal legislative action, not state legislative action. And the surrounding facts and circumstances strongly suggested that the challenged municipal action unconstitutionally targeted religious beliefs regarding animal sacrifice. The Church of Lukumi Babalu Aye and its congregants practice the Santeria religion, a religion that involves the fusion of traditional African religions and Roman Catholicism and holds as a central tenet the ritual of animal sacrifice. When the Church acquired land and obtained permits to build a house of worship, school and cultural center within city limits, the public expressed concerns. The City, after holding a series of public hearings, enacted several ordinances aimed at prohibiting animal sacrifice. The Supreme Court found that all the facts and circumstances of the enactment of the ordinances, not just the statements of municipal officials,

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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 [ED NY 2016]; *Caviezel v Great Neck Pub. Sch.*, 701 F Supp 2d 414, 429 [ED NY 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 [SD NY 2000]). Skepticism over the genuineness of some who claimed religious exemptions does not equate to hostility toward legitimate religious beliefs. Moreover, the broad and delicate construction that must be given the phrase "sincerely held religious belief" can pose difficulties for enforcement and be inimical to the overriding goal of protecting the public health (*see Jolly v Coughlin*, 76 F3d 468, 476 [2d Cir 1996]; *Ford v McGinnis*, 352 F3d 582, 588 [2d Cir 2003]; *Mason v General Brown Cent. School Dist.*, 851 F2d at 50; *Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp 81, 97-98 [ED NY 1987]).

"compel[ed] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances" (*id.* at 534). In contrast, the facts and circumstances presented here, even affording plaintiffs' allegations all reasonable inferences, do not give rise to a conclusion that the New York Legislature's repeal of the religious exemption to longstanding compulsory vaccination requirements in the face of recent measles outbreaks was motivated by animus targeting religious beliefs.[5]

In Any Event, the Repeal of the Religious Exemption Satisfies Strict Scrutiny.

Even if the Court were to apply strict scrutiny, plaintiffs nevertheless cannot prevail on their Free Exercise Clause claim. The courts addressing this

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[5] In response to defendants' motion, plaintiffs have also not pressed their prior argument that heightened scrutiny is required under a "hybrid rights" theory (*Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 521-522 [2006], *rearg denied* 8 NY3d 866 [2007], *cert denied* 552 US 816 [2007]; *see Employment Div., Dept. of Human Resources of Ore. v Smith*, 484 US at 881). The Court, therefore, does not address this argument.

But this Court does take the opportunity to express its view that some form of searching inquiry, albeit less than strict scrutiny, should be applied to governmental mandates enacted under the states' police power that substantially impair an individual's right to make autonomous decisions about medical treatment and bodily integrity for their children and themselves (*see Wisconsin v Yoder*, 406 US 205, 214 [1972]; *Roe v Wade*, 410 US 113, 155-156 [1973]; *Griswold v Connecticut*, 381 US 479, 485 [1965]). This view accords with longstanding, related state court precedent requiring more searching analyses of government attempts to override an individual's choice to undergo or forego medical treatment and procedures (*see Matter of Fosmire v Nicoleau*, 75 NY2d 218, 226-228 [1990]; *Rivers v Katz*, 67 NY2d 485, 495-496 [1986]; *Matter of Storar*, 52 NY2d 363, 377 [1981]). Absent scrutiny with teeth, the government's police power to protect the "public health" could swallow up fundamental constitutional liberties. Again, however, because the legislation in this case passes strict scrutiny, it would pass a lesser level of scrutiny (*see* n 2, *supra*).

question have uniformly 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, 353-354 [4th Cir 2011], *cert denied* 565 US 1036 [2011]; *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 vaccine-preventable, highly contagious diseases that pose the risk of severe health consequences "'has been long recognized as the gold standard for preventing the spread of contagious diseases'" and is unquestionably a compelling state interest (*Love v State Dep't of Educ.*, 29 Cal App 5th at 993-994, quoting *Brown v Smith*, 24 Cal App 5th at 1146; *see Workman v Mingo County Bd. of Educ.*, 419 Fed Appx at 353).[6] For such vaccine-preventable diseases, the courts have routinely held that the states need not wait for vaccination rates to fall below the recommended threshold or for outbreaks to occur before mandatory inoculations are required for children to attend school.

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[6] Plaintiffs have not differentiated among the various vaccines and argue only that the repeal of the religious exemption from the mandatory vaccines in the aggregate is unconstitutional. Because they have not argued that one or more of the mandated vaccines are for non-contagious diseases, the Court has not separately considered whether requiring vaccination for tetanus, or any other non-contagious, vaccine-preventable diseases would pass strict scrutiny.

They have upheld proactive compulsory vaccination requirements for school-aged children even where there has been no recent outbreak, in order to attain and maintain community immunity to prevent future outbreaks (*see Zucht v King*, 260 US 174, 176 [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]; *Sherr v Northport-East Northport Union Free School Dist.*, 672 F Supp at 88; *Davis v State*, 294 Md 370, 379 n 8 [1982]).

Plaintiffs argue that there are less restrictive means to protect the public health, such as temporarily excluding unvaccinated students from schools when there is an outbreak of a vaccine-preventable disease. While such measures may reduce dangers to unvaccinated individuals, they do not prevent or eliminate them. Because an infected person may be asymptomatic while still being contagious, waiting for an outbreak to manifest places exposed, unvaccinated persons at risk of serious illness or death. As the Legislature apparently concluded, reactive measures to outbreaks, like quarantining individuals once they show symptoms of an illness or keeping unvaccinated individuals home, are simply less effective at protecting the public health than proactive measures aimed at attaining and maintaining threshold community immunity to contagious diseases before outbreaks occur.

Plaintiffs' Equal Protection Claim

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 opposition to defendants' motion to dismiss, they contend that they are being treated differently than (1) students who are unvaccinated under the medical exemption; (2) adults in the schools, both staff and students who have turned 18 years old; and (3) students who have "fallen through the cracks" because schools have not enforced the vaccination mandate.

Because these legislative distinctions are not based upon suspect classifications, plaintiffs' equal protection claims are subject to rational basis review (*see Nordlinger v Hahn*, 505 US 1, 10-12 [1992]; *Lighthouse Shores, Inc. v Town of Islip*, 41 NY2d 7, 11-12 [1976]; *Sullivan v Paterson*, 80 AD3d 1051, 1053 [3d Dept 2011]; *Matter of Joseph LL.*, 97 AD2d 263, 264 [3d Dept 1983], *affd* 63 NY2d 1014 [1984]); plaintiffs do not argue otherwise. Under rational basis analysis, a law will be deemed valid as long as "any classifications it creates between similarly-situated individuals are 'rationally related to a legitimate government interest'" (*Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 167 AD3d 88, 98 [3d Dept 2018], quoting

Matter of Walton v New York State Dept. of Correctional Servs., 13 NY3d 475, 492 [2009]). And the challenger is required to "negate every conceivable basis which might support the state's interest whether or not the basis has a foundation in the record" (*Sullivan v Paterson*, 80 AD3d at 1053 [internal quotation marks, brackets, emphasis and citations omitted], *see Heller v Doe*, 509 US 312, 320-321 [1993]; *Affronti v Crosson*, 95 NY2d 713, 719 [2001], *cert denied* 534 US 826 [2001]). Taking their allegations as true, plaintiffs have failed to demonstrate that Public Health Law § 2164, as amended, violates their rights under the Equal Protection Clause.

First, children who are unvaccinated under the medical exemption are not similarly situated to plaintiffs' children and, in any event, there is a rational reason for treating medically exempt children differently. The very purpose of Public Health Law § 2164 is the protection of public health. Not exempting children who cannot be vaccinated for medical reasons would be antithetical to the purpose of the statute.

Second, the Legislature's choice to focus prophylactic vaccination efforts on school-aged children is rational. 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 mandate vaccination of 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 (*cf. Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 612 [2018]). 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.

Finally, plaintiffs 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. To the extent that such claim is properly before the Court, the fact that the State can do more to enforce the vaccination mandate does not detract from the rationality of the Legislature's decision to increase vaccination rates to provide greater community immunity by repealing the religious exemption.

In short, plaintiffs' bare legal conclusion that the legislative repeal of the religious exemption violates their rights under the Equal Protection Clause fails to state a cause of action.

Plaintiffs' Compelled Speech Claim

Plaintiffs argue that the repeal of the religious exemption compels parents to either vaccinate their children, so that they can be educated in public or private schools, or to home school. They maintain that, because of their religious beliefs, their children are unable to attend private or public schools. Thus, they contend, they have no choice but to home school.

In *Matter of Gifford v McCarthy* (137 AD3d 30, 41 [3d Dept 2016]), the Appellate Division, Third Department summarized the analytic framework for a compelled speech claim:

> "The First Amendment of the US Constitution guarantees that 'Congress shall make no law . . . abridging the freedom of speech.' This constitutional protection extends to 'the right to refrain from speaking' (*Wooley v Maynard*, 430 US 705, 714 [1977]), as well as the right to be free from government-compelled speech or conduct (*see Rumsfeld v Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 61 [2006]; *West Virginia Bd. of Ed. v Barnette*, 319 US 624, 642 [1943]). Thus, the government may not require an individual to personally speak a governmental message or require an individual 'to host or accommodate another speaker's message' (*Rumsfeld v Forum for Academic & Institutional Rights, Inc.*, 547 US at 63; *see Wooley v Maynard*, 430 US at 715-717). In assessing a claim of compelled expressive conduct, the threshold inquiry is whether the conduct allegedly compelled was sufficiently expressive so as to trigger the protections of the First Amendment (*see Clark v Community for Creative Non-Violence*, 468 US 288, 293 n 5 [1984]; *Catholic Charities of Diocese of Albany v Serio*, 28 AD3d 115, 129 [3d Dept 2006], *affd* 7 NY3d 510 [2006], *cert denied* 552 US 816 [2007]). Conduct is considered inherently expressive when there is "'[a]n intent to convey a particularized message'" and there is a likelihood that the intended "'message [will] be understood by those who view[ ] it'" (*Texas v Johnson*, 491 US 397,

404 [1989], quoting *Spence v Washington*, 418 US 405, 410-411 [1974])."

The Court disagrees with plaintiffs' contention that "[o]bviously, the decision not to vaccinate is sufficiently expressive to trigger the protections of the First Amendment." To the contrary, the statutory requirement that children be vaccinated before attending schools or be home schooled is not "inherently expressive" and does not require parents to convey a "particularized message." Plaintiffs' reliance on *Clark v Community for Creative Non-Violence* (468 US 288, 293, n 5 [1984]) is misplaced. There, the Supreme Court upheld a ban on overnight sleeping in a demonstration as a time, place and manner restriction; it assumed, but did not decide, that such conduct constituted expressive speech. The repeal of the religious exemption is not connected with the exercise of free speech rights at a demonstration and plaintiffs have articulated no other connection between the mandated conduct and expressive speech. Plaintiffs have therefore failed to state a cause of action for unconstitutional compelled speech.

Accordingly, it is

ORDERED AND ADJUDGED that defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), is granted; and it is

ORDERED, ADJUDGED, AND DECLARED that the Laws of 2019, ch 35,

§ 1, the legislative repeal of the religious exemption to compulsory vaccination, and Public Health Law § 2164, as amended, are not unconstitutional in violation of plaintiffs' rights under the Free Exercise Clause of the First Amendment of the United States Constitution, or the New York State Constitution; and it is

ORDERED, ADJUDGED, AND DECLARED that Public Health Law § 2164, as amended, is not unconstitutional in violation of plaintiffs' rights under the Equal Protection Clause of the United States Constitution; and it is

ORDERED, ADJUDGED, AND DECLARED that Public Health Law § 2164, as amended, is not unconstitutional in violation of plaintiffs' right to free speech, and freedom from compelled speech, under the First Amendment of the United States Constitution; and it is

ORDERED AND ADJUDGED that the complaint is otherwise dismissed.

The original decision and judgment is being transmitted to defendants' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and judgment does not constitute entry or filing under CPLR 2220 and 5016 and counsel is not relieved from the applicable provisions respecting filing and service.

Dated: Albany, New York
December 3, 2019

Denise A. Hartman

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

Papers Considered

1. Notice of Motion, dated September 6, 2019;
2. Affirmation of Helena Lynch, Esq., dated September 6, 2019, with Exhibits 1-2;
3. Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint, dated September 6, 2019;
4. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, undated and received by the Albany County Combined Courts on September 17, 2019;
5. Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Complaint, dated September 20, 2019.