

21-537

United States Court of Appeals for the Second Circuit

JANE DOE, on behalf of herself and her minor child; JANE BOE, SR., on behalf of herself and her minor child; JOHN COE, SR., on behalf of himself and his minor children; JANE COE, SR., on behalf of herself and her minor children; JOHN FOE, SR., on behalf of himself and his minor child; JANE GOE, SR., on behalf of herself and her minor child; JANE JOE, on behalf of herself and her medically fragile child; JANE LOE, on behalf of herself and her medically fragile child; CHILDREN'S HEALTH DEFENSE; and all others similarly situated,

Plaintiffs-Appellants,

v.

HOWARD ZUCKER, in his official capacity as Commissioner of Health for the State of New York, *et al.*,

Defendants-Appellees.

[cont'd on following page]

On Appeal from the United States District Court
for the Northern District of New York

STATE DEFENDANTS-APPELLEES' BRIEF

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
*Assistant Solicitor General
of Counsel*

LETITIA JAMES
*Attorney General of the
State of New York*
Attorney for State Appellees
The Capitol
Albany, New York 12224
(518) 776-2023

Dated: June 18, 2021

ELIZABETH RAUSCH-PHUNG, M.D., in her official capacity as Director of the Bureau of Immunizations at the New York State Department of Health; NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, acting in her official capacity as Superintendent, Three Village Central School District; CORINNE KEANE, acting in her official capacity as Principal, Paul J. Gelinas Jr. High School, Three Village Central School District; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, acting in her official capacity as Superintendent, Lansing Central School District; CHRISTINE REBERA, acting in her official capacity as Principal, Lansing Middle School, Lansing Central School District; LORRI WHITEMAN, acting in her official capacity as Principal, Lansing Elementary School, Lansing Central School District; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTMAN, acting in his official capacity as Superintendent, Penfield Central School District; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, acting in his official capacity as Superintendent, South Huntington School District; BR. DAVID MIGLIORINO, acting in his official capacity as Principal, St. Anthony's High School, South Huntington School District; ITHACA CITY SCHOOL DISTRICT; DR. LUVELLE BROWN, acting in his official capacity as Superintendent, Ithaca City School District; SUSAN ESCHBACH, acting in her official capacity as Principal, Beverly J. Martin Elementary School, Ithaca City School District; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, Superintendent, acting in his official capacity as Superintendent, Coxsackie-Athens School District; FREYA MERCER, acting in her official capacity as Principal, Coxsackie-Athens High School, Coxsackie-Athens School District; ALBANY CITY SCHOOL DISTRICT; KAWEEDA G. ADAMS, acting in her official capacity as Superintendent, Albany City School District; MICHAEL PAOLINO, acting in his official capacity as Principal, William S. Hackett Middle School, Albany City School District; and all others similarly situated,

Defendants-Appellees.

SHENENDEHOWA CENTRAL SCHOOL DISTRICT; DR. L. OLIVER ROBINSON, acting in his official capacity as Superintendent, Shenendehowa Central School District; SEAN GNAT, acting in his official capacity as Principal, Koda Middle School, Shenendehowa Central School District; ANDREW HILLS, acting in his official capacity as Principal, Arongen Elementary School, Shenendehowa Central School District,

Defendants.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
ISSUES PRESENTED	3
STATEMENT OF THE CASE	4
A. Statutory and Regulatory Background.....	4
1. New York’s school immunization requirement	4
2. DOH’s school vaccination regulations	6
3. In response to the 2018-2019 measles outbreak, the State strengthens its school vaccination rules.....	7
B. Proceedings Below	10
C. District Court Decision	13
STANDARD OF REVIEW.....	16
SUMMARY OF ARGUMENT.....	17
ARGUMENT	
POINT I	
PLAINTIFFS FAIL TO ALLEGE THAT THE AMENDED REGULATION IS FACIALLY UNCONSTITUTIONAL	19
A. The Amended Regulation Permits Medical Exemptions So Long as They Are Consistent with an Evidence- Based National Standard of Care.	20
B. Plaintiffs Fail to Allege that the Amended Regulation Implicates any Fundamental Rights.	24

C. The Amended Regulation Rationally Responds to a
Public Health Threat. 32

D. The Amended Regulation Does Not Place an
Unconstitutional Condition on Access to Education. 35

POINT II

PLAINTIFFS FAIL TO ALLEGE THAT THE AMENDED REGULATION IS
FACIALLY INVALID UNDER THE REHABILITATION ACT 38

CONCLUSION 41

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES	PAGE
<i>Am. Trucking Associations, Inc. v. N.Y. State Thruway Auth.</i> , 886 F.3d 238 (2d Cir. 2018).....	16
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	17
<i>Ayotte v. Planned Parenthood of N. New England</i> , 546 U.S. 320 (2006)	30
<i>B.C. v. Mount Vernon Sch. Dist.</i> , 837 F.3d 152 (2d Cir. 2016).....	39
<i>B.W.C. v. Williams</i> , 990 F.3d 614 (8th Cir. 2021)	26
<i>Bolmer v. Oliveira</i> , 594 F.3d 134 (2d Cir. 2010).....	29
<i>Boone v. Boozman</i> , 217 F. Supp. 2d 938 (E.D. Ark. 2002).....	26
<i>Check v. N.Y. City Dep’t of Educ.</i> , No. 13-CV-791, 2013 WL 12113679, (E.D.N.Y. Sept. 11, 2013)	5, 31
<i>Cohen v. S.A.C. Trading Corp.</i> , 711 F.3d 353 (2d Cir. 2013)	17
<i>Copeland v. Vance</i> , 893 F.3d 101 (2d Cir. 2018).....	24n
<i>Deshawn E. by Charlotte E. v. Safir</i> , 156 F.3d 340 (2d Cir. 1998).....	19-20

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)	PAGE
<i>Doe v. Bolton</i> , 410 U.S. 179 (1973)	27
<i>Doe v. Zucker</i> , No. 20A135 (Mar. 8, 2021)	13
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	31
<i>Immediato v. Rye Neck Sch. Dist.</i> , 73 F.3d 454 (2d Cir. 1996).....	20, 32, 38
<i>Jacobson v. Commonwealth of Massachusetts</i> , 197 U.S. 11 (1905)	24, 25, 37
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595 (2013)	35
<i>L-7 Designs, Inc. v. Old Navy, LLC</i> , 647 F.3d 419 (2d Cir. 2011).....	23n, 33n
<i>Lynch v. Clarkstown Cent. Sch. Dist.</i> , 590 N.Y.S.2d 687 (N.Y. Sup. 1992).....	6, 31
<i>Natale v. Town of Ridgefield</i> , 170 F.3d 258 (2d Cir. 1999).....	16
<i>Oneida Indian Nation of New York v. State of New York</i> , 691 F.2d 1070 (2d Cir. 1982).....	22n
<i>Phillips v. City of New York</i> , 775 F.3d 538 (2d Cir. 2015).....	25, 26, 29, 30, 32, 36
<i>Rodriguez v. City of New York</i> , 72 F.3d 1051 (2d Cir. 1995).....	28, 29

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)	PAGE
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973)	36
<i>Staeher v. Hartford Fin. Servs. Grp., Inc.</i> , 547 F.3d 406 (2d Cir. 2008).....	22n
<i>Stenberg v. Carhart</i> , 530 U.S. 914 (2000)	30
<i>Territory of Alaska v. Am. Can Co.</i> , 358 U.S. 224 (1959)	22n
<i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008)	20
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977)	27
<i>Winston v. City of Syracuse</i> , 887 F.3d 553 (2d Cir. 2018).....	19, 20, 37
<i>Workman v. Mingo Cty. Bd. of Educ.</i> , 419 F. App'x 348 (4th Cir. 2011).....	26
<i>Zucht v. King</i> , 260 U.S. 174 (1922)	25, 32, 34, 36, 37
 FEDERAL STATUTES	
29 U.S.C. § 794(a).....	39
42 U.S.C. § 243.....	6
§ 247b	6

TABLE OF AUTHORITIES (cont'd)

FEDERAL STATUTES (cont'd)	PAGE
Rehabilitation Act of 1973, § 504.....	39
 FEDERAL RULES AND REGULATIONS	
Federal Rule of Civil Procedure	
12(b)(6).....	16
 STATE STATUTES	
N.Y. C.P.L.R.	
article 78	5, 11n, 31, 34
N.Y. Education Law	
§ 310.....	5, 10n, 31
§ 914(1).....	5, 34
N.Y. Mental Health Law	
§ 9.39(a).....	28
N.Y. Public Health Law	
§ 206(1)(l)	6
§ 2164	4
§ 2164(1)(a)	4
§ 2164(2).....	4
§ 2164(7).....	4, 5, 29, 34
§ 2164(7)(b)	5, 10n, 31
§ 2164(8).....	5, 21, 29
§ 2164(9).....	5
§ 2164(10).....	6
N.Y. L. 2019, ch. 35, § 1.....	5, 8, 32

TABLE OF AUTHORITIES (cont'd)

	PAGE
STATE RULES AND REGULATIONS	
10 N.Y.C.R.R.	
§ 66-1.....	6
§ 66-1.1(c).....	6, 21
§ 66-1.1(f).....	6
§ 66-1.1(l).....	9, 17, 21, 22, 29, 33
§ 66-1.1(m).....	4
§ 66-1.3(c).....	7, 9, 21, 29
 MISCELLANEOUS	
CDC, <i>Vaccines & Immunizations Glossary</i> (July 30, 2020), available at https://www.cdc.gov/vaccines/terms/glossary.html#commimmunity	8n
DOH, <i>Immunization Requirements for School Attendance: Medical Exemption Statement for Children 0-18 Years of Age</i>	23
N.Y. Reg., Sept. 4, 2019,.....	9
N.Y. Reg., Dec. 31, 2019.....	9

PRELIMINARY STATEMENT

New York’s Public Health Law provides that a child must be vaccinated against certain serious diseases to attend public or private school in New York. There is a narrow exception for those who cannot be vaccinated because of legitimate medical reasons. In 2019, in response to the country’s worst outbreak of measles in a quarter-century—whose epicenter was New York—the New York State Department of Health (DOH) amended its vaccination rules to clarify when a medical exemption is appropriate (the amended regulation). Under the amended regulation, a physician must certify that the child has a “contraindication” or “precaution”¹ for the specific vaccine for which the exemption is sought, in accordance with an evidence-based national standard of care. Families who choose not to vaccinate their children, despite having no legitimate medical reason for making that choice, must homeschool their children.

In this putative class action, plaintiffs—including families with children who applied for and were denied a medical exemption during the

¹ A “contraindication” indicates that, because of the child’s current condition, the vaccine should not currently be administered. A “precaution” indicates that the vaccine should be deferred, but may be administered if the benefit outweighs the risk. (*See* SPA12; JA489-490.)

2019-2020 school year—brought suit in the United States District Court of the Northern District of New York (Sannes, J.). They raised two types of claims: (1) facial challenges to the DOH regulation as a violation of substantive due process and the Rehabilitation Act of 1973, naming as defendants DOH, Commissioner of Health Howard Zucker, and Dr. Elizabeth Rausch-Phung, M.D., Director of DOH’s Bureau of Immunizations (collectively, the State defendants); and (2) as-applied claims against their school districts and school officials (collectively, the School District defendants).² The district court denied plaintiffs’ motion for a preliminary injunction, which sought statewide relief from the amended regulation. Plaintiffs appealed that decision, and while that appeal was pending, the district court granted both sets of defendants’ motions to dismiss for failure to state a claim.

As the district court correctly held, plaintiffs have failed to state a constitutional or Rehabilitation Act claim with respect to their facial challenges. The State’s strengthened physician certification requirement is a reasonable public health measure. It ensures that medical

² This brief is submitted on behalf of the State defendants. The School District defendants are separately represented.

exemptions to the school immunization law are limited to those who have legitimate medical reasons for declining to be vaccinated. Because medical exemptions remain available to those who truly need them, and because the regulation does not compel parents in any event to vaccinate their children without their consent, no fundamental rights are implicated. Nor does the regulation place an unconstitutional condition on children's access to education. For similar reasons, the regulation does not violate the Rehabilitation Act. The Court therefore should affirm the district court's decision upholding the amended regulation.

ISSUES PRESENTED

1. Did the district court correctly dismiss plaintiffs' constitutional claims against the State defendants, because the amended regulation does not implicate any fundamental rights, is a rational response to the threat to public health posed by serious communicable diseases, and does not place an unconstitutional condition on access to education?

2. Did the district court correctly dismiss plaintiffs' Rehabilitation Act claims for similar reasons?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. New York's school immunization requirement

Public Health Law § 2164 provides that no child may attend any school for more than fourteen days unless that child has been immunized against several enumerated serious diseases. N.Y. Pub. Health Law § 2164(7). These diseases include polio, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease. *Id.* § 2164(2). The immunization requirement applies to all schools in the State, whether public or private. *Id.* § 2164(1)(a). It also applies to all students admitted at those schools, even if they are attending school remotely (as many have during the COVID-19 pandemic). *See* 10 N.Y.C.R.R. § 66-1.1(m) (defining “attend” as “enrolled in, or admitted to, a school for the purpose of participating in or receiving services at such school”). Homeschooled students, however, are not required to be immunized.

When section 2164 was first passed, it contained two narrow exceptions to the immunization requirement. The medical exemption, which remains in effect, provides that if a New York-licensed physician

certifies that a specific vaccine “may be detrimental to a child’s health,” the child need not receive that vaccine until it “is found no longer to be detrimental to the child’s health.” Pub. Health Law § 2164(8). The religious exemption, which was repealed in June 2019, provided that a child need not receive any of the required vaccines if the child’s parent or guardian objected to vaccination based on “genuine and sincere religious beliefs.” *Id.* § 2164(9), *repealed by* L. 2019, ch. 35, § 1.

School officials are responsible for ensuring that the children enrolled in their schools have received the required vaccines or are entitled to an exemption. *See* Pub. Health Law § 2164(7); N.Y. Educ. Law § 914(1). If the school denies a medical exemption, a parent may appeal that decision to the Commissioner of Education under Education Law § 310. *See* Pub. Health Law § 2164(7)(b). A parent may seek judicial review of either the school officials’ or the Commissioner’s decision in a C.P.L.R. article 78 proceeding. *See Check v. N.Y. City Dep’t of Educ.*, No. 13-CV-791, 2013 WL 12113679, at *4 (E.D.N.Y. Sept. 11, 2013) (noting that an appeal to the Commissioner is not necessary to obtain judicial review under C.P.L.R. article 78 of a school district’s ruling on the

medical exemption); *Lynch v. Clarkstown Cent. Sch. Dist.*, 590 N.Y.S.2d 687, 689 (N.Y. Sup. 1992).

2. DOH's school vaccination regulations

DOH is authorized to “adopt and amend rules and regulations to effectuate the [school immunization law’s] provisions and purposes.” Pub. Health Law § 2164(10); *see also id.* § 206(1)(l) (providing that DOH must “establish and operate . . . child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health,” and is empowered to “promulgate such regulations as are necessary” to implement this provision). Consistent with this authority, DOH has promulgated comprehensive regulations to implement the school immunization requirement. *See* 10 N.Y.C.R.R. subpart 66-1. Among other things, these regulations incorporate the recommendations of the federal Advisory Committee on Immunization Practices (ACIP) with respect to dosage requirements and the schedule for administering the required vaccines. *See* 10 N.Y.C.R.R. § 66-1.1(f). The ACIP is a committee within the U.S. Centers for Disease Control and Prevention (CDC) that provides evidence-based guidance to states on best immunization practices. *See* 42 U.S.C. §§ 243, 247b.

DOH has also issued regulations, not challenged here, governing requests for a medical exemption. To obtain such an exemption, these regulations have long required that a child's parents provide the school with a medical exemption form, signed by a New York-licensed physician, certifying that an immunization "may be detrimental to the child's health." 10 N.Y.C.R.R. § 66-1.3(c). The certification must (i) contain "sufficient information to identify a medical contraindication to a specific immunization," and (ii) "specify[] the length of time the immunization is medically contraindicated." *Id.* Additionally, a medical exemption must be sought and reissued annually. *Id.*

3. In response to the 2018-2019 measles outbreak, the State strengthens its school vaccination rules

In 2019 the State took measures to strengthen its school vaccination rules—including by promulgating the challenged regulation, which amended 10 N.Y.C.R.R. § 66-1.1(c)—in response to the 2018-2019 measles outbreak. (JA138.) While travel from other countries initiated the outbreak of this vaccine-preventable disease, low vaccination rates in certain communities contributed to its spread. (JA138-139.) For instance, in the 2017-2018 school year, there were 280 schools in the State with measles vaccination rates of only 85% or less, and 211 schools with rates

below 70%. (JA139.) These pockets of under-vaccination jeopardized herd immunity³ and posed a significant public health risk. (JA139.)

In response to this public health crisis, the State took two important steps to increase vaccination rates. First, the State Legislature repealed the religious exemption to the school immunization requirement, effective June 13, 2019. *See* L. 2019, ch. 35, § 1.

Second, DOH strengthened its rules for obtaining a medical exemption. DOH reasonably anticipated that parents who had relied on the religious exemption would now try to obtain a medical exemption, even where they lacked any valid medical reason for doing so. (JA139.) In this respect, California's experience was instructive: After that state had repealed a non-medical exemption from its mandatory school vaccination law, the rate of medical exemptions had more than tripled. (JA139.) To ensure that New York did not have a similar experience,

³ "Herd immunity" means that "a sufficient proportion of a population is immune to an infectious disease (through vaccination and/or prior illness) to make its spread from person to person unlikely. Even individuals not vaccinated (such as newborns and those with chronic illnesses) are offered some protection because the disease has little opportunity to spread within the community." *See* CDC, *Vaccines & Immunizations Glossary* (July 30, 2020), available at <https://www.cdc.gov/vaccines/terms/glossary.html#commimmunity>.

DOH issued the regulation at issue in this case, which amended the rules for obtaining a medical exemption. The regulation was first issued on an emergency basis, effective August 16, 2019, *see* N.Y. Reg., Sept. 4, 2019, at 22-24 (JA138-140), and became permanent on December 31, 2019, *see* N.Y. Reg., Dec. 31, 2019, at 25 (JA239).

The new regulation continues to provide, as before, that in order to qualify a child for a medical exemption, a physician must certify that a vaccine “may be detrimental to the child’s health,” and this certification must contain “sufficient information to identify a medical contraindication” and specify the length of time the immunization is medically contraindicated. 10 N.Y.C.R.R. § 66-1.3(c). That certification requirement long predated the measles outbreak. To clarify and strengthen the certification requirement, the regulation was amended to define the phrase “may be detrimental to the child’s health” to mean that “a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.” 10 N.Y.C.R.R. § 66-1.1(*l*). (*See also* JA139.)

The amended regulation ensures that a physician may recommend a medical exemption only if it is supported by an evidence-based national standard of care, such as the ACIP guidance, which lists each condition that is known to be a specific contraindication or precaution to certain vaccines. (JA139.) Other nationally recognized evidence-based standards of care that can support a request for a medical exemption include, but are not limited to, guidelines issued by the Infectious Diseases Society of America, the American Academy of Pediatrics, and the American Academy of Family Physicians. (See ECF Nos. 28-9, 28-10, 28-11.)

B. Proceedings Below

Plaintiffs are seven families with children who applied for medical exemptions for the 2019-2020 school year. Five families were allegedly denied such exemptions by their schools because the physician had not pointed to any contraindication or precaution consistent with a nationally recognized evidence-based standard of care, as required by the amended regulation.⁴ (JA704-705, 710-711, 716-717, 727-728, 735.)

⁴ Although each of the plaintiffs had the right to appeal the school's denial to the Commissioner of Education, see Pub. Health Law § 2164(7)(b); Educ. Law § 310, only one did so. (JA706-708.) The

These parents chose not to vaccinate their children and homeschooled them. The children from the two other families—John Foe and Jane Goe—obtained medical exemptions under the amended regulation and attended school. (JA721, 725.)

Each of the named plaintiffs' requests for a medical exemption was submitted to, and either rejected or accepted by, local school officials. In some cases, DOH and its officials allegedly provided advice to the school districts regarding the requested medical exemptions. Specifically, for John and Jane Coe, DOH Immunization Director Dr. Rausch-Phung advised that medical exemptions may be appropriate based on certain "genetic vulnerabilities," even though neither child had a condition specifically identified by ACIP guidance as supporting a contraindication or precaution. (JA716.) Dr. Rausch-Phung recommended further review of these genetic vulnerabilities by a medical genetics specialist. (JA716.) And for Jane Boe, Dr. Rausch-Phung allegedly recommended that the school district deny her medical exemption request—but later advised

Commissioner affirmed the denial. (JA707.) The complaint does not allege that any of the plaintiffs sought judicial review in a C.P.L.R. article 78 proceeding.

that because of an acute illness, Jane Boe's parents could delay her meningococcal vaccine by one month. (JA712.)

Plaintiffs commenced this putative class action in the United States District Court for the Northern District of New York on July 23, 2020. (JA30.) Plaintiffs raised two broad facial challenges to the amended regulation governing medical exemptions. (*See* JA35.) In Counts One through Four, plaintiffs alleged that this regulation violates their right to substantive due process and access to education under the Fourteenth Amendment to the extent the regulation permits school officials to deny a medical exemption even though one is recommended by a physician familiar with the child. (JA96-99.) In Counts Five and Six, plaintiffs asserted the amended regulation's facial invalidity with respect to the Rehabilitation Act. (JA99-100.) Plaintiffs also brought as-applied claims against the School District defendants based on their denials of the medical exemptions with respect to specific plaintiff-children. (*See* JA101.) Plaintiffs asked for a declaration that the amended regulation violates their constitutional and statutory rights, and an injunction against its application. (JA101-102.)

The State and School District defendants moved to dismiss plaintiffs' claims in fall 2020. (ECF Nos. 28, 54, 78, 91.) In response, plaintiffs moved to amend. (ECF No. 93.) While these motions were pending, plaintiffs moved for a preliminary injunction barring DOH from enforcing the regulation statewide. (ECF No. 41.) The district court denied plaintiffs' motion (ECF No. 92), and plaintiffs appealed (ECF No. 113).⁵ Plaintiffs then moved for an injunction pending appeal in this Court. (Case No. 20-3915, Doc. No. 21.) The Court denied that motion in January 2021. (Case No. 20-3915, Doc. No. 64.) Plaintiffs also moved for an emergency injunction in the Supreme Court, which was denied. *Doe v. Zucker*, No. 20A135 (Mar. 8, 2021).

C. District Court Decision

In February 2021, the district court granted the motions to dismiss of both the State defendants and the School District defendants. The court held that plaintiffs' amended complaint failed to allege that the amended regulation implicates any fundamental rights that would trigger strict scrutiny (SPA49); the court further held that the amended

⁵ That appeal has since been dismissed by stipulation of the parties.

regulation satisfies rational basis review (SPA50-56). The court also rejected plaintiffs' arguments that the amended regulation placed an unconstitutional condition on the children's access to an education at a public or private school in New York (SPA75-76), and held that plaintiffs failed to allege Rehabilitation Act claims (SPA82-84).

In rejecting plaintiffs' claim that the amended regulation implicates fundamental rights, the court reasoned that the regulation does not compel parents to vaccinate their children against their will, because they always retain the option of homeschooling. Thus, the regulation does not implicate plaintiffs' liberty interest in refusing an unwanted medical procedure. (SPA44-45.) For the same reason, the court held that the abortion access cases plaintiffs relied on were inapposite, because in those cases the challenged regulations not only involved the fundamental right to access abortion but also created a threat to the life or health of the pregnant person. (SPA48.) The court held that plaintiffs also failed to establish the existence of a fundamental right to education, to a medical exemption, or to parenting. (SPA43-44, 45-47.)

In applying the rational basis test, the court held that the amended regulation rationally promotes public health by "ensur[ing] that medical

exemptions are limited to individuals that can demonstrate genuine, evidence-based medical contraindications or precautions.” (SPA54.) The court noted that it was rational for DOH to rely on the ACIP guidance (SPA54), but also that the regulation on its face “allows for a broader range of medical exemptions than the ACIP guidance alone would” (SPA53). Additionally, the court held that DOH rationally delegated authority over individual medical exemptions to school districts. (SPA56.) For similar reasons, the court held that plaintiffs failed to allege a violation of the Rehabilitation Act by claiming that the regulation discriminated against children solely because of conditions not listed in the ACIP guidance. (SPA82.)

The court also rejected plaintiffs’ as-applied claims, which the court construed as claims against the School District defendants only. (SPA57.) While noting that plaintiffs have a non-fundamental property interest in access to education, the court held that they failed to allege the kind of egregious or conscience-shocking conduct that would violate an individual’s substantive due process rights. Rather, plaintiffs were excluded from school because they chose “not to comply with a condition for school enrollment permissibly set by the state.” (SPA59; *see also*

SPA66.) While the court did not reach the merits of each plaintiff's individual claims (some were dismissed because of lack of involvement by the named school officials), the court found that with respect to two plaintiffs—Jane Boe and John Joe—the alleged medical exemption requests did not satisfy the regulatory requirements. (SPA64, 72.) The court further noted, in the context of John Doe's claim, that even if the school's decision to exclude John Doe had been arbitrary, "it was the type of state action that is 'correctable in a state court lawsuit seeking review of administrative action'"—not "egregious official conduct that violates substantive due process standards." (SPA62 (quoting *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999))).

Accordingly, the court dismissed the complaint in its entirety, and entered a final judgment. (SPA85.) This appeal ensued. (JA771.)

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Am. Trucking Associations, Inc. v. N.Y. State Thruway Auth.*, 886 F.3d 238, 244 (2d Cir. 2018). To survive a Rule 12(b)(6) motion, a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that

is plausible on its face.” *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 359 (2d Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

SUMMARY OF ARGUMENT

The amended regulation challenged by plaintiffs clarified and strengthened the rules for obtaining a medical exemption from the school vaccination requirement. It did so by specifying that a medical exemption is appropriate only if a child’s physician certifies that the child has “a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.” 10 N.Y.C.R.R. § 66-1.1(*l*). This certification requirement is intended to ensure that physicians do not issue medical exemptions for non-medical reasons. (JA139.)

As the district court correctly found, plaintiffs failed to state valid claims that the amended regulation is facially invalid under either the Constitution or the Rehabilitation Act. As an initial matter, the regulation does not implicate a fundamental right, and thus strict scrutiny does not apply. In particular, there is no fundamental right to a medical exemption from a state’s school vaccination requirement solely because the child’s treating physician recommends such an exemption.

Nor does the regulation implicate a patient's right to rely on her physician's independent medical judgment because the regulation permits a medical exemption based on such a judgment (so long as it is consistent with an evidence-based national standard of care). Finally, the regulation does not implicate a child's right to life or health because the regulation does not force parents to vaccinate their child against their will. Rather, parents may decline vaccination and homeschool their child. And even if a school district improperly denied a medical exemption in a particular case, that would support only an as-applied claim—not the facial claims plaintiffs assert against the State defendants.

The amended regulation is thus subject to rational basis review, which it readily passes. By ensuring that medical exemptions are available only to those who truly need them, the State's strengthened certification requirement promotes, and is rationally related to, the legitimate and, indeed, compelling objective of protecting communities from serious vaccine-preventable diseases. Nor does the amended regulation place an unconstitutional condition on access to education in the State. The district court thus correctly held that the amended

regulation is constitutional, and, for similar reasons, that it does not violate the Rehabilitation Act. This Court should affirm.

ARGUMENT

POINT I

PLAINTIFFS FAIL TO ALLEGE THAT THE AMENDED REGULATION IS FACIALLY UNCONSTITUTIONAL

The district court properly dismissed plaintiffs’ constitutional claims, which assert that DOH’s amended regulation both violates their right to substantive due process and imposes an unconstitutional condition on their access to education. Plaintiffs’ claims against the State defendants are facial, rather than as-applied.⁶ Thus, plaintiffs must allege that “there is no set of circumstances under which the challenged practices would be constitutional.” *Winston v. City of Syracuse*, 887 F.3d 553, 559 (2d Cir. 2018) (quoting *Deshawn E. by Charlotte E. v. Safir*, 156

⁶ As plaintiffs allege (*see, e.g.*, JA89, 753), school principals or superintendents implement the amended regulation. The district court therefore treated plaintiffs’ individual claims as against the School District defendants only, and dismissed those claims as well as the facial claims. (SPA57.) Plaintiffs do not challenge this approach on appeal. To the contrary, plaintiffs present argument only on their facial claims. For example, plaintiffs in their conclusion ask this Court to “reverse the district court’s dismissal and *facially* invalidate the challenged regulation.” (Br. 77) (emphasis added.)

F.3d 340, 347 (2d Cir. 1998)); *see also Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). And unless plaintiffs can show that the amended regulation implicates a fundamental right—which they cannot do—plaintiffs must demonstrate that the regulation is not “reasonably related to a legitimate state objective.” *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996); *see also Winston*, 887 F.3d at 566. Plaintiffs fail to do so.

A. The Amended Regulation Permits Medical Exemptions So Long as They Are Consistent with an Evidence-Based National Standard of Care.

As an initial matter, plaintiffs misdescribe the scope of the amended regulation in asserting that it places excessive constraints on a physician’s clinical judgment that a certain vaccine may be detrimental to a child’s health. (Br. 10-12, 45-47.) The amended regulation retains sufficient flexibility to permit a medical exemption in virtually any circumstance in which that judgment finds objective support.

As noted above, the amended regulation clarified how parents may obtain a medical exemption from New York’s school immunization requirement. The immunization requirement itself is set by statute. Under New York’s Public Health Law, any child attending a school in the

State must be vaccinated against certain serious diseases unless a physician certifies that a specific vaccine “may be detrimental to a child’s health.” Pub. Health Law § 2164(8). Prior to the amendment challenged here, DOH rules placed the burden of furnishing such a certification on the child’s parents, and required that such certification (i) contain “sufficient information to identify a medical contraindication to a specific immunization,” and (ii) “specify[] the length of time the immunization is medically contraindicated.” 10 N.Y.C.R.R. § 66-1.3(c). The amended regulation clarified that a medical exemption is appropriate only if a child’s physician certifies that the child has “a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.” *Id.* § 66-1.1(*l*). DOH promulgated the amended regulation to ensure that physicians certify medical exemptions to the school immunization requirement only if the exemptions are supported by an evidence-based national standard of care, such as the ACIP guidance, which lists each

condition that is known to be a specific contraindication or precaution to certain vaccines. (JA139.)⁷

Although plaintiffs assert otherwise (Br. 10-12), the plain language of the amended regulation permits physicians to consider evidence of national standards other than the ACIP guidance. A physician may rely, for example, on guidance issued by the Infectious Diseases Society of America, the American Academy of Pediatrics, and the American Academy of Family Physicians. (ECF Nos. 28-9, 28-10, 28-11.)⁸ Nor is a physician strictly limited to a nationally recognized standard of care that expressly lists a condition as a contraindication or precaution for a specific vaccine. Rather, a physician must certify that a child has a contraindication or precaution “consistent with” a national standard of care. 10 N.Y.C.R.R. § 66-1.1(*l*). As plaintiffs themselves state: Physicians “can, and certainly should, consider ACIP’s recommendations. But they

⁷ The district court properly took judicial notice of this regulatory history. (SPA7.) *See Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226 (1959); *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1086 (2d Cir. 1982).

⁸ Because these documents are publicly available, the Court may take judicial notice of the fact that they exist. *See, e.g., Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008).

also need to be able to make their decision based on all relevant factors—clinical examination, family history, emerging peer-reviewed evidence, Institutes of Medicine reports, and anything else that responsibly informs a physician’s determination about the patient’s health.” (Br. 47.)

The amended regulation is sufficiently flexible to permit the kind of evidence-based clinical judgment that plaintiffs describe. So long as a concern about the effect of a vaccine can be rationally inferred from evidence, consistent with a national standard of care, the regulation is satisfied. For example, as the district court noted (SPA53), a physician may rely on guidance contained in manufacturers’ vaccine inserts. *See* DOH, *Immunization Requirements for School Attendance: Medical Exemption Statement for Children 0-18 Years of Age* (SPA96).⁹ And plaintiff’s own allegations reflect the flexibility allowed by the amended regulation. According to the complaint, Dr. Rausch-Phung advised that plaintiffs John and Jane Coe may be entitled to medical exemptions—despite not having a condition specifically identified by ACIP guidance as

⁹ The district court properly considered this DOH medical exemption form on a motion to dismiss because the complaint incorporated the form by reference. (*See, e.g.*, JA734, 757-758.) *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011).

supporting a contraindication or precaution—subject to further review of their “genetic vulnerabilities” by a medical genetics specialist. (JA716.) Additionally, both John Foe and Jane Goe were able to obtain medical exemptions and attend school despite not meeting the criteria for a contraindication or precaution under the ACIP guidance. (JA720-721, 724-725.)

Accordingly, in determining whether a vaccine may be detrimental to a child’s health, a physician may consider any evidence that would bear on a national standard of care.¹⁰

B. Plaintiffs Fail to Allege that the Amended Regulation Implicates any Fundamental Rights.

Plaintiffs do not challenge New York’s school immunization law itself. Nor could they; courts have long upheld such laws. *See, e.g., Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)

¹⁰ Plaintiffs assert in conclusory fashion that the regulation’s reference to other nationally recognized standards of care is unconstitutionally vague. (Br. 12.) But the regulation is not vague merely because it is flexible. And in any event, plaintiffs do not even attempt to show that the regulation “is so fatally indefinite that it cannot constitutionally be applied to anyone,” as they must on a facial vagueness challenge. *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018).

(upholding Massachusetts law that authorized City of Cambridge to adopt a compulsory vaccination program, with allowance for medical exemptions, in response to smallpox epidemic); *Zucht v. King*, 260 U.S. 174 (1922) (upholding ordinance passed by City of San Antonio requiring proof of vaccination for any individual who wished to attend school—public or private—in the city); *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) (upholding New York’s school immunization law against substantive due process challenge).

Instead, plaintiffs attempt to articulate a right to an unsupported and unreviewable medical exemption from the school immunization requirement. (Br. 37-55.) They argue that they have a fundamental right to obtain a medical exemption from that requirement based solely upon the recommendation of a child’s treating physician, and that the amended regulation infringes that right.

There is no precedent for the fundamental right that plaintiffs articulate. To the contrary, in *Jacobson*, the Supreme Court made clear that medical exemptions from vaccine mandates may be limited to those cases in which “it be apparent or *can be shown with reasonable certainty* that” the vaccine would harm an individual. 197 U.S. at 39 (emphasis

added). The Court thus endorsed the principle that a state may require substantial evidentiary support for a medical exemption from compulsory vaccination.

Nor is there any authority for applying heightened scrutiny to the contours of such medical exemptions. As this Court noted in *Phillips*, which upheld New York's school immunization law, "no court appears ever to have held" that "*Jacobson* requires that strict scrutiny be applied to immunization mandates." 775 F.3d at 542 n.5. Indeed, courts around the country have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny. *See, e.g., B.W.C. v. Williams*, 990 F.3d 614, 622 (8th Cir. 2021) (noting that plaintiffs' challenge to school immunization law failed to state hybrid rights claim based on rights to bodily integrity, education, and parenting, among others); *accord Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 355 (4th Cir. 2011) (parent has no fundamental right to refuse to vaccinate child in violation of school immunization law); *Boone v. Boozman*, 217 F. Supp. 2d 938, 956 (E.D. Ark. 2002) (rejecting argument that "the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or

private school where immunization is a precondition to attending school”).

Because they lack any on-point authority for their purportedly fundamental right to an unsupported and unreviewable medical exemption, plaintiffs make two fundamental rights arguments based on case law borrowed from the abortion context. Neither one has merit.

First, plaintiffs argue (at 45-50) that by tying medical exemptions to the ACIP guidance, the amended regulation infringes a patient’s fundamental right to rely on her physician’s independent medical judgment. *See Whalen v. Roe*, 429 U.S. 589, 603 (1977); *Doe v. Bolton*, 410 U.S. 179, 192, 199-200 (1973). That right, however, is not implicated here, because for the reasons explained above (Point I.A), the amended regulation permits a medical exemption based on a case-specific clinical judgment, so long as it is consistent with an evidence-based, national standard of care.

Moreover, strict scrutiny should not apply merely because the amended regulation requires physicians to adhere to an evidence-based national standard of care, such as the ACIP guidance, when recommending a medical exemption. The requirement that a physician’s

clinical judgment be consistent with an evidence-based national standard of care was based in part on California's experience with medical exemption rates. Such rates more than tripled after California repealed its non-medical exemption from its mandatory school vaccination law. (JA139.) DOH thus promulgated the amended regulation to ensure that New York does not repeat California's experience, and physicians do not issue medical exemptions for non-medical reasons. (JA139.)

In other areas of the law, physicians are similarly expected to adhere to an evidence-based standard of care. For example, in *Rodriguez v. City of New York*, 72 F.3d 1051, 1062 (2d Cir. 1995), this Court held that substantive due process requires that “an involuntary emergency commitment be made in accordance with a standard that promises some reasonable degree of accuracy.” The Court interpreted New York's involuntary commitment statute—which permitted a physician to commit a patient upon finding that he posed a “substantial risk of physical harm to himself,” N.Y. Mental Health Law § 9.39(a)—as implicitly requiring that the physician's decision “be made in accordance with the standards of the medical profession.” *Rodriguez*, 72 F.3d at 1063. What those standards are, and whether a physician's clinical judgment

is consistent with those standards in a particular case, are fact questions to be determined on a case-by-case basis. *See id.*; *see also Bolmer v. Oliveira*, 594 F.3d 134, 142, 145 (2d Cir. 2010).

Second, plaintiffs argue that the amended regulation puts children at risk of harm, thus implicating their right to life or health. (Br. 40-45.) While the right to life or health is undoubtedly fundamental, that right is not implicated by the amended regulation because the State is not forcing schoolchildren to be vaccinated against their parents' will. Under the amended regulation and State law, if parents cannot furnish a physician's certification (consistent with a nationally recognized, evidence-based standard of care) that a specific vaccine may be detrimental to a child's health, then an unvaccinated child may not be admitted to a school in the State. *See* Pub. Health Law § 2164(7), (8); 10 N.Y.C.R.R. §§ 66-1.1(*l*), 66-1.3(c). Parents remain free to homeschool their children without having them vaccinated. *See Phillips*, 775 F.3d at 542 n.5 (noting that New York's school immunization law does not implicate substantive due process because it does not compel

vaccination). Thus, plaintiffs cannot show that the amended regulation implicates their fundamental right to life or health.¹¹

Indeed, for this reason, the abortion access cases upon which plaintiffs rely are of no help to them. The Supreme Court's decisions in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), and *Stenberg v. Carhart*, 530 U.S. 914 (2000), stand for the proposition that a state cannot prevent abortions that are necessary for the life or health of a woman—what plaintiffs call the “harm avoidance” doctrine. (Br. 40.) Because the State is not compelling plaintiffs to vaccinate their children, however, but merely placing a reasonable condition on their non-fundamental right to attend school, *see Phillips*, 775 F.3d at 542 n.5, those cases are inapposite. As the district court held, “the medical exemption at issue here does not directly implicate the same ‘unnecessary risk of tragic health consequences’ that drives the abortion medical exemption jurisprudence.” (SPA48 (quoting *Stenberg*, 530 U.S. at 937).)

¹¹ For the same reason, the amended regulation does not implicate plaintiffs' purportedly fundamental rights to refuse medical treatment; to informed consent; and, for parents, to make medical decisions for their children. (Br. 55.)

Even if the amended regulation did raise a health concern, that would not warrant the broad, facial relief that plaintiffs seek. If a child is denied a medical exemption in a specific case, that is a ground for an appeal to the Commissioner, *see* Educ. Law § 310; Pub. Health Law § 2164(7)(b), a state-court article 78 proceeding, *see Check v. N.Y. City Dep't of Educ.*, No. 13-CV-791, 2013 WL 12113679, at *4 (E.D.N.Y. Sept. 11, 2013); *Lynch v. Clarkstown Cent. Sch. Dist.*, 590 N.Y.S.2d 687, 689 (N.Y. Sup. 1992), or an as-applied challenge in federal court. It does not warrant facial relief. As the Supreme Court held in rejecting a facial challenge to the federal ban on partial birth abortion, *see Gonzales v. Carhart*, 550 U.S. 124, 167 (2007), an as-applied challenge to the ban was “the proper means to consider exceptions” to the ban that may be required “if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which [partial birth abortion] must be used.” The same is true here with respect to a request for a medical exemption.¹²

¹² Plaintiffs also suggest, in a footnote, that deprivation of access to public or private school “is entitled to at least some vigorous review.” (Br. 64 n.7.) This argument is inconsistent with *Zucht* and *Phillips*, both of which upheld school immunization laws—covering both public and private schools—without applying heightened scrutiny.

In sum, plaintiffs fail to allege a violation of fundamental rights, and therefore rational basis review, rather than strict scrutiny, applies. *See Immediato*, 73 F.3d at 461.

C. The Amended Regulation Rationally Responds to a Public Health Threat.

The amended regulation readily survives review as a rational response to a serious threat to public health from communicable disease. DOH strengthened the certification requirement in response to the 2018-2019 measles outbreak, which was fueled by low vaccination rates in certain communities across the State. (*See* JA139.) That outbreak also led the Legislature to repeal the religious exemption to the school immunization requirement. *See* L. 2019, ch. 35, § 1.

The amended regulation thus promotes the legitimate State objective of protecting communities from serious, vaccine-preventable diseases. It both protects vaccinated children from such diseases and advances communal resistance to those diseases by placing a reasonable condition on children's attendance at a school in the State. *See Zucht*, 260 U.S. at 176-77; *Phillips*, 775 F.3d at 542. Medical exemptions remain available, but to ensure that they are received only when necessary, the

regulation provides clear, evidence-based guidance to physicians about when vaccination would be detrimental to a child's health. Specifically, a physician must point to a contraindication or precaution "consistent with [either] ACIP guidance or other nationally recognized evidence-based standard of care." 10 N.Y.C.R.R. § 66-1.1(*l*).

Tying the receipt of a medical exemption to widely-accepted standards, including ACIP guidance, is a rational means of advancing the State's legitimate interest. ACIP is a committee within the CDC that "provides information for clinicians and other health care providers about concerns that commonly arise when vaccinating persons of various ages." (JA442.) The ACIP guidance, relying on numerous published studies, lists each condition that is known to be a specific contraindication or precaution to certain vaccines. (JA489-499.) ACIP also identifies conditions that may wrongly be perceived as contraindications or precautions. (JA492, 500-502.)¹³ For the vast majority of children, the ACIP guidance is sufficient to determine whether a specific vaccine may

¹³ The district court properly considered the ACIP guidance on a motion to dismiss because the complaint incorporated the guidance by reference. (JA688, 737-739.) *See L-7 Designs, Inc.*, 647 F.3d at 422.

be detrimental to a child's health, and plaintiffs do not suggest otherwise. Nevertheless, as explained above (Point I.A), the regulation does not limit the factors a physician may consider in certifying a medical exemption, so long as the certification is consistent with an evidence-based, national standard of care.

The amended regulation also reasonably provides that school officials are responsible for ensuring that students have received the required vaccines or are entitled to an exemption. *See* Pub. Health Law § 2164(7); Educ. Law § 914(1). It is well settled that a state may vest in local officials "broad discretion in matters affecting the application and enforcement of a health law." *Zucht*, 260 U.S. at 176. Thus, in *Zucht*, the Supreme Court rejected the argument that a school immunization requirement was unconstitutional because it gave local authorities discretion "to determine when and under what circumstances the requirement shall be enforced" without adequate guidance. *Id.* at 175. Additionally, if a medical exemption is denied, a parent has the right to appeal that decision to the Commissioner of Education or seek judicial review in state court under C.P.L.R. article 78.

In sum, the amended regulation is a reasonable response to a threat to the public health. By strengthening and clarifying the certification requirement for obtaining a medical exemption to a specific vaccine, the regulation ensures that medical exemptions are reserved for those schoolchildren who truly need them—those for whom a physician makes an evidence-based clinical judgment, consistent with a national standard of care, that a specific vaccine may be detrimental to their health. Thus, the regulation satisfies rational basis review. And because the regulation does not implicate any fundamental rights, *see supra* Point I.B, the Court should affirm the district court’s holding that the regulation is constitutional.

D. The Amended Regulation Does Not Place an Unconstitutional Condition on Access to Education.

Finally, plaintiffs fail to state a constitutional claim based on the unconstitutional conditions doctrine. That doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Plaintiffs argue that by conditioning children’s access to education on vaccination, against their

parents' wishes, the amended regulation coerces parents to waive their substantive due process right to make medical decisions in accordance with their physicians' independent medical judgment. (Br. 63.)

It is well settled that the right to attend school is not fundamental. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). It is also well settled that states may require children to be vaccinated as a condition of attending school. *See Zucht*, 260 U.S. at 176-77; *Phillips*, 775 F.3d at 542. The right to make medical decisions in accordance with a physician's independent judgment necessarily yields to the State's legitimate, and indeed compelling, interest in protecting public health. *See Phillips*, 775 F.3d at 542 (noting that in *Jacobson*, the Court "rejected the claim that the individual liberty guaranteed by the Constitution overcame the State's judgment that mandatory vaccination was in the interest of the population as a whole").

Plaintiffs argue that certain vaccines do not prevent asymptomatic transmission, and thus do not contribute to herd immunity. (Br. 73.) Even if this were true, plaintiffs' challenge is facial, requiring them to show that the regulation is unconstitutional in all or most applications—including for the majority of vaccines that indisputably promote herd

immunity. *See Winston*, 887 F.3d at 559. That argument is foreclosed by *Zucht* and *Phillips*. Moreover, vaccines that do not contribute to herd immunity nonetheless protect the children who receive them—thus preventing outbreaks among unvaccinated individuals.

This case does not present the very difficult question whether there are any circumstances in which a State may condition a child’s attendance at school on the parents’ consent to a vaccine that poses a significant and supported risk to the life or health of the child. The Supreme Court suggested in *Jacobson* that compelling such an individual to take that risk “would be cruel and inhuman in the last degree.” 197 U.S. at 39. But the amended regulation does not coerce children to take that risk. Rather, the regulation preserves the medical exemption for (the very few)¹⁴ children to whom a specific vaccine poses a genuine risk of harm. The regulation merely imposes objective standards to ensure that the risk is genuine and appropriately assessed. If a physician makes an evidence-based clinical judgment, consistent with a national standard of

¹⁴ Indeed, plaintiffs aver that “less than a third of one percent of all school children in New York even submit medical exemptions for consideration.” (Br. 72.)

care, that a child should not be vaccinated, then the child is exempt. If there is no evidence that a child is at risk from a vaccine, however, then the child should be vaccinated—for his or her own health and for the health of the community.

Thus, for children who genuinely cannot be vaccinated for medical reasons, the amended regulation places no condition on their attendance at a school in the State apart from providing a medical exemption form that contains a proper physician's certification. Because that condition does not implicate fundamental rights, the regulation must be upheld so long as it satisfies rational basis review. *See Immediato*, 73 F.3d at 461. For the reasons already discussed, *supra* Point I.C, that standard is readily met here. The district court therefore properly dismissed Counts One through Four against the State defendants, and this Court should affirm.

POINT II

PLAINTIFFS FAIL TO ALLEGE THAT THE AMENDED REGULATION IS FACIALLY INVALID UNDER THE REHABILITATION ACT

The district court also correctly dismissed Counts Five and Six, which allege violations of Section 504 of the Rehabilitation Act of 1973,

against the State defendants. Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). “Exclusion or discrimination may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation.” *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016).

Plaintiffs fail to allege that the amended regulation excludes them and other putative class members from school, or otherwise discriminates against them, solely by reason of their alleged disability. According to the complaint, their disability is that they might be at risk from vaccines for reasons not listed in the ACIP guidance. (JA766-767; *see also* Br. 75.) As discussed above (Point I.A.), the amended regulation does not limit medical exemptions to those whose conditions appear in the ACIP guidance. A physician may certify that a specific vaccine may be detrimental to a child’s health based on a contraindication or precaution consistent with any nationally recognized, evidence-based standard of

care. And this flexibility allows a physician to certify a medical exemption based on her clinical judgment, so long as that judgment is based on evidence and consistent with a national standard of care.

The amended regulation therefore does not prevent children who cannot be safely vaccinated from obtaining a medical exemption. And all others who choose not to be vaccinated are excluded from school because of that choice—not because of any disability. Thus, the Court should affirm the district court’s dismissal of plaintiffs’ Rehabilitation Act claims against the State defendants.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: Albany, New York
June 18, 2021

Respectfully submitted,

LETITIA JAMES
*Attorney General of the
State of New York*
Attorney for State Appellees

By: /s/ Beezly J. Kiernan
BEEZLY J. KIERNAN
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2023

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
*Assistant Solicitor General
of Counsel*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, Beezly J. Kiernan, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains **7,598** words and complies with the typeface requirements and length limits of Rule 27(d).

/s/ *Beezly J. Kiernan*
BEEZLY J. KIERNAN