

*To be argued by*  
MICHAEL H. SUSSMAN, ESQ.  
*Time Requested: 15 minutes*

Appellate Division – Third Department Case No. 530783

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# New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

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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., on 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.;

*(caption continued on inside cover)*

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## APPELLANT'S BRIEF

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Albany County Index No. 4108-2019

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

*Plaintiffs-Appellants*

—against—

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

*Defendants-Respondents.*

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## PRELIMINARY STATEMENT

On June 13, 2019, New York State ended the more than 55-year-old religious exemption to vaccinations, effective immediately, thereby excluding non- and partially-vaccinated children from public, private, and religious schools and daycares.

While the State has long recognized each child's right to a free public education, and while the United States Supreme Court has long recognized that each family has the right to choose a private school, the repeal evicts healthy children from any and all schools, period, in perpetuity.

The Court below recognized that this repeal legislation imposes irreparable harm on these children and their families.<sup>1</sup> But, after denying them a preliminary injunction against the repeal, it dismissed the Verified Complaint, holding that the State of New York violated no constitutional right in repealing the religious exemption to vaccinations. As is demonstrated below, the Complaint sets forth viable constitutional claims and, therefore, Supreme Court's grant of Respondents' motion to dismiss was clearly erroneous and must be vacated and reversed with the Verified Complaint reinstated.

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<sup>1</sup> "Having read the hundreds of affidavits from plaintiffs and potential plaintiffs about the difficult choices and consequences to their lives if the repeal is enforced, the Court acknowledges the magnitude of disruption and potential harm they would suffer." (A-194).



## QUESTIONS PRESENTED

- (1) DID SUPREME COURT ERR WHEN IT DISMISSED THE VERIFIED COMPLAINT?
- (2) DOES THE VERIFIED COMPLAINT SET OUT A VIABLE CLAIM THAT THE CHALLENGED RELIGIOUS REPEAL LEGISLATION VIOLATED THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT?
- (3) DOES THE VERIFIED COMPLAINT SET OUT A VIABLE CLAIM THAT NO COMPELLING INTEREST EXISTED TO REPEAL THE RELIGIOUS EXEMPTION TO VACCINATIONS IN NEW YORK?
- (4) DOES THE VERIFIED COMPLAINT FACIALLY ESTABLISH A PLAUSIBLE VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT?
- (5) DOES THE VERIFIED COMPLAINT SET OUT SUFFICIENT FACTS TO PREDICATE APPELLANT'S "COMPELLED SPEECH" CLAIM?

## STATEMENT OF THE CASE

### **A. Procedural History.**

On July 10, 2019, within a month of the contested conduct, Appellants initiated a challenge to the constitutionality and legality of the repeal of the religious exemption from vaccinations for children attending New York State's schools. A-94-129.

On July 12, 2019, Supreme Court denied Appellants' request for a temporary restraining order. A-502-06. Appellants moved for a preliminary injunction enjoining enforcement of the legislative repeal of the religious exemption. By Decision and Order dated August 23, 2019, Supreme Court found that plaintiffs had not demonstrated a likelihood of success on the merits and denied that application. A-181-212. Thereafter, Appellants sought a preliminary injunction in this Court and, on September 5, 2019, this Court denied the application. A-131.

On September 6, 2019, Respondents moved to dismiss the Verified Complaint. A-89-178. Appellants timely opposed the motion. A-89-108. By Decision and Order dated December 3, 2019, Supreme Court granted Respondents' motion to dismiss. A-5-39. After Respondents noticed entry of this Order on December 11, 2019, Appellants timely filed their notice of appeal and now perfect their appeal. A-1-4.

## B. STATEMENT OF FACTS

### 1. Overview.

As set forth in the Verified Complaint, Appellants are parents from throughout the State of New York, each of whom holds a *bona fide* and sincerely-held religious belief against vaccinating his or her children and have not vaccinated them based upon that belief. These parents applied for, and were granted, religious exemptions from their children's schools. A-111-12.

Appellants are persons from different and diverse religions and some are not affiliated with any organized religion; what binds them are religious beliefs that compel them to not vaccinate their children as well as the effect of the challenged action – exclusion of their children from any school-based education in the State of New York. A-111.

As only one of a myriad examples, in New York, thousands of persons of the Jewish faith, including many Plaintiffs and many in the class they represent, educate their children in religious schools, Yeshivas, which inculcate religious and secular education and provide a setting for them to engage in daily prayer and worship with their peers. Such daily worship commences when children are four years of age and continues in and throughout their schooling. A-113.

Denying these Appellants attendance at Yeshivas severely burdens their religious exercise, depriving them of education that cannot be replicated in any other setting absent these children's peers. A-113.

**2. New York State has long balanced respect for religion and public health with requirements for school attendance.**

In the early 1960's, New York State, like 47 other states, enacted an exemption for school children whose families held genuine and sincere religious beliefs against vaccinations. Since 1963, New York has recognized a religious exemption to vaccinations. See N.Y. Pub. Health L. § 2164(9). New York State has never had a "personal belief" or philosophical exemption to vaccination.

Under prior and longstanding New York State law and regulation, each appellant made written application to the school district or school explaining those religious beliefs which compelled them to not vaccinate and, in each instance, school authorities reviewed their applications, approved their religious exemption and admitted their children to school, whether public or private, based upon the parents' or guardians' genuine and sincere beliefs. This comported with the process created by New York State to determine whether a family had *bona fide* religious beliefs warranting grant of this exemption.

The religious exemption has hardly been a rubber stamp process in New York State; many school districts, such as New York City schools, rejected the overwhelming majority of applications for such exemptions.

For the 2017-18 school year, some 26,000 students attending our State's schools held religious exemptions, making up a mere 0.79% of school enrollees. Another 0.14% of students had medical exemptions, which permitted them to enroll in school without vaccinations. The challenged religious repeal legislation did not affect the latter group of students.

The New York State Constitution requires the legislature to provide for the maintenance and support of a system of free common school wherein all children of the State may be educated, regardless of race, religion, sexual orientation or ability. See N.Y. Const., art. 9, § 1. Through its compulsory attendance law, New York State requires students aged six to sixteen to attend school or to receive home instruction, and Section 3202 of the New York Education Law entitles persons between the ages of five and twenty-one to a free public education. Parents residing in New York State who fail to comply with compulsory education laws may face serious civil and/or criminal sanctions, including potentially, the loss of parental rights over their children. See N.Y. Educ. L. § 3205(1)(c); See also A-521-29. Appellants cannot abide by the repeal law and satisfy the compulsory education laws without violating deeply-held religious beliefs.

New York State law and regulation have balanced religious exemptions from vaccinations with a concern for public health for more than fifty-five years. Accordingly, before June 13, 2019, New York allowed state authorities to exclude

those students holding religious and medical exemptions from a school after another student in the same school presented with a case of a vaccine-targeted contagious disease. See 10 N.Y.C.R.R. § 66-1.10. In such an instance, New York authorized County Commissioners of Health and school officials to exclude a student exempted from vaccination due to religious beliefs until a reasonable time had passed following the discovery that a student in her/his school was infected. At the same time, valuing its commitment to universal education for children, New York did not allow the exclusion of any non-vaccinated students from school based on more generalized and less specific concerns for public health.

New York State also provides other means, measures and methods for insuring that contagious diseases did not spread. Specifically, sections 2100(2)(a) and (b) of the Public Health Law allow County Health Commissioners and the State Commissioner of Health to isolate or quarantine those infected with a contagious disease and to seal off and clean places that those with such contagious diseases frequented.

**3. The State response to the measles outbreak failed to employ methods, means and measures provided by State law and regulation to control such an outbreak.**

In late September 2018, seven cases of measles, one of the vaccine-targeted contagious diseases covered by the afore-cited regulatory structure, were reported in Rockland County. A-115. The cases did not originate in the United States or in

the State of New York, and the persons so infected were identified and known to public health authorities, as was the source of their infection. Id. The Commissioner of Health for Rockland County did not isolate or quarantine these seven persons or utilize any such authority until April 2019, nearly seven months too late. Id.

In October 2018, cognizant of the outbreak of measles in Rockland County and following existing state regulations, both the State and County Commissioners of Health advised certain schools where cases of measles had been reported to exclude children with religious exemptions. Id. At the same time, following existing state regulations, both the State and County Commissioners of Health advised other schools that they were *not* to exclude children with religious exemptions since there were no reported measles cases in their schools. A-115-16.

In the counties in New York where measles cases were reported between late September 2018 and late April 2019, neither the State nor County Health Commissioners ordered the quarantining or isolation of any persons infected with measles nor those living with such persons and thereby exposed to the contagious disease. A-116. Instead, without legal authority, in early December 2018, the Commissioner of Health for Rockland County issued an order that required certain schools and nurseries with “low vaccination rates” to exclude children with

religious exemptions from those in which no case of measles had been presented or reported. Id.

New York State law did not contemplate entry of any such order, which was *ultra vires* and beyond the Commissioner's authority. Said order lacked any legal basis or authority and kept from their schools hundreds of healthy children, despite the fact that these schools had no reported or known cases of measles, thereby violating the state law. A-116.

Between September 2018 and June 13, 2019, the State Commissioner of Health did not promulgate any directive or order preventing children with religious exemptions from attending daycare, private or public schools in the State of New York. Id. Simply put, between September 2018 and June 2019, New York State and the affected counties did not utilize the means, measures and methods provided by state law and regulation to effectively resolve the outbreak of measles. A-117.

#### **4. The legislative process lacked urgency or fact-finding.**

In January 2019, as in at least the prior three sessions, legislation to repeal the religious exemption was introduced in the State Assembly [Assembly Bill 2371-A], and, later that month, a companion bill was introduced in the State Senate [Senate Bill 2994-A]. A-117. Both proposed bills were referred to the respective Health Committees in the Assembly and Senate, id., which are charged with considering all bills that deal with the health of New Yorkers. Between January



2019 and June 2019, despite multiple requests from Appellants and other constituents, no legislative committee convened a single public hearing on either proposed bill. A-117.

The State Legislature did not take any action, let alone expedited action, to repeal the religious exemption during the months when the number of active measles cases was at its highest in those few areas of the State that experienced an outbreak. Id. Had public health concerns animated passage of this legislation and had legislators believed that repeal would have measurably abated the outbreak, the State Legislature should have swiftly enacted the repeal legislation at the height of the measles outbreak. Not only did the legislation languish for months but, before their votes, neither the Assembly nor the Senate, nor any committee of either chamber, held hearings on the proposed repeal of the religious exemption first enacted in New York more than fifty-five years ago. A-117-18.

Likewise, neither the Assembly nor the Senate, nor either of their Health Committees, engaged in any fact-finding process to determine [a] the number of active cases of measles in New York State; [b] the proportion of New York State's population which is vaccinated; [c] the proportion of unvaccinated individuals that hold religious exemptions; [d] the actual risk, if any, posed to vaccinated persons by those who do not vaccinate based on their sincerely-held religious beliefs; [e] whether those who had contracted measles were, or were not, vaccinated against

the disease; [f] whether those who contracted measles did, or did not, have religious exemptions to vaccination; [g] whether any case of measles likely had been contracted from such an unvaccinated minor; and [h] whether “herd immunity” had been achieved in and throughout the State of New York. Instead, the legislative history of the law revoking Section 2164(9) is barren with respect to each of these vital questions. A-118.

Likewise, neither the Assembly nor the Senate debated or provided answers to questions critically inter-related to the elimination of the religious exemption, including: [a] what enforcement action could or would be taken against parents whose sincerely-held religious beliefs prevent them from allowing the vaccination of their children; [b] what local school districts and the State Education Department are to do with regard to the thousands of children throughout the State who are at once obliged to attend a public or private school and who are now disallowed from such attendance; and [c] what doctors thought about the “effective immediately” clause and the health and safety ramifications of such an unprecedented clause.

Neither the Assembly nor the Senate possessed any factual information, which provided any basis for members to conclude that a compelling state interest existed which might have supported the elimination of the religious exemption. To wit, there was neither a showing that those with religious exemptions had in fact

spread a single case of measles – ever - nor that other less restrictive or narrowly tailored measures, as were then permitted by the laws of the State of New York, insufficiently responded to the outbreak of measles. A-119.

Indeed, in the floor debates on the bills, proponents repeatedly avoided any mention of the number of active cases of measles in the State and deceptively referred to the cumulative number of cases since September 2018, as if this represented the number of active cases on June 13, 2019 or at any other point in time. A-119. The same method of over-stating the active cases of measles is evident in the December 3, 2018 letter by Rockland County Health Commissioner Schnabel Ruppert, which presents the total number of cases in Rockland County as if they were then all active. Id.

As the measles outbreak diminished in intensity, and amidst a flurry of very public attacks on those of religious faith who held religious exemptions, on June 13, 2019, the Senate and Assembly both passed bills repealing the exemption. Without any legislative hearings, the Assembly health committee,<sup>2</sup> and then both chambers of the New York State Legislature, voted to eliminate religious exemptions theretofore codified at Section 2164(9) of the Public Health Law and to require parents to administer a panoply of vaccinations to their children, depending on age, including vaccines against measles, mumps, rubella, diphtheria,

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<sup>2</sup> The Senate health committee was surpassed and did not even vote on the bill.

tetanus, polio, chickenpox, meningitis, hepatitis B, haemophilus influenza Type B and pneumococcal disease. The requirements included vaccinations for diseases which were not contagious, like tetanus, not transmittable in a classroom, like Hepatitis B, and no longer in circulation in the United States, like polio. In addition, the Legislature granted itself *carte blanche* to add future vaccinations to the mandatory schedule, and if parents were to have any religious opposition to those vaccinations, their children would be excluded from daycare and all schools.

These votes followed transcribed debates replete with references to the “fraud” being perpetrated on the general public by those holding “alleged” religious beliefs. The sponsors of the legislation in both chambers publicly attacked those with religious exemptions, claiming they rejected modern science and that their beliefs were “utter garbage.”

While the legislature so acted, it maintained religious exemptions for students 18 years of age and older, who can attend public high schools without vaccination as well as for college-age students, and it failed to require that adults working in the State’s schools have any vaccinations, let alone the full panoply of vaccinations required of school-aged children.<sup>3</sup> Nor did the legislature make any reasoned determination that the means, measures, and methods provided by New

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<sup>3</sup> From pre-kindergarten through 12<sup>th</sup> grade, this is approximately 27 mandated doses of vaccinations for 12 childhood illnesses as of the date of this brief. See <https://www.health.ny.gov/publications/2370.pdf>.

York State for dealing with the measles outbreak had been employed and failed in meeting the measles outbreak. And, no such showing could have been made because neither the State Commissioner of Health nor the affected county commissioners used the authority vested in them to isolate or quarantine the infectious persons and places.<sup>4</sup> Further, the legislature made no effort to determine whether students with religious exemptions had caused or worsened the measles outbreak nor examined any evidence proving that these children pose a risk.

New York's religious repeal took effect immediately. Students benefitting from religious exemptions were denied admission to summer camps operating out of schools, excluded from summer schools, and are now disallowed from enrolling in any school in the state [beyond 14 days at the start of the school year, further showing the irrationality of the repeal – If the State was truly concerned that these students pose a true health risk to other children, then it would not have permitted them to enter school premises for the first 14 days of the school year.]

At the time the legislation passed, there was no measles crisis in the State and, since the filing of this lawsuit, the number of reported measles cases in the affected counties has dwindled to practically none.

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<sup>4</sup> Supreme Court stated that these measures “simply are not as effective” as requiring mandatory vaccinations yet cited no data or source to show that this is true.

**5. The repeal of the religious exemption was motivated by active hostility toward religion.**

The challenged legislation was intended to regulate the religious conduct of those who had been granted an exemption to vaccinate on the basis of their sincerely-held religious beliefs, and its enforcement will trammel their religious beliefs and practices or cause their children to be deprived of a free public education or a religious education, as chosen by parents in accordance with their religious beliefs.

Rather than being motivated by any serious concern for public health, and despite the Governor's rhetoric, in the public debate and discourse which preceded 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.

Illustrative of this fact, in her closing remarks at the end of the legislative session, just days after the repeal, Senate Majority Leader Andrea Stewart-Cousins mocked and disregarded plaintiffs' religious beliefs, stating, "We've chosen science over rhetoric." See Gotham Gazette, In 'Most Historic and Productive' Session, Albany Democrats Move Extensive Agenda to Transform New York, Jun. 24, 2019, available at <https://www.gothamgazette.com/state/8629-historic-productive-session-democrats=albany-cuomo-transform-new-york> (last visited Apr. 6, 2020). A-120.

In supporting the repeal, one of its Senate sponsors, James Skoufis, stated, “Let me be clear: There is not one religious institution, not one single one that denounces vaccines. So, here we have a religious exemption pretending as if there is a religion out there that has a problem with the vaccines...Whether you are Christian, whether you are Jewish or Scientologist, none of these religions... have texts or dogmas that denounce vaccines. Let’s as a state stop pretending like they do.” Skoufis later mockingly tweeted, “Stay classy, anti-vaxxers . . . . In a few moments, I look forward to casting a ‘yes’ vote on this important bill.” See Skoufis video, available at <https://www.facebook.com/watch/?v=444618979690331>. A-120-21.

In an op-ed, Senator Skoufis referred to the “so-called ‘religious exemption,’” writing that “the time is now to end the state’s nonsensical and dangerous religious exemption.” He concluded that “We’ve already wasted too much time debating this issue,” despite the fact that the Senate never convened a single hearing on the topic. See Patch.com, OP-ED: Vaccines: Protecting Our Children from Measles, May 3, 2019, available at, <https://patch.com/new-york/midhudsonvalley/op-ed-vaccines-protecting-our-children-measles> (last visited Apr. 6, 2020). A-121.

Another principal proponent, Senator David Carlucci of Rockland County, explained the repeal this way: “We are removing this religious notion to it

[vaccination]. Not everybody is the same. Religion cannot be involved here. We have to govern by science. Removing all non-medical exemptions will help to lower the stigma that happens.” See Verizon Fios Video, May 18, 2019, at 11:15-11:40, available at, <http://fios1news.com/uncategorized/state-sen-carlucci-on-measles-seat-belts-and-marijuana/>. He further explained the repeal this way: “[A] group of people has decided their ideological beliefs are more important than public health. Putting people in harm's way . . . is selfish and misguided. Vaccines save lives and with the current measles outbreaks, legislation to end non-medical exemptions is paramount.” A-121.

Another prominent proponent of repeal, State Senator Brad Hoylman, further deprecated those who hold religious exemptions, stating, “Let’s face it. Non-medical exemptions are essentially religious loopholes, where people often pay for a consultant to try to worm their way out of public health requirements that the rest of us are following.” See N.Y. Legislative Press Conference, May 6, 2019 at 8:13-8:30, available at, <https://youtu.be/wn5CI071U2w?t=8m11s> (last visited Apr. 6, 2020). Senator Hoylman manifested the same hostility in other remarks, “The goal should be to take religion out of the equation . . . . We can’t put our public health officials or our school officials into that position of deciding if a religious belief is sincere or not. That is why we need to remove it altogether.” See Id. at 31:47-32:34. A-121-22



The original Assembly sponsor of the repeal legislation, Jeffrey Dinowitz, echoed and extended this sentiment: “There are other people who don’t get their kids vaccinated because of the religious exemption. There is a provision in the law which says that if somebody has legitimate, you know truly has religious reasons for not doing it, they can be exempt as well. The problem is that most people in my opinion use that as an excuse not to get the vaccinations for their kids. There is nothing, nothing in the Jewish religion, in the Christian religion, in the Muslim religion . . . that suggests that you can’t get vaccinated. It is just utter garbage.” See Dinowitz interview, May 19, 2019, at 2:52-3:28, available at, <https://youtu.be/X99d27D-mZo?t=2m52s> (last visited Apr. 6, 2020). A-122.

In other public comments, Assemblyman Dinowitz repeated his hostility toward religion and persons who hold such beliefs: “Even if people may think they have a religious problem with it, the truth is that the overwhelming majority of these people are exercising what is in fact a personal belief exemption.” See NYS Legislative News Conference, May 6, 2019, available at, <https://www.youtube.com/watch?v=wn5CI071U2w&feature=youtu.be&t=29m30s> (last visited Apr. 6, 2020). And, on another occasion, Mr. Dinowitz remarked, “There are many people who are claiming religious exemption when in fact it has nothing to do with religion.” See N.Y. Daily News, N.Y. Lawmakers Push to End Vaccination Exemptions in State amid Growing Measles Outbreak, Apr. 29, 2019,

available at, <https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmzczsugupu2m-story.html> (last visited Apr. 6, 2020). A-122-23.

Ed Day, the Rockland County Executive, was a major proponent of repeal and repeatedly expressed antipathy toward those who held religious exemptions in Rockland County where a measles outbreak occurred and which contains a large ultra-Orthodox Jewish community. A-123. On March 28, 2019, Mr. Day issued a “Declaration of Local State of Emergency for Rockland County.” His Declaration was aimed at, and only at, children who held religious exemptions to vaccination. . It sought to ban such children from any place of public assembly, including their schools, synagogues, churches, malls and parks, precisely during the period of Passover and Easter celebrations. By Decision and Order dated April 5, 2019, Supreme Court, Rockland County enjoined the force and effect of this Declaration, finding that no emergency existed in Rockland County so as to justify an Executive Order pursuant to Section 24 of the Executive Law.<sup>5</sup>

Without any factual basis, Mr. Day stated, “The religious exemption has been abused and it has been used as a personal preference exemption.” See N.Y. Daily News, N.Y. Lawmakers Push to End Vaccination Exemptions in State Amid Growing Measles Outbreak, Apr. 29, 2019, available at,

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<sup>5</sup> The County of Rockland sought emergency review and the Appellate Division for the Second Department affirmed the restraining order Judge Thorsen entered.

<https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmzczsugupu2m-story.html> (last visited Apr. 6, 2020).

A-123. Day remarked further: “The truth is that the purported religious exemption for vaccinations as a requirement to enter public and private schools is a total myth and fabrication. In fact, it has become a ‘personal belief’ exemption and that is NOT allowable under existing law.” See Day comment May 10, 2019 available at, <https://drive.google.com/file/d/1F74xfYygJWTj1kjT4ZZqEc3XsBzAx5pX/view>.

A-123.

Indeed, as manifest by their statements, a majority of legislators who took leadership positions on the repeal bills in both the Assembly and Senate were substantially motivated by an overt hostility toward the religious beliefs underlying the religious exemption and those who exercised it. A-123.

Since the means, measures and methods already authorized by New York State were *not* implemented significantly to reduce the spread of measles before June 13, 2019, neither the State Assembly nor Senate had any basis to conclude that those means, measures and methods were inadequate or insufficient to combat the spread of contagious disease, specifically measles, without eliminating the religious exemption and burdening the Plaintiffs’ free exercise of religion. A-124.

**6. The repeal has devastated New York families.**

The challenged action caused Appellants and thousands of similarly situated families irreparable harm by forcing them to choose between violating their religious beliefs and depriving their children of an education, be it either a free public education as guaranteed by the New York State Constitution or a religious education as their religious beliefs may mandate. The challenged action also caused Appellants irreparable harm by forcing Plaintiffs and those similarly situated to find immediate ways to homeschool their children, which will undeniably require additional expenditures on child care, disrupt their careers and impose financial strains on many families. The challenged action caused Appellants irreparable harm by forcing them to choose between violating their religious beliefs and depriving their children of summer activities incident to childhood, including summer day and sleep-away camps and other recreational activities like sports leagues, which are now closed to their children if affiliated with a school. Kindergartners lost out on their first days of school and high school seniors were denied their last year (and many, the opportunity for scholarships to college). A-124-25.

Plaintiffs-Appellants are parents of children now deprived of any form of organized education in the State of New York. Parents had obtained a religious exemption for their children from local school authorities. They chose not to

vaccinate their children not out of “apathy” or “ignorance”, but from a sincerely-held belief that doing so was contrary to their religious obligations.

### **C. Supreme Court’s Decision and Order.**

On December 3, 2019, Supreme Court granted Respondents’ motion pursuant to CPLR 3211(a)(7) and dismissed this action. A-5-39.

First, Supreme Court improvidently held that since there were no disputed factual issues, it was authorized to grant declaratory judgment on a pre-answer motion to dismiss.

Next, the Court determined that Appellants could not make out their free exercise claim because federal courts have held that states could require all children to be vaccinated and not recognize a religious exemption. The Court next cited federal cases upholding state laws which eliminated all personal belief and religious exemptions to compulsory vaccinations of school children. Recognizing that these precedents did not address the claims Appellants raised here, the court held that the religious repeal was a “neutral law of general applicability” – one that does not target religious beliefs as such – which need not be justified by a compelling government interest even where it incidentally burdens religious practice.

Rather than focus on the enactment Appellants challenge – the repeal of the exemption - Supreme Court then erroneously concluded that, as amended, Section

2164 of the Public Health Law is neutral on its face and generally applicable to all students who attend school in New York. Then, engaging in fact finding absent a developed record, Supreme Court conclusorily reached the “inexorable” conclusion that “the repeal was driven by public health concerns, not religious animus.”

Citing to language included by legislative amendment in 1968, and ignoring the fact that at the time the Legislature so acted our state recognized religious exemptions, Supreme Court noted the broad public health objectives of measles and smallpox vaccinations. Citing the sanitized legislative memoranda accompanying the 2019 amendment, the Court found continued emphasis on the need to protect public health and erroneously maintained that the compulsory vaccination statute is “a neutral law of general applicability.”

After making these arguable findings, Supreme Court refused to “extend” Masterpiece Cakeshop, *infra*, to a legislative body, finding as a fact that “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.”

Viewing the statements by the sponsors of the legislation as “isolated remarks,” the court concluded that 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 religious beliefs.” In reaching these conclusions, Supreme Court never acknowledged the central teaching of Masterpiece Cakeshop – that religious bias could not taint governmental action – proceeding, instead, on the erroneous notion that Appellants needed to show that this motive was the sole or even primary motive behind religious repeal.

The Court next erroneously applied “strict scrutiny” analysis to the repeal, as if that finding would justify or negate the religious animus Appellants had demonstrated in their Verified Complaint. But, the presence of religious bias makes irrelevant Supreme Court’s strict scrutiny analysis.

The Court next dismissed Appellants’ Equal Protection claim, holding that the Respondents merely had to show that some rational basis underlay the distinctions the legislature made. Citing to no part of the legislative debate or any other matter of record, Supreme Court found that allowing unvaccinated medically exempt children in school was rational because the whole purpose of the law was to protect those children. Of course, there is no rational basis to this thinking because any medically exempt child could infect any other child just as easily (or

improbably) as any child with a religious exemption could have done. So, no rational purpose is made out by recognizing such an exemption, which merely amplifies the hostility toward those with religious beliefs who are denied the exemption. Likewise, to the extent that the public health concern relates to those unvaccinated children with medical exemptions [0.14%, as the vast majority of children are vaccinated], Supreme Court's effort to explain why allowing unvaccinated adults in their midst passes a rational basis test is equally unavailing. Notably, the State Legislature never discussed this, rushing merely to disallow religious exemptions.

Finally, the court cited Matter of Gifford v. McCarthy, 137 AD3d 30, 41 (3d Dep't. 2016), which provided the analytic framework for a compelled speech claim. That case recognized that the First Amendment "extends to the right to refrain from speaking . . . as well as the right to be free from government-compelled speech or conduct." The threshold inquiry is "whether the conduct allegedly compelled was sufficiently expressive so as to trigger the protections of the First Amendment." Conduct is considered inherently expressive when there is an intent to convey a particularized message.

Supreme Court summarily concluded that the requirement to vaccinate before attending school is not inherently expressive and does not require parents to convey a particularized message. Of course, the contrary is true. Appellants do



not wish to vaccinate because of their religious beliefs and compelling them to do so forces them to externalize the state's message as against their own. Repeal of the religious exemption is plainly linked to the Appellants' freedom of speech and conduct, and the State's amendment compels speech inimical to the sincerely held religious beliefs of each appellant.

### STANDARD OF REVIEW

Pursuant to Section 3211(a)(7) of the CPLR, in resolving a motion to dismiss on the pleadings, Supreme Court reviews and assumes as true the facts Plaintiffs have pled. It construes the pleading liberally and accords it "every possible favorable inference" and determines whether it fits "within any cognizable legal theory." 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 151-52 (2002); Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). As the Court of Appeals explained in Guggenheimer v. Ginzberg, 43 N.Y.2d 268 (1977):

Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail . . . .

When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate . . . .

Id. at 275 (citations omitted).

And, while, in rare cases, an absence of factual dispute will allow for resolution of a case seeking declaratory judgment on a motion to dismiss, “if the record before the motion court is insufficient to resolve all factual issues such that the rights of the parties cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible.” Matter of Tilcon N.Y. Inc. v. Town of Poughkeepsie, 87 A.D.3d 1148, 1151 (2d Dep’t 2011); See also Rockland Light & Power Co. v. City of New York, 289 N.Y. 45, 51 (1942); Nadel v. Costa, 91 A.D.2d 976, 976 (2d Dep’t. 1983); Verity v Larkin, 18 A.D.2d 842 (2d Dep’t. 1963); La Lanterna, Inc. v. Fareri Enters., Inc., 37 A.D.3d 420, 422-423 (2d Dep’t. 2007); Law Research Serv. V. Honeywell, Inc., 31 A.D.2d 900, 901 (1<sup>st</sup> Dep’t. 1969).

Here, as set forth in greater detail above and explained below, factual disputes as to the motivation of the challenged enactment and its rationality could not be resolved on a motion to dismiss and Supreme Court erroneously concluded the contrary.

## ARGUMENT

### Point I

**The repeal impermissibly exhibited active hostility toward religion in violation of the First Amendment's free exercise clause.**

Appellants challenged the repeal because it represents state action motivated by active hostility toward religion and thereby violated the free exercise clause. As made actionable by 42 U.S.C. § 1983, the First Amendment to the United States Constitution bars such hostility. “The Constitution commits government itself to religious tolerance, and *upon even the slightest suspicion* that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their high duty to the Constitution and to the rights it secures.” Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm’n, 138 S.Ct. 1719, 1731 (2018) (emphasis added).

In Masterpiece Cakeshop, writing for a seven-member majority, Justice Kennedy wrote:

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the

delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication *in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach*. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Id. at 1729 (emphasis added).

Here, the allegations set forth in the Verified Complaint regarding New York's repeal of the religious exemption to vaccination strongly support the same conclusion. "Active hostility" toward religion dominated the debate in the New York Legislature, with leading proponents claiming that the religious beliefs of those who oppose vaccinations were "utter garbage" and "fabricated". See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 530 (1993) (striking a municipal ordinance where hostility toward religious belief motivated its enactment).

Other undisputed facts support the conclusion that disdain for Appellants' sincerely-held religious beliefs, as opposed to any other factor, substantially informed the repeal: first, to the extent there was an outbreak of measles in the State, it peaked in the months of January-March 2019. During that time period, the State Legislature did not act to eliminate the religious exemption or bar from

school those who had obtained them. Indeed, in this time period, the state took no effective action to respond to the measles outbreak.

Second, in advocating for elimination of this exemption, legislative leaders repeatedly evinced hostility to those of religious faith. This anti-religious rancor was entirely unnecessary if the issue was about, and only about, public health. These advocates need not have attacked those with sincerely-held religious beliefs. Rather, they simply could have urged that those beliefs be subordinated to the alleged public health emergency. But these legislators never provided accurate data concerning that alleged emergency and, instead, repeatedly spewed vitriol at those with sincerely-held religious beliefs.

As in Masterpiece Cakeshop and Lukumi, here, the legislative enactment might be permissible if done for secular reasons, but not if influenced by hostility toward religion. See Slockish v. United States FHA, No. 08-cv-01169-YY, 2018 U.S. Dist. LEXIS 174002, at \*5-6 (D.Or. Oct. 10, 2018) (approving review of contemporaneous statements by members of the decision-making body and the specific series of events leading to enactment by the legislature in adjudging the role of religion in the challenged act). The legislature's evidenced hostility toward religion invalidates the adopted repeal and shames New Yorkers.

It must be further noted that, while people of all religions have religious exemptions, the specific sequence of events here linked the outbreak of measles to

the Orthodox Jewish community as the clusters of measles outbreak were primarily amongst members of that community in Rockland and Kings Counties. Public outcry focused on the ultra-Orthodox as those who would not vaccinate and amongst whom the disease spread. In this context, even though religious people of numerous faiths and persons with religious beliefs associated with no specific faith refused to vaccinate, the public discussion highlighted and fanned hostility toward the ultra-Orthodox and exploited this animus to pass the legislation.

This case raises the question of whether a state, which has long recognized a religious exemption, may reverse that in a hail of anti-religious rhetoric and escape the scope of the First Amendment's prohibition against state action premised on religious bias.

Like Respondents, Supreme Court expended much time citing cases which do not address, let alone settle, that question. Respondents minimized to the point of non-existence the actual debate which occurred in our State on June 13, 2019. That debate pitted a group of state legislators against parents, whom the legislators condemned as “anti-vaxxers,” denigrated for their faith and claimed had “no major religion” recognizing their position. Out of what can only be regarded as a hateful wrath, the legislators eviscerated religious exemptions.

The Verified Complaint plausibly alleges that this course of conduct had little to do with public health. Indeed, the action was both over-inclusive and

under-inclusive – it lacked any studied consideration and there was no public process, hearings or ratiocination matching a matter of this import. Unlike Supreme Court, this Court should not attempt to minimize the allegations of the Complaint. Nor can it conclude that, if Appellants’ version of events is true, New York acted constitutionally. It did not.

As noted above, the United States Supreme Court has recently re-affirmed that *any* state action which displays “even [a] slight suspicion” of religious animus is *per se* unconstitutional, regardless of whether it otherwise forwards a compelling public interest. Masterpiece Cakeshop, *supra*, at 1731. This is true of any state action, including legislative enactments and administrative regulations or actions.

Supreme Court rejected this holding, finding that state legislative actions are not subject to the same analysis. In so concluding, it was wrong. In Masterpiece Cakeshop, the majority decision plainly states: “the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base *laws* or regulations on hostility to a religion or religious viewpoint. See Id. at 1731 (emphasis added). It explained further:

In Church of Lukumi Babalu Aye, *supra*, the Court made clear 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. The Free Exercise Clause bars even subtle departures from neutrality on matters of

religion . . . Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution commits government itself to religious tolerance, and upon even slight suspicion that *proposals for state* intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures . . .

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 decision making body . . . . In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave every appearance, . . . of adjudicating Phillips' religious objection based on a negative normative evaluation of the particular justification for his objection and the religious grounds for it . . . . It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

Id. at 1731-32 (emphasis added) (internal quotation marks & citations omitted).

The Court's repeated references to laws, legislative history and legislation show that Masterpiece Cakeshop applies equally to administrative *and* legislative bodies, and Supreme Court's explicit rejection of the scope of that holding here was erroneous.



The principles enunciated in Masterpiece Cakeshop require courts to discern whether religious animus even subtly tainted state decisions, which, in turn, requires judicial inquiry into the motivation underlying such actions. Dual or mixed motivations do not save actions influenced by religious animus. The requirement for judicial examination applies regardless of the importance of “other” motivating principles. This is a testament to the fundamental importance of state neutrality towards religion and the Court’s deep concern that otherwise permissible state action is actually motivated, even in part, by hostility toward religion. It is analogous to the prohibition of race as a factor influencing adverse employment actions; even a little discriminatory motivation is too much.

Masterpiece Cakeshop illustrates the crucial role religious tolerance plays in our constitutional order. Colorado prohibited discrimination on the basis of sexual orientation. Such discrimination violates both the relevant statute and the privacy rights possessed by those engaging in homosexual relationships. However, where religious animus tainted the State of Colorado’s effort to enforce such basic principles, the U.S. Supreme Court struck down the state action because the record showed evidence of religious intolerance toward the baker. This could not be tolerated in a society governed by the First Amendment. The same logic applies here.

Below, Supreme Court failed to come to grips with the centrality of this principle. That the legislature might have been permitted in other circumstances to repeal the religious exemption does not mean that, when motivated by religious intolerance, its action was constitutional. It was not.

Appellants' Verified Complaint plausibly demonstrated that religious hostility substantially motivated the repeal of the religious exemption. Simply stated, in both the Assembly and Senate, the repeal's sponsors harbored and expressed deep-seated hostility toward those whose religious beliefs predicated exemptions from vaccination. They claimed that organized religions did not countenance such exemptions and that those who sought exemptions, recognized by state law for more than 55 years, were frauds. They did not seek to distinguish those who had *bona fide* and sincerely held religious beliefs from those who might have other reasons to use this exemption. Instead, the repeal grouped together everyone who held such an exemption and made it impossible for anyone to so obtain one.

The irrebuttable presumption that those using religious exemptions were frauds was wildly overbroad and justified by anti-religious rhetoric. See Verified Complaint ¶¶ 114-127. As noted above, Senator James Skoufis, a sponsor of the repeal, stated, "Let me be clear: There is not one religious institution, not one single one that denounces vaccines. So, here is a religious exemption pretending as

if there is a religion out there that has a problem with the vaccines. Whether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do." Skoufis later mockingly tweeted, "Stay classy, anti-vaxxers . . . . In a few moments, I look forward to casting a 'yes' vote on this important bill."

Senator David Carlucci from Rockland County explained the repeal this way: "[A] group of people has decided their ideological beliefs are more important than public health. Putting people in harm's way . . . is selfish and misguided." State Senator Brad Hoylman, a principal sponsor of the religious repeal, further deprecated those who hold religious exemptions, stating, "Let's face it. Non-medical exemptions are essentially religious loopholes, where people often pay a consultant to worm their way out of public health requirements that the rest of us are following."

The leading Assembly sponsor of the repeal legislation, Assemblyman Jeffrey Dinowitz, stated: "The problem is that most people in my opinion use that [religious exemption] as an excuse not to get the vaccinations for the kids. There is nothing in the Jewish religion, in the Christian religion, in the Muslim religion . . . that suggests that you can't get vaccinated. It is just utter garbage."

Ed Day, the Rockland County Executive whose Executive Order had been struck two months earlier, stated: "The truth is that the purported religious

exemption for vaccinations as a requirement to enter public and private schools is a total myth and fabrication.”

These comments, which the state defendants have chosen to ignore and Supreme Court characterized as “isolated,” raise more than a slight suspicion that religious animosity tainted the repeal. This evidence here is every bit as strong, and arguably much stronger, than that which caused the Supreme Court to reverse the Colorado Human Rights Commission in Masterpiece Cakeshop.

At oral argument on Appellants’ motion for a preliminary injunction, the Court below queried whether the expressed religious animosity was directed at those who were “faking” religious beliefs and not reflective of a more general attack on those with religious exemptions. In its decision denying preliminary relief, Supreme Court noted that the legislation itself pronounced another purpose – to advance public health. However, neither strand of argument justified dismissal of the Verified Complaint, where, as here, it contains statements showing religious animus by the primary sponsors of the legislation, and the U.S. Supreme Court has made clear that evidence supporting even a suspicion of religious intolerance and active hostility is sufficient to call into question any form of state action.

In arguing to the contrary below, Supreme Court and Respondents misinterpreted Masterpiece Cakeshop and its implications for *any* state action which is tainted with bias against those of religious faith. The distinctions

Respondents drew were meaningless at this stage of the litigation because the Verified Complaint plainly contains sufficient evidence to allow a court to recognize that the challenged repeal *may* have been motivated in part by active hostility toward religion, and this showing defeats the motion to dismiss.

Even if two motives for the state action existed, where one reflects active hostility toward religion, this is sufficient to strike the challenged action. Masterpiece Cakeshop could not make that any clearer. “The Commission was obliged to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even the slightest suspicions that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” Church of Lukumi Babalu Aye, supra. at 547, cited approvingly in Masterpiece Cakeshop, supra.

And, it also could not be clearer that whatever the difficult evidentiary issues raised by the inquiry, courts are required, after proper discovery, to ascertain and determine whether religious animus did taint the enactment. Courts cannot defeat this obligation by refusing to allow parties to engage in discovery which would confirm this motive.

Below, Respondents argued that prior precedent establishes that the right to a public education may be burdened by a regime of required or mandatory vaccinations. However, while courts have upheld the authority of the state to order mandatory vaccination in certain, circumscribed circumstances, no prior case has held that, where religious intolerance taints the repeal of religious exemptions, the state may still so proceed. That is the import of recent Supreme Court precedent; accordingly, the cited precedents are inapposite and distinguishable.

Contrary to their contentions, Respondents' repeal of the religious exemption alone in New York is not analogous to recent state acts in California and Maine to limit vaccine exemptions. The Verified Complaint shows that one plain motivation for religious repeal was the legislature's desire to "do something," however belatedly, to respond to a measles outbreak that originated amongst devout Orthodox Jews in Rockland County and spread to their brethren in Brooklyn. State legislators impertinently argued that, because Jewish scripture does not proscribe vaccinations, those in the Orthodox community who did not vaccinate were "frauds" hiding behind non-existent religious doctrine.

This motivation contravenes the required separation between church and state, ignores U.S. Supreme Court teaching that religious beliefs are personal, not institutional, and reflects animus toward those of religious faith. See Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993). And, in Masterpiece

Cakeshop, the Supreme Court condemned any state action based upon active hostility toward religion:

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetoric, as something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

138 S.Ct. at 1729.

Nor does Supreme Court's citation to Matter of Viemeister, 179 N.Y. 235 (1904) save this enactment. There, the Court of Appeals did not address a claim arising from religious belief, let alone a claim that the challenged legislation was motivated by religious animus. Indeed, in the context of smallpox epidemics affecting the entire community, the court held, "When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property." Id. at 238. There, all students and teachers in New York schools were required to be vaccinated against smallpox. Here, the sole object of the challenged repeal was to disallow children of verified religious convictions up

to age 18 from attending school. And, as the Verified Complaint elucidates, the legislative history strongly suggests that religious animus played a key role.

Likewise, none of the other cases Supreme Court cited discuss an enactment passed with the evident hostility to religious beliefs manifested in New York in June 2019. The medical affidavit Supreme Court cites does not show that those with a religious exemption pose any, and certainly not a greater, threat to the public than adults in schools who are unvaccinated or those children with medical exemptions who are unvaccinated. Similarly, Supreme Court has not justified why this “nuclear option” – throwing thousands of healthy children out of all schools, public and private – was necessary without having examined less restrictive means to maintain public health available to State health authorities. Nor does the Court justify how excluding these students from schools, yet not from museums, parks, shops, libraries, or any other public place, protects the public health.

Nor was Respondents’ next argument below any better: while a state might permissibly cite a compelling reason to override religious objections to vaccination, it cannot do so based upon hostility to religion. Again, the Verified Complaint makes clear that this motive was operative here. Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) does not hold to the contrary. The Appellants there did not argue that the challenged state action evinced active



hostility to religion. Similarly, *dicta* from Prince v. Massachusetts, 321 U.S. 158, 166 (1944) is inapposite to the current claim.

Moreover, Supreme Court erred in holding that the law here is one of general applicability – indeed, its under-inclusiveness entirely undermines this conclusion. New York State does not require that adults working in its schools – whether as teachers, cafeteria workers, bus drivers, coaches, and custodians – demonstrate that they have current immunity or up to date vaccinations. Students 18 years of age or older need not be vaccinated, thus permitting students aged 18-21 with religious exemptions to continue education in all high schools. Students with medical exemptions may continue to attend school. Indeed, New York has never enacted a vaccination law of general applicability to the whole population as in Jacobson; the challenged repeal was aimed at the less than 1% of all students who held religious exemptions.

No case Respondents cited in moving to dismiss dealt with the issue before this Court: can a state legislature, motivated by expressed hostility toward those with religious exemptions, constitutionally repeal the religious exemption? Following Masterpiece Cakeshop, the answer is decisively in the negative, and, in light of the well-pled allegations in the Verified Complaint, this makes discovery into the motives of the legislative body material and necessary.

Citation to Whitlow v. Cal. Dep't. of Educ., 203 F.Supp.3d 1079, 1085-87 (S.D.Ca. 2016) demonstrates the point: there was no religious exemption in California to repeal and no claim that the broader repeal was tainted with religious bias. The same is true of West Virginia's Workman v. Mingo Cty. Bd. of Educ., 419 Fed.App'x 348, 354 (4<sup>th</sup> Cir. 2011).

It is the state actors' expression of religious bias which violates the U.S. Constitution, and that is precisely what occurred in New York, distinct from the fact patterns present in each of the cases Respondents inappositely cited below. The repeal here was perniciously motivated, and that is the gravamen of the Verified Complaint, which raises a case of first impression.

## **Point II**

### **No compelling state interest justified the challenged repeal.**

Trespasses on the free exercise clause cannot be justified by a compelling state interest. Eradicating discrimination against gays did not justify the religious intolerance exhibited by Commission members in Masterpiece Cakeshop. But, if this Court were to consider whether a compelling state interest might countervail the religious intolerance manifest here, it should conclude that no such interest existed.

As the Supreme Court observed in Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015), "[t]he First Amendment ensures that religious organizations and

persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths . . . .”

The Verified Complaint plausibly alleges that no compelling interest predicated the religious repeal. The legislature delayed enacting the religious repeal for months after the known outbreak of measles. This suggests that advancing public health was not its actual objective. Had the legislature believed that the religious repeal would help tamp down the spread of measles, it would have acted swiftly, at the time of the outbreak. However, at that time, it did nothing. In denying Plaintiffs’ application for a preliminary injunction, this Court speculated that the legislature might have been working on other matters earlier in the session – if this is in fact accurate, then it undercuts the alleged compelling nature of any public health crisis. Moreover, such speculation is hardly conclusive and does not support dismissal of the Verified Complaint. In one day, both houses of the State legislature adopted, and the Governor signed, the religious repeal.

Had this matter been urgent to public health in the State, it only makes sense that these state actors, who broadly pontificate about their concern for public health, would have found a day in January, February, March or April to have enacted this.

In addition, a legislature interested primarily in public health, [not in appeasing constituents worked up over the role of the religious exemption in the

spread of measles or advancing other agendas], would have convened hearings during the five months following the bills' introduction and heard from experts. They would have learned that county health commissioners were *not* implementing the methods state law and regulations commend in dealing with such outbreaks. One expects they would have insisted that, in the absence of responsible local action, State agencies issue edicts that reflected the alleged seriousness of the outbreak.

Instead, the Verified Complaint alleges that neither Assembly nor Senate heard from a single public health expert, let alone anyone who stated that this selective repeal would be an efficacious means to control future outbreaks. Had the Legislature been interested in public health, it would have acted in a very different manner than it did throughout the 2018-19 session.

The Legislature did not convene a single hearing to take testimony from public health experts concerning the medical necessity for eliminating the religious exemption and, as shown above, anti-religious sentiment, rather than science, motivated the State. This hardly represents a compelling state interest, and Supreme Court's contrary finding is erroneous.

### **Point III**

#### **The repeal violated the New York State Constitution.**

Appellants also alleged that the challenged action represented an unreasonable interference with their religious freedom in violation of the New York State Constitution. They did not drop this claim, which rests on undisputed facts: the State Health Commissioner and the County Health Commissioners uniformly failed to employ the methods, means and measures already provided by state law to combat the outbreak of a contagious disease. Those included isolating or quarantining infected people as provided explicitly by Sections 2100(a) and (b) of the Public Health Law.

While Rockland County identified those infected and counted them as early as October 2018, it was not until late April 2019 that it ordered the isolation of infected individuals. And, thereafter, the cases of measles reported in that County dwindled.

Rather than employ the methods State law and regulation provided, the State eliminated the religious exemption, unreasonably interfering in Appellants' religious exercise absent a showing that the means, methods and measures provided by State law were inadequate or insufficient to deal with the outbreak.

Indeed, the Verified Complaint alleges that these less-infringing means were not even tried, undermining any argument that the infringement on religious freedom could be justified as necessary or compelling.

#### **Point IV**

##### **The repeal violated the Equal Protection Clause.**

In their Verified Complaint, Appellants alleged that the religious repeal violated the Equal Protection Clause because it was directed only toward those of religious faith and was suspiciously under-inclusive if the State's actual purpose was protecting public health. The repeal affected only those holding religious exemptions, not those holding medical exemptions.

When combined with the sponsors' rhetoric, and the timing at which it was passed, this disjunctive treatment strongly supports the conclusion that religious intolerance informed the bills' passage in violation of the Equal Protection clause in that children with medical exemptions are equally capable of spreading a contagious disease as are those with a religious exemption.

If the State's concern was to curtail the spread of contagious disease, then those unvaccinated pose the same threat to others, regardless of whether the basis for their status is religious or medical or age or employment. Moreover, if protecting public health was the State's objective, the legislature would have barred all non-fully vaccinated students from school, eliminated the religious

exemption for those over the age of 18 and for college students while requiring all individuals working in the state's schools and in the public at large to obtain vaccinations, not merely school-aged children. After all, people can contract measles anywhere, not just in schools, and not just from children, and a legislature concerned about public health would have adopted a far more comprehensive approach.

Indeed, in contrast to Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25-27 (1905), the challenged enactment does not require that the whole population be vaccinated, but, rather, only includes children with religious exemptions. The court below recognized that “New York’s legislature has chosen to target school-aged children.” But the Verified Complaint is much more particular – school-aged children were not targeted in a neutral manner. Indeed, three groups of school-aged students are still permitted in school *without* vaccination: (1) those who are or turn 18 in school; (2) those who “fall through the cracks” administratively and are not in compliance with vaccination requirements (approximately *7 times the number of students holding religious exemptions* in 2017-18); and (3) students with medical exemptions. These three groups are similarly situated and yet are treated radically differently under the law.

Respondents’ contrary argument below was again lame. It failed to recognize the profound under-inclusiveness of its repeal approach and the

constitutional infirmity that approach created: the legislative mandate excludes groups every bit as likely to transmit a contagious disease as those who held a religious exemption. Phillips does not save the State here: indeed, it does not address the issue.

The Verified Complaint plausibly avers that the profound under-inclusiveness of the repeal undermines the “public health” rationale and, when combined with the anti-religious rhetoric of the bills’ primary sponsors, suggests the pretextual nature of this action. Certainly, the factual allegations of the Verified Complaint undermine any compelling state interest.

#### **Point V**

##### **The selective repeal burdened fundamental rights.**

The Verified Complaint avers that, by repealing exemptions to vaccination held by persons of religious faith, the state deprived Appellants and other similarly-situated persons of the right (i) to exercise their religion as they choose, (ii) to parent as they choose, (iii) to access a free public education without any form of due process, (iv) to choose religious schools for their children, as is their constitutional right, and (v) to exercise informed consent to medical procedures with known risks. Each of these deprivations trespasses a fundamental right, and the State may not so proceed without a compelling state interest and, as shown above, the history of this repeal belies any such claim.



## Point VI

### **The religious repeal impermissibly compels speech.**

New York State provides a free public education for all children between the ages of 6-16. The State compels parents to educate their children in either a public or private school or to home school. The religious repeal deprives children of the right to a free public education and their parents of the right to send them to a private school of their choice.

For 26,000 children who had received religious exemptions because their families sincerely held contrary religious convictions, they are being compelled to violate their religious beliefs or lose their entitlement to either a free public education or their right to enroll their child in a private school of their choice.

Below, Respondents admitted that the state may not compel speech or conduct. See Wooley v. Maynard, 430 U.S. 705, 714 (1977). The government's message here is quite clear – vaccinate or lose the precious right to a free public education or to place your child in a private school. Obviously, the decision not to vaccinate is sufficiently expressive to trigger the protections of the First Amendment. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294, n. 5 (1984). Here, the refusal to vaccinate conveys a sincerely held religious belief, is broadcast to each child's school and was recognized as a *bona fide*

religious expression by that school. The speaker in these cases was following a state-created protocol, which has now been eliminated.

Respondents' dismissal of the expressive conduct these Plaintiffs engaged in is nothing less than shocking. Contrary to its hypocritical pronouncements, the State is forcing these parents to take actions contrary to their recognized religious beliefs or lose other protected rights, like that of exercising informed consent, raising their children as they see fit and accessing a public or private school of their choice. The state is compelling their speech and, by so doing, demanding adherence to a highly controversial practice.

The claim that the Verified Complaint fails to particularize the compelled expressive conduct is sophistry: it is plain from the Verified Complaint that the State is compelling vaccinations lest Appellants lose, as they now have lost, a whole panoply of rights and that, in capitulating, Appellants would lose the most sacred right – to religious freedom.

The vaccination requirement plainly compels a course of conduct against the religious principles of all Appellants and deprives them of significant benefits if they insist on maintaining their religious principles.

As demonstrated above, since the State's motive was actually to compel religious people to give up their principles because the state legislature falsely believed that those with religious exemptions were "frauds" or "anti-vaxxers" or

“anti-scientific,” no compelling state interest saves the compelled speech, and Appellants have set forth a cognizable claim through this cause of action.

### **Point VII**

#### **The court below erred in relying on the Blog Affidavit.**

In adjudicating both Appellants’ application for preliminary relief and Respondents’ motion to dismiss and without permitting any discovery into its validity, Supreme Court relied on the Blog Affidavit. However, that Affidavit contains numerous disputed factual statements, and it should have been ignored in adjudicating Respondents’ motion to dismiss, which considers the four corners of the Verified Complaint, not extraneous and disputable evidence.

### **CONCLUSION**

As the Verified Complaint plausibly alleged a plethora of cognizable constitutional challenges to the repeal legislation, its dismissal was erroneous, and this Court should vacate that order and reinstate the Verified Complaint.


Our nation is now facing the coronavirus pandemic, a tremendous threat to public health. In fighting this epidemic, public health authorities have deployed the methods not utilized in the 2018-19 measles outbreak. They have aggressively quarantined individuals, though likely belatedly. There has been no focus on specific religious groups and no hostility expressed toward specific religious or ethnic groups.

In these times, insuring the protection of individual freedoms and rights remains critical. Where government overreaches and acts unconstitutionally, our courts must remain beacons of light.

Dated: Goshen, New York  
April 10, 2020

Respectfully submitted,

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