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CHILDHOOD VACCINATION CRISIS: A CONSTITUTIONAL ANALYSIS OF NEW
YORK'S RESPONSE TO ABUSE OF THE RELIGIOUS EXEMPTION

Megan O'Boyle

INTRODUCTION

Vaccines are lauded as one of the most effective public health interventions of the twentieth century.¹ The infectious diseases that once left children with high mortality rates across the country, such as polio and measles, were considered to be eliminated in countries in which vaccines were widely accessible.² Recent years have seen the resurgence of diseases Americans once had eliminated from society.³ Vaccine resistance in developed countries has seen the removal of this elimination status and the United States is in danger of the same thing.⁴ Much of the current opposition to vaccination stems from misinformation based on a now-debunked study claiming a link between the Measles Mumps and Rubella (MMR) vaccine and

¹ Ctrs. for Disease Control & Prevention, *Impact of Vaccines Universally Recommended for Children--United States, 1900-1998*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 247 (1999).

² *Id.* at 244.

³ Jeneen Interlandi, *To Stop the Spread of Polio, Don't Shame Religious Groups*, N.Y. TIMES, (Aug. 18, 2022) ("Polio has re-emerged in New York.... Measles descended upon the same communities in 2019, Covid ravages them disproportionately in 2020, and before either of those, mumps and whooping cough were known to pop up at regular intervals.").

⁴ Sharon Otterman, *Get Vaccinated or Leave School: 26,000 New York Children Face a Choice*, N.Y. TIMES, <https://www.nytimes.com/2019/09/03/nyregion/measles-vaccine-exemptions-ny.html> (Sept. 6, 2019)(With the growing number of measles cases, there is a potential for the loss of "elimination status, as was seen in England); see also *Measles Elimination of Measles (Rubeola)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/elimination.html> (Nov. 5, 2020). According to the Centers for Disease Control and Prevention (CDC), the United States could lose its measles elimination status if an outbreak lasts for a full year; however, the 2019 New York outbreak ended before the one-year cutoff, and the status was preserved. *Id.* "The World Health Organization (WHO) defines measles elimination as 'the absence of endemic measles virus transmission in a defined geographical area (e.g.,[.] region or country) for at least [twelve] months in the presence of a surveillance system that has been verified to be performing well.'" *Id.* (quoting Weekly Epidemiological Record, 9 WORLD HEALTH ORGANIZATION [WHO] 88, 91 (Mar. 1, 2013), <https://www.who.int/wer/2013/wer8809.pdf>); see also *The Clock Is Ticking for New York Vaccinations*, L.A. TIMES (Sept. 1, 2019), <https://www.latimes.com/world-nation/story/2019-09-01/new-york-student-vaccinations-deadline> ("Legislators did away with the exemption in June amid the nation's worst measles outbreak since 1992.").

autism.⁵ While this has been discredited, the rate at which parents have sought and been granted religious exemptions is rising at unprecedented rates.⁶

Many parents seeking to circumvent state-mandated vaccinations for their children have claimed to rely on values that emanate from religion in order to ensure that their children remain unvaccinated.⁷ In order to combat the growing unvaccinated population, the State of New York removed its religious exemption to mandatory vaccines in school children in 2019 following a Measles outbreak.⁸ This repeal has been met with several lawsuits from those who had previously been protected under the religious exemptions who are now making claims that this repeal is in violation of their rights under the Free Exercise Clause of the First Amendment.⁹

This paper proceeds as follows. Part I will go into the background regarding compulsory vaccine mandates and their exemptions as applied in various states. Part II explores the constitutional analysis of a law that touches upon the Free Exercise Clause of the First Amendment. Part III discusses the recent repeal of New York's religious exemption for vaccines in schools and how the courts have reacted. This part describes the *F.F. v. New York* suit that was brought against the State since the repeal. Lastly, Part IV argues that New York's repeal of the religious exemption for vaccinations in children due to the resurgence of infectious diseases will be upheld by the current court even if it should choose to analyze it under heightened strict

⁵ Linda E. LeFever, *Religious Exemptions from School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PA. ST. L. REV. 1047, 1054-1055 (2006).

⁶ Dorit Rubinstein Reiss & Lois A. Weithorn, *Responding to the Childhood Vaccination Crisis: Legal Frameworks and Tools in the Context of Parental Vaccine Refusal*, 63 BUFF. L. REV. 881, 884 (2015).

⁷ Anna Kata, *A Postmodern Pandora's Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1709 (2010); James Lobo, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C. L. REV. 261, 278 (2016).

⁸ Jon Campbell, *New York Repeals Religious Exemption for School Vaccinations*, Democrat & Chronicle, <https://www.democratandchronicle.com/story/news/2019/06/13/new-york-repeal-religious-exemption-school-vaccinations/1445973001/>.

⁹ *Id.*

scrutiny due to the government's interest in public health, as established in *Jacobson v. Massachusetts*.

I. Background

A. Vaccination

Modern vaccination was developed in the late eighteenth century for the disease of smallpox.¹⁰ Vaccination protects individuals from infectious diseases by exposing them to weaker forms of the virus without causing infection and allowing the body to develop an immune response.¹¹ When a vaccinated person is exposed to the virus again, the body produces antibodies that can recognize and eliminate the disease before the onset of an infection.¹² It provides protection against infection without an individual having to suffer through the disease.¹³

Vaccination has since come to be regarded as a core component of public health practice in the United States and is widely used to help control the spread of epidemic diseases such as measles, polio, and most recently COVID-19.¹⁴ With the institution of state school immunization requirements, incidents of communicable epidemic diseases for which there are vaccines have significantly declined.¹⁵ The Centers for Disease Control and Prevention (CDC) currently recommends children get vaccinated against twelve potentially serious diseases.¹⁶ The CDC has created a schedule with recommendations for when children are to receive these

¹⁰ James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 KY. L.J. 831, 833 (2001).

¹¹ LeFever, *supra* note 5, at 1049.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Childhood & Adolescent Immunization Schedule*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/schedules/hcp/imz/child-adolescent.html> (Feb. 17, 2022).

vaccines to maximize efficacy and minimize risk.¹⁷ In most states, parents are required by law to provide verification that their child is properly immunized via written proof from a healthcare provider at the time of school registration.¹⁸

High vaccination rates that have stemmed from widespread school immunization requirements have made many diseases, such as polio, rare in modern society.¹⁹ This is due to a concept known as herd immunity, as vaccinated people are less likely to catch and spread the disease and provide de facto protection for those who remain unvaccinated.²⁰ One of the ways herd immunity has been achieved for a number of immunizable diseases is via school immunization requirements.²¹ Despite this, vaccines remain controversial due to both real and perceived potential harms. This controversy, and its subsequent resistance to vaccination, has endangered herd immunity to the point of the resurgence of numerous diseases.

B. Beginning of Compulsory Vaccination

The early 1800s saw the rise of the first compulsory vaccination programs in several European countries in the modern form of vaccines.²² Germany performed over 17,000 vaccinations in 1803 and in 1805, Napoleon mandated mass vaccination against smallpox in his

¹⁷ See Paul A. Offit, M.D. & Louis M. Bell, M.D., *Vaccines: What You Should Know* 24-25 (John Wiley & Sons 2003).

¹⁸ See Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?* 37 U. MICH. J.L. REFORM 353, 412-13 (2004).

¹⁹ CTRS. FOR DISEASE CONTROL & PREVENTION, Pertussis Epidemic -- Washington, 2012, 61 MORBIDITY & MORTALITY WKLY. REP. 517, 517-18 (2012); see also Willem G. van Panhuis et al., *Contagious Diseases in the United States from 1888 to the Present*, 369 NEW ENG. J. MED. 2152, 2154- 56 (2013).

²⁰ Calandrillo, *supra* note 18 at 420; Douglas S. Diekema, *Commentary, Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, 107 MICH. L. REV. FIRST IMPRESSIONS 90, 91 (2009).

²¹ Calandrillo, *supra* note 18 at 381 n. 199; see generally Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States -- The Role of School Immunization Laws*, 17 VACCINE S19 (1999) (overview of school immunization requirements and exemptions).

²² Hodge & Gostin, *supra* note 10 at 833; see also U.S. GENERAL ACCOUNTING OFFICE, PREVENTIVE HEALTHCARE FOR CHILDREN, EXPERIENCE FROM SELECTED FOREIGN COUNTRIES (Aug. 1993).

troops.²³ Within the next 15 years, compulsory vaccination was instituted in Bavaria, Denmark, Russia, and Sweden.²⁴ British Parliament followed suit in 1853, passing an act that requires parents to vaccinate all children unless otherwise unfit for vaccination.²⁵

In 1818, there is evidence of the earliest school vaccination requirements in a decree from the King of Wittenberg (modern-day Germany), which proclaimed that every child must be vaccinated before age three or will be banned from any educational institution, apprenticeship, or public office.²⁶

The history of compulsory vaccines in the United States dates back to the American Revolution.²⁷ While it is not the modern form of vaccination as we know it, General George Washington, like Napoleon, immunized his troops against smallpox.²⁸ This was via an early form of vaccination known as variolation which entailed inoculating a non-immune person with the actual pustules or scabs from someone who was actively infected.²⁹ This decision is credited as being one of the reasons his troops were able to win the war.³⁰

Early vaccination in the modern form came to the United States in Massachusetts in 1809 for the general population to receive the smallpox vaccination.³¹ In 1855, Massachusetts became the first state to require children to be vaccinated as a requirement to attend school.³² Although met with some resistance and skepticism initially, vaccination rates eventually reached a rate of efficacy where the eradication of smallpox was announced in 1980.³³ The last known case of

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ C.W. Dixon, SMALLPOX, 216, 278, 1962.

²⁷ Joshua Loomis, EPIDEMICS: THE IMPACT OF GERMS AND THEIR POWER OVER HUMANITY, 44, 2018.

²⁸ *Id.*

²⁹ *Id.*; LeFever, *supra* note 5, at 1050.

³⁰ Loomis, *supra* note 27.

³¹ Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 J.L. MED. & ETHICS 122, 124 (2002).

³² *Id.*

³³ *Id.*

smallpox was three years prior, in 1977.³⁴ Today, mandatory school immunization laws like Massachusetts' have been credited with the decline of many diseases within the United States.³⁵

C. History of Vaccine Resistance and The Legal Standard

The First Amendment of the U.S. Constitution guarantees every American citizen's freedom concerning religion.³⁶ The First Amendment specifically states that "Congress shall make no law respecting an establishment of religion or prohibiting the Free Exercise thereof ..."³⁷ Regarding this Amendment, the Supreme Court has consistently held that such religious rights are not absolute.³⁸ The Court has generally considered laws that are neutral and of general applicability to be constitutionally valid against claims of violations of free exercise.³⁹

Two major cases have created the baseline standards through which courts analyze vaccine mandates in schools: *Jacobson v. Massachusetts* and *Zucht v. King*.⁴⁰ While *Jacobson* predates the advent of the Court's modern tier system of scrutiny and relied on a highly deferential standard of reasonableness, the decision could be viewed as a rudimentary precursor

³⁴ *Id.*

³⁵ Jennifer S. Rota et al., *Processes For Obtaining Nonmedical Exemptions to State Immunization Laws*, 91 AM. J. PUB. HEALTH 645, 645 (Apr. 1, 2000).

³⁶ *U.S. CONST. amend. I.*

³⁷ *Id.*; see also Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 611 (1993) ("Religious liberty holds an esteemed position among American values. The first words of the First Amendment to the United States Constitution set forth the federal policy regarding religion: 'Congress shall make no law respecting the establishment of religion, or prohibiting the Free Exercise thereof.'" (quoting *U.S. CONST. amend. I*)).

³⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 38 (1905). In *Jacobson*, the Court observed:

[T]he liberty is secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint [Nor is it] an element in the liberty . . . that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state.

Jacobson, 197 U.S. at 26, 38; see also *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 882-83 (1990) ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.).

³⁹ *Smith*, 494 U.S. at 879.

⁴⁰ *Jacobson*, 197 U.S. 11; *Zucht v. King*, 260 U.S. 174 (1922).

to a rational basis test.⁴¹ *Jacobson* was a case brought by a man who claimed that a state-instituted vaccine mandate violated his liberty right "to care for his own body ... and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person."⁴² The Court observed that all members of society owe a duty to one another and that persons may not endanger the general welfare, even if personal liberties must be restricted to accomplish that end.⁴³ The Court concluded that passing a vaccine mandate was within the state police powers as it has a duty and thus a compelling interest in protecting public health.⁴⁴ It also stated that permitting an exception to all objections would strip the legislature of its function to care for public health and safety when endangered by infectious diseases.⁴⁵ While *Jacobson* was about an adult receiving a vaccine rather than a child, it provides the groundwork for how public health law has been handled by the Court, as it held that the government has the authority to restrict the liberty of adult citizens by compelling vaccinations in order to prevent further spread of life-threatening contagious disease within the community.⁴⁶ The Court based this finding in the State's police powers.⁴⁷ It determined that the State's power to promote the general welfare and protect society outweighed the liberty interests of an individual.⁴⁸

⁴¹ *Id.*

⁴² *Jacobson*, 197 U.S. at 26.

⁴³ *See id.* at 26-27 (The Court discussed the principle of the "social compact" whereby individuals submit to governance by laws "for "the common good, for the protection, safety, prosperity, and happiness of the people" even where such submission restricts "liberty itself, the greatest of all rights.").

⁴⁴ *Id.* at 37.

⁴⁵ *Id.*

⁴⁶ *See id.* at 26-31.

⁴⁷ *Id.* at 25 ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

⁴⁸ Reiss & Weithorn, *supra* note 6, at 895.

Within 20 years of *Jacobson*, the court would be presented with the issue of mandatory vaccinations versus the right to a public education in *Zucht v. King*.⁴⁹ When confronted with a parent refusing to vaccinate their child under the claim that the mandate violated the child's liberty without due process, the court held that mandatory vaccinations as a condition of attending public school fell within the state's police power that it relies upon for immunizations per *Jacobson*.⁵⁰ Together with *Jacobson*, these cases hold that states have the police power to mandate vaccinations and make them a prerequisite for attending school.⁵¹ These decisions provide the framework for the discussion on mandatory vaccinations for children attending school but predate the addition, and subsequent revocation, of the religious exemptions to these laws.⁵²

D. Path to the Religious Exemption

The outcome of *Jacobson* was met with a great deal of discontent among several communities.⁵³ While Europe spearheaded its anti-vaccination movement with a conscientious objection clause that was more philosophical in nature in the 19th Century, the United States pursued its initial objections under religion.⁵⁴ Within the United States, it was the lobbying of Christian Scientists starting in the 1910s that represented the beginning of an organized claim for

⁴⁹ Emily R. Jones, *Who Calls the Shots?: Parents Versus the Parens Patriae Power of the States to Mandate Vaccines for Children in New York*, 37 GA. ST. U.L. REV. 637, 644 (2021), (citing LeFever, *supra* note 5, at 1051); see generally *Zucht*, 260 U.S. 174.

⁵⁰ *Zucht*, 260 U.S. at 175.

⁵¹ Megan Joy Riels, *By the Pricking of My Thumbs, State Restriction This Way Comes: Immunizing Vaccination Laws from Constitutional Review*, 77 LA. L. REV. 209, 211 (2016).

⁵² Nick Paumgarten, *The Message of Measles*, NEW YORKER (Aug. 26, 2019), <https://www.newyorker.com/magazine/2019/09/02/the-message-of-measles>.

⁵³ Andrew Meriwether, *The Complicated History Of Religious Exemptions To Vaccines*, WBEZ CHICAGO (Sept. 16, 2021), <https://www.wbez.org/stories/the-complicated-history-of-religious-exemptions-to-vaccines/d86d02a3-5ec3-49ef-af8a-48195fd4df1c>.

⁵⁴ *Id.*; see also Marin Fichman, *Resister's logic: the anti-vaccination arguments of Alfred Russel Wallace and their role in the debates over compulsory vaccination in England, 1870–1907*, PhilPapers (2007), <https://philpapers.org/rec/FICRLT-2>.

religious exemption.⁵⁵ This would be a decades-long campaign that did not achieve success until the 1960s.⁵⁶

When New York sought to join the numerous states that had already enacted laws requiring vaccination of schoolchildren in 1966, it was met with resistance from Christian Scientists, who believe that disease is a state of mind.⁵⁷ In response to this resistance, New York codified a religious exemption to the mandate.⁵⁸ Numerous states followed suit with their own religious or philosophical exemptions, with forty-six other states and Washington D.C. currently using some version of this provision in their own vaccination mandates.⁵⁹

Currently, all fifty states have legislation requiring specific vaccines for students prior to starting their school careers.⁶⁰ Every state school immunization law has a medical exemption for children.⁶¹ In addition to the previously mentioned religious exemption in 44 states, 15 states allow for philosophical objections to immunization based on personal or moral beliefs.⁶² There is a great deal of variation in the language and execution of these exemptions.⁶³ States vary in

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Meriwether, *supra* note 53; see also *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (June 26, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁶⁰ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (June 26, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>.

⁶¹ *Id.*

⁶² *Id.* (listing each state statute and whether it permits a religious or philosophical exemption).

The states providing philosophical exemptions were Arizona, Arkansas, Colorado, Idaho, Louisiana, Maine, Michigan, Minnesota, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Washington, and Wisconsin.

Id.

⁶³ Dorit Rubinstein Reiss, *Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements*, 65 HASTINGS L.J. 1551, 1573 (2014).

the phrasing of the religious requirement ("sincerely held" or "genuine and sincere") and there is no agreement about how to enforce these requirements.⁶⁴

Furthermore, the level of difficulty in obtaining these exemptions varies from state to state.⁶⁵ Some states, like Washington and Georgia, require only a notarized form stating that the parent has a religious objection to vaccinations.⁶⁶ Conversely, New York before 2019, required a more in-depth evaluation of these beliefs through an extensive form with a notarized signature and the ability to request more documentation if the school requires it.⁶⁷

E. The Abuse of Religious Claims Today

While anti-vaccination sentiment is nothing new, modern “anti-vaxxer” ideology is commonly attributed to the now-debunked study that claims there is a link between the Measles Mumps and Rubella (MMR) vaccine and autism.⁶⁸ Although the study itself has been discredited and no link was ever found between autism and any vaccine, the damage to public trust has been substantial.⁶⁹ With today’s technology and the internet, the misinformed beliefs of a niche group such as these anti-vaxxers can turn local culture into a global phenomenon.⁷⁰ Parents who refuse the vaccine are vocal about the harms they believe are associated with vaccines, although the information that leads parents to believe in these risks is typically

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ James Lobo, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C. L. REV. 261, 277 (2016).

⁶⁷ *Id.*

⁶⁸ LeFever, *supra* note 5, at 1055.

⁶⁹ *Id.* ("As a result of the autism scare, Britain's immunization rates have dropped from over ninety-two percent in 1995 to seventy-nine percent at the start of 2004, with the number of actual reported cases more than tripling.")

⁷⁰ Anna Kata, *A Postmodern Pandora's Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1709 (2010).

misleading or false.⁷¹ Extensive evidence shows that vaccines do not cause autism, food allergies, or Sudden Infant Death Syndrome.⁷²

Many vaccine-hesitant and vaccine-resistant parents have claimed a religious exemption to avoid vaccine mandates for their child, regardless of whether their objection to the vaccination is legitimately grounded in a religious belief.⁷³ No major religion, Islam, Judaism, or Christianity, wholly opposes vaccinations with formal anti-vaccination doctrine.⁷⁴ A majority of parents who object to vaccinations do so for nonreligious reasons and have created a network within their community to instruct others on how to successfully qualify for religious exemptions.⁷⁵

This unimmunized group is growing in population, although it still represents a niche facet of society. The parents within this movement who refuse to vaccinate their children are not only placing their children at risk, but they are also threatening the community's health.⁷⁶ A decline in vaccinated children may lead to disease resurgence because high immunization levels indirectly protect the community through herd immunity.⁷⁷

II. Constitutional Analysis of Free Exercise

A. *Smith versus Lukumi: Rational Basis or Strict Scrutiny*

⁷¹ Francesco Nicoli & Victor Appay, *Immunological Considerations Regarding Parental Concerns on Pediatric Immunizations*, 35 VACCINE 3012, 3015 (2017); Paul A. Offit et al., *Addressing Parents' Concerns: Do Too Many Vaccines Overwhelm or Weaken the Infant's Immune System?*, 109 PEDIATRICS 124, 124-25 (2002).

⁷² Paul A. Offit & Charles J. Hackett, *Addressing Parents' Concerns: Do Vaccines Cause Allergic or Autoimmune Diseases?*, 111 PEDIATRICS 653, 653 (2003).

⁷³ LeFever, *supra* note 5, at 1048.

⁷⁴ See Reiss, *supra* note 63, at 1573; see also *What Religions Actually Say About Vaccines*, ARIZ. P'SHIP FOR IMMUNIZATION, <https://www.whylimmunize.org/what-religions-actually-state-about-vaccines/>.

⁷⁵ See Reiss & Weithorn, *supra* note 6.

⁷⁶ LeFever, *supra* note 5, at 1048 (citing the for individuals who are susceptible to infection such as the elderly, newborns and pregnant women).

⁷⁷ Arthur Allen, *Bucking the Herd*, THE ATLANTIC MONTHLY 40, 42 (2002) (describing how "herd immunity" protects unvaccinated people since most of the people around them have been vaccinated).

When a claim is made under the Free Exercise Clause, the Supreme Court has held that the first question in the analysis of the law to determine the proper constitutional standard is whether it is a neutral law of general applicability.⁷⁸ *Employment Div., Dept. of Human Resources of Oregon v. Smith* held that “the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes).”⁷⁹ Ergo, a law “specifically directed” at religion, such as one banning “the casting of statues that are to be used for worship purposes,” would “doubtless[ly] be unconstitutional.”⁸⁰ The Free Exercise Clause does not permit even subtle departures from neutrality on matters of religion.⁸¹ If a law that burdens religiously motivated behavior is neutral and of general applicability, the standard used is a rational basis standard to test its constitutional viability.⁸² Rational basis review is the least stringent level of scrutiny provided to a constitutional interest.⁸³ To pass the rational basis test, the regulation must have a legitimate state interest and there must be a connection between the regulation and its goal.⁸⁴

Justice Scalia, in his opinion in *Smith*, wrote that a basic example of a generally applicable and neutral law would be an across-the-board criminal prohibition, such as the drug ban in *Smith*.⁸⁵ Governmental neutrality in a regulation is determined based on factors such as 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,

⁷⁸ *Smith*, 494 U.S. at 879.

⁷⁹ *Id.*

⁸⁰ *Id.* at 877.

⁸¹ *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

⁸² *Smith*, 494 U.S. at 879.

⁸³ David Hudson Jr., *Strict Scrutiny*, The First Amendment Encyclopedia, Middle Tennessee State University, <https://mtsu.edu/first-amendment/article/1966/strict-scrutiny>.

⁸⁴ *Id.*

⁸⁵ *Smith*, 494 U.S. at 877.

including contemporaneous statements made by members of the decision-making body.⁸⁶ In analyzing these factors, the presence of animus or hostility towards religion is indicative of a lack of neutrality.⁸⁷ A law is not generally applicable or neutral if the intent of a law is to infringe upon or restrict practices because of their religious motivation.⁸⁸ One way neutrality can be assessed is via facial neutrality.⁸⁹ If a law refers to a religious practice without a secular meaning discernible from the context, the law is not facially neutral.⁹⁰ Even if a regulation is facially neutral, this is not determinative as the Free Exercise clause extends beyond facial discrimination.⁹¹

In *Church of Lukumi Babalu Aye v. City of Hialeah*, a religious group whose practices required ritual animal sacrifices claimed to be victims of target suppression of a city ordinance that forbade such sacrifices in the name of preventing animal cruelty.⁹² Here, the ordinance was deemed not to be neutral because of the discriminatory language used by members of the city council toward this group's practice.⁹³ Furthermore, the ordinance was also not generally applicable because there were exemptions for slaughterhouses and a lack of regulations for hunting and other killings of animals for nonreligious reasons.⁹⁴ Because the ordinance burdened religiously motivated behavior and was not neutral or generally applicable, it had to

⁸⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993).

⁸⁷ *Id.* at 541; *Masterpiece*, 138 S. Ct. at 1729.

⁸⁸ *Smith*, 494 U.S. at 878-879.

⁸⁹ *Lukumi*, 508 U.S. at 533.

⁹⁰ *Id.* at 533-534 (using the example of the targeted language of "sacrifice" and "ritual" with deep religious connotations as used in the law at issue in *Lukumi*).

⁹¹ *Id.* at 534. The Court in *Lukumi* stated:

Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt.

⁹² *Id.* at 524-526.

⁹³ *Id.* at 541-542.

⁹⁴ *Id.* at 545.

undergo strict scrutiny.⁹⁵ Any law of this nature is considered invalid unless the government can justify it by way of a compelling interest and show that it is narrowly tailored to advance that interest.⁹⁶ A law will very rarely survive strict scrutiny if it targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation.⁹⁷ When a state restricts only conduct protected by the First Amendment and fails to restrict other conduct resulting in the same substantial harm, the interest given in justification cannot be compelling.⁹⁸

B. Fulton: Multiple Exemptions and Strict Scrutiny

Recently, the U.S. Supreme Court has spoken in regard to exemptions and their relationship to *Smith* in *Fulton v. City of Philadelphia*. In this case, Catholic Social Services sought an exemption to a discrimination ban so that it could maintain a policy of not licensing same-sex couples to be foster parents, as it claimed that went against their religious beliefs.⁹⁹ While there were no other overarching exemptions to the nondiscrimination policy, the Commissioner had the authority to grant one.¹⁰⁰ The Court found that because any exemption to the anti-discrimination requirement was at the sole discretion of the Commissioner, the law regarding the requirement was not neutral and generally applicable and thus outside of the scope of *Smith*.¹⁰¹ Once removed from *Smith*, the law would qualify for a strict scrutiny analysis requiring the government to show that the law is necessary to achieve a compelling government

⁹⁵ *Lukumi*, 508 U.S. at 546.

⁹⁶ *Id.* at 533.

⁹⁷ *Id.* at 546.

⁹⁸ *Id.* at 547.

⁹⁹ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021).

¹⁰⁰ *Id.* at 1879.

¹⁰¹ *Id.*

interest.¹⁰² The Court emphasized the necessity to analyze the government’s compelling interest in denying the specific exception, which the Court found the government lacked in this case.¹⁰³

III. New York’s Repeal of subdivision (9) of Public Health Law § 2164

A. *New York’s Religious Exemption and the 2019 Measles Outbreak*

In June of 2019, New York lawmakers voted to end the almost 50-year-old religious exemption to the vaccine mandate for school children.¹⁰⁴ In doing so, New York became the fifth state to require all public school children to be vaccinated unless they had a valid medical reason.¹⁰⁵ This was in response to a measles outbreak in New York City and Rockland County.¹⁰⁶ Measles is often referred to as the most contagious disease on Earth, as it is airborne with pathogens that can linger for hours once a person is gone.¹⁰⁷ This is why it was possible for one man, Patient 0, to cause the spread of Measles to 854 people in less than a year.¹⁰⁸ The outbreak stemmed from a small religious community in Rockland County and ravaged the largely unvaccinated population.¹⁰⁹ Such an outbreak not only presents a physical danger in the form of disease but also puts a significant strain on state resources.¹¹⁰

¹⁰² *Id.* at 1881.

¹⁰³ *Id.* at 1873.

¹⁰⁴ Campbell, *supra* note 8; see also *F.F. v. State of New York*, 65 Misc. 3d 616, 619 (removing the language that exempted “parents or guardians “hold genuine and sincere religious beliefs which are contrary” to the required vaccinations (N.Y. Pub. Health Law § 2164 [9])”).

¹⁰⁵ Aleksandra Sandstrom, *Amid Measles Outbreak, New York Closes Religious Exemption for Vaccination--but Most States Retain It*, PEW RSCH. CTR.: FACTTANK (June 28, 2019), <https://www.pewresearch.org/fact-tank/2019/06/28/nearly-all-states-allow-religious-exemptions-for-vaccinations/> (California, Maine, Mississippi, and West Virginia had also enacted laws eliminating a religious/philosophical exemption).

¹⁰⁶ David Robinson, *NY Vaccinations: What to Know About an Amish Lawsuit Seeking to Restore Religious Exemption*, Democrat & Chronicle, <https://www.democratandchronicle.com/story/news/investigations/2019/10/21/why-amish-family-sued-new-york-over-religious-exemption-repeal/4021371002/>.

¹⁰⁷ Paumgarten, *supra* note 52.

¹⁰⁸ *Id.*; see also Robinson, *supra* note 106.

¹⁰⁹ *Id.*; see also Campbell, *supra* note 8.

¹¹⁰ Jacqueline Howard, *New York City Measles Outbreak Has Ended, Health Officials Say*, CNN, <https://www.cnn.com/2019/09/03/health/new-york-city-measles-outbreak-over-bn/index.html> (Sept. 3, 2019, 1:59

The 2019 law in response to the outbreak did not immediately bar unvaccinated children from attending public school.¹¹¹ Once enacted, the law mandated that in order to attend school, all children would have to show they received at least the first dose of each immunization by June 30, 2020.¹¹² The bill did not alter the existing exception for medical purposes.¹¹³ The state looked to the example of the 2015 California law removing language providing philosophical and religious exemptions to vaccine mandates following a similar outbreak.¹¹⁴ Following its passage in California, the cases of vaccine-preventable illnesses fell.¹¹⁵

Protesters were present at the capital for the vote, representing the parents of the nearly 26,000 students exempted from vaccinations based on religious beliefs in the 2017-2018 school year.¹¹⁶ The protesters argued that by rescinding the exemption, their right to religious expression was infringed upon.¹¹⁷

B. How the Courts Have Handled New York's Actions

Following the enactment of this legislation repealing the religious exemption, parents of diverse religious beliefs who had previously obtained or qualified for religious exemptions filed suit.¹¹⁸ The plaintiff's claim was that the repeal was based on religious discrimination and violated the Free Exercise Clause of the First Amendment, as well as Article I, § of the New

PM)(New York spent \$6 million on reactive countermeasures, education campaigns, and the administration of over 5,000 doses of the MMR vaccine in an attempt to contain it).

¹¹¹ Chad Arnold, *Vaccinations: Lawsuit filed seeking to repeal New York's religious exemption ban*, Lohud, USA Today, <https://www.lohud.com/story/news/politics/elections/2019/07/11/dozens-file-lawsuit-repeal-new-yorks-vaccination-mandate/1703016001/>.

¹¹² Robinson, *supra* note 106.

¹¹³ *Id.*

¹¹⁴ Mark Fadel, *360 Years of Measles: Limiting Liberty Now for a Healthier Future*, 39 J. LEGAL MED. 1, 8 (2019).

¹¹⁵ Campbell, *supra* note 8.

¹¹⁶ Robinson, *supra* note 106.

¹¹⁷ *Id.*

¹¹⁸ *F.F. v. State of New York*, 65 Misc. 3d 616, 618 (2019).

York Constitution.¹¹⁹ The plaintiffs all claimed to hold genuine and sincere religious beliefs against vaccinating their children, all with diverse religious beliefs.¹²⁰ Several plaintiffs were not even affiliated with any organized religion but still attested to these strongly held religious beliefs.¹²¹ The complaint further alleged religious animus in enacting the repeal and hostility toward religious exemption.¹²²

The Albany County Supreme Court began by addressing the request for a preliminary injunction that would allow unvaccinated students to continue attending school.¹²³ The court weighed the potential harms of forced vaccination on the individuals versus the potential harms to society as a whole should they remain unvaccinated.¹²⁴ The court decided that regardless of how the scale of equity balances out, the lack of a likelihood of success would be determinative of this matter.¹²⁵

Regarding the Free Exercise Claim, the New York Supreme Court relied on the precedent of both *Jacobson* and *Zucht* to reiterate that mandatory vaccinations, particularly in the context of attending private or public schools, were within the state's police powers.¹²⁶ In order to address the Free Exercise claim, the court relied upon *Prince v. Massachusetts*, where the Supreme Court stated in persuasive dicta that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to a communicable

¹¹⁹ *Id.*

¹²⁰ *F.F. v. State of New York*, 65 Misc. 3d at 621.

¹²¹ *Id.*

¹²² *Id.* (citing a statement by a bill sponsor stating “[w]hether you are Christian, Jewish or Scientologist, none of these religions have texts or dogma that denounce vaccines. Let's stop pretending like they do" and that “the religious exemption has become in effect a personal belief exemption influenced largely by disagreement with the prevailing scientific and medical views underlying mandatory vaccination.”).

¹²³ *Id.* at 624-626.

¹²⁴ *Id.* at 626.

¹²⁵ *Id.*

¹²⁶ *F.F. v. State of New York*, 65 Misc. 3d at 626 (citing *Jacobson*, 197 U.S. at 25-27, 38; *Zucht*, 260 U.S. at 176).

disease or the latter to ill health or death."¹²⁷ This was further supported by a decision in the Second Circuit which relied on *Prince* when it rejected a claim that the temporary exclusion of unvaccinated students from school during a chickenpox outbreak violated the Free Exercise Clause because mandatory vaccination as a condition of admission does not violate the Free Exercise Clause.¹²⁸

The court furthered its reasoning that mandatory vaccines without a religious exemption do not violate the Free Exercise Clause because these laws already exist in four other states and courts have addressed the issue there.¹²⁹ Courts in both West Virginia and California have struck down Free Exercise claims made against mandatory vaccines in order to attend school.¹³⁰

After addressing the issue under the standards of vaccinations under *Jacobson*, the court pivoted to address the law under *Smith* to address the burden of a religious practice.¹³¹ In an assessment of whether the law repealing the religious expression was neutral and of general applicability, the court weighed the plaintiffs' argument in favor of strict scrutiny instead.¹³² The court rejected the claim that compulsory vaccinations were non-neutral laws and that this repeal was targeted in order to place burdens on their religious belief.¹³³ The court further rejected an

¹²⁷ *F.F. v. State of New York*, 65 Misc. 3d at 626 (quoting *Prince v. Massachusetts*, (321 U.S. 158, 166-167 [1944])).

¹²⁸ *F.F. v. State of New York*, 65 Misc. 3d at 627; *Phillips v. City of New York*, 775 F3d 538, 543 (2d Cir. 2015), *cert denied* 577 U.S. 822 (2015). In *Phillips*, the Court observed:

New York could constitutionally require that all children be vaccinated in order to attend public school. New York law [prior to the repeal] goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs.

¹²⁹ *F.F. v. State of New York*, 65 Misc. 3d at 627.

¹³⁰ See *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 354 (4th Cir. 2011), *cert denied* 565 U.S. 1036 (2011); see e.g. *Whitlow v. California*, 203 F. Supp. 3d 1079, 1085-1087 (SD Cal. 2016) (denying preliminary injunction); *Love v. State Dept. of Educ.*, 29 Cal. App. 5th 980, 996 (3d Dist. 2018) (dismissing constitutional challenges); *Brown v. Smith*, 24 Cal App 5th 1135, 1144-1145 (2d Dist. 2018) (dismissing constitutional challenges); see also *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (WD Ark. 2002), *appeal dismissed* 359 F3d 1029 (2004) ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children").

¹³¹ *F.F. v. State of New York*, 65 Misc. 3d at 628; see *Smith*, 494 U.S. at 879.

¹³² *F.F. v. State of New York*, 65 Misc. 3d at 628.

¹³³ *Id.* at 628-629 (The fact that the legislature first allowed for a religious exemption and later repealed that exemption does not in and of itself turn the law into one that targets religious beliefs). Cf. *Catholic Charities of*

argument for strict scrutiny due to hostility toward religious belief, as the legislative memoranda and governor’s approval all expressly state the objective was for public health reasons in reaction to a serious Measles outbreak.¹³⁴ The court did not dispute whether the plaintiffs held genuine and sincere religious beliefs regarding vaccinations.¹³⁵

The court determined that even if it were to apply the heightened strict scrutiny that the plaintiffs argued for, the Free Exercise claim would still fail, relying on other courts that have applied rational basis or strict scrutiny.¹³⁶ Protecting public health, and children's health in particular, through the attainment of threshold inoculation levels for community immunity from communicable diseases is unquestionably a compelling state interest.¹³⁷ Relying on the extensive case history upholding the state’s police power to require children to be vaccinated before attending private or public schools, the court allowed the repeal to remain in effect.¹³⁸

On appeal, the Appellate Division of the Supreme Court upheld the lower court’s findings. This court relied on rational basis reasoning, per *Smith*, and found that it was a neutral law of general applicability, not based upon hostility towards religion, and did not infringe upon the free exercise of religion.¹³⁹ The court reiterated that the sole purpose of the repeal was to achieve herd immunity and protect the public at large via vaccination¹⁴⁰

Diocese of Albany v. Serio, 7 NY3d at 522-533 (stating fact that challenged law provided some religious exemptions did not mean it was not overall a neutral statute of general applicability).

¹³⁴ *Id.* at 630-631.

¹³⁵ *Id.* at 632.

¹³⁶ *Id.* at 633; *see supra* note 130.

¹³⁷ *See Workman*, 419 Fed Appx at 353.

¹³⁸ *F.F. v. State of New York*, 65 Misc. 3d at 634.

¹³⁹ *F.F. v. N.Y.*, 194 A.D.3d 80, 87-88 (2021). The Court stated:

Overall, even when viewed in the light most favorable to plaintiffs, Supreme Court did not err by concluding as a matter of law that the repeal is a neutral law of general applicability, not based upon hostility towards religion and not infringing upon the free exercise of religion.⁵ Accordingly, given the significant public health concern, the repeal is supported by a rational basis and does not violate the Free Exercise Clause.

¹⁴⁰ *Id.* at 88 (“the sole purpose of the repeal is to make the vaccine requirement generally applicable to the public at large in order to achieve herd immunity”).

An appeal to New York’s highest court, the Court of Appeals, was dismissed on the ground that there was no substantial constitutional question directly involved.¹⁴¹ The U.S. Supreme Court has denied the writ of certiorari as of May 2022.¹⁴²

A suit based on the precursory actions taken by Rockland County to limit the spread of measles during the outbreak through a ban of all unvaccinated children in schools, except those qualifying for a medical exemption, via an Emergency Declaration was recently brought to federal court in *M.A. v. Rockland County Department of Health*.¹⁴³ The District Court sided with the state court and agreed that this practice was neutral and of general applicability and granted summary judgment.¹⁴⁴ However, on appeal in the Second Circuit, the case was reversed and remanded, having found potential evidence of animus towards religion in the language used by lawmakers when discussing the bill.¹⁴⁵ The Second Circuit stated that a reasonable jury could find that there was significance to the negative commentary made by government officials in regard to “anti-vaxxers”, much like there was in *Lukumi* where such an action constituted animus.¹⁴⁶ As such, the Second Circuit reversed the summary judgment and remanded it to the District Court because factual questions about the Emergency Declaration pervade the issues of neutrality and general applicability, thus making summary judgment inappropriate.¹⁴⁷

IV. Predictions on the Supreme Court’s Opinion on the Repeal of Religious Exemptions to Vaccines

¹⁴¹ *F.F. v. State*, 37 N.Y.3d 1040 (2021).

¹⁴² *F.F. v. New York*, 142 S. Ct. 2738 (2022).

¹⁴³ *M.A. v. Rockland Cnty. Dep’t of Health*, 53 F.4th 29, 32 (2d Cir. 2022).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 32, 37 (“Day commented that ‘[t]here’s no such thing as a religious exception’ and characterized ‘anti-vaxxers’ as ‘very ignorant.’”).

¹⁴⁶ *Id.* at 36.

¹⁴⁷ *Id.* at 38.

A. *Is New York's Repeal a Neutral Law of General Applicability*

Both the New York Supreme Court and the Appellate Division of the New York Supreme Court, as well as the Federal District Court, determined that the state action was neutral and generally applicable and owed rational basis review under *Smith*.¹⁴⁸ The Supreme Court of the United States would likely adopt the same standard of review. The letter of the law, on its face, appears to be neutral and there is no language specifically attacking any religion as it was simply the removal of an exception to a rule.¹⁴⁹ While the rhetoric surrounding the passage of the repeal by lawmakers is critical to a degree of those who abused the religious exemption to keep their children from being vaccinated, it is clear that their motivations were in protecting public health and making use of scientific developments in order to overcome a very dangerous outbreak.¹⁵⁰ Both the governor and members of the legislature stated that the purpose of the repeal was to protect the public at large from the spread of outbreaks like the one the state was suffering from at the time.¹⁵¹ The repeal did not target any specific religious belief and merely took away a protection that it was not constitutionally obligated to provide, as is evidenced by its absence in four other states.¹⁵² Thus, the repeal is a neutral law of general applicability. As such, when put under the scope of rational basis review, it is evident that the state of New York has a legitimate state interest in the protection of public health. Furthermore, it is also clear that enforcing vaccination in order to achieve herd immunity has a logical connection with achieving the goal of public health.

¹⁴⁸ *F.F. v. N.Y.*, 194 A.D.3d at 87-88; *F.F. v. State of New York*, 65 Misc. 3d at 628-629; *M.A. v. Rockland Cnty. Dep't of Health*, 53 F.4th at 32.

¹⁴⁹ N.Y. Pub. Health Law § 2164(9)(2015).

¹⁵⁰ Campbell, *supra* note 8.

¹⁵¹ *Id.*

¹⁵² *F.F. v. State of New York*, 65 Misc. 3d at 627.

B. In the Event of a Strict Scrutiny Analysis

Although there is a very strong case for the neutral and generally applicable status of this repeal, there are a number of reasons the Supreme Court might consider a strict scrutiny analysis, as the Second Circuit noted when it remanded *M.A. v. Rockland County. Department of Health*. However, even with the use of this strict scrutiny analysis, the repeal still falls within constitutionally accepted boundaries. The plaintiffs presented arguments as to why strict scrutiny analysis should apply in this case and the courts below struck them all down, with one exception in the Second Circuit.¹⁵³ These are unlikely to succeed for the same reasons as those listed by the courts below, as seen above in Part III of this paper.¹⁵⁴

Any argument to force strict scrutiny under the guidance of *Fulton* will fail. While *Fulton* allowed for the removal of the Philadelphia law from *Smith*'s scope of rational basis due in large part to the ability of the Commissioner to grant other exemptions, the New York law presents a very different situation.¹⁵⁵ In the case of *F.F. v. New York*, the only other exemption is not at the discretion of a government actor but instead by a doctor who is guided by years of medical training.¹⁵⁶ The choice to remove a religious exemption to vaccinations was not religiously motivated, nor was it at the sole discretion of a single government officer, and the only other exemption rests in the hands of medical professionals with diagnosis capabilities.¹⁵⁷ Likewise, in *M.A. v. Rockland County Department of Health*, the law provided only a medical exemption to

¹⁵³ *Id.* at 628-630.

¹⁵⁴ *F.F. v. State of New York*, 65 Misc. 3d 616; *F.F. v. N.Y.*, 194 A.D.3d 80.

¹⁵⁵ *Fulton*, 141 S. Ct. at 1879.

¹⁵⁶ N.Y. Pub. Health § 2164(8); *Lynch v. Clarkstown Cent. School Dist.*, 590 N.Y.S.2d 687 (N.Y. Sup. Ct. 1992).

¹⁵⁷ *F.F. v State of New York*, 65 Misc. 3d 619 (citing N.Y. Pub. Health Law § 2164[8]).

this exclusion for unvaccinated children in schools.¹⁵⁸ This was done specifically to combat the ongoing outbreak to spread through Rockland County in 2019.¹⁵⁹

Even if the court were to view *F.F.* or *M.A.* as similar enough to *Fulton* to rise to the level of strict scrutiny, the New York law would pass the constitutional muster required because of the compelling state interest in the law. *Fulton* requires that the government have a compelling state interest in the denial of this particular exemption. Unlike *Fulton*, there is a clear compelling state interest because of the exigencies of public health that require government intervention in the pursuit of herd immunity. In denying the religious exemption to a vaccine mandate, New York is furthering its interest in maintaining public health and preventing a crisis. Conversely, the removal of the medical exemption would hinder this pursuit of the goal of public health as it would put the health of individuals who previously qualified for the exemption in direct, potentially life-threatening danger.

The Supreme Court of the United States recently determined that some instances regarding religion and public health could demand a strict scrutiny analysis. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court determined that an executive order that imposed restrictions on religious events during the COVID-19 pandemic was likely to require a strict scrutiny analysis.¹⁶⁰ This is because the executive order imposed restrictions on religious gatherings while permitting businesses to continue without such restrictions, thus favoring businesses over religious organizations.¹⁶¹ The repeal in New York does not create a favored class, rather it makes the mandate more generally applicable by removing a previously covered class. The repeal was enacted for the purpose of protecting the public at large via herd

¹⁵⁸ *M.A. v. Rockland Cnty. Dep't of Health*, 53 F.4th at 39.

¹⁵⁹ *Id.*

¹⁶⁰ *F.F. v. N.Y.*, 194 A.D.3d at 87.

¹⁶¹ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020).

immunity.¹⁶² Therefore, although the reasoning behind both governmental actions is in the name of public health, the vaccine mandate does not create a favored class and is thus distinguishable.¹⁶³

An additional argument could be made that the existence of a medical exemption does create a favored class and thus demands a strict scrutiny-level analysis. It could be argued that the medical exemption presents a favored class like *Cuomo*, regarding the executive order.¹⁶⁴ For this analysis, the Court could look at *Tandon v. Newsom*, a recent case in California that is very similar to *Cuomo*. Like *Cuomo*, *Tandon v. Newsom* involved a COVID-19 restriction that prevented large religious gatherings but failed to restrict other secular activities.¹⁶⁵ The Court found, like in *Cuomo*, where there is a secular exemption, there must also be a religious exemption in order to be neutral and generally applicable under *Smith*.¹⁶⁶ The burden would fall on the government to establish that the challenged law and subsequent denial of a religious exemption satisfies strict scrutiny.¹⁶⁷ In order to do so, the government must do more than assert that certain risk factors are always present in worship, or always absent from the other secular activities the government may allow.¹⁶⁸

The government can easily distinguish the medical and religious exemptions. Religious exemptions thwart the goals of the vaccination mandate. Medical exemptions advance the goals of the vaccination mandate. Here, the government could assert the fact that the medical exemption and the vaccine mandate both further the efforts of the government's goals in pursuing public health and safety. Unlike the case regarding businesses as a favored class, it is

¹⁶² *F.F. v. N.Y.*, 194 A.D.3d 80, 88.

¹⁶³ *Cuomo*, 141 S. Ct. at 66 & 73.

¹⁶⁴ *Compare Cuomo*, 141 S. Ct. at 66-67.

¹⁶⁵ *Tandon v. Newsom*. 141 S. Ct. 1294 (2021).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

not so much that those who qualify for the medical exemption are favored over those seeking exemption on religious grounds, but rather that those seeking an exemption must do so in order to prevent death or serious bodily harm that the vaccine would cause.¹⁶⁹ A medical exemption works in conjunction with the vaccine mandate's overall goal in the pursuit of public health. Those who qualify for the medical exemption largely benefit from the overall umbrella of the vaccine mandate as they can be protected from infectious diseases via herd immunity without causing harm to themselves by taking a vaccine that they may be allergic to or too autoimmune compromised to handle.¹⁷⁰

Additionally, the overall health of those seeking religious exemptions is not endangered by the repeal of the exemption. In fact, quite the opposite is true as the vaccine will now protect them against future outbreaks.¹⁷¹ Those who remain unvaccinated under the claim of religion cannot hide behind the Free Exercise Clause as the Supreme Court has stated "the right to practice religion freely does not include the liberty to expose the community or the child to a communicable disease or the latter to ill health or death."¹⁷² Even if the court did see this repeal as the creation of a favored class and thus demanding a strict scrutiny analysis, it would likely withstand constitutional muster because a medical exemption furthers the government's interest in the pursuit of public health and safety, unlike the religious exemption.

There is a strong possibility that the present court will at least consider this argument regarding the conflict between the existence of a medical exemption and the absence of a religious exemption. Justice Alito, during his time on the Third Circuit, penned an opinion in

¹⁶⁹ Vaccine Exemptions & ADA Accommodations, American University, <https://www.american.edu/hr/how-we-work/vaccinations.cfm#:~:text=Exemptions%20to%20the%20vaccine%20requirement,with%20federal%20and%20DC%20law>.

¹⁷⁰ Calandrillo, *supra* note 18.

¹⁷¹ Campbell, *supra* note 8.

¹⁷² *Prince*, 321 U.S. at 166-67.

which there was a medical exemption to a rule pertaining to facial hair within the Newark Police Force, but not a religious exemption.¹⁷³ In *FOP Newark Lodge No. 12 v. City of Newark*, Alito wrote that there was reason for the Court to concern itself when the government creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.¹⁷⁴ He later concluded that the existence of the medical exemption while refusing a religious exemption was suggestive enough of discriminatory intent to demand heightened scrutiny under *Smith* and *Lukumi*.¹⁷⁵ Alito reasoned that this heightened scrutiny was permissible under *Smith* because the decision to allow officers to wear beards for medical reasons undoubtedly undermines the Department's interest in fostering a uniform appearance through its "no-beard" policy.¹⁷⁶

In his discussion of the medical exemption, Alito raised the issue that this exemption indicated that the police department made a value judgment that secular or medical motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not.¹⁷⁷ He emphasized that under both *Smith* and *Lukumi*, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.¹⁷⁸ In his application of strict scrutiny, he found that the Department's pursuit of uniformity did not withstand the test due to a lack of evidence as to the threat that religious exemptions provided to that goal that a medical exemption did not.¹⁷⁹

¹⁷³ *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (1999).

¹⁷⁴ *Id.* at 365(citing generally *Lukumi*, 508 U.S. at 542 [1992][“All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.”]).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 366.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*, (citing *Smith*, 494 U.S. at 884 and *Lukumi*, 508 U.S. at 537).

¹⁷⁹ *FOP*, 170 F.3d at 366.

In contrast, under the guidance of Justice Alito’s opinion in the Third Circuit, the repeal of the exemption in New York presents a very different outcome than that of *FOP*. Unlike the goal of uniformity in *FOP*, the goal and interest in public health and safety via vaccination is readily achievable even with the existence of a medical exemption. Furthermore, the existence of a religious exemption poses a direct threat to this interest, as is evidenced by the 2019 measles outbreak. The continued medical exemption in the absence of a religious exemption can withstand strict scrutiny because of the longstanding governmental interest in public health dating back to *Jacobson* and the fact that the medical exemption exists also in pursuit of public health for those whose health would suffer adverse effects from the vaccine.

The state’s interest in protecting public health and safety is further compounded when assessing parental rights, which often go hand and hand with free exercise, as is the case with the vaccine mandate requirement for schools.¹⁸⁰ Even under a claim of “hybrid rights” under both the First and Fourteenth Amendments, the New York law does not violate constitutional rights.¹⁸¹

A parent’s right to raise a child as they see fit under the 14th Amendment is deemed fundamental and is thus subject to the same level of scrutiny as religious rights, strict scrutiny.¹⁸² Like other fundamental rights, parental rights are not without limitation.¹⁸³ Courts have agreed that much like with vaccines as a whole, states have a compelling interest in protecting the public health, as well as the health of children through compulsory vaccine laws.¹⁸⁴ While the court has acknowledged the importance of custody, care, and nurture of the child being left first with the

¹⁸⁰ Jones, *supra* note 49 at 652.

¹⁸¹ *Id.* at 659.

¹⁸² *Id.* at 652.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

parents, it has also given states the power to intervene in matters of school attendance, child labor, and health.¹⁸⁵ When subjected to strict scrutiny, the repeal continues to meet constitutional muster even in the face of hybrid parental rights with a particular focus on religion, because of the state's police powers regarding school attendance and health as well as the state's overall interest in public health.

CONCLUSION

American communities are in danger of a reemergence of deadly infectious diseases once thought to have been eliminated by the invention of the vaccine.¹⁸⁶ Misinformation has made a lifesaving public health achievement controversial. New York's repeal of its religious exemption was a response to the crisis it fell into during the measles outbreak of 2019.¹⁸⁷ New York saw the devastation an outbreak caused on both physical and financial health and sought to remedy the situation via herd immunity.¹⁸⁸

Regardless of the analysis used, the state of New York is well within its powers to mandate the vaccination of children as a requirement for school attendance. It has been well established for over a century that mandatory vaccinations, particularly mandatory vaccinations as a requisite for school children, are well within the state's police powers. Furthermore, New York's repeal should be analyzed under rational basis review per *Smith* as a neutral and generally applicable law. However, even if it were raised to the level of heightened strict scrutiny, it would still be firmly constitutional as public health and safety is a well-established compelling government interest, as can be seen in the vaccine context in *Jacobson*. In the event that the

¹⁸⁵ *Prince*, 321 U.S. at 166-67.

¹⁸⁶ *Measles Elimination of Measles (Rubeola)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/elimination.html> (Nov. 5, 2020).

¹⁸⁷ Robinson, *supra* note 106.

¹⁸⁸ Howard, *supra* note 110.

Supreme Court decides to hear this case, it will likely find that New York's repeal was well within the bounds of constitutionality regardless of the level of scrutiny used in the analysis.