SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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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.; 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.,

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PLAINTIFFS' BRIEF IN SUPPORT OF <u>ENTRY OF TRO</u>

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,

vs.

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

Defendants.

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INTRODUCTION

On June 13, 2019, New York State ended more than fifty years of codified recognition of religious exemption from vaccination for those with genuine and sincerely-held religious beliefs. The law became effective immediately, throwing thousands of families in our state into chaos and barring their children from school throughout the State. See Exhibit 1 to Sussman Affirmation for Department of Health publication stating effective date of the law.

By and through this action, a representative group of affected families, from different religious backgrounds and regions of our State, challenge this repeal as constitutionally defective and unlawful and seek judicial intervention

to enjoin the repeal and permit their children back into schools and camps throughout the state.

STATEMENT OF FACTS

THE PARTIES

Plaintiffs include Orthodox Jewish families whose religious practice is directly and immediately burdened by the repeal; sending their children year-round to Yeshivas is part and parcel of their daily religious practice and the means by which they daily transmit religious values to their children. See Epstein Affidavit. For many of these families, school attendance is a twelve month/year religious activity and the repeal is daily burdening their religious exercise. Plaintiffs who represent this class of New York State residents include F.F., M. and T.M., E.W., Rabbi M., C.O., Y. & M., J.M., J.E., C.B. & D.B., T.F., R.K., J.M., F.H., M.E., L.B., B.K. W.E. and C.E., R.J and A.J., S.B. and Y.B., E.H. and M.B.

Religious families of different faiths join this action on behalf of their non-vaccinated children throughout the state. They are represented by M.H., whose son, like all the other affected children, may not attend any other public or private school in the State of New York by force of the challenged action, and L.C., R.S. and D.S., D.B., R.B., L.R., G.F., D.A., T.R., B.N., M.K., A.V.N., N.L., L.G., L.L., K.W., T.H, K.T., L.M., D.Y.B., A.M., Judge F.M., H.M., M.T. and R.T., S.L. and J.F., A-M.P., R.L., N.B., B.C., J.S. and W.C., L.M., S.L. and N.H., whose children are all equally excluded from public and private schools throughout the State.

All these Plaintiffs are parents whose children had religious exemptions allowing them to attend public and/or private schools or nursery programs in the State of New York.

Plaintiffs represent a class of over 26,000 similarly situated persons too numerous to name individually - that is, parents with religious exemptions for sincerely-held religious beliefs. It is efficient to litigate this matter on behalf of such a class, and the participation of each affected person is not necessary for adjudication of the common issues which plainly predominate over others in challenging the legality of the challenged action.

Defendant State of New York is governed by a bi-cameral legislature [Assembly and Senate] both of which enacted legislation revoking the long-standing religious exemption to vaccinations on June 13, 2019.

Defendant Governor Andrew Cuomo signed the challenged repeal into law on June 13, 2019, hours after its passage by the State Legislature.

Defendant Letitia James is the New York State Attorney General and, as such, is the State's Chief law enforcement official charged with ensuring enforcement of all state laws, including this legislation repealing the religious exemption.

JURISDICTION

Pursuant to 42 U.S.C. section 1983, this court has jurisdiction to enforce the provisions of the United States Constitution. Pursuant to the authority vested in it by state law, this court has jurisdiction to enforce the New York State Constitution and its statutes and to find and declare any statute unconstitutional either on its face or as applied.

FACTUAL ALLEGATIONS

Plaintiffs are parents from throughout the State of New York, each of whom hold a *bona fide* and sincerely-held religious belief against vaccinating their children and have not vaccinated their children based upon that belief. As noted, plaintiffs are persons from different and diverse religions and some are not affiliated with any organized religion; what binds them are religious beliefs which 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.

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. Denying these plaintiffs 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.

NEW YORK STATE HAS LONG BALANCED RESPECT FOR RELIGION AND PUBLIC HEALTH WITH REQUIREMENTS FOR SCHOOL ATTENDANCE

Since 1963, New York has recognized a religious exemption to vaccinations. See Public Health Law section 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, all plaintiffs made written application to their school district or school explaining those religious beliefs which impelled 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 rejected the vast majority of applications for such exemptions.

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 section 1.

Through its compulsory attendance law, New York State requires students aged 6-16 to attend school or to receive home instruction, and New York Education Law section 3202 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.

A publication of the State of New York State Education Department Student Support Services Office includes the following:

"Per Part One of Article 65 of the New York State Education Law, Section 3205(1)(c), the following age requirements apply:

- A child must attend full time instruction from the first day school is in session in September if he/she turns six years old on or before the first day of December of that school year. Please note: The school year begins on July 1st and runs through June 30th.
- A child who becomes six years old after the first of December must attend full time instruction from the first day school is in session in the following September.
- A child must attend full time instruction until the last day of session in the school year in which the minor becomes 16 years of age. New York State Education Law, §3205(3), provides that the board of education in a school district may require minors from 16 to 17 years of age, who are not employed, to attend full time day instruction until the last day of the session in the school year in which the student becomes 17 years old.
- A child who has completed a four year high-school course of study is not required to attend school regardless of age.
- A child who has applied and is eligible for a full-time employment certificate may be permitted to attend school part-time not less than 20 hours per week.

Reporting

For purposes of this document, Educational Neglect is considered to be the failure of a parent to ensure that child's prompt and regular attendance in school or the keeping of a child out of school for impermissible reasons resulting in an adverse affect on the child's educational progress or imminent danger of such an adverse affect.

Attendance - There are both excused and unexcused absences from school. Such absences may occur for either a portion of the day or the entire school day. It is the responsibility of the parent to establish the legitimate nature of the absence to the satisfaction of the school principal or person designated by the principal to oversee school attendance. Each local school district must include in its comprehensive attendance policy its determination of which pupil absences, tardiness and early departures will be excused and which will not be excused and provide an illustrative list of what will be considered excused and unexcused absences and tardiness, as required in the SED regulations at 8 NYCRR §104.1(i)(2)(iii). The school district policy on excused and unexcused absences should be incorporated into the local policy on reporting and investigation of educational neglect so that there will a common understanding between CPS and the school district of what constitutes excused and unexcused absences.

There are three elements necessary for acceptance of a report of educational neglect based on absenteeism, as identified in guidance

established at the Statewide Central Register for Child Abuse and Maltreatment (SCR):

- Excessive absence from school by the child. Confirmation that the absences are unexcused is an issue for the CPS investigation and a decision on this issue is not required at the point of making a report. However, any information the school has as to whether the absences are excused or unexcused should be provided to the SCR; and
- Reasonable cause to suspect that the parent is aware or should have been aware of the excessive absenteeism and that the parent has contributed to the problem or is failing to take steps to effectively address the problem (in other words, failure to provide a minimum degree of care); and
- Reasonable cause to suspect educational impairment or harm to the child or imminent danger of such impairment or harm.

Excessive Absence: What constitutes excessive absence from school is a determination to be made by the school district. Guidelines for making that determination should be included in the policy or procedure for reporting and investigating educational neglect. The law is not specific as to the number of absences that would provide reasonable cause to suspect that a child may be educationally neglected. School districts may decide on a number of absences that would trigger a report to the SCR or a number of absences that would trigger further inquiry by the school district to determine if a report to the SCR is warranted. The number does not have to be absolute; the number of absences that is potentially problematic may vary among different children, and the policy may take this into consideration. As one example, the New York City (NYC) Board of Education has adopted an internal protocol regarding educational neglect. If a student misses ten consecutive days of school or twenty days of school within a four month period, the school is required to "look into" why the student has been absent.

The policy should also specify that any guidelines established in the policy are meant for guidance and should never be interpreted to preclude a mandated reporter in the school from making a report to the SCR if the mandated reporter believes that he or she has reasonable cause to suspect child abuse or maltreatment, even if the conditions set forth in the guidelines have not been met.

Role of Parent: The role of the parent must be considered. School officials should contact the parent in accordance with its district attendance policy (see 8 NYCRR §104.1(i)(2)(vii)) to determine the parent's awareness of the excessive absences and to offer assistance as appropriate. It is recommended that the attempts to contact the parent be made both verbally and in writing. In cases where the school advises that a parent has been unable to be contacted, has been uncooperative with school officials, or cannot provide an explanation for a child's absences and other criteria for educational neglect can be met, that

would establish reasonable cause to suspect that a parent is aware of the absence and has not taken reasonable steps to address the problem.

Educational impairment or harm: There must be concern that the absences have had an adverse effect on the child's educational progress or are creating a danger of such an adverse effect. Certainty of an adverse effect or risk of an adverse effect is not required for a report to be accepted by the SCR; there only needs to be reasonable cause to suspect an adverse effect or risk thereof. Whether there is actually such impairment or risk is an issue for investigation by CPS.

Other considerations: The reporting of educational neglect by schools may also result in the reporting of other forms of abuse or maltreatment. Student absenteeism, whether excessive, unexcused or not, may be an indicator of other forms of underlying abuse or maltreatment in the home. As in all calls received by the SCR, the interviewer will be asking a series of open-ended questions to determine whether the caller/reporter/source has concerns that would result in ANY reasonable suspicion of abuse or maltreatment. With respect to the reporting of other forms of abuse and neglect, school district staff must follow their district's policies and procedures regarding the same as adopted in accordance with Education Law §3209-a."

See, Exhibit 2 to Sussman Affirmation.

Each plaintiff 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 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 NYCRR sec. 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 the school was infected.

At the same time, 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, given its commitment to universal education of children.

New York State provides other means, measures and methods for insuring that contagious diseases did not spread. Specifically, Public Health Law sections 2100(2)(a) & (b) allowed 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 where those with such contagious diseases frequented.

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. The cases did not originate in the United States or 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. See Exhibit 3 to Sussman Affirmation for Affidavit of Patricia Schnabel Ruppert, M.D., dated April 5, 2019, para. 8.

The Commissioner of Health for Rockland County did not isolate or quarantine these seven persons or utilize any such authority until April 2019. 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 non-vaccinated children with religious exemptions. See Exhibits 4 and 5 to Sussman Affirmation.

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 non-vaccinated children with religious exemptions since there were no reported measles cases in their schools. Id.

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 persons infected with measles nor those living with such persons and thereby exposed to the contagious disease.

Instead, without legal authority, in early December 2018, the Commissioner of Health for Rockland County issued an order which required certain schools and nurseries with "low vaccination rates" to exclude non-vaccinated children from those in which no case of measles had been presented or reported. See Exhibit 6 to Sussman Affirmation.

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's obligation to educate all children.

Between September 2018 and June 13, 2019, the State Commissioner of Health did not promulgate any directive or order preventing unvaccinated

children from attending nurseries or private or public schools in the State of New York.

Simply put, between September 2018 and June 2019, New York State and the affected counties did not utilize the approved and available means, measures and methods, already provided by state law and regulation, to effectively resolve the outbreak of measles in the State.

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, and, later that month, a companion bill was introduced in the State Senate. See Exhibits 7 and 8 to Sussman Affirmation for 2371-A, the Assembly bill which was introduced on January 22, 2019 and sponsored by Assemblyman Dinowitz and 2994-A, the Senate bill which was introduced by Senator Hoylman.

Both proposed bills were referred to the respective Health Committees in the Assembly and Senate, *id.*, which are each charged with considering all bills that deal with the health of New Yorkers. Between January 2019 and June 2019, despite multiple requests from plaintiffs and constituents, no legislative committee convened a single public hearing on either proposed bill.

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 which experienced an outbreak. 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 years ago.

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.

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 belief prevents 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 in the proposed legislation 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 no showing that those with religious exemptions had in fact spread a single case of measles 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.

Indeed, in the floor debates on the bills, proponents repeatedly avoided any mention to the number of active cases of measles in the State and deceivingly 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. 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. See Exhibit 6, page 1.

On or about June 13, 2019, absent any legislative hearings, both health committees and, subsequently, both chambers of the New York State legislature, voted to eliminate religious exemptions theretofore codified at Public Health Law section 2164(9) and to require parents to administer a panoply of vaccinations to their children, depending on age, including vaccines

against measles, mumps, rubella, diphtheria, tetanus, polio, chickenpox, meningitis, hepatitis B, haemophilius 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.

THE REPEAL OF THE RELIGIOUS EXEMPTION WAS MOTIVATED BY ACTIVE HOSTILITY TOWARD RELIGION

Said legislation was intended to regulate the religious conduct of those who had been granted an exemption to vaccinate on the basis of their 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 in stating, "We've chosen science over rhetoric." https://www.gothamgazette.com/state/8629-historic-productive-session-democrats=albany-cuomo-transform-new-york. Published 6/24/19.

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 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." https://youtu.e/U_4551sC5n4?=13m22s.

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. https://patch.com/new-york/midhudsonvalley/op-ed-vaccines-protecting-our-children-measles, Patch, May 3, 2019.

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." http://fios1news.com/uncategorized/state-sen-carlucci-on-measles-seat-belts-and-marijuana/. Video, May 18, 2019, Fios, 11:15-11:40. 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."

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 a consultant to worm their way out of public health requirements that the rest of us are following." https://youtu.be/wn5CI071U2w?t=8m11s Youtube, NY Legislative Press Conference, May 6, 2019, 8:13-8:30. 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." Same Press Conference as immediately above, 31:47-32:34.

The original Assembly sponsor of the repeal legislation, Jeffrey Dinowitz, echoed and extended this sentiment, "There are other people who don't get the vaccinations because of the religious exemption. There is a provision in the law that says that anyone who has legitimate and truly 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 the kids. There is nothing in the Jewish religion, the Christian religion, or Muslim religion that suggests that you can't get vaccinated. It is just utter garbage." https://youtu.be/X99d27D-mZo?t=2m52s. Clip on Youtube published March 19, 2019. 2:52-3:28.

In other public comments, Assemblyman Dinowitz repeated his hostility toward religion and persons who hold religious 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." https://www.youtube.com/watch?v=wn5CI071U2w&feature=youtu.be&t=29m30s, Youtube, May 6, 2019, NYS Legislative News Conference. And, on another occasion, Mr. Dinowitz remarked, "There are many people who are claiming religious exemption when it fact it has nothing to do with religion." https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmczcsugupu2m-story.html, Daily News, April 29, 2019.

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.

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 had religious exemptions to vaccination. See Exhibit 9. 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 Executive Law section 24. See Exhibit 10. [1]

Thereafter, without any factual basis, Mr. Day stated, "The religious exemption has been abused and it has been used as a personal preference

[1] The County of Rockland sought emergency review and the Appellate Division for the Second Department affirmed the restraining order Judge Thorsen entered.

exemption." https://www.nydailynews.com/news/politics/ny-measles-exemption-bill-20190429-ldtsgxug4jhctbmczcsugupu2m-story.html, PIX News, June 14, 2019, 1:05. Mr. Day further remarked, "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."

https://drive.google.com/file/d/1F74xfYygJWTj1kjT4ZZqEc3XsBzAx5pX/view, Day's Facebook post, May 10, 2019.

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 a hostility toward the religious beliefs underlying the religious exemption and the individuals who exercised it.

In that the means, measures and methods already authorized by New York State were generally NOT implemented 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.

THE REPEAL HAS DEVASTATED NEW YORK FAMILIES

The challenged action is causing plaintiffs 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 New York State Law or a religious

education as their religious beliefs may mandate. The challenged action is also causing plaintiffs irreparable harm by forcing plaintiffs and those similarly situated to find 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 is causing plaintiffs 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.

LEGAL ARGUMENT

I. THE REPEAL IS UNCONSTITUTIONAL

A. INTRODUCTION

Several well-settled principles inform this lawsuit:

The First Amendment disallows state action which is motivated by disfavor toward religion and active hostility by government decision-makers toward the religious.

The First Amendment to the United State Constitution recognizes a separation between church and state and the right of each person to engage in the free exercise of religion and to not be compelled to engage in affirmative acts which violate religious beliefs absent a compelling state interest.

The First Amendment requires states to demonstrate a compelling state interest to deny a religiously-based accommodation, to overrule religiously-

compelled practices or to force a person to act in a manner contrary to his/her personal religious beliefs.

New York State's Constitution recognizes religious freedom as a fundamental right for all those who reside in our state. Article 1, section 3.

New York State requires a party claiming an exemption to a law of general application on the ground of religious beliefs to demonstrate that the law is an unreasonable interference with his/her religious beliefs.

An actual public health emergency may constitute a compelling state interest allowing the state to override sincerely-held religious beliefs. However, our Court of Appeals has held that "history teaches that constitutional protections do not readily yield to blanket assertions of exigency." *Ware v. Valley Stream High School Dist.*, 75 N.Y.2d 114,129 (1989).

Here, active hostility to religion motivated the passage of the repeal. Moreover, no compelling state interest existed or was shown to exist to justify eliminating the religious exemption and to burden plaintiffs' free exercise of religion. This is particularly true since prior New York State law permitted the exclusion of those with a religious exemption where an outbreak of a contagious disease occurred in their school, and this provision was never shown to be ineffectual. Likewise, no compelling state interest exists to selectively eliminate the religious exemption for children where, as here, the State continues to maintain [the medical exemption from vaccinations], religious exemptions for students in higher education under Public Health Law section 2165, and imposed no vaccination requirements at all for adult staff and personnel at the same public and private schools. Finally, absent a

compelling state interest, the repeal unconstitutionally compels those of deeply-held religious beliefs to either engage in acts prohibited by their faith or lose sacred state benefits, including a free public education for their children.

B. **THE REPEAL IMPERMISISBLY EXHIBITED ACTIVE HOSTILITY TOWARD RELIGION**

Plaintiffs challenge the repeal because it represents state action motivated by active hostility toward religion. The First Amendment to the United States Constitution, as made actionable by 42 U.S.C. section, 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).

In *Masterpiece Cakeshop,* at 1729*,* writing for a seven member majority, Justice Kennedy noted,

> "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." [emphasis supplied].

The proofs presented above regarding New York's repeal of the religious exemption to vaccination strongly support the same conclusion. Active hostility toward religion punctuated 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 plaintiffs' 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 those months, 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 to a concern for 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. *Slockish v. United*

States FHA, 2018 U.S. Dis. LEXIS 174002 *5-6 (D.Or. 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).

This attack on 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 rode this animus to pass the legislation.

C. **THE REPEAL VIOLATES THE NEW YORK STATE CONSTITUTION**

Plaintiffs also allege that the challenged action is an unreasonable interference in the religious freedom of plaintiffs and those similarly-situated and thereby violates the New York State Constitution. In *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 525 (2006), the Court of Appeals held that when New York State imposes "an incidental burden on the right to free exercise of religion," the Court must consider the interest advanced by the

legislation that imposes the burden and "the respective interests must be balanced to determine whether the incident burdening is justified."

Here, the State Health Commissioner and the County Health Commissioners uniformly failed to employ the methods and means 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) & (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 such individuals. And, thereafter, the cases of measles reported in that County dwindled.

Rather than employ the methods state law and regulation provided, the State radically interfered with the religious exemption and ultimately eliminated it. This represents an unreasonable interference in the religious exercise of plaintiffs because the means and methods provided by state law were never shown to be inadequate or insufficient to deal with the outbreak. Indeed, one could reasonably claim that these less infringing means were not even tried, undermining any argument that the outbreak was as serious as public health professionals claimed.

In addition, here, the balancing required includes, on the one hand, the State's profound interest in insuring that all children can take advantage of our State's commitment to a free public education or attend a private school. Repeal of this exemption has directly impaired the ability of religious children to worship with their peers, as in Yeshivas, *see*, Epstein Affidavit, and thereby

substantially burden their religious exercise. *Cf.*, People v. Woodruff, 26 A.D.2d 236, 238-39 (requirement to testify before a Grand Jury does not impose a burden on freedom of worship).

D. **THE REPEAL VIOLATES THE FIRST AMENDMENT FREE EXERCISE CLAUSE**

Plaintiffs next allege that, without a compelling state interest, the challenged enactment burdens plaintiffs in the free exercise of their religious faiths in violation of the United States Constitution as made actionable by 42 U.S.C. section 1983 Constitution. As the Supreme Court observed in *Obergefell v. Hodges*, 576 U. S. ___ (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." *Id.*, at ___ (slip op., at 27).

Having failed to use the means and methods made available by state law to combat the measles outbreak, the State lacked any compelling state interest to eradicate the religious exemption in its entirety. 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.

E. **THE REPEAL VIOLATES THE EQUAL PROTECTION CLAUSE**

Fourth, plaintiffs submit that the challenged enactment violates the Equal Protection clause of the United States Constitution as made actionable by 42 U.S.C. section 1983. This follows because the legislature has repealed

the religious exemption for children while allowing students in higher education to maintain their religious exemptions. See Public Health law section 2165. Moreover, adults working in New York's schools and camps need not demonstrate any vaccination status across the range of diseases included in the current legislation. There is no rational basis for allowing these populations to retain religious exemptions or remain free of vaccine requirements altogether while compelling religious families to vaccinate at the peril of losing their right to a free public or selected private school education in New York. [2]

F. **THE REPEAL COMPELS EXPRESSIVE ACTS IN VIOLATION OF THE FIRST AMENDMENT**

Finally, the challenged enactment violates the First Amendment to the United States Constitution as made actionable by 42 U.S.C. section 1983, because, *absent a compelling state interest*, it requires plaintiffs to engage in compelled expressive acts or violate a state law requiring them to send their children, ages 6-16, to a public or private school, which they are unable do without violating their religious beliefs.

New York compels parents to send their children, ages 6-16, to school. Parents who do not do so and do not have the facility, time or expertise to provide home schooling violate the Education Law and subject themselves to potential severe penalties, including the loss of parental rights. Yet, many in plaintiffs' class will be unable to homeschool or otherwise meet the state requirement. They will be compelled to engage in a practice which violates

[2] It is noteworthy that County Executive Day likewise excluded anyone other than children with religious exemption from his emergency declaration, though about 25-30% of the Rockland County measles cases involved adults, many of whom had been vaccinated against measles.

their religious beliefs or face possible harsh sanctions. Absent a compelling state interest, which does not exists here, this form of compulsion is antithetical to a pluralistic society. And, when combined with the active hostility to religion which has been shown to have motivated the passage of the repeal, such compulsion represents a majoritarianism which endangers the First Amendment's commitment to individual rights.

II. PLAINTIFFS SATISFY THE STANDARDS FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Pursuant to CPLR section 6301, to obtain a temporary restraining order, plaintiffs must show entitlement to a preliminary injunction, and demonstrate that immediate and irreparable injury, loss or damage will result unless a defendant is restrained before a hearing may be held. "To be entitled to a preliminary injunction, plaintiffs [have] to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor." *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990).

The merits of this case could not be more clear: the State dilly-dallied while the measles outbreak was at its height, did not utilize the means and methods which state law contemplated and then, without any deliberative process whatsoever and steeped in ant-religious invective, repealed a religious exemption which had been codified in New York State law for more than 55 years. The impact of this has been and will continue to be devastating to thousands of families, creating irreparable harm in that children will be denied access to public and private schools and nurseries, and religious exercise has

been and will continue to be severely burdened. Finally, where religious liberty and access to education, core principles in our society, are compromised without a compelling state interest, the balance of equities necessarily favors enjoining the offensive and challenged action. Accordingly, this Honorable Court should find and declare that the repeal legislation was enacted based upon impermissible and active hostility to the freedom of religion which is a fundamental right; that the repeal further burdens and offends the First Amendment without a compelling state interest in that New York failed to utilize those measures set forth in state law and regulation to combat the outbreak of a contagious disease; that the repeal unreasonably interferes in the religious beliefs and practices of plaintiffs because its enactment was not supported by any empirical evidence that unvaccinated minors holding a religious exemption played any role in the spread of measles and because the process by which the legislature adopted the repeal belies any sense that a public health emergency justified this action; that the repeal violates the equal protection clause because the legislature has concurrently retained the religious exemption for students in higher education, allowed staff in both public and private schools in New York with no regard to vaccination status, and has taken no meaningful measures to alter the 7-8% of students who attend public schools in New York without vaccinations or any form of exemption due to apparent ongoing administrative failures of oversight.

In this light, this Court should conclude that no rational basis supports this repeal based on public health concerns for those who could not be vaccinated; and finally that the repeal compels speech and acts repugnant to

plaintiffs' religious beliefs or causes their children to be deprived of a free public education or a religiously-mandated education.

On these grounds, this Honorable Court should further temporarily, preliminarily and permanently enjoin the repeal legislation, enter any additional orders which the interests of law and equity require and award the reasonably incurred attorneys' fees and costs to plaintiffs and their counsel.

Yours, etc.

MICHAEL H. SUSSMAN

SUSSMAN & ASSOCIATES
PO BOX 1005
GOSHEN, NEW YORK 10924
(845)-294-3991

ROBERT F. KENNEDY, JR.
HURLEY, NEW YORK
OF COUNSEL