

24-681-CV

In the United States Court of Appeals for the Second Circuit

JOSEPH MILLER, ET AL.,

Plaintiffs-Appellants,

v.

JAMES V. McDONALD, ET AL.,

Defendants-Appellees.

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

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STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument. This case implicates the foundational First and Fourteenth Amendment question whether the State of New York can compel Amish schoolchildren living in remote Amish communities to receive vaccinations that conflict with their sincerely held religious beliefs and Amish way of life. The district court held “yes,” dismissing this civil rights case under Federal Rule of Civil Procedure 12(b)(6). That outcome is inconsistent with decades of First and Fourteenth Amendment jurisprudence and the U.S. Supreme Court’s recent decisions in *Tandon v. Newsom*, 593 U.S. 61 (2021), and *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). Oral argument is likely to aid the Court’s resolution of these weighty issues.

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INTRODUCTION AND PRELIMINARY STATEMENT

This case is about whether the First and Fourteenth Amendments permit the State of New York to compel Amish schoolchildren—who attend private Amish-only schools in rural Amish communities removed from the modern world—to receive vaccinations in violation of their sincerely held religious beliefs in order to attend Amish community schools.

The Amish share “a fundamental belief that salvation requires life in a church community” that is “insulate[d] ... from the modern world” and its modern trappings. *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972). As part of their rejection of modernity, the Amish have an undisputed and sincerely held religious objection to vaccinations. A-11, 13 to 14, 21 to 23, 25.¹ For over 50 years, from 1966 until 2019, New York accommodated that religious belief by granting the Amish religious exemptions from the State’s school vaccination requirements, N.Y. Pub. Health Law § 2164 (“PHL 2164”). But in 2019, the State eliminated that religious exemption. Now, New York allows only

¹ Citations to the Joint Appendix are designated “A-__.” Citations to the Special Joint Appendix are designated “SPA-__.”

secular—not religious—exemptions to its school vaccination requirements. In 2022, the State brought an enforcement action against the Amish Appellants here imposing catastrophic penalties.

This lawsuit is an as-applied challenge under Section 1983 to that enforcement action as well as the application of the vaccine requirements to these Amish Appellants. In a 108-paragraph verified complaint, Appellants pleaded that the U.S. Constitution bars New York’s enforcement action as well as the application of the vaccine requirements to these Amish Appellants. They asserted the right not to “perform[] ... physical acts,” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (citation omitted), that will “endanger their own salvation and that of their children,” *Yoder*, 406 U.S. at 209.

The district court nevertheless dismissed Appellants’ claims under Federal Rule of Civil Procedure 12(b)(6) and denied Appellants’ motion for a preliminary injunction. It relied almost entirely on this Court’s decision last year in *We the Patriots USA, Inc. v. Connecticut Office of Early Childhood Development*, 76 F.4th 130 (2023), which in turn applied *Employment Division v. Smith*, 494 U.S. 872 (1990), to uphold under rational basis review

Connecticut’s school vaccine mandate as both generally applicable and neutral to religion. The district court reflexively concluded that it was bound by *We the Patriots*—even though that case was a facial challenge involving students in metropolitan areas to a different statute with a different legislative history that permits less discretionary exemptions than the New York statute now before this Court.

Respectfully, that was error: PHL 2164 is not generally applicable because it prefers secular concerns over religious interests, and it remains subject to discretionary medical exemptions that are applied on a case-by-case basis. It is not neutral because its 2019 amendment targeted *only* religious exemptions for elimination based on hostility to religious beliefs, which the amendment’s sponsors decried as “fake” and “garbage.” Appellants’ claim also falls outside the *Smith* rational-basis framework because Appellants have plausibly pleaded a hybrid-rights claim under *Yoder*, and because PHL 2164’s amenability to religious exemptions—as demonstrated by their history in New York and elsewhere—does not implicate *Smith*’s animating rationale. Indeed, 45 states today successfully maintain religious exemptions,

making New York an “extreme outlier.” *M.A. v. Rockland Cnty. Dep’t of Health*, 53 F.4th 29, 41 (2d Cir. 2022) (Park, J., concurring).

Because neither *Smith* nor *We the Patriots* applies, the government must overcome strict scrutiny. It cannot. Whatever generalized interest the State may have in preventing transmission of a pathogen does not supply the sort of “precise analysis” trained at these “particular religious claimants” that strict scrutiny’s compelling-interest prong requires. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021) (citation omitted). Furthermore, PHL 2164 is not narrowly tailored because it is both underinclusive and overbroad. It applies to only one group of people who may transmit (students) in only one setting where transmission may occur (K-8 schools) and requires vaccines that the complaint alleges, and that Appellees did not refute, do not operate to prevent transmission of the targeted pathogen. It was also adopted in lieu of far less burdensome alternatives to prevent transmission that would have retained a religious exemption, and was based on virtually no evidence that religious exemptions—particularly in Amish communities—actually cause transmission.

Simply put, there is no valid basis to compel these particular Amish children to receive vaccines that violate their sincere religious beliefs in order for them to attend Amish schools. The judgment below should be reversed.

JURISDICTIONAL STATEMENT

Appellants bring their cause of action under 42 U.S.C. § 1983. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a) because the district court entered final judgment dismissing the action on March 11, 2024, SPA-1 to 36, and also denied Appellants' request for a preliminary injunction. Appellants filed a timely notice of appeal on March 11, 2024. A-974 to 975.

ISSUES PRESENTED

This case concerns whether, as applied, PHL 2164 unconstitutionally abridges Appellants' rights under the First and Fourteenth Amendments. The district court below held "no" under *Employment Division v. Smith*, 494 U.S. 872 (1990). This appeal presents two principal issues:

1. Is Appellants' as-applied challenge to PHL 2164 subject to rational-basis review under *Smith*?
2. Does PHL 2164 overcome strict scrutiny?

STATEMENT OF THE CASE

I. Factual Background

A. Appellants are part of an Amish community that lives apart from society and shuns the trappings of modernity.

1. Appellants are three Amish individuals—Joseph Miller, Jonas Smucker, and Ezra Wengerd—and three Amish schools—the Dygert Road School, Pleasant View School a/k/a Twin Mountain School, and Shady Lane School. A-12 to 13.

The three individual Appellants, along with their families, belong to Amish communities in rural Chautauqua and Montgomery Counties in New York. A-13. Messrs. Miller and Smucker are fathers of Amish children who attend Amish schools. A-13. Mr. Wengerd serves as a representative of Amish families and Amish schools in their dealings with the government. A-13. The three school Appellants are private Amish community schools, funded solely by the Amish, and located exclusively on Amish land within the Amish communities. A-12 to 13.

2. Appellants and the Amish communities “are religiously committed to living separately from the modern world.” *Mast v. Fillmore County*, 141 S. Ct. 2430, 2430 (2021) (Gorsuch, J., concurring); *see also Yoder*, 406 U.S. at 210 (“Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence.”). Their way of life has “not altered in fundamentals for centuries.” *Yoder*, 406 U. S. at 217. It has “remained constant” despite “unparalleled progress in human knowledge generally.” *Id.* at 216.

This “traditional way of life ... is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living.” *Id.* The “Old Order Amish religion pervades and determines virtually their entire way of life.” *Id.* “They grow their own food, tend their farms using pre-industrial equipment, and make their own clothes.” *Mast*, 141 S. Ct. at 2430 (Gorsuch, J., concurring). They have “reject[ed] ... telephones, automobiles, radios, and television.” *Yoder*, 406 U.S. at 217. They “have established their own elementary schools in many respects like the small local schools of the past.” *Id.* at 212. And at those schools, they “educat[e] their children in the Amish way, with Amish teachers, ... on Amish owned property.” A-11.

3. Inherent in the Amish “traditional way of life,” *Yoder*, 406 U.S. at 216, is an undisputedly sincere and abiding “religious objection[] to injecting their children with vaccines,” A-14; *see also* A-11, 13, 21-23, 25. As Mr. Wengerd has explained:

Our almighty God wants us to fully put our faith + trust in Him. Which is in conflict to put our trust in vaccines. We are also commanded to not be conformed to this world, Romans 12[:]1-2. If we honestly obey this, then it will affect everything we do, yes even in

the way we try to remain healthy.... Also since some of the vaccines are based on fetal or aborted cell lines, we believe it would be an abomination to our Creator to inject such into our bodies.

A-22 to 23.

B. Governments and courts have long accommodated the Amish by granting exemptions from laws and regulations.

As modern society has “become more populous, urban, industrialized, and complex,” the Amish lifestyle has “come into conflict increasingly with requirements of contemporary society.” *Yoder*, 406 U.S. at 217. To resolve these conflicts between religion and government, legislatures and courts regularly create and interpret laws to balance these competing interests in a way that is fair to both the Amish and the public and respects Amish religious tradition that predates the Founding of this Nation.

Notably, the Supreme Court in *Yoder* held that the Amish were exempt from a state law requiring all students to remain in school until the age of 16. As the Court noted, “[f]ormal high school education beyond the eighth grade is contrary to Amish beliefs.” *Id.* at 211. Forcing the Amish to violate these beliefs pursuant to compulsory secondary education laws was “precisely the kind of objective danger to the free exercise of religion that the First

Amendment was designed to prevent.” *Id.* at 218. Absent an exemption, the Amish would “not only expose themselves to the danger of the censure of the church community, but ... also endanger their own salvation and that of their children.” *Id.* at 209. The Court recognized the State’s “admittedly strong interest in compulsory education,” but it concluded that the State had failed to “show with ... particularity how [that interest] would be adversely affected by granting an exemption to the Amish.” *Id.* at 236.²

Consistent with the values underlying *Yoder* and its progeny, many states affirmatively sought to accommodate and have seamlessly accommodated the Amish and their religious beliefs. In 2015, for example, Wisconsin crafted a religious exemption to the state’s housing code for the Amish that allowed them to build homes without carbon monoxide detectors, smoke

² In the wake of *Fulton*, the Supreme Court granted, vacated, and remanded a case so that the lower court could reevaluate its denial of an exemption for the Amish. *See Mast*, 141 S. Ct. at 2430. That case, like this one, concerned a regulation targeting public health. On remand, the lower court recognized such an exemption. *See Mast v. Cnty. of Fillmore*, 993 N.W.2d 895, 910 (Minn. Ct. App. 2023) (recognizing Amish exemption to state law mandating installation of certain septic systems).

detectors, or indoor plumbing.³ Also in 2015, Indiana passed a bill allowing a religious exemption for the Amish from photographs for state-issued identification. *See* Ind. Code § 9-24-16.5 (2016). And in 2012, Kentucky passed a bill providing Amish buggies an exemption from a law requiring bright orange warning signs on vehicles. *See* Ky. Rev. Stat. § 189.820(4).

II. Regulatory Background

A. New York requires certain vaccines for schoolchildren.

New York—like all other states—mandates that children attending schools receive certain vaccines. This requirement is codified at PHL 2164. *See* N.Y. Pub. Health Law § 2164(7)(a). PHL 2164 requires children who attend schools to be vaccinated for “poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B.” *Id.* § 2164(2)(a). Generally speaking, no school “shall permit any child to be admitted to such school, or

³ *See* Rich Kremer, *State Rules Amish Can Build a Home Without a Smoke Detector, Indoor Plumbing*, Wis. Pub. Radio (Sept. 29, 2015), <https://perma.cc/KDC5-KW9W>.

to attend such school, in excess of fourteen days” without proof of the required vaccinations. *Id.* § 2164(7)(a). This mandate applies broadly to “any public, private or parochial” school. *Id.* at § 2164(1)(a). But it does not apply to teachers, aides, administrators, bus drivers, or any adults who work in or with schools.

PHL 2164 carries stiff penalties for noncompliance. As relevant here, each violation warrants a civil penalty of up to \$2,000. *See* N.Y. Pub. Health Law §§ 12(1), 206(4)(c). And the State has taken the position, as reflected in the record against the Amish, that each day each student attends school contrary to PHL 2164 is a separate violation. *See* A-89 to 90; A-127 to 128.

B. From 1966 to 2019, New York grants medical and religious exemptions to its school vaccine requirements.

For half a century, from 1966 until 2019, New York offered two exemptions to PHL 2164. A-16; *see* 1966 N.Y. Laws ch. 994. *First*, it provided a medical exemption. Pursuant to this exemption, a child need not be vaccinated if “any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child’s health.” N.Y. Pub. Health L. § 2164(8). *Second*, New York provided a religious exemption. Pursuant to this

exemption, a child did not need to be vaccinated if the child’s “parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to” vaccination. *Id.* § 2164(9) (2015).

Religious exemptions have long been the norm when it comes to school vaccination laws. New York successfully recognized and administered such an exemption for more than 50 years. A-16, 33. And 45 states (plus the District of Columbia) currently offer religious exemptions to their school vaccination laws. A-16.⁴ Only five states do not, and for most of them, this is a

⁴ See Ala. Code § 16-30-3; Alaska Admin. Code tit. 7, § 57.550; Ariz. Rev. Stat. Ann. §§ 15-872(G), -873(A)(1); Ark. Code Ann. § 6-18-702(d)(4)(A); Colo. Rev. Stat. §§ 25-4-902, -903(b)(V); Del. Code Ann. tit. 14, § 131(a)(6); D.C. Code §§ 38-501, -506(1); Fla. Stat. § 1003.22(1); Ga. Code Ann. § 20-2-771(e); Haw. Rev. Stat. §§ 302A-1154, -1156(2); Idaho Code §§ 39-4801, -4802(2); 105 Ill. Comp. Stat. § 5/27-8.1(6); Ind. Code § 21-40-6; Iowa Code § 139A.8(4)(a)(2); Kan. Stat. Ann. § 72-6262(b)((2); Ky. Rev. Stat. Ann. § 214.034(2); La. Stat. Ann. §§ 17:170(E), 40:31.16(D); Md. Code Ann., Educ. § 7-403(b)(1); Mass. Gen. Laws ch. 76, § 15; Mich. Comp. Laws §§ 333.9208, .9215(2); Minn. Stat. § 121A-15; Mo. Rev. Stat. §§ 167.181(3), 210.003; Mont. Code Ann. §§ 20-5-403, -405(1)(a); Neb. Rev. Stat. §§ 79-217, 221(1); Nev. Rev. Stat. §§ 392.435, .437; N.H. Rev. Stat. Ann. § 141-C:20-a, :20-c; N.J. Stat. Ann. § 26:1A-9.1; N.M. Stat. Ann. § 24-5-1, -3(A); N.C. Gen. Stat. §§ 130A-155, -157; N.D. Cent. Code § 23-07-17.1(3); Ohio Rev. Code Ann. § 3313.671(B)(4); Okla. Stat. tit. 70, §§ 1210.191, .192; Or. Rev. Stat. § 433.267(1)(c)(A); 28 Pa. Cons. Stat. §§ 23-83, -84; 16 R.I. Gen. Laws § 16-38-2(a); S.C. Code Ann. § 44-29-

relatively recent development.⁵

C. In 2019, driven by hostility to what legislators call “fake” and “garbage” religious beliefs, New York abolishes its policy of granting religious exemptions but continues to allow medical exemptions.

On June 13, 2019, the New York Legislature reversed its five-decade tradition of religious accommodation and repealed the religious exemption, targeting religious practice while leaving medical exemptions untouched. *See* 2019 N.Y. Laws ch. 35, §§ 1, 2. Governor Cuomo immediately signed the bill into law. The State continues to recognize medical exemptions to PHL

180(D); S.D. Codified Laws § 13-28-7.1; Tenn. Code Ann. § 49-6-5001(b)(2); Tex. Educ. Code Ann. § 38.001(c)(1)(B); Utah Code Ann. § 53G-9-303(3); Vt. Stat. Ann. tit. 18, §§ 1121, 1122(3)(A); Va. Code Ann. §§ 22.1-271.2(C), 32.1-46(D)(1); Wash. Rev. Code § 28A.210.080, .090(1)(c); Wis. Stat. § 252.04(3); Wyo. Stat. Ann. § 21-4-309(a). Mississippi now offers a religious exemption after a federal court issued a permanent injunction following a free exercise challenge requiring Mississippi to provide a religious exemption process. *See Bosarge v. Edney*, 669 F. Supp. 3d 598, 625 (S.D. Miss. 2023).

⁵ *See* Cal. Health & Safety Code § 120325 *et seq.* (religious exemption eliminated in 2016); Conn. Gen. Stat. § 10-204a (religious exemption eliminated in 2021); Me. Stat. tit. 20-A, § 6355 (religious exemption eliminated in 2019). West Virginia has never offered a religious exemption. W. Va. Code § 16-3-4; *see We the Patriots*, 76 F.4th at 135.

2164. New York’s present refusal to recognize any religious exemptions makes it an “extreme outlier.” *M.A.*, 53 F.4th at 41 (Park, J., concurring).

Assembly Bill 2371A (“A2371A”),⁶ which was sponsored primarily by Assemblyman Jeffrey Dinowitz, stated that its purpose was to “repeal all non-medical exemptions from vaccination requirements for children” to ensure “prevention of disease outbreaks.” A2371A Sponsor Memo.⁷ The bill was introduced on the heels of a measles outbreak that was “largely ... concentrated in communities in Brooklyn and Rockland County” within the New York City metropolitan area. S2994A Sponsor Memo⁸; see Sarah Maslin Nir & Michael Gold, *An Outbreak Spreads Fear: Of Measles, of Ultra-Orthodox Jews, of Anti-Semitism*, N.Y. Times (Mar. 29, 2019), <https://perma.cc/9P59-C73Z> (As a result of the measles outbreak, “some residents say they now wipe public bus seats and cross the street when they see ultra-Orthodox

⁶ The text of A2371A is available at <https://perma.cc/48KT-STNR>. The companion bill in the Senate, S2994A, was sponsored primarily by Senator Brad Hoylman-Sigal. The text of S2994A is available at <https://perma.cc/3Q5J-VGUM>.

⁷ A2371A’s sponsor memo is available at <https://perma.cc/PS3N-254C>.

⁸ S2994A’s sponsor memo is available at <https://perma.cc/7ZDG-5VHJ>.

Jews. Hasidic leaders said they feared not only a rise in anti-Semitism but an invasion of their cloistered community by the authorities under the guise of public health.”). None of those communities were Amish or similar to the remote rural areas where the Amish live. *See* A-32.

Lawmakers at the time questioned whether there was evidence that religious exemptions—as opposed to medical exemptions, noncompliance, or non-students who are not subject to the vaccination requirements—were responsible for the outbreak. *See, e.g.,* Assembly Record⁹ at 91 (Abinati, A.) (“There has not been one instance that has been pointed out to us that anyone with a religious exemption had measles during the last outbreak.”); Senate Record¹⁰ at 5386 (SENATOR ANTONACCI: “Am I to understand that all 924 cases [of measles] are individuals ... claiming the religious exemption under New York State law? SENATOR HOYLMAN: The answer is no,

⁹ Citations to “Assembly Record” are to the transcript of the Assembly proceedings, which is available at the link for “6-13-19 Session Part 1” at <https://perma.cc/4F9T-NM8Z>.

¹⁰ Citations to “Senate Record” are to the transcript of the Senate proceedings, which is available at <https://perma.cc/SFH8-VZTC>.

probably not.”). As some Senators noted, New York City had a track record of withholding religious exemptions. *See* Senate Record at 5390 (Antonacci, S.) (“[T]he de Blasio administration has been very difficult on recognizing religious exemptions.”); *id.* at 5425 (Lanza, S.) (“[I]n every case in New York City, the answer [when requesting a religious exemption] has been no.”).

Nonetheless, the bill’s sponsors could not be deterred from their attack on religious exercise and exemptions. Regrettably, the legislative record reflects that their preoccupation was rooted in animus toward religion.¹¹ Senator David Carlucci, a sponsor of the bill in the Senate, vilified those who had invoked the religious exemption: “[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.”¹² In his words, the goal of the bill

¹¹ This Court may consider legislative history when evaluating a district court’s resolution of a motion to dismiss. *See, e.g., We the Patriots*, 76 F.4th at 136; *Goe v. Zucker*, 43 F. 4th 19, 29 (2d Cir. 2022).

¹² Brad Hoylman-Sigal, N.Y. State Senate, *As New York Faces Worst Measles Outbreak in Decades, Hoylman, Dinowitz, Carlucci, Childhood Cancer Survivors, and Transplant Recipients Urge End to Non-Medical Exemptions for Vaccination* (May 28, 2019), <https://perma.cc/4MG9-THFA>.

was to “take any of that misconception” about religious views on vaccinations “out of the puzzle.”¹³

Senator James Skoufis, another sponsor of the bill in the Senate, decried religious opposition to vaccines as a sham: “The matter of fact is the religious exemption in New York State is made up. It’s fake. Because there is no religion that objects to vaccines. Not Islam, not Catholicism, not Judaism. There is no organized religion that condemns immunization.”¹⁴ As he explained after voting to repeal the religious exemption, he “would have voted for [it] whether there was a measles outbreak or not.”¹⁵

Assemblyman Dinowitz, the bill’s primary sponsor in the Assembly, expressed a similar sentiment: “There’s nothing, nothing in the Jewish religion, the Christian religion, in the Muslim religion ... that suggests that you can’t

¹³ Morgan Gstalter, *New York Lawmakers Introduce Bill to End Religious Vaccine Exemptions Amid Measles Outbreak*, The Hill (Apr. 6, 2019), <https://perma.cc/47DE-ZJCA>.

¹⁴ Senate Record at 5443.

¹⁵ @JamesSkoufis, Twitter (July 25, 2019, 4:14 PM), <https://perma.cc/2F9Z-PZL9>.

get vaccinated.... It is just utter garbage.”¹⁶ He indicated that vaccination exemptions should not be made available to “anti-science people who know nothing,” likening those who invoke the religious exemption to those who “tried [Galileo] as a heretic.”¹⁷ He explained that the “reason for the bill” went “beyond” the recent measles outbreak.¹⁸

While expressing hostility toward religious exercise, the Legislature carefully preserved its longstanding medical exemption to the school vaccine mandate. That exemption permits students to forego vaccination where a “physician ... certifies ... [it] may be detrimental to [their] health.” N.Y. Pub. Health Law § 2164(8). The process of obtaining a medical exemption involves significant subjective discretion. It begins with a determination and certification by a licensed physician “that a child has a medical contraindication or precaution to a specific immunization consistent with [Advisory

¹⁶ *Assembly Update* at 3:11 (Mar. 19, 2019), <https://www.facebook.com/watch/?v=441644779709395>; see also *Assembly Record* at 68 (Dinowitz, A.) (“I’m not aware of anything in the Tora, the Bible, the Koran or anything else that would suggest that you should not get vaccinated.”).

¹⁷ *Assembly Record* at 102.

¹⁸ *Id.* at 46.

Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care.” 10 N.Y. Comp. Codes R. & Regs. § 66-1.1(l). This certification is then presented to the relevant school official, who has additional discretion to “require additional information supporting the exemption,” *id.* § 66-1.3(c), and to decide whether to “grant a medical exemption from the State’s school immunization requirements,” *Goe*, 43 F. 4th at 33.

Historical application of the medical exemption confirms its broad and discretionary sweep. For instance, “for the 2021-22 school year, medical exemptions were granted” to children attending some schools at rates of 50%, 30%, and 17%. A-18, 31. But for other schools in the same communities in the same school year, zero medical exemptions were granted. A-18.

III. Procedural History

A. Nearly three years after eliminating religious exemptions, New York issues its first notice of violation against Appellants.

In March 2022, nearly three years after the State eliminated PHL 2164’s religious exemption, the Commissioner of Health charged Appellant schools

with violation of PHL 2164. A-19; *see also* A-52 to 71. The State charged each school with allowing students to attend without proof of vaccination. A-19 to 20; *see also* A-56 to 57, 63 to 64, 69 to 70. The charges notified Appellant schools that a hearing would be held on May 2, 2022, and that civil penalties of up to \$2,000 per violation could be imposed. A-20; *see also* A-52 to 55, 59 to 62, 65 to 68. This meant a possible \$52,000 penalty for the Dygert Road School (based on 26 noncompliant students for one day), a possible \$46,000 penalty for the Twin Mountains School (based on 23 noncompliant students for one day), and a possible \$20,000 penalty for the Shady Lane School (based on the assumption that at least one student was noncompliant for ten days). A-26.

At the hearing before the administrative law judge (“ALJ”), Mr. Wengerd on behalf of Appellants “articulated his community’s religious beliefs that preclude them from vaccinating their children.” A-21. While he explained that he had no desire to “caus[e] the state a prob[lem],” he emphasized that, due to their sincerely held religious beliefs, a “large percentage of

the Amish + Mennonite famil[ies] [in New York] will choose other consequences before going against [their] religious convictions.” A-22.

The ALJ ultimately determined that all three schools had violated PHL 2164. A-89; *see also* A-26. But she determined that penalties should not be imposed because they did not have adequate pre-enforcement notice of the repeal of the religious exemption. A-90 to 97; *see also* A-26. The DOH guidance regarding the repeal “was only made available online and thus inaccessible to [Appellants].” A-90; *see also* A-93 (“[DOH] failed to offer reasonable accommodations for [Appellants’] distinct religious and cultural differences throughout the audit process.”).

The then-Commissioner of Health “adopt[ed] the ALJ’s recommendation to sustain the charges against each of the ... schools” but “reject[ed] her recommendation to impose no civil penalty.” A-126; *see also* A-28. She determined that Appellants “were aware of the legal requirements” but did “not ... comply because of an irreconcilable conflict between their religious beliefs and PHL § 2164.” A-126. DOH characterized this conflict as “a promise to continue violating the law of ‘man’” and “recommendation for

administrative nullification of a duly enacted law, in violation of the separation of powers doctrine inherent in the State Constitution.” A-100; *see also* A-103 (“constitutionally impermissible circumvention of the Legislature”). The then-Commissioner of Health imposed the full extent of penalties sought by the State—totaling \$118,000 in ruinous penalties for these entirely Amish-funded schools. A-127 to 128; *see also* A-28.

B. Appellants bring this claim under Section 1983.

In June 2023, Appellants timely filed a verified complaint in federal court. *See generally* A-10 to 50. That complaint asserts a single, as-applied claim under Section 1983 for violation of Appellants’ First and Fourteenth Amendment rights. A-29 to 44. Appellants allege that PHL 2164 fails *Smith’s* “general applicability and neutrality tests, and violates [Appellants’] rights to free exercise ... and to regulate their children’s upbringing.” A-30.

Appellants named as Defendant, Dr. James V. McDonald in his official capacity as the Commissioner of Health of New York. A-13. In that role, Dr. McDonald is responsible for implementing and enforcing PHL 2164. A-13. Appellants sought a permanent injunction “prohibiting Defendant[] ... from

implementing and enforcing [PHL] 2164 against [them]” and a declaration “that [PHL] 2164 is unconstitutional as applied to” them. A-46.¹⁹

Appellants moved for a preliminary injunction barring enforcement of PHL 2164 against them. A-130 to 132. In support, Appellants presented evidence that established that most of the required vaccines do not prevent infection and transmission of the target pathogen, substantiated the discretionary nature of the medical exemption scheme, and demonstrated better health among Amish children as compared to the general public. A-288 to 292, 692 to 898. The State moved to dismiss for failure to state a claim. A-323 to 324. After a hearing on both motions, the district court granted the motion to dismiss and denied the preliminary injunction motion as moot. SPA-35.

The district court explained that “[h]owever colorable [Appellants]’ claims may have been at the outset,” it was “bound by the Second Circuit’s intervening decision in *We the Patriots*” to dismiss this case. SPA-3. The court

¹⁹ Appellants’ also named Dr. Betty A. Rosa as a Defendant, in her official capacity as Commissioner of Education of New York. A-13 to 14. The district court dismissed Appellants’ claim against Dr. Rosa without prejudice under Rule 12(b)(1) for lack of standing. SPA-12 to 15. Appellants do not contest that portion of the district court’s decision.

invoked *We the Patriots* in subjecting PHL 2164 to rational basis review, believing PHL 2164 to be “neutral and generally applicable” under *Smith*. SPA-17 (quoting *We the Patriots*, 76 F.4th at 144). The district court concluded that PHL 2164 was neutral because it was not motivated by “hostility to religion” or “religious animus.” SPA-19, 23. And it concluded that PHL 2164 was generally applicable because its medical exemption “is phrased in mandatory terms and applies to an objectively defined group of people.” SPA-25. The district court also found general applicability on the ground that the secular conduct favored by PHL 2164’s medical exemption is not “comparable” to the religious conduct PHL 2164 prohibits. SPA-29 to 33. The district court determined that PHL 2164 satisfied rational basis review and accordingly dismissed the case. SPA-34 to 35. Because that dismissal “eliminate[d] any possibility” of injunctive relief, the Court denied the preliminary injunction motion as moot. SPA-35.

Appellants timely appealed. A-974 to 975. On April 8, 2024, this Court notified the parties that this appeal would be placed on its Expedited Appeals Calendar under Local Rule 31.2(b).

SUMMARY OF THE ARGUMENT

I. Appellants have plausibly stated a claim under Section 1983 that PHL 2164, as applied to them, unconstitutionally infringes their First and Fourteenth Amendment rights. The district court erred when it relied on *Smith* and *We the Patriots* to conclude otherwise. Properly understood, PHL 2164 “falls outside *Smith*.” *Fulton*, 593 U.S. at 533.²⁰ The judgment below should be reversed.

A. PHL 2164 is not generally applicable. It treats at least some “comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62. PHL 2164 categorically bars nonvaccination for religious reasons but allows nonvaccination for other reasons—including as a result of a medical exemption or widespread noncompliance. PHL 2164 also allows for nonvaccination in all contexts outside of school and for all people aside from

²⁰ Appellants have argued and continue to argue that *Smith* does not apply. Appellants also believe *Smith* was wrongly decided. But because this Court cannot overrule the Supreme Court, Appellants cannot ask this Court to overrule *Smith*. See *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001). Should this Court reject Appellants’ arguments and find *Smith* controlling, Appellants preserve the right to ask the Supreme Court to overrule *Smith*.

students. PHL 2164 also is not “generally applicable” because “it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton*, 593 U.S. at 533 (citation omitted). In particular, PHL 2164 allows for individualized, case-by-case medical exemptions. *See supra* pp.19-20. These exemptions are discretionary and categorically unavailable for religious reasons.

B. PHL 2164 is not neutral because the State eliminated the religious exemption “at least in part because of [its] religious character.” *Kennedy*, 597 U.S. at 508 (citation omitted). This is evident on the face of the bill that was ultimately enacted to end the religious exemption. That bill expressly and with surgical precision excised only religiously motivated exemptions while continuing to provide legal protection for the only other (secular) exemption. “[C]ontemporaneous statements” made by the bill’s sponsors reveal hostility to religion and “distrust of [religious] practices.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 540, 547 (1993). The bill’s sponsors denigrated sincere religious opposition to vaccinations as “anti-science,” “anti-vax,” “fake,” and “garbage.” DPH’s imposition of ruinous penalties on

Appellants precisely because of their religious motivation compounds the lack of neutrality here.

C. To the extent *Smith* applies, it only does so in recognizing that Appellants' hybrid-rights claim warrants strict scrutiny under *Yoder*. The Supreme Court in *Yoder* recognized Amish parents' right to exercise their religion in controlling the religious upbringing of their children. *See Yoder*, 406 U.S. at 233. While this Court has declined to extend this hybrid-rights theory beyond the particular Amish context presented in *Yoder*, that is the very context in which this case arises. Like the Amish in *Yoder*, the Amish Appellants here sincerely believe that PHL 2164 would "endanger their own salvation and that of their children" based on their Amish faith. *Id.* at 209.

D. *Smith* is inapplicable for the additional reason that PHL 2164 is amenable to workable religious exemptions. The *Smith* framework grew out of a concern that allowing religious exemptions to certain neutral and generally applicable laws "would be courting anarchy," *Smith*, 494 U.S. at 888, because such laws "could not function" in the face of religious exemptions, *United States v. Lee*, 455 U.S. 252, 260 (1982). But experience demonstrates that this

is not the case with PHL 2164. New York itself successfully offered religious exemptions to PHL 2164 for more than 50 years, as did and does virtually every other state. Indeed, 45 states presently offer religious exemptions to their school vaccination requirements. New York could easily have continued to do the same.

II. For all these reasons, strict scrutiny applies. And according to the plausible and well-pleaded allegations in Appellants' verified complaint, PHL 2164 neither serves a compelling state interest, nor is narrowly tailored to serve any such interest.

A. New York lacks a sufficiently compelling interest in requiring these "*particular* [Amish] claimants" to vaccinate their children. *Fulton*, 593 U.S. at 541 (emphasis added) (citation omitted). They live in isolated communities removed from the modern world, and they have plausibly alleged that most of the required vaccines do not operate to prevent infection and transmission. That the State delayed enforcement of PHL 2164—by nearly three years—further undercuts its asserted interest.

B. PHL 2164 is also fatally under- and overinclusive. It is underinclusive because it applies to only one place where transmission may occur (schools), covers only one group who may transmit (students), and still permits students who claim medical exemptions to remain unvaccinated. Notably, PHL 2164 does not require vaccinations for teachers, who (like the students themselves) congregate and work with students in schools on a daily basis. It is overinclusive because the State could have prevented transmission while retaining a religious exemption: PHL 2164 requires vaccines that Appellants plausibly allege do not operate to prevent transmission, and there is no evidence Appellants have caused any transmission in the first place.

STANDARD OF REVIEW

This Court “review[s] the grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff’s favor.” *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013). In doing so, this Court “construe[s] the complaint liberally.” *Cap. Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214, 219 (2d Cir. 2012).

Furthermore, because the preliminary injunction decision below rested on an erroneous legal conclusion, it is also subject to *de novo* review. See *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018).

ARGUMENT

I. The District Court Erred In Applying The *Smith* Framework Here.

This case falls outside *Smith* for four independent reasons: (1) PHL 2164 is not “generally applicable,” (2) PHL 2164 is not “neutral,” (3) this case involves the “Free Exercise Clause in conjunction with other constitutional protections,” and (4) and religious exemptions to PHL 2164 would not “court[] anarchy.” *Smith*, 494 U.S. at 880-81, 888.

A. PHL 2164 is not generally applicable.

This case falls outside *Smith* because New York’s practice of broadly granting medical exemptions means that PHL 2164 is not generally applicable. A law is not generally applicable “if it ‘prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way,’ or if it provides ‘a mechanism for individualized exemptions.’” *Kennedy*, 597 U.S. at 526 (citation omitted). The district court

was wrong to hold that PHL 2164 is generally applicable in reliance on this Court's divided opinion in *We the Patriots*. SPA-24 to 33; *cf. M.A.*, 53 F.4th at 38-39 (factual issues regarding comparability between religious and medical exemptions precluded summary judgment).

1. PHL 2164 treats comparable secular activity more favorably than religious exercise.

A law is not generally applicable if “it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it.” *Cent. Rabbinical Cong. of the U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014). The Supreme Court was crystal clear in *Tandon* that government actions lack neutrality and “trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.” 593 U.S. at 62 (emphasis in original). When assessing whether religious and secular conduct is comparable, courts are “concerned with the risks [the] activities pose, not the reasons why” the activities are carried out. *Id.*; *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 17 (2020) (per curiam) (asking whether secular activities either “have

contributed to the spread of COVID–19” or “could” have presented similar risks). Thus, “whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the government interest that justifies the regulation at issue.” *Tandon*, 593 U.S. at 62; *see also Does 1-11 v. Bd. of Regents of Univ. of Colorado*, No. 21-1414, 2024 WL 2012317, at *19-*20 (10th Cir. May 7, 2024).²¹

As the bill’s sponsor memos explained, the State’s purported interest in eliminating the religious exemption to PHL 2164 was to “prevent[] ... disease outbreaks.” A2371A Sponsor Memo; *see* S2994A Sponsor Memo (expressing the aim of “dealing with this [measles] epidemic”). These sponsor memos are entitled to “considerable weight in discerning legislative intent.” *CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 263 (2d Cir. 2009) (citation omitted). The bill’s sponsors also underscored the bill’s interest in

²¹ Just last week, the Tenth Circuit considered a challenge to the University of Colorado’s refusal to grant religious exemptions to its vaccine mandate. *Does*, 2024 WL 2012317, at *1. That court explained: “[A] government policy that grants an exemption for medical reasons but denies the same exemption for religious reasons is not generally applicable, as it devalues religious reasons by judging them to be of lesser import than nonreligious reasons.” *Id.* at *19 (cleaned up).

preventing transmission during legislative debate. *See, e.g.*, Assembly Record at 41 (Dinowitz, A.) (describing the bill as a “precaution to protect our children” from “future” outbreaks); Senate Record at 5417 (Hoylman, S.) (“The point of this bill ... is to protect children from infecting other children and immunocompromised individuals.”).

Despite claiming an interest in preventing transmission, the State continues to permit *secularly motivated* nonvaccination of students while barring solely *religiously motivated* nonvaccination of students. This plainly treats at least some “comparable secular activity more favorably than religious exercise.” *Tandon*, 593 U.S. at 62. In fact, it treats the *very same* activity—nonvaccination—more favorably when engaged in for secular rather than religious reasons.

The riskiness of nonvaccination does not differ depending on its motivation. A student who is not vaccinated for secular reasons does not “pose a lesser risk of transmission than [*Appellants’*] proposed religious exercise.” *Id.* at 63. Nor does medical nonvaccination of Amish students in the “aggregate” pose a greater risk of transmission than medical nonvaccination in the

“aggregate.” *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 287 (2d Cir. 2021). The Amish communities here have a “tiny number” of children. A-41; *see* A-32 n.4 (“[T]he total Amish population in New York ... is estimated at 21,000 souls, including children and adults.”). These children live in isolated, remote communities “separate and apart from the world.” *Yoder*, 406 U.S. at 210; *see supra* pp.6-8. The risk of transmission posed by this small group of Amish children pales in comparison to the theoretical risk of transmission posed by the sum total of medically unvaccinated children statewide. *See, e.g.*, Senate Record at 5389 (Hoylman, S.) (expressing concern about the risk in Rockland County and Brooklyn).

The district court suggested that the State had asserted a granular interest in “the health of children while they are physically present in the school environment,” and that medical exemptions promote health in a way religious exemptions do not. SPA-30. But that was not an interest the State expressed at the time. *See supra* p.15. To the extent the State has devised new justifications during the course of this litigation, such justifications are nothing more than “post hoc rationalizations” the State cannot rely upon now.

See *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (“The government’s justification ‘must be genuine, not hypothesized or invented *post hoc* in response to litigation.’” (citation omitted)). Indeed, preventing transmission *only* for children and *only* during school hours is not genuine and is non-sensical.

But even if the State had asserted such an interest at the time, medical and religious nonvaccination would still be comparably risky. As noted, the free-exercise analysis is concerned with “the *risks* various activities pose, not the *reasons* why people [undertake them].” *Tandon*, 593 U.S. at 62 (emphasis added). That a student may claim a medical exemption for *reasons* of health is beside the point. What matters—and what makes *Smith* inapplicable—is that the *risks* posed by both medical nonvaccination and religious nonvaccination are the same. The State cannot meet its burden to show that nonvaccination for either reason carries different risks.

Medical nonvaccination is not the only comparably risky secular activity that PHL 2164 permits. The State has also allowed for noncompliant nonvaccination through DOH’s lax enforcement efforts. These lax enforcement

efforts resulted in the nonvaccination of at least 66,000 students who have not claimed any medical exemption. A-32 to 33.²² In New York City alone, as of February 7, 2024, there are 35,406 students attending school without the required vaccines and without any exemption.²³ Either number is substantially larger than the number of children at issue here. *See* A-32 n.4 (“[T]he total Amish population in New York ... is estimated at 21,000 souls, including children and adults.”). The noncompliant nonvaccination allowed by the State thus cannot be said to pose a “lesser risk of transmission than [Appellants’] proposed religious exercise.” *Tandon*, 593 U.S. at 63. Targeting a small group of Amish students rather than the willfully noncompliant bespeaks the sort of religious hostility the First Amendment prohibits.

²² In opposing Appellants’ preliminary injunction motion, the State presented evidence showing that the number may in fact be as high as 97,900 students. *See* A-574. The District Court rejected the comparator, arguing that the State could not be expected to achieve “perfect compliance,” but that reasoning permits the targeting of religious communities while turning a blind eye to religious discrimination, something decades of free exercise jurisprudence forbids.

²³ New York City Department of Education, Freedom of Information Law Request Response (Mar. 8, 2024), <https://perma.cc/6WQ9-8FUQ>.

Moreover, PHL also freely allows for nonvaccination of children who congregate outside of schools, children who are homeschooled, adults who work in schools, and adults who congregate in any other context. A-32. Notably, PHL 2164 does not require vaccinations for teachers in schools, who congregate and work with students on a daily basis. Nonvaccination in each of these contexts—including for secular reasons—is permitted even though it also presents a risk of transmission at least as high as that posed by religious nonvaccination of students (without even taking into account the reality that most of the vaccines at issue do not prevent infection and transmission). *See* A-34, 40 to 42. Yet only students must “endanger their own salvation.” *Yoder*, 406 U.S. at 209.

All told, Appellants plausibly alleged numerous comparable secular behaviors that PHL 2164 treats more favorably than religious exercise. The State is free to contest the comparability of these behaviors later in the litigation. But at this stage, under Rule 12(b)(6), Appellants’ allegations must be accepted as true. *See Hochul*, 17 F.4th at 287 (“With a record as undeveloped on the issue of comparability as that presented here, we cannot conclude that

the above vaccination requirements are *per se* not generally applicable.”); *cf. Cent. Rabbinical Cong.*, 763 F.3d at 197 (“In light of the sparse record at this preliminary [injunction] stage, [the Court] cannot conclude that [the law] is generally applicable.”).

2. PHL 2164’s medical exemption precludes a finding of general applicability.

“A law is not generally applicable if it ‘invite[s]’ the government to consider the particular reasons for a person’s conduct by providing ‘a mechanism for individualized exemptions.’” *Fulton*, 593 U.S. at 533 (citation omitted). Where the government has such a mechanism in place, it “may not refuse to extend [it] to cases of ‘religious hardship’ without compelling reason.” *Id.* at 535 (quoting *Smith*, 494 U.S. at 884); *see id.* at 544 (Barrett, J., concurring) (“A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions.”).

The State has done precisely that here. PHL 2164 “incorporates a system of individual exemptions” in cases of medical hardship but categorically

refuses to extend this exemption to cases of religious hardship. *Id.* at 535. A child may receive a medical exemption if “any physician licensed to practice medicine in [New York] certifies that such immunization *may be* detrimental to [the] child’s health.” N.Y. Pub. Health L. § 2164(8) (emphasis added); *see also* 10 N.Y. Comp. Codes R. & Regs. § 66-1.1. This determination is performed on a case-by-case basis and is up to the discretion of the certifying physician. Even after a physician has certified that a medical exemption ought to be granted, school officials still have broad discretion to override that certification. *See* 10 N.Y. Comp. Codes R. & Regs. § 66-1.3; *see also* *Goe*, 43 F. 4th at 33; Assembly Record at 32 (“MR. RAIA: Okay. Under the current law, does a school have the ability to reject a medical exemption? MR. DINOWITZ: Yes.”).

The way the medical exemption functions in practice confirms its highly discretionary nature. As Appellants alleged, children in different schools—even in the same communities—are granted the exemption at wildly different rates. “[F]or the 2021-22 school year, medical exemptions were granted” to children attending some schools at rates of 50%, 30%, and 17%. A-18, 31.

But for other schools in the same communities in the same school year, zero medical exemptions were granted. A-18, 31. And as legislators noted during debate on the repeal of the religious exemption, health professionals disagree on whether the exemption should be granted even in particular cases. *See, e.g.*, Assembly Record at 35 (Raia, A.) (“I’ve seen case after case after case of legitimate doctors’ findings that are overruled by another doctor.”).

Declarations submitted in support of Appellants’ preliminary injunction motion confirm the medical exemption’s discretionary nature. The parent of one child who had sought a medical exemption testified that, after a physician recommended the child receive the exemption, the State denied the exemption but a school official later granted it. A-703 to 706. Another parent testified that her son—based on the same medical condition—was granted a medical exemption in some years but denied it in another year based on the same medical condition. A-697 to 701. As Appellants appeal the district court’s denial of a preliminary injunction under 28 U.S.C. § 1292(a), these un rebutted declarations are properly before the Court.

This discretionary system for granting secular—but not religious—exemptions permits the State to “decide which reasons for not complying with the policy are worthy of solicitude” and which are not. *Fulton*, 593 U.S. at 537 (citation omitted). But the government is not free to “assume the worst when people [exercise their religion] but assume the best when people [engage in secular activities].” *Tandon*, 593 U.S. at 64 (citation omitted). The State’s categorical “refus[al] to extend” its exemption “system to cases of ‘religious hardship’” cannot be justified “without compelling reason.” *Fulton*, 593 U.S. at 534 (citation omitted).

3. The district court erred in relying on *We the Patriots* to reach a contrary conclusion.

The district court reflexively dismissed these “clear” First Amendment “principles,” *Tandon*, 593 U.S. at 62-63, on the ground that this Court’s recent decision about a Connecticut law in *We the Patriots* “compels dismissal of [Appellants’] ... claims on the merits.” SPA-3. The court explained that “[h]owever colorable [Appellants’] claims may have been at the outset of this action, [it was] bound by the Second Circuit’s intervening decision in *We the Patriots*” to dismiss this case. SPA-3; *cf.* A-936 (“I’ll be very up front, when

the lawsuit was first filed, I thought, these are complex, interesting, challenging issues.”). The district court’s reliance on *We the Patriots* was misguided for multiple reasons.

First, this as-applied challenge to PHL 2164 entails a fundamentally different claim than did the facial challenge in *We the Patriots*. Appellants have been clear throughout the course of this litigation that they are challenging the constitutionality of PHL 2164 only “as applied to [them] and their schools.” A-46 (requesting that the court “[d]eclare that N.Y. Public Health Law § 2164 is unconstitutional as applied to [Appellants] and their schools”); A-640 (“[T]his case involves a challenge to [PHL 2164] ‘as applied’ specifically to the Amish [Appellants].”); *see* A-41 (They live in small communities with a “tiny number of healthy Amish children.”). This stands in stark contrast to the challengers in *We the Patriots*, who argued that Connecticut’s school vaccination law—on its face, in all of its applications—violates free exercise. *See We the Patriots*, 76 F.4th at 135-36; *see also Kane v. De Blasio*, 19 F.4th 152, 174-75 (2d Cir. 2021) (explaining the difference between as-applied

and facial challenges and explaining that plaintiffs were likely to succeed on the former but not the latter because of those differences).

The district court waved away this difference, asserting with little explanation that “the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect.” SPA-18 n.3 (citation omitted). But when it comes to the free-exercise analysis, that difference matters. As explained above, courts evaluating a law’s general applicability are concerned with the particular religious exercise at issue, and how it is treated relative to “comparable secular activit[ies]” that carry similar “risks.” *Tandon*, 593 U.S. at 62. The particular religious exercise at issue here—nonvaccination of the Amish specifically—is different from the religious exercise at issue in *We the Patriots*—nonvaccination for religious reasons statewide. Indeed, while the government may have a compelling interest in the abstract, that does not mean that it has one “in each marginal percentage point by which” it achieves its general goals. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 803 n.9 (2011).

Second, New York permits significantly more comparable activity under *Tandon* than was at issue (or was raised) in *We the Patriots*. That includes permitting all forms of gatherings of children irrespective of vaccination status outside of school, permitting nonvaccinated adults to be present in schools, permitting medical exemptions, and permitting significant percentages of students and schools to remain in noncompliance with PHL 2164 without any action by the State. *See supra* p.12. This Court in *We the Patriots* did not grapple with all of this comparable activity.

Third, the plain language and design of PHL 2164 is fundamentally different from—and more discretionary than—the language of the Connecticut statute at issue in *We the Patriots*. In *We the Patriots*, the Connecticut statute at issue allowed for a medical exemption when vaccination “*is* medically contraindicated.” 76 F.4th at 150 (emphasis added) (citation omitted). This Court was careful to underscore that this language was “more certain than what at least one other State requires.” *Id.* at 150 n.19 (citing *Does 1-3 v. Mills*, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting from the denial of application

for injunctive relief) (interpreting a Maine law providing for a medical exemption where immunization “may be” inapposite)).

PHL 2164, like the Maine statute this Court distinguished in *We the Patriots*, provides for a less “certain” and more “discretionary” medical exemption. It allows for such an exemption whenever the vaccination “*may be* detrimental to a child’s health.” N.Y. Pub. Health L. § 2164(8) (emphasis added). And its enforcement scheme further “delegates to school officials” the discretionary “authority to grant a medical exemption.” *Goe*, 43 F.4th at 33. The law at issue in *We the Patriots* did not bear these hallmarks of discretion, which are key in the general applicability analysis. *See Fulton*, 593 U.S. at 536.

The district court suggested that an individualized medical exception can still satisfy *Fulton*’s “generally applicable” requirement so long as it specifies “objective” criteria to be considered in applying it. SPA-25. But in *Fulton* itself, an exemption precluded a finding of general applicability even though it was based on specific “statutory criteria.” 593 U.S. at 530 (observing that criteria included “the family’s ‘ability to provide care, nurturing and supervision to children,’ ‘[e]xisting family relationships,’ and ability ‘to work in

partnership’ with a foster agency” (citation omitted)). Whether these criteria were “objective” was not relevant to the Court. What matters under the Court’s precedents, in Justice Alito’s words, is “the prospect of the government’s deciding that secular motivations are more important than religious motivations.” *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999). If anything, that concern is heightened where—as here—the government makes a “categorical” determination that religious exercise is not worthy of solicitude. *Id.*; see *Fulton*, 593 U.S. at 537 (expressing concern that “the government [would] decide which reasons for not complying with the policy are worthy of solicitude”). When “the government makes a value judgment in favor of secular motivations, but not religious motivations, the government’s actions must survive heightened scrutiny.” *Fraternal Ord. of Police*, 170 F.3d at 366.

B. PHL 2164 is not neutral.

In addition to being not generally applicable, PHL 2164 also is not neutral toward religion because it disfavors religious practice compared to other secular practices. A government action is not neutral if it is “specifically

directed at ... religious practice.” *Kennedy*, 597 U.S. at 526 (citation omitted).²⁴ Governments “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 584 U.S. 617, 638 (2018). The First Amendment forbids even “subtle departures from neutrality.” *Gillette v. United States*, 401 U.S. 437, 452 (1971); see *Lukumi*, 508 U.S. at 534 (First Amendment prohibits “covert suppression of particular religious beliefs” (citation omitted)). Where there is so much as a “slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.” *Lukumi*, 508 U.S. at 547.

²⁴ To the extent the district court held that a lack of religious neutrality requires a showing of “religious hostility” or “religious animus,” that is contrary to Supreme Court precedent. See, e.g., *Lukumi*, 508 U.S. at 534 (law not neutral where it “target[s] religious conduct for distinctive treatment”); see also, e.g., *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (“[T]he Free Exercise Clause is not confined to actions based on animus.” (citations omitted)).

1. The bill amending PHL 2164 was facially discriminatory, and its sponsors denigrated sincere religious opposition to vaccines as “fake” “garbage.”

PHL 2164 “violate[s] ‘the minimum requirement of neutrality’ to religion.” *Roman Cath. Diocese*, 592 U.S. at 16. The bill amending PHL 2164 to eliminate the religious exemption on its face singled out religious exercise for disfavored treatment. Its title specifies (twice) that it relates solely to “exemption from vaccination due to *religious beliefs*.” A2371A (emphasis added); S2994A (same); see *Bell v. Reno*, 218 F.3d 86, 91 (2d Cir. 2000) (“It is well established that the title of a statute or section is an indication of its meaning.”). And, true to its title, it surgically removes only the religious exemption from PHL 2164—leaving the one other exemption (a secular one) untouched. See A2371A § 1; S2994A § 1.

The district court determined that “the legislative history related to the repeal of the non-medical exemption contains no evidence of hostility towards religious belief.” SPA-19. But a closer examination of the legislative history suggests otherwise. This case involves precisely the type of “specific expressions of animus” that this Court found lacking in *We the Patriots*, 76

F.4th at 148, and that both the Supreme Court and this Court have recognized exhibit a lack of religious neutrality.

Those who sponsored the religious exemption’s repeal were frank that the bill’s purpose was to “target religious conduct for distinctive treatment.” *Lukumi*, 508 U.S. at 534. Assemblyman Dinowitz—the lead sponsor of the bill in the Assembly—explained that the goal of the bill was to take “misconception[s]” about religion “out of the puzzle.”²⁵ And a sponsor of the bill in the Senate stated that “[t]he 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.” A-16.

Other sponsor comments sent a clear “signal of official disapproval of [Appellants’] religious beliefs.” *Masterpiece*, 584 U.S. at 638. Perhaps most glaringly, Assemblyman Dinowitz likened those claiming religious exemptions to those who “tried [Galileo] as a heretic.” Assembly Record at 102. Both groups were composed of “anti-science people who know nothing”

²⁵ Gstalter, *supra* n.13.

and “thought that [someone] was violating their religious beliefs.” *Id.* Senator David Carlucci—the bill’s lead sponsor in the Senate—similarly vilified those who had invoked the religious exemption, proclaiming them “selfish and misguided” because they had “decided their ideological beliefs are more important than public health.”²⁶ These statements call to mind those in *Masterpiece*, where members of Colorado’s Civil Rights Commission “went so far as to compare [an individual’s] invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.” 584 U.S. at 635. The Supreme Court explained that to suggest that ““religion has been used to justify discrimination”” and historical intolerance “is to disparage religion.” *Id.*

The Court was also clear in *Masterpiece* that it is disparaging to religion to characterize it “as merely rhetorical—something insubstantial and even insincere.” *Id.* at 635. The legislative history here is full of such remarks. In the words of Senator Hoylman, “We do not want to give credence to those who would use a religious exemption as a guise.”²⁷ Senator Skoufis—a

²⁶ Hoylman-Sigal, *supra* n.12.

²⁷ Senate Record at 5381.

sponsor of the bill in the Senate—boldly proclaimed that any invocation of the religious exemption must be “fake” because “there is no religion that objects to vaccines. Not Islam, not Catholicism, not Judaism.”²⁸ And Assemblyman Dinowitz similarly stated that “[t]here’s nothing, nothing in the Jewish religion, the Christian religion, in the Muslim religion ... that suggests that you can’t get vaccinated.... It is just utter garbage.”²⁹ This Court has already recognized that statements just like these can indicate hostility to religion. *See M.A.*, 53 F.4th at 37 (reasonable juror could find hostility based on statement “[t]here’s no such thing as a religious exception”).³⁰

This Court has also determined that statements calling those claiming a religious exemption “anti-vaxxers” or “loud, very vocal, also very ignorant”

²⁸ *Id.* at 5443.

²⁹ *Assembly Update* at 3:11, *supra* n.16.

³⁰ *F.F. v. State*, 194 A.D.3d 80 (App. Div. 2021), is beside the point. That non-binding, state-court opinion predated this Court’s decision in *M.A.*, 53 F.4th at 37-38, which recognized that statements of the sort in the legislative history here can be evidence of hostility to religion. *F.F.* is likewise inapplicable to the general applicability analysis, as it did not involve an as-applied challenge by the Amish and predates the Supreme Court’s intervening decision in *Fulton*.

can “support a finding of discriminatory intent.” *M.A.*, 53 F.4th at 34, 37-38. Once again, the legislative history here is replete with such statements. *See, e.g.*, Senate Record at 5381 (Hoylman, S.) (“[W]e do not want to give credence to the anti-vaxxers.”); *id.* at 5400-01 (Hoylman, S.) (urging a need to “disabuse ... parents of ... anti-vaxx, suspicious anti-science, non-evidence-based decision making”); Assembly Record at 47 (Dinowitz, A.) (“anti-science people”); *id.* at 102 (Dinowitz, A.) (“anti-science people who know nothing”); *id.* at 102-03 (Dinowitz, A.) (“There are probably people who don’t believe anything other than that the earth is flat. There are people who believe evolution is not real.”).

The State fell short of its duty to ensure that “the sole reasons for imposing the burdens of law and regulation are secular.” *Lukumi*, 508 U.S. at 547. Assemblyman Dinowitz explained that the “reason for the bill” plainly went “beyond” the recent measles outbreak, as he had “introduced the bill before this [recent] outbreak.”³¹ And Senator Skoufis explained to members of the

³¹ Assembly Record at 46.

public that he “would have voted for [the bill] whether there was a measles outbreak or not.”³²

These public statements—by those who designed, proposed, and championed the repeal of PHL’s religious exemption—are plainly relevant to understanding the motivation behind that action. *See Lukumi*, 508 U.S. at 541-42 (evaluating a city ordinance’s neutrality by looking to statements by city council members and local proponents of the ordinance); *M.A.*, 53 F.4th at 37 (finding fact dispute on neutrality based on contemporaneous statements made by policy’s proponent); *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (“[T]he pleadings give rise to a sufficient ‘suspicion’ of religious animosity to warrant ‘pause’ for discovery before dismissing [the] claim as implausible.”)

2. The DOH applied PHL 2164 to impose severe penalties on Appellants because of their religious motivations.

The DOH’s imposition of penalties was also motivated “at least in part because of” Appellants’ religious beliefs. *Kennedy*, 597 U.S. at 526 (citation

³² @JamesSkoufis, *supra* n.15.

omitted). In recommending penalties to the tune of \$118,000, DOH uncharitably characterized Appellants' beliefs as a "recommendation for administrative nullification of a duly enacted law, in violation of the separation of powers." A-100; *see also* A-103 (characterizing Appellants' beliefs as "constitutionally impermissible circumvention of the Legislature"). Failure to impose sanctions, DOH asserted, would "constitute a revival of the religious exemption to PHL § 2164." A-102 (formatting altered); *see* A-104 (Appellants' "position can be viewed as another 'end-run' around the Legislature[']s" elimination of religious exemptions.).

The then-Commissioner of Health followed DOH's recommendations, imposing penalties because "it would be contrary to public policy, the Department's mission, and the clear intent of the State legislature" not to do so on account of the "irreconcilable conflict between [Appellants'] religious beliefs and PHL § 2164." A-126. Not imposing penalties would "encourage other schools to ... assert a religious exemption." A-127. These clear statements show that it was the religious nature of the exemption Appellants requested which drove DOH to impose ruinous penalties. That the State

singled out the Amish, yet tolerates at least 66,000 other noncompliant students, further underscores its non-neutrality and further distinguishes this case from *We the Patriots*, raising obvious “doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular [group].” *Brown*, 564 U.S. at 802; *see also New Hope*, 966 F.3d at 168 (“[A]nother matter bearing in religious hostility and making dismissal premature is the severity of OCFS’s actions in ordering New Hope’s closure.”).

C. Appellants have plausibly pleaded a hybrid-rights claim under *Yoder*.

Even if PHL 2164 were both generally applicable and neutral, it would nonetheless be subject to strict scrutiny because Appellants’ claim fits squarely within the hybrid-rights framework the Supreme Court applied in *Yoder*. The Court there held that Wisconsin’s mandatory secondary education law “impinge[d]” on both the rights “specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.” 406 U.S. at 214. And it explained that “when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than

merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” *Id.* at 233 (citation omitted).

The Supreme Court since *Yoder* has reaffirmed that there is a particular class of free-exercise claims that fall outside the *Smith* framework and are subject to strict scrutiny. See *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (*Yoder* “implicated not only the right to the free exercise of religion but also the right of parents to control their children’s education.”); *Smith*, 494 U.S. at 881-82 (recognizing “hybrid situation[s]” where “the First Amendment bars application of a neutral, generally applicable law” that involves “the Free Exercise Clause in conjunction with other constitutional protections”).

This Court has held that the discussion of hybrid rights in *Smith* is “dictum because the plaintiffs in *Smith* presented no such claim.” *We the Patriots*, 76 F.4th at 159 (citing *Leebaert v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003)).³³

³³ Appellants respectfully believe that this language in *Smith* is not dicta but understand that one panel of this Court generally cannot overrule another. See *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). Should this Court reject Appellants’ arguments and affirm,

But the individuals in *Yoder* presented that very claim, and the Court's holding in *Yoder* is not dictum. See *Yoder*, 406 U.S. at 233 (“[T]he interests of parenthood are combined with a free exercise claim.”); *State v. Yoder*, 182 N.W.2d 539, 542 (Wis. 1971) (“We view this case as involving solely a parent’s right of religious freedom to bring up his children as he believes God dictates.”).

This Court has also noted that the hybrid-rights theory applied in *Yoder* is “one that probably few other religious groups or sects could” claim. *Leebaert*, 332 F.3d at 144 (citation omitted); see *We the Patriots*, 76 F.4th at 159 (declining to extend the hybrid-rights theory to Greek Orthodox, Roman Catholic, and Muslim plaintiffs). But this case involves the *same* religious group and the *same* kind of claim as in *Yoder*. Appellants, just like the individuals in *Yoder*, are Amish. Compare A-12 to 13, with *Yoder*, 406 U.S. at 207. Appellants, just like the individuals in *Yoder*, argue that application of the law will

Appellants preserve the right to argue before the en banc court or the Supreme Court that such cases were wrongly decided. See, e.g., *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021) (William Pryor, J.) (“Inferior courts owe more fidelity to the opinions of the Supreme Court than the Second Circuit showed in *Leebaert*.”).

burden their right to free exercise in parenting their children. *Compare* A-34 to 35, *with Yoder*, 406 U.S. at 233. And Appellants, just like the individuals in *Yoder*, face an “irreconcilable ... clash between the essence of [their] religious culture and the mandatory [law] that [they] challenge[.]” *Leebaert*, 332 F.3d at 144; *compare* A-14 (“The Compulsory Vaccination Law is in sharp conflict with [Appellants’] religious beliefs and their way of life.”), *with Yoder*, 406 U.S. at 209 (“[R]espondents believed ... that their children’s attendance at high school, public or private, was contrary to the Amish religion and way of life.”).

The district court concluded that Appellants’ hybrid-rights theory fails because it is “coextensive with their free exercise claim.” SPA-34. But that misapplies *Yoder*. The point in *Yoder* was that a claim that implicates free exercise rights triggers strict scrutiny when it implicates the right of Amish parents to specifically direct the religious upbringing of their children. Where such rights are implicated, even if by the same conduct, strict scrutiny trumps the *Smith* rational basis framework. *Yoder*, 406 U.S. at 233; *see Smith*, 494 U.S. at 882 (rational basis applied because there was “no contention that

Oregon's drug law represents an attempt to regulate ... the raising of one's children in [religious] beliefs"). Such a hybrid claim (evaluated under strict scrutiny) does not necessarily rise or fall with a conventional free-exercise claim (evaluated for a rational basis under *Smith*).

For these reasons, Appellants plausibly alleged a *Yoder* hybrid-rights claim sufficient to trigger strict scrutiny and specifically plead such a claim in their verified complaint. A-34 to 37.

D. PHL 2164 is amenable to exemptions.

PHL 2164 does not implicate *Smith* for the additional reason that it is readily amenable to workable religious exemptions. In prescribing rational basis review for neutral laws of general applicability in *Smith*, the Supreme Court emphasized that the criminal drug law at issue in that case was not amenable to workable exemptions. To permit such exemptions would be "to permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (citation omitted). Such a state of affairs would be unworkable and "would be courting anarchy." *Id.* at 888.

The Court in *Smith* relied in large part on its prior opinion in *United States v. Lee*, 455 U.S. 252 (1982), where it had denied an Amish “exemption from collection and payment of Social Security taxes.” *Smith*, 494 U.S. at 880. As the Court explained in *Lee*, “the tax system could not function” if religious exemptions of the sort the Amish claimant sought were permitted. *Lee*, 455 U.S. at 260. Such religious exemptions to “the comprehensive social security system” would “be difficult to accommodate.” *Id.* at 259-60.

That is not true of PHL 2164. Unlike the Court’s view of the workability of exemptions to the criminal drug law in *Smith* and the social security tax law in *Lee*, religious exemptions to PHL 2164 are readily workable. Indeed, New York itself accommodated religious exemptions to PHL 2164 for more than 50 years. *See supra* pp.12-13. Those exemptions did not prevent the school vaccination requirement from “function[ing].” *Lee*, 455 U.S. at 260.

The experience of virtually every other state in the country confirms that school vaccination laws are readily amenable to exemptions. Until recently, Mississippi and West Virginia were the only states that refused to offer a religious exemption to their school vaccination laws. *See supra* pp.13-14 &

n.5. In this way, PHL 2164 parallels the compulsory secondary education law in *Yoder*. There, the Court emphasized that such laws were a “relatively recent development.” 406 U.S. at 226. Just 60 years prior, “the educational requirements of almost all of the States were satisfied by completion of the elementary grades.” *Id.* Because the Amish had successfully functioned against this backdrop “for a period approaching almost three centuries,” the Court required “a more particularized showing from the State ... to justify the severe interference with religious freedom” that refusal of an exemption would cause. *Id.* at 226–27.

* * *

For all of these reasons, the district court erred in applying the rational basis framework from *Smith* and *We the Patriots* in this case.

II. PHL 2164 Fails Strict Scrutiny.

Because PHL 2164 triggers strict scrutiny, the State may enforce PHL 2164 against Appellants only if it demonstrates that the law (1) “advances ‘interests of the highest order’” and (2) “is narrowly tailored to achieve those

interests.” *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546). The State has demonstrated neither.

A. The State has no compelling interest in requiring these particular Amish Appellants to vaccinate their children.

When it comes to evaluating the State’s asserted interests, strict scrutiny demands a “precise analysis.” *Fulton*, 593 U.S. at 541. The State may not “rely on ‘broadly formulated interests,’” but rather must “‘scrutinize[] the asserted harm of granting *specific* exemptions to *particular* religious claimants.” *Id.* (emphasis added) (citation omitted). The relevant question “is not whether the [State] has a compelling interest in enforcing [PHL 2164] *generally*, but whether it has such an interest in denying an exception” to the Amish *specifically*. *Id.* (emphasis added); see *Yoder*, 406 U.S. at 221 (“[W]e must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.”).

The State here has asserted no such Amish-specific interests. As explained, in repealing the religious exemption, the State asserted only a general interest in preventing transmission. See *supra* pp.15, 33-34. Whatever the

State's *general* interest in preventing transmission might be, the verified complaint plausibly alleged that the State has no credible—much less compelling—reason to insist that these *specific* Amish Appellants receive vaccines over their sincere religious objection. A-37 to 40; *cf.* Nir & Gold, *An Outbreak Spreads Fear* (“Hasidic leaders said they feared not only a rise in anti-Semitism but an invasion of their cloistered community by the authorities under the guise of public health.”).

Appellants allege that they live in remote communities that are “separate[] from the modern world.” A-11 (citation omitted). These remote communities include just a “tiny number” of Amish children who the record reflects are “healthy.” A-41. To be sure, these communities are far removed from the New York City areas where a measles outbreak occurred over five years ago. *See supra* pp.15-16; *cf.* *Yoder*, 406 U.S. at 228-29 (recognizing that the State’s interest in compelling secondary education for the Amish was “somewhat less substantial than ... for children generally”).

Appellants also allege—drawing support from the CDC and medical scholarship—that most of the vaccines PHL 2164 requires in fact “do not

prevent transmission or infection of the diseases they target.” A-42. These allegations—which, at this stage, must be taken as true—severely undermine the State’s purported interest. Appellants allege, for example, that the vaccines for “pertussis, tetanus, diphtheria and ... polio ... do not prevent transmission” but rather operate to “provide a level of personal protection by preventing recipients from experiencing the symptoms of these infections.” A-42. With respect to Hepatitis B, the CDC “does not have a single documented case of Hepatitis B being transmitted in a school setting”—let alone in an Amish school setting. A-42. And as for measles, mumps, rubella, and chicken pox, Appellants allege that “there is no health imperative to give these vaccines since the peer reviewed studies roundly show significantly lower rates of cancer and cardiovascular deaths if one contracts these childhood diseases.” A-42. Appellants also alleged, and then supported in their motion for a preliminary injunction, that “Plaintiffs’ children, like most Amish children ... do not suffer from many of the medical conditions that

plague children in non-Amish communities.” A-25.³⁴ Simply put, Appellants have plausibly alleged that PHL 2164 does little to advance even the State’s asserted generalized interest in preventing transmission. The State was welcome to contest these factual allegations in response to the motion for a preliminary injunction but, despite a lengthy declaration from the Medical Director of the Bureau of Immunization, N.Y.S. Department of Health, failed to do so. In any event, for now, at the motion to dismiss stage, these allegations are to be “liberally” construed, *Bennett*, 680 F.3d at 219, and “accept[ed] as true,” *Fink*, 714 F.3d at 740-41.

That the State waited “over two and a half years” to enforce PHL 2164 against Appellants, and continues not to enforce PHL 2164 against at least

³⁴ See A-694 (“There are 26 families that have children in the Dygert Road School, Pleasant View School, or the Shady Lane School. Among these 26 families, there are 168 unvaccinated children (some in and some out of school) and none of these 168 children have any diagnosed medical condition or any other health condition that arose or occurred after they were born.”); A-734 (“[A]mong 168 children outside of the Amish community, on average and based on the above background rates in the U.S., one would expect that at least 9 of these 168 Amish children would have food allergies, 31 would have environmental allergies, 10 would have asthma, ... [and] 15 would have ADHD.”).

66,000 students, further underscores the point. A-19, 32 to 33; *see supra* pp.20-21, 36-37, 29. This substantially delayed enforcement undercuts any assertion by the State that the interest involved here is compelling. As in *Yoder*, “[t]he independence and successful social functioning of the Amish community” with religious exemptions for a lengthy “period” of time is “strong evidence that there is at best a speculative gain” to be had by overriding their religious beliefs. 406 U.S. at 226-27; *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (“If [peyote] use is permitted in the face of the congressional findings [underlying the Controlled Substances Act] for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the [O Centro Espirita Beneficente Uniã do Vegetal] who want to practice theirs.”).

B. PHL 2164 is not narrowly tailored because it is both underinclusive and overbroad.

The State’s purported interest lies in preventing transmission, *see supra* pp.15, 33-34., but PHL 2164 is nowhere close to narrowly tailored to achieve

that objective. “[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest.” *Tandon*, 593 U.S. at 63. A law can fail narrow tailoring if it is underinclusive, overinclusive, or both. *See Lukumi*, 508 U.S. at 546. For several reasons, PHL 2164 fails narrow tailoring because it is both underinclusive and overinclusive.

PHL 2164 is underinclusive for three primary reasons. *First*, PHL 2164 applies in only one of many settings where transmission may occur: schools. PHL 2164 does not require vaccination for children (or anyone else, for that matter) to participate in any number of other gatherings in other places where they may congregate or interact—such as barn raisings, church services, community festivals, and other Amish gatherings. A-32. This limited coverage of PL 2164 undercuts any interest the State may assert in preventing transmission, as “a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 547 (citation omitted).

Second, PHL 2164 applies only to one group of people who may transmit in schools: children. PHL 2164 does not require vaccination for any of the other people who congregate and interact with children in schools every day—such as teachers, administrators, aides, and lunch ladies. A-32. Because of their Amish beliefs, all of these school officials are likely to be unvaccinated. A-40 to 41. But PHL 2164 is unconcerned with their vaccination status. Only students must “endanger their own salvation” through forced vaccination. *Yoder*, 406 U.S. at 209. This limited coverage compounds the underinclusivity problem, further undercutting any interest the State may claim in preventing transmission.

Third, PHL 2164 still allows for a broad medical exemption to its vaccination requirements. This exemption sweeps in any child for whom a licensed physician determines that “immunization *may be* detrimental to [the] child’s health.” N.Y. Pub. Health L. § 2164(8) (emphasis added). It is broad and discretionary, and it has historically been granted to as many as 50% of students in some schools. *See* A-18, 31; *supra* p.20. Much like in *Fulton*, “[t]he creation

of a system of exceptions ... undermines the [State's] contention that its [vaccination] policies can brook no departures." *Fulton*, 593 U.S. at 542.

PHL 2164 is similarly overinclusive for three primary reasons. *First*, less burdensome means of preventing transmission are plainly available. Forty-five other states operate with some form of religious exemption to their school vaccination laws without routine outbreaks of the diseases listed in PHL 2164. *See* A-16; *supra* p.13 & n.4. And transmission can be prevented through means short of exclusion from all schools. For example, the State could have crafted a system in which nonvaccinated students are removed from schools for a limited time in the case of an outbreak. Several nearby states have religious exemptions that work in this way.³⁵

Furthermore, if the State truly were concerned with the genuineness of claimed religious exemptions, it could have established a system for verifying religious exemptions rather than categorically prohibiting them. It could, for example, have "institute[ed] a standardized method for reviewing

³⁵ *See, e.g.*, 28 Pa. Code § 27.77(e); Oh. Rev. Code § 3313.671(C); N.J. Admin. Code § 8:57-4.4(d); Vt. Dep't of Health, *School Year 2023-24 Religious Immunization Exemption Child Care and Schools*, <https://perma.cc/Y48L-PMDC>.

applications for religious exemptions to ensure they are granted only to those who, like [Appellants], plainly have sincere religious beliefs.” A-41 to 42; *see Lukumi*, 508 U.S. at 539 (A law is suspect “if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.”).

Second, as discussed above, “many of the vaccines required” by PHL 2164 “do not prevent transmission or infection of the diseases they target.” A-42. By including vaccines that do not prevent transmission, PHL 2164 is not narrowly tailored to preventing transmission. Appellants have plausibly alleged that “the state has made no attempt to differentiate between vaccine requirements” or “to show why specific vaccines were necessary.” A-43. Once again, the State is free to dispute these allegations, and the CDC and medical literature citations reflecting the same, as litigation progresses. But, at this juncture, they must be taken as true.

Third, there is no evidence that sweeping Amish students within PHL 2164’s coverage will further any goal of preventing transmission. As Appellants allege, the measles outbreak the State has cited did not occur in Amish

communities. A-41; see *Roman Cath. Diocese*, 592 U.S. at 18 (regulation not narrowly tailored where “there [was] no evidence that the applicants have contributed to the spread of COVID-19”). Rather, it occurred in the faraway New York City area. See *supra* pp.15-16. Several legislators also noted that there was scant evidence that the religious exemption caused the measles outbreak five years ago—as opposed to the medical exemption, noncompliance, or non-students not subject to a mandate. See *supra* pp.16-17. At this stage in the litigation, it is at least plausible—based on the allegations in Appellants’ verified complaint—that PHL 2164 could be more narrowly tailored and still achieve its stated interest. There is no reason “why religion alone must bear the burden” of the State’s push to prevent transmission. *Lukumi*, 508 U.S. at 544.

* * *

In sum, Appellants have plausibly alleged that the denial of an exemption for the Amish under PHL 2164 does not serve a compelling interest and is not narrowly tailored. Strict scrutiny is therefore unsatisfied at this stage, and the State’s motion to dismiss under Rule 12(b)(6) should have been

denied and the preliminary injunction considered using the correct legal standard.

CONCLUSION

The judgment and decisions below should be reversed.

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CERTIFICATE OF SERVICE

On May 13, 2024, this brief was served via ACMS on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,671 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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