14-2156

United States Court of Appeals for the Second Circuit

NICOLE PHILLIPS, individually and on behalf of B.P. and S.P., minors, DINA CHECK, on behalf of minor MC, FABIAN MENDOZA-VACA, individually and on behalf of MM and VM, minors,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General, State of New York, DR. NIRAV R. SHAH, in his official capacity as Commissioner, New York State Department of Health, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.

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

BRIEF FOR STATE DEFENDANTS

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PRELIMINARY STATEMENT

New York laws and regulations require schoolchildren to be vaccinated and exclude unvaccinated children from school unless they or their parents qualify for either a religious or medical exemption. Local school officials, not state officials, are responsible for enforcing the mandatory vaccination requirements. For the religious exemption, local officials are authorized to inquire into the genuineness and sincerity of a parent's assertedly religious beliefs. Although children subject to an exemption from vaccination may generally attend school, officials may nonetheless temporarily exclude such unvaccinated children during an outbreak of a vaccine-preventable disease in their school. *See* N.Y. Public Health Law (PHL) § 2164; 10 N.Y.C.R.R. § 66-1.1 *et seq*.[1]

Three New York City parents, individually and on behalf of their school-age children (the Plaintiffs), challenge local school officials' implementation of this mandatory vaccination scheme, primarily on the ground that the officials' administration of the scheme violated their

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[1] Pursuant to PHL § 228(3), localities may also promulgate regulations that are more stringent than State Department of Health standards.

First Amendment right to free exercise of religion, as well as their substantive due process rights. Two parents received a religious exemption from New York City but challenge the temporary exclusion of their children during an outbreak of disease; the third parent was denied a religious exemption and challenges that denial. The U.S. District Court for the Eastern District of New York (Kuntz, J.) dismissed the complaints. This Court should affirm.

Plaintiffs' objection to vaccination, whether expressed in religious or medical terms, rests on the claim that vaccination of schoolchildren is harmful to children and does not in fact prevent disease. Neither the Free Exercise Clause nor the Due Process Clause requires the State to accept that claim. First, courts have upheld mandatory vaccination as a public health measure without any religious exemption at all. Second, when the State grants a religious exemption, it is entitled to inquire into the genuineness of the religious claim. And third, Plaintiffs' substantive due process claims fail because they have not identified any deeply rooted right to resist vaccination mandates. To the contrary, mandatory vaccination programs have been implemented by States and upheld by the courts for over one hundred and fifty years. Thus, this

nation's history and traditions support the validity of New York's mandatory vaccination scheme.

ISSUES PRESENTED

1. Does the Free Exercise Clause (a) forbid New York from mandating that schoolchildren be vaccinated, and from excluding unvaccinated children from school, despite their parents' asserted secular and religious objections; or (b) forbid New York from authorizing local school officials to inquire into whether parents' assertedly religious objections are sincere and based on religious rather than secular concerns?

2. Does substantive due process give parents a right to resist mandatory vaccination for their children on secular or religious grounds rooted in history and tradition?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. New York's universal vaccination program for schoolchildren

To prevent the spread of fatal and debilitating diseases among children, New York State has required vaccination for schoolchildren against specified communicable diseases since 1860. Local school authorities were "directed and empowered . . . to exclude from the benefits of the common schools . . . any child or any person who has not been vaccinated." Ch. 438, § 1, 1860 N.Y. Laws 761, 761.

New York was a leader in mandating vaccination of school-age children, following close behind Massachusetts, which was the first State to have such a requirement. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002). Over time more States adopted mandatory vaccination rules, until eventually they were universal throughout the United States. *See* Jared P. Cole & Kathleen S. Swendiman, Cong. Research Serv., RS 21414, *Mandatory Vaccinations: Precedent and Current Laws* 2 (May 21, 2014).

New York's original vaccination law was limited to smallpox, the only disease for which a vaccine then existed. The Legislature has since then regularly updated its compulsory school vaccination law as medical knowledge and public health regulation changed and improved, and as new vaccines have become available and been tested by the medical and public health communities. As smallpox waned in this country as a direct result of compulsory vaccination, the Legislature first relaxed the law's requirements, *see, e.g.*, Ch. 641, § 1, 1952 N.Y. Laws 1410, 1410-11 (allowing the commissioner of health to suspend vaccination for up to 6 months in cities where it was deemed unnecessary), and then later eliminated it, *see* Ch. 145, § 1, 1972 N.Y. Laws 966, 966.

In 1966, the Legislature required vaccination for polio and directed school officials to exclude the unvaccinated. *See* Ch. 994, § 2, 1966 N.Y. Laws 3331, 3332-33. And in the ensuing decades the Legislature has gradually extended the mandatory vaccination requirement to ten other diseases in addition to polio: measles, *see* Ch. 1094, § 4, 1968 N.Y. 3095, 3095-96, rubella, *see* Ch. 265, § 1, 1970 N.Y. Laws 1343, 1343, diphtheria, *see* Ch. 974, § 1, 1971 N.Y. Laws 2321, 2322, mumps, *see* Ch. 926, § 1, 1976 N.Y. Laws 1944, 1944,

haemophilus influenza type b (Hib), *see* Ch. 538, § 1, 1989 N.Y. Laws 1032, 1032-33, Hepatitis B, *see* Ch. 521, §§ 1-6, 1994 N.Y. Laws 1233, 1234-35, varicella (chickenpox), *see* Ch. 416, §§ 1-4, 1999 N.Y. Laws 986, 986-87, tetanus and pertussis (whooping cough), *see* Ch. 207, §§ 1-5, 2004 N.Y. Laws 625, 625-27, and pneumococcal disease, *see* Ch. 189, § 1, 2006 N.Y. Laws 702, 702-03.

Today, New York law requires parents to vaccinate their children against these eleven serious diseases (not "more than 70," as the Plaintiffs allege (Joint Appendix ("A") 316)), if available vaccines meet "the standards approved by the United States public health service"—*i.e.*, the Centers for Disease Control and Prevention (CDC). PHL § 2164(2)(a); 10 N.Y.C.R.R. § 66-1.1(f). Public and private school officials, including officials running nursery schools and day cares, may not admit unvaccinated children, unless they have been exempted. PHL § 2164(7)(a); Education Law § 914(1).

New York's mandatory vaccination program reflects the consensus public-policy view that "immunizations are among the most effective preventative measures to preserve and protect the public health" and that compliance with "the childhood and adult vaccination schedules"

promulgated by public health authorities is essential to preventing the spread of communicable diseases. Ch. 603, § 1, 2005 N.Y. Laws 3379, 3379.[2] Because of the importance of vaccination to public health, the State will pay for vaccinations for those unable to afford it. *See* PHL § 2164(4).

According to the CDC,[3] the development and spread of vaccination has been one of the most important public health advances in history.[4]

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[2] *See also* Ch. 994, § 1, 1966 N.Y. Laws 333 ("One of the truly great medical advances of this generation has been the development of proved methods of reducing the incidence of poliomyelitis, the once great crippler. . . . Immunization has been proven absolutely safe . . . ."); Ch. 1094, § 1, 1968 N.Y. Laws 3095 (to the same effect regarding vaccination for smallpox and measles).

[3] This Court may take judicial notice of "matters of public record in deciding a motion to dismiss," *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998), including publicly available reports of government agencies, *see Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012); *see generally Gent v. CUNA Mut. Ins. Soc'y*, 611 F.3d 79, 84 n. 5 (1st Cir. 2010) (taking judicial notice of CDC reports); *United States v. Chester*, 628 F.3d 673, 692 (4th Cir. 2010) (same).

[4] Centers for Disease Control and Prevention, *Achievements in Public Health, 1900-1999: Impact of Vaccines Universally Recommended for Children -- United States, 1990-1998*, 48 Morbidity & Mortality Weekly Rep. 243-48 (1999) ["CDC *Achievements*"] ("Vaccines are one of the greatest achievements of biomedical science and public health."); *see also* Centers for Disease Control and Prevention, William Atkinson, M.D., et al., *Epidemiology and Prevention of Vaccine-Preventable*

(*continued on the next page*)

Polio and smallpox, previously devastating diseases that killed or maimed millions of people, have been essentially eliminated in the United States due to vaccination,[5] and the incidence of seven other serious diseases—diseases for which New York requires vaccinations—has similarly been reduced in the United States by nearly 100 percent because of compulsory vaccination.[6]

Where vaccination is not so widespread, particularly in developing countries, vaccine-preventable diseases continue to cause death on a very large scale. For example, according to a 1999 CDC report, approximately one million people outside the United States die every year from measles.[7] Even in the United States, the incidence of various communicable diseases has grown due to a recent trend in parents refusing to vaccinate their children, causing diseases such as measles,

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Diseases 45 (12th ed., 2012) ["CDC *Textbook*"] ("Vaccination is among the most significant public health success stories of all time.").

[5] CDC *Achievements* at 244, 246.

[6] CDC *Achievements* at 243-46.

[7] CDC *Achievements* at 247.

mumps and whooping cough—once thought to be nearly eradicated here—to reappear throughout the United States.[8]

2. New York's medical and religious exemptions from the vaccination requirement

Notwithstanding the importance of universal vaccination, the Legislature has also recognized that there may be legitimate reasons for parents to decline vaccination for their children. New York has two statutory exemptions.

First, a child need not be vaccinated, and may attend school notwithstanding the absence of vaccination, "[i]f any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health." PHL § 2164(8) (added by Ch. 994, § 2, 1966 N.Y. Laws 3333). This exemption was added in 1966 to accommodate the safety concerns of parents whose children suffered from medical problems (such as allergies to vaccine ingredients) that might make vaccines harmful. And the Legislature has continued to

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[8] Centers for Disease Control and Prevention, *Parent's Guide to Childhood Immunizations,* 37 (2012); N.Y. State Dep't of Health, School Immunization Requirements, 37 (Eff. July 12, 2014).

respect safety concerns in other parts of the statute as well. For example, when some parents recently developed concerns about mercury found in a preservative used in some vaccines, the Legislature responded by limiting the amount of mercury that could be contained in vaccine doses, *see* PHL § 2112, while making clear that this limitation did not reflect any significant health threat but rather was intended solely to "minimize public fear and to increase public confidence in the safety of New York's vaccine supply," Ch. 603, § 1, 2005 N.Y. Laws 3379.

Second, the mandatory vaccination requirement contains a religious exemption that permits parents to decline vaccinations for their children if the parents "hold genuine and sincere religious beliefs which are contrary to the practices herein required." PHL § 2164(9). The current language of this exemption was the product of a dialogue between the Legislature and the federal courts about how to balance the overwhelming public-health benefits of vaccination against protections for the religious beliefs of parents and children. As originally enacted in 1967, New York's religious exemption covered the children of parents who "are bona fide members of a recognized religious organization whose teachings are contrary to the practices

herein required." Ch. 994, § 2, 1966 N.Y. Laws 3333. But after several court decisions held that the exemption was too narrowly focused on religious individuals in recognized organizations, *see Mason v. General Brown Cent. Sch. Dist.,* 851 F.2d 47, 51-53 (2d Cir. 1988); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88-92 (E.D.N.Y. 1987), the Legislature removed the requirement of membership in a religious organization and enacted the language that appears today. Ch. 538, § 3, 1989 N.Y. Laws 1035 (now codified at PHL § 2164(9)).

Parents seeking medical or religious exemptions are required to make a submission to local school officials, who are the ones directed by state law to enforce the mandatory vaccination requirements. *See* PHL § 2164(7)(a); N.Y. Education Law § 914(1); 10 N.Y.C.R.R. § 66-1.3. The Department of Health has created forms that parents may fill out, and localities (including New York City) have propounded their own forms; alternatively, parents may submit a physician's statement (for the medical exemption) or their own statement (for the religious exemption). *See* 10 N.Y.C.R.R. § 66-1.3(c), (d). Upon receiving an application for an exemption, state regulations empower school officials to "require additional information" or "supporting documents" to justify

the exemption. 10 N.Y.C.R.R. § 66-1.3(c), (d). Parents who disagree with school officials' decision may file an appeal with the Commissioner of Education. *See* PHL § 2164(7)(b).

Although a medical or religious exemption ordinarily permits an unvaccinated child to attend school, state and city regulations provide for the exclusion of all unvaccinated children—even those with exemptions—during an outbreak of certain vaccine-preventable illnesses in their school. *See* 10 N.Y.C.R.R. § 66-1.10(a); N.Y. City Dep't of Educ. Regulations of the Chancellor, Reg. A-701(III)(A)(4)(c). Outside of New York City, the Commissioner of the Department of Health determines when outbreaks occur such that all unvaccinated children must be excluded; in New York City, that authority is delegated to the Commissioner of Health of the City's Department of Mental Health and Hygiene. *See* 10 N.Y.C.R.R. § 66-1.10(a).

B. Factual Background

Plaintiffs are three New York City parents with minor, school-age children. All three parents allege that they have not vaccinated their children because of religious reasons and because of their belief that vaccines are dangerous and do not work. (A. 312, 321, 324.) All three

parents applied to New York City school officials for religious exemptions from the vaccination requirement under Public Health Law § 2164. (A. 317.) Those officials granted religious exemptions to two of the parents (Phillips and Mendoza-Vaca) under Public Health Law § 2164(9). (A. 317.) (These parents did not apply for or receive medical exemptions.) The third parent (Check) was denied a religious exemption by school officials and did not receive a medical exemption.[9] Plaintiffs do not allege that state officials had any involvement in granting or denying these exemptions.

Although Plaintiffs assert that their objections to vaccines stem from religious beliefs, the allegations in their Amended Complaint (as well as their arguments on appeal) primarily focus on medical objections to vaccines. Plaintiffs assert repeatedly in the Amended

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[9] Check alleges in the Amended Complaint and testified at a hearing on a motion for a preliminary injunction that a local school nurse mistakenly and without the parent's knowledge or consent submitted a request for a medical exemption from the vaccination requirement. (A. 285-286, 317-318.) The request was denied by New York City school officials. Check did not appeal the denial administratively or seek to challenge it in state court, as she might have. (A. 286-287, 290-292.)

Complaint that not a single vaccine actually prevents illness. (A. 324 ("there are no 'vaccine preventable illnesses'").) Instead, Plaintiffs allege that vaccines are "dangerous to the children, dangerous to the public health," and "not sufficiently tested." (A. 324, 327.) And Plaintiffs allege that the dangers of vaccines are themselves transmittable because when vaccinated children "shed . . . bodily fluids, hair and droplets" this "expos[es]" other children "to the potentially harmful substances within the vaccines." (A. 328.)

The children of the Phillips and Mendoza-Vaca plaintiffs (who received religious exemptions) were temporarily excluded from school by city school officials when a case of chickenpox was reported at each school. (A. 315, 317, 319-320.) School officials stated that they were acting under a city regulation, N.Y. City Chancellor's Regulation A-701(III)(A)(4)(c). (A. 319, 325.) These plaintiffs do not appear to allege that the State defendants had any involvement in deciding whether or not the children attended school. Indeed, at the time of these temporary exclusions, the state regulations did not provide for exclusion of unvaccinated children due to chickenpox outbreaks; the state regulation was amended to cover chickenpox only in July 2014, well

after the filing of the Amended Complaint. *See* N.Y. State Dep't of Health, School Immunization Requirements, *supra*, at 32-33.

The Check plaintiff's child (who received no exemptions) was excluded from school altogether due to failure to vaccinate or obtain either of the statutory exemptions. According to the Amended Complaint, the City officials either "revoked" and/or refused to grant anew ("denied") a religious exemption for Check's daughter. (A. 314, 316-318.) Check alleges that she was subjected by local school officials to a "religion test" that questioned the sincerity of her religious beliefs (A. 318); and alleges that the religious exemption was revoked or denied either because city officials "deem[ed] her religious beliefs insincere"—in part because she "did not assert that the tenets of Catholicism prohibit immunization" (A. 318)—or because local school officials found that her objections to vaccination "were not religious in nature," (A. 317). Check does not allege that state officials had any involvement in the inquiry into her religious beliefs.

C. Procedural History

Plaintiffs filed suits to challenge various aspects of New York's mandatory vaccination program, naming as defendants the Attorney General of New York State, Eric T. Schneiderman, and the Commissioner of the Department of Health of New York State, Nirav R. Shah, (the State Defendants), as well as New York City and its Department of Education.

First, Plaintiffs claimed violations of their rights to free exercise of religion under the First Amendment. Check's First Amendment claim was based on New York City school officials' denial of her request for a statutory religious exemption as well as the allegedly improper "religion test" that she claims those officials conducted to determine the genuineness and sincerity of her religious beliefs. Phillips and Mendoza-Vaca, who received religious exemptions, alleged that city officials violated the First Amendment by temporarily excluding their children from school during outbreaks of vaccine-preventable diseases.

Second, Plaintiffs alleged that the required vaccinations are dangerous and represent unwanted interference with bodily integrity

and the right of parents to direct the education, medical care and upbringing of their children.

Third, Plaintiffs raised Ninth Amendment and equal protection claims, though the Amended Complaint does not clearly explain either claim. The Ninth Amendment claim appears to duplicate the substantive due process claim. And the equal protection claim appears to be based on New York's differential treatment of vaccinated and unvaccinated children, which Plaintiffs allege is improperly based on "unproven and junk science."[10] (A. 328-329.)

Fourth, Plaintiffs sought declaratory and injunctive relief for a number of alleged violations of both city and state law. Specifically, Plaintiffs allege that they were deprived of their statutory right to a religious exemption under Public Health Law § 2164 (even though two

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[10] Plaintiffs' brief on appeal does not make any substantive arguments in support of their Ninth Amendment claim. That claim is therefore abandoned. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012); *cf.* Fed. R. App. P. 28(a)(8). In the event Plaintiffs do explain this claim in a reply brief, this Court has made clear that it "will not consider an argument raised for the first time in a reply brief." *United States v. Yousef*, 327 F.3d 56, 115 (2d Cir. 2003) (citation omitted).

of them did receive religious exemptions) and that they were improperly excluded from school under New York City regulations during an outbreak of a vaccine-preventable illness.

After each of the three families filed separate suits in 2012 and 2013, the cases were ordered consolidated by the District Court in October 2013 (A. 6), and an amended complaint was filed (A. 7, 311-332). Check twice sought preliminary injunctions in 2013, seeking to have her child admitted to school because the child was allegedly entitled to both a religious exemption and a medical exemption. Both requests for preliminary injunctive relief were denied. On the religious exemption, the District Court (Townes, J.) agreed with the magistrate judge's finding, made after an evidentiary hearing, that Check's "mistrust of vaccination is driven by health reasons and not religious conviction" (Special Appendix ("SPA") 4), and accordingly found no likelihood of success on the claim for a religious exemption. On the medical exemption, the District Court (now Kuntz, J.) agreed with the magistrate judge that a federal court should not entertain this request to enjoin state or city officials under state law when state law provided

an adequate avenue to address Check's medical concerns through the medical exemption. (SPA 9-10.)

Both the City and State Defendants moved to dismiss or for summary judgment. (A. 8-9.) The District Court treated the motions as motions to dismiss under Rule 12(b)(6) and held that the facts alleged did not state any viable claim for a violation of the federal law. (SPA 11-16.) Regarding the Free Exercise claims, the district court reasoned that the Supreme Court, in *Jacobson v. Massachusetts*, 197 U.S. 11, 35-39 (1905), has "strongly suggested that religious objectors are not constitutionally exempt from vaccination," and agreed with the "courts in this Eastern District" which have "resolutely found there is no such constitutional exemption." (SPA 14 (citing, *inter alia*, *Caviezel v. Great Neck Pub. Sch.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010), *aff'd*, 500 F. App'x 16 (2d Cir. 2012).) The substantive due process claim, the district court held, was foreclosed by this Court's recent decision in *Caviezel*. (SPA 15.)

STANDARD OF REVIEW

This Court reviews a district court's decision on a motion to dismiss de novo. *See Aegis Ins. Servs., Inc. v. 7 World Trade Co.*, 737 F.3d 166, 176 (2d Cir. 2013). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

SUMMARY OF ARGUMENT

Plaintiffs' alleged injuries here arise from decisions by New York City officials to deny them religious exemptions and exclude their unvaccinated children from school. Plaintiffs do not allege that state officials were personally involved in these decisions and, indeed, do not seek any specific relief against State Defendants. To the extent that Plaintiffs seek to invalidate the State's mandatory vaccination program in general (*e.g.*, A. 330), this Court should find their arguments meritless and affirm the district court's dismissal of their claims.

Plaintiffs' Free Exercise challenge to New York's mandatory vaccination scheme fails as a matter of law. New York's scheme, which provides a religious exemption, easily satisfies the First Amendment

because the Constitution does not require any religious exemption at all from a vaccination mandate—as the Supreme Court and the lower courts have consistently held. It is thus well-established that a mandatory vaccination scheme does not impose an impermissible burden on the free exercise of religion so long as it satisfies rational-basis review. New York's scheme easily passes that test because the government's interest in preventing the spread of dangerous diseases among children is rationally effectuated by mandating vaccination for school children.

Moreover, contrary to Plaintiffs' arguments, in determining whether to grant a religious exemption, city officials (who have been delegated the authority under state law to implement the State's vaccination requirements) are entitled to determine whether parents' objections are sincere and religious in nature, rather than pretextual or based on secular concerns. This Court expressly recognized as much in a decision that concerned the vaccination statutes at issue here, and Plaintiffs have offered no grounds for departing from that on-point precedent.

Finally, parents have no fundamental right protected by substantive due process to exempt their children from school vaccination requirements. This Court recently rejected a nearly identical substantive

due process claim. And for well over one hundred years, other courts, including the Supreme Court, have upheld mandatory vaccination. This unbroken string of precedent conclusively shows that Plaintiffs' asserted right has no basis in our history and traditions. As such, the program must only have a rational basis, which it assuredly does.

ARGUMENT

POINT I

NEW YORK'S VACCINATION MANDATE COMPLIES WITH THE FREE EXERCISE CLAUSE

A. State Laws May Require Schoolchildren to Be Vaccinated With or Without a Religious Exemption.

Although Plaintiffs argued below that the Free Exercise Clause requires an unconditional exemption from the vaccination requirements due to their allegedly sincere and religiously based opposition to vaccination (A. 325), their brief on appeal no longer seems to press this argument. It is accordingly waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n.1 (2d Cir. 2005). But if this Court does reach the merits of this claim, it should reject Plaintiffs' arguments as meritless.

New York law respects religious beliefs against vaccines by exempting children from vaccination if their parents "hold genuine and sincere religious beliefs which are contrary to the practices herein required." PHL § 2164(9). Children who are unvaccinated due to a religious exemption may attend school except in the limited circumstance of an outbreak of a vaccine-preventable illness. *See* 10 N.Y.C.R.R. § 66-1.10(a); N.Y. City Dep't of Educ. Regulations of the Chancellor, Reg. A-701(III)(A)(4)(c).

Contrary to Plaintiffs' arguments, New York's religious exemption far exceeds what the Free Exercise Clause requires. Indeed, courts have overwhelmingly rejected constitutional challenges to mandatory vaccination requirements, even when (unlike in New York's scheme) there was no religious exemption at all. *See, e.g.*, *Jacobson*, 197 U.S. at 27-32 (upholding Cambridge, Massachusetts ordinance and citing decisions upholding vaccination requirements by the state courts of Pennsylvania, Indiana, Georgia, North Carolina, California, Connecticut and Vermont); *Zucht v. King*, 260 U.S. 174, 176-77 (1922) (upholding San Antonio ordinance mandating vaccination of school children); *Matter of Viemeister v. White*, 179 N.Y. 235, 238-42 (1904)

(upholding New York's statute mandating vaccination of school children). As the Supreme Court specifically recognized seventy years ago, a parent's right "to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 & n.12 (1944). More recently, the Court identified "compulsory vaccination laws" as among the neutral, generally applicable laws that did not require religious exemptions under the First Amendment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 889 (1990).

Challenges to vaccination requirements on free exercise grounds have fared no better in the lower federal and state courts. The Fourth Circuit recently rejected Free Exercise (as well as Substantive Due Process) challenges to West Virginia's mandatory childhood vaccination statute, which contains no religious exemption. *See Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348, 352-56 (4th Cir.), *cert. denied* 132 S. Ct. 590 (2011). And courts in New York and a number of other States have likewise rejected Free Exercise (and other) challenges to mandatory vaccination statutes, considered without any religious

exemptions.[11] In short, "it has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs." *Sherr*, 672 F. Supp. at 83, 88 (citing cases). And if vaccination mandates without religious exemptions do not unconstitutionally burden the free exercise of religious beliefs, New York's less strict statutory scheme (which does contain such an exemption) likewise does not unconstitutionally burden the free exercise of religion simply by requiring schoolchildren to be vaccinated.

These decisions are fully consistent with modern Free Exercise jurisprudence. It is now firmly established that rational-basis review is all that is required to uphold "neutral" laws of "general applicability"—*i.e.*, laws that do not target, disapprove of, or single out religious groups

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[11] *See, e.g.*, *Boone v. Boozman*, 217 F. Supp. 2d 938, 953-57 (E.D. Ark. 2002); *Davis v. State*, 294 Md. 370, 377-83 (1982); *Brown v. Stone*, 378 So. 2d 218, 220-24 (Miss. 1979); *McCartney v. Austin*, 31 A.D.2d 370, 371 (3d Dep't 1969). In some of these cases, the vaccination statute had been enacted with a religious exemption, but the exemption had been struck down as improperly distinguishing between established religions and individual beliefs. The courts nonetheless held that, even without any exemption, the statutes satisfied Free Exercise Clause requirements.

or practices or seek to coerce religious beliefs, even if the law "proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879.[12]

There is no dispute here that New York's compulsory vaccination statute is generally applicable: it applies to every school and every parent (or guardian) and every child between the ages of two months and eighteen years in the State, unless they fall under narrow medical and religious exemptions. *See* PHL § 2164(1)(a), (b) & (c). And there can equally be no dispute that the law is neutral as to religion. Far from targeting or disfavoring religion, New York's mandatory vaccination program contains an express religious exemption that extends special protections to religious believers—an exemption that

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[12] *Smith* thus conclusively rebuts Plaintiffs' assertion—made without any explanation—that strict scrutiny applies here. Nor does any other basis for strict scrutiny apply. Public Health Law § 2164 is not a law that grants secular but not religious exemptions, *see Smith*, 494 U.S. at 884, nor does it threaten the way of life of an entire community, *see Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (discussing Supreme Court case on compelling school attendance by Amish children). Moreover, this Court does not apply strict scrutiny under a "hybrid" theory, where free exercise rights are asserted in conjunction with other constitutional rights. *See id.* at 143-44.

the Legislature rewrote and broadened after concerns were raised by parents and courts that it was too narrow under First Amendment principles. (See *supra* at 10-11.)

Thus, rational basis review applies to New York's mandatory-vaccination program. And under that lenient standard, § 2164 is plainly constitutional. New York seeks to protect public health and safety by reducing the incidence of eleven dangerous diseases, and its method of doing so is to vaccinate New Yorkers as children. Universal vaccination both ensures that children themselves are protected and, since diseases can spread so quickly between children, prevents outbreaks that could threaten the larger community.

Moreover, it is rational for New York to delegate enforcement of mandatory vaccination to local school officials. Diseases may spread quickly in schools, and so focusing the protections on schools makes sense. And because school attendance is nearly universal, school officials are in a position to interact with nearly every parent and school-age child in the State, making them ideally situated to enforce the requirements and explain the laws—including, for example, how to obtain free vaccination if parents cannot afford it.

Finally, contrary to the arguments made by Plaintiffs Phillips and Mendoza-Vaca, whose children received religious exemptions but were nonetheless temporarily excluded from school during outbreaks of vaccine-preventable illnesses, it is rational for New York to require all unvaccinated children to stay away from school during such outbreaks even if they or their parents received an exemption.[13] The same public policy that supports universal vaccination of schoolchildren as a prophylactic measure applies even more strongly when a vaccine-preventable illness is actually present at a school. An outbreak puts unvaccinated children at heightened risk of contracting a disease to which they have little resistance due to their lack of vaccination. And such exposure also threatens other children by potentially turning unvaccinated children into additional vectors for the disease, thus magnifying the effect of the original outbreak.

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[13] The specific challenges brought by Plaintiffs Phillips and Mendoza-Vaca to their children's exclusion do not apply to State Defendants. As discussed earlier, see *supra* at 14-15, at the time of the alleged exclusions, only the city regulations applied to chickenpox outbreaks; the state regulations did not.

New York's mandatory-vaccination program thus demonstrates a "reasonable fit" between the State's purpose and "the means chosen to advance that purpose." *Leebaert*, 332 F.3d at 139 (quoting *Reno v. Flores*, 507 U.S. 292, 305 (1993)). Accordingly, the district court correctly dismissed Plaintiffs' claim for an unconditional religious exemption from New York's vaccination scheme.[14]

[14] The Supreme Court has long rejected claims to religious exemptions from government-mandated conduct under generally-applicable laws that had sufficient public justification. *See, e.g., Bowen v. Roy*, 476 U.S. 693, 696 (1986) (Native American applicant for welfare benefits required to obtain Social Security number); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (Orthodox Jewish member of Air Force required to remove yarmulke while in uniform); *United States v. Lee*, 455 U.S. 252, 255, 257-58 (1982) (Amish employer required to make Social Security tax payments); *Jehovah's Witnesses in the State of Wash. v. King County Hosp. Unit No. 1*, 390 U.S. 598 (1968) (per curiam), *aff'ing* 278 F. Supp. 488, 503-05 (W.D. Wash. 1967) (Jehovah's Witness parents could not prevent medically-necessary blood transfusions fir their child).

B. The Free Exercise Clause Authorizes an Inquiry Into the Genuineness and Sincerity of Religious Beliefs.

Plaintiffs (primarily Check) challenge New York's process for granting statutory religious exemptions on the ground that they should not be subjected to a "religion test" given by school officials. But both the Supreme Court and this Court have squarely held otherwise.

The First Amendment's protections for religiously motivated conduct extend only to beliefs that are sincerely held, asserted in good faith, and religious in nature. *See, e.g.*, *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713-14 (1981); *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439-40 (2d Cir. 1981). And the Supreme Court has repeatedly held that, when an individual seeks a religious exemption, the government may test and review that individual's beliefs to ensure that they are religious in nature and sincere. *See Frazee*, 489 U.S. at 833; *Thomas*, 450 U.S. at 713-14; *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Frazee*, 489 U.S. at 833.

This Court recognized as much with respect to New York's mandatory vaccination program in *Mason v. General Brown Central Schools District,* 851 F.2d 47 (2d Cir. 1988), a case that Plaintiffs do not discuss or distinguish. That decision concluded that the religious exemption as it then existed—which required proof of membership in "a recognized religious organization"—was too narrow. *Id.* at 51. (See *supra* at 10-11.) But in the course of holding that the First Amendment protects individual religious beliefs whether or not held by an organized religion, this Court confirmed that the State need not simply accept a parent's assertion that their anti-vaccination views are religious. "An individual's assertion" of religious belief "does not, however, automatically mean that the belief is religious. To the contrary, 'a threshold inquiry into the "religious" aspect of particular beliefs and practices *cannot be avoided*.'" *Mason*, 851 F.2d at 51 (quoting *Int'l Soc'y for Krishna Consciousness*, 650 F.2d at 433) (emphasis added).

Since *Mason*, this Court has repeatedly upheld denials of statutory religious exemptions under New York's mandatory vaccination program based on a finding that an individual's beliefs were not genuine, sincere,

or religious in nature.[15] Hence the claim that the First Amendment is violated by school officials testing the factual basis for a request for a statutory religious exemption is foreclosed by directly on-point precedent.[16]

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[15] *See Caviezel v. Great Neck Pub. Schs.*, 701 F. Supp. 2d 414, 430 (E.D.N.Y. 2010), *aff'd,* 500 F. App'x 16 (2d Cir. 2012); *Galinsky v. Bd. of Educ. of the City of N.Y.*, No. 99-cv-1613 [Raggi, J.], Trial Trs. for Apr. 29 & Aug. 16, 1999, Dkt Nos. 16 & 26 (discussed in NY City appellees' brief on appeal), *aff'd*, 213 F.3d 626, 2000 WL 562423 (2d Cir. 2000); *Friedman v. Clarkstown Cent. Sch. Dist.*, No. 01-cv-10646 (E.D.N.Y. Aug. 16, 2002), Dkt. No. 26, *aff'd*, 75 F. App'x 815 (2d Cir. 2003).

[16] To the extent that Check alleges in the Amended Complaint that school officials erred as a factual matter by finding that she did not meet the statutory requirements for a religious exemption, this is a state law claim over which the district court properly declined to exercise supplemental jurisdiction. Moreover, that claim is asserted only against city, not state, officials. In any event, it is meritless. There is ample support in the record for the district court's finding that Check's "mistrust of vaccinations is driven by health reasons and not religious conviction," and this "aversion to immunization . . . is not a proper basis for a religious exemption." (SPA 4-5.) That factual finding is entitled to deference from this Court. Here, as in *Caviezel,* the district court's finding precludes a viable claim that plaintiffs have been injured in the free exercise of religion. 500 F. App'x at 18.

POINT II

COMPULSORY VACCINATION DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

As the district court correctly recognized (SPA 15), Plaintiffs' substantive due process claim is foreclosed by this Court's decision in *Caviezel*, which held that there was no substantive due process right to resist New York's vaccination scheme for schoolchildren. There, parents asserted religious objections to vaccination but, as the district court found, their objections were not truly religious in nature but instead based on "a personal, moral or cultural feeling against vaccination"—including the allegation that vaccination "may not be safe." *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 429-30 (E.D.N.Y. 2010); *see also* Br. for Pls.-Appellants at 24, *Caviezel*, 500 F. App'x 16 (2d Cir. 2012) (No. 11-3431), *available at* 2011 WL 6765157, at *24 (basing substantive due process claim on allegation that state and local officials had not shown how denying exemption "would further the legitimate purpose of preventing communicable diseases"). This Court affirmed the district court's holding that such allegations did not state a substantive due process claim. *See* 500 F. App'x 16, 19 (2d Cir. 2012).

The Court should reach the same conclusion here. Substantive due process protects with heightened scrutiny only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)); *accord Leebaert*, 332 F.3d at 140. Because the Supreme Court has "always been reluctant to expand the concept of substantive due process," it has stressed the need to first carefully and narrowly define the interests at issue before looking to see if they are deeply rooted in law, practices, and traditions.[17] *Glucksberg*, 521 U.S. at 720 (quotation marks omitted).

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[17] The Supreme Court and this Court have repeatedly rejected broad formulations of asserted substantive due process rights in favor of narrow ones. *See Glucksberg*, 521 U.S. at 720-24 (rejecting "self-sovereignty" or "personal autonomy" or "bodily integrity" and instead defining the asserted right as "a right to commit suicide which itself includes a right to assistance in doing so"); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277-79 (1990) (rejecting "right to die" and other descriptions in favor of "right to refuse lifesaving hydration and nutrition"); *Flores*, 507 U.S. at 302 (rejecting "freedom from physical restraint," or a right "to come and go at will" and instead defining the asserted right as the "right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution"); *Leebaert*, 332 F.3d at 139-40 (rejecting "a parent's right to

(*continued on the next page*)

Thus, Plaintiffs' substantive due process claim must be understood as a claim that they have a right to send their unvaccinated children to school without the restrictions imposed by New York laws and regulations. The Phillips and Mendoza-Vaca families assert a right to send their unvaccinated children to school during outbreaks of vaccine-preventable diseases, on the basis of their religious exemption and their beliefs that vaccines are unsafe and unnecessary. The Check family, despite failing to qualify for an exemption, similarly asserts a right to send their child to school unvaccinated on religious and medical grounds.

These asserted rights are not "objectively, deeply rooted in this Nation's history and tradition," *Glucksberg*, 521 U.S. at 720-21 (quotation marks omitted), or "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Rochin v. California*, 342 U.S. 165, 169 (1952) (quotation marks omitted). To the contrary, the only deeply rooted history here supports New York's policy of mandatory vaccinations and exclusion of unvaccinated children.

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direct the education of his or her children" and instead identifying the asserted right as "the right to excuse his son from mandatory public school classes").

As explained above (see *supra* at 3), New York enacted a compulsory school vaccination statute in 1860, and that statute lacked any religious exemption for more than a century, until 1967. During that time, vaccination mandates were repeatedly upheld by both state and federal courts. The Supreme Court suggested in 1894 that laws providing for the "compulsory vaccination of children" are valid uses of the police power. *Lawton v. Steele*, 152 U.S. 133, 136 (1894). The New York Court of Appeals upheld this state's compulsory school vaccination statute in 1904 and commented that "[n]early every state of the Union has statutes to encourage or, directly or indirectly to require vaccination, and this is true of most nations of Europe." *Matter of Viemeister*, 179 N.Y. at 239-40. In 1905, in the course of upholding the adult vaccination mandate of Cambridge, Massachusetts, the Supreme Court observed that "the principle of vaccination as a means to prevent the spread of smallpox" – the only vaccine then available – "has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools." *Jacobson*, 197 U.S. at 32-33, 36 (citing decisions upholding these requirements by the state courts of Pennsylvania, Indiana, Georgia,

North Carolina, California, Connecticut and Vermont). And in 1922, citing *Jacobson*, the Supreme Court summarily upheld a vaccination mandate for attendance in public and private schools in San Antonio.[18] *See Zucht*, 260 U.S. at 176-77.

This historical consensus is reflected today in an equally broad nationwide consensus that mandatory vaccination is essential to protect public health. Today, all fifty states and the District of Columbia mandate vaccination for school children and exclude unvaccinated children from attending schools, unless they are entitled to a statutory exemption for medical, religious, or other reasons. *See* Jared P. Cole & Kathleen Swendiman, *supra*, at 2. And courts have repeatedly upheld

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[18] The power to exclude unvaccinated children from school is related to the equally well-established authority of state and local governments to quarantine and isolate people, both sick and well, during outbreaks of diseases. *See, e.g.*, *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380 (1902) (upholding involuntary quarantine of persons to prevent spread of communicable diseases); *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877) (suggesting the general validity of quarantine laws enacted by state governments under their police power, provided they do not infringe Congress' authority over interstate commerce).

these mandates against substantive due process challenges. *See, e.g.*, *Workman*, 419 F. App'x at 355-56); *Boone*, 217 F. Supp. 2d at 956.

In light of this, Plaintiffs have failed to show that their asserted right to exempt their children from a school vaccination mandate is a "fundamental" one so deeply rooted in this nation's history and traditions that it is protected by heightened scrutiny under substantive due process doctrine. The claim is therefore evaluated under the deferential standards of rational basis review. *See Beatie v. City of N.Y.*, 123 F.3d 707, 711 (2d Cir. 1997). And, as explained above (see *supra* at 26-27), New York's vaccination regime is plainly rational.

Plaintiffs cannot save their substantive due process claim by alleging that vaccinations are medically dangerous to their children and ineffective at preventing diseases. *See, e.g.*, Br. for Pls.' ("Br.") at 32-33. With respect to the allegation by Check that her child "has medical contraindications to vaccinations," (*id.* at 40), the magistrate judge correctly recognized that New York law provides a medical exemption that can accommodate such claims, *see* PHL § 2164(8), and that state administrative and judicial proceedings are thus the appropriate forum for asserting medical objections to vaccination. (A. 288-294, 344-347.)

Yet Check alleged in her complaint and testified at a hearing below that she never applied for this medical exemption. (A. 285-286, 317-318.) There can be no federal constitutional claim based on an individual's failure to obtain an exemption she never applied for.

With respect to Plaintiffs' more general assertions about the supposed dangerousness and inefficacy of vaccines, it is well established that such allegations cannot defeat the judgment of the Legislature, public health authorities, and the medical establishment that vaccination is an effective response to dangerous diseases. On rational-basis review, "a legislative choice is not subject to courtroom fact-finding." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). And the Supreme Court has already rejected attempts to defeat vaccination mandates by parties raising general allegations that vaccines are harmful. In *Jacobson*, which was an enforcement proceeding by the State against two adults who defied a municipal smallpox vaccination requirement, the defendants offered to prove the "alleged injurious or dangerous effects of vaccination." *Commonwealth of Massachusetts v. Pear*, 183 Mass. 242, 246 (1903), *aff'd sub nom. Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The Supreme Court held that the

state courts correctly refused to accept testimony or other evidence to support those allegations because the Legislature was entitled to rely on scientific opinion and common belief that vaccination was safe and effective, and neither the judiciary nor a private individual could second-guess that judgment. 197 U.S. at 30-32.

Jacobson approvingly cited and discussed, *see* 197 U.S. at 34-35, a then-recent New York Court of Appeals case that had rejected allegations that compulsory vaccination of schoolchildren should be barred because vaccination "does much harm with no good." *Matter of Viemeister,* 179 N.Y. at 239. The New York court held that it could take judicial notice of the medical and popular opinion that vaccination is safe and effective, and concluded that this opinion supplied all the rational basis required for the Legislature to have validly and constitutionally invoked its police powers. *See id.* at 239-41.

Thus, the relevant right that is deeply rooted in our history and traditions is the right of the States to make reasonable judgments about public health matters and to decide, in consultation with public health authorities, to mandate vaccination. Plaintiffs' asserted substantive due process right has been rejected for generations.

POINT III

PLAINTIFFS' REMAINING CONTENTIONS ARE INSUBSTANTIAL AND NOT PROPERLY RAISED

Plaintiffs brief to this Court raises a number of other claims. Each is not properly before this Court and also meritless.

Equal Protection, Establishment Clause, and Procedural Due Process. Plaintiffs' appellate brief alleges an equal protection violation based on City officials' alleged discriminatory treatment of Check's application for a statutory religious exemption. *See, e.g.*, Br. at 17, 25. But Plaintiffs raised no such allegations in their Amended Complaint or in their briefing below. (A. 328-329 (setting out equal protection allegations).) (*Cf.* SPA 15 ("Plaintiffs have not asserted any facts tending to show that Defendants favored any religion over another, or that Plaintiffs are part of any protected class.").) Likewise, Plaintiffs' appellate brief asserts Establishment Clause injuries, including allegations raised for the first time in their brief about a supposed "quota" for religious exemptions, and alleged deprivations of procedural due process. But such claims are nowhere found in the Amended Complaint or in Plaintiffs' brief opposing the motion to dismiss below.

Claims not presented below are not preserved for appellate review. *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1077 (2d Cir. 1993).

State and City Law. Plaintiffs' appellate brief also asserts a number of alleged violations of both city and State law. *See, e.g.*, Br. at 9, 19, 23. The district court properly declined to exercise supplemental jurisdiction over these claims given the dismissal of Plaintiffs' federal claims. This Court should affirm the district court's decision not to address the state and city law claims. But if this Court does reach these claims as against the State Defendants, it should find them barred by sovereign immunity because they seek to require state officials to comply with state law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120-21 (1984).

CONCLUSION

The district court's decision and order dismissing the Amended Complaint claim should be affirmed.

Dated: New York, NY
September 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Andrew Kent, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,045 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Andrew Kent
Andrew Kent