State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 18, 2021 530783

F.F., as Parent of Y.F. et al., Infants, et al.,
Appellants,
v OPINION AND ORDER

STATE OF NEW YORK et al.,
Respondents.

Calendar Date: February 5, 2021

Before: Garry, P.J., Lynch, Aarons, Pritzker and Reynolds Fitzgerald, JJ.

Sussman and Associates, Goshen (Michael H. Sussman of counsel), for appellants.

Letitia James, Attorney General, Albany (Dustin J. Brockner of counsel), for respondents.

Whatley Kallas, LLP, New York City (Henry C. Quillen of counsel), for American Medical Association and others, amici curiae.

Pritzker, J.

Appeal from a judgment of the Supreme Court (Hartman, J.), entered December 11, 2019 in Albany County, which, among other things, granted defendants' motion to dismiss the complaint.

Public Health Law § 2164 requires children from the ages of two months to 18 years to be immunized from certain diseases,

including measles, in order to attend any public or private school or child care facility (see Public Health Law § 2164 [7] [a]). Initially, the school vaccination law contained two exemptions to this requirement: a medical exemption requiring a physician's certification that a certain vaccination may be detrimental to a child's health (hereinafter the medical exemption) and a non-medical exemption that required a statement by the parent or guardian indicating that he or she objected to vaccination on religious grounds (hereinafter the religious exemption) (see Public Health Law § 2164 [8]; former § 2164 [9]).

In 2000, public health officials declared that measles had been eliminated from the United States (see Sponsor's Mem, Senate Bill S2994A [2019]). However, after seven cases of measles were reported in Rockland County in the fall of 2018, a nationwide measles outbreak[1] occurred that was largely concentrated in communities in Brooklyn and Rockland County with "precipitously low immunization rates" (Sponsor's Mem, Senate Bill S2994A [2019]). That October, following state regulations, both the State and County Commissioners of Health advised certain schools with reported cases of measles to exclude children who had not been vaccinated pursuant to the religious exemption. In January 2019, companion bills were introduced in the Senate and Assembly that proposed to repeal the religious

[1] The World Health Organization defines a measles outbreak as "two or more laboratory-confirmed cases that are temporally related (with dates of rash onset occurring 7–23 days apart) and epidemiologically- or virologically-linked, or both" (Measles Outbreak Toolbox, World Health Organization, https://www.who.int/emergencies/outbreak-toolkit/disease-outbreak-toolboxes/measles-outbreak-toolbox [November 2019 update]). The records of the floor debate in the Senate reveal that, in May 2019, there were 266 cases of measles in Rockland County. "According to the [Centers for Disease Control and Prevention], from January 1 to April 11, 2019, some 555 individual cases of measles were confirmed in 20 states, the second-largest number of cases reported in the United States since measles was eliminated in 2000" (C.F. v New York City Dept. of Health & Mental Hygiene, 191 AD3d 52, 56 [2020]).

exemption (see 2019 NY Senate-Assembly Bill S2994A, A2371A). On June 13, 2019, the Legislature voted to adopt the bills (hereinafter the repeal), which went into effect immediately (see Public Health Law § 2164, as amended by L 2019, ch 35, §§ 1, 2).

Plaintiffs are parents from throughout the state who, prior to the repeal, were granted religious exemptions from their children's schools due to a myriad of religious beliefs. They commenced this declaratory judgment action seeking to have the repeal declared unconstitutional and the legislation enjoined. Defendants thereupon submitted a pre-answer motion to dismiss the complaint for failure to state a claim, which plaintiffs opposed. Supreme Court granted defendants' motion, finding, among other things, that the repeal was a neutral law of general applicability driven by public health concerns and not tainted by hostility towards religion. Ultimately, the court concluded that the complaint failed to plausibly allege free exercise, equal protection or compelled speech claims and thus dismissed the complaint in its entirety. Plaintiffs appeal.

Plaintiffs raise a number of constitutional challenges, but primarily contend that the complaint alleged a viable cause of action that the repeal was motivated by active hostility towards religion and thus violated the Free Exercise Clause. "[I]n a motion to dismiss pursuant to CPLR 3211, a 'court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [the] plaintiff the benefit of every possible inference'" (Koziatek v SJB Dev. Inc., 172 AD3d 1486, 1487 [2019], quoting EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]). "The question to be resolved on such a motion is not whether [the] plaintiff can ultimately establish [his or] her allegations and is likely to prevail, but whether, if believed, [his or] her complaint sets forth facts that constitute a viable cause of action" (Mason v First Cent. Natl. Life Ins. Co. of N.Y., 86 AD3d 854, 855-856 [2011] [internal quotation marks, brackets and citations omitted]). However, "the favorable treatment accorded to a plaintiff's complaint is not limitless and, as such, conclusory

allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (Rodriguez v Jacoby & Meyers, LLP, 126 AD3d 1183, 1185 [2015] [internal quotation marks and citations omitted], lv denied 25 NY3d 912 [2015]).

To begin our analysis, we must first determine the proper constitutional standard of review by answering the key question: given that the repeal eliminated a religious exemption, is it nonetheless a neutral law of general applicability? It is well settled that, "the right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" (Employment Div., Dept. of Human Resources of Oregon v Smith, 494 US 872, 879 [1990] [internal quotation marks and citation omitted]). As such, to state a federal free exercise claim, a plaintiff generally must establish that "the object or purpose of a law is the suppression of religion or religious conduct" (Church of the Lukumi Babalu Aye, Inc. v City of Hialeah, 508 US 520, 533 [1993]). Significantly, if the law is neutral and of general applicability, a rational basis is all that is required to meet constitutional muster under the First Amendment, even if the law "proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)" Employment Div., Dept. of Human Resources of Oregon v Smith, 494 US at 879; Catholic Charities of Diocese of Albany v Serio, 7 NY3d 510, 526 [2006], cert denied 552 US 816 [2007]).

"Neutrality" and "general applicability" are not synonymous, but are "interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest" (Church of the Lukumi Babalu Aye, Inc. v City of Hialeah, 508 US at 531-532). With regard to the "neutrality" factor, "[t]he Free Exercise Clause bars even subtle departures from neutrality on matters of religion" (Masterpiece Cakeshop, Ltd. v Colorado Civil Rights

Comm'n, 584 US ___, ___, 138 S Ct 1719, 1731 [2018] [internal quotation marks and citations omitted]). "Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body" (id. [internal quotation marks and citation omitted]).

Here, plaintiffs allege three reasons in their complaint why the repeal was not a neutral law: first, that the Legislature failed to act during the height of the measles outbreak, asserting that the timing of the legislation undermines the public health concerns it relied upon in adopting the repeal; second, that, despite multiple requests from plaintiffs and others in the six months between the proposal of the bills and their adoption, no public hearings were held on the matter; and third, that the alleged religious animus is reflected in certain statements made by some of the legislators.

First, we do not find that the timing of the repeal reveals political or ideological motivation; rather, the record reflects that the repeal simply worked its way through the basic legislative process and was motivated by a prescient public health concern. As to the public health concerns, the American Medical Association, the Medical Society of the State of New York, the American Academy of Pediatrics and the New York State American Academy of Pediatrics, as amici curiae in support of defendants' position, offered their conclusion that eliminating religious exemptions is in the best interest of public health. They describe the highly contagious nature of measles,[2] noting

[2] As noted by the amicus brief, "[f]or infectious diseases, epidemiologists estimate the basic reproductive number (called R_0), which is the average number of other people that an infectious person will infect with an agent in a completely susceptible population" (citation omitted). Alarmingly, the R_0 for COVID-19 has been estimated to be between 2.43 and 3.10 (Marco D'Arienzo and Angela Coniglio, Assessment of the SARS-CoV-2 Basic Reproduction Number, R_0, Based on the Early Phase of

that effective prevention will occur when 93% to 95% of the population becomes immune, requiring that "the vaccine be given to virtually everyone who can safely receive it." The amici curiae note that they submitted statements to the Legislature in support of the repeal and were joined by 26 other organizations with expertise in medicine and public health. They further describe that the evidence before the Legislature at the time the repeal was adopted "was accurate and consistent with the scientific literature" and that the determination to eliminate the religious exemption was a "sound, evidence-based decision in the interest of public health." Given the foregoing, the timing of the repeal fails to demonstrate any neutrality infraction by the Legislature, and instead reveals a reasonably prompt deliberation and targeted response to a very serious public health issue.[3] Moreover, plaintiffs' allegations regarding the timing of the repeal are unpersuasive, considering that most public schools in the state complete the academic year in mid- to late June. As the repeal was enacted on June 13, 2019, the 14-day grace period allowed under Public Health Law § 2164 would carry most students through the end of the academic year, allowing parents ample time to arrange for their children to be vaccinated over the summer vacation prior to returning to school. Furthermore, the reality is that bills, even exigent ones, take time to pass.

Second, we find plaintiffs' claims regarding the Legislature's failure to hold hearings to be equally unavailing, given the Legislature's reliance upon data from the Centers for

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COVID-19 Outbreak in Italy, 2 Biosafety and Health 57, 58 [2020]), while the *R*0 for measles is as high as 18 (see Catherine I. Paules, Hilary D. Marston and Anthony S. Fauci, Measles in 2019 – Going Backward, 380 New England Journal of Medicine 2185, 2185 [2019]).

[3] As noted in the amicus brief, it has been estimated that, prior to the vaccine, measles killed seven to eight million children each year (see Martin Ludlow, Stephen McQuaid, Dan Milner, Rik L. de Swart and W. Paul Duprex, Pathological Consequences of Systemic Measles Virus Infection, 235 Journal of Pathology 253 [2015]).

Disease Control and Prevention and other public health officials, including the amici, which represent various medical experts in the state and have confirmed that the data contemplated by the Legislature was scientifically accurate. Further, the legislative history reveals a spirited floor debate among the legislators, particularly in the Assembly, where many representatives professed both their personal concerns as well as concerns of their constituents regarding the repeal's impact on religion. The ultimate floor vote reflected the many different views among the lawmakers. Finally, the extensive bill jacket reveals that several hundred letters were received, mostly in opposition to the repeal, which address religious issues.

Third, we reject plaintiffs' claims that, based upon statements by some of the legislators, the repeal was motivated by religious animus.[4] Significantly, the 11 statements alleged to suggest religious hostility were attributed to only five of the over 200 legislators in office at any given time. Although a suggestion of animosity towards religion is sufficient to state a cause of action under the Free Exercise Clause, that the comments here were made by less than three percent of the Legislature does not, under these circumstances, taint the actions of the whole (compare Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n, 138 S Ct at 1729; Church of the Lukumi Babalu Aye, Inc. v City of Hialeah, 508 US at 541; New Hope Family Servs., Inc. v Poole, 966 F3d 145, 167-168 [2d Cir 2020]). More importantly, many of the statements do not demonstrate religious animus, as plaintiffs suggest, but instead display a concern that there were individuals who abused the religious exemption to evade the vaccination requirement based upon non-religious beliefs. Indeed, some legislators were concerned that parents may be hiring consultants to evade the vaccination requirement – suggesting that parents attempted to falsify religious beliefs to receive exempt status. The repeal relieves public school officials from the challenge of distinguishing sincere expressions of religious beliefs from

[4] Given this finding, plaintiffs' argument that laws motivated by religious animus are per se unconstitutional is rendered academic.

those that may be fabricated. In fact, one of the quotes cited by plaintiffs refers to so-called "anti-vaxxers," implying a secular, rather than religious, movement resistant to vaccination. Another comment refers not to religion at all, but to "ideological beliefs." One of the comments goes so far as to explicitly state that "[r]eligion cannot be involved here," explaining that the priority must be to "govern by science," not only with the goal of promoting public health, but also to "lower the stigma that happens" against religious communities in the aftermath of viral outbreaks. To be sure, there were certain insensitive comments that could be construed as demonstrating religious animus. However, by and large, these comments highlight the tension between public health and socio-religious beliefs – a unique intersection of compelling personal liberties that was to be balanced against the backdrop of a measles outbreak that could be repeated (compare Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Comm'n, 138 S Ct at 1729; New Hope Family Servs. v Poole, 966 F3d at 165-166).

The repeal is also a law of "general applicability." Although, at first blush, the repeal of a religious exemption naturally seems to target the First Amendment, such is not the case here. In Roman Catholic Diocese of Brooklyn v Cuomo (___ US ___, ___, 141 S Ct 63, 66 [2020]), the Supreme Court of the United States determined that an executive order that imposed restrictions on attendance at religious services in certain areas in response to the COVID-19 pandemic would likely not be considered neutral and of general applicability and thus must satisfy strict scrutiny. As noted by Justice Kavanaugh in a concurring opinion, the regulation created a favored class of businesses and it thus needed to justify why houses of worship were excluded from that favored class (id. at 73 [Kavanaugh, J., concurring]; see C.F. v New York City Dept. of Health & Mental Hygiene, 191 AD3d 52, 76 [2020]). By contrast, here, the religious exemption previously created a benefit to the covered class, and now the elimination of the exemption subjects those in the previously covered class to vaccine rules that are generally applicable to the public (compare Roman Catholic Diocese of Brooklyn v Cuomo, 141 S Ct at 66-67). In fact, the sole purpose of the repeal is to make the vaccine requirement

generally applicable to the public at large in order to achieve herd immunity. Overall, even when viewed in the light most favorable to plaintiffs, Supreme Court did not err by concluding as a matter of law that the repeal is a neutral law of general applicability, not based upon hostility towards religion and not infringing upon the free exercise of religion.[5] Accordingly, given the significant public health concern, the repeal is supported by a rational basis and does not violate the Free Exercise Clause (see e.g. C.F. v New York City Dept. of Health & Mental Hygiene, 191 AD3d at 78).

Plaintiffs' claim pursuant to the NY Constitution is equally unavailing. "[W]hen the [s]tate imposes 'an incidental burden on the right to free exercise of religion' [this Court] must consider the interest advanced by the legislation that imposes the burden, and that 'the respective interests must be balanced to determine whether the incidental burdening is justified'" (Catholic Charities of Diocese of Albany v Serio, 7 NY3d at 525 [brackets omitted], quoting La Rocca v Lane, 37 NY2d 575, 583 [1975], cert denied 424 US 968 [1976]). "[S]ubstantial deference is due the Legislature, and . . . the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom" (Catholic Charities of Diocese of Albany v Serio, 7 NY3d at 525). Given the Legislature's substantial interest in protecting the public health, plaintiffs fall short of establishing such a claim (see id. at 528).

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[5] Conversely, the failure to vaccinate a child for a communicable disease may hamper others who wish to congregate, including those wanting to safely and freely worship by attending religious services without undo fear of infection (see e.g. Rebecca Randall, Should Pastors Speak Up About the COVID-19 Vaccine, Christianity Today [Dec. 11, 2020], https://www.christianitytoday.com/ct/2020/december-web-only/should-pastors-speak-up-about-covid-19-vaccine.html; Sarah Pulliam Bailey, A Pastor's Life Depends on a Coronavirus Vaccine, The Washington Post [Dec. 11, 2020], https://www.washingtonpost.com/religion/2020/12/11/ pastors-covid-vaccine-skeptics/).

Plaintiffs also contend that Supreme Court erred in holding that the complaint failed to state an equal protection claim. Specifically, plaintiffs assert that because the repeal was directed only towards students holding religious exemptions, and not students with medical exemptions, students over the age of 18 and adults employed by schools, it was "suspiciously underinclusive." The Equal Protection Clause prohibits "governmental decisionmakers from treating differently persons who are in all relevant respects alike" (Nordlinger v Hahn, 505 US 1, 10 [1992]). In undertaking an equal protection analysis, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest" (id.; see Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn., 167 AD3d 88, 99 [2018]).

Here, since none of the classifications are inherently suspect nor do they jeopardize the exercise of a fundamental right, rational basis review applies. To this end, we reject plaintiffs' argument that the repeal makes classifications based on religion, which could implicate a fundamental right and require heightened scrutiny. Instead, the repeal places all school-aged children who are not medically exempt on equal footing, which does not offend equal protection. For example, the Supreme Court of the United States has held that "there is no denial of equal protection in excluding [Jehovah's Witnesses'] children from doing . . . what no other children may do" (Prince v Massachusetts, 321 US 158, 171 [1944]), and, indeed, there is no equal protection violation where children are not permitted to attend school without a vaccination (see Zucht v King, 260 US 174, 176-177 [1922]). Significantly, "in the exercise of the police power[,] reasonable classification may be freely applied, and that regulation is not violative of the [E]qual [P]rotection [C]lause merely because it is not all-embracing" (id. at 177).

Under the well-settled case law and the facts presented here, the repeal easily survives rational basis review. The

group targeted by the Legislature is, and has been since the enactment of Public Health Law § 2164, school children. This is a logical place from which to start, as it ensures that the vast majority of children – who will quickly grow into the vast majority of adults – are vaccinated. Further, school children, by their very environment and nature, spend significant portions of their time in close contact with one another. Most parents, no doubt, are well aware of the speed with which a virus can sweep through a classroom. Targeting school children, as such, is a rational approach to stemming the spread of communicable diseases. From there, certain exceptions were carved out for those who would be particularly burdened or harmed by vaccination – namely, the medical and religious exemptions. While perhaps no vaccination regime may ever be perfect, it became clear from the 2018 measles outbreak that there were cracks in New York's prevention scheme. The Legislature, determined to increase the vaccination rate, distinguished between the two existing exemptions. Although parallels may be made between the two, the groups they address are not similarly situated. Those school children with medical exemptions have been advised by a physician that certain immunizations may be detrimental to their physical health (see Public Health Law § 2164 [8]). There are many arguments to be made as to how children formerly subjected to the religious exemption may also be detrimentally impacted, however, documented concerns as to the physical well-being of children with medical exemptions is a sufficient basis upon which to distinguish the two groups. Indeed, it would be irrational to sacrifice the physical health of some children in the pursuit of protecting public health. In attempting to address the vulnerabilities in its current immunization scheme, the Legislature was permitted to exercise such "broad discretion required for the protection of the public health" (Zucht v King, 260 US at 177). Accordingly, Supreme Court properly determined that plaintiffs have failed to state a cause of action pursuant to the equal protection clause.

Finally, contrary to their contention, plaintiffs' freedom of speech claim fails as a matter of law. "[F]reedom of speech prohibits the government from telling people what they must say" (Rumsfeld v Forum for Academic and Institutional Rights, Inc.,

547 US 47, 61 [2006]). Expressive conduct, however, is protected by the First Amendment if it is "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative" (Clark v Community for Creative Non-Violence, 468 US 288, 294 [1984]; see Matter of Gifford v McCarthy, 137 AD3d 30, 41 [2016]). Given this two-part test, plaintiffs' compliance with Public Health Law § 2164 is merely conduct, not constitutionally protected speech. Although the repeal may force parents to make difficult decisions for their families, it "does not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like" (Catholic Charities of Diocese of Albany v Serio, 7 NY3d at 523). Rather, plaintiffs remain free to express whatever views they may have on the subject of vaccination (see Matter of Gifford v McCarthy, 137 AD3d at 41). As such, plaintiffs' claim that the repeal interferes with their rights of free speech is without merit, as the conduct allegedly compelled is not sufficiently expressive to trigger First Amendment protections (see id. at 42). Accordingly, Supreme Court did not err in granting defendants' motion and dismissing the complaint. Plaintiffs' remaining contentions have been examined and have been found to lack merit.

Garry, P.J., Lynch, Aarons and Reynolds Fitzgerald, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court