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SUPREME COURT
OF THE
STATE OF CONNECTICUT

SC 20776
KEIRA SPILLANE, ET AL.
V.
NED LAMONT, ET AL.

BRIEF OF THE PLAINTIFFS-APPELLEES

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COUNTERSTATEMENT OF THE ISSUES

A. Was the trial court correct in holding that sovereign immunity did not apply to Plaintiffs' constitutional challenges to Public Act 21-6, where the allegations in the complaint, if ultimately proven true, constitute substantial claims of violations of plaintiffs' constitutional rights?

B. Was the trial court correct in holding that the statutory waiver of sovereign immunity contained in C.G.S. § 52-571b(c) applies to subsequently enacted laws such as P.A. 21-6?

C. Was the trial court correct in holding that P.A. 21-6 – which is merely one of an infinite number of potential state actions which could trigger the edicts of §52-571b – did not supersede or repeal §52-571b?

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I. INTRODUCTION

This matter is largely about the Defendants trying to turn a motion to dismiss into a motion for summary judgment.

Much like they did below in improperly arguing facts outside of the pleadings and otherwise seeking to litigate the substantive merits of the complaint, the Defendants in their appellant brief have wrongly included a plethora of alleged facts, data and information that was not a part of the record at the time the trial court denied their motion to dismiss. It is black letter law that a reviewing court is limited to the record below. "When... the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support ***in the facts that appear in the record***." *Blumenthal v. Kimber Mfg., Inc.*, 265 Conn. 1, 7, 826 A.2d 1088 (2003) (citations omitted).[1]

For instance, the case cited by the Defendants as support for the proposition that this reviewing court can take judicial notice of certain things, *Conboy v. State*, 292 Conn. 642, 651-52 (2009), actually confirms their apparent misapprehension. PA 15, note 2. Therein, the court stated that "if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss; other types of undisputed evidence; and/or public records of which judicial notice may be taken; the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts "and need not conclusively presume the validity of the allegations of the complaint." *Id.* (citations omitted) (emphasis in original).

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[1]Out of an abundance of caution and to ensure that the proverbial playing field is level, the Plaintiffs may include some materials not in the record below solely to counter the extraneous items in the appellate brief and appendix.

In short, the trial court (Genuario, J.) was correct to conclude that (a) the state has expressly waived sovereign immunity in C.G.S. §52-571b, and (b) the Plaintiffs have pled substantial violations of constitutional rights and, thus, sovereign immunity does not apply in this case.

II. COUNTERSTATEMENT OF FACTS

"The percentage of kindergarten students with a religious exemption decreased by 0.2% compared with last year and is now 2.3%. The national average during 2019-20 for non-medical exemptions is 2.2%." PA 61.

Notably, the data contained in PA 60-62 measures *only* incoming kindergarten students; there is no data or information regarding the overwhelming majority of Connecticut's K-12 students, as the state only checks student vaccination status at original enrollment and 7th grade. C.G.S. 10-204a(a). Hence, there is no way for the Defendants to know the vaccination status of children in Grades 1 though 6 and 8 through 12.

In the year preceding the repeal, 1.3% of incoming Kindergarteners were not compliant with the vaccine requirements and did not have either a medical or religious exemption. PA 62.

The Defendants are cherry-picking data. In particular, they are providing only a small snapshot of the vaccination rate of the entire K-12 student body. A look at the 7th Grade vaccination rates for the year preceding the repeal, however, shows that ***98% of all 7th grade public and private school students in Connecticut were vaccinated for MMR***. PA 62. The use of the religious exemption decreased as students get older.

The CDC recommendation has nothing to do with herd immunity. App, Br. 15-16. This claim by the Defendants, from a CDC press release, can be refuted with countervailing facts indicating that

the current "95%" figure is the culmination of a series of goals set by the CDC to increase vaccination rates each decade. But because this is a motion to dismiss and the record below is limited to the allegations of the complaint, undisputed facts, and any affidavits attached to the pleadings below, the Plaintiffs will not partake in Defendants' de facto effort to turn a motion to dismiss into a motion for summary judgment.

There is no indication that the current vaccination rates or any trend in vaccination rates over the last three decades even, have any impact on the occurrence of measles in the Connecticut community. In fact, according to the Defendants' own data, the following are the number of measles cases in the state, by year, ***for the last 30 years***: 1994-0; 1995-2; 1996-2; 1997-1; 1998-0; 1999-2; 2000-0; 2001-0; 2002-1; 2003-1; 2004-0; 2005-0; 2006-0; 2007-0; 2008-0; 2009-0; 2010-1; 2011-1; 2012-1; 2013-0; 2014-5; 2015-0; 2016-1; 2017-0; 2018-3; 2019-4; 2020-0; 2021-2. PA 59 ("Vaccine Preventable Disease" link; then "Vaccine – Preventable Disease Case Counts" link). The incidence of measles in Connecticut going back 30 years, presumably when overall vaccination rates were significantly lower than they are today, has fluctuated from 0 to 5 cases annually irrespective of vaccination or exemption rates.

According to the CDC, "[t]he United States has maintained measles elimination status for almost 20 years." Centers for Disease Control and Prevention, *Measles Elimination*.

The Defendants cite to a Connecticut State Department of Public Health press release, dated April 23, 2021, that announces **two cases**[2] of measles which occurred within the same household. PA 70. The second case was another child in the household who "was not yet vaccinated" and acquired measles "while travelling internationally."

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[2] Defendants state that there were "multiple" cases of measles in Connecticut citing to the two cases in 2021. App. Br. at 16.

Press Releases, *DPH Confirms Case of Measles in CT Child*, Connecticut State Department of Public Health, 4/09/2021, available at https://portal.ct.gov/DPH/Press-Room/Press-Releases---2021/DPH-Confirms-Case-of-Measles-in-CT-Child. These two measles cases in the same household comprised the total number of measles cases in the entire state of Connecticut for the year 2021.

The modest increase in the rate of religious exemptions has not led to any increase in infectious disease and has not adversely impacted the peace and safety of the state. To be sure, the State of Connecticut's schools have not had a substantial outbreak of any infectious disease for which a vaccine is mandated pursuant to C.G.S. §10-204a, in many decades. CA 11 ¶8.

III. ARGUMENT

A. The State Expressly Waived Sovereign Immunity in C.G.S. §52-571b.

1) Standard of Review

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.... [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant ... the motion to dismiss will be de novo." *Columbia Air Services Inc. v. Department of Transportation*, 293 Conn. 342, 346-47 (2009).

2) Sovereign Immunity is waived as to the Plaintiffs' first, second and third causes of action.

"[T]he sovereign immunity enjoyed by the State is not absolute. There are [three exceptions: (1) when the legislature, either expressly or by force of a necessary implication statutorily waives the State's

sovereign immunity; (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the State or one of its officers has violated the plaintiffs constitutional rights; and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." *Columbia Air,* 293 Conn. at 349.

As to the first three causes of action in the complaint, the State has expressly waived sovereign immunity via C.G.S. §52-571b. "A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state." §52-571b(c)

The Connecticut Supreme Court "recogniz[es]" "the judicial duty under a constitutional government such as ours to decide a justiciable controversy as to the constitutionality of a legislative enactment." *Horton v. Meskill*, 172 Conn. 615, 625, 376 A.2d 359, 364 (1977).

Plaintiffs allege a violation of: Connecticut's Religious Freedom Restoration statute, C.G.S. §52-571b in Count One; the free exercise clause of the Connecticut Constitution in Count Two; and the equal protection clause of the Connecticut Constitution, infringing free exercise, in Count Three – and each of these claims are predicated on allegations of state action that is violative of Plaintiffs' free exercise of religion. Therefore, because the state has expressly waived its sovereign immunity in C.G.S. §52-571b, the Court has subject matter jurisdiction over these claims - that the state has unduly burdened the Plaintiffs' free exercise of religion.

3) Our Supreme Court has already found that §52-571b applies to legislation.

This Court has already acknowledged the obvious - that Connecticut's Religious Freedom Restoration Act, codified in §52-571b of the General Statutes, applies to legislation.

In *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, 285 Conn. 381, 941 A.2d 868 (2009), the Supreme Court explained that "[section] 52–571b was enacted in response to the United States Supreme Court's decision in *Employment Division, Dept. Of Human Resources of Oregon v. Smith, supra,* at 494 U.S. 885, in which the court held that a generally applicable prohibition against socially harmful conduct does not violate the free exercise clause, regardless of whether ***the law*** burdens religious exercise." (Footnote omitted.) *Id*. at 423 (emphasis added). "[T]he purpose of § 52–571b was to restore the balancing standard, articulated by the United States Supreme Court in *Sherbert v. Verner,* 374 U.S. [398,] 403, [83 S.Ct. 1790, 10 L.Ed.2d 965 (1963),] under which ***a law*** that burdens religious exercise must be justified by a compelling governmental interest." (note omitted) *Id.* at 424 (emphasis added).

In the unlikely event there is any doubt that §52-571b applies to laws, a traditional statutory construction analysis leads to the same unequivocal conclusion.

4) The plain language of §52-571b is clear and unambiguous.

"When construing a statute, [the Court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In other words, [the Court will] seek to determine, in a reasoned manner, the meaning of the statutory language as applied to

the facts of the case, including the question of whether the language actually does apply...." *C.R. Klewin Ne., LLC v. Fleming*, 284 Conn. 250, 261, 932 A.2d 1053, 1059 (2007).

"The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Conn. Gen. Stat. Ann. § 1-2z.

"When a statute is not plain and unambiguous, [the Court] also look[s] for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." *Southern New England Telephone Co. v. Cashman,* 283 Conn. 644, 650-51, 931 A.2d 142 (2007).

Section 52-571b provides, in pertinent part, that "[t]he state or any political subdivision of the state shall not burden a person's exercise of religion…" The law expands on that broad description in subsection (f): "For the purposes of this section, 'state or any political subdivision of the state' ***includes*** any agency, board, commission, department, officer or employee of the state or any political subdivision of the state..." C.G.S. §52-571b(f) (emphasis added). This definitional provision is clearly not exhaustive or the legislature would simply have said: "the term 'state' ***means*** …" rather than "the term 'state' ***includes*** ..."

An analysis of the legislative history confirms our Supreme Court's understanding.

5) The legislative history makes it clear that §52-571b applies to legislation.

a) General Assembly

Influential Senator George Jepsen said of Connecticut's Religious Freedom Restoration Act: "For 31 years until 1989 the United States of America had a standard by which – a constitutional standard by which to evaluate whether a religious minority was having its legitimate constitutional rights infringed upon by a state action or state law. This standard which required that the state show a compelling state interest in enacting a law and its impact on the free exercise of religion was overturned in a narrow decision [*Smith*] in 1989 by the Supreme Court. The court left in place a far weaker standard by which to evaluate whether ***laws*** affecting the free exercise of religion violated the Constitution." Senator Jepsen, *CT General Assembly, Senate Proceedings*, Vol. 36, Part 8, pp. 2601-2911 (1993) (p. 2780) (emphasis added). "In overturning the standard and leaving essentially all a state had to show was that it had a rational basis for ***enacting a law*** that could have an incidental impact on religion." *Id.* at p. 2781 (emphasis added)

In response to a question from Senator Kissel as to whether §52-571b would provide a "religious" defense for people charged with violation Connecticut's Controlled Substance LAWS / STATUTES, Senatore Jepson further stated: "I'm not sure that under any circumstances any religious group could make the claim that they have the right to …[torture wild animals] just because it's the free exercise of religion, but it does take judgment calls in the margin and I think that the compelling interest standard leaves plenty of room to rule invalid the more extreme forms of religious practice that might be at issue while protecting the legitimate exercise of religion, as we know it,

and even allowing the wide variation in the practice of religion, which is part of our political heritage. *Id.* at p. 2783.

Representative Ward went on to say: "Connecticut will now be the first state in the nation to say that what had been the law for 40 years in this country, will remain the law at least in this State, that if you have a deeply held religious belief and are exercising your religion, that the State cannot interfere with that, absent a compelling interest and absent less restrictive means of applying the generally applicable ***law***." *CT General Assembly, Senate Proceedings*, Vol. 36, Part 14, pp. 4778-5152 (1993) (p. 4924) (emphasis added). "This law will allow a balancing when there is a compelling State interest to apply a generally applicable ***law***, but it says that you've got to have that compelling interest so that we will say to all the citizens of Connecticut, your religious practices are protected in this State and as I say, we're the first state in the nation to do that." *Id.* (pp. 4924-25) (emphasis added).

Thus, if the Court somehow finds some ambiguity about the applicability of §52-571b to subsequent legislation, the statements of the legislators who presented and voted for the law unequivocally indicate their intent that this new law apply to any future laws that implicate religious freedom. This conclusion is, somewhat ironically, bolstered even further in a Formal Opinion submitted to the General Assembly prior to the passage of Public Act 21-6.

b) Attorney General's formal opinion

In 2019, at the request of the General Assembly while it was considering passage of Public Act 21-6, the Office of the Attorney General issued a formal legal opinion regarding whether a ***LAW*** eliminating the school vaccine Religious Exemption contained in C.G.S. §10-204a(a) would pass constitutional and legal muster. *Office of the Attorney*

General, Formal Opinion #2019-01; CA 53.

The Attorney General's formal opinion is replete with mentions of whether "**the state**" has the authority to remove the religious exemption; and as he was responding to a direct inquiry from House Speaker Matthew Ritter specifically about the very legislative proposal that ultimately became Public Act 21-6, there is no doubt whatsoever that Connecticut's Attorney General understood that any such law would be subject to the standards set forth in C.G.S. §52-571b. *Id*.

In fact, the Attorney General wrote an entire paragraph acknowledging that any such repeal of the Religious Exemption would hinge on the heightened standard of review provided by C.G.S. §52-571b.

> The only legal question here is whether requiring vaccination as a precondition to enrolling at a public or private school, without a religious exemption, is the "least restrictive means" of accomplishing the salutary purpose of the statute. Such an inquiry must be informed by the underlying principle that "'[t]he 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.'" *Phillips*, 775 F.3d at 543 (quoting *Prince*, 321 U.S. at 166-67). The legislature could reasonably determine that the requirements of Section 52-571b were satisfied in this situation meaning the Legislature and engaging in a legal analysis regarding whether a statute removing the religious exemption would satisfy § 52-571b.

Id. at p. 5.

Accordingly, and because this aspect of the legislative history is consistent with the aforementioned legislative testimony and this Court's finding in *Cambodian Buddhist Society of Connecticut, Inc*., 285 Conn. 381, there is no doubt

that the State has expressly waived its sovereign immunity as to the Plaintiffs' state free exercise claims in counts one (§52-571b), two (Free Exercise) and three (Equal Protection).

6) Public Act 21-6 does not conflict with, nor supersede, C.G.S. §52-571b.

The Appellate Court, in *Rweyemamu v. Commission on Human Rights and Opportunities*, 98 Conn.App. 646, 911 A.2d 319 (2006), elucidated the relevant standards in determining whether a subsequent law supersedes an existing one. "[W]e are mindful that when the legislature enacts a statute, it is presumed to be aware of the status of the law relevant to the statute. *Id*. at 662 (citing *St. George v. Gordon*, 264 Conn. 538, 553, 825 A.2d 90 (2003) ("legislature is presumed to have acted with knowledge of existing statutes") and *Considine v. Waterbury*, 279 Conn. 830, 844, 905 A.2d 70 (2006) ("legislature is presumed to be aware of prior judicial decisions involving common-law rules" [internal quotation marks omitted])." *Id*. This Court need not rely on that presumption, however, as the legislative history in the form of the Attorney General's Formal Opinion, which was specifically requested by the Speaker of the House to address any potential legal pitfalls should the legislature remove the school vaccine religious exemption, shows without question that the legislature was acutely aware that P.A. 21-6 would be subject to the "strict scrutiny" standard under §52-571b.

> Repealing or suspending the religious exemption does not create any necessary conflict with Section 52-571b in the first instance. Combatting the spread of dangerous infectious diseases, particularly among children who congregate in schools where the danger of the spread of such diseases is particularly high, grounded as it is in the state's paramount duty to seek to ensure public safety, has repeatedly been found

> to constitute a compelling state interest. (citations omitted) The only legal question here is whether requiring vaccination as a precondition to enrolling at a public or private school, without a religious exemption, is the "least restrictive means" of accomplishing the salutary purpose of the statute.

Office of the Attorney General, *Formal Opinion* #2019-01, at p. 5. Thus, there is no doubt that the legislature was aware of the existing law (§52-571b) and believed that the repeal of the religious exemption would survive the "strict scrutiny" standard set forth in §52-571b.

Moreover, and as Judge Genuario pointed out below: "First, repeal by implication is not favored and will not be presumed when the old and new statute can work together. *Rivera v. Commissioner of Corrections,* 254 Conn. 21 (2000); *Nash v. Yap,* 247 Conn. 638 (1999). Second, the legislature is presumed to know of existing statutes and to know how to draft legislation to effectuate its intent. *McCoy v Commissioner of Public Safety,* 300 Conn. 144 (2011); *State v. Courchesne,* 296 Conn. 62 (2010). Third, where two pieces of legislation can be reconciled the Court must read them harmoniously. *Connecticut Life and Health Insurance Guaranty Association v. Jackson,* 173 Conn 352 (1977)." CA 82.

B. The Complaint Alleges Substantial Claims of Constitutional Violations.

"But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943).

1) Standard of Review

"A motion to dismiss ... properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law

and fact state a cause of action that should be heard by the court.... A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction.... [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant ... the motion to dismiss will be de novo." *Columbia Air*, 293 Conn. at 346-47.

2) Defendants misconstrue the Standard of Review.

The Defendants contend that the standard of review in a motion to dismiss based on sovereign immunity is "the functional equivalent of the legal sufficiency standard applicable to a motion to strike". App. Br. at 22. The trial court properly rejected[3] this argument, stating that "the second exception to sovereign immunity does not require the Court to evaluate the substantive merits of the constitutional claims but rather to evaluate the factual allegations and the nature of the alleged incursion on the plaintiff's rights". CA 85.

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[3] The trial court explained: "A motion to dismiss is not designed to test the legal sufficiency of a complaint in terms of whether it states a cause of action. That should be done, instead, by a motion to strike…, the practical difference being that if a motion to strike is granted, the party whose pleading is stricken is given an opportunity to re-plead in order to avoid a harsh result." *Pratt v. Old Saybrooke*, 225 Conn. 177, 185 (1923). There is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike. *Pecan v. Madigan*, 97 Conn. At 617, 621 (2006) *cert denied*, 281 Conn. 919 (2007) (internal quotations omitted)." CA 76-77.

"But it is the *nature of the rights burdened* and the factual underpinnings that demonstrate that such constitutional rights have been burdened, that trigger the second exception to the doctrine of sovereign immunity, not the merits of the claim." CA 87-88.

At the trial court level, the Defendants relied primarily on this Court's decisions in *Columbia Air Services* and *Barde*. On appeal, the Defendants now rely primarily on *Markley*.

In *Markley*, the plaintiff, an electric utility ratepayer, appealed from the judgment of the trial court dismissing the actions against the defendants, the state department of public utility control. *Markley v. Dep't of Pub. Util. Control,* 301 Conn. 56, 58, 23 A.3d 668, 672 (2011). The defendants filed a motion to dismiss, maintaining that the court lacked subject matter jurisdiction because the plaintiff's claims were barred by the defendants' sovereign immunity. *Id.* at 62. In response, the plaintiff submitted an amended complaint, adding new claims that the defendants violated his right to equal protection of the law, and filling an opposition arguing his action was not barred by sovereign immunity because he was seeking injunctive relief based on allegations that the defendants had acted unconstitutionally. *Id.* at 63. In response to the amended complaint, the defendants brought a motion to strike averring that the plaintiff's claims failed as a matter of law. *Id.* at 63. The trial court then granted the motion to dismiss. *Id.* at 63.

The Court affirmed the trial court's dismissal because "the plaintiff has not set forth a substantial claim that the order violated his right to equal protection, and, accordingly, that the constitutional sovereign immunity exception does not apply." *Id.* at 67. The court held: "In the present case, there is no indication, and the plaintiff does not allege, that the higher tax burden the order allegedly imposes on CL & P ratepayers reflects any animus toward that class on the part of

the department or the legislature. Rather, the plaintiff argues simply that: (1) the charges arbitrarily apply to the distributor's customers but not to municipal ratepayers; and (2) the order inequitably distributes the burden between the CL & P and United customers. Those allegations are insufficient, as a matter of law, to establish a violation of the plaintiff's equal protection rights." *Id.* at 71.

This is unmistakably distinguishable from the instant case where the Plaintiffs clearly allege that the Defendants targeted religious practice in "a concerted effort to violate the religious rights of Plaintiffs." CA 9 ¶1; *see also* CA 25 ¶ 60 (alleging Defendants actions demonstrate a hostility to religious beliefs); CA 26 ¶64 (alleging Defendants actions intentionally treat religious students different than other classes of students); CA 27 ¶72; CA 29 ¶89. Unlike the instant action, the *Markley* plaintiff did not allege that the legislative classifications were drawn along suspect lines or that they burdened any fundamental rights. *Markley*, 301 Conn. 56, 69, 23 A.3d at 678.

Moreover, because *Markley* did not involve an incursion on a fundamental right or a suspect classification, the Court looked at the issue from the "rational basis" standpoint and not, as is applicable here, the highest and most fact-driven level of review – strict scrutiny.

In any event, the problem in *Markley*, like in *Columbia Air* and *Barde,* was that the plaintiff did not allege sufficient facts[4], that even if

[4] "The complaint, to survive the defense of sovereign immunity, must allege sufficient facts to support a finding of a taking of [property] in a constitutional sense...."*Gold v. Rowland*, 296 Conn. 186, 201, 994 A.2d 106, 117 (2010) (granting state's motion to dismiss plaintiff's claim of unconstitutional taking under the state constitution based on sovereign immunity because "plaintiff neither alleged in his complaint nor presented any evidence to the trial court" that he had an agency

taken as true, amounted to a constitutional violation.[5] That is plainly not the case here.

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relationship with the state and therefore he would be "unable to prove this fact at trial"). Here, the Plaintiffs alleged sufficient facts to support a finding of a free exercise violation.

[5] This Court explained the weakness of the *Markley* plaintiff's constitutional allegations: "The present status of the plaintiff's constitutional claims is somewhat murky. Although the plaintiff contends in his reply brief that he has 'consistently challenged P.A. 10–179 as ... unconstitutional, both at the trial level and on appeal,' a review of the record fails to bear out that contention. The plaintiff's original complaint did not contain any constitutional claims. Although he subsequently amended his complaint to allege that the order denied him equal protection of the law, the amended complaint refers only to the financing order, and the plaintiff initially disclaimed any facial challenge to P.A. 10–179. In a December 10, 2010 supplemental memorandum to the trial court intended to clarify the nature of his complaint, he clearly states: 'Nowhere in the plaintiff's amended complaint does the plaintiff mention P.A. 10–179.... The plaintiff is not seeking an order as to the constitutionality of P.A. 10–179.... The plaintiff is not seeking a determination of constitutionality....' The plaintiff appeared to retreat from this position at the trial court's December 20, 2010 hearing, suggesting that 'I would not abandon the constitutional [challenge to P.A. 10–179] ... [e]ven if I've appeared to have abandoned [it] in that ... memorandum.' Nevertheless, the plaintiff's brief to this court is devoid of any reference to the constitutionality of P.A. 10–179 as a potential basis for overcoming sovereign immunity. At oral argument before this court, the plaintiff's counsel again disclaimed a facial equal protection challenge, and also

3) A Motion to Dismiss assumes all facts alleged as true.

In a motion to dismiss, the Court will "take the facts as expressly set forth, and necessarily implied, in the plaintiff's complaint, construing them in the light most favorable to the pleader." *C.R. Klewin Ne.*, 284 Conn. at 253 (citing *First Union National Bank v. Hi Ho Mall Shopping Ventures, Inc.,* 273 Conn. 287, 291, 869 A.2d 1193 (2005)).

"Sovereign immunity relates to a court's subject matter jurisdiction over a case, and therefore presents a question of law over which [the Court] exercise[s] de novo review. In so doing, [the Court] must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." *C.R. Klewin Ne., LLC v. Fleming*, 284 Conn. 250, 257, 932 A.2d 1053, 1057 (2007) (citing *184 Windsor Avenue, LLC v. State,* 274 Conn. 302, 308, 875 A.2d 498 (2005) (Internal quotation marks omitted.).

Plaintiffs herein do not merely *allege* in conclusory fashion a constitutional violation. Rather, Plaintiffs allege facts that reasonably support those violations. The Defendants confuse alleging the facts that make out a constitutional violation, with proving the merits of the constitutional violation; indeed, it seems the Defendants seek to turn their Motion to Dismiss into a Motion for Summary Judgment. [6]

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appeared to disclaim any equal protection challenge to the order as applied to the plaintiff." *Markley*, 301 Conn. at 67 n. 12.

[6] The Defendants have gone so far as to include multiple "data" and "informational" items in their Appendix that were simply not a part of the record below and, therefore, are not appropriate for consideration by this reviewing court. Beyond effectively seeking to convert this

4) The Plaintiffs' Right to Education claim pursuant to the Connecticut Constitution (fourth cause of action) is substantial and therefore comes within the second exception to sovereign immunity.

The Defendants' acknowledge that, under Connecticut law, the right to an Education is fundamental. CA 39. Nonetheless, they assert that not all claims of a violation of that fundamental right must be subject to strict scrutiny based on *Campbell v. Bd. of Educ.*, 193 Conn. 93, 105 (1984) *Id.* However, *Campbell i*nvolved a claim that a school board policy imposing academic sanctions for nonattendance – and the court held that, because there was no other fundamental right involved, that the claim was subject to rational basis review.

In this case of first impression, however, the Plaintiffs have alleged that, as a result of the targeted removal of the vaccine religious exemption, Defendants have forced Plaintiffs into a Hobson's choice: either swallow the substantial infringement on the fundamental right to the free exercise of their religion and vaccinate their children or incur the substantial infringement of their fundamental right to education. Regardless of which decision Plaintiffs make, the Defendants will have wrongly violated their fundamental rights. Accordingly, strict scrutiny must apply. Given the applicability of this highest standard, the Defendants will not be able to meet their burden of showing that there is a compelling interest in the repeal and that

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matter to one for Summary Judgment, the Defendants also believe that "de novo" review means "a new trial." Plaintiff's will shortly be filing a Motion to Strike, accordingly.

attacking religious freedom was the least restrictive means of addressing that interest.

Moreover, an analysis under strict scrutiny is extremely fact-intensive and this motion to dismiss is simply not the proper mechanism for that determination to be made. *See Forde v. Baird*, 720 F.Supp.2d 170 (2010) (wherein a motion to dismiss a claim under the federal RFRA statute was converted to a motion for summary judgment).

5) The Plaintiffs' constitutional challenges pursuant to the Free Exercise Clauses of the Connecticut Constitution (second cause of action) and the U.S. Constitution (fifth cause of action) are substantial and therefore come within the second exception to sovereign immunity.

a) The district court case, *WTP*, heavily relied upon by Defendants, is distinguishable in many ways.

The Defendants mistakenly place a lot of their appellate eggs in the district court ruling in *We the Patriots USA, Inc. v. CT Office of Early Childhood Education*, 579 F.Supp.3d 290 (D. Conn. 2022) ("*WTP*").

In the first instance, the claims in the Plaintiffs' complaint are materially different than those pled in *WTP*. In this case, the Plaintiffs primary claim is based on Connecticut's Religious Freedom Restoration Act, codified in C.G.S. §52-571b. There are no state law claims at all in *WTP*.

Additionally, out of 5 claims in *WTP* and the 7 herein, only 2 of the claims sound in similar law, as both complaints allege a violation of the federal constitutional free exercise and equal protection clauses. But even those claims are substantially different. In the complaint, Plaintiffs allege that: the subject law is neither neutral nor generally applicable; it resulted from religious animus; it is subject to strict scrutiny; there is no compelling interest; and the Defendants cannot establish that the repeal of the religious exemption was the least restrictive means of achieving any alleged compelling interest. Conversely, the plaintiffs in *WTP* alleged a mish-mash of religion, education, and equal protection claims within its free exercise claim.

Further, it is unclear if the *WTP* federal case is primarily an effort to promote *WTP* as an organization rather than a bona fide challenge to Public Act 21-6. In dismissing the *WTP* case, the federal court reprimanded the attorneys, stating "neither associational Plaintiff (WTP or Connecticut Freedom Alliance LLC) identifies any individual member by name." In footnote 6, the judge noted that the plaintiffs did not rebut the fact that the associational Plaintiffs did not have a redressable injury: "Defendants also argue that the associational Plaintiffs do not have standing to sue on their own behalf because they do not have their own redressable injury. (Defs.' Mem. at 8 n.9.) This is not rebutted by Plaintiffs. (See Pls.' Opp'n at 9-10.)" *WTP,* 579 F.Supp.2d 290, n. 6. Notably, the lead party in that suit is an entity known as "We the Patriots USA, Inc." which was created and controlled by the Plaintiff's lead attorney, Brian Festa. *CT Secretary of State*, Business ALEI# 1353354. Additionally, and perhaps most troubling, at the time of the *WTP* filing, Brian Festa worked for the very executive branch that he was suing. Brian Festa, GOV SALARIES, https://govsalaries.com/festa-brian-d-135762422 (last accessed April 4. 2023).

There are other aspects of the *WTP* case which also call into question whether *WTP* is a bona fide challenge to Public Act 21-6. The court pointed out, in Footnote 5, that in a pretrial conference the *WTP* attorneys were instructed to amend their Complaint to name the agency officials themselves as individuals as Defendants, instead of naming the state agencies which employ them. The Attorneys were warned that the case would be dismissed based on claims of 11th Amendment immunity unless they amended the Complaint, yet the *WTP* Attorney inexplicably failed to Amend their complaint.[7] In any event, the *WTP* decision that the Defendants herein have placed so much faith, is of no precedential value.

b) *WTP* is not binding precedent.

The Defendant's primary argument is that because a district court dismissed a federal free exercise challenge to P.A. 21-6 for failure to state a claim, that somehow renders the Plaintiffs' constitutional claims as *unsubstantial* for purposes of the second exception to sovereign immunity. The Defendants heavy reliance on this decision is misplaced for several reasons.

The complaint in the subject case, *WTP* is substantially and materially different from that herein. First, *WTP* is a federal district court decision which "is not binding on this court". *Velasco v. Comm'r*

[7] In the same vein, the complaint in *WTP* was filed – in conjunction with a press conference on steps of the Connecticut Supreme Court - on April 30, 2021, less than 2 days after Public Act 21-6 was enacted and barely after the ink was dry. It is unlikely that the plaintiffs and their attorneys could have crafted a serious complaint when the final bill language was 2 days old and they hadn't yet even had access to the legislative history / record / transcripts.

of Correction, 214 Conn. App. 831, 847 n.7, *cert. denied*, 345 Conn. 960, 285 A.3d 52 (2022).

Most importantly, though, in addition to the fact that *WTP* is currently on appeal in the 2nd Circuit and therefore of *no current precedential value*, the Defendant's curiously failed to inform this Court that the appeal has been *expressly held in abeyance* by the Court of Appeals pending it's ruling in the highly analogous case of *M.A. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29 (2d Cir. Nov. 9, 2022). *See* Certified Order, *We the Patriots USA, Inc. v. CT Office of Early Childhood Education*, Docket #22-249, Document #99 (2d Cir. Oct. 17, 2022).

And in *M.A.*, the Second Circuit has since decided to vacate the district court's grant of summary judgment for defendants on the plaintiffs' Free Exercise Claim which challenged Rockland County's Emergency Declaration that prohibited unvaccinated children, except those with a medical exemption, from assembly in certain public spaces. *M.A.*, 53 F.4th at 39.[8] The Second Circuit "consider[ed] whether the Declaration "had as [its] object the suppression of religion" by assessing factors including, "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 decision-making body." *Id*. at 37 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 540 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, __U.S. __, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540). "Government fails to act neutrally when it proceeds in a manner intolerant of

[8] Unlike *WTP*, this highly analogous decision of the 2nd Circuit Court of Appeals is persuasive precedent.

religious beliefs or restricts practices because of their religious nature.*"* *Id*. at 37 (*quoting Fulton*, 141 S. Ct. at 1877). The Court then noted that, "[w]here a law is not neutral or generally applicable, 'this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.'" *Id*. at 36 (citations omitted). The Court went on to set forth the necessary analysis for a court in determining whether a law is neutral and generally applicable. "If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id*. at 36-37 (citation omitted). "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face."

The Second Circuit found that, though the applicable law was neutral on its face, there were genuine issues of fact as to whether the law targeted individuals' right to freely exercise their religion and, therefore, ***reversed*** the granting of summary judgment in favor of the government defendant. *Id*. "[G]iven the fact-intensive nature of this inquiry, Defendants have not met the high bar required to prevail at the summary judgment stage." *Id*. at 37

In this case, there is little doubt that P.A. 21-6 is not neutral on its face, as the entire purpose of the law was to eliminate the school vaccine ***religious*** exemption which has existed for as long as the vaccine requirement itself.[9] That alone should secure the survival of

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[9] The legislative history supports the idea that, at the time of the passage of Connecticut's school vaccine mandate in 1959, legislators believed that the Constitutions required a religious exemption. "If you will notice in this bill, we have provided that (1) if any youngster or the parent of youngster secures a certificate from a physician showing that

Plaintiffs' free exercise claims. And the nature of the religious burden here is a permanent interference and alteration of the sanctity of their bodies, which Plaintiffs believe is God's divine creation.

Moreover, given the nature of Plaintiffs' claims and the reality that the question of whether the Defendants can meet the high burden of strict scrutiny is wholly fact-intensive – how, then, in light of the holding in *M.A.*, can Defendants have even remotely come close to the high bar necessary to prevail at this mere motion to dismiss stage?

c) Existing federal precedent does not address whether the removal of the religious exemption to school vaccination requirements violates the Free Exercise Clause.

Significantly, none of the cases relied upon by the Defendants concern a law which repeals an existing religious exemption to vaccine mandates. The cases that the Defendants rely upon in support of their mistaken contention that federal precedent compels the conclusion that P.A. 21-6 does not violate the free exercise clause do not stand for

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this child cannot take the vaccine because of his health, then that would be made an exception, (2) the only other opposition to mandatory legislation of, this type would be a person who has a religious belief against the vaccination. Now, that is also made an exception in this bill. Any person or parent who has a religious belief against having a child vaccinated by bringing such a certificate or letter to the school board would also be exempted from having the vaccine shot." Senator Alfano, *Joint Standing Committee Hearings*, *Public Health and Safety*, CT Gen. Assembly, 1959, p. 103

that proposition. And the Defendants ignore important recent Supreme Court and Second Circuit precedent, such as, *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021) and *M.A. on behalf of H.R. v. Rockland Cnty. Dep't of Health*, 53 F.4th 29, 36 (2d Cir. 2022), focusing instead on dicta and irrelevant antiquated decisions that do not even address the issues in this case.

The Defendants erroneously claim that the Supreme Court's 1905 decision in *Jacobson v. Massachusetts* forecloses the Plaintiffs' free exercise claim. *Jacobson* dealt with a plaintiff who relied on general claims of bodily autonomy to challenge a state's regulation requiring vaccination or pay a five dollar fine. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905). The plaintiff "refused to submit to vaccination for the reason that he had, 'when a child,' been caused great and extreme suffering for a long period by a disease produced by vaccination." *Id.* at 36. The Supreme Court of the United States held that "his views" did not "entitle him to be excepted from [the regulation's] provisions." *Id.* at 23. *Jacobson,* which does not address a religious exemption nor *any religious objections* to a vaccine requirement, is a rather slender reed to rely upon for the Defendant's proposition that P.A. 21-6 does not violate the Free Exercise clause. Indeed, *Jacobson* was decided decades before the Supreme Court, in *Gitlow v. New York*, 268 U.S. 652 (1925), ruled that the protections of the First Amendment apply to the states.

> But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.
>
> Start with the mode of analysis. Although *Jacobson* pre-dated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that,

in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. *Id.*, at 25, 27-28 (asking whether the State's scheme was "reasonable"). Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. *Lukumi*, 508 U.S. at 546.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption. 197 U.S. at 13–14. This Court disagreed. **But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.**

Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the fine, **or**

> **identify a basis for exemption**. *Id.*, at 12, 14. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, **given the opt-outs available to certain objectors**. *Id.*, at 36, 38–39.

Roman Cath. Diocese of Brooklyn v. Cuomo, 208 L. Ed. 2d 206, 141 S. Ct. 63, 70–71 (2020) (Gorsuch, J, concurring) (emphasis added).[10]

Notably, the plaintiff in *Jacobson* was offered the alternative of a fine in lieu of accepting the vaccination; and there is nothing comparable in Connecticut's compulsory vaccination scheme.

And *Prince v. Massachusetts*, an appeal from convictions for violating Massachusetts' child labor laws, had absolutely nothing to do with vaccines. The Supreme Court's statement quoted by Defendants ("the right to practice religious freely does not include the liberty to expose the community or the child to communicative disease or death") was superfluous language that was not necessary for the court to arrive at its holding, and therefore was dicta. *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944). Moreover, there is absolutely no evidence in the record that the Plaintiffs' attending school with religious exemptions would be exposing the community to communicative

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[10] Here, by contrast Defendants have effectively sought to ban all religious objection to the State's vaccination requirement. "Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. **In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument**." *Roman Cath. Diocese,* 141 S. Ct. at 79 (citing to *Jacobson*, 197 U.S. at 25) (emphasis added).

disease or death. Certainly, one line of dicta that is inapposite to the facts of this case, and which did not even address the legal issues presented in this case do not compel this Court to hold that the Plaintiffs' constitutional claims are not substantial.

Likewise, in *Phillips*, the plaintiffs challenged New York state's compulsory vaccination requirement for school attendance, which *allowed for* ***religious*** *and medical exemptions*. *Phillips*, 775 F.3d at 543. The issue in *Phillips* was whether New York had the ability to mandate vaccination for school attendance with religious and medical exemptions. *Id.* Whether religious exemptions are required by the United States Constitution was not adjudicated by the court, and the Second Circuit was merely expressing an opinion unnecessary to the outcome. The concurring opinion in a recent Second Circuit opinion regarding a Free Exercise claim sheds light on *Phillips*.

> In accordance with *Smith,* we said that "New York could constitutionally require that all children be vaccinated in order to attend public school" and the state "goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs." *Phillips v. City of N.Y.*, 775 F.3d 538, 543 (2d Cir. 2015). **But we have never said that allowing some unvaccinated students (i.e., those with medical exemptions) to mingle with their peers in school, while excluding religious objectors, would be constitutional.**

M.A. on behalf of H.R. v. Rockland Cnty. Dep't of Health, No. 21-551, 2022 WL 16826545, at *8 (2d Cir. Nov. 9, 2022) (J. Park, concurring) (emphasis added).

And this is the issue directly implicated by P.A. 21-6. The State now permits medical exemptions but excludes religious exemptions.

Significantly, this was not an issue in any of the case law cited by the Defendants. None of these cases even address a vaccine mandate that does not provide for a religious exemption, let alone a law which explicitly targeted religious exercise by repealing a religious exemption which had been provided by the State of Connecticut for over sixty years, while also providing secular exemptions.

The Defendants conveniently fail to mention *M.A.*, yet argue that " 'it is well settled' that Second Circuit decisions must be given 'particularly persuasive weight' on matters of federal law to prevent forum-shopping." App. Br. n. 6 (citations omitted).

6) Even if the Court applied a motion to strike standard, the Defendants' motion to dismiss must fail because P.A. 21-6 is subject to strict scrutiny under the First Amendment.

Whether a state action can withstand strict scrutiny review is highly fact-specific and not a determination fit for a motion to dismiss. *See Forde*, 720 F.Supp.2d 170 (wherein a motion to dismiss a claim under the federal RFRA was converted to a motion for summary judgment). Out of an abundance of caution, Plaintiffs will use the facts in the record to show that even now without the benefit of discovery, the Plaintiffs can demonstrate an incursion to constitutionally protected rights. However, Plaintiffs maintain that the trial court was correct in holding that "the second exception to sovereign immunity does not require the Court to evaluate the *substantive* merits of the constitutional claims but rather to evaluate the factual allegations and the *nature* of the alleged incursion on the plaintiffs' rights." CA 85 (emphasis in original).

a) P.A. 21-6 is subject to strict scrutiny because it is neither

neutral nor generally applicable.

Asking the Plaintiffs to prove the merits of their claims without the benefit of discovery is prejudicial. Defendants are essentially requiring the Plaintiffs to defeat a summary judgment motion without any of the evidence of the Defendants' unconstitutional acts which would be sought in discovery. However, even with only the facts in the record, as held by the trial court, the Plaintiffs "clearly demonstrate an incursion on constitutionally protected interests." CA 90.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). Neutrality and general applicability are overlapping concepts but they are nevertheless distinct, and therefore a law could fail the separate test of general application even if it satisfied the neutrality criteria. *See Lukumi,* 508 at 542.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *Fulton*, 141 S. Ct. at 1877. The Defendants have transgressed this neutrality standard by directly targeting religious exercise in removing the long-standing religious exemption. Even without the benefit of any discovery[11] it is clear that PA 21-6 is not neutral because it solely targeted[12] religious practice.

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[11] Discovery is needed to uncover the Defendants' motives, animus, and obtain evidence regarding the lack of neutrality.

[12] The Defendants' direct targeting of only religious practice is a clear distinguishing factor which sets this case apart from the precedents cited by the Defendants.

In *M.A.*, the Second Circuit found that a reasonable juror could conclude that the Emergency Declaration was neither neutral nor generally applicable, requiring strict scrutiny. *M.A.,* 53 F.4th at 39. The court held that a reasonable juror could find that the defendant acted with religious animus where the defendant was lobbying for the repeal of the religious exemption to vaccination in New York, which was not the government conduct being challenged in *M.A. Id.* at 37. The court held that "a reasonable juror could find the Declaration was designed to target religious objectors to the vaccine requirement *because of* their religious beliefs." *Id.* at 37 (internal citations omitted, emphasis in original). Here, it is without question that P.A. 21-6 targets religious objectors.

Likewise, P.A. 21-6 is not generally applicable in several ways: First, it provides for medical exemptions while removing religious exemptions. P.A. 21-6(a). Second, P.A. 21-6 does not address students who are non-compliant but do not have any approved exemptions. PA 62. Third, P.A. 21-6 provides for religious exemptions for children in grades kindergarten through twelfth grade with existing religious exemptions. P.A. 21-6(b). Fourth, P.A. 21-6 permitted preschool children with religious exemptions to provide proof of vaccination over one year after the effective date of P.A. 21-6. P.A. 21-6(c). Fifth, P.A 21-6 permits school staff and volunteers to remain unvaccinated. "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.*, 141 S. Ct. at 1877 [13] (quoting

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[13] In *Fulton*, Catholic Social Services (CSS), a Catholic adoption agency, sued Philadelphia for refusing to refer foster children to it after the agency confirmed it would not match children with same-sex

Smith, 494 U.S. at 884). "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986**)**); *see also Lukumi*, 508 U.S. at 537 (same).

> Additionally, there is a dispute regarding what governmental interest the Declaration was intended to serve, which is relevant to the question of whether the Declaration was "substantially underinclusive," and therefore, not generally applicable. *See We The Patriots*, 17 F.4th at 284–85. Rockland County's interest in issuing the Declaration could be to stop the transmission of measles, which might lead a factfinder

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couples—a policy that violated the antidiscrimination provision in the city's contract. *Fulton*, 141 S. Ct. at 1874. The agency argued that the city's refusal to permit the adoption agency to place children amounted to discrimination against religion. Brief for Pet. at 23-30, *Fulton*, 141 S. Ct. 1868 (No. 19-123). Specifically, CSS contended that because the city had discretionary authority to grant "exemptions" to the antidiscrimination provisions in its contract, the city had established an "individualized exemptions" regime. *Id.* at 17. The Court agreed. Writing for the majority, Chief Justice Roberts focused on the terms of the city's contract with foster-care agencies, which forbade discrimination based on sexual orientation but permitted city officials to make exceptions to that prohibition. *Fulton*, 141 S. Ct. at 1878-79. He concluded that this wiggle room doomed the city's requirement that the Catholic agency must not discriminate against same-sex couples. *Id.* at 1878.

> to question why there was a medical exemption, where, as Plaintiffs point out, medically exempt children "are every bit as likely to carry undetected measles [as] a child with a religious exemption and are much more vulnerable to the spread of the disease and serious health effects if they contract it." Appellants' Br. at 56.

M.A., 53 F.4th at 39.

Here, the medical exemption undermines the State's *actual interests*[14] in increasing vaccination rates and decreasing the likelihood of a measles outbreak. App. Br. at 32. And so does allowing any other category of student (or staff members) to remain

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[14] *See* Section (B)(7)(a) for a full discussion of the Court's role in identifying the *actual* government interest as opposed to the interest stated by the Defendants. Defendants frame their interest broadly as "protecting student and public health and safety." App. Br. at 32. Such a broad, general interest cannot demonstrate general applicability. The First Amendment requires *particularity* in the government's interest precisely to avoid this sort of convenient gerrymandering. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1999 (2022) ("The definition of a particular program can always be manipulated to subsume the challenged condition."); *Fulton*, 141 S. Ct. at 1881. And defining broad interests like "health and safety" as the interest for general applicability purposes allows the government to cloak religious discrimination in a general assertion of the police power. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (explaining that a city's police powers include the authority to "protect public health and safety"). Notably, when explaining the reasons for P.A. 21-6 Defendants reveal the actual interests the repeal law served. App. Br. 32; 15-16.

unvaccinated, such as the students with grandfathered religious exemptions, CA 35-36, preschool students with religious exemptions who were given a one-year grace period, CA 36, and students who are not in compliance with the vaccination requirement but do not have any exemption, CA 21 ¶40. Additionally, children who are vaccinated but have primary or secondary vaccine failure and therefore cannot mount an immune response to measles present the same risk as the Plaintiffs and undermines the State's interest in "decreasing the likelihood of disease outbreak." App. Br. at 32.

Although Defendants claim that the medical exemption is not "discretionary" because P.A. 21-6 "provided that they 'shall' grant medical exemptions to students who present the proper documentation", App. Br. at 31-32, this is untrue because the State retains the sole discretion in deciding what the "proper documentation" is.[15] And in *Fulton*, there was no evidence that the government had

[15] *See* P.A. 21-6(7) (explaining the form that a student applying for a medical exemption must submit to the school which provides "a section in which the physician, physician assistant or advanced practice registered nurse may record a contraindication or precaution that is not recognized by the National Centers for Disease Control and Prevention, but in his or her discretion, results in the vaccination being medically contraindicated, including, but not limited to, any autoimmune disorder, family history of any autoimmune disorder, family history of any reaction to a vaccination, genetic predisposition to any reaction to a vaccination as determined through genetic testing and a previous documented reaction of a person that is correlated to a vaccination"). This is where discovery is needed because Connecticut schools deny medical exemption requests despite applicants providing

ever exercised its discretion in granting exemptions, and the state argued that it never did and never would grant exemptions because it believed it could not exempt any agency whatsoever from its antidiscrimation policy for any reason. Brief for City Respondents at 35-36, *Fulton*, 141 S. Ct. 1868 (No. 19-123). But the United States Supreme Court held that the sheer fact that the Commissioner *could* grant exemptions meant that "the City may not refuse to extend" one for "religious hardship without compelling reason." *Fulton*, 141 S. Ct. at 1878 (internal citations omitted).

b) PA 21-6 is subject to strict scrutiny because it violates the Plaintiffs' free exercise of religion in conjunction with the Plaintiffs' right to education.

This is a hybrid-rights case, which include claims of free exercise violations connected with the right of parents to direct the education of their children. In *Smith*, the United States Supreme Court deemed this exact type of hybrid-rights case was subject to strict scrutiny. *Smith*, 494 U.S. at 882–83. *Smith* held that strict scrutiny is required in cases that implicate the "Free Exercise Clause in conjunction with other constitutional protections", such as "the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, *see Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)." *Smith*, 494 U.S. at 881.

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medical documentation stating that they are contraindicated, however at this stage of litigation, the Plaintiffs have no access to this evidence.

7) PA-21-6 cannot satisfy strict scrutiny.

Defendants have the burden to show that PA 21-6 serves a compelling state interest and is the least restrictive means of attaining that interest. *See Thomas v. Review Bd. of Indiana Emp't Sec. Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624, 634. But it is impossible to meet this burden.

a) PA 21-6 is not supported by a compelling interest.

Where, as here, First Amendment rights are at issue, "the government must shoulder a *correspondingly heavier burden* and is entitled to *considerably less deference* in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Because the PA 21-6 implicate Plaintiffs' free exercise of religion, the Defendants "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993). A compelling interest is an interest "of the highest order." *Lukumi*, 508 U.S. at 546.

"To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'" and "the legislature must have had a strong basis in evidence to support that justification". *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S. Ct. 1894, 1902 n. 4, 135 L. Ed. 2d 207 (1996). The government must be limited to its

actual goals or purpose for the action taken.[16] The Defendants claim that the "State's interest in passing P.A. 21-6 was to protect the health and safety of school students and the broader public." App. Br. at 30. It is self-serving for the State to frame its interests broadly as protecting health and safety. But "strict scrutiny, properly conceived, only allows *actual* interests to be considered as possible justifications for government action." Roy G. Spece, Jr. & David Yokum (FNd1), *Scrutinizing Strict Scrutiny*, 40 Vt. L. Rev. 285, 298 (2015) (emphasis added). "This essential actual purpose requirement" "encourages government accountability by identifying actual goals, protects important individual interests from the great assault occasioned by the government's embrace of patently illegitimate interests, and maximizes the probability that individual interests are sacrificed only when the government embraced a coherent goal that channels its action toward achieving important ends." *Id*.

> However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975).

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728, 102 S. Ct. 3331, 3338, 73 L. Ed. 2d 1090 (1982) (looking to "the statutory scheme itself" and "the legislative history" to determine the Legislature's actual purpose).

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[16] *See M.A.*, 53 F.4th at 36 ("There are also disputes as to whether the County's purpose in issuing the Declaration was to stop the spread of measles or to encourage vaccination.").

The State acknowledges its *actual purpose or interest* in passing PA 21-6 was to "increase the percentage of vaccinated students, thereby decreasing the likelihood of a disease outbreak." App. Br. at 32. The State unambiguously proffers two reasons for passing P.A. 21-6 in April of 2021: (1) "[G]rowing concerns about under-vaccination in Connecticut." App. Br. at 15; and (2) "Vaccine-preventable diseases were making a comeback, with reported outbreaks in several areas of the United States." App. Br. at 15.

"Where a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law . . . furthers a compelling interest." *McAllen Grave Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). Defendants claim that they repealed the religious exemption in order to "increase the percentage of vaccinated students, thereby decreasing the likelihood of a disease outbreak," App. Br. at 32, but allowing similarly situated students to remain unvaccinated, such as the students with grandfathered religious exemptions, CA 35-36, preschool students with religious exemptions who were given a one-year grace period, CA 36, and students who are not in compliance with the vaccination requirement but do not have any exemption, CA 21 ¶40, as well as staff members and volunteers, undermines any claim that the Defendants' interest is compelling. Regardless of the reason for their unvaccinated status, they all "pose a 'similar hazard,'" *Air Force Officer v. Austin, 588 F. Supp. 3d 1338, 1355 (M.D. Ga. 2022)*, to defendants' interest in "decreasing the likelihood of disease outbreak." App. Br. at 32. PA 21-6 "cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

If the Defendants' interest in "increasing the percentage of vaccinated students" and "decreasing the likelihood of a disease outbreak" is "of the highest order" why would the State be allowing such considerable damage to that interest? Why is it only the religious objectors who are categorically excluded from exemption?

The Defendants did not have a compelling interest in removing the long-standing religious exemption, which has existed since 1959. CA 22 ¶45-46. First, the Defendants completely overstate the supposed "under-vaccination in Connecticut." App. Br. at 15. Defendants only provide the incoming kindergarten data, which shows a 96.2% vaccination rate for MMR. PA 60-61. By cherry-picking data, Defendants are only providing a small snapshot of the vaccination status and compliancy data of the entire K-12 student body. Defendants are intentionally painting a picture of "under-vaccination" in Connecticut. On PA 62, clicking on the link for 2019-2020 under Statewide Summary Statistics, leads to The Connecticut Statewide School Survey Data Summary, 2019-2020 School Year, which shows that **98% of Seventh Grade students are vaccinated with MMR**. PA 62. This is well above the 95% general recommendation from the CDC. This shows that there is no under-vaccination in Connecticut.

Second, the Defendants mislead the Court by stating "vaccine-preventable diseases were making a comeback" and claiming "DPH had confirmed multiple cases of measles in Connecticut. App. Br. at 16. The Defendants cite to a Connecticut State Department of Public Health press release, dated April 23, 2021, that announces **two cases** of measles which occurred within the same household. PA 70. The second case was another child in the household who "was not yet vaccinated" and acquired measles "while travelling internationally." Press Releases, *DPH Confirms Case of Measles in CT Child*, Connecticut State Department of Public Health, 4/09/2021, available at

https://portal.ct.gov/DPH/Press-Room/Press-Releases---2021/DPH-Confirms-Case-of-Measles-in-CT-Child. The State of Connecticut's schools had not had a substantial outbreak of any infectious disease for which a vaccine is mandated pursuant to C.G.S. §10-204a, in many decades. CA 11 ¶8. And there is no indication that the current vaccination rates or any trend in vaccination rates over the last 3 decades even, is having any impact on the occurrence of measles in the Connecticut community.[17]

Therefore, Defendants had absolutely no compelling interest in removing the religious exemption.

b) PA 21-6 is not the least restrictive means of furthering the Defendants' interests.

"Narrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objectives." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *Thomas*, 450 U.S. at 718). Showing that the challenged action has "some effect" on achieving a governmental interest is insufficient. *Ashcroft v. Am. C.L. Union, 542 U.S. 656, 666, 124 S. Ct. 2783, 2793, 159 L. Ed. 2d 690 (2004)*; *Gonzales v. O Centro*, 546 U.S. 418 (2006). To meet this burden, the Defendants must show it "seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014); *see also Agudath Israel*, 983 F.3d at 633 (same). And Defendants must "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), and that

[17] *See* p.13 above (listing number of measles cases in the state, by year, for the last 30 years (*quoting* PA 59 ("Vaccine Preventable Disease" link; then "Vaccine – Preventable Disease Case Counts" link).

"imposing lesser burdens on religious liberty 'would fail to achieve the government's interest, not simply that the chosen route was easier'." *Agudath Israel*, 983 F.3d at 633.

Discovery is needed to understand the Defendants' undertakings in examining less restrictive means. Defendant cannot "rely on magic words" and "must demonstrate, with specific and reliable evidence, that the proposed alternative measures are insufficient to further — to an extent reasonably similar to vaccination — [a] compelling governmental interest." *Navy Seal 1 v. Austin*, 586 F. Supp. 3d 1180, 1202 (M.D. Fla. 2022).

Prior to April 2021, the State successfully provided other means, measures and methods for ensuring that contagious diseases did not spread while simultaneously providing access to all schools and protecting religious liberty. CA 11. The guidelines for schools are: (a) encouraging sick students and staff to stay home and seek medical attention for severe illness; (b) facilitating hand hygiene by supplying soap and paper towels and teaching good hygiene practices; (c) being vigilant about cleaning and disinfecting classroom materials and surfaces; (d) adopting health practices such as safe handling of food and use of standard precautions when handling bodily fluids and excretions. CA 11-12 ¶10. These guidelines have been effective because there have been no substantial outbreaks of measles or other illnesses for which a vaccine is mandated. CA 12 ¶11; *see also Case Occurrence of Selected Disease*, Connecticut State Department of Public Health, https://portal.ct.gov/DPH/Immunizations/Case-Occurrence-of-Selected-Diseases-Connecticut (last accessed April 5, 2023). Additionally, during outbreaks officials have removed unvaccinated children from schools, which has proved to be a successful control measure. CA 12 ¶ 12.

Additionally, the Defendants could have tried to either increase school vaccination rates statewide or specifically increase compliance

in the schools and districts that had substantially lower vaccination rates than the state as a whole. CA 21-22 ¶41. However, the Defendants did not make any meaningful effort to employ means of increasing statewide school vaccination rates that were less restrictive than the wholesale elimination of the Religious Exemption. CA 22 ¶43. Moreover, students are only required to provide vaccination records upon enrollment in kindergarten and again in seventh grade. So, from first grade to sixth grade, and eighth grade through twelfth grade, the Defendants do not check students' vaccination status. C.G.S.§ 10-204a(a). A less restrictive means of increasing vaccination rates would have been to simply check vaccination status more frequently. Significantly, whether any of the students with religious exemptions are vaccinated with MMR is unknown since students with religious exemptions are not required to report any vaccinations. C.G.S. §10-204a. And religious objections can be vaccine-specific when religious objectors only oppose certain vaccines, for example, based on the way they were developed or their ingredients.

"[D]efendants haven't shown that vaccination is actually necessary by comparison to alternative measures since the 'curtailment of free exercise must be actually necessary to the solution'." *Air Force Officer,* 588 F. Supp. 3d at 1354 (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). The Defendants do not contend that they actually considered any less restrictive measures. Discovery is absolutely crucial on this issue.

Defendants' allowing other unvaccinated classes[18] of students and people inside Connecticut schools demonstrates that PA 21-6, the

[18] (1) Students with medical exemptions. P.A. 21-6(a) (2) Students who are non-compliant but do not have any approved exemptions. PA 62 (showing 1.3% non-compliant) (3) Students in grades kindergarten

repeal of the religious exemption, is not the least restrictive means of serving their interest. *Poffenbarger v. Kendall*, 588 F. Supp. 3d 770, 790 (S.D. Ohio 2022)*, appeal dismissed*, No. 22-3413, 2022 WL 3029325 (6th Cir. June 30, 2022*)* (defendant did not meet least-restrictive-means tests where "less restrictive means of furthering [defendant's] interests are being provided (even if only on a 'temporary' basis) on non-religious grounds"); *U.S. Navy Seals 1-26 v. Biden, 27 F.4th 336, 352 (5th Cir. 2022)*[19] (Navy granting medical exemptions was "salient fact" that "further undermined" "Navy's alleged compelling interest," rendering "vaccine requirements underinclusive," and "no reason is given for differentiating those service members from Plaintiffs", whose religious exemptions were denied). Put simply, "restrictions inexplicably applied to one group and exempted from another do little to further [the government's] goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020). As the Supreme Court said in *Tandon*:

> Narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the

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through twelfth grade with existing religious exemptions. P.A. 21-6(b). (4) Preschool students with religious exemptions who were given a one-year grace period. P.A. 21-6(c). (5) Unvaccinated staff and volunteers.

[19] The Supreme Court of the United States has issued a partial stay only as far as the district court's order precluded the "Navy from considering respondents' vaccination status in making deployment, assignment, and other operational decisions" in deference to the military. *Austin v. U. S. Navy Seals 1-26*, 212 L. Ed. 2d 348, 142 S. Ct. 1301 (2022).

> spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

141 S. Ct. at 1296–97.

"Maybe the most telling evidence that [PA 21-6] isn't narrowly tailored lies in how unique it is." *Dr. A v. Hochul,* 142 S. Ct. 552, 557 (2021)(Gorsuch, J., dissenting) ("It seems that nearly every other State [other than NY] has found that it can satisfy its COVID–19 public health goals without coercing religious objectors to accept a vaccine."). Forty-four states currently honor their state and federal Constitutions by offering religious exemptions to their school vaccine requirements. CA 38. Connecticut is one of only six that do not. CA 38. And, importantly, of those six, Connecticut is the only one with RFRA protections.

8) The Plaintiffs' state and federal Equal Protection claims (third & sixth causes of action) are substantial and therefore come within the second exception to sovereign immunity.

The Defendants' actions in removing the religious exemption deprive the Plaintiffs of the equal protection of the laws in violation of the Connecticut and United States Constitution. "To prevail on an equal protection claim, a plaintiff first must establish that the state is affording different treatment to similarly situated groups of individuals." *Keane v. Fischetti,* 300 Conn. 395, 403, 13 A.3d 1089 (2011). The Defendants are treating similarly situated students differently. Even though they are all unvaccinated, religious students are barred from school whereas those who are non-compliant with

vaccination requirements and those with medical exemptions are permitted to attend school. PA 21-6 has wrongly burdened the free exercise of religion by devaluing religious objection to vaccination. The government cannot regulate constitutionally protected religious exercise while exempting other activities. *See Tandon*, 141 S. Ct. at 1296; *Fulton*, 141 S. Ct. at 1878; *Roman Cath. Diocese*, 141 S. Ct. at 66-67. "A statutory classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Classifications that "impinge upon the exercise of a fundamental right" are "presumptively invidious" and subject to strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,440 (1985). Free exercise as an equality right triggers strict scrutiny. As outlined in section 7 above, the Defendants cannot satisfy strict scrutiny. Moreover, the Defendants make a value judgment by devaluing religious objection to vaccination while respecting secular objections.

IV. CONCLUSION

For the foregoing reasons, the sound judgment of the trial court denying the Motion to Dismiss should be affirmed.

Respectfully Submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that on April 10, 2023:

(1) a copy of the Appellee Brief has been sent electronically to each counsel of record listed below in compliance with § 62-7, except for counsel of record exempt from electronic filing pursuant to § 60-8, to whom a paper copy was sent;

(2) a copy of this brief was sent to both Plaintiffs;

(3) the brief being filed with the appellate clerk is a true copy of the brief that was submitted electronically pursuant to subsection (f) of this section;

(4) the brief has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, unless the brief is filed pursuant to § 79a-6;

(5) the brief complies will all applicable rules of appellate procedure;

(6) the brief contains 12,665 words; and

(7) no deviations from the rules were requested or approved.

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