STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

JONAS STOLTZFUS, Individually and as Parent and Natural Guardian of B.H.S., D.A.S., and R.H.S,.

Plaintiffs,

-vs-

ANDREW M. CUOMO, in his Official Capacity as Governor of the State of New York, ATTORNEY GENERAL OF THE STATE OF NEW YORK, and STATE OF NEW YORK,

Defendants.

Decision and Order

Index No. 20190311

Appearances:
James Mermigis, Esq., and Kevin M. Barry, Esq., for Plaintiffs
Heather L. McKay, Esq., and Ted O'Brien, Esq., for Defendants

Daniel J. Doyle, J.

New York's Public Health Law mandates that every parent or guardian of a child "shall have administered to such child an adequate dose or doses of an immunizing agent against" certain specified diseases (Public Health § 2164[2][a]). The statute provides generally that a child may not be admitted or attend a "school" in this State without a certificate from a health care provider or other proof that the child has received the mandated vaccines (Public Health § 2164[5], [7]). For purposes of the mandatory vaccination statute, "school" is defined broadly to mean "any public, private or parochial child caring center, day

nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school" (Public Health Law § 2164[1] [a]). Before June 13, 2019, New York's Public Health Law provided for a religious exemption, which permitted an exemption for parents who "hold genuine and sincere religious beliefs which are contrary" to the required vaccinations (formerly Public Health Law § 2164[9]). On June 13, 2019, the Legislature repealed the Public Health Law § 2164[9] (hereinafter, "Section 9") and eliminated religious exemptions (L 2019, ch 35, § 1).

Plaintiffs commenced this action challenging the repeal of Section 9 solely on free exercise grounds of the New York State Constitution (NY Const. Art. I, § 3). The Plaintiffs' complaint seeks, *inter alia,* a declaration "that the Repeal is unconstitutional as it violates the Free Exercise Clause of the New York Constitution" and the Court should "preliminarily and permanently enjoin the Repeal." Pending before the Court are (1) Plaintiff's Order to Show Cause for a preliminary injunction seeking to enjoin the repeal of Section 9; and (2) the Defendants' cross-motion to stay this action pending the outcome of a putative class action lawsuit pending in Albany County (*F.F. on behalf of Y.F. v State,* 65 Misc 3d 616 [Sup Ct 2019]) involving the repeal of Section 9.

A party seeking a preliminary injunction "must establish, by clear and

convincing evidence" the following three elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*Mangovski v DiMarco*, 175 AD3d 947, 948 [4th Dept 2019]).

In evaluating the constitutionality of a legislative enactment, the Court of Appeals instructs that "nothing but a clear violation of the Constitution will justify a court in overruling the legislative will" and that "every statute is presumed to be constitutional, and every intendment is in favor of its validity" (*Farrington v Pinckney*, 1 NY2d 74, 78 [1956]). Further, the Court is required to apply the "presumption that the Legislature has investigated and found the facts necessary to support the legislation" (*I.L.F.Y. Co. v. Temporary State Housing Rent Comm.*, 10 NY2d 263, 269 [1961]).

The Plaintiffs argue that the repeal of Section 9 violates the Free Exercise clause of the New York State Constitution.[1] The thrust of Plaintiffs' argument is that once the Legislature codified the religious exemption, it could not be repealed. New York's Free Exercise provision provides the following:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this

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[1]They also argue that New York's Free Exercise clause provides greater protection than that afforded by the Free Exercise Clause of the First Amendment to the United States Constitution.

> state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state (NY Const. Art. I, § 3) (emphasis added)).

This last clause emphasized above has been interpreted by the Court of Appeals as applying to health concerns and that a parent may not assert free exercise as a grounds for refusing to obtain medical attention for a child as "an omission to do this is a public wrong, which the state, under its police powers, may prevent" (*People v Pierson*, 176 NY 201, 211 [1903]). Put another way, the Free Exercise clause of the New York Constitution would yield to a valid exercise of the State's police powers. In determining whether Public Health Law § 2164 is a valid exercise of the State's police powers, the Appellate Division, Third Department held that "statutes of this nature, and section 2164 in particular, are within the police power and thus constitutional generally is too well established to require discussion" (*McCartney v Austin*, 31 AD2d 370, 371 [3d Dept 1969]). While the Plaintiffs point out that the Court of Appeals holding in (*Viemeister v White*, 179 NY 235, 239 [1904]) only applied to the vaccination of school aged children in public schools and not to private schools, they ignore that the vaccination requirement under Public Health Law § 2164 extends to private and

challenged the constitutionality of Public Health Law § 2164[1][a] and cite no cases for the proposition that the Court of Appeals holding in *Viemeister* cannot be applied to private or parochial schools.

Contrary to the Plaintiffs' argument, the Court of Appeals has not imposed a heightened level of scrutiny for the evaluation of a free exercise claim under the New York Constitution. In analyzing free exercises claims under the New York Constitution, the Court of Appeals has rejected the test formulated by the Supreme Court in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 [1989] in favor of the balancing test it has previously employed:

> when the State imposes an incidental burden on the right to free exercise of religion we 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. We have never discussed, however, how the balancing is to be performed. Specifically, we have not said how much, if any, deference we will give to the judgments of the Legislature when the result of those judgments is to burden the exercise of religion. We now hold that substantial deference is due the Legislature, and that 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 510, 525 [2006]).

While the Court of Appeals has held that its test is more "protective of religious exercise than the rule of Smith" (*Catholic Charities of Diocese of Albany v*

Serio, 7 NY3d at 525), it does not rise to a heightened level of scrutiny for the analysis of the governmental interest or that the State demonstrate a compelling interest, only that the challenged action be "an unreasonable interference." The Plaintiffs have failed to meet their burden of clear and convincing evidence that repeal of Section 9 was an "unreasonable interference" on their religious freedom. Therefore, the Plaintiffs have not demonstrated a likelihood of success on the merits to enjoin the repeal of Section 9, their motion for a preliminary injunction is denied.[2]

The Defendant's have cross-moved to stay this action pending the outcome of the putative class action *F.F. v State of New York* in Albany County. While Plaintiffs are incorrect in their assertion that the plaintiffs in *F.F v State of New York* do not assert a separate claim under the Free Exercise clause of the New York Constitution, staying this action pending the outcome of *F.F v State of New York* is unwarranted at this point in that there is no indication that the plaintiffs

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[2]In arriving at this holding, the Court is specifically rejecting the Defendants' argument that the Court's denial of the preliminary injunction is compelled by the Third Department's denial of a preliminary injunction in *F.F. v State of New York.* While the Court acknowledges that a decision from the Third Department would be binding (*Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]), that rule is only implicated when the requirements of *stare decisis* are met. *Stare decisis* requires a decision on the merits and "it is well settled that the granting or denial of a motion for a preliminary injunction does not constitute the law of the case or an adjudication on the merits" (*Meyer v Stout*, 45 AD3d 1445, 1447 [4th Dept 2007]).

in *F.F v State of New York* intend on advancing the State Constitutional claim.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that Plaintiffs' application for a preliminary injunction is hereby denied; and it is further

ORDERED that Defendants' cross-motion to stay this action is hereby denied; and it is further

ORDERED that the Defendants' time to answer or make dispositive motions is extended until December 6, 2019.

Dated: November 4, 2019

The Honorable Daniel J. Doyle
Supreme Court Justice