



## CONSTITUTIONAL FRAMEWORK OF EXEMPTIONS TO VACCINATION REQUIREMENTS; A WHITE PAPER

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### Introduction

This paper analyzes the constitutional limits of a religious exemption to the vaccination requirement in New Jersey. To aid that analysis, this paper presents an overview of the law in the fifty states governing religious exemptions to vaccination requirements and the constitutional limits that have been placed on those exemptions. Section I of the paper discusses the origins of the state police power to compel vaccination. Sections II and III contain a discussion of medical and philosophical exemptions, respectively, to the vaccination requirement that have been permitted in the states. The discussion of medical and philosophical exemptions is presented for purposes of background information and comparison to religious exemptions. Section IV contains a discussion of religious exemptions, including a detailed discussion of the constitutional limits on religious exemptions, as well as procedural limitations that have been placed on religious exemptions in various states. Finally, Section V presents a discussion of religious exemptions under New Jersey law.

### I. State Police Power to Require Vaccination

More than 100 years ago, the United States Supreme Court upheld the states' police power to impose mandatory vaccination on individuals. *Jacobson v. Mass.*, 197 U.S. 11 (1905)

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(upholding as constitutional a Massachusetts law that required persons to be vaccinated against smallpox, or face fine or imprisonment). Nearly twenty years later, the Supreme Court reaffirmed its decision in *Jacobson* and established the constitutionality of requiring students to be vaccinated as a condition to attending school. *See Zucht v. King*, 260 U.S. 174 (1922); *see also id.* at 176 (stating that *Jacobson* had “settled that it is within the police power of a State to provide for compulsory vaccination.”)

Since *Jacobson* and *Zucht*, courts have routinely upheld compulsory vaccination laws and laws requiring vaccination for school attendance. *See, e.g., Sadlock v. Bd. of Ed.*, 137 N.J.L. 85 (Sup. Ct. 1948) (relying on *Jacobson* and *Zucht* to uphold a local resolution that compelled vaccination of children in public schools). Indeed, one commentator has said that *Jacobson* is a “sound modern precedent” that would “indisputably” have been decided the same way if presented to the United States Supreme Court today. *See Lawrence O. Gostin, Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 *Am. J. of Pub. Health* 576, 580 (2005).

Although *Jacobson* and *Zucht* clearly permit states to require vaccination as a condition of attending school, many states have established exemptions for medical, philosophical and/or religious reasons; these exemptions are discussed in Sections II, III and IV below.

## **II. Medical Exemptions to Vaccination Requirement**

All fifty states offer a medical exemption to the requirement that students be vaccinated before attending school where, for example, the vaccination would be injurious to the student’s health. These medical exemptions are consistent with the United States Supreme Court’s decision in *Jacobson*; and although no court has ever expressly stated so, it appears that such exemptions would be constitutionally required. As the *Jacobson* Court noted, the states’ police

power is not without limits, and courts would be compelled to intervene if a state exercised its power “in such an arbitrary, unreasonable manner,” or went “so far beyond what was reasonably required for the safety of the public.” *See Jacobson*, 197 U.S. at 28; 38. As an example, the Court suggested a situation where vaccination would cause a person’s death or seriously impair his health. *See id.* at 38-39 (“We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned.”). Indeed *Jacobson* has been described as establishing “a floor of constitutional protection” consisting of four standards, “necessity, reasonable means, proportionality, and harm avoidance,” intended to safeguard liberty. *See Gostin, supra*, at 579. In light of these standards, if a state were to impose mandatory vaccinations without a medical exemption, such action would likely be found to be an unconstitutional exercise of the state’s police power.

Even though medical exemptions to vaccination requirements appear to be constitutionally required, states have limited the availability of the exemption, and some even inquire into the validity of the claimed exemption. For example, all fifty states require a statement by a physician, or other health care professional (including department of health officials), that the exemption is necessary; no state grants a medical exemption based solely on a statement by a parent or guardian. *See* Summary Chart of Medical Exemptions, attached hereto as Exhibit A. The states vary widely, however, on what the statement must contain from a statement only that the vaccination is “medically contraindicated,” to a statement that the vaccination would “seriously endanger the child’s health or life.” *See id.* At least two states, New Jersey and Connecticut, require that the statement be based on reasons that have been validated by independent entities. *See* N.J. Stat. Ann. § 8A:61D-10 (statement must be “based

upon valid medical reasons as determined by regulation of the Commissioner of Health and Senior Services.”); *see also* N.J. Admin. Code § 8:57-6.14 (statement must be “based upon valid medical reasons as enumerated by the 2007 Advisory Committee on Immunization Practices (ACIP), Recommended Child, Adolescent, and Adult Immunization Schedules and the ACIP Recommendations”); Conn. Agencies Regs. § 10-204a-2a (requiring statement that immunization is medically contraindicated “in accordance with the current recommendation of the National Centers for Disease Control and Prevention Advisory Committee on Immunization Practices”). A majority of states also place a durational limit on the exemption, limiting it to the period of the contraindication, and in several states the doctor or professional must indicate how long the condition causing the contraindication will last. *See* Exhibit A. Once the condition is resolved, the medical exemption would presumably expire.

In cases where states have inquired into the validity of the basis for the claimed medical exemption, courts have differed on the extent to which the state can raise such questions. For example, in *Jones v. State of Wyo. Dep’t. of Health*, 18 P.3d 1189 (Wyo. 2001), the Wyoming Supreme Court held that the Department of Health overstepped its authority when it required further “reasons” for the stated medical contradiction where a medical exemption form simply stated that the student had a “history of reactions to immunizations.” Although the court based its holding on the fact that the statute on its face did not require any reason to be given for the contraindication, and stated that “even if [it] were to look further into the statute, [it did] not believe that the legislature necessarily intended to authorize the Department of Health to interrogate students regarding specifics of their medical condition,” the court went on to further note that “such interrogation [would] bring[] up concerns regarding invasion into the right of privacy and intrusion into the physician-patient relationship.” *Id.* at 13-14.

In contrast, the New York Supreme Court in *Lynch v. Clarkstown Cent. Sch. Dist.*, rejected a petitioner’s argument that a school district was required to accept a medical exemption at face value and without further investigation, where the exemption statute required a statement that the vaccination “may be detrimental to [the] child’s health.” 590 N.Y.S.2d 687 (N.Y. Sup. Ct. 1992). In *Lynch*, the child had been diagnosed with Rett Syndrome and a physician certified that “all vaccinations are contraindicated indefinitely.” *Id.* at 689. Before denying the medical exemption, the school district’s chief medical officer conducted his own inquiry regarding Rett Syndrome and vaccinations, and determined that there was no known contraindication. The chief medical officer’s inquiry included reviewing medical literature on Rett Syndrome, writing to the Director of the Rett Center at Baylor College of Medicine, and speaking with medical specialists in pediatric neurology. *Id.* at 690. The court found that the procedure followed by the school district “was neither an arbitrary and capricious one, nor an abuse of discretion” and upheld the denial of the exemption. *Id.* Similarly in *Workman v. Mingo County Sch.*, 567 F. Supp. 2d 679 (S.D. W. Va. 2009), the court upheld a school board’s denial of a medical exemption where the statute required a statement that the vaccination was “impossible or improper or other sufficient reason.” The plaintiff submitted a certificate from a child psychiatrist recommending against vaccination because the child’s older sibling had been diagnosed with autism believed to have been caused by vaccinations. The exemption was challenged by the school nurse and escalated to the Department of Health. The Department concluded, based on recommendations issued by the American Academy of Pediatrics, among others, that autism in a family member was not a contraindication to any of the required vaccinations, nor were speech and language delays defined contraindications to any of the vaccines. The federal court in West Virginia ultimately rejected the plaintiff’s claim that the

denial of the exemption violated her equal protection and due process rights, because the record revealed no evidence of unequal treatment. *See id.* at 690.

### **III. Philosophical Exemptions to Vaccination Requirement**

At present eighteen states provide a statutory philosophical exemption to the requirement that students be vaccinated before attending school.<sup>1</sup> Although philosophical exemptions can encompass religious beliefs, the states that provide for philosophical exemptions do not restrict these exemptions to purely religious or spiritual beliefs. For example, North Dakota allows objections based on “religious, philosophical, or moral beliefs,” and California allows exemptions based simply on “beliefs.” *See* Summary Chart of Philosophical Exemptions, attached hereto as Exhibit B. Others, such as Idaho, Michigan, Missouri and Oklahoma, allow philosophical exemptions less explicitly, based on “other grounds” or “objections” generally. *See id.* At least two states purport to provide a religious exemption, but in actuality provide for a philosophical exemption given the broad definition of “religion” or “religious exemption” found in the applicable regulations. *See, e.g.,* Or. Admin. R. 333-050-0010(24) (defining “religion” as “any system of beliefs, practices or ethical values”) and 28 Pa. Code § 23.84(b)(providing that religious objections include those that are based on “strong moral or ethical conviction[s] similar to [] religious belief[s]).

At least one state adopted a philosophical exemption in reaction to its religious exemption being struck down as unconstitutional. *See* M. Craig Smith, Note, *A Bad Reaction: A Look at the Arkansas General Assembly's Response to McCarthy v. Boozman and Boone v. Boozman*, 58 Ark. L. Rev. 251, 257-58 (2005); *see also* *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002) (finding religious exemption that required membership in a “recognized

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<sup>1</sup> In Missouri, the philosophical exemption applies only to daycare, preschool and nursery school. Mo. Rev. Stat. § 210.003.

church or religious denomination” unconstitutional); *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002) (same).

In contrast, a few states, including New Jersey, have gone as far as explicitly rejecting the notion that an exemption may be based on philosophical beliefs. *See e.g.*, N.J. Admin. Code § 8:57-4.4 (“The school . . . shall be prohibited from exempting a child from mandatory immunization on the sole basis of a moral or philosophical objection to immunization.”); Del. Code Ann. tit. 14 § 131 (requiring affidavit that “this belief is not a political, sociological or philosophical view of a merely personal moral code”); 10A N.C. Admin. Code 41A.0403 (“there is no exception to these requirements for the case of a personal belief or philosophy . . . not founded upon a religious belief”).

Although a sizeable minority of the states offer a philosophical exemption to the vaccination requirement, there does not appear to be any suggestion that such philosophical exemptions are required as a constitutional matter. Indeed, it seems that if a court were to hold that an individual has a constitutional right to a philosophical exemption to vaccination, such a holding would run afoul of the Supreme Court’s decision in *Jacobson* insofar as such a holding could effectively afford every person an unrestricted right to be free from vaccination, and that is clearly counter to *Jacobson*. *See e.g.*, *Jacobson*, 197 U.S. at 26-27 (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will.”).

The states that do offer philosophical exemptions vary widely in what is required to obtain the exemption. *See* Exhibit B. For example, some states, such as California and Maine, simply require a written statement of the beliefs, while other states, such as Minnesota, require the statement to be notarized. *See id.* Still other states, such as Arizona and Louisiana, require a signed statement acknowledging that the parent or guardian has received information about

immunizations provided by the department of health and that they understand the risks and benefits of immunizations and potential risks of non-immunization. *See id.* And Arkansas imposes several requirements including completion of an “educational component” that includes information on the risks and benefits of vaccination. *See id.*

Our research revealed no instances in which these philosophical objections, or the limits imposed on them, have been challenged in the courts.

#### **IV. Religious Exemptions to Vaccination Requirement**

All but two states (Mississippi and West Virginia) currently offer a religious exemption to the requirement that students be vaccinated before attending school. Although religious exemptions are provided by statute, courts across the United States — including in New Jersey — have routinely concluded that religious exemptions are not constitutionally mandated by the First Amendment. *See, e.g., Bd. of Educ. v. Maas*, 56 N.J. Super. 245, 268 (App. Div. 1959) (upholding vaccination requirement and noting “the constitutional guaranty of religious freedom was not intended to prohibit legislation with respect to the general public welfare.”); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“The constitutional right to freely practice one’s religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children.”); *Sherr v. Northport—East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987) (“The legislature’s creation of a statutory [religious] exception [] goes beyond what the Supreme Court has declared the First Amendment to require.”); *Davis v. State*, 294 Md. 370, 379 (1982) (noting that a state need not “provide a religious exemption from its immunization program.”).

Although the United States Supreme Court has never directly addressed whether a religious exemption to a vaccination requirement is constitutionally required, the Court’s dicta



and reasoning in various cases strongly suggests that religious exemptions are not required. *See, e.g., Prince v. Mass.*, 321 U.S. 158, 167 (1944) (upholding application of child labor law to child selling religious literature and noting “the 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.”); *Empl. Div. Dept. of Human Res. v. Smith*, 494 U.S. 872, 889 (1990) (naming “compulsory vaccination laws” in list of laws Court believed should not be required to be justified by a “compelling state interest,” even if it adversely affected the practice of religion); *Welsh v. U.S.*, 398 U.S. 333, 356 (1970) (J. Harlan concurring) ( in case involving religious exemption to draft requirement, noting “Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate all exemptions for conscientious objectors.”).

One court has gone as far as to say that not only are religious exemptions not constitutionally mandated, but that they are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *See Brown v. Stone*, 378 So. 2d 218 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980).<sup>2</sup> Faced with a free exercise challenge to a religious exemption granted only to members of recognized denominations whose doctrines forbid vaccination, the Mississippi Supreme Court ruled that *any* religious exemption — even one extended “to individuals whose private or personal religious beliefs will not allow them to permit immunization of their children” — violates the Equal Protection Clause. The Court reasoned that the exception to the vaccination requirement was unconstitutional because it “would require the great body of school children to be vaccinated and at the same time expose[d] . . . to the hazard of associating in school with children . . . who had not been immunized.” *Id.* at 223; *see also id.* (religious “exemption of children of parents whose religious beliefs conflict with the

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<sup>2</sup> As stated above, Mississippi and West Virginia are the only states that do not have a religious exemption to the vaccination requirement. It is apparent that Mississippi does not offer the exemption, because of the *Brown*

immunization requirements, would discriminate against the great majority of children whose parents have no such religious convictions.”). This opinion appears to be an anomaly, not only among the religious exemption decisions decided in the vaccination context, but also among religious exemption decisions in other areas. For example, the United States Supreme Court has recognized that religious exceptions are constitutionally permitted, as long as the exceptions do not discriminate among religions or religious beliefs. *See, e.g., U.S. v. Seeger*, 380 U.S. 163 (1965) (recognizing religious exemption to military service); *Smith*, 494 U.S. at 890 (acknowledging that several states have an exception to their drug laws for sacramental peyote use, and adding that “a nondiscriminatory religious-practice exemption is permitted.”); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (J. O’Connor, concurring in part and concurring in judgment) (government may make accommodations for religion, as long as one particular religious group is not being accommodated over another).

Consistent with the view that religious exemptions are not constitutionally required, the majority of states that offer a religious exemption allow the exemption to be suspended, or the unvaccinated children to be excluded from school, in the event of an outbreak or epidemic. *See, e.g., Ga. Code Ann. § 20-2-771(e)* (stating as a proviso to the religious waiver that “immunization may be required in cases when such disease is in epidemic stages.”); *Ky. Rev. Stat. Ann. § 214.036* (“[I]n the event of an epidemic in a given area, the Cabinet for Health and Family Services may, by emergency regulation, require the immunization of all persons within the area of epidemic, against the disease responsible for such epidemic.”); *see also* Summary Chart of Religious Exemptions, attached hereto as Exhibit C.

Moreover, courts have made clear that once a religious exemption is provided, it must be provided in a constitutional manner. *See, e.g., Davis*, 294 Md. at 379 (“If the Legislature

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decision. Our research did not reveal why West Virginia does not offer a religious exemption.

chooses to provide a religious exemption from compulsory immunization, however, the exemption must not run afoul of the Establishment Clause.”); *see also McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002) (“If the legislature chooses to provide a religious exemption from compulsory immunization, however, the exemption itself must pass constitutional muster.”). States have placed various requirements on the availability of religious exemptions, which have been challenged in court on a variety of constitutional grounds.

The majority of constitutional claims against religious exemptions appear to be based on First Amendment (Free Exercise and Establishment Clause) grounds; however, Equal Protection Claims and Due Process Claims have also been brought. Subsections IV.A and IV.B below, discuss key cases involving such constitutional challenges and aim to illustrate some of the constitutional limits that have been placed on religious exemptions by courts across the United States. Subsection IV.C then presents some of the procedural requirements that have been placed on religious exemptions by the various states.

#### **A. First Amendment Limitations on Religious Exemptions**

There is significant variation, as well as overlap, in the statutory language used by the various states to provide religious exemptions. Generally speaking, however, the requirements that states impose on eligibility for religious exemptions fall into one or more of several categories: membership in a “recognized” religion; religious belief of an institution; religious belief of the individual (including, in some cases, the degree of “sincerity” or “genuineness” of that individual’s belief). For the sake of clarity and organization, it is useful to discuss First Amendment challenges to the exemptions in terms of those same categories.

## 1. Membership in a Recognized Religion

Several states explicitly require membership in a “recognized” religion that opposes immunization as a condition to eligibility for a religious exemption to vaccination. *See, e.g.*, S.C. Code Ann. Regs. §61-8(2) (requiring membership in a “recognized religious denomination in which the tenets and practices of the religious denomination conflict with immunizations.”); *see also* Exhibit C. However, the majority of courts — including the New Jersey Law Division — that have considered challenges to this type of requirement, have found that they violate the Free Exercise and/or Establishment Clause of the First Amendment. *See, e.g., Kolbeck v. Kramer*, 84 N.J. Super. 569, 576 (Law Div. 1964) (“Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under . . . constitutional law.”)<sup>3</sup>; *Sherr*, 672 F. Supp. at 89 (“limitation of a religious exemption from vaccination to those who are members of recognized religious organizations is blatantly violative of th[e] First Amendment”); *Davis v. State*, 294 Md. 370 (1982) (finding exemption limited to members of recognized churches or religious denominations violative of First Amendment); *Dalli v. Bd. of Educ.*, 358 Mass. 753 (1971) (same); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 949 (W.D. Ark. 2002) (same).

In contrast, only one court has upheld a religious exemption that was available only to members of a “nationally recognized” religion. *See Kleid v. Bd. of Educ.*, 406 F. Supp. 902 (W.D. Ky 1976). However, the plaintiff in *Kleid* was not opposed to immunization based on his religious beliefs; rather he had challenged the religious exemption because it did not allow for secular objectors. Given these facts, courts that have later considered *Kleid* have distinguished it, and found that it was not an endorsement of the state’s ability to discriminate among religions. *See Walker v. Superior Court*, 47 Cal. 3d 112, 149 (1988) (“The [*Kleid*] opinion nowhere

mentions the possibility under the statutory language of discrimination among the religious”); *Davis v. State*, 294 Md. at 381 (“In *Kleid*, however, the plaintiff was philosophically opposed to immunization; his opposition was not religiously based.”). Notably, the Kentucky religious exemption statute that was at issue in *Kleid* has since been amended and no longer includes the “recognized” religion requirement.

In light of the above cases, it appears likely that the state laws that currently require membership in a “recognized” religion to qualify for vaccine exemption may be unconstitutional. Those specific exemptions, however, have not been the subject of court challenges, and so they remain on the books. A majority of these states that still require membership in a “recognized” religion also provide an alternative religious exemption for “personal” religious beliefs. *See, e.g.*, N.M. Stat. § 24-5-3; *see also* Exhibit C. The fact that parents who are not members of a “recognized” religion can simply invoke the “personal” religious belief exemption may explain why the exemptions requiring membership in a “recognized” religion have not been challenged in these states.

## **2. Religious Belief of an Institution**

Several states have formulated their religious waivers to explicitly require membership, not in a “recognized” religion, but in a religious denomination whose tenets are opposed to immunizations. *See, e.g.*, Alaska Admin. Code tit. 4, §06.055 (requiring affirmation that immunization “conflicts with the tenets and practices of the church or religious denomination of which the applicant is a member.”); Kan. Stat. Ann. § 72-5209(b)(2) (requiring statement that “child is an adherent of a religious denomination whose religious teachings are opposed to such tests or inoculations.”); Or. Rev. Stat. § 433.267(c) (requiring statement that “child is being reared as an adherent to a religion the teachings of which are opposed to such immunization.”);

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<sup>3</sup> The *Kolbeck* case will be discussed in greater detail in Section V below.

*see also* Exhibit C. There do not appear to be any cases in which plaintiffs have challenged these types of religious exemptions that effectively require the religious belief opposing vaccinations be held by an “institution” as opposed to held personally by the individual. It is therefore unclear whether such exemptions are constitutional. Moreover, several of the states (though not all) that provide this type of exemption, also provide an alternative religious exemption for “personal” religious beliefs. The availability of an alternative means of satisfying the religious exemption may again explain the lack of challenges brought against these exemptions.

As will be discussed below in Subsection IV.A.3., the few courts that have considered whether the tenets of the claimed religion actually oppose immunization have done so in the context of assessing whether a person’s religious belief was “sincere” and “genuine.” *See, e.g., Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994) (noting the fact that Jewish teachings do not prohibit immunization as “bear[ing] on determining whether plaintiffs’ beliefs are genuine and sincere.”). There do not appear to be any cases considering whether as the sole basis for the granting the religious exemption a state can inquire into whether the tenets of the claimed religion actually oppose immunization.<sup>4</sup>

Interestingly, one New Jersey court, in denying a Christian Scientist’s challenge to a statute that had no religious exemption, noted that “[t]here is some question whether the tenets and teachings of Christian Science actually compel a person like defendant to resist plaintiff board’s policy requiring vaccination and immunization for children who want to attend the local schools.” *Bd. of Educ. v. Maas*, 56 N.J. Super. 245, 270 (App. Div. 1959). The court even

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<sup>4</sup> The Montana Attorney General has opined that such exemptions may be unconstitutional. *See* Opinion No. 7, 1991 Mont. AG Lexis 6 (Feb. 27, 1991). The Attorney General was asked to consider whether a school district could require that the claimed religious exemption “be based on the tenets and practices of an established religion and not on personal religious practices.” *Id.* at \*2. The Attorney General concluded that such a construction may be unconstitutional under existing case law from other states such as *Dalli* and *Davis*, discussed in Subsection IV.A.1 above. *Id.* at \*6.

quoted from an excerpt of the writings of Mary Baker Eddy, the founder of the Christian Science Church, where she recommended that individuals submit to vaccination. *Id.* at 270-71.

However, the Court went on to note that its discussion of the writings of Eddy were “not intended to be in any way dispositive of the religious freedom issue posed by defendant.”

Because defendant had only challenged the fact that no religious exemption was available under the statute at all, the court was able to resolve the issue under existing precedent, without delving into this specific defendant’s beliefs.

### **3. Religious Belief of An Individual**

Several states explicitly require a statement that vaccination conflicts with the personal religious beliefs of an individual (e.g., a parent, guardian or, in some cases, the child herself) in order to qualify for a religious exemption. *See, e.g.*, Ark. Code Ann. § 6-18-702 (requiring statement that the immunization “conflicts with the religious or philosophical beliefs of the parent or guardian.”); R.I. Gen. Laws § 16-38-2 (requiring statement that immunization “is contrary to that person’s religious beliefs”); *see also* Exhibit C. Some states impose a further requirement that the individual’s religious belief be sincere, genuine or bona fide. *See, e.g.*, Maine Rev. Stat. Ann. Tit. 20, § 6355 (requiring “sincere religious belief that is contrary to the immunization”); Md. Code Ann., Educ. § 7-403 (requiring that immunization “conflicts with the parent’s or guardian’s bona fide religious beliefs and practices”); 048-141-001 Wyo. Code R. § 5(b) (requiring “evidence of a truly held and genuine religious objection”).

Courts in Wyoming and New York have considered whether it is proper for the state to inquire whether a person’s claimed religious belief is actually “religious” in nature and is sincerely held. Although the Supreme Court of Wyoming in one case found that the Department of Health overstepped its authority when it conducted an investigation into the sincerity of the

plaintiff's religious beliefs, the New York courts have consistently allowed the state to inquire into the nature and genuineness of a plaintiff's religious beliefs. The Wyoming and New York cases are presented below.

First, in *In re LePage*, plaintiff sought a religious waiver under Wyoming's statute which provided that "[w]aivers *shall be authorized* by the state or county health officer upon submission of written evidence of religious objection." 18 P.3d 1177, 1180 (Wyo., 2001) (emphasis added). The Department of Health asked plaintiff for additional written evidence regarding the sincerity of her beliefs, and ultimately denied her request. An administrative hearing was then held, after which her request was determined to be based on "personal, moral, or philosophical" beliefs rather than truly held religious beliefs. On appeal, the Wyoming Supreme Court found that the statutory language (i.e., the Department "shall" authorize a waiver) was "mandatory" and not "discretionary," and that the Department of Health exceeded its statutory authority by inquiring into the sincerity of plaintiff's religious beliefs. *Id.* Although the Court's decision was based entirely on statutory interpretation, the Court went on to question (but not decide) the extent to which the state could inquire into an individual's religious beliefs if the statute had so provided, and stated in dicta that such inquiries could possibly infringe upon the free exercise of religion. *Id.* at 1181.

In contrast, both state and federal courts in New York repeatedly have upheld the state's ability to inquire into whether a plaintiff's belief is "religious" in nature, in addition to inquiring into the sincerity of that belief.<sup>5</sup> Indeed, in analogous contexts, the United States Supreme Court has acknowledged that it is proper for courts to consider both of these questions. *See, e.g., U.S. v. Seeger*, 380 U.S. 163, 185 (1965) (stating that in evaluating a conscientious objector's claim

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<sup>5</sup> New York has long allowed persons to claim religious exemptions based on a personal and sincerely held religious belief. The current formulation of the N.Y. exemption provides for an exemption where a parent holds a



for exemption from the military draft, local draft boards and courts were “to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.”); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972) (evaluating whether Amish parents’ claim that compulsory school attendance was contrary to their religious beliefs was actually “rooted in religious belief” as opposed to “based on purely secular considerations”). Relying on such Supreme Court cases, the Second Circuit has recognized in the vaccination context that there must be some threshold inquiry into whether a belief is “religious” even though religion has been broadly defined by the United States Supreme Court and the Second Circuit.<sup>6</sup> *See Mason v. Gen. Brown Cent. Sch. Dist.*, 851 F.2d 47 (2d Cir. 1988) (affirming denial of religious exemption based on finding that parents’ opposition to vaccination, which was based on lifestyle of living in a “natural order,” did not rise to the level of a religious belief). The New York state courts have also followed this approach. *See, e.g., Matter of Nassau Cnty. Dept. of Soc. Servs. v. R.B.*, 870 N.Y.S.2d 874, 878 (N.Y. Fam. Ct. 2008) (noting that courts must first find that the exemption seeker’s belief is “religious” in nature, as opposed to medical or based upon “purely moral considerations.”). Once a religious belief is found, New York courts will inquire into the sincerity of that religious belief. *See, e.g., Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994) (stating that court “must first determine whether plaintiffs’ purported beliefs are ‘religious.’ Only if they are, then this Court must determine whether those beliefs are genuinely and sincerely held.”); *Matter of Nassau Cnty.*,

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“genuine and sincere religious belief[.]” against vaccination. *See* NY Pub. Health Law 2164.

<sup>6</sup> In *Seeger*, *supra*, the Supreme Court crafted a definition to assist in determining whether a belief rises to the level of “religious.” *See Seeger*, 380 U.S. at 165-166 (the test “is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.”); *see also Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 427-430 (E.D.N.Y. 2010) (discussing Supreme Court and Second Circuit cases that provide standards for what constitutes “religious beliefs”).

870 N.Y.S.2d at 878 (stating that “[o]nce a religious belief is found, an inquiry must be made into the sincerity of the belief.”).

New York courts have held evidentiary hearings to determine the religious nature and sincerity of an exemption seeker’s claimed beliefs and, therefore, whether an individual qualifies for a religious exemption to mandatory immunization. At these hearings, courts have considered documentary evidence and witness testimony and have required exemption seekers to prove by a preponderance of the evidence that they hold a genuine and sincere religious belief against vaccination. *See, e.g., Galinsky v. Bd. of Educ.*, 2000 U.S. App. LEXIS 9529, \*1-2 (2d Cir. May 9, 2000) (affirming denial of religious exemption where District Court held a bench trial and determined that, although sincere, plaintiffs’ opposition to vaccination did not stem from their religious convictions); *Shmuel G. v. Rivka G.*, 2005 NY Slip Op 50120U, \*4 (N.Y. Fam. Ct. 2005) (concluding after evidentiary hearing that plaintiff’s opposition to immunization was “rooted in her religious beliefs, and that her religious beliefs are genuine and sincerely held” and also noting that her burden was preponderance of evidence); *Matter of Nassau Cnty.*, 870 N.Y.S.2d at 879 (same). To determine whether an exemption seeker’s religious belief is genuine and sincere, New York courts have even considered expert testimony regarding whether the claimed religion actually opposes immunizations. *See, e.g., Berg*, 853 F. Supp. at 655 (granting TRO to Jewish parents and noting it seemed “odd that plaintiffs interpret certain tenets of the Jewish religion to prohibit immunization, while Jewish teaching, according to [the states’] expert, imposes no such prohibition, and although these facts bear on determining whether plaintiffs’ beliefs are genuine and sincere, plaintiffs have thus far sufficiently shown that they hold their beliefs genuinely and sincerely”).

Before ending this discussion of First Amendment limits on religious exemptions, it should be noted that it is difficult to predict whether a specific state's religious exemption will be found constitutional, given the ability of the courts to interpret the wording of the exemptions in a variety of ways. This is especially so in states where the religious exemption is broadly worded. *See, e.g.*, 105 Ill. Comp. Stat. 5/27-8.1 (requiring only that objection to immunization be based on "religious grounds"). Sometimes in an effort to preserve the constitutionality of the exemption, a court will interpret the exemption in a broader way than suggested in the statutory text. *See, e.g., Brown v. City Sch. Dist. of the City of Corning*, 429 N.Y.S.2d 355 (N.Y. Sup. Ct. 1980) (interpreting an exemption that required membership in a "recognized religious organization" as only requiring a sincerely held religious belief, in an effort to avoid striking the law as unconstitutional). Other times, however, a court might interpret the exemption more narrowly than stated in the text, and possibly in a way that might be unconstitutional. *See, e.g., In re Stratton*, 571 S.E.2d 234, 236 (N.C. Ct. App. 2002) (noting, but without considering the merits thereof, that a religious waiver was rejected because the applicants "could not point to any particular provision of their religion that prohibits immunization," despite the fact that the statute in question only considers the "bona fide religious beliefs of ... the parent").

### **B. Other Constitutional Limitations on Religious Exemptions**

In addition to the First Amendment challenges discussed above, plaintiffs have also brought Equal Protection Clause and Due Process Clause challenges to religious exemptions. For example, religious exemptions that require membership in a "recognized" religion have been challenged on Equal Protection grounds in addition to First Amendment grounds. Although in some cases the court decided the case on First Amendment grounds, and did not reach the Equal Protection issue, in cases where the court did reach the issue, it also found the exemption

violative of the Equal Protection clause. *See, e.g., McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002).

Plaintiffs have also brought Due Process challenges to religious exemptions which have had mixed success in the courts. For example, in *Avard v. Dupuis*, plaintiff challenged a New Hampshire statute that allowed exemption from vaccination “for religious reasons at the discretion of the local school board.” 376 F. Supp. 479 (D.N.H. 1974). The New Hampshire District Court found that the statute denied plaintiff a meaningful right to be heard by putting him in a position of not knowing what to present to the Board to make its decision. *Id.* at 483. Additionally, the Court found that the statute provided no standards to guide the Board’s decisions. *Id.* The Court concluded that this lack of standards, rendered the religious exemption “unconstitutionally vague and in contravention of the due process clause of the Fourteenth Amendment.” *Id.*

In *Hanzel v. Arter*, plaintiff-parents raised a similar due process challenge to an Ohio statute that provided an exemption “for good cause, including religious convictions.” 625 F. Supp. 1259 (S.D. Ohio 1985). The plaintiff-parents argued that the statute allowed school officials to burden a fundamental right without providing guidelines for the exercise of their authority. *Id.* at 1263. The Court denied the claim, basing its decision on the fact that the plaintiffs’ beliefs (in “chiropractic ethic”) were not religious, and, therefore, because no fundamental right was implicated, the level of discretion given to school officials was appropriate. Having rejected the as-applied challenge, the Court declined to rule whether the statute was unconstitutional on its face, although it recognized that the statute’s language might be constitutionally problematic in its “standardless delegation of discretion . . . imparted to local school boards.” *Id.* Possibly in response to the dicta in *Hanzel*, Ohio later amended its religious

exemption statute to eliminate the “good cause” standard. *See* Ohio Rev. Code Ann. § 3313.671(A)(1) ([now requiring that a written statement be submitted declining immunization “for reasons of conscience, including religious convictions”](#)).

### **C. Practical Limitations on Religious Exemptions**

As discussed above in Subsection IV.A., the states vary in the “substantive” requirements they impose on individuals seeking religious exemptions (i.e. requiring membership in religious group whose tenets oppose vaccination or requiring a sincerely held individual belief against vaccination). As set forth below, the states also vary in the “procedural” requirements that they impose on those seeking exemptions.

Several states require a notarized statement, or an affidavit or other sworn statement, in support of the exemption. *See, e.g.*, Minn. Stat. § 121A.15(d); N.H. Rev. Stat. Ann §141-C:20-C; *see also* Summary Chart of Procedural Requirements for Religious Exemptions, attached hereto as Exhibit D. Utah even requires that the statement be witnessed by the “local health officer or his designee.” Utah Code Ann. § 53A-11-302(3)(b)(ii). Some states also require renewal of the statement or affidavit. *See, e.g.*, 25 Tex. Admin. Code § 97.62 (“The affidavit will be valid for a two-year period.”); Mont. Code Ann. § 20-5-405(1) (requiring form to be notarized annually and provided to the school before each school year); 048-141-001 Wyo. Code R. § 5(b) (“Approved Religious Exemptions must be renewed upon entry into the seventh grade.”).

Several states require parents to sign a form specifically prepared by the state or its health department. *See, e.g.*, S.C. Code Ann. § 44-29-180; 12 Va. Admin. Code § 5-110-80. South Carolina adds an additional burden, requiring the parent to request the form *in person* from the county public health department. *See* <http://www.scdhec.gov/health/disease/immunization/>

faq.htm# exemption3. Texas imposes a similar additional burden by requiring that the form be requested *in writing* from the health department. *See* 25 Tex. Admin. Code § 97.62.

Still other states require some form of education and informed consent before granting a religious exemption. For example, in Arizona parents must acknowledge in writing that they have “received information about immunizations provided by the department of health services and understands the risks and benefits of immunizations and the potential risks of nonimmunization.” Ariz. Rev. Stat. Ann. § 15-873. Arkansas, in addition to requiring a signed statement of informed consent, requires “completion of an educational component.” Ark. Code Ann. § 6-18-702(d)(4)(C). Although several states impose additional “procedural” requirements on obtaining religious exemptions, many states — including New Jersey — impose no procedural hurdles beyond the simple submission of a signed written statement.<sup>7</sup>

There do not appear to be any cases involving challenges to any of the above “procedural” requirements to obtain religious exemptions. Nor do there appear to be any cases involving challenges to the aggregate effect of several of these “procedural” requirements. However, based on existing case law from both inside and outside the vaccination context, it appears that if challenged, these “procedural” requirements, both individually and in the aggregate, would be constitutional. Courts have acknowledged that the right to an exemption from a vaccine requirement does not constitute a “fundamental right” for purposes of a constitutional due process analysis. *See, e.g., Hanzel v. Arter*, 625 F. Supp. 1259, 1261-62 (S.D. Ohio 1985) (finding that the fundamental right to privacy does not encompass immunization decisions). Therefore, under United States Supreme Court jurisprudence, any legislation

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<sup>7</sup> In response to a public comment that the statements submitted in support of religious objections should be sworn or notarized, the New Jersey Department of Health stated that it had no authority to impose such additional requirements on religious exemptions. *See* 41 N.J. Reg. 2417(a) at 13, comment 16. In light of that view, if any such requirements were to be implemented in New Jersey, it may be advisable that they be added to the statute,

burdening the right to an exemption need only be rationally related to a legitimate state purpose. *See, e.g., Wash. v. Glucksberg*, 521 U.S. 702, 792 (1997) (holding that the “right” to assistance in committing suicide is not a fundamental right and therefore the relevant inquiry was whether the state’s assisted-suicide ban was rationally related to legitimate state interests). The “procedural” requirements discussed in this section, such as those requiring a notarized signature or receipt of information, would clearly satisfy the rational basis test. This is particularly apparent in light of cases in which the United States Supreme Court has upheld as constitutional even greater procedural hurdles that do burden a fundamental right, and therefore must meet a more exacting constitutional inquiry. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality) (upholding various requirements, including a twenty-four-hour waiting period and the receipt of state-mandated information, that a woman must meet before she can exercise her fundamental right to terminate her pregnancy).

## **V. New Jersey’s Religious Exemption**

Title 26 (Health and Vital Statistics) of the New Jersey Statutes provides for a religious exemption from vaccination where the parent or guardian objects “upon the ground that the proposed immunization interferes with the free exercise of the pupil’s religious rights.” N.J. Stat. Ann. § 26:1A-9.1. The New Jersey Department of Health has promulgated a regulation to implement N.J. Stat. Ann. § 26:1A-9.1, which simply tracks the language of the statute. *See* N.J. Admin. Code § 8:57-4.4 (providing for religious exemption where parent or guardian requests an exemption “pursuant to the requirements for religious exemption established at N.J.S.A. 26:1A-9.1, on ‘the ground that the . . . immunization interferes with the free exercise of the pupil’s religious rights.’”). This current formulation of regulation 8:57-4.4 was recently adopted, and amended the prior version of the regulation which had provided for exemption where a parent

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as opposed to the regulation.

explained how the immunization “conflicts with the pupil’s exercise of bona fide religious tenets or practices.” *See* 41 N.J. Reg. 2417(a) at 5 (noting differences between current and former version of regulation).

It should be noted that Title 18A (Education) of the New Jersey Statutes also contains a religious exemption that contains the same language as the old version of N.J. Admin. Code § 8:57-4.4. *See, e.g.*, N.J. Stat. Ann. § 18A:61D-10 (requiring a written statement “explaining how the administration of the vaccine conflicts with the bona fide religious tenets or practices of the student”). The Department of Health has acknowledged that an “incongruity” exists between Title 26 and Title 18, but claims it lacks authority to resolve these differences. *See* 41 N.J. Reg. 2417(a) at 13, comment 14.

A recent opinion by the New Jersey Office of Legislative Services (“OLS”) determined that N.J. Stat. Ann. § 18A:61D-10 (which contains the “bona fide religious tenets or practices of the student” formulation) would be unconstitutional if health officials were to make determinations regarding whether a person’s religious tenets or practices are “bona fide religious tenets or practices.” *See* February 17, 2011 OLS Opinion. In reaching this conclusion, the OLS relied on the New Jersey Law Division’s opinion in *Kolbeck v. Kramer*, 84 N.J. Super. 569 (Law Div. 1964). The OLS’s interpretation of *Kolbeck*, however, goes too far.

In *Kolbeck*, Rutgers University refused to admit a student who objected to the vaccination requirement as violative of his religious principles and beliefs. Although the statute providing for a religious exemption only required a statement that “vaccination interferes with the free exercise of [one’s] religious principles,” Rutgers required the student to certify that he was a member of the Christian Scientist faith. Plaintiff argued that his opposition was based on religious belief, despite the fact that he was not a member of any recognized sect or religion.



Rutgers denied him an exemption, concluding that his refusal was “not based on a bona fide claim of religious belief.” *Id.* at 570.

Throughout its arguments, Rutgers used the phrase “bona fide,” for example arguing that it had eight “bona fide Christian Scientists” to whom it granted the exemption. *Id.* at 575. And the New Jersey Court itself also used the phrase “bona fide” in its opinion. However, it appears that both Rutgers’ and the Court’s use of the phrase “bona fide” related to whether the plaintiff belonged to a “recognized” religion. The Court was clearly troubled that the University relied on the fact that the plaintiff did not belong to a recognized religion as a basis for rejecting his exemption:

The suggestion that plaintiff does not have a bona fide religion to qualify for this exemption, in view of the facts and the law on this question, indicates an arbitrary and capricious policy for a State University. There is no right on the part of a political subdivision of a State to take discriminate action against a person in reference to his religious views. Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under statute and constitutional law.

[*Id.* at 576].

The Court’s and University’s repeated use of “bona fide” appears to reflect an inquiry into whether the plaintiff’s religious beliefs were a “real” religion — one that was established and recognized — not the sincerity of the plaintiff’s beliefs. The *Kolbeck* Court did not say that the state or university had no right or ability to inquire into whether an individual’s religious belief was genuine or sincere, *i.e.* bona fide.

The OLS opinion is an overbroad interpretation of *Kolbeck*, in that it does not consider the limited use of the word “bona fide” in that case. Nor does it consider that the phrase “bona fide religious tenets or practices” in Title 18 could properly be interpreted to allow inquiry into the *sincerity* of claimed beliefs under similar reasoning used by the various Second Circuit and

New York state court decisions discussed above in Subsection IV.A.3. Indeed, in *Kolbeck*, the Court considered the plaintiff's past conduct (i.e. he had consistently rejected vaccines in the past), and testimony from his family as to their religious beliefs, and found that plaintiff should be admitted to Rutgers without vaccination.

## **VI. Conclusion**

A New Jersey religious exemption requiring “bona fide religious tenets or practices” could be constitutional if it were interpreted to mean that a person’s religious tenets or practices must be sincerely and genuinely held. Such a standard has been found constitutional by the Second Circuit and New York state courts, and has been applied often by those courts to determine whether or not an individual qualifies for a religious exemption. Such a standard also appears to be constitutional under the New Jersey decision of *Kolbeck v. Kramer*, because that decision does not appear to stand for the proposition that the state cannot inquire into whether an individual’s religious belief is genuine or sincere.

Additionally, imposing “procedural” requirements, such as those described above, on the New Jersey religious exemption may provide a constitutionally permissible means of ensuring that only those whom the legislature intended qualify for the exemption. Indeed, as one commentator has observed there is an inverse relationship between the complexity of the requirements to obtain the exemption and the proportion of children claiming the exemption. Jennifer S. Rota et al., Processes for Obtaining Nonmedical Exemptions to State Immunization Laws, 91 Am. J. of Pub. Health 645, 647 (2001). This same commentator also observed that “in many states, the actions required to obtain an exemption are simpler and less time consuming than the effort needed to meet the immunization requirements,” which should not be the case. *Id.* at 648.