

**Testimony of Professor Jennifer Wriggins, Esq. in Support of L.D. 798 An Act to Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization Requirements.**

Good afternoon, Senator Millet and Representative Kornfield, and members of the Joint Standing Committee on Education and Cultural Services. My name is Jennifer Wriggins and I live in Portland Maine. I am a Professor at University of Maine School of Law and also am a lawyer. I have taught at Maine Law for 22 years. I teach Health Care Law & Ethics. I have a bachelors degree from Yale College and a law degree from Harvard Law School. I am speaking not as a representative of the University of Maine School of Law or the University of Maine, but as an individual with specialized knowledge in this area. I wish to address the legal context and issues surrounding LD 798. Thank you for this opportunity.

I have 3 main points to make today. First, protecting the public's and children's health and safety is a core government task; states are allowed to make reasonable regulations limiting personal freedom in doing that task. Second, this bill is a reasonable regulation; I won't spend much time on this point because extensive, scientifically grounded testimony will be presented today. Third, the bill is consistent with the U.S. Constitution. Precedent and legal doctrine strongly support this conclusion.

On the first point, for more than 100 years, it has been clear that protecting the public health is a core state function and that vaccination laws passed by legislatures after hearings like this one are part of protecting the public health.<sup>1</sup> The state also has a strong interest in protecting children.<sup>2</sup> "No court, state or federal, in the United States, has found state school immunization mandates unconstitutional."<sup>3</sup> The Supreme Court first upheld a mandatory vaccination law in 1905 in *Jacobson v. Massachusetts* and courts consistently have upheld vaccination laws ever since.<sup>4</sup> Your job as elected policymakers is to

---

<sup>1</sup> In *Jacobson v. Massachusetts*, the Supreme Court wrote, upholding a vaccination law, "the authority of the State to enact this statute is to be referred to what is commonly called the police power...[this Court] has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description.'" ...According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety." 197 U.S. 11, 27, 38 (1905).

<sup>2</sup> See generally, *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

<sup>3</sup> Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 u. P. J. Const. L. 207, 208 (Oct. 2018).

<sup>4</sup> See, e.g. *Love v. State DOE*, 240 Cal. Rptr. 3d 861 (Nov. 20, 2018)(upholding California's 2015 vaccination law), *Brown v. Smith*, 24 Cal. App. 5<sup>th</sup> at 135 (2018)(upholding California's 2015 vaccination law), *Philips v. New York City*, 775 F.3d 538 (2d Cir. 2015)(upholding a New York school vaccination law and stating it did not need to have a religious exemption in order to be constitutional), *Workman v. Mingo County Bd. Of Educ.* 419 Fed. Appx 348, 353-54 (4th Cir. 2011)(unpublished opinion.upholding West Virginia's vaccination law), *Caviezel v. Great Neck Public* 500 Fed. Appx. 16, 18 (2012)(plaintiffs having failed to show "genuine and sincere religious beliefs which prohibit vaccinations", have no valid first amendment or equal protection claim), *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 School*. Dist. 672 F. Supp. 81, 88 (E.D. N.Y. 1987)("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs); *Davis v. State*, 294 Md. 370, 379 n. 8, 451 A.2d 107, 112 n. 8 (Md. 1982)("Maryland's compulsory immunization program clearly furthers the important governmental objective of eliminating and preventing certain communicable diseases"); *Cude v. State*, 237 Ark. 927, 932, 377 S.W. 816, 819 (Ark. 1964).

weigh the evidence about health and safety and make your best possible decisions.<sup>5</sup> Some will object to what they see as unacceptable restraints on their choice and liberty. But some restrictions on liberty are necessary. As the Supreme Court noted in the 1905 *Jacobson* case, “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. ... Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.”<sup>6</sup> The good and welfare of society “of which the legislature is primarily the judge” is the basis of the government’s power in this area, wrote the Supreme Court. And in 1922 the Supreme court upheld a law requiring a child to be vaccinated before attending school.<sup>7</sup> The court wrote, “[I]t is within the police power of a state to provide for compulsory vaccination.”<sup>8</sup> So there is a clear recognition in law – almost 100 years old – of conditioning school attendance on immunization.

Second, the bill represents reasonable regulation. It requires people generally to be vaccinated against certain diseases before attending school, but does not require vaccination if a doctor writes that it “may be medically inadvisable.”<sup>9</sup> Also it does not apply to children who are home schooled. It is aimed at protecting children (and indirectly society) from infectious disease outbreaks, and does this in a targeted way by requiring vaccination before children enter schools which are a group setting where infectious diseases can easily be spread. There is overwhelming evidence that this law is a very good idea.

Third, this bill is in line with the U.S. Constitution. As noted above, courts have consistently upheld vaccination laws. The bill repeals two exemptions, one a “philosophical” exemption, and one a religious exemption. Neither of those exemptions is necessary for the law to be constitutional, in my view.<sup>10</sup>

First, the philosophical exemption.<sup>11</sup> This currently allows any parent to excuse his or her child from vaccination and let the child go to school unvaccinated if the parent states in writing that he or she opposes the immunization “for philosophical reasons,” which are totally undefined. It allows anyone to excuse his or her child from vaccination for literally any reason. There is no part of the constitution that requires this. The exemption effectively allows each parent to be a “law unto himself,” which the Supreme Court warned against in 1905.

Second, the religious exemption. This currently allows any parent to excuse his or her child from vaccination for a “sincere religious belief that is contrary to the immunization requirement.”<sup>12</sup> The bill removes that exemption. The first amendment protects the free exercise of religion. It also says that the government shall not make laws establishing a particular religion. Is a vaccination law that does not

---

<sup>5</sup> *Jacobson v. Massachusetts*, 197 U.S. 11. In *Jacobson*, the person who objected to being vaccinated (the punishment was a fine) argued that vaccinations were not safe and did not work [go back and read whole opinion] and the court stated that it was the Legislature’s job “to determine” what method “was most effective for the protection of the public against disease...in light of all the information it had or could obtain.”... [get page cite]

<sup>6</sup> *Jacobson v. Massachusetts*, 197 US. 11.

<sup>7</sup> *Zucht v. King*, 260 U.S. 174, 175 (1922).

<sup>8</sup> 260 US at 176.

<sup>9</sup> 20-A MRSA 6355 (2).

<sup>10</sup> When *Jacobson v. Massachusetts* and *Zucht v. King* were decided, the Supreme Court had not yet decided that the First Amendment applied to the states so those cases did not resolve that issue. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>11</sup> 20-A MRSA 6355(3).

<sup>12</sup> 20-A MRSA 6355(3).

have a religious exemption consistent with the first amendment? Yes. Three states have vaccination laws without religious exemptions – Mississippi, West Virginia, and most recently, California. West Virginia’s law, which has never had a religious exemption, was upheld in 2015 over a parent’s claim that it violated her religious freedom.<sup>13</sup> Mississippi has lacked a religious exemption since 1979 when a court held that its religious exemption violated the Constitution.<sup>14</sup> Last but not least, California is the third state with no philosophical or religious exemption.<sup>15</sup> It repealed its exemptions in 2015 after a measles outbreak traced to Disneyland. California’s new law has been challenged repeatedly and upheld every time, most recently in a November 2018 decision.<sup>16</sup> In the 2015 case of *Phillips v. New York City*<sup>17</sup> the Second Circuit Court of Appeals held that a student vaccination law, in this case New York’s law, did not have to have a religious exemption in order to comply with the constitution.

Claims that a neutral, public health law like a school vaccination law violate a parent’s first amendment rights of religious exercise face many hurdles as well as the precedent upholding the laws. First, the Supreme Court has ruled that parents’ liberty interest in raising their children as they wish does not supercede the state’s interest in child health. The Supreme Court has stated in dictum that a parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. 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.”<sup>18</sup> Also, a parent may need to show a substantial burden on his religious exercise from the law; for a parent to simply state that he has a religious objection is not necessarily enough to prove a substantial burden.<sup>19</sup> It is also essential to remember that even if the law creates a substantial burden on someone’s religious exercise, that does not make it unconstitutional. The state always has the opportunity to show that there is a compelling governmental interest at stake and that the law is narrowly tailored to further that interest. Preventing the spread of communicable disease is a compelling governmental interest.<sup>20</sup> If the state can show that the law is narrowly tailored to further that compelling interest, the law is acceptable. In this case, school vaccination is a targeted, narrowly tailored way to further the extremely important – indeed, compelling - goal of preventing infectious disease outbreaks. The bill will be constitutional if it becomes law, in my view.<sup>21</sup>

In short, this bill is squarely within your authority and power, there are strong reasons for it, and it is constitutional.

---

<sup>13</sup> *Workman v. Mingo County Bd. Of Educ.* 419 Fed. Appx 348, 353-54 (4th Cir. 2011)(unpublished)

<sup>14</sup> *Brown v. Stone*, 378 So.2d 318, 223 (Miss. 1979). No challenges have gone to trial since *Brown*. James Cosgrove & Abigail Lowin, *A Tale of Two States: Mississippi, West Virginia, and Exemptions to Compulsory School Vaccination Laws*, 35 *Health Affairs* 351 (Feb. 2016)

<sup>15</sup>For a thorough discussion of the California Law, SB277 and challenges to it before the article’s publication, see Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 *U. Pa. J. Const. L.* 207 (2018).

<sup>16</sup> See e.g., *Love v. State DOE*, 240 Cal. Rptr. 3d 861 (Nov. 20, 2018), *Brown v. Smith*, 24 Cal. App. 5<sup>th</sup> at 135 (2018)

<sup>17</sup> 775 F.3d 538 (2d Cir. 2015).

<sup>18</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944). In *Prince*, a Jehovah’s Witness distributed leaflets with her 9 year old niece in violation of a child labor law and claimed enforcement of the law violated her free exercise rights. 321 U.S. 166-167. The court held that the child labor law applied despite the claimed religious defense.

<sup>19</sup> See, e.g. *Phillips v. New York City*, 775 F.3d 538 (2d Cir. 2015)(upholding a New York school vaccination law and stating it did not need to have a religious exemption in order to be constitutional).

<sup>20</sup> See e.g. *Brown v. Smith*, 24 Cal. App. 5<sup>th</sup> 1135 (2018), *Workman v. Mingo County Bd. Of Educ.* 419 Fed. Appx 348, 353-54 (4th Cir. 2011)(unpublished)

Thank you for the opportunity to share my position on this important bill with you today and I'd be happy to answer any questions you might have.

Jennifer Wiggins

[jennywiggins@gmail.com](mailto:jennywiggins@gmail.com)

207-450-3341

March 13, 2019