

MEASLES, CHICKENPOX, AND  
OTHER PREVENTABLE DISEASES:  
WHY STRICTER VACCINE EXEMPTIONS ARE  
A MUST-PROPOSED LEGISLATION FOR  
STRICTER VACCINE EXEMPTION STANDARDS

ELEANOR H. SILLS\*

ABSTRACT

*The outbreak of measles in 2019 was the largest measles outbreak since the Centers for Disease Control and Prevention declared it eliminated in 2000. With measles and other vaccine-preventable diseases on the rise, there is growing concern that vulnerable populations will be exposed to these diseases, which can lead to death. One major factor in this increase is the lackadaisical vaccine exemption policies that are implemented in the United States. If vaccine exemption policies were more like those of states that have lower exemption rates and included some inquiry into the sincerity and genuineness of the requesting parent's religious beliefs, then it is likely vaccine-preventable disease outbreaks would decline. This Note looks to how different states through their state statutes implement vaccine exemption policies and then analyzes each state's vaccination statistics. By using this empirical data and comparing state statutes, this Note determines which state vaccine exemption policies are the most effective in ensuring the health of the public. This Note advocates for a model state statute that incorporates the most effective state policies and includes inquiries into vaccine exemption requests, thus creating a more stringent standard in order to make vaccine exemptions less obtainable for those who do not truly need them. In implementing said policy, the population of the United States would achieve herd immunity and thus decrease or eliminate any outbreaks of vaccine-preventable diseases.*

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\* J.D. Candidate, Florida State University College of Law, 2020. B.S. in Public Health, Tulane University, 2017. Thank you to my husband, Jeffrey James Grosholz, and my incredible parents for encouraging me and supporting me every day.

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## I. INTRODUCTION

Measles was reported in thirty-one states in 2019.<sup>1</sup> An alert was issued when three unvaccinated children were hospitalized for measles after traveling through two major airports—Denver and Los Angeles.<sup>2</sup> A chickenpox outbreak was reported at University of Mississippi School of Law in late 2018.<sup>3</sup> A prominent screenwriter likened criticizing supporters of the anti-vaccination movement to using racial slurs.<sup>4</sup> Needless to say 2019 brought vaccine exemptions back to the forefront of the news. What is even more startling is that in 2000 the Centers for Disease Control and Prevention (CDC) declared

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1. *Measles Cases and Outbreaks*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/cases-outbreaks.html> (last updated Feb. 3, 2020).

2. Jessica Seaman, *Health Officials Warn Denver Airport Travelers of Potential Measles Exposure After 3 Children Hospitalized*, DENVER POST (Dec. 16, 2019, 4:14 PM), <https://www.denverpost.com/2019/12/16/colorado-measles-outbreak-denver-airport/>.

3. Posting of University of Mississippi School of Law, lawcomm@olemiss.edu, to law-center@listserv.olemiss.edu (Nov. 8, 2018, 11:59 EST) (on file with author) (informational memo regarding chickenpox outbreak).

4. William Hughes, *Aladdin Screenwriter Uses Racial Slur to Defend Anti-Vaccination Comments, So Welcome to 2018*, A.V. CLUB (Nov. 24, 2018, 1:50 PM), [https://news.avclub.com/aladdin-screenwriter-uses-racial-slur-to-defend-anti-va-1830633245?utm\\_medium=sharefromsite&utm\\_source=avclub\\_copy&utm\\_campaign=bottom](https://news.avclub.com/aladdin-screenwriter-uses-racial-slur-to-defend-anti-va-1830633245?utm_medium=sharefromsite&utm_source=avclub_copy&utm_campaign=bottom).

measles to be eliminated.<sup>5</sup> In early 2019, there were ten reported outbreaks, which are more serious than mere isolated incidents.<sup>6</sup> With this recent trend of an increase in preventable disease outbreaks, a logical question that follows is why?

There are a multitude of reasons, and it would be nearly impossible to narrow it down to just one. One reason, though, is because vaccine exemptions are on the rise.<sup>7</sup> Every state in the United States provides some sort of vaccine exemption on the grounds of medical, religious, or personal beliefs.<sup>8</sup> Each state offers a medical exemption, but some states are more lenient when it comes to deciding on what basis to grant an exemption for religious or philosophical beliefs.<sup>9</sup> For example, under North Carolina's vaccine exemption statute, the parent or guardian of the child must not state any sort of personal or philosophical reason for seeking a religious exemption.<sup>10</sup> In June of 2019, New York repealed its prior statute allowing for religious exemptions which required a showing of sincere and genuine belief.<sup>11</sup> Compare, for example, in North Carolina, the requirement that no personal or philosophical beliefs be the foundation for vaccine exemptions as well as New York's prior sincere and genuine belief requirement to vaccine exemptions in Florida. In Florida, courts have held that, because the legislature did not put in such wording in the exemption statute, they will not go into deciding if a parent's or guardian's belief is indeed grounds for an exemption.<sup>12</sup> It is unclear whether this means that Florida does any sort of inquiry into the request or if all requests are granted. This is the case in many states, which leads not only to confusion and a lack of uniformity but, more importantly, a higher public health risk.

Further, states are not even constitutionally required to have a statute that creates a vaccine exemption.<sup>13</sup> In the seminal case, *Jacobson v. Massachusetts*, the Supreme Court was confronted with the

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5. *Measles History*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/measles/about/history.html> (last updated Feb. 5, 2018).

6. See *Measles Cases and Outbreaks*, *supra* note 1. Additionally, there was a huge spike in mumps in 2016 and a similar trend in 2017. *Mumps Cases and Outbreaks*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mumps/outbreaks.html> (last updated Jan. 8, 2020).

7. See PLOS, *Childhood Vaccination Exemptions Rise in Parts of the US*, SCI. DAILY (June 12, 2018), <https://www.sciencedaily.com/releases/2018/06/180612201811.htm>.

8. Juliette Mullin, *The States with Most (and Least) Strict Vaccine Policies*, DAILY BRIEFING BLOG (Feb. 5, 2015, 10:32 AM), <https://www.advisory.com/daily-briefing/blog/2015/02/a-look-at-state-vaccine-policies>.

9. *Id. Compare* 10A N.C. ADMIN. CODE 41A.0403 (2020), *and* ARK. CODE ANN. § 6-18-702 (2018), *with* FLA. STAT. § 1003.22 (2018), *and* COLO. REV. STAT. § 25-4-903 (2018).

10. 10A N.C. ADMIN. CODE 41A.0403 (2020).

11. N.Y. PUB. HEALTH § 2164 (2018).

12. *Flynn v. Estevez*, 221 So. 3d 1241, 1249 (Fla. 1st DCA 2017).

13. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

question of whether there must be a vaccine exemption statute.<sup>14</sup> In *Jacobson*, the Court held that “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.”<sup>15</sup> The Court again was faced with a similar question in *Prince v. Massachusetts*—whether religious freedom trumped the public’s health.<sup>16</sup> In *Prince*, the Court held, “[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.”<sup>17</sup>

Vaccine regulation is an area where the state exercises broad discretion as to how to effectuate and enforce health law.<sup>18</sup> However, there should be some sort of guiding principle on when to grant vaccine exemptions in order to keep the general population healthy and safe from these preventable diseases and to keep frivolous religious exemptions low. A standard is needed that is stricter than merely requiring a parent or guardian to sign a form and be exempt from vital vaccines.<sup>19</sup> States such as California and Arkansas have tightened up on their vaccine exemption statutes in recent years.<sup>20</sup> California has completely eliminated vaccine exemptions for everyone except those who have a medical exemption.<sup>21</sup> Arkansas’ statute creates a multitude of barriers for parents or guardians to jump through in order to get an exemption.<sup>22</sup> Those barriers are: (i) an annual renewal requirement; (ii) getting a notarized statement requesting the exemption from the Department of Health; (iii) completion of an educational component that includes fact sheets from the CDC; (iv) a signature, which signifies informed consent about the refusal; and (v) a signed statement stating that the parent or guardian understands that the child may be removed from school during an outbreak and that the child may not return to school until the Department of Health

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14. *Id.* at 37.

15. *Id.* at 26.

16. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

17. *Id.* at 166-67.

18. *Zucht v. King*, 260 U.S. 174, 176 (1922).

19. See Fla. Dep’t of Health, *Exemption from Required Immunizations*, FLA. HEALTH, <http://www.floridahealth.gov/programs-and-services/immunization/children-and-adolescents/immunization-exemptions/index.html> (last updated Sept. 18, 2019, 1:22 PM).

20. *California State Vaccine Requirements*, NAT’L VACCINE INFO. CTR. (Sept. 5, 2019), <https://www.nvic.org/Vaccine-Laws/state-vaccine-requirements/california.aspx>; ARK. CODE ANN. § 6-18-702 (2019).

21. See CAL. HEALTH & SAFETY CODE § 120370 (2019).

22. See § 6-18-702.

approves his or her return.<sup>23</sup> All of these steps have been shown to deter parents and guardians without sincere beliefs from requesting vaccine exemptions.<sup>24</sup>

This Note proposes a model statute that requires a stricter evidentiary standard for religious vaccine exemptions by adding three additional requirements to the Arkansas Legislature's vaccine exemption requirements, abolishing philosophical exemptions completely, and restricting those who can grant medical vaccine exemptions. This Proposed Legislation will accomplish this by incorporating North Carolina's ban on referencing any sort of personal and philosophical reasons for seeking the exemption, New York Legislature's former sincere and genuine belief in regard to religious exemptions and proposing a requirement for a signed and notarized form from the parent's or guardian's religious leader. Creating this stricter standard will add an additional step to the vaccine exemption process in hopes to deter frivolous religious exemption claims. The Proposed Legislation will keep the medical exemption in place, as long as there is a signed statement from the child's physician that the medical exemption is necessary.

Part II of this Note will explore the different statutes in Arkansas, California, Colorado, Florida, New York, North Carolina and Louisiana as examples of some of the most restrictive states and some of the least restrictive states. Part III will discuss the Arkansas exemption and the New York's former sincere and genuine belief requirement and, specifically, how New York courts determine whether sincere and genuine beliefs exist, as well as discussing North Carolina's ban on referencing personal or philosophical beliefs. Part IV will delve into the Proposed Legislation and the rationale behind it. This Note will briefly examine how this Proposed Legislation would satisfy the *Lemon* test. Part V will explain why the standards are useful, what impacts the Proposed Legislation would have going forward, and possible counterarguments.

## II. ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, NEW YORK, AND LOUISIANA EXEMPTION STATUTES

Vaccine exemptions are categorically broken up into medical, religious, and philosophical exemption grounds. Some examples of state statute from least restrictive to most restrictive are Colorado (allowing medical, religious, and philosophical exemptions),<sup>25</sup>

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23. *Id.*

24. Michael Poreda, Comment, *Reforming New Jersey's Vaccination Policy: The Case for the Conscientious Exemption Bill*, 41 SETON HALL L. REV. 765, 800 (2011).

25. COLO. REV. STAT. § 25-4-902-3 (2019).

Arkansas (allowing medical, religious, and philosophical exemptions),<sup>26</sup> Louisiana (allowing medical and philosophical),<sup>27</sup> Florida (allowing medical and religious),<sup>28</sup> North Carolina (allowing medical and religious),<sup>29</sup> New York (allowing medical),<sup>30</sup> and California (allowing medical).<sup>31</sup>

The reasons why parents and guardians seek vaccine exemptions vary.<sup>32</sup> However, it is well known that it is relatively easy to get vaccine exemptions.<sup>33</sup> Sometimes, it is as easy as filling out a form.<sup>34</sup> Some argue that, because it is so easy to claim a religious exemption and no questions are raised regarding sincerity, many parents chose that route to avoid vaccination.<sup>35</sup> With this in mind, state legislatures must tighten up on their vaccine exemption policies in order to avoid eradicated, preventable, and deadly diseases from becoming prevalent again. Some groups suggest that making vaccine exemptions temporary, basing the exemption off evidence-based medicine, abolishing philosophical exemptions and ensuring genuine religious beliefs, excluding children during outbreaks, notarizing the exemption, recertification, and a separate exemption application for each vaccine will create change.<sup>36</sup> This Note incorporates many of these aspects in the Proposed Legislation. Further, when reading the statistics on vaccine rates, it is best to keep in mind, in order to maintain herd immunity, which is the number needed to keep unvaccinated people from contracting these diseases, there needs to be a 95% vaccination rate.<sup>37</sup>

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26. As seen from the discussion *supra* Part I, while Arkansas allows for exemptions for medical, religious, and philosophical beliefs, their statutory requirements for getting those exemptions is quite tenuous.

27. Because of Louisiana's lax requirements, often times religious exemptions are granted under the guise of philosophical exemptions. See *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. ST. LEGISLATURES (Jan. 3, 2020), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [hereinafter NAT'L CONF. ST. LEGISLATURES].

28. FLA. STAT. § 1003.22 (2019).

29. N.C. GEN. STAT. § 130A-155-57 (2019).

30. N.Y. PUB. HEALTH LAW § 2164 (2018).

31. CAL. HEALTH & SAFETY CODE § 120325 (West 2019).

32. Vincent Iannelli, *Abuse of Vaccine Exemptions*, VAXOPEDIA (Jan. 7, 2018), <https://vaxopedia.org/2018/01/07/abuse-of-vaccine-exemptions/>. Some examples of this include fear that there's aborted fetus tissue in the vaccines, desire to control the child's medical care, and worry over vaccine-related injuries.

33. *Id.*

34. See FLA. STAT. § 1003.22(5)(b)-(d) (2019).

35. Iannelli, *supra* note 32.

36. *Id.*

37. Marco Cáceres, *The Misunderstood Theory of Herd Immunity*, VACCINE REACTION (June 20, 2015), <https://thevaccinereaction.org/2015/06/the-misunderstood-theory-of-herd-immunity/>. As will be discussed, *infra*, herd immunity is imperative to maintain the safety of the public and is a driving factor in creating new legislation.

### A. Colorado

Colorado's medical exemption requires a school certification from a recognized medical professional (physician, physician's assistant, advance practice nurse) stating that one or more of the vaccines would endanger the child's health or is medically contraindicated due to other medical conditions.<sup>38</sup> Colorado's religious or philosophical exemption requires signed statement that the parent, guardian, or student adheres to a religious belief that opposes immunization or that the parent, guardian, or student has a personal belief that is opposed to immunizations.<sup>39</sup> With these standards in mind, the vaccination rate for kindergarteners<sup>40</sup> in Colorado, during the 2015-2016 school year, was the lowest of all states in for measles, mumps, and rubella (MMR) and diphtheria, tetanus, and acellular pertussis (DTap) doses, 87.1% and 86.6%, respectively.<sup>41</sup>

### B. Arkansas

As explained in Part I, Arkansas has many barriers to overcome in order for parents or guardians to receive a vaccine exemption.<sup>42</sup> However, Arkansas still allows for philosophical exemptions, which skyrocketed after the legislature amended the statute—out of the 1,145 vaccine exemptions granted 721 were on philosophical grounds, which equates to approximately 63%.<sup>43</sup> Because of this, their vaccination rates remain low, 90.8% and 88.2% for MMR and DTap doses, respectively.<sup>44</sup>

### C. Louisiana

Louisiana provides for philosophical and religious exemptions.<sup>45</sup> Under Louisiana's medical vaccine exemption section of the statute, if

38. COLO. REV. STAT. § 25-4-903(2)(a) (2019).

39. *Id.* § 25-4-903(2)(b).

40. This age is most typically used to measure vaccination rates because most children are vaccinated before they enter school. See *Vaccines at 4 to 6 Years*, CDC (Last reviewed February 25, 2020), <https://www.cdc.gov/vaccines/parents/by-age/years-4-6.html> (stating that most vaccines are given between four to six years and that children ill typically need a certificate of immunization to enroll in school).

41. Rane Seither et al., *Vaccination Coverage Among Children in Kindergarten—United States, 2015-16 School Year*, 65 MORBIDITY & MORTALITY WKLY. REP. 1057, 1059 tbl.1 (2015). MMR and DTap cover measles, mumps, rubella, diphtheria, tetanus, and pertussis. *Id.* at 1057.

42. See discussion *supra* Part I.

43. Joseph W. Thompson et al., *Impact of Addition of Philosophical Exemptions on Childhood Immunization Rates*, 32 AM. J. PREVENTATIVE MED. 194, 196 (2007). As will be discussed, see *infra* Part IV, doing away with the philosophical ground will likely decrease Arkansas' overall vaccine exemption rate.

44. Seither, *supra* note 41, at 1059.

45. LA. STAT. ANN. § 46-231-4(c) (2019).

a minor's parent or guardian submits a written statement from a physician stating that the immunization procedure is contraindicated for medical reasons, then the vaccine requirement shall not apply.<sup>46</sup> Within that same section, it is stated that, if a person's parent or guardian submits a written statement stating that the parent or guardian objects to the procedure (i.e., vaccination) on religious grounds, then the statute shall not apply.<sup>47</sup> Louisiana's vaccination rates are said to be one of the lowest in the country along with Colorado.<sup>48</sup> However, a more recent study showed that Louisiana's vaccination rates for MMR and DTap were 96.8% and 98.3%, respectively.<sup>49</sup> While these statistics seem contrary,<sup>50</sup> the state's overall vaccination rate is well below the 95% herd immunity threshold.

#### D. Florida

Florida's medical vaccine exemption statute allows for medical exemptions to be granted if a licensed physician certifies in writing that the child should be permanently exempt, if a licensed physician certifies in writing that the child has received as many immunizations as are medically necessary, or if the Department of Health determines the immunization to be unnecessary or hazardous.<sup>51</sup> If the parent of the child objects in writing that immunization conflicts with his or her religious tenants or practices, then the vaccination requirement shall not apply (i.e., a religious exemption will be granted).<sup>52</sup> In turn, Florida's vaccination rates for both MMR and DTap were 93.7%.<sup>53</sup>

#### E. North Carolina

North Carolina's medical vaccine exemption statute allows for medical exemptions to be granted if a licensed physician certifies that the required immunization is or may be detrimental to a person's health due to the presence of one of the contraindications adopted by the Commission.<sup>54</sup> As long as the contraindication persists, the exemption is valid.<sup>55</sup> Religious exemptions are granted if the bona fide religious belief of the parent or guardian are contrary to the immunization

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46. *Id.*

47. *Id.*

48. Mullin, *supra* note 8.

49. As will be discussed, *see infra* Part IV, this signed form requirement might be acting as a large deterrent in Louisiana.

50. *See infra* Section II.G.

51. FLA. STAT. § 1003.22(5)(b)-(d) (2019).

52. *Id.* § 1003.22(5)(a).

53. Seither, *supra* note 41, at 1057.

54. N.C. Gen. Stat. Ann. § 130A-156 (West 2019).

55. *Id.*



requirements and this belief shall be submitted in writing.<sup>56</sup> In turn, North Carolina vaccination rates for both MMR and DTap were 97.3% and 97.1%, respectively.<sup>57</sup>

#### F. New York

New York's medical vaccine exemption statute grants an exemption when a physician licensed to practice medicine certifies that such immunization would be detrimental to the child's health.<sup>58</sup> In June of 2019, New York repealed their religious exemption exception.<sup>59</sup> Although in an ideal world every state would do away with every type of exemption besides medical exemptions, that is unlikely. Moreover, New York is one of the only states with semi-developed jurisprudence on religious exemptions. Therefore, this Proposed Legislation uses New York's former religious exemption framework as a foundation for tightening the availability of religious vaccine exemptions. Previously, for religious exemptions in New York, the parent, parents, or guardians must have held a genuine and sincere religious belief, which is contrary to vaccination, and no certification was required.<sup>60</sup> Prior to the change in legislation, for the 2015-16 school year, New York's vaccination rates for MMR and DTap were 95.6% and 94.1%, respectively.<sup>61</sup>

#### G. California

After the 2014 measles outbreak in Disneyland, California's legislature responded by removing vaccine exemptions for everyone except those who have a medical reason.<sup>62</sup> However, this bill did not go into effect until 2016.<sup>63</sup> Today, in order to get a medical exemption, a parent or guardian must file a written statement by a licensed physician that the immunization of the child would not be considered safe, indicating the specific nature and probable duration of the medical condition.<sup>64</sup>

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56. N.C. Gen. Stat. Ann. § 130A-157 (West 2019).

57. Seither, *supra* note 41, at 1057.

58. N.Y. PUB. HEALTH LAW § 2164(8) (2019). Note that New York requires a licensed physician to certify the medical exemption; this is strikingly different from Colorado's medical exemption which allows for many other medical professionals to certify the exemption. Compare *id.*, with COLO. REV. STAT. § 25-4-903(2)(a) (2019).

59. Compare N.Y. PUB. HEALTH LAW § 2164(9) (2018) to N.Y. PUB. HEALTH LAW § 2164(9) (2019).

60. N.Y. PUB. HEALTH § 2164(9).

61. Seither, *supra* note 41, at 1057.

62. Emily Oster & Geoffrey Kocks, *After a Debacle, How California Became a Role Model on Measles*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/upshot/measles-vaccination-california-students.html>.

63. *Id.*

64. CAL. HEALTH & SAFETY CODE § 120370(a) (2019).

The Seither study, which has provided all of the previous statistics, was conducted prior to this new statute being enacted.<sup>65</sup> Other studies have shown that vaccination rates for all the required vaccines (more than just MMR and DTap) were 96% in 2016-17 school year.<sup>66</sup>

#### H. Analysis

With vaccine exemption rates on the rise,<sup>67</sup> it is important to look at what is working in “nudging” people to vaccinate.<sup>68</sup> Nudges are defined as “liberty-preserving approaches that steer people in particular directions, but that also allow them to go their own way.”<sup>69</sup> If it can be better understood what nudges people in the direction of getting their children vaccinated, then public health will improve for all.<sup>70</sup> Of course, it is important to preserve people’s liberty and, more specifically, their freedom of religion. Thus, striking a balance in between a strong statute and preserving people’s liberty would create an ideal nudge.

While Louisiana had the higher vaccination rates for MMR and DTap vaccines, its 2016 rate of overall vaccinations was an abysmal 66.8%.<sup>71</sup> Taking that discrepancy into account, the statistics follow the idea that the states with stricter vaccination policies (i.e., those that allow medical, philosophical, and religious exemptions and those that only allow medical) have higher vaccination rates. Additionally, requiring a physician to certify a medical exemption also seemingly played a role in further reducing vaccine exemption rates. Further, states that required some written form of exemption also had lower rates.

With each of these ideas in mind, two things seem clear from the statutory language and the statistics: First, requiring a licensed physician (not other medical professionals) to sign off on a medical

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65. Seither, *supra* note 41, at 1057; Oster & Kocks, *supra*, note 62.

66. Ali Bay & Corey Egel, *California’s Kindergarten Vaccination Rates Hit New High*, CAL. DEPT PUB. HEALTH (Apr. 12, 2017), <https://www.cdph.ca.gov/Programs/OPA/Pages/NR17-032.aspx>.

67. Saad B. Omer et al., *Trends in Kindergarten Rates of Vaccine Exemption and State-Level Policy, 2011-2016*, 5 OPEN F. INFECTIOUS DISEASES, Feb. 2018, at 1, 1.

68. Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL’Y 583, 583 (2014).

69. *Id.*

70. *See generally Why Are Childhood Vaccines So Important?*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vac-gen/howvpd.htm> (last updated May 16, 2018).

71. La. Dep’t of Health, *Memo: NIS Data Show Decline in Vaccination Rates in LA*, AM. ACAD. PEDIATRICS, LA. CHAPTER (Nov. 9, 2017), <http://www.laaap.org/memo-nis-data-show-decline-in-vaccination-rates-in-la/>.

exemption would impact vaccination exemption rates, and second, philosophical vaccine exemptions have a large impact on vaccine exemption rates.<sup>72</sup>

### III. ARKANSAS STATUTE RATIONALE AND NEW YORK'S SINCERE AND GENUINE BELIEF JURISPRUDENCE

#### A. *Arkansas Statute Rationale*

The Arkansas Legislature's decision to strengthen the state's vaccine exemption statute came amidst backlash after the state only allowed for medical exemptions, because its previous religious exemption was found to be unconstitutional.<sup>73</sup> Seemingly, the legislature's concern was that, by reinstating religious exemptions, its work on restricting vaccine exemptions to only medical exemptions would be lost. Thus, the legislature created these requirements for religious vaccine exemptions. Arkansas district courts held that the religious exemption portion of the statute was unconstitutional because it required proof of church membership.<sup>74</sup> In order to avoid a very broad non-medical exemption statute, Arkansas Medical Society, Johns Hopkins Institute for Vaccine Safety, and the Johns Hopkins Center for Law and the Public's Health teamed up and proposed their own legislation.<sup>75</sup> Their proposed legislation included requirements such as: (i) meeting with a doctor or public health official for counseling, (ii) a statement including that the parents received counseling, the reason for the request, the strength of belief, the parent's understanding of the risks, and the parent's understanding that the child may be removed from school during an outbreak, and (iii) an annual renewal requirement.<sup>76</sup> While this proposal did not pass,<sup>77</sup> there are obvious remnants in the current statute: the annual renewal requirement, the statement acknowledging school removal during an outbreak, and the educational component.<sup>78</sup> The rationales for these requirements remain the same. First, having to gather all of this documentation is rather inconvenient.<sup>79</sup> The additional step this Note proposes, a signed

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72. This is probably in large part because courts have held that if there is a moral root in the religious beliefs, then it cannot stand. *See Watkins-El v. Dep't of Educ.*, No. 16-CV-2256, 2016 U.S. Dist. LEXIS 139860, at \*6 (E.D.N.Y. Oct. 6, 2016). Thus, parents turn to philosophical exemptions for these moral beliefs and by allowing these exemptions, more exemptions are granted.

73. Poreda, *supra* note 24, at 798.

74. *Id.*

75. *Id.*

76. *Id.* at 800.

77. *See* ARK. CODE ANN. § 6-18-702 (2019).

78. *Id.*

79. Poreda, *supra* note 24, at 800.

statement from a religious official, is another burdensome administrative step.<sup>80</sup> Second, the annual renewal process requires parents and guardians to stay informed about the latest developments in medicine and public health while also making the renewal process continually inconvenient for parents and guardians.<sup>81</sup>

*B. New York's Sincere and  
Genuine Belief Jurisprudence*

The Second Circuit has held that New York's statute does not violate either the Free Exercise Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment.<sup>82</sup> In *Phillips v. City of New York*, a mother was challenging the statute on the grounds that it violated her Catholic beliefs because she had a right to raise her daughter "strictly by the word of God" and that the vaccinations "could hurt [her] daughter. It could kill her. It could put her into anaphylactic shock. It could cause any number of things."<sup>83</sup> The mother challenged the statute on Due Process grounds, Free Exercise of Religion grounds, Equal Protection grounds, and Ninth Amendment grounds.<sup>84</sup>

On the Due Process grounds, the court cited to *Jacobson* and *Zucht*, affirming that mandatory vaccination policies were well within the state's police power.<sup>85</sup> Further, the court held that determinations of safety of vaccines and their effect on society are for the legislature to determine.<sup>86</sup>

On the Free Exercise claim, the Second Circuit quoted *Prince*, holding 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."<sup>87</sup> Thus, because of the persuasive dictum from *Prince* and the fact that there was a compelling governmental interest, even though it may interfere or burden a religious practice,<sup>88</sup> the state's limiting exclusion during an outbreak was found to be constitutional.<sup>89</sup>

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80. See *Religious Exemption Documentation Requirements*, ALASKA DIV. OF PUB. HEALTH AND DEP'T OF HEALTH AND SOCIAL SERVS., <http://dhss.alaska.gov/dph/Epi/iz/Documents/factsheet/ReligiousExemptionSupportFactRelig.pdf> (July 1, 2013) (requiring notarization of religious exemption form).

81. *Id.* The sociology behind the renewal process will be discussed, see *infra* Part IV.

82. See *Phillips v. City of New York*, 775 F.3d 538, 542-43 (2d Cir. 2015).

83. *Id.* at 541.

84. *Id.* at 542. On the Equal Protection and the Ninth Amendment grounds, the court found that the plaintiffs failed to allege these violations. *Id.* at 544.

85. *Id.* at 542.

86. *Id.*

87. *Id.* at 543 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944)).

88. *Phillips*, 775 F.3d at 543.

89. *Id.*

In a decision from the Eastern District Court of New York, *Watkins-El v. Department of Education*, the plaintiff alleged that his Islamic beliefs create an exemption to the requirement because the vaccines contain “monkey cells, pork derivatives, and aborted human fetuses.”<sup>90</sup> The plaintiff argued that the statute violated his due process and free exercise of religion rights.<sup>91</sup> The court rejected both arguments, holding that, while the plaintiff’s beliefs may be genuine and sincere, he failed to demonstrate that these beliefs stemmed from a religious belief.<sup>92</sup> Instead, the court suggested that these beliefs were based on morals and thus not viable.<sup>93</sup>

Finally, in *Polydor v. Kellenberg Memorial High School*, the Supreme Court of New York held that health concerns are not a basis for an exemption based on religious beliefs.<sup>94</sup> There, the plaintiff argued that vaccines are safe but harmful to the body and that she did not want to place trust in the United States Food and Drug Administration and the system; rather, she wanted to place her faith in God and her own judgment.<sup>95</sup> The court rejected these arguments, saying that, while they may be sincere, they are not based on religious beliefs.<sup>96</sup>

From these three cases the idea emerges that, though a belief may sincere and genuine, it must also be deeply rooted in a religious belief. Additionally, even if these beliefs are sincere and genuine, there is a compelling state interest in the health of the public and the health of each child that goes unvaccinated. With these thoughts in mind, a logical outgrowth of these cases would be incorporating a requirement of religious membership into the vaccine exemption statute. However, this idea was rejected in *Sherr v. Northport-East Northport Union Free School District*.<sup>97</sup> This leaves open the question of how the health department determines that one has a sincere and genuine religious belief?

Some have argued that the sincere and genuine belief requirement “represents a balance between the legislature’s ‘highly praiseworthy urge to minimize imposition’ of vaccination requirements on those whose religion disagrees with the practice, and the need to prevent

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90. *Watkins-El v. Dep’t of Educ.*, No. 16-CV-2246, 2016 U.S. Dist. LEXIS 139860, at \*8 (E.D.N.Y. Oct. 6, 2016). Later in the opinion, the court noted that the plaintiff presented no evidence that vaccines in fact contained these substances. *Id.* at \*8-9.

91. *Id.* at \*7.

92. *Id.* at \*8.

93. *Id.*

94. *Polydor v. Kellenburg Mem’l High Sch.*, 2011 N.Y. Misc. LEXIS 4345, at \*8 (N.Y. Sup. Ct. Sept. 1, 2011).

95. *Id.* at \*2-3.

96. *Id.* at \*8.

97. *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 91 (E.D.N.Y. 1987).

those who wish to couch their own personal opposition to vaccines in religious rhetoric.”<sup>98</sup> Professor James Lobo has proposed the adoption of New York’s sincere and genuine belief requirement along with requirements showing why the parent or guardian wants the exemption, “a description of the religious principles that guide the objection to immunization, and an indication of whether the parent opposes all immunizations, and if not, the religious basis that prohibits particular immunizations.”<sup>99</sup> Additionally, it would be up to each individual school to evaluate the merits of the parent’s religious objection.<sup>100</sup>

While it is evident that the sincere and genuine belief requirement should be adopted, what Lobo’s proposal fails to do is show that these religious beliefs are truly sincere. Today, parents can easily access the Internet and craft written objections to vaccines that appear to be made on the basis of religious beliefs. As this Note proposes, by requiring a written document that is signed by a religious official (in some capacity), the Proposed Legislation would avoid the possibility of fraudulent exemptions that may be requested and would create an additional barrier to the exemption, which in turn would lower the rate of vaccine exemptions.

### C. *Opposition to Religious Inquiry*

A foreseeable problem, besides the constitutionality of the proposal<sup>101</sup> is that courts, other than New York courts, have previously refused to delve into how deep a parent’s religious beliefs truly are.

For example, in *Workman v. Mingo County Schools*, the judge presiding over the case declined to evaluate the nature of the plaintiff’s beliefs.<sup>102</sup> In *Workman*, the plaintiff was challenging the West Virginia statute that did not provide for a religious beliefs vaccine exemption.<sup>103</sup> There, the court held that the state need not provide an exemption at all.<sup>104</sup> Because of that, the judge declined to resolve the issue of whether Ms. Workman’s beliefs were religious.<sup>105</sup> Some courts, such as the First District Court of Appeal of Florida, have taken it further. In *Flynn v. Estevez*, the court cited to precedent holding that, because the

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98. James Lobo, *Vindicating the Vaccine: Injecting Strength into Mandatory School Vaccination Requirements to Safeguard the Public Health*, 57 B.C. L. REV. 261, 279-80 (2016).

99. *Id.*

100. *Id.* at 280.

101. See discussion *infra* Part IV.

102. *Workman v. Mingo Cty. Schs.*, 667 F. Supp. 2d 679, 688 n.10 (S.D.W. Va. 2009).

103. See *id.* at 688.

104. *Id.* at 689.

105. *Id.* at 688 n.10.

legislature did not include some degree of inquiry in the statute, the court could not inquire whether the plaintiff's religious objection was in good faith.<sup>106</sup>

With courts' reluctance to inquire into a plaintiff's religious beliefs, the legislature will need to provide a "guide," in a sense, as to whether one's religious beliefs are sincere and genuine.<sup>107</sup> While New York courts have created their own jurisprudence on "sincere and genuine beliefs," it would be helpful to have a more uniform guide to this standard.

#### IV. PROPOSED LEGISLATION, CONSTITUTIONALITY, COUNTERARGUMENTS

##### A. *Proposed Legislation*

###### 1. *Abolishment of the Philosophical Exemption and Medical Exemption Leniency*

This Note proposes, first and foremost, that the philosophical exemption be eliminated. States with sole philosophical exemptions, like Louisiana, see a lot of religious-like claims for exemptions.<sup>108</sup> By doing away with this "catch-all"-like exemption category, exemption requests would be considered under the stricter scrutiny of the religious exemption framework.

Further, this Proposed Legislation would include medical exemptions. The requirement for a medical exemption would be to produce a signed statement from a licensed medical doctor stating that the child cannot be vaccinated for some medical reason.<sup>109</sup> By including this written requirement, this Legislation would still allow for medical exemptions to be subjected to some sort of scrutiny, thus maintaining the integrity of the exemption. This exemption requirement is similar to the current medical exemption requirement in California.<sup>110</sup> However, this Proposed Legislation would not be taking the most coercive approach to vaccine exemptions. On the intervention ladder created by the Nuffield Council on Bioethics, this Proposed Legislation would fall in the "restrict choice" category, which is the second-most coercive

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106. *Flynn v. Estevez*, 221 So. 3d 1241, 1244 (Fla. 1st DCA 2017).

107. This guide is outside the scope of this Note, as the guide would require one with religious expertise to aid the legislature in making the guide.

108. NAT'L CONF. ST. LEGISLATURES, *supra* note 27.

109. By requiring that the statement be from a medical doctor, this is slightly stricter than other states that allow for any licensed medical personnel to write and sign the statement.

110. *See* CAL. HEALTH & SAFETY CODE § 120370(a) (2020).

approach.<sup>111</sup> The Supreme Court would likely allow states to adopt the most coercive category,<sup>112</sup> “eliminate choice,” thus this Proposed Legislation strikes an in-between for states to consider.<sup>113</sup>

## 2. *Religious Exemption Framework*

The Proposed Legislation would include a religious exemption if the parent or guardian of the child holds a sincere and genuine belief<sup>114</sup> and has documents including, but not limited to: a notarized statement requesting the exemption, the completion of an education component developed by the state’s department of health, a signed informed consent recognition, a signed statement acknowledging that the child or children can be pulled out of school at any time during an outbreak and cannot return until the health department has determined the outbreak has been resolved, and a signed statement by the parent or guardian stating the religious grounds which requires a signature from some sort of religious official. The final component of the religious vaccine exemption request would be to require renewal of the request every two years. However, if the first vaccine exemption request is approved, the parent or guardian would only have to meet with a public health official about continuing to not vaccinate his or her child or children and restating their beliefs.

The first required document, the notarized statement requesting the religious exemption, would require the parent or guardian to state the reason for their request. Once a parent or guardian has had that statement notarized<sup>115</sup> and the statement has been presented to the jurisdiction’s department of health, the official receiving the document would also need to ask if the parent or guardian understands the risk of not vaccinating. Upon a verbal yes this step of the exemption request process would be complete. By requiring this face-to-face contact, the parent or guardian who lacks grounds for such belief are unlikely to move forward in the process because face-to-face contact is often a deterrent in this context.<sup>116</sup>

The second required document, the educational component, is currently given out to parents and guardians requesting vaccine

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111. Ross D. Silverman & Lindsay F. Wiley, *Shaming Vaccine Refusal*, 45 J.L. MED. & ETHICS 569, 576 (2017).

112. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

113. *See discussion infra* Part IV.

114. Ideally these operative words would carry with them the same jurisprudence that they have in New York.

115. This, in itself, is creating another barrier by asking the parents or guardians to go to a notary.

116. *See Poreda, supra* note 24, at 800; Joan Zolot, *Mandatory Parental Counseling Reduces Vaccine Exemptions*, 118 AM. J. NURSING, Apr. 2018, at 13, 13. Immunization exemption rates in Washington dropped 40% after requiring face-to-face counseling. Zolot, *supra*.



exemptions in Arkansas.<sup>117</sup> By including this educational component, there is likely to be greater immunization coverage.<sup>118</sup> Again, this further dissuades parents and guardians that do not have a sincere and genuine belief to go through with the vaccine exemption process. This also relates to the third required document, the signed informed consent form. By including the educational component, health officials can rest assured that the parent or guardian were provided all of the necessary educational materials to fully consent to the vaccine exemption.

The fourth document, the signed statement acknowledging possible withdrawal from school during an outbreak, will keep parents or guardians of the children receiving the vaccine from filing frivolous lawsuits against schools or municipalities for excluding their children from schools. The idea behind excluding children from schools comes from the idea of herd immunity; other children who are vaccinated are not placed at risk when there is an outbreak because they have been vaccinated. On the other hand, children who have not been vaccinated are at a higher risk of contracting whatever disease is being spread because they are not immunized from the disease. Thus, because unvaccinated children are at a higher risk of contracting diseases they are not vaccinated against, especially when there is an outbreak, the government has a legitimate interest in containing the outbreak and thus excluding the unvaccinated children from the schools.<sup>119</sup>

The fifth required document is one that no state has implemented yet.<sup>120</sup> This document would require a statement of the particular religious belief and the reason why it goes against the parent's or guardian's religious beliefs. It would also require that the parent or guardian seek a religious leader in their community to sign off on the request and the reasoning.<sup>121</sup> Requiring a religious official to sign off on the statement is not a signal of the state recognizing a new religion, or even well founded religions; instead, it is a

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117. ARK. DEPT OF HEALTH, ARKANSAS 2019-2020 IMMUNIZATION EXEMPTION APPLICATION PACKET FOR CHILDCARE OR SCHOOL STUDENTS (2019).

118. See generally Emily B. Zimmerman et al., *Understanding the Relationship Between Education and Health: A Review of the Evidence and an Examination of Community Perspectives*, in AGENCY FOR HEALTHCARE RESEARCH & QUALITY & OFFICE OF BEHAVIORAL & SOC. SCIS., RESEARCH NAT'L INSTS. OF HEALTH, POPULATION HEALTH: BEHAVIORAL AND SOCIAL SCIENCE INSIGHTS 347 (Robert M. Kaplan et al. eds., 2015), <https://www.ahrq.gov/professionals/education/curriculum-tools/population-health/zimmerman.html>.

119. See *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015).

120. Presumably lawmakers would fear that by requiring this document it would lead to more lawsuits and a busier court system; however, as shown in the discussion *infra* Section IV.B., this would be constitutional.

121. Few, if any, religions that have a sincere and genuine belief in not vaccinating their children do not have some sort of religious leader. And even if they do, such as in the case of naturalist Wiccans, this would fail the sincere and genuine belief requirement. See J. Gordon Melton, *Wicca*, ENCYCLOPEDIA BRITANNICA (2000).

supplemental document that requires parental counseling in a religious setting. This would have a similar deterrence effect that parental educational counseling has.

The final requirement of the vaccine exemption process would be to require a renewal every two years. People's religious beliefs may change overtime; parents or guardians may experience a change in attitude towards vaccines, new persuasive research that may emerge, etc. Requiring parents and guardians to meet with a public health official every two years to reaffirm their beliefs and stay informed about the risks of non-vaccination combats the spread of misinformation and creates a safeguard to ensure that parents and guardians do still hold those sincere and genuine beliefs.

All of these documents would be a way of influencing a change in social norms and creating barriers to get the exemptions. One of the best ways to change social norms in regard to health is to educate the public.<sup>122</sup> By educating parents on vaccine exemptions, there will likely be a change in the social norms in regard to vaccines. An anti-vaccination movement emerged quickly after an inaccurate study was published;<sup>123</sup> it only took one small scientific article to be published to create a huge public fear of vaccines. By educating parents and guardians who are misinformed about vaccination, hopefully, the anti-vaccination movement will slow down.

### 3. Required Vaccines

The required vaccines would be in line with what is normally recommended by pediatricians.<sup>124</sup> Under this Proposed Legislation, children under the age of six months would be required to have the Hepatitis B (HepB), Rotavirus (RV), DTap, *Haemophilus influenzae* type B (Hib), Pneumococcal Conjugate (PCV), and Polio vaccines (IPV). After the age of six months the requirements include boosters for DTap, HepB, PCV, IPV, and also require vaccines for MMR, Varicella (chickenpox), and HepA.<sup>125</sup>

By requiring these vaccines, this preserves herd immunity, which prevents outbreaks.<sup>126</sup> Herd immunity was first recognized in 1923<sup>127</sup> and represents the idea that, if more people in the community are

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122. Silverman & Wiley, *supra* note 111, at 571.

123. See discussion *infra* IV.G.

124. U.S. Dep't of Health & Human Servs., *Infants and Children Birth Through Age 6*, VACCINES.GOV, [https://www.vaccines.gov/who\\_and\\_when/infants\\_to\\_teens/child/index.html](https://www.vaccines.gov/who_and_when/infants_to_teens/child/index.html) (last visited Jan. 19, 2020).

125. *Id.*

126. Poreda, *supra* note 24, at 775.

127. Cáceres, *supra* note 37.

vaccinated, then the community has protection against a disease.<sup>128</sup> The typical percentage of the population that would need to be vaccinated ranges anywhere from 80% to 95% in order for the community to prevent diseases from spreading.<sup>129</sup> However, it is currently stipulated that 95% of people in the community would need to be vaccinated in order to preserve the herd immunity.<sup>130</sup> Only California, which only allows for medical exemptions, and North Carolina, which allows for both medical and religious exemptions but has strict requirements, have achieved a vaccination percentage over 95.<sup>131</sup>

### B. Constitutionality

Some have argued that, after the Court's seminal holding in *Jacobson*, there should be little debate in the law about whether states should allow vaccine exemptions.<sup>132</sup> However, even though it may be true that this is settled law, creating vaccine exemption requirements is not.

#### 1. Equal Protection Argument

The Court in *Jacobson* rejected the argument that the Massachusetts Legislature violated the Fourteenth Amendment by requiring vaccinations by statute.<sup>133</sup> The party opposing the mandatory vaccine requirement argued that he had an adverse reaction to vaccinations, and thus, it would be likely that his son would also have an adverse reaction.<sup>134</sup> There, the Court held that states are not constitutionally required to provide vaccine exemptions because "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."<sup>135</sup> Further, the Court held that this was a valid use of the police power of the state to require vaccinations.<sup>136</sup> Additionally, the Court also held that the vaccine requirement could not be said to be "necessary in order to protect the public health and secure the public safety."<sup>137</sup> Thus, the

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128. Poreda, *supra* note 24, at 775.

129. *Id.*; Cáceres, *supra* note 37.

130. Cáceres, *supra* note 37.

131. See discussion *supra* Part II.

132. See Marie Killmond, Note, *Why Is Vaccination Different? A Comparative Analysis of Religious Exemptions*, 117 COLUM. L. REV. 913, 915 (2017).

133. See *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

134. *Id.* at 17.

135. *Id.* at 26.

136. *Id.* at 35.

137. *Id.* at 28.

state can require vaccinations, and in this case stricter vaccine exemptions, when there is a necessity to protect public health and public safety.

Seventeen years later in *Zucht v. King*, the Court again rejected the argument that vaccine requirements violated due process of law under the Fourteenth Amendment.<sup>138</sup> There, the Court relied on its precedent to hold that the police power was given to the states and that municipalities may give their officials broad discretion for the application and enforcement of health laws.<sup>139</sup> Thus, this Proposed Legislation would not violate the Fourteenth Amendment because both *Zucht* and *Jacobson* hold that mandatory vaccine statutes are not unconstitutional and states do not require there to be a vaccine exemption.

Broadly speaking, for a law to survive a Fourteenth Amendment challenge the law must survive strict scrutiny, intermediate scrutiny, or rational basis. Here, the protected class of people would be parents and their ability to control the way their child is, or children are, raised. This is a fundamental right.<sup>140</sup> Thus, because this is a fundamental right, the law would be subject to strict scrutiny. In order to survive strict scrutiny, the law must have a compelling governmental interest and be narrowly tailored.<sup>141</sup> Here, there is obviously a huge governmental interest, public health. As seen in *Jacobson*, this is a compelling government interest.<sup>142</sup> This law would also be narrowly tailored because it does not sweep in too many people, nor does it force people under the microscope. It requires only those seeking exemptions to provide this additional paperwork. This narrows the class of people this law is targeting by only imposing requirements on those actively seeking out the exemption. Thus, the Proposed Legislation would pass strict scrutiny.

## 2. Establishment Clause Argument

The next constitutionality argument concerns the Establishment Clause. To test the constitutionality of this Legislation, courts would turn to the test established in *Lemon v. Kurtzman*.<sup>143</sup> Under the *Lemon* test courts would examine three elements: whether there is a secular

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138. See *Zucht v. King*, 260 U.S. 174, 176 (1922).

139. *Id.* at 176-77.

140. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Prince*, 321 U.S. at 166.

141. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015).

142. See *Jacobson*, 197 U.S. at 25 (stating that “health laws of every description” are police powers of the state).

143. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

legislative purpose, whether the principal or primary effect of the statutes does not advance or inhibit religion, and whether there is excessive government entanglement.<sup>144</sup>

First, there is a secular legislative purpose of this Legislation—to protect the public health and public safety. As stated in *Jacobson*, requiring mandatory vaccines furthers public health and public safety and is necessary to further those purposes.<sup>145</sup> Additionally, in recent years, diseases that the CDC thought to be eradicated have reappeared.<sup>146</sup> These diseases are dangerous and can cause long-term, disabling effects. For example, 90% of infants who acquire Hepatitis B become chronically infected;<sup>147</sup> children without vaccinations are thirty-five times more likely to contract measles, specifically;<sup>148</sup> and diphtheria, tetanus, pertussis, *Haemophilus influenzae* type B, pneumococcal conjugate, rotavirus, measles, mumps, rubella, varicella, and hepatitis A can all be lethal.<sup>149</sup> Thus, this Proposed Legislation would satisfy the Purpose Prong of the *Lemon* test.

The primary effect of the Proposed Legislation does not advance nor inhibit religion. The mere requirement of the vaccine exemption request is a signed piece of paper from a religious official. This does not

144. See *Lemon*, 403 U.S. at 612-13.

145. See *Jacobson*, 197 U.S. at 25.

146. *Measles Cases and Outbreaks*, *supra* note 1; CDC Media Relations, *CDC Media Statement: Measles Cases in the U.S. Are Highest Since Measles was Eliminated in 2000*, CTR. FOR DISEASE CONTROL & PREVENTION (April 25, 2019).

147. COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Hepatitis B*, in EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASE 149, 151 (Jennifer Hamborsky et al. eds., 13th ed. 2015) [hereinafter EPIDEMIOLOGY].

148. Coll. Physicians of Phila., *Vaccination Exemptions*, HIST. VACCINES, <https://www.historyofvaccines.org/content/articles/vaccination-exemptions> (last updated Jan. 17, 2018).

149. See COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Diphtheria*, in EPIDEMIOLOGY, *supra* note 147, at 107, 109; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Tetanus*, in EPIDEMIOLOGY, *supra* note 147, at 341, 343; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Pertussis*, in EPIDEMIOLOGY, *supra* note 147, at 261, 263; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Haemophilus Influenzae*, in EPIDEMIOLOGY, *supra* note 147, at 119, 121; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Poliomyelitis*, in EPIDEMIOLOGY, *supra* note 147, at 297, 299; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Pneumococcal Disease*, in EPIDEMIOLOGY, *supra* note 147, at 279, 282; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Rotavirus*, in EPIDEMIOLOGY, *supra* note 147, at 311, 311; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Measles*, in EPIDEMIOLOGY, *supra* note 147, at 209, 211; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Mumps*, in EPIDEMIOLOGY, *supra* note 147, at 247, 249; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Rubella*, in EPIDEMIOLOGY, *supra* note 147, at 325, 326; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Varicella*, in EPIDEMIOLOGY, *supra* note 147, at 353, 356; COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Hepatitis A*, in EPIDEMIOLOGY, *supra* note 147, at 135, 136. Each of these vaccines are the recommended vaccines for children under the age of 2. See COMMC'N & EDUC. BRANCH, CTR. FOR DISEASE CONTROL & PREVENTION, *Principles of Vaccination*, in EPIDEMIOLOGY, *supra* note 147, at 1, 7. These are the vaccines that are normally required by statute.

place the burden on the state to advance or inhibit religion; the burden is placed on the parent or guardian seeking the exception to seek out a religious leader in his or her community and discuss the exemption request. Even then, the primary effect of the statute would be to make a religious exemption for anyone seeking it harder. Therefore, it does not inhibit or advance a religion, and the Proposed Legislation would satisfy the Effect Prong.

Additionally, the Proposed Legislation is not excessively entangled with the government. The relevant factors in this test include the character and purpose of the institution benefitted, the nature of aid the state provides, and the resulting relationship between the government and religious authority.<sup>150</sup> Here, the character and purpose of the institutions benefitted are the public at large, including children and educational systems. Further, the Legislation is not positively benefiting any religion. Therefore, because the Legislation is not benefitting any particular religion, it would satisfy the benefit factor.

The nature of the aid the state provides is, again, universal. The state is aiding children by not allowing easy workarounds to the mandatory vaccine requirement. No specific religion or group is being aided; society as a whole is being aided. Thus, because the aid is not specified to one group it would satisfy the nature of the aid factor.

Under the final factor, the resulting relationship between government and religious authority would remain unchanged. This Proposed Legislation would merely require the parent or guardian to go seek a religious leader in their community to discuss the vaccine exemption request. The state is not investigating whether the religious belief is common practice or is accepted within the religious community. The sincere and genuine belief requirement that has been found to be constitutional<sup>151</sup> serves as the gatekeeper for these concerns. The signed statement that is of concern here is serving the purpose of forcing parents and guardians to talk to their religious leaders about their concern in hopes that the religious leader will have an open and honest discussion about vaccine exemptions. Thus, because each of these factors under the Entanglement Prong weighs in favor of constitutionality, the Entanglement Prong is met. Therefore, since each prong of the *Lemon* test is met, this Proposed Legislation is constitutional.

Additionally, the Court, on many occasions, has held that some state interests trump the Free Exercise clause. For example, in *Wisconsin v. Yoder*, the court held, “[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”<sup>152</sup> In *Yoder*, the Court was

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150. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

151. See *Phillips v. City of New York*, 775 F.3d 538, 540 (2d Cir. 2015).

152. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

considering the constitutionality of universal compulsory education.<sup>153</sup> There, however, the Court held that the Amish community could not be required to send their children to school.<sup>154</sup> This is similar to a compulsory vaccination requirement; however, as seen in *Jacobson*, the Court explicitly rejected the argument that the state could not require mandatory vaccines.<sup>155</sup> The Court has implemented broad views on states' mandatory vaccine requirements by rooting the states' ability to enforce these laws in their police powers and protection of public health.<sup>156</sup>

With the strong language from *Jacobson*, *Zucht*, the satisfaction of the *Lemon* test, and the Court's overall deference to public health, it is likely that this Proposed Legislation would be constitutional if challenged under the First and Fourteenth Amendments.

### C. Counter Arguments

In addition to arguing that the Proposed Legislation would fail one of the *Lemon* test prongs, some arguments that those who oppose this legislation may make include the notion that parents or guardians have full legal custody of their child or children and, thus, this is a fundamental right; a few vaccine studies have linked vaccination with adverse health outcomes; and, finally, some courts have expressed reluctance to evaluate religious claim on the merits.

Although state courts have struck down religious exemptions when they are more readily available to holders with certain types of religious beliefs,<sup>157</sup> this would not be applicable here. While an argument can be made that, for example, those of the Christian faith may have an easier time getting in contact with a religious leader, almost all religious communities have a leader.<sup>158</sup> Secondly, if the religious belief that is the basis for the exemption is sincere and genuine, then it is likely that the holder of that belief has the ability to easily contact his or her religious leader. Thus, while state courts may scrutinize the signed document by a religious leader, it is hard to accept the argument that it is more readily available for some religions than others since almost every religion has a leader. Further, it seems unfair to strike down this requirement solely because of the prevalence of Christianity in the United States. Courts are not determining if a parent's

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153. *Id.*

154. *Id.* at 234.

155. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

156. Killmond, *supra* note 132, at 931.

157. *Id.* at 932.

158. Editors of Encyclopedia Britannica, *Clergy*, ENCYCLOPAEDIA BRITANNICA (2007).

or guardian's religious beliefs are valid in their religion; instead, the requirement is an extra step in the educational process of requesting a vaccine exemption.

Arguing that parents or guardians have full legal custody over their children is likely to be rejected by courts. This argument would likely be rejected because of cases like *Prince*. The Court in *Prince* was clear: "[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."<sup>159</sup> Thus, the right of parents and guardians to practice their religion freely does not allow them to expose children or the community to ill health or death. The diseases included in vaccines all cause ill health or death.

Another potential problem would be when a child, who was not known to have any adverse reactions to vaccines, was injured due to the compulsory nature of statute and because the barrier to receive an exemption is higher. Since compulsory vaccinations have been in place for quite some time now, the federal government created a fund called National Vaccine Injury Compensation Program.<sup>160</sup> Under this program, a parent or guardian can receive up to \$1,000 in damages for a vaccine related injury or death.<sup>161</sup> The program also restricts whom the parties may sue, i.e., the parties cannot sue the vaccine administrator or manufacturer.<sup>162</sup> Thus, if a child is injured, the government has already determined that there is a set amount of damages for them to receive; therefore, this new Proposed Legislation would have no bearing on that.

The recurring argument that vaccines cause autism is likely to come up in regard to this Proposed Legislation. One of the strongest arguments against this is that the study that started this panic was a very small sample size (twelve).<sup>163</sup> Additionally, no other studies have linked autism with vaccines.<sup>164</sup> Even a federal claims court found that there was overwhelmingly contrary evidence the MMR vaccine was linked to autism.<sup>165</sup>

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159. *Prince*, 321 U.S. at 166-67.

160. See 42 U.S.C. § 300aa-11 (2019).

161. *Id.* § 300aa-11(a)(2)(A).

162. *Id.* § 300aa-11(a)(3).

163. T. S. Sathyanarayana Rao & Chittaranjan Andrade, *The MMR Vaccine and Autism: Sensation, Refutation, Retraction, and Fraud*, 53 INDIAN J. PSYCHIATRY 95, 95 (2011).

164. *No MMR Vaccine-Autism Link in Large Study*, AUTISM SPEAK (Apr. 21, 2015), <https://www.autismspeaks.org/science-news/no-mmr-autism-link-large-study-vaccinated-vs-unvaccinated-kids>; *Vaccines Do Not Cause Autism*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccinesafety/concerns/autism.html> (last updated Oct. 27, 2015).

165. Am. Acad. of Pediatrics, *Vaccine Safety: Examine the Evidence*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/safety-prevention/immunizations/Pages/Vaccine-Studies-Examine-the-Evidence.aspx> (last updated July 24, 2018).



Finally, some courts have opposed delving into evaluating religious beliefs.<sup>166</sup> While this remains a valid concern, as it is fathomable that some courts will want to avoid the religious question, this Proposed Legislation is not asking the courts to look into the parent's or guardian's religious beliefs. The sincere and genuine requirement gives the court guidance on this issue; however, it is not a requirement that the courts get into the merits of the claim. By requiring the signature from a religious official, this is likely to lessen the possible burden on the courts to look into each person's beliefs to determine if they are sincere and genuine. The court's ruling in *Flynn*, which suggested that if the legislature incorporates indicative language into the statute, is even more persuasive.. In *Flynn*, the First District Court of Appeal of Florida said, "[T]he Legislature could have written the exemption to require some degree of inquiry as to the genuineness of the religious objection, but it did not."<sup>167</sup> Because the court made specific reference to the inclusion of inquisitive language, it is likely that, with guidance from the legislature like this Proposed Legislation would provide, courts would not completely avoid inquiring into the parent or guardians religious beliefs.

## V. CONCLUSION

Although the Supreme Court has seemingly settled the dispute over whether or not vaccines can be required, states have been reluctant to only allow medical exemptions.<sup>168</sup> Because of the growing public fear that vaccines are going to cause some sort of injury to children, each state's legislature needs to step in and create a regime to keep the public safe, regardless of what rights it may infringe upon, since the Court has placed public health and safety in the highest regard.<sup>169</sup> Unfortunately, the COVID-19 pandemic has shown what happens when herd immunity is not achieved; widespread disease overwhelming the healthcare system.<sup>170</sup> Now, more than ever it is imperative that states enact stricter vaccine statutes so that vaccine-preventable diseases do not become like COVID-19 has.

In order for this Proposed Legislation to be effective, each state would need to adopt it. Alternatively, the federal government could adopt this Proposed Legislation because, as this Note points out, the Court has given a lot of weight to the states' interest in protecting the

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166. See discussion *supra* Section III.C.

167. *Flynn*, 221 So. 3d at 124.

168. See generally discussion *supra* Part II.

169. See *Zucht v. King*, 260 U.S. 174, 177 (1922).

170. Daniel Ackerman, *Experts Explain the Important Reasons Why COVID-19 Differs From a Flu Pandemic*, SCIENCE ALERT, <https://www.sciencealert.com/experts-explain-how-the-coronavirus-differs-from-a-flu-pandemic> (Apr. 3, 2020).

public.<sup>171</sup> These diseases are preventable, and there needs to be a change in the lax attitudes towards vaccine exemptions. By incorporating one of the more coercive public health measures, restricting choice, and by educating parents and guardians, this Proposed Legislation has the ability to change social norms surrounding vaccines. Additionally, by incorporating stricter vaccination means, for example, abolishing philosophical beliefs exemptions, excluding children from schools during outbreaks, recertifying, notarizing documents, and ensuring that beliefs are sincere and genuine, there should be a decrease in the number of vaccine exemptions granted and, or abused. Thus, there will be more herd immunity and, in turn, fewer outbreaks of these preventable, lethal, and life-altering diseases.

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171. See discussion *supra* Part IV.