

**Testimony of Professor Jennifer Wriggins, Esq. in Opposition to L.D. 174 (An Act to Restore Religious Exemptions to Vaccine Requirements) and L.D. 727 (An Act to Repeal Certain Immunization Requirements for Schools)**

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 Health Care Law & Policy and other courses. I write 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 also am a member of Woodfords Church - United Church of Christ. I wish to address the legal context and issues surrounding LD 174 and LD 727 and also offer a faith-based perspective. Thank you for this opportunity.

First, a little history: Requiring vaccinations before school attendance is not a new idea. In 1857, Maine law first provided that unvaccinated children could be excluded from schools.<sup>1</sup> Maine passed its first mandatory vaccination law even earlier, in 1821, right after it became a state.<sup>2</sup> Courts across the country have upheld school vaccination laws.<sup>3</sup>

I have 4 main points to make today. First, protecting the public's and children's health and safety is a central government task; states are allowed to make reasonable regulations limiting personal freedom in doing that task. Second, the law on vaccination passed by the legislature in 2019 and approved by the voters is a reasonable regulation; the legislature took account of a huge amount of scientifically grounded testimony in making its 2019 decision.<sup>4</sup> Third, the existing statute is consistent with the U.S. Constitution and Maine Constitution. Fourth, as a person of faith, I believe that the extremely important right to freely practice one's religion should not include the freedom to expose community members to communicable disease, sickness, or death by having a religious exemption in the school vaccination law (or no vaccination law at all).

As to 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 thoughtful consideration are part of protecting the public health.<sup>5</sup> The state also has a strong interest in protecting children.<sup>6</sup> "No court, state or federal, in the United States, has found state school immunization mandates unconstitutional."<sup>7</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>8</sup> Your job as elected

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<sup>1</sup> Maine Laws, Title Two, Chapter 11, sec. 14 (1857).

<sup>2</sup> Maine Laws, An Act to Diffuse the Benefits of Innoculation for the Kine Pock, Chapter CXXVI, Approved 2/21/1821. (Kine Pock appears to be the term used for Smallpox).

<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 Jennifer Wriggins, Op-Ed, *Maine's New Vaccination Law balances Democracy and Public Health*, Bangor Daily News, July 5, 2019.

<sup>5</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>6</sup> See generally, *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944).

<sup>7</sup> Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. P. J. Const. L. 207, 208 (Oct. 2018).

<sup>8</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. 5th at 135 (2018)(upholding California's 2015 vaccination law), *Philips v. New York*

policymakers is to weigh the evidence about health and safety and make your best possible decisions.<sup>9</sup> Some will object to what they see as unacceptable restraints on their choice and liberty. But some restrictions on liberty are essential for us to live in a society. 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>10</sup> (Emphasis added). 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>11</sup> The court wrote, “[I]t is within the police power of a state to provide for compulsory vaccination.”<sup>12</sup> So there is a clear recognition in law – over 100 years old – of conditioning school attendance on immunization.

Second, the existing law is a 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>13</sup> It is aimed at protecting children (and indirectly society) from infectious disease outbreaks, and does this in a focussed way by requiring vaccination before children enter schools. There is overwhelming evidence that this law is a very good idea. Also, adding an additional exemption and even repealing the law are very bad ideas which will likely lead to additional, preventable illness and death.

Third, the existing law is in line with the U.S. Constitution and the Maine Constitution. As noted above, courts have consistently upheld vaccination laws. The legislature in 2019 eliminated two exemptions, one a religious exemption and one a ‘philosophical’ exemption as you know. While some

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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).

<sup>9</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 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.”...

<sup>10</sup> *Jacobson v. Massachusetts*, 197 US. 11.

<sup>11</sup> *Zucht v. King*, 260 U.S. 174, 175 (1922).

<sup>12</sup> 260 US at 176.

<sup>13</sup> 20-A MRSA 6355 (2).

may claim there must be a religious exemption for the law to be constitutional, that is incorrect. The law does not need a religious exemption to be constitutional in my view.<sup>14</sup>

#### FEDERAL CONSTITUTION:

LD 174 would reinstate the religious exemption which provided that any parent could excuse his or her child from vaccination for a “sincere religious belief that is contrary to the immunization requirement.”<sup>15</sup> The first amendment of course protects the free exercise of religion. It also says with equal emphasis that the government shall not make laws *establishing* a particular religion. Is a vaccination law that does not have a religious exemption consistent with the first amendment? Yes. Several states besides Maine have vaccination laws without religious exemptions. 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>16</sup> Mississippi has lacked a religious exemption since 1979 when a court held that its religious exemption violated the Constitution.<sup>17</sup> California has no philosophical or religious exemption.<sup>18</sup> It repealed its exemptions in 2015 after a measles outbreak traced to Disneyland. California’s law has been challenged repeatedly and upheld repeatedly.<sup>19</sup> In the 2015 case of *Phillips v. New York City*<sup>20</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>21</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>22</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

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<sup>14</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>15</sup> L.D. 174.

<sup>16</sup> *Workman v. Mingo County Bd. Of Educ.* 419 Fed. Appx 348, 353-54 (4th Cir. 2011)(unpublished)

<sup>17</sup> *Brown v. Stone*, 378 So.2d 318, 223 (Miss. 1979). No challenges to my knowledge 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>18</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>19</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>20</sup> 775 F.3d 538 (2d Cir. 2015).

<sup>21</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>22</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).

interest. Preventing the spread of communicable disease is a compelling governmental interest.<sup>23</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 way to further the extremely important – indeed, compelling – goal of preventing infectious disease outbreaks.<sup>24</sup>

#### MAINE CONSTITUTION:

No religious exemption is needed for the vaccination law to be constitutional under the Maine State Constitution either. The legislature in 2019 left in place a medical exemption and repealed the philosophical and religious exemptions. The Maine Constitution section on religion (Article 1 section 3)<sup>25</sup> does not require that there be a religious exemption for the law to be constitutional, in my opinion.

Two concepts are covered by the Maine Constitution Article 1 section 3 – the freedom to believe and the freedom to act. The freedom to believe is absolute, but the freedom to act is not. “Conduct remains subject to regulation for the protection of society,” according to the Maine Supreme Judicial Court.<sup>26</sup> Maine’s Constitution Article 1 section 3 and the U.S Constitution’s first amendment language on religion are worded differently but are similar in meaning.

The existing law, passed after exhaustive consideration of the science, aims to prevent the spread of infectious disease and protect children from disease. Protecting public health and children are core, basic jobs of state government. Stopping the spread of infectious disease is a compelling governmental interest. In the situation presented here, requiring vaccinations before school attendance unless there is a medical reason not to vaccinate, is a carefully targeted way to further the extremely important – indeed, compelling -- goals of preventing infectious disease outbreaks and protecting children. Changing it by reinstating the exemption as proposed by LD 174 or repealing the law altogether as proposed by LD 727 would be a huge mistake.

Fourth, taking a faith-based perspective on this issue, as noted above the Maine Constitution protects the freedom to believe, but the freedom to act is not absolute. As you consider LD 174 and LD 727 it is important for you to know that none of the seven denominations represented by the Maine Council of Churches<sup>27</sup> opposes a requirement that children be vaccinated in order to attend school. (In

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<sup>23</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 (4<sup>th</sup> Cir. 2011)(unpublished)

<sup>25</sup>Maine Constitution, Article 1, Section 3. Religious freedom; sects equal; religious tests prohibited; religious teachers. All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship; -- and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

<sup>26</sup> *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57 at 70, quoting *Cantwell v. Connecticut*, 310 U.S. at 303-304 (1940).

<sup>27</sup> These denominations are Episcopal, Lutheran (ELSA), Presbyterian (PCUSA), Quaker, Unitarian Universalist, United Methodist, United Church of Christ.

fact, NONE of the world's major religions opposes requiring vaccinations—not Buddhism, Mormonism, Judaism, Islam, nor Jehovah's Witnesses nor the Christian Science Church). Furthermore, all of the denominations of the Maine Council of Churches support protecting children and adults from diseases that can spread throughout a community and have the potential to cause extreme illness or even death. Thus, major religions actually explicitly encourage vaccination; some even call it a "moral obligation." The denominations of the Maine Council of Churches uphold the fundamental religious value of loving neighbor as self, as do I. Although I am a firm proponent of an individual's right to practice their religion, I do not believe the exercise of religious freedom should be allowed to pose risks to public health or cause harm to our neighbors. The right to practice religion freely should not include the liberty to expose the community to communicable disease, sickness or death, in my view. Therefore, I urge you to reject both bills.

Thank you for your consideration.

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