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BY HAND AND EMAIL

The Honorable Matthew Ritter
Majority Leader
House of Representatives
State Capitol
Hartford, Connecticut 06106

Dear Majority Leader Ritter:

I am writing in response to your request for a formal legal opinion from the Office of the Attorney General (the "Office") regarding the "constitutionality of eliminating the religious exemption for required immunizations" that is set forth in Conn. Gen. Stat. § 10-204a(a).[1]

There is no serious or reasonable dispute as to the State's broad authority to require and regulate immunizations for children: the law is clear that the State of Connecticut may create, eliminate or suspend the religious exemption in Section 10-204a(a) in accordance with its well-settled power to protect public safety and health. The exercise of this authority is fully consistent with the Constitutions of the United States and the State of Connecticut.

This Office expresses no opinion regarding whether the State should eliminate the religious exemption in Section 10-204a(a), or any other exemption from the requirement for a child to be vaccinated as a condition to attending a school. That is a policy decision entrusted exclusively to the judgment of the legislature and the Governor.

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[1] Conn. Gen. Stat. § 10-204a(a) provides in relevant part that public and private schools must require that all children "be protected by adequate immunization" against various specific diseases unless the child has a medical exemption pursuant to subsection (2) or "presents a statement from the parents or guardian of such child" that the immunizations would be "contrary to the religious beliefs" of the child, parents or guardian, pursuant to subsection (3).

I. The U.S. Supreme Court Has Repeatedly Affirmed The Authority of the States On This Issue For More Than 100 Years.

Federal law has supported the authority of the states to require and regulate immunizations for children for over 100 years. As early as 1905, the United States Supreme Court recognized the states' authority to enact "health laws of every description" to protect the public health and the public safety. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905). *Jacobson* involved a Fourteenth Amendment challenge to the constitutionality of a Massachusetts statute requiring compulsory vaccination for smallpox. The Court, recognizing that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members", held that the state law did not "invad[e] any right secured by the Federal Constitution." *Id.* at 27, 38. Notably, the Court cited with approval several state court decisions upholding "statutes making the vaccination of children a condition of their right to enter or remain in public schools." *Id.* at 32-34.[2] Seventeen years later, the U.S. Supreme Court affirmed that *Jacobson* "had settled that it is within the police power of a state to provide for compulsory vaccination," and that such ordinances in the exercise of that police power may make reasonable classifications reflecting the "broad discretion required for the protection of the public health." *Zucht v. King*, 260 U.S. 174, 176-77 (1922). Accordingly, the *Zucht* Court held that a city ordinance requiring immunization for school attendance violated neither due process nor equal protection principles. *Id.*

Twenty-two years after *Zucht*, the U.S. Supreme Court cited *Jacobson* for the proposition that 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." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). Noting that the "state's authority over children's activities is broader than over like action of adults," the *Prince* Court reasoned that "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of

[2] Before 1905, the states of Indiana, Georgia, North Carolina, California, Connecticut, Vermont, New York and Pennsylvania had all upheld state statutes requiring vaccination of children as a condition of their right to enter or remain in public schools. *Jacobson*, 197 U.S. at 32-35 and cases cited therein.

their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id*. at 168, 170.[3]

Jacobson, Zucht and *Prince* remain valid today. Numerous federal courts in recent times have held that the free exercise of religion must give way in the face of mandatory state vaccination laws. The United States Court of Appeals for the Second Circuit recently held "following the reasoning of *Jacobson* and *Prince*, that mandatory vaccination as a condition for admission to school does not violate the Free Exercise Clause." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir.) (per curiam), *cert. denied*, 136 S. Ct. 104 (2015). The *Phillips* Court observed that a law that is neutral and of general applicability need not be justified by a compelling government interest even if it has the incidental effect of burdening a particular religious practice. *Id*.; *accord, Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1999 (2018) (upholding Michigan's mandatory immunization law).

Similarly, the Fourth Circuit upheld West Virginia's decision to eliminate any religious exemption to mandatory immunization statutes, rejecting challenges based on the free exercise, due process and equal protection clauses of the U.S. Constitution. *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 353-55 (4th Cir.), *cert. denied*, 565 U.S. 1036 (2011). Citing *Jacobson, Zucht* and *Prince*, the *Workman* Court noted that the "Supreme Court has consistently recognized that a state may constitutionally require school children to be immunized." *Id*. at 356. The court found that this was "not surprising given the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs." *Id*. (internal citations omitted).

In another vein, the Mississippi Supreme Court struck down a state statutory exemption from mandatory vaccinations on the basis of religious beliefs,

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[3] Notably, *Prince* was decided after *Cantwell v. Connecticut*, which established that the Fourteenth Amendment to the U.S. Constitution prohibited state legislatures from enacting legislation that would infringe upon the First Amendment protections for the free exercise of religion and the prohibition of state "establishment" of religion. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). While *Cantwell* concerned a Connecticut law prohibiting, among other things, solicitation of donations for religious purposes without a state license, the Court observed that a state may, consistent with constitutional principles, "safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." *Id*.

on the grounds that it violated equal protection under the Fourteenth Amendment of the U.S. Constitution. *Brown v. Stone*, 378 So.2d 218, 222-24 (Miss.), *cert. denied*, 449 U.S. 887 (1980). Noting that vaccinations prevent "the horrors of crippling and death resulting from poliomyelitis or smallpox or from one of the other diseases against which means of immunization are known and have long been practiced successfully," the Court held that a religious exemption would "discriminate against the great majority of children whose parents have no such religious convictions." *Id.* at 223. Thus the *Brown* Court concluded that requiring "the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school" with children who have not been vaccinated because of a religious exemption would violate equal protection under the Fourteenth Amendment. *Id.*

II. Analysis Under Connecticut Law Supports The State's Authority To Require School Immunizations.

Connecticut constitutional provisions and statutes support the same result. Our courts have generally followed federal constitutional jurisprudence in interpreting Connecticut's Free Exercise Clause, finding such "precedent construing the analogous federal constitutional provision … persuasive." *Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning & Zoning Commission*, 285 Conn. 381, 399-400 (2008); *see also Mayock v. Martin*, 157 Conn. 56, 64 (1968) (consistent with First Amendment free exercise protections a state may safeguard the peace, good order and comfort of the community without invading liberties protected by the Fourteenth Amendment; citing *inter alia*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

It is important to note that our State's school vaccination law does not require vaccination of all children in all circumstances. This law does not prohibit parents or guardians from freely exercising their genuinely held religious beliefs. If the religious exemption of Section 10-204a(a) was eliminated or suspended, parents and guardians who object to vaccinations on religious grounds could continue to do so and educate their children through alternative means, such as through home schooling.

Connecticut has enacted statutory protections for the free exercise of religious beliefs. Conn. Gen. Stat. § 52-571b provides that the state or any Connecticut political subdivision cannot burden the free exercise of religion under Article I, § 3 of the state constitution "even if the burden results from a rule of

general applicability," except where the burden is in furtherance of a compelling state interest, and it is the least restrictive means of furthering that compelling state interest. Repealing or suspending the religious exemption does not create any necessary conflict with Section 52-571b in the first instance. Combatting the spread of dangerous infectious diseases, particularly among children who congregate in schools where the danger of the spread of such diseases is particularly high, grounded as it is in the state's paramount duty to seek to ensure public safety, has repeatedly been found to constitute a compelling state interest. [4] See, e.g., *Zucht*, *Prince*.

The only legal question here is whether requiring vaccination as a precondition to enrolling at a public or private school, without a religious exemption, is the "least restrictive means" of accomplishing the salutary purpose of the statute. Such an inquiry must be informed by the underlying principle 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.'" *Phillips*, 775 F.3d at 543 (quoting *Prince*, 321 U.S. at 166-67). The legislature could reasonably determine that the requirements of Section 52-571b were satisfied in this situation.[5] If the efficacy of mandatory vaccinations depends upon exemptions being limited and rarely exercised, and if a religious exemption is being so frequently taken as to undermine the effectiveness of the mandatory vaccination program, elimination of the exemption would appear to meet the "least restrictive means" test of Conn. Gen. Stat. § 52-571b(b)(2). Eliminating the religious exemption from the existing statute would be narrowly tailored to the state's goal, since it would protect children from the spread of dangerous communicable diseases, while allowing a parent or guardian who objected to vaccinations on religious grounds the option to home school his or her child.

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[4] The Centers for Disease Control gives us an insight into these diseases and their effects on the health of children and adults. See, *e.g.*, https://www.cdc.gov/vaccines/parents/diseases/child/measles.html.

[5] The legislature could of course obviate any concern regarding a conflict with Conn. Gen. Stat. § 52-571b(b) by specifically exempting the mandatory vaccination law from the requirements of § 52-571b(b). To the extent that there was any tension between the two legislative actions, the later one would prevail. *Tomlinson v. Tomlinson*, 305 Conn. 539, 553 (2012) ("'[i]f the expressions of legislative will are irreconcilable, the latest prevails. . . .'").

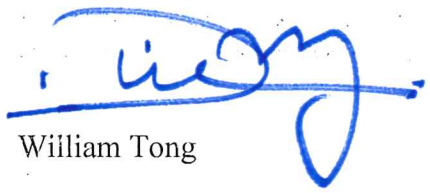
Despite a diligent search, we have been unable to find a Connecticut case that has held that a religious exemption from school vaccinations was constitutionally required. On the contrary, over 100 years ago, the Connecticut Supreme Court upheld mandatory school immunizations. *Bissell v. Davison*, 65 Conn. 183 (1894). More recently, a superior court case has upheld the constitutional dimensions of immunization in the context of a child custody case. In *Archer v. Cassel*, the court reviewed the applicable federal jurisprudence, and held that "Connecticut courts have the authority to order children to be vaccinated." 60 Conn. L. Rptr. 10, 2015 WL 1500447 (Conn. Sup., March 10, 2015). The court in *Archer* noted that "religious freedom in this country is not an absolute right" and that "the right of parents to raise their children in accord with their personal and religious beliefs must yield when the health of the child is at risk or when there is a recognized threat to public safety." *Id*.

The Connecticut Supreme Court has recently held that the Commissioner of the Department of Children and Families, acting as an appointed guardian, could not compel a child to be vaccinated against the wishes of biological parents whose parental rights have not been terminated. *In re Elianah T.-T.*, 326 Conn. 614 (2017) *on reconsideration,* 327 Conn. 912 (2017). However, *Elianah T.-T.* was predicated not on federal or state constitutional claims, but on interpretation of the state statute authorizing the Commissioner to ensure "medical treatment" (which the Court held implied curing illness or injury but not preventive care such as vaccinations).[6]

[6] Connecticut's constitutional guarantee of free public education (Conn. Const. art. VIII, § 1) does not limit the State's power to require vaccinations. A California appellate court held that given the compelling need to fight the spread of contagious diseases, elimination of the state's religious exemption to mandatory vaccinations would not violate the state constitutional right to a free education, even if analyzed under strict scrutiny. *Brown v. Smith* 24 Cal.App.5th 1135, 1145-47 (2018). The *Brown v. Smith* court also upheld the elimination of the exemption against state equal protection and due process claims. *Id*., at 1147-1148.

Given the foregoing, it is the opinion of the Office of the Attorney General that there is no constitutional or statutory bar to the State's elimination or suspension of the religious exemption currently contained in Conn. Gen. Stat. § 10-204a.

Very truly yours,



William Tong

Cc: Joe Aresimowicz, Speaker of the House
Themis Klarides, House Minority Leader
Martin M. Looney, Senate President *pro tempore*
Len Fasano, Senate Minority Leader