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Vaccinations, Religious Exemptions, and Covid-19 Responding to the Pandemic with a Mandatory Vaccination

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I. INTRODUCTION

The Covid-19 pandemic has had a remarkable impact on almost every facet of life in the United States. As of December 14, 2020, there have been over 16 million cases of Covid-19 and 299,328 deaths from the virus in the United States.¹ The response to the virus has had wide ranging effects across the nation, as states try to combat its spread. The result has been a wide range of responses that have been consistently changing throughout the United States, ranging from stay at home orders, to occupancy limits and mask requirements.² The impact of this response has been vast, with one in four American's saying they or someone in their household lost their job because of Covid-19.³ The effects are still ongoing, with half of those who lost their jobs because of Covid-19 remaining unemployed months after many non-essential businesses were closed to combat the spread of the virus.⁴ The recent news of a man being reinfected in the United States has shown that natural immune responses to Covid-19 will not be enough and that this pandemic will require a vaccination to stop its spread.⁵

It is becoming increasingly apparent that the only way that the United States will be able to move on from Covid-19 will be with a vaccination.⁶ With this revelation, an important question comes to mind. What, if anything, could the government do to protect public health and mandate a rollout of the vaccination? As herd immunity, somewhere between 75% and 95% of the population, needs to be reached to stop the spread Covid-19, a vaccination mandate would be

¹ The New York Times, *Covid in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Dec. 14, 2020, 1:00 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

² Kamran Rahman and Alice Miranda Ollstein, *How States are Responding to Coronavirus, in 7 Maps*, POLITICO (Mar. 25, 2020), <https://www.politico.com/news/2020/03/24/coronavirus-state-response-maps-146144>

³ Kim Parker et al., *Economic Fallout From COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW RESEARCH CTR. (Oct. 19, 2020, 7:00 PM), <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/#:~:text=Fully%2015%25%20of%20adults%20report,they%20are%20currently%20not%20employed.>

⁴ *Id.*

⁵ William A. Haseltine, *What COVID-19 Reinfection Means for Vaccines*, SCIENTIFIC AMERICAN (Sept. 23, 2020) <https://www.scientificamerican.com/article/what-covid-19-reinfection-means-for-vaccines/>

⁶ *Id.*

needed to ensure that those numbers are met.⁷ The need to mandate a vaccine is in large part due to the rise of the anti-vaccination movement in the last few years, and resistance by parents to vaccinate their children.⁸ This resistance to vaccinations ultimately lead New York State first to revoke vaccination exemptions in a number of Brooklyn zip codes and eventually remove religious exemptions all together.⁹ Current measures to prevent the spread have already received protests and resistance.¹⁰ There have been widespread examples in the U.S. of religious groups protesting, church leaders mocking public health requirements, and suing states that have limited church gatherings.¹¹ This comes despite research showing that those who have attended church for either worship or community reasons are sixteen times more likely to be infected with Covid-19.¹²

In this paper, I argue that the government can respond to Covid-19 through the use of a mandatory vaccination without a religious exemption. Section II outlines a general history of mandatory vaccinations in the United States. Section III looks at how laws without religious exemptions have been treated in the courts. Section IV looks at laws with religious exemptions. Section V is an analysis of the treatment of states that have removed religious exemptions in the wake of the 2019 measles outbreaks. Section VI shows that states can pass mandatory vaccinations without religious exemptions to deal with the Covid-19 pandemic.

⁷ Sara Mahmoud-Davis, *Balancing Public Health and Individual Choice: A Proposal for a Federal Emergency Vaccination Law*, 20 HEALTH MATRIX 219, at 226-227 (2010).

⁸ Julia Ries, *Vaccine Preventable Diseases Are Rising, How People Are Fighting Back*, HEALTHLINE (Nov. 18, 2019) <https://www.healthline.com/health-news/vaccine-preventable-diseases-are-on-the-rise-what-to-know>

⁹ *Id.*

¹⁰ Katie Shepherd, *Tensions Over Restrictions Spark Violence and Defiance Among Protesters as Trump Pushes States to Reopen*, THE WASHINGTON POST (May 13, 2020) <https://www.washingtonpost.com/nation/2020/05/13/protest-violence-coronavirus/>

¹¹ Pamela E. Klassen, *Why Religious Freedom Stokes Coronavirus Protests in the U.S., but Not Canada*, THE CONVERSATION (May 4, 2020), <https://theconversation.com/why-religious-freedom-stokes-coronavirus-protests-in-the-u-s-but-not-canada-136557>

¹² Francis X. Rocca, *Churches Push Back Against Coronavirus Restrictions*, THE WALL STREET JOURNAL (Nov. 20, 2020), <https://www.wsj.com/articles/churches-push-back-against-coronavirus-restrictions-11605867870>

II. HISTORY OF MANDATORY VACCINATIONS IN THE UNITED STATES

Vaccinations have long been a part of public life in the United States. The first development in vaccinations, in the form of inoculation, was in 1796 and helped stop the spread of Smallpox.¹³ This huge development in medical science did not catch on right away. Massachusetts was the first state to use its police powers to force compulsory vaccinations in the name of public health in 1809.¹⁴ This use of police powers would be challenged almost a hundred years later, and the issue would face the United States Supreme Court for the first time.¹⁵

The first test of a state's ability to compel vaccinations in the name of public health came in 1905, when Jacobson challenged a Cambridge law compelling all unvaccinated residents over the age of twenty-one to get vaccinated or pay a fine.¹⁶ Unlike most of the current vaccination laws, which are tied to a child's ability to attend public school, this was a direct mandate with a fine attached for non-compliance.¹⁷ At the time of the case, mandatory vaccinations were not a novel idea; eleven states at the time had compulsory vaccine laws, with Massachusetts itself passing its first vaccination laws almost a hundred years earlier.¹⁸ Jacobson was challenging the Massachusetts law on the grounds that it was a deprivation of liberty under the Due Process Clause.

The Court first looked to where the powers to compel a vaccination came from. The Court noted that the Constitution of the United States reserved police powers, those laws that are for the protection of the health and safety of the citizens within the states, to the states

¹³ Kevin M. Malone and Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, LAW IN PUBLIC HEALTH PRACTICE, 262-280 (2003).

¹⁴ *Id.* at 271.

¹⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

themselves.¹⁹ When the states entered into the union, they did not give up these powers, but that does not mean there are no limits on the powers whatsoever.²⁰ The Court noted that these police powers still had to be reasonable and connected to the protection of public safety and health.²¹ If the enactment of a police power ran against any right guaranteed within the Constitution, then it would be invalidated as well.²² The Court pointed to the principle that the Constitution does not grant an “unrestricted license to act according to one's own will” but instead sacrifices some of this for the common good and safety of all.²³ The common good, therefore, is the measurement that should be used when judging a state’s exercise of its police powers.²⁴

The Court looked at the defendant’s claims that vaccinations were not useful, or in some cases harmful.²⁵ It determined that the state in its law-making duties had probably already addressed these concerns and weighed these theories against evidence in favor of vaccinations.²⁶ The Court refused to overrule state legislation to protect the people of the state, so long as there was a clear connection between the goals of the legislation and the laws passed.²⁷ Here the Court stated that there is undoubtedly a connection between mandatory vaccinations and the protection of public health.²⁸ The Court ultimately held that it is within the state’s police powers to pass a mandatory vaccination law.²⁹ It also went on to say that assuming someone could present a case that they cannot get a vaccination out of medical necessity they would be exempt.³⁰

¹⁹ *Id.* at 24-25.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 27.

²⁴ *Id.*

²⁵ *Id.* at 34.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 38-39.

³⁰ *Id.*

This is the first case in the line of mandatory vaccinations, and it establishes the basis upon which states may use their police powers to compel vaccinations. The next case is the first major case to look at the ability to compel vaccinations through school requirements. While this is not the only way vaccinations may be compelled, it has become the predominant method to compel vaccinations.³¹ This happened more so by circumstance rather than design, as the rise in Smallpox during the Civil War era coincided with the first compulsory school attendance laws.³²

The next important case in the line of compulsory vaccinations is *Zucht v. King*.³³ Rosalyn Zucht was denied entry into schools, both public and private in San Antonio, Texas, because she would not provide a certificate of vaccination.³⁴ San Antonio required all students to be vaccinated prior to being admitted to schools.³⁵ A suit was brought charging that this was deprivation of liberty without due process of law.³⁶

The Court noted that *Jacobson* had established that compulsory vaccinations were within the police powers, and that the state could delegate these powers to municipalities to execute at a localized level.³⁷ The Court found that these regulations were not arbitrary in their execution but were reasonable efforts to promote public health and protection.³⁸

The Court in *Zucht* held that the police powers to compel vaccinations that were affirmed in *Jacobson* could be compelled by conditioning the ability to attend school on compliance with the health ordinance.³⁹ Considering that the state could just outright compel citizens to get vaccinations, it was not a stretch that they could deprive a public service for non-compliance

³¹ Malone and Hinman, *supra* note 13, at 271.

³² *Id.*

³³ *Zucht v. King*, 260 U.S. 174, 175 (1922).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 176.

³⁸ *Id.* at 177.

³⁹ *Id.*

with the ordinance. The next case was not a vaccination case, but it does contain an important extension of police powers, as well as serving as an example of police powers competing with free exercise of religion.

In *Prince v. Massachusetts* the Court tackled a number of competing issues as a public health law ran against both parental rights and free exercise of religion.⁴⁰ Sarah Prince was the custodian of her niece Betty Simmons, age 9.⁴¹ As a part of their practice of faith, being Jehovah's Witnesses, Prince had Simmons selling magazines professing their faith on the street along with her.⁴² Prince was charged with providing the magazines to the minor to sell and permitting the minor to work contrary to the state law.⁴³ At the time in Massachusetts, any girl under the age of 18 was not allowed to sell magazines, newspapers, or articles, in the street or public.⁴⁴ Prince contended that Simmons had a "God given" right to perform ministry in the form of selling religious texts with her.⁴⁵

The two legal arguments made by Prince were that the ordinance was infringing on her free exercise of religion, and her parental rights to raise the child in her faith.⁴⁶ The Court, however, pointed to the fact that neither of these rights were unable to be limited. While discussing limitations that can be made on parental rights the Court said "[parents] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds."⁴⁷ 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."⁴⁸ The Court ultimately ruled that the

⁴⁰ *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944).

⁴¹ *Id.*

⁴² *Id.* at 161-62.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 165.

⁴⁷ *Id.* at 166.

⁴⁸ *Id.* at 166-67.

prohibition against children selling religious literature was valid.⁴⁹ The goals of the legislature in enacting the bar on child labor was to protect the children, and even in the presence of their parents, they could still be in danger.⁵⁰ The important take away from this case however is that free exercise of religion and parental rights cannot overcome a reasonable regulation by the legislature in order for the state to express their police powers.

Mandatory vaccinations have been tested a number of times in the courts. *Jacobson* set the foundation that mandatory vaccinations are permissible as an exercise of the states police power and analyzed this using rational basis review.⁵¹ This case did not limit the way in which the state could compel compliance, with it being a fine for those who did not receive their vaccinations.⁵² Further methods of compelling compliance have been looked at by the courts as well. School requirements for vaccinations have become the common way to ensure that children are vaccinated and was challenged in *Zucht*.⁵³ The Court upheld the state's ability to compel vaccinations by barring attendance of unvaccinated children.⁵⁴ *Prince* touched on the topic of religion and parental rights being used to challenge state police powers, and once again the Court allowed state police powers to hold up, this time against a broad challenge on the grounds of free exercise and parental rights.⁵⁵

After *Prince*, the Court heightened the standard of review for laws that burden religious exercise in *Sherbert v. Verner*.⁵⁶ This standard could have impacted the way in which *Prince*, *Zucht*, and even *Jacobson* were decided. During the era of the *Sherbert* standard came *Wisconsin*

⁴⁹ *Id.* at 171.

⁵⁰ *Id.* at 168.

⁵¹ See *Jacobson v. Massachusetts*, 197 U.S. 11.

⁵² *Id.*

⁵³ *Malone and Hinman*, *supra* note 13, at 271.

⁵⁴ *Zucht v. King*, 260 U.S. at 177.

⁵⁵ *Prince v. Massachusetts*, 321 U.S. at 165.

⁵⁶ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

v. Yoder, where school attendance and religion clashed again.⁵⁷ Here the Court overturned the convictions of members of the Amish faith who refused to send their children to school past eight grade.⁵⁸ They claimed this was against the tenets of the Amish faith and that following the mandatory attendance rules would cause them to violate their faith.⁵⁹ While this does seem to go against the holding in *Zucht*, there are a number of factors to set these cases apart. In *Zucht* Rosalyn Zucht was trying to attend school without complying with a vaccination ordinance.⁶⁰ The ordinance was for the health and safety of those attending school, and Zucht's attendance without a vaccination could undermine this effort.⁶¹ This is different from the ordinance in question in *Yoder*.⁶² In *Yoder* the ordinance was to promote the education of people within the state, but there were alternative means by which the Amish received their education.⁶³ Here there was a concern that attendance beyond eight grade would damage an Amish person's faith.⁶⁴ This is far different from an ordinance that is protecting public health from one individual who is not receiving a vaccination. So even under the higher standard seen after *Sherbert* mandatory vaccination laws would most likely stand. Regardless, the standard was once again changed, this time to rational basis review.⁶⁵ This was more in line with the reasoning used in these cases, specifically *Jacobson* as the Court noted that the strict scrutiny was allowing personal beliefs to dictate laws themselves.⁶⁶ The Court in *Employment Division v. Smith* changed the standard for assessing how laws that impacted religious freedoms to a rational basis review.⁶⁷ In response to

⁵⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

⁵⁸ *Id.*

⁵⁹ *Id.* at 209.

⁶⁰ *Zucht v. King*, 260 U.S. at 175.

⁶¹ *Id.* at 176.

⁶² *Wisconsin v. Yoder*, 406 U.S. at 207.

⁶³ *Id.* at 216-222.

⁶⁴ *Id.* at 218.

⁶⁵ Whitney Travis, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1705 (2007), <https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/17>

⁶⁶ See *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990).

⁶⁷ *Id.*

Smith congress passed the Religious Freedom Restoration Act, which prevented laws from burdening religious freedom without a compelling justification and doing so by the least restrictive means possible.⁶⁸ However, the national Religious Freedom Restoration Act was struck down from being applicable to the states.⁶⁹

The courts have given the states a lot of room to exercise police powers in the name of health and safety, especially in the field of vaccinations. However, the question of when vaccination requirements run against free exercise of religion must be addressed. Currently only five states do not have any exemptions except for medical exemptions from vaccinations; thirty states have religious exemptions, and fifteen states have both religious and personal belief exemptions.⁷⁰ The next two Sections look at how laws with and without exceptions are treated by the courts. This will give a framework to understand what a Covid-19 vaccination law could look like and what, if any, exemptions would need to be given in that law.

III. TREATMENT OF LAWS WITHOUT EXEMPTIONS

Five states currently do not have religious exemptions to vaccinations: California, Maine, Mississippi, New York, and West Virginia.⁷¹ Of those, California, Maine, and New York, have repealed their religious exemptions within the last five years.⁷² Mississippi had a religious exemption until 1979 when it was overturned by the state's Supreme Court in *Brown v. Stone*.⁷³ As shown in the historical analysis, the courts have given great deference to state police powers and have not required religious exemptions for mandatory vaccinations. In fact, the reason for most state-level religious exemptions is due to the deference given to police powers. The failure

⁶⁸ Travis, *supra* note 65, at 1707.

⁶⁹ *Id.* at 1709.

⁷⁰ *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATURES (June 26, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx>

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979).

to challenge mandatory vaccinations in the courts, led to religious organizations lobbying for religious exemptions to be passed by state legislatures.⁷⁴ As such West Virginia is the only state that never had religious exemptions to its vaccination laws. This was finally challenged when Jennifer Workman challenged the West Virginia law in 2009 on behalf of her daughter.⁷⁵

Jennifer Workman had vaccinated her first child, who subsequently developed a developmental disorder. Fearing that vaccines were to blame for her child's disorder, Workman decided to not vaccinate her youngest child. She obtained a medical exemption, but the school district challenged the validity of the exemption. The basis of this was that autism in a family member was not a valid reason to receive a medical exemption. After having her unvaccinated child denied admission to Mingo County Schools, Workman sued on claims that this was a violation of her free exercise rights, as her religion compelled her to "protect her child from harm and illness".⁷⁶ The Court denied Workman's free exercise argument by relying on both *Jacobson* and *Prince*, saying that states have long had a recognized ability to mandate vaccinations, and that a parent cannot claim religious protections anymore for their child than themselves.⁷⁷ In a case where a law is generally applicable and factually neutral, the standard of review is rational basis.⁷⁸ Even though rational basis review is all that is required, the Court still relied on cases showing that the law would stand under strict scrutiny.⁷⁹ Further, the Court pointed out that while vaccinations exemptions can be given by the state for religious reasons it does not need to do so.⁸⁰ The Court ultimately granted summary judgement for the County.⁸¹

⁷⁴ James Colgrove and Abigail Lowin, *A Tale Of Two States: Mississippi, West Virginia, And Exemptions To Compulsory School Vaccination Laws*, HEALTH AFFAIRS (Feb, 2016), <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2015.1172>

⁷⁵ See *Workman v. Mingo County Schools*, 667 F.Supp.2d 679 (S.D. W. Va. 2009).

⁷⁶ *Id.* at 684.

⁷⁷ *Id.* at 688-89.

⁷⁸ *Emp't Div. v. Smith*, 494 U.S. at 879.

⁷⁹ *Workman v. Mingo County Schools*, 667 F.Supp.2d at 689.

⁸⁰ *Id.*

⁸¹ *Id.* at 691.

Workman is the perfect illustration of the Court's treatment of mandatory vaccination laws. The analysis goes through all of the historic cases and shows that the Court has always held that the police powers of the state in mandating vaccinations do not require religious exemptions, and that the existence of such exemptions is the state opting to do so.⁸² Subsequently the Fourth Circuit affirmed the ruling and the Supreme Court denied certiorari.⁸³

Workman also showed one of the trends that Courts have followed in addressing vaccination laws, that of holding themselves to a higher standard than required. Since *Employment Division v. Smith*, the standard moved from requiring a compelling interest with which there was no less restrictive means of achieving that interest, to only needing a rational basis between the state's objective and the means used.⁸⁴ However, many states have passed Religious Freedom Restoration Acts to restore the strict scrutiny standard held prior to *Smith*.⁸⁵ As such, many courts have used the strict scrutiny standard to show that even if a state has passed a Religious Freedom Restoration Act, or if *Smith* was overturned, mandatory vaccination laws will not be overturned. This is important as it lays a foundation going forward that even under the highest level of scrutiny a law can face, mandatory vaccinations are a valid means to protect public health, even if it impacts religious freedoms.

IV. TREATMENT OF LAWS WITH EXEMPTIONS

Even though the courts have never held that religious exemptions or personal belief exemptions are necessary exemptions for mandatory vaccinations, an overwhelming number of state legislatures have still extended these exemptions. Despite these exemptions being issues, there have been a number of questions about whether distinctions can be made among religions,

⁸² *Id.* at 688-90.

⁸³ *Workman v. Mingo Cnty. Bd. of Educ.*, 565 U.S. 1036 (2011).

⁸⁴ *Emp't Div. v. Smith*, 494 U.S. at 879.

⁸⁵ *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>

what questions can a court ask concerning sincerity of religious beliefs, and whether the exemptions in and of themselves violate the Establishment Clause of the First Amendment.⁸⁶

A. Recognized Religions

When states started passing religious exemptions to mandatory vaccinations in the 1960's many of them tried to limit how many people could apply for exemptions by limiting them to only recognized exemptions.⁸⁷ Due to this, many of the challenges to these exemptions were on the ground that they violated the Establishment Clause by limiting what religions would be recognized for the statute.

Massachusetts's religious exemption was challenged in 1971 on the grounds that it violated the Establishment Clause.⁸⁸ The exemption in question allowed for children to be exempt from the vaccination law in cases where due to the religion of the child there was conflict "with the tenets and practice of a recognized church or religious denomination of which he . . . [was] an adherent or member".⁸⁹ In the case, the trial Court had concluded that Dalli did hold a sincere religious belief, but the exemption still did not cover her, because she was not a part of a recognized church or religious denomination.⁹⁰ Dalli challenged this as a violation of the Establishment Clause due to the differential treatment of religions.⁹¹ The Court found that by treating one religious group better than another is a violation of the First and Fourteenth Amendments.⁹² As such the Court struck down the entire section, which effectively did away with the religious exemption in the state of Massachusetts until the legislature went back to readdress how the religious exemption was written. In this case the Court could not expand the

⁸⁶ U.S. Const. Art. II, Sec. 1.

⁸⁷ Colgrove and Lowin, *supra* note 74.

⁸⁸ See *Dalli v. Bd. of Educ.*, 358 Mass. 753 (1971).

⁸⁹ *Id.* at 756.

⁹⁰ *Id.* at 754.

⁹¹ *Id.*

⁹² *Id.* at 759.

exemption by statutory construction, but instead left it to the legislature to amend the language and instead invalidated the violating clause.

Similarly, Arkansas lost its religious exemption to vaccinations for two years due to a challenge on the grounds of a violation of the Establishment Clause.⁹³ In *Boone v. Boozman* a mother had her religious exemption for her child rejected because she was not a part of a recognized religion.⁹⁴ The Court in this case, using the framework of the *Lemon* test, found that the main issue here was in the entanglement of the state and religion.⁹⁵ Applications for religious exemptions asked questions regarding the size of the church, where the members meet, what specific doctrine says they are not allowed to be vaccinated, as well as having to be signed by a religious leader to assure that they are a member in good standing with said church.⁹⁶ The Court found that this asked the state to become entangled in religious doctrines, as well as opened the state to bias since it was required to determine what churches would be recognized by the state.⁹⁷ As a result, the religious exemption was struck down as unconstitutional, until it was revised by the state legislature.⁹⁸

In another instance similar limiting language was challenged in New York, in *Sherr v. Northport-East Northport Union Free School District*.⁹⁹ In that case a number of individuals challenged the legality of the religious exemption statute since it required those seeking an exemption to be “bona fide members of a recognized religious organization”.¹⁰⁰ Here the Court, after noting the length of time this limiting language had existed, decided that the government

⁹³ Colgrove and Lowin, *supra* note 74.

⁹⁴ *Boone v. Boozman*, 217 F. Supp. 2d 938, 943 (E.D. Ark. 2002).

⁹⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding a law does not violate the Establishment Clause if it has (1) a valid secular purpose, (2) its primary effect neither advances nor suppresses religion, and (3) the law does not result in excessive government entanglement with religion).

⁹⁶ *Boone v. Boozman*, 217 F. Supp. 2d at 949.

⁹⁷ *Id.* at 950.

⁹⁸ Colgrove and Lowin, *supra* note 74.

⁹⁹ *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987).

¹⁰⁰ *Id.* at 97.

entanglement of saying which religions would be recognized for the purpose of the statute was the main issue, and expanded the section by removing the recognized religion requirement.¹⁰¹ In effect, this expanded who could get a religious exemption to the law.

These cases show that the statutory construct and the difference of opinion regarding judicial activism can result in very similar cases with the same legal issue having contrasting results in the relief provided. *Boone* and *Dalli* resulted in religious exemptions being struck down all together, whereas *Sherr* resulted in religious exemptions becoming more lenient.

B. Sincerity of Belief

The other issue that a few courts have found in the construct of religious exemptions to mandatory vaccinations is in assessing the sincerity of belief. When courts have had to assess the sincerity of beliefs they consistently find that the excessive entanglement of the government and religion in doing so violates the Establishment Clause.¹⁰² Some states, such as Florida, did not give any ability to the state to investigate the sincerity of the religious belief, over concerns that this would cause the courts to become entangled as they were in *Boone* or *Dalli*.¹⁰³ The language of the Florida statute did not allow for the state to investigate whatsoever into the sincerity of belief, which meant all someone had to do was claim it violated their religious beliefs and they were exempt.¹⁰⁴ This essentially made the exemption work for both religious and philosophical reasons, as there was no way for the state to challenge someone who was seeking a vaccination exemption.

Similarly, in Wyoming the Court was concerned about the ability of the courts to inquiring into sincerity of someone's religious beliefs.¹⁰⁵ The Court in Wyoming, upon receiving

¹⁰¹ *Id.* at 98.

¹⁰² *Flynn v. Estevez*, 221 So. 3d 1241, 1246 (Fla. Dist. Ct. App. 2017).

¹⁰³ *Id.* at 1249.

¹⁰⁴ *Department of Health v. Curry*, 722 So. 2d 874, 878 (Fla. Dist. Ct. App. 1998).

¹⁰⁵ *In re Exemption from Immunization Requested by Susan Lepage v. State*, 18 P.3d 1177, 1181 (Wyo. 2001).

an appeal for a religious exemption application cited statutory construct as limiting them in their ability to investigate the sincerity of someone’s religious belief.¹⁰⁶ The Court came to this conclusion as the statute said that upon written religious objections being submitted the waiver “shall” be granted.¹⁰⁷ Under this language the Court did not think the legislature had granted any ability for an inquiry into the sincerity of belief to be done.¹⁰⁸

In both of these cases state legislatures had constructed religious exemptions that were unable to be questioned when they were being utilized or they would have violated the Establishment Clause. This has a dual effect of allowing a larger number of people to utilize the religious exemptions, which consequently means that there is less ability for the state to ensure adequate immunization levels are achieved. However, this format of exemption does protect these statutes from running afoul of the Establishment Clause.

C. Equal Protection of the Law

The Court of Mississippi in 1979 went beyond what other courts had in overturning their religious exemptions.¹⁰⁹ In *Brown v. Stone* the Court took a strong stance against the constitutionality of religious exemptions.¹¹⁰ In the cases discussed above the courts had been concerned about treatment of one religion over another; however, the Mississippi Supreme Court in *Brown* were more concerned about a different issue.¹¹¹

Like the other cases, Mississippi’s law had religious exemptions for recognized religions.¹¹² However instead of striking down the exemption on the grounds that it held one religion higher than another, the Court saw any religious exemption as being a violation of the

¹⁰⁶*Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Kim Krisberg, *In Mississippi, Strong Vaccine Laws Keeping Measles at Bay*, AMERICAN PUBLIC HEALTH ASS’N (July, 2019), <https://thenationshealth.aphapublications.org/content/49/5/E17>

¹¹⁰ *Brown v. Stone*, 378 So. 2d at 223.

¹¹¹ *Id.*

¹¹² Krisberg, *supra* note 109.

Equal Protection Clause of the Fourteenth Amendment. The Court said “[t]he exception, which would provide for the exemption of children of parents whose religious beliefs conflict with the immunization requirements, would discriminate against the great majority of children whose parents have no such religious convictions.”¹¹³ Unlike other courts concerned primarily about the government looking into the tenets of faith, or recognizing certain religions, Mississippi was concerned about the safety of children would be put in danger due to those utilizing the religious exemption. Part of the motivation in this was the Court looking at the goal of the vaccination legislation in trying to protect school children from dangerous infectious diseases.¹¹⁴ It saw the exemption as running counter to this objective and giving those with religious opposition to vaccinations preferential treatment to the detriment of the public in general.¹¹⁵

D. Overview

While courts have largely allowed states to pass exemptions to mandatory vaccinations in the name of bolstering free exercise of religion, states have had a number of concerns with this. States have tried a variety of ways to limit the impact of religious exemptions but in doing so have run into problems with the Establishment Clause. Using “recognized religions” or “sincere beliefs” to try and limit the number of religious exemptions ends up either invalidating the exemption as a whole, or if the “recognized religion” language alone gets removed, making it extremely broad. While only Mississippi has overturned religious exemptions on equal protection grounds, if someone did try to challenge religious exemptions using the same framework, another court could end up following in the footsteps of the Mississippi Supreme Court.

¹¹³ *Brown v. Stone*, 378 So. 2d at 223.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

However, equal protection violations are different when on grounds of religion so long as the exemption is done in the name of promoting religious exercise. This is seen in *Presiding Bishop v. Amos*.¹¹⁶ In *Amos*, a provision of the Civil Rights Act of 1964, which exempted religious organizations from the prohibition of religious discrimination in employment decisions was challenged.¹¹⁷ Ultimately the Court upheld the exemption; while it did raise concerns regarding equal protection of the law, it was done in order to promote religious freedom and free exercise.¹¹⁸ This established the boundary for a religious exemption to be upheld over the concerns of equal protection. On the other end of the spectrum, is *Thornton v. Caldor*.¹¹⁹ In *Thornton*, the Supreme Court addressed the outer boundaries of exemptions being permissible if they are done in the name of promoting religious exercise.¹²⁰ The state of Connecticut had passed a law that required any employee who had a particular Sabbath day to be granted that day off regardless of the business's practices.¹²¹ The Court found that this statute amounted to holding religion above businesses in all cases, which went beyond simply promoting religious freedom, and instead put religious rights above secular rights.¹²² As such the Connecticut law was struck down for violating the Establishment Clause.¹²³

Thus, an exemption may be granted if it is to promote religious freedom. However, if that exemption places a greater concern for religion than it does for secular reasons, it will not stand up to a challenge for violations of equal protections. So, a permissive statute, that allows religions to practice as they see fit will stand, but a demanding statute that places a burden on others in order to accommodate religion will not. This dichotomy leaves room for the Mississippi

¹¹⁶ *Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

¹¹⁷ *Id.* at 329.

¹¹⁸ *Id.* at 338.

¹¹⁹ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

¹²⁰ *Id.* at 708-09.

¹²¹ *Id.* at 707.

¹²² *Id.* at 709.

¹²³ *Id.* at 710-11.

decision, because allowing religious exemptions to vaccination requirements is promoting free exercise, but it is also putting a priority on religious exercise over that of public health.

V. TREATMENT OF EXEMPTIONS BEING REPEALED

While states have been able to give religious exemptions to mandatory vaccinations, when states repeal these exemptions it raises a few questions. The Court in *Sherr* pointed out that it is not necessary for a state to extend religious exemptions to mandatory vaccination laws; but a state did have a right to do so.¹²⁴ It would follow that the state then would not have to continue to provide exceptions for religion if it did not have to allow them in the first place. However, depending on what motivated the change in law could dictate the treatment it gets in the Courts.

A. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah

The first question would be under what standard the court would review the law. A law that burdens the free exercise of religion will be reviewed under rational basis if it is generally applicable and facially neutral.¹²⁵ In *Lukumi* the city of Hialeah had violated this by religiously targeting in passing a city ordinance, which resulted in heightened scrutiny of the law.¹²⁶ In this case Hialeah had passed a city ordinance that the unnecessary or cruel killing of an animal would be a criminal offense.¹²⁷ It did this under the guise of police powers to protect their citizens.¹²⁸ However, there was clear evidence that the city council meeting in which these ordinances were passed was primarily trying to stop the church from being in their community.¹²⁹ Usually this would receive rational basis review and would only have to be neutral and generally applicable if not for the obvious religious targeting.¹³⁰ In *Lukumi* the Court looked beyond the neutral face of

¹²⁴ *Department of Health v. Curry*, 722 So. 2d at 878.

¹²⁵ *Emp't Div. v. Smith*, 494 U.S. 872, 885 (1990).

¹²⁶ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

¹²⁷ *Id.* at 534-35.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

the ordinance and at the comments made by citizens and council members when passing the ordinances.¹³¹ In the city council meeting the church's practices of sacrifice were mentioned as being against the public morals of the city, which led to the passage of the ordinance.¹³² Further the definition of unnecessary was defined to only really limit ritual sacrifices of this church.¹³³ As such the law was not neutral. The Court also concluded that it was underinclusive in the government's goals, making it not generally applicable either.¹³⁴

Since the law was infringing on free exercise rights and was not neutral or generally applicable it must be analyzed under strict scrutiny.¹³⁵ Only in rare instances will a law pass strict scrutiny, and a law will not pass if it is not tailored as narrowly as possible to achieve its legitimate government interests.

Lukumi shows that there are some public health laws that will not stand when they impact religious freedom.¹³⁶ If a state is repealing a religious exemption to a vaccination the grounds on which they base this decision can largely impact if the revision would stand. If someone petitioned the Court in a case of exemptions being repealed and could show that like *Lukumi* there was animus toward religion leading to the repeal, then the revision would be struck down. Any case where a religious exemption is being repealed can face this kind of scrutiny, and the legislative intent could come under question. Intent in changing the law is just as important as the law itself that law impacts religious exercise.

¹³¹ *Id.* at 534-35.

¹³² *Id.* at 541.

¹³³ *Id.* at 545.

¹³⁴ *Id.*

¹³⁵ *Id.* at 546.

¹³⁶ *Id.*

California Repeals Exemptions

In 2015, California made headlines after 125 people were infected with measles, 110 residents of California among them, due to an outbreak stemming from Disneyland.¹³⁷ This was indicative of the problems that occur when vaccination rates fall. Forty-five percent of those infected were unvaccinated, twelve percent were confirmed to have had varying doses of vaccination and still were infected due to this outbreak, while the rest could not be confirmed to have been vaccinated or not.¹³⁸ Further, only thirty-nine of the individuals infected from California had actually been to the park itself, with thirty-four being exposed due to secondary exposure, and the other thirty-seven could not have their source traced back.

Ultimately, the California legislature decided it was time to act. In June, 2015, the California legislature passed Senate Bill 277 removing their personal belief exemption to mandatory vaccinations.¹³⁹ Immediately after the amendment went into effect plaintiffs sought to stop the enforcement of the act on the grounds that it violated their free exercise of religion, and their equal protection under the law.¹⁴⁰

The California Court of Appeals quite strongly rejected these claims. Moving through an analysis of *Jacobson* and *Prince* the Court found both that vaccines are well within a state's police powers, and that existence of one's religious beliefs do not allow for people to endanger the people around them.¹⁴¹ Beyond this though, the Court says even if a court was to find that this substantially burdened religious exercise and was analyzed under strict scrutiny, it would be one of the rare cases where the law would stand.¹⁴² Relying on the West Virginia Court's holding

¹³⁷ *The Centers for Disease Control and Prevention, Measles Outbreak — California, December 2014–February 2015*, THE CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 20, 2015)

<https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6406a5.htm>

¹³⁸ *Id.*

¹³⁹ *Brown v. Smith*, 24 Cal. App. 5th 1135, 1139 (2018).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1138-45.

¹⁴² *Id.* at 1145.

in *Workman* the Court noted that even if a disease is not currently prevalent in an area it is still clearly a compelling state interest to keep it that way.¹⁴³

There was a claim for a violation of the Equal Protection Clause, as the plaintiff contended the law was treating unvaccinated and vaccinated people differently.¹⁴⁴ The Court found that there was no basis from any authority that vaccination status should be treated as a classification needing protection, and cited a 1904 decision stating that mandatory vaccination laws did not have any “element of class legislation”.¹⁴⁵ The Court also stated that any of the other classes that were claimed, such as home schooled versus classroom attending, or medically exempt versus non-medically exempt also did not raise equal protection concerns.¹⁴⁶ The Court noted that the law was passed for the benefit of all children, by compelling vaccinations, not to the detriment of those without it, since they can receive the educational benefit by receiving their vaccination.¹⁴⁷

If this case demonstrates anything it is that the Court found no additional obligation to maintain an exemption once one had been granted. Instead it used the same case law as West Virginia did when their lack of exemptions was challenged in *Workman*. This framework has been used to address subsequent challenges in California, as well as eventually being cited by New York courts in dealing with the repeal of their vaccination law’s religious exemptions.

B. New York Repeals Exemptions

In 2019, the number of measles cases in the United States reached a 25-year high.¹⁴⁸ In Brooklyn, New York, a huge outbreak of 654 reported cases, resulted in a yearlong effort to

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1147.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1148.

¹⁴⁸ Krisberg, *supra* note 109.

contain the virus and a reported \$6 million in efforts to stop it.¹⁴⁹ In response to this outbreak the New York Legislature repealed the religious exemption to their vaccination laws.¹⁵⁰ The legislature noted the recent measles outbreak as a driving force behind this repeal, and the only mention of religion was conceding that “freedom of religion is a founding tenet of this nation” while going on to cite the longstanding case history backing up their right to repeal the exemption in the name of public health and safety.¹⁵¹ Despite these official accounts regarding religious respect, plaintiffs still contended there was *Lukumi*-like religious animus as some members of the legislature did allude to religion being used to justify personal objections to vaccinations.¹⁵²

The Court noted that here the plaintiffs were seeking a preliminary injunction, so their burden of proof is quite high.¹⁵³ While the Court noted that the detriment of forcing those with sincere religious objections to vaccinations is quite high, it also noted that the danger of death or disability to those exposed to the unvaccinated children is also quite high.¹⁵⁴ From here the Court goes through the precedent set in *Jacobson*, *Prince*, and *Phillips* to justify the ability of the state to require mandatory vaccinations.¹⁵⁵ Further it relies on *Workman* to deal with challenges to state vaccination laws not containing religious exemptions, as well as citing the recent holding in California cases challenging their repeal of religious exemptions to vaccinations.¹⁵⁶

The Court next works to determine what level of scrutiny should be used to analyze the law under. The plaintiffs contend that removal of religious exemptions is automatically a

¹⁴⁹ Stephanie Soucheray, *US Measles Cases Hit 1,234 as Brooklyn Outbreak Called Over*, CENTER FOR INFECTIOUS DISEASE AND RESEARCH POLICY (Sep. 3, 2019) <https://www.cidrap.umn.edu/news-perspective/2019/09/us-measles-cases-hit-1234-brooklyn-outbreak-called-over>

¹⁵⁰ *F.F. v. State of N.Y.*, 108 N.Y.S.3d 761, 767 (Sup. Ct. 2019).

¹⁵¹ *Id.* at 766.

¹⁵² *Id.* at 773.

¹⁵³ *Id.* at 765.

¹⁵⁴ *Id.* at 770.

¹⁵⁵ *Id.* at 771-72.

¹⁵⁶ *Id.* at 770.

targeted law requiring strict scrutiny, but the Court rejects this contention looking at precedent established in *Catholic Charities of Diocese of Albany v Serio*, that says the target of the underlying law, not the exemptions should be used to judge if it is a generally applicable law.¹⁵⁷ The Court determined that even if strict scrutiny were used in this case, the plaintiffs still would not be likely to succeed, as *Workman* has determined that vaccination laws are constitutional even when they do not contain a religious exemption.¹⁵⁸ The Court ultimately rejected all of the plaintiffs arguments and denied a preliminary injunction be granted.¹⁵⁹

Similarly, another New York Court rejected a preliminary injunction claim trying to stop enforcement of the same law but challenged under the New York Constitution’s religious protections.¹⁶⁰ Here, the Court rejected the injunction primarily relying on the Free Exercise provision itself, which states “the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state”.¹⁶¹

While the New York cases on repealing religious exemptions to their mandatory vaccination laws have not gone through the appeals process thus far, it appears that the courts in New York are following the same line of cases as California. Further, they have stated more directly that precedent of *Workman* always allows for a vaccination law without religious exemptions.¹⁶²

VI. CONCLUSION

Vaccinations have played an important role in combating deadly and debilitating diseases in the United States and the world. Looking at the most recent cases to deal with mandatory

¹⁵⁷ *Id* at 772-73.

¹⁵⁸ *Id.* at 775.

¹⁵⁹ *Id.* at 777.

¹⁶⁰ See *Stoltzfus v Cuomo*, 2019 N.Y. Misc. LEXIS 6948 (Sup. Ct. 2019).

¹⁶¹ *Id* at 3.

¹⁶² *Id.* at 775.

vaccination laws, the courts seem to have an extremely permissible view on mandatory vaccinations. Religious exemptions have already begun to be repealed in response outbreaks of the measles.¹⁶³ These outbreaks, which numbered just a few thousand, pale in comparison to the current Covid-19 pandemic, which has reached 16 million infected people and will likely surpass 300,000 deaths this week.¹⁶⁴ If states began reforming their vaccination requirements and removing their religious exemptions for a few thousand cases of measles, it is likely that a stronger response to the current pandemic is to follow. The newly approved Covid-19 vaccinations have begun to be rolled out, and currently are being given to high-risk health care workers.¹⁶⁵ While there is currently no mandate, and not enough vaccinations to even cover a mandatory vaccination, one could follow. Currently vaccines are being encouraged to the public but for them to be effective long term herd immunity has to be reached.¹⁶⁶ It is estimated that at least eighty to ninety percent of people would need to be vaccinated to hit herd immunity for Covid-19.¹⁶⁷ This number is important because if the simple encouragement of public health officials does not get the public to that number, a state response would be needed.

The resistance to public health orders thus far currently does not paint an encouraging picture for herd immunity to be reached without a vaccination mandate. There have been numerous challenges to simple social distancing and mask mandates on First Amendment grounds, typically in the form of freedom of expression and free exercise of religion.¹⁶⁸ Beyond

¹⁶³ *Brown v. Smith*, 24 Cal. App. 5th at 1139.

¹⁶⁴ New York Times, *supra* note 1.

¹⁶⁵ *The New York Times Live, Covid-19 Live Updates: U.S. Starts Vaccine Rollout as Shots Given in New York*, THE NEW YORK TIMES (Dec. 14, 2020), <https://www.nytimes.com/live/2020/12/14/world/covid-19-coronavirus>

¹⁶⁶ *COVID-19 Vaccine Key to Reaching 'Herd Immunity'*, MU HEALTH CARE (Dec. 14, 2020), <https://www.muhealth.org/our-stories/covid-19-vaccine-key-reaching-herd-immunity#:~:text=Experts%20estimate%20that%20herd%20immunity,get%20the%20COVID%2D19%20vaccine.>

¹⁶⁷ *Id.*

¹⁶⁸ Brian J. Buchanan, *Covid-19 and the First Amendment: A Running Report*, MIDDLE TENNESSEE STATE UNIVERSITY: FREE SPEECH CENTER (Dec. 3, 2020), <https://mtsu.edu/first-amendment/post/613/covid-19-and-the-first-amendment-a-running-report-oct-28>

this, polling done by Pew shows that the public is still skeptical about getting a vaccination to Covid-19.¹⁶⁹ Of those polled thirty-nine percent said they definitely would not or probably would not get the Covid-19 vaccination.¹⁷⁰ Even though this number is down nine percent since September, it is still far below the minimum herd immunity requirement of eighty percent. States are most likely going to have to make the Covid-19 vaccination mandatory if the United States is going to hit the required vaccination numbers to reach herd immunity. This would fall in line with the resolution passed by the New York State Bar Association.¹⁷¹ This resolution asks New York State to make the vaccination mandatory if there are not enough voluntary vaccinations to reach herd immunity levels.

Looking at the case history, states would be well within their rights to mandate such a vaccination as the ongoing pandemic continues to spread.¹⁷² This would be directly analogous to *Jacobson* as that was the state using police powers to deal with an ongoing public health crisis.¹⁷³ While states have traditionally done this through mandating vaccinations in order for children to attend school, *Jacobson* shows that fines or criminal penalties could be used for those who do not obtain a government mandated vaccination. This would also be in line with current government mandates for social distancing, mask requirements, and stay at home orders to combat Covid-19, as many of these are enforced through fines.¹⁷⁴ As discussed by states that have repealed their religious exemptions to vaccinations, even if a mandatory Covid-19

¹⁶⁹ Ralph Ellis, *Americans Increasingly Say They'll Get COVID Vaccine*, WEBMD NEWS BRIEF (Dec. 7, 2020), <https://www.webmd.com/lung/news/20201207/americans-increasingly-say-theyll-get-covid-vaccine>

¹⁷⁰ *Id.*

¹⁷¹ Jason Grant, *State Bar Passes Mandatory COVID-19 Vaccination Recommendation*, NEW YORK LAW JOURNAL (Nov. 7, 2020), <https://www.law.com/newyorklawjournal/2020/11/07/state-bar-passes-mandatory-covid-19-vaccination-recommendation/>

¹⁷² New York Times, *supra* note 165.

¹⁷³ See *Jacobson v. Massachusetts*, 197 U.S. at 26.

¹⁷⁴ Dena Bunis and Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP (Oct. 26, 2020) <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html>

vaccination went into place, and a challenge to that law was given a strict scrutiny test, the law would be upheld. Relying on the holding in *Workman*, vaccinations in the name of public health and safety are one of the rare cases where strict scrutiny does not overturn the law.

However, even during the ongoing pandemic the U.S. Supreme Court has shown that free exercise of religion is one of their top priorities. In *Roman Catholic Diocese of Brooklyn v. New York* Covid-19 regulations for church attendance limits were challenged.¹⁷⁵ The churches involved in the case were being held to a limit of ten or twenty-five individuals depending on if they were in orange or red zone classifications.¹⁷⁶ These churches had operated at a limited capacity of either a fourth or third of their regular capacity prior to these ordinances.¹⁷⁷ Following these self-imposed safety measures they had not had a single outbreak of Covid-19.¹⁷⁸ This shows that there were less restrictive means by which the spread of Covid-19 could be achieved. This is important because this case had another unique factor: there is clear evidence that when the lines for zoning were drawn, there was gerrymandering to include certain houses of worship in the restricted zones.¹⁷⁹ The Court goes on the state that even if there was not this *Lukumi*-like religious animus the Court found that these regulations cannot be viewed as neutral because they single out houses of worship for stricter regulations than secular buildings.¹⁸⁰ The Court enjoined the enforcement of the restrictions, finding that the ordinances had to be assessed using strict scrutiny and that they were not narrowly tailored to accomplish the compelling interest.¹⁸¹ This case shows that the current makeup of the Supreme Court has a strong inclination to protect free exercise of religion, even when faced with the current pandemic. What

¹⁷⁵ *Roman Catholic Diocese v. Cuomo*, 208 L.Ed.2d 206, 207 (U.S. 2020).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 208.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 209.

is clear is that any rule put out to stop the spread of Covid-19 must be generally applicable and not single out religions for stricter enforcement. The good news is that a mandatory vaccination order would be best implemented by having it be applicable to everyone, keeping it generally applicable.

Given the current unprecedented level that this public health crises has reached, a strong government response is likely needed. The law allows for states to utilize mandatory vaccinations to keep the public safe. There has been resistance to most measures put out to curtail the spread of Covid-19, but there is finally a tool to stop this pandemic once and for all. If we cannot reach herd immunity though, all of the work on developing and deploying this vaccination may be for nothing. The states would be smart to give the choice to the people, if you do not want to have to continue wearing a mask, missing church services, social distancing, then we have to reach herd immunity. To do this, there should be a mandatory vaccination order, without any religious or philosophical exemptions, in any state where the minimum threshold for herd immunity is not reached. This would be a generally applicable and neutral law that would stand even under strict scrutiny.