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To: The New Jersey Legislature  
Trenton, NJ 08625-0068

Re: S1147, statutory exemptions from mandatory immunizations for students<sup>1</sup>

Dear New Jersey Legislators:

I am a nationally recognized legal expert on vaccine exemption and waiver law. I have advised clients, attorneys, legislators, and legislative committees on vaccine policy and law nationally as they pertain to vaccines required for birth, school and daycare enrollment, college, employment, military members, immigrants, parents in custody disputes, international travel, and various subcategories of these various vaccine contexts. While there are 140 attorneys who accept vaccine injury and death cases, I am the nation's only attorney whose practice is focused on vaccine exemptions and waivers and vaccine legislative activism.

Honorable New Jersey Legislators, there are several Constitutional problems with S1147:

1. First Amendment "free exercise" of religion

S1147 would require of parents seeking a vaccine religious exemption that applicants provide, among other things, "a statement that the religious tenet or practice is not solely an expression of that person's political, sociological, philosophical, or moral views, or concerns related to the safety or efficacy of the vaccination." However, states may not place unconstitutional limits on what qualifies for a state vaccine religious exemption. The requirements are determined by the First Amendment's "free exercise" and "establishment" clauses as interpreted by the courts. For example, the U.S. Supreme Court has held that religion need not "be founded upon a belief in the fundamental premise of a 'God' as commonly understood in Western Theology," *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); that "the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God," *United States v. Seeger*, 380 U.S. 163, 165-66, 85 S.Ct. 850, 854, 13 L.Ed.2d 733 (1965); and that religion involves "the 'ultimate concerns' of individuals," *Seeger*, 380 U.S. at 187, 85 S.Ct. at 865). This and other relevant Supreme Court precedent is properly summarized and codified in federal civil rights law with respect to religious accommodation in the workplace (and which "accommodation" has essentially the same First Amendment "free exercise" boundaries as vaccine religious exemptions, or any other religious right):

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<sup>1</sup> [http://www.njleg.state.nj.us/2014/Bills/S1500/1147\\_I1.PDF](http://www.njleg.state.nj.us/2014/Bills/S1500/1147_I1.PDF)

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Protected religious beliefs include theistic beliefs—those that include a belief in God—but also non-theistic “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views,” “ultimate” ideas about “life, purpose, and death.”<sup>2</sup>

Thus, S1147’s stated exclusion of moral beliefs and concerns about vaccine adverse events is overreaching. For example, one could reasonably have a serious moral objection to vaccines cultured or aborted human fetal cells or cell lines derived therefrom; or a serious moral objection to vaccines on the grounds that there is a risk of death both from the disease and the vaccines, and that ultimately, the future risk of potential disease death is outweighed by the immediate risk of a potential vaccine death if one is administered. Such would clearly fall within the scope of First Amendment boundaries as established by applicable legal precedent. But in any event, such boundaries must be determined by the courts. Accordingly, the State of New Jersey should refrain from trying to codify applicable First Amendment Constitutional boundaries, as those boundaries are determined by the courts, and such boundaries are continually evolving as court cases continue to address new boundary disputes as they come up, and to refine or even overturn previously established boundaries.

## 2. First Amendment “free speech”

S1147’s requirement that parents exercising an exemption provide “a statement that the person understands the risks and benefits of vaccination” may violate parents’ First Amendment free speech rights. If the State requires exemption applicants to agree with the State’s view or opinion on these matters, that would violate exemption applicants’ First Amendment “free speech” rights. The U.S. Supreme Court has held that the right to free speech includes the right to be free from being compelled to speak, and requiring exemption applicants to agree with the State’s views on vaccine risks and benefits would constitute compelling the exemption applicants to speak, thereby violating their First Amendment rights. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977). However, if the State requires instead that exemption applicants merely acknowledge the State’s views, without the applicants having to agree with the State’s views, then that may not violate the applicants’ free speech rights.

## 3. Potential 14<sup>th</sup> Amendment “equal protection”

S1147 does not appear to be clear about whether or not the State has authority to scrutinize an exemption applicant’s beliefs, and if so, who specifically would have the authority to scrutinize. It is further unclear as to whether or not this matter is being delegated to the Commissioner of Health. Therefore, this bill as worded invites widespread confusion and misinterpretation of the law on this point, and potential overreaching of authority on the part of the Commissioner.

It is probably not unconstitutional for the State to require vaccine religious exemption applicants to state the specific religious beliefs they hold that are opposed to immuniza-

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<sup>2</sup> The U.S. Equal Employment Opportunity Commission, Title VII: Religious Accommodation, March 5, 2012 discussion letter.

tions, but a serious 14<sup>th</sup> Amendment “equal protection” concern arises if the state should engage in the process of evaluating individual applicant’s beliefs to determine if they qualify, as States are required under the equal protection clause to apply laws fairly and equally to similarly situated persons, and as a purely practical matter, it is impractical for a State to scrutinize all exemption applicants’ beliefs fairly, evenly and consistently statewide. Who will make that assessment? What specific criteria will be applied (as this is a legal question requiring legal training)? Who will provide what level of training? And most importantly: How could the state ensure that the proper criteria is applied consistently and evenly throughout the state? The 14<sup>th</sup> Amendment requires that states apply their laws evenly and consistently among citizens in the same or similar situations. It strains the imagination to envision a procedure that could consistently apply appropriate exemption criteria fairly and evenly to all vaccine religious exemption applicants.

4. 14<sup>th</sup> Amendment “due process,” First Amendment “free exercise”

Language in this bill (in the original version only?) requiring exempting parents to provide “a signed statement from a physician . . . that the person has received individual counseling from the physician, or other individual as appropriate, concerning the risks and benefits of vaccination to the student and the public health” raises a 14<sup>th</sup> Amendment due process concern. Parents have a 14<sup>th</sup> Amendment due process right to parent their children. In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court states:

The Fourteenth Amendment's Due Process Clause also has a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests,” *Washington v. Glucksberg*, 521 U.S. 702, 720, including parents’ fundamental right to make decisions concerning the care, custody, and control of their children, *see, e. g., Stanley v. Illinois*, 405 U.S. 645, 651. Pp. 63-66.

The *Troxel* Court further explained:

There is a presumption that fit parents act in their children's best interests, *Parham v. J. R.*, 442 U.S. 584, 602; there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children, *see, e. g., Reno v. Flores*, 507 U.S. 292, 304.

The *Troxel* “fit parents” presumption may be rebutted by a showing (evidence) that a parent is unfit, but such a showing requires a case-by-case analysis for each parent suspected of being unfit. By requiring parents to first be educated about vaccines before exercising the exemption, the State unlawfully presumes that all parents wishing to exercise the exemption are unfit, without the required case-by-case showing.

This language also violates parents’ First Amendment “free exercise” rights. Federal courts have clarified that all the First Amendment requires for a vaccine religious exemption is a belief that is “religious in nature” and “sincerely held.” *See, e.g., Sherr and Levy vs. Northport East-Northport Union Free School District*, 672 F. Supp. 81, (E.D.N.Y., 1987); *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47 (2nd Cir.

1988), *Lewis v. Sobel*, 710 F. Supp. 506, 512 (S.D.N.Y. 1989); and *Farina v. The Board of Education*, 116 F. Supp.2d 503 (S.D.N.Y. 2000) (which cases cite *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850 and other U.S. Supreme Court cases). While States are free to be more lenient in their exemption requirements than the First Amendment requires, States may not lawfully be more restrictive than the First Amendment by adding further substantive requirements beyond those established by the courts—in this instance, the “religious in nature” and “sincerely held” requirements.

#### CONCLUSION

For the above reasons, S1147 should be withdrawn, or substantially revised in a manner that addresses the above concerns. In the meantime, please let me know if I may be of any further assistance in this matter.

Respectfully Submitted at the  
Request of New Jersey Residents,



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