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April 27, 2015

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Re: H.B. 589, LRC/Reevaluate Immunization Requirements<sup>1</sup>

Honorable North Carolina Representatives and Sponsors of H.B. 589:

I am a nationally recognized legal expert on vaccine exemption and waiver law and resident of Asheville, North Carolina.<sup>2</sup> I have advised clients, attorneys, legislators, and legislative committees throughout the country on vaccine policy and law regarding vaccines required for birth, school and daycare enrollment, college, employment, military members, immigrants, international travel, and/or various subcategories of these vaccine contexts. I respectfully call to your attention and request your consideration of Constitutional and other problems with the current language of H.B. 589. The outline below is followed by a more complete Legal Analysis:

I. Regarding SECTION 1. (3) Whether to repeal or amend the current medical and/or religious vaccine exemptions.

<sup>1</sup> <http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H589v1.pdf>

<sup>2</sup> [www.vaccinerights.com](http://www.vaccinerights.com)

A. North Carolina's vaccine medical exemption is Constitutionally required, so it cannot be repealed. However, some amendments may be Constitutionally permissible.

B. North Carolina's religious exemption may not be required by the U.S. Constitution, though no legal precedent has ever addressed this point directly. However, the North Carolina Constitution probably *does* require a vaccine religious exemption, so it could not be repealed. On a more practical note, the recent S.B. 346 seeking to repeal North Carolina's religious exemption was quickly shot down by angry activists statewide. A follow-up attempt to do this would likely be met with even more aggressive opposition.

C. Constitutional restrictions on amending the religious exemption make doing so impractical. E.g., it is not Constitutionally permissible to require exemption applicants to: 1) Be members of an organized religion or to have support from a member of the clergy in order that they qualify for the exemption (violates the First Amendment "free exercise" of religion), 2) Get a "vaccine education" from a medical professional to qualify for the exemption (violates the First Amendment "free exercise" of religion and 14<sup>th</sup> Amendment "due process" clauses), or 3) Sign a form stating that they agree with the state's view on the risks and benefits of immunizations (violates First Amendment "free exercise" and "free speech").

In addition, there would be Constitutional problems with: 4) State scrutiny of an applicant's religious beliefs to ensure that the beliefs qualify for the exemption (implementation of this would likely violate 14<sup>th</sup> Amendment "equal protection"); and 5) The State defining what qualifies for a vaccine religious exemption, as the boundaries of religious freedom are determined by the First Amendment (State definitions could violate First Amendment "free exercise" and/or "establishment" clauses).

II. Regarding H.B. 589's SECTION 1., subsections (1), (2) and(4) (should any vaccines be added to or eliminated from the current vaccine schedule; should any exemptions be added), the many North Carolinians who vehemently opposed and quickly shot down the recent S.B. 346 seeking to repeal the state's vaccine religious exemption are skeptical that H.B. 589's Legislative Research Commission (LRC) would address their concerns, that the LRC may approach its reevaluation task in a manner biased in favor of pharmaceutical industry interests, given the powerful pharmaceutical industry presence and lobby here in North Carolina. Therefore, if H.B. 589 is to go forward, the Legislature will have to go to great lengths to assure these North Carolina constituents that the LRC will conduct its reevaluation fairly and transparently, with full and open consideration of all relevant scientific information, and without undue influence from corporate interests or bias favoring an industry-desired outcome. To achieve this end, the LRC would have to directly include interested and concerned members of the public, in particular, the broad spectrum of North Carolina healthcare professionals, allopathic and otherwise, and other experts with knowledge of the medical literature, government statistics and/or the relevant legal concerns such as myself, and from informed, concerned members of the general public. That is, all sides of the growing International Vaccine Controversy must be represented.

In brief, the LRC must ensure that the reevaluation makes a clear distinction between medical science and medical politics. It must distinguish between “facts” are designed to increase pharmaceutical profits, and facts that are genuinely targeting public health irrespective of their impact on industry profits. Past vaccine policy development has arguably failed to do this effectively.

H.B. 589 should be revised to factor in the above concerns.

Thank you for your kind attention to the above concerns and the legal analysis below. Please do not hesitate to contact me if I may be of any further assistance.

Respectfully,

Alan G. Phillips  
NC State Bar No. 30436

## ANALYSIS

I. Regarding SECTION 1. (3) Whether to repeal or amend the current medical and/or religious vaccine exemptions.

A. North Carolina’s vaccine medical exemption is Constitutionally required, so cannot be repealed. *See, e.g., Jacobson v. Mass*, 197 U.S. 11 (1905), the “seminal” vaccine case that, along with subsequent cases citing *Jacobson*, has set the standard for immunization policy nationally that is in place today.

There is no Constitutional barrier to some potential modifications of NC’s vaccine medical exemption. E.g., it is up to the State to decide whether or not the State may review and reject a doctor’s recommendation for a vaccine medical exemption (should the State have authority to second-guess a doctor’s recommendation for her patient, to interfere with the doctor-patient relationship in this way?), and whether or not to offer protection for doctors who, in today’s medical-political climate, are reluctant to recommend medical exemptions for qualifying patients for fear of retaliation from peers or other members of the healthcare community. This condition leads to children being vaccinated who, for medical reasons, are at greater risk of vaccine injury or death and should not be vaccinated.

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B. Religious exemptions may not be Constitutionally required, though no court has actually ever directly addressed this point in formal legal precedent.<sup>3</sup> However, the North Carolina Constitution probably *does* require a vaccine religious exemption:

All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

N.C. Const. art. I, § 13. Religious liberty. While we could not reasonably interpret this section to impart an absolute right to do anything one wishes in the name of religion, since routine immunizations concern hypothetical future disease exposure, and not any imminent risk; and since state and local health departments have developed protocols to control any future infectious disease concerns, e.g., quarantine and isolation if needed should outbreaks occur, the language of § 13 arguably requires the State to offer a religious exemption to immunizations, since the absence of this would amount to the State controlling and interfering with rights of conscience unnecessarily.

On a more practical note, the recent S.B. 346, which sought to repeal NC's vaccine religious exemption, was quickly shot down by a statewide grassroots movement vehemently opposed it. Raising this issue again would be unwise, as it would likely elicit an even stronger reaction.

C. Constitutional restrictions on amending the religious exemption make doing so impractical. E.g., it is not Constitutionally permissible to require exemption applicants to:

**1) Be members of an organized religion or to have support from a member of the clergy:**

Federal courts have consistently held that a requirement of membership in an organized religion for a vaccine religious exemption violates the First Amendment of the U.S. Constitution. For example:

- 1987: The “limitation of the availability of a religiously-based exemption from immunization to ‘bona fide members of a recognized religious organization’ whose doctrines oppose such vaccinations violates both the establishment and free exercise clauses of the First Amendment to the United States Constitution.” Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 99 (E.D.N.Y., 1987)
- 1988: “[I]t is sufficient if the belief ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’” Mason v. General Brown Cent. School Dist., 851 F.2d 47, 51 (2nd Cir. 1988) (quoting United States v. Seeger, 380 U.S. 163, 166, 85 S.Ct. 850, 854).

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<sup>3</sup> The Court in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 167 (1944) touched on this issue in dicta. The Fourth Circuit, citing *Prince*, addressed the matter in *Workman v. Mingo County Board of Education*, 419 Fed.Appx. 348, 2011 WL 1042330 (C.A.4 (S.C.)), but *Workman* is an unpublished case, and thus does not constitute formal legal precedent.

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- 1989: A federal court upheld a religious exemption for a child whose parents' personal religious beliefs sprung from their past membership in a community of people from the Chumash, Navaho and Hopi tribes. In Lewis v. Sobel, 710 F. Supp. 506, 508 (S.D.N.Y. 1989), The court in *Lewis* "awarded damages . . . [for the] violation of [the parents'] First Amendment right to free exercise of their religion," and underscored the fact that the plaintiffs' lack of membership in "an organized religion does not preclude them from protection under the Free Exercise clause if their beliefs are in fact religious." The *Lewis* court stated that the plaintiff's beliefs, "upon which their opposition to immunization is based, stem from 'ultimate concerns' that are clearly more than intellectual in nature."
  - 1994: A federal court upheld a vaccine religious exemption for Jewish parents, despite the testimony of a Rabbi that "there is nothing in the teaching of the Jewish religion that would proscribe immunization for children." Berg v. Glen Cove City School Dist., 853 F. Supp. 651, 654 (E.D.N.Y. 1994)
  - 2000: "The beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization." Farina v. The Board of Education, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) held: (citing Sherr, 672 F. Supp. at 91).

State and federal courts have been consistently held that vaccine religious exemption statutes requiring church membership are unconstitutional.

- 1987: A New York federal court ordered the state to revise its statute requiring church membership to meet Constitutional boundaries. Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 99 (E.D.N.Y., 1987)
- 2002: An Arkansas federal court held that the statute requiring church membership violated both the First and Fourteenth Amendments. McCarthy v. Boozman, 212 F.Supp.2d 945 (W.D.Ark. 2002).
- State courts in Massachusetts in 1971 and Maryland in 1982 held that similar statutes in those states were unconstitutional.<sup>1</sup> Dalli v. Board of Education, 358 Mass. 753, 267 N.E.2d 219 (1971), and Davis v. State, 294 Md. 370, 451 A.2d 107 (1982).

There are two anomalous rulings: 1) The Mississippi State Supreme Court ruled in 1979 that vaccine religious exemptions violate the U.S. Constitution (the only state to ever do so), Brown v. Stone, 378 So.2d 219 (Miss. 1979); and 2) Kentucky's exemption requirement that applicants be members of a "nationally recognized and established church or religious denomination" was held not to violate the First Amendment's Establishment Clause in Kleid v. Board of Educ., 406 F.Supp. 902 (W.D. Ky. 1976). However, the Kentucky exemption has since been changed to remove the organized religion requirement.

Given the above, North Carolina's vaccine religious exemption cannot require applicants to be members of an organized religion or to have the support of a member of the clergy, as such requirements would violate the U.S. Constitution.

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**2) Get a “vaccine education” and/or signature from a medical professional to get the exemption:**

(a) Violation of the First Amendment “free exercise” of Religion

Regarding vaccine religious exemptions, such a requirement violates the First Amendment “free exercise” of religion. In Sherr and Levy vs. Northport East-Northport Union Free School District, 672 F. Supp. 81, 98 (E.D.N.Y., 1987), the court held that the state “must offer the exemption to all persons who sincerely hold religious beliefs. . .” In Lewis v. Sobel, 710 F. Supp. 506, 511 (S.D.N.Y. 1989)(quoting Mason v. General Brown Central School Dist., 851 F.2d 47, 54 (2d Cir. 1988)), the court held that the state must provide “a general exemption for any person who opposes immunization of their child based on a sincerely held religious belief.” That is, there can be only two substantive requirements, that the beliefs be “sincere” and “religious” as the law defines these terms. As Constitutional law is a higher legal authority than state law, U.S. Const. art. VI, § 2, cl. 2,<sup>4</sup> the State may not add additional substantive requirements such as receipt of a “vaccine education” for a parent to exercise a vaccine religious exemption.

(b) Violation of 14<sup>th</sup> Amendment “due process”

Regarding any type of vaccine exemption (medical, religious, or personal/ philosophical), parents have a 14<sup>th</sup> Amendment due process Constitutional right to parent their children that includes medical decision-making. In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court states:

The Fourteenth Amendment's Due Process Clause 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 explains:

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 only by a showing that a parent is unfit, and this requires a case-by-case analysis. In requiring a vaccine “education,” the State unlawfully presumes that all parents wishing to exercise an exemption are “unfit” by definition, without the required showing with respect to each individual parent that she or he is unfit.

(c) Violation of First Amendment “free speech”

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<sup>4</sup> The Supremacy Clause: “This Constitution, and the Laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, § 2, cl. 2.

The U.S. Supreme Court has held that the right to free speech includes the right to be free from being compelled to speak. Requiring exemption applicants to agree with the states' views on vaccination and infectious disease would amount to compelling the exemption applicants to speak, thereby violating their First Amendment rights. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977). To pass First Amendment scrutiny, a vaccine education would have to meet the approval of individual parents, a virtual impossibility given the many different views and opinions about vaccine safety and effectiveness.

Given the above, North Carolina cannot require parents to get a vaccine education or doctor's signature in order to exercise a vaccine exemption, as doing so would violate the U.S. Constitution.

**3) Sign a form stating that they agree with the state's view on the risks and benefits of immunizations:**

See the previous section 2) (c) above. This requirement violates First Amendment free speech. However, the State may require exemption applicants to sign a form indicating that the applicant understands the State's view of vaccine risks and benefits are; the State simply may not require applicants to agree with the State.

**4) State scrutiny of an applicant's religious beliefs to ensure that the beliefs qualify:**

Bill language requiring state scrutiny, in and of itself, is probably not unconstitutional, but the implementation of such scrutiny is Constitutionally problematic (violates 14<sup>th</sup> Amendment "equal protection"). Who would do the scrutinizing? What qualifications or training would be required for scrutinizers? Who would determine scrutiny guidelines, and how? Who would oversee the scrutiny process, to ensure that legally proper scrutiny is applied fairly, evenly and consistently? What process would be in place for exemption applicants to appeal rejection of their exemption request? These questions underscore the fact that the implementation of scrutiny would be all but impossible to do in a way that the scrutiny would be done fairly, evenly and consistently statewide. Unless it were, the implementation of such scrutiny would violate 14<sup>th</sup> Amendment "equal protection" that requires states to apply their laws fairly, evenly and consistently to residents in the same or similar situations.

**5) The State defining what beliefs qualify for a vaccine religious exemption:**

Once the State offers a vaccine religious exemption, the exemption must be drafted and interpreted within the boundaries of the First Amendment. First Amendment boundaries are quite broad. *See, e.g.,* subsection I. C. 1) above (religious exemption applicants need not be members of an organized religion, nor does it matter which one they belong to if they do belong to one; applicants need not even believe in 'God' in the western theological sense of the word). While the State could choose to expand the scope of Constitutionally protected religious beliefs, it cannot be more restrictive.