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SUPREME COURT
of the
State of Connecticut

SC 20776
KEIRA SPILLANE, ET AL.
v.
NED LAMONT, ET AL.

Brief of the DEFENDANTS-APPELLANTS NED LAMONT, CHARLENE M. RUSSELL-TUCKER, AND MANISHA O. JUTHANI
With attached party appendix

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Statement of issues

A. Did the trial court err in concluding that sovereign immunity did not apply to Plaintiffs' constitutional challenges to Public Act No. 21-6 ("P.A. 21-6"), where Plaintiffs' claims all fail as a matter of law and therefore are not "substantial" in character?

B. Did the trial court err in holding that the statutory waiver of sovereign immunity contained in General Statutes § 52-571b(c) applied to Plaintiffs' claim that P.A. 21-6 violates § 52-571b, where § 52-571b does not apply to subsequent legislation?

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I. Introduction

"For more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated." *Whitlow v. California*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016) (*citing Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905)). This lawsuit is the latest of many attempts to challenge a mandatory school vaccination law based on religion. Relying on many of the same theories that state and federal courts have rejected many times over since *Jacobson*, Plaintiffs challenge Public Act No. 21-6 ("P.A. 21-6"), which amended Connecticut's school vaccination law, General Statutes § 10-204a, to begin phasing out the religious exemption.

Sovereign immunity bars this lawsuit. None of Plaintiffs' constitutional claims are substantial in character so as to invoke the second exception to sovereign immunity. Indeed, Plaintiffs' principal constitutional challenges to P.A. 21-6 have already been rejected by a federal district court. *We the Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 579 F. Supp. 3d 290 (D. Conn. 2022) ("*WTP*") (upholding constitutionality of P.A. 21-6).[1]

The trial court nevertheless ruled that sovereign immunity does not apply. That decision was erroneous and must be reversed, for two principal reasons.

The first concerns the appropriate standard to apply when addressing the exception to sovereign immunity for constitutional claims seeking declaratory or injunctive relief. This Court need not break any new ground here. It has consistently held that, to invoke this exception, it is not enough for plaintiffs simply to allege the

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[1] Plaintiffs' appeal in *WTP* is pending before the Second Circuit. Oral argument was held October 13, 2022.

violation of a constitutional right or to allege facts that merely implicate a constitutional right. Instead, plaintiffs must "demonstrate a sufficient likelihood of succeeding" on the merits of their claims, *Markley v. Dep't of Pub. Util. Control*, 301 Conn. 56, 71-72 (2011), by meeting what is effectively a motion to strike standard. Their claims must be "***substantial***"—that is, the facts alleged, together with any undisputed evidence, must "***clearly demonstrate***" an actual violation of a constitutional right. *Id.* at 68 (emphasis in original; quotation marks omitted). In applying that standard, this Court has many times dismissed constitutional claims if the pleadings, viewed in the light most favorable, and undisputed evidence fail as a matter of law to establish the violation of a constitutional right.

The trial court misunderstood the substantial claim standard. It essentially ruled that the second exception applies so long as the claim is constitutional in "nature," and that any inquiry into the merits is inappropriate at the motion to dismiss stage. That formulation is simply wrong, is at odds with this Court's cases, and would render sovereign immunity a dead letter as applied to constitutional claims. Any plaintiff could invoke the exception and subject the State to suit and the burdens of litigation—including discovery and motion practice—simply by alleging the violation of a constitutional right, even if the claim plainly lacked merit or could readily be disposed of as a matter of law based on the pleadings alone. That is not how sovereign immunity works.

Applying the correct standard, sovereign immunity bars Plaintiffs' constitutional claims because none of them are substantial. To the contrary, they all fail as a matter of law. Plaintiffs' free exercise and equal protection claims under the First and Fourteenth Amendments are foreclosed by a century of federal precedent, as the District Court in *WTP* has already held. 579 F. Supp. 3d at 302-13.

Plaintiffs' claims under the corresponding provisions of the Connecticut constitution were not briefed in the trial court and therefore are not preserved, and are not substantial in any event because those state provisions provide no broader protection than their federal counterparts under *State v. Geisler*, 222 Conn. 672 (1992). Finally, Plaintiffs' claim that P.A. 21-6 violates their right to public education under article eighth, § 1, of the Connecticut constitution is not substantial because, as many courts have recognized—including this Court in *Bissell v. Davison*, 65 Conn. 183 (1894)—vaccination requirements as a condition for school enrollment do not impermissibly restrict access to education.

The second issue concerns Plaintiffs' claim that P.A. 21-6 violates General Statutes § 52-571b, which provides statutory protections to religious exercise beyond what the constitutions provide, and waives sovereign immunity for lawsuits brought under the statute against certain state actors who violate those protections. The trial court ruled that Plaintiffs' claim came within that statutory waiver. That was error. The waiver does not encompass Plaintiffs' challenge to P.A. 21-6 because the plain text of § 52-571b makes clear that the statute does not apply to legislation. Indeed, § 52-571b ***cannot*** apply to legislation because it is a bedrock, centuries-old principle that one legislature cannot bind or limit the authority of a succeeding legislature. The trial court's conclusion that P.A. 21-6 is subject to heightened scrutiny and potential invalidation under § 52-571b would have precisely that result, and must be reversed.

II. Statement of facts

A. Connecticut phases out the religious exemption in response to rising public health concerns

Section 10-204a requires all public and private schools to require their students to be vaccinated against certain communicable

diseases before permitting them to enroll. Initially, the law permitted students to obtain exemptions for medical reasons if they presented documentation from a medical provider attesting that a vaccine was "medically contraindicated because of [their] physical condition," and for religious reasons if they presented a statement that a vaccine "would be contrary to [their] religious beliefs" or those of their parent or guardian. Conn. Gen. Stat. (Rev. to 2019) § 10-204a(a)(2) and (3).

In recent years, however, the religious exemption has led to growing concerns about under-vaccination in Connecticut.[2] According to data ("Immunization Data") compiled by the Connecticut Department of Public Health ("DPH")—none of which is disputed—the percentage of incoming kindergarten students claiming a religious exemption increased almost every year from 2012 to 2020: from 1.4% during the 2012-13 school year to 2.3% by the 2019-20 school year. Party Appendix ("PA") PA60-PA 62. Those increases caused a corresponding decrease in Connecticut's state-wide school vaccination rates. PA 62. By the 2019-20 school year, 96.2% of kindergarteners were fully vaccinated against measles, mumps, and rubella ("MMR"), a 0.9% decrease since the 2012-13 school year. PA 60-PA 61.

The decrease in vaccination rates was more dramatic at the local level. The United States Centers for Disease Control and Prevention ("CDC") recommends a 95% vaccination rate to achieve herd immunity

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[2] The following facts are drawn from the facts alleged in Plaintiffs' Amended Complaint, the undisputed evidence submitted in support of Defendants' motion to dismiss, and "public records of which judicial notice may be taken." *Conboy v. State*, 292 Conn. 642, 651-52 (2009).

for measles,[3] Clerk Appendix ("CA") 22 (¶42); PA 75, and many schools had fallen below that. The average MMR rate for private schools was only 92.1%, and of the schools with more than 30 kindergarten students, 120 were below 95%, and 26 were below 90%. PA 60-PA 61.

Unlike the religious exemption, the medical exemption had little if any impact on vaccination rates. The percentage of kindergarteners with medical exemptions remained virtually constant, at 0.2% in 2019-20, compared with 0.3% during all previous years. PA 61.

Meanwhile, vaccine-preventable diseases were making a comeback, with reported outbreaks in several areas of the United States. PA 65 (noting that "[m]easles outbreaks in 2019 reached emergency levels in the United States"). New York, for example, experienced measles outbreaks in 2018 and 2019 that prompted school closures and caused widespread disruption. *See Goe v. Zucker*, 43 F.4th 19, 25-26 and n.5 (2d Cir. 2022) (describing outbreaks); *M.A. v. Rockland Cty. Dep't of Health*, 53 F.4th 29, 33-34 (2d Cir. 2022) (same). By April, 2021, DPH had confirmed multiple cases of measles in Connecticut. PA 70.

In response to these public health concerns, the General Assembly passed P.A. 21-6 in April, 2021. *See WTP*, 579 F. Supp. 3d at 306-07 and n.10. Section 1 amended § 10-204a to begin phasing out the religious exemption.

Under the new law, children enrolled in kindergarten through twelfth grade ("K-12") who had obtained religious exemptions before passage of P.A. 21-6 were grandfathered and could continue using

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[3] Herd immunity refers to when a "large percentage of the population is vaccinated [such that] the entire community (vaccinated and unvaccinated) receives additional protection from vaccine preventable diseases." PA 60.

their religious exemptions. Conn. Gen. Stat. § 10-204a(b). Children in preschool or prekindergarten ("pre-K") who already had exemptions were not grandfathered, but were given a one-year grace period to become vaccinated, until September 1, 2022, or fourteen days after transferring to a public or private school program, whichever was later. Conn. Gen. Stat. § 10-204a(c).

B. Plaintiffs' lawsuit

Plaintiffs are two parents bringing suit on behalf of their minor children, who they allege will be subject to the vaccination requirements. CA 12-13 (¶¶ 13-18). Plaintiffs further allege that vaccination conflicts with their religious beliefs. CA 20-21 (¶¶ 34-38), CA 23 (¶ 47). They claim that P.A. 21-6 § 1 violates (1) the free exercise clauses of the First Amendment and article first, § 3; (2) the equal protection clauses of the Fourteenth Amendment and article first, §§ 1 and 20[4]; (3) the education clause of article eighth, § 1; and (4) § 52-571b. Plaintiffs seek declaratory relief and an order enjoining the enforcement of P.A. 21-6.

C. Trial court proceedings

Defendants moved to dismiss Plaintiffs' Amended Complaint on sovereign immunity grounds. CA 33. In support of their motion, Defendants submitted the affidavit of DPH's Immunization Program Manager, Kathy Kudish. PA 56-PA 57. Kudish attested to the authenticity and accuracy of Connecticut's Immunization Data showing a steady decline in vaccination rates. PA 57 (¶¶ 6-7). Plaintiffs offered no evidence to contradict Kudish's affidavit or the accuracy of the Immunization Data, or any evidence at all. CA 35-61.

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[4] The Amended Complaint lists article first, § 10, as the basis for Plaintiffs' state equal protection claim, apparently in error. CA 26.

The trial court denied Defendants' motion to dismiss, concluding that Plaintiffs' constitutional claims came within the second sovereign immunity exception, and that the waiver of immunity in § 52-571b(c) applied to Plaintiffs' claim that P.A. 21-6 violated § 52-571b. CA 91. Defendants appealed, and this Court transferred the appeal to itself.

III. Argument

A. Standard of review

Sovereign immunity implicates subject matter jurisdiction and is therefore a question of law subject to plenary review. *Markley* 301 Conn. at 64-65. When the Court decides a jurisdictional question on the basis of the Complaint alone, it must consider the allegations in their most favorable light. *Id.* at 65. If the motion to dismiss is supported by undisputed facts established by affidavits and other evidence, the Court "may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint." *Cuozzo v. Orange*, 315 Conn. 606, 615 (2015) (emphasis and quotation marks omitted).

B. Exceptions to sovereign immunity must be narrowly construed

Sovereign immunity is "[t]he principle that the state cannot be sued without its consent . . . . It has deep roots in this state and our legal system in general, finding its origin in ancient common law." *Columbia Air Servs. v. DOT*, 293 Conn. 342, 349 (2009) (quotation marks omitted). It applies to the State as well as its officers. *Id.*

There are three exceptions to sovereign immunity: (1) when the legislature statutorily waives it; (2) "when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights"; and (3) "when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal

purpose in excess of the officer's statutory authority." *Id.* at 50. "In the absence of a proper factual basis in the complaint to support the applicability of these exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." *Id.* These exceptions are "***narrowly construed under our jurisprudence.***" *Chief Information Officer v. Computers Plus Center, Inc.*, 310 Conn. 60, 80 (2013) (emphasis in original; quotation marks omitted).

C. The trial court erroneously concluded that Plaintiffs' constitutional challenges to P.A. 21-6 were "substantial" and therefore came within the second exception to sovereign immunity

The trial court's conclusion that the second exception to sovereign immunity applies was based on a fundamental misunderstanding of the "substantial claim" requirement.

1. The trial court's formulation of the substantial claim standard is wrong, is inconsistent with this Court's precedents, and would render sovereign immunity virtually meaningless in the context of constitutional claims.

To correctly understand the substantial claim requirement, it is important to keep in mind the broader context in which it operates. The doctrine of sovereign immunity "rest[s] . . . on the hazard that the subjection of the state . . . government[] to private litigation might . . . serious[ly] interfere[] with the [State's] performance of [its] functions and with [its] control over [its] instrumentalities, funds, and property." *Gold v. Rowland*, 296 Conn. 186, 212 (2010) (quotation marks omitted). "The public service might be hindered . . . and the public safety

endangered . . . if the [State] could be subjected to suit at the instance of every citizen . . . ." *Textron, Inc. v. Wood*, 167 Conn. 334, 340 (1974).

These interests can be overcome if a plaintiff makes a substantial allegation that the State acted unconstitutionally, as "the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine." *Gold*, 296 Conn. at 212-13. "On the other hand, ***where no substantial claim is made*** that the [State] is acting [unconstitutionally], the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction." *Horton v. Meskill*, 172 Conn. 615, 624 (1977) (*quoting* J. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 Harv. L. Rev. 1060, 1061 (1946) ("*Block*") PA 81) (emphasis added).

Therefore, the requirement that the claim be substantial strikes a balance between competing interests: individuals' interests in ensuring the State complies with its constitutional obligations, and the public's interest in ensuring that meritless litigation does not unduly interfere with the State's ability to perform its governmental functions. *See also Block*, 59 Harv. L. Rev. at 1061-62 (substantial claim requirement prevents State officials from being "subject[ed] to the impediment of litigation palpably lacking in merit," which could cause "a serious interference" with State business) PA 82; *id.* at 1081-82 (to avoid "open[ing] the gates to a deluge of litigation against public officers," plaintiff's allegations must be "substantial and not merely colorable") PA 88. In maintaining that balance, this Court has been careful to emphasize that the second exception "must be narrowly construed," *Gold*, 296 Conn. at 214 (*citing DaimlerChrysler Corp. v. Law*, 284 Conn. 701, 711 (2007)), and that it does not apply to every claim against the State that merely asserts a constitutional violation. *E.g. Upson v. State*, 190 Conn. 622, 626 (1983) (rejecting proposition

that "the mere allegation of a wrongful taking coupled with an allegation of [a] constitutional violation would be sufficient" to avoid sovereign immunity).

Instead, the exception applies only if plaintiffs can "demonstrate ***a sufficient likelihood of succeeding*** on [their] claims to overcome the defendants' sovereign immunity." *Markley*, 301 Conn. at 71-72 (*citing Gold*, 296 Conn. at 200-201) (emphasis added). To ensure plaintiffs are held to that threshold burden, this Court "ha[s] imposed specific pleading requirements." *DaimlerChrysler Corp.*, 284 Conn. at 721. The Court has articulated that pleading requirement—with emphasis in the original—as follows: "The second exception permits a plaintiff to bring an action for declaratory or injunctive relief based on a ***substantial*** claim that the state or one of its officers has violated the plaintiff's constitutional rights. . . . In order to sufficiently raise such a claim, the allegations of the complaint and the facts in issue must ***clearly demonstrate*** an incursion upon constitutionally protected interests." *Markley*, 301 Conn. at 67-68 (*quoting Columbia Air Services, Inc.*, 293 Conn. at 358).

This Court's use of the phrase "clearly demonstrate" might suggest that the substantial claim standard imposes pleading requirements above and beyond the ordinary legal sufficiency standard applicable to a motion to strike. Indeed, Superior Court judges have characterized the standard as "a heightened burden of pleading." *E.g. Simso v. State*, No. CV020819172S, 2003 Conn. Super. LEXIS 996, at *30 (Super. Ct. Apr. 7, 2003) (Sheldon, J.). PA 110.

Defendants, however, do not take the position that the substantial claim requirement imposes a heightened burden of pleading. Instead, Defendants believe that the State's interests in preserving sovereign immunity are more appropriately balanced against citizens' weighty interests in bringing suit for alleged

constitutional violations by treating the substantial claim requirement as the functional equivalent of the legal sufficiency standard applicable to a motion to strike.

Indeed, this Court's cases ***require*** that approach. The Court has already explained that the substantial claim requirement operates just as a motion to strike standard does: "Although in reviewing a motion to dismiss [courts] must construe the allegations of the complaint in the light most favorable to the plaintiff, to survive the defense of sovereign immunity the complaint ***must allege sufficient facts to support a finding of unconstitutional . . . state action***." *Markley*, 301 Conn. at 66 (*citing Gold*, 296 Conn. at 200-201) (emphasis added). And this Court's cases have applied a motion to strike standard when addressing claims under the second exception to sovereign immunity by analyzing the merits of the claim and dismissing it if the Court could determine as a matter of law—based on the pleadings (viewed in the light most favorable) and any undisputed evidence—that the claim lacked merit.[5] *See Markley*, 301 Conn. at 66-

[5] The Court has likewise applied a motion to strike standard when analyzing claims under the third exception to sovereign immunity for substantial allegations that the State is acting in excess of its statutory authority. *see Markley*, 301 Conn. at 66 ("complaint must . . . allege sufficient facts to support a funding of . . . extra statutory state action"); *id.* at 72 (plaintiffs must "do more than allege that the defendants' conduct was in excess of their statutory authority; they also must allege or otherwise establish facts that reasonably support those allegations"). In so doing, the Court applies the exception only if the "process of statutory interpretation establishes that the state officials acted beyond their authority . . . ." *Miller v.*

72; *Gold*, 296 Conn. at 201-205; *DaimlerChrysler Corp.*, 284 Conn. at 721 n.9; *Columbia Air Servs.*, 293 Conn. at 358-63.

The trial court, however, ignored that caselaw and ruled that Plaintiffs were not required to satisfy even a motion to strike standard. Instead, the court ruled that the exception applies so long as "the nature" of the claim is constitutional, and that the "the merits of the claim," i.e., whether or not Plaintiffs alleged sufficient facts to establish that P.A. 21-6 actually violates the constitution, is irrelevant at the motion to dismiss stage. CA 87-88. Accordingly, the court did not consider Defendants' substantive arguments for why Plaintiffs' claims all failed as a matter of law and therefore were not substantial. Instead, the court ruled that it was enough that Plaintiffs had alleged that vaccinating their children would burden their sincerely held religious beliefs, which implicates a constitutionally protected interest. "Whether or not that burden is unconstitutional is a decision for another day." CA 88.

That is simply wrong. Determining whether a plaintiff has alleged a substantial claim that the State "violated [his or her] constitutional rights" or acted "unconstitutional[ly]" necessarily requires an analysis of the merits of that claim. *Markley*, 301 Conn. at 66 (emphasis added). Indeed, the very purpose of these "specific pleading requirements," *DaimlerChrysler Corp.*, 284 Conn. at 721, is to ensure that plaintiffs "demonstrate a sufficient likelihood" they will "***succeed[]***" on their claims so as to "overcome [the State's] sovereign immunity." *Markley*, 301 Conn. at 71-72 (emphasis added).

If the substantial claim requirement permitted no substantive inquiry into the merits, sovereign immunity would be virtually

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Egan, 265 Conn. 301, 327 (2003); *C.R. Klewin Northeast, LLC v. Fleming*, 284 Conn. 250, 260 (2007).

meaningless as applied to constitutional claims. The State would be subject to suit and the "impediment of litigation" in virtually every lawsuit in which a litigant uses magic words invoking a constitutional right, even if the claim is "palpably lacking in merit" and fails as a matter of law based on the pleadings and undisputed evidence alone. *Block*, 59 Harv. L. Rev. at 1062. PA 82. That could "substantial[ly] interfere[]" with State's ability to perform its public functions, and would undermine the careful balance the substantial claim requirement was designed to serve. *Horton*, 172 Conn. at 624.

The State therefore must be able to dispose of such claims at the earliest possible stage in a motion to dismiss, for sovereign immunity protects the State "against suit as well as liability—in effect, ***against having to litigate at all***." *Sena v. Am. Med. Response of Conn., Inc.*, 333 Conn. 30, 41 (2019) (emphasis added). Requiring the State to adjudicate legal sufficiency issues through a motion to strike would still require the State to litigate, in violation of that principle. Moreover, while that motion to strike were pending, the State could be subject to burdensome discovery.

That is why this Court has consistently held that legally deficient constitutional claims are properly disposed of in a motion to dismiss as a matter of sovereign immunity. *E.g. Markley*, 301 Conn. at 68 (dismissing equal protection claim because, "[r]eading the complaint in the light most favorable to plaintiff, we conclude that he has failed to demonstrate that the order violated his equal protection rights"). This Court's decision in *Barde v. Board of Trustees*, 207 Conn. 59 (1988), is especially instructive. There, the Court held that the second exception did not apply to plaintiff's equal protection claim where the "linchpin" of plaintiff's allegations was refuted by a letter submitted by defendants in support of their motion to dismiss, and plaintiff did not dispute the validity of the contents of that letter. *Id.* at 65-66. The

Court held that "the factual basis for the equal protection claim simply did not exist" and, therefore, that "the constitutional claims have not been established and thus the doctrine of sovereign immunity operates as a bar to subject matter jurisdiction." *Id.* at 66.

Simply put, this Court's cases ***require*** an inquiry into the merits of the claim in determining whether it is substantial in character. The trial court failed to follow that clearly established law. And had it done so, it should have dismissed Plaintiffs' claims as insubstantial, for each one of them fails as a matter of law.

2. Plaintiffs' First Amendment free exercise claim is not substantial in light of WTP, which squarely held that P.A. 21-6 does not violate the free exercise clause

In *WTP*, 579 F. Supp. 2d at 290, the District Court dismissed a federal free exercise challenge to P.A. 21-6—on the pleadings alone for failure to state a claim—for two reasons: (1) the claim is foreclosed by existing precedent, and (2) P.A. 21-6 is a neutral law of general applicability and is therefore subject only to rational basis review, which it satisfies. Both conclusions are correct, and foreclose any argument that Plaintiffs' virtually identical free exercise challenge is substantial for purposes of the second exception to sovereign immunity. *See Columbia Air Servs.*, 293 Conn. at 360-61 (relying on federal precedent in concluding that plaintiff's constitutional claim was not substantial).

a. Plaintiffs' free exercise claim is foreclosed by existing precedent

Longstanding federal precedent compelled the conclusion in *WTP*—and does so here—that P.A. 21-6 does not violate the free exercise clause.

In *Jacobson*, 197 U.S. at 11, the United States Supreme Court rejected a Fourteenth Amendment challenge to a Massachusetts law that made it a crime to refuse to be vaccinated against smallpox. The Court explained that "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] regardless of the injury that may be done to others." *Id.* at 26. Instead, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 26-27. Although the free exercise clause had not yet been applied to the States, the Court broadly recognized that mandatory vaccination did not "invade[] ***any*** right secured by the Federal Constitution." *Id.* at 38 (emphasis added). It also cited favorably to state court decisions—including *Bissell*, 65 Conn. at 183—that had upheld "statutes making the vaccination of children a condition of their right to enter or remain in public schools." *Id.* at 31-32. And in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court cited *Jacobson* for the proposition that one "cannot claim freedom from compulsory vaccination . . . on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67 and n.12 (footnote omitted).

The Supreme Court reaffirmed these principles in subsequent cases. In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888-89 (1990) ("*Smith*"), the Court emphasized that the free exercise clause does not "require[] religious exemptions from . . . health and safety regulations such as . . . compulsory vaccination laws." As support for that proposition, the Court cited *Cude v. State*, 237 Ark. 927 (1964), which held that mandatory school vaccination "does not violate the constitutional rights of anyone, on religious grounds or otherwise," and observed that that principle is "so

firmly settled that no extensive discussion is required." *Id.* at 933; *see also Sherbert v. Verner*, 374 U.S. 398, 402-403 (1963) (citing *Prince* and *Jacobson* for proposition that free exercise challenges fail when regulated conduct "posed some substantial threat to public safety").

The Second Circuit applied these longstanding principles in *Phillips v. City of New York*, 775 F.3d 538 (2d Cir.), *cert. denied*, 577 U.S. 822 (2015), which affirmed the dismissal of a free exercise challenge to New York's school vaccination law and a regulation permitting unvaccinated students to be excluded from school during an outbreak. Relying on *Jacobson* and *Prince*, the Second Circuit held that "mandatory vaccination does not violate the Free Exercise Clause." *Id.* at 543. Although New York's law at that time permitted religious exemptions, the court emphasized that "New York could constitutionally require that all children be vaccinated in order to attend public school," and that the law "***goes beyond what the Constitution requires*** by allowing an exemption for parents with genuine and sincere religious beliefs." *Id.* (emphasis added).

Consistent with *Phillips*, other state and federal courts have summarily rejected—on the pleadings or summary judgment—free exercise challenges to school vaccination laws that permit medical but not religious exemptions. *See Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir.), *cert. denied*, 565 U.S. 1036 (2011) PA 99; *F.F. v. New York*, 194 A.D.3d 80, 84-88 (N.Y. App. Div. 3rd Dept.), *cert. denied*, 37 N.Y.3d 1040 (2021), *cert. denied*, 142 S. Ct. 2738 (2022); *Brown v. Smith*, 24 Cal. App. 5th 1135, 1144 (2018); *Love v. State Dep't of Educ.*, 29 Cal. App. 5th 980, 996 (2018), *cert. denied,* 2019 Cal. LEXIS 958 (2019); *see also Whitlow*, 203 F. Supp. 3d at 1085-87 (denying motion for preliminary injunction challenging California's repeal of personal belief exemption); *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017) ("[c]onstitutionally, [plaintiff] has no right to an

exemption" from school vaccination requirement on religious grounds), *cert. denied*, 138 S. Ct. 1999 (2018).

The District Court concluded—unavoidably—that *Phillips* was dispositive and that the plaintiffs' free exercise challenge to P.A. 21-6 "fail[ed] to state a claim for relief . . . ." *WTP*, 579 F. Supp. 3d at 306. That conclusion applies equally here.[6] Plaintiffs' free exercise claim therefore fails as a matter of law and cannot be regarded as substantial for purposes of the second exception to sovereign immunity.

b. Alternatively, P.A. 21-6 is a neutral law of general applicability, and satisfies rational basis review

Even if *Phillips* were not controlling, Plaintiffs' claim is not substantial under an independent free exercise analysis because—as the District Court held in *WTP*, 579 F. Supp. 3d at 306-311—P.A. 21-6 is a neutral law of general applicability and satisfies rational basis review.

Under *Smith*, 494 U.S. at 879, laws that incidentally burden religious practices are subject only to rational basis review if they are both "neutral" and "generally applicable." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). P.A. 21-6 is both.

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[6] Although *Phillips* is not binding on this Court as it was in *WTP*, "it is well settled" that Second Circuit decisions must be given "particularly persuasive weight" on matters of federal law to prevent forum-shopping. *Dayner v. Archdiocese of Hartford*, 301 Conn. 759, 783 (2011). Moreover, *Phillips* (1) adheres to overwhelming authority from other jurisdictions, and (2) reached the conclusion it did by interpreting and applying *Jacobson* and *Prince*, which ***are*** binding on this Court on questions of federal constitutional law.

At the outset, § 10-204a requires ***all*** students who can safely receive a vaccine to become vaccinated. *See* Conn. Gen. Stat. § 10-204a(a) (providing that "***[e]ach***" public and private school "shall require ***each*** child" to be vaccinated in order to enroll unless the child obtains medical exemption) (emphasis added). Courts have uniformly held such laws to be neutral and generally applicable. *E.g. F.F.*, 194 A.D.3d at 84-88; *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 282-93 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir.), *cert. denied*, 142 S. Ct. 552 (2021); *Doe v. Mills*, 16 F.4th 20, 30-34 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 1112 (2022). Indeed, *Smith* itself lists "compulsory vaccination laws" as an example of the type of law that should not be subject to strict scrutiny, referring to a case addressing a school vaccination law that permitted medical but not religious exemptions. 494 U.S. at 888-89 (citing *Cude*, 237 Ark. at 927).

In any event, Plaintiffs make no substantial claim that P.A. 21-6 is not both neutral and generally applicable. "A law is not neutral . . . if it is 'specifically directed at [a] religious practice.'" *Cent. Rabbinical Cong. of the United States v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) ("*Cent. Rabbinical*") (quoting *Smith*, 494 U.S. at 878). A law fails this requirement "if it explicitly singles out a religious practice" on its face, or if it is facially neutral but nonetheless "targets religious conduct for distinctive treatment." *We the Patriots USA, Inc.*, 17 F.4th at 281 (quotation marks omitted).

As the District Court correctly concluded, P.A. 21-6 is neutral because it does not target religion for distinctive treatment, but "requires all students to receive common vaccinations, exempting those with medical exemptions and [K-12 students] with existing religious exemptions." *WTP*, 579 F. Supp. 3d at 306. The law requires all students who can safely be vaccinated, regardless of religion, to become

vaccinated. Nor is there any evidence P.A. 21-6 was motivated by religious animus. *Id.* at 306-307.

P.A. 21-6 also is generally applicable. That requirement "prohibits the government from 'in a selective manner impos[ing] burdens only on conduct motivated by religious belief.'" *Cent. Rabbinical Cong.*, 763 F.3d at 196 (quoting *Lukumi*, 508 U.S. at 542-43). A law may fail the general applicability requirement if it is "substantially underinclusive," i.e., it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" as the religious conduct would. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *We the Patriots USA, Inc.*, 17 F.4th at 284-85 (secular conduct must be "at least as harmful" to State interest to raise underinclusiveness issue). "Whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). "Comparability is concerned with the risks various activities pose." *Id.*

Plaintiffs allege that P.A. 21-6 is substantially underinclusive because it permits medical exemptions but not religious ones. CA 10-11 (¶¶ 6-7), 25 (¶ 58). The District Court rejected that claim in *WTP*, for very good reason. 579 F. Supp. 2d at 307-308. The State's interest in passing P.A. 21-6 was to protect the health and safety of school students and the broader public. Permitting medical exemptions ***furthers*** rather than undermines that interest because it "ensur[es] that children are not harmed by vaccines that are contraindicated." *Id.* at 308. In fact, requiring students with medical contraindications to vaccinate "would likely be unconstitutional itself." *Doe*, 16 F.4th at 33; *see also We the Patriots USA, Inc.*, 17 F.4th at 285 (citing *Jacobson*, 197 U.S. at 38-39, for proposition that "the state may not be permitted to require vaccination of individuals with contraindications").

In any event, the medical exemption does not undermine the State's interest in protecting health and safety "in a similar way" as the religious exemption would. In 2019-20, ten times as many kindergarten students claimed religious exemptions as medical exemptions.[7] PA 62. Over the past decade, the percentage of incoming students claiming religious exemptions has steadily risen and may well have continued doing so, whereas medical exemptions remained constant. PA 62. Further, the religious exemption caused vaccination rates to drop especially low in certain districts, many dropping below the recommended 95% threshold for herd immunity, and some below 90%. PA 60-PA 61.[8] Given these undisputed facts, there simply is no credible argument that the medical exemption and religious exemption are "comparable" so as to create an underinclusiveness problem.

A law can also fail the general applicability requirement if it "invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," such as by giving officials "sole discretion" to grant or deny an exemption, *Fulton*, 141 S. Ct. at 1877 (quotation marks omitted), or by requiring officials to grant benefits upon a showing of "good cause." *Smith*, 494 U.S. at 884. The District Court held in *WTP* that the medical exemption in P.A. 21-6 was not a mechanism for individualized exemptions because it gave no discretion to school

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[7] Because the Immunization Data is undisputed, the Court may consider it in determining whether Plaintiffs' claims are barred by sovereign immunity. *Barde*, 207 Conn. at 65-66.

[8] It is not uncommon that individuals with religious exemptions to vaccines will "cluster" in particular communities, causing those communities' vaccination rates to be especially low. PA 72-PA73; *see We the Patriots USA, Inc.*, 17 F.4th at 286 (discussing clustering).

officials, but provided that they "shall" grant medical exemptions to students who present the proper documentation. 579 F. Supp. 3d at 309; *accord We the Patriots USA, Inc.*, 17 F.4th at 289-90; *Doe*, 16 F.4th at 30. To the extent Plaintiffs attempted to allege a similar claim here, CA 25 (¶ 59) 28 (¶81), their claim fails for the same reason. P.A. 21-6 is generally applicable.

Finally, P.A. 21-6 easily "withstands rational basis review." *WTP*, 579 F. Supp. at 311. The State's interest in protecting student and public health and safety is not merely a legitimate interest but a compelling one. *Workman*, 419 F. App'x at 353. PA 100. Nor have Plaintiffs alleged any facts to suggest that phasing out the religious exemption was not rationally related to that interest. It was not irrational for the legislature to conclude that removing the religious exemption would increase the percentage of vaccinated students, thereby decreasing the likelihood of a disease outbreak. Indeed, the undisputed Immunization Data bears out that the religious exemption had an outsized effect on vaccination rates, particularly in certain individual schools. The State reasonably responded to those trends by phasing out the religious exemption.

3. Plaintiffs' Fourteenth Amendment equal protection claim is not substantial because, as the District Court concluded in *WTP*, P.A. 21-6 neither infringes on a fundamental right nor distinguishes on the basis of a suspect class

Under an equal protection analysis, classifications are subject to rational basis review if they neither (1) burden fundamental rights nor (2) distinguish on the basis of a suspect class. *Markley*, 301 Conn. at 69; *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

As the District Court ruled in *WTP*, P.A. 21-6 does not violate equal protection by permitting medical but not religious exemptions. 579 F. Supp. 3d at 41-42. First, the classification is subject only to rational basis review because it is subsumed within Plaintiffs' free exercise claim, which, as previously explained, fails as a matter of law. *Id.* at 41; *accord Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) (rational basis applies to equal protection claim alleging religious discrimination where free exercise claim failed); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (same).

Second, the classification is subject to rational basis review for the additional reason that it neither violations a fundamental right nor distinguishes on the basis of a suspect class. The classification does not burden a fundamental right because, as previously explained, the right to free exercise does not include the right to a religious exemption from school vaccination requirements. Nor it distinguish on the basis of a suspect class. Contrary to Plaintiffs' allegations, CA 29-30 (¶¶ 89, 92), P.A. 21-6 makes no classifications based on religion. It merely distinguishes between health exemptions, which are permitted, and non-health exemptions, which are not. If a parent seeks an exemption for ***any*** reason unrelated to their child's health—whether that reason is religious or secular—they will not qualify for an exemption. The only classification the statute makes is between children who have a medical need for an exemption and children who have no such need. That is not a suspect classification.

Accordingly, P.A. 21-6 is subject only to rational basis review. *Nordlinger*, 505 U.S. at 10. As the District Court ruled in *WTP*, the distinction between health and non-health exemptions easily satisfies that standard, for the reasons discussed above. 579 F. Supp. 3d at 41-42.

As alleged, the nature of Plaintiffs' equal protection claim is unclear. They assert that P.A. 21-6 "treat[s] students with religious exemptions differently from students with medical exemptions or no exemptions at all." CA 26 (¶ 89). That allegation fails to raise a substantial claim because P.A. 21-6 does not do this. Students "with religious exemptions," i.e., who had obtained them before the passage of P.A. 21-6, are grandfathered and may keep using them. They are treated no differently than students with medical exemptions.

If Plaintiffs' claim is instead that P.A. 21-6 violates equal protection because it permits medical but not religious exemptions, CA 26 (¶ 64), that claim is also not substantial. The District Court rejected that claim in *WTP*, and that decision is supported by overwhelming authority from other jurisdictions rejecting equal protection challenges to vaccination laws that similarly permitted medical but not religious exemptions. *Workman*, 419 Fed. Appx. at 354-55 PA 100; *Whitlow*, 203 F. Supp. 3d at 1087-88; *F.F.*, 194 A.D. 3d at 89-90; *Brown*, 24 Cal. App. 5th at 1147; *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding that provision ***authorizing*** religious exemptions violated equal protection), *cert. denied*, 449 U.S. 887 (1980); *see also Zucht v. King*, 260 U.S. 174, 176-77 (1922) (equal protection challenge to school vaccination law was "not . . . substantial in character" because *Jacobson* and progeny had "settled" that "in the exercise of the police power reasonable classification may be freely applied," and the law "is not violative of the equal protection clause merely because it is not all-embracing"); *Bissell*, 65 Conn. at 192 (rejecting equal protection challenge to school vaccination law because law "may operate to exclude [plaintiff's] son from school, but if so, it will be because of his failure to comply with" the requirement").

Plaintiffs' equal protection claim is not substantial and should have been dismissed.

4. Plaintiffs' free exercise and equal protection claims under the Connecticut constitution are not substantial because those provisions do not provide any broader protections than the federal provisions, and Plaintiffs have failed to preserve any argument to the contrary

Although federal constitutional law "does not inhibit state governments from affording higher levels of protection," our appellate courts "often rely" on federal constitutional law when "delineat[ing] the boundaries of the protections provided by the constitution of Connecticut . . . ." *State v. Ledbetter*, 275 Conn. 534, 560-61 (2005), *cert. denied*, 547 U.S. 1082 (2006) (quotation marks omitted). The analytical framework for determining whether a Connecticut constitutional provision affords broader protection than its federal counterpart is the multi-factor test set forth in *Geisler*, 222 Conn. at 684-86.

Plaintiffs have no substantial claim that the state free exercise or equal protection provisions provide any broader protections than their federal counterparts because (1) any such claim is unpreserved; and (2) the *Geisler* factors establish that the state provisions do not provide broader protection.

a. Plaintiffs failed to preserve their argument under *Geisler*

It is Plaintiffs' burden to establish that the *Geisler* factors support interpreting the state provisions more broadly. This Court has therefore repeatedly refused to consider state constitutional claims when the plaintiff failed to sufficiently brief and analyze the *Geisler* factors. *E.g. Aselton v. Town of E. Hartford*, 277 Conn. 120, 152-55

(2006); *State v. Colon*, 272 Conn. 106, 154 n.26 (2004); *State v. Higgins*, 265 Conn. 35, 39 n.9 (2003).

In their motion to dismiss, Defendants argued that Plaintiffs' state constitutional claims are not substantial because the state provisions provide no broader protection under *Geisler* than the federal ones. In their opposition, Plaintiffs chose not to brief or even mention *Geisler*, or to include any substantive argument related to their state constitutional claims. CA 35-61. Accordingly, any argument that the state provisions provide broader protection is not preserved for review. *Perez-Dickson v. Bridgeport*, 304 Conn. 483, 498 and n.21 (2012).

b. Even if Plaintiffs had briefed *Geisler*, neither state provision provides broader protection in the context of school vaccination

If the Court considers Plaintiffs' unpreserved state constitutional claims, they are not substantial. The *Geisler* factors are: "(1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies." *Ledbetter*, 275 Conn. at 560-61.

When conducting a *Geisler* analysis, the question is not whether state constitutional provisions provide broader protections "***in certain circumstances***," but whether they provide broader protections "***in the circumstances relevant to this case*** . . . ." *Ramos v. Vernon*, 254 Conn. 799, 838 (2000) (emphasis in original); *see also O'Shea v. Scherban*, 339 Conn. 775, 798 (2021). Plaintiffs cannot show that the state free exercise or equal protection provisions would operate any

differently in the school vaccination context than their federal counterparts.

Free Exercise. Any claim under *Geisler* fails out of the gate because the text of article first, § 3, is clear and unambiguous, which is dispositive. *See Fay v. Merrill*, 338 Conn. 1, 32 (2021) ("effect must be given to every part of and each word in the constitution"); *id.* at 36 ("textual factor [is] dispositive" if text is not "sufficiently ambiguous"). Article first, § 3, provides in relevant part: "The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; ***provided, that the right hereby declared and established, shall not be so construed as to . . . justify practices inconsistent with the peace and safety of the state.***" (emphasis added). A school vaccination requirement is the quintessential public health law designed to protect "the peace and safety of the state." There is therefore no reason to suspect the framers intended article first, § 3, to provide any protection to religious exercise in the context of school vaccination beyond what the First Amendment provides. The text is dispositive. *Fay*, 338 Conn. at 36.

Even if the text were not dispositive, other *Geisler* factors weigh decisively in Defendants' favor. First, federal precedent has uniformly recognized that mandatory vaccination does not violate free exercise. *Prince*, 321 U.S. at 166-67 (*citing Jacobson*, 197 U.S. at 11); *V.D. v. New York*, 403 F. Supp. 3d 76, 87 (S.D.N.Y. 2019) (collecting cases); *Cude*, 237 Ark. at 933 (calling issue "so firmly settled that no extensive discussion is required"). Second, this Court's precedents interpret article first, § 3, in line with the First Amendment. *E.g. Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n*, 285 Conn. 381, 400 (2008); *Mayock v. Martin*, 157 Conn. 56, 65 (1968), *cert. denied*, 393 U.S. 1111 (1969); *St. John's Roman Catholic Church Corp. v. Darien*, 149 Conn. 712, 720 (1962). Third, other state courts have

held that mandatory vaccination laws did not violate the free exercise provisions of their state constitutions. *F.F.*, 194 A.D.3d at 88; *Brown*, 24 Cal. App. 5th at 1144; *Love*, 29 Cal. App. 5th at 996; *Cude*, 237 Ark. at 933.

These factors, together with the unambiguous text of article first, § 3, demonstrate that in the context of school vaccination requirements, Plaintiffs' state and federal free exercise rights are coextensive. Plaintiffs' state claim is therefore not substantial and is barred by sovereign immunity.

Equal Protection. Nor could Plaintiffs make a substantial claim that the equal protection provisions of article first, §§ 1 or 20, provide broader protections than the Fourteenth Amendment.[9] This Court "has interpreted the state constitution's equal protection clause to have a like meaning and [to] impose similar constitutional limitations as the federal equal protection clause." *Markley*, 301 Conn. at 68 (quotation marks omitted). State and federal equal protection claims "therefore may be considered together." *Plourde v. Liburdi*, 207 Conn. 412, 418 (1988); *see also Zapata v. Burns*, 207 Conn. 496, 504 (1988) (article first, § 1 "has a meaning equivalent to" federal equal protection clause). Our state equal protection clauses thus provide no broader protection than the federal provision. *See Bissell*, 65 Conn. at 192 (law authorizing schools to require vaccination could "[i]n no proper sense . . . be said to contravene the provisions of § 1 of the first article"); *Brown*, 24 Cal. App. 5th at 1147 (repeal of personal belief

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[9] Section 1 provides in relevant part that "[a]ll men when they form a social compact, are equal in rights." Section 20, as amended, provides in relevant part that "[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil rights because of religion . . . ."

exemption did not violate equal protection provision of California constitution).

5. Plaintiffs' claim under article eighth, § 1, is not substantial because P.A. 21-6 is merely a condition of enrollment designed to protect the health and safety of students, and such laws do not limit access to education

Article eighth, § 1, provides that "[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." The right to education "requires only . . . a minimally adequate system of free public schools." *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 327 Conn. 650, 664 (2018) ("*CCJEF*"). The "essential components" of a constitutionally adequate education system include minimally adequate physical facilities and classrooms, instrumentalities of learning such as desks and textbooks, basic curricula, and teaching personnel. *Id.* at 662, 696. Most relevant here, "a safe and secure environment also is an essential element of a constitutionally adequate education." *Id.* at 665 (quotation marks omitted). And policymakers are "entitled to considerable deference with respect to . . . [the] implementation of the right . . . because courts are ill equipped to deal with issues of educational policy." *Id.* at 667.

Although the right to an adequate education is a fundamental right, *Horton*, 172 Conn. at 648-49, this Court has rejected the argument that "strict scrutiny must be the test for any and all governmental regulations affecting public school education." *Campbell v. Bd. of Educ.*, 193 Conn. 93, 105 (1984). Rather, a policy that is "neither disciplinary . . . nor an infringement of equal educational opportunity" is subject to the "usual rational basis test" under which

"the plaintiff bears the heavy burden of proving that the challenged policy has no reasonable relationship to any legitimate state purpose . . . ." *Id.*

Although the right to education had not yet been enshrined in Connecticut's constitution when *Bissell* was decided,[10] that case is nonetheless instructive. In rejecting legal challenges to a school vaccination requirement, this Court explained that the State "has a duty of providing for the education of the children within its limits," and that "the question [of] what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools, is a question solely for the legislature and not for the courts." *Bissell*, 65 Conn. at 191. The court emphasized that the vaccination law enhanced student education by "promot[ing] the usefulness and efficiency of the schools by caring for the health of the scholars," and was no different from other conditions of enrollment such as age requirements. *Id.* The statute was therefore a valid exercise of the police power, as much so as a law permitting the exclusion of students during an outbreak. *Id.* at 192. And the Court recognized that vaccination requirements "may operate to exclude [children] from school, but if so, it will because of [their] failure to comply" with the vaccination requirement. *Id.*

Consistent with *Bissell*, many courts have held that school vaccination requirements do not violate students' state constitutional rights to education because (1) such laws are a valid exercise of the State's police power to protect public welfare, and (2) students can still freely access education if they comply with the requirements. *Love*, 29 Cal. App. 5th at 995 (*quoting French v. Davidson*, 143 Cal. 658, 662 (1904)); *Brown*, 24 Cal. App. 5th at 1146-47; *Viemeister v. White*, 179

[10]Article eighth, § 1, was passed in 1965.

N.Y. 235, 241 (1904); *State ex rel. Milhoof v. Bd. of Educ.*, 76 Ohio St. 297, 307 (1907); *see also Doe v. Zucker*, 520 F. Supp. 3d 218, 258-59 (N.D.N.Y. 2021) (holding that school vaccination requirement did not violate protected property interest in education as established by New York law), *aff'd sub. nom.*, *Goe v. Zucker*, 43 F.4th 19, 34-35 (2d Cir. 2022); *V.D.*, 403 F. Supp. 3d at 92 (repeal of religious exemption did not violate right to special education under Individuals with Disabilities Education Act because "it was plaintiffs' affirmative decision" not to vaccinate, rather than repeal itself, that led to alteration of services).

Given these authorities, Plaintiffs' article eighth, § 1, claim is not substantial. The right to education does not preclude the State from enacting public health laws affecting public schools. Moreover, P.A. 21-6 is neither "disciplinary" nor "an infringement of equal educational opportunity." *Campbell*, 193 Conn. at 105. It does not exclude students from school or restrict their access to education. All students may enroll so long as they comply with the vaccination requirements (or have a medical exemption).

Nor does P.A. 21-6 undermine any of the critical components of a constitutionally adequate education. If anything, phasing out the religious exemption as a response to Connecticut's declining vaccination rates and outbreaks in neighboring States ***helps ensure*** those elements are met—in particular the "safe and secure environment" element, *CCJEF*, 327 Conn. at 665—by reducing the risk that students will contract vaccine-preventable diseases. That is especially true for the medically-exempt students, whose physical condition and unvaccinated status may place them at greater risk of contracting and becoming seriously ill from such diseases. For those students, each of whom has their own constitutional right to education, low vaccination rates may well infringe on their right to a safe school

environment. *C.f. Brown*, 378 So. 2d at 223 (holding religious exemption unconstitutional in part because it "expos[ed]" vaccinated children to "the hazard of associating in school with children . . . who had not been immunized").

Ultimately, P.A. 21-6 reflects a policy decision that student education—and the broader public health—were better served by phasing out the religious exemption. Such decisions are "solely for the legislature and not for the courts." *Bissell*, 65 Conn. at 191.

There may well be parents who object to vaccination on religious grounds and who will choose not to enroll their children in public school to avoid vaccination. But that does not mean that P.A. 21-6 impermissibly restricts student access to education. The exclusion of their children from school will "ultimately [have] resulted from their decisions not to comply with a condition for school enrollment permissibly set by the state; the fact that [those parents] felt" their religious beliefs "compelled them not to comply . . . does not change that." *Doe*, 520 F. Supp. 3d at 258-59; *Bissell*, 65 Conn. at 192; *c.f. We the Patriots USA, Inc.*, 17 F.4th at 293-94 ("[a]lthough individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice").

That ***must*** be the rule. Otherwise, "a host of neutral school policies would be subject to invalidation" whenever individual parents objected to them on religious grounds. *V.D.*, 403 F. Supp. at 88. Any parent denied a requested religious accommodation could disenroll their child, and then assert that the denial of the accommodation (rather than their decision to disenroll) restricted their child's access to education in violation of article eighth, § 1. That would permit any parent, "by virtue of his [religious] beliefs, to become a law unto himself" in the context of public education. *Smith*, 494 U.S. at 885.

That is not how the right to education operates. This Court has never suggested that article eighth, § 1, may be used to secure religious accommodations not otherwise required by the free exercise clauses of the state or federal constitutions. *C.f. County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) ("where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide").

Because P.A. 21-6 does not implicate article eighth, § 1, it is subject only to rational basis review. As previously explained, it satisfies that standard as a matter of law.

D. Section 52-571b does not, and could not, waive sovereign immunity for Plaintiffs' statutory challenge to P.A. 21-6

1. Background

The General Assembly passed § 52-571b in response to *Smith*, 494 U.S. 872, to ensure that certain state actions that would otherwise be regarded as neutral and generally applicable, and thus subject only to rational basis review, continued to receive strict scrutiny. *Cambodian Buddhist Soc'y of Conn., Inc.*, 285 Conn. at 423-24. To that end, subsection (a) provides: "The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." Subsection (b) provides: "The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling

governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest."

Plaintiffs allege that P.A. 21-6 violates § 52-571b and must therefore be enjoined. CA 24 (¶¶ 51-54). The trial court concluded that Plaintiffs' claim came within the statutory waiver of sovereign immunity contained in § 52-571b(c). That conclusion was error.[11]

2. Statutory waivers of sovereign immunity must be strictly construed, and the claim must clearly come within the scope of the waiver

"A legislative decision to waive sovereign immunity must be manifested either by the use of express terms or by force of a necessary implication." *Mahoney v. Lensink*, 213 Conn. 548, 555 (1990) (quotation marks omitted). Statutes in derogation of sovereign immunity must be "strictly construed." *Columbia Air Servs.*, 293 Conn. at 350. If "there is any doubt about [the statute's] meaning or

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[11] Before the trial court, Plaintiffs only relied on the first exception to sovereign immunity. The second exception does not apply because Plaintiffs' claim under § 52-571b is statutory rather than constitutional in nature. The third exception does not apply because Plaintiffs have made no substantial claim that Defendants are acting in excess of their statutory authority. *Markley*, 301 Conn. at 72. Nor could they, as the individual schools are the ones directly responsible for enforcing the vaccination requirements, not Defendants. Conn. Gen. Stat. § 10-204a(a); *see Elec. Contractors, Inc. v. Dep't of Educ.*, 303 Conn. 402, 458-59 (2012) (third exception does not apply where statute imposes "a mandate on municipalities, not on the state defendants"). In any case, as in *Markley*, 301 Conn. at 73, P.A. 21-6 would itself provide Defendants with the necessary authority to act.

intent," the statute must be interpreted as preserving rather than waiving sovereign immunity. *Id.* And if there is a waiver of sovereign immunity, the "scope [of that waiver] must be confined strictly to the extent the statute provides." *Mahoney*, 213 Conn. at 555-56; *see State v. Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 452 (2012) ("scope of an exception to sovereign immunity is not to be extended . . . or enlarged . . . by the mechanics of statutory construction").

Moreover, when there is an express statutory waiver of immunity, "the plaintiff's complaint must allege a claim falling within the scope of that waiver." *Conboy v. State*, 292 Conn. 642, 649-50 (2009). "[A] party attempting to sue under the legislative exception must come clearly within its provisions." *Federal Deposit Ins. Corp. v. Peabody, N.E., Inc.*, 239 Conn. 93, 101-102 (1996). "There must be a '***precise fit*** between the narrowly drawn reach of the relevant statute' and the plaintiff's cause of action . . . ." *Ruffin v. Dep't of Pub. Works*, 50 Conn. Supp. 98, 105 (2006) (*quoting Berger, Lehman Associates, Inc. v. State*, 178 Conn. 352, 356 (1979)) (emphasis added).

3. Section 52-571b(c) does not waive sovereign immunity for Plaintiffs' claim that P.A. 21-6 violates § 52-571b because § 52-571b does not apply to legislation

Section 52-571b(c) contains a limited waiver of sovereign immunity. It provides: "A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state."

That waiver applies to causes of action challenging conduct by particular state agencies and officials, but not to challenges to ***legislation passed by the General Assembly***. It therefore does not

authorize Plaintiffs' challenge to P.A. 21-6 here. This is so for two reasons. First, the plain text of § 52-571b indicates the legislature never intended it to apply to legislation. Second, regardless of the statutory text, § 52-571b ***cannot*** apply to legislation because that would violate both the principle that one legislature cannot bind or limit the authority of a subsequent legislature, and the doctrine of repeal by implication.

a. The plain text of § 52-571b does not encompass legislation passed by the General Assembly.

This Court must apply a strict construction not only to the waiver provision in § 52-571b(c), but to the ***entirety*** of § 52-571b because it creates a statutory cause of action that would not otherwise exist. *Ecker v. W. Hartford*, 205 Conn. 219, 233 (1987). Therefore, unless the text of § 52-571b clearly encompasses legislation, the statute must be interpreted as ***not*** applying to legislation.

The text of the statute does not encompass legislation. Section 52-571b(a) provides in relevant part that "[t]he ***state or any political subdivision of the state*** shall not burden a person's exercise of religion," unless the State can satisfy strict scrutiny. (emphasis added) Subsection (f) provides in relevant part that, "[f]or the purposes of this section, 'state or any political subdivision of the state' includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state . . . ."

At the outset, the list in § 52-571b(f) must be interpreted as exhaustive. First, § 52-571b must be strictly construed, *Ecker*, 205 Conn. at 233, and interpreting the list as merely illustrative would not conform to a strict construction. Second, the legislature's decision not to use the phrase "includes ***but is not limited to***," as it often does in statutes, demonstrates that it intended the list to be exhaustive. *See*

Denunzio v. Denunzio, 320 Conn. 178, 194 (2016) (presumption that items not included in group or series were deliberately excluded is "reinforced by the fact that the legislature undoubtedly knows how to enumerate a nonexclusive list of factors when it wants to"). Finally, the legislature used the word "include" in § 52-571b(f) in the context of defining the meaning of another statutory term. *State v. Acordia, Inc.*, 310 Conn. 1, 21-22 (2013) (statutory itemization indicates list is exhaustive, particularly where list is "a definitional one").

The General Assembly does not come within this definition of "state or any political subdivision of the state." It is not an agency, board, commission, department, officer or employee of the state. Nor is it a "political subdivision of the state," which this Court has interpreted as referring to cities, boroughs, and towns. *Mayfield v. Goshen Volunteer Fire Co.*, 301 Conn. 739, 745-47 (2011); *State ex rel. Maisano v. Mitchell*, 155 Conn. 256, 263-64 (1967). Accordingly, the requirements set forth in § 52-571b(a) and (b) do not apply to the General Assembly or—by necessary extension—to legislation passed by the General Assembly.

The legislature's clarification that strict scrutiny applies "even if the burden results from a ***rule*** of general applicability," is more evidence the legislature did not intend § 52-571b to apply to statutes. Conn. Gen. Stat. § 52-571b(a) (emphasis added). The word "rule" may encompass state/local regulations, policies, or guidance, but it is not typically understood as encompassing statutes. *See Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1186 (9th Cir. 2019) ("'law' encompasses statutes . . . whereas 'rule or regulation' does not"). By specifying that generally applicable "rules" may be subject to strict scrutiny but not "legislation" or "statutes," the legislature intended not to include the latter within the scope of § 52-571b.

Finally, although Defendants are state officials that fit within the definition of § 52-571b(f), that is beside the point. Plaintiffs do not challenge any actions taken by Defendants or the manner in which Defendants are enforcing P.A. 21-6. Nor could they, as the vaccination requirements are enforced by the local school districts. *See Elec. Contrs., Inc.*, 303 Conn. at 458-59. Instead, Plaintiffs are challenging the validity of P.A. 21-6 itself. Section 52-571b does not apply to such a claim.

b. Section 52-571b cannot apply to legislation because that would violate both the constitutional principle that one legislature cannot limit the authority of a subsequent legislature to enact laws, and the doctrine of repeal by implication.

It is well-settled that "[o]ne legislature cannot control the exercise of the powers of a succeeding legislature." *Patterson v. Dempsey*, 152 Conn. 431, 439 (1965). "The correctness of this principle, so far as respects general legislation, can never be controverted." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); *see United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (discussing "centuries-old concept that one legislature may not bind the legislative authority of its successors"). "[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years." *Reichelderfer v.* Quinn, 287 U.S. 315, 318 (1932). Thus, "a general law . . . may be repealed, amended or disregarded" and "is not binding upon any subsequent legislature." *Winstar Corp.*, 518 U.S. at 873; *State v. Staub*, 61 Conn. 553, 564-65 (1892).

This doctrine protects a current legislature's constitutional authority to enact laws without interference from prior legislatures.

United States v. Dixon, 648 F.3d 195, 200 (3d Cir. 2011). It also protects the basic principle in our representative democracy that citizens have the right to be governed by the policy choices of the officials they elect. That principle would be undermined if those newly elected officials were bound by the policy choices of a prior generation of elected officials. *See Ctr. for Investigative Reporting v. United States DOJ*, 14 F.4th 916, 941-42 (9th Cir. 2021) (Bumatay, J., dissenting) (discussing constitutional and historical underpinnings of doctrine).

Operating in tandem with that principle, the doctrine of repeal by implication prevents prior legislation from be construed as precluding or limiting the operation of subsequent legislation. Under that doctrine, "[e]nactments by the General Assembly are presumed to repeal earlier inconsistent ones to the extent that they are in conflict." *Dugas v. Lumbermens Mut. Cas. Co.*, 217 Conn. 631, 641 (1991). "If the expressions of legislative will are irreconcilable, the latest prevails." *Tomlinson v. Tomlinson*, 305 Conn. 539, 553 (2012).

This Court explained the interplay of these parallel doctrines in *Patterson*, 152 Conn. at 431. There the General Assembly passed a special act appropriations bill that included provisions that directly violated the requirements of a previously enacted section of the General Statutes. The Court concluded that the prior statute "could not effectively prevent the General Assembly from including [the challenged provisions] in the special act" because "[o]ne legislature cannot control the exercise of the powers of a succeeding legislature." *Id.* at 438-39. Rather, "[t]o the extent that the [special act] failed to conform to the provisions of [the prior statute], those provisions [of the statute] were rendered ineffective. . . . The effect is really that of repeal by implication. . . . To hold otherwise would be to hold that one General Assembly could effectively control the enactment of legislation by a subsequent General Assembly." *Id.* (citations omitted).

The same is true here. Under *Smith*, the legislature may constitutionally enact laws that incidentally burden religious practices so long as the law is both neutral and generally applicable (and satisfies rational basis review). Subjecting those laws to heightened scrutiny under § 52-571b would unconstitutionally limit the authority of subsequent legislatures—as reconstituted by the voters in each election—to enact laws. Legislation passed by a later General Assembly could be struck down under the heightened requirements of § 52-571b even if the legislation were perfectly constitutional. That would undermine the subsequent General Assembly's constitutional authority under article third, § 1, to exercise "[t]he legislative power of the state," by subjecting it to the heightened standards that a prior legislature saw fit to impose. *See Patterson*, 152 Conn. at 444 ("the General Assembly has the power to enact ***any legislation*** except as restricted by provisions of the state or federal constitution").

It would be especially inappropriate to apply § 52-571b to a public health law like P.A. 21-6, which the legislature passed in response to recently-emerging threats that were not present nearly 30 years ago when § 52-571b was enacted. "It is vital to the public welfare that each [succeeding legislature] should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil." *Newton v. Commissioners*, 100 U.S. 548, 559 (1879); *See Stone v. Miss*, 101 U.S. 814, 817-18 (1879) ("[a]ll agree" that "no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police," including "all matters affecting the public health") (quotation marks omitted).

Moreover, concluding that § 52-571b does not apply to later-enacted statutes is consistent with caselaw addressing the federal version of § 52-571b, the Religious Freedom and Restoration Act

("RFRA"). Unlike § 52-571b, RFRA contains a clear textual requirement that it applies to later statutes. 42 U.S.C. § 2000bb-3(b) ("[f]ederal statutory law adopted after the date of the enactment of this Act . . . is subject to this Act unless such law explicitly excludes such application by reference to this Act"). But as Justice Scalia explained in his widely-cited concurring opinion in *Lockhart v. United States*, 546 U.S. 142 (2005), the United States Supreme Court generally refuses to enforce such "express statement" provisions because they violate the rule that one legislature cannot bind another. *Id.* at 147-48 (citing cases). Justice Scalia emphasized that, "[d]espite our jurisprudence on this subject, it is regrettably not uncommon for Congress to attempt to burden the future exercise of legislative power" with express statement provisions, and that "it does no favor" to Congress "to keep secret the fact that" such provisions "are ineffective." 546 U.S. at 149-50. Significantly, Justice Scalia identified § 2000bb-3 as one of the offending statutes. *Id.* at 149. Courts have cited that concurrence for the proposition that RFRA's express statement provision is ineffective and that RFRA likely does not apply to later statutes. *Hobby Lobby Stores, Inc. v. Sebelius*, 2014 U.S. Dist. LEXIS 161761, at *4-5 (W.D. Okla. Nov. 19, 2014) PA 79; *see also Mich. Catholic Conference v. Burwell*, 755 F.3d 372, 383 n.8 (6th Cir. 2014), *vacated on other grounds by* 575 U.S. 981 (2015).

Accordingly, § 52-571b cannot apply to legislation like P.A. 21-6. Alternatively—under the doctrine of repeal by implication—even if P.A. 21-6 were subject to and violated § 52-571b, P.A. 21-6 would not be invalid. It would simply mean that the requirements of § 52-571b are repealed and superseded to the extent P.A. 21-6 violates them. Either way, P.A. 21-6 is not subject to § 52-571b. And since § 52-571b does not apply to legislation, § 52-571b(c) cannot be construed as waiving sovereign immunity for lawsuits challenging legislation.

The trial court's conclusion to the contrary is wrong. It acknowledged the rule that one legislature cannot bind another, but stated that it "must be cognizant of other principles of statutory construction" and ultimately concluded that those principles dictated that § 52-571b applies to P.A. 21-6. CA 82-83. That misunderstands the nature of the rule. It is not merely a canon of construction used to determine legislative intent. It is a rule with constitutional underpinnings that applies ***regardless*** of the legislature's intent. Even if the legislature intended § 52-571b to apply to later statutes and expressed that intention with clear language (as Congress did in RFRA), it would not matter. Any such language would be "ineffective," entitled to no legal significance. *Lockhart*, 546 U.S. at 149-50. But unlike RFRA, § 52-571b contains no such language, likely because the legislature knew it would be invalid.

To the extent the trial court suggested that the General Assembly that passed P.A. 21-6 wanted it to be subject to § 52-571b, CA 83, that reasoning simply does not make sense. It is absurd to suggest that the legislature passed P.A. 21-6 to response to looming threats to public health, but with the intention of it being subject to and possibly struck down by a court under another statute. To the contrary, the legislature is presumed to be aware of existing statutes and to pass legislation that is ***consistent*** and "harmonious" with them, not to pass laws with the intent and knowledge that a prior statute could or will render the new law invalid. *Board of Education v. State Board of Education*, 278 Conn. 326, 333 (2006). And again, if there is inconsistency, the doctrine of repeal by implication requires that the newer law prevails, not that it is invalidated. *In re Ava W.*, 336 Conn. 545, 582 (2020).

IV. Conclusion

The judgment of the trial court should be reversed.

Respectfully submitted,

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ATTORNEY GENERAL

/s/ Timothy J. Holzman

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SUPREME COURT

of the

State of Connecticut

SC 20776

KEIRA SPILLANE, ET AL.

v.

NED LAMONT, ET AL.

Party Appendix for the Defendants-Appellants

Appendix table of contents

DOCKET NO.: FST-CV-6056249-S	:	SUPERIOR COURT
SPILLANE, KEIRA, PARENT OF CHILD #1, ET AL.	:	JUDICIAL DISTRICT OF STAMFORD
	:	AT HARTFORD
v.	:	
LAMONT, NED, IN HIS OFFICIAL CAPACITY AS GOVERNOR, ET AL.	:	JUNE 22, 2022

AFFIDAVIT OF KATHY KUDISH

I, Kathy Kudish, am over the age of eighteen, understand the obligations of an oath, and, having been duly sworn, state as follows:

1. I am currently employed as Immunization Program Manager for the Connecticut State Department of Public Health ("DPH"), and have served in that capacity since 2016.

2. Each year, DPH conducts immunization surveys of prekindergarten through twelfth grade public and private schools in order to determine the extent to which school children are vaccinated against preventable diseases. DPH publishes the results of these surveys on its website in a document entitled School Immunization Survey Data ("Immunization Data"). The Immunization Data is generally accessible at:

   https://portal.ct.gov/DPH/Immunizations/School-Survey.

3. I am familiar with the Immunization Data and the policies and procedures in place for conducting the surveys and compiling the data.

4. DPH is required by law to conduct these surveys and publish the Immunization Data. See Public Act No. 21-6 § 1(e); Regs. of Conn. State Agencies, § 10-204a-

4(b). Individual schools are required by law to record and accurately report their immunization data to DPH for use in these surveys. Regs. of Conn. State Agencies, § 10-204a-4(a) and (b).

5. In April, 2021, the General Assembly passed Public Act No. 21-6 ("P.A. 21-6") § 1, which amended Conn. Gen. Stat. § 10-204a(a) to begin phasing out the religious exemption to the school vaccination requirements.

6. A true and accurate copy of the most recent Immunization Data that had been compiled at the time the General Assembly passed P.A. 21-6, which includes data through the 2019-2020 school year, is attached hereto as Exhibit A.

7. Exhibit A accurately reflects the data provided to DPH by public and private schools as part of the surveys.

Kathy Kudish — 6/22/2022

Kathy Kudish
Immunization Program Manager
Connecticut State Department of Public Health

Date

TAWANA JAUNAI NOTARY PUBLIC MY COMM. EXPIRES SEPT. 30, 2024 CONNECTICUT

OATH

STATE OF CONNECTICUT)
) ss. Hartford
COUNTY OF HARTFORD)

Personally appeared before me, KATHY Kudish authorized signer of the foregoing instrument and acknowledged the same to be his/her free act and deed, subscribed and sworn to before me this 22nd day of June, 2022

Notary Public/
Commissioner of the Superior Court

EXHIBIT A

Immunization Homepage (/DPH/Immunizations/CONNECTICUT-IMMUNIZATION--PROGRAM)

Immunization Laws and Regulations (/DPH/Immunizations/Immunization--Laws-and-Regulations)

Vaccine Preventable Disease Surveillance (https://portal.ct.gov/DPH/Immunizations/VACCINE-PREVENTABLE-DISEASES)

About CT WIZ (/DPH/Immunizations/ALL-ABOUT-CT-WiZ)

EHR Data Exchange-HL7 (https://portal.ct.gov/DPH/Immunizations/Electronic-Health-Record-Electronic-Exchange-With-CT-WiZ)

Connecticut Vaccine Program- CVP (/DPH/Immunizations/Connecticut-Vaccine-Program-CVP)

For CVP Providers (/DPH/Immunizations/CVP---Information-for-Providers)

For Healthcare Providers (/DPH/Immunizations/Immunization-Information-for-Health-Professionals)

Immunization Action Plan - IAP (/DPH/Immunizations/Immunization-Action-Plan-IAP)

For Adults (/DPH/Immunizations/Adult-Immunizations)

For Parents (/DPH/Immunizations/CVP---Information-for-Parents)

For Pregnant Women (/DPH/Immunizations/Tdap-Coccooning)

International Travel (https://www.cdc.gov/travel/)

Preventing Seasonal Influenza (/DPH/Immunizations/Seasonal-Influenza)

COVID-19 Vaccine Providers (/DPH/Immunizations/COVID-19-Vaccine-Providers)

Contact Us (/DPH/Immunizations/Contact-Us)

Search Department of Public Health

School Immunization Survey Data

Required Immunizations for School and Child Care Vaccination is a medical intervention with direct benefits to *both* individuals and communities. When a large percentage of a population is vaccinated, the entire community (vaccinated and unvaccinated) receives additional protection from vaccine preventable diseases. This concept, known as 'herd immunity,' is a primary justification for mandatory vaccination policies in the United States. By following the recommended schedule and fully immunizing children on time, parents protect their children against 14 vaccine preventable diseases. If a high enough percentage of children are vaccinated outbreaks can also be prevented. In the U.S., all states require children attending public school or state-licensed day care facilities to receive a series of vaccinations. Vaccination requirements for school and day care attendance are critical to ensuring high rates of vaccination. Linking vaccination with school attendance, which is also required by law, ensures that vaccines reach the greatest number of children. Schools are a prime venue for the transmission of vaccine-preventable disease, and active school-age children can further spread disease to their families and others with whom they interact.[1] Specific vaccine requirements for school and child care vary by state. The Connecticut immunization laws and regulations can be found on the **Department of Public Health's Immunization Laws and Regulations web page (https://portal.ct.gov/DPH/Immunizations/Immunization--Laws-and-Regulations)**. Each school and child care program is responsible for ensuring that attendees are in compliance with the vaccine requirements.

Immunization Survey

The school immunization survey measures the extent to which children in Connecticut are protected from vaccine-preventable diseases. Each year the Department of Public Health distributes an immunization survey to all Connecticut schools and licensed group day care homes and child care centers. On the survey, the total number of attendees who completed the required vaccine series, the number who failed to complete the required vaccine series, and the number of children with a religious or medical exemption are reported. This information is reported for all child care attendees on the child care survey and for all kindergarten and seventh grade students on the school survey. In addition, influenza vaccine receipt is surveyed for all preschool[2] attendees. Individual vaccine information on each child is not collected; only total numbers are collected from each school and child care facility.

Typically survey results for the current school year will not be available until the summer or fall of the next school year.

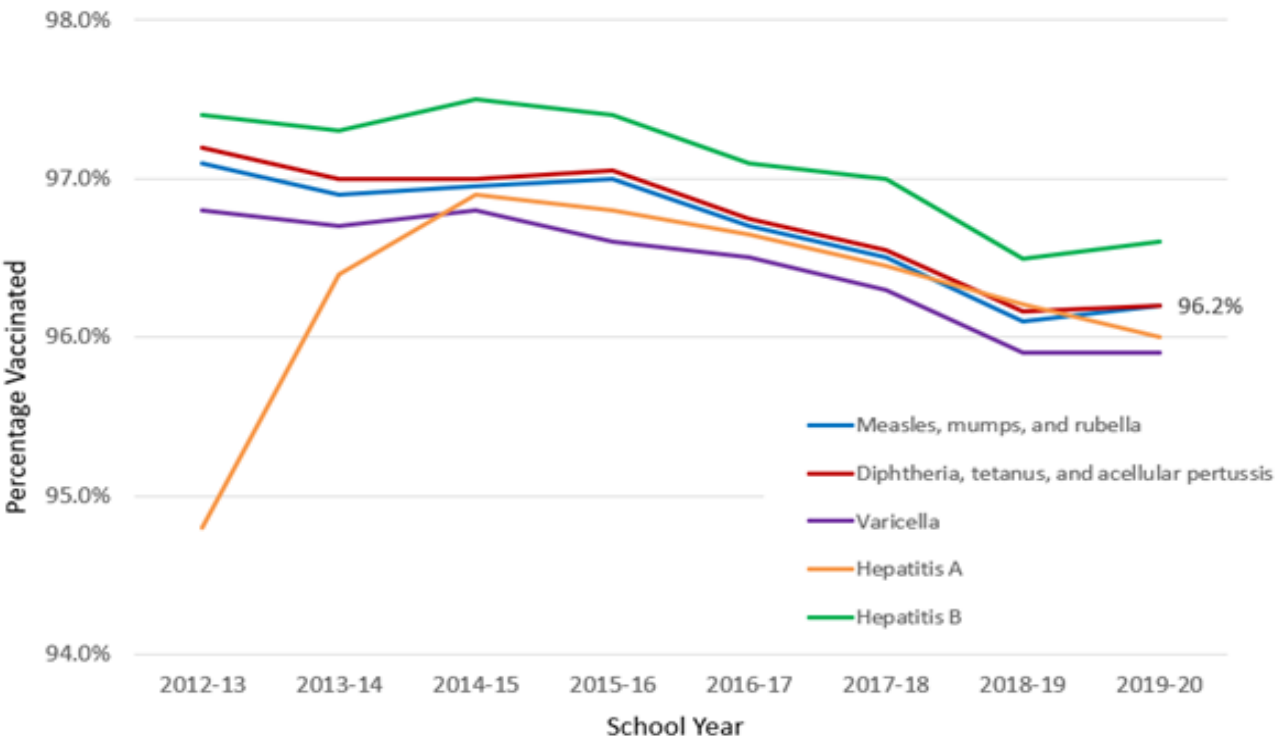
Statewide Data Summary of Religious and Medical Exemptions, 1999–2020

Highlights for 2019-2020

The percentage of Connecticut kindergarten students receiving all required measles mumps and rubella (MMR) vaccines in the 2019-2020 school year was 96.2%. This is a slight increase of 0.1 percentage points from the previous year and a drop of 0.9 percentage points since 2012–2013. For public schools the

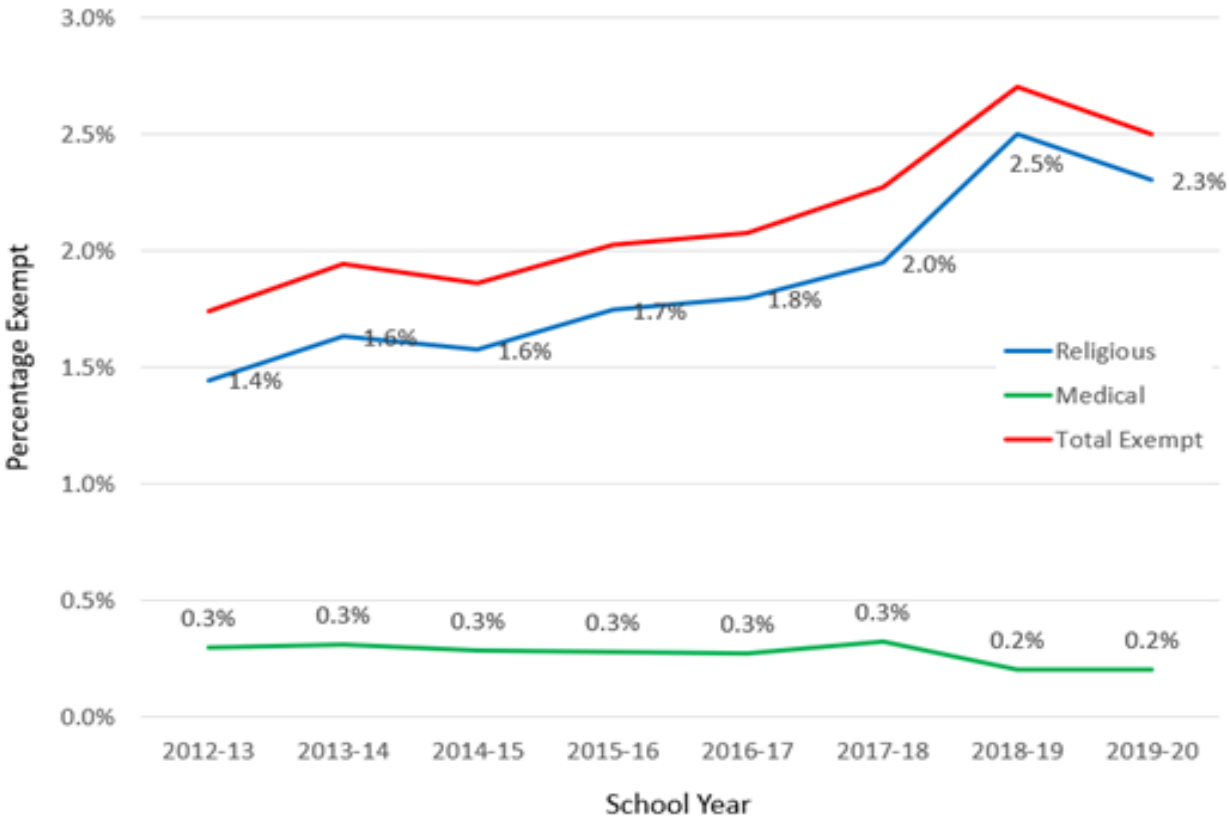
average MMR rate is 96.5% and for private schools the average is 92.1%. Of the schools with more than 30 kindergarten students, 120 schools have MMR rates below 95%, and 26 schools have MMR rates below 90%.

Percentage of Vaccinated Kindergartners, Connecticut, 2012 – 2020



The percentage of kindergarten students with a religious exemption decreased by 0.2% compared with last year, and is now 2.3%. The national average during 2019-20 for non-medical exemptions is 2.2%[3]. The percentage of kindergarten students with a religious exemption has increased 0.9% since 2012-2013. The percentage of kindergarten students with a medical exemption remains fairly constant, at 0.2% in 2019-2020, compared with 0.3% during previous years.

Kindergarten Exemptions, Connecticut, 2012–2020



Statewide Summary Statistics includes summary immunization information for kindergarten, seventh grade, and influenza vaccine for preschool.

- **2019-2020**
- **2018-2019**
- **2017-2018**
- **2016-2017**
- **2015-2016**
- **2014-2015**
- **2013-2014**
- **2012-2013**

County Summary Statistics includes county summary immunization information for kindergarten, seventh grade, and influenza vaccine for preschool.

- **2019-2020**
- **2018-2019**
- **2017-2018**
- **2016-2017**
- **2015-2016**

- **2014-2015**
- **2013-2014**
- **2012-2013**

School Immunization Data includes immunization information data for each reporting school. You can look up your individual school to see immunization rates, exemption rates, and other related information.

Please note the data limitations listed in the definitions tab in each of the following documents.

- **Kindergarten**
  - **2019-2020**
  - **2018-2019**
  - **2017-2018**
- **Seventh Grade**
  - **2019-2020**
  - **2018-2019**
  - **2017-2018**
- **Exemption rates for all students, all grade levels**
  - **2019-2020**
  - **2018-2019**
  - **2017-2018**

1 **http://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf**

2 Includes preschool programs run by local boards of education; preschool programs located in child care centers are counted on the child care survey.

3 **Vaccination Coverage with Selected Vaccines and Exemption Rates Among Children in Kindergarten — United States, 2019–20 School Year (https://www.cdc.gov/mmwr/volumes/70/wr/mm7003a2.htm?s_cid=mm7003a2_e)**

For more information or to contact the Immunization Program, please call:
860-509-7929 (tel:8605097929), during normal business hours, Monday-Friday 8:30am to 4:30pm

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Anti-Vaccine Decision-Making and Measles Resurgence in the United States

Olivia Benecke, BA[1] and Sarah Elizabeth DeYoung, PhD[2]

Keywords
vaccination; pediatrics; health behavior; health communication

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Introduction

Measles outbreaks in 2019 reached emergency levels in the United States, in addition to other countries such as the Philippines, Ukraine, Venezuela, Brazil, Italy, France, and Japan.[1] The aim of our article is to provide an overview of the major social, psychological, and technological factors that led to these outbreaks in the United States. We also explore the policy landscape and potential solutions for public health researchers. Specifically, we address the social and contextual factors can provide health professionals with tools to develop an effective pro-vaccine response campaign for this highly contagious, preventable disease.

Epicenter of the Outbreak

During January 2019, a measles outbreak in Clark County, Washington, in the United States infected 72 people, 53 of whom were children aged between 1 and 10 years. This prompted the governor to declare a state of emergency.[2] Though once eliminated, measles outbreaks are becoming increasingly common. Since 2014, public health officials have observed an increase in vaccine opposition throughout the United States, primarily concentrated in major metropolitan areas. Seventeen states allow for nonmedical vaccination exemptions. This dangerous trend renders multiple populous cities vulnerable to vaccine-preventable diseases.[3] Recent resurgences of measles, mumps, and pertussis and increased mortality from vaccine-preventable diseases prompt an in-depth exploration of the social and behavioral factors that influence the "anti-vaxx" movement. Understanding these social and behavioral factors can prevent these behavioral trends from gaining additional traction throughout the United States and beyond, protecting an increasingly connected world from preventable illnesses.

Historical Context

In the United States, fear of vaccines emerged in the 18th century. Religious figureheads often referred to them as "the devil's work" and actively spoke against them.[4,5] In the 19th century, the movement became increasingly politically motivated as passage of laws in Britain made it mandatory for parents to vaccinate their children. In response, anti-vaccine activists formed the Anti-Vaccination League in London, emphasizing their mission to protect individual liberties that were being "invaded" by government.[5] These movements expanded to Britain in the 1970s and 1980s when parents increasingly refused to vaccinate their children against pertussis in response to a report that attributed 36 negative neurological reactions to the pertussis vaccine. This caused a decrease in the pertussis vaccine uptake in the United Kingdom from 81% in 1974 to 31% in 1980, eventually resulting in a pertussis outbreak in the United Kingdom.[5]

However, the anti-vaccination sentiments in recent decades were also fomented by the 1998 publication of a series of articles in *The Lancet* by a former British doctor, Andrew Wakefield. Wakefield suggested a connection between the measles, mumps, and rubella (MMR) vaccine and development of autism in young children. Despite flawed research methodology, and conflict of interest in funding, the MMR vaccine rates continued to drop dramatically. Members of the anti-vaccine

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movement still cite his research as a talking point in refuting vaccinations.

There is an inverse association between nonmedical exemption rates and MMR vaccine coverage of kindergarteners in the 17 states that allow for vaccination exemptions.[3] States with higher overall nonmedical exemption rates have lower MMR vaccine coverage, demonstrating the dangerous and lasting influence of Wakefield's publication.

The anti-vaxx movement may also be situated within economic and social movements in the United States. Sociological research on parental perception about vaccination decision-making reveals that gender, resources, and norms influence medical decision-making.[6,7] As Reich[6] points out, ideas about neoliberalism and skewed perceptions of feminist concepts of bodily autonomy and parental decision-making trumps medical expertise. Reich's data and findings suggest that upper-class women may adopt anti-vaxx sentiments as a means for expressing independence—while tragically undermining the value and science behind herd immunity. The landscape of vaccination is complex. Lack of access to regular healthcare— for low-income families, can reduce vaccination compliance (Chen et al., 2018).[8]

The Role of Social Media in the Anti-Vaxx Movement

Persuasion from entertainment and pop culture figures can influence health behavior and decision-making about vaccinations (eg, Tiedje et al[10]). Celebrities such as Jenny McCarthy, Alicia Silverstone, Rob Schneider, and Robert De Niro used fear-based messaging to influence parents to avoid vaccination, particularly in claiming a false link between vaccinations and autism.[5] Political leaders also play a role in spreading misinformation. Donald Trump shared anti-vaxx messages on social media,[9] although in recent months he encouraged vaccinations. More recently, vocal representative Jonathan Strickland in Texas described vaccinations as "sorcery."

Another reason skepticism has begun to flourish over vaccinations is due to the spread of misinformation on social media.[20] Medical knowledge that was once held exclusively by medical professionals is now accessible to anyone and can be shared in posts that become "viral." According to an analysis of YouTube videos about immunization, 32% opposed vaccination.[5] Perhaps more concerning, these videos had higher ratings and more views than pro-vaccine videos. In addition, a study that explored the content of the first 100 anti-vaccination sites found after typing "vaccination" and "immunization" into Google revealed that 43% of websites were anti-vaccination.[5] Skeptics also use online platforms to advocate vaccine refusal; as many as 50% of tweets about vaccination contain anti-vaccine beliefs.[10] Research suggests that it only takes 5 to 10 minutes on an anti-vaccine site to increase perceptions of vaccination risks and decrease perceptions of the risks of vaccine omission.[5]

Among these social media influencers are parents who attribute the deaths of their children or illnesses they contract to "vaccine injury," and they often take to the Internet to discuss their experiences and warn other parents. Indeed, a substantial part of the vaccine discussion takes place on anti-vaccine website discussion boards such as *Age of Autism, Say No to Vaccines*, and *Naturalnews.com*.[12] Even on mainstream social media sites like Facebook and Twitter, anti-vaccine discussions are flourishing as these groups have closed their forums to anyone who describes themselves as "pro-vaccine." According to Shelby and Ernst,[12] these parents and other anti-vaccine activists "have relied on the profound power of storytelling to infect an entire generation of parents with fear and doubt".

Perhaps the most common trope told by this group is the "overnight autism" narrative, in which a parent takes their child in to get the MMR vaccine only to watch them digress cognitively almost immediately after.[12] In the anti-vaccine community, these stories serve as cautionary tales that vaccines are dangerous without accurate information to refute their claims. Additionally, the widespread involvement of bots and malware promoted by foreign powers in online public health discourse is skewing discussions about vaccination. In 2015, DARPA's (the US Defense Advanced Research Projects Agency) Bot Challenge asked researchers to identify "influence bots" on Twitter in a stream of vaccine-related tweets, focusing heavily on the actors behind the content.[11] Researchers studied #VaccinateUS, a Twitter hashtag linked directly to Russian troll accounts connected to the Internet Research Agency—a company backed by the Russian government that specializes in online influence projects.[11] One of the primary tactics used by these influence bots is to use the vaccine debate to target socioeconomic tensions that are unique to the United States. For example, anti-vaccine tweets from this source will often blame elite groups for forcing vaccine on low-income people. In addition, it was determined that "93% of tweets about vaccines are generated by accounts whose provenance can be verified as neither bots nor human users yet who exhibit malicious behaviors."[11] This amplifies the misinformation that parents are exposed to, and it fuels the belief that the science behind vaccine efficacy and safety is still debatable.

Psychological Factors and Beliefs

In tandem with access to information, components of social psychology play a key role in understanding the escalation of the anti-vaccine movement. After surveying 1000 parents of children younger than 13 years of age who were living in the United States, researchers found that the morals of purity and liberty were most associated with vaccine hesitancy.[14] Those who place high value on liberty are most concerned with individual freedom, resenting government mandates that demand parents vaccinate their children. Similarly, those who value purity disapprove "of acts that are deemed 'disgusting' or 'unnatural,'" which they associate with vaccination.[14] Indeed, anti-vaccination websites and other propaganda often claim that vaccines contain "contaminants." According to epidemiologist Amin,[14] this finding is significant because many pro-vaccine arguments and campaigns are grounded on the values of harm and fairness. For example, they usually strive to remind parents that getting immunized helps prevent outbreaks, or they frame it as an obligation to protect those who cannot be vaccinated.[14] Understanding the sociobehavioral variables that influence vaccine-hesitant parents is critical because it will allow the public health community to develop a more targeted and effective response campaign that will prevent this dangerous movement from growing.

Mitigation Against Misinformation

Sites like Facebook, Twitter, and Instagram are all home to flourishing anti-vaccine communities. In 2017, Pinterest blocked all searches for the term "vaccines," as a part of the company's enforcement of a broader policy against health misinformation.[15] Soon after, YouTube announced that anti-vaccine channels and videos on its platform would no longer be able to advertise or receive money from viewers. In addition, in March of 2019, Facebook said it will no longer recommend groups and pages that spread hoaxes about vaccines, and that it will also reject ads that do this.[15] Instagram also recently announced that it would block anti-vaccine hashtags, such as #vaccinescauseautism and #vaccinesarepoison.[16]

Despite these strides, groups are still finding ways to spread misinformation. For example, one can still find anti-vaccine content on Pinterest by instead searching for "measles vaccine." While Facebook's new policies are making it more difficult for a lay person to come across anti-vaccine propaganda, the platform is not banning the groups altogether.[15] Twitter has yet to make any formal announcements regarding action against anti-vaccine related content.[16]

Education and Anti-Vaxx Movements

Effectively countering the anti-vaccine movement should be addressed through understanding mechanisms for increasing trust between the medical community and parents. Issues of mistrust began with the way in which the measles vaccine campaign was introduced in the United States in 1967. Concerned by the relationship between socioeconomic disparities and infectious disease incidence, the Johnson administration made federal funds for measles vaccination available starting in 1965. A mass measles eradication began in 1967, which did not allow popular confidence around the vaccine to take hold.[4] In addition, early side effects left some parents skeptical.

In Great Britain, public health officials and policymakers cautiously established a large-scale clinical trial to distinguish the relative benefits of the different available vaccines and possible immunization schedules.[4] Through this, the goal was to convince parents about vaccination efficacy from a disease they previously thought to be inevitable.[4] This method of transparency was a success, and mass evacuations were accepted by the public when they were introduced in 1968.[4] The disparities in these cases highlight the importance of the responsibility held by doctors and public health officials in keeping the science behind vaccines transparent and parents informed. This allows confidence and trust around the practice to take hold.

In the United States, most of the Centers for Disease Control and Prevention Vaccine Information Statements parents receive before vaccination dedicate almost half of their information to detailing risks of the vaccines and providing information to parents on how to report negative vaccine reactions to the National Vaccine Injury Compensation Program.[12] This does little to reassure parents who may feel fearful or skeptical. Information in these statements should also contain content about the benefits of vaccinations. Outreach efforts should also focus on communities and marginalized group that may have higher levels of mistrust in government-based medical services. It is also important to acknowledge the harm caused to racial minorities by government trials such as the Tuskegee Study in the United States (Reverby, 2017).[13] Eroded trust can still be a factor today in medical decision-making, and this historical context should be considered when working with communities for vaccination promotion.

In addition, public health officials should use social science and behavioral research to develop pro-vaccine narratives. Indeed, emerging evidence suggests that one

of the most persuasive and effective means of communicating vaccine information to some parents is through sharing anecdotes.[12] Doctors and public health organizations should publish stories online or in pamphlets of successful vaccine appointments and preventable disease horror stories. Some parents who feel strongly about the importance behind vaccines may serve as "vaccine ambassadors."[12] These parents can volunteer to provide their e-mail addresses or phone numbers to the clinic to hand to vaccine-hesitant parent, allowing peer-to-peer communication to serve as interventions.[17]

Policy Implications

The anti-vaccine movement poses several implications for the future direction of public health policy. Developing public policy that closes vaccine loopholes is critical. Despite all 50 states having legislation requiring vaccines for students, almost every state allows exemptions for people with religious beliefs against immunizations. Specifically, 17 states grant philosophical exemptions for those opposed to vaccines because of personal or moral beliefs, and 45 permit "conditional entrance" on the promise that children will be vaccinated. Rarely do schools follow-up.[16] Indeed, lifetime exemption is as easy as obtaining a notarized letter.

Exemptions cluster geographically—these are places at greater risk as herd immunity disappears. In order to counter these loopholes, the Centers for Disease Control and Prevention recommends that states begin by implementing vaccination requirements that reach more children through a broad range of facilities, that have more requirements for receiving an exemption, that require parental documentation of exemption requests, and that are implemented with strong enforcement and monitoring.[18] Indeed, with the recent measles outbreaks that occurred this past winter, 8 states are considering removing personal exemptions for the measles vaccine.[19] As of right now, only 3 states—Mississippi, West Virginia, and California—prohibit nearly all vaccine exemptions. This number is expected to grow as bills to restrict exemptions are now pending in a growing number of states.[19]

Long-Term Solutions

To address the root causes of the measles outbreak, social science can inform community-based interventions and policies.

Additionally, social media platforms should play an active role in monitoring and banning false information. Second, medical and public health professionals must take a different approach in informing skeptical parents about vaccines that includes outreach for vulnerable communities. Finally, K-12 policies on vaccines and common loopholes should be addressed through policy change.

These longterm programs should be carried out through collaborative efforts. Research by sociologists, psychologists, public health researchers, and other scholars should be integrated with strategies launched by nonprofits, state-level health initiative, and community health promotion efforts.

Author Contributions

Both authors contributed to the writing for this article. The first author (Benecke) wrote initial drafts of the content and the second author (DeYoung) provided guidance on revisions and organization of content.

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Connecticut State
Department of Public Health

(/DPH)

Press Releases

04/23/2021

DPH Confirms A Second Case of Measles In Fairfield County Household

The Connecticut Department of Public Health (DPH) today said it has confirmed a second case of measles in a Fairfield County child. The child did not attend school while infectious. The child is a household contact of the child who contracted the first case of measles announced on April 9. DPH is collaborating with local partners to identify contacts and implement appropriate control measures. These are the first cases of measles in Connecticut since 2019.

Measles is a highly contagious disease that can spread quickly among unvaccinated people. However, the majority of people exposed to measles are not at-risk of developing the disease since most people have either been vaccinated or have had measles in the past, before vaccination became routine.

"The single best way to protect yourself and your children from measles is to be vaccinated," said DPH Acting Commissioner Dr. Deidre Gifford. "One dose of measles vaccine is about 93% effective, while two doses are about 97% effective. We must ensure we continue to protect our children from vaccine preventable illnesses through on-time vaccination."

Very few people—about three out of 100—who get two doses of measles vaccine will still get measles if exposed to the virus. Measles vaccine does not cause measles illness.

Most Connecticut residents have been vaccinated. Vaccination with 2 doses of measles, mumps, and rubella (MMR) is required to attend schools and colleges in Connecticut; however, students with medical or religious exemptions may attend school without being vaccinated. According to the 2019-2020 Statewide School Immunization Survey, 96.2% of Connecticut students were vaccinated with 2 doses of MMR by kindergarten entry. Exposed individuals who are not vaccinated against measles must stay out of school, or other high-risk settings, for a full 21 days after their last known exposure.

CDC recommends all children get two doses of MMR vaccine, starting with the first dose at 12- through 15-months of age, and the second dose at 4 through 6 years of age.

CDC also recommends that adults born after 1957 should receive at least one dose of MMR vaccine if they have never been vaccinated against measles. Adults born in the U.S. before 1957 are considered immune to measles from past exposures; in situations where exposure to measles is likely, these adults may benefit from a dose of MMR vaccine. Certain adults need two doses of MMR, such as college students, health care workers, international travelers, and persons at high risk for measles complications.

International travelers should be up-to-date on their vaccinations. Most cases of measles are acquired or linked to international travel. Most people who are diagnosed as having measles are not vaccinated or did not know their vaccination status. So far during 2021, other than in Connecticut, no other measles cases have been confirmed in the United States. From January 1 to December 31, 2020, 13 cases of measles were confirmed in the U.S.

Symptoms of measles generally begin 7-14 days after exposure to an infected person. A typical case of measles begins with mild to moderate fever, cough, runny nose, red eyes (conjunctivitis), and sore throat. Three to five days after the start of these symptoms, a red or reddish-brown rash appears, usually starting on a person's face at the hairline and spreading downward to the entire body. At the time the rash appears, a person's fever may spike to more than 104 degrees Fahrenheit.

The rash typically lasts at least a few days and then disappears in the same order. People with measles may be contagious up to 4 days before the rash appears and for four days after the rash appears.

Measles is very easily spread from person to person. If you have a fever and a rash and you think you might have measles, you should avoid public settings and telephone your healthcare provider BEFORE going directly to a healthcare facility so steps can be taken to avoid possibly exposing others.

For more information about measles, please visit **www.cdc.gov/measles** (http://www.cdc.gov/measles).

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'Clustering of exemptions' as a collective action threat to herd immunity

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Abstract

In this paper, we examine the phenomenon of 'clustering of exemptions' to childhood vaccination, and the dangers this poses both to those exempted as well as the general population. We examine how clusters of exemptions might form through collective action as described by Thomas Schelling, and how religious groups who live in close proximity to one another can "self-select" in a way that exacerbates this phenomenon. Given the growing number of exemptions and the increasing visibility of the anti-vaccine movement, policy makers must be vigilant for dangerous clustering in order to avoid loss of herd immunity.

Keywords: Clustering of exemptions; Herd immunity; Vaccination

1. Introduction

Herd immunity is a concept that is at the foundation of any public health vaccination program. No vaccine is 100% effective, so the eradication, elimination or radical reduction of epidemics relies on the protection provided when a large enough percentage of a given population is immune, so as to prevent potential outbreaks of vaccine-preventable disease from getting started. In this way, even those for whom vaccination is not effective are protected through the unlikelihood that they will be exposed to the disease (since an outbreak cannot get a "foothold" where herd immunity is achieved). Along with those who are vaccinated but do not achieve immunity to vaccine-preventable diseases, children exempted from mandatory vaccination are protected through herd immunity. The greater the number of people not immune, however, the greater the chances become that the protection provided through herd immunity will be lost.

In this context, the medical literature has recently begun to focus on the potential harmful effects of the anti-vaccination movement and expanding exemptions to mandatory childhood vaccination [1]. For example, one study found that drops in vaccination rates due to this movement in the UK, Japan, Sweden, Russia, Ireland, Italy, the former West Germany and Australia have resulted in Pertussis incidence 10–100 times greater than in countries where high vaccine coverage was maintained [2]. The level of vaccination required in order to achieve herd immunity varies by disease, but generally ranges from 83 to 94% [3]. Although historically, the level of exemptions to vaccination in the US has not been high enough to pose a threat (not exceeding 3% for any state prior to 2000), the exemption rate is rising. In Michigan, the percentage of children entering the school system who were exempt from vaccination requirements exceeded 3% for the first time in 2000 [4]. In Colorado, the percentage of those seeking exemptions rose by 59% between 1987 and 1998.

In order to avoid loss of protection through herd immunity, the literature calls for greater public and parental education about the risks associated with being vaccinated versus not being vaccinated, in order to counter the influence of the anti-vaccination movement [5]. Education concerning the relative risks of opting out of vaccination is mitigated, however, when the basis of exemption is not related to risk assessment, but to religious beliefs. In particular, one important area related to this concern has not received proper attention: the phenomenon of "clustering" and how this might exacerbate the effects of the anti-vaccination movement. Clustering, as this relates to vaccination, is a phenomenon in which the proportion of people who seek exemption to mandatory vaccination is higher in a particular locality than it is for the broader population. It is this phenomenon that we examine in this paper.

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2. The phenomenon of clustering and critical mass

The phenomenon of clustering is attributable to a number of things. For example, a child may have an adverse reaction to vaccination; when this happens in a small community, it may become a focus of that community's attention, leading to a higher than normal exemption rate. Most importantly for our purposes, people who share religious beliefs that object to vaccination will, in many cases, live in close proximity to each other. For example, in Ohio, the Amish population is concentrated in nine of the state's 88 counties, with 7 of those 9 counties being contiguous [6]. Whatever the reasons that motivate some individuals to seek exemption to mandatory childhood vaccination, there is a danger of clustering once exemption begins to take hold in a particular community. As we will see below, this can create conditions in which exemption to vaccination multiplies.

In a classic book titled *Micromotives and Macrobehavior* [7], Thomas Schelling examines the ways in which the behavior of some individuals effect the behavior of others. The foundational concept Schelling works from is the concept of "critical mass." This concept involves an understanding of behavior as becoming widespread and self-sustaining once enough people have begun to engage in this behavior. The examples Schelling gives are as follows:

> I walk across the lawn if that seems to be what others are doing; I sometimes double-park if it looks as though everybody is double-parked.... If a few people get away with smoking in a non-smoking section... so many others will light up... [8].

Schelling goes on to observe:

> What is common to all these examples is the way people's behavior depends on *how many* are behaving a particular way... [9].

The influence of the behavior of some people on the behavior of others may well lead to a multiplying effect once a critical mass is reached. An example Schelling uses to illustrate this phenomenon involves students deciding whether to take a course for a letter grade or pass–fail [10]: if this option is available to all students, there will be some who take the course for a grade and some who take it pass–fail regardless of what others do. Many students, however, will choose according to how many others are choosing in that particular way—this is called the "intermediate group." The actual number of other students required to influence the "intermediate group" will differ, however, among the members of the intermediate group. Nonetheless, if a critical mass of students who choose one option independent of the actions of others is reached, the intermediate group can soon begin to choose in a common way.

Schelling explains that if the number of students who choose to take the course pass–fail is great enough to induce those who require only a minimum number of others in order to choose pass–fail, then these students will be influenced to choose this option. When these "intermediate group" students requiring only a minimal level of others are added to those who choose pass–fail independent of the behavior of others, however, it forms a group of enough students choosing pass–fail to induce more "intermediate group" students to choose the pass–fail option. The addition of these students to those choosing pass–fail, in turn, induce even more intermediate group students to choose this option, and so on until all but the students who will choose to take the course for a letter grade regardless of the behavior of others are taking the course pass–fail. This phenomenon is known as "tipping" [11].

How do the above phenomena relate to threats to herd immunity? Because those whose religious or personal views create a willingness to seek exemption to mandatory childhood vaccination often live, as we discussed earlier, in proximity to others who share these outlooks, the possibility of reaching a "critical mass" of exemptors large enough to undermine herd immunity is made more likely. Herd immunity, though not requiring 100% compliance with mandatory vaccination, nonetheless requires a very high percentage of the population to be vaccinated (since not all of those who *are* vaccinated will achieve immunity).

Based on national and state averages, the number of people who seek exemption from mandatory childhood vaccination is, on average, very low [12]. There are "clusters" of exemptions in local communities, however, that are much higher than the national or state averages. For example, while the percentage of people exempted from mandatory childhood vaccination is only 0.64% nationally, Utah has a rate of exemption twice that percentage (1.2%). Furthermore, one county in Utah (Washington county), has an exemption rate nearly six times the national average (3.7%). This high exemption rate undermined herd immunity for this county, resulting in an outbreak of measles lasting 6 viral generations and 107 cases, half of which were contracted by people who *had* been vaccinated [13].

Returning to Schelling's analysis, even if we assume that most people will not fall into an "intermediate group" for seeking exemption to vaccination (unlike the students in Schelling's example), but instead will fall into the group that will choose vaccination for their child regardless of the behavior of others, the tendency of those who might be induced to seek exemption, to live in proximity to others who might also be induced to seek exemption, creates conditions in which a critical mass of exemptors could result in "tipping" that undermines herd immunity. That is, even if we assume that the "intermediate group" for seeking exemption to childhood vaccination is small, the tendency of those who do fall into this intermediate group to live in proximity to others in this intermediate group poses a potential "tipping" phenomenon that could undermine herd immunity.

Evidence for the results of clustering can be seen in recent outbreaks of pertussis and rubella among Amish populations, and in the period 1985–1994, when 13 outbreaks of measles among persons with religious exemptions were

documented, resulting in more than 1200 cases and at least 9 deaths. This phenomenon is not unique to the US: a 1999 measles outbreak in the Netherlands also exemplifies this phenomenon. What began with a cluster of children enrolled in a religious school whose members routinely decline vaccination, grew into a 10-month-long outbreak, with 2961 reported cases. These cases were largely concentrated in the communities in which members of this religious organization reside, and the vast majority of those who contracted the disease—2317 of the 2961 cases—were found to have been eligible for vaccination but had declined for religious reasons. In addition, five percent of those who contracted the disease whose vaccination status was known had received at least one dose of the measles mumps and rubella (MMR) vaccine [14]. While vaccination of children in the Netherlands is recommended rather than compulsory for entrance into schools, most children are vaccinated. However, in some communities with significant numbers of members of this religious group coverage rates were as low as 53%.

3. Local communities and critical mass

Central to the understanding of what dangers the phenomena Schelling describes pose to herd immunity, is a recognition that the number of "others" needed to induce "tipping" may be related to the make-up of the community one lives in. While some behaviors will be influenced by the *absolute number* of other people who engage in that behavior, Schelling observes that other behaviors are "undoubtedly" influenced by the *proportion* of other people who engage in that behavior, rather than absolute numbers [15]. For these behaviors, the make-up of a particular community becomes of great importance. If a community is composed of people that disproportionately tend to display a particular characteristic, the tipping phenomenon is increased when related to proportionate numbers. For example, consider attendance at an "optional" class field trip: if the attendance of some is influenced by the proportion of other class members who attend, it might matter if the course is one that is a "general required course" or one attracting only students who have an inherent interest in the subject. If the latter, the students may have "self-selected" according to characteristics that will bias the proportion who attend the field trip. Regarding this type of attendance phenomenon, Schelling states:

> By separating away half the population, and specifically the half least likely to attend, we have doubled the influence of everybody who attends—doubled the percentage that he or she represents [16].

In brief, when a group of people is composed in a way that tends to select for a certain characteristic or characteristics, the influence of those characteristics becomes greater. This phenomenon is known as "separating populations." States Schelling:

> If it is proportions that matter—smoking cigarettes or wearing turtlenecks... depending on the fraction of the relevant population that does so—there is the possibility of dividing or separating populations. If people are influenced by local populations—the people they live with or work with or play or eat with or go to school with or ride the bus with... any local concentration of the people most likely to display the behavior will enhance the likelihood that, at least in that locality, the activity will reach critical mass [16].

Exemption to mandatory childhood vaccination is often based on religious beliefs that are not "mainstream" in the society as a whole. Often, this type of shared religious belief will result in communities whose make-up is "self-selected" for this characteristic. The Amish, Christian Scientists, and Jehovah's witnesses are but a few examples of religious groups whose members are likely (relative to the population as a whole) to seek exemption to childhood vaccination. The fact that members of groups whose shared beliefs tend to make them open to seeking exemption also tend, as we have seen at the outset of this paper and in outbreaks described in the previous section, to live in proximity to other members of these groups, create conditions in which a clustering of exemptions sufficient to undermine herd immunity might occur.

The dangers that the 'clustering' phenomenon poses goes beyond the groups that opt out of vaccination. For example, in Colorado public health records confirmed that, for 11% of vaccinated children who contracted measles between 1987 and 1998, the exposure source was unvaccinated children; however, because two-thirds of the measles exposure sources during this time period were unknown, it is reasonable to deduce that the actual percentage of vaccinated children who contracted measles from unvaccinated neighbors was significantly higher. Awareness of this danger is essential for physicians advising parents in communities susceptible to clustering, and for local authorities who determine whether to grant exemption to mandatory childhood vaccination in a particular community.

Given the growing numbers of exemptions, it is imperative that physicians and policy makers be vigilant for dangerous "clustering" that might undermine herd immunity. In communities susceptible to the clustering phenomenon, difficult decisions may need to be made to deny exemptions, even where current rates of exemption fall below a level that threatens herd immunity, in order to avoid a snowballing of exemptions that would threaten not only those who seek exemption, but some percentage of those who undergo vaccination.

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Nearly 40 million children are dangerously susceptible to growing measles threat

Press Release

Embargoed Until: Wednesday, November 23, 2022, 1:00 p.m. ET/Atlanta – 7 p.m. CET/Geneva

Contact:

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Measles vaccination coverage has steadily declined since the beginning of the COVID-19 pandemic. In 2021, a record high of nearly 40 million children missed a measles vaccine dose: 25 million children missed their first dose and an additional 14.7 million children missed their second dose, a joint publication by the World Health Organization (WHO) and the United States Centers for Disease Control and Prevention (CDC) reports. This decline is a significant setback in global progress towards achieving and maintaining measles elimination and leaves millions of children susceptible to infection.

In 2021, there were an estimated 9 million cases and 128,000 deaths from measles worldwide. Twenty-two countries experienced large and disruptive outbreaks. Declines in vaccine coverage, weakened measles surveillance, and continued interruptions and delays in immunization activities due to COVID-19, as well as persistent large outbreaks in 2022, mean that measles is an imminent threat in every region of the world.

“The paradox of the pandemic is that while vaccines against COVID-19 were developed in record time and deployed in the largest vaccination campaign in history, routine immunization programs were badly disrupted, and millions of kids missed out on life-saving vaccinations against deadly diseases like measles,” said WHO Director-General Dr Tedros Adhanom Ghebreyesus. “Getting immunization programs back on track is absolutely critical. Behind every statistic in this report is a child at risk of a preventable disease.”

The situation is grave: measles is one of the most contagious human viruses but is almost entirely preventable through vaccination. Coverage of 95% or greater of 2 doses of measles-containing vaccine is needed to create herd immunity in order to protect communities and achieve and maintain measles elimination. The world is well under that, with only 81% of children receiving their first measles-containing vaccine dose, and only 71% of children receiving their second measles-containing vaccine dose. These are the lowest global coverage rates of the first dose of measles vaccination since 2008, although coverage varies by country.

Urgent global action needed

Measles anywhere is a threat everywhere, as the virus can quickly spread to multiple communities and across international borders. No WHO region has achieved and sustained measles elimination. Since 2016, 10 countries that had previously eliminated measles experienced outbreaks and reestablished transmission.

“The record number of children under-immunized and susceptible to measles shows the profound damage immunization systems have sustained during the COVID-19 pandemic,” said CDC Director Dr. Rochelle P. Walensky. “Measles outbreaks illustrate weaknesses in immunization programs, but public health officials can use outbreak response to identify communities at risk, understand causes of under-vaccination, and help deliver locally tailored solutions to ensure vaccinations are available to all.”

In 2021, nearly 61 million measles vaccine doses were postponed or missed due to COVID-19-related delays in immunization campaigns in 18 countries. Delays increase the risk of measles outbreaks, so the time for public health officials to accelerate vaccination efforts and strengthen surveillance is now. CDC and WHO urge coordinated and collaborative action from all partners at global, regional, national, and local levels to prioritize efforts to find and immunize all unprotected children, including those who were missed during the last two years.

Measles outbreaks illustrate weaknesses in immunization programs and other essential health services. To mitigate risk of outbreaks, countries and global stakeholders must invest in robust surveillance systems. Under the Immunization Agenda 2030 global immunization strategy, global immunization partners remain committed to supporting investments in strengthening surveillance as a means to detect outbreaks quickly, respond with urgency, and immunize all children who are not yet protected from vaccine-preventable diseases.

More Information on Measles

For more information on CDC's global measles vaccination efforts, visit cdc.gov/globalhealth/measles.

For more information on WHO's measles response and support, visit who.int/factsheet/measles .

Quotes from our partners

"Since 2001 the American Red Cross has mobilized volunteers in 47 countries around the world to reach vulnerable communities with lifesaving vaccines. The global COVID-19 pandemic has reinforced just how critical vaccines are to preventing the spread of deadly diseases. We and our partners in the global Red Cross Movement are committed to averting needless deaths. It is imperative we work together to close existing immunity gaps and ensure that no one suffers from vaccine preventable diseases." – Gail McGovern, President and CEO of the American Red Cross.

"The significant decline in measles coverage is alarming. Gavi is supporting lower-income countries to get routine immunization programs back on track and continues to fund global outbreak response through the MR&I's Outbreak Response Fund. As an Alliance we are also pushing further, with targeted efforts to reach zero dose children and communities that consistently miss out on immunization and other essential services. This is fundamental to reducing outbreaks and keeping health systems strong and resilient in the face of other threats." Dr. Seth Berkley, Gavi CEO.

"Plummeting measles vaccination rates should set off every alarm. Tens of millions of children are at risk of this deadly, yet entirely preventable disease until we get global vaccination efforts back on track. There is no time to waste. We must work urgently to ensure life-saving vaccines reach every last child." Elizabeth Cousens, President and CEO, United Nations Foundation

"For three years, we have been sounding the alarm about the declining rates of vaccination and the increasing risk to children's health globally. Widening gaps in immunization coverage are letting measles – the most contagious yet vaccine-preventable killer disease – spread and cause illness and death. We have a short window of opportunity to urgently make up for lost ground in measles vaccination and protect every child. The time for decisive action is now." Ephrem Tekle Lemango, UNICEF Chief of Immunization.

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U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

CDC works 24/7 protecting America's health, safety and security. Whether diseases start at home or abroad, are curable or preventable, chronic or acute, or from human activity or deliberate attack, CDC responds to America's most pressing health threats. CDC is headquartered in Atlanta and has experts located throughout the United States and the world.

Last Reviewed: November 23, 2022

Hobby Lobby Stores, Inc. v. Sebelius

United States District Court for the Western District of Oklahoma

November 19, 2014, Decided; November 19, 2014, Filed

NO. CIV-12-1000-HE

Reporter
2014 U.S. Dist. LEXIS 161761 *

HOBBY LOBBY STORES, INC., et al., Plaintiffs, vs. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al., Defendants.

Prior History: *Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 2012 U.S. Dist. LEXIS 164843 (W.D. Okla., 2012)*

Core Terms

regulations, plaintiffs', contraceptive, parties, Religious, enjoining, costs, Patient, dismissal without prejudice, attorney's fees, seek to avoid, noncompliance, permanently, proceedings, employees, enforcing, minimizes, coverage, appears

Counsel: **[*1]** For Hobby Lobby Stores Inc, Mardel Inc, David Green, Barbara Green, Mart Green, Steve Green, Darsee Lett, Plaintiffs: Charles E Geister, III, Derek B Ensminger, LEAD ATTORNEYS, Hartzog Conger Cason & Neville, Oklahoma City, OK USA; Adele A Keim, Lori H Windham, Mark L Rienzi, Stuart K Duncan, The Becket Fund for Religious Liberty, Washington, DC USA; Eric S Baxter, PRO HAC VICE, The Becket Fund for Religious Liberty, Washington, DC USA.

For Kathleen Sebelius, Secretary of the United States Department of Health and Human Services, United States Department of Health And Human Services, Hilda Solis, Secretary of the United States Department of Labor, United States Department of Labor, Timothy F Geithner, Secretary of the United States Department of Treasury, United States Department of The Treasury, Defendants: Michelle R Bennett, Us Dept Of Justice Civil Div-20-Dc, Federal Programs Branch, Washington, DC USA.

For Senator Orrin G Hatch, Senator Daniel R Coats, Thad Cochran, Senator Mike Crapo, Senator Charles Grassley, Senator James M Inhofe, Senator Mitch Mcconnell, Senator Pat Roberts, Senator Richard Shelby, Congressman Wally Herger, Congressman Dan Burton, Congressman Donald Manzullo, **[*2]** Congressman John Mica, Congressman Lamar Smith, Amicuses: Andrew W Lester, Carrie L Vaughn, Lester Loving & Davies, Edmond, OK USA.

Judges: JOE HEATON, UNITED STATES DISTRICT JUDGE.

Opinion by: JOE HEATON

Opinion

ORDER

The parties are in agreement that plaintiffs are entitled to judgment in their favor on their claims asserted under the Religious Freedom Restoration Act ("RFRA"), in light of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 189 L. Ed. 2d 675 (2014)*.[1] They disagree, however, as to the form that judgment should take. Plaintiffs seek a broad order enjoining both the statute involved and the implementing regulations adopted by the Department of Health and Human Services.[2] Defendants seeks a narrower order focused on the particular regulations at issue in this case and as discussed in Burwell. Both parties are concerned with the potential impact of future regulatory developments—with plaintiffs seeking to avoid having their success in this litigation undercut by some future regulation which may insufficiently accommodate their religious rights, and defendants seeking to avoid some

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[1] *Though the parties do not explicitly address the issue, the prevailing plaintiffs are the corporate entities, Hobby Lobby Stores, Inc. and Mardel Inc. The Supreme Court affirmed the judgment of the Tenth Circuit, which ran in favor of the corporate plaintiffs*.

[2] *The principal statute at issue is 42 U.S.C. § 300gg-13(a)(4), which generally requires an employer's group health plan to furnish "preventive care and screenings" for women without "any cost sharing requirements*."

anticipatory limitation on otherwise proper regulatory initiatives that they might undertake. The crux of the parties' competing positions appears to be whether the court's **[*3]** judgment should enjoin the operation of the statute involved, in addition to the particular regulations implementing the contraceptive mandate.

While the plaintiffs' desire to avoid unnecessary future litigation is understandable, the court concludes the course of proceedings in this case is more consistent with a limited order which does not attempt to anticipate future regulatory developments. Plaintiffs' complaint challenged "the regulations issued under the [Act]" and referred to the "administrative rule at issue in this case ('the Mandate')." Doc. #1, ¶¶ 1, 8. Similarly, the Supreme Court focused on the regulations—"We hold that the regulations that impose this obligation violate RFRA ...." *Burwell, 134 S.Ct. at 2759*. "Since RFRA applies in these cases, we must decide **[*4]** whether the challenged HHS regulations substantially burden the exercise of religion ...." *Id*. A broader order enjoining any potential application of the statute thus goes beyond what has been actually decided and litigated in this case.

A narrow approach also minimizes constitutional concerns which might otherwise arise. Allowing one statute to trump another later-enacted statute potentially implicates longstanding constitutional limitations on the power of one Congress to bind a future Congress. See, e.g., *United States v. Winstar Corp., 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996)*; *Reichelderfer v. Quinn, 287 U.S. 315, 318, 53 S. Ct. 177, 77 L. Ed. 331 (1932)* ("[T]he will of a particular Congress ... does not impose itself upon those to follow in succeeding years." Justice Scalia has suggested this principle limits the power of one legislature to control the manner in which a later legislature makes its will known. *Lockhart v. U.S., 546 U.S. 142, 148, 126 S. Ct. 699, 163 L. Ed. 2d 557 (2005)* (Scalia, J., concurring). RFRA, particularly the requirement of *42 U.S.C. § 2000bb-3* that RFRA's provisions control unless the future statute explicitly excepts itself from RFRA, arguably does exactly that. Though the issue appears not to have been raised in the appellate proceedings in this case,[3] it has potential applicability in defining RFRA's reach. A judgment directed solely to the regulations issued by HHS, rather than to the entire statutory **[*5]** basis for them, minimizes any issue in that regard.

Accordingly, in light of the Supreme Court's decision in Burwell and the parties further submissions, it is **ORDERED** as follows:

1. Judgment will be entered in favor of Hobby Lobby Stores, Inc. and Mardel, Inc. and against defendants on the corporate plaintiffs' claims under the Religious Freedom Restoration Act.

2. Defendants, their employees, agents, and successors in office are permanently **ENJOINED** from enforcing against plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc., their employee health plan(s), the group health coverage provided in connection with such plan(s), and/or these plaintiffs' health insurance issuers and/or third-party administrators with respect to these plaintiffs' health plan(s):

> (a) the regulations promulgated by the United **[*6]** States Department of Health and Human Services under the Patient Protection and Affordable Care Act of 2010, referred to by the Supreme Court in Burwell as "the contraceptive mandate," which require plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc. to provide their employees with health coverage for contraceptive methods, sterilization procedures, and related patient education and counseling to which patients object on religious grounds, *e.g.*, *26 C.F.R. §54.9815-2713(a)(1)(iv)*; *29 C.F.R. §2590.715-2713(a)(1)(iv)*; *45 C.F.R. § 147.130(a)(1)(iv)*;
> (b) any penalties, fines, or assessments for noncompliance with "the contraceptive mandate;" and
> (c) from taking any other actions based on noncompliance with "the contraceptive mandate;"

3. All plaintiffs' remaining claims are **DISMISSED WITHOUT PREJUDICE**.

4. As the prevailing parties, Hobby Lobby Stores, Inc. and Mardel, Inc. are entitled to recover their costs pursuant to *Fed.R.Civ.P. 54(d)(1)*. The parties are directed to confer and attempt to reach an agreement on attorney's fees, *see* *42 U.S.C. § 1988(b)*, and costs. If the parties are unable to reach an agreement, plaintiffs may file a motion for attorney's fees and a bill

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[3] *The Court of Appeals appears to have viewed the reach of RFRA as being only a question of the legislative intent of the earlier Congress: "In addition, Congress knows how to ensure that a prior-enacted statute restricts the meaning of a later-enacted statute. RFRA is just such a statute, restricting later-enacted federal statutes unless those statutes specifically exempt themselves," citing 42 U.S.C. § 2000bb-3(b). Hobby Lobby Stores Inc. v. Sebelius, 723 F.3d 1114, 1130 (2013).*

of costs within **sixty (60) days** of the entry of judgment.

IT IS SO ORDERED.

Dated this 19th day of November, 2014.

/s/ Joe HeatonJoe Heaton

JOE HEATONJOE HEATON

UNITED STATES DISTRICT [*7] JUDGE

JUDGMENT

In accordance with the order entered this date, judgment is entered in favor of plaintiffs Hobby Lobby Stores, Inc. and Mardel, Inc. and against defendants on the corporate plaintiffs' claims under the Religious Freedom Restoration Act. As stated more fully in the order, defendants are permanently enjoined from enforcing against the corporate plaintiffs the regulations identified as the "contraceptive mandate" in *Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 189 L. Ed. 2d 675 (2014)*. The corporate plaintiffs shall recover their costs. All other claims of plaintiffs are dismissed without prejudice.

IT IS SO ORDERED.

Dated this 19th day of November, 2014.

/s/ Joe HeatonJoe Heaton

JOE HEATONJOE HEATON

UNITED STATES DISTRICT COURT

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59 Harv. L. Rev. 1060

Harvard Law Review
September, 1946
Joseph D. Block
Chicago, Ill.

SUITS AGAINST GOVERNMENT OFFICERS AND THE SOVEREIGN IMMUNITY DOCTRINE

THE doctrine of sovereign immunity, which in this country prevents a suit against the United States or a state without legislative consent, gave rise at an early date to the problem of whether a suit against government officials is actually a suit against the government itself. That this has been a problem of plaguing proportions is well demonstrated by the multitude of cases on the point, by the disharmony apparent in the decisions of those cases, and by the legal fictions invoked by the courts to aid them in reaching their results.[1] The consequences have not been satisfactory from the standpoint of doctrinal analysis and treatment; and more important, relief has been denied against unconstitutional and unauthorized official action on formalistic and technical grounds. The increased reliance today on administrative techniques for effective governmental operation makes it timely to reexamine the problem of suits against officers of the government and to propose a possible solution of the difficulties which appear.

I

Various reasons have been advanced from time to time in justification of denying jurisdiction to the courts in cases against sovereign states. Such of those reasons as are based upon notions of royal supremacy clearly have no application in this country and can be put to one side.[2] Also, the indignity of subjecting a government ***1061** to judicial process at the instance of private parties[3] seems to be an objection lacking in force, however substantial a consideration it might have been in the times when state and federal governments were less solidly established than they are now. Similarly, the passage of time, with its mutations upon the theory of the role of the State in society, has sapped the strength from Mr. Justice Holmes' explanation that "there can be no legal right as against the authority that makes the law on which the right depends."[4] Chief Justice Marshall, in a more practical vein, concluded that the Eleventh Amendment, which gave constitutional status to the doctrine of sovereign immunity in the case of certain suits against states, was adopted to protect the states against compulsory payment of their debts.[5] This reason, standing alone, no longer seems entitled to the weight it possessed at the time of *Chisholm v. Georgia*.[6] This brings us to the final explanation and the only one that seems worthy of consideration as a real policy basis for the doctrine of sovereign immunity today: it is possible that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property.[7]

***1062** To be weighed against this consideration of undue interference with the operations of government is the strong interest in permitting individuals who have suffered an invasion of their rights by government officials acting under an unconstitutional statute or in excess of their statutory authority to bring suit for appropriate relief. To weigh these interests against each other would seem to lead to a decision in favor of the latter. It does not seem logical to allow a government to claim that its functions are being unduly interfered with when the exercise of the function complained of is either unconstitutional or unsupported by statutory authority.

It is recognized, however, that the burden of litigation itself may be a serious interference with the efficient operation of government, and that this burden would be too greatly increased if plaintiffs could gain admittance to federal courts simply by leveling charges of unconstitutionality or lack of statutory authority at official action which they wish to resist. While this factor is certainly entitled to consideration, it is believed that such a burden can be avoided more appropriately in other ways than by a wooden application of the sovereign immunity doctrine. To prevent groundless allegations of unconstitutionality or lack of statutory authority from conferring jurisdiction upon the federal courts and thus subjecting government officials to the impediment of litigation palpably lacking in merit, it should be required that such allegations be substantial. The danger of suspending a vital governmental function by an erroneous decree of a lower court could well be mitigated by sound judicial administration in refusing to grant relief pending appeals in those cases in which the governmental interest in uninterrupted activity outweighs the private interest which the plaintiff is seeking to protect. It is in such ways[8] that both the burden of litigation and the direct interference with governmental operations can be controlled without sacrificing the individual's interest in seeking relief from unconstitutional or unauthorized official action.

The case of *Mine Safety Appliances Co. v. Forrestal*[9] provides an illustration both recent and relevant of the standard treatment of this subject. Acting pursuant to the Renegotiation Act, Forrestal, ***1063** then Under Secretary of the Navy, determined that the plaintiff company had received excessive profits on government war contracts, and accordingly notified the company that unless action were taken to eliminate these profits the Under Secretary would direct government disbursing officers to withhold payments due the company on other contracts. The company filed a complaint in the United States district court, alleging that the Renegotiation Act was unconstitutional and praying for a declaratory judgment and an injunction to prevent Forrestal from taking action which would stop payments from the Treasury of the amounts due to the company on its other contracts. The Supreme Court, assuming for the purpose of disposing of the jurisdictional issue that the Renegotiation Act was unconstitutional, nevertheless affirmed the lower court's dismissal of the complaint. Some of the language in the opinion indicates that the suit was dismissed because the United States was deemed an indispensable party. However, the whole opinion leaves the impression that the Court believed that not only was the United States an indispensable party, but that it was the only party in interest.[10] The suit, thus deemed in substance against the United States, was not maintainable in the absence of consent.

If in this case the doctrine of sovereign immunity had been viewed in the light of its *raison d'être* — the prevention of undue interference with governmental operations — it is believed that there would have been no necessity for the dismissal of the suit on this ground, and that the interest in the assertion of constitutional rights could have been accorded full protection. The only interference involved in the suit was with the operation of the Renegotiation Act and the procedure followed by the Under Secretary of the Navy pursuant to the Act. However, since the Act was alleged and assumed by the Court to be unconstitutional, the claim that such interference constituted undue interference within the protective ambit of the sovereign immunity doctrine should not have been permitted. It is true that the result of an injunction against Forrestal may have been eventual payment to the plaintiff from the ***1064** United States Treasury. But all that the injunction would have accomplished was the removal of an assumedly unconstitutional withholding order imposed by another department. With the order removed, the normal governmental procedure for the disbursement of funds would still have to be followed, and similarly in all other respects there would be no interference with the Treasury and its funds.[11] This is not to take issue with dismissal of the complaint, which may well have been justified on more appropriate grounds.[12]

The *Mine Safety Appliances* case illustrates the problem of the relation between the doctrine of sovereign immunity and that of the indispensable party. Both of these are of importance in connection with suits against government officers, but they have not been distinguished carefully by the courts. The sovereign immunity doctrine comes into play when the court regards the suit, though nominally against an official, as in substance or effect against the government for which the official is acting. This deprives the court of jurisdiction unless the particular government, through the action of its legislature,[13] has consented to be sued in a proceeding and tribunal of that nature.[14] With respect to suits ***1065** against the Federal Government, it is wholly a judge-made doctrine, since there is nothing in the Constitution requiring it.[15] With respect to suits against the states in the federal courts, the doctrine is judge-made so far as suits by citizens of the same state are concerned.[16] So far as suits against

a state by citizens of other states or subjects of foreign governments are concerned, the doctrine is embedded in the Eleventh Amendment of the Constitution.[17]

The indispensable party doctrine,[18] on the other hand, requires the dismissal of a suit when all the parties whose presence is essential to a proper disposition of the case are not brought in. While the failure to join indispensable parties is frequently referred to as a jurisdictional defect, there is also language in the opinions indicating that this is not so.[19] In any event, it is apparent that the courts do not regard dismissal on this ground as merely discretionary. They have not kept the doctrine distinct from the sovereign immunity concept, but have been prone to fuse the two or use them interchangeably. In a suit against a government officer, although ***1066** the court's real objection may be that the suit is substantially one against the government itself and is thus barred by the sovereign immunity doctrine, it is not uncommon to find the court speaking in terms of the indispensable party rule, saying that the suit must fail because the government is an indispensable party and is not before the court. The same tests are applied in the opinions to decide whether the suit is one against the government and also to determine whether the government is an indispensable party.[20] The result of this admixture is that the terminology used by the courts cannot be taken at its face value and cannot be relied upon to determine the actual holdings of the cases. Of course, this is not particularly harmful once it is recognized, but it would clarify the issue if the courts would dispense with adversion to the indispensable party rule in suits against government officers when the essential objection to the maintenance of the suit is that it is substantially one against the government.[21] This would place the emphasis where it belongs — on the question of sovereign immunity — and would permit the development and use of the indispensable party doctrine within its more appropriate sphere. That sphere in this particular field of litigation would embrace those suits against government officers in which the defendants are proper parties but additional government officers[22] or other persons whose presence is indispensable are not before the court.

II

The decision in the *Mine Safety Appliances* case is not without precedent to support it. However, there is also precedent which might well have been used to reach an opposite result on the issue of sovereign immunity. A review of the development of the cases in this field is necessary to see what elements the courts have relied ***1067** upon in reaching their decisions and to appraise the soundness of these elements.

The starting point of that class of cases in which the purpose of the suit against the government officer was to reach funds in the governmental treasury is *Osborn v. Bank of the United States*.[23] Although relief was granted in that case, the opinion has been taken as prescribing principles which in later application have frequently resulted in denial of relief. There, Ohio had enacted a statute imposing a heavy, tax on the Bank of the United States. Relying on the decision in *McCulloch v. Maryland*,[24] the Bank had obtained an injunction in the federal courts to restrain the enforcement of the tax statute on the ground of its unconstitutionality. Thereafter, and in violation of the injunction, an official of Ohio entered upon the premises of the Bank and seized a sum of money, which was turned over to the state treasurer as collection of the tax. The Bank then filed a supplemental bill in equity against the state treasurer and state auditor to enjoin them from using or paying away the money and to compel them to restore it to the Bank. The prayer for this relief was granted and the decree was affirmed by the Supreme Court.

The extent to which crucial political factors[25] impelled Chief Justice Marshall and the Court to reach a decision for the Bank is perhaps best illustrated by his enunciation of the doctrine that the jurisdictional bar of the Eleventh Amendment is limited to those suits in which a state is a party on the record. The artificiality of this rule was soon recognized, and it was ultimately thoroughly discredited and abandoned.[26] Moreover, in view of Marshall's disposition of the remaining issues in the *Osborn* case, the rule was not necessary to the decision.[27]

***1068** Although passing over the problem of whether the suit was one against the state in this rather cavalier manner, Marshall was still faced with the objection that the state was the real party in interest, and that consequently the suit could not be sustained

inasmuch as a court of equity will not make a decree unless all those who are substantially interested are made parties. Marshall, in answer to this contention, stated that the defendant officials had obtained the funds in question as the result of a trespass which made them personally liable to the full extent of the injury. This personal liability was relied upon to give them the status of real parties in interest, amenable to the preventive powers of a court of equity.[28] The opinion indicates that the funds seized from the Bank were held segregated and not mingled generally with the other funds in the state treasury, and this has been taken to explain the ability of the Court to permit restitution.[29]

Thus, a Pyrrhic twist was given to this victory with respect to inroads on the doctrine of sovereign immunity in suits against government officers. The insistence on a trespass or other individual liability on the part of the defendant official in order to avoid the doctrine has persisted to the present day, as can be seen from the language in *Mine Safety Appliances Co. v. Forrestal*.[30] Similarly, the devotion to the bookkeeping notion of segregation threatens to endure.[31] Both these requirements can be accorded only the weight of fictions, as they have no substantial relevance ***1069** to the fundamental inquiry whether a particular suit against a government officer would cause such interference with the operations of government that it should appropriately be regarded as a suit against the government itself.

An interesting series of cases in which the actions were brought to recover moneys out of state treasuries involve suits in the federal courts against tax officials for the refund of taxes paid. In *Smith v. Reeves*,[32] such a suit was regarded as one against the state, primarily because it was not to recover specific funds in the hands of the state treasurer but would require payment out of the general funds in the treasury. This is an example of the controlling influence of the segregation fiction. A contrary result was reached in *Atchison, T. & S. F. Ry. v. O'Connor*,[33] the Court referring to the allegation in the taxpayer's complaint that the defendant official still had the funds in his possession, without, however, specifically making that point the basis of the decision. More recently, the problem again came before the Supreme Court in *Great Northern Life Insurance Co. v. Read*.[34] In this case, as in *Smith v. Reeves*, a state statute provided for the payment of taxes under protest and for suits against state officials for the recovery of the amounts so paid. However, the statute in the *Read* case further provided that it should be the duty of the collecting officer to hold taxes paid under protest separate and apart from all other taxes collected by him. As we have seen, the objection to the suit in *Smith v. Reeves* was that payment would be required out of the general funds in the state treasury. It would seem to follow that, since segregation was maintained in the *Read* case, no such argument could be advanced and the suit would not be regarded as one against the state. The Court, however, after having repeatedly attached great weight to the element of segregation in the past, now declared that it was an "immaterial difference that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer."[35] Consequently, the Court held that the suit was against the state, and that it was barred since the consent given by the state to suit under the statute did not extend to federal court proceedings.

Having disregarded the element of segregation, absence of which ***1070** was apparently the real basis for the decision in *Smith v. Reeves*, the Court nevertheless purported to follow that case as controlling, emphasizing the similarity between it and the *Read* case in that both involved suits against state officials as such, and were brought in accordance with state statutes authorizing proceedings for recovery of illegally exacted taxes. The Court attempted to distinguish *Atchison, T. & S. F. Ry. v. O'Connor* as a suit to recover personally from a tax collector money wrongfully exacted by him under color of state law.

This rationale hardly seems adequate. The insertion or omission of the defendant's official title should not control the result.[36] Nor should the similarity of the form of the federal court proceeding to that prescribed by a state statute consenting to suit in state courts be permitted to obscure the essential nature of the action.[37] The existence of a statute permitting suits in the state courts for tax refunds should have little bearing on whether a suit for the same purpose in the federal courts is one against the state so as to bar federal jurisdiction. Mr. Justice Frankfurter's dissent in the *Read* case thoroughly exposes the difficulties inherent in the position taken by the majority:

... as I read the opinion of the Court, even a suit of this very nature for the recovery of money paid for a disputed tax will lie against the collector in what is called his individual capacity; that is, a suit against the same person on the same cause of action for the same remedy can be brought, if only differently entitled. In view of the history of such a suit as this and of the incongruous consequences of disallowing it in the form in which it was a case in the federal court in Oklahoma, the claims of ***1071** sovereignty which are sought to be respected must surely be attenuated and capricious.[38]

Nevertheless, the *Read* case is the law today, as demonstrated by two recent Supreme Court cases decided upon its authority,[39] and must be taken to stand for the formalistic proposition that a suit brought against state tax officials to recover taxes will be deemed to be a suit against the state where the plaintiff has permitted a superabundance of caution to lead him to comply with some procedural requirements set out in the state statutes governing suits for tax refunds. If the plaintiff, however, ignores the state statutes, his suit in the federal courts against the same parties on the same cause of action for the same relief will stand a much better chance of success.[40]

The readiness of the courts to interpose the bar of sovereign immunity in suits against government officers designed to reach funds in the governmental treasuries is not always found in those cases involving actions against government officials to recover possession of real property. Since both types of suits stand substantially on a par with respect to the extent of their interference with governmental operations, it is reasonable to assume that the variance in the judicial approach is conditioned more upon notions of the sanctity of the individual's rights in real property than upon any attempt to apply the doctrine of sovereign immunity with careful regard for its purpose.

In four early cases in which actions were brought against government officers to recover possession of land occupied by the United States, the Supreme Court took jurisdiction and decided the question of title without even a reference to any possibility that sovereign immunity might stand in the way.[41] In ***1072** *United States v. Lee*,[42] the leading case of this class, a suit against officers of the Federal Government to recover possession of land used by the United States as a military station and national cemetery was held not to be a suit against the Government, and, the title of the United States having been found invalid, judgment was rendered for the plaintiff.[43]

Numerous decisions of the Supreme Court in cases involving disputes over federal land grants to railroads and to states, usually with the Secretary of the Interior and the Commissioner of the General Land Office as defendants, have reached conflicting results as to whether the suits were barred by sovereign immunity. Where it clearly appears that title to the land has vested in the grantee, the Court has held that the suit is not one against the Government.[44] However, where legal title to the lands is in the United States or where there is a substantial question as to who has title, the Court has generally held that the suit is one against the United States.[45] This cart-before-the-horse method of examining the merits to reach an answer to the jurisdictional problem is not in keeping with the Court's settled approach in other cases where the allegations of the plaintiff's complaint are assumed to be true for the purpose of disposing of the jurisdictional issue.[46] Moreover, in ***1073** those land grant cases in which the Court has held the sovereign immunity bar applicable, there can usually be found alternative grounds for the decisions which reduce the weight of the holdings on the sovereign immunity point.[47]

The state debt repudiation debacle following the Civil War gave rise to a series of cases against state officials which were frequently disallowed on sovereign immunity grounds. These cases are of interest because they indicate that, in cases involving substantially the same facts, different results on the jurisdictional problem are made to depend on the form of relief sought. In the *Virginia Coupon Cases*,[48] actions for damages and for an injunction were sustained against tax collectors who had refused to accept state coupons in payment of taxes, in accordance with the statute under which they had been issued, and had proceeded to levy upon and seize the taxpayers' property. The sovereign immunity doctrine, however, was applied in a number of subsequent coupon cases. In *Hagood v. Southern*, the Court regarded the suit as one to compel specific performance of a contract between the plaintiff and the state, emphasizing that affirmative official action would be required on the part of the defendant officials if the desired relief were granted.[49] The element of affirmative relief should more appropriately be considered on the issue of

whether the desired affirmative action is of the non-discretionary type for which mandamus or its equivalent will be granted.[50] Moreover, reliance on a ***1074** prayer for affirmative relief as the point of demarcation between suits against states and those which are not seems especially weak in the light of the modern tendency to phrase most prayers in injunctive language.[51]

In re *Ayers*,[52] another case which arose out of the debt repudiation era, is still cited as binding precedent in spite of the fact that its holding rests on a tenuous and over-worked distinction. After Virginia had been thwarted in her initial attempts to reject her coupons in payment of taxes, a state statute was passed requiring officials to sue taxpayers who had tendered coupons for taxes and providing that the taxpayers could prevail only after satisfying an onerous burden of proof as to the genuineness of the coupons. British subjects who had purchased coupons brought suit against the state attorney general and others to enjoin them from commencing suits under the statute. The Supreme Court held that the injunction would indirectly compel specific performance of the state's contract, so that the suit was against the state. The Court reviewed earlier decisions and concluded that those cases in which sovereign immunity was held inapplicable, such as *Osborn v. Bank of the United States*, the *Virginia Coupon Cases*, and *United States v. Lee*, were explainable because of the individual liability of the defendant officials, a factor absent in the case at hand.[53] This distinction with regard to individual liability, like the matters of segregation of funds in the governmental treasury, trespass on the plaintiff's property, and request for affirmative relief, seems little more than a convenient label to express a conclusion. The courts sometimes lean heavily upon it, and sometimes ignore it.

***1075** As some of the debt repudiation cases have indicated, the Court will be likely to deem the suit one against the government if it appears that the plaintiff's complaint rests upon a breach of contract by the government and seeks to compel specific performance directly, or indirectly by enjoining the acts which constitute the breach.[54] The approach heretofore suggested for the application of the sovereign immunity doctrine can also provide a workable solution here. When the breach of contract is the result of official action pursuant to an unconstitutional statute or in excess of statutory authority, the interest in protecting individuals from the consequences of such conduct should preclude recognition of the sovereign immunity doctrine; and, other prerequisites being present, appropriate relief should be granted. On the other hand, when the breach of contract is not occasioned by such conduct, but arises, for example, from a discretionary act of the official or from a difference of opinion as to the interpretation of the terms of the contract, then the underlying policy of the sovereign immunity doctrine to prevent undue interference with the operations of government should be afforded full protection and the suit barred for lack of jurisdiction. In this latter type of case, unlike the former situation, the plaintiff has no interest which outweighs the reason for applying the sovereign immunity doctrine.

This suggestion can perhaps be clarified by reference to *Wells v. Roper*,[55] where the contract between the plaintiff and the Postmaster General, acting for the United States, contained a stipulation allowing cancellation upon notice. When the Postmaster General gave notice of cancellation, the plaintiff brought suit against him to enjoin the annulment of the contract. The Court properly applied the sovereign immunity bar, since there was no allegation that the defendant official was proceeding under an unconstitutional statute or in excess of his statutory authority, but merely that his action was inconsistent with the stipulation in the contract. It is relevant in this type of case that Congress has established the Court of Claims to decide contract actions against the United States, and that remedy may be available even though the sovereign ***1076** immunity doctrine forecloses other forms of relief. Even where the breach is caused by action under an unconstitutional statute or in excess of statutory authority, the adequacy of that remedy by way of damages may suffice as a proper ground for declining to exercise jurisdiction to compel, in effect, specific performance.

There are two remaining types of cases in which the courts have been less reluctant to grant relief than in the classes of suits against government officers previously treated. These are suits to enjoin the collection of taxes and to enjoin regulatory administrative action. Both types are treated similarly; the governing principle, stated generally, is that a suit against an officer who is proceeding for either of these two purposes under an unconstitutional statute or in excess of his statutory authority will not be considered a suit against the government. Even in these cases, however, the courts from time to time take occasion to declare that the official has either committed or is threatening to commit a trespass against vested property rights of the plaintiff, and hence is individually liable, so that the suit is not one against the government.[56]

A few of the tax cases present interesting situations. In *Tomlinson v. Branch*;[57] a railroad was given a tax exemption by its corporate charter. When the state later attempted to impose a tax on the railroad, an injunction was granted against the state officials to enjoin them from collecting it. The Court did not mention the sovereign immunity point, although the result could be described as equivalent to enjoining a breach of contract by the state. In the federal field, *Rickert Rice Mills v. Fontenot*[58] held that a collector of internal revenue could be enjoined from collecting taxes levied pursuant to the Agricultural Adjustment Act after those taxes had been declared unconstitutional in the *Butler* case.[59] This is an instance in which the Court felt constrained to justify the result by reasoning that, if allowed to proceed, the collector would be guilty of a trespass. That the claim of invalidity of the tax must be meritorious is indicated by *Worcester County Trust* ***1077** *Co. v. Riley*.[60] There, an executor of an estate sought to join as defendants under the Federal Interpleader Act the tax officials of Massachusetts and California, both of whom were threatening to subject the estate to a death tax on the total amount of intangibles. The Court held that it had no jurisdiction since the suit was in substance against the two states, and pointed out that no showing was made that either defendant was proceeding in violation of any state law or of the laws or Constitution of the United States.[61]

With respect to suits against government officers to enjoin regulatory administrative action, the Supreme Court early demonstrated a willingness to refrain from imposing the bar of sovereign immunity.[62] In *Fitts v. McGhee*,[63] however, a halt was called and the suit there involved was held to be against the state. The action was to enjoin the enforcement of a state rate statute and to restrain the institution and prosecution of civil and criminal suits for rate violations. The Court jumbled together a number of reasons to support its conclusion. One — that since a state can only act by its officers, an order restraining them is one which restrains the state itself — is, of course, true in every case. The Court also noted the lack of trespass on the plaintiff's property. This did not seem enough to sustain the decision, however, in view of earlier utility cases in which the lack of trespass did not prevent the maintenance of the suits.[64] This brought the Court to its two final ***1078** reasons, both of which seem addressed to the problem of want of equity rather than to the jurisdictional point of sovereign immunity. The Court stated that the defendant officials were not charged by law with any special duty in connection with the rate statute, and also, that if any prosecution were brought against the plaintiff, he would have an effective remedy by way of defense in that action. The lack of a special duty on the part of the officials named as defendants might well require dismissal of the suit because of lack of a case or controversy, or because of failure to show a threat of injury by them; but it would not seem to make the suit one against the state. In fact, it might even be said that a suit against officials specially charged by state law with a duty to act seems more nearly an attack upon the state itself than does a suit against officials without such a duty.

The leading case of Ex parte *Young*[65] did not ignore *Fitts v. McGhee*, but did greatly limit it. There is language in the *Young* opinion indicating that the element of trespass on the plaintiff's property is unnecessary provided an attempt to enforce an unconstitutional statute is involved.[66] With respect to the duty of the defendant official to act, the Court said that it need not be created specifically by the very statute being enforced against the plaintiff; a duty existing by virtue of the office and arising out of the general law would be sufficient.[67] Even with this concession, however, the emphasis on existence of some duty seems subject to the objection mentioned above, that the question of duty does not shed much light on the sovereign immunity issue. A further criticism of Ex parte *Young* is that its enunciation of the doctrine that an official proceeding unconstitutionally is "stripped of his official ... character"[68] gave impetus to the fiction that the suit must be one against an officer as an individual to escape the bar of sovereign immunity.

***1079 III**

An evaluation of the criteria upon which the courts have relied to determine whether a suit is in substance òne against the government leads to the conclusion that most of them are simply fictions. Although they undoubtedly served a useful purpose in assisting the courts in earlier times to alleviate the strict application of the sovereign immunity doctrine, it would seem that further progress in this direction now requires their abandonment. What is needed is frank recognition of the frequently

camouflaged fact that in practically every case against a government officer the interests of the government itself are so directly involved that it is actually the major defendant.[69] Enjoining a government official is certainly enjoining the government, and discouraging an official from acting by a suit for damages is similarly equivalent to halting government action. The courts know this is true, of course, but have apparently been caught in the dilemma of wishing to grant some relief against unauthorized governmental action while at the same time fearing that a frank recognition of the government's interest in these cases would bring down the bar of sovereign immunity to foreclose all relief. Out of this dilemma have been born the fictions.

If these judicial devices served to open up federal jurisdiction in all cases of unconstitutional or unauthorized action, they would be less objectionable. But, as we have seen, they stand in the way of relief in many instances. The chief obstacle is the notion that the government officer must be sued as an individual, and ironically enough, this notion has the greatest fictional content. No matter how the action may be entitled in these cases, the prime purpose is to reach the defendant as an officer because of his official conduct. A further incongruity in the "stripped-of-authority" doctrine is pointed up in those cases in which suits have been ***1080** allowed against government corporations.[70] It can hardly be asserted that such corporations are stripped of their official character, since it would seem that they can exist only in an official capacity. Also, the insistence that a trespass must have been committed on the plaintiff's property in order that the defendant official may be sued overlooks the fact that injuries arising out of unconstitutional action may be just as real and severe though there is no trespass. The trespass is apparently required to give rise to a personal liability for which the official can be sued as an individual. Once it is admitted that the official is being sued as an official, all these devices fall together.

It has been observed that at times the courts, in applying the bar of sovereign immunity, emphasize that funds sought to be recovered from the government have been mingled with the general funds in the treasury rather than kept segregated. It is difficult to regard this as anything more than a matter of bookkeeping. The interest of the government in the suit would seem to be the same whether the funds are mingled or a separate entry maintained in the treasury accounts. Similarly, when the plaintiff is claiming property to which the government also has a claim, whether or not the plaintiff's title is vested does not substantially alter the government's interest in the litigation. In fact, these and all the other criteria have as a common basis the reluctance of the courts to face squarely the fact that the naming of the official as defendant is always an attempt to reach the government.

A recognition of this fact does not mean that all suits against government officers, since they are in effect suits against the government, must be barred by the sovereign immunity doctrine. On the contrary, it would permit the scrapping of artificial tests and would leave the way open for the application of the immunity doctrine in accordance with its fundamental purpose — the prevention of undue interference with the operations of government. In those cases in which it is alleged that the defendant officer is proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the ***1081** interest served by the sovereign immunity doctrine. Moreover, the government cannot justifiably claim interference with its functions when the acts complained of are unconstitutional or unauthorized by statute. On the other hand, where no substantial claim is made that the defendant officer is acting pursuant to an unconstitutional enactment or in excess of his statutory authority, the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction.

This treatment of the sovereign immunity doctrine can be accomplished by the courts without the necessity of legislative action. In suits against government officers, the courts have always decided for themselves the question of how and to what extent the doctrine should be applied. Therefore, this is not like the problem of governmental liability for torts in suits against the government itself, rather than its officers.[71]

IV

If it is feared that the application of the sovereign immunity doctrine in the manner proposed would open the gates to a deluge of litigation against government officers, it may be pointed out that a number of well-settled rules can be depended upon to keep the volume within bounds. As some of these "safeguards" are outlined in the following paragraphs, reference will be made

where relevant to cases in which jurisdiction was denied because of sovereign immunity but which might have been disposed of more appropriately on these alternative grounds.

In the first place, while jurisdiction under the proposed approach would depend upon allegations in the plaintiff's complaint that the official was acting under an unconstitutional statute or in excess ***1082** of his statutory authority, those allegations, as has been suggested before, should be substantial and not merely colorable. A useful analogy can be found in the application of the requirement that the plaintiff's suit must arise under the Constitution or laws of the United States to satisfy one ground of original jurisdiction of the federal district courts. For that purpose, the federal question presented in the plaintiff's complaint must be substantial, and the courts have managed to apply this test without unusual difficulty.[72] The Supreme Court has indicated an appreciation of the usefulness of such a test in sovereign immunity cases. Thus, in *Worcester County Trust Co. v. Riley*, where the plaintiff was seeking to avoid the imposition of an inheritance tax by two states, each of which claimed that the decedent was domiciled within its boundaries at the time of death, the suit was held barred by the Eleventh Amendment largely because of the insubstantial character of the allegations of unconstitutionality of the taxes.[73]

Another precaution which should be taken before assuming jurisdiction of a suit against a government officer is the inquiry into the presence of a case or controversy. For example, whereas the sovereign immunity doctrine was applied in *Fitts v. McGhee*[74] because of the lack of a duty to act on the part of the officials against whom the suit was brought, the same result of dismissal could have been reached by holding that no case or controversy existed.

Similarly, a preliminary examination of the plaintiff's standing to sue would have enabled the courts in a number of instances to arrive at the same results without using the sovereign immunity doctrine for a purpose here regarded as unjustifiable and inappropriate. In re *Ayers*, for example, could have been dismissed for ***1083** this reason. There, the British subjects who were seeking to restrain state officials from commencing actions against Virginia taxpayers who tendered state coupons in payment of taxes would not have been subject to such suits themselves, and their interest in the suits that might be brought against the taxpayers was regarded by the Court as collateral and remote.

Once having taken jurisdiction, there are also a number of situations in which the courts might properly decline to exercise it. Failure on the part of the plaintiff to comply with the sound rule of judicial administration requiring exhaustion of administrative remedies is one such situation. This ground could have been used to dispose of *Mine Safety Appliances Co. v. Forrestal*. Since, as pointed out earlier, the Court assumed for the purpose of disposing of the jurisdictional issue that the Renegotiation Act under which Forrestal was proceeding was unconstitutional, the case was not a proper one for the application of the sovereign immunity jurisdictional bar. However, that is not to say that the plaintiff was entitled to a decree. The Renegotiation Act provides for a review of the administrative official's determination as to the existence of excessive profits in the Tax Court of the United States, and the plaintiff in the *Mine Safety Appliances* case had ignored that remedy.[75] In a subsequent case, *Macauley v. Waterman Steamship Corp.*,[76] also arising under the Renegotiation Act, the Court did dismiss the complaint on the ground that the prescribed administrative remedy had not been exhausted. Since it would seem that the Court's first inquiry in a case should necessarily be directed toward the question of its jurisdiction, it is difficult to see how the Court could reach the issue of exhaustion of administrative remedies without departing from the rule laid down in the *Mine Safety Appliances* case. In both of these cases, the ultimate objective of the plaintiffs was to avoid the administrative determination of excessive profits and the enforcement of that determination ***1084** by the sequestration of moneys due them by the United States on other contracts. If a suit for such a purpose must be regarded as one against the United States, as was held in the *Mine Safety Appliances* case, why was not this objection also controlling in the *Waterman Steamship* case?[77] While, unfortunately, it is not safe to assume that the holding of the *Mine Safety Appliances* case is thus overruled on the sovereign immunity point, it should at least take a good measure of judicial explanation of the *Waterman Steamship* decision to restore the former to substantial vigor.[78]

The existence of an adequate remedy at law is another ground that can frequently be relied upon by the courts to dispose of cases against government officers. Especially important in this connection is the fact that Congress has provided a remedy for claimants against the United States in certain cases. This remedy should suffice wherever it affords adequate relief. The

relaxation of the sovereign immunity rule in suits against officers, as suggested here, is not intended to result in an avoidance of any legislatively prescribed procedure for the Government's satisfaction of its liabilities.[79]

***1085** Also, where the object of the action is to prevent the defendant official from commencing the prosecution of a suit against the plaintiff, usually in enforcement of a statutory scheme of regulation, the situation should be scrutinized carefully to see if the plaintiff may not have a complete and adequate remedy by way of defense in the action which he is seeking to prevent.[80]

A further safeguard can be found in the appropriate use of the indispensable party doctrine. As suggested previously, this doctrine should not be used in a suit against a government officer where the basic objection is that the suit is in effect one against the government itself. But there are cases where parties other than the government should have been brought into the suit in order to make possible its effective disposition, and it is in these instances that the doctrine can properly be applied. In both *Oregon v. Hitchcock*[81] and *New Mexico v. Lane*,[82] the absence of third parties who were regarded as indispensable could have furnished an ample basis for dismissal.

Where the plaintiff is seeking a mandamus or its equivalent to compel official action, no departure is suggested from the ordinary rule that action involving the exercise of discretion will not be ordered by the courts. In *Lankford v. Platte Iron Works Co.*,[83] the plaintiff was refused payment of his certificates of deposit from a state depositors' guaranty fund, and brought suit against the members of the state banking board to compel payment. The ***1086** Court found that the state board had discretion in passing on the validity of the claims presented for payment, and could well have dismissed the action on this ground. The same alternative reason for dismissal has been present in other cases rested on sovereign immunity.[84]

It is apparent that the application of the sovereign immunity doctrine in the suggested manner need not result in either a flood of burdensome litigation or a wholesale and indiscriminate granting of decrees against governmental action. In fact, it is believed that, up to the present date, the majority of suits against government officers in which jurisdiction has been denied on the basis of sovereign immunity could have been dismissed on other grounds. Thus, it is not always the results as such that are protested; it is rather the method by which they have been reached. This can be remedied by allowing suits against government officers who are allegedly acting pursuant to an unconstitutional statute or in excess of their statutory authority. Then, if other prerequisites are present for jurisdiction and for equitable relief when it is demanded, the interest in protecting individuals from unconstitutional or unauthorized official action may be fully served and need not be made to depend upon the use of the empty fictions which have thus far largely controlled the application of the sovereign immunity doctrine in suits against government officers.

Footnotes

1 Judicial cognizance of this state of affairs has been often expressed by the Supreme Court. *See* Brooks v. Dewar, 313 U. S. 334, 359 (1941); Pennoyer v. McConnaughy, 140 U. S. 1, 9 (1891); Cunningham v. Macon & B. R. R., 109 U. S. 446, 451 (1883).

2 Of the royal supremacy notions, the most common is the dogma that the king can do no wrong. For a thorough demonstration that this concept is not only inapplicable in the United States, but also that its development in England was based on a misconception of early law and practice, see Borchard, *Government Liability in Tort* (1924) 34 Yale L. J. 1, 2; Borchard, *Governmental Responsibility in Tort* (1926) 36 Yale L. J. 1, 17-41. See also Laski, *The Responsibility of the State in England* (1919) 32 Harv. L. Rev. 447.

3 See *In re* Ayers, 123 U. S. 443, 505 (1887). This element of indignity to a state in making it a defendant was stressed by John Marshall in his speech on June 20, 1788, during the debates on the adoption of the Constitution in the Virginia Convention. 3 Elliot, Debates (2d ed. 1836) 555. However, in *United States v. Lee*, the Court minimized the notion of indignity by pointing out that the United States Government was constantly appearing as a party plaintiff and was thus voluntarily submitting its rights as against citizens to the judgment of the courts. 106 U. S. 196, 206 (1882).

4 *See* Kawananakoa v. Polyblank, 205 U. S. 349, 353 (1907). Holmes regarded his explanation as "logical and practical" and not based on "any formal conception or obsolete theory." For a refutation of both the logic and the practicality, see Borchard, *Governmental Responsibility in Tort* (1927) 36 Yale L. J. 757, 1039.

5 *See* Cohens v. Virginia, 6 Wheat. 264, 406 (U. S. 1821). Marshall here relied upon the fact that the Eleventh Amendment did not prohibit suits against a state by another state or a foreign government for his proposition that the Amendment was not prompted by a desire to preserve the state from the indignity of being sued, a matter as to which he had earlier expressed concern. See note 3 *supra*. *But cf.* Monaco v. Mississippi, 292 U. S. 313 (1934).

6 2 Dall. 419 (U. S. 1793). For an account of how this case, holding that a citizen of one state could bring assumpsit against another state, led to the adoption of the Eleventh Amendment, see New Hampshire v. Louisiana, 108 U. S. 76, 80-88 (1883).

7 *See* United States v. Lee, 106 U. S. 196, 206 (1882).

8 For a discussion of other controls on the volume of litigation against government officers, see pp. 1081-86 *infra*.

9 66 Sup. Ct. 219 (Dec. 10, 1945).

10 The Court stated: "Nor does the record present any other circumstances that would make the Secretary suable as an individual in this proceeding .... and the sole purpose of the proceeding is to fix the government's and not the Secretary's liability .... the suit is essentially one designed to reach money which the government owns." *Id.* at 221.

11 An analogy can be found in *Perkins v. Elg*: "The court below ... declared Miss Elg 'to be a natural born citizen of the United States,' and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship." 307 U. S. 325, 349-50 (1939). Similarly, in the *Mine Safety Appliances* case, the injunction would not have interfered with the Treasury except to preclude refusal to pay out funds on the sole ground of the assumedly unconstitutional withholding order.

12 See pp. 1083-84 *infra*.

13 In the absence of an act of Congress, an officer of the Federal Government cannot waive the Government's immunity from suit. Stanley v. Schwalby, 162 U. S. 255, 270 (1896); Carr v. United States, 98 U. S. 433 (1878); Case v. Terrell, 11 Wall. 199 (U. S. 1870). As to whether state administrative and executive officers can waive the state's immunity, see Ford Motor Co. v. Department of Treasury of Indiana, 323 U. S. 459, 466-70 (1945). *Cf.* Gunter v. Atlantic Coast Line R. R., 200 U. S. 273, 284-89 (1906).

14 A federal statute may limit the consent of the Federal Government to suits brought against it in the federal courts. Minnesota v. United States, 305 U. S. 382, 388 (1939). Similarly, a state statute may limit consent to suits against the state in the state courts. Ford Motor Co. v. Department of Treasury of Indiana, 323 U. S. 459, 464-66 (1945); Great Northern Life Ins. Co. v. Read, 322 U. S. 47, 53-57 (1944); Chandler v. Dix, 194 U. S. 590 (1904); Smith v. Reeves, 178 U. S. 436, 440-49 (1900); *cf.* Smyth v. Ames, 169 U. S. 466, 515-17 (1898); Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 392 (1894). For the power of the state to prescribe the terms of its consent, see Beers v. Arkansas, 20 How. 527 (U. S. 1857).

15 The immunity from suit of the Federal Government also bars a suit by a state against the United States. *See* Minnesota v. United States, 305 U. S. 382, 387 (1939); Arizona v. California, 298 U. S. 558, 568 (1936); Kansas v. United States, 204 U. S. 331, 342 (1907).

16 Hans v. Louisiana, 134 U. S. 1 (1890).

17 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const. Amend. XI. In view of the language of the Amendment, it has never been satisfactorily explained how consent by a state can confer jurisdiction upon the federal courts in these cases. It is also to be noted that the Amendment did not withdraw the jurisdiction conferred upon the federal courts by Article III of suits between two or more states and of suits to which the United States shall be a party. Thus, a state can be sued in the federal courts by another state or by the United States. *See* Kansas v. United States, 204 U. S. 331, 342 (1907); Minnesota v. Hitchcock, 185 U. S. 373, 385 (1902); United States v. Texas, 143 U. S. 621, 646 (1892).

18 See Dobie, Federal Jurisdiction and Procedure (1928) § 68; Note (1937) 46 Yale L. J. 538.

19 *See* Washington v. United States, 87 F.(2d) 421, 427 (C. C. A. 9th, 1936): "In cases where there is error in non-joinder of parties, either necessary or indispensable, the courts have fallen into common error by designating the error as 'jurisdictional.' The defect is not, properly speaking, a jurisdictional one ... [citing cases]."

20 *E.g.*, Mine Safety Appliances Co. v. Forrestal, 66 Sup. Ct. 219 (Dec. 10, 1943); Wells v. Roper, 246 U. S. 335 (1918); Louisiana v. Garfield, 211 U. S. 70 (1908).

21 For a contrary suggestion to the effect that the crucial inquiry in suits against state officers should be whether the state is an indispensable party and not whether the suit is in substance one against the state, see Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States* (1908) 8 Col. L. Rev. 183.

22 For a proposal that a superior officer should not be considered an indispensable party unless his active concurrence is required to effect the relief asked, see Note (1937) 50 Harv. L. Rev. 796.

23 9 Wheat. 738 (U. S. 1824).

24 4 Wheat. 315 (U. S. 1819). The Maryland tax statute held unconstitutional in *McCulloch v. Maryland* was similar to the Ohio statute involved in the *Osborn* case.

25 See 1 Warren, Supreme Court in United States History (1922) 526-38; 2 *id.* at 91-92.

26 In Governor of Georgia v. Madrazo, 1 Pet. 110 (U. S. 1828), the Court, although verbally following the *Osborn* rule, actually departed from it by saying that the state would be considered as a party on the record since the suit was against the Governor in his official capacity only. The *Osborn* rule was finally repudiated in *In re* Ayers, 123 U. S. 443, 487-92 (1887).

27 Since the Court held the defendant officials to be the real parties in interest in the suit, it would seem that the action against them could have been maintained even without this formal rule. In other words, the action was against the officials in substance as well as form and not against the state.

28 This aspect of the *Osborn* case was later explained by the Court as follows: "But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals." *In re* Ayers, 123 U. S. 443, 500 (1887).

29 See Louisiana v. Jumel, 107 U. S. 711, 725 (1882).

30 66 Sup. Ct. 219, 221 (Dec. 10, 1945).

31 In *Lankford v. Platte Iron Works Co.*, a suit for payment of time certificates of deposit out of funds administered by a state banking board was regarded as a suit against the state, chiefly because under state decisions the funds of the board were considered state funds. 235 U. S. 461 (1915); *cf.* Houston v. Ormes, 252 U. S. 469 (1920).

32 178 U. S. 436 (1900).

33 223 U. S. 280 (1912).

34 322 U. S. 47 (1944).

35 *Id.* at 53.

36 Naming the defendant by official title has not always been held fatal. In *Perkins v. Elg*, the bill of complaint prayed for an injunction against "defendant Perkins, individually and as Secretary of Labor and defendant Shaughnessy, individually and as Acting Commissioner of Immigration and Naturalization" and "defendant Cordell Hull individually and as Secretary of State." Transcript of Record, p. 6, 307 U. S. 325 (1939).

37 Other than naming the defendant in his official capacity, it appears that the only step taken by the plaintiff in compliance with the state statute in *Smith v. Reeves* was the giving of written notice to the state comptroller of intention to bring an action for the recovery

of taxes paid. In the *Read* case, the plaintiff's compliance with the Oklahoma statute consisted of giving the collector notice of protest and intention to bring suit, naming the defendant as insurance commissioner, and alleging in its complaint that there was no appeal provided by Oklahoma laws from defendant's action in collecting the tax.

38 322 U. S. at 58-59.

39 Kennecott Copper Corp. v. State Tax Comm'n, 66 Sup. Ct. 745 (March 25, 1946); Ford Motor Co. v. Department of Treasury of Indiana, 323 U. S. 459 (1945).

40 The Court in the *Read* case left open the questions of whether the Oklahoma statutory method for the recovery of taxes was intended to be exclusive of all other remedies, "including actions against an individual who happened to be a tax collector," or whether, if it were so intended, it would be constitutional. 322 U. S. at 52. The reference to actions against an individual who "happened" to be a tax collector does not effectively gloss over the artificiality of the Court's distinction between suing an official as an individual and suing him as an official.

41 Meigs v. McClung's Lessee, 9 Cranch 11 (U. S. 1815); Wilcox v. McConnel, 13 Pet. 498 (U. S. 1839); Brown v. Huger, 21 How. 305 (U. S. 1858); Grisar v. McDowell, 6 Wall. 363 (U. S. 1867).

42 106 U. S. 196 (1882); *cf.* Stanley v. Schwalby, 162 U. S. 255 (1896).

43 *Accord*, Tindal v. Wesley, 167 U. S. 204 (1897) (action to recover possession of land from state officials); *cf.* Chandler v. Dix, 194 U. S. 590 (1904); see (1942) 10 Geo. Wash. L. Rev. 371.

44 Noble v. Union River Logging R. R., 147 U. S. 165 (1893); Payne v. Central Pacific Ry., 255 U. S. 228 (1921); *cf.* Work v. Louisiana, 269 U. S. 250 (1925) (although the United States retained legal title to the lands, claimant was allowed to bring suit to enjoin the Secretary of the Interior from enforcing an order, alleged to be beyond his statutory authority, relating to the method of perfecting the claim to the lands). For cases involving land grants by states, see Davis v. Gray, 16 Wall. 203 (U. S. 1872); Pennoyer v. McConnaughy, 140 U. S. 1 (1891). And for a suit to recover possession of barges from the Secretary of War, see Goltra v. Weeks, 271 U. S. 536 (1926).

45 Oregon v. Hitchcock, 202 U. S. 60 (1906); Naganab v. Hitchcock, 202 U. S. 473 (1906); Louisiana v. Garfield, 211 U. S. 70 (1908); New Mexico v. Lane, 243 U. S. 52 (1917); Morrison v. Work, 266 U. S. 481 (1925); *cf.* Minnesota v. Hitchcock, 185 U. S. 373 (1902) (example of consent to suit by act of Congress); Cunningham v. Macon & B. R. R., 109 U. S. 446 (1883) (involving claim against railroad property of which the state had both title and possession).

46 See, *e.g.*, Mine Safety Appliances Co. v. Forrestal, 66 Sup. Ct. 219, 221 (Dec. 10, 1945); Philadelphia Co, v. Stimson, 223 U. S. 605, 629 (1912).

47 *E.g.*, Morrison v. Work, 266 U. S. 481 (1925) (lack of standing to sue); New Mexico v. Lane, 243 U. S. 52 (1917) (absence of indispensable parties); Oregon v. Hitchcock, 202 U. S. 60 (1906) (failure to exhaust administrative remedies).

48 Poindexter v. Greenhow, 114 U. S. 270 (1885) (detinue); White v. Greenhow, 114 U. S. 307 (1885) (action for damages); Chaffin v. Taylor, 114 U. S. 309 (1885) (trespass *de bonis asportatis)*; Allen v. Baltimore & O. R. R., 114 U. S. 311 (1885) (injunction). See 3 Warren, Supreme Court in United States History (1922) 385-93 for a discussion of the political background of these cases.

49 117 U. S. 52 (1886). The Court's decision may well have been influenced by the fact that the scrip which the complainant was seeking to have redeemed and accepted in payment of taxes had been held void by a state court as being bills of credit within the prohibition of the United States Constitution. *Id.* at 60.

50 Smith v. Jackson, 246 U. S. 388 (1918); Roberts v. United States, 176 U. S. 221 (1900); *cf.* Work v. United States *ex rel.* Rives, 267 U. S. 175 (1925); Louisiana v. McAdoo, 234 U. S. 627 (1914). Thus, in Louisiana v. Jumel, 107 U. S. 711 (1882), New York Guaranty & Indemnity Co. v. Steele, 134 U. S. 230 (1890), and North Carolina v. Temple, 134 U. S. 22 (1890), since unconstitutional official action was complained of, the sovereign immunity doctrine should not have been invoked to deny jurisdiction. However, it might have been held that the relief sought in those cases was not the type for which the remedy of mandamus or its equivalent will be granted.

51 See Note (1938) 38 Col. L. Rev. 903.

52 123 U. S. 443 (1887).

53 Probably the best explanation for the result reached by the Court is not that this was a suit to compel specific performance of the state's contract and therefore a suit against the state, but rather that the plaintiffs had no equitable grounds for relief. First, they were not taxpayers of Virginia and hence no suits would be brought against them under the state statute. While their coupons would decrease in value if not acceptable for taxes, the Court regarded this interest of the plaintiffs as collateral and remote. Second, the Court apparently viewed as lawful the provision of the statute allowing suits against taxpayers who had tendered coupons for taxes. All rights possessed by the taxpayers could be fully asserted in such actions at law. 123 U. S. at 495-97.

54 *In re* Ayers, 123 U. S. 443 (1887); Hagood v. Southern, 117 U. S. 52 (1886); *cf.* Ickes v. Fox, 300 U. S. 82 (1937); Murray v. Wilson Distilling Co., 213 U. S. 151 (1909); see Note (1941) 41 Col. L. Rev. 1236.

55 246 U. S. 335 (1918).

56 Ickes v. Fox, 300 U. S. 82 (1937); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); *Ex Parte* Young, 209 U. S. 123 (1908).

57 15 Wall. 460 (U. S. 1872).

58 297 U. S. 110 (1936).

59 United States v. Butler, 297 U. S. 1 (1936).

60 302 U. S. 292 (1937). Nor will the collection of the tax be enjoined where there is an adequate remedy at law. Matthews v. Rodgers, 284 U. S. 521 (1932); *cf.* Old Colony Trust Co. v. Seattle, 271 U. S. 426 (1926); *In re* Tyler, 149 U. S. 164 (1893).

61 Each tax official was proceeding in accordance with the laws of his own state on the theory that the decedent was domiciled within its borders at the time of his death, and the Court stated that neither the Fourteenth Amendment nor the full faith and credit clause of the Constitution requires uniformity in the decisions of the courts of different states as to the place of domicil.

62 *State action*: Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1894); Scott v. Donald, 165 U. S. 58 (1897); Smyth v. Ames, 169 U. S. 466 (1898); Prout v. Starr, 188 U. S. 537 (1903); Mississippi R. R. Comm'n v. Illinois C. R. R., 203 U. S. 33S (1906); Scully v. Bird, 209 U. S. 481 (1908); Truax v. Raich, 239 U. S. 33 (1915); Sterling v. Constantin, 287 U. S. 378 (1932). *Federal action*: American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902); Philadelphia Co. v. Stimson, 223 U. S. 605 (1912); Waite v. Macy, 246 U. S. 606 (1918); Ickes v. Fox, 300 U. S. 82 (1937).

63 172 U. S. 516 (1899).

64 Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362 (1893); Smyth v. Ames, 169 U. S. 466 (1898); Prout v. Starr, 188 U. S. 537 (1903).

65 209 U. S. 123 (1908).

66 “The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter .... The sovereignty of the State is, in reality, no more involved in one case than in the other.” *Id.* at 167.

67 *Id.* at 157.

68 *Id.* at 160. See Note (1037) 50 Harv. L. Rev. 956, for a discussion of the logical contradiction involved in proceeding against an officer as an individual and at the same time regarding his action as state action under the due process clause of the Fourteenth Amendment.

69 As a matter of fact, the government is not inarticulate in these cases. The defendant officials are represented by government counsel in the courts, and there is no basis for the assertion that the government's position is not as fully presented and defended as if the government were a party on the record. The courts are fond of saying that the government “cannot be tried behind its back,” but although arresting, this proposition does not take account of the actual situation in these cases.

70 *E.g.*, Hopkins v. Clemson College, 221 U. S. 636 (1911). It is true that in this case some weight was attached to the provision in the statute creating the corporation that it might sue and be sued in its corporate name.

71 Even though the sovereign immunity doctrine is judge-made, except insofar as it is embodied in the Eleventh Amendment with respect to certain suits against states, it would not seem to be open to the courts to permit suits against the government itself. In the

federal field, for example, Congress, by allowing suits against the United States on contracts, so acted as to crystallize the situation and impliedly forbid tort actions. To change that situation by allowing suits to impose tort liability on the United States thus fell within the legislative province. Recently Congress has recognized the necessity for legislative action by enacting the Federal Tort Claims Act, authorizing suits against the United States in the district courts on certain tort claims for damages. Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946) tit. iv, 15 U. S. L. Week 50.

72 Bell v. Hood, 66 Sup. Ct. 773 (April 1, 1046); see Bunn, Jurisdiction and Practice of the Courts of the United States (4th ed. 1939) 36-37.

73 Other cases which might have been disposed of similarly include *Ex parte* State of New York, 256 U. S. 490 (1921); Wells v. Roper, 246 U. S. 335 (1918); Governor of Georgia v. Madrazo, 1 Pet. 110 (U. S. 1828).

74 172 U. S. 516 (1899). The defendant officials in this case were the governor, the state attorney general, and the solicitor of a state judicial circuit. No threat of prosecution appeared to have been made by the first two officers, and it is therefore doubtful whether a case or controversy existed with respect to them. The solicitor, however, had actually commenced prosecution of a criminal suit against plaintiff's employees, and so the question as to him would be whether an adequate remedy at 1aw existed by way of defense to the prosecution.

75 Another possible ground for the dismissal of this suit was the existence of an adequate remedy at law in the Court of Claims, in which a suit could have been brought against the United States for moneys withheld under contracts. Mr. Justice Reed concurred on this ground. 66 Sup. Ct. at 222. It is significant that the Government devoted the first thirty pages of the argument in its brief to the issues of exhaustion of administrative remedies and adequacy of the remedy at law, and only the last six pages to the sovereign immunity point.

76 66 Sup. Ct. 712 (March 25, 1946).

77 In the *Waterman Steamship* case, the plaintiff brought its suit for a declaratory judgment and an injunction after having been invited to attend a conference in Washington on the subject of whether or not it was subject to renegotiation. Unlike the *Mine Safety Appliances* case, no determination of excessive profits had yet been issued, nor had the defendant official threatened to issue an order directing the Treasury to withhold amounts due the plaintiff on other contracts. While this makes more glaring the failure of the plaintiff to exhaust the administrative process, it would not seem to serve as a distinction between the two suits on the sovereign immunity issue in view of the similarity of their ultimate purposes.

78 A possible explanation is that, until the defendant official in the *Waterman Steamship* case actually issued his order to the Treasury directing the withholding of funds otherwise due to the plaintiff, or at least threatened to do so, it could not be certain that this method of enforcement would be utilized. Other methods of enforcement under the Renegotiation Act, such as instructing prime contractors to withhold moneys due the plaintiff, or reduction in contract prices, or recovery of excess profits through suit, would not necessarily involve funds in the Treasury; and suits to enjoin such methods of enforcement consequently might not be considered suits against the United States. Until it became clear that the plaintiff was attacking a withholding order directed to the Treasury, therefore, the sovereign immunity bar would not apply. Even if this is so, however, the Court's jurisdiction was certainly doubtful in view of the *Mine Safety Appliances* decision, and accordingly the question should have been dealt with specifically before the Court proceeded with issues arising further along in the case.

79 Cases in which a remedy existed against the United States in the Court of Claims, but in which the Supreme Court nevertheless put its decision on the sovereign immunity point, include Mine Safety Appliances Co. v. Forrestal, 66 Sup. Ct. 219 (Dec. 10, 1945); International Postal Supply Co. v. Bruce, 194 U. S. 601 (1904); Belknap v. Schild, 161 U. S. 10 (1896). The recently enacted Federal Tort Claims Act will provide an adequate remedy at law in some situations, but the exceptions to that Act include several types of claims which constitute the grounds for much of the litigation against government officers. These include claims based on non-negligent acts in execution of a statute or regulation (whether or not valid), on exercise of a discretionary function, and on assessment or collection of taxes. Pub. L. No. 601, 79th Cong., 2d Sess. (Aug. 2, 1946), tit. iv, §§ 421(a), 421(c), 15 U. S. L. Week 51.

80 Fitts v. McGhee, 172 U. S. 516 (1899), is a case in which the Court mentioned this as one of the bases of its decision. However, where compliance with the law involves irreparable injury and the validity of the law can be determined only by disobedience, which in turn involves a multiplicity of suits and the accumulation of criminal penalties, as in *Ex parte* Young, 209 U. S. 123 (1908), the remedy by way of defense would be clearly inadequate.

81 202 U. S. 60 (1906).

82 243 U. S. 52 (1917).

83 235 U. S. 461 (1915).

84 *E.g.*, Louisiana v. McAdoo, 234 U. S. 627 (1914); Goldberg v. Daniels, 231 U. S. 218 (1913); New York Guaranty & Indemnity Co. v. Steele, 134 U. S. 230 (1890); North Carolina v. Temple, 134 U. S. 22 (1890); Louisiana v. Jumel, 107 U. S. 711 (1882).

59 HVLR 1060

Workman v. Mingo County Bd. of Educ.

United States Court of Appeals for the Fourth Circuit

December 9, 2010, Argued; March 22, 2011, Decided

No. 09-2352

Reporter
419 Fed. Appx. 348 *; 2011 U.S. App. LEXIS 5920 **

JENNIFER ***WORKMAN***, individually and as guardian of M.W., a minor; M.W., a minor, Plaintiffs - Appellants, v. MINGO COUNTY BOARD OF EDUCATION; DR. STEVEN L. PAINE, State Superintendent of Schools; DWIGHT DIALS, Superintendent Mingo County Schools; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Defendants - Appellees, and MINGO COUNTY SCHOOLS; STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Defendants, v. MARTHA YEAGER WALKER, in her capacity as Secretary of the West Virginia Department of Health and Human Resources; DR. CATHERINE C. SLEMP, in her capacity as State Health Director for the West Virginia Department of Health and Human Resources, Third Party Defendants - Appellees. CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED; AMERICAN ACADEMY OF PEDIATRICS, INCORPORATED, West Virginia Chapter; CENTER FOR RURAL HEALTH DEVELOPMENT, INCORPORATED; WEST VIRGINIA ASSOCIATION OF LOCAL HEALTH DEPARTMENTS; IMMUNIZATION ACTION COALITION, INCORPORATED, Amici Supporting Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by ***Workman*** *v. Mingo County Bd. of Educ., 2011 U.S. LEXIS 8260 (U.S., Nov. 14, 2011)*

Prior History: [1]** Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. (2:09-cv-00325). Joseph R. Goodwin, Chief District Judge.

Workman *v. Mingo County Sch., 667 F. Supp. 2d 679, 2009 U.S. Dist. LEXIS 102662 (S.D. W. Va., 2009)*

Disposition: AFFIRMED.

Core Terms

district court, ***vaccination***, immunization, exemption, religious, argues, summary judgment, diseases, religion, state law claim, certificate, mandatory, Schools, courts, issue of material fact, compelling interest, fundamental rights, equal protection, strict scrutiny, attend school, state law

Counsel: ARGUED: Patricia Ann Finn, PATRICIA FINN, ATTORNEY, PC, Piermont, New York, for Appellants.

Charlene Ann Vaughan, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia; Joanna Irene Tabit, STEPTOE & JOHNSON, LLP, Charleston, West Virginia, for Appellees.

ON BRIEF: Michelle E. Piziak, J. A. Curia III, STEPTOE & JOHNSON, LLP, Charleston, West Virginia, for Appellees Mingo County Board of Education and Dr. Steven L. Paine; Silas B. Taylor, Managing Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia, for Appellee Dwight Dials.

Braun A. Hamstead, HAMSTEAD & ASSOCIATES, LC, Martinsburg, West Virginia; James G. Dwyer, Professor of Law, MARSHALL WYTHE SCHOOL OF LAW, College of William & Mary, Williamsburg, Virginia, for Amici Supporting Appellees.

Judges: Before AGEE and WYNN, Circuit Judges, and Patrick Michael DUFFY, Senior United States District Judge for the District of South Carolina, sitting by designation. Judge Wynn wrote the opinion, in which Judge Agee and Senior Judge Duffy **[**2]** concurred.

Opinion by: WYNN

Opinion

[*350] WYNN, Circuit Judge:

Plaintiff Jennifer ***Workman*** filed this *42 U.S.C. § 1983* action against various West Virginia state and county officials, alleging that Defendants violated her constitutional rights in refusing to admit her daughter to public school without the immunizations **[*351]** required by state law. The district court granted summary judgment to Defendants. We now affirm.

I.

Workman is the mother of two school-aged children: M.W. and S.W. S.W. suffers from health problems that appeared around the time she began receiving ***vaccinations***. In light of S.W.'s health problems, ***Workman*** chose not to ***vaccinate*** M.W.

Workman's decision not to allow ***vaccination*** of M.W. ran afoul of West Virginia law, which provides that no child shall be admitted to any of the schools of the state until the child has been immunized for diphtheria, polio, rubeola, rubella, tetanus, and whooping cough. *W. Va. Code § 16-3-4*. However, ***Workman*** sought to take advantage of an exception under the statute, which exempts a person who presents a certificate from a reputable physician showing that immunization for these diseases "is impossible or improper or other sufficient reason why such immunizations have not **[**3]** been done." Id. Thus, in an effort to enroll M.W. in the Mingo County, West Virginia, school system without the required immunizations, ***Workman*** obtained a Permanent Medical Exemption ("the certificate") from Dr. John MacCallum, a child psychiatrist.

Dr. MacCallum recommended against ***vaccinating*** M.W. due to S.W.'s condition. Mingo County Health Officer, Dr. Manolo Tampoya approved the certificate and indicated that it satisfied the requirements for M.W. to attend school in Mingo County. M.W. attended the pre-kindergarten program at Lenore Grade School in Lenore, West Virginia for approximately one month in September 2007.

On September 21, 2007, the Superintendant of Mingo County Schools, Defendant Dwight Dials, sent a letter to Dr. Cathy Slemp, the acting head of the West Virginia Department of Health and Human Resources, stating that a school nurse had challenged ***Workman***'s certificate. Dr. Slemp responded by letter dated October 3, 2007, recommending ***Workman***'s request for medical exemption be denied. On October 12, 2007, Rita Ward, the Mingo County Pre-K Contact, sent ***Workman*** a letter notifying her that "as of October 12, 2007 [M.W.] will no longer be attending the Preschool Head Start **[**4]** Program at Lenore Pre—k—8 School in Mingo County."

M.W. did not attend school again until 2008, when she was admitted into a Head Start Program that accepted Dr. MacCallum's certificate. However, when M.W. aged out of that program, Mingo County Schools would not admit her; accordingly, ***Workman*** home-schooled M.W.

Workman brought suit individually and as parent and guardian of her minor child, M.W. She filed an amended complaint on May 11, 2009 against the Mingo County Board of Education; Dr. Steven L. Paine, State Superintendant of Schools; Dwight Dials, Superintendant of Mingo County Schools; and the West Virginia Department of Health and Human Resources ("Defendants").

In her complaint, ***Workman*** raised constitutional and statutory claims, and sought a declaratory judgment, injunctive relief, and damages. Specifically, she alleged that Defendants' denial of her application for a medical exemption violated her *First Amendment* rights. She further alleged that Defendants' denial of her application for a medical exemption constituted a denial of Equal Protection and Due Process. In addition, ***Workman*** alleged that Defendants violated *West Virginia Code Section 16-3-4* by refusing to accept Dr. **[**5]** MacCallum's certificate.

In a memorandum opinion and order of November 3, 2009, the district court determined that the Mingo County Board of **[*352]** Education and the West Virginia Department of Health and Human Services were entitled to *Eleventh Amendment* immunity from ***Workman***'s claims. The district court further concluded that ***Workman***'s constitutional claims lacked merit. Finally, the district court ruled that, after dismissing all federal claims, it lacked jurisdiction to hear ***Workman***'s remaining state law claim for injunctive relief and it could discern no statutory basis for a damage claim. The district court therefore granted Defendants summary judgment. ***Workman*** appeals.

II.

We first address ***Workman***'s argument that this case presents issues of material fact precluding summary judgment. Summary judgment is appropriate only where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. ***Workman*** argues that this case presents two material issues of fact: (1) whether Defendants acted "properly" **[**6]** in overturning ***Workman***'s medical exemption pursuant to state law; and (2) whether

Workman's religious beliefs are sincere and genuine.

Workman frames the first issue as "whether or not the Mingo County Board of Education, Superintendent Dials, and State Superintendent Dr. Paine's rejection of the medical exemption was legal." Brief of Appellant at 14 (emphasis added). The district court ruled that it lacked jurisdiction to hear ***Workman***'s state law claim for injunctive relief and saw no indication that state law provided a cause of action for damages. ***Workman*** does not explain how such purely legal determinations raised any triable issue of fact. Accordingly, we hold that the district court did not err in ruling that this issue did not preclude summary judgment. See *United States v. West Virginia, 339 F.3d 212, 214 (4th Cir. 2003)* ("Because this dispute ultimately turns entirely on a question of statutory interpretation, the district court properly proceeded to resolve the case on summary judgment.").

Regarding the second issue, the district court stated: "Since it is not necessary for me to resolve this issue, I decline the opportunity to evaluate the nature of Ms. ***Workman***'s beliefs." **[**7]** Indeed, the district court appears to have assumed the sincerity of ***Workman***'s religious beliefs but ruled that those "beliefs do not exempt her from complying with West Virginia's mandatory immunization program." Because a different resolution of this issue would not change the outcome of the case, it, too, did not preclude summary judgment. See *JKC Holding Co. LLC v. Washington Sports Ventures, Inc., 264 F.3d 459, 465 (4th Cir. 2001)* ("The existence of an alleged factual dispute between the parties will not defeat a properly supported motion for summary judgment, unless the disputed fact is one that might affect the outcome of the litigation.").

In sum, the district court did not err in finding that no genuine issues of material fact precluded summary judgment.

III.

Workman next argues that West Virginia's mandatory immunization program violates her right to the free exercise of her religion. The *First Amendment* provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *U.S. Const. amend. I*. The *First Amendment* has been made applicable to the states by incorporation into the *Fourteenth Amendment*. *Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)*.

Preliminarily, **[**8]** we note that the parties disagree about the applicable level of scrutiny. **[*353]** ***Workman*** argues that the laws requiring ***vaccination*** substantially burden the free exercise of her religion and therefore merit strict scrutiny. Defendants reply that the Supreme Court in *Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*, abandoned the compelling interest test, and that the statute should be upheld under rational basis review. ***Workman*** counters that Smith preserved an exception for education-related laws that burden religion. We observe that there is a circuit split over the validity of this "hybrid-rights" exception. See *Combs v. Homer—Center School Dist., 540 F.3d 231, 244-47 (3rd Cir. 2008)* (discussing circuit split and concluding exception was dicta). However, we do not need to decide this issue here because, even assuming for the sake of argument that strict scrutiny applies, prior decisions from the Supreme Court guide us to conclude that West Virginia's ***vaccination*** laws withstand such scrutiny.

Over a century ago, in *Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*, the Supreme Court considered the constitutionality of a statute that authorized a municipal board of health **[**9]** to require and enforce ***vaccination***. *Id. at 12*. Proceeding under the statute, the board of health of Cambridge, Massachusetts, in response to an epidemic, adopted a regulation requiring its inhabitants to be ***vaccinated*** against smallpox. Id. Upon review, the Supreme Court held that the legislation represented a valid exercise of the state's police power, concluding "we do not perceive that this legislation has invaded any right secured by the Federal Constitution." *Id. at 38* (emphasis added).

In *Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944)*, the Supreme Court considered a parent's challenge to a child labor regulation on the basis of the *Free Exercise Clause*. *Id. at 164*. The Court explained that the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory ***vaccination*** for the child more than for himself on religious grounds." *Id. at 166* (footnote omitted). The Court concluded 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." *Id. at 166-67*.

In **[**10]** this appeal, ***Workman*** argues that Jacobson

dealt only with the outbreak of an epidemic, and in any event should be overruled as it "set forth an unconstitutional holding." Brief of Appellant at 11. ***Workman***'s attempt to confine Jacobson to its facts is unavailing. As noted by one district court, "[t]he Supreme Court did not limit its holding in Jacobson to diseases presenting a clear and present danger." *Boone v. Boozman, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002)* (footnote omitted). Additionally, we reject ***Workman***'s request that we overrule *Jacobson* because we are bound by the precedents of our Supreme Court. *Hutto v. Davis, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982)* (per curiam) ("[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.")

Workman also argues that because West Virginia law requires ***vaccination*** against diseases that are not very prevalent, no compelling state interest can exist. On the contrary, the state's wish to prevent the spread of communicable diseases clearly constitutes a compelling interest.

In sum, following the reasoning of *Jacobson* and *Prince*, we conclude that the **[*354]** West Virginia statute requiring **[**11]** ***vaccinations*** as a condition of admission to school does not unconstitutionally infringe ***Workman***'s right to free exercise. This conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases. See, e.g., *McCarthy v. Boozman, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002)* ("The constitutional right to freely practice one's religion does not provide an exemption for parents seeking to avoid compulsory immunization for their school-aged children."); *Sherr v. Northport—East Northport Union Free Sch. Dist., 672 F. Supp. 81, 88 (E.D.N.Y. 1987)* ("[I]t has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs."); *Davis v. State, 294 Md. 370, 379 n.8, 451 A.2d 107, 112 n.8 (Md. 1982)* ("Maryland's compulsory immunization program clearly furthers the important governmental objective of eliminating and preventing certain communicable diseases."); *Cude v. State, 237 Ark. 927, 932, 377 S.W.2d 816, 819 (Ark. 1964)* ("According to the great weight of authority, it is within the **[**12]** police power of the State to require that school children be ***vaccinated*** against smallpox, and that such requirement does not violate the constitutional rights of anyone, on religious grounds or otherwise.").

IV.

Workman next argues that West Virginia's immunization requirement violates her right to equal protection. The *Equal Protection Clause of the Fourteenth Amendment* provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001)*. Here, ***Workman***'s equal protection claim challenges the West Virginia statute as-applied and facially.

Regarding her as—applied challenge, ***Workman*** argues that the school system discriminated against her when Defendant Dials inquired into the validity of her exemption. The district court found, however, that ***Workman*** presented "no evidence of unequal treatment resulting from **[**13]** intentional or purposeful discrimination to support her claim." Indeed, Dials submitted an affidavit in which he stated that "we had never dealt with a request for a medical exemption during my tenure as Superintendant . . . ." Although ***Workman*** asserts that Dials and Paine used the statute and accompanying regulations improperly, she points to no evidence of unequal treatment, and we see none. Consequently, the district court did not err in ruling ***Workman***'s as—applied challenge was without merit. See *Hanton v. Gilbert, 36 F.3d 4, 8 (4th Cir. 1994)* (rejecting equal protection challenge when record revealed no evidence of discrimination).

Regarding her facial challenge, ***Workman*** notes that the statute does not provide an exemption for those with sincere religious beliefs contrary to ***vaccination***. She argues that the statute therefore discriminates on the basis of religion. The district court ruled that, although a state may provide a religious exemption to mandatory ***vaccination***, it need not do so.

The Supreme Court held as much in *Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922)*, where it considered an equal protection and due process challenge to ordinances in San Antonio, Texas, that prohibited a child **[**14]** from attending school **[*355]** without a certificate of ***vaccination***. *Id. at 175*. The Court stated that Jacobson "settled that it is within the police power of a State to provide for compulsory ***vaccination***." *Id. at 176*. "A long line of

decisions by this court . . . also settled that in the exercise of the police power reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing." Id. at 176-77.

Further, in Prince, a mother argued that her religion made the street her church and that denying her child access to the street to sell religious magazines violated her right to equal protection. 321 U.S. at 170. The Supreme Court explained that the public highways do not become religious property merely by the assertion of a religious person. Id. at 170-71. "And there is no denial of equal protection in excluding [Jehovah's Witnesses'] children from doing [on the streets] what no other children may do." Id. at 171.

Here, ***Workman*** does not explain how the statute at issue is facially discriminatory; indeed, her complaint is not that it targets a particular religious belief but that it provides no exception from **[**15]** general coverage for hers. [1] Following the Supreme Court's decisions in Zucht and Prince, we reject ***Workman***'s contention that the statute is facially invalid under the Equal Protection Clause.

V.

Workman next argues that denying her a religious exemption from the mandatory ***vaccination*** statute violates her substantive due process right to do what she reasonably believes is best for her child. ***Workman*** asserts that, because the statute infringes upon a fundamental right it must withstand strict scrutiny. She contends that the statute fails strict scrutiny because West Virginia has no compelling interest to justify ***vaccinating*** M.W.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). To determine **[**16]** whether an asserted right is a fundamental right subject to strict scrutiny under the Due Process Clause, a court must (1) consider whether the asserted right is deeply rooted in the Nation's history and tradition; and (2) require a careful description of the asserted liberty interest. Id. at 720-21. Where a fundamental right is not implicated, the state law need only be rationally related to a legitimate government interest. Id. at 728.

As in Boone, "the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school." Boone, 217 F. Supp. 2d at 956 (footnote omitted). We agree with other courts that have considered this question in holding that ***Workman*** has no such fundamental right. See Zucht, 260 U.S. at 176-77; Boone, 217 F. Supp. 2d at 956; Bd. of Educ. of Mountain Lakes v. Maas, 56 N.J. Super. 245, 264, 152 A. 2d 394, 404 (N.J. Super. Ct. App. Div. 1959).

[*356] Indeed, the Supreme Court has consistently recognized that a state may constitutionally require school children to be immunized. **[**17]** See Prince, 321 U.S. at 166-67; Zucht, 260 U.S. at 176; cf. Jacobson, 197 U.S. at 31-32 (noting that "the principle of ***vaccination*** as a means to prevent the spread of [disease] has been enforced in many States by statutes making the ***vaccination*** of children a condition to their right to enter or remain in public schools."). This is not surprising given "the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs." Sherr, 672 F. Supp. at 88. Accordingly, we conclude that ***Workman*** has failed to demonstrate that the statute violates her Due Process rights.

VI.

Workman also argues that the district court erred in ruling that certain Defendants were protected by the Eleventh Amendment. The District court ruled that only Defendants Mingo County Board of Education and the West Virginia Department of Health and Human Resources were entitled to Eleventh Amendment immunity. "While we ordinarily would decide an immunity claim before reaching the merits of the underlying claim, when the complaint alleges no claim against which immunity would attach, we need not decide the immunity issue." Jackson v. Long, 102 F.3d 722, 731 (4th Cir. 1996) **[**18]** (citation omitted). Because ***Workman***'s constitutional claims against all Defendants fail, we need not determine whether the district court erred in applying Eleventh Amendment

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[1] Several courts have declared unconstitutional religious exemptions from mandatory ***vaccination*** statutes. See, e.g., McCarthy, 212 F. Supp. 2d at 948-49 (invalidating religious exemption from Arkansas compulsory immunization statute); Brown v. Stone, 378 So. 2d 218, 223 (Miss. 1979) (invalidating religious exemption from Mississippi compulsory immunization statute).

immunity to some of them.

VII.

Finally, ***Workman*** argues that subject matter jurisdiction exists over her state law claims. The district court ruled that, after dismissing all of ***Workman***'s federal claims, it lacked jurisdiction to hear her state law claim for injunctive relief. The district court also saw no indication that West Virginia law permits a private cause of action for damages against Defendants Paine and Dials.

Workman contends that the district court "can retain jurisdiction over [state law claims] even if it dismisses the federal claims." Brief of Appellant at 35. In general, this is a correct statement of supplemental jurisdiction. See *28 U.S.C. § 1367*; but see *Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)* (holding *Eleventh Amendment* prohibits federal courts from instructing state officials on how to conform their conduct to state law). Yet "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over **[**19]** which it has original jurisdiction." *28 U.S.C. § 1367(c)(3)* And "trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished." *Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995)*. There is no indication that the district court abused its discretion in dismissing ***Workman***'s state law claims. [2]

VIII.

In sum, we hold that the district court did not err in awarding summary judgment where there were no genuine issues of material fact. ***Workman***'s constitutional **[*357]** challenges to the West Virginia statute requiring mandatory ***vaccination*** as a condition of attending school are without merit. Finally, the district court did not abuse its discretion in declining to exercise jurisdiction over ***Workman***'s remaining state law claims.

AFFIRMED

End of Document

[2] In her reply brief, ***Workman*** makes additional arguments regarding the district court's ruling on her state law claims. Because ***Workman*** failed to raise those arguments in her opening brief, we consider the arguments waived. ***Fed. R. App. P. 28(a)(9)(A)***; *Yousefi v. U.S. I.N.S., 260 F.3d 318, 326 (4th Cir. 2001)* (per curiam).

Simso v. State

Superior Court of Connecticut, Judicial District of Hartford At Hartford

April 7, 2003, Decided ; April 7, 2003, Filed

CV020819172S

Reporter
2003 Conn. Super. LEXIS 996 *; 2003 WL 1962442

Andrew J. Simso, III v. State of Connecticut

Notice: [*1] THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Related proceeding at *Simso v. Connecticut, 2006 U.S. Dist. LEXIS 85791 (D. Conn., Nov. 27, 2006)*

Core Terms

allegations, statutory authority, doctrine of sovereign immunity, administrative enforcement, sovereign immunity, constitutional right, truck, correspondence, repairs, plaintiff's claim, subpoenaed, final decision, complains, damages, employees, clear violation, common-law, consented, documents, licensed, misconduct, permission, handling, Counts, rights, waived, declaratory relief, state official, public policy, due process

Judges: Michael R. Sheldon, J.

Opinion by: Michael R. Sheldon

Opinion

MEMORANDUM OF DECISION ON STATE'S MOTION TO DISMISS

In this case, plaintiff Andrew J. Simso, III ("plaintiff") has sued the State of Connecticut ("State") to recover money damages and obtain declaratory relief in connection with the State's decade-long handling of certain administrative and judicial proceedings arising from his January 1988 purchase of a defective 1981 Ford pickup truck from a licensed used car dealer in Danbury, Connecticut. In his 52-page complaint dated August 14, 2002 ("Complaint"), which was served on August 29, 2002, the plaintiff claims that agents and representatives of the State Department of Motor Vehicles ("DMV") and attorneys from the State Office of the Attorney General violated his state and federal constitutional rights to "equal protection of the law through due process" in the following ways:

1) Conducting themselves during their handling of the plaintiff's complaint, against a [sic] auto dealer/repairer licensed by the state and **[*2]** under the jurisdiction of the Connecticut Department of Motor Vehicles (hereinafter "DMV"), with misfeasance and nonfeasance acts of ultra vires through acts of intentional tort, to criminally defraud the plaintiff out of the purchase of a vehicle of fair market value in compliance with state and federal laws; 2) Issuing and wrongfully upholding unauthorized, fraudulent and/or frivolous orders and/or documents without any reasonable basis in law or fact; 3) Showing reckless indifference to the rights of the plaintiff through acts of perjury and deceit; 4) Having had continuous and timely complaints filed with them and using their authority beyond the scope of their employment to refuse or correct or even acknowledge the wrongful actions of its employees; 5) Failing to protect evidence in their possession from unlawful removal; 6) Refusing to ensure that state government, acted within the letter and spirit of the law thereby protecting the rights of the plaintiff, as a person of the state, to the fullest extent allowed by law thereby protecting the public interest from corruption from within the government; 7) Using unethical and unprofessional conduct against the plaintiff during court **[*3]** procedures to defend and protect the unlawful actions of state employees; 8) Failing to comply with the Rules of Professional Conduct in accordance with the Connecticut Practice Book; 9) Failing to comply with the procedures in civil matters in accordance with the Connecticut Practice Book including refusing to accept the service of subpoenas by the Sheriff's Department as prescribed by law, ordering their clients to appear in court and; 10) Failing to present one of their clients before the court.

Complaint at 2-3.

As relief for these alleged constitutional violations, the plaintiff seeks $ 4 million in compensatory damages, an additional award of punitive damages, and an official declaration by this Court regarding the legality of the actions taken by the State, as to whether it has the discretion through statutory authority to use their offices and scope of employment for the following actions against a citizen of the public in an attempt to deny them equal protection of the law through due process:

(1) To deny a citizen due process, to protect and defend acts of intentional tort to criminally defraud a member of the public out of a vehicle of fair market value in compliance **[*4]** with the state's own mandated laws, by state employees and officials, over its duty to act in the public interest to protect its citizens from governmental corruption. (2) To deny a state citizen, who files a formal complaint in which any decision made would greatly and specifically affect the citizen, party status? (3) To refuse to investigate, address or even acknowledge evidence supported genuine issues of material fact, in conflict with their decisions? (4) To use their refusal to address or acknowledge evidence, against the public? (5) To refuse to address and/or hide the fact that DMV Officials unlawfully removed documents substantially supporting the plaintiff's complaints from DMV files? (6) To violate a person's right to due process by issuing and deceitfully upholding an order that could not be complied with as written? (7) To exempt from falling under the guidelines set forth in the Connecticut Practice Book when taking action against the member of the public? (8) To refuse to accept duly authorized subpoenas delivered in accordance with the law, directing them to present their defendant clients? (9) To refuse to present their client before the court knowing a subpoena had **[*5]** been issued for his appearance? (10) To refuse to take action to assure their client adhered to a court ordered subpoena? (11) To use unprofessional conduct against a member of the public as a pro se, by refusing to respond to their letters in reference to court issues? (12) To use unethical practices in violation of the public's right to equal protection of the law through due process? (13) To force a consumer to take court action against a dealer/repairer licensed by and under the jurisdiction of the DMV, to have a vehicle brought into compliance the state mandates. (14) Does the Connecticut Constitution or common law which authorizes the Attorney General's Office to represent the state in litigation, serving as legal counsel to all state agencies, give it the discretion through statutory authority to use their office to protect acts of corruption by state officials thereby willfully superseding their obligation to represent the people of the state to protect the public interest and the rights of the people to the fullest extent allowed by law against governmental corruption by ensuring government acts within the letter and spirit of the law? (15) Is the client of an attorney who **[*6]** does not cash, and therefore does not consummate his unauthorized acceptance of a decision his client ordered appealed, still bound by his attorney's unauthorized acceptance in violation of *Rule 1.2(a)* Scope of Representation of the Connecticut Practice Book?

Complaint, pp. 49-51.

The State has now moved this Court to dismiss this case for lack of subject matter jurisdiction on two grounds: first, that the prosecution of the plaintiff's claims violates the doctrine of sovereign immunity; and second, that the plaintiff's prosecution of such claims in this forum is an improper attempt to appeal from or collaterally attack prior decisions of judicial or administrative tribunals which the plaintiff failed to challenge in the manner prescribed by law. For the following reasons, the Court agrees with the State that this case must be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff purchased his pickup truck from Ralph's Auto Sales ("Ralph's"), a licensed used car dealer in Danbury, on January 6, 1988. The total purchase price for the truck, which already had 44,000 miles on it, was $ 4,837.50, including taxes. When the truck developed problems which Ralph's failed **[*7]** or refused to address, the plaintiff took two courses of action. First, on February 9, 1988, he filed a consumer complaint against Ralph's with the DMV. Second, on September 13, 1989, he filed a civil lawsuit against Ralph's, entitled *Andrew Simso, III v. Ralph LoStocco d/b/a Ralph's Auto Sales*, Docket No. CV 89-00299603S ("the *LoStocco* Action"), in the Danbury Superior Court. In response to the plaintiff's consumer complaint, the DMV conducted an investigation which led it to conclude that there were reasonable grounds to believe that Ralph's had violated State law in connection with the sale of the truck. Accordingly, the DMV initiated an administrative enforcement proceeding against Ralph's, ultimately docketed as DMV Case No. 91/2503, [1] to *General*

[1] The DMV lost its records of the plaintiff's first administrative complaint for some time.

Statutes § 14-64. [2] On August 15, 1991, the DMV sent Ralph's a notice to inform it that an administrative hearing would be held on September 5, 1991, in accordance with the contested case provisions of the Uniform Administrative Procedures Act ("UAPA"), General Statutes §§ 4-177-4-182, to determine if Ralph's had violated State law by allowing the plaintiff to operate a vehicle **[*8]** which it knew or should have known not to be in compliance with State emission control standards. The notice advised Ralph's that the hearing could result in the suspension or revocation of its dealer's license or such other administrative action as might be appropriate. The plaintiff was also sent a copy of the notice of hearing.

[*9] On November 6, 1991, the date to which the original hearing was rescheduled with notice to the plaintiff the State and Ralph's entered into settlement negotiations which resulted in a Consent Agreement, signed by Ralph's and the DMV, under which Ralph's was required to take certain remedial actions with respect to the plaintiff's truck. The plaintiff neither participated in these settlement negotiations nor signed the Consent Agreement to which they led. In fact, he later contacted the DMV to express his strong disagreement with the Consent Agreement and to request that the DMV rescind it, which the DMV refused to do. The plaintiff did not seek judicial review of the Consent Agreement under the administrative appeal provisions of the UAPA. See General Statutes § 4-183.

While the administrative enforcement proceeding was pending before the DMV, the plaintiff separately prosecuted the *LoStocco* action against Ralph's in an effort to rescind the sale of the pickup truck and to recover money damages for his resulting financial losses. The case was tried before an attorney trial referee, who found for the plaintiff awarding him $ 1,684.75 in money damages, **[*10]** but declined to order rescission of the sale. The referee's decision was approved by the Honorable Howard J. Moraghan, who rendered judgment thereon on August 17, 1993. Thereafter, Ralph's paid the plaintiff the damages awarded by the Court and received a satisfaction of judgment from the plaintiff's attorney which expressly "releas[ed it] from any further liability on the claim."

Notwithstanding Ralph's payment of the judgment against it in the *LoStocco* action and the plaintiff's own failure to appeal from the final decision of the DMV in its administrative enforcement proceeding against Ralph's, the plaintiff remained dissatisfied with the way in which the latter proceeding had been handled by the DMV and its attorneys. Accordingly, he filed two lawsuits. The first, entitled *Andrew J. Simso, III v. Jose O. Salinas*, Docket No. CV 97-0573175S ("the *Salinas* Action"), was a mandamus action, filed in the Hartford Superior Court, in which the plaintiff sought to vacate the Consent

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[2] At all times relevant to this case, General Statutes § 14-64 provided as follows:

The commissioner may suspend or revoke the license or licenses of any licensee or impose a civil penalty of not more than one thousand dollars for each violation on any licensee or both, when, after notice and hearing, the commissioner finds that the licensee (1) has violated any provision of any statute or regulation of any state or any federal statute or regulation pertaining to its business as a licensee or has failed to comply with the terms of a final decision and order of any state department or federal agency concerning any such provision; or (2) has failed to maintain such records of transactions concerning the purchase, sale or repair of motor vehicles or major component parts, as required by such regulations as shall be adopted by the commissioner, for a period of two years after such purchase, sale or repairs, provided the records shall include the vehicle identification number and the name and address of the person from whom each vehicle or part was purchased and to whom each vehicle or part was sold, if a sale occurred; or (3) has failed to allow inspection of such records by the commissioner or the commissioner's representative during normal business hours, provided written notice stating the purpose of the inspection is furnished to the licensee, or has failed to allow inspection of such records by any representative of the Division of State Police within the Department of Public Safety or any organized local police department, which inspection may include examination of the premises to determine the accuracy of such records; or (4) has made a false statement as to the condition, prior ownership or prior use of any motor vehicle sold, exchanged, transferred, offered for sale or repaired if the licensee knew or should have known that such statement was false; or (5) is not qualified to conduct the licensed business, applying the standards of section 14-51 and the applicable regulations; or (6) has violated any provision of sections 42-221 to 42-226, inclusive; or (7) has failed to fully execute or provide the buyer with (A) an order as described in section 14-62, (B) the properly assigned certificate of title, or (C) a temporary transfer or new issue of registration; or (8) has failed to deliver a motor vehicle free and clear of all liens, unless written notification is given to the buyer stating such motor vehicle shall be purchased subject to a lien; or (9) has violated any provision of sections 14-65f to 14-65j, inclusive; or (10) has used registration number plates issued by the commissioner, in violation of the provisions and standards set forth in sections 14-59 and 14-60 and the applicable regulations. In addition to, or in lieu of the imposition of any other penalties authorized by this section, the commissioner may order any such licensee to make restitution to any aggrieved customer.

Agreement and Order which ended the administrative enforcement proceeding and to compel the DMV to hold a hearing in that proceeding. The second, entitled *Andrew J. Simso, III v. Simon Hobbs,* **[*11]** *et al.*, Docket No. CV 98-0579788S ("the *Hobbs* Action"), was an ordinary civil action for money damages, also filed in the Hartford Superior Court, in which the plaintiff sought to recover from several individual DMV employees for alleged misconduct in handling his consumer complaint and resolving the administrative enforcement proceeding by the Consent Agreement.

The *Hobbs* action was resolved in favor of the defendant DMV employees on September 27, 1999 by the granting of their motion for summary judgment based on the applicable statute of limitations and the defense of sovereign immunity. The *Salinas* action, by contrast, was resolved in favor of the plaintiff after a trial on the merits before the Honorable Mary R. Hennessey. [3]

In her Memorandum of Decision dated January 30, 2001, Judge Hennessey ordered that the Consent Agreement **[*12]** and Order in the administrative enforcement proceeding be vacated, and that the DMV was "to pick up where it left off [in that proceeding] before undertaking the settlement discussion of November 16 [sic], 1991, which culminated in the consent decree, that is to hold a contested hearing and to proceed according to the rules and regulations promulgated by DMV for such contested hearings." Memorandum of Decision (1/30/01), p. 14. Later, however, in response to the DMV's request for clarification of this ruling, Judge Hennessey wrote that she was "not ordering the Department of Motor Vehicles to hold a contested hearing." Clarification. The DMV did not appeal from Judge Hennessey's decision, so clarified. The plaintiff, however, did appeal from that decision, but the Appellate Court dismissed his appeal as untimely on July 11, 2001.

On February 10, 2001, shortly before Judge Hennessey clarified her decision in the *Salinas* action, the plaintiff requested intervenor status in the reopened administrative enforcement proceeding and requested that the DMV conduct a hearing in that case. The Commissioner responded by granting the plaintiff's request for intervenor status but denying **[*13]** his request for a hearing. Shortly thereafter, upon reviewing the existing administrative record, the Commissioner issued a written decision dismissing that proceeding for the following reasons:

First, the licensee who is the respondent in Case No. 91/2503 and whose dealership sold you the pickup truck, Ralph LoStocco, is dead and his license has terminated. Obviously, DMV cannot suspend or revoke a license that no longer exists. *Mangels v. Commissioner of Motor Vehicles, 40 Conn.Sup. 226, 229, 487 A.2d 1121 (1984)* ("a licensee holds a license"). Second, you have already litigated to judgment the issue of the monetary injury that you suffered as a result of the sale of the truck and you were awarded damages. *Andrew Simso, III v. Ralph LoStocco d/b/a Ralph's Auto Sales*. In other words, you have been compensated for the loss sustained by reason of the acts of the licensee which constitute the grounds for the contested case proceeding in Case No. 91/2503.

Though the Commissioner's final decision was mailed to the plaintiff on March 20, 2001, the plaintiff never appealed from that decision, as permitted by the UAPA. See *General Statutes § 4-183* **[*14]** . Instead, he wrote a letter to the Commissioner in which he repeated his complaints about the DMV's handling of his consumer complaint and objected to the Commissioner's dismissal of the reopened administrative enforcement proceeding without a hearing. Treating the plaintiff's letter as a request for reconsideration under *General Statutes § 4-181a*, the Commissioner responded to it in writing, restating the basis for his March 20, 2001 order of dismissal.

Notwithstanding the rejection of his request for reconsideration, the plaintiff still did not appeal from the Commissioner's final decision under *General Statutes § 4-183*. Instead, he wrote further letters to the Commissioner restating his earlier arguments. Ultimately, on May 11, 2001, the Commissioner put an end to his post-decision correspondence with the plaintiff by writing him a letter explaining as follows that the matter was closed and that no further action would be taken:

With all due respect, I believe that we have reached the point where you are simply beating the proverbial dead horse in this matter. Your latest correspondence essentially rehashes the arguments presented **[*15]** in your letters of February 10th and March 28th, 2001. These arguments were carefully considered as part of my decision to dismiss the contested case and to deny

[3] The case was originally tried before the Honorable Frances Allen, J.T.R, but did not go to judgment because Judge Allen died before she could render her decision.

your petition for reconsideration. At this point, I see no useful purpose to be served in continuing to debate the matter, and I do not intend to do so.

On March 20, 2001, the DMV mailed to you the final decision in Ralph's Auto Sales, DMV Case No. 91/2503. You of course were not obligated to agree with the decision. On the contrary, if you believed that you were aggrieved by the final decision and that the decision was contrary to law, you had the opportunity to seek judicial review through an appeal pursuant to Section 4-183 of the Connecticut General Statutes. However, you chose not to file an appeal. Again, that is your prerogative--as it was your prerogative not to file a complaint against LoStocco Motors with the DMV in 1988, or not to bring a lawsuit against LoStocco Motors in the Superior Court at the time you were suing Ralph's Auto Sales.

I regret that you had an unpleasant experience with DMV in connection with the investigation and prosecution of your consumer complaint against Ralph's **[*16]** Auto Sales. Nevertheless, there comes a point when one must move on and stop dwelling on past events, especially when no practical relief can be provided by DMV under the changed circumstances since you purchased the used truck some 13 years ago. Again, I consider this matter closed.

Exhibit 28 to Affidavit of John Yacavone (10/10/02) (submitted in support of State's Motion to Dismiss).

Shortly before Judge Hennessey rendered her decision in the *Salinas* action, the plaintiff sought to cure one of the defects which had led to the granting of summary judgment in the *Hobbs* action by seeking permission from the Claims Commissioner to sue the State for alleged improper handling of the complaint about his truck. The Claims Commissioner dismissed the plaintiff's claim "for lack of jurisdiction" in a short-form order dated November 9, 2000. *Simso v. State of Connecticut*, File No. 18078.

Two years later--and over one year after the Commissioner of Motor Vehicles issued his final decision dismissing the DMV's administrative enforcement proceeding against Ralph's and almost one month after the instant case was commenced--the Claims Commissioner denied a second request by the **[*17]** plaintiff for permission to sue the State on the claims here at issue. In his two-page memorandum of decision dated September 27, 2002, the Claims Commissioner explained that permission to sue could not be granted because the plaintiff had failed to file his claim within the one-year time limit established by General Statutes § 4-148(a). [4] The plaintiff has never obtained permission from the General Assembly to extend the one-year deadline for requesting permission from the Claims Commissioner to sue the State, as permitted by General Statutes § 4-148(b).

[*18] *II. SOVEREIGN IMMUNITY*

"It is well established law that the State is immune from suit unless it consents to be sued by appropriate legislation waiving sovereign immunity in certain prescribed cases." *Martinez v. Department of Public Safety,* 258 Conn., 680, 683, 258 Conn. 680, 784 A.2d 347 (2001); see Conn. Constitution, Art. XI § 4. There are two ways in which a plaintiff who sues the State can avoid the bar of sovereign immunity: (1) if the State has consented to the suit; or (2) if the allegations of the Complaint and the relief requested fall within a common-law exception to the doctrine of sovereign immunity.

A. Consent to Suit

The State may waive its right to sovereign immunity by

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[4] At all times relevant to this case, General Statutes § 4-148 has provided as follows:

(a) Except as provided in subsection (b) of this section, no claim shall be presented under this chapter but within one year after it accrues. Claims for injury to person or damage to property shall be deemed to accrue on the date when the damage or injury is sustained or discovered or in the exercise of reasonable care should have been discovered, provided no claim shall be presented more than three years from the date of the act or event complained of.

(b) The General Assembly may, by special act, authorize a person to present a claim to the Claims Commissioner after the time limitations set forth in subsection (a) of this section have expired if it deems such authorization to be just and equitable and makes an express finding that such authorization is supported by compelling equitable circumstances and would serve a public purpose. Such finding shall not be subject to review by the Superior Court.

(c) No claim cognizable by the Claims Commissioner shall be presented against the state except under the provisions of this chapter. Except as provided in section 4-156, no claim once considered by the Claims Commissioner, by the General Assembly or in a judicial proceeding shall again be presented against the state in any manner.

consenting to suit. Since the giving or withholding of consent to suit is the prerogative of the General Assembly, *id.*, the General Statutes control this inquiry.

In most cases, the General Assembly has delegated the task of waiving sovereign immunity to the State Claims Commissioner under General Statutes § 4-142. [5] Section 4-142 requires the Claims Commissioner to hear all "claims" [6] against the State except those covered by any of the five narrow **[*19]** exceptions listed in the statute, then to decide, in his sole discretion, whether or not to authorize suit. Capers v. Lee, 239 Conn. 265, 268 n.3, 684 A.2d 696 (1996).

[*20] Against this background, this Court's inquiry as to whether or not the State has consented to this suit must proceed as follows. The Court must first determine if the suit is covered by one of the five exceptions listed in Section 4-142. If it is, then the State must be found to have consented to the suit as a matter of law. If, however, the suit is not covered by one of the listed statutory exceptions, the Court must go on to determine if the Claims Commissioner has consented to the suit in the manner prescribed by law. If he has not, then the suit must be dismissed unless it falls within a common-law exception to the sovereign immunity doctrine.

The first exception listed in Section 4-142 authorizes suits against the State for "claims for the periodic payment of disability, pension, retirement or other employment benefits." This case is plainly not covered by the first exception because it does not involve claims for the periodic payment of employment benefits.

The second exception listed in the statute is for "claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts[.]" The State is deemed to have consented **[*21]** to suit under this exception if the General Assembly has passed another statute granting the right to bring a civil action directly against the State in particular circumstances. E.g., General Statutes § 13a-144 (the defective highway statute). "Such a statute must clearly indicate an intent to allow a suit against the state by the use of express terms or by force of a necessary implication." Conn. Employees Ass'n v. Dep't of Administrative Services, 20 Conn.App. 676, 678, 569 A.2d 1152 (1990), quoting Baker v. Ives, 162 Conn. 295, 298, 294 A.2d 290 (1972)). No such statute has been invoked by the plaintiff in this case, and none is fairly implicated by the allegations of his Complaint. [7]

[*22] The third exception listed in Section 4-142 grants consent to suit on "claims for which an administrative hearing procedure otherwise is established by law." That exception is patently irrelevant to this case because this is a civil action rather than a proceeding before an administrative tribunal. [8]

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[5] At all times relevant to this case, Section 4-142 has provided as follows:

There shall be a Claims Commissioner who shall hear and determine all claims against the state except: (1) Claims for the periodic payment of disability, pension, retirement or other employment benefits; (2) claims upon which suit otherwise is authorized by law including suits to recover similar relief arising from the same set of facts; (3) claims for which an administrative hearing procedure otherwise is established by law; (4) requests by political subdivisions of the state for the payment of grants in lieu of taxes; and (5) claims for the refund of taxes.

[6] "Claim means a petition for the payment or refund of money by the state or for permission to sue the state." General Statutes § 4-141. The allegations made in plaintiff's Complaint, and the money damages he seeks, clearly bring most of the counts, accusations, and charges presented in his Complaint within this definition.

[7] Claims for money damages alleging constitutional violations on the part of State employees are not claims upon which suit is otherwise authorized by law within the meaning of Section 4-142(2). Martin v. Brady, 64 Conn.App. 433, 780 A.2d 961 (2001), *aff'd on other grounds,* 261 Conn. 372, 802 A.2d 814 (2002). The plaintiff in *Brady* argued that the Supreme Court had authorized direct constitutional claims against state employees for money damages in Binette v. Sabo, 244 Conn. 23, 710 A.2d 688 (1998). The Appellate Court flatly rejected that proposition, as the claims in *Binette* had been brought against municipal employees, not State employees. Brady supra, 64 Conn.App. at 439. In light of the Appellate Court's holding in *Brady,* the State has not consented to suit under Section 4-142(2) as to the plaintiff's money damages claims, notwithstanding the constitutional labels the plaintiff has affixed to many of his claims.

[8] On the other hand, the limited waiver of sovereign immunity for administrative hearings and their appeals is implicated in this case to the extent that some claims here presented by the plaintiff could and should have been pursued by him in the DMV administrative enforcement proceeding against Ralph's, the licensed used car dealer who sold him his defective truck. When a statute waives sovereign immunity in particular circumstances, the waiver of immunity thereby authorized is strictly construed against a party asserting a claim within the scope of that waiver. Duguay v. Hopkins, 191 Conn. 222, 232, 464 A.2d 45 (1983). Consistent with this rule, statutory procedures for the assertion of waived claims are enforced no

[*23] The fourth and fifth exceptions set forth in the statute are for "requests by political subdivisions of the state for the payment of grants in lieu of taxes" and "claims for the refund of taxes." This suit is plainly not authorized under either such exception because it is brought by an individual rather than a political subdivision and it does not involve any listed request or claim.

Since this case does not fit within any of the five exceptions spelled out in *§ 4-142*, the only way the State could have consented to this suit would have been if the Claims Commissioner had authorized it. The Claims Commissioner, however, has twice rejected petitions by the plaintiff for permission to sue the State on this matter. Most recently, the Claims Commissioner denied the plaintiff's request for permission to sue because he filed his request more than one year after the claim accrued, in violation of *General Statutes § 4-148(a)*. Without permission from the General Assembly, in the form of a Special Act authorizing the late presentation of a claim beyond the one-year time limit established by *§ 4-148(a)*, the Claims Commissioner had no power to grant the plaintiff's **[*24]** petition to file this lawsuit, or thus to waive sovereign immunity with respect to his present claim.

Because the claims presented in this lawsuit do not fall within any of the five exceptions listed in *Section 4-142* and the Claims Commissioner did not authorize the plaintiff to sue the State based upon them, the State has not consented to this suit, and thus has not waived its sovereign immunity. Therefore, this case can continue only if the doctrine of sovereign immunity does not apply. The Court now turns to the common-law exceptions to the doctrine of sovereign immunity.

B. Common-Law Exceptions to the Doctrine of Sovereign Immunity

Our courts have come to recognize two important exceptions to the doctrine of sovereign immunity. Those exceptions, which arise in situations where the interests of individuals to sue State are deemed to outweigh the State's sovereign right to be free from suit, are for: (1) actions for declaratory and/or injunctive relief agents based upon clear violations of fundamental constitutional rights; see, e.g., *Horton v. Meskill, 172 Conn. 615, 624, 376 A.2d 359 (1977)*; and (2) actions based upon allegations of egregious misconduct **[*25]** by State agents "in excess of [their] statutory authority." See, e.g, *Shay v. Rossi, 253 Conn. 134, 169, 749 A.2d 1147 (2000)*; *Antinerella v. Rioux, 229 Conn. 479, 642 A.2d 699 (1994)*.

1. The "In Excess of Statutory Authority" Doctrine

In this case, the plaintiff argues that his claims are not barred by the doctrine of sovereign immunity because the misconduct he complains of was so egregious as to fall outside the statutory authority of the State agents and officials identified in his Complaint. This argument is supported by our Supreme Court's decisions in *Shay* and *Antinerella*, where the plaintiffs' respective interests in the right to be free from the consequences of unlawful, *ultra vires* actions were deemed to outweigh the interest served by the sovereign immunity doctrine. *Shay, supra, 253 Conn. at 169*; *Antinerella, supra, 229 Conn. at 497* ("[Sovereign immunity] doctrine does not apply when there is a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority."). Although the Supreme Court has not yet defined the precise contours of **[*26]** the "in excess of statutory authority" doctrine, its decisions in *Shay* and *Antinerella*, as well as the Appellate Court's decision in *Martin v. Brady, supra, note 6*, provide useful guidance for this Court's inquiry.

In *Shay*, the plaintiffs alleged that the defendants, all agents of the State Department of Children and Families ("DCF"), compounded their unjustified removal of a seven-month-old child from her parents by acting not to protect the child, as the law and public policy required, but to protect themselves by self-serving efforts to justify their own prior actions. The complaint in that case alleged that the DCF defendants knew that their course of conduct was legally and factually unjustified, but that they persisted in it nonetheless. Those allegations, in turn, were supported by particular facts which, if proved, would reasonably support the plaintiff's claim of improper motive. In light of those allegations, the Supreme Court concluded that "if the defendants acted solely in order to justify their own prior unjustified conduct, and not to carry out the government policy with which that were entrusted, there would be no reason to provide **[*27]** immunity from suit." *Shay, supra, 253*

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less strictly against parties asserting such claims than substantive statutory provisions establishing the proper scope of the claims themselves. Here, then, the plaintiff cannot argue that sovereign immunity has been waived for the purposes of this action as to any claims he could have presented, but failed to present, in the DMV's administrative enforcement proceeding.

Conn. at 174. The agents' alleged conduct, the Court declared, was "sufficiently egregious to constitute conduct that was in excess of their statutory authority." Id. at 180.

Similarly, if a state employee acts solely to further an illegal scheme, and not to carry out government policy, there is no reason to provide sovereign immunity. Thus in Antinerella, supra, 229 Conn. at 497, the plaintiff, a deputy sheriff accused the High Sheriff of Hartford County of firing him in order to "take his business and personally benefit under the statutorily forbidden and illegal fee splitting arrangements he had made with several appointed deputy sheriffs." Id. at 491.

Such allegations of unlawful, self-serving conduct were deemed sufficiently egregious to state a claim not barred by sovereign immunity. In reaching that conclusion, it was important to the Court that the High Sheriff's alleged conduct contravened the clear public policy that high sheriffs may not engage in fee splitting. Id. at 493; Shay, supra, 253 Conn. at 169-70.

The actionable misconduct of **[*28]** state officials, as alleged in *Antinerella* and *Shay*, was engaged in solely for illegal, self-serving or other improper purposes, in clear violation of public policy. Because misconduct of that nature is "sufficiently egregious" to overcome the bar of sovereign immunity, the State's motion to dismiss must be denied if the plaintiff has alleged facts describing such misconduct in his challenged Complaint. [9]

[*29] *2. Declaratory or Injunctive Relief for Constitutional Violations by the State*

The second common-law exception to the doctrine of sovereign immunity is for claims for declaratory or injunctive relief from the State's unconstitutional actions. In a constitutional democracy, "sovereign immunity must relax its bar when suits against the government complain of unconstitutional acts." Barde v. Board of Trustees of Regional Comm. Colleges, 207 Conn. 59, 64, 539 A.2d 1000 (1988), quoting Sentner v. Board of Trustees, 184 Conn. 339, 343, 439 A.2d 1033 (1981). The sovereign people must be able to confront their government when it violates its constitutional limits. Horton v. Meskill, 172 Conn. 615, 623, 376 A.2d 359 (1977). Indeed, it A.2d 1033 (1981). The sovereign people must be able to confront their government when it violates its constitutional limits. Horton v. Meskill, 172 Conn. 615, 623, 376 A.2d 359 (1977). Indeed, it has been held that a declaratory judgment action is a "particularly appropriate vehicle" to litigate justiciable constitutional questions. Maloney v. Pac, 183 Conn. 313, 323, 439 A.2d 349 (1981); **[*30]** Horton, supra, 172 Conn. at 626-27.

This does not mean, however, that all allegations of constitutional violations by the State defeat sovereign immunity. "The allegations of such a complaint and the factual underpinnings if placed in issue, must clearly demonstrate an incursion upon constitutionally protected interests." Barde, supra, 207 Conn. at 64. A plaintiff who seeks declaratory relief from constitutional violations by the State bears a heightened burden of pleading. *Id.* Otherwise, plaintiffs could circumvent proper sovereign immunity claims by invoking empty constitutional phrases. The Court must focus on the substance of the plaintiff's allegations, not their labels he puts on them.

In this case, the Court must therefore inspect each and every claim for declaratory relief. Claims for declaratory relief based on non-constitutional claims are properly barred by the doctrine of sovereign immunity if so challenged, Fetterman v. University of Conn., 192 Conn. 539, 553, 473 A.2d 1176 (1984), because those claims do not disturb the foundation upon which the doctrine of sovereign immunity rests. But see Krozser v. New Haven, 212 Conn. 415, 421, 562 A.2d 1080 (1989), **[*31]** cert. denied sub nom. *Krozser v. Connecticut, 493 U.S. 1036, 107 L.E.2d 774, 110 S. Ct. 757 (1990)* (noting generally, in dicta, that "the state cannot use sovereign immunity as a defense in an action for declaratory or injunctive relief").

If a request for declaratory relief is based upon alleged constitutional violations--in label or in substance--which the plaintiff could have objected to or appealed from in the underlying deprivation complained of, he cannot

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[9] The Court notes that there is considerable disagreement as to whether the "in excess of statutory authority" exception to the doctrine of sovereign immunity extends to claims for money damages as well as claims for injunctive and declaratory relief. This Court has previously ruled, in a case now pending before the Connecticut Supreme Court, that under *Shay* and *Antinerella* the exception applies both types of claims. See *Prigge v. Ragaglia,* Superior Court, judicial district of Waterbury at Waterbury, Docket No. 01-0167912 (April 11, 2002) (Sheldon, J.). Until the *Prigge* Court decides the issue, the Court will assume, as it previously decided, that claims for money damages may indeed be brought under the "in excess of statutory authority" exception to the sovereign immunity doctrine.

now raise those claims because he has waived them.

3. Analysis of Plaintiff's Claims Under Exceptions to the Sovereign Immunity Doctrine

Since the State did not consent to this suit, the suit must be dismissed unless the plaintiff has alleged sufficient facts in his Complaint to draw the State out from behind the shield of sovereign immunity. The Court must inspect the plaintiff's factual allegations to determine if they state facts which, if credited, either describe conduct by State officials in excess of their statutory authority or clearly demonstrate an incursion by such officials upon the plaintiff's constitutionally protected rights. *Barde, supra, 207 Conn. at 64*.

The plaintiff has divided his Complaint into twenty-six **[*32]** counts, which the Court has inspected in detail. On the basis of that inspection, the Court reaches the following conclusions.

First Count

The First Count complains about the initial inspection of the plaintiff's pickup truck by DMV officials and subsequent repairs made to the vehicle, ostensibly to bring it into compliance with State emissions laws. The DMV was satisfied with the repairs, but the plaintiff was not. The plaintiff styles the DMV's conclusions and reports on this point "wanton acts of tort." Complaint at 9. Furthermore, the plaintiff alleges that an Assistant Attorney General (AAG) failed to take action against DMV "to ensure that DMV's decisions fell within the letter and spirit of the law" when the plaintiff contacted him to complain.

No factual allegation in the First Count implicates the plaintiff's constitutional rights. Moreover, while DMV officials may have been incorrect in their assessment of his vehicle or what was truly necessary to repair it correctly, their alleged errors, as the plaintiff describes them, were not engaged in solely for illegal, self-serving or other improper purposes, in clear violation of public policy, and thus were not "sufficiently **[*33]** egregious" to permit this action under the "in excess of statutory authority" doctrine. As for the AAG about whom the plaintiff complains, the plaintiff makes no specific allegations about the state of his knowledge or the nature of his alleged conduct. Without such allegations, the plaintiff has not pleaded a claim against him at all, much less one that survives the instant motion under any recognized exception to sovereign immunity.

Second Count

The gravamen of the Second Count is the plaintiff's claim that the DMV's attorney in the administrative enforcement proceeding, Thomas Ruby ("Mr. Ruby"), mishandled the administrative enforcement proceeding against Ralph's. According to the Complaint, Mr. Ruby gave the plaintiff inadequate notice of the rescheduled hearing where the Consent Agreement was negotiated, thereby denied him party status in that proceeding by nullifying his right to file a written petition seeking party status more than five days before that hearing, as required by *General Statutes § 4-177a(a)*, [10] denied him the right to present evidence against Ralph's at a hearing or to participate in settlement talks, and told him that he **[*34]** could not appeal from the settlement.

There are three major problems with the plaintiff's factual allegations in the Second Count. First, those allegations are misdirected. Mr. Ruby represented the DMV as a party in the administrative enforcement proceeding. Hence he proceeded as an advocate in that proceeding, not as counsel for the plaintiff or as final decision maker for the agency. The plaintiff's allegations should have been directed against the DMV hearing **[*35]** officer. Second, if the plaintiff wished to challenge the final decision of the DMV hearing officer based upon his claimed inability to participate meaningfully in that proceeding, he could and should have filed an appeal from that final decision under *General Statutes § 4-183*. Having failed to do so when he could have, the plaintiff cannot now challenge the outcome of that proceeding in this collateral context. Third, the plaintiff has no basis for blaming others for his inability to become a party to the administrative enforcement proceeding, since the hearing was originally scheduled, with timely notice to the plaintiff almost *three months* before the date the parties settled the case. Yacavone Affidavit at P5(b). Hence, the plaintiff could easily have filed a timely application for party status had he wished to do so.

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[10] At all times relevant to this case, *General Statutes § 4-177a(a)* provided as follows:

The presiding officer shall grant a person status as a party in a contested case if that officer finds that: (1) Such person has submitted a written petition to the agency and mailed copies to all parties, at least five days before the date of hearing, and (2) the petition states facts that demonstrate that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency's decision in the contested case.

The balance of the Second Count alleges that the Consent Order could not be carried out as issued. The plaintiff alleges as follows: (1) the Consent Order agreed to have repair work performed on the truck; (2) the engine's precise identity was required to make repairs; (3) the engine in the truck had no identification number; and (4) therefore, **[*36]** the repairer could not possibly certify that the repairs were in accordance with the manufacturer's specifications. The Court rejects the proposition that a licensed auto mechanic could not repair an engine that Ford has been making since 1965 (240 cubic inch displacement six-cylinder) without an engine identification number. More to the point, however, the Court concludes that this plethora of claims and arguments has no constitutional content or significance whatsoever, and surely does not constitute the kind of unlawful, self-serving misconduct, clearly violative of public policy, that is actionable under the "in excess of statutory authority" exception to the doctrine of sovereign immunity.

Third Count

The Third Count alleges that after the administrative enforcement proceeding was settled by the Consent Agreement and Order, the DMV improperly responded to letters written to it on the plaintiff's behalf by the Governor's Office and the Office of then-State Senator James Maloney, to which the plaintiff had separately complained. The DMV allegedly made misrepresentations in response to those letters, then removed all related correspondence from its files.

All post-proceeding **[*37]** correspondence between the Governor's Office and the DMV, as well as that between the DMV and Senator Maloney, were matters of bureaucratic courtesy. It is of no moment that such correspondence was not placed in an official DMV file, for it had no effect at all upon the DMV's investigation, which was over, or the administrative enforcement proceeding, which had gone to judgment pursuant to the Consent Agreement and Order. Such correspondence thus had no effect on any of the plaintiff's substantive or procedural rights, constitutional or otherwise. Moreover, there is nothing in the Complaint to suggest that the conduct in question was engaged in for unlawful, self-serving purposes, in clear violation of public policy.

Fourth Count

The Fourth Count is analogous to the Third Count in two respects. First, it concerns alleged misconduct by the DMV, and in particular of its attorney, Mr. Ruby, in responding to certain post-proceeding correspondence from another State agency, the Office of the Attorney General, concerning the status of the plaintiff's complaint. Mr. Ruby, claims the plaintiff, falsely responded to an inquiry made on his behalf by AAG Cornelius Tuohy by "upholding" **[*38]** the Consent Agreement and Order and stating that the DMV was ready and willing to comply therewith, but could not do so because the plaintiff had declined to present his vehicle so that required repairs could be made. According to the plaintiff, the repairs in question could not be made because his engine could not be identified, and thus there could be no assurance that parts used to repair it would be in compliance with manufacturer's specifications. Second, the Fourth Count complains that after Mr. Ruby responded to AAG Tuohy, the DMV removed all related correspondence from its files.

Mr. Ruby's correspondence with AAG Tuohy did not take place in the context of an official proceeding. Instead, it was an act of inter-agency courtesy of no legal moment. The plaintiff's substantive and procedural rights did not depend upon it, as they had already been determined in the administrative enforcement proceeding in which he did not seek party status and from which he did not appeal. There was no reason why DMV should have kept a copy of the correspondence in their files, and plaintiff's claim that they should have is misguided. Nothing described in the Fourth Count implicates the plaintiff's **[*39]** constitutional rights or describes conduct in excess of statutory authority.

Fifth Count

The Fifth Count is based upon the DMV's alleged "upholding" of the Consent Agreement and Order by which it settled the administrative enforcement proceeding despite receiving post-settlement input from the United States Environmental Protection Agency ("EPA") that the Order could not be complied with because the year of manufacture of the engine in his vehicle could not be identified. Complaint at 20. These allegations do not state a claim of constitutional dimension because the DMV's response to the EPA was not determinative of the plaintiff's rights. Those rights, to reiterate, had already been determined in the administrative enforcement proceeding, by the entry of the Consent Agreement and Order--a final decision from which the plaintiff did not appeal. The DMV's failure to vacate or modify its final Order in an administrative

proceeding that had long been concluded did not constitute conduct in excess of statutory authority, moreover, since nothing in the General Statutes required it even to respond to such input.

Sixth Count

The Sixth Count alleges wrongdoing by the plaintiff's **[*40]** own attorney in the *LoStocco* action, and complains that the Statewide Grievance Committee's failure to discipline the attorney for such wrongdoing, based in part on the attorneys success at trial, set a "wrongful precedent" which this Court must now address. The actions of the Statewide Grievance Committee are not claimed to have violated any of the plaintiff's constitutional rights, nor is any such violation suggested by the plaintiff's allegations. The role of the Statewide Grievance Committee is to investigate claims of impropriety against Connecticut attorneys, not to adjudicate the substantive or procedural rights of the persons who make such claims of impropriety. Hence, even if the Statewide Grievance Committee committed gross misconduct in the handling of a disciplinary complaint against an attorney--and none is here alleged--the complainant would suffer no resulting loss or deprivation of his liberty or property. Nothing decided by the Committee would preclude the complainant from suing his attorney directly for any loss occasioned by the attorney's alleged misconduct.

Similarly, nothing in the Sixth Count describes conduct by the Committee in excess of their statutory **[*41]** authority. A simple claim that a State agent or official made an error in ruling on a grievance, and thereby set a "wrongful precedent," falls far short of alleging the kind of unlawful, self-serving or other improper conduct, in clear violation of public policy, that permits a claim to go forward under *Shay* and *Antinerella.*

Seventh Count

The Seventh Count is based upon the plaintiff's unsuccessful efforts to persuade the Office of Chief State's Attorneys to file criminal charges against certain persons in connection with this matter. After some correspondence and other communications between the plaintiff and his Office, the Chief State's Attorney decided not to prosecute a criminal case. Plaintiff's claim that he was "wrongly informed that his complaint lacked prosecutive merit" ignores the tremendous discretion vested in the office of the Chief State's Attorney. Prosecutors have "a wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law." *State v. Kinchen, 243 Conn. 690, 699-701, 707 A.2d 1255 (1998)*, quoting *State v. Corchado, 200 Conn. 453, 460, 512 A.2d 183 (1985)*. **[*42]** The plaintiff's claim, as alleged in the Seventh Count, simply has no merit.

Eighth Count

The Eighth Count explains, in more detail than the Seventh Count, why the Chief State's Attorneys Office was allegedly wrong when it decided not to prosecute. For the reasons explained in the paragraph above, the discretion vested in the Office of the State's Attorney is not limited by the facts as alleged by a victim. For this reason, the Eighth Count fails to state a claim against the State, let alone a claim of unconstitutional conduct or conduct in excess of statutory authority. Despite the plaintiff's disbelief, this conduct is entirely consistent with that of a state official acting within the scope of his statutory duties.

Tenth Count

The plaintiff claims in the Tenth Count that attorneys from the Office of the Attorney General violated his rights by *filing an appearance* in the *Salinas* action, and thereby used their office "in a wonton [sic], reckless and malicious discharge of their duties beyond the scope of their employment or statutory authority." Complaint at 28. This claim betrays the plaintiff's fundamental misunderstanding as to what attorneys working **[*43]** for the Attorney General can lawfully do. Those attorneys appear for the State and its agents in cases in which the official acts and doings of those officers are called into question. *General Statutes § 3-125*. Simply, the AAGs who appeared for the defendants in the *Salinas* action did their jobs. They did not act in excess of their statutory authority or engage in any conduct violative of the plaintiff's constitutional rights.

Eleventh Count

The Eleventh Count alleges that the AAGs defending the *Salinas* action violated the plaintiff's "right to equal protection of the law through due process" by answering his complaint and offering special defenses to his claims. The "wanton and malicious statements of deceit" that gave rise to this claim appear to be the following

special defenses pleaded by the State: (1) plaintiff's demands were a matter of administrative discretion; and (2) plaintiff had failed to cooperate with the consent order. Exposed to the light, plaintiff's grandiloquent allegations melt away. The claims of the Eleventh Count do not implicate constitutional concerns or the "in excess of statutory authority" doctrine because the **[*44]** AAGs who interposed them were simply doing their jobs in a lawful manner.

Twelfth Count

The Twelfth Count, like the Tenth and Eleventh Counts, is based upon actions by the State's attorneys in defending defendant DMV employees in the *Salinas* action instead of settling that action in a manner acceptable to the plaintiff. Because these actions were well within the attorneys statutory responsibilities and not at all violative of the plaintiff's constitutional rights, this claim does not fall within any common-law exception to the doctrine of sovereign immunity.

Thirteenth Count

The Thirteenth Count alleges various unprofessional and unethical actions on the part of AAGs involved in the defense of DMV employees in the *Salinas* action. Even if credited, such allegations do not give rise to a private cause of action against the State, let alone one based on clear violations of the plaintiff's constitutional rights or conduct in excess of the AAGs' statutory authority. Any claim that the plaintiff's substantive or procedural rights had been violated by the AAGs' alleged misconduct in defending the *Salinas* action could and should have been raised in the context **[*45]** of that action, by timely motion, objection or otherwise. An adverse decision by the trial court on any such motion or objection could later have been raised on appeal from an adverse judgment in that action. The plaintiff of course, prevailed in the *Salinas* action. It is therefore not clear how he claims to have been harmed by the misconduct he alleges in the Thirteenth Count. Moreover, his appeal from the final judgment in the *Salinas* action was dismissed as untimely by the Appellate Court. Therefore, it appears both that he did not suffer any actionable harm under any theory of liability, and that any harm he did suffer is ultimately attributable to his own failure to seasonably assert and protect his rights.

Fourteenth and Fifteenth Counts

The Fourteenth and Fifteenth Counts allege that the DMV and the Attorney General's Office violated the plaintiff's rights by continuing to defend State officials in the *Salinas* action after denial of the State's Motion for Summary Judgment (Fourteenth Count) and at trial (Fifteenth Count). These Counts fail to allege conduct falling within an exception to the sovereign immunity doctrine for the same reasons given in rejecting **[*46]** the claims presented in the Tenth, Eleventh, and Twelfth Counts, discussed above.

Sixteenth Count

The Sixteenth Count alleges that the DMV failed to produce certain evidence subpoenaed at the first trial of the *Salinas* action before Judge Allen. The proper remedy for such alleged misconduct was obviously to move for a court order in that proceeding. There is nothing that this Court could hope to do in this case to right any wrong the plaintiff suffered therein.

The first trial of the *Salinas* action, moreover, did not go to judgment because, as previously noted, Judge Allen passed away before she could issue her final decision. The plaintiff thus suffered no loss or deprivation of liberty or property rights as a result of the failure to produce the evidence in question at that trial. He has therefore failed to plead any colorable violation of his constitutional rights. correspondence. Just as DMV employees had the right to dispose of those documents as they saw fit, because no such document was received or responded to in the course of an ongoing proceeding where the plaintiff's substantive or procedural rights were at issue, the AAG handling the case had the right **[*47]** to defend those employees on that basis. Her conduct in so doing was not in excess of her statutory authority or in clear violation of the plaintiff's constitutional rights.

Eighteenth Count

The Eighteenth Count complains that the AAG defending DMV officials in the *Salinas* action violated his rights in that action by opposing his "Motion To Order DMV Employees Subpoenaed Provide All Documents Subpoenaed." The Motion was ostensibly filed for the purpose of requiring the DMV to produce all of its unofficial correspondence with other agencies and officials following the settlement of the administrative enforcement proceeding. The plaintiff hoped to use

those documents to demonstrate that the final Order of the DMV in that proceeding could not be complied with.

The AAG allegedly violated the plaintiff's rights by opposing the plaintiff's Motion on the ground that all of the requested documents had already been disposed of by the DMV, and thus could not be produced. The plaintiff does not claim that this representation was untrue, or that it in any way impacted his ultimate ability to prevail in the *Salinas* action, which he did before Judge Hennessey. The AAG's truthful **[*48]** assertion that all documents requested by the plaintiff had already been disposed of is not actionable on any basis, let alone on the basis that it constituted conduct in excess of her statutory authority or in clear violation of the plaintiff's constitutional rights.

Nineteenth Count

The Nineteenth Count alleges that the AAG assigned to defend the *Salinas* action refused to accept service of subpoenas on behalf of other state officials, "in an unprofessional act against the plaintiff." Complaint at 37. Unprofessional conduct does not give rise to a private cause of action. See Rules of Professional Conduct, Scope. Furthermore, an attorney is under no legal obligation to accept service of a subpoena on behalf of her client. This Count thus alleges no actionable wrong, much less a wrong falling within a common-law exception to the doctrine of sovereign immunity.

Twentieth Count

The most important allegation in the Twentieth Count is that a subpoenaed DMV official failed to appear at the second trial of the *Salinas* action. When a subpoenaed witness fails to appear, the party who subpoenaed him can obtain a capias to compel his appearance. General Statutes § 52-143 **[*49]** . If he did, he suffered no loss. If he did not, then he waived his right to do so and can blame no one but himself for any resulting loss or deprivation. Since the plaintiff prevailed in the *Salinas* action, moreover, it is not clear what harm the plaintiff could have suffered on account of the complained-of conduct. The Court thus concludes that the conduct here at issue constituted neither a clear violation of the plaintiff's constitutional rights nor conduct in excess of statutory authority.

Twenty-First Count

The Twenty-First Count, like the Fifteenth Count, realleges the plaintiff's claim that it was wrong for the State to defend the *Salinas* action, this time at trial. The Court is still not persuaded that such conduct was violative of the plaintiff's constitutional rights or engaged in in excess of the defendants' statutory authority.

Twenty-Second Count

The Twenty-Second Count details the plaintiff's frustration with the State's objections to the admission of various documents from the EPA that the plaintiff offered as evidence at trial. Each party has the right to object to evidence. It appears that the State objected to the admissibility of the documents **[*50]** in question on hearsay and/or foundation grounds. Without knowing more or less about the plaintiff's evidentiary offer, it appears to the Court that the AAGs were acting well within their statutory authority when they made such objections, and that, by so doing, they did nothing whatsoever to threaten the plaintiff's constitutional rights.

Twenty-Third Count

The Twenty-Third Count of the Complaint complains that the *Salinas* Court's granting of the State's post-trial Request for Clarification was based on "wantonly wrongful, deceitful and/or false arguments by the state." Without getting into detail as to the State's many challenged arguments, it seems clear to this Court that the defendants' attorney had the right to make them, and that if they were improper and led to an adverse decision, the plaintiff had the right to oppose them both at trial and on appeal. The plaintiff, of course, prevailed in the *Salinas* action, raising serious questions as to how the making of those arguments could have adversely affected his substantive or procedural rights. To the extent, moreover, that he was dissatisfied by Judge Hennessey's Clarification of her decision, he waived his **[*51]** right to appeal from that decision by filing a late appeal, which was later dismissed.

For the foregoing reasons, the claim set forth in the Twenty-Third Count is not actionable under any common-law exception to the doctrine of sovereign immunity.

Twenty-Fourth Count

The Twenty-Fourth Count explains how the DMV re-

opened the plaintiff's complaint after the *Salinas* trial, granted the plaintiff intervenor status, and then summarily dismissed the complaint. While this must have been maddening to the plaintiff, the Court cannot discern any constitutional violation in the plaintiff's allegations, nor any facts that support an "in excess of statutory authority" claim. In fact, the logic of the Commissioner's explanation to the plaintiff of his actions is compelling.

Twenty-Fifth and Twenty-Sixth Counts

The Twenty-Fifth Count complains that the State Attorney General did not respond to a letter sent to him by the plaintiff after the conclusion of the *Salinas* action. Similarly, the Twenty-Sixth Count complains that State Senator Eric Coleman did not respond to the plaintiff's request for a special act authorizing a late claim to the Claims Commissioner under *General Statutes § 4-148(b)* **[*52]** . Since these two Counts do not allege any wrongdoing, they merit no further attention.

4. Failure Of Any Challenged Count To Support A Claim For Declaratory Relief

If any constitutional claims linger in the Complaint, they linger in the air, because there is no remedy available to this Court that would make the plaintiff whole for his losses. The plaintiff's use of the phrase "equal protection of the law through due process" does not transform his many complaints about State officials into alleged incursions upon constitutionally protected interests. After reviewing the balance of plaintiff's Complaint, the Court is unable to link any of his constitutional labels to particular factual allegations that clearly demonstrate incursions upon constitutionally protected interests.

This lawsuit is about conduct in the past. The only thing in genuine controversy--the only reason why this matter is a controversy--is the plaintiff's claim that he is entitled to recover money damages from the State. Although constitutional claims for declaratory and injunctive relief are ordinarily excepted from the doctrine of sovereign immunity, the declaratory relief plaintiff seeks in this case **[*53]** only serves to support his claim for money damages. Without his claim for money damages, the plaintiff has no interest in the outcome of this action by reason of danger of loss or of uncertainty as to his rights or other jural relations. *Practice Book § 17-55*. In other words, the plaintiff has no standing to bring any claim other than a claim for money damages, yet any such claim is clearly barred by sovereign immunity.

III. CONCLUSION

The State did not consent to this suit, either specifically, through the Claims Commissioner, or generally, through the General Statutes. The allegations and requests for relief of the plaintiff's Complaint do not bring this suit within one of the common-law exceptions to the doctrine of sovereign immunity. For these reasons, the State's Motion to Dismiss must be GRANTED.

It is so ORDERED this 7th day of April 2003.

Michael R. Sheldon, J.

End of Document

Certification

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that on January 23, 2023:

(1) a copy of the brief and party appendix has been sent electronically to each counsel of record listed below in compliance with § 62-7, except for counsel of record exempt from electronic filing pursuant to § 60-8, to whom a paper copy was sent;

(2) the brief and party appendix being filed with the appellate clerk is a true copy of the brief and party appendix that was submitted electronically pursuant to subsection (f) of this section;

(3) the brief [and party appendix] has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, unless the brief is filed pursuant to § 79a-6;

(4) the e-brief contains 12,049 words;

(5) the brief complies with all provisions of this rule; and (6) no deviations from this rule were requested/approved.

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