KANSAS NURSES VOTE
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Kansas State Capitol
300 SW 10th Street
Topeka, Kansas 66612

The Special Committee on Government Overreach and the Impact of COVID-19

Kansas State Nurses Association Opposes Draft Bill 22rs2356

Dear Members of the Special Committee:

On behalf of the Kansas State Nurses Association this written testimony is submitted in opposition of draft bill 22rs2356. The Kansas State Nurses Association (KSNA) is the largest association representing our over 40,000 RNs in Kansas and one of the largest professions in Kansas. Our members are also constituent members of the American Nurses Association (ANA) which is the largest nursing association in the country. We are a bipartisan non-profit association who operates without a PAC or contributions to any State Legislator.

It is the role and oath of a nurse to dedicate and devote ourselves to the welfare of whom we serve. We do this by providing evidence-based care and collaboration with other professions and organizations dedicated to the health of the communities.

We oppose draft bill 22rs2356, due in part to the draft bill's stated interpretation and lack of accompanying evidence *that an employer shall grant an exemption requested in accordance with this section based on sincerely held religious beliefs without inquiring into the sincerity of the request.*

We believe that effective protection of the public health mandates that all individuals receive immunizations against vaccine-preventable diseases according to the best and most current evidence outlined by the Centers for Disease Control and Prevention (CDC) and the Advisory Committee on Immunization Practices (ACIP). KSNA also believes that it is imperative for everyone to receive immunizations for vaccine-preventable diseases as vaccines are critical to infectious disease prevention and control.

KSNA does not support any exemptions from immunization other than for medical contraindications. All requests for medical exemption from vaccination should be accompanied by documentation from the appropriate authority to support the request. Individuals exempted from vaccination may be required to adopt measures or practices in the workplace to reduce the chance of disease transmission. Employers should offer reasonable accommodations in such circumstances. KSNA does not endorse philosophical or religious exemptions.

There is significant clinical evidence on the safety and effectiveness of the three approved COVID-19 vaccines (Pfizer-BioNTech, Moderna, and Johnson & Johnson/Janssen) being administered under the Food and Drug Administration's (FDA) Emergency Use Authorization process. With regard to these three vaccines, KSNA does not support any exemptions other than for medical contraindications to being vaccinated against COVID-19.

As novel diseases emerge, such as COVID-19, KSNA supports ongoing research and development of safe, easily accessed vaccinations for these public health threats. Vaccinations must be available and accessible to all to ensure public health and safety.

KSNA recognizes that employers would like to honor the religious beliefs of their employees, however this bill as currently drafted does not define if the individual is an adherent of a recognized religious denomination or provide accompanying evidence. Additionally, in a number of states (including within the Midwest), exemptions also do not apply in times of emergency or epidemic.

Thank you for the opportunity to present our concern. In summary, we oppose draft bill 22rs2356 and any non-medical exemption.
Sincerely,

Kelly K Sommers

Kelly Sommers, RN, BSN
State Director
Kansas State Nurses Association

Vaccinations: Legal Background

I synthesized material for this memo from:
-- Kevin M. Malone And Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, available at https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf (See especially pp. 271-280)
-- Ana Santos Rutschman, *Can employers require workers to take the COVID-19 vaccine? 6 questions answered*, The Conversation (Dec. 22, 2020), available at https://theconversation.com/can-employers-require-workers-to-take-the-covid-19-vaccine-6-questions-answered-152434
-- U.S. Constitution

Constitutional Law
The U.S. Constitution does not come right out and say, "the government can enact a vaccine mandate in order to ensure public health." The way we get to that authority is a little more roundabout, so bear with me for a little background. I'm going to give some background on a Constitutional doctrine called "the police power" and then I'll go into some cases and state legislation that connect that to the authority for vaccine mandates.

I. U.S. Constitution: Tenth Amendment and "Police Power" Doctrine
A. The key Constitutional provision that sets the general division of authority in this area comes from the 10th Amendment to the U.S. Constitution, which says that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

B. What that means is this:
1. **On the federal level**
By the wording of the United States Constitution, the government at the federal level does not hold a general power to regulate on anything it thinks needs regulating.

- Instead, at the federal level, authorities may only act where the Constitution specifically lists a power.
- For example, in Article I, Section 8, Clause 12, the U.S. Constitution says Congress "shall have Power To . . . raise and support Armies". That's an example of an "enumerated power": by the words in its text, the Constitution explicitly gives Congress that power to raise armies.
- Bottom line from from the 10th Amendment: the federal government does not get a blank check to do whatever it thinks is right. Instead, it can only do what the Constitution specifically allows it to do and that is called the enumerated powers" of the federal government.
    - Spoiler alert for the **federal government**: Powers to put in place a general vaccine mandate for all citizens, or for workers who are not federal government employees, are **not** among the Constitution's "enumerated powers" for the federal government.

2. **On the state level** (it's a whole different ball game)
By the 10th Amendment of the U.S. Constitution, it's not the federal government but the states that hold a general power to regulate. Because of the wording of the 10th Amendment, any state may put into place a regulation on anything (with just a few limited exceptions) unless the U.S. Constitution or the state's own constitution specifically forbids it.

- This general power to regulate to safeguard or maintain the public good is referred to as a state's "police power."
- The name is a little confusing. The "Police Power" Doctrine doesn't just refer to the power to have police forces. The "police power" refers to a government's general power to put regulations in place.

3. Bottom line:
The "Police Power" Doctrine says this: Under the 10th Amendment, the federal government does not have "the police power" (a general authority to put reglations in place for the public good, like a vaccine mandate) but the state governments do (unless a particular state's constitution expressly forbids it).

C. A quick note: Can private employers legally require employees to get vaccinated? Yes. Explanation is here: https://theconversation.com/can-employers-require-workers-to-take-the-covid-19-vaccine-6-questions-answered-152434

D. Another quick note on relevant Constitutional provisions:
1. Another provision of the U.S. Constitution that comes up in many of the cases about state government's powers to require vaccines is the 14th Amendment. Just for quick reference when it gets referenced below, the relevant portion of the 14th Amendment (U.S. Const. amend. XIV, §1, cl. 2) says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law…"

2. Objections to vaccine mandates that are made on the basis of religious belief often cite to the First Amendment, so let's review that text up front too. The First Amendment to the U.S. Constitution (U.S. Const. amend. I) states in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This part is referred to in shorthand as the "Establishment Clause" (the government can not establish an official state religion) and the "Free Exercise" clause (the government can not prohibit the free exercise of religion). These clauses have been held applicable to the states through that "Due Process Clause" of the Fourteenth Amendment that I cited in the paragraph immediately above this one.

II. State Legislation and Case Law on Vaccines

(This part is adapted from the piece given at the top of this memo, Kevin M. Malone And Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, pp. 271-280)

A. Vaccine mandates in state law

1. The first state law mandating vaccination was enacted in Massachusetts in 1809.
2. In 1855, Massachusetts became the first state to enact a school vaccination requirement. (As discussed above, the basis for considering a vaccination requirement by a state government a proper or Constitutional exercise of its power rests in the so-called "police power" of the state.)

B. State Law Vaccine Mandates Survive Challenges

1. U.S. Supreme Court upholds the power of states to require vaccines in 1905: *Jacobson v. Massachusetts*

In the landmark ruling in *Jacobson v. Massachusetts,* the U.S. Supreme Court upheld the right of states to compel vaccination.

The backstory:

- In the *Jacobson* case, the Commonwealth of Massachusetts had enacted a statute that authorized local boards of health to require vaccination.
- Jacobson challenged his conviction for refusal to be vaccinated against smallpox as required by regulations of the town of Cambridge Board of Health.

The U.S. Supreme Court's response:

- While acknowledging the potential for vaccines to cause adverse events and the inability to determine with absolute certainty whether a particular person can be safely vaccinated, the Court specifically rejected the idea of an exemption based on personal choice.
- To do otherwise "would practically strip the legislative department of its function to [in its considered judgment] care for the public health and the public safety when endangered by epidemics of disease" (*Jacobson v. Massachusetts*, 197 U.S. at 37, 25 S.Ct. at 366).
- In *Jacobson*, the Court—in addition to holding that providing for compulsory vaccination is within the police power of a state—also held that such authority may be delegated to a local body (like a city government) (*Jacobson v. Massachusetts*, 197 U.S. at 25, 25 S.Ct. at 361).

About Kris Kobach and others' possible First Amendment objection to vaccine mandates, or any objection based on a "personal liberty" argument:

- The Court gives one answer to an objection like this in *Jacobson*.
- In *Jacobson*, the Court addressed a tension between personal freedom and public health inherent in liberty: "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members" (*Jacobson v. Massachusetts*, 197 U.S. at 26, 25 S.Ct. at 361).

Bottom line:

- In the *Jacobson* case, the Court held that a health regulation requiring small pox vaccination was a reasonable exercise of the state's police power that did not violate the liberty rights of individuals under the Fourteenth Amendment to the U.S. Constitution. The police power is the authority reserved to the states by the Constitution and embraces "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety" (197 U.S. at 25, 25 S.Ct. at 361).

Fine print details:
The way you cite in a legalese footnote to the *Jacobson* case is:
Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905). The parentheses above give the page numbers (where it says "at" is the page number).

2. School Vaccination Laws

a. U.S. Supreme Court Upholds School Vaccination Laws as constitutional

Zucht v. King, 260 U.S. 174, 43 S.Ct. 24 (1922).
The U.S. Supreme Court in 1922 addressed the constitutionality of childhood vaccination requirements in *Zucht v. King*. The Court denied a due process Fourteenth Amendment challenge to the constitutionality of city ordinances that excluded children from school attendance for failure to present a certificate of vaccination. Instead, the Supreme Court held that "these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health" (260 U.S. at 177, 43 S.Ct. at 25).

b. State courts uphold school vaccination requirements as constitutional

Maricopa County Health Department v. Harmon, 156 Ariz. 161, 750 P.2d 1364 (Ariz. Ct. App. 1987).

- In the face of a measles epidemic in Maricopa County, Arizona, the Arizona Court of Appeals rejected the argument that an individual's right to education would trump the state's need to protect against the spread of infectious diseases short of confirmed cases of measles in the particular school. Given the nature of the spread of measles and the lag time in getting laboratory confirmation of cases, the court in *Maricopa County Health Department v. Harmon* was satisfied that it is prudent to take action to combat disease by excluding unvaccinated children from school when there is a reasonably perceived, but unconfirmed, risk for the spread of measles (156 Ariz. at 166, 750 P.2d at 1369).
- Although the court considered the right to education under Arizona's constitution, the decision is instructive in showing the reach of the police power to ensure the public health. The Arizona court in *Maricopa* specifically noted that the U.S. Supreme Court in *Jacobson* did not require that epidemic conditions exist to compel vaccination (156 Ariz. at 166, 750 P.2d at 1369).

III. What about First Amendment Freedom of Religion exemptions from vaccine mandates? Is There a Constitutional Right to a Religious Exemption from Mandatory Vaccination?

(Answer here is also adapted from Kevin M. Malone And Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, available at https://www.cdc.gov/vaccines/imz-managers/guides-pubs/downloads/vacc_mandates_chptr13.pdf
Note: the words in []below are direct copies of their text.)

Bottom line: "Challenges to mandatory vaccination laws based on religion or philosophic belief have led various courts to hold that **no constitutional right exists to either religious or philosophic exemptions**.

A. *First Amendment "free exercise" clause*
1. [Freedom to believe in a religion is absolute under the First Amendment. However, freedom to act in accordance with one's religious beliefs "remains subject to regulation for the protection of society."]

2. Supreme Court develops a "Balancing Test" for considering whether a state regulation violates a person's First Amendment interests
[The U.S. Supreme Court in the 1963 case of *Sherbert v. Verner* established a balancing test for determining whether a regulation violated a person's First Amendment right to free exercise of religion. The test, which prevailed until 1990, required the government to justify any substantial burden on religiously motivated conduct by a "compelling government interest" and by means "narrowly tailored" to achieve that interest (374 U.S. at 406–8, 83 S.Ct. at 1795–6).]

3. Little recent case law directly addresses the existence of a First Amendment "free exercise" right to a religious exemption from mandatory vaccination, in part because 48 states have provided by statute for religious exemptions to school vaccination laws. (For this statistic, see CDC. State immunization requirements, 1998–1999. Atlanta: U.S. Department of Health and Human Services, CDC, 1999.)

However, Supreme Court statements in some recent cases that refer to prior cases like the *Jacobson* decision [clearly indicate that on the grounds of doctrines like the police power, the U.S. Supreme Court sees a compelling state interest in mandating vaccination of children because of the health threat to the community and to the children themselves. With little practical alternative to vaccination to avoid or be a disease risk (e.g., inability to avoid contact with other persons, except for those totally isolated from society), mandatory vaccination of all school children should also meet the "narrowly tailored" criterion of *Sherbert*.]

4. The Supreme Court in 1990 makes it easier for states to prevail against claims that a state regulation violates a person's First Amendment rights

[Whether a vaccination law that does not provide for religious exemptions would meet the "compelling state interest" test is essentially moot now because of a U.S. Supreme Court ruling that significantly lowers the bar for states to prevail. In its 1990 decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith,* the Supreme Court rejected the compelling interest test and established a new standard that holds that "the **right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes**)' " (494 U.S. at 879, 110 S.Ct. at 1600 [quoting *United States v. Lee*, 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051, 1058, n. 3 (1982)]).

Congress attempted to legislatively override the ruling in *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA), which reestablished the compelling interest test as the standard for considering the constitutionality of free exercise claims. However, the U.S. Supreme Court in *City of Boerne v. Flores* struck down RFRA, holding that Congress had exceeded its consti tutional authority in implementing the statute (521 U.S. at 510–37, 117 S.Ct. at 2160–72). Thus, the *Smith* standard is the current law. Whether judged under the neutral law of general applicability test of *Smith* or the compelling interest test of *Sherbert*, it is reasonable to conclude that there is no First Amendment free exercise right to an exemption from mandatory vaccination requirements.

5. Is a Statutory Religious Exemption Constitutional?
[With no First Amendment free exercise right to a religious exemption, the next question is whether the states have the discretion to allow such exemptions by statute. The court decisions are mixed. The Establishment Clause of the First Amendment establishes the constitutional limits within which a state may accommodate a religious exemption to a law of general application, including whether such an exemption is allowed and how inclusively the exemption must be defined. As noted above, 48 states have provided by statute for religious exemptions to school vaccination laws.

In *Brown v. Stone,* the Mississippi Supreme Court struck down the religious exemption that appeared in the Mississippi school vaccination statute, holding that the statutory religious exemption violated the Equal Protection Clause of the Four teenth Amendment because it would "require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized" (378 So.2d at 223). Thus, the *Jacobson* argument comes full circle. The fact that no vaccine confers immunity on all vaccinees illustrates the point that even persons who comply with vaccination statutes can be placed at increased risk by exposure to individuals never vaccinated because of exemptions.]

B. *First amendment—establishment clause*

1. [Most challenges to religious-based vaccination exemptions have been decided by the courts on establishment grounds and concern the inclusiveness of such exemptions rather than their existence. The U.S. Supreme Court in *Lemon v. Kurtzman,*[50] a case involving state supplementation of parochial school salaries, defined a three-pronged test for determining whether a state religious accom modation complies with the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion' " (403 U.S. at 612–3, 91 S.Ct. at 2111 [citation omitted] [quoting *Walz v. Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414 (1970)]).]

*2. **Scope of statutory exemptions—sincerely held religious belief***
[In *Sherr v. Northport-East Northport Union Free School District,* the **plaintiffs had been denied an exemption under the state's religious exemption statute by the school district because, although they claimed religious opposition to vaccination, they were not "bona fide members of a recognized religious organization**" whose teachings oppose vaccination, as required by New York law (672 F.Supp. at 84 [quoting subsection 9 of N.Y. Pub. Health L. § 2164]). The U.S. District Court for the Eastern District of New York found that New York's limitation of the religious exemption violated both the Establishment and Free Exercise clauses of the First Amendment.

The **court found that this limitation violated the Establishment Clause** by running afoul of at least the last two prongs of the *Lemon* test: (*1*) by inhibiting the religious practices of individuals who oppose vaccination of their children on religious grounds but are not members of a religious organization recognized by the state and (*2*) by restricting the exemption to "recognized religious or ganizations" requires that the government involve itself in religious matters to an inordinate degree through such government approval (672 F.Supp. at 89–90). **In addition, the court held that the limiting language violated the Free Exercise Clause because no compelling societal interest existed to justify the burden placed on the free religious exercise of "certain individuals while other persons remain free to avoid subjecting their children to a religiously objectionable medical technique because they may belong to a particular religious organization to which the state has given a stamp of approval"** (672 F.Supp. at 90–1). There "surely exist less restrictive alternative means of achieving the state's aims than the blatantly discriminatory restriction . . . the state has devised" (672 F.Supp. at 91). Striking down New York's limitation, the court found that "sincerely held religious beliefs" in opposition to vaccination, whether or not as part of a recognized religion, should suffice (672 F.Supp. at 98).]

C. **Do Statutory Religious Exemptions Encompass Philosophic Opposition?**
[Strength of convictions aside, defining "religious" belief can be difficult, and un derstanding its implications for philosophic exemptions that a state may or may not wish to voluntarily confer is a challenge. As the Supreme Court noted in *Yoder*: "to have the protection of the Religion Clauses, the claims must be rooted in religious belief" (406 U.S. at 215, 92 S.Ct. at 1533). Decisions by the U.S. Supreme Court in

two conscientious objector cases indicate that a bright line may not always exist between the religious and the philosophic and that at least some amount of philosophic opposition to vaccination may rise to the level of being religious and therefore incorporated into a voluntarily conferred religious exemption, regardless of whether the state explicitly provides for a philosophic exemption. In *United States v. Seeger* and *Welsh v. United States,* the Court interpreted "religious," as it appeared in a federal statutory religious-based con scientious objector exemption from military conscription, very expansively to extend beyond traditional religious beliefs. *Seeger* defined the test as "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" (380 U.S. at 176, 85 S.Ct. at 859). The Court elaborated in *Welsh*: "to be 'religious' . . . this opposition . . . [must] stem from . . . moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions" (398 U.S. at 340, 90 S.Ct. at 1796). However, the *Welsh Court* clarified that "moral, ethical, or religious principles" do not incorporate "considerations of policy, pragmatism, or expediency" (398 U.S. at 342–3, 90 S.Ct. at 1798). *Yoder* provides further illumination: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations. . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which the society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses" (406 U.S. at 215–6, 92 S.Ct. at 1533). Thus, **the court in *Mason v. General Brown Central School District* rejected fear of the possible side effects from vaccination, although based on strong convictions, as rising to the level of religious beliefs because of evidence that the plaintiff's beliefs were "simply an embodiment of secular chiropractic ethics"** (851 F.2d at 51–2). ***Mason*, and similar decisions, indicate that the expansive religious interpretation of *Seeger* and *Welsh* should not be read too broadly**.]