

January 23, 2023

The Honorable James E. Edmunds, II
Chair
Health, Welfare, and Institutions
Subcommittee #1
Virginia House of Delegates
900 East Main Street
Richmond, VA 23219

Re: Oppose HB 2306 – This Bill Would Put Public Health at Risk

Dear Chair Edmunds:

On behalf of the Virginia members and supporters of Americans United for Separation of Church and State, I write to express our opposition to HB 2306, which would allow people to take religious exemptions from vaccination requirements during an epidemic, exactly when vaccines are most important to protect public health. The First Amendment to the U.S. Constitution does not require—and in fact prohibits—granting a religious exemption like the one in this bill. I therefore urge you to oppose HB 2306.

HB 2306 Would Put Public Health at Risk

It is a fundamental responsibility of the government to protect the public during an epidemic or other emergency. Indeed, State Health Commissioner has the mission “of protecting the health and promoting the well-being of all people in Virginia” and the goal of making Virginia the “healthiest state in the nation.”¹ Virginia’s laws address this responsibility by giving the State Health Commissioner the ability to require immunizations during an epidemic.²

Requiring vaccines during an epidemic is extremely important to protect the health of everyone. High immunization rates decrease the risk of disease.³ People who refuse vaccinations reduce herd immunity, which can lead to outbreaks.⁴ If too many people claim exemptions from vaccination requirements, it could potentially prolong an

¹ Va. Dept. of Health, The Commissioner, *available at* <https://www.vdh.virginia.gov/commissioner/> (last accessed Jan. 23, 2023).

² Va. Code Ann. § 32.1-48.

³ Kevin Malone & Alan Hinman, [Vaccination Mandates: The Public Health Imperative and Individual Rights](#) (last accessed Jan. 23, 2023).

⁴ *Id.*

epidemic and risk the health of everyone, including children who are too young to be vaccinated or people who cannot be vaccinated for medical reasons.⁵

Despite the need for widespread vaccination to prevent the spread of disease, this bill would create a religious exemption from immunization requirements imposed by the State Health Commissioner during an epidemic. If people were able to claim a religious exemption during an epidemic, it would likely prolong and worsen outbreaks of disease, which would put the health of Virginians at risk.

Religious Exemptions That Harm Others Are Unconstitutional

For more than a century, the United States Supreme Court has made clear that the Free Exercise Clause does not require the government to offer religious exemptions from mandatory vaccination laws.⁶ In 1905, in *Jacobson v. Massachusetts*, the Court rejected claims that a mandatory vaccination law violated individual liberties, holding 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.”⁷ As explained by the United States Supreme Court in *Prince v. Massachusetts*: “the right to practice religion freely does not include liberty to expose the community . . . to communicable disease or . . . ill health or death.”⁸ And in *Employment Division v. Smith*, a 1990 opinion written by Justice Antonin Scalia, the Court reaffirmed that the Free Exercise Clause does not “require[] religious exemptions from . . . health and safety regulation such as . . . compulsory vaccination laws.”⁹

On the contrary, the Establishment Clause of the First Amendment *prohibits* the government from granting religious exemptions that will harm others. A religious exemption “must be measured so that it does not override other significant interests”¹⁰ and may not “impose unjustified burdens on other[s].”¹¹

Yet, there is no question that an exemption from vaccination requirements during an epidemic would pose a significant and unjustified danger to all. The exemption in this bill

⁵ Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 *S. Cal. Interdisc. L.J.* 437, 447-48 (2012).

⁶ Nor is there a requirement under the Virginia Constitution. The Virginia Court of Appeals has recognized that religious conduct can be regulated for the protection of society. See e.g. *Roberts v. Roberts*, 41 Va. App. 513, 523 (Va. Ct. App. 2003) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

⁷ 197 U.S. 11, 26 (1905). See also *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (one “cannot claim freedom from compulsory vaccination . . . on religious grounds” because “the right to practice religion freely does not include liberty to expose the community . . . to communicable disease or . . . to ill health or death.”).

⁸ 321 U.S. 158, 166-67 (1944).

⁹ 494 U.S. 872, 888-89 (1990) (citing *Cude v. State*, 377 S.W.2d 816 (Ark. 1964)).

¹⁰ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interest” violates Constitution).

¹¹ *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

would undermine the effectiveness of efforts to contain the spread of an epidemic and put everyone, particularly children and other vulnerable populations throughout their communities, in harm's way.

Conclusion

Because it would create religious exemptions that would put the public health at risk, this bill violates the Constitution. We therefore urge you to oppose HB 2306. Thank you for your consideration on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikolas Nartowicz". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nikolas Nartowicz
State Policy Counsel

cc: Members of the House Health, Welfare and Institutions Subcommittee