

## SECOND CIRCUIT REVIEW

## Circuit Approves Repeal of Religious Exemptions From Vaccine Mandates

By Martin Flumenbaum and Brad S. Karp

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In *We the Patriots USA v. Connecticut Office of Early Childhood Development*, \_\_ F.4th \_\_ (2d Cir. 2023), the U.S. Court of Appeals for the Second Circuit considered whether Connecticut's repeal of religious exemptions from vaccination requirements for children to attend schools violated various constitutional rights. Circuit Judge Denny Chin authored the majority opinion, which Circuit Judge Pierre Leval joined in full, and Circuit Judge Joseph Bianco joined in part and dissented in part.

The Second Circuit affirmed the district court's decision dismissing each of the constitutional claims, while remanding the final claim, under the Individuals with Disabilities Education Act (IDEA), for further proceedings.

This decision will likely be an important precedent for policymakers across the country considering similar bills in the wake of the public debate surrounding vaccination mandates in the post-COVID-19 world.

### Connecticut's Repeal of The Vaccination Requirement

Like other states, Connecticut has a long history of conditioning enrollment in schools and other programs on the student being immunized against various diseases. In 1923, Connecticut created a carveout for children with a certificate from a medical professional that they should be medically exempt from a particular vaccination. In 1959, Connecticut created an additional carveout that would allow parents to exempt their child if the vaccination



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would be contrary to the religious beliefs of the child or parent or guardian.

Over the last decade, the percentage of Connecticut's schoolchildren who were immunized declined from approximately 97.1% to 96.2%, with religious exemptions specifically seeing a notable rise. In response to this decline, as well as growing public health concerns, Connecticut repealed the religious exemption on April 28, 2021.

### The District Court's Decision

Two days after Connecticut repealed the exemption, two not-for-profit organizations and three parents who object to vaccination on religious grounds brought suit. They argued that the repeal violated (1) the Free Exercise Clause of the First Amendment; (2) the right to privacy and medical freedom implied in the First, Fourth, Fifth, and Fourteenth Amendments; (3) the Equal Protection Clause of the Fourteenth Amendment; and (4) the liberty interest in childrearing in the Due Process Clause of the Fourteenth Amendment. One parent brought a final count, claiming the repeal violates the IDEA.

Senior District Judge Janet Bond Arterton of the District of Connecticut granted the defendants' motion to dismiss and denied plaintiffs' request to amend. Judge Arterton granted the motion

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on multiple grounds, including dismissing certain claims on sovereign immunity grounds, some claims for lack of associational standing and all claims on the merits for failure to state a claim. The plaintiffs appealed.

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### Surrounding Context

In the wake of the COVID-19 pandemic, vaccination mandates have increasingly become a hot button topic both in public discourse and in the courts. This case presented the Second Circuit with the novel question of whether the *repeal* of a religious exemption, but not a medical exemption, violated the Constitution. In recent years, several other states have enacted similar repeals, and courts have been divided on their constitutionality.

While courts in California and New York affirmed the constitutionality of analogous repeals, the Southern District of Mississippi granted a motion for a preliminary injunction in *Bosarge v. Edney*, \_\_ F. Supp. 3d. \_\_ (S.D. Miss. 2023), finding that the plaintiffs had demonstrated a likelihood of success on the merits of their constitutional challenge.

### The Second Circuit's Decision

The Second Circuit chose to address the merits, affirming the motion to dismiss for failure to state a claim, and declining to address the other grounds for dismissal.

First, with respect to the Free Exercise Claim, the Second Circuit examined Connecticut's repeal and found that it did not contain evidence of hostility to religious believers. The circuit rejected the plaintiffs' argument that the mere fact that the repeal targeted the religious exemption meant it was made with hostility to religion.

In addition to highlighting the Supreme Court's prior precedent on what it means to act with "hostility," the circuit pointed out that if a repeal of an exemption was *prima facie* evidence of hostility, then states would be disincentivized from accommodating religious practices in the first place.

The circuit then determined that the repeal did not provide individualized exemptions and was not substantively underinclusive. The circuit found that repealing the religious exemption, but not

the medical exemption, furthered Connecticut's public health interests.

Judge Bianco dissented on this issue, contending that there was insufficient facts at the motion to dismiss stage to make this conclusion, instead preferring to remand for further factual development on this issue.

Accordingly, the circuit found that under established Supreme Court precedent, rational basis review should apply to the Free Exercise claim, and plaintiffs did not dispute that the repeal satisfied rational basis review.

Second, the court turned to the medical freedom and privacy claims. The circuit found that the binding precedent holds that there is no fundamental right to medical freedom and privacy as defendants claimed, and there was no evidence that the right to be free from vaccination was implicit in the concept of ordered liberty or deeply rooted in U.S. history. In doing so, the circuit emphasized that the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) undercuts many of the plaintiffs' arguments and the cases upon which they rely.

Third, the court rejected the Equal Protection Claim, where the plaintiffs had claimed that the legacy provision, exempting children

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currently enrolled in kindergarten and later grades, creates an aged-based classification that burdens their free exercise rights.

The court rejected the claimed violation of the fundamental liberty interest in childrearing, finding that this claim was coextensive with the Plaintiffs' free exercise clause claim.

Finally, the court vacated the District Court's dismissal of the IDEA claim. The District Court found that the complaint only alleged that the child received "special services," but not "special education" as required by the statute. The circuit found this required by the statute was overly formalistic, and remanded for further proceedings.

### Conclusion

Given the public discourse surrounding vaccine mandates, it is possible other states follow Connecticut's lead in repealing religious exemptions. Accordingly, the Second Circuit's decision in *We the Patriots USA* will likely serve as important precedent for both litigators and lawmakers considering how to address this significant issue.