

No. 20-1222

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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B.W.C., et al.,  
*Plaintiffs-Appellants,*

v.

Randall Williams,  
Director of the Missouri Department of Health & Senior Services, et al.,  
*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Western District of Missouri, No. 4:19-cv-00682-HFS  
The Honorable Howard F. Sachs

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BRIEF OF STATE APPELLEES

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## SUMMARY OF THE CASE

This appeal concerns whether Missouri's vaccination law comports with the U.S. Constitution. By statute, Missouri requires all schoolchildren to be vaccinated unless the child's parent claims an exemption based on medical contraindications or religious beliefs. Mo. Rev. Stat. § 167.181. Several schoolchildren and their parents have challenged this vaccination program, as well as the form that Missouri requires parents to fill out to claim a religious exemption.

Below, the district court dismissed each challenge. The court held (1) that Missouri's vaccination law is constitutional under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and (2) that Missouri's religious exemption form does not burden free speech or religious exercise because it does not require parents to affirm anything in conflict with their beliefs.

Because this appeal concerns the constitutionality of a state statute, this Court should hold oral argument with 15 minutes per side.

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## STATEMENT OF THE ISSUES

Missouri requires all schoolchildren to be vaccinated unless the student's parent claims an exemption based on religious beliefs or medical contraindications. Mo. Rev. Stat. § 167.181.

The questions presented in this appeal and the most apposite authorities are:

I. Whether Missouri's mandatory vaccination law comports with the federal Constitution.

- *Jacobson v. Massachusetts*, 197 U.S. 11 (1905),
- *Zucht v. King*, 260 U.S. 174 (1922),
- *Prince v. Massachusetts*, 321 U.S. 158 (1944), and
- *McCarthy v. Boozman*, 212 F. Supp. 2d 945 (W.D. Ark. 2002).

II. Whether Missouri's religious exemption form for vaccinations comports with the federal Constitution.

- *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S.Ct. 2239 (2015), and
- *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

III. Whether the district court should have enjoined Missouri's law or its religious exemption form.

- *Maryland v. King*, 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers), and
- *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019).

## INTRODUCTION

For more than a century, the Supreme Court has made clear that States may require children to be vaccinated. Mandatory vaccinations do not violate the Constitution. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Nor does conditioning school admission based on mandatory vaccination violate the Free Exercise Clause. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944); *Zucht v. King*, 260 U.S. 174, 176 (1922). A State is also free to offer religious exemptions to its vaccination laws, so long as the exemptions do not require adherence to a particular religion. *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002).

Missouri's law fits comfortably within this precedent. The State requires schoolchildren to be vaccinated but it also allows parents to claim exemptions based on medical contraindications or religious beliefs. Mo. Rev. Stat. § 167.181. Parents may claim an exemption by requesting and returning a simple, one-page form by mail that informs the parents of the benefits of vaccination. They need only fill out the form with their names and then sign a box on the form saying vaccination conflicts with their religious beliefs.

Missouri does not limit exemptions to any particular religion, and its form does not require parents to agree with the State’s explanation of the benefits of vaccination. The exemption form thus does not compel speech from parents, restrain their speech, or pose any other novel constitutional problems.

In short, Missouri goes above and beyond what the Constitution requires it to do. Under longstanding precedent, the State could enact a more restrictive law and still satisfy the federal Constitution. Instead, Missouri has provided a generous exemption program that gives greater accommodation to religious objections than the Constitution requires.<sup>1</sup>

## **STATEMENT OF THE CASE**

### **I. Statutory and Regulatory Background**

**A.** For more than two centuries, medical professionals have recognized the live-saving importance of vaccinating children against

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<sup>1</sup> The challengers’ opening brief does not directly contest the conduct of Crossroads Academy-Central Street, Eva Copeland, or Karis Parker. To the extent the challengers’ arguments nevertheless implicate the district court’s rulings as to these Crossroads Appellees, the Court should affirm those rulings—denial of a preliminary injunction, dismissal of Crossroads Academy-Central Street for failure to state a claim, and dismissal of Copeland and Parker based on qualified immunity—for the reasons stated by the district court and detailed throughout this brief. The Crossroads Appellees join this brief in full.

infectious diseases. The English physician and scientist Edward Jenner first used the cowpox vaccine to vaccinate a child against smallpox in 1796, and by the early 1800s, many European countries began requiring smallpox vaccination of infants.<sup>2</sup> The first vaccinations in America began in 1801 when Benjamin Waterhouse, a physician and president of Harvard Medical School, began using the cowpox vaccine to vaccinate against smallpox in Massachusetts in 1801.<sup>3</sup> French chemist and microbiologist Louis Pasteur later created an avian cholera vaccine in 1879 and a rabies vaccine in 1885, and over the next century, scientists created vaccines for many more diseases, saving countless children from suffering from typhoid, diphtheria, tuberculosis, tetanus, pertussis (whooping cough), polio, measles, mumps, and rubella.<sup>4</sup>

These public health campaigns have transformed the world. Smallpox—once an uncontrollable epidemic that had scarred survivors, blighted populations, and filled cemeteries worldwide—now became a manageable, avoidable disease, before being eradicated worldwide in

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<sup>2</sup> Martha McCarthy, Ph.D., *Student Vaccination Requirements: Can Nonmedical Exemptions Be Justified?*, 320 Ed. Law Rep. 591, 592 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

1977.<sup>5</sup> Vaccination thus ranks among the top public health achievements of the twentieth century.<sup>6</sup> *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 226 (2011).

**B.** Beginning in Massachusetts towns in the 1830s and continuing to today in every state, states have required children to be vaccinated.<sup>7</sup> President Thomas Jefferson is often called the greatest patron of vaccination in America for inoculating several hundred members of his family, staff, and friends in 1801, and for helping to spread vaccination among southern states.<sup>8</sup> When schools became widespread around this time, the risk of disease outbreaks among children began to rise due to so many children in proximity with each other. Compulsory vaccination laws thus became enacted at the same time as compulsory education laws, beginning by locality and then statewide in northeastern states like

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<sup>5</sup> James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 836, 840 (2002).

<sup>6</sup> *Id.* at 833.

<sup>7</sup> McCarthy, *supra* at 592–93; National Conference of State Legislatures, States With Religious and Philosophical Exemptions From School Immunization Requirements (Jan. 3, 2020), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> (collecting statutes).

<sup>8</sup> Hodge & Gostin, *supra* at 842–43.

Massachusetts in 1855, New York in 1862, Connecticut in 1872, and Pennsylvania in 1895.<sup>9</sup> Other regions followed, requiring compulsory child vaccination in as a condition of school attendance—such as Indiana in 1881, Illinois and Wisconsin in 1882, Iowa in 1889, Arkansas in 1882, and California in 1888.<sup>10</sup>

Missouri is no exception. In 1909, the Missouri Supreme Court held that “We have no doubt that, in the event of a threatened epidemic of smallpox, [local] boards can pass a rule excluding all pupils who have not been vaccinated.” *State ex rel. O'Bannon v. Cole*, 119 S.W. 424, 426 (Mo. 1909). “Many states have passed laws requiring vaccination of pupils before entering schools, and these have been generally upheld, and that, too, in the face of statutory and constitutional provisions making such schools open to all pupils within the required ages.” *Id.* at 427–28.

Today, by statute, Missouri continues to require vaccination of schoolchildren. The State makes it “unlawful for any student to attend school unless he [or she] has been immunized as required under the rules and regulations of the department of health and senior services, and can

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<sup>9</sup> Hodge & Gostin, *supra* at 851.

<sup>10</sup> *Id.*

provide satisfactory evidence of such immunization.” Mo. Rev. Stat. § 167.181(2).

Like other states, these laws are paired with compulsory education laws. Missouri requires children to attend school. *Id.* § 167.031. Parents who do not send their children to school are guilty of a misdemeanor. *Id.* § 167.061.

C. Although every state requires children to be vaccinated, every state still allows exemptions for medical reasons.<sup>11</sup> In addition, 45 states and Washington D.C. grant exemptions for religious or other objections to immunizations.<sup>12</sup> But, even though “virtually all states currently grant religious exemptions to school vaccination requirements, requesting a person to submit to vaccination against his religious beliefs is generally viewed as constitutional.”<sup>13</sup>

Missouri requires schoolchildren to be vaccinated unless parents claim an exemption based on “religious beliefs or medical contraindications.” Mo. Rev. Stat. § 167.181(3). Missouri’s religious

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<sup>11</sup> National Conference of State Legislatures, *supra*.

<sup>12</sup> *Id.*

<sup>13</sup> Hodge & Gostin, *supra* at 859, 863-66 (collecting cases); *see also* McCarthy, *supra* 559-601 (summarizing historical cases).

exemption may be obtained “if one parent or guardian objects in writing to his [or her] school administrator against the immunization of the child, because of religious beliefs or medical contraindications.” *Id.* § 167.181(3).<sup>14</sup> State regulations thus make it “unlawful for any student to attend school unless the student has been immunized according to this rule or unless a signed statement of medical or religious exemption is on file with the school administrator.” 19 CSR 20-28.010(1)(C).

Under Section 167.181.1, the Department of Health and Senior Services (DHSS) is instructed to “supervise and secure the enforcement of the required immunization program.” It must “promulgate rules and regulations” governing the immunization “of children attending public, private, parochial or parish schools.” Mo. Rev. Stat. § 167.181.<sup>15</sup>

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<sup>14</sup>Section 167.181.3 provides

3. This section shall not apply to any child if one parent or guardian objects in writing to his school administrator against the immunization of the child, because of religious beliefs or medical contraindications. In cases where any such objection is for reasons of medical contraindications, a statement from a duly licensed physician must also be provided to the school administrator.

Mo. Rev. Stat. § 167.181.

<sup>15</sup> Section 167.181.1 provides

1. The department of health and senior services . . . shall promulgate rules and regulations governing the immunization against poliomyelitis, rubella, rubeola, mumps,

D. Many states condition vaccination waivers on receiving information about the risks and benefits of vaccination from the state department of health or from a healthcare provider.<sup>16</sup> Arizona, for example, requires parents to sign a statement that they have found out about immunizations provided by the state and that the parents understands the risks and benefits of immunizations and non-immunization. Ariz. Rev. Stat. § 15-873. Utah requires an online education module or an in-person consultation from a health official. Utah Code Ann. § 53G-9-304. Vermont likewise grants exemptions only

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tetanus, pertussis, diphtheria, and hepatitis B, to be required of children attending public, private, parochial or parish schools. Such rules and regulations may modify the immunizations that are required of children in this subsection. The immunizations required and the manner and frequency of their administration shall conform to recognized standards of medical practice. The department of health and senior services shall supervise and secure the enforcement of the required immunization program.

Mo. Rev. Stat. § 167.181.

<sup>16</sup>Centers for Disease Control & Prevention, Center for State, Tribal, Local, and Territorial Support, Public Health Law Program, *State School and Childcare Vaccination Laws* (Apr. 28, 2017), <https://www.cdc.gov/phlp/publications/topic/vaccinations.html>; Aila Hoss & Matthew Penn, *State School Immunization Requirements and Vaccine Exemption Laws*, Office for State, Tribal, Local & Territorial Support, CDC (March 27, 2015). <https://www.cdc.gov/phlp/docs/school-vaccinations.pdf> (collecting statutes).

if parents provide “a signed statement to the school or child care facility on a form created by” the state health department after reviewing “evidence-based educational material” about the risks of adverse reactions to immunization and the risks of non-immunization, especially the risks to the person and others of contracting or carrying a life-threatening vaccine-preventable infectious disease. Vt. Stat. Ann. tit. 18, § 1122(a)(3).

Missouri does not require parents claiming a religious exemption to undergo an educational or counseling session, but the State does provide parents with brief written information about the benefits of vaccination on the form for religious exemptions that parents can obtain and return by mail. As part of its duty to administer and regulate the vaccination of schoolchildren, the department requires religious exemptions to “be provided on an original Department of Health and Senior Services’ form Imm.P.11A.” 19 CSR 20-28.010(1)(C)(2). This original form can be obtained in many ways, including “by contacting a medical provider, local public health agency, or the department’s Bureau of Immunization

Assessment and Assurance at PO Box 570, Jefferson City, MO 65102-0570, or by calling 800-219-3224.” *Id.*<sup>17</sup>

The religious exemption form provides information about the benefits of immunization and encourages parents to vaccinate. A244. Missouri’s exemption form contains two boxes. *Id.* In the top box, it provides information about the importance of vaccination for the community, especially the risks of non-vaccination for vulnerable members of the population like babies who cannot be vaccinated and who depend on herd immunity for protection. *Id.*<sup>18</sup> In the bottom box, it allows

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<sup>17</sup> 19 CSR 20-28.010(1)(C)(2) provides

2. Religious exemption. A student shall be exempted from the immunization requirements of this rule as provided in section 167.181, RSMo, if one (1) parent or guardian objects in writing to the school administrator that immunization of that student violates his/her religious beliefs. This exemption must be provided on an original Department of Health and Senior Services' form Imm.P.11A, and shall be signed by the parent or guardian and placed on file with the school immunization health record. The Imm.P.11A form is incorporated by reference in this rule as published April 2012 by the Department of Health and Senior Services and may be obtained by contacting a medical provider, local public health agency, or the department's Bureau of Immunization Assessment and Assurance at PO Box 570, Jefferson City, MO 65102-0570, or by calling 800-219-3224.

<sup>19</sup> CSR 20-28.010(1)(C)(2).

<sup>18</sup> The form’s top box reads:

a parent to claim an exemption by checking a box for the vaccine to be skipped, by filling in a child's name, and by signing text that states that "immunizations violate my religious beliefs." *Id.*<sup>19</sup>

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Required under the Missouri State immunization law (Section 167.181, RSMo) of children attending public, private, and parochial or parish schools.

We strongly encourage you to immunize your child, but ultimately the decision is yours. Please discuss any concerns you have with a trusted healthcare provider or call the immunization coordinator at your local or state health department. Your final decision affects not only the health of your child, but also the rest of your family, the health of your child's friends and their families, classmates, neighbors, and community.

Unimmunized children have a greater risk of contracting and spreading vaccine-preventable diseases to babies who are too young to be fully immunized and those who cannot be immunized due to medical conditions. In the event of an outbreak of a vaccine-preventable disease within a particular facility, children who are not fully immunized or do not have documented laboratory evidence of immunity shall not be allowed to attend school or day care until the local health authority declares the designated outbreak or health emergency has ended.

A244.

<sup>19</sup> The form's bottom box reads

THIS IS TO CERTIFY THAT NAME OF CHILD (PRINT OR TYPE) \_\_\_\_\_ SHOULD BE EXEMPTED FROM RECEIVING THE FOLLOWING CHECKED IMMUNIZATION(S) BECAUSE IMMUNIZATIONS VIOLATE MY RELIGIOUS BELIEFS:

DIPHtheria  
HEPATITIS B  
MMR

The form does not require parents to certify that they have read or agree with the information provided by the state. Nor does the form ask about the parent’s religion, or ask parents to justify or explain their religious objections.

The department also publishes a one-page document called “Religious Exemption: What Parents Need to Know.” A24–25, 226. This document is not part of the official form. *Id.* It need not be submitted for an exemption. *Id.* It provides information about Missouri’s law and about the benefits of vaccination, including how vaccines save lives and avoid disease for vulnerable members of the community. The document also informs the public that religious exemptions are available. It explains what a religious exemption is by saying that “Claiming a religious exemption represents a parent or guardian’s belief that the family’s

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PERTUSSIS  
POLIO  
TETANUS  
VARICELLA  
OTHER \_\_\_\_\_  
PARENT/GUARDIAN NAME (PRINT OR TYPE) \_\_\_\_\_  
PARENT/GUARDIAN SIGNATURE \_\_\_\_\_  
DATE \_\_\_\_\_

A244.

religious preference does not support immunizing against vaccine-preventable diseases.” *Id.*

## **II. Procedural Background**

**A.** Seven Missouri parents have now challenged the constitutionality of Missouri’s vaccination requirement and its religious exemption form. A231.

According to the allegations in their complaint, Audrey and Zach Baker, parents of un-immunized minor child W.B., were asked to provide proof of vaccination or submit a state religious exemption form to their school Crossroads Academy for W.B. to attend school. A16–17, 22, 26. They insisted on giving Crossroads Academy a handwritten note stating a general religious objection, which the school explained was not acceptable because state regulations required the request for religious exemption to be asserted on the official state form. *Id.*

Rather than request an official exemption form from the state health department by mail or through any of the other methods outlined in state regulations, 19 CSR 20-28.010(1)(C)(2), they sued the Director of the Department of Health and Senior Services Dr. Randall Williams and the state Attorney General Eric Schmitt to enjoin the state vaccination

law. And they sued their school to enjoin it from dismissing their child.

A1. They sought injunctions and declaratory relief, as well as compensatory and punitive damages. A28, 38–39, 51–53.

In their complaint, the Bakers disagreed with the form’s educational information and other department educational materials providing facts about vaccination. A67–68. They emphasized the alleged risks of vaccination, and they rejected not only the medical need for vaccination but also the value of herd immunity. A17–19, 25, 28–29, 32, 38, 58, 61–62, 65–66.

The Bakers claimed that mandatory vaccination is unconstitutional and that their child has a right to be free from vaccination. A17. They referred to this right in many ways: as a right to privacy, a right to choice, a right to bodily integrity, a right to autonomy, a right to property, a right to dignity, a right to liberty, a right to education, “a fundamental right to make medical decisions,” a “right to provide informed consent as to whether their school aged child is vaccinated,” and “the right to pursue a life as a child and enjoy the special time in that period of one’s life.” A17, 19, 28–34, 40.

They claimed that this right to be free from vaccination falls under several constitutional provisions, citing the First Amendment's free speech, free exercise, and establishment clauses; the Third Amendment's rule against compulsory quartering of soldiers; the Fourth Amendment's protections against searches and seizures; the Fourteenth Amendment's equal protection clause and due process clause; and the unconstitutional conditions doctrine. A5–10, 18, 22, 28–37, 40, 44, 51–53, 245–46.

The Bakers also objected to having to submit a state religious exemption form. A2–3, 245–46. They alleged that requiring parents to use the state form violates the First Amendment's free speech and free exercise clauses by compelling parents to listen to or to affirm the Department's information about the importance of vaccination. A4–7, 15, 20–25, 44–45, 63. They also claimed that the form restrains parental speech because First Amendment gives them the right to submit religious objections to vaccinations and claim exemptions to Missouri's law in other formats than the form. A6, 15, 20–25, 40, 45, 65, 111–12.

The Bakers also asserted that the state religious exemption form shows hostility to religion rather than neutrality, suggesting that it violates the First Amendment's establishment clause. A20–21, 24, 35, 38,

63. They alleged that the form lacks a secular purpose, such as providing informed consent; that the form burdened or demeaned religion; that the form entangled the state health department with parents' exercise of religion; and that the form's educational information prioritized religious beliefs favoring vaccination over religious beliefs objecting to vaccination. A10–14, 25, 66.

The Bakers raised various claims under state law about the permissibility of mandatory vaccinations, the lawfulness of religious exemption form, and the enforcement of Missouri's laws and regulations. A3–4, 22, 25–26, 30, 37–38, 40–41, 45, 51–53, 72–74, 245–46. They also complained that the regulations did not make the exemption form downloadable online. A24, 26, 41, 45.

The parties stipulated to a temporary restraining order allowing the child W.B. to remain in school while the court considered the Bakers' request for preliminary and permanent injunctions. A56–87, 232–33, 239–56.

**B.** The district court then denied an injunction and dissolved the temporary restraining order. A154–55, 236 (Add2–3), reported at *W.B. by & through Baker v. Crossroads Acad.-Cent. St.*, No. 4:19-CV-00682-HFS,

2019 WL 6257963, at \*1 (W.D. Mo. Nov. 22, 2019). The court held that “the basic issues are not difficult.” A155 (Add3). It is thus “quite unlikely that plaintiffs will ultimately prevail in obtaining an injunction against the State and school officials.” A161 (Add9).

*First*, the district court held that there is no constitutional right not to be vaccinated. “Vaccination obligations have long been approved by the courts, with or without religious exemptions.” A155 (Add3). “As of a century ago, it was well settled that vaccination as a ‘condition precedent to the attendance of children upon schools in their communities is a valid exercise of the police power for the prevention of disease and the preservation of health.” A156–57 (Add4–5) (quoting *Herbert v. Demopolis Sch. Bd. of Educ.*, 73 So. 321 (Ala. 1916)). The Supreme Court upheld mandatory vaccination in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). A156 (Add4). Nor have any recent decisions eroded this holding: “*Jacobson* continues to represent well-established law that a parent ‘has no constitutional right to an exemption’ from vaccination requirements.” A157 (Add5) (citing *Nicolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017); *Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015)). The “most current State and Federal decisions also uniformly support

vaccination requirements, including governmental advocacy of vaccinations, despite various scientific, religious, family autonomy and general libertarian objections by parents.” A157 (Add5). No court has ever held to the contrary and invalidated a vaccination law. A157 (Add5).

*Second*, the district court held that the First Amendment permits the State to express its view on vaccination through the brief educational component of Missouri’s exemption form. The court explained that the “State’s freedom to advocate vaccination as governmental policy is also well settled.” A155 (Add3). The First Amendment allows governmental advocacy of vaccination, just as it allows “governmental advocacy” of many other “practices to effectuate the public policy of the State.” A158 (Add6). And the court noted a recent Supreme Court decision, *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S.Ct. 2239, 2245–46, 2255 (2015), in which “the Supreme Court, in dicta, recently again recognized the governmental right to speak in support of its programs, mentioning vaccinations.” A158–59 (Add6–7). “Although the Bakers say they have religious scruples against vaccination, they are not entitled to insist on governmental silence rather than advocacy.” A158 (Add6).

*Third*, the district court held that the First Amendment did not give the parents a right, as an unequal “captive audience,” to avoid hearing this message. A159 (Add7). If Missouri has a “right to advocate vaccination of school children,” the “most obviously useful opportunity for last-minute persuasion would be” in “the upper half of the form which parents are to use to claim religious objections.” A159 (Add7). Besides, here, there is no requirement that the person read the message to claim the exemption. A160 (Add8) (citing *Doe v. Parson*, 567 S.W.3d 625 (Mo. 2019); *Doe v. Parson*, 368 F. Supp. 3d 1345 (E.D.Mo. 2019), appealed No. 19-1578 (8th Cir. March 20, 2019)).

The district court next held that the form’s inclusion of a message targeted to objecting parents did not pose problems of under-inclusiveness under the equal protection clause. A159 (Add7). The State can limit its message to particular groups, even if the group cannot avoid being provided the material. A160 (Add8) (citing *Consol. Edison Co. of N.Y. v. Public Service Commission*, 447 U.S. 530 (1980)). “No case is cited that would bar effective salesmanship by the State, targeting the group most needing its message.” A160 (Add8).

The district court also held that this language was neutral among religious beliefs. A159 (Add7). The court form's information is "appropriately designated as secular." *Id.* The State's advocacy of vaccination did not involve the adoption of religious beliefs favoring vaccination, nor did it pit "one set of religious beliefs against another." *Id.*

*Fourth*, the court held that providing this government information differs from compelling private speakers to deliver the government's message. A159–60 (Add7–8) (citing *NIFLA v. Becerra*, 138 S.Ct. 2361, 2275–76 (2018)). Unlike cases in which governments have used private speakers to deliver government messages, here, "the State is using its own facilities to deliver its message." A160 (Add8).

The district court noted that no parent who signs the lower box must endorse the State's educational message in the top box. A160–61 (Add8–9). This "form containing modest advocacy is divided into parts which separate the advocacy language by the State from the wording to be used by a parent claiming an exemption." A155 (Add3). "The parental signature at the bottom of the religious exemption form serves to verify the required parental inserts of the child's name, the types of vaccination

objected to, and the grounds for the exemption, simply asserted as ‘religious.’” A161 (Add9). “Filling in, signing and submitting the form in no way comments on or endorses the State’s message” because that message “is separated on the form by a line dividing the upper and lower portions and clearly identified as DHSS language.” *Id.*

The district court also explained that this case is not like *Wheaton College v. Burwell*, 573 U.S. 958 (2014), where the religious exemption form did not merely provide notice of religious objections but actually enabled the provision of contraceptive coverage—a case that held that religious objectors “should not be required to be ‘complicit’ in the procedure by filing exemption forms.” A161 (Add9). Here, by contrast, “the filing of forms does not advance vaccination use but simply results in an exemption.” *Id.*

The court thus denied a preliminary injunction. “Where a party is unlikely to succeed on the merits, as here, this may be the predominant consideration in denying relief.” A162 (Add10). The other equitable factors also did not favor an injunction. “Assuming plaintiffs continue to have strong objections to vaccinations they can readily obtain an official exemption form, execute it, and submit it,” so that their child is exempt

from vaccination and can attend school. *Id.* In contrast, “a preliminary injunction would encourage disregard for the program, particularly since an order would be likely publicized.” *Id.* The balance of harm and the public interest thus favors the State, “assuming the vaccination program significantly safeguards public health.” *Id.*

The court thus concluded that “the child may attend school if vaccinated or if a State-approved exemption form is submitted to the school.” A155 (Add3). It delayed entry of its order temporarily to allow for an interlocutory appeal, but the challengers did not appeal. A163 (Add11); A211 (Add15). The court then declined to stay its order longer. A237, 308–10.

C. While the motions for injunctive relief were still pending, the Bakers amended their complaint to add three more schoolchildren and five other parents as plaintiffs and two other school districts, two school nurses, and two school principals as defendants. A1–2, 16, 26–27. 42–51, 227–31. They claimed that they had submitted religious objections in writing in various informal ways, but because they refused to use the state form, their schools or daycare still required them to submit an original state form to receive an exemption. A16–17, 22–23. (To be sure,

one school is no longer insisting on vaccination for one student because the school believes the student is compliant on his vaccines, although the student's parents dispute that the student is in fact compliant. A22–23.) Plaintiffs then reasserted essentially the same merits arguments as the Baker plaintiffs had raised in the earlier filings and that the district court had considered before. A167–210.

The district court then dismissed the amended complaint for largely the same reasons that it had denied a preliminary injunction. A213–14, 236–38, 320 (Add17–18). The court accepted the theory that the challengers “are sufficiently ‘injured’ by the current system” to have standing to sue. A214 (Add18). But it reiterated that, if the State “wishes to require vaccination of schoolchildren, there is an unbroken collection of cases confirming that it can do so.” A216 (Add20). Missouri “can also advocate vaccination” on the exemption form. *Id.* Far from being unjustified unbridled discretion, allowing the department to create and use this form is a “quite routine” delegation of authority to an administrative agency. A21 (Add19). This “advocacy (right or wrong) deals with public health issues” and thus “is religiously neutral” and “is entirely secular in nature and motive, not ‘hostile to religion.’” A216

(Add20). “For instance, it would not be hostile to a religious objection to eating pork for an agency to certify that pork is safe to eat.” *Id.* The form’s “text is in no way ambiguous as to the source of the vaccination recommendation.” A217 (Add21). And the challengers “have not exhausted possible efforts to show disapproval of the DHSS message, without endangering school attendance by their children.” *Id.*

Because Missouri’s vaccination program is constitutional and because of qualified immunity, the court dismissed claims against the school, school districts, and individual school employees who had rejected handwritten religious objections and instead required the state form. A164–66, 218–19, 236–37 (Add12–14, 22–23). The Attorney General was also dismissed because he lacks a role in enforcing the vaccination program. A214 (Add18). The court then had no need to reach other issues, such as whether the correct remedy for a violation would be to sever the religious exemption, rather than strike down the vaccination program, under *Boone v. Boozman*, 217 F. Supp. 2d 938, 952 (E.D. Ark. 2002). A299–300.

The court refused to exercise supplemental jurisdiction over any state-law claims. A165, 214, 218–220 (Add13, 18, 22–24). The court also

denied leave to amend the complaint again to make it a class action.  
A236, 283–85.

The challengers now appeal the district court’s denial of an injunction and the dismissal of their suit. A221, 238.

## STANDARD OF REVIEW

Preliminary injunctive relief is “an extraordinary remedy,” and “the burden of establishing the propriety of an injunction is on the movant.” *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

Four factors govern whether to grant a preliminary injunction: “(1) the likelihood of the movant’s success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest.” *Id.* (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)).

A “more rigorous standard” applies before issuing “preliminary injunctions that thwart a state’s presumptively reasonable democratic processes.” *Planned Parenthood v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc). A party seeking to enjoin the implementation of a state statute must prove more than just a “fair chance” that it will succeed on the merits: the party must show that it “is likely to prevail on the merits.” *Id.* at 731–32.

This Court reviews an order granting or denying a preliminary injunction for abuse of discretion. *Id.* It reviews legal questions and First

Amendment challenges de novo. *United States v. Petrovic*, 701 F.3d 849, 854 (8th Cir. 2012).

This Court reviews de novo a district court's disposition of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 933 (8th Cir. 2012). The court will "accept as true all of the factual allegations contained in the complaint, and review the complaint to determine whether its allegations show that the pleader is entitled to relief." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008).

## SUMMARY OF THE ARGUMENT

The district court correctly held that Missouri's vaccination law and religious exemption form comport with the federal Constitution. Missouri requires schoolchildren to be vaccinated but it also allows parents to claim exemption based on religious beliefs or medical contraindications. Mo. Rev. Stat. § 167.181. Below and on appeal, the challengers have failed to state a claim on the merits and have failed to meet their high burden of proving the need for an injunction under each traditional equitable factor.

The challengers have not stated a claim on the merits. States may require schoolchildren to be vaccinated, *Zucht v. King*, 260 U.S. 174, 176, (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and they may condition school admission on mandatory vaccination under the Free Exercise Clause, *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). A State may also offer religious exemptions to its vaccination laws, so long as the exemptions do not require adherence to a particular religion. *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948 (W.D. Ark. 2002).

Missouri allows any parents to claim an exemption to its vaccination requirements by checking a box on a simple, one-page form

after being informed about the benefits of vaccination. This form does not require parents to agree with the benefits of vaccination. It thus does not compel speech from parents, does not prevent parents from speaking about vaccination, or pose any other novel constitutional problems.

The balance of the equities disfavor an injunction. The challengers do not face any irreparable harm because they may easily claim a religious exemption. If anything, the State and its citizens would suffer irreparable harm if Missouri's vaccination law were enjoined, by potentially exposing schoolchildren to preventable diseases.

## ARGUMENT

### I. Mandatory vaccination is constitutional.

#### A. The federal Constitution contains no right to be free from mandatory vaccination.

Missouri imposes a less strict vaccination scheme than the Constitution allows, and it provides a more generous religious exemption scheme than the Constitution requires. Mandatory vaccinations are within the police power of the states, and they do not violate an individual's due process rights. *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905). Under this longstanding precedent, the State could enact a more restrictive law and still satisfy any level of constitutional scrutiny. Instead, Missouri has chosen to accommodate religious objectors by providing religious exemptions freely upon request.

Missouri requires schoolchildren to be vaccinated unless parents claim a medical or religious exemption. By statute, it is “unlawful for any student to attend school unless he [or she] has been immunized as required under the rules and regulations of the department of health and senior services, and can provide satisfactory evidence of such immunization.” Mo. Rev. Stat. § 167.181(2). The law provides exemptions based on “religious beliefs or medical contraindications.” *Id.* § 167.181(3).

The religious exemption may be obtained “if one parent or guardian objects in writing to his [or her] school administrator against the immunization of the child, because of religious beliefs or medical contraindications.” *Id.*

The challengers assert that the federal Constitution gives them a right to be free from mandatory vaccination. Aplt. Br. 1, 4, 11, 13, 41, 46–47, 53. They claim that this right to be free from vaccination falls under several constitutional provisions, including the First Amendment, the Fourteenth Amendment, and the unconditional conditions doctrine. *Id.* Below and on appeal, they have referred to this right in many ways, including as a right to bodily integrity, a right to autonomy, a right to property, a right to dignity, a right to liberty, a right to education, and “a fundamental right to make medical decisions.” *Id.*; A17, 19, 28–34, 40. They assert that Missouri’s compulsory vaccination law causes involuntary consent to vaccinations. Aplt. Br. 1–2, 4, 10–11, 13, 41.

But the district court correctly held that there is no constitutional right not to be vaccinated. *Zucht v. King*, 260 U.S. 174, 176, (1922). “Vaccination obligations have long been approved by the courts, with or without religious exemptions.” A155 (Add3). Parents “may not endanger

the health of the community by refusing” to vaccinate their children. *Mosier v. Barren Cty. Bd. of Health*, 215 S.W.2d 967, 969 (Ky. 1948).

Under the Free Exercise Clause, States may condition school admission on mandatory vaccination. *See, e.g., Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *Workman v. Mingo County Bd. of Educ.*, 419 Fed. Appx. 348, 353–54 (4th Cir. 2011). “As of a century ago, it was well settled that vaccination as a ‘condition precedent to the attendance of children upon schools in their communities is a valid exercise of the police power for the prevention of disease and the preservation of health.’” A156–57 (Add4–5) (quoting *Herbert v. Demopolis Sch. Bd. of Educ.*, 73 So. 321 (Ala. 1916)); *see, e.g., Cude v. State*, 377 S.W.2d 816, 819 (Ark.1964). As the Supreme Court stated in *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944), under the Free Exercise Clause, 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 164, 166.

The challengers also allege Missouri’s vaccination requirements deny them equal protection under the Fourteenth Amendment. But this

argument conflicts with precedent, too. When it comes to mandatory vaccination, a “long line of decisions” has “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.” *Zucht*, 260 U.S. at 176–77.

The challengers allege that more recent decisions after *Jacobson* and *Zucht* have recognized that forcible intrusions on the body trigger heightened scrutiny for a deprivation of a parent or child’s liberty interest under the Fourteenth Amendment. Aplt. Br. 2, 13–14, 46–47.

But these recent decisions have not eroded *Jacobson* or any other case. To the contrary, “*Jacobson* continues to represent well-established law that a parent ‘has no constitutional right to an exemption’ from vaccination requirements.” A157 (Add5) (citing *Nicolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017)). The “most current State and Federal decisions also uniformly support vaccination requirements, including governmental advocacy of vaccinations, despite various scientific, religious, family autonomy and general libertarian objections by parents.” A157 (Add5). “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.” *Id.* There is no fundamental right not to vaccinate under modern due process analysis. *Workman*, 419 F. App'x at 355. And “[e]vidence of different treatment of unlike groups does not support an equal protection claim.” *Whitlow v. California*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016).

This precedent remains binding today, and during the current pandemic, this Court has recently reaffirmed its adherence to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). A156 (Add4). A “district court’s failure to apply the *Jacobson* framework produce[s] a patently erroneous result.” *In re Rutledge*, No. 20-1791, 2020 WL 1933122, at \*5 (8th Cir. Apr. 22, 2020); accord *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). No court has ever held to the contrary and invalidated a vaccination law. A157 (Add5). If the State wishes to require vaccination of schoolchildren, “there is an unbroken collection of cases confirming that it can do so.” A216 (Add20).

**B. The State has compelling interests in vaccination.**

The challengers allege that this Court must apply strict scrutiny to Missouri’s vaccination program. Aplt. Br. 16. This is incorrect. Missouri’s

law violates no constitutional rights, and so no scrutiny applies. *Phillips*, 775 F.3d at 543.

The challengers allege that the State lacks any interests, let alone compelling interests, in its vaccination program. Aplt. Br. 1, 12, 16, 47–48, 53–54. They claim that vaccines risk permanent harm. Aplt. Br. 1, 14.

But even if some form of scrutiny were to apply, any level of scrutiny would be easily satisfied. Communicable diseases affect more than just the individual: they affect the entire population, including non-objecting schoolchildren attending school with objecting children. Eliminating a states’ ability to mandate vaccination could impact the health and safety of many others. “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.” *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944).

In their complaint, the challengers emphasized the alleged risks of vaccination, and they rejected not only the medical need for vaccination but also the value of herd immunity. Aplt. Br. 7, 12–14; A17–19, 25, 28–29, 32, 38, 58, 61–62, 65–66. But the challenger’s opinion of the value of

vaccination is not a fact that this Court must accept as true. Instead, this Court applies the usual constitutional framework to their claims, and it may take judicial notice of the State's compelling interests in the safety and efficacy of vaccines. *E.g.*, *Brown v. Stone*, 378 So. 2d 218, 221 (Miss. 1979).

The challengers have cited no authority contrasting long-standing precedent in favor of compulsory immunization, nor have they provided any compelling argument in favor of overturning compulsory immunization. As this Court recently held, under the current pandemic, state governments have no less need for this police power than they did when *Jacobson* was decided. *In re Rutledge*, 2020 WL 1933122, at \*5.

## **II. Missouri's religious exemption form may include pro-vaccination information.**

### **A. Missouri may use its own speech to advocate for vaccination.**

The challengers argue that, under the First Amendment, the State may not take sides on questions of vaccination. *Aplt. Br.* 55.

But the district court correctly held that the First Amendment permits the State to have and express its view on vaccination through the brief educational component of Missouri's exemption form. Missouri has chosen through its democratic process to promote vaccination based

on the public health benefits of vaccination over the last two centuries. *See supra* Pt. I. And the “State’s freedom to advocate vaccination as governmental policy is ... well settled.” A155 (Add3). The district court found that Missouri’s language was at best mild advocacy favoring vaccinations, and that despite their opposition to vaccination, the challengers “are not entitled to insist on governmental silence rather than advocacy.” A158 (Add6).

The First Amendment allows advocacy of vaccination, just as it allows “governmental advocacy” of many other “practices to effectuate the public policy of the State.” A158 (Add6). It may make and express a value judgment on public health issues. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989). And, as another circuit court has held, “Where a parent wishes not to vaccinate his or her child, [the State] educates that parent regarding the risks associated with that decision. This is done in an effort to get parents to reconsider and, ultimately, to get more children vaccinated. The endgame is widespread vaccination, which is necessary, indeed essential, to promote adequate immunity.” *Nikolao v. Lyon*, 875 F.3d 310, 3186 (6th Cir. 2017).

In *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S.Ct. 2239, 2245–46, 2255 (2015), the Supreme Court asked in dicta, “How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? It is not easy to imagine how government could function if it lacked the freedom to select the messages it wishes to convey.” 135 S.Ct. at 2246.

**B. Missouri may advocate for vaccination on its religious exemption form.**

The challengers allege that requiring parents to use the state exemption form violates the First Amendment’s free speech and free exercise clauses by compelling parents to listen to the Department’s information about the importance of vaccination. Aplt. Br. 4, 11, 17, 42–43.

The district court correctly held that the First Amendment did not give the parents a right, as an unequal “captive audience,” to avoid hearing this message. A159 (Add7). If Missouri has a “right to advocate vaccination of school children,” so that parents are informed about the nature of the exemption that they claim, the “most obviously useful opportunity for last-minute persuasion would be” in “the upper half of

the form which parents are to use to claim religious objections.” A159 (Add7). Besides, here, there is no requirement that the person even read the message to claim the exemption. A160 (Add8) (citing *Doe v. Parson*, 567 S.W.3d 625 (Mo. banc 2019); *Doe v. Parson*, 368 F. Supp. 3d 1345 (E.D.Mo. 2019), appealed No. 19-1578 (8th Cir. March 20, 2019).

The challengers claim that parents seeking medical exemptions or receiving vaccinations are treated differently. Aplt. Br. 10–11, 15, 17, 43–44, 48–49, 56. The challengers assert that they are similarly situated to all parents of school-age children, and only parents opposed to immunization face the prefatory language of the religious exemption form. *Id.*

But the targeting of the government message on this form to parents objecting to vaccination does not pose problems of under-inclusiveness under the equal protection clause or the free exercise clause. A159 (Add7). “The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). “Evidence of different treatment of unlike groups does not support an equal protection claim.”

*Whitlow v. California*, 203 F. Supp. 3d 1079, 1087 (S.D. Cal. 2016). And the State can limit its message to particular groups, even if the group cannot avoid being provided the material. A160 (Add8) (citing *Consol. Edison Co. of N.Y. v. Public Service Commission*, 447 U.S. 530 (1980)).

Here, for the purposes of the State’s pro-vaccination message, parents seeking religious exemptions differ from parents not seeking religious exemptions. One group is taking action that relates to information about vaccines and the effect of an exemption, while the other is not. The challengers are not similarly situated to all Missouri parents because they are not alike in the single most relevant aspect: their children are not immunized, and the parents do not intend to seek immunization for their children. In the vaccination context, “children with [vaccinations or exemptions] are not similarly situated to children without [vaccinations or exemptions].” *Whitlow*, 203 F. Supp. 3d at 1087.

Parents seeking a medical exemption do so on a separate basis, are governed by a separate provision of the regulation, and must satisfy separate requirements to obtain an exemption. Anyone seeking a medical exemption must obtain signed certification by a licensed physician. As a

result, the prefatory language encouraging parents to seek counsel of a medical professional would be unnecessary.

Any unequal treatment is therefore justified by the different circumstances. As the lower court concluded, the challengers cite no case “that would bar effective salesmanship by the State, targeting the group most needing its message.” A160 (Add8).

The challengers have not alleged facts showing they have been unfavorably targeted within the category of all other parents seeking a religious exemption. The group of “similarly situated” persons here is all parents seeking a religious exemption, all of whom must obtain an official exemption form from the department. Within that class, the challengers are not subject to any differing treatment from other parents seeking religious exemptions. They need do nothing different from similarly situated parents for any reason, let alone because of their religious beliefs.

The challengers allege that this Court must apply strict scrutiny to Missouri’s use of its religious exemption form. Aplt. Br. 16, 26, 54–55. This is incorrect. The form violates no rights, and so no scrutiny applies. In particular, no fundamental rights are at stake that would trigger

heightened scrutiny. Instead, the state has created a neutral, generally applicable regulation conferring a voluntary religious exemption to parents with religious objections.

But even if some form of scrutiny were to apply, this form would easily satisfy it. It is precisely tailored only to the relevant population of parents seeking a religious exemption. There is no need to inform any other group of citizens about this topic, and no other group of citizens needs to fill out this form.

The challengers also object to the department's informational document about vaccinations, which they say calls their religious beliefs a preference rather than calling religious beliefs a "need," as the department refers to medical exemptions. Aplt. Br. 5, 10; A24–25, 226. But the exemption form does not use the term "preference" at any point, only referring to the parent's "decision." And, even as to the educational publication, while they may take personal offense to the phrase "religious preference," others may be offended by the term "religious need."

The challengers allege that Missouri requires an in-person educational session to receive an exemption, which they call forced indoctrination. Aplt. Br. 1, 4–5, 9, 13, 17, 41–43. They also claim that the

law can target certain religious beliefs through individualized assessments of whether to issue an exemption. Aplt. Br. 42–43.

But the challengers have alleged no facts supporting their statements that parents seeking exemptions face an “intended gauntlet” of “targeted indoctrination” and must be undergo “religious inquisition.” Aplt. Br. 41, 53. The cited portion of their complaint did not allege that an in-person session is the exclusive way to obtain an exemption form, just that it is one possible way. A7, 11, 26. Nor did it allege that exemptions were conditional on parents passing a religious test at some in-person meeting. Nor could they.

State law does not require any in-person counseling or travel. By regulation, forms are available by mail or phone, so the challengers have an easy way to obtain a form without having to come in-person. 19 CSR 20-28.010(1)(C)(2). And, even if local officials were to require in-person sessions to obtain a form, this would be lawful, as other courts have held. *Nikolao*, 875 F.3d at 318–19.

Moreover, even if this allegation had been pleaded in the complaint, the challengers have sued no local officials who they allege unlawfully required in-person sessions, so these claims are not properly raised in

this suit. Though the challengers speculate that they may be subject to questioning should they obtain the religious exemption form at a local public health agency, none of the parents here alleged that they tried to do so. Any allegations against local public health agencies such as the Pettis County Health Center, for example, bear no relevance to DHSS regulations for obtaining an exemption form. Local health centers are not parties and operate under municipal authority separate from the department.

According to the Amended Complaint, plaintiff Mykala Martin was the only plaintiff who visited a public healthcare agency. A11. But because Ms. Martin's child I.E.G.M. is enrolled in daycare, her claims would be governed by a separate provision for a personal belief exemption that contains no reference to religion. Under 19 CSR 20-28.040(3)(B)(2), the required daycare exemption form to be Imm.P.11, rather than the religious exemption form Imm.P.11A required by 19 CSR 20-28.010(1)(C)(2).

Even so, visiting a local public health agency is just one of several options afforded to parents seeking an exemption form. 19 CSR 20-28.010(1)(C)(2). For instance, parents may obtain an exemption form

directly from the department by mailing a request to the P.O. Box provided, or calling the toll-free number provided and request the form be mailed to their home. *Id.* Parents need not visit a local health agency at all.

**C. Missouri’s pro-vaccination message on its exemption form is secular.**

The challengers also assert that the state exemption form shows hostility to religion rather than neutrality, which they suggest violates the First Amendment. Aplt. Br. 6, 12–13; A20–21, 24, 35, 38, 42–43, 63. They also allege that the form violates the Free Exercise Clause by targeting them in a way that is not neutral or generally applicable. Aplt. Br. 15. They alleged that the form lacks a secular purpose, such as providing informed consent; that the form served only to burden or demean religion; that the form entangled the state health department with parents’ exercise of religion; and that the form’s educational information prioritized religious beliefs favoring vaccination over religious beliefs objecting to vaccination. A10–14, 25, 66. The challengers also object to the department’s informational document about vaccination, which they say calls their religious beliefs a preference rather than calling religious beliefs a “need.” Aplt. Br. 5, 15; A24–25, 226.

Religious exemptions are constitutional if they are neutral in application and do not unnecessarily scrutinize an individual's religious preference or reason for exercising such an exemption. *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 949–50 (W.D. Ark. 2002); *Boone v Boozman*, 217 F. Supp. 2d 938, 952 (E.D. Ark. 2002); *Davis v State*, 451 A.2d 107 (Md. 1982). The Free Exercise Clause requires only that a religious exemption does not express a preference among religions, mandate adherence to a particular religion, or question a parent's religious preference. *McCarthy*, 212 F. Supp. 2d at 948–49.

Missouri's exemption is neutral. The first sentence of the form states: "We strongly encourage you to immunize your child, but ultimately the decision is yours." A158 (Add6). The exemption form does not question a parent's right to request an exemption, does not ask about the legitimacy of a parent's beliefs, and does not seek any information about the parent's religion. The only information required of the parent is the student's name, a check box list showing which immunizations the student has not received, and the signature of an authorized guardian. Seeking the exemption places no substantial burden on parents.

Nor do the challengers allege that the state will only grant religious exemptions to members of certain religions or for certain religious reasons. They do not claim that individual parental beliefs are scrutinized or judged for sincerity or on any other individualized basis as a condition of getting an exemption. So long as the form is filled out, the parent receives an exemption. Missouri is not concerned about why parents request a religious exemption, so long as they complete the requested documentation. As discussed above, the challengers have not alleged in their complaint that any travel, in-person sessions, or religious tests are necessary to get an exemption, merely that some local health officials outside this suit try to persuade parents to vaccinate.

The district court correctly held that the form's language was neutral among religious beliefs. A159 (Add7). Though the challengers claim that the prefatory language of the form is somehow hostile to their religious beliefs, the information directed to parents just recommends that parents consider their decision carefully and seek the advice of medical health professionals where needed. This secular public health information reflects recognized standards of medical practice. Missouri

“advocate[s] vaccination” on the exemption form without violating principles of neutrality. A216 (Add20).

The form’s information is therefore secular. A159 (Add7). This government “advocacy (right or wrong) deals with public health issues,” and the lower court correctly concluded that it “is religiously neutral” and “is entirely secular in nature and motive, not ‘hostile to religion.’” *Id.* “For instance, it would not be hostile to a religious objection to eating pork for an agency to certify that pork is safe to eat.” *Id.* The form’s “text is in no way ambiguous as to the source of the vaccination recommendation.” A217 (Add21). The State’s advocacy of vaccination did not involve the adoption of religious beliefs favoring vaccination, nor did it pit “one set of religious beliefs against another.” A159 (Add7).

### **III. Missouri’s religious exemption form does not compel parents to agree with pro-vaccination information to receive a religious exemption.**

The challengers also alleged that having to submit a state exemption form compels their speech in violation of the First Amendment. A2–3, 245–46. They argue that requiring parents to use and sign the state exemption form violates the First Amendment’s free speech and free exercise clauses by compelling parents to affirm the

Department's information about the importance of vaccination. Aplt. Br. 2, 4, 13–15, 17, 20–35, 42. And they claim that Missouri compels parents to join and speak with the department on this form, which they assert violates their right to expressive association. Aplt. Br. 15, 40–41. They claim that the religious exemption form, in full, constitutes their “pure” speech, like a painting, essay, artwork, or blog, but the government forces them to publish its message. Aplt. Br. 21–22. They assert that this form is thus a viewpoint-based or content-based regulation of parental speech or conduct, meriting strict scrutiny. Aplt. Br. 20–39.

This argument is unconvincing. A simple reading of the language makes it clear that parents do not have to voice any message in support of vaccination. The top portion of the exemption form contains language encouraging parents to carefully consider their decision not to immunize their children and to consult healthcare professionals with any potential concerns, and it notifies parents of potential consequences which may result from their decision (that is, making parents aware that if an outbreak occurs of vaccine-preventable disease, un-immunized children may be removed from school for their protection). Concluding that the department should not be allowed to inform parents seeking exemptions

of the potential public health consequences would favor these parents' individual wishes over the State's right to communicate its own message.

The lower court thus correctly concluded that including this government information at the top of the form differs from cases in which the government compels private speakers to deliver the government's message. A159–60 (Add7–8) (citing *NIFLA v. Becerra*, 138 S.Ct. 2361, 2275–76 (2018)). The educational information in Missouri's religious exemption form is the government's speech, not private speech. It is on a government form, not a private publication. It is thus not a regulation of parental speech or conduct—let alone a viewpoint-based or content-based regulation—and it thus triggers no scrutiny.

Unlike when other governments have used private speakers to deliver government messages, here, “the State is using its own facilities to deliver its message.” A160 (Add8). This “form containing modest advocacy is divided into parts which separate the advocacy language by the State from the wording to be used by a parent claiming an exemption.” A155 (Add3). “The parental signature at the bottom of the religious exemption form serves to verify the required parental inserts of the child's name, the types of vaccination objected to, and the grounds for

the exemption, simply asserted as ‘religious.’” A161 (Add9). “Filling in, signing and submitting the form in no way comments on or endorses the State’s message” because that message “is separated on the form by a line dividing the upper and lower portions and clearly identified as DHSS language.” *Id.* No parent who signed the lower box must endorse the State’s educational message in the top box. A160–61 (Add8–9). The top box is not their speech.

The district court thus correctly held that this case is not like the situation in *Wheaton College v. Burwell*, 573 U.S. 958 (2014), where a religious exemption form did not merely provide notice of religious objections but enabled the provision of the very contraceptive coverage that the religious objectors found objectionable—a case holding that religious objectors “should not be required to be ‘complicit’ in the procedure by filing exemption forms.” A161 (Add9) (citing *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014)). Here, “the filing of forms does not advance vaccination use but simply results in an exemption.” *Id.*

In response, the challengers argue that the “location of the message” is irrelevant. Aplt. Br. 18, 33. But the location of the message is in a box that makes clear that the government is the speaker, not the

parent. The location is part of the text, and it makes clear that the parent is not compelled to affirm or endorse the message.

The challengers then claim that the First Amendment protects them from having to host or author the government's message on the form, even if the form does not require them to endorse the government's message. Aplt. Br. 18, 23–25. But this is just another way to argue that the form compels them to speak and that the form in full is their private speech. In reality, the form has components of public and private speech, separated in different boxes. And, because this is a government form, the host or author of the form is the government, not the parent. The government created this medium or method of communication, not the parent. It can thus put its own message on the form. And, because the form's top box is government speech, not a public forum, it need not print other views.

For this reason, this case differs from *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995), where the government regulation changed the expressive activity of the private group. As the Supreme Court clarified in *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63, (2006), *Hurley* turned on the

fact that the accommodation law requiring inclusion in the private parade “alter[ed] the expressive content of the parade.” On the other hand, requiring law schools to accommodate military recruiters did not constitute compelled speech “because the accommodation does not sufficiently interfere with any message of the school.” *Id.* at 64. Here, because the form’s top box is government speech, it does not interfere with the parent’s speech. The form’s bottom box simply records their objection to immunizations based on their religious beliefs, whatever they may be.

The challengers have not been asked to alter their message, nor have they been compelled to alter any expression on their part that they oppose immunization. The clear purpose of the form is: a) to document that a parent has requested an exemption from compulsory vaccination for a given student; b) to specify which immunization(s) the student has not received; and c) to provide a signature and date from an authorized parent or guardian. This factual, secular, and un-intrusive information presents vital public health information that the department would need to respond to a potential outbreak of vaccine-preventable disease. If an outbreak were to occur, this information would be used by the

department to remove un-immunized children from schools as they may be particularly vulnerable to these diseases. In that way, the information protects the un-immunized children. Without a standardized form showing which students are un-immunized in which schools, and which immunizations have been withheld, the State would have to engage in a lengthy investigation to identify those at-risk children. Given how quickly disease may spread, this information needs to be readily available. An immediate and timely response benefits all school children, especially the un-immunized.

To accept, as the challengers suggest, that this government public health advocacy constitutes compelled speech would undermine the state government's ability to require standardized documentation. Perhaps any language contained on government documentation could be considered compelled speech by the signor. For instance, a taxpayer could argue that instructions from the Missouri Department of Revenue's Tax Payment Voucher on how to submit annual income tax payments to the state constitute compelled speech for individuals who personally disagree with the state's ability to collect income tax. Or a driver could argue that a driver's license application with a checkbox whether one would like to

be an organ donor constitute compelled endorsement of medical procedures that some religions question. As the Supreme Court held, “[i]t is not easy to imagine how government could function if it lacked the freedom to select the messages it wishes to convey.” *Walker*, 135 S. Ct. at 2246.

What is more, the challengers raised for the first time on appeal their claim about expressive association, alleging that they are forced to join together and speak with the State. This claim thus was not preserved below.

The challengers next claim that the form restrains (or compels) parental speech because First Amendment gives them the right to submit religious objections to vaccinations and claim exemptions to Missouri’s law in other formats than the form, like in handwritten notes. Aplt. Br. 2, 4, 10–11, 13–14, 17, 35. They would like the ability to draft their own religious objection.

But this novel proposition has no support in precedent. The State has the right to share its own message, and to require standard information on a neutral form. Implementation of a standardized form is common practice because it is common sense. *See Resnick v. Adams*, 348

F.3d 763, 771 (9th Cir. 2003) (requiring prisoner to complete a standard prison form to obtain kosher meals does not violate his free exercise rights).

And it is not difficult to predict the complications from allowing any parent to draft their own religious exemption, leading to non-standardized and incomplete information across the hundreds of school districts across the state. The state health department should not have to exert countless working hours attempting to identify which students may or may not be immunized across the state, especially where this lack of public health information would hinder a prompt response to a vaccine-preventable outbreak.

The challengers also claim that Missouri “bans a parent from communicating her own unique religious beliefs regarding vaccine injections to that school administrator.” Aplt. Br. 4, 14, 30, 35–40, 49.

But this contention lacks any support in the law or the record. Requiring the use of the form does not prohibit the parent from voicing their objection in whatever method they choose along with using the form. A217 (Add21). Further, no facts support the challengers’ alleged ban on speech. They have not alleged that they have been prevented from

voicing their opposition to vaccinations, nor is there any indication from the record that they would be prohibited from doing so.

**IV. Missouri’s vaccination program does not vest unbridled discretion in state officials.**

The challengers next claim that Missouri’s law is invalid as applied “under the unbridled discretion doctrine because it allows DHSS to regulate a parent’s religious speech without providing any limitations or guidance.” Aplt. Br. 6, 50–53. They claim that the department has no standard to “regulate religious speech” or govern “their indoctrination session requirements.” Aplt. Br. 16.

The district court rightly held that this contention is not correct. Far from being unjustified under state law, allowing the department to create and use this form is a “quite routine” delegation of authority to an administrative agency. A21 (Add19). Under Section 167.181.1, the department is instructed to “supervise and secure the enforcement of the required immunization program.” It must “promulgate rules and regulations” governing the immunization of children attending schools. Mo. Rev. Stat. § 167.181. The department must also “supervise and secure the enforcement of the required immunization program.” *Id.*

Here, the department has reasonably exercised its authority by promulgating a simple form that implements the statutory requirements for parents seeking an exemption. Missouri’s religious exemption may be obtained “if one parent or guardian objects in writing to his [or her] school administrator against the immunization of the child, because of religious beliefs.” Mo. Rev. Stat. § 167.181(3). State regulations thus make it “unlawful for any student to attend school unless the student has been immunized according to this rule or unless a signed statement of medical or religious exemption is on file.” 19 CSR 20-28.010(1)(C).

The state form is a signed statement with all the necessary information, and it does not require parents to affirm anything beyond their religious objection. No plaintiff alleges that affirming their religious objection would somehow contradict their religious beliefs. Neither the statute, nor the regulation, nor the form is vague as to what the parent must do. The complaint does not allege that the department requires in-person sessions, rather than allowing forms to be obtained by mail as the regulation allows. Nor does the complaint allege that the department grants or withholds exemptions on an individual basis. Missouri’s law allows the department discretion to provide basic educational

information about the nature of vaccines and about the effect of completing a religious exemption form, but that is hardly “unbridled discretion” that may be used to violate constitutional rights.

**V. Conditioning school attendance upon vaccination is not an unconstitutional condition or a violation of a hybrid right.**

The challengers claim that that they must forgo their First Amendment rights to speech in exchange for their children’s fundamental right to education. They allege that mandatory vaccination is an unconstitutional condition on the right to an education, the right to bodily integrity or autonomy, the right to free speech, the right to religious exercise, the parent’s right to withhold consent, or the right to equal protection. Aplt. Br. 1, 5, 15–16, 42–43, 45–50.

This is just another way to claim a freestanding right not to be vaccinated or to claim that the vaccination program violates one of these other rights. The unconstitutional conditions doctrine provides that “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *F.A.I.R.*, 547 U.S. at 59. As explained above, Missouri’s law and form do not burden any right to free speech, religious exercise, or equal protection. The challengers do not have a right to be

free from compulsory vaccination, nor do they have a right to a religious exemption from vaccinations. There is thus no unconstitutional condition on any right.

Many cases establish that “the State is well within its powers to condition school enrollment on vaccination.” *Whitlow v. California*, 203 F. Supp. 3d 1079, 1089 (S.D. Cal. 2016). “The right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State’s interest in protecting the health and safety of its citizens, and particularly, school children. Because a personal belief exemption is not required in the first instance, the State can remove it—and impinge on education rights—in light of the compelling interest here.” *Id.* at 1091.

For the same reason, Missouri’s vaccination program does not violate any hybrid rights. Laws burdening religiously motivated speech and conduct may fall into a class of “hybrid situations” that strengthen a free exercise and free-speech claim. *Telescope Media Group v. Lucero*, 936 F.3d 740, 759 (8th Cir. 2019). The challengers assert that Missouri’s program “colorably infringes” six intertwined fundamental rights. Aplt. Br. 45–47. And they claim that, even if they have not proven a certitude

of success on any other claim, alleging colorable claims is enough to make out a constitutional violation under a hybrid rights theory. *Id.* But they have made out no colorable violations of any constitutional rights, and so this doctrine does not apply. Unlike in *Telescope*, the challengers have not established that the regulation of conduct here “crosses over to speech or other expression.” 936 F.3d at 755.

In short, the challengers have not been denied a right to education or anything else. They have chosen not to immunize in conflict with a long-standing constitutionally accepted requirement. And they have chosen not to accept the benefit of the readily available religious exemption provided to them.

**VI. The district court was correct not to exercise supplemental jurisdiction over state-law claims.**

The challengers also ask this Court to rule that Missouri’s religious exemption program conflicts with requirements of state law. Aplt. Br. 7–10. The challengers also raised various claims under state law about the permissibility of mandatory vaccinations, the lawfulness of religious exemption form, and the enforcement of Missouri’s laws and regulations. A3–4, 22, 25–26, 30, 37–38, 40–41, 45, 51–53, 72–74, 245–46. For example, they claim that the religious exemption form conflicts with

Missouri's statutory requirements for an exemption. Aplt. Br. 7–8. They also assert that the regulations should make the exemption form downloadable online. Aplt. Br. 8–9; A24, 26, 41, 45.

The district court correctly refused to exercise supplemental jurisdiction over these state-law claims. A165, 214, 218–20 (Add13, 18, 22–24). There was no need for a federal court to rule on these questions when all federal claims were dismissed and when a state court action was available. *Marianist Province of United States v. City of Kirkwood*, 944 F.3d 996, 1003–05 (8th Cir. 2019). But even if the lower court should have exercised supplemental jurisdiction over these questions, it would still have to remand these questions to the lower court to rule on in the first instance, rather than rule on them now on appeal.

## **VII. The equities disfavor an injunction.**

Under the traditional factors for a permanent injunction, the balance of the equities and the public interest weigh against enjoining either the State's vaccination law or its exemption form. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

The challengers claim that are entitled to an injunction because they showed a likely or plausible constitutional violation. Aplt. Br. 19–

20. But, for all the reasons above, the challengers did not succeed on the merits and show any constitutional violations, which is an independent ground to deny an injunction.

The challengers also claim that an injunction was necessary against the State because the schools have expelled some children. Aplt. Br. 3, 6. But the court below correctly held that the students have no risk of irreparable harm from the State because the parents can easily obtain an exemption to vaccination. A162 (Add10). “Assuming plaintiffs continue to have strong objections to vaccinations they can readily obtain an official exemption form, execute it, and submit it,” so that their child is exempt from vaccination and can attend school. *Id.* Under those circumstances, any injury to the student arises from the parents’ conduct, not the State’s. And the challengers “have not exhausted possible efforts to show disapproval of the DHSS message, without endangering school attendance by their children.” A217 (Add21).

If anything, an injunction would irreparably harm the State by invading its sovereign authority to enact and enforce a legal code. Here, “a high level of deference is appropriate because this is a duly enacted

statute.” *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc).

Because Missouri’s law follows the Constitution, any injunction would improperly intrude upon the state democratic process. “Any time a State is enjoined by a court from effectuating” its state constitution, or any other initiative enacted by its people, “it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). A law like Missouri’s law “is in itself a declaration of the public interest” and so, by definition, this factor counsels against entering an injunction. *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937). The public interest is thus merged with consideration of harm to the State. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *see also, e.g., Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Any injunction would likely also create serious mischief in the administration of the state vaccination program. Permitting handwritten objections in place of the standardized form would undermine the State’s ability to track unvaccinated children and the vaccines that those children have not received, which would interfere with the State’s ability

to respond speedily and effectively to protect those children and others around them if an outbreak occurs. And, as the court below recognized, “a preliminary injunction would encourage disregard for the program, particularly since an order would be likely publicized.” A162 (Add10). The balance of harm and the public interest thus favors the State, “assuming the vaccination program significantly safeguards public health.” *Id.*

The district court thus properly respected the judgment of the people of Missouri—a “policy choice, articulated in a statute, as to what behavior should be prohibited.” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001).

C. What is more, even if some form of injunctive relief were proper, which it is not, the challengers have not carried the heavy burden of proving that any injunction should extend beyond the parties.

Under this Court’s precedent, it is not the case that “a universal injunction is available by default to plaintiffs who are likely to prevail on a First Amendment challenge.” *Rodgers v. Bryant*, 942 F.3d 451, 468 (8th Cir. 2019) (Stras, J., concurring and dissenting in part). That is because “[i]njunctive relief should be no more burdensome to the defendant than

necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

As a result, for statewide relief that extends to parties not present in this suit, the plaintiffs must show (and the district court must find) that a universal injunction would be appropriate or necessary. *Rodgers*, 942 F.3d at 457–60 (majority op.). Under this rule, “the scope of injunctive relief is dictated by the extent of the violation established,” as shown under the traditional equitable factors, not by hypothetical future harm to unknown other people. *Id.*

The plaintiffs have not tried to meet this burden, and so this is another reason to deny their request for an injunction, especially their request for an injunction this broad in scope. No party is a representative of a class of plaintiffs, and they have not proven any of the injunction factors were met for themselves, let alone for absent third parties.

## CONCLUSION

This Court should affirm the judgment dismissing the case.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE AND SERVICE**

On May 4, 2020, this brief was served electronically through the courts CM/ECF system upon the parties.

This foregoing brief complies with the limitations in Rule 32(a)(5), 32(a)(6), and 32(a)(7)(B) and that the brief contains 12,978 words. The undersigned certifies that the electronically filed brief has been scanned for viruses and is virus-free.

/s/ Julie Marie Blake

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