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Tenth Circuit Dismisses Putative Anti-Vaccination Class Action for Lack of Standing

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In *Baker v. USD 229 Blue Valley*, No. 20-3054, 2020 WL 6437964 (10th Cir. 2020), the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of Baker's putative class action complaint for lack of standing. Plaintiff Baker sued to invalidate various Kansas statutes that require children to be vaccinated before attending school or other childcare. But those laws allow for religious exemptions, which Baker received and which allowed her son to attend pre-school. In an effort to establish standing, Baker advanced a series of arguments based on possible future harm, but the Tenth Circuit concluded that Baker's theories failed to satisfy Article III's requirements.

Baker's claims related to Kansas's vaccination laws

“Kansas law requires children in schools and child care facilities to be vaccinated unless a medical exemption or a religious exemption applies.” *Id.* at *1. First, any pupil who enrolls in school for the first time “shall present to the appropriate school board certification that the pupil has been vaccinated.” *Id.* (quotations omitted) (Kan. Stat. §72-6262(a)). The statute allows for religious exemptions to this vaccination requirement, and “[t]o qualify for a religious exemption, a pupil must submit ‘a written statement signed by one parent or guardian that the child is an adherent of a religious denomination whose religious teachings are opposed to such tests or inoculations.’” *Id.* (quoting Kan. Stat. §72-6262(b)(2)) (emphasis added).

Second, children in child care facilities must also be vaccinated, and “[t]he person who manages a child care facility must maintain immunization records.” *Id.* (citing Kan. Stat. §65-508). The vaccination requirement for children in child care facilities also has a religious exemption, which can be based on “a written statement signed by a *parent or guardian* that the parent or guardian is an adherent of a religious denomination whose teachings are opposed to immunizations.” *Id.* at *2 (quotations omitted) (quoting Kan. Stat. §§65-508(h), 65-508(h)(2)) (alterations in original).

Baker's son had “never been vaccinated.” *Id.* at *2. Baker, who “uses ‘holistic and dietary remedies’ for her health and has taught her children

'her understanding of Biblical holistic dietary and medical treatment[.]'" sued to invalidate Kansas's vaccination requirements for children who wish to attend school. Id.

Before her son was set to attend school in the fall of 2018, Baker and her husband sought a religious exemption by submitting the following statement to the pre-school:

In response to our inquiry about an immunization exemption for [S.F.B.] in order to attend [elementary school], you directed us to write a letter stating it is against our religion. [Ms. Baker] and I make that statement in this letter. We also acknowledge that the school nurse has a policy that if there is an outbreak of a vaccine-preventable disease, that [S.F.B.] will not be permitted to attend school until 21 days after the last case of outbreak.

Id.

The school district accepted Baker's statement and granted her son a religious exemption to the vaccination requirements. Baker's son was therefore allowed to attend pre-school.

Yet Baker was not satisfied with the school district's religious exemption. She decided that because her own statement to the school seeking a religious exemption "did not expressly state that [her son] was an adherent of a religious denomination, [her statement] was deficient under [the statute]." Id. Baker "therefore contended that the [school district] erred in granting [her son] a religious exemption, and she fears the [school district] will revoke it." Id.

Baker also alleged that she would like the option of home schooling her son or sending him to some other "school program" or "licensed child care," but she "anticipated a denial of a religious exemption under Kansas law if she tried to enroll [her son] in one of those options." Id.

Based on these allegations, Baker raised 18 counts of federal and state constitutional violations. Id. at *3.

District court's rulings on the school district's motion to dismiss

The defendants (the school district and three Kansas officials) moved to dismiss, arguing that Baker lacked Article III standing because she had alleged no injury in fact. While this motion to dismiss was pending, Baker filed her amended complaint that included class allegations. The district court agreed with Defendants and concluded that because Baker failed to allege any injury in fact, she lacked Article III standing. Baker appealed.

Article III standing requirements

The Tenth Circuit began by articulating the well-known test for Article III standing. "Article III of the Constitution permits federal courts to decide only 'Cases' or 'Controversies.' Id. (citing U.S. Const. art. III, §2, and *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). "Article III standing requires the plaintiff to 'have (1) suffered an injury in fact, (2) that is fairly

traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” Id. (quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

To demonstrate injury in fact, “a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” Id. (quotation omitted) (quoting *Spokeo*, 136 S. Ct. at 1548). Future injuries will only satisfy this requirement “if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.” Id. (quotations omitted) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (2014)).

Baker's allegations of future harm failed to allege an injury in fact

The Tenth Circuit wholly rejected Baker's arguments that she had alleged an injury in fact “based on her concern that the [school district] might revoke [her son's] religious exemption.” Id. at *5. The court concluded that “Baker's unusual standing theory falls outside any recognized notion of injury based on the potential enforcement of a law.” Id.

In particular, the circuit court rejected Baker's argument that she suffered an injury *because* she received her religious exemption. The future risk that the school district “would apply the law correctly” and “revoke the religious exemption” “fails to establish a credible and imminent risk of revocation.” Id. “The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute.” Id. at *4 (quotations omitted) (quoting *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006)). Baker got what she wanted from the school district, namely, a religious exemption for her son. Any theoretical future harm, including the risk that the school district decides to “apply the law correctly,” merely “piles conjecture upon contingency.” Id. at *6.

The Tenth Circuit also dispensed with Baker's arguments regarding her possible future desire to either homeschool her son or enroll him in some other childcare facility. It explained, “[Baker] has not identified any imminent enforcement and cannot do so because she has not alleged any attempt or concrete plans to enroll [her son] in a non-accredited private school or a child care facility.” Id. at *7. Her “some day” intentions, according to the court, were “insufficient to show the credible and imminent threat necessary for standing.” Id.

The circuit court therefore affirmed the district court's dismissal of Baker's complaint.

Stephen Masciocchi and Jessica Smith are attorneys at Holland & Hart specializing in complex commercial litigation. Steve assists clients with federal and state appeals and class actions in high-stakes trial and appellate litigation. Jessica has substantial appellate experience and leads

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