No. _____

In the
Supreme Court of the United States

JEROME KUNKEL, ET AL.,
Petitioners,

v.

NORTHERN KENTUCKY INDEPENDENT HEALTH DISTRICT, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Health Department and its employees violate the United States Constitution when they disparately treat and target private Catholic Elementary and High School students by imposing a ban on children from attending the school who refuse to be vaccinated for chicken pox, due to the students' and parents' sincerely held religious beliefs, and in retaliation from a threat of a lawsuit?

PARTIES TO THE PROCEEDING

The following individuals were Plaintiffs before the trial court and Appellants in the Kentucky Court of Appeals and Kentucky Supreme Court and are Petitioners here: Jerome Kunkel,[1] Seante Carter, as Next Friend and Guardian of AC, EC, MC, OC, NC, SC, and RC, minors; Christina Bell, as Next Friend and Guardian of GB, CB, GB2, CB2, and GB3, minors; Maria Kunkel, as Next Friend and Guardian of NK, CK, RK, SK, AK, MK, and GK, minors; and David Kunkel, as Next Friend and Guardian of CK2, DK, VK, IK, LK, and DK2, minors.

The following individuals and entities were Defendants before the trial court and Appellees in the Kentucky Court of Appeals and Kentucky Supreme Court and are Respondents here: Northern Kentucky Independent Health District, Zach Raney, and Lynne M. Saddler, MD. Respondents were sued in their official capacities that correspond to their respective offices, and their individual capacities.

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[1] Mr. Kunkel was 18 years old at the time this action was filed and a senior in the high school; the other Plaintiffs are the parents and guardians of minor children who attended and continue to attend the school.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, the undersigned counsel state that none of the Petitioners are publicly traded companies or have parent entities that are publicly traded companies.

STATEMENT OF RELATED PROCEEDINGS

- Jerome Kunkel, et. al. v. Northern Kentucky Independent Health District, et. al. No. 2019-SC-000359-I (KY Supreme Court) (order and judgment entered August 29, 2019).
- Jerome Kunkel, et. al. v. Northern Kentucky Independent Health District, et. al. No. 2019-CA-000575-I (KY Court of Appeals) (order and judgment entered June 26, 2019).
- Jerome Kunkel, et. al. v. Northern Kentucky Independent Health District, et. al. No. 19-CI-00357 (Boone Circuit Court) (order and judgment entered April 2, 2019).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs Jerome Kunkel, Seante Carter, as Next Friend and Guardian of AC, EC, MC, OC, NC, SC, and RC, minors; Christina Bell, as Next Friend and Guardian of GB, CB, GB2, CB2, and GB3, minors; Maria Kunkel, as Next Friend and Guardian of NK, CK, RK, SK, AK, MK, and GK, minors; and David Kunkel, as Next Friend and Guardian of CK2, DK, VK, IK, LK, and DK2, minors, respectfully petition for a writ of certiorari to review the judgments of the Kentucky Court of Appeals and Kentucky Supreme Court.

OPINIONS BELOW

The subject of this petition for a writ of certiorari is the Order denying a Temporary Injunction, entered by the Boone Circuit Court on April 2, 2019 (App. 1-App.16), which was not reported, the *Order Denying Motion for Interlocutory Relief,* entered June 26, 2019, by the Kentucky Court of Appeals in Case No. 2019-CA-000575-I (App.17–App.57), and was not reported, as well as the Kentucky Supreme Court's Order, denying the petition for C.R. 65.09 relief in Case No. 2019-SC-359 (App.58), also not reported. These orders are, under, Kentucky's procedural law, final orders that involve the state law equivalent of denials of preliminary injunctions.

STATEMENT OF JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C. §1257(a) and 28 U.S.C. §2101(c). This Petition was timely filed under the terms of Supreme Court Rule 13(1) and (3).

The Opinion and Judgment of the Boone Circuit Court was entered April 2, 2019. (App. 1-16). The Opinion and Judgment of the Kentucky Court of Appeals was entered on June 26, 2019. (App. 17-57). The Kentucky Supreme Court denied relief on August 29, 2019. (App.58). Justice Sotomayor extended the filing date for this Petition from October 31, 2019, to January 6, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. U.S. Const., Amend I. (App.60)

B. U.S. Const., Amend XIV. (App.60)

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves the targeting of a private catholic high school and elementary school by a local health district for disparate treatment based on a refusal of the parents and students to be vaccinated for certain infections (namely chicken pox in the current case) because the only available vaccine for that infection is derived from aborted fetal tissue. The genuinely and deeply held religious beliefs were stipulated to below and, for the most part, the facts are not in dispute. The record below consists of a single day of hearing on the Petitioners' motion for injunctive relief.

Petitioners are a former student and the parents and guardians of 25 other students who attended the Assumption Academy, a private Catholic High School located outside of Cincinnati, Ohio, in Northern

Kentucky. This dispute arose when the Northern Kentucky Independent Health District ("NKIHD" or the "Health Department") and its officials targeted a private Assumption Academy its students, in what began as an extra-curricular activity ban following suspected cases of varicella (varicella, in common parlance, is the chickenpox). The Petitioners, along with the vast majority (over 80%) of the students and parents at Assumption Academy, refused to get vaccinated for chicken pox because the only available vaccine is derived from aborted fetal tissue, which violates their religious beliefs.

In mid-February 2019, the Health Department banned the non-vaccinated or otherwise immune (e.g. those students who had contracted chicken pox before or had received the vaccine) students from extra-curricular activities, and, in mid-March 2019, after threat of a lawsuit, and the same day the lawsuit in the underlying matter was filed, the Health Department retaliated and then banned the students from school (even though they are and were permitted, and actually attended, daily mass in the same building).

The case has received significant national press[2] and comes among a spate of other newsworthy cases, including the targeting of the Hasidic Jewish Community in New York City for the refusal to be vaccinated due to religious objections.[3]

Petitioners seek review of the denial of injunctive relief insofar as their claims under the U.S. Constitution are concerned.

B. FACTUAL BACKGROUND

Five witnesses testified at the hearing of this matter: Karen Kunkel, Jerome Kunkel, Zach Raney, Dr. Toni Bark, and Dr. Gary Marshall. We have recounted critical testimony below. Citations are to the particular .wmv file that the testimony was recorded on

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[2] https://www.nytimes.com/2019/03/18/us/unvaccinated-student-basketball-lawsuit.html (last visited 10/21/2019); https://www.fox19.com/2019/03/15/catholic-student-not-vaccinated-chicken-pox-sues-nky-health-dept-claims-he-was-told-he-couldnt-play-basketball-amid-outbreak/ (last visited 10/21/2019); https://www.wcpo.com/news/local-news/boone-county/walton/student-who-refuses-chickenpox-vaccine-says-hell-appeal-after-judge-upholds-ban (last visited 10/21/2019); https://www.nbcnews.com/news/us-news/kentucky-teen-who-sued-over-school-ban-refusing-chickenpox-vaccination-n1003271 (last visited 10/21/2019).

[3] https://www.washingtonpost.com/national/health-science/new-york-city-vaccination-order-shines-spotlight-on-insular-jewish-community/2019/04/11/fd59b098-5bc3-11e9-a00e-050dc7b82693_story.html (last visited 10/21/2019); https://www.jta.org/2019/06/07/united-states/heres-what-we-know-about-orthodox-vaccination-rates (last visited 10/21/2019); https://www.jta.org/2019/06/11/united-states/nyc-closes-tenth-jewish-school-for-violating-vaccine-order (last visited 10/21/2019).

at the Circuit Court hearing, and then the time stamp (time of day) of the Circuit Court hearing (which is the record under Kentucky's procedural rules). We begin with the undisputed facts:

A. Testimony of Karen Kunkel

Karen Kunkel testified that she filled out the relevant religious exemption form exempting Jerome from the requirement to have been vaccinated for the 2018-2019 school year.[4] She confirmed at the time that Jerome was 17, but he subsequently turned 18 during the school year.[5] She, Jerome, and her husband, Bill, went to the Health Department after they imposed an activities ban in mid-February, 2019, which prohibited non-vaccinated students from participating in extracurricular activities.[6] While there, she met with Zach Raney and Caroline Swisshelm.[7]

Primarily, the Kunkels conveyed that Jerome was healthy, and was not infected with the varicella virus.[8] During that meeting, the Kunkels expressed their opposition to the vaccine for chickenpox because it is derived from aborted fetal cells, and, in response, Mr. Raney stated that "it was okay" under Vatican guidance to receive the vaccine – the Kunkels

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[4] CD of Hearing at 2019-04-01_09.08.54.523.wmv, at 9:09:53 a.m.

[5] *Id.* at 9:10:32.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 9:11:00.

expressed the fact that they have a markedly different understanding of that guidance.[9] The Kunkels' understanding is that the guidance perhaps makes it acceptable to receive a vaccine for rubella, but not chickenpox.[10]

The Kunkels expressed that Jerome had no symptoms of chickenpox – he was *not* displaying a fever, blisters, or rashes.[11] And, in the course of that conversation, Ms. Swisshelm indicated that the Health Department could "shut the school down" and "kick any kids out," but "what would that accomplish?"[12]

Swisshelm's statement was made in light of the fact that these students regularly interact, even with the current school ban in place.[13] The students (vaccinated and unvaccinated) all attended a St. Joseph's Feast Day Dinner and Raffle, where the church and its members prepared the dinner.[14] And the Church holds daily mass that all of the students (vaccinated and unvaccinated – including the students who are banned from school and those who are not) attend.[15] The

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[9] *Id.* at 9:11:30.

[10] *Id.* at 9:12:38.

[11] *Id.* at 9:13:17.

[12] *Id.* at 9:13:50.

[13] *Id.* at 9:14:15.

[14] *Id.*

[15] *Id.* at 9:14:52.

particular church has rejected certain Vatican II reforms and, as such, at that daily mass, these students (banned and unbanned) receive communion on the tongue – with the priest physically inserting the host into congregants' mouth and, consequently, saliva is likely to be transferred between congregants.[16]

B. Testimony of Jerome Kunkel

Jerome Kunkel also testified that he is 18 years old, attends Assumption Academy, and is the 12th grade.[17] He confirmed Assumption is a private traditional Catholic School, in which the congregants and students are Catholic, and share that faith.[18] Jerome has been out of school because of an order by the Health Department, since March 14, 2019.[19] He had never had the chicken pox, and has never received the vaccine.[20]

Jerome testified that he has sincerely held religious beliefs in opposition to the receipt of the chickenpox vaccine – it is derived from aborted fetal cells, and the receipt of the vaccine is contrary to his religious

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[16] *Id.* at 9:15:30.

[17] CD of Hearing at 2019-04-01_09.08.54.523.wmv, at 9:22:07 a.m.

[18] *Id.* at 9:22:45. The church and school are a Society of St. Pius X, which is not canonically recognized by Rome, and not under the authority or direction of a local bishop. SSPX rejected certain changes brought about by Vatican II.

[19] *Id.* at 9:22:45.

[20] *Id.* at 9:23:30.

beliefs.[21] If he were in any way symptomatic, he would stay away from school.[22] In terms of the extracurricular ban, he missed the end of his basketball season, and he is now missing his senior year of baseball due to the Health Department's activities ban.[23]

Jerome likewise testified that he visited the Health Department to question the activities ban.[24] While there, Jerome noted his religious exemption to the vaccine, and, in response, Mr. Raney from the Health Department asked if Jerome was aware of the Vatican position on vaccines and indicated that the Vatican said it was okay.[25]

Mr. Kunkel then testified to his understanding of the Vatican position on vaccines, which directly contradicted the religious dogma that Mr. Raney opined to: that the vaccines in question did "not cease to pose ethical problems," that Jerome should "oppose the culture of death," "stand up for life," not engage in "passive cooperation with abortion," and that vaccines derived from aborted fetal cells could be used only

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[21] *Id.* at 9:24:20.

[22] *Id.* at 9:25:25.

[23] *Id.* at 9:28:31.

[24] *Id.* at 9:28:31.

[25] *Id.* at 9:28:57.

where there is "significant risks to health," which the chicken pox did not qualify for.[26]

The Health Department stipulated, in a sidebar, to Mr. Kunkel's sincerely held religious beliefs concerning the chicken pox vaccine and his objections thereto.[27]

Mr. Kunkel likewise noted that since March 15, 2019, he has been and remains out of school.[28]

Mr. Kunkel likewise testified that he attends daily mass, where he sees other kids, including the children not banned from school, attends coffee and donuts after mass on Sundays, and attends rosary and confessions weekly.[29] Mr. Kunkel confirmed that these activities are well attended with children and adults, and he seeks both vaccinated and unvaccinated children at these events.[30]

Mr. Kunkel testified to the serious impact he has and continues to suffer from the actions of the Health Department: namely effects on his grades and prospects for college.[31] He further confirmed that

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[26] *Id.* at 9:30:24.

[27] CD of Hearing at 2019-04-01_09.31.52.486.wmv, at 9:32:00 a.m.

[28] CD of Hearing at 2019-04-01_09.32.17.691.wmv, at 9:32:17 a.m.

[29] *Id.* at 9:32:50 through 9:33:40.

[30] *Id.* at 9:33:40-9:33-52.

[31] *Id.* at 9:34:00-9:35:06.

Assumption Academy is located in the church building itself, namely in the basement of the church.[32] And, finally, Mr. Kunkel testified he is suffering ongoing exclusion from the baseball team due to the extracurricular ban.[33]

C. Testimony of Zach Raney, Health Department representative

Mr. Raney testified that he is the Epidemiology Manager for the Health Department.[34] He is not a Medical Doctor, Nurse, Pharmacist, or Clinician and does not treat patients.[35] He indicated he had no awareness of K.R.S. 446.350, and therefore, that statute did not weigh in whatsoever on the Health Department's actions in this matter.[36] He further confirmed that he was aware that Assumption Academy was a private catholic high school and church, but that neither he, nor anyone at the Health Department had any understanding, until the hearing of this matter, that the Church held daily mass in which the students (both banned and unbanned) interacted.[37]

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[32] *Id.* at 9:35:06-9:36:00.

[33] *Id.* at 9:36:06.

[34] CD of Hearing at 2019-04-01_09.32.17.691.wmv, at 9:39:01 a.m.

[35] *Id.* at 9:39:57.

[36] CD of Hearing at 2019-04-01_09.42.04.806.wmv, at 9:42:54 a.m.

[37] *Id.* at 9:44:42.

He further confirmed that Ms. Dredger, the school's registrar who was involved in reporting the alleged cases of the chickenpox to the Health Department, never personally saw any of the children with the alleged cases.[38] And he understood that Dredger was not a nurse, physician, or pharmacist and could not diagnose the cases.[39]

As of both February 6, 2019 and February 13, 2019, there were zero confirmed cases of chicken pox, which is why the Health Department was asking parents to take their children to their doctors – because medical doctors in Kentucky had to conduct laboratory testing and report those results by law to the Health Department.[40] As it turns out, the Health Department never received any laboratory testing of any of the alleged cases of chicken pox, throughout the entire situation – a circumstance that continues to the present.[41]

Nevertheless, on February 21, 2019, the Health Department issued the first of its control measures – with a single suspected diagnosis from a hospital, and with no laboratory confirmations.[42] The doctor's note

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[38] *Id.* at 9:45:50.

[39] *Id.* at 9:46:10.

[40] *Id.* at 9:47:33.

[41] *Id.* at 9:47:40-47.

[42] *Id.* at 9:48:10.

indicated merely that chicken pox was "suspected."[43] Thus, when the Health Department cancelled extracurricular activities at the school, they indicated that a "proper diagnosis" will help, because they did not know what they were dealing with.[44]

On February 26, 2019, Bill, Karen, and Jerome Kunkel met with the Health Department, and specifically with Mr. Raney and Ms. Swisshelm, who report to Mr. Raney.[45] In that conversation, Raney and Swisshelm admitted that all they had to base their actions on was the hearsay statements from the school's registrar.[46] And they had no idea whether Jerome was sick.[47] Furthermore, they confirmed the Kunkels' expressed a religious objection to any vaccine – which the Health Department wanted them to get – because the vaccine is derived from aborted fetal tissue.[48] In fact, Raney and Swisshelm acknowledged that they did not even know if anyone at the school

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[43] *Id.* at 9:49:19-40.

[44] *Id.* at 9:50:00-9:50:55.

[45] *Id.* at 9:51:45; The testimony confirming Swisshelm reported to Raney is contained at CD of Hearing at 2019-04-01_09.32.17.691.wmv, at 9:39:08 a.m.

[46] CD of Hearing at 2019-04-01_09.42.04.806.wmv, at 9:51:45 a.m. to 9:53:10 a.m.

[47] *Id.* at 9:53:10 a.m. – 9:53:19 a.m.

[48] *Id.* at 9:54:00-9:55:00 a.m.

currently had the chicken pox, since the doctor's note was from a week or two before.[49]

When questioned by Mr. Kunkel about the necessity of the ban, Raney confirmed that "his opinion" as to the "outbreak" was going to control.[50] And, as to the necessity of their actions, Raney confirmed that what the Health Department had done was merely "an abundance of caution."[51] **When pressed further, Mr. Raney confirmed that Jerome had the right not to be vaccinated due to his religious objections, but, because he exercised that right, he (and the other students) were being punished by the Defendants**.[52]

And, the Kunkel's recorded Ms. Swisshelm confirming Karen Kunkel's prior testimony that, in fact, while the Health Department could shut the school down, it would accomplish nothing because the students interacted with each other outside of school.[53]

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[49] *Id.*

[50] *Id.* at 9:56:20-9:57:08.

[51] *Id.* at 9:57:37.

[52] *Id.* at 9:57:45-9:59:00 a.m.

[53] *Id.* at 9:59:17-10:00:05 a.m.

Raney indicated he did not recall whether or not he told the Kunkels that the Vatican encouraged them to get vaccinated.[54]

And then the incredible happened: Mr. Raney confirmed for us that the activities ban did nothing other than mete out punishment to a religious group with whom he disagreed. Raney confirmed that the ban ***did not***: (i) prevent these same students from sharing food or beverages at a local restaurant; (ii) prevent these same students from attending local events, or even church events, weekly; (iii) prevent these same students from receiving communion on the tongue; (iv) prevent these same students from attending church dinners; (v) prevent these same students from going over to friends house who were symptomatic with the chicken pox; or even (vi) prevent these same students from going to an after school job at a restaurant and preparing food.[55]

Not surprisingly, the Kunkels retained counsel after this meeting, and, on March 7, 2019, Raney, Swisshelm, and others received an email communication from the undersigned threatening a lawsuit if the extracurricular ban was not rescinded.[56] And, on March 14, 2019, the same day this lawsuit was filed, the Health Department retaliated, by instating a

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[54] *Id.* at 10:00:05 a.m. to 10:01:13 a.m.

[55] *Id.* at 10:01:13-10:02:30 a.m.

[56] *Id.* at 10:02:13 a.m.

ban from the students attending school.[57] They did so, even though the Health Department previously acknowledged, through Swisshelm, that such a ban would be pointless.[58]

Further demonstrating the targeting and absurdity of the Health Department's actions, Raney confirmed **that at no time in the last four years has the Health Department ever placed a similar ban on any public schools for any disease**.[59] And, even though Influenza causes approximately ***80,000 deaths per year in the United States*** (compared to approximately 100 deaths per year prior to 1995, and even less today from chicken pox), the Health Department has ***never*** issued a similar ban for the flu on any kids or schools.[60]

Raney similarly acknowledged, when it came to the school ban, that it ***did not*** (i) prevent these same students from sharing food or beverages at a local restaurant; (ii) prevent these same students from attending local events, or even church events, weekly; (iii) prevent these same students from receiving communion on the tongue; (iv) prevent these same students from attending church dinners; (v) prevent

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[57] CD of Hearing at 2019-04-01_10.05.56.851.wmv, at 10:06:00 a.m. to 10:06:50 a.m.

[58] *Id.* at 10:08:12 a.m.

[59] *Id.* at 10:08:30 a.m.

[60] *Id.* at 10:09:24 a.m.; See, also, https://www.cdc.gov/flu/about/burden/2017-2018.htm

these same students from getting together for coffee and donuts after church; (vi) prevent these same students from going over to friends house who were symptomatic with the chicken pox; or even (vii) prevent these same students from going to an after school job at a restaurant and preparing food.[61]

Raney again acknowledged that the targets of these bans were a church and student population, 82% of which had executed a religious exemption form to this particular vaccine, and the Health Department knew as much when they took their actions.[62]

Incredibly, in so doing, the Health Department failed to follow Centers for Disease Control Guidance for Varicella/Chickenpox, by failing to first confirm an outbreak with laboratory testing or appropriately surveying the affected community.[63]

Raney acknowledged that it was "impossible" to know whether the Health Department's measures were effective or not in preventing the spread of chickenpox.[64] Nevertheless, there were additional cases after March 14, 2019.[65] And, Raney acknowledged that the Health Department could have chosen less restrictive means, namely notification to

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[61] *Id.* at 10:09:24 a.m.-10:10:25 a.m.

[62] *Id.* at 10:10:32 a.m.-10:11:37 a.m.

[63] *Id.* at 10:11:53 a.m. - 10:13:40 a.m.

[64] *Id.* at 10:14:16 a.m.

[65] *Id.*

the Church and School of the suspected chicken pox, and a request for at-risk populations to stay away, but did not do so.[66]

The Health Department attempted to rehabilitate Raney in direct – he testified, for instance, that it was not the threat of the lawsuit that caused them to institute the school ban, but rather another 12 suspected cases between February and March (never mind that most of those occurred in the same family where there were already suspected cases), and they implemented the school ban in consultation with state officials. But that did not change the fact that the Health Department only reached out to state officials to take more extreme measures after they had received the threat of a lawsuit on March 7, 2019.[67]

D. Testimony of Dr. Toni Bark, M.D.

Dr. Bark rendered a number of opinions – some of those were disputed by the Health Department's expert and some were not.[68] Dr. Bark confirmed that in the United States, the sole vaccine available for chickenpox is that from Merck, and that it is derived and grown in the cell lines from MRC-5, which come from an aborted fetus.[69] The vaccine itself contains the fragmented

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[66] *Id.* at 10:15:58.

[67] CD of Hearing at 2019-04-01_10.45.51.360.wmv, at 10:45:51 a.m. – 10:51:16 a.m.

[68] Dr. Bark's background can be found within the CD of Hearing at 2019-04-01_10.55.44.442.wmv, at 10:55:42 a.m. – 10:58:52 a.m.

[69] *Id.* at 10:58:52-11:00:28 a.m.

DNA of the aborted fetus.[70] And we know this from the excipient list for the vaccine, which is posted on the CDC's website.[71]

Dr. Bark further confirmed that, while the original abortion from which the cell line was derived was remote in time, Chinese researchers are paying parents in China to abort their children for medical research and the development of new cell lines.[72]

We have focused in on the uncontradicted opinions here. Dr. Bark confirmed that prior to 1995 everyone got the chickenpox, generally got it as a child, and that getting it would boost the immunity of older persons who had previously had chicken pox.[73] She confirmed that many European countries do not vaccinate for chickenpox, but instead let it run its course.[74]

She confirmed that, prior to 1995, there were approximately 4,000,000 cases a year of chicken pox, most of whom did not go to the doctor and, of those, approximately 11,000 were hospitalized (0.00275 chance) and there were approximately 100 deaths a

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 11:02:02-11:02:42 a.m.; CD of Hearing at 2019-04-01_11.04.58.617.wmv, at 11:05:00 a.m. – 11:05:42 a.m.

[73] CD of Hearing at 2019-04-01_10.45.51.360.wmv, at 10:45:51 a.m. – 10:51:16 a.m.

[74] *Id.* at 11:09:30 a.m.

year (0.000025 chance), but those figures may be overinflated.[75]

Dr. Bark also testified that there are studies that Glioma, a serious form of brain cancer, was reduced due to exposure to natural chickenpox, and that these Glioma rates far exceed the 100 or so pre-vaccine era deaths that were linked to chickenpox.[76]

Dr. Bark testified that the bans and measures put on by the Health Department made no sense, in no small part because the same students receive communion on the tongue, and have other contacts with each other.[77] Dr. Bark testified that keeping at-risk populations away from school or church during the incident would be sufficient to deal with suspected cases of chicken pox.[78] Finally, Dr. Bark testified that public health is not meaningfully advanced by the measures taken by the Health Department because: (i) the measures are illogical in light of the interactions this small, close knit community has with each other; and (ii) the saliva sharing with the communion process is highly likely to spread the chickenpox, if that is what is going on.[79]

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[75] *Id.* at 11:08:35-11:09:30 a.m.

[76] *Id.* at 11:12:45-11:14:22 a.m.

[77] *Id.* at 11:16:40-11:17:17 a.m.

[78] *Id.* at 11:20:47-11:21:05 a.m.

[79] *Id.* at 11:25:10-11:27:01 a.m.

E. Testimony of Dr. Gary Marshall, M.D.

Dr. Gary Marshall testified for the Health Department.[80] He confirmed that the virus easily spready, in respiratory and aerosol form, and is transmitted through breath in droplets and replicates in the throat.[81] He confirmed that the individual complication rate (i.e. the chance of something bad happening in a particular case) was "fairly low."[82]

But he testified that the virus is highly contagious – so contagious that he has seen cases diagnosed in hospital charges spreading via a hospital's ventilation system, and Doctors being able to track the spread of the virus down the hall.[83] This testimony, of course, even though he likely did not mean it to do so – *completely undermined the measures of the Health Department*. Vaccinated and non-vaccinated students attending church and school in the same building, with the same ventilation system, indicates that the school ban makes no sense.

Dr. Marshall expressed his total support for vaccination, and explained his concerns in terms of the potential complications with chicken pox.[84] He explained his opinion that he believes medical

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[80] CD of Hearing at 2019-04-01_12.14.55.257.wmv, at 12:20:05 p.m.

[81] *Id.* at 12:20:05 p.m. – 12:22:22 p.m.

[82] *Id.* at 12:22:22-12:22:42 p.m.

[83] *Id.* at 12:22:42-12:23:40 p.m.

[84] *Id.* at 12:23:59-12:40:58 p.m.

professionals could diagnose the chicken pox without lab testing.[85]

When it came to the measures imposed by the Health Department, Dr. Marshall stated his opinion that the measures were "necessary," "reasonable," "measured," and "incremental."[86] But Dr. Marshall did not indicated such measures were the "least restrictive," nor did he have any explanation about why these measures were "necessary" or "reasonable" in light of the interactions the students had with each other at church. In fact, he never addressed these everyday interactions that occur.

Instead, he indicated it was "reasonable" to ban extracurriculars to try to stop the spread outside the church community – but offered absolutely no similar analysis of the school ban (probably because there is no reasonable explanation for that ban).[87]

Dr. Marshall offered that pulling kids out of school once they are symptomatic is not effective because the virus can be spread prior to symptoms appearing.[88] But Dr. Marshall did not offer any rebuttal to Dr. Bark's less restrictive alternative of simply removing the at-risk populations from the church and school.

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[85] *Id.* at 12:40:58 p.m. – 12:43:30 p.m.

[86] *Id.* at 12:43:13 p.m. – 12:44:12 p.m.

[87] *Id.* at 12:44:12 p.m. to 12:45:16 p.m.

[88] *Id.* at 12:49:50 p.m.

Dr. Marshall also confirmed that getting the natural chickenpox gives a lifetime immunity and boosts the immunity of grandparents and others who previously had the disease.[89]

Dr. Marshall confirmed the relative rarity of hospitalizations (11,000 a year out of 4,000,000 cases; and 100 a year out of 4,000,000 cases), and confirmed that those estimates may be overinflated.[90] He likewise confirmed that immunity from natural (versus vaccinated) varicella is stronger and longer.[91] And he confirmed that the highest risk of transmission of varicella is in the home, due to the close proximity of persons with varicella.[92] Finally, Dr. Marshall confirmed that he regularly accepts money from the Pharmaceutical Industry, amounting to over $70,000 alone in 2016, which manufactures vaccines.[93]

C. The Proceedings Below

On March 14, 2019, Plaintiff Jerome Kunkel filed his verified Complaint in this matter. (Complaint, copy of which was filed with the Court of Appeals). The next day, March 15, 2019, after he was banned from school, he amended it to include a First Amendment retaliation claim. He also filed a Motion for Temporary

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[89] *Id.* at 1:00:28 p.m. – 1:00:43 p.m.

[90] CD of Hearing at 2019-04-01_13.03.27.531.wmv, at 1:05:06 p.m.

[91] *Id.* at 1:09:10 p.m. -1:09:45

[92] *Id.* at 1:11:26 p.m.

[93] *Id.* at 1:17:24 p.m. – 1:19:20 p.m.

Injunction on March 15, 2019. (Motion for Temporary Injunction). And, approximately a week later, the Intervening Plaintiffs, other parents whose children were banned from school, moved to intervene with Intervening Complaints, asserting the same claims. Defendants filed a response to the Motion for Temporary Injunction, and the Circuit Court held a hearing and took testimony on April 1, 2019. It then entered an order. (Circuit Court Order).

REASONS FOR GRANTING THE WRIT

A. The Decisions of the Kentucky Courts contradicts decisions in of the federal circuits and this Court's precedents.

> "Driven from every other corner of the earth, freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country as their last asylum." Samuel Adams, Speech on August 1, 1776.

1. The First Amendment's Guaranty of Freedom of Religion was violated

This Court has repeatedly made clear that government actors cannot determine what is appropriate religious dogma. *Sherbert v. Verner*, 374 U.S. 398, 402-404 (1963) (state could not deny unemployment benefits to someone who refused to work on the Sabbath in violation of their sincerely held religious beliefs); *Wisconsin v. Yoder*, 406 U.S. 205, 214-215 (1972) (holding the sincerely religious beliefs that mandated the Amish students not to attend school beyond age 16 could not be infringed by the state).

Most on point is *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). *Hialeah* involved the use of religiously neutral laws concerning zoning to target the church and sect at issue. In that case, the Supreme Court observed that "in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524. The fundamental component of the religion at issue in that case was animal sacrifice. *Id.* at 524-525. The City in that case sought to prevent animal sacrifice after the church's intent to establish itself in the City of Hialeah became known. *Id.* at 525-529. This was due, in part, to concerns about "public health, safety, welfare and morals of the community." *Id.* at 528.

The District Court in *Hialeah*, like the Circuit Court in this case, determined that the actions taken were valid, because the laws targeted conduct and actions "deemed inconsistent with public health and welfare." *Id.* at 529. The District Court in *Hialeah* found four compelling governmental interests to be at issue: (1) "a substantial health risk, both to participants and the general public;" (2) "emotional injury to children who witness the sacrifice of animals;" (3) the city's interest "in protecting animals from cruel and unnecessary killing;" and (4) "the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use." *Id.* at 529-530.

This Court reversed. First, this Court observed that "Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to

others in order to merit First Amendment protection'." *Id.* at 531. To many, the refusal to vaccinate for chicken pox may not be "acceptable, logical, consistent, or comprehensible, but this does not mean that the beliefs do not merit First Amendment protection.

This Court likewise observed that "[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Id., citing Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 248 (1990). The Court also observed that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532.

"Although a law targeting religious beliefs as such is never permissible … if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, …" "and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. Indeed, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." Indeed, "[t]he Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* Further, "the effect of a law in its real operation is strong evidence of its object." *Id.* at 535. "It is a necessary conclusion that almost the only conduct subject to Ordinances … is the religious

exercise of Santeria church members." *Id.* Further, "[w]e also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends." *Id.* at 538. "The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation." *Id.* at 539.

Here, the evidence was that (i) the Health Department officials indicated the Kunkels their own interpretations of Vatican Guidance concerning vaccinations; (ii) the Health Department targeted a private Catholic school, where the vast majority of the congregants and students refused to get vaccinated on the ground of a religious exemption; (iii) the Health Department did not enact a ban on extracurricular activities or school bans in instances of outbreaks of even more serious illnesses in public schools (the flu); (iv) the Health Department enacted the school ban, after confirming in a candid statement (prior to the opportunity to seek the advice of Counsel) that such a ban would not do a thing given other interactions these students engaged in; and (v) for both the extracurricular activity ban and the school ban, it was readily apparent that those bans did not prevent numerous interactions between students and the public that continued to occur and would possibly further an interest in slowing the spread of the chicken pox, if that were, in fact, the Health Department's object.

As in *Hialeah*, 508 U.S. 520, there was significant evidence that the trial court ignored religious targeting. As in *Hialeah*, 508 U.S. 520, this Court's action is needed to rectify the situation.

The Circuit Court, and Respondents, cited *Phillips v. City of New York*, 775 F.3d 538 (2nd Cir.), *cert. denied*, 136 S.Ct. 104 (2015), as the basis under which the Health Department's actions should be upheld. *Phillips* is wholly distinguishable on a number of grounds, which are readily apparent from even a cursory reading of that case. First, the religious exemptions and grounds sought by one of the parents were based on testimony which "demonstrated that her views on vaccination were primarily health-related and did not constitute a genuine and sincere religious belief." *Id.* at 541. Here, the Health Department stipulated to Petitioners' sincerely held religious belief. Second, at issue in *Phillips* was a facial challenge to a New York law "permitting temporary exclusion of exempted schoolchildren during a disease outbreak were unconstitutional." *Id.* at 542. Petitioners raised no such facial claims in this case.

The *Phillips* Court noted that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* And, concerning laws of neutral and general applicability, that is true.

Here, however, we have two directives, issued to a private church/school, not to the general public at large; directives, by the Health Department's own admission, were done to punish the students and

parents for their exercise of their rights under Kentucky's religious exemption law; directives that have no precedence with the Health Department's own practice, even in relation to more serious illness outbreaks, such as the flu.

This Court has been particularly vigilant towards the targeting of religious views – even unpopular ones[94] – both before and after *Hialeah*, 508 U.S. 520. Just last term, the Court decided *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018). That case dealt with a cake baker who refused to decorate a cake based on his sincerely held religious beliefs. Colorado had an anti-discrimination act, that, on its face, was unquestionably constitutional. Nevertheless, this Court noted that the case "has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729. The record below, including the disparate treatment, reveals a similar hostility.

Thus, the decisions below meets several of the Rule considerations for the grant of certiorari.

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[94] Perhaps it should be noted that popular speech, or popular religious beliefs, is protected by democratic institutions. The First Amendment was created to protect unpopular speech, and unpopular religious beliefs.

2. The First Amendment's Guaranty of Freedom of Speech was violated

The gist of this claim is simple: after the threat of a lawsuit, the Health Department took steps to retaliate, namely it enacted the school ban. The Health Department contended below that the school ban was not as a result of the lawsuit threat, but was, instead, the result of additional suspected cases of chickenpox.

On March 7, 2019, the Health Department received an email threatening suit by counsel for the Kunkels. It was only after that that the Health Department initiated interactions with state officials to take further actions – the school ban. And, the Circuit Court completely ignored the Health Department's own admissions, recorded, that demonstrated such a ban would do nothing.

The elements of a First Amendment retaliation claim are set forth in *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999), and *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1949 (2018). The Sixth Circuit, in *Thaddeus-X* explained that "It is well established that government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right." *Id.* at 386. *See, also, Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.").

A retaliation claim essentially entails three elements: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two-that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d at 394.

The filing, or even the threat, of a lawsuit is protected First Amendment speech. *Hoskins v. Lenear*, 395 F.3d 372, 375 (7th Cir. 2005); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Noble v. Schmitt*, 87 F.3d 157, 162 (6th Cir. 1996); *Jackson v. City of Columbus*, 194 F.3d 737, 756-57 (6th Cir. 1999) (holding that an employee engages in protected activity under the First Amendment when he threatens to file a lawsuit on a matter of public concern).

An adverse action was taken against the Plaintiffs – namely the school ban.

The Circuit Court appeared to conclude that the connection was not present. The Circuit Court missed the mark. The Court of Appeals found this was not error.

The Sixth Circuit Court of Appeals has dealt with First Amendment retaliation claims. As that Court observed, "[m]otive is often very difficult to prove with direct evidence in retaliation cases." *King v. Zamiara*, 680 F.3d 686, 695 (2012). Thus, "[w]e have previously considered the temporal proximity between protected conduct and retaliatory acts as creating an inference of

retaliatory motive." *citing Muhammad v. Close*, 379 F.3d 413, 417-18 (6th Cir. 2004) ("[T]emporal proximity alone may be significant enough to constitute indirect evidence of a causal connection so as to create an inference of retaliatory motive."). Or, as the Sixth Circuit noted in *Thaddeus-X*, "[c]ircumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals, is appropriate" to consider when determining whether a genuine issue of fact exists on that element of a First Amendment retaliation claim. *Thaddeus-X*, 175 F.3d at 399.

Here, the timing, which was not disputed, was that discussions between state officials and Raney and the Health Department did not occur until immediately after the email threatening the lawsuit. The timing prong, then, supports a finding of a retaliation.

And the other factor, "the disparate treatment of similarly situated individuals" – also supports an inference of retaliation – remember, the Health Department did not ban children from school even where the infection was more serious and widespread (the flu cases Raney testified to).

And finally, we have the pre-attorney admission by Swisshelm, just a few weeks before the school ban, that the school ban would accomplish nothing. That itself is a remarkable and damning statement, that undermines the validity, and raises to an even more heightened level, the questions of the school ban.

This Court has recently dealt with a retaliation claim as well in *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018). In that case, this Court made clear that because the right to petition for redress of injury is so high, and the Plaintiff's right to threaten and bring suit so core to the First Amendment, that it mattered not one bit that probable cause justified the arrest of the Plaintiff, or that other public policy grounds may have supported the arrest. *Id.*, 138 S.Ct. at 1951-1952. *Lozman* stands for the unremarkable proposition that government actors are not permitted to take actions, no matter how well justified, if retaliation is a driving force behind their actions.

Thus, the decisions below meets several of the Rule considerations for the grant of certiorari.

3. The Fourteenth Amendment's Guaranty of Equal Protection was violated

As noted, the actions here burden numerous fundamental rights, including, without limitation, the rights to free speech and freedom of religion, protected under the First Amendment, the right to privacy, the right to parent, and an unreasonable interference with the educational decisions of parents, and thus are collectively subject to strict scrutiny as a result, and therefore violate Equal Protection as set forth in *Kiser v. Kamdar*, 831 F.3d 784, 792 (6th Cir. 2016). The Circuit Court acknowledged that the Health Department's actions affected and put at issue, the fundamental rights to parent and direct the upbringing of one's children. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) *citing Meyer v. Nebraska*, 262 U.S. 390 (1923).

The question is, did the Health Department put forward a compelling governmental interest, and demonstrate that its means were narrowly tailored to that interest? And, again, the evidence demonstrated the answer to those questions was "no." The actions of the Health Department are highly suspect, when one considers that they did not even prohibit interactions among infected children who attend daily mass and receive communion. This under-inclusivity has long been a guidepost for a determination that something other than the proffered interest was actually driving the governmental action.

Thus, the decisions below meets several of the Rule considerations for the grant of certiorari.

4. The Fourteenth Amendment's Guaranty of Substantive Due Process was violated

That then turns us to the substantive due process claim. First, that clause precludes arbitrary and capricious governmental action claim. *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000); *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004); and *Lewellen v. Metropolitan Gov't*, 34 F.3d 345, 351 (6th Cir. 1994). We do not claim that a local health department cannot respond to an outbreak with appropriate control measures.

However, the measures here, imposed on a private Catholic school and church, where the student body regularly interacts otherwise in ways likely to further the spread of the chickenpox, are the very definition of arbitrary and capricious action. Arbitrary and

irrational action by governmental actors is prohibited by the Constitution. *Seal*, 229 F.3d at 574-575.

In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), this Court determined that a law that forced the vaccination of persons from a highly infectious and lethal disease was constitutional. It likewise noted that if the forced vaccination posed a threat to someone's health or life, that such vaccination could not be forced on them. *Id*. at 39. This case, of course, does not involve forced vaccination, but rather the punishing of private catholic school children who refuse to be vaccinated for an infection that is not lethal.

This Court's jurisprudence since *Jacobson*, however, suggests that the rationale, and indeed the holding of *Jacobson* is no longer valid. First, in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court examined the Constitutional protection of bodily autonomy. In those cases, this Court examined cases such as *Loving v. Virginia*, 388 U.S. 1, 12 (1967), *Turner v. Safley*, 482 U.S. 78 (1987), *Carey v. Population Services International*, 431 U.S. 678 (1977), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), protects the right of the individual to make individual, deeply personal, decisions about marriage, procreation, and the right to make bodily decisions, then it stands to reason that the Due Process Clause also protects the individual right to decide what to inject into his or her own body.

This Court recognized in *Casey*, 505 U.S. at 851, that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and

education," *citing Carey v. Population Services International*, 431 U.S. at 685.

Indeed, other cases from this Court suggest that there is a fundamental right to make decisions about one's bodily integrity, which is implicated here. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)(invalidating a statute authorizing sterilization of certain felons); *Cruzan v. Director, DMH*, 497 U.S. 261 (1990) (fundamental right to make medical decisions); *Mills v. Rogers*, 457 U.S. 291, 294, n.4 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Washington v. Harper*, 494 U.S. 210, 221-222 (1990). *See, also*, The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines, Jessie Hill, Univ. Tex. Law Review, 86:277 (2006) (discussing privacy and bodily autonomy jurisprudence and continuing validity of Jacobson).

If, as these cases suggest, these rights exist, then the actions of Defendants should have been subject to strict scrutiny. And, as noted, the school ban here was overbroad in that it did more than it needed to do to prevent the spread of the infection outside of the affected community, and was underinclusive, as we have demonstrated.

This case tests the commitment to the principle of bodily integrity and the exercise of rights. This case does not involve a public school or the use or conditions on placed by school and public officials on attendance at that public school; if it did, the outcome could likely be different. This case does not even involve the spread of a lethal disease, as was the case in *Jacobson*. 197 U.S. 11.

Rather, the petitioners in this case have made the determination to educate their children away and apart from the public-school system. The petitioners, in the case, have, instead, chosen to educate their children in a private religious school that comports with their religious beliefs. Among those beliefs is their widespread rejection, as a group, of vaccines that are derived from aborted fetal tissue.

The Courts below failed to protect these families and children's fundamental religious beliefs, concerning the most significant of decisions: how and where to educate their children, and more fundamentally, what to put in their body; they failed to do so, even though the measures taken by the Defendants at issue were grossly underinclusive, which has long been a hallmark of demonstrating that the proffered governmental interests did not, in fact, drive the governmental action. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 448 (2015); *Hialeah*, 508 U.S. 520, 543-547.

Perhaps this Court will step in and review these questions. Absent such relief, many of these Plaintiffs again face the threat of additional action by these Respondents, and, more importantly, the fundamental infringements at issue are likely to become more widespread. Thus, the decisions below meets several of the Rule considerations for the grant of certiorari.

B. This case presents an appropriate vehicle for granting review of this issue, which continues to raise itself around the country in a number of occurrences.

> While we are contending for our own liberty, we should be very cautious not to violate the conscience of others, ever considering that God alone is the judge of the hearts of men, and to Him only in this case are they answerable – George Washington

This case, in its current posture, presents an excellent vehicle for review of the presented issue. The record below succinctly presents these issues and considerations. The evidence itself was taken over the course of a single evidentiary hearing that spanned only one day, and the evidence was, for the most part, undisputed. Further, questions about the scope and permissibility of similar actions, including implications of religious targeting, continue to percolate around the country, warranting this Court's review.[95]

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[95] https://www.washingtonpost.com/national/health-science/new-york-city-vaccination-order-shines-spotlight-on-insular-jewish-community/2019/04/11/fd59b098-5bc3-11e9-a00e-050dc7b82693_story.html (last visited 10/21/2019); https://www.jta.org/2019/06/07/united-states/heres-what-we-know-about-orthodox-vaccination-rates (last visited 10/21/2019); https://www.jta.org/2019/06/11/united-states/nyc-closes-tenth-jewish-school-for-violating-vaccine-order (last visited 10/21/2019); https://www.washingtonpost.com/health/2019/06/14/new-york-epicenter-measlesoutbreak-bans-religious-exemptions-vaccines/ (last visited 12/16/2019).

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition be granted and that a writ of certiorari issue for the questions presented.

Respectfully submitted,

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