

No. 19-837

**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 Supreme Court Of Kentucky**

—————◆—————
BRIEF IN OPPOSITION

—————◆—————
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COUNTERSTATEMENT OF QUESTION PRESENTED

Eighty-two percent of students at Assumption Academy choose not to be vaccinated against the varicella virus, based on religious objections to the vaccine's ingredients. It is undisputed that no one ever required these students to undergo a vaccination to which they objected on religious grounds. Rather, during an outbreak of varicella at Assumption Academy, and to protect the unvaccinated students and the community at-large from exposure to the virus, the local health department restricted unvaccinated students, including Petitioner, Jerome Kunkel, from participating in extracurricular activities involving other schools and from attending classes. Petitioners now assert that the local health department violated their constitutional rights under the First and Fourteenth Amendments. Thus, the question presented is: Does an unvaccinated student have a right under either the First or Fourteenth Amendments to attend school and/or to participate in extracurricular activities during an outbreak of contagious, infectious disease at his school?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE FACTS	1
OPINIONS BELOW	8
REASONS FOR DENYING THE PETITION	13
I. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI	13
II. PETITIONERS' ASSERTION THAT THE ACTIVITIES AND ATTENDANCE RESTRICTIONS INFRINGED HIS FREE EXERCISE OF RELIGION IS A RED HERRING	16
III. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO CONSIDER PETITIONERS' RETALIATION CLAIM ...	20
IV. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO CONSIDER PETITIONERS' EQUAL PROTECTION CLAIM	21
V. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI TO CONSIDER PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM	29
CONCLUSION	31

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Email to Zach Raney, Sent March 8, 2019.....	App. 1
Form, Commonwealth of Kentucky, Parent or Guardian’s Declination on Religious Grounds to Required Immunizations	App. 5
Letter Informing Parents of Outbreak, Sent February 5, 2019	App. 10
Email, Possible Varicella Outbreak, Sent March 12, 2019	App. 13
Email, Phone Conversation Follow-Up, Febru- ary 22, 2019	App. 16
Letter, Informing Parents that Outbreak is still Occurring, Sent February 21, 2019	App. 18
Email, Phone Conversation Follow-Up, Febru- ary 22, 2019	App. 22
Email, Basketball Tournament, February 22, 2019	App. 24
Email, Varicella Titer Test, February 22, 2019 ...	App. 25
Email, Assumption Academy Varicella Outbreak, Sent February 23, 2019.....	App. 28
Email, Authority to take necessary measures to control outbreaks, Sent February 25, 2019 ...	App. 30
Email, Follow-Up from Our Meeting, Sent Feb- ruary 27, 2019	App. 32
Email, Chickenpox Outbreak Update, Sent March 12, 2019.....	App. 35

TABLE OF CONTENTS – Continued

	Page
Letter, Chickenpox Outbreak Grows to 32 Students at Assumption Academy, Dated March 14, 2019	App. 37
Letter, Informing Parents that Outbreak is Increasing, Dated March 14, 2019	App. 40
Affidavit of Zach Raney, Commonwealth of Kentucky Court of Appeals, Filed June 4, 2019 ..	App. 45

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abington Sch. Dist. v. Schempp</i> , 374 U.S. 203 (1963).....	16
<i>Carey v. Population Services Intl.</i> , 431 U.S. 678 (1977).....	30
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993)	18
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	30
<i>Hodel v. Virginia Surface Min. & Reclamation Assn., Inc.</i> , 452 U.S. 264 (1981)	22
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).....	14, 15, 22, 29, 30
<i>Kanuszewski v. Mich. HHS</i> , 927 F.3d 396 (6th Cir. 2019)	22
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	30
<i>Mozert v. Hawkins Cty. Bd. of Educ.</i> , 827 F.2d 1058 (6th Cir. 1987).....	16
<i>Nikolao v. Lyon</i> , 875 F.3d 310 (6th Cir. 2017)	17
<i>Phillips v. City of New York</i> , 775 F.3d 538 (2d Cir. 2015)	15
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992).....	29
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	15
<i>Roe v. Wade</i> , 410 U.S. 113 (1973).....	29
<i>Thompson v. City of Los Angeles</i> , 885 F.2d 1439 (9th Cir. 1989)	22

TABLE OF AUTHORITIES – Continued

	Page
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	30
<i>Workman v. Mingo County Bd. of Ed.</i> , 419 Fed. Appx. 348 (4th Cir. 2011)	15, 22
<i>Zucht v. King</i> , 260 U.S. 174 (1922)	15, 29, 30
 CONSTITUTIONAL PROVISIONS	
U.S. Const., amend. I	9, 18, 19, 20
U.S. Const., amend. XIV	9, 14, 29
 STATUTES	
Ky. Adm. Reg. 2:020(10)(a).....	24
Ky. Adm. Reg. 2:030(1)(2).....	24
Ky. Adm. Reg. 2:050	1, 23, 28
Ky. Rev. Stat. § 212.780.....	1
Ky. Rev. Stat. § 214.020.....	1
Ky. Rev. Stat. § 214.036.....	3
 RULE	
Sup. Ct. R. 10	13, 14, 20
 OTHER AUTHORITIES	
Dr. Gary Marshall, <i>Vaccine Handbook</i>	12
https://disease-reversal.com/	11
https://www.skinandchocolate.com/aboutus.asp	11

COUNTERSTATEMENT OF THE FACTS

In Kentucky, local health departments, such as the Northern Kentucky Independent District Board of Health (“NKIDBH”), are charged with preventing the introduction or spread of infectious or contagious diseases. Ky. Rev. Stat. §§ 212.780 et seq., 214.020. *See also* 902 Ky. Adm. Reg. 2:050.

Varicella, or “chicken pox,” is an infectious disease caused by the varicella zoster virus, which is a herpes simplex virus. (CD of Hearing at 2019-04-01_12.14.55.257. wmv at 12:20:02 – 12:20:21) Varicella is highly contagious and spreads rapidly through populations; it has a 90% attack rate, meaning that if a nonimmune population is exposed to a single case of varicella, 90% of that nonimmune population will contract the disease. (*Id.* at 12:20:46 – 12:21:03) And, a person infected with varicella is contagious for 1 to 2 days before the first tell-tale red bump appears on his body, such that he can spread the disease before he knows he has it. (*Id.* at 12:21:03 – 12:21:39)

Five to ten percent of individuals who contract varicella will experience complications during the course of the disease, the most common being secondary bacterial infections that range in severity from ear infections to the potentially deadly severe invasive streptococcal syndrome. (*Id.* at 12:20:20 – 12:24:18) Varicella can cause other problems, too, such as encephalitis or pneumonia. (*Id.* at 12:24:18 – 12:24:35) Prior to the availability of the varicella vaccine, approximately 11,000 of the 4,000,000 persons who contracted

varicella each year were hospitalized and 100 died due to such complications of varicella. (*Id.* at 12:22:40)

However, the most problematic complication of varicella is the subsequent contraction of herpes zoster, or “shingles.” One-third of all persons who contract varicella will eventually develop shingles, which is much more painful and has more complications than varicella. (*Id.* at 12:24:49 – 12:26:16)

In 1995, it became standard medical practice to administer the varicella vaccine to children, a practice that has largely eradicated chicken pox and that is expected to decrease the incidence and severity of shingles as the vaccinated population ages. (*Id.* at 12:27:53 – 12:29:42, 12:38:00 – 12:38:28) Still, there are groups – such as children with severe asthma who are treated with high-dose steroids, children with leukemia, children whose immune systems are otherwise compromised, and pregnant women – who cannot receive the vaccine for medical reasons, and for whom exposure to varicella is especially dangerous. (*Id.* at 12:43:56 – 12:45:15)

Against this backdrop, Assumption Academy (“Assumption”) is a private school in Boone County, Kentucky. (Resp. App. 37) On February 5, 2019, Assumption’s Registrar, Vanessa Dredger, contacted the NKIDBH to report that six students were believed to have varicella. (Resp. App. 1; CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:18:22 – 10:18:50) Dredger further reported that 82% of Assumption’s 240 students were unvaccinated. (Resp. App. 3)

Kentucky requires schoolchildren to receive certain vaccinations, including the varicella vaccination, to attend school. However, Kentucky also exempts a student from that requirement if the student has religious objections to the vaccine in question. Ky. Rev. Stat. § 214.036. The parents of such students must sign a form in order to qualify for the exemption. The form contains the following acknowledgement: “In the event that the county health department or state health department declares an outbreak of a vaccine-preventable disease for which proof of immunity for a child cannot be provided, he or she may not be allowed to attend childcare or school for up to three (3) weeks, or until the risk period ends.” (Resp. App. 8)

Petitioners are the parents of students who signed these forms – with the specified acknowledgement – for their students, including the parents of Jerome Kunkel.

In response to the six reported cases of varicella, the NKIDBH drafted a letter advising Assumption parents of the outbreak, and recommending a course of action in the event their children exhibit symptoms. (Resp. App. 10 – 12; CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:21:00 – 10:22:58) Assumption distributed this letter to parents of its students. (Resp. App. 3)

Within two weeks, the number of varicella cases at Assumption had tripled to 18, according to Dredger’s report to the NKIDBH. (CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:23:00 – 10:23:55) In addition, the NKIDBH received information from Cincinnati

Children’s Medical Center indicating that an Assumption student had been treated on an emergency basis for an infection due to a suspected case of varicella. (*Id.* at 10:23:56 – 10:24:28) Considering the rapid increase in suspected varicella cases, the spread of the disease from Assumption’s lower school to its upper school, and the school’s low immunity rate, the NKIDBH grew increasingly concerned for the welfare of Assumption’s students, faculty, staff and the community at-large. (*Id.* at 10:23:00 – 10:29:21) Thus, the NKIDBH began to consider measures it could take, consistent with the authority provided to it under state statute and administrative regulations, to combat the spread of varicella. (*Id.*)

Toward that end, the NKIDBH consulted with officials from the Kentucky Department for Public Health’s Division of Epidemiology. (*Id.* at 10:24:30 – 10:28:30; Resp. App. 13 – 15) On February 20, 2019, those officials advised the NKIDBH: “Here [is the] guidance from the CDC’s Strategies for the Control and Investigation of Varicella Outbreaks Manual, the CDC Surveillance Manual Varicella chapter, Control of Communicable Diseases Manual, and AAP Managing Infectious Diseases in Child Care and Schools. . . . Here is the guidance on exclusion: Children who lack evidence of immunity and whose parents refuse vaccination should be excluded from school from the start of the outbreak through 21 days after rash onset of the last identified case.”¹ (Resp. App. 14 – 15) Prohibiting unvaccinated

¹ “CDC” refers to the Centers for Disease Control.

students from attending school altogether was thus one measure the NKIDBH considered at state officials' suggestion. (*Id.*) However, the NKIDBH settled on a less restrictive alternative at that point, i.e., prohibiting unvaccinated students from participating in school-sponsored activities until 21 days after the onset of rash of the last ill student, which it communicated to Assumption's Headmaster, Fr. Daniel Muscha by phone and email on February 22, 2019. (Resp. App. 16 – 17) At the same time, the NKIDBH told Fr. Muscha: "If cases continue or if any of these measures are not followed, additional prevention and control measures may become necessary." (Resp. App. 17)

The NKIDBH drafted a second letter to Assumption parents. The letter, dated February 21, 2019, reminded parents of the dangers of varicella and again recommended a course of action to take in the event a child exhibits symptoms. (Resp. App. 18 – 21) In addition, the letter also contained the following statement: "As a result of this outbreak, all school events are being cancelled until 21 days after the onset of rash for the last ill student. These events would include any instance where students from your school are going into other schools/public areas or the public/other schools are coming to your school. Events include but are not limited to sporting events (including both home and away games), fairs, festivals, music events, etc." (Resp. App. 19) The NKIDBH sent the letter to Dredger for distribution to parents, thus implementing the so-called "Activities Restriction."

On February 22, 2019, Fr. Muscha, contacted the NKIDBH and spoke with Zack Raney, the NKIDBH's Epidemiology Manager. (CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:29:35 – 10:31:50; Resp. App. 22 – 24) Fr. Muscha told Raney that Assumption's boys' basketball team wanted to participate in a state tournament in the upcoming weeks, and asked if there was any way the team could compete with the Activities Restriction in place. (*Id.*) Raney consulted the NKIDBH's Medical Director, who told him an unvaccinated person would be at no risk to spread varicella if the person was immune because he had previously contracted the disease, and that a titer test could make that determination. (*Id.*) Raney therefore told Fr. Muscha that unvaccinated students had the option to take a titer test and could play in the tournament if their titer test showed they were immune to varicella. (*Id.*) Students on the basketball team took titer tests. (Resp. App. 25 – 28) Eight showed they were immune to varicella; but, Petitioner, Jerome Kunkel and another boy were not, and therefore those two could still spread the disease. (*Id.*) Consequently, Raney told Fr. Muscha that Kunkel and the other boy could not play in the basketball tournament. (*Id.* at 10:31:50 – 10:33:05; Resp. App. 27)

On February 25, 2019, Kunkel's father called the Kentucky Department for Public Health's Division of Epidemiology, questioning the NKIDBH's authority to implement an Activities Restriction. (Resp. App. 30 – 31) The Department sent him the Kentucky laws that provided the NKIDBH with that authority, and also told him: "When the [NKIDBH] learned the school has

pregnant teachers, pregnant mothers of students, and siblings who have not had varicella disease, combined with such a high percentage of unvaccinated children in the facility, the [NKIDBH] felt it was necessary to intervene to prevent a community-wide outbreak.” (*Id.*)

On February 26, 2019, Kunkel and his parents showed up unannounced at NKIDBH headquarters and demanded to speak with someone about the Activities Restriction. (CD of Hearing 2019-04-01_09.42.04.806.wmv at 9:51:14 – 9:59:10) Raney and Carolyn Swisshelm, an NKIDBH nurse, met with them. Among other things, the Kunkels complained that there had been no laboratory-confirmed cases of the varicella, such that the NKIDH could not know whether the outbreak was varicella as opposed to “poison ivy” or some other illness. (*Id.*; Resp. App. 32 – 34) Raney and Swisshelm responded by pointing out that laboratory confirmation was not necessary in light of the well-known presentation of varicella and in light of the fact that the parents of affected students had identified the students’ ailments to Dredger as varicella. (*Id.*) And, they told the Kunkels that the illness needed to be contained no matter what it was: “[R]egardless of diagnosis, these measures needed to be implemented to prevent and control the spread of the illness. . . . Our primary concern is preventing the spread of this illness to the public.” (Resp. App. 33)

The Kunkels apparently retained an attorney, who, on March 7, 2019, sent the NKIDBH a letter threatening a lawsuit if it did not lift the Activities Restriction. (CD of Hearing 2019-04-01_09.42.04.806.wmv

at 9:59:30 – 10:04:38) Notwithstanding the threat, the NKIDBH left the Activities Restriction in place.

Despite the Activities Restriction, the incidents of varicella at Assumption nearly doubled within three more weeks, reaching 32 by March 12, 2019. (Resp. App. 35 – 39) On that date, the NKIDBH requested a conference call with State Public Health officials to discuss further prevention and control measures. (CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:40:29 – 10:42:55; Resp. App. 35 – 36) Having consulted state officials, the NKIDBH then decided to issue a third letter, dated March 14, 2019, to Assumption parents informing them that the school continued to experience cases of presumed varicella, and implementing an Attendance Restriction for those students who could not show proof that they were vaccinated or otherwise immune to the disease. (*Id.* at 10:40:29 – 10:42:55; Resp. App. 40 – 44) According to the letter, the Attendance Restriction would remain in place “until 21 days after the onset of rash for the last ill student or staff member,” consistent with the CDC guidelines that had been communicated to the NKIDBH by state officials. (*Id.*; Resp. App. 41)

It is undisputed that no student was ever required to undergo vaccination.



OPINIONS BELOW

Coincidentally, Petitioners filed suit against the NKIDBH, its Executive Director, Dr. Lynn Sadler, and Raney in Boone Circuit Court on March 14, 2019, the

same date the Attendance Restriction was announced. By way of their suit, Petitioners seek to recover damages for the alleged violation of their rights under the First Amendment to the free exercise of religion, and under the Fourteenth Amendment to substantive due process and equal protection. In addition, Petitioners assert a cause of action for First Amendment retaliation, based on their belief that the Attendance Restriction was implemented in retaliation for their threat to sue if the Activities Restriction was not lifted.

Soon after filing suit, Petitioners filed a Motion for Temporary Injunction. The Boone Circuit Court held a lengthy hearing on April 1, 2019, at which Jerome Kunkel, his mother, and Raney all testified. During Raney's testimony, it became apparent that the Kunkels had clandestinely recorded their February 26, 2019 meeting with Raney and Swisshelm. (*Id.* at 10:34:31 – 10:37:24) A copy of that recording has never been provided to Respondents; however, Petitioners' counsel played snippets of the recording while questioning Raney. (CD of Hearing 2019-04-01_09.42.04.806.wmv at 9:51:14 – 10:04:39) One of those snippets went as follows:

Mr. Kunkel: The best you guys can come up with is I have the right to say this kid does not get . . . one of your virus shots.

Mr. Raney: That is correct.

[unintelligible]

Mr. Raney: That's within your right. But, as a result of that decision, we are here.

Mrs. Kunkel: So we're penalized.

Mr. Raney: Unfortunately – if –

(*Id.* at 9:58:58 to 9:59:10; Pet. App. 20 – 22) Then, Petitioners' counsel abruptly stopped playing the recording, cutting off the remainder of Raney's statement. (*Id.* at 9:59:10) Petitioners rely on that exchange as "confirm[ation that] . . . he (and the other students) were being punished by the Defendants" for exercising their freedom of religion. (Petition, p. 13, 27 – 28) But, Petitioners' manipulation of the record in this underhanded fashion does not prove what they think it does. As the Kentucky Court of Appeals astutely noted: "We are unable to conclude that 'unfortunately' *necessarily* connotes an admission of animus or an affirmative response as to whether Movants were 'penalized,' *particularly when considered as a single word of an unfinished sentence.*" (Pet. App. 50 – 51, 53)

In any event, at the hearing, Movants also presented testimony from Dr. Toni Bark, an Illinois doctor who practices "classical homeopathy,"² autonomic biofeedback, and clinical nutrition with a focus on

² Homeopathy is a philosophy under which one attempts to stimulate the body to heal itself. (*Id.* at 11:30:38 – 11:30:48) It is different from the normal domain of treatment employed by physicians in the United States, and relies on a patient's willingness to explore the role of dreams, attitudes, fears, hopes and desires in relation to overall health and life satisfaction. (*Id.* at 11:30:48 – 11:31:16)

plant-based ketogenic diets and European aesthetics.” (CD of Hearing 2019-04-01_11.28.49.008.wmv at 11:30:24 – 11:31:46)³ She holds no board certifications in any specialty, is not an immunologist or an epidemiologist or an infectious disease doctor, has not conducted any peer-reviewed studies, and has not authored any publications about varicella. (*Id.* at 11:31:18 – 11:32:40) Her only relevant experience comes from having served a pediatric residency in the late 1980s and early 1990s. (*Id.* at 11:29:40 – 11:30:23) Instead, she posts YouTube videos about her anti-vaccination views, and sells skincare items, chocolate, perfumes and microfiber cloths in an online store called Skin and Chocolate.⁴ In her testimony, Dr. Bark was dismissive of overwhelmingly accepted scientific research establishing that varicella is a dangerous, infectious virus; opined that varicella is not a public health risk; maintained that the varicella vaccine is detrimental to public health; and advocated that society would be better off if varicella were allowed to run “wild” and infect the majority of the population. (*Id.* at 11:36:15 – 11:43:40) Deaths and/or severe physical impairments for susceptible populations – infants, fetuses, elderly and the immune-compromised were just, in Dr. Bark’s opinion, acceptable casualties of the virus being allowed to run wild. (*Id.* at 11:37:15 – 11:43:40)

The NKIDBH presented testimony from Dr. Gary Marshall, Professor of Pediatrics and Chief of the

³ <https://disease-reversal.com/>

⁴ <https://www.skinandchocolate.com/aboutus.asp>

Division of Pediatric Infectious Diseases at the University of Louisville College of Medicine. (CD of Hearing 2019-04-01_12.14.55.257.wmv at 12:15:20 – 12:16:17) Of particular note, he is board-certified in Pediatric Infectious Diseases and conducts research in the area of vaccines and immunology. (*Id.* at 12:16:18 – 12:17:50) He authored the *Vaccine Handbook*, also known as “The Purple Book,” which includes a chapter on the varicella vaccine and is a widely recognized authority on vaccines, used by over 150,000 clinicians. (*Id.* at 12:18:21 – 12:20:00)

Dr. Marshall testified at length about the highly contagious nature of varicella (CD of Hearing 2019-04-01_12.14.55.257.wmv at 12:20:29 – 12:21:39, 12:23:00 – 12:23:40), its symptoms (*Id.* at 12:21:39 – 12:22:12), and its serious complications, including shingles (*Id.* at 12:22:20 – 12:38:28). Among other things, he opined that there is a threat to public health if varicella is not contained. (*Id.* at 12:33:00 – 12:33:07) He testified that the steps taken by the NKIDBH were reasonable, measured and incremental to contain the outbreak of varicella at Assumption for the protection of both the unvaccinated, nonimmune students at Assumption and at-risk members of the community at-large. (*Id.* at 12:43:14 – 12:45:15)

On April 2, 2019, the Boone Circuit Court issued a sound and well-reasoned Order denying Petitioners’ Motion for a Preliminary Injunction. (Pet. App. 1 – 16)

On April 16, 2019, Petitioners filed a Motion for Interlocutory Relief in the Kentucky Court of Appeals.

During the pendency of that motion, the NKIDBH lifted the Activities and Attendance Restrictions because twenty-one days had passed since the onset of the last reported case of varicella. (Resp. App. 45 – 46) In a thorough decision dated June 26, 2019, the Kentucky Court of Appeals denied Petitioners’ Motion for Interlocutory Relief. (Pet. App. 17 – 57)

Thereafter, Petitioners moved the Kentucky Supreme Court for relief. On August 29, 2019, the Kentucky Supreme Court denied such relief in an Order that stated: “The Court has considered the movants’ CR 65.09 motion and the respondents’ response and determines that the trial court did not abuse its discretion in denying the movants’ motion for a temporary injunction, and we find both the trial court and the Court of Appeals to have adequately addressed the issues presented by the movants’ request. Accordingly the Court DENIES the motion. All sitting. All concur.” (Pet. App. 58 – 59)

This Petition for Writ of Certiorari followed.



REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI

Supreme Court Rule 10 is exceedingly clear that a “petition for writ of certiorari will be granted only for compelling reasons.” For example, the Court might grant a writ of certiorari when “a state court of last

resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals” or when “a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court.” *See* Supreme Court Rule 10. None of those circumstances exist in the present case. In fact, the decisions of the courts below were all perfectly consistent with existing federal precedent, which uniformly hold that it does not violate the United States Constitution to condition the right to attend school on receiving a vaccine.

The seminal case on compulsory vaccines is this Court’s decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). There, a Massachusetts city ordered all adults to receive the smallpox vaccine in response to an outbreak of smallpox in the region. Jacobson refused and was found guilty by a trial court of disobeying the vaccination law. He appealed the decision through the Massachusetts court system, and this Court accepted certiorari to consider whether the vaccination requirement violated Jacobson’s Fourteenth Amendment liberty interest. In affirming the lower court’s decision, the Court relied on the police power of the state, which it said gave states authority to enact laws or impose regulations that protect public health and safety. The Court held that the law in question was not arbitrary, unreasonable or beyond what was reasonably required to ensure the public health and safety.

Subsequently, this Court extended *Jacobson* to school vaccination requirements in *Zucht v. King*, 260 U.S. 174 (1922). In *Zucht*, officials in Texas refused to allow a student to enroll in either private or public school because she lacked the required vaccination documentation and refused to vaccinate in compliance with Texas law. This Court upheld the state requirement that predicated enrollment in school on sufficient evidence of vaccinations. *Id.* See also *Prince v. Massachusetts*, 321 U.S. 158 (1944) (stating in dicta that “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”).

Likewise, federal circuit courts that have considered the issue have ruled that a mandatory vaccine requirement before one can attend school does not violate the United States Constitution. In *Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015), the Second Circuit Court of Appeals held that the government’s temporary exclusion of unvaccinated students from school during an outbreak of varicella did not unconstitutionally burden those students’ free exercise of religion, substantive due process rights or equal protection rights. In particular, the Court ruled that the right to practice religion freely through the refusal to receive a vaccination does not include a liberty to expose the community to the varicella virus. *Id.* at 543.

And, in *Workman v. Mingo County Bd. of Ed.*, 419 Fed. Appx. 348 (4th Cir. 2011), the Fourth Circuit Court of Appeals held that the constitutional right to freely practice one’s religion by refusing vaccination

must give way to the compelling interest of society in fighting the spread of contagious diseases.

Thus, the Kentucky courts' decisions are not in conflict with federal law on the issue whether an unvaccinated student has the constitutional right to attend school or participate in school activities during an outbreak at his school. Therefore, there is no compelling reason to grant a writ of certiorari.

II. PETITIONERS' ASSERTION THAT THE ACTIVITIES AND ATTENDANCE RESTRICTIONS INFRINGED HIS FREE EXERCISE OF RELIGION IS A RED HERRING

Petitioners assert that the Activities and Attendance Restrictions implemented by the NKIDBH infringed his ability to freely exercise his religion. That assertion is a red herring.

The Free Exercise Clause is predicated on coercion. *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). As such, a litigant suffers an injury to his free exercise rights when the state compels him "to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion." *Id.* Petitioners cannot make such a showing.

What is forbidden by their religion, according to Petitioners, is receiving the varicella virus. The NKIDBH did not force Petitioners to be vaccinated

against varicella over their religious objections. In fact, the NKIDBH never required any person, much less Petitioners, to become vaccinated. The students' right to refuse vaccination in accordance with their respective religious beliefs remained intact without any interference by the NKIDBH.

Under similar circumstances, the Sixth Circuit ruled that the Free Exercise Clause was not implicated. Specifically, in *Nikolao v. Lyon*, 875 F.3d 310 (6th Cir. 2017), a parent went to the local health department to secure a religious exemption from her state's compulsory vaccination requirement, in order to allow her children to attend school without receiving vaccinations. *Id.* When she did, nurses at the health department confronted her with information allegedly written by the Pope expressing the view that the vaccine did not conflict with the Catholic faith. *Id.* Ultimately, though, the parent successfully secured the exemption, and no one compelled the parent's children to receive the vaccination. *Id.* On those facts, the Sixth Circuit ruled there was no violation of the parent's right to freely exercise her religion. *Id.*

What was actually burdened in this case by the measured, stepped restrictions was *not* any religious belief, but rather the ability of unvaccinated and nonimmune students to attend school and participate in school activities with children from other schools during the varicella outbreak at Assumption. Petitioners' religion presumably takes no position on whether they must or must not attend school or play basketball. Consequently, no religious belief or act was burdened

by the NKIDBH's restrictions. Instead, these restrictions only burdened the *non-religious activities* of playing basketball, and later, attending school while they were reservoirs of infection and a threat to the health of others in the community.

Finally, Respondents rely most heavily on *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) to establish a violation of the Free Exercise Clause. The *Hialeah* case is different, of course, because it involved coercion. The churchgoers in that case were compelled to refrain from something their religion required, i.e., animal sacrifice. As such, the case is entirely distinguishable.

In any event, *Hialeah* holds that the protections of the First Amendment's Free Exercise Clause only apply if the action at issue discriminates against some or all religious beliefs or prohibits conduct because the conduct is undertaken for religious reasons. *Id.* Even under that case, the Free Exercise Clause simply is not implicated here.

The Activities and Attendance Restrictions prevented *all* students – regardless of religious persuasion – from attending school and participating in extracurricular activities unless they could prove they had been vaccinated against varicella or had a titer test demonstrating that they were otherwise immune because they had previously experienced the disease. Because they applied to *all* unvaccinated students regardless of religious persuasion, the Restrictions did not discriminate against some or all religious beliefs.

Likewise, the Restrictions did not prohibit conduct because that conduct was undertaken for religious reasons. Rather, the Restrictions prohibited conduct – i.e., coming to school or participating in extracurricular activities while unvaccinated and nonimmune – regardless of whether or not that conduct was undertaken for religious reasons. There are multiple reasons why someone might not be vaccinated. For example, a person might have a medical condition that makes the vaccine dangerous for him; a person might have a scientific concern about the vaccine; the person might have a religious objection to the vaccine; or the person might have a fear of needles. The Restrictions were not concerned with the reason *why* the student was unvaccinated. Rather, the Restrictions were only concerned with whether or not the student was infectious, period. Religion did not factor into the determination in any way whatsoever.

Because the Restrictions did not discriminate against some or all religious beliefs and did not prohibit conduct because that conduct was undertaken for religious reasons, the Restrictions simply do not implicate the Free Exercise Clause. Petitioners' assertion to the contrary is a red herring.

There is no compelling reason premised on the First Amendment's Free Exercise Clause to grant a writ of certiorari.

III. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO CONSIDER PETITIONERS' RETALIATION CLAIM

Petitioners do not contend that any of the lower courts misstated or misconstrued the law applicable to First Amendment retaliation claims. Nor do they contend that any of the lower courts decided an issue of law in a way that conflicts with a decision of another state court of last resort or with a decision of a federal court of appeals on an important federal question. Nor do they contend that this is a case in which a state court has decided an important question of federal law that has yet to be addressed by this Court.

Rather, Petitioners argue that this Court should grant certiorari to consider their retaliation claim because “[t]he Circuit Court missed the mark” when it “conclude[d] that the connection [between the protected conduct and the allegedly adverse action] was not present,” and because the Court of Appeals found no error in the Circuit Court’s decision. (Petition, p. 30) In other words, Petitioners ask this Court to grant certiorari merely because they believe the lower courts misapplied properly stated rules of law.

A “petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.” *See* Supreme Court Rule 10.

Here, the lower courts were obviously aware that one of the elements of a First Amendment retaliation claim is a causal connection between the protected

conduct and the allegedly adverse action. (Pet. App. 9, 47 – 48) They just concluded that Petitioners did not carry their burden of establishing that element. In that regard, the Circuit Court wrote: “After hearing the testimony at the Hearing, as well as a review of the timeline of the steps taken and the meetings/discussions held among members of both NKIDHD [*sic*] and the State and correspondence to and from both Assumption and the Kunkels regarding the different steps, the Court does not find there is a substantial probability that Kunkel will succeed on this [retaliation] claim.” (Pet. App. 9) And, the Kentucky Court of Appeals pointed to evidence that an Attendance Ban was being considered as early as February 20, 2019, and concluded that a causal connection could not be established because “the possibility of a school closure was being discussed prior to the threat of a lawsuit.” (Pet. App. 51 – 52)

That Petitioners disagree with the lower courts’ application of one of the elements of a retaliation claim simply does not provide a compelling reason to grant certiorari.

IV. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI TO CONSIDER PETITIONERS’ EQUAL PROTECTION CLAIM

The existence of a fundamental right means that government actions that burden the exercise of the right are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling

governmental interest. *Kanuszewski v. Mich. HHS*, 927 F.3d 396 (6th Cir. 2019). Here, the Kentucky Court of Appeals extensively reviewed the Activities and Attendance Restrictions to determine if they survived strict scrutiny and concluded they did. (Pet. App. 31 – 45, 47) The Circuit Court also considered whether the Restrictions were narrowly tailored to achieve the goal of reducing the spread of varicella, and concluded they were. (Pet. App. 11 – 14) Petitioners point to no errors of law made by either court. They also point to no cases with which the lower courts’ decisions conflict. Rather, they merely argue that the lower courts decided the case incorrectly. (Petition, p. 33) That does not provide a compelling reason to grant certiorari.

In any event, the lower courts correctly determined that the Activities and Attendance Restrictions survive strict scrutiny. Specifically, the NKIDBH had a compelling interest in preventing the spread of varicella. *Hodel v. Virginia Surface Min. & Reclamation Assn., Inc.*, 452 U.S. 264 (1981) (“Protection of the health and safety of the public is a paramount governmental interest which justifies summary administrative action.”); *Jacobson, supra* (“According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.”); *Workman, supra* (a state’s wish to prevent the spread of communicable disease clearly constitutes a compelling interest); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) (prison officials have a compelling interest in preventing

disease in the prison population). And, the Activities and Attendance Restrictions were narrowly tailored to serve that interest. In fact, as the Kentucky Court of Appeals concluded, the NKIDBH “could have done more, not less, to prevent the spread of the outbreak.” (Pet. App. 45)

Below, Petitioners contended that the NKIDBH lacked a compelling interest in containing the outbreak of varicella at Assumption, by questioning whether the illness at issue was actually varicella (since there had not been laboratory confirmation of that disease), questioning whether there were enough cases to constitute an “outbreak,” and maintaining that varicella is not serious enough to constitute a public health threat. But, the Kentucky Court of Appeals thoroughly considered and ultimately rejected each of those arguments. (Pet. App. 31 – 40)

As the Kentucky Court of Appeals noted, nothing under Kentucky law required the NKIDBH to have a laboratory confirmation of varicella before it acted to contain the spread of communicable disease. To the contrary, state regulations allow the NKIDBH to act “whenever any person has been implicated as a *possible* reservoir or *possible* source of infection of any communicable disease.” 902 Ky. Adm. Reg. 2:050(2). Another state regulation specifically states: “Whenever a case of unrecognized illness shall be reported to, or otherwise brought to the attention of the local health department . . . which upon investigation presents symptoms of a communicable disease but in which sufficient time has not elapsed to render a positive

diagnosis, the local health department . . . may establish the control measures applicable in actual cases of the suspected communicable disease, until such time as a positive diagnosis can be established. If the disease proved to be noncommunicable, the temporary control measures shall be terminated at once.” 902 Ky. Adm. Reg. 2:030(1)(2). There was plenty of evidence that the affected students were experiencing varicella. First and foremost, they told Dredger they suspected they had varicella. (Resp. App. 1) In addition, one of the students went to Cincinnati Children’s Medical Center for treatment of complications from what Children’s suspected was varicella. (CD of Hearing 2019-04-01_10.05.56.851.wmv at 10:23:56 – 10:24:28) Moreover, as the Kentucky Court of Appeals noted, Petitioners simply refused to take the students to the doctor (CD of Hearing 2019-04-01_13.03.27.531.wmv at 1:16:00 – 1:16:50), and “cannot decline to take the children to a doctor for diagnoses and/or laboratory tests, then be heard to complain the government acted without having ‘laboratory confirmation.’” (Pet. App. 35) The NKIDBH clearly had the regulatory authority to act without a laboratory confirmation that the disease at issue was varicella.

Likewise, there was clearly an “outbreak,” which requires only “two or more cases . . . that are epidemiologically linked or connected by person, place, or time.” 902 Ky. Adm. Reg. 2:020(10)(a). Here, there were 18 cases of suspected varicella when the NKIDBH implemented the Activities Restriction (CD of Hearing 2019-04-01_10.05.56.581.wmv at 10:23:00 – 10:23:55),

and 32 cases when it implemented the Attendance Restriction (Resp. App. 13 – 14) Thus, there was an “outbreak.”

Interestingly, Dr. Bark and Dr. Marshall agreed with respect to many of the underlying facts regarding varicella; however, Dr. Bark opined that varicella was not a public health threat, and Dr. Marshall opined that it is. Here are the facts about varicella, to which the experts agreed: Varicella, or “chicken pox,” is an infectious disease caused by the varicella zoster virus, which is a herpes simplex virus. (CD of Hearing at 2019-04-01_12.14.55.257.wmv at 12:20:02 – 12:20:21) Varicella is highly contagious and spreads rapidly through populations; it has a 90% attack rate, meaning that if a nonimmune population is exposed to a single case of varicella, 90% of that nonimmune population will contract the disease. (*Id.* at 12:20:46 – 12:21:03) And, a person infected with varicella is contagious for 1 to 2 days before the first tell-tale red bump appears on his body, such that he can spread the disease before he knows he has it. (*Id.* at 12:21:03 – 12:21:39) Five to ten percent of individuals who contract varicella will experience complications during the course of the disease, the most common being secondary bacterial infections that range in severity from ear infections to the potentially deadly severe invasive streptococcal syndrome. (*Id.* at 12:20:20 – 12:24:18) Varicella can cause other problems, too, such as encephalitis or pneumonia. (*Id.* at 12:24:18 – 12:24:35) Prior to the availability of the varicella vaccine, approximately 11,000 of the 4,000,000 persons who contracted varicella each

year were hospitalized and 100 died due to such complications of varicella. (*Id.* at 12:22:40) Some persons – including infants, fetuses, children being treated for certain illnesses, the elderly and pregnant women – are at greater risk for these complications, and are more likely to suffer catastrophic consequences of contracting varicella. (*Id.* at 12:43:56 – 12:45:15) The most problematic complication of varicella is the subsequent contraction of herpes zoster, or “shingles.” One-third of all persons who contract varicella will eventually develop shingles, which is much more painful and has more complications than varicella. (*Id.* at 12:24:49 – 12:26:16) Given the nature of varicella, its complications, the fact that certain persons are particularly susceptible to it and can die from it, and the fact that it is highly contagious, there can be no doubt that it *does* pose a public health threat.

Accordingly, the NKIDBH has a compelling interest in containing the spread of varicella.

The NKIDBH also implemented the least restrictive means necessary to contain the disease. It increased its level of regulation and response as the outbreak continued to grow: First, when six cases were reported, it issued an advisory letter; second, when 18 cases were reported, it implemented the Activities Restriction; and, third, when a total of 32 cases had been reported, it implemented the Attendance Restriction. This response was reasonable, measured and incremental.

Petitioners argue that the NKIDBH could have imposed a less restrictive alternative such as only restricting symptomatic children from attending school. But that would not stop the outbreak, because varicella can be transmitted before the sufferer is symptomatic, as Dr. Bark and Dr. Marshall agreed. (CD of Hearing at 2019-04-01_12.14.55.257.wmv at 12:21:03 – 12:21:39)

Petitioners also argue that the NKIDBH could have restricted at-risk populations from school premises. But that would not have stopped unvaccinated, non-immune and likely infectious (due to their known exposure to the virus) students from spreading varicella to other communities when they had sporting events or other activities at other schools. And, that would have led to a host of other problems. For example, pregnant mothers and grandparents would be unable to take their children or grandchildren to, or pick them up from, Assumption for school or activities. Siblings who are too young to be immunized could not accompany a parent to school to drop off or pick up students. Pregnant teachers could not teach classes at Assumption. And, any immunocompromised students at Assumption would be unable to attend class, through no fault of their own.

Petitioners additionally argue that the Attendance Restriction was an ineffective means to prevent the spread of varicella because infected and exposed students, encouraged by their parents, could *and did* regularly interact with the community of non-infected persons inside and outside of school, including attending

daily Mass at the church, which shares a ventilation system with the school; having coffee and donuts together after Mass; and receiving Communion on the tongue at Mass, and even frequenting general public venues such as stores and theaters. Petitioners maintain that Swisshelm conceded at the February 26 meeting with the Kunkels that a school ban would be pointless, and they draw from this a flawed conclusion that the Attendance Ban was unreasonable. The flaw in this argument is obvious: any control measure can be rendered pointless in the face of active, intentional disregard of such measure by any individual. For example, laws against murder are designed to protect life; and yet, all those laws fail if a person chooses to ignore them and take another's life.

The Kentucky Court of Appeals rejected Petitioners' argument that the Health Department's control measures were futile because Petitioners intentionally disregarded them, and citing 902 Ky. Adm. Reg. 2:050, stated, "If anything, this supports a conclusion that the Health Department could have done more, not less, to prevent the spread of the outbreak." (Pet. App. 45) The fact that Petitioners voluntarily risked exposure, and deliberately disregarded the health department's suggested control measures designed to avoid spread of the disease, does not negate the efficacy of the health department's measures taken to prevent a community-wide epidemic. Moreover, and despite Petitioners' admitted sabotage of the health department's control measures, the Attendance Restriction ultimately worked: Between the time the Attendance Restriction was implemented

on March 15, 2019 and the time of the April 1, 2019 hearing, only two new cases of varicella were reported from the school. (CD of Hearing 2019-04-01_13.03.27.531 at 1:15:30 – 1:15:51)

Under these circumstances, the NKIDBH employed the least restrictive means of containing the varicella outbreak, and preventing a spread of the disease into the wider Northern Kentucky/Greater Cincinnati community.

There is no compelling reason to grant a writ of certiorari to consider Petitioners' Equal Protection claim.

V. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI TO CONSIDER PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM

As previously demonstrated, this Court long ago decided that the government has the right, notwithstanding the Fourteenth Amendment's liberty interest, to prevent an unimmunized student from attending school. *Jacobson, supra*; *Zucht, supra*. There is no compelling reason to revisit that decision.

All of the cases Petitioners cite in advocating for a reversal of *Jacobson* involve the government's effort to intrude on a personal decision that affects no one but the person making that decision. For example, Petitioners cite *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), both

cases in which the government attempted to interfere with a woman's decision regarding abortion. That decision affects no one but the woman making that decision. Petitioners also cite *Loving v. Virginia*, 388 U.S. 1 (1967), in which the government attempted to interfere with an interracial couple's decision to marry, and *Turner v. Safley*, 482 U.S. 78 (1987), in which the government attempted to interfere with a prisoner's decision to marry. The decision whether to marry a certain person affects no one but the person making that decision. Petitioners cite *Carey v. Population Services Intl.*, 431 U.S. 678 (1977), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), both cases in which the government attempted to interfere with a person's right to utilize contraception medication. The decision whether to utilize contraceptives affects no one but the person making that decision.

This is not such a case. The decision not to vaccinate a child has significant ramifications for the entire community in which that child lives, plays, and attends school.

This Court should not revisit *Jacobson, supra*, or *Zucht, supra*.

Since the Court has already decided this issue, and since there is no conflict amongst the circuit courts of appeals on this issue, and since the decisions of the lower courts were consistent with federal law, there is no compelling reason to grant certiorari in this case.



CONCLUSION

In light of the foregoing, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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