

App. No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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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

Petitioners

v.

NORTHERN KENTUCKY INDEPENDENT HEALTH DISTRICT, ZACH RANEY, LYNNE M. SADDLER, MD, and Unknown Defendants, 1-10

Respondents

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ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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PETITIONERS' APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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October 25, 2019

App. No. \_\_\_\_\_

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In the  
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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

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PETITIONERS' APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT  
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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Petitioners 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 request that the time to file a Petition for a Writ of Certiorari in this matter be extended for forty days, to, and including, January 6, 2020. The Kentucky Supreme Court denied relief and review on August 29, 2019. *See* App. A, *infra*. The Court of

Appeals issued its opinion on May 30, 2019. *See* App. B, *infra*. On June 26, 2019, the Court of Appeals issued an order in which it affirmed the denial of injunctive relief in this matter. *See* App. B, *infra*. On April 2, 2019, the Circuit Court entered its order. *See* App. C, *infra*. Absent an extension of time, the Petition would therefore be due on November 27, 2019. Petitioners are filing this Application at least ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1257(a).

## **Background**

Petitioners are a former student, and 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”) and its officials targeted a private Catholic School and its students in what began as an extra-curricular activity ban following suspected cases of varicella (chicken pox). Petitioners, along with the vast majority (over 80%) of the students and parents in the private school they attend, 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. had contracted chicken pox before and 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 permitted, and actually attend, daily mass in the same building).

The case has received significant national press<sup>1</sup> 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.<sup>2</sup>

Karen Kunkel, Jerome's mother, 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.<sup>3</sup> While there, she met with Zach Raney and Caroline Swisshelm.<sup>4</sup>

Primarily, the Kunkels conveyed that Jerome was healthy, and was not infected with the varicella virus (varicella, in common parlance, is the chickenpox).<sup>5</sup> During that meeting, the Kunkels expressed their opposition to the vaccine for chickenpox due to the fact 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 expressed the fact that they have a markedly

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<sup>1</sup> <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).

<sup>2</sup> [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](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).

<sup>3</sup> CD of Injunction Hearing at 2019-04-01\_09.08.54.523.wmv, at 9:09:53 a.m.

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

<sup>5</sup> *Id.* at 9:11:00.

different understanding of that guidance.<sup>6</sup> The Kunkels' understanding is that the guidance perhaps makes it acceptable to receive a vaccine for rubella, but not chickenpox.<sup>7</sup>

The Kunkels expressed that Jerome had no symptoms of chickenpox – he was not displaying a fever, blisters, or rashes.<sup>8</sup> 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?”<sup>9</sup>

Swisshelm’s statement was made in light of the fact that these students regularly interact, even with the current school ban in place.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> The 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.<sup>13</sup>

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 beliefs.<sup>14</sup> If he were in any way symptomatic, he would stay away from

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<sup>6</sup> *Id.* at 9:11:30.

<sup>7</sup> *Id.* at 9:12:38.

<sup>8</sup> *Id.* at 9:13:17.

<sup>9</sup> *Id.* at 9:13:50.

<sup>10</sup> *Id.* at 9:14:15.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 9:14:52.

<sup>13</sup> *Id.* at 9:15:30.

<sup>14</sup> *Id.* at 9:24:20.

school.<sup>15</sup> 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.<sup>16</sup>

Jerome likewise testified that he visited the Health Department to question the activities ban.<sup>17</sup> 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.<sup>18</sup>

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 where there is “significant risks to health,” which the chicken pox did not qualify for.<sup>19</sup>

**The Health Department stipulated, in a sidebar, to Mr. Kunkel’s sincerely held religious beliefs concerning the chicken pox vaccine and his objections thereto.**<sup>20</sup>

Mr. Kunkel likewise noted that since March 15, 2019, he has been and remains out of school.<sup>21</sup>

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,

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<sup>15</sup> *Id.* at 9:25:25.

<sup>16</sup> *Id.* at 9:28:31.

<sup>17</sup> *Id.* at 9:28:31.

<sup>18</sup> *Id.* at 9:28:57.

<sup>19</sup> *Id.* at 9:30:24.

<sup>20</sup> CD of Hearing at 2019-04-01\_09.31.52.486.wmv, at 9:32:00 a.m.

<sup>21</sup> CD of Hearing at 2019-04-01\_09.32.17.691.wmv, at 9:32:17 a.m.

and attends rosary and confessions weekly.<sup>22</sup> Mr. Kunkel confirmed that these activities are well attended with children and adults, and he seeks both vaccinated and unvaccinated children at these events.<sup>23</sup>

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.<sup>24</sup> He further confirmed that Assumption Academy is located in the church building itself, namely in the basement of the church.<sup>25</sup> And, finally, Mr. Kunkel testified he is suffering ongoing exclusion from the baseball team due to the extracurricular ban.<sup>26</sup>

Testimony of Zach Raney, Health Department representative

Mr. Raney testified that he is the Epidemiology Manager for the Health Department.<sup>27</sup> He is not a Medical Doctor, Nurse, Pharmacist, or Clinician and does not treat patients.<sup>28</sup> 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.<sup>29</sup> He further confirmed that he was aware that Assumption 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.<sup>30</sup>

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

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<sup>22</sup> *Id.* at 9:32:50 through 9:33:40.

<sup>23</sup> *Id.* at 9:33:40-9:33:52.

<sup>24</sup> *Id.* at 9:34:00-9:35:06.

<sup>25</sup> *Id.* at 9:35:06-9:36:00.

<sup>26</sup> *Id.* at 9:36:06.

<sup>27</sup> CD of Hearing at 2019-04-01\_09.32.17.691.wmv, at 9:39:01 a.m.

<sup>28</sup> *Id.* at 9:39:57.

<sup>29</sup> CD of Hearing at 2019-04-01\_09.42.04.806.wmv, at 9:42:54 a.m.

<sup>30</sup> *Id.* at 9:44:42.

any of the children with the alleged cases.<sup>31</sup> And he understood that Dredger was not a nurse, physician, or pharmacist and could not diagnose the cases.<sup>32</sup>

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 the Doctors – because medical doctors in Kentucky had to conduct laboratory testing and report those results by law to the Health Department.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> The doctor's note indicated merely that chicken pox was “suspected.”<sup>36</sup> 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.<sup>37</sup>

On February 26, 2019, Bill, Karen, and Jerome Kunkel met with the Health Department, and specifically with Mr. Raney and Ms. Swisshelm, who reports to Mr. Raney.<sup>38</sup> 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.<sup>39</sup> And they had no idea whether Jerome was

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<sup>31</sup> *Id.* at 9:45:50.

<sup>32</sup> *Id.* at 9:46:10.

<sup>33</sup> *Id.* at 9:47:33.

<sup>34</sup> *Id.* at 9:47:40-47.

<sup>35</sup> *Id.* at 9:48:10.

<sup>36</sup> *Id.* at 9:49:19-40.

<sup>37</sup> *Id.* at 9:50:00-9:50:55.

<sup>38</sup> *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.

<sup>39</sup> CD of Hearing at 2019-04-01\_09.42.04.806.wmv, at 9:51:45 a.m. to 9:53:10 a.m.

sick.<sup>40</sup> Furthermore, they confirmed the Kunkel's expressed a religious objection to any vaccine – which the Health Department wanted them to get – because the vaccine is derived from aborted fetal tissue.<sup>41</sup> In fact, Raney and Swisshelm acknowledged that they did not even know if anyone at the school currently had the chicken pox, since the doctor's note was from a week or two before.<sup>42</sup>

When questioned by Mr. Kunkel about the necessity of the ban, Raney confirmed that “his opinion” as to the “outbreak” was going to control.<sup>43</sup> And, as to the necessity of their actions, Raney confirmed that what the Health Department had done was merely “an abundance of caution.”<sup>44</sup> **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.**<sup>45</sup>

**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.**<sup>46</sup>

Raney indicated he did not recall whether or not he told the Kunkels that the Vatican encouraged them to get vaccinated.<sup>47</sup>

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 that Mr. Raney disagreed with: he confirmed that the ban **did not** (i) prevent these same students from sharing food or beverages at

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<sup>40</sup> *Id.* at 9:53:10 a.m. – 9:53:19 a.m.

<sup>41</sup> *Id.* at 9:54:00-9:55:00 a.m.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 9:56:20-9:57:08.

<sup>44</sup> *Id.* at 9:57:37.

<sup>45</sup> *Id.* at 9:57:45-9:59:00 a.m.

<sup>46</sup> *Id.* at 9:59:17-10:00:05 a.m.

<sup>47</sup> *Id.* at 10:00:05 a.m. to 10:01:13 a.m.

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.<sup>48</sup>

Not surprisingly, the Kunkels retained counsel after this meeting, and, on March 7, 2019, Raney, Swisshelm, and others received an email communication from their counsel threatening a lawsuit if the extracurricular ban was not rescinded.<sup>49</sup> And, on March 14, 2019, the same day this lawsuit was filed, the Health Department retaliated, by instating a ban from the students attending school.<sup>50</sup> They did so, even though the Health Department previously acknowledged, through Swisshelm, that such a ban would be pointless.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup>

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

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<sup>48</sup> *Id.* at 10:01:13-10:02:30 a.m.

<sup>49</sup> *Id.* at 10:02:13 a.m.

<sup>50</sup> CD of Hearing at 2019-04-01\_10.05.56.851.wmv, at 10:06:00 a.m. to 10:06:50 a.m.

<sup>51</sup> *Id.* at 10:08:12 a.m.

<sup>52</sup> *Id.* at 10:08:30 a.m.

<sup>53</sup> *Id.* at 10:09:24 a.m.; See, also, <https://www.cdc.gov/flu/about/burden/2017-2018.htm>

students from receiving communion on the tongue; (iv) prevent these same students from attending church dinners; (v) prevent 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.<sup>54</sup>

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.<sup>55</sup>

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.<sup>56</sup>

Raney acknowledged that it was “impossible” to know whether the Health Department’s measures were effective or not in preventing the spread of chickenpox.<sup>57</sup> Nevertheless, there were additional cases after March 14, 2019.<sup>58</sup> And, Raney acknowledged that the Health Department could have chosen less restrictive means, namely notification to the Church and School of the suspected chicken pox, and a request for at-risk populations to stay away, but did not do so.<sup>59</sup>

The Courts below held that the targeting was acceptable, largely reasoning that public health concerns justified the restrictions.

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<sup>54</sup> *Id.* at 10:09:24 a.m.-10:10:25 a.m.

<sup>55</sup> *Id.* at 10:10:32 a.m.-10:11:37 a.m.

<sup>56</sup> *Id.* at 10:11:53 a.m. - 10:13:40 a.m.

<sup>57</sup> *Id.* at 10:14:16 a.m.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 10:15:58.

## REASONS FOR GRANTING AN EXTENSION OF TIME

The time to file a Petition for a Writ of Certiorari should be extended for forty days for these reasons:

1. Additional time is warranted to allow preparation of a Petition because seeking this Court's review in any case is a serious decision, and the implications of this case are important, warranting careful preparation of the petition.
2. This case presents extraordinarily important issues warranting a carefully prepared Petition. At stake are serious First Amendment religious freedom issues that continue to percolate in the lower courts and across the country. Prior jurisprudence of this Court is implicated. See, e.g. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 310 U.S. 296 (1963); and *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
3. In addition to the religious targeting issues, this case also presents a clear case of retaliation for protected First Amendment speech (e.g. the threat of the lawsuit that was then followed by the school ban). *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999); *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018).
4. Equal protection is likewise implicated, given the differential treatment of the students here and the fundamental rights for parents to make educational decisions. *Kiser v. Kamdar*, 831 F.3d 784 (6th Cir. 2016); *Washington v. Glucksberg*, 521 U.S. 702 (1997), *citing Meyer v. Nebraska*, 262 U.S. 390 (1923).
5. And this case raises substantial questions under the Due Process Clauses of the U.S. Constitution. *Daniels v. Williams*, 474 U.S. 327 (1986); *Seal v. Morgan*, 229 F.3d 567 (6th

Cir. 2000); *Morrison v. Warren*, 375 F.3d 468 (6th Cir. 2004); *Lewellen v. Metropolitan Gov't*, 34 F.3d 345 (6th Cir. 1994); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

6. There is, at a minimum, some prospect that this Court will grant certiorari, and a similar prospect of reversal.

7. Several obligations of the undersigned Counsel have led to them not being in a position to complete the certiorari petition within the time otherwise allotted. First, Counsel were Counsel for Petitioners in *Schickel, et. al. v. Troutman*, 19-458 (cert pending) involving a First Amendment certiorari petition that was filed October 3, 2019 and involved an exceptional amount of time to prepare. In addition, while preparing the *Schickel* petition, Counsel have been and currently are involved in an expedited elections case in the U.S. District Court for the Eastern District of Kentucky: *Sweeney, et. al. v. Crigler, et. al.*, 2:19-cv-00046. The *Sweeney* case has involved the taking or defending of ten depositions (including expert depositions), including an expert witness in California, all of which have occurred since September 6, 2019, and that matter is now subject to an expedited briefing schedule so that the court is in a position to render a decision before and so as to not interfere with, the 2020 election cycle. In addition to *Sweeney* and *Schickel*, the undersigned Counsel have an exceptionally busy case load between them, including appellate deadlines in several cases and two previously scheduled trials and hearings between now and the date the petition is due.

8. The current deadline also immediately follows the Thanksgiving holiday, and the undersigned considered and attempted to seek only a 30-day extension, but that would place the deadline immediately following the Christmas holiday and the end of the year. The additional 10 days, to 40 days, places the deadline in early January, after that holiday.

9. Finally, there is no prejudice that would arise from the extension, and an additional forty days is warranted.

## CONCLUSION

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended forty days to, and including, January 6, 2020.

Respectfully submitted,

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October 25, 2019

## CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon Counsel for the Defendants/Respondents, this 25th day of October 2019, by ordinary U.S. mail.

/s/Robert A. Winter, Jr.  
Robert A. Winter, Jr.