No. 25-133

In the Supreme Court of the United States

JOSEPH MILLER, ET AL.,

Petitioners,

v.

JAMES V. MCDONALD,
IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF
HEALTH OF THE STATE OF NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PHYSICIANS FOR INFORMED CONSENT IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, Amici Curiae, submits this brief.

PHYSICIANS FOR INFORMED CONSENT ("PIC"), a 501(c)(3) nonprofit educational organization focused on science and statistics. PIC delivers data on infectious diseases and vaccines, and unites doctors, scientists, healthcare professionals, attorneys, and families who support voluntary vaccination. In addition, its Coalition for Informed Consent consists of over 350 U.S. and international organizations.

PIC was founded in California in 2015, by doctors, scientists, and attorneys, after SB277 was signed into law[2] and their parental rights to personal belief and religious exemptions from childhood vaccination for both private and public school were usurped—even though both of these rights had been protected since 1911.[3]

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[1] No counsel for a party authored this amicus brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to fund the production of the brief. Both parties received timely notice of this filing.

[2] Cal. Health & Safety Code §§ 120325–120380

[3] Conis, E., *The History of the Personal Belief Exemption*, PEDIATRICS (2020) Apr;145(4): e20192551. https://pubmed.ncbi.nlm.nih.gov/32184337/

SUMMARY OF ARGUMENT

The lower court rulings should have applied strict scrutiny because Respondents favored secular exemptions while concurrently prohibiting religious exemptions to vaccination. Courts are split on this recurring legal issue. Ethical and scientific reasons support Petitioners under the Equal Protection Clause.

ARGUMENT

A. Unequal Treatment of Religious and Secular Vaccine Exemptions Is a Recurring Legal Issue Splitting Decisions in Lower Courts, and Causing Legislative Confusion, for Decades

For decades plaintiffs have challenged States' unequal treatment of religious and secular exemptions to vaccination. But in the last decade the split decisions have created a constant current of lawsuits, especially in California and New York. The fact patterns in these cases have the same commonality: a student is denied a religious exemption because of a State law that respects only medical exemption. The cases fit in three categories:

(1) *Successful cases* at trial where the court ordered the defendant State agency to grant the unvaccinated the same equal protection afforded to the vaccinated (*e.g.*, *Bosarge v. Edney* (S.D.Miss. 2023) 669 F. Supp. 3d 598);

(2) *Cases settled or dismissed favorably* before trial because the State agency changed policy during the litigation to afford equal protection to the unvaccinated (*e.g.*, *Gold v. Sandoval* (D.Nev. Dec. 3, 2021), No. 3:21-cv-00480-JVS-CBL [legislative body ended vaccine mandate after motion to dismiss equal protection claim[4]]; and *Kiel v. Regents of the Univ. of California*, 2020 Cal. Super. LEXIS 46082 [university restored a religious exemption after motion to dismiss equal protection claim[5]]); and

(3) *Unsuccessful cases* where the court found the unvaccinated need not be treated equally with the vaccinated (*e.g.*, *We the Patriots United States v. Conn. Office of Early Childhood Dev.* (2d Cir. 2023) 76 F.4th 130.)

In the instant *Miller* case, it appears the lower courts (NY D.Ct and Second Circuit) assumed that category (3) was the most prominent constitutional outcome, but in reality (1) and (2) reach the same constitutional outcome and are just as frequent, emphasizing both the recurring split among courts and dire need among lawyers for clarity in this area.

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[4] *See* news article announcing the legislative change and citing the case. *GOP legislators block college student, state worker vaccine mandate*, THE DAILY INDY, https://thenevadaindependent.com/article/gop-legislators-block-college-student-state-worker-vaccine-mandate

[5] *See* university's executive order announcing change in policy immediately after the lawsuit's filing. https://childrenshealthdefense.org/wp-content/uploads/sept29EO.pdf

For obvious reasons, category (2) cases are more difficult to find on Lexis-Nexis or Westlaw, but their abundant existence is known by the lawyers (such as the undersigned) who have litigated in this area, especially in the last five years. We have observed a decisive legal shift in favor of governments respecting religious exemptions together with medical exemptions.[6]

And technically there is a fourth category (4): equal protection cases in progress so the outcome is unknown (*e.g.*, *Doescher v. Aragón* (E.D.Cal. Mar. 11, 2025), No. 2:23-cv-02995-KJM-JDP) 2025 U.S.Dist. LEXIS 47872 [currently on Ninth Circuit appeal]; and *Grimsby v. Pan* (C.D.Cal. Jun. 24, 2025), No. 5:25-cv-01575-JFW), which would all benefit from SCOTUS resolving the recurring legal issue of how to apply the equal protection clause to vaccinated and unvaccinated children in a school attendance setting.

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[6] Indeed, the only vaccine mandate upheld by this Supreme Court (a Medicare worker vaccine mandate in 2022) *allowed for* religious exemptions. *See e.g.*, https://pmc.ncbi.nlm.nih.gov/articles/PMC9033625/ And further, since then legal commentators have been almost uniformly waiting for this Supreme Court to make explicit equal protection for the unvaccinated just like this Court has done so in similar situations. Even aggressive vaccine mandators recognize the Supreme Court's current jurisprudence requires equal protection for the unvaccinated. *See e.g.*, https://www.yalelawjournal.org/forum/individualized-exemptions-vaccine-mandates-and-the-new-free-exercise-clause ("The free exercise vaccine-mandate cases demonstrate that the Supreme Court's new doctrine, couching free exercise as an equality right, is far more protective of religious objectors than was the Court's previous doctrine framing free exercise as a liberty right. Indeed, this new doctrine has already achieved what was previously thought unfathomable: conferring upon religious objectors the right of vaccine refusal.")

Future court decisions are likely to continue splitting over the Equal Protection Clause until SCOTUS provides the needed clarity.

1. Ethical Reasons Support Petitioners

Universally recognized by physicians, informed consent/refusal in vaccination is ethically the standard of care. Banning religious exemptions to vaccination effectively legalizes "medical bullying by proxy" by allowing legislators to dictate the personal medical care of families by threatening the loss of rights and benefits (for children to attend school).

> Informed consent to medical treatment is fundamental in both ethics and law. Patients have the right to receive information and ask questions about recommended treatments so that they can make well-considered decisions about care. Successful communication in the patient-physician relationship fosters trust and supports shared decision making.

American Medical Association (2025). AMA *Principles of Medical Ethics: I, II, V, VIII, Informed Consent*. https://www.ama-assn.org/delivering-care/ethics/informed-consent.

> Informed consent is a core component of the ethical clinical relationship. As with all forms of medical therapy, informed consent should precede vaccination administration.
>
> . . . If the patient declines, this informed refusal of recommended vaccination should be respected . . . . Patients who decline vaccination should continue to be supported with appropriate care options that honor their

autonomous choices.

Ethical Issues with Vaccination in Obstetrics and Gynecology. (2021) Committee Opinion No. 829. American College of Obstetricians and Gynecologists. Obstet Gynecol 2021;138:e16–23. https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/07/ethical-issues-with-vaccination-in-obstetrics-and-gynecology

Safeguarding informed consent/refusal is quite essential to a successful doctor-patient relationship. Vaccination carries risk of harm and is an invasive medical procedure that punctures the skin for direct access to the patient's tissue and bloodstream. For a state or federally-funded institution to engage in coercing this medical procedure upon patients (by threatening to strip their education) is unethical and has been illegal for much of U.S. history unless exemptions were allowed. *See* footnote 3.

2. Scientific Reasons Support Petitioners

Americans are constantly in different stages of learning about the benefits and risks of vaccination.

The Equal Protection Clause provides a vital safeguard for these interests. The scientific authorities presented in the remainder of this amicus brief emphasize that each childhood vaccine has not been proven safer than the disease in normal-risk children who are healthy enough to attend school.

At the district court, Petitioners introduced the expert declaration of James Neuenschwander, MD (D.Ct. Dkt. 28-4 (Aug. 25, 2023)), which provided a trustworthy analysis (with rigorous citation to PubMed .gov) of the scientific consensus among integrative

physicians regarding this subject of vaccine risk versus disease risk.

The amicus analysis below is offered as further support that Plaintiff's expert Dr. Neuenschwander is right that the State of New York cannot *scientifically* defend its mandate under any level of scrutiny, least of all strict scrutiny. In other words, the State of New York, like the CDC, has not proven and cannot prove that the vaccine is safer than the disease it targets.

And this amicus would know, because it is the very mission of our organization to know the answer to this very narrow question: what are the exact numbers comparing disease risk and vaccine risk? We have found the question so vitally important that we have spent the last 10 years pursuing it and proving it by citation to mainstream sources only. And this year our organization published our rigorous scientific results: *Vaccines and the Diseases They Target: An Analysis of Vaccine Safety and Epidemiology*. www.picdata.org/silver-booklet-federal (hereafter "*Silver Booklet*").

In the *Silver Booklet*, our doctors group reached the following conclusion, "For normal-risk U.S. children the data is inconclusive. Vaccines may cause more death or permanent disability than the diseases they target. Therefore, it's not accurate to state that vaccines have been proven safer than those diseases."

Thus, if the lower courts had applied strict scrutiny as Petitioners properly requested, then Dr. Neuenschwander's testimony at the District Court (based on the vetted official sources) would definitively

require equal protection for the vaccinated and unvaccinated.

a. What Do Parents and Guardians Need to Know Regarding the Risk of Polio Versus the Risk of the Polio Vaccine?

The following are highlights of essential facts from the *Silver Booklet* (pages 20-21) on polio:

- Before the introduction of the polio vaccine in 1955, paralytic poliomyelitis was a disease of low incidence, occurring in about 1 in 22,000 or 0.005% in the U.S. population.
- Before the polio vaccine was introduced, about 0.0005% (1 in 190,000) of children at normal risk contracted polio that was fatal or led to permanent paralysis.
- About 95% of people who contract polio have no symptoms (asymptomatic).
- The great majority of polio infections that are fatal or result in permanent paralysis occur in people who have had their tonsils surgically removed (tonsillectomy) or do not rest after feeling sick.

As a necessary comparison, highlights from the *Silver Booklet* (pages 22-23) on the polio vaccine are here:

- The polio vaccine does not prevent asymptomatic infection or transmission.
- The Institute of Medicine has not ruled out the possibility that IPV vaccination can lead

to Guillain-Barré syndrome or sudden infant death syndrome (SIDS).

- Seizures may occur in about 1 in 829 children vaccinated with IPV vaccine.
- A study published in the Journal of the American Medical Association (JAMA) did not rule out the possibility that an IPV-containing vaccine may cause permanent injury in 1 in 500 vaccinated people.
- The polio vaccine has not been proven safer than polio infection for normal-risk children.

b. What Do Parents and Guardians Need to Know Regarding the Risks of Diphtheria, Tetanus, and Pertussis Versus the Risks of the DTaP Vaccines?

The following are highlights of PIC's *Silver Booklet* on diphtheria (pages 8-9), tetanus (pages 10-11), and pertussis (pages 12-13):

- In the modern era, it is rare to contract a fatal case of diphtheria, tetanus or pertussis in the United States.
- Between 1900 and 1945, before widespread use of the DTP vaccine, the mortality rate of diphtheria, tetanus, and pertussis dropped significantly (by 97%, 79% and 92% respectively) due to advancements in living conditions, sanitation, nutrition, and health care.
- In the absence of mass vaccination, for children under age 10, the annual risk of fatal diphtheria, tetanus, and pertussis

> respectively is 1 in 1.7 million (or 0.00006%), 1 in 784,000 (or 0.0001%), and 1 in 323,000 (or 0.0003%) — and the cumulative annual risk of a fatal case of any of those diseases is about 1 in 200,000 (or 0.0005%). (*Silver Booklet*, page 14).

As necessary comparisons, highlights from PIC's *Silver Booklet* (pages 14-15) on the DTaP vaccine are here:

- DTaP is a descendant of the DTP vaccine, which was introduced in 1948; it contains aluminum, a neurotoxin.
- The DTaP vaccine does not prevent asymptomatic infection or the spread of diphtheria or pertussis, and it has no effect on the transmission of tetanus because tetanus is not contagious. The Institute of Medicine has not ruled out the possibility that DTaP vaccination can lead to neurological disorders (*e.g.*, encephalitis, infantile spasms, ataxia, autism, transverse myelitis, optic neuritis, multiple sclerosis, Guillain-Barré syndrome, and Bell's palsy), autoimmune diseases (e.g., chronic urticaria, serum sickness, and arthropathy), myocarditis, and sudden infant death syndrome.
- The manufacturer's package insert states that the DTaP vaccine has "not been evaluated for carcinogenic or mutagenic potential or impairment of fertility."
- The DTaP vaccine has not been proven safer than diphtheria, tetanus, and pertussis.

c. What Do Parents and Guardians Need to Know About the Risks of Chicken Pox (Varicella) Versus the Risks of the Chicken Pox Vaccine?

The following are highlights from PIC's *Silver Booklet* (pages 32-33) on chicken pox:

- More than 96% of new varicella infections are benign and not reported to public health departments.
- Even before the introduction of the varicella vaccination program, fatal cases of varicella were already rare at a rate of 1 in 40,000 or 0.003% of varicella cases.
- Because varicella infection resolves on its own in almost all cases, usually only rest and hydration are necessary.
- Immune globulin is available to treat immunocompromised patients who are exposed to chicken pox, such as those on chemotherapy.

As a necessary comparison, highlights from PIC's *Silver Booklet* (pages 34-35) on the chicken pox vaccine are here:

- The Centers for Disease Control and Prevention (CDC) states, "It is not known how long a vaccinated person is protected against varicella."
- The Institute of Medicine has not ruled out the possibility that varicella vaccination can lead to stroke as well as several neurological and autoimmune disorders, including encephalopathy, cerebellar ataxia, transverse

myelitis, Guillain-Barré syndrome, small fiber neuropathy, arthropathy, and thrombocytopenia.

- Seizures may occur in about 1 in 940 children vaccinated with the varicella vaccine.
- A study published in The Pediatric Infectious Disease Journal did not rule out the possibility that the varicella vaccine may cause permanent injury in 1 in 919 vaccinated people.
- The chicken pox (varicella) vaccine has not been proven safer than chicken pox.

d. What Do Parents and Guardians Need to Know Regarding the Risks of Hepatitis B Versus the Risks of the Hepatitis B Vaccine?

The following are highlights from PIC's *Silver Booklet* (pages 4-5) about hepatitis B:

- An unvaccinated normal-risk child has a 1 in 7,000,000 (or 0.00001%) chance of contracting fatal hepatitis B annually.
- About 50% of hepatitis B-vaccinated children lose their immunity by age 5, and the vaccine has not made a measurable impact on the prevalence of chronic hepatitis B infection.

As a necessary comparison, highlights from PIC's *Silver Booklet* (pages 6-7) on the hepatitis B vaccine are here:

- Seizures may occur in about 1 in 1,300 children vaccinated with the hepatitis B vaccine.

- The hepatitis B vaccine contains an amount of aluminum that is 75 times greater than the maximum safe level of aluminum in the bloodstream per day for a 7.3-pound infant.
- The Institute of Medicine found that evidence is inadequate to rule out the possibility that hepatitis B vaccination leads to more than two dozen neurological and autoimmune disorders.
- The hepatitis B vaccine has not been proven safer than hepatitis B infection for normal-risk children.

e. What Do Parents and Guardians Need to Know Regarding the Risks of Measles, Mumps, and Rubella Versus the Risks of the MMR Vaccine?

The following are highlights from PIC's *Silver Booklet* (pages 24-25) on measles:

- In 1963, before the measles vaccine was introduced in the U.S., almost everyone had measles by age 15, which provided lifelong immunity. And measles was a generally benign infection, with 99.99% of people experiencing a full recovery.

As a necessary comparison, highlights from PIC's *Silver Booklet* (pages 30-31) on the MMR vaccine are here:

- Seizures from the MMR vaccine occur in about 1 in 640 children within two weeks of receiving the first dose of the MMR vaccine.

This amounts to approximately 5,700 cases of MMR-vaccine seizures annually in the U.S., and a significant portion of MMR-vaccine seizures may cause permanent harm, as 5% of febrile seizures may result in epilepsy. Consequently, about 300 MMR-vaccine seizures (5% of 5,700) may lead to epilepsy annually.

- In 2007, the Centers for Disease Control and Prevention (CDC) conducted a study on waning immunity after two doses of the MMR vaccine. the results, published in Archives of Pediatrics and Adolescent Medicine, show that even after being previously vaccinated twice for measles, about 35% of vaccinated 7-year-olds and 60% of vaccinated 15-year-olds are susceptible to subclinical infection with measles virus. And by age 24–26, a projected 33% of vaccinated adults are susceptible to clinical infection. Consequently, nearly 50% of schoolchildren and more than 60% of adults fully vaccinated with the MMR vaccine can still be infected with measles virus and spread it to others, even with mild or no symptoms of their own.
- The CDC conducted another study in 2016, published in The Journal of Infectious Diseases, which concludes that a third dose (booster shot) of the MMR vaccine is short-lived, lasting only one year. The authors state: "MMR3 [a third dose of MMR] is unlikely to solve the problem of waning immunity in the United States . . . We did not find compelling

data to support a routine third dose of MMR vaccine."

f. What Do Parents and Guardians Need to Know About the Risks of Aluminum in Vaccines?

In the *Silver Booklet* (pages 38-40), PIC provides the public with an Aluminum Vaccine Risk Statement titled "Aluminum in Vaccines: What Parents Need to Know." The Booklet explains that both the FDA and ATSDR have raised concerns about the negative effects of aluminum exposure in humans. Scientific studies have shown that small amounts of aluminum can interfere with cellular and metabolic processes in the nervous system. Some of the most damaging effects of aluminum range from motor skill impairment to encephalopathy (altered mental state, personality changes, difficulty thinking, loss of memory, seizures, coma, and more).

Studies have also shown that adverse effects of aluminum may not be restricted to neurological conditions. In 2008, the Agency for Toxic Substances and Disease Registry (ATSDR), a division of HHS, used studies of the neurotoxic effects of aluminum to determine that no more than 1 milligram (mg) (1,000 micrograms [mcg]) of aluminum per kilogram (kg) of body weight should be taken orally per day to avoid aluminum's negative effects.

Another study referenced in the *Silver Booklet* and published in *Academic Pediatrics* found that asthma occurred in 1 in 183 vaccinated children for every 1 mg (1,000 mcg) increase in aluminum exposure. In the United States, up to 22 doses of aluminum-

containing vaccines are administered to children, with 11 doses administered from birth to 6 months of age.

g. The Idea of 'Under-Vaccination' in New York or Any Other State Is a False Concept

Under-vaccination is not an ethical, legal, scientific, or medical concept. It is a politically motivated false concept which distracts focus from the main issues at hand, namely the 1) rights of individuals to informed consent and refusal of medical procedures, without penalties for choices which are unpopular in the current political climate, and the 2) rights of individuals to safeguard their children's health, without penalties for choices which are unpopular in the current political climate.

The history of vaccine mandates is inseparable from strife over these inalienable rights, and vaccine mandates have only been allowed to enjoy a peaceful existence when political compromise has respected both secular and religious exemptions. *See* footnote 3.

CONCLUSION

Proper application of the Equal Protection Clause is necessary to resolve the split among lower courts. Petitioners should retain the right and dignity of informed consent/refusal without penalty. The scientific data currently available demonstrate that vaccines mandated for school attendance have not been proven safer than the infections they were designed to prevent.

Respectfully submitted,

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