

IN THE BOONE CIRCUIT COURT

BOONE COUNTY, KENTUCKY

Case No.: _____

Jerome Kunkel :
11878 Big Bone Church Rd. :
Union, Kentucky :

Plaintiff :

v. :

Northern Kentucky Health Department :
8001 Veterans Memorial Drive :
Florence, KY 41042 :

AND :

Boone County Local Board of Health :
8001 Veterans Memorial Drive :
Florence, KY 41042 :

AND :

Zach Raney :
8001 Veterans Memorial Drive :
Florence, KY 41042 :
In his Official and Individual Capacity :

AND :

LYNNE M. SADDLER, M.D. :
8001 Veterans Memorial Drive :
Florence, KY 41042 :
In her Official Capacity Only :

AND :

CABINET FOR HEALTH AND FAMILY :
SERVICES, KENTUCKY DEPARTMENT :
FOR PUBLIC HEALTH :
275 E. Main St. :
Frankfort, KY 40621 :

AND

Jeffrey D. Howard, Jr., MD
Commissioner,
KY Department for Public Health
In his Official Capacity Only
275 East Main Street
Frankfort, KY 40621

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:
:
:

AND

Julie A Miracle RN
KY Department for Public Health
Nurse Consultant
In her Official Capacity Only
275 East Main Street
Frankfort, KY 40621

:
:
:
:

AND

UNKNOWN DEFENDANTS 1-10

Defendants

:
:
:

ALSO SERVE:

Andrew Beshear, Kentucky Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601-3449

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**VERIFIED COMPLAINT FOR MONEY DAMAGES, DECLARATORY RELIEF, AND
INJUNCTIVE RELIEF**

Facts – Background

1. Jerome Kunkel is 18 years old, and lives at 11878 Big Bone Church Rd. in Union, Kentucky, with his parents.
2. Jerome Kunkel attends Assumption Academy (“Assumption”) at 472 Beaver Road, Walton, Kentucky, 41094, and is a senior in high school there.
3. Assumption is a private Catholic High School.

4. Since 2015, Mr. Kunkel has played basketball for Assumption. He has played Center since that time, and is and has been a pivotal member of the school's basketball team.
5. Mr. Kunkel is a practicing Catholic, and is a faithful member of the Assumption Church.
6. The Assumption Church practices and believes in, the Latin Mass, and further rejects certain of the reforms of Vatican II, and, at moreover, certain dictates of the Vatican.
7. Among other fundamental and deeply held religious beliefs of Mr. Kunkel, and the beliefs of his family, is that the use of any vaccine that is derived from aborted fetal cells is immoral, illegal, and sinful.
8. Among the vaccines that are derived from aborted fetal cells is the Varicella Vaccine (commonly known as Chicken Pox). Mr. Kunkel is opposed, and has been opposed since learning where the vaccine came from, to the use of that vaccine, under fundamental moral and religious grounds, due to its being derived from aborted fetal cells.
9. Prior to reaching the age of majority, Mr. Kunkel's parents, Bill and Karen Kunkel, have likewise had strenuous objections to the Varicella Vaccine, under both religious and medical reasons, and have shared their deep opposition to that vaccine with Mr. Kunkel, particularly because it is derived from aborted fetal cells.
10. As a consequence, Mr. Kunkel has never received the Varicella Vaccine, and refuses, under grounds of religion to do so.
11. Furthermore, Mr. Kunkel, and his parents, caused the EPID-230A "Parent or Guardian's Declination on Religious Grounds to Required Immunizations" to be filled out in early 2018 (and in prior school years as well). This form governed the 2018-2019 school year.

12. Vanessa Dredger (“Dredger”) is the Registrar for the Assumption Academy. Since at least late 2018 to early 2019, she began communicating with the Northern Kentucky Health Department (“NKHD”).
13. In the beginning of December, through early January, Dredger reported to NKHD that certain students had come down with Varicella (Chicken Pox). However, prior to March 1, 2019, there was only reported case of Varicella that occurred approximately the week of February 18, 2019.
14. As of the filing of this Complaint, Mr. Kunkel has not been diagnosed with Varicella.
15. On or about February 22, 2019, Father Muscha, the Principal and Priest for Assumption Academy, was informed by the Northern Kentucky Health Department (Zach Raney, the Department’s Epidemiology Manager either made this notification, or directed this notification) that no one in the school could participate or attend any extra curricular activities unless they were tested for Varicella and it was determined they were immune from Varicella.
16. On February 22, 2019 Mr. Kunkel got tested by urgent care for an emergency test for Varicella. Then Mr. Kunkel went to St. Elizabeth Hospital to be tested.
17. That evening, he was permitted to play basketball, since the test results did not come back.
18. Ultimately, Mr. Kunkel’s test results revealed he was not immune, having never received the vaccine or otherwise contracted the virus to give rise to an immunity.
19. On or about February 23, 2019, Mr. Kunkel’s father, Bill, was telephoned by Father Muscha. At that time, Father Muscha informed Bill that the Northern Kentucky Health Department, and specifically Zach Raney, directed that Mr. Kunkel could not attend or

play in any basketball games or any other extracurricular activities involving other schools.

20. But for the Health Department and Raney's directive, Father Muscha would have permitted Mr. Kunkel, and for that matter the other students, to participate in sports and other extracurricular activities.
21. There was a second case of Varicella that occurred on March 4, 2019.
22. It should be noted that both cases of Varicella were in Our Lady of the Sacred Heart Elementary School, which is across the street from Assumption. There were, and have been, no confirmed cases in Assumption Academy (the junior high/high school).
23. Starting in March, 2019, Mr. Kunkel is the Assistant Coach of the Assumption Baseball team. Currently, Mr. Kunkel is not permitted to attend any baseball games or scrimmages, including the March 15, 2019 baseball game.
24. Mr. Kunkel is permitted, however, to attend school. He is further permitted to go out in public, to go to movie theaters, public sporting events, and other public functions. He can also attend school sporting events between schools other than Assumption, can attend church, local fish fries, can go to the local Chuck-E-Cheese and be exposed to numerous children.

Background of Kentucky's Health Regime and Regulations

25. K.R.S. Chapter 214 governs Health Departments in Kentucky related to the prevention of disease.
26. K.R.S. 214.020 provides that "When the Cabinet for Health and Family Services believes that there is a probability that any infectious or contagious disease will invade this state, it shall take such action and adopt and enforce such rules and regulations as it deems

efficient in preventing the introduction or spread of such infectious or contagious disease or diseases within this state, and to accomplish these objects shall establish and strictly maintain quarantine and isolation at such places as it deems proper.”

27. K.R.S. 214.036 provides: “Nothing contained in KRS 158.035, 214.010, 214.020, 214.032 to 214.036, and 214.990 shall be construed to require the testing for tuberculosis or the immunization of any child at a time when, in the written opinion of his attending physician, such testing or immunization would be injurious to the child’s health. Nor shall KRS 158.035, 214.010, 214.020, 214.032 to 214.036, and 214.990 be construed to require the immunization of any child whose parents are opposed to medical immunization against disease, and who object by a written sworn statement to the immunization of such child on religious grounds. Provided, however, that in the event of an epidemic in a given area, the Cabinet for Health and Family Services may, by emergency regulation, require the immunization of all persons within the area of epidemic, against the disease responsible for such epidemic.”
28. Kentucky law requires that, for laws, orders, and other governmental actions that impinge on fundamental religious freedom, certain conditions be met. Specifically, K.R.S. 446.350 provides that: “Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.”

29. 902 KAR 2:030 provides, in relevant part, that a local health department shall: "(b) Establish and maintain quarantine, isolation or other measures as required by law or by administrative regulations of the Cabinet for Human Resources relating to communicable disease control."
30. 902 KAR 2:050 provides, in relevant part, "Section 2. Persons. Whenever any person has been implicated as a possible reservoir or possible source of infection of any communicable disease, the local health department or the Cabinet for Human Resources shall employ such measures as are necessary to secure adequate isolation, restriction of employment or other control procedures that may be necessary to insure cessation of transmission of infection."
31. At no time has the Kentucky Department of Public Health ever issued an emergency regulation ordering the immunization, or quarantine, of Assumption, its staff, or its students. Similarly, no emergency regulation exists regarding vaccination or quarantine for Boone County, or even Walton, Kentucky, either.

The Kunkel's Interactions with the Health Department and its officials

32. As might be expected, Bill Kunkel, on behalf of his son, inquired with NKHD and state officials – specifically Raney and Miracle, as to the basis of the extracurricular activities order.
33. On February 26, 2019, Bill Kunkel went to the Northern Kentucky Health Department and had a conversation with Raney.
34. In that conversation, Raney engaged in derogatory statements regarding the (and specifically Bill and Jerome Kunkel's) beliefs at Assumption concerning religious opposition to the varicella vaccine and the fact that it is derived from aborted fetal cells.

35. In the context of that conversation, it was made clear that the extracurricular activity ban was motivated and put in place to punish the parishioners at Assumption and at the school, for their vaccination beliefs, and not due to an actual concern for public health. His use of the terms “you people” and “your beliefs” in a derogatory manner exhibit that animus.
36. Raney, as a state actor, and as at least one of the architects of the extracurricular activity ban, likewise provided Bill Kunkel citation to a 2005 study in which Raney contended it was not doctrinally against the Catholic faith to undergo the vaccination in question.¹
37. Raney’s use of his government office, and as a state actor, to push his dogma on the Kunkel’s, and Jerome in particular, and to punish Jerome for not being vaccinated in accordance with that dogma, is an egregious Free Exercise and Establishment Clause violation of the First Amendment of the United States Constitution.
38. Unknown Defendants 1-10 are additional members of the NKHD and/or State Department of Health, who are complicit with Raney’s use of public office to infringe on religious liberty with an animus towards the beliefs of Jerome Kunkel and others at his school and church. They will be identified in discovery.
39. Aware that his actions were in fact motivated by religious animus towards Mr. Kunkel and his views, and aware that such animus was unconstitutional, Raney followed up by email to Bill Kunkel on February 27, 2019. Among other things, Raney indicated that “[o]ur primary concern is preventing the spread of this illness to the public. Without

¹ Notwithstanding Raney’s contentions, the Vatican white paper on the issue, attached at Exhibit A, is not so clear cut; it suggests that the use of such vaccines may, in fact, be immoral and sinful. In any event, the Kunkel’s faith and beliefs, or those of the majority of the Assumption Church, in line with such beliefs.

definitive evidence of immunity, a person could be a source of potential exposure, even if they are currently healthy. It's impossible to know how anyone will react to chickenpox, therefore we must act with an abundance of caution.”

40. This email is remarkable, in that Raney admits that he has concerns other than “preventing the spread of this illness to the public” – namely his animus towards Kunkel’s religious beliefs. It is also remarkable insofar as it admits to “potential” sources of exposure, and does not indicate any assessment of a clear and present threat to public health that would possibly justify the extraordinary actions taken by the Health Department.
41. In a similar vein, on February 25, 2019, Julie Miracle, who is a Nurse Consultant with the Kentucky Department for Public Health, provided support and cover for Raney and the NKHD’s actions, stating, by email to Bill Kunkel, that “When the NKY Health Department 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 health department felt it necessary to intervene to prevent a community-wide outbreak.” She further indicated that “At this point, as there is no diagnostic confirmation associated with these illnesses, there is no choice but to intervene on behalf of the community as a precaution. We urge those affected to seek clinical diagnosis to determine the exact cause of the rash so treatment and prevention efforts can be fully addressed. Depending on the outcome of a clinical diagnosis for those affected, outbreak control measures may be revised accordingly.”

42. Miracle's statements are also extraordinary, in that they confirm that there was no community-wide outbreak at the time, that there was no clinical diagnosis to determine the cause of the rash's, and that the measures taken were merely a "precaution."

General Effect, Motivation, and Purpose of the Activity Ban

43. The purpose and motivation of the Activity Ban was and is to pressure, punish, and coerce non-vaccinated persons in the particular parish, which holds the sincerely held religious beliefs about vaccines that were derived from aborted fetal cells, such as Mr. Kunkel, into receiving a vaccination that violates their sincerely held religious beliefs.

44. By excluding these students from extracurricular activities, the Defendants intended to punish the students for not ascribing to the wishes of the Defendants to be vaccinated against the wishes and fundamental religious beliefs of Mr. Kunkel, and the other students who hold his views.

The facts, and medical expert opinions concerning varicella and the Activity Ban

45. If the circumstances in fact constituted an outbreak or epidemic (and the facts and diagnosis to date does not such an outbreak or epidemic), and if the varicella virus itself presented a serious public health threat (and it does not) then, and only then, it might be appropriate to enact a general quarantine of the area, including the cancelling of school and classes.

46. As it stands, the Activity Ban does not keep the students from spreading the disease between themselves, or from attending sporting and community events in which it is far more likely the disease could be spread (in particular church festivals, fish fries, church/mass, public sporting events involving other schools, the supermarket, etc).

47. Symptomatic students are almost always pulled from school and do not engage in school or these activities; that, in and of itself, is adequate protection of the public from the spread of chicken pox.
48. The injection of the varicella vaccine is and can be contra-indicated from a medical standpoint and has its own serious community risks for several reasons. First, peer reviewed studies have documented that incidents of shingles, particularly among adults, is increased where the population has a number of individuals that have received the vaccine. Second, the administration of the vaccine in question is the injection of a live virus, that further spreads the disease in question.
49. The varicella virus is not a serious public health threat; for years, prior to 1995, no vaccine was developed and for good reason, namely there was not serious health threats from the disease that warranted the development of a vaccine. Hospitalizations, prior to the advent of the vaccine, occurred in approximately 13,000 cases out of 4,000,000 people that contracted the disease annually (a 0.325% hospitalization rate), with deaths occurring in approximately 100 cases out of 4,000,000 (0.0025% rate) and those were almost invariably from pre-existing health conditions that were aggravated by the disease. By way of comparison, that was approximately double the number of deaths annually in the United States from lightning strikes, and so roughly the occurrences of death were as rate as someone being struck and killed by lightning. It is notable that deaths have been reported by and through the U.S. FDA/CDC Vaccine Adverse Event Reporting System following the administration of vaccines, including from the varicella vaccine.

50. While the Northern Kentucky Health Department may be able to act or issue orders in the event of an epidemic or outbreak or epidemic; no such outbreak or epidemic requiring such an order exists.
51. The Northern Kentucky Health Department may be able to act respecting a “possible reservoir or possible source of infection of any communicable disease,” Mr. Kunkel has had no such diagnosis, nor has he displayed any symptoms that would be consistent with him being a possible reservoir or source of infection.
52. Unlike other disease progressions naturally occurring varicella disease is more beneficial to the patient, and the community, than a vaccinated individual.
53. There is no public health threat from enjoining/prohibiting the Health Department from enforcing their extracurricular activities ban, and, in my opinion public health is undermined by such a ban. Again, even with a diagnosis of chicken pox, and even assuming the disease were dangerous enough to warrant it (and it is not), it is sufficient to have infected students pulled from school during the pendency of their infection and symptoms. Furthermore, the extracurricular ban does not meaningfully advance public health when the supposedly seriously at-risk students still have significant public interactions.
54. Given Mr. Kunkel’s serious religious objections to the vaccination, there is no compelling governmental interest that is furthered in terms of disease control from the extracurricular activity ban, and, further, the ban is not the least restrictive means of preventing the spreading the disease, or even in protecting community health.

The Parties and Grounds for Suit Against Them

55. The Northern Kentucky Health Department (“NKHD”) is the District Health Department that covers Northern Kentucky’s counties, including Boone County. Upon information and belief, the Northern Kentucky Health Department issued orders and directives related to the exclusion of Assumption students from extracurricular activities (“Activity Ban”). The NKHD is sued in its organizational capacity for declaratory and injunctive relief only.
56. The Boone County Local Board of Health is the local board of health that is suspected to have also been part of the issuance of the Activity Ban, and is therefore sued in its organizational capacity for declaratory and injunctive relief only.
57. Zachary Raney is the Epidemiology Manager with the NKHD. He was instrumental in, personally participated in, and largely directed, the Activity Ban, along with Unknown Defendants 1-10. He is sued in his official capacity for injunctive and declaratory relief, and his individual capacity for money damages (including punitive damages).
58. Dr. Lynne Sadler is the Director of the NKHD. She, at a minimum, failed to appropriately supervise Raney and Unknown Defendants 1-10, may have participated in the decisions regarding the Activity Ban, and may be one of the Unknown Defendants 1-10. At present, she is sued solely in her official capacity for injunctive and declaratory relief. However, if it is determined that she meets the criteria of being one of the Unknown Defendants 1-10, Plaintiffs will seek amend this Complaint to include her.
59. The Cabinet for Health and Family Services, Division of the Kentucky Department for Public Health, is the agency tasked with, among other things, regulating immunization programs and outbreaks, under K.R.S. 12.020 and K.R.S. 194A.030, and the enforcement

of K.R.S. Chapter 214, and the promulgation and implementation of regulations adopted thereunder. It is sued for purposes of injunctive and declaratory relief only.

60. Dr. Jeffrey D. Howard, Jr. is the Commissioner of the Division of the Kentucky Department for Public Health, and the Chief Medical Officer of the Commonwealth of Kentucky. In that capacity, he is responsible for, among other things, the supervision of Nurse Julie Miracle, and the enforcement of K.R.S. Chapter 214, and the promulgation and implementation of regulations adopted thereunder. At present, he is sued solely in his official capacity for injunctive and declaratory relief. However, if it is determined that he meets the criteria of being one of the Unknown Defendants 1-10, Plaintiffs will seek amend this Complaint to include him.
61. Julie Miracle, R.N. is the Nurse Consultant, with the Kentucky Immunization Program, within the Department for Public Health, Division of Epidemiology and Health Planning, and in that capacity, supported the NKHD on their Activity Ban, including with respect to communicating with Mr. Bill Kunkel. In her official capacity, she is responsible for, among other things, the enforcement of K.R.S. Chapter 214, and the promulgation and implementation of regulations adopted thereunder. At present, she is sued solely in his official capacity for injunctive and declaratory relief. However, if it is determined that she meets the criteria of being one of the Unknown Defendants 1-10, Plaintiffs will seek amend this Complaint to include her.
62. Unknown Defendants 1-10 are additional members of the NKHD and/or State Department of Health, who are complicit with Raney's use of public office to infringe on religious liberty with an animus towards the beliefs of Jerome Kunkel and others at his school and church. They will be identified in discovery.

63. The Attorney General is not named as a party, but is served pursuant to K.R.S. 418.075.

Claims – Count I – 42 U.S.C. 1983, First Amendment Violation

64. Plaintiff reincorporates the preceding paragraphs as if fully written herein.

65. Mr. Kunkel is a citizen of the United States of America.

66. Mr. Kunkel has clearly established rights and protections under the United States

Constitution and its statutes to Freedom of Free Exercise of Religion and Freedom from the Government Establishment of Religion, and other First Amendment guarantees.

67. Defendants, using their offices and acting under color of state law, violated, is violating, and will in the future violate Mr. Kunkel's First Amendment Rights, which has deprived, is depriving, and will deprive him of his rights to Free Exercise of Religion and Freedom from the Government Establishment of Religion, and other First Amendment guarantees of the U.S. Constitution, which rights are clearly established. Defendants thereby subjected themselves under 42 U.S.C. § 1983, to prospective injunctive relief, and to declaratory relief under KRS Chapter 418, and the individual capacity Defendant subjected himself to be liable for monetary damages sought herein.

68. Defendants abused the authority of their offices and, while acting under color of law and with knowledge of Mr. Kunkel's clearly established rights, used their offices to violate Mr. Kunkel's First Amendment rights.

69. Mr. Kunkel further seeks declaratory and injunctive relief against Defendants: (a) declaring that Defendants violated his constitutional rights as set forth in this Complaint; and (b) enjoining future violations of Mr. Kunkel's rights by Defendants, including enjoining the Activity Ban. Mr. Kunkel further seeks his costs and reasonable attorney fees under 42 U.S.C. § 1988.

70. As against Defendant Raney and Unknown Defendants 1-10, Mr. Kunkel further states that he was the actor responsible for the constitutional violations complained of, and other breaches of the Constitution as set forth herein. As such, Mr. Kunkel seek damages in an amount to be determined at trial under 42 U.S.C. § 1983, for violations of his clearly established constitutional rights as set forth herein. The measure of such damages shall be proven at trial, and exceed the jurisdictional minimum of this Court, exclusive of interest and costs.
71. Mr. Kunkel further seeks punitive damages against Raney and Unknown Defendants 1-10, in his individual capacity, since his actions complained of were motivated by evil motive or intent, and/or when it involves reckless or callous indifference to the federally protected rights of Mr. Kunkel. Mr. Kunkel demands judgment on these punitive damages against Raney, in his individual capacity, in an amount to be determined at trial, exclusive of interest and costs.
72. Raney's actions, those of Unknown Defendants 1-10, and the other Defendants, who supervised, acquiesced, and failed to stop the ongoing violations of Constitutional rights of the Plaintiff, violate clearly established rights to Free Exercise and against the Establishment of religion, as protected in the First Amendment of the United States Constitution, as set forth in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 171 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Maye v. Klee*, 2019 U.S. App. LEXIS 4466 (6th Cir. 2019); *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987) (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963)); and other cases.

Claims – Count II – 42 U.S.C. 1983, Equal Protection Violation

73. Plaintiff reincorporates the foregoing paragraphs as if full written herein.
74. Mr. Kunkel is a citizen of the United States of America.
75. Mr. Kunkel has clearly established rights and protections under the United States Constitution and its statutes to Equal Protection of the Laws.
76. Defendants, using their offices and acting under color of state law, violated, is violating, and will in the future violate Mr. Kunkel's Fourteenth Amendment Rights, which has deprived, is depriving, and will deprive him of his rights to Equal Protection of the Law, which rights are clearly established. Defendants thereby subjected themselves under 42 U.S.C. § 1983, to prospective injunctive relief, and to declaratory relief under KRS Chapter 418, and the individual capacity Defendant subjected himself to be liable for monetary damages sought herein.
77. Defendants abused the authority of their offices and, while acting under color of law and with knowledge of Mr. Kunkel's clearly established rights, used their offices to violate Mr. Kunkel's Fourteenth Amendment rights.
78. Mr. Kunkel further seeks declaratory and injunctive relief against Defendants: (a) declaring that Defendants violated his constitutional rights as set forth in this Complaint; and (b) enjoining future violations of Mr. Kunkel's rights by Defendants, including enjoining the Activity Ban. Mr. Kunkel further seeks his costs and reasonable attorney fees under 42 U.S.C. § 1988.
79. As against Defendant Raney and Unknown Defendants 1-10, Mr. Kunkel further states that he was the actor responsible for the constitutional violations complained of, and other breaches of the Constitution as set forth herein. As such, Mr. Kunkel seek damages

in an amount to be determined at trial under 42 U.S.C. § 1983, for violations of his clearly established constitutional rights as set forth herein. The measure of such damages shall be proven at trial, and exceed the jurisdictional minimum of this Court, exclusive of interest and costs.

80. Mr. Kunkel further seeks punitive damages against Raney and Unknown Defendants 1-10, in his individual capacity, since his actions complained of were motivated by evil motive or intent, and/or when it involves reckless or callous indifference to the federally protected rights of Mr. Kunkel. Mr. Kunkel demands judgment on these punitive damages against Raney, in his individual capacity, in an amount to be determined at trial, exclusive of interest and costs.

81. Raney's actions, those of Unknown Defendants 1-10, and the other Defendants, who supervised, acquiesced, and failed to stop the ongoing violations of Constitutional rights of the Plaintiff, violate clearly established rights to Equal Protection of the Law, since they burden a fundamental right under the First Amendment, are subject to strict scrutiny as a result, and therefore violate Equal Protection as set forth in *Kiser v. Kamdar*, 831 F.3d 784 (6th Cir. 2016).

Claims – Count III – 42 U.S.C. 1983, Procedural Due Process; Substantive Due Process

82. Plaintiff reincorporates the foregoing paragraphs as if full written herein.

83. Mr. Kunkel is a citizen of the United States of America.

84. Mr. Kunkel has clearly established rights and protections under the United States Constitution and its statutes to Procedural and Substantive Due Process.

85. Defendants, using their offices and acting under color of state law, violated, is violating, and will in the future violate Mr. Kunkel's Fourteenth Amendment Rights, which has

deprived, is depriving, and will deprive him of his rights to Procedural and Substantive Due Process, which rights are clearly established. Defendants thereby subjected themselves under 42 U.S.C. § 1983, to prospective injunctive relief, and to declaratory relief under KRS Chapter 418, and the individual capacity Defendant subjected himself to be liable for monetary damages sought herein.

86. Defendants abused the authority of their offices and, while acting under color of law and with knowledge of Mr. Kunkel's clearly established rights, used their offices to violate Mr. Kunkel's Fourteenth Amendment rights.

87. Mr. Kunkel further seeks declaratory and injunctive relief against Defendants: (a) declaring that Defendants violated his constitutional rights as set forth in this Complaint; and (b) enjoining future violations of Mr. Kunkel's rights by Defendants, including enjoining the Activity Ban. Mr. Kunkel further seeks his costs and reasonable attorney fees under 42 U.S.C. § 1988.

88. As against Defendant Raney and Unknown Defendants 1-10, Mr. Kunkel further states that he was the actor responsible for the constitutional violations complained of, and other breaches of the Constitution as set forth herein. As such, Mr. Kunkel seek damages in an amount to be determined at trial under 42 U.S.C. § 1983, for violations of his clearly established constitutional rights as set forth herein. The measure of such damages shall be proven at trial, and exceed the jurisdictional minimum of this Court, exclusive of interest and costs.

89. Mr. Kunkel further seeks punitive damages against Raney and Unknown Defendants 1-10, in his individual capacity, since his actions complained of were motivated by evil motive or intent, and/or when it involves reckless or callous indifference to the federally

protected rights of Mr. Kunkel. Mr. Kunkel demands judgment on these punitive damages against Raney, in his individual capacity, in an amount to be determined at trial, exclusive of interest and costs.

90. Raney's actions, those of Unknown Defendants 1-10, and the other Defendants, who supervised, acquiesced, and failed to stop the ongoing violations of Constitutional rights of the Plaintiff, violate clearly established rights to Procedural and Substantive Due Process.
91. Specifically, K.R.S. 214.036 required the adoption of emergency regulation to enact quarantines or other preventative measures for a specific area; pursuant to K.R.S. 13A.190 there were procedural protections associated with such an enactment, including the requirement for a public hearing.
92. There was no such hearing, and no such enactment, concerning the Activity Ban.
93. Furthermore, Mr. Kunkel had certain rights conferred on him under K.R.S. 446.350, that were not vindicated, but would have been vindicated, had the procedures in K.R.S. 214.036 regarding emergency regulation enactment been followed.
94. Mr. Kunkel likewise has a substantive due process to be free from arbitrary and capricious governmental action, and to be free from invasions of his bodily integrity. That right has likewise been violated, insofar as the Activity Ban is concerned.
95. The aforementioned rights are clearly established, as set forth in *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000); *Morrison v. Warren*, 375 F.3d 468, 473 (6th Cir. 2004); and *Lewellen v. Metropolitan Gov't*, 34 F.3d 345, 351 (6th Cir. 1994).

Claims – Count IV – Declaratory and Injunctive Relief – KRS Chapter 418

96. Plaintiff reincorporates the foregoing paragraphs as if full written herein.

A. The Activity Ban and the actions of Defendants violate Sections 1, 2, and 5 of the Kentucky Constitution

97. The Activity Ban, and, to the extent it was authorized by 902 KAR 2:030 and 902 KAR 2:050, those regulations as applied in this context, are unconstitutional under Section 1, of the Kentucky Constitution.

98. Section 1 of the Kentucky Constitution provides that all men have: “The right of worshipping Almighty God according to the dictates of their consciences.”

99. Section 2 of the Kentucky Constitution provides that “Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.” Further, under Section 2, and Univ. of Ky. v. Davis, 551 S.W.3d 443 (2016), Mr. Kunkel possesses an inherent right to appeal the determinations regarding the Activity Ban and does so.

100. Section 5 of the Kentucky Constitution provides that:

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.

101. Additionally, Section 26 of Kentucky's Constitution protects Sections 1 through 25:

To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government,

and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

102. Given that an actual controversy exists between the Plaintiff and the Defendants, and the Activity Ban, and, to the extent it was authorized by 902 KAR 2:030 and 902 KAR 2:050, those regulations as applied in this context, are subject to declaratory relief that the regulations and Activity Ban are unconstitutional and void, as provided in Section 26 of Kentucky's Constitution, and as authorized in K.R.S. 418.040. Mr. Kunkel is authorized to pursue such declaratory relief under K.R.S. 418.045.

103. Injunctive relief is further authorized pursuant to K.R.S. 418.055, and C.R. 65.

B. The Activity Ban and the actions of Defendants violate K.R.S. 446.350 and/or K.R.S. 214.036

104. The Activity Ban, and, to the extent it was authorized by 902 KAR 2:030 and 902 KAR 2:050, those regulations as applied in this context, are illegal and of no force and effect insofar as they violate K.R.S. 446.350 and/or K.R.S. 214.036.

105. Specifically, the Activity Ban substantially burdens Mr. Kunkel's freedom of religion. K.R.S. 446.350. Mr. Kunkel has a sincerely held religious belief not to be vaccinated by a vaccine that is derived from aborted fetal cells. Defendants cannot prove by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A "burden" shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities, which is what the Activity Ban entails in this case.

106. Further, K.R.S. 214.036 provides the sole means and mechanism under which the Health Department may act concerning person(s) who obtain religious exemptions;

namely, “in the event of an epidemic in a given area, the Cabinet for Health and Family Services may, by emergency regulation, require the immunization of all persons within the area of epidemic, against the disease responsible for such epidemic.” That did not happen, and the Northern Kentucky Health Department was otherwise not empowered to act in the manner it did.

107. Given that an actual controversy exists between the Plaintiff and the Defendants, and the Activity Ban, and, to the extent it was authorized by 902 KAR 2:030 and 902 KAR 2:050, those regulations as applied in this context, are subject to declaratory relief that the regulations and Activity Ban are illegal and/or void since they exceed the statutory authority in K.R.S. 214.036, and, furthermore, contravene K.R.S. 446.350. Mr. Kunkel is authorized to pursue such declaratory relief under K.R.S. 418.045.

108. Injunctive relief is further authorized pursuant to K.R.S. 418.055, and C.R. 65.

WHEREFORE, Mr. Kunkel demands:

- Compensatory and punitive damages, in an amount to be proven at trial, under 42 U.S.C. 1983, against Raney in his individual capacity;
- An injunction and declaratory relief, that 902 KAR 2:030 and/or 902 KAR 2:050 and/or the Activity Ban, are unconstitutional as applied to Mr. Kunkel and his religious objections, and are further illegal and of no force and effect insofar as they violate K.R.S. 446.350 and/or K.R.S. 214.036; and
- Such other relief as this Court may find just and proper.

Respectfully submitted,

/s/Christopher Wiest
Christopher Wiest (KBA 90725)
25 Town Center Blvd, STE 104
Crestview Hills, KY 41017
513-257-1895 (v)
chris@cwiestlaw.com
Trial Attorney for Plaintiff

/s/Thomas Bruns
Thomas Bruns (KBA 84985)
4750 Ashwood Drive, STE 200
Cincinnati, OH 45241
tbruns@bcvalaw.com
Co-Counsel for the Plaintiff

JURY DEMAND

Plaintiff demands trial by jury for all claims so triable.

/s/Christopher Wiest
Christopher Wiest (KBA 90725)

Presiding Judge: HON. JAMES R. SCHRAND (654281)

COM : 000024 of 000034



PONTIFICIA ACADEMIA
PRO VITA

Il Presidente

Prot.n.P/3431

Mrs Debra L.Vinnedge
Executive Director, *Children of God for Life*
943 Deville Drive East
Largo, Florida
33771
Stati Uniti

Vatican City, June 9 2005

Dear Mrs Debra L.Vinnedge,

On June 4, 2003, you wrote to His Eminence Cardinal Joseph Ratzinger, with a copy of this letter forwarded to me, asking to the Sacred Congregation of the Doctrine of Faith a clarification about the liceity of vaccinating children with vaccines prepared using cell lines derived from aborted human fetuses. Your question regarded in particular the right of the parents of these children to oppose such a vaccination when made at school, mandated by law. As there were no formal guidelines by the magisterium concerning that topic, you said that catholic parents were often challenged by State Courts, Health Officials and School Administrators when they filled religious exemptions for their children to this type of vaccination.

This Pontifical Academy for Life, carrying out the commission entrusted to us by the Congregation for the Doctrine of Faith, in answer to your request, has proceeded to a careful examination of the question of these "tainted" vaccines, and has produced as a result a study (in Italian) that has been realized with the help of a group of experts. This study has been approved as such by the Congregation and we send you, there enclosed, an English translation of a synthesis of this study. This synthesis can be brought to the knowledge of the interested officials and organisms.

A documented paper on the topic will be published in the journal "*Medicina e Morale*", edited by the *Centra di Bioetica della Universita Cattolica* in Rome.

The study, its synthesis, and the translation of this material took some time. We apologize for the delay.

With my best regards,

Sincerely yours,

+E.Sgreccia

MORAL REFLECTIONS
ON VACCINES PREPARED FROM
CELLS
DERIVED FROM ABORTED HUMAN FOETUSES

The matter in question regards the lawfulness of production, distribution and use of certain vaccines whose production is connected with acts of procured abortion. It concerns vaccines containing live viruses which have been prepared from human cell lines of foetal origin, using tissues from aborted human foetuses as a source of such cells. The best known, and perhaps the most important due to its vast distribution and its use on an almost universal level, is the vaccine against Rubella (German measles).

Rubella and its vaccine

Rubella (German measles)¹ is a viral illness caused by a Togavirus of the genus *Rubivirus* and is characterized by a maculopapular rash. It consists of an infection which is common in infancy and has no clinical manifestations in one case out of two, is self-limiting and usually benign. Nonetheless, the German measles virus is one of the most pathological infective agents for the embryo and foetus. When a woman catches the infection during pregnancy, especially during the first trimester, the risk of foetal infection is very high (approximately 95%). The virus replicates itself in the placenta and infects the foetus, causing the constellation of abnormalities denoted by the name of *Congenital Rubella Syndrome*. For example, the severe epidemic of German measles which affected a huge part of the United States in 1964 thus caused 20,000 cases of congenital rubella², resulting in 11,250 abortions (spontaneous or surgical), 2,100 neonatal deaths, 11,600 cases of deafness, 3,580 cases of blindness, 1,800 cases of mental retardation. It was this epidemic that pushed for the development and introduction on the market of an effective vaccine against rubella, thus permitting an effective prophylaxis against this infection.

The severity of congenital rubella and the handicaps which it causes justify systematic vaccination against such a sickness. It is very difficult, perhaps even impossible, to avoid the infection of a pregnant woman, even if the rubella infection of a person in contact with this woman is diagnosed from the first day of the eruption of the rash. Therefore, one tries to prevent transmission by suppressing the reservoir of infection among children who have not been vaccinated, by means of early immunization of all children (universal vaccination). Universal vaccination has resulted in a considerable fall in the incidence of congenital rubella, with a general incidence reduced to less than 5 cases per 100,000 livebirths. Nevertheless, this progress remains fragile. In the United States, for example, after an overwhelming reduction in the number of cases of congenital rubella to only a few cases annually,

¹ J. E. Banatvala, D.W.G. Brown, *Rubella*, The Lancet, 3rd April 2004, vol. 363, No. 9415, pp.1127-1137

² *Rubella*, Morbidity and Mortality Weekly Report, 1964, vol. 13, p.93. S.A. Plotkin, *Virologic Assistance in the Management of German Measles in Pregnancy*, JAMA, 26th October 1964, vol.190, pp.265-268

i.e. less than 0.1 per 100,000 live births, a new epidemic wave came on in 1991, with an incidence that rose to 0.8/100,000. Such waves of resurgence of German measles were also seen in 1997 and in the year 2000. These periodic episodes of resurgence make it evident that there is a persistent circulation of the virus among young adults, which is the consequence of insufficient vaccination coverage. The latter situation allows a significant proportion of vulnerable subjects to persist, who are a source of periodic epidemics which put women in the fertile age group who have not been immunized at risk. Therefore, the reduction to the point of eliminating congenital rubella is considered a priority in public health care.

Vaccines currently produced using human cell lines that come from aborted fetuses

To date, there are two human diploid cell lines which were originally prepared from tissues of aborted fetuses (in 1964 and 1970) and are used for the preparation of vaccines based on live attenuated virus: the first one is the WI-38 line (Winstar Institute 38), with human diploid lung fibroblasts, coming from a female foetus that was aborted because the family felt they had too many children (G. Sven *et al.*, 1969). It was prepared and developed by Leonard Hayflick in 1964 (L. Hayflick, 1965; G. Sven *et al.*, 1969)³ and bears the ATCC number CCL-75. WI-38 has been used for the preparation of the historical vaccine RA 27/3 against rubella (S.A. Plotkin *et al.*, 1965)⁴. The second human cell line is MRC-5 (Medical Research Council 5) (human, lung, embryonic) (ATCC number CCL-171), with human lung fibroblasts coming from a 14 week male foetus aborted for "psychiatric reasons" from a 27 year old woman in the UK. MRC-5 was prepared and developed by J.P. Jacobs in 1966 (J.P. Jacobs *et al.*, 1970)⁵. Other human cell lines have been developed for pharmaceutical needs, but are not involved in the vaccines actually available⁶.

³ L. Hayflick, *The Limited In Vitro Lifetime of Human Diploid Cell Strains*, Experimental Cell Research, March 1965, vol.37, no. 3, pp. 614-636.

G. Sven, S. Plotkin, K. McCarthy, *Gamma Globulin Prophylaxis; Inactivated Rubella Virus; Production and Biological Control of Live Attenuated Rubella Virus Vaccines*, American journal of Diseases of Children, August 1969, vol. 118, no. 2, pp.372-381.

⁴ S. A. Plotkin, D. Cornfeld, Th.H. Ingalls, *Studies of Immunization With Living Rubella Virus, Trials in Children With a Strain coming from an Aborted Fetus*, American Journal of Diseases in children, October 1965, vol. 110, no. 4, pp.381-389.

⁵ J.P. Jacobs, C.M. Jones, J.P. Bailie, Characteristics of a Human Diploid Cell Designated MRC-5, Nature, 11th July 1970, vol.277, pp.168-170.

⁶ Two other human cell lines, that are permanent, HEK 293 aborted fetal cell line, from primary human embryonic kidney cells transformed by sheared adenovirus type 5 (the fetal kidney material was obtained from an aborted fetus, in 1972 probably), and PER.C6, a fetal cell line created using retinal tissue from an 18 week gestation aborted baby, have been developed for the pharmaceutical manufacturing of adenovirus vectors (for gene therapy). They have not been involved in the making of any of the attenuated live viruses vaccines presently in use because of their capacity to develop tumorigenic cells in the recipient. However some vaccines, still at the developmental stage, against Ebola virus (Crucell,NV and the Vaccine Research Center of the National Institutes of Health's Allergy and Infectious Diseases, NIAID), HIV (Merck), influenza (MedImmune, Sanofi pasteur), Japanese encephalitis (Crucell N.V. and Rhein Biotech N.V.) are prepared using PER.C6® cell line (Crucell N.V., Leiden, The Netherlands).

The vaccines that are incriminated today as using human cell lines from aborted fetuses, WI-38 and MRC-5, are the following:⁷

A) Live vaccines against rubella⁸ :

- the monovalent vaccines against rubella Meruvax®!! (Merck) (U.S.), Rudivax® (Sanofi Pasteur, Fr.), and Ervevax® (RA 27/3) (GlaxoSmithKline, Belgium);
- the combined vaccine MR against rubella and measles, commercialized with the name of M-R-VAX® (Merck, US) and Rudi-Rouvax® (AVP, France);
- the combined vaccine against rubella and mumps marketed under the name of Biavax®!! (Merck, U.S.),
- the combined vaccine MMR (*measles, mumps, rubella*) against rubella, mumps and measles, marketed under the name of M-M-R® II (Merck, US), R.O.R.®, Trimovax® (Sanofi Pasteur, Fr.), and Priorix® (GlaxoSmithKline UK).

B) Other vaccines, also prepared using human cell lines from aborted fetuses:

- two vaccines against hepatitis A, one produced by Merck (VAQTA), the other one produced by GlaxoSmithKline (HAVRIX), both of them being prepared using MRC-5;
- one vaccine against chicken pox, Varivax®, produced by Merck using WI-38 and MRC-5;
- one vaccine against poliomyelitis, the inactivated polio virus vaccine Poliovax® (Aventis-Pasteur, Fr.) using MRC-5;
- one vaccine against rabies, Imovax®, produced by Aventis Pasteur, harvested from infected human diploid cells, MRC-5 strain;
- one vaccine against smallpox, AC AM 1000, prepared by Acambis using MRC-5, still on trial.

The position of the ethical problem related to these vaccines

⁷ Against these various infectious diseases, there are some alternative vaccines that are prepared using animals' cells or tissues, and are therefore ethically acceptable. Their availability depends on the country in question. Concerning the particular case of the United States, there are no options for the time being in that country for the vaccination against rubella, chickenpox and hepatitis A, other than the vaccines proposed by Merck, prepared using the human cell lines WI-38 and MRC-5. There is a vaccine against smallpox prepared with the Vero cell line (derived from the kidney of an African green monkey), ACAM2000 (Acambis-Baxter) (a second-generation smallpox vaccine, stockpiled, not approved in the US), which offers, therefore, an alternative to the Acambis 1000. There are alternative vaccines against mumps (Mumpsvax, Merck, measles (Attenuvax, Merck), rabies (RabAvert, Chiron therapeutics), prepared from chicken embryos. (However serious allergies have occurred with such vaccines), poliomyelitis (IPOL, Aventis-Pasteur, prepared with monkey kidney cells) and smallpox (a third-generation smallpox vaccine MVA, Modified Vaccinia Ankara, Acambis-Baxter).

In Europe and in Japan, there are other vaccines available against rubella and hepatitis A, produced using non-human cell lines. The Kitasato Institute produce four vaccines against rubella, called Takahashi, TO-336 and Matuba, prepared with cells from rabbit kidney, and one (Matuura) prepared with cells from a quail embryo. The Chemo-sero-therapeutic Research Institute Kaketsuken produce one another vaccine against hepatitis A, called Ainmugen, prepared with cells from monkey kidney. The only remaining problem is with the vaccine Varivax® against chicken pox, for which there is no alternative.

⁸ The vaccine against rubella using the strain Wistar RA27/3 of live attenuated rubella virus, adapted and propagated in WI-38 human diploid lung fibroblasts is at the centre of present controversy regarding the morality of the use of vaccines prepared with the help of human cell lines coming from aborted fetuses.

From the point of view of prevention of viral diseases such as German measles, mumps, measles, chicken pox and hepatitis A, it is clear that the making of effective vaccines against diseases such as these, as well as their use in the fight against these infections, up to the point of eradication, by means of an obligatory vaccination of all the population at risk, undoubtedly represents a "milestone" in the secular fight of man against infective and contagious diseases.

However, as the same vaccines are prepared from viruses taken from the tissues of foetuses that had been infected and voluntarily aborted, and the viruses were subsequently attenuated and cultivated from human cell lines which come likewise from procured abortions, they do not cease to pose ethical problems. The need to articulate a moral reflection on the matter in question arises mainly from the connection which exists between the vaccines mentioned above and the procured abortions from which biological material necessary for their preparation was obtained.

If someone rejects every form of voluntary abortion of human foetuses, would such a person not contradict himself/herself by allowing the use of these vaccines of live attenuated viruses on their children? Would it not be a matter of true (and illicit) cooperation in evil, even though this evil was carried out forty years ago?

Before proceeding to consider this specific case, we need to recall briefly the principles assumed in classical moral doctrine with regard to the problem of *cooperation in evil*⁹, a problem which arises every time that a moral agent perceives the existence of a link between his own acts and a morally evil action carried out by others.

The principle of *licit cooperation in evil*

The first fundamental distinction to be made is that between *formal* and *material cooperation*. *Formal cooperation* is carried out when the moral agent cooperates with the immoral action of another person, sharing in the latter's evil intention. On the other hand, when a moral agent cooperates with the immoral action of another person, without sharing his/her evil intention, it is a case of *material cooperation*.

Material cooperation can be further divided into categories of *immediate* (direct) and *mediate* (indirect), depending on whether the cooperation is in the execution of the sinful action *per se*, or whether the agent acts by fulfilling the conditions - either by providing instruments or products - which make it possible to commit the immoral act. Furthermore, forms of *proximate cooperation* and *remote cooperation* can be distinguished, in relation to the "distance" (be it in terms of *temporal* space or *material* connection) between the act of cooperation and the sinful act committed by someone else. *Immediate material cooperation* is always *proximate*, while *mediate material cooperation* can be *either proximate or remote*.

Formal cooperation is always morally illicit because it represents a form of direct and intentional participation in the sinful action of another person.¹⁰ *Material*

⁹ D.M. Prummer O. Pr., *De cooperatione ad malum*, in *Manuale Theologiae Moralis secundum Principia S. Thomae Aquinatis*, Tomus I, Friburgi Brisgoviae, Herder & Co., 1923, Pars I, Trat. IX, Caput III, no. 2, pp. 429-434.

.K.H. Peschke, *Cooperation in the sins of others*, in *Christian Ethics. Moral Theology in the Light of Vatican II*, vol.1, General Moral Theology, C. Goodliffe Neale Ltd., Arden Forest Industrial Estate, Alcester, Warwickshire, B49 6Er, revised edition, 1986, pp. 320-324.

10 A. Fisher, *Cooperation in Evil*, Catholic Medical Quarterly, 1994, pp. 15-22.

cooperation can sometimes be illicit (depending on the conditions of the "double effect" or "indirect voluntary" action), but when *immediate material cooperation* concerns grave attacks on human life, it is always to be considered illicit, given the precious nature of the value in question¹¹.

A further distinction made in classical morality is that between *active* (or positive) cooperation in evil and *passive* (or negative) cooperation in evil, the former referring to the performance of an act of cooperation in a sinful action that is carried out by another person, while the latter refers to the omission of an act of denunciation or impediment of a sinful action carried out by another person, inasmuch as there was a moral duty to do that which was omitted¹². Passive cooperation can also be formal or material, immediate or mediate, proximate or remote. Obviously, every type of formal passive cooperation is to be considered illicit, but even passive material cooperation should generally be avoided, although it is admitted (by many authors) that there is not a rigorous obligation to avoid it in a case in which it would be greatly difficult to do so.

Application to the use of vaccines prepared from cells coming from embryos or foetuses aborted voluntarily

In the specific case under examination, there are three categories of people who are involved in the cooperation in evil, evil which is obviously represented by the action of a voluntary abortion performed by others: a) those who prepare the vaccines using human cell lines coming from voluntary abortions; b) those who participate in the mass marketing of such vaccines; c) those who need to use them for health reasons.

Firstly, one must consider morally illicit every form of *formal* cooperation (sharing the evil intention) in the action of those who have performed a voluntary abortion, which in turn has allowed the retrieval of foetal tissues, required for the preparation of vaccines. Therefore, whoever - regardless of the category to which he belongs — cooperates in some way, sharing its intention, to the performance of a voluntary abortion with the aim of producing the above-mentioned vaccines, participates, in actuality, in the same moral evil as the person who has performed that abortion. Such participation would also take place in the case where someone, sharing the intention of the abortion, refrains from denouncing or criticizing this illicit action, although having the moral duty to do so (*passive formal cooperation*).

.D. Tettamanzi, *Cooperazione*, in *Dizionario di Bioetica*, S. Leone, S. Privitera ed., Istituto Siciliano di Bioetica, EDB-ISBN, 1994, pp.194-198.

.L. Melina, *La cooperazione con azioni moralmente cattive contra la vita umana*, in *Commentario Interdisciplinare alia "Evangelium Vitae"*, E. Sgreccia, Ramon Luca Lucas ed., Libreria Editrice Vaticana, 1997, pp.467-490.

.E. Sgreccia, *Manuale di Bioetica*, vol. I, Reprint of the third edition, Vita e Pensiero, Milan, 1999, pp.362-363.

¹¹ Cf. John Paul II, Enc. *Evangelium Vitae*, no. 74.

¹² No. 1868 of the *Catechism of the Catholic Church*.

In a case where there is no such formal sharing of the immoral intention of the person who has performed the abortion, any form of cooperation would be *material*, with the following specifications.

As regards the preparation, distribution and marketing of vaccines produced as a result of the use of biological material whose origin is connected with cells coming from fetuses voluntarily aborted, such a process is stated, as a matter of principle, morally illicit, because it could contribute in encouraging the performance of other voluntary abortions, with the purpose of the production of such vaccines. Nevertheless, it should be recognized that, within the chain of production-distribution-marketing, the various cooperating agents can have different moral responsibilities.

However, there is another aspect to be considered, and that is the form of *passive material cooperation* which would be carried out by the producers of these vaccines, if they do not denounce and reject publicly the original immoral act (the voluntary abortion), and if they do not dedicate themselves together to research and promote alternative ways, exempt from moral evil, for the production of vaccines for the same infections. Such *passive material cooperation*, if it should occur, is equally illicit.

As regards those who need to use such vaccines for reasons of health, it must be emphasized that, apart from every form of *formal cooperation*, in general, doctors or parents who resort to the use of these vaccines for their children, in spite of knowing their origin (voluntary abortion), carry out a form of *very remote mediate material cooperation*, and thus very mild, in the performance of the original act of abortion, and a *mediate material cooperation*, with regard to the marketing of cells coming from abortions, and *immediate*, with regard to the marketing of vaccines produced with such cells. The cooperation is therefore more intense on the part of the authorities and national health systems that accept the use of the vaccines.

However, in this situation, the aspect of *passive cooperation* is that which stands out most. It is up to the faithful and citizens of upright conscience (fathers of families, doctors, etc.) to oppose, even by making an objection of conscience, the ever more widespread attacks against life and the "culture of death" which underlies them. From this point of view, the use of vaccines whose production is connected with procured abortion constitutes at least a mediate remote passive material cooperation to the abortion, and an immediate passive material cooperation with regard to their marketing. Furthermore, on a cultural level, the use of such vaccines contributes in the creation of a generalized social consensus to the operation of the pharmaceutical industries which produce them in an immoral way.

Therefore, doctors and fathers of families have a duty to take recourse to alternative vaccines¹³ (if they exist), putting pressure on the political authorities and

¹³ The alternative vaccines in question are those that are prepared by means of cell lines which are not of human origin, for example, the Vero cell line (from monkeys) (D. Vinnedge), the kidney cells of rabbits or monkeys, or the cells of chicken embryos. However, it should be noted that grave forms of allergy have occurred with some of the vaccines prepared in this way. The use of recombinant DNA technology could lead to the development of new vaccines in the near future which will no longer require the use of cultures of human diploid cells for the attenuation of the virus and its growth, for such vaccines will not be prepared from a basis of attenuated virus, but from the genome of the virus and from the antigens thus developed (G. C. Woodrow, W.M. McDonnell and F.K. Askari). Some experimental studies have already been done using vaccines developed from DNA that has been derived from the genome of the German measles virus. Moreover, some Asiatic researchers are trying to use the Varicella virus as a vector for the insertion of genes which codify the viral antigens of

health systems so that other vaccines without moral problems become available. They should take recourse, if necessary, to the use of conscientious objection¹⁴ with regard to the use of vaccines produced by means of cell lines of aborted human foetal origin. Equally, they should oppose by all means (in writing, through the various associations, mass media, etc.) the vaccines which do not yet have morally acceptable alternatives, creating pressure so that alternative vaccines are prepared, which are not connected with the abortion of a human foetus, and requesting rigorous legal control of the pharmaceutical industry producers.

As regards the diseases against which there are no alternative vaccines which are available and ethically acceptable, it is right to abstain from using these vaccines if it can be done without causing children, and indirectly the population as a whole, to undergo significant risks to their health. However, if the latter are exposed to considerable dangers to their health, vaccines with moral problems pertaining to them may also be used on a temporary basis. The moral reason is that the duty to avoid *passive material cooperation* is not obligatory if there is grave inconvenience. Moreover, we find, in such a case, a *proportional reason*, in order to accept the use of these vaccines in the presence of the danger of favouring the spread of the pathological agent, due to the lack of vaccination of children. This is particularly true in the case of vaccination against German measles¹⁵.

In any case, there remains a moral duty to continue to fight and to employ every lawful means in order to make life difficult for the pharmaceutical industries which act unscrupulously and unethically. However, the burden of this important battle cannot and must not fall on innocent children and on the health situation of the population - especially with regard to pregnant women.

To summarize, it must be confirmed that:

- there is a grave responsibility to use alternative vaccines and to make a conscientious objection with regard to those which have moral problems;
- as regards the vaccines without an alternative, the need to contest so that others may be prepared must be reaffirmed, as should be the lawfulness of using the former in the meantime inasmuch as is necessary in order to avoid a serious risk not only for one's Rubella. These studies are still at a preliminary phase and the refinement of vaccine preparations which can be used in clinical practice will require a lengthy period of time and will be at high costs. .D. Vinnedge, *The Smallpox Vaccine*, The National Catholic Bioethics Quarterly, Spring 2000, vol.2, no. 1, p. 12. .G.C. Woodrow, *An Overview of Biotechnology As Applied to Vaccine Development*, in «*New Generation Vaccines*»), G.C. Woodrow, M.M. Levine eds., Marcel Dekker Inc., New York and Basel, 1990, see pp.32-37. W.M. McDonnell, F.K. Askari, *Immunization*, JAMA, 10th December 1997, vol.278, no.22, pp.2000-2007, see pp. 2005-2006.

¹⁴ Such a duty may lead, as a consequence, to taking recourse to "objection of conscience" when the action recognized as illicit is an act permitted or even encouraged by the laws of the country and poses a threat to human life. The Encyclical Letter *Evangelium Vitae* underlined this "obligation to oppose" the laws which permit abortion or euthanasia "by conscientious objection" (no.73)

¹⁵ This is particularly true in the case of vaccination against German measles, because of the danger of Congenital Rubella Syndrome. This could occur, causing grave congenital malformations in the foetus, when a pregnant woman enters into contact, even if it is brief, with children who have not been immunized and are carriers of the virus. In this case, the parents who did not accept the vaccination of their own children become responsible for the malformations in question, and for the subsequent abortion of foetuses, when they have been discovered to be malformed.

own children but also, and perhaps more specifically, for the health conditions of the population as a whole - especially for pregnant women;

- the lawfulness of the use of these vaccines should not be misinterpreted as a declaration of the lawfulness of their production, marketing and use, but is to be understood as being a passive material cooperation and, in its mildest and remotest sense, also active, morally justified as an *extrema ratio* due to the necessity to provide for the good of one's children and of the people who come in contact with the children (pregnant women);

- such cooperation occurs in a context of moral coercion of the conscience of parents, who are forced to choose to act against their conscience or otherwise, to put the health of their children and of the population as a whole at risk. This is an unjust alternative choice, which must be eliminated as soon as possible.

VERIFICATION

COMMONWEALTH OF KENTUCKY

COUNTY OF Kenton

]ss.


Jerome Kunkel states that he has read the foregoing Verified Complaint, and that the facts set forth therein are true to the best of his knowledge, information and belief.



Jerome Kunkel

SUBSCRIBED AND SWORN to before me, a Notary Public, by Jerome Kunkel, this

13 day of March, 2019.



NOTARY PUBLIC
Notary # 612589

My Commission Expires:
11/19/2022

Presiding Judge: HON. JAMES R. SCHRAND (654281)

COM : 000034 of 000034