COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2022-P-754
Bristol Superior Court Docket No. 2273CV133

CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC.
Appellant,

v.

CAMBRIDGE PUBLIC SCHOOL DISTRICT, *et al.*,
Appellees.

BRIEF OF APPELLANT CHILDREN'S HEALTH RIGHTS OF MASSACHUSETTS, INC.

Brian Unger, BBO No. 706583
THE LAW OFFICES OF WARNER MENDENHALL, INC.
20 Park Plaza, 400-4
Boston, MA 02116
617.297.2227; f 330.762.9743
brian@warnermendenhall.com

Counsel for Children's Health Rights of Massachusetts, Inc.

Dated: September 14, 2022

CORPORATE DISCLOSURE STATEMENT

Under Massachusetts Rule of Appellate Procedure 16(a)(2) and Massachusetts Supreme Judicial Court Rule 1:21, Appellant Children's Health Rights of Massachusetts, Inc. states it has no parent corporations, and there are no publicly held corporations that own 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF ISSUES

1) Whether the Superior Court erred in concluding the opportunity to apply for an exemption from the vaccine mandate equates to a failure to show injury and thus to bring a declaratory judgment action.

2) Whether the Superior Court erred in concluding CHRM lacked standing due to an alleged failure to identify a member or member's child within either of the Districts.

3) Whether the Superior Court erred in concluding CHRM failed to establish a likelihood of success on the merits and in subsequently denying CHRM's motion for a Temporary Restraining Order and/or Preliminary Injunction.

STATEMENT OF THE CASE

On February 16, 2022 Appellant Children's Health Rights of Massachusetts, Inc. ("CHRM") sued for declaratory judgment and injunctive relief seeking to prevent Appellees Cambridge Public School District and Belmont Public School District (collectively the "Districts") from enacting and enforcing mandates requiring students to receive the Covid-19 vaccine or be barred from participating in extracurricular activities. RA 10-47. CHRM alleged the Districts lack authority to enact the mandates, that the mandates are preempted by the Massachusetts Department of Public Health's ("DPH") comprehensive regulatory scheme concerning infectious diseases, and that the mandates violate parents' Constitutional rights to due process and to direct the care and upbringing of their children. Id. CHRM moved for a temporary restraining order concurrent with the filing of its Complaint. RA 48-57.

On March 9, 2022, the trial court denied CHRM's motion for temporary restraining order, stating:

> "After submissions by the parties, and oral argument this date, the court cannot identify a plaintiff member, or child of the plaintiff's membership who was harmed by the policies of either defendant. The policies at issue permit exemptions for those with a medical disability or sincerely held religious belief. The court finds that the Plaintiffs have failed to establish a likelihood of success on the merits. The motion for preliminary injunction is DENIED." RA 210.

This appeal followed.

STATEMENT OF FACTS

CHRM is a Massachusetts nonprofit corporation whose members have children in the Cambridge and Belmont Public School Districts. RA 14 at ¶ 8. Both Districts currently have Covid-19 vaccine mandates for their students, and those mandates apply to CHRM's members' children. RA 26 at ¶ 61.

On October 5, 2021, over the objections of parents concerned with the harms the Covid-19 vaccine poses to children, the Belmont Public School District committee voted on and approved a mandate conditioning participation in school-sponsored sports and rostered extracurricular activities occurring outside of the school day to take a Covid-19 vaccine. RA 26 at ¶¶ 58, 59.

On October 6, 2021, the Cambridge Public School District committee announced and approved a similar mandate. RA 26 at ¶ 60. Cambridge's mandate requires all students age twelve and up to take the Covid-19 vaccine. Id. While any student in the Cambridge Public School District will not be excluded from school for declining vaccination, the student will be excluded from participating in extracurricular activities including athletics, student government, after school visual and performing arts, all school clubs meeting out of the school day, and school sponsored social events. Id.

There are two distinct populations of people who face a very different risk from COVID infection. One segment – the elderly and others with severe chronic

disease – faces a higher risk of mortality if infected. A second segment – typically non-elderly people – face a very low risk of mortality if infected.[1] RA 33 at ¶ 85; RA 181 at ¶ 17. The Coronavirus has had virtually no impact on children in Massachusetts or in the Defendant School Districts. RA 28 at ¶ 72. The risk of serious COVID-19 illness in children is no different than their risk from the flu.[2] RA 32 at ¶ 80. In fact, the risk of mortality is lower in children than the seasonal flu. RA 176 at ¶ 7. A study in the fall of 2020 showed no statistically significant difference in the rates of hospitalization, admission to the intensive care unit, and medical ventilator use between children with COVID-19 and children with the seasonal flu.[3] Id.

CDC Director Dr. Rochelle Walensky has acknowledged for several months that the COVID-19 vaccine does not prevent from *infection* or *transmission* of COVID-19.[4] [5] [6] RA 35 at ¶ 91. COVID-19 vaccines appear to reduce symptoms in some individuals but still permit them to become infected with and transmit the virus. RA 92 at ¶ 26. An outbreak last summer in Barnstable County,

---

[1] Bhattacharya J, Gupta S, Kulldorff M (2020) Great Barrington Declaration. https://gbdeclaration.org

[2] https://www.npr.org/2021/05/21/999241558/in-kids-the-risk-of-covid-19-and-the-flu-are-similar-but-the-risk-perception-isn

[3] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770250?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=090820

[4] https://www.cnbc.com/2021/12/21/cdc-dir-walensky-being-vaccinated-with-two-doses-may-not-be-enough.html

[5] https://www.cdc.gov/media/releases/2021/s0813-additional-mRNA-mrna-dose.html

[6] https://www.stardem.com/news/national/cdc-covid-vaccines-won-t-stop-transmission-fully-vaccinated-can-still-get-spread-delta-strain/article_5f83d0cb-8b0a-535d-bbad-3f571754e5ae.html

Massachusetts, which then had a 69% vaccination rate among its eligible residents, reflected that the vaccinated can still carry the virus.[7] RA 92 at ¶ 28.

By way of expert affidavit CHRM presented this and more information showing how patently unnecessary and potentially dangerous the Covid-19 vaccines are for children. See RA 87-106, RA 172-209. Still, the Districts push forward with their mandates. In a recent study involving Harvard Medical School and Johns Hopkins University School of Medicine it was suggested that "the continued policy of two-dose mandates may represent status quo bias: when a rule is normalised it remains even when it has no (current) rational basis."[8] The researchers continued:

> It is even harder to justify a two-dose primary vaccine mandate in late 2022 than when such policies began in mid-2021. Consistent with our argument above, the now high prevalence of prior infection, data regarding the lack of sustained transmission reduction by current vaccines, and the age at peak risk for myo/pericarditis being college-bound students ages 17–19 all undermine the case for two-dose vaccine mandates. We would therefore urge universities and schools to rescind all Covid-19 vaccine mandates. Strong statements in support of mandates made in 2021 by organisations such as the Association of Bioethics Program Directors in North America, the American Civil Liberties Union, and the Ontario Human Rights Commission should be updated. Such organisations have an ethical obligation to revise these public statements and consider whether they are valid in light of current data.[9]

[7] https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm

[8] Bardosh, Kevin and Krug, Allison and Jamrozik, Euzebiusz and Lemmens, Trudo and Keshavjee, Salmaan and Prasad, Vinay and Makary, Martin A. and Baral, Stefan and Høeg, Tracy Beth, COVID-19 Vaccine Boosters for Young Adults: A Risk-Benefit Assessment and Five Ethical Arguments against Mandates at Universities (August 31, 2022). Available at SSRN: https://ssrn.com/abstract=4206070 (last accessed September 13, 2022).

[9] See Id., at pp. 30-31.

The Districts are have no authority outside of what is statutorily granted to them. School Districts typically have the power to make rules regarding educational standards as well as rules relating to the safety of school buildings and the provision of transportation to school. The Districts are unequivocally not boards of health and cannot enact vaccine mandates preempted by the Massachusetts Department of Public Health's regulatory scheme. Further, there is currently no rational basis for the Districts' mandates, and they may be nullified based on mere arbitrariness. The Superior Court disagreed and found CHRM did not demonstrate a likelihood of success on the merits.

SUMMARY OF ARGUMENT

The Superior Court erred in finding CHRM failed to show standing.

An action for declaratory judgment may be maintained to determine a plaintiff's rights when it is alleged that government action is illegal or unconstitutional. The illegality of the government rule is not cured by the existence of a possibility to be exempted from the rule. The rule itself is the injury. Thus, the Superior Court erred inasmuch as its decision was based on the possibility of obtaining an exemption to the rule.

Further, CHRM sufficiently pled that it represents students in the Districts that are affected by the mandates. For purposes of this declaratory judgment action that is enough to establish the associational standing of CHRM. The Superior Court's erred inasmuch as its decision was based on CHRM's alleged failure to identify a member within either of the Districts affected by the policy.

Finally, CHRM established a likelihood of success on the merits. The Districts do not have the authority to enact the rules subject to this lawsuit, and that was clearly established in the Complaint and accompanying Motion for TRO and/or Preliminary Injunction. Thus, the Superior Court erred in finding CHRM did not show a likelihood of success on the merits.

This Court should reverse the Superior Court's order denying CHRM's request for a preliminary injunction.

ARGUMENT

I. Standard of Review

This Court "review[s] the grant or denial of a preliminary injunction for abuse of discretion." *King v. Shank*, 92 Mass. App. Ct. 837, 838 (2018). "The focus of appellate review of an interlocutory matter is 'whether the trial court abused its discretion — that is, whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions.'" *Caffyn v. Caffyn*, 441 Mass. 487, 490 (2004) (quoting *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20, 25 (1981)). "The judge's 'conclusions of law are subject to broad review and will be reversed if incorrect.'" *Caffyn*, 441 Mass. at 490 (quoting *Edwin R. Sage*, 12 Mass. App. Ct. at 26). "If a preliminary injunction was issued solely on the basis of documentary evidence, '[the appellate court] may draw [its] own conclusions from the record." *King*, 92 Mass. App. Ct. at 839.

II. The Superior Court erred in concluding CHRM could not show injury due to the Districts' exemption policies.

Where government action is challenged as illegal or unconstitutional, the action itself is injury sufficient to satisfy the standing requirement. CHRM alleged its students were subject to the Districts' mandates. RA 26 at ¶ 61. The mere possibility of applying for an exemption to the illegal rule does not resolve the question of whether the rule is illegal or unconstitutional. The Superior Court appeared to find that the possibility of obtaining an exemption to the Districts'

policies equates to an inability to show injury and thus an inability to show standing in this declaratory judgment action. See RA 210 (finding no showing of harm "by the policies of either defendant. The policies at issue permit exemptions for those with a medical disability or sincerely held religious belief."). The plain language of G.L. c. 231A contradicts this holding.

Section 2 of G.L. c. 231A provides that declaratory relief can be obtained "to secure determinations of right, duty, status or other legal relations under ... a ... statute ... or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination." *Villages Dev. Co.* v. *Sec'y of Executive Office of Envtl. Affairs*, 410 Mass. 100, 106 (1991); Add. 32. It is settled that such relief is available to challenge the legality of administrative action even when the action concerns neither adjudication nor rule making. *Id*. (internal citations omitted). Thus, it "may be used in the superior court to enjoin and to obtain a determination of the legality of the administrative practices and procedures of any municipal, county or state agency or official which practices or procedures are alleged to be in violation of the Constitution of the United States or of the constitution or laws of the commonwealth, or are in violation of rules or regulations promulgated under the authority of such laws, which violation has been consistently repeated ..." *Turley v. W. Massachusetts Reg'l Police Acad.*, Mass. Super., No. CV 18-0118-B (Nov. 13, 2018), citing

Villages Dev. Co., supra. The purpose of the Declaratory Judgment Act is to afford a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations. *Nelson* v. *Comm'r of Correction*, 390 Mass. 379, 387–88 (1983), citing *Hadley v. Amherst*, 372 Mass. 46, 52, 360 N.E.2d 623 (1977).

Unless an exclusive mode of review is provided by law, judicial review of any regulation or of the sufficiency of the reasons for its adoption as an emergency regulation may be had through an action for declaratory relief in the manner and to the extent provided under chapter two hundred and thirty-one A. G.L. ch. 30A, § 7.

The Superior Court's finding that no student could show injury due to the possibility of applying for an exemption runs contrary to the spirit and purpose of the Commonwealth's declaratory judgment statute. See RA 210. CHRM alleged for several reasons that the Districts' policies are illegal and unconstitutional. The fact that students may apply to be exempted from these policies cannot mean that the policies may not be challenged. The injury lies in the illegality of the mandates themselves. The mere fact that CHRM-represented students are subject to the mandates is injury sufficient to give them standing the challenge the mandates via action for declaratory judgment. That is, CHRM-represented students may have their rights determined under the Commonwealth's declaratory judgment statute.

For this reason this Court should overturn the Superior Court's order and remand for further proceedings or, as this Court may do, the preliminary injunction should be granted in CHRM's favor.

III. The Superior Court erred in concluding CHRM lacked standing due to an alleged failure to identify a member or member's child injured within either of the Districts.

The exact basis for the Superior Court's marginal order is unclear. Thus, Appellant argues additionally that the Superior Court erred in finding that CHRM failed to identify a student represented by a CHRM member within either district, if that is the basis for the Superior Court's order. It is clearly established that this is not a requirement to show standing since CHRM pled children of its members attend school in the Districts and are subject to the challenged mandates, which is enough to establish standing to have rights determined in a declaratory judgment action. See RA 14, 26 at ¶¶ 8, 61.

At the March 9, 2022, hearing, the Superior Court expressed concern about whether it could grant preliminary injunctive relief in light of its finding that it cannot identify a child of CHRM's members who was harmed by the policies of either Defendant. RA 210; RA 218. This concerns CHRM's standing to pursue claims on behalf of its unnamed members. Id.

"Where a nonprofit organization asserts associational standing on behalf of its members, it must establish that its members would independently have standing

to pursue the claim." *Statewide Towing Ass'n v. City of Lowell,* 68 Mass. App. Ct. 791, 794 (2007). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977).

"[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. *Warth* v. *Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 2213, 45 L. Ed. 2d 343 (1975). "If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Id*.

In *Warth v. Seldin*, supra, the Supreme Court elaborated on the requirements later enumerated in *Hunt*: the organization "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the

members themselves brought suit. ... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Warth* v. *Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2212, 45 L. Ed. 2d 343 (1975).

It is not necessary to name specific members of an organization to establish standing. The first *Hunt* factor satisfies Article III standing concerns by "requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association." *United Food & Commercial Workers Union Local 751* v. *Brown Grp., Inc.*, 517 U.S. 544, 555, 116 S. Ct. 1529, 1535, 134 L. Ed. 2d 758 (1996). The association need not name the members on whose behalf suit is brought. *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999). "[N]either unusual circumstances, inability of individual members to assert rights nor an explicit statement of representation are requisites." *Id.*

Here, CHRM seeks only declaratory and injunctive relief of the type discussed in *Warth v. Seldin*, supra. CHRM does not seek monetary damages and thus the prospective relief it seeks may reasonably be supposed to inure to the benefit of its members. See *Id*. CHRM pled that its members have children in both

Districts subject to the Districts' rules. RA 26 at ¶ 61. Further, while Belmont requires vaccination specifically for participation in extracurricular activities, Cambridge requires vaccination for every "age eligible" student. RA 26 at ¶¶ 58-60. In other words, Cambridge does not tie its vaccination policy to participation in extracurricular activities but threatens disqualification from extracurricular activities if age eligible students are not vaccinated. Thus, CHRM has met the requirement of *United Food & Commercial Workers Union Local 751*, supra, "to include at least one member with standing with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association)."

A declaratory judgment action seeks prospective relief and is available to anybody who wishes to have his or her rights determined within a legal relationship – here student and school district. Thus, the allegation that the Districts' rules are illegal or unconstitutional and that CHRM members' children are subject to them is a sufficient allegation of injury to satisfy standing for purposes of declaratory judgment. Further, the purpose of CHRM is relevant to the goal of this lawsuit, and CHRM can pursue its claims for injunctive relief without the participation of individual members since the claims are all questions of law. See RA 223-4. Thus, CHRM satisfies all three requirements for associational standing under *Hunt*, 432 U.S. 333, 343.

CHRM satisfied associational standing under the governing law. This Superior Court's decision should be reversed and this case remanded for further proceedings or, as this Court may do, the preliminary injunction should be granted in CHRM's favor.

IV. The Superior Court erred in concluding CHRM failed to establish a likelihood of success on the merits, and in subsequently denying CHRM's Motion for a Temporary Restraining Order and/or Preliminary Injunction.

a. The Districts lack authority to issue Covid-19 vaccine mandates because the Legislature did not expressly grant them any authority to enact vaccine mandates for students.

Municipalities may "exercise any power or function conferrable on them by the Legislature, so long as exercise of that power is 'not inconsistent' with the Constitution or a general law enacted pursuant to the Legislature's retained powers." *Del Duca v. Town Administrator*, 368 Mass. 1, 10 (1975). Further, the Home Rule Amendment does not provide a municipality any authority it would not otherwise have. See *Arlington v. Board of Conciliation & Arbitration*, 370 Mass. 769, 773 (1976) ("[T]he scope of the disability imposed on the Legislature by the [home rule] amendment is quite narrow."). Municipalities must, nevertheless, exercise only that authority "conferred" on them and not inconsistent with the Constitution or state law.

In Massachusetts, a school district's authority is governed by G.L. chapter 71. A school committee's powers are limited. Generally, "[t]he school committee

in each city and town and each regional school district shall have the power to select and to terminate the superintendent, shall review and approve budgets for public education in the district, and shall establish educational goals and policies for the schools in the district consistent with the requirements of law and statewide goals and standards established by the board of education. The school committee in each city, town and regional school district may select a superintendent jointly with other school committees and the superintendent shall serve as the superintendent of all of the districts that selected him." G.L. c. 71, § 37; Add. 31.

Other provisions in Chapter 71 address specific powers of school committees necessarily contained in the above provision. For example, "[t]he school committee may establish and maintain schools to be kept open for the whole or any part of the summer vacation." G.L. c. 71, § 28. School committees may assist in deciding whether to admit a student who resides outside the Commonwealth. G.L. c. 71, § 6A. They may "supervise and control all athletic and other organizations composed of public school pupils and bearing the school name or organized in connection therewith." G.L. c. 71, § 47. They may discipline students. *Bd. of Educ. v. School Cmte. of Quincy*, 415 Mass. 240, 246 (1993) (citing G.L. c. 71, §§ 37, 37G, 37H).

Nothing in Chapter 71 provides school committees with the authority to pass broad health measures, nor can G.L. c. 71, § 47 be read to permit the mandates at

issue in this case as the mandates are health related. The only health and safety related authority held by school committees is the authority to develop "a plan to address the general mental health needs of its students," G.L. c. 71, § 37Q, regulate specific safety concerns of students, including establishing "school safety patrols," G.L. c. 71, § 48A, and establishing "highway safety stations," G.L. c. 71, § 71A, and "internet safety measures." G.L. c. 71, § 93. Authority to implement health related measures, like vaccine mandates, cannot reasonably be read into any of these provisions.

As demonstrated in the Complaint, several cases in other jurisdictions have concluded school districts and agencies that lack the express authority to issue broad health measures such as mask or vaccine mandates may not do so. RA 11-13, ¶¶ 2-5, incorporated herein.

There is no Massachusetts statute, rule, or regulation that permits school districts to enact vaccine mandates, and the mandates themselves – as explained below – conflict with DPH's scheme and the Constitution. For this reason the Superior Court erred in finding CHRM did not establish a likelihood of success on the merits.

b. The Districts' mandates are preempted by the Department of Public Health's statutory and regulatory scheme.

A municipal regulation will be invalidated where "the local regulation would so frustrate the state statute as to warrant the conclusion that preemption was

intended." *LeClair v. Town of Norwell*, 430 Mass. 328, 337 n.11 (1999). "[T]he legislative intent to supersede local enactments need not be expressly stated for the State law to be given preemptive effect. Where legislation deals with a subject comprehensively, it may reasonably be inferred as intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated." *Boston Teachers Union, Local 66 v. Boston*, 382 Mass. 553, 564 (1981).

DPH has a comprehensive statutory and regulatory scheme concerning infectious diseases, and that scheme charges both DPH and local boards of health with various powers to address outbreaks. Among those powers, DPH and local boards of health have the authority to issue quarantine orders for infected individuals from whom they cannot first obtain voluntary compliance, and those individuals have the right to challenge such orders through various due process protections. See RA 20-22, ¶¶ 33-46, incorporated herein. DPH also has a set of immunization requirements for Massachusetts school children, and those requirements are identified, determined, and amended, by DPH, not school districts. See RA 22-25, ¶¶ 47-54, incorporated herein.

This comprehensive regulatory framework concerning infectious diseases and school immunization requirements preempts any local measure that requires Massachusetts school children be immunized against Covid-19 because any such

measure conflicts with DPH's scheme that does not require school children receive the Covid-19 vaccine. A school committee does not have the authority to mandate a vaccine for students or issue similar directives without affording students the opportunity to voluntarily comply or contest them.

Thus, the Districts do not have the authority to mandate the Covid-19 vaccine for students because the Commonwealth pre-empted that regulatory field. For this reason the Superior Court erred in finding CHRM did not establish a likelihood of success on the merits.

c. The Districts' Mandates violate CHRM parents' Constitutional rights.

The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment. *Santosky* v. *Kramer*, 455 U.S. 745, 745, 102 S. Ct. 1388, 1390, 71 L. Ed. 2d 599 (1982). This liberty interest includes the right to direct medical care for their child. *Panzardi vs. Jensen*, E.D.N.Y., No. 13-CV-4441 MKB (Feb. 20, 2015). "Part II, c. 1, s 1, art. 4, of the Massachusetts Constitution, and arts. 1, 10 and 12 of its Declaration of Rights, are the provisions in our Constitution comparable to the due process clause of the Federal Constitution." *Pinnick* v. *Cleary*, 360 Mass. 1, 14 (1971).

It is well-settled that parents are the natural guardians of their children, with the legal as well as moral obligation to support, educate, and care for their

children's development and well-being. *Custody of a Minor*, 375 Mass. 733, 747–48 (1978), citing *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932); *Purinton v. Jamrock*, 195 Mass. 187, 199, 80 N.E. 802 (1907). As such, it is they who have the primary right to raise their children according to the dictates of their own consciences. *Custody of a Minor*, 375 Mass. 733 (internal citations omitted). Indeed, these "natural rights" of parents have been recognized as encompassing an entire "private realm of family life which must be afforded protection from unwarranted State interference." *Id*., citing *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 554-555, 54 L.Ed.2d 511 (1978); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977).

"In light of these principles, this court and others have sought to treat the exercise of parental prerogative with great deference." *Custody of a Minor*, 375 Mass. 733, 748 (1978), citing *Richards v. Forrest*, supra 278 Mass. at 556, 180 N.E. 508; *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). "For example, in the area of medical treatment for minors, courts have shown great reluctance to overturn parental objections to medical treatment where the child's condition is not life-threatening, and where the proposed treatment would expose the child to great risk." *Custody of a Minor*, supra. "In some cases, this has been true even where the proposed medical treatment would offer great benefit to the

child." *Id*., citing *In re Hudson*, 13 Wash.2d 673, 126 P.2d 765 (1942).

CHRM contends, for good reason, that the vaccines are not beneficial to the children but in fact harmful.[10] The Districts cannot argue that the vaccines provide anything more than a negligible benefit, if any at all. Thus, the decision whether to take the vaccine falls squarely within the parent's right to direct the medical care for their child. Any rule requiring vaccination for participation in any extracurricular activity is arbitrary government interference in the CHRM parents' fundamental liberty interest in the care, custody, and management of their children.

For this reason the Superior Court erred in finding CHRM did not establish a likelihood of success on the merits.

d. CHRM established all elements necessary to obtain a preliminary injunction.

While the Superior Court did not address the remaining three elements necessary to obtain a temporary restraining order and/or preliminary injunction, CHRM established those elements in its Motion for Temporary Restraining Order and/or Preliminary Injunction and Memorandum in Support. See RA 48-57. Since the Superior Court did not address those elements, CHRM will not repeat its arguments but herein adopts and incorporates its briefing at the Superior Court. RA 48-57.

[10] See fn. 8.

For these reasons and the reasons stated more fully above, the Superior Court erred in concluding CHRM failed to establish a likelihood of success on the merits, and in subsequently denying CHRM's Motion for a Temporary Restraining Order and/or Preliminary Injunction. This Court should reverse and remand for further proceedings or, as this Court may do, the preliminary injunction should be granted in CHRM's favor.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's Order denying CHRM's request for injunctive relief, remand for further proceedings, or grant injunctive relief as CHRM requested at the Superior Court.

Respectfully submitted,

Children's Health Rights of Massachusetts,

By Its Attorney,

Dated: September 14, 2022

/s/ Brian Unger
Brian Unger, BBO No. 706583
THE LAW OFFICES OF WARNER MENDENHALL, INC.
20 Park Plaza, 400-4
Boston, MA 02116
617.297.2227; f 330.762.9743
brian@warnermendenhall.com

Counsel for Children's Health Rights of Massachusetts, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email this 14th day of September 2022 upon all counsel or parties of record.

Dated: September 14, 2022

/s/ Brian Unger
Brian Unger, BBO No. 706583

CERTIFICATE OF COMPLIANCE

Appellant certifies that its brief complies with the rules of the Court that pertain to the filing of briefs, including Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 18 (appendix to the brief); Mass. R. App. P. 20 (form and length of briefs, appendices, and other documents); and Mass. R. App. P. 21 (redaction). Compliance with the applicable length limit of Mass. R. App. P. 20 was ascertained by the word count function of Microsoft Word; this Brief is typed in size 14 Times New Roman font. The word count of the sections of this Brief required under Mass. R. App. P. 5 through 11 is approximately 4,850.

Dated: September 14, 2022

/s/ Brian Unger
Brian Unger, BBO No. 706583

ADDENDUM