

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSHUA A. MAZER,	.	
	.	
Plaintiff,	.	
	.	
v.	.	CA No. 21-1782 (TNM)
	.	
D.C. DEPARTMENT OF HEALTH,	.	
et al.,	.	
	.	
Defendants.	.	Washington, D.C.
.	Thursday, March 3, 2022
	.	10:12 a.m.
VICTOR M. BOOTH, et al.,	.	
	.	
v.	.	CA No. 21-1857 (TNM)
	.	
MURIEL BOWSER, et al.,	.	
	.	
Defendants.	.	
.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TREVOR N. MCFADDEN
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, this is Civil Action
3 21-1782, Mazer versus D.C., et al., and Civil Action 21-1857,
4 Booth, et al., versus Bowser, et al. Counsel, please come
5 forward to identify yourselves for the record, starting with
6 the plaintiffs.

7 MR. SIRI: Good morning, Your Honor. Aaron Siri on
8 behalf of the plaintiff.

9 THE COURT: Good morning, Mr. Siri.

10 MR. HAZELHURST: Good morning, Your Honor. I'm Rolf
11 Hazelhurst. I represent the plaintiffs in the Booth action.

12 THE COURT: Good morning, Mr. Hazelhurst.

13 MR. GARZA: Good morning, Your Honor. John Garza for
14 the plaintiff, Mr. Mazer.

15 THE COURT: Good morning, Mr. Garza.

16 MR. WIEST: Good morning, Your Honor. Chris Wiest.
17 I'm co-counsel with Mr. Siri for the plaintiffs in Mazer.

18 THE COURT: Good morning, Mr. Wiest.

19 MS. DISNEY: Good morning, Your Honor. My name is
20 Pamela Disney. I'm representing the defendants, and I'm
21 joined by co-counsel, Andrew Saindon.

22 THE COURT: Good morning.

23 All right. Thanks to you all for being here. I think
24 these are tricky cases, and I'm looking forward to your
25 thoughts on them. Before we start, I wanted to give you

1 just kind of a thumbnail sketch of my thoughts at this point.

2 In some ways, I feel like the standing and irreparable harm
3 considerations are pretty closely linked here. I'm inclined
4 to think that the plaintiffs have shown both, depending on
5 whether there's been any changes in circumstances, but I think
6 that's a close matter.

7 I also -- I think probably the plaintiffs' strongest
8 argument in my mind is on the preemption issue. I think some
9 of the constitutional claims, particularly the substantive
10 due process and RFRA claims -- I'll put those together for
11 the moment -- I'm less impressed by those claims, I guess.
12 It doesn't seem to me that there's the type of compulsion
13 that the courts have looked for in those types of claims.

14 And I think the First Amendment claim actually may be
15 a little closer in this case than RFRA just because of,
16 arguably, while you may not have compulsion, I think,
17 obviously, the statute does point to those who've claimed a
18 religious exemption and arguably treats them -- gives them
19 less rights or puts them in a disfavored status compared to
20 those who haven't claimed a religious exemption.

21 So those are my very preliminary thoughts. But I'm
22 certainly open to being persuaded on all those things,
23 but I thought it might be useful to counsel to know where
24 I am as an initial matter to help frame your arguments.

25 All right. I'll hear first from the plaintiffs. As I

1 said, I'm certainly hopeful plaintiffs' counsel have talked
2 amongst yourselves and I'm not going to be hearing two sets
3 of arguments on substantially the same issues from plaintiffs.
4 But whichever one of you wishes to go first, I'm happy to hear
5 from you. Probably makes sense to start out on standing and
6 mootness in your discussion.

7 MR. SIRI: Good morning again, Your Honor. Thank you.

8 THE COURT: And you're Mr. Siri.

9 MR. SIRI: I am.

10 THE COURT: Great.

11 MR. SIRI: Would you like me to go just straight to
12 standing?

13 THE COURT: Sure. If you had any initial comments
14 you wanted to make, I'm certainly happy to hear those, but I
15 guess if you could address if anything has changed certainly
16 since your original filings in terms of the vaccine status or
17 how things have changed on the ground that may affect the
18 standing and mootness claims, that may be helpful.

19 MR. SIRI: Absolutely. So in terms of my client,
20 Mazer, there's been no change in terms of the status with
21 regards to his child. She still remains a child. She's still
22 not an adult. She is still threatening to obtain vaccinations
23 that her parents opposed.

24 As we pled in our complaint, there is a summer camp that
25 she would like to attend in order to do that. They're

1 requiring a Tdap vaccine. She continues to argue with her
2 parents with regards to obtaining that vaccine. That has been
3 put into our complaint as well.

4 That is despite the fact that she is now aware that she
5 had a prior reaction to a pertussis-containing vaccine when
6 she was five; and according to the vaccine information
7 statement for the pertussis-containing vaccine -- Tdap is a
8 pertussis-containing vaccine -- it provides that if you have
9 had either a prior allergic reaction or severe swelling to a
10 prior pertussis-containing vaccine, you should advise your
11 medical provider, the parents should, before the child gets
12 that shot again. It's a way to assure that the child won't
13 have a serious reaction.

14 Despite having that knowledge, she's still threatening
15 to get it because she wants to go to that summer camp. And
16 the concern is now even more acute, Your Honor, because the
17 parents are concerned that the very information that -- I'm
18 sorry -- that had they been there, certainly the first time
19 she went down as alleged in our complaint, they would have
20 advised the medical provider of that.

21 The child at that point didn't know about it, didn't
22 advise the medical provider, as you know and as we've alleged,
23 and the medical provider was going to administer the vaccine.
24 The parents are concerned she will nonetheless go and do
25 that again. Separately, there is also a college summer

1 program she wants to attend that similarly has certain other
2 vaccine requirements. So those still remain ongoing issues
3 I understand in that household, so that status has not changed.

4 THE COURT: Remind me, how old is she?

5 MR. SIRI: She's 16, Your Honor.

6 THE COURT: Okay.

7 MR. SIRI: And if I could make just one more general
8 point and I'll going directly to standing, which is the whole
9 purpose of the National Childhood Vaccine Injury Act of 1986
10 was that there was only one manufacturer left for each
11 vaccine, they were facing liability, and Congress provided
12 them immunity from liability for the injuries caused by their
13 products.

14 And so what that did is it got rid of the normal market
15 forces that assured safety for products, and instead it
16 transferred, effectively, responsibility for vaccine safety
17 to the secretary of DHS. And one of the key components of
18 assuring safety is providing a vaccine information statement.

19 It assures that the parent will be told what information
20 they should tell the medical provider before their child is
21 vaccinated, what to look for after their child is vaccinated,
22 and then also, if there's an issue, to be able to file a claim
23 in the Vaccine Injury Compensation Program.

24 Those are all things that the parent needs to do because
25 most vaccines are given when a child is really young, toddler

1 or baby. The parent's the one who's going to know what's
2 happened in the past. Most of the things that the VIS
3 provides that the parent should advise the medical provider
4 are for prior reactions. The child's not going to be in a
5 position to do that.

6 That's exactly what happened in this case. This child
7 wasn't aware really what happened to her when she was five.
8 She didn't know she had a reaction to a prior pertussis-
9 containing vaccine. She did remember something, right?
10 But with that, she didn't know to tell the medical provider,
11 and the medical provider here never even thought to elicit the
12 information from her. Had her parents been there as required
13 by federal law to receive the VIS and get it beforehand, they
14 could have advocated for her.

15 More acutely, Your Honor, had she suffered a reaction,
16 the only person that could have filed a claim for her in the
17 Vaccine Injury Compensation Program under the 1986 act is the
18 parent. Not even a mature minor is permitted to file a claim
19 in the Vaccine Injury Compensation Program. Only the parent
20 or legal guardian can do that.

21 And when you look at the VIS, what's required under Section
22 26, 300aa-26 of VIS, there really are only three required
23 pieces of information on that document. One is what are the
24 benefits, what are the risks including what to look out for,
25 and to advise the parents about the Vaccine Injury

1 Compensation Program.

2 THE COURT: Mr. Siri, on what basis do you say that
3 a mature minor couldn't file a complaint?

4 MR. SIRI: If you look at 42 U.S.C. 300aa-11 --
5 virtually certain that's the section -- it specifies and this
6 is in our papers, Your Honor, who can file a claim in the
7 Vaccine Injury Compensation Program, and nowhere in there does
8 it provide that a child, mature minor or otherwise, can
9 provide the claim, only a legal representative.

10 THE COURT: So you're looking at (b) (1): "Except as
11 provided in subparagraph (B), any person who sustained a
12 vaccine-related injury, the legal representative if such
13 person is a minor or is disabled, or the legal representative
14 of any person who has died" may file a petition for compensation.

15 MR. SIRI: Yes, Your Honor.

16 THE COURT: Okay. Thank you.

17 MR. SIRI: So in this instance, had my client's child
18 suffered a reaction, first of all, the parents wouldn't have
19 known to look for it. And had the -- and then secondly they
20 wouldn't have been in a position to file a claim.

21 And that goes to the very structure I think -- and I
22 don't want to get too far afield from the standing question,
23 Your Honor, but I think it does go to the other point that
24 Your Honor I think wanted us to address, which is when you
25 look at the statutory provision regarding providing a VIS,

1 it does say to the legal representative of the child or to
2 any other individual the -- you know, that obviously needs
3 to be read in context. Any other individual would be, as we
4 explained -- you know, we provided Oxford dictionary and other
5 case citations -- it's to the exclusion of the categories that
6 preceded it. What preceded any other individual was the legal
7 representative of the child, the child -- a child being
8 vaccinated. That's what was excluded, and that comports
9 with the overall statutory scheme, because if you read into
10 any other individual a child, it undoes the whole entire
11 statutory scheme, which is -- the whole point of VS [sic] is
12 to give the parents notice that they can file a claim under
13 the Vaccine Injury Compensation Program, right? Which the
14 child can't do.

15 It's to let the parent know, here's what you should tell
16 the provider before the child's vaccinated, information that
17 virtually typically only the parent would have, and to
18 let the parent know the benefits of vaccination, which are,
19 you know, set forth to encourage the parent in order to
20 vaccinate the child.

21 But getting directly to your standing question, Your
22 Honor, here the requirement to provide a vaccine information
23 statement under the statute, it kicks in before the child is
24 vaccinated. When the parent arrives at the doctor's office
25 and the doctor has the intent to provide the vaccine, it's at

1 that point, as provided in Section 26, that the provider is
2 supposed to provide the VIS that intends to administer the
3 vaccine along with other relevant potential information.

4 In this case the VIS was supposed to be provided when that
5 doctor decided on that day when the child at issue here went
6 down to that medical office, when the doctor decided that they
7 were going to administer the vaccine, not only the Tdap
8 vaccine, the other two vaccines that they had, convince the
9 child to also receive which she didn't even come in for, they
10 were supposed to provide the VIS to the parents.

11 There was a concrete and cognizable harm in that moment
12 because in that moment the parents didn't get a VIS. In fact,
13 not only did they not get it in the moment they were supposed
14 to, which was when the doctor decided to give the vaccine, but
15 the nurse came in with the vaccines into the room and was
16 intent on providing the vaccines but still the VIS's weren't
17 provided. So there was a cognizable and concrete harm in that
18 moment.

19 THE COURT: So the defense points out that your client
20 certainly has a VIS now or is aware of it. If J.D. went back,
21 you know everything that's in the VIS. So what's the real
22 harm given that you already are fully aware of anything that
23 would be contained in the VIS?

24 MR. SIRI: We all have to follow federal law, and the
25 statutory provision here provides that the VIS needs to be

1 provided every single time a vaccine is given, even when its
2 provided. Again, so the VIS for the Tdap needs to be given
3 to the parents each time before the Tdap is provided to the
4 child. There's two real important reasons for that.

5 Number one, the VIS get updated regularly. They were
6 just updated in 2020. They were updated in 2021. There's
7 constantly changing information. So those VIS's are changing
8 all the time. In fact, under the National Childhood Injury
9 Act, the provider in the medical record has to record not
10 only that the VIS is given, they must record which version it
11 was provided to make sure the parent got the most up-to-date
12 version. So that's one thing.

13 But the second thing is is that -- and I think this is a
14 really important component -- is that one of the safeguards
15 the '86 act envisions is the parent's participation in the
16 process of the child getting this medical procedure, and it
17 assures that through the parent getting the VIS before the
18 child is given the vaccine, again, so they can advocate for
19 their child, they can advise of any prior issues, they can
20 look for any reactions, and then they can file any claim in
21 the VICP if one occurs. Obviously, if they don't know the
22 child's getting a vaccine, they can't advocate for them, they
23 can't look for reactions, and they can't file a claim if one
24 arises.

25 THE COURT: Why doesn't it matter that the providers

1 here are not District employees? Doesn't that create kind of
2 a causation problem for you?

3 MR. SIRI: I don't think so, Your Honor, because but
4 for the statutory provision, this provider wouldn't have
5 sought to give the vaccines without parental permission. When
6 the child walked into this medical office, normally they have
7 the parents sign a consent form. Here they didn't have a
8 parent sign a consent form.

9 Normally they would give the VIS. They didn't here because
10 of this law. This is the but-for cause for why this provider
11 acted the way they did - interestingly, by the way, not for a
12 child that even lives in the District, a child that lives in
13 -- and not not out of state [sic]. I mean, the reach and
14 breadth of the law would apply to basically any child in the
15 whole world.

16 It's the D.C. law that chose to make it so that providers
17 can provide a vaccine to a child without giving the parent
18 the VIS, and in fact, not only does it do that, the D.C.
19 law specifically provides that the D.C.'s to make alternative
20 VIS's for children because apparently they're not mature
21 enough to understand the ones created by the federal health
22 authorities.

23 THE COURT: And so that's what J.D. got? J.D. got
24 this alternative?

25 MR. SIRI: She didn't get anything. She didn't get

1 any VIS because you don't give a VIS to a child. Providers
2 are not -- I don't even think they have a mindset to do that,
3 because they never do that.

4 THE COURT: I'm sorry. You're saying that the doctor
5 didn't give the alternative document that --

6 MR. SIRI: He didn't give either, neither an
7 alternative VIS, nor the actual VIS that's issued by the CDC.

8 THE COURT: Okay.

9 MR. SIRI: And just to make sure I answered your one
10 question you asked me, which was standing, and so I pointed
11 out there was a cognizable injury and a concrete injury when
12 at the time the parents didn't get the VIS. And that injury,
13 there's a serious -- is likely to occur again because the
14 child is continuing to threaten to go back, and I won't
15 belabor that again because I explained that earlier.

16 THE COURT: All right. So let's talk about preemption
17 and particularly what does it mean to be a child. I'll tell
18 you I'm inclined to agree with your interpretation there of
19 subsection (d) that the provider shall provide to the legal
20 representatives of any child or to any other individual that
21 means not a child. But I think this still comes back to what
22 does it mean to be a child.

23 My impression is we have -- in general, the Supreme Court
24 has told us that, when interpreting federal statutes, we
25 should interpret based on kind of federal common law or look

1 to dictionary definitions, what have you, of terms so that
2 we don't have a patchwork. And I think your client's case
3 is kind of a textbook example of the problems with patchwork
4 definitions of she might be a child in Maryland but not in
5 D.C.

6 But it also looks to me like there's this strain of case
7 law that says in domestic relations cases that we should
8 be looking to state case law or state definitions of terms,
9 which suggests that maybe the District is right that even if
10 your interpretation of this section about child versus any
11 other individual is correct, that J.D. is not a child because
12 I should be looking to D.C. law for the definition of "child."

13 MR. SIRI: I think that we start with the statute at
14 issue itself and look to see if the statute itself provides
15 guidance on that question. And I think when we look to the
16 '86 act in its totality, we see that it should not -- the
17 definition of "child" should not be defined in reference to
18 D.C. law, and here's why:

19 This is called -- the act at issue is the National
20 Childhood Vaccine Injury Act of 1986. It relates to children.
21 I mean the whole statute revolves around children. Children,
22 child, is not just a random term that happens to be in one
23 provision. It's all over the act which is only 34 sections
24 long, right? It's not hundreds or thousands. It's 34
25 sections long.

1 And when Congress wanted to define a term in the 1986
2 act in relation to state law? It did so. The term "legal
3 representative" is defined to relate to state law. That term
4 "legal representative" is just a few words away from the word
5 "child." And Congress chose not to make the word "child"
6 defined under state law. It chose to give it a meaning, the
7 ordinary meaning, which is anybody under 18 years of age.

8 And we see that from the actual structure of the '86 act
9 itself because a "child" could mean something other than --
10 you know, could mean the child could act on their own, not
11 through their legal representative, then the whole requirements
12 with regards to who filed Vaccine Injury Compensation Program
13 doesn't make any sense. They could directly conflict.

14 You can't -- it wouldn't make sense in a statutory scheme
15 that only one of three pieces of information that the legal
16 representatives must get is this VIS that tells them about the
17 Vaccine Injury Compensation Program but yet the only person
18 that could file in that program is the parent or legal
19 guardian, which under state law in D.C. means appointed by
20 the court, right? Not the doctor. But yet the VIS could be
21 given to the child themselves and not the parent. So I think
22 when you look at the statutory scheme here, it doesn't make
23 sense.

24 The other thing is this: When it talks about a child,
25 it talks specifically about the legal representative of the

1 child in the Section 26. It's telling you what it expects,
2 who it expects to get the VIS, the legal representative. Yes.

3 THE COURT: So I'm inclined to agree with you that
4 18 is the most common break for adult versus a minor, but
5 that's not the only one, right? I think some states I believe
6 say over 18, rather than 18 or over. Other states, I don't
7 know, maybe they say 17. You know, you could imagine D.C.
8 saying that age majority of 16. Maybe in some states that's
9 true; I don't know.

10 And it seems to me that would kick in for the other part,
11 too, that that 16-year-old would no longer be a minor under
12 the Section 300aa-11; therefore, that 16-year-old could file
13 a suit. Not a child. Right? Why isn't that right?

14 MR. SIRI: Well, I can tell you that -- I guess what
15 I can say to that, Your Honor, is that we handle claims in
16 the Vaccine Injury Compensation Program at my firm all the
17 time. We have a whole practice around it. And the consistent
18 definition that's -- and when you practice in the Vaccination
19 Compensation Program, which is in the Court of Federal Claims,
20 you can represent anybody in the whole state -- in all 50
21 states, excuse me. And so the age at which we always -- it
22 has always been 18.

23 THE COURT: And based on what?

24 MR. SIRI: Well, frankly, that's just based on my
25 experience with the program. I think that if Congress

1 intended the definition of "child" to vary -- well, let me
2 start with this: When it talks about a child in Section 26,
3 it says "the legal representative of the child." We know that
4 the term "legal representative" is defined vis-à-vis state
5 law, right? And we know that that term, certainly in the
6 District, in this district, means either the parents or a
7 legal guardian appointed by the Court.

8 So we know that when it comes to it, when it comes to D.C.,
9 as things stand right now in this district? "Child" means
10 17 or younger, because that's what you would need a parent or
11 legal guardian appointed by the court for. Right? So the
12 age of majority here is 18.

13 So at least in terms of the actual language in Section 26,
14 it's got to be 17 or younger the VIS must be given to the
15 parent or the legal guardian under the statutory scheme that
16 applies. Maybe that answers your question, Your Honor?

17 THE COURT: Yeah. I mean, I agree with you it's
18 notable that "legal representative" they do point to state
19 law. I think you're making a fair distinction: Okay, we look
20 to state law for legal representative; we don't for child.
21 But I still do have this background presumption, I think,
22 when we're talking about domestic relations terms, that we
23 are supposed to look to state law.

24 It's also kind of funny they use "child" here in -26.
25 They use "minor" in -11. I mean, there are these different

1 terms that are thrown around that are probably synonymous,
2 but it's not clear they are, and I think it does become
3 tricky, especially as you have older teenagers who conceivably
4 one state would say is not a child for any purposes. Right?

5 MR. SIRI: Two points to directly answer your -- I
6 think the struggle that you're having, and it's a fair one,
7 Your Honor, I see what you're saying, is that -- one is that
8 a lot of the laws with regards to domestic relations often
9 revolve around contraception and abortion and things of that
10 nature, where courts at the federal level have recognized the
11 privacy right that children do have, which can abut with the
12 parent's right to the care, custody, and control of their
13 children.

14 And so there can be that tension in those scenarios,
15 but there's never been a privacy right recognized vis-à-vis
16 vaccination. In fact, it's the opposite. Courts have held,
17 no, parents do have to provide schools, for example, a child's
18 vaccination record. So that tension that exists between a
19 child's right to privacy and the parent's right to control
20 the care and upbringing is in tension when it comes to
21 vaccination.

22 And so maybe in those statutory provisions that defendants
23 cite, which almost all have to do with that area where there's
24 a privacy right interest, maybe those are more inclined to
25 look to state law, whereas here that's not the case.

1 And the other thing I would say is that when it comes
2 to mature minors, as defendants point out, the concept of a
3 mature minor was known before the '86 act was passed, but
4 yet it wasn't incorporated as a concept in the '86 act like
5 it has been incorporated specifically in other statutory
6 provisions from that era and forward.

7 One of the provisions defendants point out is 45 C.F.R.
8 164.502(g) (3) in which a "mature minor" was specifically
9 addressed, and some of those cases are quite old. So I think
10 that when you -- but really I think, stepping back from all
11 of that? I think it's first looking at the statute that's
12 directly before us: what was the congressional intent when
13 they adopted this statute, this statutory scheme?

14 And here, read in its totally, and fairly I believe,
15 that they didn't just say "child," they had a specific turn
16 of phrase, which I don't think you often see, is the "legal
17 representative of the child."

18 THE COURT: And so you believe I should understand
19 "child" to be under 18. Is that correct?

20 MR. SIRI: Yes. I think that in this instance the
21 plain and ordinary meaning, which is often the way we start
22 statutory constructions, as you know, Your Honor, I think
23 should govern, and then into the context in which the terms
24 are used in the '86 act and then looking at the goal and
25 purpose of a vaccine information statement.

1 I mean, I don't want to belabor it, but it only requires
2 three pieces of information: benefits, risks including what
3 the parents should tell the doctor before the kid's vaccinated,
4 as well as about the Vaccine Injury Compensation Program.
5 Those are the only three things. For the VICP, certainly,
6 standing here today, right now in this district, the child
7 at issue could not file a VICP claim.

8 In the District of Columbia today, that child would have
9 to wait till they're no longer a minor, which would be 18
10 years old. As that stands today, you have a situation where
11 the District wants the child to be able to get a vaccine
12 without the parents getting a VIS, meaning the parents
13 wouldn't know about the vaccine, wouldn't be able to file a
14 claim under the VICP. That would undercut the entire purpose
15 that Congress requires a VIS to provide some minimal safety
16 assurances after it gave the pharmaceutical companies --
17 Pfizer, Moderna, all of it -- immunity for any injuries caused
18 by their vaccine products.

19 And then also it would undercut the ability of the parent
20 to advocate. When an 11-year-old goes in to get vaccinated,
21 it's not reasonable to expect the 11-year-old is going to be
22 able to tell the provider whether they had prior swelling, to
23 which vaccine, where, what was the extent of it, did they have
24 an allergic reaction, did they have any lowered consciousness
25 after prior vaccination.

1 Vaccinations, there are lots of diseases that can harm
2 children, and we care about those children and we make sure
3 those children are safe. But there are also some children,
4 Your Honor, who can have a reaction to a vaccine. That's why
5 we have a Vaccine Injury Compensation Program. That's why
6 we have this whole statutory scheme, and this is critically
7 important to assure that those kids are also protected.

8 THE COURT: All right. Anything else on preemption?
9 I'm not sure what you and your colleagues have divided up
10 amongst you. I have some other questions.

11 MR. SIRI: Well, there was the -- there was the
12 direct conflict vis-à-vis what the '86 act provides that
13 a parent must be in the child's medical record, which is
14 required by law to be provided by them, but that was an
15 argument that was made in the Booth case, and I believe
16 Mr. Hazelhurst is prepared to address that point.

17 THE COURT: Okay. Before he comes up, were you going
18 to argue any of the other claims, constitutional or RFRA, or
19 is he handling those for you all?

20 MR. SIRI: I'll just make one argument on the First
21 Amendment claim if I may, Your Honor, and that's that
22 whenever there is a system that provides for exemptions for
23 nonreligious reasons or systems of particularized judgment
24 calls with regards to nonreligious bases, there needs to also
25 be a religious exemption provided as well, and there's a

1 series of cases we cite in our papers that stand for that
2 proposition. I believe the U.S. Supreme Court has recently
3 reaffirmed that principle. And here you do have a system
4 that provides for a lot of judgment calls on behalf of the
5 provider.

6 In particular, the provider here has to decide is the child
7 a mature minor, for example, and also the provider is now
8 being given the discretion, effectively, I guess because the
9 parents aren't there to determine should the child get the
10 vaccine or not, meaning should they have a medical exemption.

11 The provider's making that judgment call in the moment,
12 in that doctor's office, without input from the parent,
13 talking to an 11-, 12-year-old. They're effectively deciding
14 whether or not this kid has a medical contraindication or
15 precaution.

16 If there is a nonreligious reason that a vaccine should
17 not be administered in that setting, then the First Amendment
18 provides, should provide, that there also should be a -- that
19 the government can't preclude a religious exemption reason for
20 not vaccinating. But that's exactly what this D.C. law does.
21 It says the religious exemption a parent has needs to be cast
22 aside. Yes, Your Honor.

23 THE COURT: So I guess I'm trying to follow you there.
24 I thought there's a kind of a medical determination -- I don't
25 know if it's a medical determination, actually, but a

1 determination of whether this person is a mature minor.

2 Are you saying that by making this determination about whether
3 or not somebody is mature, you also must provide a religious
4 exemption?

5 MR. SIRI: I'm saying it's two things. It's saying
6 that they're mature to get over the threshold, right? But
7 once they've decided that, they make another important
8 determination. They need to determine whether the child is
9 fit to get that vaccine, right? That's part of what the VIS
10 provides you should tell a provider.

11 THE COURT: Isn't it how it works, once the minor is
12 deemed to be a mature minor, then it's up to that minor to
13 decide? Or are you saying that a doctor could make a
14 determination, yes, you're a mature minor, but I'm not going
15 to give you a shot because you're not fit to have the shot?

16 MR. SIRI: Yes. Right. Nobody can make the doctor
17 give you a shot if the doctor believes there's a
18 contraindication. In fact, if a doctor believes that a child
19 has a contraindication to getting a vaccine and the child
20 insists on getting -- or even the parent insists on giving
21 the child a shot and the doctor administers it, I believe that
22 would be medical malpractice.

23 If a child has had, for example, pertussis-containing
24 vaccines, the manufacturer's insert, as well as the VIS, all
25 say if you had lowered consciousness, coma, or any kind of

1 encephalopathy, meaning basically a form of brain damage,
2 from a prior pertussis-containing vaccine, you should not
3 get another dose of that vaccine.

4 THE COURT: Right.

5 MR. SIRI: It's the doctor who makes the determination.
6 The child's not in a position, nor is the parent usually in a
7 position, to determine what is a contraindication precaution.
8 They're in the position to provide the medical provider the
9 information that the doctor needs to make that medical decision.

10 THE COURT: Sure. But the child still had the option
11 of saying, no, I don't want to get it because I'm -- on
12 religious grounds. Right?

13 MR. SIRI: But what's at issue here are the parents'
14 religious rights, and what the D.C. law at issue here says
15 is that the parents' religious rights can be set aside.

16 If the parents have a religious-protected interest under
17 the First Amendment as well, vis-à-vis their religious
18 beliefs, I don't believe that can just be ignored when it
19 comes to their 11, 12, 13-year-old child if their child has an
20 opposing religious belief. I don't believe the state gets to
21 just say, well, we're just going to accept what the child says
22 and totally ignore what the parents' religious beliefs are.
23 I'm not sure that that's -- yeah.

24 THE COURT: All right. Thank you, Mr. Siri.

25 MR. SIRI: All right. Thank you, Your Honor.

1 THE COURT: Mr. Hazelhurst.

2 MR. HAZELHURST: Thank you, Your Honor. I wanted to
3 begin by addressing the questions that you had in your email
4 for Booth only, the question being the meaning of the term
5 "permanent medical record" in 42 U.S.C. 300aa-25.

6 THE COURT: Sorry. Before you get to that, have
7 all of your clients' children, have any of them received
8 the COVID vaccine?

9 MR. HAZELHURST: Not that I'm aware of, Your Honor.
10 No, sir.

11 THE COURT: Okay. And so this act was passed in March.
12 Your PI was filed last March. Your PI was filed in December.
13 Why is the injury still imminent at this point?

14 MR. HAZELHURST: Because the pressure is still there,
15 Your Honor. Every day these children -- and the difference
16 between my clients and Mr. Siri's clients are my clients are
17 students in the District of Columbia.

18 Every single day they are under the pressure to receive
19 the vaccines. They are the subject of mass-media campaign.
20 They're the subject of peer pressure. Quite frankly, just
21 government-sponsored peer pressure. They're under tremendous
22 peer pressure to receive these vaccinations.

23 In addition to the advertisements and incentives giving
24 them basically financial incentives to go and get the
25 vaccines, they are also singled out as "the unvaccinated."

1 There's double standards. There's contact tracing. And with
2 the contact tracing, if the unvaccinated come into contact a
3 vaccinated -- excuse me. If they come in contact with someone
4 who tests positive for COVID, then they must self-quarantine
5 at home. The most extreme example I can give is Mr. Booth's
6 child who came into contact with his teacher and the teacher
7 tested positive, and Victor Booth's child had to remain home
8 for 10 days. He didn't have COVID.

9 They're just under tremendous pressure to receive the
10 vaccinations by the government, and then the government is
11 offering them a release from this pressure. So this is
12 occurring on a daily basis. So it's not moot. If anything,
13 it's intensified.

14 THE COURT: Okay. I understand your point.

15 MR. HAZELHURST: While I'm on that point, Your Honor,
16 there is one thing that I wanted to make sure that I got into
17 the record, because my -- and that's an illustration done by
18 Mr. Booth's child. It's Exhibit No. 11. When I pull it up on
19 my computer, I can see it, but when I go to print it off, it's
20 faint. So I wasn't sure if Your Honor had a good copy or not.

21 THE COURT: If you want to pass one up, I'll certainly
22 take a look at it.

23 (Document tendered to the Court.)

24 I know you described it in your brief.

25 MR. HAZELHURST: That's one of two illustrations that

1 he made, Your Honor, and I think the other one being entitled
2 as Exhibit 10. Exhibit 10 first says, "I feel I'm being
3 pressured into taking the vaccination because I feel like an
4 outsider since everybody else has the vaccine. And not only
5 that, but I feel like the vaccine is some sort of hall pass
6 because I need the vaccine in order to go to certain places
7 which is very annoying." He goes on to explain how he's in a
8 very tight spot. That one is Exhibit 10.

9 Exhibit 11, Your Honor can see, is the manifestations of
10 a child under tremendous pressure, and that's ultimately what
11 we're here about. He was just asked to express what he's
12 feeling: "Come on, dude. Take it. Scared? Just do it. I
13 think you should." Based on that illustration, it's clearly
14 a child under tremendous pressure to receive vaccinations.

15 THE COURT: And, of course, he would continue to face
16 that pressure.

17 MR. HAZELHURST: Every day. Every day.

18 THE COURT: But even if I enter the injunction, he
19 just won't have the choice to give in to it anymore. Right?

20 MR. HAZELHURST: It will relieve a great deal of
21 pressure for him, Your Honor. He's aware of this proceeding.
22 Quite frankly, I think he's been holding out to see what Your
23 Honor does. I can't say what he will or won't do, but he --

24 THE COURT: No, but you agree with me that all of that
25 environment would remain the case regardless.

1 MR. HAZELHURST: But the release valve will no longer
2 be there. They're putting the pressure on him. But he can
3 escape the pressure at any time. The defendants are saying
4 they're not stalking the halls offering the vaccine.

5 No, they set up camp down at the end of the hallway.
6 They have regular walk-in, pop-up clinics where he can just
7 go and register and get vaccinated at his convenience. So it's
8 a tremendous, easily-accessible escape from this government
9 pressure to receive the vaccination.

10 I'll move back to answering your questions about 42 U.S.C.
11 300aa-25, the question being the meaning of the term "permanent
12 medical record" in 42 U.S.C. 300aa-25(a) and whether the
13 immunization record referenced in the D.C. act constitutes a
14 medical record? That's the first question.

15 THE COURT: Right.

16 MR. HAZELHURST: I would answer yes because it is
17 completed by licensed medical professionals. I'll come back
18 to that question in a minute. I wanted to answer the second
19 part and then combine it.

20 Your second question is, is there a separate record that
21 vaccinations are recorded in other than the District's
22 immunization record. The answer to that question is also yes.
23 But that record is a reflection of the official immunization
24 record. The difference between the two, as I understand it,
25 is the federal vaccine act requires the recording of the lot

1 numbers. The D.C. act does not include the lot numbers, but
2 it is a permanent medical record with a permanent office log
3 or file to which a legal representative shall have access upon
4 request.

5 The bottom line is this, Your Honor. The whole key to it
6 is Congress never could foresee or intend the District of
7 Columbia would pass a law to circumvent the entire purpose and
8 protections of the vaccine act.

9 In essence, how the defendants are able to do this is they
10 are ordering licensed medical professionals to falsify medical
11 records, to certify that it is false. There's no getting
12 around that. I'll direct Your Honor's attention to Exhibit 1
13 is what we're talking about, the D.C. Universal Healthcare
14 Certificate. It clearly states, "Have a licensed medical
15 professional complete parts 2 and 4." That's at the top of
16 the page.

17 Turning to the second page, which is part 3, which is the
18 part which is the center of this part of the discussion, it
19 says, "Immunization information to be completed by licensed
20 healthcare provider." And this is what they're asking is
21 blank, and the information is the vaccinations and the date
22 it was provided. Where does this information come from?

23 Well, you go down to part 4. "Licensed healthcare
24 practitioner certifications to be completed by licensed
25 healthcare provider."

1 It states, "This child has been appropriately examined
2 and health history reviewed and recorded in accordance with
3 the items specified on this form." And then it goes on to
4 say, "I hereby certify that I have examined the child, and the
5 information recorded here was determined as a result of the
6 examination" with a place for the provider's name, phone
7 number, and his signature.

8 So the healthcare provider is certifying that this
9 information is true, and this information comes directly
10 from the vaccine record mandated by the vaccine act. So
11 the whole way the District of Columbia is getting around
12 the mandates of the federal act is creating a false record.
13 I don't know how to put it any more plainly than that.

14 THE COURT: So if your client went to the school
15 and asked, can I see my child's medical records, is your
16 understanding that he would only receive that, the incomplete
17 one, or would he then have the right to get both and discover
18 that there's a discrepancy?

19 MR. HAZELHURST: The parents or the child, Your Honor?

20 THE COURT: No, the parents.

21 MR. HAZELHURST: My understanding is the parent would
22 not be allowed -- he would only receive that portion that says
23 blank. So the parent would be under the obvious impression
24 that his sincerely held religious beliefs are holding up and
25 that he has not received the vaccination.

1 Now, the other record which legally he's entitled to, he
2 has no knowledge of it. There's no way that he can get access
3 to a record that he has absolutely no knowledge of, has no
4 knowledge of who administers the vaccines, who recorded this
5 information. He would not have access to that information.
6 He would only have access to the falsified blank information.

7 THE COURT: Okay. Thank you.

8 MR. HAZELHURST: Let's see. Your second question was
9 the importance of any reference to the Vaccine Injury Table in
10 300aa-25a(a) and (b) given that the COVID vaccines are covered
11 by the PREP Act and not the Vaccine Injury Act.

12 I would point out this, Your Honor: The D.C. act does
13 not limit the vaccinations to the COVID vaccination. There's
14 multiple other vaccinations: DTP, measles, MMR, varicella,
15 pneumococcal conjugate, hepatitis B, Hib, rotavirus, on and
16 on and on. So it's not just COVID vaccine.

17 But in the spirit of the law, I'll point out this:
18 The reason that the COVID-19 vaccine is not yet under the
19 Vaccine Injury Compensation Act and the Vaccine Injury Table,
20 and we have every reason to believe that in the future it's
21 probable that it will, but it's not yet because it's not FDA-
22 approved, it's approved under emergency use authorization.
23 So we don't know what the long-term effects are. We don't
24 know what the long-term dangers and safety are.

25 THE COURT: I get that, but does that create a problem

1 for you? I mean your clients are primarily concerned about
2 COVID. Right? Is the COVID vaccine covered under 300aa?

3 MR. HAZELHURST: Two answers to your question,
4 Your Honor. They're concerned about all of the vaccines,
5 not just COVID. But you are correct, Your Honor, in that
6 the vaccine act does not yet cover COVID.

7 THE COURT: So the vaccine -- I mean -- just trying
8 to think through this. It looks to me like the D.C. statute
9 actually predated, or at least began, before COVID. It wasn't
10 necessarily a COVID response.

11 MR. HAZELHURST: Yes, Your Honor.

12 THE COURT: But is it fair to say that if they repass
13 today the same statute but just limited it to COVID vaccines,
14 there actually would not be a problem under 300aa?

15 MR. HAZELHURST: I would say that -- I would still
16 think there's a problem, but the problem is not as well
17 defined.

18 THE COURT: Okay.

19 MR. HAZELHURST: And I would go back to that the reason
20 it's not on the act -- under the Vaccine Injury Compensation
21 Program, it hasn't been approved yet. It hasn't been through
22 that process.

23 THE COURT: I understand that.

24 MR. HAZELHURST: One other thing I would like to point
25 out, Your Honor -- well, I guess I already covered that in the

1 beginning, that being the standing of my clients and the
2 pressure they're under.

3 THE COURT: Yeah. So why don't we talk -- if you want
4 to try to convince me on any of the constitutional claims or
5 the RFRA, now is your chance.

6 MR. HAZELHURST: Well, I listened to Mr. Siri. I think
7 he did a good job of answering those. If there's any specific
8 question you want me to --

9 THE COURT: Do you agree that -- I mean often I feel
10 like RFRA is a stronger claim than First Amendment. It kind
11 of puts a higher standard on the government.

12 It seems to me, here it's actually not true, that your
13 First Amendment claim is stronger because, as I look at it
14 anyway, it doesn't seem to me like there's a lot of compulsion,
15 which really is kind of the trigger for RFRA. But you do kind
16 of have an arguable disparate treatment claim between people
17 who've invoked the religious exemption and those who haven't.

18 MR. HAZELHURST: The point I'd like to make, Your
19 Honor, is that the government is targeting children that
20 claim a religious exemption and -- give me just a moment.
21 I don't have it all memorized. But if a parent is utilizing
22 a religious exemption for vaccination or is opting out of
23 receiving the HPV vaccine under another section. But in other
24 words, if they're utilizing a religious exemption -- this
25 is on page 2 -- then a healthcare provider shall leave the

1 immunization record blank.

2 So they are targeting children that claim a religious
3 exemption. I think that's an extremely important fact.
4 They're openly hostile to a religious exemption. They don't
5 have to give a religious exemption, but once they do, they
6 can't punish someone because they exercised their religious
7 exemption.

8 THE COURT: But isn't that more of a First Amendment
9 claim than a RFRA claim?

10 MR. HAZELHURST: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. HAZELHURST: Thank you very much.

13 THE COURT: Thank you.

14 Ms. Disney?

15 MS. DISNEY: Thank you, Your Honor. I'll be happy to
16 discuss any aspect of the briefs, but I'll focus my remarks
17 on standing and preemption as you mentioned earlier that's a
18 particular focus.

19 THE COURT: Okay.

20 MS. DISNEY: Plaintiffs here simply cannot succeed
21 because they lack standing. There are several reasons
22 plaintiffs fail to establish standing, but I'll start with the
23 simple fact that plaintiffs' injuries are purely speculative.

24 As Your Honor noticed, this case has been going on for
25 quite some time. The students have been in school for six

1 months now with only three months left to go. The Mazer
2 plaintiff filed a PI originally in July, and yet none of
3 the fears have come to pass.

4 Plaintiffs cannot satisfy standing as laid out in
5 *Clapper v. Amnesty International*, and that case is particularly
6 apt. *Clapper v. Amnesty* requires that an injury be certainly
7 impending, and it is certainly not here. As noticed in
8 *Clapper*, allegations of possible future injury are not
9 sufficient. That's precisely what plaintiffs have alleged.

10 THE COURT: They are kind of between a rock and a
11 hard place, right? I mean if they're right that this is a
12 violation, I mean what more would they have to show -- I mean
13 once it happens, it's too late. Right? I'm not sure what
14 more I would expect from them to show a bad thing's about to
15 happen to me.

16 In the Mazer case, J.D. has actually already gone and
17 sought a vaccine, which seems to me to be pretty -- that gets
18 pretty close there to showing real concern that this is not
19 just speculative, that the child actually has gone and sought
20 a vaccine before and says she's going to do so again. I mean
21 what more should I be looking for?

22 MS. DISNEY: Well, a few things, Your Honor.
23 First, the Mazer Plaintiff has not alleged that she will get the
24 vaccine. The plaintiff has only alleged that she is interested
25 in receiving the vaccine and has some incentives to do so, has

1 some things she may want to do over the summer.

2 THE COURT: That she's already tried to do so before.
3 Doesn't that help them?

4 MS. DISNEY: The fact that she tried to do so before
5 and didn't, actually, I believe hurts them. She tried to get
6 one; she did not get one. She chose not to get one, and she
7 talked to her parents about it. Her parents provided more
8 information about her medical history, and there's been no
9 movement again for -- these allegations occurred last summer.

10 I think the time that has passed undermines the speculation
11 there, and there's no allegation even that she will get one by
12 a date certain. There's no allegation that she will get one
13 by this summer. Again, plaintiffs only point to possibilities
14 and opportunities to get one, but that's it, and that's just
15 not sufficient. That's certainly not impending under *Clapper*.

16 And if there were more allegations, that may bolster the
17 problem with the speculation aspect of it, the speculative
18 nature of their claims, but that wouldn't cure it. There's
19 other problems, as Your Honor noted, regarding causation, having
20 a legally protected interest in the first place. There are
21 other problems with standing that plaintiffs haven't addressed.

22 But I'll say, though, even more than that, even if there
23 was no possible way for the complaint to be re-pled in such
24 a way that plaintiffs would have standing, that would be an
25 okay outcome, too.

1 The fact that they couldn't plead to provide sufficient
2 allegations is not an argument in favor of standing. There's
3 no requirement that a person must have standing to challenge
4 a government's ability to give someone else a choice, which
5 is what's going on here.

6 And I point Your Honor on that point again back to *Clapper*
7 *v. Amnesty*, where the court explicitly stated that the argument
8 that, if respondents have no standing to sue, no one would
9 have standing, is not a reason to find standing. And in
10 support of that, the court cites many other Supreme Court
11 cases. So the fact that standing may be difficult to
12 establish is not a reason to find it here.

13 THE COURT: Yeah. I guess I'm just saying, if we
14 take it for the moment that they're right on the law, this
15 is a preemption problem. Their constitutional rights will
16 be horribly violated if the children are vaccinated. This is
17 different from somebody just being angry about some statute in
18 general and have some sort of taxpayer standing or something
19 like that.

20 Here, they clearly would have been wronged, but it's
21 too late to do anything about it if we wait until they're
22 vaccinated. This seems like why we have kind of the courts
23 of equity and the idea of preliminary injunction.

24 MS. DISNEY: Assuming they're right, as Your Honor
25 stated, which I will get to later, there are still other

1 problems. So it is -- and as I mentioned, they could replead
2 more to make the speculation more strong if they had better
3 facts, if they even produced competent evidence and, for
4 example, the minors aren't parties to this case. But I think
5 if you look at the case law, if you look at -- of course,
6 *Clapper* I think is the most on-point case here as well as
7 in *Spokeo*. We have causation issues, too.

8 Plaintiffs are basing their claim on a many-linked sequence
9 of what-ifs here, and particularly that injury that they fear
10 is dependent on actions of third parties. And in that case
11 it is very difficult to show standing, and they have simply not
12 shown that all of these sequence of events will come to pass.
13 And without more by way of allegations, without more certainty
14 -- and it is a high bar to cross -- they simply can't have
15 standing in this case.

16 THE COURT: Aren't the school nurses your employees?
17 It's not -- I guess I'm not quite sure who's administering
18 these in-school programs for the Booth plaintiffs, but I would
19 have thought they are District employees.

20 MS. DISNEY: I'm not sure, Your Honor. I know that
21 there are providers working with the Department of Health to
22 provide those clinics. I cannot say if the people putting
23 shots in the arms are District nurses. I can say that the
24 Department of Health is working hard to put on the clinics
25 and have organized them.

1 THE COURT: And I take it a lot of kind of the peer
2 pressure plaintiffs point to, I think you're right that's
3 not -- those are third parties.

4 MS. DISNEY: That's correct. I would note that
5 plaintiffs point a lot to the peer pressure they face, and
6 understanding that that's difficult for a child, but the
7 government of the District of Columbia are not the children's
8 peers here. They're not the ones who are applying the
9 pressure that plaintiffs allege are causing this coercion.
10 And it is well within the District's rights and abilities to
11 promote public health measures, to promote the benefits of
12 vaccines, to promote the benefits of responding to the
13 pandemic in a way that the District sees fit.

14 THE COURT: Understood.

15 MS. DISNEY: So, Your Honor, I'm happy to discuss
16 any questions you have regarding standing or preemption.
17 I could just --

18 THE COURT: Yeah, why don't we talk about the
19 preemption. As you heard, I'd just -- I don't think you're
20 going to convince me on your kind of child versus any other
21 individual argument. I think the better argument for you,
22 and the one I'm struggling on, is where I should look to for
23 the definition of "child."

24 So, certainly interested in your thoughts on that and on
25 these two different kind of lines of Supreme Court case law,

1 and then certainly I'm interested in the religious exemption
2 portion in particular as well.

3 MS. DISNEY: Sure, Your Honor. Happy to address those.

4 I'll start with a topic that seemed to have caught your
5 interest before regarding that definition. I'd like to think
6 I can still convince you on that part --

7 THE COURT: You're certainly welcome to try.

8 MS. DISNEY: -- the question of whether it is legal
9 representative or any other individual. I think there was
10 some discussion over whether the fact of the definition being
11 present for "legal representative" was somehow indicative that
12 Congress did not intend to define "child" in any way that
13 meant anything but under 18.

14 THE COURT: Yeah. So I think their point is that
15 they did define "legal representative" by pointing to state
16 law. Isn't this -- you know, there's some Latin phrase to
17 mean, well, I didn't do this for "child" and therefore I
18 shouldn't be invoking the state's definition for "child."

19 MS. DISNEY: Right. Right. And I would just note
20 that "legal representative," as I'll talk about soon, is not
21 an area of domestic relations which is, for example, very
22 clearly within the state purview and for which there is a
23 strong body of law that Congress defers to, that the Supreme
24 Court in some of the cases that Your Honor even mentioned,
25 *De Silva*, for example, noted that domestic relations,

1 including the parent-child relationship, is firmly within the
2 grasp of state law, and therefore, when interpreting statutes
3 that import one of those terms, you look to state law to
4 determine its ordinary meaning. "Legal representative" is
5 not within that.

6 So it does make some sense that Congress might say, hey,
7 when you're looking at "legal representative," look at state
8 law, but when we use the word "child," everyone knows to look
9 to state law because that's clearly within the local
10 government, the state government's, purview. The definition
11 of "child" is a definition that is not anywhere in federal
12 statutes, not establishing a single definition for "child,"
13 and it is very firmly within the grasps of state control.

14 I think that one thing you might -- you know, Your Honor
15 pointed to *De Silva* and some other case, *Mississippi Band*, and
16 both of those really affirmed that it is part of the ordinary
17 meaning of the term, to look to state law for that definition.

18 THE COURT: But I guess -- you know, I'm struggling
19 with it. It just goes so far here, this code. To say that
20 an 11-year-old isn't a child kind of beggars belief. You
21 know, you point to the FAQ at HHS, I think about which way
22 an 18-year-old should go, and that makes a lot of sense to me.
23 But to say an 11-year-old isn't a child? That's a very
24 different argument.

25 MS. DISNEY: And, Your Honor, it very well may be

1 that under the act a large swath of 11-year-olds are not
2 considered children for the purpose of receiving a vaccination.
3 I think that it often gets confused that the vaccine -- this
4 act permits any 11-year-old or anyone over the age of 11 to
5 receive the vaccine; but it very specifically states that
6 they'd have to meet the mature minor standard, and the
7 standard involves informed consent.

8 It may be -- it's very difficult for an 11-year-old and
9 12-year-old to meet that standard. So it may be that the act
10 only contemplates the atypical 11-year-old or the atypical
11 12-year-old, but that still isn't a reason to disregard the
12 state's definition of "child" there, because it does
13 incorporate that in there as well.

14 THE COURT: What if the state hadn't put the "mature
15 minor" but said, but for purposes of vaccine consent, we
16 define "child" to mean anybody 10 or younger. Would that
17 be appropriate? Would I have to defer to that?

18 MS. DISNEY: It's a good question. I think that you --
19 depends how the law is written, right? I mean there are
20 circumstances -- I think this is more actually a medical
21 question than a legal question, whether that would be
22 appropriate under medicine standards, because the -- separate
23 and apart from the act itself that's in question, medical
24 professionals are required to obtain informed consent before
25 administering vaccines. That's separate and not at issue

1 here, but that is an obligation that medical professionals
2 have. So the question of whether a five-year-old can give
3 informed consent, I would guess not. I would guess that
4 across the board that's not going to fly.

5 So rather than a question of legality, it so clearly
6 conflicts with what would be medical professional standards.
7 I'm not sure that we can really -- I think we've got apples
8 and oranges here.

9 THE COURT: This is a legal standard here.
10 This vaccine act, you admit, kind of preempts state law
11 in some areas.

12 MS. DISNEY: I do not admit that.

13 THE COURT: I thought you did.

14 MS. DISNEY: No.

15 THE COURT: Sure. You admit that it preempts --
16 somebody can no longer sue a vaccine provider for a bad
17 shot. They've got to go through the vaccine court.

18 MS. DISNEY: Oh, I'm sorry. Generally speaking.
19 I apologize, Your Honor.

20 THE COURT: So it was -- it sets in this new legal
21 framework here displacing what had existed. And part of it,
22 as plaintiffs point out, it kind of links to who can sue and
23 when. And so there's a lot of law here, and the individuals
24 involved actually end up being pretty important. Right?
25 Whether it's an 11-year-old, mature or not, could the

1 11-year-old file the suit? Is plaintiff correct that it's
2 got to be an 18-year-old to sue in D.C.?

3 MS. DISNEY: I don't think that's clear in the law
4 that it is correct. And I would note as well -- so the law --
5 forgive me, I don't have it in front of me, but I believe the
6 law could still -- a mature minor, for example, who receives
7 the shot, because I believe it says if someone who receives
8 the vaccine or the legal representative -- I don't have that
9 piece in front of me.

10 But regardless, even if, let's say a 12-year-old who
11 received a shot had an adverse reaction, presumably they've
12 been determined -- or we have to assume that they've been
13 determined to be a mature minor under the act, that they've
14 given informed consent, that they understand the risks. And
15 part of that understanding of the risk is understanding what
16 to do if something goes wrong, right?

17 THE COURT: And what would that be?

18 MS. DISNEY: Excuse me?

19 THE COURT: What should that 12-year-old do who's
20 kind of gone behind his parents' back and has had an adverse
21 reaction?

22 MS. DISNEY: If a mature minor is having an adverse
23 reaction, if they're mature enough to consent to understand
24 the risks and benefits, that would suggest that they are
25 mature enough to seek appropriate medical care, to inform an

1 adult or to call the doctor where they just went. There's
2 nothing there that --

3 THE COURT: Agreed. But this National Vaccine Injury
4 Compensation Program is a compensation program, and it's a
5 legal scheme. And I certainly agree with you that, okay, a
6 mature minor should know to call 911, but is the mature minor
7 going to know that he needs to sue within, I forget, a year or
8 something or else he's out of luck to get compensation? And
9 even can he sue? I mean, that's the plaintiffs' argument
10 here, that it's got to be the legal representative of such
11 person if such person is a minor.

12 MS. DISNEY: If such person is a minor. And I will
13 start out by saying, the question of would that 15-year-old
14 know that they have rights to sue, they are also required to
15 receive a VIS just as an adult who goes to get a vaccine is
16 required, or just says, you know, their parents would receive
17 a VIS.

18 THE COURT: Wait. I thought it was an alternative
19 VIS that you came up with. I mean not you.

20 MS. DISNEY: So the answer is both. The fact that the
21 District's law mandates that providers provide an alternative
22 VIS is not a substitution for the VIS that the NCVIA requires
23 providers to provide to the individual. If a provider
24 fails to provide a VIS to a mature minor who is receiving a
25 vaccination, under the act that provider is in violation of

1 the NCVIA.

2 THE COURT: But doesn't -- I mean your code says an
3 alternative VIS. And you talk about that as being poorly
4 drafted or something, but -- I mean, I'm not sure that would
5 be at all clear to me if I were a doctor or that "alternative"
6 means "in addition to." The act talks about supplementary
7 documentation, but it's not called a "supplemental" VIS;
8 it's called "alternative." That means "in lieu of." Right?

9 MS. DISNEY: No, Your Honor. We disagree on that.
10 "Alternative" here means they're producing something that is
11 not a VIS but it is -- again, a provider is still required to
12 follow the NCVIA as well as the act. So the provider should
13 be giving the minor two things: the alternative produced by
14 the D.C. Department of Health, as required by the law, as well
15 as the NCVIA.

16 THE COURT: Can you point to anything other than the
17 NCVIA for that proposition that the doctor should be pointing
18 to both? In other words, has D.C. said something about,
19 despite calling this an alternative, you're actually supposed
20 to be providing both?

21 MS. DISNEY: D.C. has not made us aware of any
22 particular guidance they're providing to doctors. They
23 may be; I'm not sure.

24 THE COURT: Okay. Can I go back to -11 just a minute
25 here? This is who gets to sue. So, as I said, I know you may

1 not have this in front of you, but it says, "Except as
2 provided in subparagraph (B), any person who has sustained
3 a vaccine-related injury, the legal representative of such
4 person if such person is a minor or is disabled, or the legal
5 representative of any person who has died, must file a
6 petition for compensation under the program."

7 So I take it you would agree, a mature minor is still a
8 minor for purposes of -11 whether or not a mature minor is
9 a child for purposes of that later part.

10 MS. DISNEY: I'm not sure, Your Honor. I would --
11 I can't agree immediately to that. I think that might be
12 something that requires some more research if that's of
13 particular interest.

14 THE COURT: So you don't have a position on whether
15 or not a 12-year-old could actually sue under this program
16 for compensation.

17 MS. DISNEY: It strikes me, by the plain language
18 initially, that they may be able to, that they may be able
19 to as an individual who received the shot if -- a minor may
20 not necessarily require that you be not a mature minor there.

21 THE COURT: Okay.

22 MS. DISNEY: But I'd also like to address a point Your
23 Honor asked about earlier regarding whether a 12-year-old
24 would know that they had these rights, and I think that
25 there's -- again, I go back to the idea that there is informed

1 consent; there's the VIS; there's this alternative VIS that
2 they get.

3 All of that leads to the idea that the 12-year-old, in
4 this case a mature 12-year-old, would have the same knowledge
5 about what to do in the event of an adverse reaction as their
6 parents would if their parents had received the VIS. And if
7 they're not able to understand those risks and benefits, then
8 once again they're not a mature minor there.

9 THE COURT: Well, there's one big difference there,
10 that an adult would know what happened -- and I think Mazer
11 makes this point. An adult would know what happened when
12 the infant -- when the minor had vaccines as an infant.
13 The minor may or may not.

14 In other words, you can be a very mature like -- frankly,
15 I don't know what happened with my vaccines when I was a baby,
16 but that's something you would expect a parent to know. There
17 could be a very good reason why you would want it to be the
18 parent who's involved regardless of how mature a 12-year-old
19 may appear. Right?

20 MS. DISNEY: No. So, for example, Your Honor would
21 qualify under the informed consent standard to receive your
22 own vaccines even though you're not aware. Presumably, a
23 medical provider who's obtaining informed consent, part
24 of their inquiry in getting that informed consent for an
25 individual might be saying, you know, Your Honor, do you

1 recall when you were a baby, what happened when you got the
2 pertussis vaccine? I have no idea. They say, you know,
3 that's okay, there's not really allergens there -- I don't
4 know what doctors say about this, but there would be that
5 conversation, right?

6 That same conversation would occur with anyone. And
7 you could look at, actually, the AAP amicus brief that was
8 submitted on defendants' behalf, or in support of defendants,
9 and they note that part of that informed consent standard that
10 medical providers are required to do again in understanding
11 the risks and benefits is questions about medical histories
12 as well.

13 And so if the same conversation that you would have, not
14 knowing, would be the same conversation that any minor who
15 might be covered under the area of the act would presumably
16 also be able to have with the medical provider. The medical
17 provider would be asking the same questions.

18 If the minor says, gee, I don't know what happened to me,
19 you know, that may not -- that that may speak to their ability
20 to comprehend the risks and benefits of what they're about to
21 do. And that's all encompassed within the law, that that
22 conversation takes place, the medical histories are taken into
23 account, and that informed consent is given.

24 THE COURT: Okay. Can we talk about the religious
25 exemption, particularly these two forms. You agree there are

1 two forms that vaccines are being recorded on for a student
2 who gets a vaccine at a public high school?

3 MS. DISNEY: Under the act or...

4 THE COURT: Let's say 14-year-old in D.C. right now
5 goes and says I want to get a vaccine in his high school.
6 How is that recorded?

7 MS. DISNEY: Sure. So there are -- I will say there
8 is one form that goes to the school, and that's the form we
9 talked about. It's Exhibit 1 to the Booth claim. That is a
10 reporting mechanism, a form that is from just providers goes
11 to the school, gives some information to the school. It is
12 in no way a medical record.

13 The permanent medical record is something entirely
14 different that is kept in the doctor's offices and that
15 is also prescribed by local regulations.

16 So the Court should use the definition generally used
17 in states' laws because states have the role of regulating
18 physicians and other healthcare providers and healthcare
19 facilities. And so we could see locally -- and I don't
20 believe Your Honor has these cites.

21 Locally, 17 DCMR § 4612.1, for example, states that "A
22 licensed physician shall maintain a record for each patient
23 that accurately reflects the evaluation and treatment of each
24 patient. Those records shall be kept for three years after
25 last seeing the patient or three years after a minor patient

1 reaches 18 years of age."

2 And I could also point you to 22-B DCMR § 2030, which
3 addresses recordkeeping requirements for hospitals. There's
4 also 22-DCMR § 2321 that's medical records requirements for
5 nursing facilities.

6 I point this out just to note that this is a locally
7 regulated thing, these permanent medical records, and that's
8 part of what states do in their practice of regulating medical
9 healthcare professionals and what services they provide.

10 So as you can see, if you look at Exhibit 1 -- and I'm
11 happy to provide that to you if you don't have it handy.

12 THE COURT: It would be helpful, yeah, if you don't
13 mind.

14 MS. DISNEY: I'll get these passed around.

15 So what I just described in the local regulations regarding
16 records for all the evaluations and treatments of each patient
17 and them needing to be kept for years at a time, especially
18 for minor patients which must be kept three years after a
19 patient reaches 18, if we look at the D.C. Health Universal
20 Health Certificate, this is clearly not that.

21 This is simply asking specific questions about some medical
22 history, some basic information that takes a snapshot of where
23 the kid is now, just going to school. And this is the form
24 that is used as a -- and actually I'll just read the very
25 top line right under where it says D.C. Health:

1 "Use this form to report your child's physical health to
2 their school/ childcare facility."

3 This is a point-in-time report of a kid's health, providing
4 some information that a school might want: immunizations, some
5 TB assessment, lead exposure. I think there's a question here
6 about allergens, things that it would be good for the school
7 to know. But it is in no way a comprehensive list of all of
8 the treatments and evaluations that a child has received prior
9 to attending school.

10 And so the part in question here is part 3, and all we
11 have here is a list of vaccines and blank boxes to put the
12 date on which the child received them. That is all that the
13 act addresses. Again, that's part 3.

14 I'll note as well, just to drive home the point a bit
15 about how this is very much not a permanent medical record,
16 D.C. law actually permits someone -- someone can obtain a
17 religious exemption from even submitting this form to the
18 school. Can't obtain a religious exemption certainly from
19 having permanent medical records, but this is just to be
20 used at the school. D.C. law is only concerned with that.

21 THE COURT: Okay. So -- first, thank you. This was
22 helpful. What is your understanding of what a permanent
23 medical record is, then?

24 MS. DISNEY: "Permanent medical record," as I discussed,
25 in the regulations is a record kept in the doctor's office,

1 in the healthcare provider's office, and that involves what
2 is suggested by the regulations, which is all the evaluations,
3 all the treatments, all the information a doctor may need to
4 obtain, to keep.

5 THE COURT: And so the clinic that is providing these
6 vaccines would have basically two records. One is this,
7 Exhibit 1, and the other is this permanent medical record.
8 Am I understanding that correctly?

9 MS. DISNEY: So "healthcare provider" you're referring
10 to a clinic at a school, for example?

11 THE COURT: Yes. Whoever would be doing one of these.

12 MS. DISNEY: Right. The healthcare provider would
13 be subject again to the same regulations, the same local
14 regulations, as any healthcare provider is in the District,
15 and so they would be required to maintain that record.

16 I can't say how, if I get a vaccine at CVS, how that goes
17 onto my permanent medical record, but yes, they are required
18 to maintain records in the way that all medical providers are
19 required to obtain --

20 THE COURT: But CVS isn't one of these.

21 MS. DISNEY: Yeah.

22 THE COURT: These are just for school clinics.

23 Is that correct?

24 MS. DISNEY: Those are for every student. If you
25 have a child in the D.C. school, if you go to get your child a

1 regular checkup to attend D.C. school, the provider will often
2 ask, do you need a certificate of health to bring back to your
3 school? You say yes; they fill out what they need to fill
4 out; they give it to you. It's something that our providers'
5 offices have. Or you could go, you know, I think before
6 school starts, there are probably a lot of students that need
7 to get it. You go to your doctor; I need to get this, bring
8 it up to date.

9 THE COURT: Am I understanding that the family holds
10 onto this document and brings it to the doctor's offices, or
11 is this something that the doctor's office hangs onto?

12 MS. DISNEY: I think it's not defined in the law either
13 way. I could only speak from personal experience.

14 THE COURT: Well, that's more than I have, so go for it.

15 MS. DISNEY: I could say it works either way. My
16 personal experience is that doctors often have these forms
17 that I think they are very familiar with people saying, oh,
18 I need one of these.

19 THE COURT: I guess the point is, Ms. Disney, is
20 if you go to your school clinic and say I'd like to see my
21 child's medical records, and let's say, unbeknownst to you,
22 your child -- well, you filed a religious exemption.
23 Unbeknownst to you, your child has gone and gotten a vaccine.
24 What would you be provided? Will you be provided with Exhibit
25 1, will you be provided with the full records that show your

1 child had received a vaccine unbeknownst to you, or would you
2 receive both or something else?

3 MS. DISNEY: The important part to answer that question
4 is that the act plays no role in this answer. The act does
5 not govern anything that has to do with any request a parent
6 has to receive or look at their child --

7 THE COURT: Which act are you talking about here, the
8 federal act?

9 MS. DISNEY: The local act, the Minor Consent Act.
10 And so that question about what the provider would show to you
11 regarding the child's permanent medical records is governed by
12 HIPAA, and I can't speak to exactly what the outcome would be.

13 I think we might have discussed in our brief that this is
14 also -- or I apologize. I think it might have been the AAP
15 amicus brief that might have suggested as well that this is a
16 determination that the medical provider in some circumstances
17 maybe they wouldn't share everything that's in there, maybe
18 they would. But again, that's governed by HIPAA, and this act
19 has nothing to do with a child's medical records. I wouldn't
20 even call this form a medical record.

21 If you went to a provider and say could I see the medical
22 record, they would not show you this form. This form again is
23 a report to the school at a particular time.

24 THE COURT: So -- I mean, what is it doing, then?
25 By "it," what is this religious exemption language here in

1 the Minor Consent for Vaccinations Amendment Act of 2020?
2 Certainly you agree that it is trying to mislead parents
3 by telling doctors not to include accurate information on
4 this health certificate. Right?

5 MS. DISNEY: It is keeping the mature minor's
6 confidentiality here. It's not accidentally releasing
7 information that, for the purpose of this form only, is
8 assumed to be just within the mature minor's ability to
9 obtain that information. But, again, that's about this form.
10 That's not about the medical record. And so this form, it
11 is protecting the child's health information for this one
12 purpose.

13 THE COURT: How is that not in conflict, though,
14 with this -- you know, 300aa-25(c), which says that medical
15 information about vaccines should be made available to the
16 legal representative of the person, which I think would be
17 here even a mature minor; wouldn't you agree?

18 MS. DISNEY: You're referring to in the NCVIA?

19 THE COURT: Yes, ma'am.

20 MS. DISNEY: The requirement that information is
21 recorded -- and, again, so I think we're looking at the same
22 42 U.S.C. 300aa-25?

23 THE COURT: Yes. (c).

24 MS. DISNEY: Actually, I have the wrong thing.
25 I would note here again that the requirement here is for --

1 first of all, it relates to the healthcare provider and what
2 the healthcare provider needs to record. So here it notes that
3 the healthcare provider who administers a vaccine set forth
4 in the Vaccine Injury Table shall record or ensure there is
5 recorded in such person's permanent medical record and that
6 that is a provision that a medical provider can readily comply
7 with even after administering a vaccine to a mature minor under
8 the act.

9 THE COURT: Yeah.

10 MS. DISNEY: Does that answer your question?

11 THE COURT: I get that. But coming to this second
12 part -- and let's say, for purposes of a conversation, we're
13 talking about a school clinic right now. And so the school
14 clinic has -- let's say they've filled this out and not
15 included the vaccine because the parent has a religious
16 exemption on file, and the school clinic has also filled out
17 the -- kind of the true information on the child's permanent
18 medical record.

19 It seems to me that this federal statute expects that the
20 information would be provided to the legal representative of
21 the -- even a mature minor, which would be the parent, but yet
22 the whole point here of this Section 3 of the D.C. Amendment
23 Act is to hide that information from the parent. Right?

24 MS. DISNEY: Perhaps, Your Honor, I was looking at
25 a different section than you were looking at in the NCVIA?

1 Is that correct?

2 THE COURT: No. When you go down to (c) -- I think
3 you were looking at -25, but if you go down to (c), Release
4 of Information?

5 MS. DISNEY: Oh, that's correct. I was not looking
6 at Release of Information. But again, if there is a provision
7 there in that section that requires that the information be
8 released to the individual receiving the vaccine or the legal
9 representative of a child, I would go back to the earlier
10 arguments about the fact that an individual who's a mature
11 minor who receives the vaccine would still be capable of
12 getting that information released to themselves.

13 THE COURT: I certainly agree about that.

14 MS. DISNEY: Okay.

15 THE COURT: But it seems to me that a parent is under
16 this -- or the legal representative also has the right to get
17 the information. Correct?

18 MS. DISNEY: I cannot say, Your Honor. I apologize.
19 I don't have that section in front of me. But I don't see how
20 the legal representative would have -- under the mature minor
21 doctrine or under importing the state definition of "child"
22 there, a mature minor would not be a child with a legal
23 representative that would have that.

24 THE COURT: Yeah. This isn't talking about a child,
25 though. Even a mature minor has a legal representative.

1 Right? The legal representative would be a parent. Say I
2 have a very mature 13-year-old who counts as a mature minor,
3 but I would still be the legal representative. Right?

4 MS. DISNEY: Yeah. So, Your Honor, I would apologize.
5 Just looking at the statute now, it is very clear that the
6 release of information goes to the person who received the
7 vaccine or the legal representative of such person, right?
8 Perhaps I'm missing something here in your question, but I
9 don't see any reference to child or minor --

10 THE COURT: No, I agree.

11 MS. DISNEY: And so I think it's very clear that a
12 minor would fall under what is the section (c)(1)(A), person
13 who received a vaccine, and there's no conflict there that I
14 would see.

15 THE COURT: But my point is that a parent would be
16 for (B), would qualify as (B), even with a mature minor.
17 And so a parent could go and demand this information under
18 this statute.

19 MS. DISNEY: There is an "or" between (A) and (B)
20 there. So if -- apologies for my pause.

21 THE COURT: No, no. I want you to take a look.

22 MS. DISNEY: This might go back to the question of
23 if a parent goes to a medical provider. Let's say I go to
24 my child's pediatrician and I say, can I see the records,
25 let me see what you've got there, again that's referring to

1 the permanent medical record. There's certainly nothing in
2 the NCVIA that would begin to address anything in this D.C.
3 health certificate and vice versa.

4 Nothing in the Minor Consent Act addresses the permanent
5 medical record, and so the access to information again is a
6 question that is governed by HIPAA and not pertinent to the
7 discussions we're having regarding the act itself.

8 THE COURT: Well, I think it's also the access to
9 information is governed by this section, right? This section
10 says that this information should be provided to the legal
11 representative of such a person the vaccine status.

12 MS. DISNEY: That may be accurate, yeah. That would
13 be fine if that were the case.

14 THE COURT: Yeah. So --

15 MS. DISNEY: Again, this is -- you know, you could look
16 at the D.C. Minor Consent Act as addressing the thing that was
17 in their control, right? And that is this one form through
18 the D.C. schools that might inadvertently mention a child who
19 got a vaccine who does not wish his parents to know.

20 And that is on one form, but it does not touch the question
21 of medical records, of a parent's access to medical records
22 and those permanent medical records. This is just communication
23 from a doctor to a school, and again, only D.C. schools or
24 daycare facilities.

25 THE COURT: Okay. Hopefully not too many mature

1 minors running around in daycares.

2 MS. DISNEY: Correct.

3 THE COURT: All right. Anything else, Ms. Disney?

4 MS. DISNEY: We haven't talked about standing. If
5 you would like --

6 THE COURT: Yeah, feel free --

7 MS. DISNEY: -- some standing issues here.

8 You know, actually, I said I was going to discuss standing,
9 but before we move off preemption, I think I'd like to address
10 a few more points before we go. Before we arrive at these
11 questions of statutory construction, plaintiffs' NCVIA
12 arguments can't get off the ground, for two reasons:

13 First, there is no private right of action for plaintiffs
14 to bring a suit against the District for violation of the
15 NCVIA. And we've discussed this in our brief, Your Honor, and
16 that's in our docket No. 28, in Mazer footnote 6 on page 14,
17 and happy to discuss that more. And also for -- so that's one
18 reason we don't even reach the questions of statutory
19 construction for NCVIA.

20 And the second reason is more recently raised, and that's
21 the issue of the COVID vaccine not being in the Vaccine Injury
22 Table; thus, it is not covered in the NCVIA.

23 THE COURT: So that's just a Booth argument, right?

24 MS. DISNEY: That -- right. It also affects standing
25 for bringing these NCVIA claims, that the only alleged

1 injuries that certainly the Booth plaintiffs, and until today
2 the Mazer plaintiff as well, have alleged are regarding
3 specifically the COVID vaccine.

4 The COVID vaccine is governed by a different statutory
5 scheme, which I'm happy to discuss as well, but the
6 complaints, including the Mazer complaint, although counsel
7 for Mazer today noted that the plaintiff's daughter has some
8 intention of getting the Tdap vaccine?

9 THE COURT: Yeah. I think that's what they were
10 alleging all along. But that was the summer camp issue,
11 right?

12 MS. DISNEY: In the amended complaint. And I could
13 point to it. The amended complaint doesn't still allege that
14 she's going to get the Tdap vaccine. The amended complaint
15 only alleges that she may get the COVID vaccine. The summer
16 camp was noted in the complaint as being canceled. I'm not
17 sure if things have changed since the amended complaint was
18 filed that that was canceled.

19 And all of the other allegations for reasons she would
20 possibly get a vaccine, the only allegations that I could
21 point you to where those are were that she would get the
22 COVID one. And so I think -- and I'll just note for Your
23 Honor that that's paragraphs 71 through 76 in the Mazer
24 complaint.

25 So all of the provisions that have been raised as issues

1 in the NCVIA specifically state that they are tied to vaccines
2 in the Vaccine Injury Table. So with the allegations as they
3 stand now, there's simply no allegation of any vaccine in the
4 Vaccine Injury Table that may even come to pass.

5 And with the Court's indulgence, I would just like to note
6 one more item while we're on the COVID vaccine. The COVID
7 vaccine is covered in the PREP Act, as has been noted, and
8 that's -- and as a result of being covered in the PREP Act,
9 they're not covered by the NCVIA, not covered under that
10 Vaccine Injury Table. The COVID vaccine is instead covered
11 under the Countermeasures Injury Compensation Program.

12 I bring that up because I'd like to note that that's all
13 part of its 42 C.F.R. § 110.1, and those regulations are all
14 about how compensation occurs for an injury. And I'll note
15 that there, in section -- this is 42 C.F.R. § 110.3(e). In
16 that regulation, "child" is defined, and in that regulation
17 there was specifically a definition of what a child is.

18 And that's notable because, in that case, there clearly
19 wasn't the intention to defer to the state definition, which
20 would be the standard thing to do, and to specifically define
21 what a child is, what ages count as a child, and it's
22 informative that they did that explicitly there as they're
23 capable of doing elsewhere.

24 So now I think that's all I have to say on preemption.
25 If I could, Your Honor, would you like me to move to standing?

1 THE COURT: Yeah. Before you do, going back to this
2 religious exemption issue -- and this is not on preemption but
3 kind of more on First Amendment. I have in mind two families
4 with rebellious 14-year-olds. You can imagine.

5 MS. DISNEY: Yes, I can.

6 THE COURT: One family is a religious family, and
7 they filed a religious exemption saying we don't want our
8 kids getting any vaccines. The other family isn't religious,
9 still doesn't want their kids to get vaccines.

10 So both 14-year-olds go off and get the vaccines behind
11 their parents' back. The religious family -- and then both
12 parents have an idea something went wrong and go try to find
13 out if the kids actually got vaccinated.

14 The religious parents are given an incomplete health
15 certificate, Exhibit 1, because they filed a religious
16 exemption, and that suggests that the kid didn't get a
17 vaccine, and the secular parents get the complete Exhibit 1
18 with the vaccine. Why isn't this a First Amendment problem?

19 MS. DISNEY: A few points there. First, I know I may
20 be beating a dead horse here, but I think it's important to
21 note that if a parent were to call the healthcare provider,
22 for example, these 14-year-olds' pediatricians, and I said I
23 need to see my kid's medical records, Exhibit 1 is not on the
24 table. That's not something they would receive. Again, it's
25 a snapshot provided at the beginning of school from the

1 provider that ends up on the school's desk.

2 So I think that there's an issue there with assuming
3 that one would be given an incomplete form. That's not the
4 case at all. In both cases the provider would be making a
5 determination, again under HIPAA, about what information
6 they're able to and would believe is prudent under the law to
7 provide to the parents. So that's one point I'd like to make.

8 And then the interesting hiccup to this argument is that
9 plaintiffs claim that they're being targeted because they have
10 a religious exemption. But that is an extra benefit afforded
11 to them that's not afforded to anyone else in the secular
12 realm.

13 And so it's -- again, the religious exemption only applies
14 to what happens at a school, and a school that may have this
15 religious exemption is simply not the provider. So in the
16 circumstance in the hypothetical that you lay out, it's the
17 provider making the determination about what information to
18 provide to the parents. The District is not a part of this
19 scenario.

20 THE COURT: I guess I'm struggling to understand what
21 work this D.C. Code is doing, then. I mean -- yeah, there's
22 got to be a situation where clearly the point of this D.C.
23 statute is to hide information from parents who have claimed
24 a religious exemption. Right?

25 MS. DISNEY: Its goal is not to hide all information.

1 THE COURT: No, I agree.

2 MS. DISNEY: That is again a HIPAA consideration
3 between the provider and the student. What this is saying
4 is that the D.C. schools will not be the one to accidentally
5 spill the beans.

6 THE COURT: But they're accidentally going to spill
7 the beans to the parents who claimed a religious exemption,
8 but they will spill the beans to this other secular family.
9 Right? Back to my hypo of the two --

10 MS. DISNEY: Back to your hypo, it would need to
11 require that both families -- let's say at the same time that
12 the students got the vaccines, they happen to be completing
13 the D.C. health certificate form at that same time. And one
14 student would have left section 3 blank, the other would not.
15 In that case -- I'm sorry. Could you repeat what the problem
16 with that was?

17 THE COURT: Why is there not a First Amendment problem?
18 I get your bigger point that they've decided to treat this as
19 kind of a benefit that is, for 90 percent of the religious
20 families, that this turns out to be a benefit. But for these
21 parents with the rebellious kids, this benefit actually ends
22 up being kind of a sour pill because they actually get less
23 information than the secular family who is otherwise in
24 exactly the same circumstance who did not fill out that
25 religious exemption.

1 MS. DISNEY: It's also important to note in this
2 circumstance -- I understand where you're coming from,
3 Your Honor, and I'll bring the other side of it here in
4 that the 14-year-old has rights as well.

5 THE COURT: But both 14-year-olds have rights.

6 MS. DISNEY: Both 14-year-olds have rights under the --
7 and it could be under HIPAA, right? They could have the right
8 to have this information protected privately. And so I would
9 actually say that in this case, you know, we're talking about
10 different harms here. But the 14-year-old himself or herself
11 is in a worse position, right, if this is the case in this
12 scenario. The 14-year-old may be in a worse position --

13 THE COURT: Which one? The one with the religious
14 parents?

15 MS. DISNEY: We'll call the rebellious 14-year-old
16 the --

17 THE COURT: They're both rebellious. The religious
18 parents or the ones with the secular parents?

19 MS. DISNEY: Call the secular-parent 14-year-old is
20 put in a worse position than the religious-parent 14-year-old,
21 in that they're putting the provider in a tough place because
22 again, under HIPAA, the provider is deciding what information
23 to provide to the parents.

24 So I see Your Honor is focused on the parents as being the
25 ones here who have some hypothetical harm, but I don't think

1 you can say that one's in better position than the other --

2 THE COURT: They're clearly in different positions.
3 This whole -- the point of the statute is to provide different
4 information to two different parents based on whether or not
5 they've -- one, the parent has invoked this religious exemption.

6 I mean, it just -- I'm having a hard time seeing how that
7 isn't a First Amendment problem. The statute doesn't talk
8 about HIPAA. And I realize there are various other factors
9 here, but either this statute does no work, or it must be
10 making distinctions between families or rebellious
11 14-year-olds based on whether the parents invoked a religious
12 exemption.

13 MS. DISNEY: And again you're referring just to the
14 use of this Exhibit 1.

15 THE COURT: Just Exhibit 1.

16 MS. DISNEY: In this case -- I'd also like to point
17 out, just because I'm not trying to fight the hypothetical,
18 Your Honor, but I would really need to note here that, you
19 know, we're talking about -- you're suggesting that both of
20 these kids have an adverse reaction, parents don't know what's
21 going on.

22 Again, if we're talking about mature minors, this isn't
23 an issue here. This isn't an issue under the act because,
24 for mature minors, presumably they are capable of handling
25 and responding properly to any risks or adverse effects of

1 the vaccination, and you have to assume that under the act.
2 That's part of the informed consent standard, part of what's
3 required under the act. And so we'll fight the hypothetical
4 just a bit on that front.

5 I think you also have to keep in mind that this religious
6 exemption is a benefit.

7 THE COURT: It was a benefit, but then it all of a
8 sudden turns out to really hurt them, right?

9 MS. DISNEY: It's also entirely voluntary. If it is
10 a concern to a parent that they don't -- you know, they were
11 aware of this act, as certainly all of the plaintiffs are, and
12 they're afraid that they may not see the -- they're afraid
13 about what's going to happen with this D.C. school form under
14 their nose, they simply don't have to access the religious
15 exemption benefit.

16 There is no -- in spite of what plaintiffs have suggested,
17 this religious exemption is in no way required under the
18 Constitution, and that's very well established. And so if
19 parents decide that this is a concern, and specifically
20 plaintiffs here decide that this is a concern, they simply
21 don't need to get the religious exemption benefit.

22 THE COURT: But then their kids would get vaccinated,
23 right? They're kind of caught in a catch-22. Either we don't
24 invoke the religious benefit and our kids will have to get
25 vaccinated, or we do exempt them and our kids might decide

1 to get vaccinated and we don't even know about it.

2 MS. DISNEY: That is a determination that a parent
3 can make. Like I said, and I'll say it again, there's no
4 requirement that they have this religious exemption. And so
5 if they have a particularly rebellious teenager, they might
6 find it more useful without it then in this hypothetical
7 scenario.

8 THE COURT: All right. You can move on. Let's try
9 to get to the end here. What else did you want to raise?

10 MS. DISNEY: Well, Your Honor had expressed some
11 concern about standing, and I'd like to address any questions
12 you had there. I'm happy to talk. If particular things are
13 bothering you or if you're particularly curious about anything
14 or --

15 THE COURT: I think we kind of talked about this at
16 the beginning, but it just -- you know, I take your point,
17 and I think it is notable that the statute has been in place
18 for about a year and that these cases have dragged on, not
19 really the -- certainly not the parents' faults here, but
20 for one reason or another. But nothing bad has happened.
21 I think that's a fair point. And *Clapper* -- I'm certainly
22 familiar with *Clapper*.

23 Having said that, it's very clear that if somebody doesn't
24 need to wait to actually have their constitutional rights
25 violated to prevent that from happening, and if we assumed

1 that the plaintiffs are right on the law about their potential
2 injuries, I'm not sure what more they would need to show to
3 establish imminence here.

4 Particularly in my mind -- I don't know if you disagree --
5 I think that the Mazer case is a particularly strong one where
6 the daughter has already gone once to get vaccinated, decided
7 not to at the last moment, but says she wants to do so again.
8 There's a lot of kind of facts there that show this is far
9 from theoretical.

10 MS. DISNEY: Sure. I would agree, Your Honor, but
11 there are more facts there -- there are more allegations in
12 the Mazer complaint than the Booth complaint that suggests
13 perhaps more of a possibility, but it still doesn't rise to
14 the level of certainly impending.

15 You know, I'd encourage Your Honor to look back at the
16 paragraph that I mentioned before regarding in the complaint
17 the specific allegations. The specific allegations do not
18 state that she will get it or intends to get it.

19 Even if, you know, there was some sort of speculative
20 injury that could rise to the level of certainly impending,
21 for example, that would cure the problem that you're
22 contemplating here if they'd had legally protected interests
23 at stake and all those things. It's simply not present in the
24 allegations. There's not an allegation, for example, that she
25 will get it before her summer program starts. That is not

1 in the complaint.

2 And there's certainly no affidavit from anyone, not even
3 the plaintiff. We don't have a lot of competent evidence
4 here. There's no speculation that speculates certainly.
5 And I think it's important to look at the particular words
6 that are in there and that are used and note that even if I
7 might not necessarily agree that there's a way to plead in
8 such a way that would confer standing here, but even if there
9 were, the allegations here do not rise to that level.

10 There's been -- you know, they talk about in Mazer how
11 there are dance recitals and dances happening. Those have
12 been happening for months and there has been no vaccination,
13 as we heard today. So we have speculation on top of speculation
14 that requires actions of third parties that does not rise to
15 the level of a date certain that anything will occur at all.
16 And without that, I don't think you get around *Clapper* and
17 as we point at many other cases in our brief as well.

18 THE COURT: Thank you, Ms. Disney.

19 MS. DISNEY: Thank you, Your Honor.

20 Is there anything else?

21 THE COURT: No. Thank you.

22 MS. DISNEY: Thank you.

23 THE COURT: All right. I'll give each of the
24 plaintiffs five minutes, if you want to have the last word.
25 Mr. Siri.

1 MR. SIRI: Thank you, Your Honor. I'll be brief.

2 Going to standing, Your Honor, effectively the defendants'
3 position appears to be, even if the child got the vaccine,
4 then they would have no standing because they no longer have
5 an injury under the provision that they could get a vaccine
6 because they've already gotten it.

7 And their position is that if the child is threatening
8 to get the vaccine, they don't have standing. I think
9 defendants' position really is, and they're clear about this,
10 they don't believe anyone would have standing to challenge
11 their statute, and that obviously is not appropriate. It
12 leaves the public with no remedy.

13 As for the allegation that we don't have any claim in the
14 complaint that the child is threatening to get the vaccine,
15 I'd like to just read a few quick paragraphs.

16 Paragraph 60 through 61, we explain how J.D. has actually
17 pinned in her room? The business card that Dr. Holder? The
18 pediatrician that she saw that day when she almost got the
19 vaccine without parental permission? Gave her and wrote the
20 doctor's cell phone number on it? And the dad took a picture
21 of it? This was recent?

22 Well, it was recent from when we filed the complaint, and
23 my understanding is that that business card is still there
24 with that cell phone number on it. We redacted the cell phone
25 number for privacy purposes so people wouldn't call the doctor.

1 And then we can move on to paragraphs 68 and 69 in
2 which in those paragraphs we say that you know a plaintiff is
3 extremely concerned that a doctor in D.C. sought to vaccinate
4 his daughter J.D. without his knowledge or consent and was
5 prepared to engage in elaborate subterfuge --

6 THE COURT: Yeah, I don't need you to read it.

7 MR. SIRI: Yeah, yeah. I apologize. I'll just end
8 it where it says, bottom of 69, they have numerous reasons
9 to believe that J.D. has not abandoned her intent to do so.
10 Go back, skip forward to paragraph 74. I'll just note these
11 for the record.

12 74, Your Honor, I won't belabor it, where specifically
13 plaintiff's daughter says she wants to go to this particular
14 college, and she specifically -- she's saying I will have
15 to get a shot in order to go to the school and she says that
16 as we allege in here that you know that's her intent to do so,
17 but maybe most critically Your Honor paragraphs 76 through 78
18 okay and in 76 and 78 it goes back to summer camp. We are
19 approaching summer again. The concern is becoming acute.

20 In paragraph 76, that's where it alleges the parents --
21 leading up from their discussions with J.D. that she has
22 continued to say she's gonna need this shot to go to the
23 summer camp. She's already tried to do it once. Summer camp
24 was canceled last summer. Summer camp is not canceled this
25 summer. They are very concerned that leading up to the summer

1 she very well will have the intention to go back and get the
2 shot, and we explain how she has the access and the means to
3 do so in paragraphs 77 through 78.

4 Obviously, there's a tension. You know, children as
5 rebellious as they are you know grapple with their parents.
6 They also don't want to let their parents down but they also
7 want to do certain things and there's that tension and it's
8 ongoing so that addresses the -- and then in terms of the
9 sequence, Your Honor, the sequence is relatively simple.
10 All she has to do is show up at the doctor's office and
11 because of this law she can get the shot.

12 THE COURT: So Ms. Disney described the Exhibit 1
13 and how this is kind of something completely different from
14 the permanent medical records. Why doesn't that doom your
15 argument that at least kind of on preemption grounds, there's
16 a problem with this health certificate?

17 MR. SIRI: Yeah. I think that when you look at section
18 25, and obviously -- if you look at section 25 of the act, and
19 I believe Your Honor pointed this out, it says, quote, the
20 legal representative shall access upon request.

21 And I understand that that -- there's a medical record at
22 the office, right, legal representative is a defined term
23 under state law. Under state D.C. law that means the parent
24 or the legal guardian. Legal guardian means appointed by the
25 court under the D.C. law, and I have the section of the code

1 for that.

2 THE COURT: That's fine. I don't think that's where
3 the problem is.

4 MR. SIRI: Yeah.

5 THE COURT: It's the permanent medical record thing.
6 She's saying that this is --

7 MR. SIRI: She's saying that that's not, but still
8 the act prohib -- the D.C. act -- she's saying -- defense
9 counsel's stating that the doctor's office apparently would
10 be able to provide that permanent medical record, but I think
11 that when you look at the D.C. statutory scheme, its entire
12 intent is to prevent the parent from learning about the
13 vaccination that the doctor has to provide, as you pointed
14 out, when it comes to the school? A record that does not
15 include all the vaccines?

16 The school can't provide a copy of it? The insurance
17 company's not supposed to send a statement of benefits?
18 The health department's not supposed to tell the parents
19 about it? But yet the healthcare provider is going to provide
20 a copy of that permanent medical record if the parent asks for
21 it that it does include the vaccination on it?

22 That would appear to conflict with the purpose of the D.C.
23 law if they're saying that can happen, but I believe counsel
24 for the Booth case might be in a better position to address
25 that point.

1 THE COURT: Got it.

2 MR. SIRI: I don't want to misstate what he might
3 argue on that point.

4 THE COURT: Okay.

5 MR. SIRI: On the COVID vaccine, Your Honor, under
6 42 U.S.C. 300aa -- I apologize, Your Honor. I left my notes.
7 Can I just grab it?

8 14(e)(2). It provides that a vaccine shall be added to the
9 Vaccine Injury Table within two years of it being recommended
10 for routine use in children. COVID-19 vaccine was recommended
11 for routine use in 16-year-olds and above by the CDC based on
12 December 12, 2020. That was by the Advisory Committee on
13 Immunization Practices at the CDC.

14 So we are very quickly coming upon the two years that
15 the COVID vaccine would be needed to be added to the Vaccine
16 Injury Table, and at this point it needs to be added pursuant
17 to the section 4014, so -- but of course our case doesn't rest
18 on the child here getting a COVID vaccine. That's -- that is
19 one of the vaccines she's threatened to get, but it's not the
20 only vaccine.

21 THE COURT: I understand.

22 MR. SIRI: Okay. I thought one of the things that
23 defense counsel said was telling. She said if the child is
24 mature enough to get the vaccine, she's mature enough to
25 inform an adult if she's got an issue. That's exactly what

1 really should occur under the act, is the adult should be
2 involved from the beginning.

3 On the point of providing an alternative to the VIS, I
4 think alternative speaks for itself. It means an alternative.
5 It doesn't mean additional under the plain meaning of that
6 term. I believe that defense counsel stated to you, while
7 adults don't always know what adverse reactions they had, and
8 that might be true, but most vaccinations are given to
9 children, not to adults.

10 And in particular the vaccinations often given to adults
11 are different than the ones given to children. And so a prior
12 reaction an adult might have wouldn't be to the ones that they
13 got that they need to know about that they had as children
14 since they're not repeated. In terms of the -- and for
15 example, meningococcal, HPV vaccine, Tdap vaccine, these are
16 all vaccines typically only given to children before the age
17 of 18.

18 And in terms of our ability -- because I think I'm coming
19 up on my five minutes, in terms of our ability to state a
20 claim under the 1986 act, I believe that Your Honor always
21 has jurisdiction to rule upon situations where there's a
22 preemption issue where federal law conflicts with state law.

23 THE COURT: All right. Thank you, Mr. Siri.

24 MR. SIRI: Thank you, Your Honor.

25 THE COURT: Mr. Hazelhurst.

1 MR. HAZELHURST: Thank you, Your Honor. I'll try to
2 be brief. With standing, a lot of talk about links in the
3 chain. There's only one link, and that's the child. That
4 is the only thing standing in between the child getting the
5 vaccination.

6 Defense counsel -- I don't know if this is in their brief
7 or during oral arguments -- talked about hearsay as to I
8 believe they were referencing the document that I passed
9 forward to Your Honor. But that would fall under a Rule 803
10 exception to then existing mental and emotional condition.
11 So I think that document is highly relevant.

12 As far as the 42 U.S.C. 300aa-26 and the VIS forms, the
13 defense discussion about alternate means both? No. Alternative
14 means alternative, meaning "or." In the law words matter, and
15 alternative means what it means, and the District does not have
16 the right to make alternative VIS forms. That's clearly spelled
17 out in the vaccine act.

18 Third point? They keep talking about the mature minor
19 doctrine? To the best of my knowledge, no state has ever
20 recognized the mature minor doctrine as low as 11. The research
21 I found goes down to about 14. I can elaborate on that if you
22 want to, but I'll keep moving.

23 A very important point to remember is that none of this is
24 occurring in a vacuum. The D.C. law says what it says, but
25 then the D.C. government is also applying this pressure. Now

1 they're saying that they're not the providers. Yes, they are.
2 They're providing pop-up clinics in the child's school.
3 So they are the providers.

4 And then a distinguishing point about the permanent medical
5 records, 300aa-25. I think it's very important to understand
6 there is the term "original vaccine record" and "permanent
7 medical record." The D.C. record is not the original vaccine
8 record, but it is, no question about it, it's a permanent
9 medical record because by law it is filled out and certified by
10 a licensed medical provider.

11 So the bottom line, Your Honor, is the two laws conflict,
12 and there is no way that you can comply with both laws, at least
13 not without forcing licensed medical providers to certify false
14 records. And then there's no getting around that they are
15 clearly, intentionally, willfully misleading these parents.
16 Not sending the parents an EOB, even though their insurance
17 company is billed for the services, there's no other explanation
18 for that other than trying to mislead the parents.

19 The last point I'll point out, Your Honor, is in your email
20 you mentioned three different Supreme Court cases, and they
21 conflict. You got older ones saying you look at the statutes,
22 and you have the newer *Mississippi Choctaw Indians*, 1989.
23 Clearly, that's more favorable for us in that you look at
24 other sources' common meaning of the word.

25 So I would say that the controlling law would be the

1 *Mississippi Choctaw Indians* and also further point out not
2 only is this case favorable to us, but it's more recent and
3 it is in the context of a federal law to protect a person
4 and a class of people.

5 The other two Supreme Court cases Your Honor pointed out,
6 *Seaboard* and *De Silva*, both have to do with rights when you
7 get to probate, intestate succession. You get into areas of
8 law that is a patchwork all over the country, which would be
9 a nightmare to try to sort out.

10 But even in the *De Silva* case, I point out on page 7, it
11 says, "This does not mean that a state would be entitled to use
12 the term 'children' in a way strange to those familiar with its
13 ordinary usage." And to say that an 11-year-old is not a child,
14 that's not consistent with the ordinary usage.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Hazelhurst.

17 All right. Thank you to all the attorneys for your good
18 briefing and helpful arguments. I'll be taking this under
19 advisement. I've got a civil trial starting next week, but
20 I hope to have something to you all within the next couple
21 weeks. Thank you.

22 (Proceedings adjourned at 12:27 p.m.)
23
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne
Bryan A. Wayne